100. Preliminary Admonitions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Directions for Use

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

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

Sources and Authority

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

- Instructing the Jury. Code of Civil Procedure section 608. ~~provides in part: "In charging the jury the court may state to them all matters of law which it thinks necessary for their information in giving their verdict; and, if it state the testimony of the case, it must inform the jury that they are the exclusive judges of all questions of fact."~~

- Jury as Trier of Fact. ~~(See also~~ Evidence~~.~~ Code, ~~§~~ section 312.~~; Code Civ. Proc., § 592.)~~

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

- Contempt of Court for Juror Misconduct. Code of Civil Procedure section 1209(a)(6). ~~provides in part:~~

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

  ~~(1) (5) omitted~~

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

  ~~(7) (12) omitted~~

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

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

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

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

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

- It is improper for jurors to receive information from the news media about the case. (*Province v. Center for Women's Health & Family Birth* (1993) 20 Cal.App.4th 1673, 1679 [25 Cal.Rptr.2d 667],

disapproved on other grounds in *Heller v. Norcal Mutual Ins. Co.* (1994) 8 Cal.4th 30, 41 [32 Cal.Rptr.2d 200, 876 P.2d 999]; *Hilliard v. A. H. Robins Co.* (1983) 148 Cal.App.3d 374, 408 [196 Cal.Rptr. 117].)

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

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

Secondary Sources

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

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

101. Overview of Trial

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

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

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

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

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

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

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

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

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

After the evidence has been presented, I will instruct you on the law that applies to the case

and the attorneys will make closing arguments. What the parties say in closing argument is not evidence. The arguments are offered to help you understand the evidence and how the law applies to it.

New September 2003; Revised February 2007, June 2010

Directions for Use

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

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

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

Sources and Authority

- Pretrial Instructions on Trial Issues and Procedure. Rule 2.1035 of the California Rules of Court. ~~provides: "Immediately after the jury is sworn, the trial judge may, in his or her discretion, preinstruct the jury concerning the elements of the charges or claims, its duties, its conduct, the order of proceedings, the procedure for submitting written questions for witnesses as set forth in rule 2.1033 if questions are allowed, and the legal principles that will govern the proceeding."~~

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

- Order of Trial Proceedings. Code of Civil Procedure section 607. ~~provides:~~

  When the jury has been sworn, the trial must proceed in the following order, unless the court, for special reasons otherwise directs:

  ~~1. The plaintiff may state the issue and his case;~~

2. The defendant may then state his defense, if he so wishes, or wait until after plaintiff has produced his evidence;

3. The plaintiff must then produce the evidence on his part;

4. The defendant may then open his defense, if he has not done so previously;

5. The defendant may then produce the evidence on his part;

6. The parties may then respectively offer rebutting evidence only, unless the court, for good reason, in furtherance of justice, permit them to offer evidence upon their original case;

7. When the evidence is concluded, unless the case is submitted to the jury on either side or on both sides without argument, the plaintiff must commence and may conclude the argument;

8. If several defendants having separate defenses, appear by different counsel, the court must determine their relative order in the evidence and argument;

9. The court may then charge the jury.

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

Secondary Sources

7 Witkin, California Procedure (5th ed. 2008) Trial, § 147

Wagner et al., Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group) ¶¶ 1:427–1:432; 4:460–4:463

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

102. Taking Notes During the Trial

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

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

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

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

New September 2003; Revised April 2007, December 2007

Directions for Use

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

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

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

Sources and Authority

- Juror Notes. Rule 2.1031 of the California Rules of Court. ~~provides: "Jurors must be permitted to take written notes in all civil and criminal trials. At the beginning of a trial, a trial judge must inform jurors that they may take written notes during the trial. The court must provide materials suitable for this purpose."~~

- "Because of [the risks of note-taking], a number of courts have held that a cautionary instruction is required. For example, [one court] held that the instruction should include 'an explanation ... that [jurors] should not permit their note-taking to distract them from the ongoing proceedings; that their

notes are only an aid to their memory and should not take precedence over their independent recollection; that those jurors who do not take notes should rely on their independent recollection of the evidence and not be influenced by the fact that another juror has taken notes; and that the notes are for the note taker's own personal use in refreshing his recollection of the evidence. The jury must be reminded that should any discrepancy exist between their recollection of the evidence and their notes, they should request that the record of the proceedings be read back and that it is the transcript that must prevail over their notes.' " (*People v. Whitt* (1984) 36 Cal.3d 724, 747 [205 Cal.Rptr. 810, 685 P.2d 1161], internal citations and footnote omitted.)

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

Secondary Sources

Deskbook on the Management of Complex Civil Litigation, Ch. 2, *Case Management*, § 2.81[5] (Matthew Bender)

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

104. Nonperson Party

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

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

New September 2003

Directions for Use

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

Sources and Authority

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

Secondary Sources

9 Witkin, Summary of California Law (10th ed. 2005) Corporations, § 1, p. 775

1 Matthew Bender Practice Guide: California Pretrial Civil Procedure, Ch. 5, *Parties*, 5.13–5.17

105. Insurance

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

New September 2003

Sources and Authority

- Evidence of Insurance Inadmissible. Evidence Code section 1155. ~~provides: "Evidence that a person was, at the time a harm was suffered by another, insured wholly or partially against loss arising from liability for that harm is inadmissible to prove negligence or other wrongdoing."~~

- As a rule, evidence that the defendant has insurance is both irrelevant and prejudicial to the defendant. (*Neumann v. Bishop* (1976) 59 Cal.App.3d 451, 469 [130 Cal.Rptr. 786].)

- Generally, evidence that the plaintiff was insured is not admissible under the "collateral source rule." (*Helfend v. Southern California Rapid Transit Dist.* (1970) 2 Cal.3d 1, 16-18 [84 Cal.Rptr. 173, 465 P.2d 61]; *Acosta v. Southern California Rapid Transit Dist.* (1970) 2 Cal.3d 19, 25-26 [84 Cal.Rptr. 184, 465 P.2d 72].)

- Evidence of insurance coverage may be admissible where it is coupled with other relevant evidence, provided that the probative value of the other evidence outweighs the prejudicial effect of the mention of insurance. (*Blake v. E. Thompson Petroleum Repair Co., Inc.* (1985) 170 Cal.App.3d 823, 831 [216 Cal.Rptr. 568].)

- An instruction to disregard whether a party has insurance may, in some cases, cure the effect of counsel's improper reference to insurance. (*Scally v. Pacific Gas & Electric Co.* (1972) 23 Cal.App.3d 806, 814 [100 Cal.Rptr. 501].)

Secondary Sources

7 Witkin, California Procedure (4th ed. 1997) Trial, §§ 230-233

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

California Practice Guide: Civil Trials and Evidence, § 5:371

3 California Trial Guide, Unit 50, *Extrinsic Policies Affecting or Excluding Evidence*, §§ 50.20, 50.32 (Matthew Bender)

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

106. Evidence

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

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

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

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

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

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

Directions for Use

This instruction should be given as an introductory instruction.

Sources and Authority

- "Evidence" Defined. Evidence Code section 140. ~~defines "evidence" as "testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact."~~

- Jury to Decide Questions of Fact. Evidence Code section 312. ~~provides:~~
  ~~Except as otherwise provided by law, where the trial is by jury:~~

  ~~(a) All questions of fact are to be decided by the jury.~~

~~(b) Subject to the control of the court, the jury is to determine the effect and value of the evidence addressed to it, including the credibility of witnesses and hearsay declarants.~~

- Miscarriage of Justice. Evidence Code section 353. ~~provides:~~

  ~~A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless:~~

  ~~(a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion; and~~

  ~~(b) The court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and that the error or errors complained of resulted in a miscarriage of justice.~~

- A stipulation in proper form is binding on the parties if it is within the authority of the attorney. Properly stipulated facts may not be contradicted. (*Palmer v. City of Long Beach* (1948) 33 Cal.2d 134, 141-142 [199 P.2d 952].)

- Courts have held that "attempts to suggest matters of an evidentiary nature to a jury other than by the legitimate introduction into evidence is misconduct whether by questions on cross-examination, argument or other means." (*Smith v. Covell* (1980) 100 Cal.App.3d 947, 960 [161 Cal.Rptr. 377].)

- Courts have stated that "[t]he right to object on appeal to misconduct or improper argument, even when prejudicial, is generally waived in the absence of a proper objection and request the jury be admonished." (*Atkins v. Bisigier* (1971) 16 Cal.App.3d 414, 427 [94 Cal.Rptr. 49]; *Horn v. Atchison, Topeka & Santa Fe Ry. Co*. (1964) 61 Cal.2d 602, 610 [39 Cal.Rptr. 721, 394 P.2d 561].)

Secondary Sources

3 Witkin, California Evidence (4th ed. 2000) Presentation at Trial

7 Witkin, California Procedure (5th ed. 2008) Trial, §§ 281, 282

1A California Trial Guide, Unit 21, *Procedures for Determining Admissibility of Evidence*, §§ 21.01, 21.03 (Matthew Bender)

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

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

107. Witnesses

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

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

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

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

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

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

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

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

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

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

New September 2003; Revised April 2004, June 2005, April 2007, December 2012

Directions for Use

This instruction may be given as an introductory instruction or as a concluding instruction after trial. (See CACI No. 5003, *Witnesses.*)

In the last paragraph, the court may delete inapplicable categories of potential jury bias.

Sources and Authority

- Role of Jury. Evidence Code section 312. ~~provides:~~
  ~~Except as otherwise provided by law, where the trial is by jury:~~

  ~~(a) All questions of fact are to be decided by the jury.~~

  ~~(b) Subject to the control of the court, the jury is to determine the effect and value of the evidence addressed to it, including the credibility of witnesses and hearsay declarants.~~

- Considerations for ~~evaluating~~ Evaluating the ~~credibility~~ Credibility of ~~witnesses~~ Witnesses. ~~are contained in~~ Evidence Code section 780.~~:~~
  ~~Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following:~~

  ~~(a) His demeanor while testifying and the manner in which he testifies.~~

  ~~(b) The character of his testimony.~~

  ~~(c) The extent of his capacity to perceive, to recollect, or to communicate any matter about which he testifies.~~

  ~~(d) The extent of his opportunity to perceive any matter about which he testifies.~~

  ~~(e) His character for honesty or veracity or their opposites.~~

  ~~(f) The existence or nonexistence of a bias, interest, or other motive.~~

  ~~(g) A statement previously made by him that is consistent with his testimony at the hearing.~~

  ~~(h) A statement made by him that is inconsistent with any part of his testimony at the hearing.~~

  ~~(i) The existence or nonexistence of any fact testified to by him.~~

  ~~(j) His attitude toward the action in which he testifies or toward the giving of testimony.~~

  ~~(k) His admission of untruthfulness.~~

- Direct Evidence of Single Witness Sufficient. Evidence Code section 411. ~~provides that "[e]xcept~~

~~where additional evidence is required by statute, the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact." According to former Code of Civil Procedure section 2061, the jury should be instructed that "they are not bound to decide in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a less number or against a presumption or other evidence satisfying their minds."~~

- ~~The willfully false witness instruction was formerly codified at Code of Civil Procedure section 2061. This statute was repealed in 1965 to avoid giving undue emphasis to this rule compared to other common-law rules. Refusal to give an instruction on this point is not error:~~ "It should certainly not be of importance to tell the ordinary man of the world that he should distrust the statements of a witness whom he believes to be a liar." (*Wallace v. Pacific Electric Ry. Co.* (1930) 105 Cal.App. 664, 671 [288 P. 834].)

Secondary Sources

7 Witkin, California Procedure (5th ed. 2008) Trial, § 281

1A California Trial Guide, Unit 22, *Rules Affecting Admissibility of Evidence*, § 22.30 (Matthew Bender)

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

110. Service Provider for Juror With Disability

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

New September 2003

Directions for Use

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

Sources and Authority

- Eligibility to Serve as Juror. Code of Civil Procedure section 203(a)(6). ~~provides: "All persons are eligible and qualified to be prospective trial jurors, except the following: ... Persons who are not possessed of sufficient knowledge of the English language, provided that no person shall be deemed incompetent solely because of the loss of sight or hearing in any degree or other disability which impedes the person's ability to communicate or which impairs or interferes with the person's mobility."~~

- Service Provider for Juror With Disability. Code of Civil Procedure section 224 ~~provides:~~.

  ~~(a) If a party does not cause the removal by challenge of an individual juror who is deaf, hearing impaired, blind, visually impaired, or speech impaired and who requires auxiliary services to facilitate communication, the party shall (1) stipulate to the presence of a service provider in the jury room during jury deliberations, and (2) prepare and deliver to the court proposed jury instructions to the service provider.~~

  ~~(b) As used in this section, "service provider" includes, but is not limited to, a person who is a sign language interpreter, oral interpreter, deaf-blind interpreter, reader, or speech interpreter. If auxiliary services are required during the course of jury deliberations, the court shall instruct the jury and the service provider that the service provider for the juror with a disability is not to participate in the jury's deliberations in any manner except to facilitate communication between the juror with a disability and other jurors.~~

  ~~(c) The court shall appoint a service provider whose services are needed by a juror with a disability to facilitate communication or participation. A sign language interpreter, oral interpreter, or deaf-blind interpreter appointed pursuant to this section shall be a qualified interpreter, as defined in subdivision (f) of Section 754 of the Evidence Code. Service providers appointed by the court under this~~

~~subdivision shall be compensated in the same manner as provided in subdivision (i) of Section 754 of the Evidence Code.~~

Secondary Sources

7 Witkin, California Procedure (4th ed. 1997) Trial, §§ 331, 340

111. Instruction to Alternate Jurors

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

New October 2004

Directions for Use

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

Sources and Authority

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

- Alternate Jurors. Code of Civil Procedure section 234 ~~provides:~~.

  ~~Whenever, in the opinion of a judge of a superior court about to try a civil or criminal action or proceeding, the trial is likely to be a protracted one, or upon stipulation of the parties, the court may cause an entry to that effect to be made in the minutes of the court and thereupon, immediately after the jury is impaneled and sworn, the court may direct the calling of one or more additional jurors, in its discretion, to be known as "alternate jurors."~~

  ~~These alternate jurors shall be drawn from the same source, and in the same manner, and have the same qualifications, as the jurors already sworn, and shall be subject to the same examination and challenges. However, each side, or each defendant, as provided in Section 231, shall be entitled to as many peremptory challenges to the alternate jurors as there are alternate jurors called.~~

  ~~The alternate jurors shall be seated so as to have equal power and facilities for seeing and hearing the proceedings in the case, and shall take the same oath as the jurors already selected, and shall, unless excused by the court, attend at all times upon the trial of the cause in company with the other jurors, but shall not participate in deliberation unless ordered by the court, and for a failure to do so are liable to be punished for contempt.~~

  ~~They shall obey the orders of and be bound by the admonition of the court, upon each adjournment of the court; but if the regular jurors are ordered to be kept in the custody of the sheriff or marshal~~

~~during the trial of the cause, the alternate jurors shall also be kept in confinement with the other jurors; and upon final submission of the case to the jury, the alternate jurors shall be kept in the custody of the sheriff or marshal who shall not suffer any communication to be made to them except by order of the court, and shall not be discharged until the original jurors are discharged, except as provided in this section.~~

~~If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty, or if a juror requests a discharge and good cause appears therefor, the court may order the juror to be discharged and draw the name of an alternate, who shall then take his or her place in the jury box, and be subject to the same rules and regulations as though he or she had been selected as one of the original jurors.~~

~~All laws relative to fees, expenses, and mileage or transportation of jurors shall be applicable to alternate jurors, except that in civil cases the sums for fees and mileage or transportation need not be deposited until the judge directs alternate jurors to be impaneled.~~

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

Secondary Sources

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

1 California Trial Guide, Unit 10, *Voir Dire Examination* (Matthew Bender)

112. Questions From Jurors

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

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

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

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

Directions for Use

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

Sources and Authority

- Written Questions From Jurors. Rule 2.1033 of the California Rules of Court. ~~provides: "A trial judge should allow jurors to submit written questions directed to witnesses. An opportunity must be given to counsel to object to such questions out of the presence of the jury."~~

- "In a proper case there may be a real benefit from allowing jurors to submit questions under proper control by the court. However, in order to permit the court to exercise its discretion and maintain control of the trial, the correct procedure is to have the juror write the questions for consideration by the court and counsel prior to their submission to the witness." (*People v. McAlister* (1985) 167 Cal.App.3d 633, 644 [213 Cal.Rptr. 271].)

- "[T]he judge has discretion to ask questions submitted by jurors or to pass those questions on and leave to the discretion of counsel whether to ask the questions." (*People v. Cummings* (1993) 4 Cal.4th 1233, 1305 [18 Cal.Rptr.2d 796, 850 P.2d 1].)

- "The appellant urges that when jurymen ask improper questions the defendant is placed in the delicate dilemma of either allowing such question to go in without objection or of offending the jurors by making the objection and the appellant insists that the court of its own motion should check the putting of such improper questions by the jurymen, and thus relieve the party injuriously affected

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

Secondary Sources

3 Witkin, California Evidence (4th ed. 2000) Presentation at Trial, § 85

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

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

113. Bias

Each one of us has biases about or certain perceptions or stereotypes of other people. We may be aware of some of our biases, though we may not share them with others. We may not be fully aware of some of our other biases.

Our biases often affect how we act, favorably or unfavorably, toward someone. Bias can affect our thoughts, how we remember, what we see and hear, whom we believe or disbelieve, and how we make important decisions.

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

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

New June 2010; Revised December 2012

Sources and Authority

- Conduct Exhibiting Bias Prohibited. Standard 10.20(a)(2) of the California Standards of Judicial Administration. ~~provides: "In all courtroom proceedings, refrain from engaging in conduct and prohibit others from engaging in conduct that exhibits bias, including but not limited to bias based on disability, gender, race, religion, ethnicity, and sexual orientation, whether that bias is directed toward counsel, court personnel, witnesses, parties, jurors, or any other participants."~~

- Judge Must Perform Duties Without Bias. Canon 3(b)(5) of the California Code of Judicial Ethics. ~~provides: "A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, engage in speech, gestures, or other conduct that would reasonably be perceived as (1) bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, or (2) sexual harassment." Canon 3(b)(6) requires the judge to impose these standards on attorneys.~~

Secondary Sources

Witkin, California Procedure (5th ed. 2008) Trial, § 132

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

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

115. "Class Action" Defined (Plaintiff Class)

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

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

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

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

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

New June 2011

Directions for Use

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

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

Sources and Authority

- Right to Bring Class Action. Code of Civil Procedure section 382. ~~provides in part: "[W]hen the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all."~~

- “Courts long have acknowledged the importance of class actions as a means to prevent a failure of justice in our judicial system. ‘ “By establishing a technique whereby the claims of many individuals can be resolved at the same time, the class suit both eliminates the possibility of repetitious litigation and provides small claimants with a method of obtaining redress . . . .” ’ Generally, a class suit is appropriate ‘when numerous parties suffer injury of insufficient size to warrant individual action and when denial of class relief would result in unjust advantage to the wrongdoer.’ ‘But because group action also has the potential to create injustice, trial courts are required to ‘ “carefully weigh respective benefits and burdens and to allow maintenance of the class action only where substantial benefits accrue both to litigants and the courts.” ’ ” (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 434–435 [97 Cal.Rptr.2d 179, 2 P.3d 27], internal citations omitted.)

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

Secondary Sources

4 Witkin, California Procedure (5th ed. 2008) Pleading, § 267 et seq.

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

Deskbook on the Management of Complex Civil Litigation, Ch. 3, *Specialized Areas*, § 3.70 et seq. (Matthew Bender)

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

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

3 Matthew Bender Practice Guide: California Pretrial Civil Procedure, Ch. 33, *Class Actions*, 33.04

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

A party must persuade you, by the evidence presented in court, that what he or she is required to prove is more likely to be true than not true. This is referred to as "the burden of proof."

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

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

New September 2003; Revised February 2005

Directions for Use

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

For an instruction on clear and convincing evidence, see CACI No. 201, *More Likely True—Clear and Convincing Proof.*

Sources and Authority

- Burden of Proof – Preponderance of Evidence. Evidence Code section 115. ~~provides: " 'Burden of proof' means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court. The burden of proof may require a party to raise a reasonable doubt concerning the existence or nonexistence of a fact or that he establish the existence or nonexistence of a fact by a preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt. Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence."~~

- Party With Burden of Proof. Evidence Code section 500. ~~provides: "Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting."~~

- Each party is entitled to the benefit of all the evidence, including the evidence produced by an adversary. (*Williams v. Barnett* (1955) 135 Cal.App.2d 607, 612 [287 P.2d 789]; 7 Witkin, California Procedure (4th ed. 1997) Trial, § 305, p. 352.)

- The general rule in California is that " '[i]ssues of fact in civil cases are determined by a preponderance of testimony.' " (*Weiner v. Fleischman* (1991) 54 Cal.3d 476, 483 [286 Cal.Rptr. 40, 816 P.2d 892], citation omitted.)

- The preponderance-of-the-evidence standard "simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence.' " (*In re Angelia P.* (1981) 28 Cal.3d 908, 918 [171 Cal.Rptr. 637, 623 P.2d 198], citation omitted.)

- "Preponderance of the evidence" " 'means what it says, viz., that the evidence on one side outweighs, preponderates over, is more than, the evidence on the other side, not necessarily in number of witnesses or quantity, but in its effect on those to whom it is addressed.' " (*Glage v. Hawes Firearms Co.* (1990) 226 Cal.App.3d 314, 325 [276 Cal.Rptr. 430] (quoting *People v. Miller* (1916) 171 Cal. 649, 652 [154 P. 468] and holding that it was prejudicial misconduct for jurors to refer to the dictionary for definition of the word "preponderance").)

Secondary Sources

1 Witkin, California Evidence (4th ed. 2000) Burden of Proof and Presumptions, § 35

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

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

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

202. Direct and Indirect Evidence

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

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

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

New September 2003; Revised December 2012

Directions for Use

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

Sources and Authority

- Direct Evidence. Evidence Code section 410. ~~provides: "As used in this chapter, 'direct evidence' means evidence that directly proves a fact, without an inference or presumption, and which in itself, if true, conclusively establishes that fact."~~

- Inference. Evidence Code section 600(b). ~~provides: "An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action."~~

- The Assembly Committee on Judiciary Comment to section 600 observes: "Under the Evidence Code, an inference is not itself evidence; it is the result of reasoning from evidence."

- "[T]he fact that evidence is 'circumstantial' does not mean that it cannot be 'substantial.' Relevant circumstantial evidence is admissible in California. Moreover, the jury is entitled to accept persuasive circumstantial evidence even where contradicted by direct testimony." (*Hasson v. Ford Motor Co.* (1977) 19 Cal.3d 530, 548 [138 Cal.Rptr. 705, 564 P.2d 857], overruled on other grounds in *Soule v. GM Corp.* (1994) 8 Cal.4th 548 [34 Cal.Rptr.2d 607, 882 P.2d 298].)

- "The terms 'indirect evidence' and 'circumstantial evidence' are interchangeable and synonymous."

(*People v. Yokum* (1956) 145 Cal.App.2d 245, 250 [302 P.2d 406], *disapproved on other grounds, People v. Cook* (1983) 33 Cal.3d 400, 413 [189 Cal.Rptr. 159, 658 P.2d 86]; *People v. Goldstein* (1956) 139 Cal.App.2d 146, 152 [293 P.2d 495].)

Secondary Sources

1 Witkin, California Evidence (4th ed. 2000) Circumstantial Evidence, §§ 1, 2

3 Witkin, California Evidence (4th ed. 2000) Presentation at Trial, §§ 138–141

7 Witkin, California Procedure (5th ed. 2008) Trial, § 291

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

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

203. Party Having Power to Produce Better Evidence

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

New September 2003

Directions for Use

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

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

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

Sources and Authority

- Power to Produce Better Evidence. Evidence Code section 412. ~~provides: "If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust."~~

- Section 412 does not incorporate the "best evidence rule," but instead deals with "stronger and more satisfactory" evidence. (*Largey v. Intrastate Radiotelephone, Inc.* (1982) 136 Cal.App.3d 660, 672 [186 Cal.Rptr. 520] (giving of instruction was proper because corporate records concerning date of meeting could have been stronger evidence than recollection of participants several years later).)

- This inference was a mandatory presumption under former Code of Civil Procedure section 1963(6). It is now considered a permissible inference. (See 3 Witkin, California Evidence (4th ed. 2000) § 114, p. 152.)

Secondary Sources

7 Witkin, California Procedure (4th ed. 1997) Trial, § 313, p. 358

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

204. Willful Suppression of Evidence

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

New September 2003; Revised October 2004

Directions for Use

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

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

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

Sources and Authority

- Willful Suppression of Evidence. Evidence Code section 413. ~~provides: "In determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, the party's failure to explain or to deny by his testimony such evidence or facts in the case against him, or his willful suppression of evidence relating thereto, if such be the case."~~

- Former Code of Civil Procedure section 1963(5) permitted the jury to infer "[t]hat the evidence willfully suppressed would be adverse if produced." Including this inference in a jury instruction on willful suppression is proper because "Evidence Code section 413 was not intended as a change in the law." (*Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 994 [16 Cal.Rptr.2d 787], disapproved of on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664 [25 Cal.Rptr.2d 109, 863 P.2d 179].)

- "The rule of [present Evidence Code section 413] . . . is predicated on common sense, and public policy. The purpose of a trial is to arrive at the true facts. A trial is not a game where one counsel safely may sit back and refuse to produce evidence where in the nature of things his client is the only source from which that evidence may be secured. *A defendant is not under a duty to produce testimony adverse to himself, but if he fails to produce evidence that would naturally have been produced he must take the risk that the trier of fact will infer, and properly so, that the evidence, had it been produced, would have been adverse*." (*Williamson v. Superior Court of Los Angeles County*

(1978) 21 Cal.3d 829, 836 fn. 2 [148 Cal.Rptr. 39, 582 P.2d 126], original italics.)

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

Secondary Sources

7 Witkin, California Procedure (4th ed. 1997) Trial, § 313, p. 358

3 Witkin, California Evidence (4th ed. 2000) Presentation at Trial, § 115

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

205. Failure to Explain or Deny Evidence

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

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

New September 2003; Revised December 2012

Directions for Use

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

Sources and Authority

- Failure to Explain or Deny. Evidence Code section 413. ~~provides: "In determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, the party's failure to explain or to deny by his testimony such evidence or facts in the case against him, or his willful suppression of evidence relating thereto, if such be the case."~~

Secondary Sources

3 Witkin, California Evidence (4th ed. 2000) Presentation at Trial, § 115

7 Witkin, California Procedure (5th ed. 2008) Trial, § 302

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

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

4 Johnson, California Trial Guide, Ch. 90, *Closing Argument*, § 90.30[2] (Matthew Bender)

206. Evidence Admitted for Limited Purpose

During the trial, I explained to you that certain evidence was admitted for a limited purpose. You may consider that evidence only for the limited purpose that I described, and not for any other purpose.

New September 2003

Directions for Use

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

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

Sources and Authority

- Evidence Admitted for Limited Purpose. Evidence Code section 355. ~~provides: "When evidence is admissible as to one party or for one purpose and is inadmissible as to another party or for another purpose, the court upon request shall restrict the evidence to its proper scope and instruct the jury accordingly."~~

- Refusal to give a requested instruction limiting the purpose for which evidence is to be considered may constitute error. (*Adkins v. Brett* (1920) 184 Cal. 252, 261–262 [193 P. 251].)

- Courts have observed that "[w]here the information is admitted for a purpose other than showing the truth of the matter asserted ... , prejudice is likely to be minimal and a limiting instruction under section 355 may be requested to control the jury's use of the information." (*Korsak v. Atlas Hotels, Inc.* (1992) 2 Cal.App.4th 1516, 1525 [3 Cal.Rptr.2d 833].)

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

Secondary Sources

1 Witkin, California Evidence (4th ed. 2000) Circumstantial Evidence, §§ 30–34

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

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

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

207. Evidence Applicable to One Party

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

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

New September 2003

Directions for Use

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

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

Sources and Authority

- Evidence Applicable to One Party. Evidence Code section 355~~. provides: "When evidence is admissible as to one party or for one purpose and is inadmissible as to another party or for another purpose, the court upon request shall restrict the evidence to its proper scope and instruct the jury accordingly."~~

Secondary Sources

1 Witkin, California Evidence (4th ed. 2000) Circumstantial Evidence, §§ 30–34

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

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

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

208. Deposition as Substantive Evidence

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

New September 2003; Revised December 2012

Sources and Authority

- How Testimony is Taken. Code of Civil Procedure section 2002. ~~provides:~~
  ~~The testimony of witnesses is taken in three modes:~~

  ~~1. By affidavit;~~

  ~~2. By deposition;~~

  ~~3. By oral examination.~~

- Use of Deposition at Trial. Code of Civil Procedure section 2025.620. ~~provides, in part: "At the trial ... any part or all of a deposition may be used against any party who was present or represented at the taking of the deposition ... so far as admissible under the rules of evidence applied as though the deponent were then present and testifying as a witness, in accordance with the following [rules set forth in this subdivision]."~~

~~• "Admissions contained in depositions and interrogatories are admissible in evidence to establish any material fact." (*Leasman v. Beech Aircraft Corp.* (1975) 48 Cal.App.3d 376, 380 [121 Cal.Rptr. 768].)~~

~~• Admissibility of Former Testimony. Evidence Code sections 1291(a), 1292(a). provides:~~
~~Evidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and:~~

~~(1) The former testimony is offered against a person who offered it in evidence in his own behalf on the former occasion or against the successor in interest of such person; or~~

~~(2) The party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing.~~

~~• Evidence Code section 1292(a) provides:~~
~~Evidence of former testimony is not made inadmissible by the hearsay rule if:~~

~~(1) The declarant is unavailable as a witness;~~

~~(2) The former testimony is offered in a civil action; and~~

~~(3) The issue is such that the party to the action or proceeding in which the former testimony was given had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which the party against whom the testimony is offered has at the hearing.~~

- "Former Testimony" Defined. Evidence Code section 1290(c). ~~defines "former testimony" as "[a] deposition taken in compliance with law in another action."~~

- "Admissions contained in depositions and interrogatories are admissible in evidence to establish any material fact." (*Leasman v. Beech Aircraft Corp.* (1975) 48 Cal.App.3d 376, 380 [121 Cal.Rptr. 768].)

- "The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds the witness unavailable as a witness within the meaning of section 240 of the Evidence Code." (*Chavez v. Zapata Ocean Resources, Inc.* (1984) 155 Cal.App.3d 115, 118 [201 Cal.Rptr. 887], citation omitted.)

Secondary Sources

3 Witkin, California Evidence (4th ed. 2000) Presentation at Trial, §§ 153–162

7 Witkin, California Procedure (5th ed. 2008) Trial, § 293

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

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

16 California Forms of Pleading and Practice, Ch. 193, *Discovery: Depositions*, §§ 193.90–193.96 (Matthew Bender)

Matthew Bender Practice Guide: California Civil Discovery, Ch. 6, *Oral Depositions in California*

209. Use of Interrogatories of a Party

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

New September 2003

Sources and Authority

- Use of Interrogatories at Trial. Code of Civil Procedure section 2030.410. ~~provides: "At the trial or any other hearing in the action, so far as admissible under the rules of evidence, the propounding party or any party other than the responding party may use any answer or part of an answer to an interrogatory only against the responding party. It is not ground for objection to the use of an answer to an interrogatory that the responding party is available to testify, has testified, or will testify at the trial or other hearing."~~

- "Admissions contained in depositions and interrogatories are admissible in evidence to establish any material fact." (*Leasman v. Beech Aircraft Corp.* (1975) 48 Cal.App.3d 376, 380 [121 Cal.Rptr. 768].)

Secondary Sources

3 Witkin, California Evidence (4th ed. 2000) Presentation at Trial, § 163

7 Witkin, California Procedure (4th ed. 1997) Trial, § 304, p. 351

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

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

Matthew Bender Practice Guide: California Civil Discovery, Ch. 9, *Interrogatories*, 9.29

210. Requests for Admissions

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

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

New September 2003

Directions for Use

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

Sources and Authority

- Requests for ~~admission~~ Admission. ~~are authorized by~~ Code of Civil Procedure section 2033.010. ~~Code of Civil Procedure section 2033.410 provides, in part: "Any matter admitted in response to a request for admission is conclusively established against the party making the admission in the pending action. ... [A]ny admission made by a party under this section is binding only on that party and is made for the purpose of the pending action only. It is not an admission by that party for any other purpose, and it shall not be used in any manner against that party in any other proceeding.~~"

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

- All parties to the action may rely on admissions. (See *Swedberg v. Christiana Community Builders* (1985) 175 Cal.App.3d 138, 143 [220 Cal.Rptr. 544].)

Secondary Sources

2 Witkin, California Evidence (4th ed. 2000) Discovery, §§ 157–167, 177

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

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

Matthew Bender Practice Guide: California Civil Discovery, Ch. 12, *Requests for Admissions*

211. Prior Conviction of a Felony

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

New September 2003; Revised December 2012

Directions for Use

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

Sources and Authority

- Admissibility of Evidence of Prior Felony Conviction. Evidence Code section 788~~. provides for the circumstances under which evidence of a prior felony conviction may be used to attack a witness's credibility. This section is most often invoked in criminal cases, but it may be used in civil cases as well.~~

- The standards governing admissibility of prior convictions in civil cases are different from those in criminal proceedings. In *Robbins v. Wong* (1994) 27 Cal.App.4th 261, 273 [32 Cal.Rptr.2d 337], the court observed: "Given the significant distinctions between the rights enjoyed by criminal defendants and civil litigants, and the diminished level of prejudice attendant to felony impeachment in civil proceedings, it is not unreasonable to require different standards of admissibility in civil and criminal cases." (*Id.* at p. 273.)

  In *Robbins*, the court concluded that article I, section 28(f) of the California Constitution, as well as any Supreme Court cases on this topic in the criminal arena, does not apply to civil cases. (*Robbins, supra*, 27 Cal.App.4th at p. 274.) However, the court did hold that the trial court "may utilize such decisions to formulate guidelines for the judicial weighing of probative value against prejudicial effect under section 352." (*Ibid.*)

Secondary Sources

3 Witkin, California Evidence (4th ed. 2000) Presentation at Trial, §§ 292, 294, 295, 308

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

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

212. Statements of a Party Opponent

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

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

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

2. **If you believe that the statement was made, do you believe it was reported accurately?**

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

New September 2003

Directions for Use

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

Sources and Authority

- Determination of Preliminary Facts. Evidence Code section 403.

- Statements of Party. Evidence Code section 1220. ~~provides: "Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity."~~

  The Law Revision Commission comment to this section observes that "[t]he rational underlying this exception is that the party cannot object to the lack of the right to cross-examine the declarant since the party himself made the statement."

- There is no requirement that the prior statement of a party must have been against his or her interests when made in order to be admissible. Any prior statement of a party may be offered against him or her in trial. (1 Witkin, California Evidence (4th ed. 2000) Hearsay § 93.)

- ~~Evidence Code section 403(a)(4) provides: "The proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact, and the proffered evidence is inadmissible unless the court finds that there is evidence sufficient to sustain a finding of the~~

~~existence of the preliminary fact when [t]he proffered evidence is of a statement or other conduct of a particular person and the preliminary fact is whether that person made the statement or so conducted himself."~~

- The cautionary instruction regarding admissions is derived from common law, formerly codified at Code of Civil Procedure section 2061. The repeal of this section did not affect decisional law concerning the giving of the cautionary instruction. (*People v. Beagle* (1972) 6 Cal.3d 441, 455, fn. 4 [99 Cal.Rptr. 313, 492 P.2d 1].)

- The purpose of the cautionary instruction has been stated as follows: "Ordinarily there is strong reasoning behind the principle that a party's extrajudicial admissions or declarations against interest should be viewed with caution. ... No class of evidence is more subject to error or abuse inasmuch as witnesses having the best of motives are generally unable to state the exact language of an admission and are liable, by the omission or the changing of words, to convey a false impression of the language used." (*Pittman v. Boiven* (1967) 249 Cal.App.2d 207, 214 [57 Cal.Rptr. 319].)

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

Secondary Sources

1 Witkin, California Evidence (4th ed. 2000) Hearsay, §§ 90–93, 125

3 Witkin, California Evidence (4th ed. 2000) Presentation at Trial, § 113

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

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

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

213. Adoptive Admissions

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

1. **The statement was made to [***name of party against whom statement was offered***] or made in [his/her] presence;**

2. **[***Name of party against whom statement was offered***] heard and understood the statement;**

3. **[***Name of party against whom statement was offered***] would, under all the circumstances, naturally have denied the statement if [he/she] thought it was not true;**

   AND

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

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

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

New September 2003; Revised December 2012

Directions for Use

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

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

Sources and Authority

- Determination of Preliminary Facts. Evidence Code section 403.

- Adoptive Admissions. Evidence Code section 1221. ~~provides: "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth."~~

- ~~Evidence Code section 403(a)(4) provides: "The proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact, and the proffered evidence is inadmissible unless the court finds that there is evidence sufficient to sustain a finding of the existence of the preliminary fact when [t]he proffered evidence is of a statement or other conduct of a~~

~~particular person and the preliminary fact is whether that person made the statement or so conducted himself."~~

- "When a person makes a statement in the presence of a party to an action under circumstances that would normally call for a response if the statement were untrue, the statement is admissible for the limited purpose of showing the party's reaction to it. His silence, evasion, or equivocation may be considered as a tacit admission of the statements made in his presence." (*In re Estate of Neilson* (1962) 57 Cal.2d 733, 746 [22 Cal.Rptr. 1, 371 P.2d 745].)

- In order for the hearsay evidence to be admissible, "it must have been shown clearly that [the party] heard and understood the statement." (*Fisch v. Los Angeles Metropolitan Transit Authority* (1963) 219 Cal.App.2d 537, 540 [33 Cal.Rptr. 298].) There must also be evidence of some type of reaction to the statement. (*Ibid*.) It is clear that the doctrine "does not apply if the party is in such physical or mental condition that a reply could not reasonably be expected from him." (*Southers v. Savage* (1961) 191 Cal.App.2d 100, 104 [12 Cal.Rptr. 470].)

- "[T]here may be admissions other than statements made by the party himself; that is, statements of another may in some circumstances be treated as admissions of the party. The situations are (1) where the person who makes the statement is in privity with the party against whom it is offered, as in the case of agency, partnership, etc.; and (2) where the statement of the other is adopted by the party as his own, either expressly or by conduct. Familiar examples of this second situation are the admissions by silence, where declarations of third persons made in the presence of a party give rise to admissions, the conduct of the party in the face of the declaration constituting the adoption of the statement to form an admission." (*In re Estate of Gaines* (1940) 15 Cal.2d 255, 262 [100 P.2d 1055].)

- "The basis of the rule on admissions made in response to accusations is the fact that human experience has shown that generally it is natural to deny an accusation if a party considers himself innocent of negligence or wrongdoing." (*Keller v. Key System Transit Lines* (1954) 129 Cal.App.2d 593, 596 [277 P.2d 869].)

- If the statement is not accusatory, then the failure to respond is not an admission. (*Neilson, supra,* 57 Cal.2d at p. 747; *Gilbert v. City of Los Angeles* (1967) 249 Cal.App.2d 1006, 1008 [58 Cal.Rptr. 56].)

- Admissibility of this evidence depends upon whether (1) the statement was made under circumstances that call for a reply, (2) whether the party understood the statement, and (3) whether it could be inferred from his conduct that he adopted the statement as an admission. (*Gilbert, supra,* 249 Cal.App.2d at p. 1009.)

Secondary Sources

1 Witkin, California Evidence (4th ed. 2000) Hearsay, §§ 102–105

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

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

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

215. Exercise of a Communication Privilege

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

New September 2003; Revised December 2012

Directions for Use

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

Sources and Authority

- No Presumption on Exercise of Privilege. Evidence Code section 913(b)~~., provides: "The court, at the request of a party who may be adversely affected because an unfavorable inference may be drawn by the jury because a privilege has been exercised, shall instruct the jury that no presumption arises because of the exercise of the privilege and that the jury may not draw any inference therefrom as to the credibility of the witness or as to any matter at issue in the proceeding."~~

- The comment to Evidence Code section 913 notes that this statute "may modify existing California law as it applies in civil cases." Specifically, the comment notes that section 913 in effect overrules two Supreme Court cases: *Nelson v. Southern Pacific Co.* (1937) 8 Cal.2d 648 [67 P.2d 682] and *Fross v. Wotton* (1935) 3 Cal.2d 384 [44 P.2d 350]. The *Nelson* court had held that evidence of a person's exercise of the privilege against self-incrimination in a prior proceeding may be shown for impeachment purposes if he or she testifies in a self-exculpatory manner in a subsequent proceeding. Language in *Fross* indicated that unfavorable inferences may be drawn in a civil case from a party's claim of the privilege against self-incrimination during the case itself.

Secondary Sources

2 Witkin, California Evidence (4th ed. 2000) Witnesses, §§ 95–97

7 Witkin, California Procedure (5th ed. 2008) Trial, § 299

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

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

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

Matthew Bender Practice Guide: California Civil Discovery, Ch. 2, *Scope of Discovery*, 2.09–2.24

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

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

New September 2003; Revised December 2012

Directions for Use

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

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

Sources and Authority

- No Presumption From Exercise of Fifth Amendment Privilege. Evidence Code section 913. ~~provides:~~

  ~~(a) If in the instant proceeding or on a prior occasion a privilege is or was exercised not to testify with respect to any matter, or to refuse to disclose or to prevent another from disclosing any matter, neither the presiding officer nor counsel may comment thereon, no presumption shall arise because of the exercise of the privilege, and the trier of fact may not draw any inference therefrom as to the credibility of the witness or as to any matter at issue in the proceeding.~~

  ~~(b) The court, at the request of a party who may be adversely affected because an unfavorable inference may be drawn by the jury because a privilege has been exercised, shall instruct the jury that no presumption arises because of the exercise of the privilege and that the jury may not draw any inference therefrom as to the credibility of the witness or as to any matter at issue in the proceeding.~~

- Privilege to Refuse to Disclose Incriminating Information. Evidence Code section 940. ~~provides: "To the extent that such privilege exists under the Constitution of the United States or the State of California, a person has a privilege to refuse to disclose any matter that may tend to incriminate him."~~

- “[I]n any proceeding, civil or criminal, a witness has the right to decline to answer questions which may tend to incriminate him in criminal activity.” (*Cramer v. Tyars* (1979) 23 Cal.3d 131, 137 [151 Cal.Rptr. 653, 588 P.2d 793], internal citation omitted.)

- “A defendant may not bring a civil action to a halt simply by invoking the privilege against self-incrimination.” (*Oiye v. Fox* (2012) 211 Cal.App.4th 1036, 1055 [151 Cal.Rptr.3d 65].)

- “[T]he privilege may not be asserted by merely declaring that an answer will incriminate; it must be ‘evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.’ ” (*Troy v. Superior Court* (1986) 186 Cal.App.3d 1006, 1010–1011 [231 Cal.Rptr. 108], internal citations omitted.)

- “The Fifth Amendment of the United States Constitution includes a provision that ‘[no] person ... shall be compelled in any criminal case to be a witness against himself, ...’ Although the specific reference is to criminal cases, the Fifth Amendment protection ‘has been broadly extended to a point where now it is available even to a person appearing only as a *witness* in *any* kind of proceeding where testimony can be compelled.’ ” (*Brown v. Superior Court* (1986) 180 Cal.App.3d 701, 708 [226 Cal.Rptr. 10], citation and footnote omitted.)

- “There is no question that the privilege against self-incrimination may be asserted by civil defendants who face possible criminal prosecution based on the same facts as the civil action. ‘All matters which are privileged against disclosure upon the trial under the law of this state are privileged against disclosure through any discovery procedure.’ ” (*Brown, supra,* 180 Cal.App.3d at p. 708, internal citations omitted.)

- “California law, then, makes no distinction between civil and criminal litigation concerning adverse inferences from a witness's invocation of the privilege against self-incrimination; under Evidence Code section 913, juries are forbidden to make such inferences in both types of cases. No purpose is served, therefore, in either type of trial by forcing a witness to exercise the privilege on the stand in the jury's presence, for … the court would then be ‘required, on request, to instruct the jury not to draw the very inference [the party calling the witness] sought to present to the jury.” (*People v. Holloway* (2004) 33 Cal. 4th 96, 131 [14 Cal.Rptr.3d 212, 91 P.3d 164], internal citations omitted.)

- “The privilege against self-incrimination is guaranteed by both the federal and state Constitutions. As pointed out by the California Supreme Court, ‘two separate and distinct testimonial privileges’ exist under this guarantee. First, a defendant in a criminal case ‘has an absolute right not to be called as a witness and not to testify.’ Second, ‘in any proceeding, civil or criminal, a witness has the right to decline to answer questions which may tend to incriminate him [or her] in criminal activity.’ ” (*People v. Merfeld, supra,* 57 Cal.App.4th at p. 1443, internal citations omitted.)

- “The jury may not draw any inference from a witness's invocation of a privilege. Upon request, the trial court must so instruct jurors. ‘To avoid the potentially prejudicial impact of having a witness assert the privilege against self-incrimination before the jury, we have in the past recommended that, in determining the *propriety* of the witness's invocation of the privilege, the trial court hold a pretestimonial hearing outside the jury's presence.’ Such a procedure makes sense under the

appropriate circumstances. If there is a dispute about whether a witness may legitimately rely on the Fifth Amendment privilege against self-incrimination to avoid testifying, that legal question should be resolved by the court. Given the court's ruling and the nature of the potential testimony, the witness may not be privileged to testify at all, or counsel may elect not to call the witness as a matter of tactics." (*People v. Doolin, supra,* 45 Cal.4th at pp. 441-442, original italics, internal citations omitted.)

Secondary Sources

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

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

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

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

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

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

217. Evidence of Settlement

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

New September 2003

Directions for Use

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

Sources and Authority

- Evidence of Settlement. Evidence Code section 1152(a). ~~provides: "Evidence that a person has, in compromise or from humanitarian motives, furnished or offered or promised to furnish money or any other thing, act, or service to another who has sustained or will sustain or claims that he or she has sustained or will sustain loss or damage, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove his or her liability for the loss or damage or any part of it."~~

- "While evidence of a settlement agreement is inadmissible to prove liability, it is admissible to show bias or prejudice of an adverse party. Relevant evidence includes evidence relevant to the credibility of a witness." (*Moreno v. Sayre* (1984) 162 Cal.App.3d 116, 126 [208 Cal.Rptr. 444], internal citations omitted.)

Secondary Sources

1 Witkin, California Evidence (4th ed. 2000) Circumstantial Evidence, §§ 140–148

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

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

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

218. Statements Made to Physician (Previously Existing Condition)

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

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

New September 2003; Revised June 2006

Directions for Use

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

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

Sources and Authority

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

- Statements of Party. Evidence Code section 1220~~. provides: "Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity."~~

- ~~Evidence Code section 1250(a) provides, in part:~~

  ~~[E]vidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation ... is not made inadmissible by the hearsay rule when:~~

  ~~(1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action; or~~

~~(2) The evidence is offered to prove or explain acts or conduct of the declarant.~~

- ~~Evidence Code section 1251 provides, in part:~~

~~[E]vidence of a statement of the declarant's state of mind, emotion, or physical sensation ... at a time prior to the statement is not made inadmissible by the hearsay rule if:~~

~~(a) The declarant is unavailable as a witness; and~~

~~(b) The evidence is offered to prove such prior state of mind, emotion, or physical sensation when it is itself an issue in the action and the evidence is not offered to prove any fact other than such state of mind, emotion, or physical sensation.~~

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

Secondary Sources

1 Witkin, California Evidence (4th ed. 2000) Hearsay, § 196

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

219. Expert Witness Testimony

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

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

a. The expert's training and experience;

b. The facts the expert relied on; and

c. The reasons for the expert's opinion.

New September 2003

Directions for Use

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

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

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

Sources and Authority

- Qualification as Expert. Evidence Code section 720(a).

- The "credibility of expert witnesses is a matter for the jury after proper instructions from the court." (*Williams v. Volkswagenwerk Aktiengesellschaft* (1986) 180 Cal.App.3d 1244, 1265 [226 Cal.Rptr. 306].)

- " 'Generally, the opinion of an expert is admissible when it is "[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact … ." [Citations.] Also, "[t]estimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact." [Citation.] However, " 'Where the jury is just as competent as the expert to consider and weigh the evidence and draw the necessary conclusions, then the need for expert testimony evaporates.' " ' Expert testimony will be excluded ' " 'when it would add nothing at all to the jury's common fund of information, i.e., when 'the subject of inquiry is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness." ' " ' " (*Burton v. Sanner* (2012) 207 Cal.App.4th 12, 19 [142 Cal.Rptr.3d 782], internal citations omitted.)

- Under Evidence Code section 801(a), expert witness testimony "must relate to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (*New v. Consolidated Rock Products Co.* (1985) 171 Cal.App.3d 681, 692 [217 Cal.Rptr. 522].)

- ~~Evidence Code section 720(a) provides, in part: "A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates."~~

- Expert witnesses are qualified by special knowledge to form opinions on facts that they have not personally witnessed. (*Manney v. Housing Authority of The City of Richmond* (1947) 79 Cal.App.2d 453, 460 [180 P.2d 69].)

- "Although a jury may not arbitrarily or unreasonably disregard the testimony of an expert, it is not bound by the expert's opinion. Instead, it must give to each opinion the weight which it finds the opinion deserves. So long as it does not do so arbitrarily, a jury may entirely reject the testimony of a plaintiff's expert, even where the defendant does not call any opposing expert and the expert testimony is not contradicted." (*Howard, supra,* 72 Cal.App.4th at p. 633, citations omitted.)

Secondary Sources

1 Witkin, California Evidence (4th ed. 2000) Opinion Evidence, §§ 26–44

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

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

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

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

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

222. Evidence of Sliding-Scale Settlement

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

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

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

New April 2007

Directions for Use

Use this instruction for cases involving sliding scale or "Mary Carter" settlement agreements if a party who settled appears at trial as a witness. If the settling defendant is an entity, insert the name of the witness who testified on behalf of the entity and include the bracketed language in the third paragraph.

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

See CACI No. 217, *Evidence of Settlement*.

See also CACI No. 3926, *Settlement Deduction.*

Sources and Authority

- Evidence of Settlement. Code of Civil Procedure section 877.5(a)(2). ~~provides:~~

  ~~If the action is tried before a jury, and a defendant party to the agreement is called as a witness at trial, the court shall, upon motion of a party, disclose to the jury the existence and content of the agreement or covenant, unless the court finds that this disclosure will create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.~~

  ~~The jury disclosure herein required shall be no more than necessary to inform the jury of~~

~~the possibility that the agreement may bias the testimony of the witness.~~

- Evidence of a settlement agreement is admissible to show bias or prejudice of an adverse party. Relevant evidence includes evidence relevant to the credibility of a witness. (*Moreno v. Sayre* (1984) 162 Cal.App.3d 116, 126 [208 Cal.Rptr. 444].)

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

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, § 101

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

3 Matthew Bender Practice Guide: California Pretrial Procedure, Ch. 37, *Settlement and Release*, 37.25

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

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

223. Opinion Testimony of Lay Witness

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

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

New April 2008

Directions for Use

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

Sources and Authority

- Opinion Testamony of Lay Witness. Evidence Code section 800. ~~provides:~~

  ~~If a witness is not testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is permitted by law, including but not limited to an opinion that is:~~

  ~~(a) Rationally based on the perception of the witness; and~~

  ~~(b) Helpful to a clear understanding of his testimony.~~

- Foundation for Opinion Testamony of Lay Witness. Evidence Code section 802. ~~provides: "A witness testifying in the form of an opinion may state on direct examination the reasons for his opinion and the matter (including, in the case of an expert, his special knowledge, skill, experience, training, and education) upon which it is based, unless he is precluded by law from using such reasons or matter as a basis for his opinion. The court in its discretion may require that a witness before testifying in the form of an opinion be first examined concerning the matter upon which his opinion is based."~~

- Character Evidence. Evidence Code section 1100. ~~provides: "Except as otherwise provided by statute, any otherwise admissible evidence (including evidence in the form of an opinion, evidence of reputation, and evidence of specific instances of such person's conduct) is admissible to prove a person's character or a trait of his character."~~

Secondary Sources

1 Witkin, California Evidence (4th ed. 2000) Opinion Evidence, §§ 3–25

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

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

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

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

224. Testimony of Child

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

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

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

New April 2008

Sources and Authority

- Minors Qualified to Testify. Evidence Code section 700. ~~provides: "Except as otherwise provided by statute, every person, irrespective of age, is qualified to be a witness and no person is disqualified to testify to any matter."~~

- Evaluation of Child's Testimony in Criminal Trial. Penal Code section 1127f. ~~provides:~~

  ~~In any criminal trial or proceeding in which a child 10 years of age or younger testifies as a witness, upon the request of a party, the court shall instruct the jury, as follows:~~

  ~~In evaluating the testimony of a child you should consider all of the factors surrounding the child's testimony, including the age of the child and any evidence regarding the child's level of cognitive development. Although, because of age and level of cognitive development, a child may perform differently as a witness from an adult, that does not mean that a child is any more or less credible a witness than an adult. You should not discount or distrust the testimony of a child solely because he or she is a child.~~

Secondary Sources

3 Witkin, California Evidence (4th ed. 2000) Presentation, § 88(3)

Wegner et al., California Practice Guide: Civil Trial and Evidence (The Rutter Group) ¶¶ 8:228–8:230

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

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

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

301. Third-Party Beneficiary

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

It is not necessary for [*name of plaintiff***] to have been named in the contract. In deciding what [***insert names of the contracting parties***] intended, you should consider the entire contract and the circumstances under which it was made.**

New September 2003

Directions for Use

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

These pattern jury instructions may need to be modified in cases brought by plaintiffs who are third-party beneficiaries.

Sources and Authority

- Contract for Benefit of Third Person. Civil Code section 1559. ~~provides: "A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it."~~

- A third party may qualify as a beneficiary under a contract where the contracting parties must have intended to benefit that individual and such intent appears from the terms of the agreement. (*Brinton v. Bankers Pension Services, Inc.* (1999) 76 Cal.App.4th 550, 558 [90 Cal.Rptr.2d 469].) However, "[i]nsofar as intent to benefit a third person is important in determining his right to bring an action under a contract, it is sufficient that the promisor must have understood that the promisee had such intent. No specific manifestation by the promisor of an intent to benefit the third person is required." (*Lucas v. Hamm* (1961) 56 Cal.2d 583,591 [15 Cal.Rptr. 821, 364 P.2d 685].)

- "Traditional third party beneficiary principles do not require that the person to be benefited be named in the contract." (*Harper v. Wausau Insurance Corp.* (1997) 56 Cal.App.4th 1079, 1086 [66 Cal.Rptr.2d 64].)

- Civil Code section 1559 excludes enforcement of a contract by persons who are only incidentally or remotely benefited by the agreement. (*Lucas, supra,* 56 Cal.2d at p. 590.)

- "Whether a third party is an intended beneficiary or merely an incidental beneficiary to the contract involves construction of the parties' intent, gleaned from reading the contract as a whole in light of

the circumstances under which it was entered. [Citation.]" (*Jones v. Aetna Casualty & Surety Co.* (1994) 26 Cal.App.4th 1717, 1725 [33 Cal.Rptr.2d 291].)

- Restatement Second of Contracts, section 302, provides:

> (1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either
>
> (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or
>
> (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.
>
> (2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.

This section has been cited by California courts. (See, e.g., *Outdoor Services v. Pabagold* (1986) 185 Cal.App.3d 676, 684 [230 Cal.Rptr. 73].)

- The burden is on the third party "to prove that the performance [it] seeks was actually promised." (*Garcia v. Truck Insurance Exchange* (1984) 36 Cal.3d 426, 436 [204 Cal.Rptr. 435, 682 P.2d 1100]; *Neverkovec v. Fredericks* (1999) 74 Cal.App.4th 337, 348-349 [87 Cal.Rptr.2d 856].)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 685–706

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

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

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

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

304. Oral or Written Contract Terms

[Contracts may be written or oral.]

[Contracts may be partly written and partly oral.]

Oral contracts are just as valid as written contracts.

New September 2003; Revised December 2013

Directions for Use

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

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

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

Sources and Authority

- Oral Contracts. Civil Code section 1622.
- Statute of Frauds. ~~provides that "all contracts may be oral, except such as are specially required by statute to be in writing." (See also~~ Civil~~.~~ Code section~~, §~~ 1624.~~)~~
- "This question posed by defendant [may a contract be partly written and partly oral] must be answered in the affirmative in this sense: that a contract or agreement in legal contemplation is neither written nor oral, but oral or written evidence may be received to establish the terms of the contract or agreement between the parties. ... A so-called partly written and partly oral contract is in legal effect a contract, the terms of which may be proven by both written and oral evidence." (*Lande v. Southern California Freight Lines* (1948) 85 Cal.App.2d 416, 420–421 [193 P.2d 144].)
- "When the parties to a written contract have agreed to it as an 'integration'—a complete and final embodiment of the terms of an agreement—parol evidence cannot be used to add to or vary its terms ... [However,] '[w]hen only part of the agreement is integrated, the same rule applies to that part, but

parol evidence may be used to prove elements of the agreement not reduced to writing.' " (*Masterson v. Sine* (1968) 68 Cal.2d 222, 225 [65 Cal.Rptr. 545, 436 P.2d 561].)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts § 117

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

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

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

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

305. Implied-in-Fact Contract

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

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

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

New September 2003

Sources and Authority

- Contract May Be Express or Implied. Civil Code section~~s~~ 1619.
- Express Contract. Civil Code section 1620.
- Implied Contract. Civil Code section ~~-~~1621. ~~together provide as follows: "A contract is either express or implied. An express contract is one, the terms of which are stated in words. An implied contract is one, the existence and terms of which are manifested by conduct."~~
- ~~Section 19(2) of the Restatement Second of Contracts provides: "The conduct of a party is not effective as a manifestation of his assent unless he intends to engage in the conduct and knows or has reason to know that the other party may infer from his conduct that he assents."~~
- "Unlike the 'quasi-contractual' quantum meruit theory which operates without an actual agreement of the parties, an implied-in-fact contract entails an actual contract, but one manifested in conduct rather than expressed in words." (*Maglica v. Maglica* (1998) 66 Cal.App.4th 442, 455 [78 Cal.Rptr.2d 101].)
- Express and implied-in-fact contracts have the same legal effect, but differ in how they are proved at trial: "'Contracts may be express or implied. These terms, however, do not denote different kinds of contracts, but have reference to the evidence by which the agreement between the parties is shown. If the agreement is shown by the direct words of the parties, spoken or written, the contract is said to be an express one. But if such agreement can only be shown by the acts and conduct of the parties, interpreted in the light of the subject-matter and of the surrounding circumstances, then the contract is an implied one.'" (*Marvin v. Marvin* (1976) 18 Cal.3d 660, 678, fn. 16 [134 Cal.Rptr. 815, 557 P.2d 106], internal citation omitted.)
- "As to the basic elements [of a contract cause of action], there is no difference between an express and implied contract. ... While an implied in fact contract may be inferred from the conduct, situation

or mutual relation of the parties, the very heart of this kind of agreement is an intent to promise." (*Division of Labor Law Enforcement v. Transpacific Transportation Co.* (1977) 69 Cal.App.3d 268, 275 [137 Cal.Rptr. 855]; see also *Friedman v. Friedman* (1993) 20 Cal.App.4th 876, 888 [24 Cal.Rptr.2d 892].)

- The formation of an implied contract can become an issue for the jury to decide: "Whether or not an implied contract has been created is determined by the acts and conduct of the parties and all the surrounding circumstances involved and is a question of fact." (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 611 [176 Cal.Rptr. 824], internal citation omitted.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, § 102

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

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

308. Contract Formation—Revocation of Offer

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

1. **That [***name of defendant***] did not withdraw the offer; or**

2. **That [***name of plaintiff***] accepted the offer before [***name of defendant***] withdrew it; or**

3. **That [***name of defendant***]'s withdrawal of the offer was never communicated to [***name of plaintiff***].**

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

New September 2003

Directions for Use

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

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

Sources and Authority

- Revocation Before Acceptance. Civil Code section 1586. ~~provides: "A proposal may be revoked at any time before its acceptance is communicated to the proposer, but not afterwards."~~

- ~~The m~~Methods for ~~revocation~~ Revocation.~~are listed in~~ Civil Code section 1587.~~, and include:~~

  ~~1) Communication of revocation,~~

  ~~2) Lapse of time for acceptance,~~

  ~~3) Failure to fulfill condition precedent to acceptance, and~~

  ~~4) By death or insanity of proposer.~~

  ~~This instruction addresses the first method.~~

- "It is a well-established principle of contract law that an offer may be revoked by the offeror any time

prior to acceptance." (*T. M. Cobb Co., Inc. v. Superior Court* (1984) 36 Cal.3d 273, 278 [204 Cal.Rptr. 143, 682 P.2d 338].)

- " 'Under familiar contract law, a revocation of an offer must be directed to the offeree.' [Citation.]" (*Moffett v. Barclay* (1995) 32 Cal.App.4th 980, 983 [38 Cal.Rptr.2d 546].)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 159–165

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

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

27 California Legal Forms, Ch. 75, *Formation of Contracts and Standard Contractual Provisions*, § 75.211 (Matthew Bender)

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

309. Contract Formation—Acceptance

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

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

2. **That [***name of defendant***] communicated [his/her/its] agreement to [***name of plaintiff***].**

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

New September 2003

Directions for Use

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

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

Sources and Authority

- Acceptance. Civil Code section 1585. ~~provides: "An acceptance must be absolute and unqualified, or must include in itself an acceptance of that character which the proposer can separate from the rest, and which will conclude the person accepting. A qualified acceptance is a new proposal."~~

- "[T]erms proposed in an offer must be met exactly, precisely and unequivocally for its acceptance to result in the formation of a binding contract; and a qualified acceptance amounts to a new proposal or counteroffer putting an end to the original offer." (*Panagotacos v. Bank of America* (1998) 60 Cal.App.4th 851, 855-856 [70 Cal.Rptr.2d 595].)

- "[I]t is not necessarily true that any communication other than an unequivocal acceptance is a rejection. Thus, an acceptance is not invalidated by the fact that it is 'grumbling,' or that the offeree makes some simultaneous 'request.' Nevertheless, it must appear that the 'grumble' does not go so far as to make it doubtful that the expression is really one of assent. Similarly, the 'request' must not add additional or different terms from those offered. Otherwise, the 'acceptance' becomes a counteroffer." (*Guzman v. Visalia Community Bank* (1999) 71 Cal.App.4th 1370, 1376 [84 Cal.Rptr.2d 581].)

- "The interpretation of the purported acceptance or rejection of an offer is a question of fact. Further,

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

- "Acceptance of an offer, which may be manifested by conduct as well as by words, must be expressed or communicated by the offeree to the offeror." (*Russell v. Union Oil Co.* (1970) 7 Cal.App.3d 110, 114 [86 Cal.Rptr. 424].)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 180–192

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

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

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

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

310. Contract Formation—Acceptance by Silence

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

New September 2003

Directions for Use

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

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

Sources and Authority

- Consent by Acceptance of Benefits. Civil Code section 1589.

- Because acceptance must be communicated, "[s]ilence in the face of an offer is not an acceptance, unless there is a relationship between the parties or a previous course of dealing pursuant to which silence would be understood as acceptance." (*Southern California Acoustics Co., Inc. v. C. V. Holder, Inc.* (1969) 71 Cal.2d 719, 722 [79 Cal.Rptr. 319, 456 P.2d 975].)

- Acceptance may also be inferred from inaction where one has a duty to act, and from retention of the offered benefit. (*Golden Eagle Insurance Co. v. Foremost Insurance Co.* (1993) 20 Cal.App.4th 1372, 1386 [25 Cal.Rptr.2d 242].)

- ~~Civil Code section 1589 provides: "A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting."~~

- ~~Section 69(1) of the Restatement Second of Contracts provides:~~

  ~~(1) Where an offeree fails to reply to an offer, his silence and inaction operate as an acceptance in the following cases only:~~

  ~~(a) Where an offeree takes the benefit of offered services with reasonable opportunity to reject them and reason to know that they were offered with the expectation of compensation.~~

~~(b) Where the offeror has stated or given the offeree reason to understand the assent may be manifested by silence or inaction, and the offeree in remaining silent and inactive intends to accept the offer.~~

~~(c) Where because of previous dealings or otherwise, it is reasonable that the offeree should notify the offeror if he does not intend to accept.~~

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 193–197

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

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

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

313. Modification

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

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

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

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

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

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

New September 2003; Revised December 2009

Sources and Authority

- Modification. Civil Code section 1698. ~~provides:~~

  ~~(a) A contract in writing may be modified by a contract in writing.~~

  ~~(b) A contract in writing may be modified by an oral agreement to the extent that the oral agreement is executed by the parties.~~

  ~~(c) Unless the contract otherwise expressly provides, a contract in writing may be modified by an oral agreement supported by new consideration. The statute of frauds (Section 1624) is required to be satisfied if the contract as modified is within its provisions.~~

  ~~(d) Nothing in this section precludes in an appropriate case the application of rules of law concerning estoppel, oral novation and substitution of a new agreement, rescission of a written contract by an oral agreement, waiver of a provision of a written contract, or oral independent collateral contracts.~~

- The Law Revision Commission comment to this section observes: "The rules provided by subdivisions (b) and (c) merely describe cases where proof of an oral modification is permitted; these

rules do not, however, affect in any way the burden of the party claiming that there was an oral modification to produce sufficient evidence to persuade the trier of fact that the parties actually did make an oral modification of the contract."

- Modification of Oral Contract. Civil Code section 1697~~. provides: "A contract not in writing may be modified in any respect by consent of the parties, in writing, without a new consideration, and is extinguished thereby to the extent of the modification."~~

- "It is axiomatic that the parties to an agreement may modify it." (*Vella v. Hudgins* (1984) 151 Cal.App.3d 515, 519 [198 Cal.Rptr. 725].)

- "Another issue of fact appearing in the evidence is whether the written contract was modified by executed oral agreements. This can be a question of fact. An agreement to modify a written contract will be implied if the conduct of the parties is inconsistent with the written contract so as to warrant the conclusion that the parties intended to modify it." (*Daugherty Co. v. Kimberly-Clark Corp.* (1971) 14 Cal.App.3d 151, 158 [92 Cal.Rptr. 120], internal citation omitted.)

- "Modification is a change in the obligation by a modifying agreement which requires mutual assent." (*Wade v. Diamond A Cattle Co.* (1975) 44 Cal.App.3d 453, 457 [118 Cal.Rptr. 695].)

- "A contract can, of course, be subsequently modified with the assent of the parties thereto, provided the same elements essential to the validity of the original contract are present." (*Carlson, Collins, Gordon & Bold v. Banducci* (1967) 257 Cal.App.2d 212, 223 [64 Cal.Rptr. 915], internal citations omitted.)

- "Generally speaking, a commitment to perform a preexisting contractual obligation has no value. In contractual parlance, for example, doing or promising to do something one is already legally bound to do cannot constitute the consideration needed to support a binding contract." (*Auerbach v. Great Western Bank* (1999) 74 Cal.App.4th 1172, 1185 [88 Cal.Rptr.2d 718].)

- Consideration is unnecessary if the modification is to correct errors and omissions. (*Texas Co. v. Todd* (1937) 19 Cal.App.2d 174, 185-186 [64 P.2d 1180].)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 964–971

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

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

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

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

Bender)

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

321. Existence of Condition Precedent Disputed

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

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

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

New September 2003

Directions for Use

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

Sources and Authority

- Conditional Obligation. Civil Code section 1434. ~~provides: "An obligation is conditional, when the rights or duties of any party thereto depend upon the occurrence of an uncertain event."~~

- Condition Precedent. Civil Code section 1436. ~~provides: "A condition precedent is one which is to be performed before some right dependent thereon accrues, or some act dependent thereon is performed."~~

- "Under the law of contracts, parties may expressly agree that a right or duty is conditional upon the occurrence or nonoccurrence of an act or event." (*Platt Pacific, Inc. v. Andelson* (1993) 6 Cal.4th 307, 313 [24 Cal.Rptr.2d 597, 862 P.2d 158].)

- "A condition is a fact, the happening or nonhappening of which creates (condition precedent) or extinguishes (condition subsequent) a duty on the part of the promisor. If the promisor makes an absolute or unconditional promise, he is bound to perform when the time arrives; but if he makes a conditional promise, he binds himself to perform only if the condition precedent occurs, or is relieved from the duty if the condition subsequent occurs. The condition may be the happening of an event, or an act of a party." (1 Witkin, Summary of California Law (10th ed. 2005) Contracts, § 776.)

- "[W]here defendant's duty to perform under the contract is conditioned on the happening of some event, the plaintiff must prove the event transpired." (*Consolidated World Investments, Inc. v. Lido Preferred Ltd.* (1992) 9 Cal.App.4th 373, 380 [11 Cal.Rptr.2d 524].)

- "When a contract establishes the satisfaction of one of the parties as a condition precedent, two tests

are recognized: (1) The party is bound to make his decision according to the judicially discerned, objective standard of a reasonable person; (2) the party may make a subjective decision regardless of reasonableness, controlled only by the need for good faith. Which test applies in a given transaction is a matter of actual or judicially inferred intent. Absent an explicit contractual direction or one implied from the subject matter, the law prefers the objective, i.e., reasonable person, test." (*Guntert v. City of Stockton* (1974) 43 Cal.App.3d 203, 209 [117 Cal.Rptr. 601], internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 780–791

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

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

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

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

322. Occurrence of Agreed Condition Precedent

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

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

New September 2003

Directions for Use

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

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

Sources and Authority

- Conditional Obligation. Civil Code section 1434. ~~provides: "An obligation is conditional, when the rights or duties of any party thereto depend upon the occurrence of an uncertain event."~~
- Condition Precedent. Civil Code section 1436. ~~provides: "A condition precedent is one which is to be performed before some right dependent thereon accrues, or some act dependent thereon is performed."~~
- "Under the law of contracts, parties may expressly agree that a right or duty is conditional upon the occurrence or nonoccurrence of an act or event." (*Platt Pacific, Inc. v. Andelson* (1993) 6 Cal.4th 307, 313 [24 Cal.Rptr.2d 597, 862 P.2d 158].)
- "A condition is a fact, the happening or nonhappening of which creates (condition precedent) or extinguishes (condition subsequent) a duty on the part of the promisor. If the promisor makes an absolute or unconditional promise, he is bound to perform when the time arrives; but if he makes a conditional promise, he binds himself to perform only if the condition precedent occurs, or is relieved from the duty if the condition subsequent occurs. The condition may be the happening of an event, or an act of a party." (1 Witkin, Summary of California Law (10th ed. 2005) Contracts, § 776.)
- ~~Section 224 of the Restatement Second of Contracts provides: "A condition is an event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under a contract becomes due."~~

- ~~Section 225 of the Restatement Second of Contracts provides:~~

  ~~(1) Performance of a duty subject to a condition cannot become due unless the condition occurs or its non-occurrence is excused.~~

  ~~(2) Unless it has been excused, the non-occurrence of a condition discharges the duty when the condition can no longer occur.~~

  ~~(3) Non-occurrence of a condition is not a breach by a party unless he is under a duty that the condition occur.~~

- "[W]here defendant's duty to perform under the contract is conditioned on the happening of some event, the plaintiff must prove the event transpired." (*Consolidated World Investments, Inc. v. Lido Preferred Ltd.* (1992) 9 Cal.App.4th 373, 380 [11 Cal.Rptr.2d 524].)

- "When a contract establishes the satisfaction of one of the parties as a condition precedent, two tests are recognized: (1) The party is bound to make his decision according to the judicially discerned, objective standard of a reasonable person; (2) the party may make a subjective decision regardless of reasonableness, controlled only by the need for good faith. Which test applies in a given transaction is a matter of actual or judicially inferred intent. Absent an explicit contractual direction or one implied from the subject matter, the law prefers the objective, i.e., reasonable person, test." (*Guntert v. City of Stockton* (1974) 43 Cal.App.3d 203, 209 [117 Cal.Rptr. 601], internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 776–791

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

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

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

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

324. Anticipatory Breach

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

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

New September 2003

Sources and Authority

- Anticipatory Breach. Civil Code section 1440. ~~provides: "If a party to an obligation gives notice to another, before the latter is in default, that he will not perform the same upon his part, and does not retract such notice before the time at which performance upon his part is due, such other party is entitled to enforce the obligation without previously performing or offering to perform any conditions upon his part in favor of the former party."~~

- Courts have defined anticipatory breach as follows: "An anticipatory breach of contract occurs on the part of one of the parties to the instrument when he positively repudiates the contract by acts or statements indicating that he will not or cannot substantially perform essential terms thereof, or by voluntarily transferring to a third person the property rights which are essential to a substantial performance of the previous agreement, or by a voluntary act which renders substantial performance of the contract impossible or apparently impossible." (*C. A. Crane v. East Side Canal & Irrigation Co.* (1935) 6 Cal.App.2d 361, 367 [44 P.2d 455].)

- Anticipatory breach can be express or implied: "An express repudiation is a clear, positive, unequivocal refusal to perform; an implied repudiation results from conduct where the promisor puts it out of his power to perform so as to make substantial performance of his promise impossible." (*Taylor v. Johnston* (1975) 15 Cal.3d 130, 137 [123 Cal.Rptr. 641, 539 P.2d 425].)

- "In the event the promisor repudiates the contract before the time for his or her performance has arrived, the plaintiff has an election of remedies-he or she may 'treat the repudiation as an anticipatory breach and immediately seek damages for breach of contract, thereby terminating the contractual relation between the parties, or he [or she] can treat the repudiation as an empty threat, wait until the time for performance arrives and exercise his [or her] remedies for actual breach if a breach does in fact occur at such time.' " (*Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 489 [59 Cal.Rptr.2d 20, 926 P.2d 1114].)

- Anticipatory breach can be used as an excuse for plaintiff's failure to substantially perform. (*Gold Mining & Water Co. v. Swinerton* (1943) 23 Cal.2d 19, 29 [142 P.2d 22].)

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

- ~~Section 253 of the Restatement Second of Contracts provides:~~

  ~~(1) Where an obligor repudiates a duty before he has committed a breach by non-performance and before he has received all of the agreed exchange for it, his repudiation alone gives rise to a claim for damages for total breach.~~

  ~~(2) Where performances are to be exchanged under an exchange of promises, one party's repudiation of a duty to render performance discharges the other party's remaining duties to render performance.~~

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 861–868

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, §§ 140.54, 140.105 (Matthew Bender)
5 California Points and Authorities, Ch. 50, *Contracts*, § 50.23 (Matthew Bender)

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

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

326. Assignment Contested

[*Name of plaintiff***] was not a party to the original contract. However, [***name of plaintiff***] may bring a claim for breach of the contract if [he/she/it] proves that [***name of assignor***] transferred [his/her/its] rights under the contract to [***name of plaintiff***]. This transfer is referred to as an "assignment."**

[*Name of plaintiff***] must prove that [***name of assignor***] intended to transfer [his/her/its] contract rights to [***name of plaintiff***]. In deciding [***name of assignor***]'s intent, you should consider the entire transaction and the conduct of the parties to the assignment.**

[A transfer of contract rights does not necessarily have to be made in writing. It may be oral or implied by the conduct of the parties to the assignment.]

New February 2005

Directions for Use

The bracketed third paragraph should be used only in cases involving a transfer that may be made without a writing.

Sources and Authority

- Oral Assignments. Civil Code section 1052. ~~provides: "A transfer may be made without writing, in every case in which a writing is not expressly required by statute."~~

- ~~Restatement Second of Contracts, section 324, provides: "It is essential to an assignment of a right that the obligee manifest an intention to transfer the right to another person without further action or manifestation of intention by the obligee. The manifestation may be made to the other or to a third person on his behalf and, except as provided by statute or by contract, may be made either orally or by a writing."~~

- "While no particular form of assignment is required, it is essential to the assignment of a right that the assignor manifest an intention to transfer the right." (*Sunburst Bank v. Executive Life Insurance Co.* (1994) 24 Cal.App.4th 1156, 1164 [29 Cal.Rptr.2d 734], internal citations omitted.)

- "The burden of proving an assignment falls upon the party asserting rights thereunder. In an action by an assignee to enforce an assigned right, the evidence must not only be sufficient to establish the fact of assignment when that fact is in issue, but the measure of sufficiency requires that the evidence of assignment be clear and positive to protect an obligor from any further claim by the primary obligee." (*Cockerell v. Title Insurance & Trust Co.* (1954) 42 Cal.2d 284, 292 [267 P.2d 16], internal citations omitted.)

- "The accrued right to collect the proceeds of the fire insurance policy is a chose in action, and an effective assignment thereof may be expressed orally as well as in writing; may be the product of

inference; and where the parties to a transaction involving such a policy by their conduct indicate an intention to transfer such proceeds, the courts will imply an assignment thereof. In making such a determination, substance and not form controls." (*Greco v. Oregon Mutual Fire Insurance Co.* (1961) 191 Cal.App.2d 674, 683 [12 Cal.Rptr. 802], internal citations omitted.)

- "An assignor may not maintain an action upon a claim after making an absolute assignment of it to another; his right to demand performance is extinguished, the assignee acquiring such right. To 'assign' ordinarily means to transfer title or ownership of property, but an assignment, to be effective, must include manifestation to another person by the owner of his intention to transfer the right, without further action, to such other person or to a third person. It is the substance and not the form of a transaction which determines whether an assignment was intended. If from the entire transaction and the conduct of the parties it clearly appears that the intent of the parties was to pass title to the chose in action, then an assignment will be held to have taken place." (*McCown v. Spencer* (1970) 8 Cal.App.3d 216, 225 [87 Cal.Rptr. 213], internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 707–719

6 California Forms of Pleading and Practice, Ch. 60, *Assignments*, § 60.20 (Matthew Bender)

27 California Legal Forms, Ch. 76, *Assignments of Rights and Obligations*, § 76.201 (Matthew Bender)

2 Matthew Bender Practice Guide: California Contract Litigation, Ch. 22, *Suing or Defending Action for Breach of Contract*, 22.51–22.56, 22.58, 22.59

327. Assignment Not Contested

[*Name of plaintiff***] was not a party to the original contract. However, [he/she/it] may bring a claim for breach of contract because [***name of assignor***] transferred the rights under the contract to [***name of plaintiff***]. This transfer is referred to as an "assignment."**

New February 2005

Directions for Use

This instruction is intended to explain to the jury why a party not named in the original contract is nevertheless a party to the case.

Sources and Authority

- Oral Assignment. Civil Code section 1052. ~~provides: "A transfer may be made without writing, in every case in which a writing is not expressly required by statute."~~

- ~~Restatement Second of Contracts, section 324, provides: "It is essential to an assignment of a right that the obligee manifest an intention to transfer the right to another person without further action or manifestation of intention by the obligee. The manifestation may be made to the other or to a third person on his behalf and, except as provided by statute or by contract, may be made either orally or by a writing."~~

- "To 'assign' ordinarily means to transfer title or ownership of property, but an assignment, to be effective, must include manifestation to another person by the owner of his intention to transfer the right, without further action, to such other person or to a third person. It is the substance and not the form of a transaction which determines whether an assignment was intended. If from the entire transaction and the conduct of the parties it clearly appears that the intent of the parties was to pass title to the chose in action, then an assignment will be held to have taken place." (*McCown v. Spencer* (1970) 8 Cal.App.3d 216, 225 [87 Cal.Rptr. 213], internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 707–719

6 California Forms of Pleading and Practice, Ch. 60, *Assignments*, § 60.20 (Matthew Bender)

27 California Legal Forms, Ch. 76, *Assignments of Rights and Obligations*, § 76.201 (Matthew Bender)

2 Matthew Bender Practice Guide: California Contract Litigation, Ch. 22, *Suing or Defending Action for Breach of Contract*, 22.51–22.56, 22.58, 22.59

330. Affirmative Defense—Unilateral Mistake of Fact

[*Name of defendant***] claims that there was no contract because [he/she/it] was mistaken about [***insert description of mistake***]. To succeed, [***name of defendant***] must prove all of the following:**

1. **That [***name of defendant***] was mistaken about [***insert description of mistake***];**

2. **That [***name of plaintiff***] knew [***name of defendant***] was mistaken and used that mistake to take advantage of [him/her/it];**

3. **That [***name of defendant***]'s mistake was not caused by [his/her/its] excessive carelessness; and**

4. **That [***name of defendant***] would not have agreed to enter into the contract if [he/she/it] had known about the mistake.**

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

New September 2003; Revised April 2004

Directions for Use

If the mistake is one of law, this may not be a jury issue.

This instruction does not contain the requirement that the mistake be material to the contract because the materiality of a representation is a question of law. (*Merced County Mutual Fire Insurance Co. v. State of California* (1991) 233 Cal.App.3d 765, 772 [284 Cal.Rptr. 680].) Accordingly, the judge would decide whether an alleged mistake was material, and that mistake would be inserted into this instruction.

Sources and Authority

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

- Mistake. Civil Code section 1576. ~~provides: "Mistake may be either of fact or law."~~

- Mistake of Fact. Civil Code section 1577. ~~provides the following definition of mistake of fact:~~

  ~~Mistake of fact is a mistake, not caused by the neglect of a legal duty on the part of the person making the mistake, and consisting in:~~

  ~~1. An unconscious ignorance or forgetfulness of a fact past or present, material to the~~

~~contract; or,~~

~~2. Belief in the present existence of a thing material to the contract, which does not exist, or in the past existence of such a thing, which has not existed.~~

- ~~Civil Code section 1578 defines mistake of law:~~

~~Mistake of law constitutes a mistake, within the meaning of this Article, only when it arises from:~~

~~1. A misapprehension of the law by all parties, all supposing that they knew and understood it, and all making substantially the same mistake as to the law; or,~~

~~2. A misapprehension of the law by one party, of which the others are aware at the time of contracting, but which they do not rectify.~~

- "It is settled that to warrant a unilateral rescission of a contract because of mutual mistake, the mistake must relate to basic or material fact, not a collateral matter." (*Wood v. Kalbaugh* (1974) 39 Cal.App.3d 926, 932 [114 Cal.Rptr. 673].)

- "A mistake need not be mutual. Unilateral mistake is ground for relief where the mistake is due to the fault of the other party or the other party knows or has reason to know of the mistake. ... To rely on a unilateral mistake of fact, [the party] must demonstrate his mistake was not caused by his 'neglect of a legal duty.' Ordinary negligence does not constitute the neglect of a legal duty as that term is used in section 1577." (*Architects & Contractors Estimating Service, Inc. v. Smith* (1985) 164 Cal.App.3d 1001, 1007-1008 [211 Cal.Rptr. 45], internal citations omitted.)

- To prevail on a unilateral mistake claim, the defendant must prove that the plaintiff knew that the defendant was mistaken and that plaintiff used that mistake to take advantage of the defendant: "Defendants contend that a material mistake of fact-namely, the defendants' belief that they would not be obligated to install a new roof upon the residence-prevented contract formation. A unilateral mistake of fact may be the basis of relief. However, such a unilateral mistake may not invalidate a contract without a showing that the other party to the contract was aware of the mistaken belief and unfairly utilized that mistaken belief in a manner enabling him to take advantage of the other party." (*Meyer v. Benko* (1976) 55 Cal.App.3d 937, 944 [127 Cal.Rptr. 846], internal citations omitted.)

- "Failure to make reasonable inquiry to ascertain or effort to understand the meaning and content of the contract upon which one relies constitutes neglect of a legal duty such as will preclude recovery for unilateral mistake of fact." (*Wal-Noon Corporation v. Hill* (1975) 45 Cal.App.3d 605, 615 [119 Cal.Rptr. 646].) However, "[o]rdinary negligence does not constitute the neglect of a legal duty as that term is used in section 1577." (*Architects & Contractors Estimating Service, Inc. v. Smith, supra*, 164 Cal.App.3d at p. 1008.)

- Neglect of legal duty has been equated with "gross negligence," which is defined as "the want of even scant care or an extreme departure from the ordinary standard of conduct." (*Van Meter v. Bent Construction Co.* (1956) 46 Cal.2d 588, 594 [297 P.2d 644].)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 256–275

17 California Forms of Pleading and Practice, Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake,* §§ 215.50-215.57, 215.141 (Matthew Bender)

9 California Points and Authorities, Ch. 92, *Duress, Menace, Fraud, Undue Influence, and Mistake,* § 92.90 et seq. (Matthew Bender)

27 California Legal Forms, Ch. 77, *Discharge of Obligations,* § 77.350 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 8, *Seeking or Opposing Equitable Remedies in Contract Actions,* 8.24

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 16, *Attacking or Defending Existence of Contract—Mistake,* 16.08[2], 16.13–16.16, 16.18

332. Affirmative Defense—Duress

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

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

2. **That [***name of defendant***] was so afraid or intimidated by the wrongful act or wrongful threat that [he/she] did not have the free will to refuse to consent to the contract; and**

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

An act or a threat is wrongful if [*insert relevant rule-e.g., "a criminal act is threatened"***].**
If you decide that [*name of defendant***] has proved all of the above, then no contract was created.**

New September 2003; Revised December 2005

Directions for Use

Use CACI No. 333, *Affirmative Defense—Economic Duress*, in cases involving economic duress.

Sources and Authority

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

- Duress. Civil Code section 1569~~. provides that the following acts constitute duress:~~

  ~~1. Unlawful confinement of the person of the party, or of the husband or wife of such party, or of an ancestor, descendant, or adopted child of such party, husband, or wife;~~

  ~~2. Unlawful detention of the property of any such person; or,~~

  ~~3. Confinement of such person, lawful in form, but fraudulently obtained, or fraudulently made unjustly harassing or oppressive.~~

- Menace. Civil Code section 1570 ~~provides:~~.

~~Menace consists in a threat:~~

~~1. Of such duress as is specified in Subdivisions 1 and 3 of the last section;~~

~~2. Of unlawful and violent injury to the person or property of any such person as is specified in the last section; or,~~

~~3. Of injury to the character of any such person.~~

- "Menace" is considered to be duress: "Under the modern rule, ' "[d]uress, which includes whatever destroys one's free agency and constrains [her] to do what is against [her] will, may be exercised by threats, importunity or any species of mental coercion. It is shown where a party 'intentionally used threats or pressure to induce action or nonaction to the other party's detriment.' " ' The coercion must induce the assent of the coerced party, who has no reasonable alternative to succumbing." (*In re Marriage of Baltins* (1989) 212 Cal.App.3d 66, 84 [260 Cal.Rptr. 403], internal citations omitted.)

- "Duress envisions some unlawful action by a party by which one's consent is obtained through fear or threats." (*Keithley v. Civil Service Bd. of The City of Oakland* (1970) 11 Cal.App.3d 443, 450 [89 Cal.Rptr. 809], internal citations omitted.)

- Duress is found only where fear is intentionally used as a means of procuring consent: "[A]n action for duress and menace cannot be sustained when the voluntary action of the apprehensive party is induced by his speculation upon or anticipation of a future event suggested to him by the defendant but not threatened to induce his conduct. The issue in each instance is whether the defendant intentionally exerted an unlawful pressure on the injured party to deprive him of contractual volition and induce him to act to his own detriment." (*Goldstein v. Enoch* (1967) 248 Cal.App.2d 891, 894-895 [57 Cal.Rptr. 19].)

- It is wrongful to use the threat of criminal prosecution to obtain a consent: "California law is clear that an agreement obtained by threat of criminal prosecution constitutes menace and is unenforceable as against public policy." (*Bayscene Resident Negotiators v. Bayscene Mobilehome Park* (1993) 15 Cal.App.4th 119, 127 [18 Cal.Rptr.2d 626].) However, a threat of legitimate civil action is not considered wrongful: "[T]he action or threat in duress or menace must be unlawful, and a threat to take legal action is not unlawful unless the party making the threat knows the falsity of his claim." (*Odorizzi v. Bloomfield School Dist.* (1966) 246 Cal.App.2d 123, 128 [54 Cal.Rptr. 533].)

- Standard duress is evaluated under a subjective standard: "The question in each case [is], Was the person so acted upon by threats of the person claiming the benefit of the contract, for the purpose of obtaining such contract, as to be bereft of the quality of mind essential to the making of a contract, and was the contract thereby obtained? Hence, under this theory duress is to be tested, not by the nature of the threats, but rather by the state of mind induced thereby in the victim." (*In re Marriage of Gonzalez* (1976) 57 Cal.App.3d 736, 744 [129 Cal.Rptr. 566].)

- The wrongful acts of a third party may constitute duress sufficient to allow rescission of a contract with a party, who, although not participating in those wrongful acts, had knowledge of the innocent party's position. (*Leeper v. Beltrami* (1959) 53 Cal.2d 195, 205-206 [1 Cal.Rptr. 12, 347 P.2d 12].)

- "[Defendant has] the burden of proving by a preponderance of the evidence the affirmative of the issues of duress and plaintiff's default." (*Fio Rito v. Fio Rito* (1961) 194 Cal.App.2d 311, 322 [14 Cal.Rptr. 845]; cf. *Stevenson v. Stevenson* (1940) 36 Cal.App.2d 494, 500 [97 P.2d 982].)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 309–315

17 California Forms of Pleading and Practice, Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake,* §§ 215.20–215.21, 215.23–215.28, 215.120–215.121 (Matthew Bender)

9 California Points and Authorities, Ch. 92, *Duress, Menace, Fraud, Undue Influence, and Mistake,* § 92.20 et seq. (Matthew Bender)

27 California Legal Forms, Ch. 77, *Discharge of Obligations,* § 77.351 (Matthew Bender)

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

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

333. Affirmative Defense—Economic Duress

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

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

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

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

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

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

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

Directions for Use

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

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

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

Sources and Authority

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

1568.)

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

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

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

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

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

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

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

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

Secondary Sources

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

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

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

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

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

334. Affirmative Defense—Undue Influence

[*Name of defendant***] claims that no contract was created because [he/she] was unfairly pressured by [***name of plaintiff***] into consenting to the contract.**

To succeed, [*name of defendant***] must prove both of the following:**

1. **That [***name of plaintiff***] used**

   [a relationship of trust and confidence] [or]

   [[*name of defendant***]'s weakness of mind] [or]**

   [[*name of defendant***]'s needs or distress]**

   to induce or pressure [*name of defendant***] into consenting to the contract; and**

2. **That [***name of defendant***] would not otherwise have consented to the contract.**

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

New September 2003

Sources and Authority

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

- Undue Influence. Civil Code section 1575~~. provides three circumstances that support a finding of undue influence:~~

  ~~1. In the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him;~~

  ~~2. In taking an unfair advantage of another's weakness of mind; or,~~

  ~~3. In taking a grossly oppressive and unfair advantage of another's necessities or distress.~~

- The question of undue influence is decided as a question of fact: "[D]irect evidence of undue influence is rarely obtainable and, thus the court is normally relegated to determination by inference

from the totality of facts and circumstances. Indeed, there are no fixed definitions or inflexible formulas. Rather, we are concerned with whether from the entire context it appears that one's will was overborne and he was induced to do or forbear to do an act which he would not do, or would do, if left to act freely." (*Keithley v. Civil Service Bd. of the City of Oakland* (1970) 11 Cal.App.3d 443, 451 [89 Cal.Rptr. 809], internal citations omitted.)

- "In essence, undue influence consists of the use of excessive pressure by a dominant person over a servient person resulting in the apparent will of the servient person being in fact the will of the dominant person. The undue susceptibility to such overpersuasive influence may be the product of physical or emotional exhaustion or anguish which results in one's inability to act with unencumbered volition." (*Keithley, supra,* 11 Cal.App.3d at p. 451.)

- Whether or not the parties have a confidential relationship is a question of fact: "It is, of course, well settled that while the mere fact that a relationship is friendly and intimate does not necessarily amount to a confidential relationship, such relationship may be said to exist whenever trust and confidence is reposed by one person in the integrity and fidelity of another. It is likewise frequently emphasized that the existence of a confidential relationship presents a question of fact which, of necessity, may be determined only on a case by case basis." (*O'Neil v. Spillane* (1975) 45 Cal.App.3d 147, 153 [119 Cal.Rptr. 245], internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 316–321

17 California Forms of Pleading and Practice, Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake*, §§ 215.40-215.42, 215.130-215.132 (Matthew Bender)

9 California Points and Authorities, Ch. 92, *Duress, Menace, Fraud, Undue Influence, and Mistake*, § 92.70 et seq. (Matthew Bender)

27 California Legal Forms, Ch. 77, *Discharge of Obligations*, § 77.352 (Matthew Bender)

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

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 17, *Attacking or Defending Existence of Contract—Fraud, Duress, Menace, and Undue Influence,* 17.03–17.06, 17.25–17.28

335. Affirmative Defense—Fraud

[*Name of defendant***] claims that no contract was created because [his/her/its] consent was obtained by fraud. To succeed, [***name of defendant***] must prove all of the following:**

1. **That [***name of plaintiff***] represented that [***insert alleged fraudulent statement***];**
2. **That [***name of plaintiff***] knew that the representation was not true;**
3. **That [***name of plaintiff***] made the representation to persuade [***name of defendant***] to agree to the contract;**
4. **That [***name of defendant***] reasonably relied on this representation; and**
5. **That [***name of defendant***] would not have entered into the contract if [he/she/it] had known that the representation was not true.**

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

New September 2003

Directions for Use

This instruction covers intentional misrepresentation under the first alternative presented in Civil Code section 1572. The other types of fraud that are set forth in section 1572 are negligent misrepresentation, concealment of a material fact, and false promise.

If the case involves an alleged negligent misrepresentation, substitute the following for element 2: "That [*name of plaintiff*] had no reasonable grounds for believing the representation was true."

If the case involves concealment, the following may be substituted for element 1: "That [*name of plaintiff*] intentionally concealed an important fact from [*name of defendant*], creating a false representation." See CACI No. 1901, *Concealment*, for alternative ways of proving this element.

If the case involves a false promise, substitute the following for element 1: "That [*name of plaintiff*] made a promise that [he/she/it] did not intend to perform" and insert the word "promise" in place of the word "representation" throughout the remainder of the instruction.

Sources and Authority

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

- Actual Fraud. Civil Code section 1572 ~~provides:~~

  ~~Actual fraud, within the meaning of this Chapter, consists in any of the following acts, committed by a party to the contract, or with his connivance, with intent to deceive another party thereto, or to induce him to enter into the contract:~~

  ~~1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;~~

  ~~2. The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;~~

  ~~3. The suppression of that which is true, by one having knowledge or belief of the fact;~~

  ~~4. A promise made without any intention of performing it; or,~~

  ~~5. Any other act fitted to deceive.~~

- Fraud can be found in making a misstatement of fact, as well as in the concealment of a fact: "Actual fraud involves conscious misrepresentation, or concealment, or non-disclosure of a material fact which induces the innocent party to enter the contract." (*Odorizzi v. Bloomfield School Dist.* (1966) 246 Cal.App.2d 123, 128 [54 Cal.Rptr. 533].)

- Fraud may be asserted as an affirmative defense: "One who has been induced to enter into a contract by false and fraudulent representations may rescind the contract; or he may affirm it, keeping what he has received under it, and maintain an action to recover damages he has sustained by reason of the fraud; or he may set up such damages as a complete or partial defense if sued on the contract by the other party." (*Grady v. Easley* (1941) 45 Cal.App.2d 632, 642 [114 P.2d 635].)

- "It is well established that a defrauded defendant may set up the fraud as a defense and, in fact, may even recoup his damages by counterclaim in an action brought by the guilty party to the contract. The right to avoid for fraud, however, is lost if the injured party, after acquiring knowledge of the fraud, manifests an intention to affirm the contract." (*Bowmer v. H. C. Louis, Inc.* (1966) 243 Cal.App.2d 501, 503 [52 Cal.Rptr. 436], internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 285–308

17 California Forms of Pleading and Practice, Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake*, §§ 215.70–215.72, 215.144 (Matthew Bender)

9 California Points and Authorities, Ch. 92, *Duress, Menace, Fraud, Undue Influence, and Mistake*, § 92.40 et seq. (Matthew Bender)

27 California Legal Forms, Ch. 77, *Discharge of Obligations*, § 77.353 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 8, *Seeking or Opposing Equitable Remedies in Contract Actions*, 8.24

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 17, *Attacking or Defending Existence of Contract—Fraud, Duress, Menace, and Undue Influence*, 17.03–17.09, 17.12–17.18

337. Affirmative Defense—Novation

[*Name of defendant*] claims that the original contract with [*name of plaintiff*] cannot be enforced because the parties substituted a new and different contract for the original.

To succeed, [*name of defendant*] must prove that all parties agreed, by words or conduct, to cancel the original contract and to substitute a new contract in its place.

If you decide that [*name of defendant*] has proved this, then the original contract is not enforceable.

New September 2003; Revised October 2004

Directions for Use

If the contract in question is not the original contract, specify which contract it is instead of "original."

Although there is language in *Alexander v. Angel* (1951) 37 Cal.2d 856, 860-861 [236 P.2d 561] that could be read to suggest that a novation must be proved by the higher standard of clear and convincing proof, an examination of the history of that language and the cases upon which the language in *Alexander* depends (*Columbia Casualty Co. v. Lewis* (1936) 14 Cal.App.2d 64, 72 [57 P.2d 1010] and *Houghton v. Lawton* (1923) 63 Cal.App. 218, 223 [218 P. 475]) demonstrates that the original use of the term "clear and convincing," carried forward thereafter without analysis, was intended only to convey the concept that a novation must clearly be shown and may not be presumed. The history of the language does not support a requirement that a party alleging a novation must prove there is a high probability (i.e., clear and convincing proof) that the parties agreed to a novation. See also, sections 279 and 280 of the Restatement Second of Contracts. A party alleging a novation must prove that the facts supporting the novation are more likely to be true than not true.

Sources and Authority

- Novation. Civil Code sections 1530, ~~provides: "Novation is the substitution of a new obligation for an existing one."~~

- ~~Civil Code section~~ 1531 ~~provides:~~ .

  ~~Novation is made:~~

  ~~1. By the substitution of a new obligation between the same parties, with intent to extinguish the old obligation;~~

  ~~2. By the substitution of a new debtor in place of the old one, with intent to release the latter; or,~~

~~3. By the substitution of a new creditor in place of the old one, with intent to transfer the rights of the latter to the former.~~

- "A novation is a substitution, by agreement, of a new obligation for an existing one, with intent to extinguish the latter. A novation is subject to the general rules governing contracts and requires an intent to discharge the old contract, a mutual assent, and a consideration." (*Klepper v. Hoover* (1971) 21 Cal.App.3d 460, 463 [98 Cal.Rptr. 482].)

- Conduct may form the basis for a novation although there is no express writing or agreement. (*Silva v. Providence Hospital of Oakland* (1939) 14 Cal.2d 762, 773 [97 P.2d 798].)

- Novation is a question of fact, and the burden of proving it is upon the party asserting it. (*Alexander v. Angel* (1951) 37 Cal.2d 856, 860 [236 P.2d 561].)

- "When there is conflicting evidence the question whether the parties to an agreement entered into a modification or a novation is a question of fact." (*Howard v. County of Amador* (1990) 220 Cal.App.3d 962, 980 [269 Cal.Rptr. 807].)

- "The 'question whether a novation has taken place is always one of intention,' with the controlling factor being the intent of the obligee to effect a release of the original obligor on his obligation under the original agreement." (*Alexander, supra,* 37 Cal.2d at p. 860, internal citations omitted.)

- "[I]n order for there to be a valid novation, it is necessary that the parties intend that the rights and obligations of the new contract be substituted for the terms and conditions of the old contract." (*Wade v. Diamond A Cattle Co.* (1975) 44 Cal.App.3d 453, 457 [118 Cal.Rptr. 695].)

- "While the evidence in support of a novation must be 'clear and convincing,' the 'whole question is one of fact and depends upon all the facts and circumstances of the particular case,' with the weight and sufficiency of the proof being matters for the determination of the trier of the facts under the general rules applicable to civil actions." (*Alexander, supra,* 37 Cal.2d at pp. 860-861, internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 961–963

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.141 (Matthew Bender)

5 California Points and Authorities, Ch. 50, *Contracts*, §§ 50.450–50.464 (Matthew Bender)

27 California Legal Forms, Ch. 77, *Discharge of Obligations*, §§ 77.20, 77.280–77.282 (Matthew Bender)

2 Matthew Bender Practice Guide: California Contract Litigation, Ch. 21, *Asserting a Particular Construction of Contract*, 21.58[3]

338. Affirmative Defense—Statute of Limitations

[*Name of defendant***] contends that [***name of plaintiff***]'s lawsuit was not filed within the time set by law. To succeed on this defense, [***name of defendant***] must prove that [***name of plaintiff***]'s claimed harm occurred before [***insert date two or four years before date of filing***].**

New December 2007

Directions for Use

This instruction is for use if the defendant claims that the plaintiff's action was not filed within the applicable four-year period for breach of a written contract (see Code Civ. Proc., § 337(1)) or two-year period for breach of an oral contract. (See Code Civ. Proc., § 339(1).) Do not use this instruction for breach of a Uniform Commercial Code sales contract. (See Com. Code, § 2725.)

If the contract either shortens or extends the limitation period, use the applicable period from the contract instead of two years or four years.

If the plaintiff alleges that the delayed-discovery rule applies to avoid the limitation defense, CACI No. 455, *Statute of Limitations—Delayed Discovery,* may be adapted for use.

Sources and Authority

- Four-Year Statute of Limitations: Contract. Code of Civil Procedure section 337(1). ~~provides: "Within four years: 1. An action upon any contract, obligation or liability founded upon an instrument in writing, except as provided in Section 336a of this code; provided, that the time within which any action for a money judgment for the balance due upon an obligation for the payment of which a deed of trust or mortgage with power of sale upon real property or any interest therein was given as security, following the exercise of the power of sale in such deed of trust or mortgage, may be brought shall not extend beyond three months after the time of sale under such deed of trust or mortgage."~~

- Two-Year Statute of Limitations: Contract. Code of Civil Procedure section 339(1). ~~provides: "Within two years: 1. An action upon a contract, obligation or liability not founded upon an instrument of writing, except as provided in Section 2725 of the Commercial Code or subdivision 2 of Section 337 of this code; or an action founded upon a contract, obligation or liability, evidenced by a certificate, or abstract or guaranty of title of real property, or by a policy of title insurance; provided, that the cause of action upon a contract, obligation or liability evidenced by a certificate, or abstract or guaranty of title of real property or policy of title insurance shall not be deemed to have accrued until the discovery of the loss or damage suffered by the aggrieved party thereunder."~~

- "In general, California courts have permitted contracting parties to modify the length of the otherwise applicable California statute of limitations, whether the contract has extended or shortened the limitations period." (*Hambrecht & Quist Venture Partners v. Am. Medical Internat.*

(1995) 38 Cal.App.4th 1532, 1547 [46 Cal.Rptr.2d 33].)

- "A contract cause of action does not accrue until the contract has been breached." (*Spear v. Cal. State Automobile Assn.* (1992) 2 Cal.4th 1035, 1042 [9 Cal.Rptr.2d 381, 831 P.2d 821].)

- "The claim accrues when the plaintiff discovers, or could have discovered through reasonable diligence, the injury and its cause." (*Angeles Chem. Co. v. Spencer & Jones* (1996) 44 Cal.App.4th 112, 119 [51 Cal.Rptr.2d 594].)

- "[T]he discovery rule may be applied to breaches [of contract] which can be, and are, committed in secret and, moreover, where the harm flowing from those breaches will not be reasonably discoverable by plaintiffs until a future time." (*Gryczman v. 4550 Pico Partners, Ltd.* (2003) 107 Cal.App.4th 1, 4–5 [131 Cal.Rptr.2d 680].)

Secondary Sources

3 Witkin, California Procedure (5th ed. 2008) Actions, §§ 508–548

5 Witkin, California Procedure (5th ed. 2008) Pleading, § 1072

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, § 344

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.42[2] (Matthew Bender)

5 California Points and Authorities, Ch. 50, *Contracts*, § 50.120 et seq. (Matthew Bender)

Matthew Bender Practice Guide: California Contract Litigation, Ch. 4, *Determining Applicable Statute of Limitations and Effect on Potential Action*, 4.03 et seq.

350. Introduction to Contract Damages

If you decide that [*name of plaintiff***] has proved [his/her/its] claim against [***name of defendant***] for breach of contract, you also must decide how much money will reasonably compensate [***name of plaintiff***] for the harm caused by the breach. This compensation is called "damages." The purpose of such damages is to put [***name of plaintiff***] in as good a position as [he/she/it] would have been if [***name of defendant***] had performed as promised.**

To recover damages for any harm, [*name of plaintiff***] must prove that when the contract was made, both parties knew or could reasonably have foreseen that the harm was likely to occur in the ordinary course of events as result of the breach of the contract.**

[*Name of plaintiff***] also must prove the amount of [his/her/its] damages according to the following instructions. [He/She/It] does not have to prove the exact amount of damages. You must not speculate or guess in awarding damages.**

[*Name of plaintiff***] claims damages for [***identify general damages claimed***].**

New September 2003; Revised October 2004, December 2010

Directions for Use

This instruction should always be read before any of the following specific damages instructions. (See CACI Nos. 351–360.)

Sources and Authority

- Contract Damages. Civil Code section 3300. ~~provides: "For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom."~~
- Damages Must Be Clearly Ascertainable. Civil Code section 3301. ~~provides: "No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin."~~
- Damages No Greater Than Benefit of Full Performance. Civil Code section 3358. ~~provides: "Except as expressly provided by statute, no person can recover a greater amount in damages for the breach of an obligation, than he could have gained by the full performance thereof on both sides."~~
- Damages Must Be Reasonable. Civil Code section 3359. ~~provides: "Damages must, in all cases, be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered."~~

- "The basic object of damages is compensation, and in the law of contracts the theory is that the party injured by a breach should receive as nearly as possible the equivalent of the benefits of performance. The aim is to put the injured party in as good a position as he would have been had performance been rendered as promised. This aim can never be exactly attained yet that is the problem the trial court is required to resolve." (*Brandon & Tibbs v. George Kevorkian Accountancy Corp.* (1990) 226 Cal.App.3d 442, 455 [277 Cal.Rptr. 40], internal citations omitted.)

- "The damages awarded should, insofar as possible, place the injured party in the same position it would have held had the contract properly been performed, but such damage may not exceed the benefit which it would have received had the promisor performed." (*Brandon & Tibbs, supra,* 226 Cal.App.3d at p. 468, internal citations omitted.)

- " 'The rules of law governing the recovery of damages for breach of contract are very flexible. Their application in the infinite number of situations that arise is beyond question variable and uncertain. Even more than in the case of other rules of law, they must be regarded merely as guides to the court, leaving much to the individual feeling of the court created by the special circumstances of the particular case.' " (*Brandon & Tibbs, supra,* 226 Cal.App.3d at p. 455, internal citation omitted.)

- "Contractual damages are of two types—general damages (sometimes called direct damages) and special damages (sometimes called consequential damages)." (*Lewis Jorge Construction Management, Inc. v. Pomona Unified School Dist.* (2004) 34 Cal.4th 960, 968 [22 Cal.Rptr.3d 340, 102 P.3d 257].)

- "General damages are often characterized as those that flow directly and necessarily from a breach of contract, or that are a natural result of a breach. Because general damages are a natural and necessary consequence of a contract breach, they are often said to be within the contemplation of the parties, meaning that because their occurrence is sufficiently predictable the parties at the time of contracting are 'deemed' to have contemplated them." (*Lewis Jorge Construction Management, Inc., supra,* 34 Cal.4th at p. 968, internal citations omitted.)

- " 'Contract damages are generally limited to those within the contemplation of the parties when the contract was entered into or at least reasonably foreseeable by them at that time; consequential damages beyond the expectation of the parties are not recoverable. This limitation on available damages serves to encourage contractual relations and commercial activity by enabling parties to estimate in advance the financial risks of their enterprise.' 'In contrast, tort damages are awarded to [fully] compensate the victim for [all] injury suffered.' " (*Erlich v. Menezes* (1999) 21 Cal.4th 543, 550 [87 Cal.Rptr.2d 886, 981 P.2d 978], internal citations omitted.)

- " [I]f special circumstances caused some unusual injury, special damages are not recoverable therefor unless the circumstances were known or should have been known to the breaching party at the time he entered into the contract.' " (*Resort Video, Ltd. v. Laser Video, Inc.* (1995) 35 Cal.App.4th 1679, 1697 [42 Cal.Rptr.2d 136], internal citations omitted.)

- "The detriment that is 'likely to result therefrom' is that which is foreseeable to the breaching party at the time the contract is entered into." (*Wallis v. Farmers Group, Inc.* (1990) 220 Cal.App.3d 718, 737 [269 Cal.Rptr. 299], internal citation omitted.)

- "Where the fact of damages is certain, as here, the amount of damages need not be calculated with absolute certainty. The law requires only that some reasonable basis of computation be used, and the result reached can be a reasonable approximation." (*Acree v. General Motors Acceptance Corp.* (2001) 92 Cal.App.4th 385, 398 [112 Cal.Rptr.2d 99], footnotes and internal citations omitted.)

- "Under contract principles, the nonbreaching party is entitled to recover only those damages, including lost future profits, which are 'proximately caused' by the specific breach. Or, to put it another way, the breaching party is only liable to place the nonbreaching party in the same position as if the specific breach had not occurred. Or, to phrase it still a third way, the breaching party is only responsible to give the nonbreaching party the benefit of the bargain to the extent the specific breach deprived that party of its bargain." (*Postal Instant Press v. Sealy* (1996) 43 Cal.App.4th 1704, 1709 [51 Cal.Rptr.2d 365], internal citations omitted.)

- "[D]amages for mental suffering and emotional distress are generally not recoverable in an action for breach of an ordinary commercial contract in California." (*Erlich, supra,* 21 Cal.4th 543 at p. 558, internal citations omitted.)

- "Cases permitting recovery for emotional distress typically involve mental anguish stemming from more personal undertakings the traumatic results of which were unavoidable. Thus, when the express object of the contract is the mental and emotional well-being of one of the contracting parties, the breach of the contract may give rise to damages for mental suffering or emotional distress." (*Erlich, supra,* 21 Cal.4th at p. 559, internal citations omitted.)

- "The right to recover damages for emotional distress for breach of mortuary and crematorium contracts has been well established in California for many years." (*Saari v. Jongordon Corp*. (1992) 5 Cal.App.4th 797, 803 [7 Cal.Rptr.2d 82], internal citation omitted.)

- ~~Restatement Second of Contracts, section 351, provides:~~

  ~~(1) Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made.~~

  ~~(2) Loss may be foreseeable as a probable result of a breach because it follows from the breach~~

  ~~(a) in the ordinary course of events, or~~

  ~~(b) as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know.~~

  ~~(3) A court may limit damages for foreseeable loss by excluding recovery for loss of profits, by allowing recovery only for loss incurred in reliance, or otherwise if it concludes that in the circumstances justice so requires in order to avoid disproportionate compensation.~~

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 869–878

California Breach of Contract Remedies (Cont.Ed.Bar 1980; 2001 supp.) Recovery of Money Damages, §§ 4.1–4.9

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, §§ 140.55–140.56, 140.100–140.106 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.70 et seq. (Matthew Bender)

5 California Points and Authorities, Ch. 50, *Contracts*, §§ 50.10–50.11 (Matthew Bender)

6 California Points and Authorities, Ch. 65, *Damages: Contract,* § 65.20 et seq. (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 7, *Seeking or Opposing Damages in Contract Actions,* 7.03 et seq.

352. Loss of Profits—No Profits Earned

To recover damages for lost profits, [*name of plaintiff***] must prove that it is reasonably certain [he/she/it] would have earned profits but for [***name of defendant***]'s breach of the contract.**

To decide the amount of damages for lost profits, you must determine the gross, or total, amount [*name of plaintiff***] would have received if the contract had been performed and then subtract from that amount the costs [including the value of the [labor/materials/rents/expenses/interest on loans invested in the business]] [***name of plaintiff***] would have had if the contract had been performed.**

You do not have to calculate the amount of the lost profits with mathematical precision, but there must be a reasonable basis for computing the loss.

New September 2003

Directions for Use

This instruction applies to both past and future lost profit claims. Read this instruction in conjunction with CACI No. 350, *Introduction to Contract Damages*, or CACI No. 351, *Special Damages.*

Insertion of specified types of costs to be deducted from gross earnings is optional, depending on the facts of the case. Other types of costs may be inserted as appropriate.

Sources and Authority

- Damages Must Be Clearly Ascertainable. Civil Code section 3301. ~~provides: "No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin."~~

- "Lost profits may be recoverable as damages for breach of a contract. '[T]he general principle [is] that damages for the loss of prospective profits are recoverable where the evidence makes reasonably certain their occurrence and extent.' Such damages must 'be proven to be certain both as to their occurrence and their extent, albeit not with 'mathematical precision.' " (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 773−774 [149 Cal.Rptr.3d 614, 288 P.3d 1237].)

- "Where the *fact* of damages is certain, the amount of damages need not be calculated with absolute certainty. The law requires only that some reasonable basis of computation of damages be used, and the damages may be computed even if the result reached is an approximation. This is especially true where, as here, it is the wrongful acts of the defendant that have created the difficulty in proving the amount of loss of profits or where it is the wrongful acts of the defendant that have caused the other party to not realize a profit to which that party is entitled." (*GHK Associates v. Mayer Group* (1990) 224 Cal.App.3d 856, 873-874 [274 Cal.Rptr. 168], internal citations omitted.)

- "Historical data, such as past business volume, supply an acceptable basis for ascertaining lost future

profits. [Citations.] In some instances, lost profits may be recovered where plaintiff introduces evidence of the profits lost by similar businesses operating under similar conditions. [Citations.]" (*Sargon Enterprises, Inc., supra*, 55 Cal.4th at p. 774.)

- "Regarding lost business profits, the cases have generally distinguished between established and unestablished businesses. '[W]here the operation of an established business is prevented or interrupted, as by a … breach of contract … , damages for the loss of prospective profits that otherwise might have been made from its operation are generally recoverable for the reason that their occurrence and extent may be ascertained with reasonable certainty from the past volume of business and other provable data relevant to the probable future sales.' " (*Sargon Enterprises, Inc., supra*, 55 Cal.4th at p. 774.)

- " 'On the other hand, where the operation of an unestablished business is prevented or interrupted, damages for prospective profits that might otherwise have been made from its operation are not recoverable for the reason that their occurrence is uncertain, contingent and speculative. [Citations.] … But although generally objectionable for the reason that their estimation is conjectural and speculative, anticipated profits dependent upon future events are allowed where their nature and occurrence can be shown by evidence of reasonable reliability." (*Sargon Enterprises, Inc., supra*, 55 Cal.4th at p. 774.)

- "Unestablished businesses have been permitted to claim lost profit damages in situations where owners have experience in the business they are seeking to establish, and where the business is in an established market." (*Resort Video, Ltd. v. Laser Video, Inc.* (1995) 35 Cal.App.4th 1679, 1698-1699 [42 Cal.Rptr.2d 136], internal citations omitted.)

- "Even if [plaintiff] was able to provide credible evidence of lost profits, it must be remembered that '[w]hen loss of anticipated profits is an element of damages, it means net and not gross profits. Net profits are the gains made from sales 'after deducting the value of the labor, materials, rents, and all expenses, together with the interest of the capital employed.' " (*Resort Video, Ltd., supra*, 35 Cal.App.4th at p. 1700, internal citations omitted.)

- "It is the generally accepted rule, in order to recover damages projected into the future, that a plaintiff must show with reasonable certainty that detriment from the breach of contract will accrue to him in the future. Damages which are remote, contingent, or merely possible cannot serve as a legal basis for recovery." (*California Shoppers, Inc. v. Royal Globe Insurance Co.* (1985) 175 Cal.App.3d 1, 62 [221 Cal.Rptr. 171], internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 879–882

California Breach of Contract Remedies (Cont.Ed.Bar 1980; 2001 supp.) Recovery of Money Damages, §§ 4.11–4.17

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.79 (Matthew Bender)

6 California Points and Authorities, Ch. 65, *Damages*, § 65.21 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 7, *Seeking or Opposing Damages in Contract Actions*, 7.12

353. Loss of Profits—Some Profits Earned

To recover damages for lost profits, [*name of plaintiff***] must prove that it is reasonably certain [he/she/it] would have earned more profits but for [***name of defendant***]'s breach of the contract.**

To decide the amount of damages for lost profits, you must:

1. **First, calculate [***name of plaintiff***]'s estimated total profit by determining the gross amount [he/she/it] would have received if the contract had been performed, and then subtracting from that amount the costs [including the value of the [labor/materials/rents/expenses/interest on loans invested in the business]] [***name of plaintiff***] would have had if the contract had been performed;**

2. **Next, calculate [***name of plaintiff***]'s actual profit by determining the gross amount [he/she/it] actually received, and then subtracting from that amount [***name of plaintiff***]'s actual costs [including the value of the [labor/materials/rents/expenses/interest on loans invested in the business]]; and**

3. **Then, subtract [***name of plaintiff***]'s actual profit, which you determined in the second step, from [his/her/its] estimated total profit, which you determined in the first step. The resulting amount is [***name of plaintiff***]'s lost profit.**

You do not have to calculate the amount of the lost profits with mathematical precision, but there must be a reasonable basis for computing the loss.

New September 2003

Directions for Use

Read this instruction in conjunction with CACI No. 350, *Introduction to Contract Damages*, or CACI No. 351, *Special Damages.*

Insertion of specified types of costs to be deducted from gross earnings is optional, depending on the facts of the case. Other types of costs may be inserted as appropriate.

Sources and Authority

- Damages Must Be Clearly Ascertainable. Civil Code section 3301. ~~provides: "No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin."~~

- "Lost profits may be recoverable as damages for breach of a contract. '[T]he general principle [is] that damages for the loss of prospective profits are recoverable where the evidence makes reasonably certain their occurrence and extent.' Such damages must 'be proven to be certain both as to their occurrence and their extent, albeit not with 'mathematical precision.' " (*Sargon Enterprises, Inc. v.*

University of Southern California (2012) 55 Cal.4th 747, 773−774 [149 Cal.Rptr.3d 614, 288 P.3d 1237].)

- "Where the *fact* of damages is certain, the amount of damages need not be calculated with absolute certainty. The law requires only that some reasonable basis of computation of damages be used, and the damages may be computed even if the result reached is an approximation. This is especially true where, as here, it is the wrongful acts of the defendant that have created the difficulty in proving the amount of loss of profits or where it is the wrongful acts of the defendant that have caused the other party to not realize a profit to which that party is entitled." (*GHK Associates v. Mayer Group* (1990) 224 Cal.App.3d 856, 873-874 [274 Cal.Rptr. 168], internal citations omitted.)

- "Historical data, such as past business volume, supply an acceptable basis for ascertaining lost future profits. [Citations.] In some instances, lost profits may be recovered where plaintiff introduces evidence of the profits lost by similar businesses operating under similar conditions. [Citations.]" (*Sargon Enterprises, Inc., supra,* 55 Cal.4th at p. 774].)

- "Regarding lost business profits, the cases have generally distinguished between established and unestablished businesses. '[W]here the operation of an established business is prevented or interrupted, as by a … breach of contract … , damages for the loss of prospective profits that otherwise might have been made from its operation are generally recoverable for the reason that their occurrence and extent may be ascertained with reasonable certainty from the past volume of business and other provable data relevant to the probable future sales.' " (*Sargon Enterprises, Inc., supra,* 55 Cal.4th at p. 774.)

- " 'On the other hand, where the operation of an unestablished business is prevented or interrupted, damages for prospective profits that might otherwise have been made from its operation are not recoverable for the reason that their occurrence is uncertain, contingent and speculative. [Citations.] … But although generally objectionable for the reason that their estimation is conjectural and speculative, anticipated profits dependent upon future events are allowed where their nature and occurrence can be shown by evidence of reasonable reliability." (*Sargon Enterprises, Inc., supra,* 55 Cal.4th at p. 774.)

- "Unestablished businesses have been permitted to claim lost profit damages in situations where owners have experience in the business they are seeking to establish, and where the business is in an established market." (*Resort Video, Ltd. v. Laser Video, Inc.* (1995) 35 Cal.App.4th 1679, 1698-1699 [42 Cal.Rptr.2d 136], internal citations omitted.)

- "Even if [plaintiff] was able to provide credible evidence of lost profits, it must be remembered that '[w]hen loss of anticipated profits is an element of damages, it means net and not gross profits.' Net profits are the gains made from sales 'after deducting the value of the labor, materials, rents, and all expenses, together with the interest of the capital employed.' " (*Resort Video, Ltd., supra,* 35 Cal.App.4th at p. 1700, internal citations omitted.)

- "It is the generally accepted rule, in order to recover damages projected into the future, that a plaintiff must show with reasonable certainty that detriment from the breach of contract will accrue to him in the future. Damages which are remote, contingent, or merely possible cannot serve as a legal basis for

recovery." (*California Shoppers, Inc. v. Royal Globe Insurance Co.* (1985) 175 Cal.App.3d 1, 62 [221 Cal.Rptr. 171], internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 879–882

California Breach of Contract Remedies (Cont.Ed.Bar 1980; 2001 supp.) Recovery of Money Damages, §§ 4.11–4.17

15 California Forms of Pleading and Practice, Ch. 177, *Damages,* § 177.79 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 7, *Seeking or Opposing Damages in Contract Actions*, 7.12

355. Obligation to Pay Money Only

To recover damages for the breach of a contract to pay money, [*name of plaintiff*] must prove the amount due under the contract.

New September 2003

Directions for Use

Read this instruction in conjunction with CACI No. 350, *Introduction to Contract Damages.* If there is a dispute as to the appropriate rate of interest, the jury should be instructed to determine the rate. Otherwise, the judge should calculate the interest and add the appropriate amount of interest to the verdict.

Sources and Authority

- Damages for Breach of Obligation to Pay Money. Civil Code section 3302. ~~provides: "The detriment caused by the breach of an obligation to pay money only, is deemed to be the amount due by the terms of the obligation, with interest thereon."~~

- Interest on Contract Damages. Civil Code section 3289. ~~provides:~~

  ~~(a) Any legal rate of interest stipulated by a contract remains chargeable after a breach thereof, as before, until the contract is superseded by a verdict or other new obligation.~~

  ~~(b) If a contract entered into after January 1, 1986, does not stipulate a legal rate of interest, the obligation shall bear interest at a rate of 10 percent per annum after a breach.~~

~~For the purposes of this subdivision, the term contract shall not include a note secured by a deed of trust on real property.~~

- "The section is part of the original Civil Code and was intended to codify a common-law rule of damages for breach of a contract to pay a liquidated sum. In *Siminoff v. Jas. H. Goodman & Co. Bank,* the court after careful and extensive analysis concluded that section 3302 was not intended to abolish the common-law measure of damages for dishonor of a check. *Hartford,* in reaching the opposite conclusion, failed even to note the common-law rule or the California cases which had followed it, and did not discuss the strong arguments in its favor advanced in the *Siminoff* opinion. The *Hartford* holding on section 3302 no longer applies to the instant problem since section 3320 clearly constitutes 'a legislative recognition that a depositor whose check is wrongfully dishonored may thereby sustain "actual damage" beyond the amount of the check' and thus supersedes the *Hartford* holding on the measure of damages." (*Weaver v. Bank of America National Trust & Savings*

Assn. (1963) 59 Cal.2d 428, 436, fn. 11 [30 Cal.Rptr. 4, 380 P.2d 644], internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, § 908

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 7, *Seeking or Opposing Damages in Contract Actions*, 7.04[7][a]

356. Buyer's Damages for Breach of Contract for Sale of Real Property (Civ. Code, § 3306)

To recover damages for the breach of a contract to sell real property, [*name of plaintiff***] must prove:**

1. **The difference between the fair market value of the property on the date of the breach and the contract price;**

2. **The amount of any payment made by [***name of plaintiff***] toward the purchase;**

3. **The amount of any reasonable expenses for examining title and preparing documents for the sale;**

4. **The amount of any reasonable expenses in preparing to occupy the property; and**

5. **[***Insert item(s) of claimed consequential damages***].**

New September 2003

Directions for Use

Read this instruction in conjunction with CACI No. 350, *Introduction to Contract Damages.* If the appropriate rate of interest is in dispute, the jury should be instructed to determine the rate. Otherwise, the judge should calculate the interest and add the appropriate amount of interest to the verdict.

For a definition of "fair market value," see CACI No. 3501, *"Fair Market Value" Explained*.

Sources and Authority

- Damages for Breach of Contract to Convey Real Property. Civil Code section 3306. ~~provides: "The detriment caused by the breach of an agreement to convey an estate in real property, is deemed to be the price paid, and the expenses properly incurred in examining the title and preparing the necessary papers, the difference between the price agreed to be paid and the value of the estate agreed to be conveyed at the time of the breach, the expenses properly incurred in preparing to enter upon the land, consequential damages according to proof, and interest."~~

- Interest on Contract Damages. Civil Code section 3289 ~~provides:~~

  ~~(a) Any legal rate of interest stipulated by a contract remains chargeable after a breach thereof, as before, until the contract is superseded by a verdict or other new obligation.~~

  ~~(b) If a contract entered into after January 1, 1986, does not stipulate a legal rate of interest, the obligation shall bear interest at a rate of 10 percent per annum after a~~

~~breach.~~

~~For the purposes of this subdivision, the term contract shall not include a note secured by a deed of trust on real property.~~

- " 'The rules of damages for a breach of a contract to sell or buy real property are special and unique. To the extent that the measure of compensatory damages available to a buyer or seller of real property for a breach of a contract are different from the general measure of compensatory damages for a breach of contract, the special provisions for damages for a breach of a real property sales contract prevail.' " (*Greenwich S.F., LLC v. Wong* (2010) 190 Cal.App.4th 739, 751 [118 Cal.Rptr.3d 531].)

- "A simple reading of the statute discloses that by its explicit terms it is adaptable only to a failure to convey, and not to a delay in conveying." (*Christensen v. Slawter* (1959) 173 Cal.App.2d 325, 330 [343 P.2d 341].)

- "This court itself has recently described section 3306 as providing for 'loss-of-bargain damages' measured by the difference between the contract price and the fair market value on the date of the breach." (*Reese v. Wong* (2001) 93 Cal.App.4th 51, 56 [112 Cal.Rptr.2d 669], internal citation omitted.)

- "It is settled that when a seller of real property fails or refuses to convey, a buyer who has made advance payments toward the purchase price may recover interest on those payments as damages for breach of contract. This rule is not limited to sales of real property; it applies to sales in general." (*Al-Husry v. Nilsen Farms Mini-Market, Inc.* (1994) 25 Cal.App.4th 641, 648 [31 Cal.Rptr.2d 28], internal citations omitted.)

- Section 3306 does not ordinarily apply to breach of an unexercised option to buy property. (*Schmidt v. Beckelman* (1960) 187 Cal.App.2d 462, 470-471 [9 Cal.Rptr. 736].)

- " 'Generally, [consequential] damages are those which, in view of all facts known by the parties at the time of the making of the contract, may reasonably be supposed to have been considered as a likely consequence of a breach in the ordinary course of events. This provision would conform the measure of damages in real property conveyance breaches to the general contract measure of damages which is specified in Civil Code 3300: "... all the detriment proximately caused (by the breach), or which, in the ordinary course of things, would be likely to result therefrom." ' " (*Stevens Group Fund IV v. Sobrato Development Co.* (1991) 1 Cal.App.4th 886, 892 [2 Cal.Rptr.2d 460], quoting the Assembly Committee on Judiciary.)

- "Moreover, in none of the foregoing cases does it appear that the buyer demonstrated the existence of the other requisites for an award of consequential or special damages, i.e., that the seller knew of the buyer's purpose in purchasing the property and that the anticipated profits were proved with reasonable certainty as to their occurrence and amount." (*Greenwich S.F., LLC , supra,* 190 Cal.App.4th at p. 757.)

- "The plain language of section 3306, adding consequential damages to the general damages and other specified damages recoverable for breach of a contract to convey real property, the legislative history

of the 1983 amendment acknowledging that the addition of consequential damages would conform the measure of damages to the general contract measure of damages, and the generally accepted inclusion of lost profits as a component of consequential or special damages in other breach of contract contexts and by other states in the context of breach of contracts to convey real property, taken together, persuade us that lost profits may be awarded as part of consequential damages under section 3306 upon a proper showing." (*Greenwich S.F., LLC , supra*, 190 Cal.App.4th at p. 758, internal citations omitted.)

- "Rents received from the lease of the property in this case are not properly an item of consequential damages. Here, plaintiff introduced evidence as to the fair market value of the property which included these profits. To allow these as consequential damages under these circumstances would have permitted a double recovery for plaintiff." (*Stevens Group Fund IV, supra*, 1 Cal.App.4th at p. 892.)

- "The phrase 'to enter upon the land' refers to the taking of possession rather than to things done to put the land to general use." (*Crag Lumber Co. v. Crofoot* (1956) 144 Cal.App.2d 755, 779 [301 P.2d 952].)

- "We think the phrase 'and interest' should continue to be read as referring to the generally applicable provisions of [Civil Code] section 3287 regarding prejudgment interest. As amended in 1967, subdivision (a) of section 3287 establishes a right to recover prejudgment interest on damages 'capable of being made certain by calculation' and subdivision (b) gives the court general discretionary authority to award prejudgment interest where damages are 'based upon a cause of action in contract ....' The discretionary authority conferred by subdivision (b) will ordinarily apply to loss-of-bargain damages measured by the contract price/market value differential." (*Rifkin v. Achermann* (1996) 43 Cal.App.4th 391, 397 [50 Cal.Rptr.2d 661].)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 898–900

California Real Property Remedies Practice (Cont.Ed.Bar 1980; 1999 supp.) Breach of Seller-Buyer Agreements, §§ 4.11–4.14

Greenwald & Asimow, California Practice Guide: Real Property Transactions, Ch. 11-D, *Buyer's Remedies Upon Seller's Breach—Damages And Specific Performance*, ¶ 11:184 (The Rutter Group)

50 California Forms of Pleading and Practice, Ch. 569, *Vendor and Purchaser*, § 569.22 (Matthew Bender)

9 California Legal Forms, Ch. 23, *Real Property Sales Agreements*, § 23.12 et seq. (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 7, *Seeking or Opposing Damages in Contract Actions*, 7.04[7][f]

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

Remedies in Contract Actions, 8.37, 8.58

357. Seller's Damages for Breach of Contract to Purchase Real Property

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To recover damages for the breach of a contract to buy real property, [*name of plaintiff***] must prove:**

1. **The difference between the amount that was due to [***name of plaintiff***] under the contract and the fair market value of the property at the time of the breach; [and]**

2. **[***Insert item(s) of claimed consequential damages, e.g., resale expenses***].**

New September 2003

Directions for Use

Read this instruction in conjunction with CACI No. 350, *Introduction to Contract Damages.* If there is a dispute regarding the appropriate rate of interest, the jury should be instructed to determine the rate. Otherwise, the judge should calculate the interest and add the appropriate amount of interest to the verdict.

For a definition of "fair market value," see CACI No. 3501, *"Fair Market Value" Explained*.

Sources and Authority

- Damages for Breach of Contract to Purchase Real Property. Civil Code section 3307. ~~provides: "The detriment caused by the breach of an agreement to purchase an estate in real property is deemed to be the excess, if any, of the amount which would have been due to the seller under the contract over the value of the property to him or her, consequential damages according to proof, and interest."~~

- "It is generally accepted that the equivalent of value to the seller is fair market value. Fair market value is reckoned 'in terms of money.' " (*Abrams v. Motter* (1970) 3 Cal.App.3d 828, 840-841 [83 Cal.Rptr. 855], internal citations omitted.)

- "The "value of the property" to [plaintiff] is to be determined as of the date of the breach of the agreement by [defendant]." (*Allen v. Enomoto* (1964) 228 Cal.App.2d 798, 803 [39 Cal.Rptr. 815], internal citation omitted.)

- There can be no damages where the value to the owner equals or exceeds the contract price. (*Newhart v. Pierce* (1967) 254 Cal.App.2d 783, 792 [62 Cal.Rptr. 553], internal citation omitted.)

- "[T]he view that this section is exclusive, and precludes other consequential damages occasioned by the breach, was rejected in *Royer v. Carter*. Under Civil Code, section 3300, other damages are recoverable, usually embracing the out-of-pocket expenses lost by failure of the transaction." (*Wade v. Lake County Title Co.* (1970) 6 Cal.App.3d 824, 830 [86 Cal.Rptr. 182], internal citation omitted.)

- "[C]ourts have permitted consequential damages, only where the seller has diligently attempted resale after the buyer has breached the contract." (*Askari v. R & R Land Co.* (1986) 179 Cal.App.3d 1101, 1107 [225 Cal.Rptr. 285], internal citation omitted.)

- "[I]f the property increases in value before trial and the vendor resells the property at a price higher than the value of the contract, there are no longer any loss of bargain damages." (*Spurgeon v. Drumheller* (1985) 174 Cal.App.3d 659, 664 [220 Cal.Rptr. 195].)

- "The same rule of no loss of bargain damages to the vendor applies where the resale is for the same price as the contract price." (*Spurgeon, supra,* 174 Cal.App.3d at p. 664, internal citations omitted.)

- "For the reason that no loss of bargain damages are available to a seller if there is a resale at the same or a higher price than the contract price, the law imposes on the seller of the property the duty to exercise diligence and to make a resale within the shortest time possible. In discussing the duty to mitigate where the vendee seeks return of a deposit, the *Sutter* court states the requirement that resales be made with reasonable diligence 'states a policy applicable to resales of real property. Whether the resale is made one, two or three months later, or whether it be a year or more, it should be made with reasonable diligence to qualify the vendor to an allowance of an off-set against the vendee's claim for restitution of money paid.' " (*Spurgeon, supra,* 174 Cal.App.3d at p. 665, internal citations omitted.)

- "Although it is well settled in the foregoing authorities that damages under Civil Code section 3307 for the difference between the contract price and property value may be insufficient to give the vendor the benefit of his bargain and he is entitled also to resale expenses and some costs of continued ownership, he should not be permitted to receive a windfall at the purchaser's expense." (*Smith v. Mady* (1983) 146 Cal.App.3d 129, 133 [194 Cal.Rptr. 42].)

- "Inasmuch as under *Abrams* and *Sutter* the vendor has an obligation to resell promptly in order to obtain consequential damages and the resale price may fix the property value as a basis for Civil Code section 3307 damages, we are impelled to conclude that there is no inherent separateness in the original sale and subsequent resale transactions. The increased resale price should not be disregarded in considering an offset to consequential damages awarded to a vendor against a defaulting purchaser of real property." (*Smith, supra,* 146 Cal.App.3d at p. 133.)

- "The owner of real or personal property may competently testify to its value." (*Newhart, supra,* 254 Cal.App.2d at p. 789, internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 901–906

California Real Property Remedies Practice (Cont.Ed.Bar 1980; 1999 supp.), Breach of Seller-Buyer Agreements, §§ 4.37–4.43

California Practice Guide: Real Property Transactions (The Rutter Group 2000), 11-C, § C., Seller's Remedies Upon Buyer's Breach-Damages and Specific Performance

50 California Forms of Pleading and Practice, Ch. 569, *Vendor and Purchaser,* § 569.22 (Matthew Bender)

9 California Legal Forms, Ch. 23, *Real Property Sales Agreements*, § 23.12 et seq. (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 7, *Seeking or Opposing Damages in Contract Actions*, 7.04[7][f]

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 8, *Seeking or Opposing Equitable Remedies in Contract Actions*, 8.37, 8.58

359. Present Cash Value of Future Damages

To recover for future harm, [*name of plaintiff***] must prove that the harm is reasonably certain to occur and must prove the amount of those future damages. The amount of damages for future harm must be reduced to present cash value. This is necessary because money received now will, through investment, grow to a larger amount in the future. [***Name of defendant***] must prove the amount by which future damages should be reduced to present value.**

To find present cash value, you must determine the amount of money that, if reasonably invested today, will provide [*name of plaintiff***] with the amount of [his/her/its] future damages.**

[You may consider expert testimony in determining the present cash value of future damages.] [You must use [the interest rate of __ percent/ [and] [*specify other stipulated information***]] agreed to by the parties in determining the present cash value of future damages.]**

New September 2003; Revised December 2010, June 2013

Directions for Use

Give this instruction if future damages are sought and there is evidence from which a reduction to present value can be made. Give the next-to-last sentence if there has been expert testimony on reduction to present value. Unless there is a stipulation, expert testimony will usually be required to accurately establish present values for future losses. Give the last sentence if there has been a stipulation as to the interest rate to use or any other facts related to present cash value.

It would appear that because reduction to present value benefits the defendant, the defendant bears the burden of proof on the discount rate. (See *Wilson v. Gilbert* (1972) 25 Cal.App.3d 607, 613–614 [102 Cal.Rptr. 31] [no error to refuse instruction on reduction to present value when defendant presented no evidence].)

Present-value tables may assist the jury in making its determination of present cash value. Tables, worksheets, and an instruction on how to use them are provided in CACI No. 3904B, *Use of Present-Value Tables*.

Sources and Authority

- Future Damages. Civil Code section 3283. ~~provides: "Damages may be awarded, in a judicial proceeding, for detriment resulting after the commencement thereof, or certain to result in the future."~~

- "In an action for damages for such a breach, the plaintiff in that one action recovers all his damages, past and prospective. A judgment for the plaintiff in such an action absolves the defendant from any duty, continuing or otherwise, to perform the contract. The judgment for damages is substituted for the wrongdoer's duty to perform the contract." (*Coughlin v. Blair* (1953) 41 Cal.2d 587, 598 [262 P.2d 305], internal citations omitted.)

- "If the breach is partial only, the injured party may recover damages for non-performance only to the time of trial and may not recover damages for anticipated future non-performance. Furthermore, even if a breach is total, the injured party may treat it as partial, unless the wrongdoer has repudiated the contract. The circumstances of each case determine whether an injured party may treat a breach of contract as total." (*Coughlin, supra*, 41 Cal.2d at pp. 598-599, internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1552

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.46 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 7, *Seeking or Opposing Damages in Contract Actions*, 7.09[3]

360. Nominal Damages

If you decide that [*name of defendant*] breached the contract but also that [*name of plaintiff*] was not harmed by the breach, you may still award [him/her/it] nominal damages such as one dollar.

New September 2003

Sources and Authority

- Nominal Damages. Civil Code section 3360. ~~provides: "When a breach of duty has caused no appreciable detriment to the party affected, he may yet recover nominal damages."~~

- "A plaintiff is entitled to recover nominal damages for the breach of a contract, despite inability to show that actual damage was inflicted upon him, since the defendant's failure to perform a contractual duty is, in itself, a legal wrong that is fully distinct from the actual damages. The maxim that the law will not be concerned with trifles does not, ordinarily, apply to violation of a contractual right. Accordingly, nominal damages, which are presumed as a matter of law to stem merely from the breach of a contract may properly be awarded for the violation of such a right. And, by statute, such is also the rule in California." (*Sweet v. Johnson* (1959) 169 Cal.App.2d 630, 632-633 [337 P.2d 499], internal citations omitted.)

- "With one exception ... an unbroken line of cases holds that nominal damages are limited to an amount of a few cents or a dollar." (*Avina v. Spurlock* (1972) 28 Cal.App.3d 1086, 1089 [105 Cal.Rptr. 198], internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, § 878

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, §§ 177.14, 177.71 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 7, *Seeking or Opposing Damages in Contract Actions*, 7.04[11]

380. Agreement Formalized by Electronic Means—Uniform Electronic Transactions Act (Civ. Code, § 1633.1 et seq.)

[*Name of plaintiff***] claims that the parties entered into a valid contract in which [some of] the required terms were supplied by [***specify electronic means, e.g., e-mail messages***]. If the parties agree, they may form a binding contract using an electronic record. An "electronic record" is one created, generated, sent, communicated, received, or stored by electronic means. [***E.g., E-Mail***] is an electronic record.**

[*Name of plaintiff***] must prove, based on the context and surrounding circumstances, including the conduct of the parties, that the parties agreed to use [***e.g., e-mail***] to formalize their agreement.**

[[*Name of plaintiff***] must have sent the contract documents to [***name of defendant***] in an electronic record capable of retention by [***name of defendant***] at the time of receipt. An electronic record is not capable of retention by the recipient if the sender or its information processing system limits or prohibits the ability of the recipient to print or store it.]**

New December 2012

Directions for Use

This instruction is for use if the plaintiff is relying on the Uniform Electronic Transactions Act (UETA, Civ. Code, § 1633.1 et seq.) to prove contract formation. If there are other contested issues as to whether a contract was formed, also give CACI No. 303, *Breach of Contract—Essential Factual Elements*.

The first paragraph asserts that electronic means were used to supply some or all of the essential elements of the contract. Give the third paragraph if a law requires a person to provide, send, or deliver information in writing to another person. (See Civ. Code, § 1633.8(a).)

The most likely jury issue is whether the parties agreed to rely on electronic records to finalize their agreement. Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct. (See Civ. Code, § 1633.5(b).)

The UETA does not specify any particular transmissions that meet the definition of "electronic record," such as e-mail or fax. (See Civ. Code, § 1633.2(g).) Nevertheless, there would seem to be little doubt that e-mail and fax meet the definition. The parties will probably stipulate accordingly, or the court may find that the particular transmission at issue meets the definition as a matter of law.

If a law requires a signature, an electronic signature satisfies the law. (Civ. Code, § 1633.7(d).) The UETA defines an electronic signature as an electronic sound, symbol, or process attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the electronic record. (Civ, Code, § 1633.2(h).) The validity of an electronic signature under this definition would most likely be a question of law for the court. If there is an issue of fact with regard to the parties' intent to use electronic signatures, this instruction will need to be modified accordingly.

Sources and Authority

- "Electronic Record" Defined Under UETA. Civil Code section 1633.2(g). ~~provides: " 'Electronic record' means a record created, generated, sent, communicated, received, or stored by electronic means."~~

- "Electronic Signature" Defined Under UETA. Civil Code section 1633.2(h). ~~provides: " 'Electronic signature' means an electronic sound, symbol, or process attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the electronic record."~~

- Exclusions Under UETA. Civil Code section 1633.3(b). ~~provides:~~

  ~~(b) This title does not apply to transactions subject to the following laws:~~

  ~~(1) A law governing the creation and execution of wills, codicils, or testamentary trusts.~~

  ~~(2) Division 1 (commencing with Section 1101) of the Uniform Commercial Code, except Sections 1107 and 1206.~~

  ~~(3) Divisions 3 (commencing with Section 3101), 4 (commencing with Section 4101), 5 (commencing with Section 5101), 8 (commencing with Section 8101), 9 (commencing with Section 9101), and 11 (commencing with Section 11101) of the Uniform Commercial Code.~~

  ~~(4) A law that requires that specifically identifiable text or disclosures in a record or a portion of a record be separately signed, including initialed, from the record. However, this paragraph does not apply to Section 1677 or 1678 of this code or Section 1298 of the Code of Civil Procedure.~~

- Agreement to Conduct Transaction by Electronic Means. Civil Code section 1633.5(b). ~~provides: "This title [UETA] applies only to a transaction between parties each of which has agreed to conduct the transaction by electronic means. Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct. Except for a separate and optional agreement the primary purpose of which is to authorize a transaction to be conducted by electronic means, an agreement to conduct a transaction by electronic means may not be contained in a standard form contract that is not an electronic record. An agreement in such a standard form contract may not be conditioned upon an agreement to conduct transactions by electronic means. An agreement to conduct a transaction by electronic means may not be inferred solely from the fact that a party has used electronic means to pay an account or register a purchase or warranty. This subdivision may not be varied by agreement."~~

- Enforceability of Electronic Transactions. Civil Code section 1633.7. ~~provides:~~

  ~~(a) A record or signature may not be denied legal effect or enforceability solely because it~~

~~is in electronic form.~~

~~(b) A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.~~

~~(c) If a law requires a record to be in writing, an electronic record satisfies the law.~~

~~(d) If a law requires a signature, an electronic signature satisfies the law.~~

- Providing Required Information by Electronic Means. Civil Code section 1633.8(a). ~~provides: "If parties have agreed to conduct a transaction by electronic means and a law requires a person to provide, send, or deliver information in writing to another person, that requirement is satisfied if the information is provided, sent, or delivered, as the case may be, in an electronic record capable of retention by the recipient at the time of receipt. An electronic record is not capable of retention by the recipient if the sender or its information processing system inhibits the ability of the recipient to print or store the electronic record."~~

Secondary Sources

7 Witkin, Summary of California Law (10th ed. 2005) Contracts § 11

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 15, *Attacking or Defending Existence of Contract—Failure to Comply With Applicable Formalities*, 15.32

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.26 (Matthew Bender)

27 California Legal Forms: Transaction Guide, Ch. 75, *Formation of Contracts and Standard Contractual Provisions*, § 75.17 (Matthew Bender)

403. Standard of Care for Physically Disabled Person

A person with a physical disability is required to use the amount of care that a reasonably careful person who has the same physical disability would use in the same situation.

New September 2003

Directions for Use

By "same" disability, this instruction is referring to the effect of the disability, not the cause.

Sources and Authority

- Liability of Person of "Unsound Mind." Civil Code section 41.

- Restatement Second of Torts, section 283C, provides: "If the actor is ill or otherwise physically disabled, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like disability." (See also *Conjorsky v. Murray* (1955) 135 Cal.App.2d 478, 482 [287 P.2d 505]; *Jones v. Bayley* (1942) 49 Cal.App.2d 647, 654 [122 P.2d 293].)

- Persons with mental illnesses are not covered by the same standard as persons with physical illnesses. (See *Bashi v. Wodarz* (1996) 45 Cal.App.4th 1314, 1323 [53 Cal.Rptr.2d 635].)

- ~~Civil Code section 41 provides: "A person of unsound mind, of whatever degree, is civilly liable for a wrong done by the person, but is not liable in exemplary damages unless at the time of the act the person was capable of knowing that the act was wrongful." This section applies to negligence. (*Bashi, supra*, 45 Cal.App.4th at p. 1321.)~~

- Restatement Second of Torts, section 283B, provides: "Unless the actor is a child, his insanity or other mental deficiency does not relieve the actor from liability for conduct which does not conform to the standard of a reasonable man under like circumstances."

- As to contributory negligence, the courts agree with the Restatement's position that mental deficiency that falls short of insanity does not excuse conduct that is otherwise contributory negligence. (*Fox v. City and County of San Francisco* (1975) 47 Cal.App.3d 164, 169 [120 Cal.Rptr. 779]; Rest.2d Torts, § 464, com. g.

Secondary Sources

California Tort Guide (Cont.Ed.Bar 3d ed.) § 1.20

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

417. Special Doctrines: Res ipsa loquitur

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

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

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

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

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

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

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

New September 2003; Revised June 2011, December 2011

Directions for Use

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

If the plaintiff has established the three conditions that give rise to the doctrine, the jury is required to find that the accident resulted from the defendant's negligence unless the defendant comes forward with evidence that would support a contrary finding. (See Cal. Law Revision Com. Comment to Evid. Code, § 646.) The last two paragraphs of the instruction assume that the defendant has presented evidence that would support a finding that the defendant was not negligent or that any negligence on the defendant's part was not a proximate cause of the accident. In this case, the presumption drops out, and the plaintiff must then prove the elements of negligence without the benefit of the presumption of res ipsa loquitur. (See *Howe, supra,* 189 Cal.App.4th at pp. 1163–1164; see also Evid. Code, § 646(c).)

Sources and Authority

- Res Ipsa Loquitur. Evidence Code section 646(c). ~~provides:~~

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

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

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

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

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

- "Res ipsa loquitur is an evidentiary rule for 'determining whether circumstantial evidence of

negligence is sufficient.' " (*Howe, supra,* 189 Cal.App.4th at p. 1161, internal citation omitted.)

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

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

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

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

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

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

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

- "As the [Law Revision Commission] Comment [to Evidence Code section 646] explains, even though the presumptive effect of the doctrine vanishes, 'the jury may still be able to draw an inference that the accident was caused by the defendant's lack of due care from the facts that gave rise to the

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

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

Secondary Sources

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

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

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

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

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

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

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

420. Negligence per se: Rebuttal of the Presumption of Negligence (Violation Excused)

A violation of a law is excused if one of the following is true:

(a) **The violation was reasonable because of [***name of plaintiff/defendant***]'s [***specify type of "incapacity"***]; [or]**

(b) **Despite using reasonable care, [***name of plaintiff/defendant***] was not able to obey the law; [or]**

(c) **[***Name of plaintiff/defendant***] faced an emergency that was not caused by [his/her] own misconduct; [or]**

(d) **Obeying the law would have involved a greater risk of harm to [***name of plaintiff/defendant***] or to others; [or]**

(e) **[***Other reason excusing or justifying noncompliance***.]**

New September 2003

Directions for Use

Subparagraph (b), regarding an attempt to comply with the applicable statute or regulation, should not be given where the evidence does not show such an attempt. (*Atkins v. Bisigier* (1971) 16 Cal.App.3d 414, 423 [94 Cal.Rptr. 49].) Subparagraph (b) should be used only in special cases because it relies on the concept of due care to avoid a charge of negligence per se.

Sources and Authority

- Rebuttal of Presumption of Negligence per se. Evidence Code section 669(b)(1). ~~provides: "This presumption may be rebutted by proof that [t]he person violating the statute, ordinance, or regulation did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law."~~

- The language of section 669(b)(1) appears to be based on the following Supreme Court holding: "In our opinion the correct test is whether the person who has violated a statute has sustained the burden of showing that he did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law." (*Alarid v. Vanier* (1958) 50 Cal.2d 617, 624 [327 P.2d 897].)

- In *Casey v. Russell* (1982) 138 Cal.App.3d 379 [188 Cal.Rptr. 18], the court held that an instruction that tracked the language of section 669(b)(1) was erroneous because it "[did] not adequately convey that there must be some special circumstances which justify violating the statute." (*Id.* at p. 385.) The court's opinion cited section 288A of the Restatement Second of Torts for a list of the types of

emergencies or unusual circumstances that may justify or excuse a violation of the statute:

(a) The violation is reasonable because of the actor's incapacity;

(b) He neither knows nor should know of the occasion for compliance;

(c) He is unable after reasonable diligence or care to comply;

(d) He is confronted by an emergency not due to his own misconduct;

(e) Compliance would involve a greater risk of harm to the actor or to others.

According to the Restatement comment, this list of circumstances is not meant to be exclusive.

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 871–896

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 1.28-1.31

1 Levy et al., California Torts, Ch. 3, *Proof of Negligence*, § 3.13 (Matthew Bender)

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

16 California Points and Authorities, Ch. 165, *Negligence*, § 165.81 (Matthew Bender)

421. Negligence per se: Rebuttal of the Presumption of Negligence (Violation of Minor Excused)

[*Name of plaintiff/defendant***] claims that even if [he/she] violated the law, [he/she] is not negligent because [he/she] was ____ years old at the time of the incident. If you find that [***name of plaintiff/defendant***] was as careful as a reasonably careful child of the same age, intelligence, knowledge, and experience would have been in the same situation, then [***name of plaintiff/defendant***] was not negligent.**

New September 2003

Directions for Use

This instruction does not apply if the minor is engaging in an adult activity. (Evid. Code, § 669(b)(2).)

Sources and Authority

- Rebuttal of Presumption of Negligence per se: Minor. Evidence Code section 669(b)(2). ~~provides: "The presumption may be rebutted by proof that [t]he person violating the statute, ordinance, or regulation was a child and exercised the degree of care ordinarily exercised by persons of his maturity, intelligence, and capacity under similar circumstances, but the presumption may not be rebutted by such proof if the violation occurred in the course of an activity normally engaged in only by adults and requiring adult qualifications."~~

- "The per se negligence instruction is predicated on the theory that the Legislature has adopted a statutory standard of conduct that no reasonable man would violate, and that all reasonable adults would or should know such standard. But this concept does not apply to children." (*Daun v. Truax* (1961) 56 Cal.2d 647, 654 [16 Cal.Rptr. 351, 365 P.2d 407].)

- An exception to this reduced standard of care may be found if the minor was engaging in an adult activity, such as driving. (*Prichard v. Veterans Cab Co.* (1965) 63 Cal.2d 727, 732 [47 Cal.Rptr. 904, 408 P.2d 360]; *Neudeck v. Bransten* (1965) 233 Cal.App.2d 17, 21 [43 Cal.Rptr. 250]; see also Rest.2d Torts, § 283A, com. c.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 871–896

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 1.28-1.31

1 Levy et al., California Torts, Ch. 3, *Proof of Negligence*, § 3.13 (Matthew Bender)

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

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

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

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

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

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

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

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

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

New December 2011

Directions for Use

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

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

Sources and Authority

- No Social Host Liability for Furnishing Alcohol. Civil Code section 1714(c). ~~provides in relevant part:~~

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

Exception to Nonliability. Civil Code section 1714(d)

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

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

- "Although the claim against [host] appears to fall within the section 1714, subdivision (d) exception, plaintiffs cannot bootstrap respondents into that exception by alleging that respondents conspired with or aided and abetted [host] by providing alcoholic beverages that were furnished to [minor]. Subdivision (b) of section 1714 unequivocally states that 'the furnishing of alcoholic beverages is not the proximate cause of injuries resulting from intoxication … .' This provision necessarily precludes liability against anyone who furnished alcohol to someone who caused injuries due to intoxication. The exception set forth in subdivision (d) vitiates subdivision (b) for a very narrow class of claims: claims against an adult who knowingly furnishes alcohol at his or her residence to a person he or she knows is under the age of 21. Because respondents are not alleged to have furnished alcohol to [minor] at their residences, plaintiffs' claims against them are barred because, as a matter of statutory law, plaintiffs cannot establish that respondents' actions proximately caused plaintiffs' injuries." (*Rybicki v. Carlson* (2013) 216 Cal.App.4th 758, 764 [157 Cal.Rptr.3d 660].)

Secondary Sources

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

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

3 California Forms of Pleading and Practice, Ch. 19, *Alcoholic Beverages: Civil Liability*, §§ 19.11, 19.13 (Matthew Bender)

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

450A. Good Samaritan—Nonemergency

[*Name of defendant***] claims that [he/she] is not responsible for [***name of plaintiff***]'s harm because [he/she] was voluntarily trying to protect [***name of plaintiff***] from harm in a nonemergency situation. If you decide that [***name of defendant***] was negligent, [he/she] is not responsible unless [***name of plaintiff***] proves both of the following:**

1. **[(a) That [***name of defendant***]'s failure to use reasonable care added to the risk of harm;]**

   [or]

   [(b) That [*name of defendant***]'s conduct caused [***name of plaintiff***] to reasonably rely on [his/her] protection;]**

AND

2. **That the [additional risk/ [or] reliance] was a substantial factor in causing harm to [***name of plaintiff***].**

Derived from former CACI No. 450 December 2010

Directions for Use

Use this instruction for situations other than at the scene of an emergency. Different standards apply in an emergency situation. (See Health & Saf. Code, § 1799.102; CACI No. 450B, *Good Samaritan—Scene of Emergency*.) Give both instructions if the jury will be asked to decide whether an emergency existed as the preliminary issue. Because under Health and Safety Code section 1799.102 a defendant receives greater protection in an emergency situation, the advisory committee believes that the defendant bears the burden of proving an emergency. (See Evid. Code, § 500 [party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense asserted].)

Select either or both options for element 1 depending on the facts.

Sources and Authority

- Good Samaritan Immunity for Medical Licensees. Business and Professions Code sections 2395–2398.
- Good Samaritan Immunity for Nurses. Business and Professions Code sections 2727.5, 2861.5.
- Good Samaritan Immunity for Dentists. Business and Professions Code section 1627.5.
- Good Samaritan Immunity for Rescue Teams. Health and Safety Code section 1317(f).

- Good Samaritan Immunity for Persons Rendering Emergency Medical Services Health and Safety Code section 1799.102.
- Good Samaritan Immunity for Paramedics. Health and Safety Code section 1799.104.
- Good Samaritan Immunity for First-Aid Volunteers. Government Code section 50086.

- "Under well-established common law principles, a person has no duty to come to the aid of another. If, however, a person elects to come to someone's aid, he or she has a duty to exercise due care. Thus, a 'good Samaritan' who attempts to help someone might be liable if he or she does not exercise due care and ends up causing harm." (*Van Horn v. Watson* (2008) 45 Cal.4th 322, 324 [86 Cal.Rptr.3d 350, 197 P.3d 164], internal citations omitted.)

- "A person who has not created a peril is not liable in tort merely for failure to take affirmative action to assist or protect another unless there is some relationship between them which gives rise to a duty to act. Also pertinent to our discussion is the role of the volunteer who, having no initial duty to do so, undertakes to come to the aid of another—the 'good Samaritan.' ... He is under a duty to exercise due care in performance and is liable if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking." (*Williams v. State of California* (1983) 34 Cal.3d 18, 23 [192 Cal.Rptr. 233, 664 P.2d 137], internal citations omitted.)

- "A police officer, paramedic or other public safety worker is as much entitled to the benefit of this general rule as anyone else." (*Camp v. State of California* (2010) 184 Cal.App.4th 967, 975 [109 Cal.Rptr.3d 676].)

- "Under the good Samaritan doctrine, CHP may have a duty to members of the public to exercise due care when CHP voluntarily assumes a protective duty toward a certain member of the public and undertakes action on behalf of that member thereby inducing reliance, when an express promise to warn of a danger has induced reliance, or when the actions of CHP place a person in peril or increase the risk of harm. In other words, to create a special relationship and a duty of care, there must be evidence that CHP ' "made misrepresentations that induced a citizen's detrimental reliance [citation], placed a citizen in harm's way [citations], or lulled a citizen into a false sense of security and then withdrew essential safety precautions." ' Nonfeasance that leaves the citizen in exactly the same position that he or she already occupied cannot support a finding of duty of care. Affirmative conduct or misfeasance on the part of CHP that induces reliance or changes the risk of harm is required." (*Greyhound Lines, Inc. v. Department of the California Highway Patrol* (2013) 213 Cal.App.4th 1129, 1136 [152 Cal.Rptr.3d 492], internal citations omitted.)

- ~~Statutory exceptions to Good Samaritan liability include immunities under certain circumstances for medical licensees (Bus. & Prof. Code, §§ 2395–2398), nurses (Bus. & Prof. Code, §§ 2727.5, 2861.5), dentists (Bus. & Prof. Code, § 1627.5), rescue teams (Health & Saf. Code, § 1317(f)), persons rendering emergency medical services (Health & Saf. Code, § 1799.102), paramedics (Health & Saf. Code, § 1799.104), and first-aid volunteers (Gov. Code, § 50086).~~

Secondary Sources

4 Witkin, California Procedure (4th ed. 1996) Pleadings, § 553

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1060–1065

Flahavan et al., California Practice Guide: Personal Injury (The Rutter Group) ¶¶ 2:583.10–2:583.11, 2:876

1 Levy et al., California Torts, Ch. 1, *Negligence: Duty and Breach*, § 1.11 (Matthew Bender)

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

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.32[5][c] (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence*, § 165.150 (Matthew Bender)

450B. Good Samaritan—Scene of Emergency

[*Name of defendant***] claims that [he/she] is not responsible for [***name of plaintiff***]'s harm because [he/she] was trying to protect [***name of plaintiff***] from harm at the scene of an emergency.**

To succeed on this defense, [*name of defendant***] must prove all of the following:**

1. **That [***name of defendant***] rendered medical or nonmedical care or assistance to [***name of plaintiff***] at the scene of an emergency;**

2. **That [***name of defendant***] was acting in good faith; and**

3. **That [***name of defendant***] was not acting for compensation.**

If you decide that [*name of defendant***] has proved all of the above, but you decide that [***name of defendant***] was negligent, [he/she] is not responsible unless [***name of plaintiff***] proves that [***name of defendant***]'s conduct constituted gross negligence or willful or wanton misconduct.**

"Gross negligence" is the lack of any care or an extreme departure from what a reasonably careful person would do in the same situation.

"Willful or wanton misconduct" means conduct by a person who may have no intent to cause harm, but who intentionally performs an act so unreasonable and dangerous that he or she knows or should know it is highly probable that harm will result.

If you find that [*name of defendant***] was grossly negligent or acted willfully or wantonly, [***name of plaintiff***] must then also prove:**

1. **[(a) That [***name of defendant***]'s conduct added to the risk of harm;]**

   [or]

   [(b) That [*name of defendant***]'s conduct caused [***name of plaintiff***] to reasonably rely on [his/her] protection;]**

AND

2. **That the [additional risk/ [or] reliance] was a substantial factor in causing harm to [***name of plaintiff***].**

Derived from former CACI No. 450 December 2010; Revised December 2011

Directions for Use

Use this instruction for situations at the scene of an emergency not involving medical, law enforcement, or emergency personnel. (See Health & Saf. Code, § 1799.102.) In a nonemergency situation, give CACI No. 450A, *Good Samaritan—Nonemergency*.

Under Health and Safety Code section 1799.102(b), the defendant must have acted at the scene of an emergency, in good faith, and not for compensation. These terms are not defined, and neither the statute nor case law indicates who has the burden of proof. However, the advisory committee believes that it is more likely that the defendant has the burden of proving those things necessary to invoke the protections of the statute. (See Evid. Code, § 500 [party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense asserted].)

If the jury finds that the statutory standards have been met, then presumably it must also find that the common-law standards for Good-Samaritan liability have also been met. (See Health & Saf. Code, § 1799.102(c) ["Nothing in this section shall be construed to change any existing legal duties or obligations"].) In the common-law part of the instruction, select either or both options for element 1 depending on the facts.

See also CACI No. 425, *"Gross Negligence" Explained.*

Sources and Authority

- Immunity for Persons Rendering Care at Scene of Emergency. Health and Safety Code section 1799.102. ~~provides:~~

  ~~(a) No person who in good faith, and not for compensation, renders emergency medical or nonmedical care at the scene of an emergency shall be liable for any civil damages resulting from any act or omission. The scene of an emergency shall not include emergency departments and other places where medical care is usually offered. This subdivision applies only to the medical, law enforcement, and emergency personnel specified in this chapter.~~

  ~~(b)~~

  ~~(1) It is the intent of the Legislature to encourage other individuals to volunteer, without compensation, to assist others in need during an emergency, while ensuring that those volunteers who provide care or assistance act responsibly.~~

  ~~(2) Except for those persons specified in subdivision (a), no person who in good faith, and not for compensation, renders emergency medical or nonmedical care or assistance at the scene of an emergency shall be liable for civil damages resulting from any act or omission other than an act or omission constituting gross negligence or willful or wanton misconduct. The scene of an emergency shall not include emergency departments and other places where medical care is usually offered. This subdivision shall not be construed to alter existing protections from liability for licensed medical or other personnel specified in subdivision (a) or any other law.~~

  ~~(c) Nothing in this section shall be construed to change any existing legal duties or obligations, nor~~

~~does anything in this section in any way affect the provisions in Section 1714.5 of the Civil Code, as proposed to be amended by Senate Bill 39 of the 2009-10 Regular Session of the Legislature.~~

~~(d) The amendments to this section made by the act adding subdivisions (b) and (c) shall apply exclusively to any legal action filed on or after the effective date of that act.~~

- " 'Gross negligence' long has been defined in California and other jurisdictions as either a ' " 'want of even scant care' " ' or ' " 'an extreme departure from the ordinary standard of conduct.' " ' " (*City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747, 754 [62 Cal.Rptr.3d 527, 161 P.3d 1095], internal citations omitted.)

- "By contrast, 'wanton' or 'reckless' misconduct (or ' "willful and wanton negligence" ') describes conduct by a person who may have no intent to cause harm, but who intentionally performs an act so unreasonable and dangerous that he or she knows or should know it is highly probable that harm will result." (*City of Santa Barbara, supra*, 41 Cal.4th at p. 754, fn. 4, internal citations omitted.)

- "Under well-established common law principles, a person has no duty to come to the aid of another. If, however, a person elects to come to someone's aid, he or she has a duty to exercise due care. Thus, a 'good Samaritan' who attempts to help someone might be liable if he or she does not exercise due care and ends up causing harm." (*Van Horn v. Watson* (2008) 45 Cal.4th 322, 324 [86 Cal.Rptr.3d 350, 197 P.3d 164], internal citations omitted.)

- "A person who has not created a peril is not liable in tort merely for failure to take affirmative action to assist or protect another unless there is some relationship between them which gives rise to a duty to act. Also pertinent to our discussion is the role of the volunteer who, having no initial duty to do so, undertakes to come to the aid of another—the 'good Samaritan.' ... He is under a duty to exercise due care in performance and is liable if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking." (*Williams v. State of California* (1983) 34 Cal.3d 18, 23 [192 Cal.Rptr. 233, 664 P.2d 137], internal citations omitted.)

- "A police officer, paramedic or other public safety worker is as much entitled to the benefit of this general rule as anyone else." (*Camp v. State of California* (2010) 184 Cal.App.4th 967, 975 [109 Cal.Rptr.3d 676].)

- "Under the good Samaritan doctrine, CHP may have a duty to members of the public to exercise due care when CHP voluntarily assumes a protective duty toward a certain member of the public and undertakes action on behalf of that member thereby inducing reliance, when an express promise to warn of a danger has induced reliance, or when the actions of CHP place a person in peril or increase the risk of harm. In other words, to create a special relationship and a duty of care, there must be evidence that CHP ' "made misrepresentations that induced a citizen's detrimental reliance [citation], placed a citizen in harm's way [citations], or lulled a citizen into a false sense of security and then withdrew essential safety precautions." ' Nonfeasance that leaves the citizen in exactly the same position that he or she already occupied cannot support a finding of duty of care. Affirmative conduct or misfeasance on the part of CHP that induces reliance or changes the risk of harm is required." (*Greyhound Lines, Inc. v. Department of the California Highway Patrol* (2013) 213 Cal.App.4th

1129, 1136 [152 Cal.Rptr.3d 492], internal citations omitted.)

- Statutory exceptions to Good Samaritan liability include immunities under certain circumstances for medical licensees (Bus. & Prof. Code, §§ 2395–2398), nurses (Bus. & Prof. Code, §§ 2727.5, 2861.5), dentists (Bus. & Prof. Code, § 1627.5), rescue teams (Health & Saf. Code, § 1317(f)), persons rendering emergency medical services (Health & Saf. Code, § 1799.102), paramedics (Health & Saf. Code, § 1799.104), and first-aid volunteers (Gov. Code, § 50086).

Secondary Sources

4 Witkin, California Procedure (5th ed. 2008) Pleadings, § 594

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1060–1065

Haning, et al., California Practice Guide: Personal Injury, Ch. 2(II)-I, *Negligence Liability Based On Omission To Act—Legal Duty Arising From "Special Relationship,"* ¶¶ 2:1985, 2:2005 (The Rutter Group)

1 Levy et al., California Torts, Ch. 1, *Negligence: Duty and Breach*, § 1.11 (Matthew Bender)

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

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.32[5][c] (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence*, § 165.150 (Matthew Bender)

451. Affirmative Defense—Contractual Assumption of Risk

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

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

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

New September 2003; Revised December 2011

Directions for Use

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

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

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

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

Sources and Authority

- Contract Releasing Party From Liabilty for Fraud or Willful Injury is Against Public Policy. Civil

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

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

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

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

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

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

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

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

- "Plaintiffs assert that Jerid did not 'freely and knowingly' enter into the Release because (1) the [defendant's] employee represented the Release was a sign-in sheet; (2) the metal clip of the

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

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

Secondary Sources

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

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

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

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

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

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

454. Affirmative Defense—Statute of Limitations

[*Name of defendant***] contends that [***name of plaintiff***]'s lawsuit was not filed within the time set by law. To succeed on this defense, [***name of defendant***] must prove that [***name of plaintiff***]'s claimed harm occurred before [***insert date from applicable statute of limitation***].**

New April 2007; Revised December 2007

Directions for Use

This instruction states the common-law rule that an action accrues on the date of injury. (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1109 [245 Cal.Rptr. 658, 751 P.2d 923].) The date to be inserted is the applicable limitation period before the filing date. For example, if the limitation period is two years and the filing date is August 31, 2007, the date is August 31, 2005.

For an instruction on the delayed-discovery rule, see CACI No. 455, *Statute of Limitations—Delayed Discovery*. See also verdict form CACI No. VF-410, *Statute of Limitations—Delayed Discovery—Reasonable Investigation Would Not Have Disclosed Pertinent Facts.*

Do not use this instruction for attorney malpractice. (See CACI No. 610, *Affirmative Defense—Statute of Limitations—Attorney Malpractice—One-Year Limit,* and CACI No. 611, *Affirmative Defense—Statute of Limitations—Attorney Malpractice—Four-Year Limit.*)

"Claimed harm" refers to all of the elements of the cause of action, which must have occurred before the cause of action accrues and the limitation period begins. (*Glue-Fold, Inc. v. Slautterback Corp.* (2000) 82 Cal.App.4th 1018, 1029 [98 Cal.Rptr.2d 661].) In some cases, it may be necessary to modify this term to refer to specific facts that give rise to the cause of action.

Sources and Authority

- Two-Year Statute of Limitations. Code of Civil Procedure section 335.1. ~~provides a two-year limitation period for an action for assault, battery, or injury to, or for the death of, an individual caused by the wrongful act or neglect of another.~~

- Three-Year Statute of Limitations. Code of Civil Procedure section 338(c). ~~provides a three-year limitation period for an action for taking, detaining, or injuring any goods or chattels, including an action for the specific recovery of personal property.~~

- One-Year Statute of Limitations. Code of Civil Procedure section 340.2(c). ~~provides a one-year limitation period for an action for the wrongful death of any plaintiff's decedent, based on exposure to asbestos, measured by the later of the date of death or the date the plaintiff first knew, or through the exercise of reasonable diligence should have known, that the death was caused or contributed to by exposure to asbestos.~~

- "A limitation period does not begin until a cause of action accrues, i.e., all essential elements are present and a claim becomes legally actionable." (*Glue-Fold, Inc., supra,* 82 Cal.App.4th at p. 1029, internal citations omitted.)

- "Where, as here, 'damages are an element of a cause of action, the cause of action does not accrue until the damages have been sustained. … "Mere threat of future harm, not yet realized, is not enough." … "Basic public policy is best served by recognizing that damage is necessary to mature such a cause of action." … Therefore, when the wrongful act does not result in immediate damage, "the cause of action does not accrue prior to the maturation of perceptible harm." ' " (*Thomson v. Canyon* (2011) 198 Cal.App.4th 594, 604 [129 Cal.Rptr.3d 525].)

- " '[O]nce plaintiff has suffered actual and appreciable harm, neither the speculative nor uncertain character of damages nor the difficulty of proof will toll the period of limitation.' Cases contrast actual and appreciable harm with nominal damages, speculative harm or the threat of future harm. The mere breach of duty—causing only nominal damages, speculative harm or the threat of future harm not yet realized—normally does not suffice to create a cause of action." (*San Francisco Unified School Dist. v. W. R. Grace & Co.* (1995) 37 Cal.App.4th 1318, 1326 [44 Cal.Rptr.2d 305], internal citations omitted.)

- "Generally, the bar of the statute of limitations is raised as an affirmative defense, subject to proof by the defendant." (*Czajkowski v. Haskell & White* (2012) 208 Cal.App.4th 166, 174 [144 Cal.Rptr.3d 522].)

- " '[R]esolution of the statute of limitations issue is normally a question of fact … .' " (*Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 487 [59 Cal.Rptr.2d 20, 926 P.2d 1114].)

Secondary Sources

3 Witkin, California Procedure (5th ed. 2008) Actions, §§ 493–507, 553–592, 673

5 Levy et al., California Torts, Ch. 71, *Commencement, Prosecution, and Dismissal of Tort Actions*, §§ 71.01–71.06 (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions*, §§ 345.19, 345.20 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.150 (Matthew Bender)

14 California Points and Authorities, Ch. 143, *Limitation of Actions*, §§ 143.20–143.65 (Matthew Bender)

1 Matthew Bender Practice Guide: California Pretrial Civil Procedure, Ch. 4, *Limitation of Actions*, 4.05, 4.14, 4.38, 4.39

463. Dog Bite Statute (Civ. Code, § 3342)—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***]'s dog bit [him/her] and that [***name of defendant***] is responsible for that harm.**

People who own dogs can be held responsible for the harm from a dog bite, no matter how carefully they guard or restrain their dogs.

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

1. **That [***name of defendant***] owned a dog;**
2. **That the dog bit [***name of plaintiff***] while [he/she] was in a public place or lawfully on private property;**
3. **That [***name of plaintiff***] was harmed; and**
4. **That [***name of defendant***]'s dog was a substantial factor in causing [***name of plaintiff***]'s harm.**

[[*Name of plaintiff***] was lawfully on private property of the owner if [he/she] was performing any duty required by law or was on the property at the invitation, express or implied, of the owner.]**

New September 2003; Revised April 2007

Directions for Use

Read the last optional paragraph if there is an issue regarding whether the plaintiff was lawfully on private property when he or she was bitten.

For an instruction on common-law liability based on the defendant's knowledge of his or her pet's dangerous propensities, see CACI No. 462, *Strict Liability for Injury Caused by Domestic Animal With Dangerous Propensities—Essential Factual Elements.*

Sources and Authority

- Liability for Dog Bites. Civil Code section 3342(a). ~~provides: "The owner of any dog is liable for the damages suffered by any person who is bitten by the dog while in a public place or lawfully in a private place, including the property of the owner of the dog, regardless of the former viciousness of the dog or the owner's knowledge of such viciousness. A person is lawfully upon the private property of such owner within the meaning of this section when he is on such property in the performance of any duty imposed upon him by the laws of this state or by the laws or postal regulations of the United States, or when he is on such property upon the invitation, express or implied, of the owner."~~

- This statute creates an exception to the general rule that an owner is not strictly liable for harm caused by a domestic animal absent knowledge of the animal's vicious propensity. (*Hicks v. Sullivan* (1932) 122 Cal.App. 635, 639 [10 P.2d 516].)

- It is not necessary that the skin be broken in order for the statute to apply. (*Johnson v. McMahan* (1998) 68 Cal.App.4th 173, 176 [80 Cal.Rptr.2d 173].)

- "The defenses of assumption of the risk and contributory negligence may still be asserted" in an action brought under section 3342. (*Johnson, supra,* 68 Cal.App.4th at p. 176.)

- "A veterinarian or a veterinary assistant who accepts employment for the medical treatment of a dog, aware of the risk that *any* dog, regardless of its previous nature, might bite while being treated, has assumed this risk as part of his or her occupation." (*Nelson v. Hall* (1985) 165 Cal.App.3d 709, 715 [211 Cal.Rptr. 668], original italics.)

- "[Plaintiff], by virtue of the nature of her occupation as a kennel worker, assumed the risk of being bitten or otherwise injured by the dogs under her care and control while in the custody of the commercial kennel where she worked pursuant to a contractual boarding agreement. The Court of Appeal correctly concluded a strict liability cause of action under the dog bite statute (§ 3342) was therefore unavailable to [plaintiff]." (*Priebe v. Nelson* (2006) 39 Cal.4th 1112, 1132 [47 Cal.Rptr.3d 553, 140 P.3d 848].)

- The definition of "lawfully upon the private property of such owner" effectively prevents trespassers from obtaining recovery under the Dog Bite Statute. (*Fullerton v. Conan* (1948) 87 Cal.App.2d 354, 358 [197 P.2d 59].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1408–1412

California Tort Guide (Cont.Ed.Bar 3d ed.) § 3.2

1 Levy et al., California Torts, Ch. 6, *Strict Liability for Injuries Caused by Animals*, § 6.12 (Matthew Bender)

3 California Forms of Pleading and Practice, Ch. 23, *Animals: Civil Liability* (Matthew Bender)

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

1 California Civil Practice: Torts (Thomson West) § 2:16

503A. Psychotherapist's Duty to Protect Intended Victim From Patient's Threat

[*Name of plaintiff***] claims that [***name of defendant***]'s failure to protect [***name of plaintiff/decedent***] was a substantial factor in causing [injury to [***name of plaintiff***]/the death of [***name of decedent***]]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was a psychotherapist;**
2. **That [***name of patient***] was [***name of defendant***]'s patient;**
3. **That [***name of patient***] communicated to [***name of defendant***] a serious threat of physical violence;**
4. **That [***name of plaintiff/decedent***] was a reasonably identifiable victim of [***name of patient***]'s threat;**
5. **That [***name of patient***] [injured [***name of plaintiff***]/killed [***name of decedent***]];**
6. **That [***name of defendant***] failed to make reasonable efforts to protect [***name of plaintiff/decedent***]; and**
7. **That [***name of defendant***]'s failure was a substantial factor in causing [[***name of plaintiff***]'s injury/the death of [***name of decedent***]].**

Derived from former CACI No. 503 April 2007; Revised June 2013

Directions for Use

Read this instruction for a *Tarasoff* cause of action for professional negligence against a psychotherapist for failure to protect a victim from a patient's act of violence after the patient communicated to the therapist a threat against the victim. (See *Tarasoff v. Regents of Univ. of Cal.* (1976) 17 Cal.3d 425 [131 Cal.Rptr. 14, 551 P.2d 334].) The liability imposed by *Tarasoff* is modified by the provisions of Civil Code section 43.92(a). First read CACI No. 503B, *Affirmative Defense—Psychotherapist's Communication of Threat to Victim and Law Enforcement*, if the therapist asserts that he or she is immune from liability under Civil Code section 43.92(b) because he or she made reasonable efforts to communicate the threat to the victim and to a law enforcement agency.

In a wrongful death case, insert the name of the decedent victim where applicable.

Sources and Authority

- Limited Psychotherapist Immunity. Civil Code section 43.92(a) ~~provides:~~.

  ~~"There shall be no monetary liability on the part of, and no cause of action shall arise against, any person who is a psychotherapist as defined in Section 1010 of the Evidence Code in failing to protect~~

~~from a patient's threatened violent behavior or failing to predict and protect from a patient's violent behavior except if the patient has communicated to the psychotherapist a serious threat of physical violence against a reasonably identifiable victim or victims."~~

- "[T]herapists cannot escape liability merely because [the victim] was not their patient. When a therapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger. The discharge of this duty may require the therapist to take one or more of various steps, depending upon the nature of the case. Thus it may call for him to warn the intended victim or others likely to apprise the victim of the danger, to notify the police, or to take whatever other steps are reasonably necessary under the circumstances." (*Tarasoff, supra*, 17 Cal.3d at p. 431.)

- Civil Code section 43.92 was enacted to limit the liability of psychotherapists under *Tarasoff* regarding a therapist's duty to warn an intended victim. (*Barry v. Turek* (1990) 218 Cal.App.3d 1241, 1244–1245 [267 Cal.Rptr. 553].) Under this provision, "[p]sychotherapists thus have immunity from *Tarasoff* claims except where the plaintiff proves that the patient has communicated to his or her psychotherapist a serious threat of physical violence against a reasonably identifiable victim or victims." (*Barry, supra*, 218 Cal.App.3d at p. 1245.)

- "When the communication of the serious threat of physical violence is received by the therapist from a member of the patient's immediate family and is shared for the purpose of facilitating and furthering the patient's treatment, the fact that the family member is not technically a 'patient' is not crucial to the statute's purpose." (*Ewing v. Goldstein* (2004) 120 Cal.App.4th 807, 817 [15 Cal.Rptr.3d 864].)

- "Section 43.92 strikes a reasonable balance in that it does not compel the therapist to predict the dangerousness of a patient. Instead, it requires the therapist to attempt to protect a victim under limited circumstances, even though the therapist's disclosure of a patient confidence will potentially disrupt or destroy the patient's trust in the therapist. However, the requirement is imposed upon the therapist only after he or she determines that the patient has made a credible threat of serious physical violence against a person." (*Calderon v. Glick* (2005) 131 Cal.App.4th 224, 231 [31 Cal.Rptr.3d 707].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1050, 1051

32 California Forms of Pleading and Practice, Ch. 361A, *Mental Heath and Mental Disabilities: Judicial Commitment, Health Services and Civil Rights*, § 361A.93 (Matthew Bender)

11 California Points and Authorities, Ch. 117, *Insane and Incompetent Persons: Actions Involving Mental Patients*, § 117.30 (Matthew Bender)

503B. Affirmative Defense—Psychotherapist's Communication of Threat to Victim and Law Enforcement

[*Name of defendant***] is not responsible for [[***name of plaintiff***]'s injury/the death of [***name of decedent***]] if [***name of defendant***] proves that [he/she] made reasonable efforts to communicate the threat to [***name of plaintiff/decedent***] and to a law enforcement agency.**

Derived from former CACI No. 503 April 2007; Revised June 2013

Directions for Use

Read this instruction for a *Tarasoff* cause of action for professional negligence against a psychotherapist (*Tarasoff v. Regents of Univ. of Cal.* (1976) 17 Cal.3d 425 [131 Cal.Rptr. 14, 551 P.2d 334]) if there is a dispute of fact regarding whether the defendant made reasonable efforts to communicate to the victim and to a law enforcement agency a threat made by the defendant's patient. The therapist is immune from liability under *Tarasoff* if he or she makes reasonable efforts to communicate the threat to the victim and to a law enforcement agency. (Civ. Code, § 43.92(b).) CACI No. 503A, *Psychotherapist's Duty to Protect Intended Victim From Patient's Threat*, sets forth the elements of a *Tarasoff* cause of action if the defendant is not immune.

In a wrongful death case, insert the name of the decedent victim where applicable.

Sources and Authority

- Limited Psychotherapist Immunity. Civil Code section 43.92(b). ~~provides:~~

  ~~"There shall be no monetary liability on the part of, and no cause of action shall arise against, a psychotherapist who, under the limited circumstances specified in subdivision (a), discharges his or her duty to protect by making reasonable efforts to communicate the threat to the victim or victims and to a law enforcement agency."~~

- Failure to inform a law enforcement agency concerning a homicidal threat made by a patient against his work supervisor did not abrogate the "firefighter's rule" and, therefore, did not render the psychiatrist liable to a police officer who was subsequently shot by the patient. (*Tilley v. Schulte* (1999) 70 Cal.App.4th 79, 85–86 [82 Cal.Rptr.2d 497].)

- "When the communication of the serious threat of physical violence is received by the therapist from a member of the patient's immediate family and is shared for the purpose of facilitating and furthering the patient's treatment, the fact that the family member is not technically a 'patient' is not crucial to the statute's purpose." (*Ewing v. Goldstein* (2004) 120 Cal.App.4th 807, 817 [15 Cal.Rptr.3d 864].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1050, 1051

32 California Forms of Pleading and Practice, Ch. 361A, *Mental Heath and Mental Disabilities: Judicial Commitment, Health Services and Civil Rights*, § 361A.93 (Matthew Bender)

11 California Points and Authorities, Ch. 117, *Insane and Incompetent Persons: Actions Involving Mental Patients*, § 117.30 (Matthew Bender)

511. Wrongful Birth—Sterilization/Abortion—Essential Factual Elements

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[*Name of plaintiff***] claims that [***name of defendant***] negligently failed to prevent the birth of her child. To establish this claim, [***name of plaintiff***] must prove both of the following:**

1. **That [***name of defendant***] performed a negligent [sterilization/abortion] procedure; and**

2. **That [***name of plaintiff***] gave birth to an unplanned child after this procedure was performed.**

New September 2003

Directions for Use

The general medical negligence instructions-instructions on the standard of care and causation-could be used in conjunction with this one.

Sources and Authority

- No Defense for Parent's Failure or Refusal to Prevent Live Birth. Civil Code section 43.6(b).

- "California law now permits a mother to hold medical personnel liable for their negligent failure to prevent or to terminate a pregnancy." (*Foy v. Greenblott* (1983) 141 Cal.App.3d 1, 8 [190 Cal.Rptr. 84].)

- Negligent sterilization procedure that leads to the birth of a child, either normal or disabled, can form the basis of a wrongful birth action. (*Custodio v. Bauer* (1967) 251 Cal.App.2d 303, 323-325 [59 Cal.Rptr. 463]; *Morris v. Frudenfeld* (1982) 135 Cal.App.3d 23, 37 [185 Cal.Rptr. 76].) The same is true of an unsuccessful abortion procedure. (*Stills v. Gratton* (1976) 55 Cal.App.3d 698, 707-709 [127 Cal.Rptr. 652].)

- A wrongful birth claim based on a negligently performed sterilization or abortion procedure does not support an action for wrongful life: "California courts do recognize a wrongful life claim by an `impaired' child for special damages (but not for general damages), when the physician's negligence is the proximate cause of the child's need for extraordinary medical care and training. No court, however, has expanded tort liability to include wrongful life claims by children born without any mental or physical impairment." (*Alexandria S. v. Pac. Fertility Medical Ctr.* (1997) 55 Cal.App.4th 110, 122 [64 Cal.Rptr.2d 23].)

- ~~Civil Code section 43.6(b) provides: "The failure or refusal of a parent to prevent the live birth of his or her child shall not be a defense in any action against a third party, nor shall the failure or refusal be considered in awarding damages in any such action."~~

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 977

California Tort Guide (Cont.Ed.Bar 3d ed.) § 9.22

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, §§ 31.15, 31.50 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 415, *Physicians: Medical Malpractice*, § 415.17 (Matthew Bender)

513. Wrongful Life—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] was negligent because [he/she] failed to inform [***name of plaintiff***]'s parents of the risk that [he/she] would be born [genetically impaired/disabled]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

[1. That [*name of defendant***] negligently failed to [diagnose/ [or] warn [***name of plaintiff***]'s parents of] the risk that [***name of plaintiff***] would be born with a [genetic impairment/disability];]**

[*or*]

[1. That [*name of defendant***] negligently failed to [perform appropriate tests/advise [***name of plaintiff***]'s parents of tests] that would more likely than not have disclosed the risk that [***name of plaintiff***] would be born with a [genetic impairment/disability];]**

2. That [*name of plaintiff***] was born with a [genetic impairment/disability];**

3. That if [*name of plaintiff***]'s parents had known of the [genetic impairment/disability], [his/her] mother would not have conceived [him/her] [or would not have carried the fetus to term]; and**

4. That [*name of defendant***]'s negligence was a substantial factor in causing [***name of plaintiff***]'s parents to have to pay extraordinary expenses for [***name of plaintiff***].**

New September 2003; Revised April 2007, April 2008

Directions for Use

The general medical negligence instructions on the standard of care and causation (see CACI Nos. 500–502) may be used in conjunction with this instruction. Read also CACI No. 512, *Wrongful Birth—Essential Factual Elements*, if the parents' cause of action for wrongful birth is joined with the child's cause of action for wrongful life.

In element 1, select the first option if the claim is that the defendant failed to diagnose or warn the plaintiff of a possible genetic impairment. Select the second option if the claim is that the defendant failed to order or advise of available genetic testing. In a testing case, there is no causation unless the chances that the test would disclose the impairment were at least 50 percent. (See *Simmons v. West Covina Medical Clinic* (1989) 212 Cal.App.3d 696, 702–703 [260 Cal.Rptr. 772].)

In order for this instruction to apply, the genetic impairment must result in a physical or mental disability. This is implied by the fourth element in the instruction.

Sources and Authority

- No Wrongful Life Claim Against Parent. Civil Code section 43.6(a).

- "[I]t may be helpful to recognize that although the cause of action at issue has attracted a special name—'wrongful life'—plaintiff's basic contention is that her action is simply one form of the familiar medical or professional malpractice action. The gist of plaintiff's claim is that she has suffered harm or damage as a result of defendants' negligent performance of their professional tasks, and that, as a consequence, she is entitled to recover under generally applicable common law tort principles." (*Turpin v. Sortini* (1982) 31 Cal.3d 220, 229 [182 Cal.Rptr. 337, 643 P.2d 954].)

- "Claims for 'wrongful life' are essentially actions for malpractice based on negligent genetic counseling and testing." (*Gami v. Mullikin Medical Center* (1993) 18 Cal.App.4th 870, 883 [22 Cal.Rptr.2d 819].)

- General damages are not available: "[W]e conclude that while a plaintiff-child in a wrongful life action may not recover general damages for being born impaired as opposed to not being born at all, the child—like his or her parents—may recover special damages for the extraordinary expenses necessary to treat the hereditary ailment." (*Turpin, supra,* 31 Cal.3d at p. 239.)

- A child may not recover for loss of earning capacity in a wrongful-life action. (*Andalon v. Superior Court* (1984) 162 Cal.App.3d 600, 614 [208 Cal.Rptr. 899].)

- The negligent failure to administer a test that had only a 20 percent chance of detecting Down syndrome did not establish a reasonably probable causal connection to the birth of a child with this genetic abnormality. (*Simmons, supra*.)

- Wrongful life does not apply to normal children. (*Alexandria S. v. Pac. Fertility Medical Ctr.* (1997) 55 Cal.App.4th 110, 122 [64 Cal.Rptr.2d 23].)

- ~~Civil Code section 43.6(a) provides: "No cause of action arises against a parent of a child based upon the claim that the child should not have been conceived or, if conceived, should not have been allowed to have been born alive."~~

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 979–985

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 9.21–9.22

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, §§ 31.15, 31.50 (Matthew Bender)

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

16 California Points and Authorities, Ch. 165, *Negligence*, § 165.70 (Matthew Bender)

518. Medical Malpractice: Res ipsa loquitur

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

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

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

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

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

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

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

New September 2003; Revised December 2011

Directions for Use

The first paragraph of this instruction sets forth the three elements of res ipsa loquitur. The bracketed sentence in element 1 should be read only if expert testimony is introduced. The word "only" within that sentence is to be used if the court has determined that the issue of the defendant's negligence involves matters beyond common knowledge.

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

If the plaintiff has established the three conditions that give rise to the doctrine, the jury is required to

find that the accident resulted from the defendant's negligence unless the defendant comes forward with evidence that would support a contrary finding. (See Cal. Law Revision Com. comment to Evid. Code, § 646.) The last two paragraphs of the instruction assume that the defendant has presented evidence that would support a finding that the defendant was not negligent or that any negligence on the defendant's part was not a proximate cause of the accident. In this case, the presumption drops out, and the plaintiff must then prove the elements of negligence without the benefit of the presumption of res ipsa loquitur. (See *Howe, supra,* 189 Cal.App.4th at pp. 1163–1164; see also Evid. Code, § 646(c).)

Sources and Authority

- Res ipsa loquitur. Evidence Code section 646(c). ~~provides:~~

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

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

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

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

- "In California, the doctrine of res ipsa loquitur is defined by statute as 'a presumption affecting the burden of producing evidence.' The presumption arises when the evidence satisfies three conditions: ' "(1) the accident must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff." ' A presumption affecting the burden of producing evidence 'require[s] the trier of fact to assume the existence of the presumed fact' unless the defendant introduces evidence to the contrary. The presumed fact, in this context, is that 'a proximate cause of the occurrence was some negligent conduct on the part of the defendant. ...' If the defendant introduces `evidence which would support a finding that he was not negligent or that any negligence on his part was not a proximate cause of the occurrence,' the trier of fact determines whether defendant was negligent without regard to the

presumption, simply by weighing the evidence." (*Brown v. Poway Unified School Dist.* (1993) 4 Cal.4th 820, 825–826 [15 Cal.Rptr.2d 679, 843 P.2d 624], internal citations omitted.)

- " 'The doctrine of res ipsa loquitur is applicable where the accident is of such a nature that it can be said, in the light of past experience, that it probably was the result of negligence by someone and that the defendant is probably the one responsible.' " (*Howe, supra,* 189 Cal.App.4th at p. 1161.)

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

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

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

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

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

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

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

- "The purpose of [the third] requirement, like that of control by the defendant is to establish that the defendant is the one probably responsible for the accident. The plaintiff need not show that he was entirely inactive at the time of the accident in order to satisfy this requirement, so long as the evidence

is such as to eliminate his conduct as a factor contributing to the occurrence." (*Newing, supra*, 15 Cal.3d at p. 363, internal citations omitted.)

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

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

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

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

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

Secondary Sources

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

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

(Matthew Bender)

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

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

531. Consent on Behalf of Another

In this case [*name of patient***] could not consent to the [***insert medical procedure***] because [he/she] was [***insert reason—e.g., a minor/incompetent/unconscious***]. In this situation, the law allows [***name of authorized person***] to give consent on behalf of [***name of patient***].**

You must decide whether [*name of authorized person***] consented to the [***insert medical procedure***] performed on [***name of patient***].**

New September 2003

Sources and Authority

- Parent Delegation of Right to Authorize Medical Care. Family Code section 6910.

- "If the patient is a minor or incompetent, the authority to consent is transferred to the patient's legal guardian or closest available relative." (*Cobbs v. Grant* (1972) 8 Cal.3d 229, 244 [104 Cal.Rptr. 505, 502 P.2d 1]; *Farber v. Olkon* (1953) 40 Cal.2d 503, 509 [254 P.2d 520].)

- ~~Family Code section 6910 provides: "The parent, guardian, or caregiver of a minor who is a relative of the minor and who may authorize medical care and dental care under Section 6550, may authorize in writing an adult into whose care a minor has been entrusted to consent to medical care or dental care, or both, for the minor."~~

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 389, 392

California Tort Guide (Cont.Ed.Bar 3d ed.) § 9.16

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.14 (Matthew Bender)

6 California Forms of Pleading and Practice, Ch. 58, *Assault and Battery*, § 58.14

32 California Forms of Pleading and Practice, Ch. 365, *Minors: Contract Actions*, § 365.13; Ch. 366, *Minors: Court Consent for Medical Care or Enlistment*, § 366.10 (Matthew Bender)

34 California Forms of Pleading and Practice, Ch. 394, *Parent and Child*, § 394.54 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 415, *Physicians: Medical Malpractice*, § 415.13 (Matthew Bender)

33 California Legal Forms, Ch. 104, *Health Care Transactions, Consents, and Directives*, § 104.11

(Matthew Bender)

554. Affirmative Defense—Emergency

[*Name of defendant***] claims that [he/she] did not have to obtain [***name of patient/authorized person***]'s informed consent to the [***insert medical procedure***] because an emergency existed.**
To succeed, [*name of defendant***] must prove both of the following:**

1. **That [***name of defendant***] reasonably believed the [***insert medical procedure***] had to be done immediately in order to preserve the life or health of [***name of patient***]; and**

2. **That [***insert one or more of the following:***]**

   [[*name of patient***] was unconscious] [or]**

   [there was not enough time to inform [*name of patient***]] [or]**

   [there was not enough time to get consent from an authorized person].

New September 2003

Directions for Use

``Whenever appropriate, the court should instruct the jury on the defenses available to a doctor who has failed to make the disclosure required by law.'' (*Cobbs v. Grant* (1972) 8 Cal.3d 229, 245 [104 Cal.Rptr. 505, 502 P.2d 1].) This instruction could be modified to cover ``informed refusal'' cases by redrafting it to state, in substance, that the emergency situation made it impossible to inform the patient regarding the risks of refusing the test.

Sources and Authority

- When Consent Not Required. Business and Professions Code sections 2397(a) (doctor), 1627.7(a) (dentist).

- Consent is implied in an emergency situation. (*Cobbs, supra,* 8 Cal.3d at p. 243.)

- ~~Business and Professions Code sections 2397(a) and 1627.7(a) provide that a medical practitioner shall not be liable for injury caused in emergency situations by reason of the failure to inform if: (1) the patient was unconscious, (2) there was not enough time to inform the patient, or (3) there was not enough time to get consent from an authorized person.~~

- This defense is considered a ``justification.'' Justification for failure to disclose is an affirmative defense on which the defendant has the burden of proof. (*Mathis v. Morrissey* (1992) 11 Cal.App.4th 332, 347, fn. 9 [13 Cal.Rptr.2d 819].)

- The existence of an emergency situation can also be a defense to battery. (*Wheeler v. Barker* (1949)

92 Cal.App.2d 776, 781 [208 P.2d 68]; *Preston v. Hubbell* (1948) 87 Cal.App.2d 53, 57-58 [196 P.2d 113]; *Hundley v. St. Francis Hospital* (1958) 161 Cal.App.2d 800, 802 [327 P.2d 131].)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, § 399

California Tort Guide (Cont.Ed.Bar 3d ed.) § 9.15

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, §§ 31.14, 31.62 (Matthew Bender)

6 California Forms of Pleading and Practice, Ch. 58, *Assault and Battery*, § 58.14 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 415, *Physicians: Medical Malpractice*, § 415.13[7] (Matthew Bender)

2 California Points and Authorities, Ch. 21, *Assault and Battery*, § 21.38 (Matthew Bender)

33 California Legal Forms, Ch. 104, *Health Care Transactions, Consents, and Directives*, § 104.11 (Matthew Bender)

600. Standard of Care

[A/An] [*insert type of professional***] is negligent if [he/she] fails to use the skill and care that a reasonably careful [***insert type of professional***] would have used in similar circumstances. This level of skill, knowledge, and care is sometimes referred to as "the standard of care."**

[You must determine the level of skill and care that a reasonably careful [*insert type of professional***] would use in similar circumstances based only on the testimony of the expert witnesses[, including [***name of defendant***],] who have testified in this case.]**

New September 2003; Revised October 2004, December 2007

Directions for Use

Use this instruction for all professional negligence cases other than professional medical negligence, for which CACI No. 501, *Standard of Care for Health Care Professionals,* should be used. See CACI No. 400, *Negligence—Essential Factual Elements,* for an instruction on the plaintiff's burden of proof. The word "legal" or "professional" should be added before the word "negligence" in the first paragraph of CACI No. 400. (See *Sources and Authority* following CACI No. 500, *Medical Negligence—Essential Factual Elements*.)

Read the second paragraph if the standard of care must be established by expert testimony.

See CACI Nos. 219–221 on evaluating the credibility of expert witnesses.

If the defendant is a specialist in his or her field, this instruction should be modified to reflect that the defendant is held to the standard of care of a specialist. (*Wright v. Williams* (1975) 47 Cal.App.3d 802, 810 [121 Cal.Rptr. 194].) The standard of care for claims related to a specialist's expertise is determined by expert testimony. (*Id*. at pp. 810–811.)

Whether an attorney-client relationship exists is a question of law. (*Responsible Citizens v. Superior Court* (1993) 16 Cal.App.4th 1717, 1733 [20 Cal.Rptr.2d 756].) If the evidence bearing upon this decision is in conflict, preliminary factual determinations are necessary. (*Ibid*.) Special instructions may need to be crafted for that purpose.

Sources and Authority

- "The elements of a cause of action in tort for professional negligence are (1) the duty of the professional to use such skill, prudence, and diligence as other members of his profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional's negligence." (*Budd v. Nixen* (1971) 6 Cal.3d 195, 200 [98 Cal.Rptr. 849, 491 P.2d 433].)

- " 'In addressing breach of duty, "the crucial inquiry is whether [the attorney's] advice was so legally deficient when it was given that he [or she] may be found to have failed to use 'such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake.' …" … ' " (*Blanks v. Seyfarth Shaw LLP* (2009) 171 Cal.App.4th 336, 357 [89 Cal.Rptr.3d 710].)

- "[T]he issue of negligence in a legal malpractice case is ordinarily an issue of fact." (*Blanks, supra*, 171 Cal.App.4th at p. 376.)

- "It is well settled that an attorney is liable for malpractice when his negligent investigation, advice, or conduct of the client's affairs results in loss of the client's meritorious claim." (*Gutierrez v. Mofid* (1985) 39 Cal.3d 892, 900 [218 Cal.Rptr. 313, 705 P.2d 886].)

- "[A] lawyer holding himself out to the public and the profession as specializing in an area of the law must exercise the skill, prudence, and diligence exercised by other specialists of ordinary skill and capacity specializing in the same field." (*Wright, supra*, 47 Cal.App.3d at p. 810.)

- "To establish a [professional] malpractice claim, a plaintiff is required to present expert testimony establishing the appropriate standard of care in the relevant community. 'Standard of care " 'is a matter peculiarly within the knowledge of experts; it presents the basic issue in a malpractice action and can only be proved by their testimony [citations] … .' " [Citation.]' " (*Quigley v. McClellan* (2013) 214 Cal.App.4th 1276, 1283 [154 Cal.Rptr.3d 719], internal citations omitted.)

- " ' … "[W]here the failure of attorney performance is so clear that a trier of fact may find professional negligence unassisted by expert testimony, then expert testimony is not required." In other words, if the attorney's negligence is readily apparent from the facts of the case, then the testimony of an expert may not be necessary.' " (*Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1093 [41 Cal.Rptr.2d 768], internal citations omitted.)

- "Where … the malpractice action is brought against an attorney holding himself out as a legal specialist and the claim against him is related to his expertise as such, then only a person knowledgeable in the specialty can define the applicable duty of care and opine whether it was met." (*Wright, supra*, 47 Cal.App.3d at pp. 810−811, footnote and internal citations omitted.)

- "The standard is that of members of the profession 'in the same or a similar locality under similar circumstances' … . The duty encompasses both a knowledge of law and an obligation of diligent research and informed judgment." (*Wright, supra*, 47 Cal.App.3d at p. 809, internal citations omitted; but see *Avivi v. Centro Medico Urgente Medical Center* (2008) 159 Cal.App.4th 463, 470–471 [71 Cal.Rptr.3d 707] [geographical location may be a factor to be considered, but by itself, does not provide a practical basis for measuring similar circumstances].)

- Failing to Act Competently. Rules of Professional Conduct, rule 3-110. ~~(Failing to Act Competently) provides:~~

  ~~(A) A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.~~

~~(B) For purposes of this rule, "competence" in any legal service shall mean to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service.~~

~~(C) If a member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by 1) associating with or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before performance is required.~~

Secondary Sources

1 Witkin, California Procedure (5th ed. 2008) Attorneys, §§ 290–293

4 Witkin, California Procedure (5th ed. 2008) Pleadings, § 593

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 990, 991, 994–997

Vapnek, et al., California Practice Guide: Professional Responsibility, Ch. 1-A, *Sources Of Regulation Of Practice Of Law In California-Overview*, ¶ 1:39 (The Rutter Group)

Vapnek, et al., California Practice Guide: Professional Responsibility, Ch. 6-D, *Professional Liability*, ¶¶ 6:230–6:234 (The Rutter Group)

1 Levy et al., California Torts, Ch. 1, *Negligence: Duty and Breach*, § 1.31 (Matthew Bender)

3 Levy et al., California Torts, Ch. 30, *General Principles of Liability of Professionals*, §§ 30.12, 30.13, Ch. 32, *Liability of Attorneys*, § 32.13 (Matthew Bender)

7 California Forms of Pleading and Practice, Ch. 76, *Attorney Professional Liability*, §§ 76.50, 76.51 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.50 (Matthew Bender)

2A California Points and Authorities, Ch. 24A, *Attorneys at Law: Malpractice*, § 24A.20 et seq. (Matthew Bender)

604. Referral to Legal Specialist

If a reasonably careful attorney in a similar situation would have referred [*name of plaintiff***] to a legal specialist, then [***name of defendant***] was negligent if [he/she] did not do so.**

However, if [*name of defendant***] handled the matter with as much skill and care as a reasonable legal specialist would have, then [***name of defendant***] was not negligent.**

New September 2003

Sources and Authority

- This type of an instruction was approved for use in legal malpractice cases in *Horne v. Peckham* (1979) 97 Cal.App.3d 404, 414-415 [158 Cal.Rptr. 714], disapproved on other grounds in *ITT Small Business Finance Corp. v. Niles* (1994) 9 Cal.4th 245, 256 [36 Cal.Rptr.2d 552, 885 P.2d 965].

- Failing to Act Competently. Rule of Professional Conduct: Rule 3-110(C). ~~(Failing to Act Competently) provides: "If a member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by 1) associating with or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before performance is required."~~

Secondary Sources

1 Witkin, California Procedure (4th ed. 1996) Attorneys, § 319

606. Legal Malpractice Causing Criminal Conviction—Actual Innocence

[*Name of plaintiff*] alleges that [*name of defendant*] was negligent in defending [him/her] in a criminal case, and as a result, [he/she] was wrongly convicted. To establish this claim, [*name of plaintiff*] must first prove that [he/she] was actually innocent of the charges for which [he/she] was convicted.

New April 2009

Directions for Use

Give this instruction after CACI No. 400, *Negligence—Essential Factual Elements,* and CACI No. 600, *Standard of Care,* in a legal malpractice action arising from an underlying criminal case.

To prove actual innocence, the plaintiff must first prove legal exoneration. (See *Coscia v. McKenna & Cuneo* (2001) 25 Cal.4th 1194, 1201 [108 Cal.Rptr.2d 471, 25 P.3d 670].) Presumably, exoneration will be decided by the court as a matter of law. If there is a question of fact regarding exoneration, this instruction should be modified accordingly.

However, one may be exonerated without actually being innocent of the charges; for example, by the People's decision not to retry the case on remand because of insufficient evidence. (See *Coscia, supra,* 25 Cal.4th at p. 1205 [exoneration is *prerequisite* to proving actual innocence (emphasis added)].) Do not give this instruction if the court determines as a matter of law that the exoneration does establish actual innocence; for example, if later-discovered DNA evidence conclusively proved that the plaintiff could not have committed the offense.

Sources and Authority

- Statute of Limitations: Factual Innocence. Code of Civil Procedure section 340.6(a). ~~provides in part: "If the plaintiff is required to establish his or her factual innocence for an underlying criminal charge as an element of his or her claim, the action shall be commenced within two years after the plaintiff achieves postconviction exoneration in the form of a final judicial disposition of the criminal case."~~

- "In a legal malpractice action arising from a civil proceeding, the elements are (1) the duty of the attorney to use such skill, prudence, and diligence as members of his or her profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the breach and the resulting injury; and (4) actual loss or damage resulting from the attorney's negligence. In a legal malpractice case arising out of a criminal proceeding, California, like most jurisdictions, also requires proof of actual innocence." (*Wilkinson v. Zelen* (2008) 167 Cal.App.4th 37, 45 [83 Cal.Rptr.3d 779], internal citations omitted.)

- "[T]hose policy considerations [underlying the actual-innocence requirement] are as follows. 'First, we should not permit a guilty defendant to profit from his or her own wrong. [Citation.] Second, to allow guilty defendants to shift their punishment to their former attorneys would

undermine the criminal justice system. [Citation.] Third, "a defendant's own criminal act remains the ultimate source of his predicament irrespective of counsel's subsequent negligence." [Citation.] Fourth, a guilty defendant who is convicted or given a longer sentence as a result of counsel's incompetence can obtain postconviction relief on that basis; in contrast, "a civil matter lost through an attorney's negligence is lost forever." [Citation.] Fifth, there are formidable practical problems with criminal malpractice litigation, including the difficulty of quantifying damages and the complexity of the standard of proof, which must combine the preponderance of the evidence standard with the reasonable doubt standard applicable in a criminal trial. [Citation.]' " (*Khodayari v. Mashburn* (2011) 200 Cal.App.4th 1184, 1193 [132 Cal.Rptr.3d 903].)

- "If the defendant has in fact committed a crime, the remedy of a new trial or other relief is sufficient reparation in light of the countervailing public policies and considering the purpose and function of constitutional guaranties." *Wiley v. County of San Diego* (1998) 19 Cal.4th 532, 543 [79 Cal.Rptr.2d 672, 966 P.2d 983].)

- "The question of actual innocence is inherently factual. While proof of the government's inability to prove guilt may involve technical defenses and evidentiary rules, proof of actual innocence obliges the malpractice plaintiff 'to convince the civil jurors of his innocence.' Thus, the determination of actual innocence is rooted in the goal of reliable factfinding." (*Salisbury v. County of Orange* (2005) 131 Cal.App.4th 756, 764–765 [31 Cal.Rptr.3d 831], internal citations omitted.)

- "[A]n individual convicted of a criminal offense must obtain reversal of his or her conviction, or other exoneration by postconviction relief, in order to establish actual innocence in a criminal malpractice action. … [P]ublic policy considerations require that only an innocent person wrongly convicted be deemed to have suffered a legally compensable harm. Unless a person convicted of a criminal offense is successful in obtaining postconviction relief, the policies reviewed in *Wiley* [*supra*] preclude recovery in a legal malpractice action." (*Coscia, supra,* 25 Cal.4th at p. 1201.)

- "[A] plaintiff must obtain postconviction relief in the form of a final disposition of the underlying criminal case—for example, by acquittal after retrial, reversal on appeal with directions to dismiss the charges, reversal followed by the People's refusal to continue the prosecution, or a grant of habeas corpus relief—as a prerequisite to proving actual innocence in a malpractice action against former criminal defense counsel." (*Coscia, supra,* 25 Cal.4th at p. 1205.)

- "[T]he rationale of *Wiley* and *Coscia* requires a plaintiff in a criminal legal malpractice case to show actual innocence and postconviction exoneration on any guilty finding for a lesser included offense, even though the plaintiff alleges he received negligent representation only on the greater offense." (*Sangha v. LaBarbera* (2006) 146 Cal.App.4th 79, 87 [52 Cal.Rptr.3d 640].)

- "[Plaintiff] must be exonerated of all transactionally related offenses in order to satisfy the holding in *Coscia*. Because the judicially noticed facts unequivocally demonstrate that [plaintiff] plead no contest to two offenses transactionally related to the felony charge of battery on a custodial officer in order to settle the criminal action, and she was placed on probation for those offenses, she cannot in good faith plead exoneration." (*Wilkinson, supra,* 167 Cal.App.4th at p. 48.)

Secondary Sources

1 Witkin, California Procedure (5th ed. 2008) Attorneys, § 290

Vapnek et al., California Practice Guide: Professional Responsibility, Ch. 6-G, *Professional Competence In Criminal Cases,* ¶¶ 6:935–6:944 (The Rutter Group)

3 Levy et al., California Torts, Ch. 32, *Liability of Attorneys*, § 32.02 (Matthew Bender)

7 California Forms of Pleading and Practice, Ch. 76, *Attorney Professional Liability*, §§ 76.10, 76.381 (Matthew Bender)

2A California Points and Authorities, Ch. 24A, *Attorneys at Law: Malpractice*, § 24A.32 (Matthew Bender)

701. Definition of Right-of-Way

When the law requires a [driver/pedestrian] to "yield the right-of-way" to [another/a] [vehicle/pedestrian], this means that the [driver/pedestrian] must let the [other] [vehicle/pedestrian] go first.

Even if someone has the right-of-way, that person must use reasonable care to avoid an accident.

New September 2003

Directions for Use

This instruction should be given following a reading of the appropriate Vehicle Code section.

If the case involves a statutory right-of-way, the jury could also be given instructions on negligence per se, if applicable. ~~Statutes concerning who has the right-of-way include:~~

~~Vehicle Code section 21800: Intersection Right of Way; Uncontrolled Intersection; Driver on "Terminating Highway"; Intersection Controlled by Stop Signs; Intersection with Inoperative Signals~~

~~Vehicle Code section 21801: Left-Turn Right-of-Way~~

~~Vehicle Code section 21802: Approaching Entrance to Intersection~~

~~Vehicle Code section 21803: Intersection Controlled by Yield Right-of-Way Sign~~

~~Vehicle Code section 21804: Entry onto Highway~~

~~Vehicle Code section 21805: Equestrian Crossings~~

~~Vehicle Code section 21806: Authorized Emergency Vehicles~~

Sources and Authority

- "Right of Way" Defined. Vehicle Code section 525. ~~provides: "'Right-of-way' is the privilege of the immediate use of the highway."~~
- Intersection Right of Way. Vehicle Code section 21800.
- Left Turn Right of Way. Vehicle Code section 21801.
- Approaching Entrance to Intersection. Vehicle Code section 21802.

- Intersection Controlled by Yield Right-of-Way Sign. Vehicle Code section 21803.
- Entry onto Highway. Vehicle Code section 21804.
- Equestrian Crossings. Vehicle Code section 21805.
- Authorized Emergency Vehicles. Vehicle Code section 21806.

- "Right of way rules have been described as simply establishing 'a practical basis for necessary courtesy on the highway.' " (*Eagar v. McDonnell Douglas Corp.* (1973) 32 Cal.App.3d 116, 122 [107 Cal.Rptr. 819].)

- "[A] driver entering a public highway from private property who collides with a vehicle traveling on the public road is not necessarily liable for a violation of [Vehicle Code] section 21804. Rather, the driver violates this section only if he or she fails to act as a ' "reasonably prudent and cautious [person]." ' Whether the driver failed to so act is a question of fact for the trier of fact to decide." (*Spriesterbach v. Holland* (2013) 215 Cal.App.4th 255, 266 [155 Cal.Rptr.3d 306], internal citation omitted.)

- "Of course, even if [defendant] had the right of way, he had a duty to exercise reasonable care to avoid an accident, and the jury was so instructed." (*Eagar, supra,* 32 Cal.App.3d. at p. 123, fn. 3, internal citation omitted.)

- "When, as here, each motorist has acted reasonably and the pedestrian has failed to exercise due care for her own safety, the law of this state does not permit the technical violation of the pedestrian's right of way statute to impose negligence on the motorists as a matter of law. The statute creates a preferential, but not absolute, right in favor of the pedestrian who is still under a duty to exercise ordinary care." (*Byrne v. City and County of San Francisco* (1980) 113 Cal.App.3d 731, 742 [170 Cal.Rptr. 302].)

- " 'Even where a right of way is given by statute, if conditions so require it to avoid injury to others, the right of way must be yielded.' " (*Bove v. Beckman* (1965) 236 Cal.App.2d 555, 563 [46 Cal.Rptr. 164], internal citation omitted.)

- "Although such a driver may have the right-of-way, he is not absolved of the duty to exercise ordinary care; may not proceed blindly in disregard of an obvious danger; and must be watchful of the direction in which danger is most likely to be apprehended." (*Malone v. Perryman* (1964) 226 Cal.App.2d 227, 234 [37 Cal.Rptr. 864].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 879, 880

California Tort Guide (Cont.Ed.Bar 3d ed.) § 4.15

2 Levy et al., California Torts, Ch. 20, *Motor Vehicles*, § 20.68 (Matthew Bender)

8 California Forms of Pleading and Practice, Ch. 82, *Automobiles: Causes of Action*, §§ 82.10, 82.68 (Matthew Bender)

2 California Civil Practice: Torts § 25:26 (Thomson Reuters)

704. Left Turns (Veh. Code, § 21801)

The statute just read to you uses the word "hazard." A "hazard" exists if any approaching vehicle is so near or is approaching so fast that a reasonably careful person would realize that there is a danger of a collision [or accident].

[A driver who is attempting to make a left turn must make sure that no oncoming vehicles are close enough to be a hazard before he or she proceeds across each lane.]

New September 2003

Directions for Use

The bracketed paragraph should be given in appropriate cases involving multiple lanes of oncoming traffic. (*Sesler v. Ghumman* (1990) 219 Cal.App.3d 218, 227 [268 Cal.Rptr. 70].)

Sources and Authority

- Duty to Yield Right of Way: Left Turn. Vehicle Code section 21801(a). ~~provides: "The driver of a vehicle intending to turn to the left or to complete a U-turn ... shall yield the right-of-way to all vehicles approaching from the opposite direction which are close enough to constitute a hazard at any time during the turning movement, and shall continue to yield the right-of-way to the approaching vehicles until the left turn or U-turn can be made with reasonable safety."~~

- "We hold section 21802, subdivision (a), requires that where, as here, some, but not all, of the oncoming vehicles have yielded their right-of-way to a left-turning driver, that driver has a continuing duty during the turning movement to ascertain, before proceeding across the next open lane(s), if any vehicle is approaching from the opposite direction so close as to constitute a hazard." (*Sesler, supra,* 219 Cal.App.3d at pp. 224-225)

- Noting that in 1957 the Legislature added the phrase "at any time during the turning movement" to this section, the court in *In re Kirk* (1962) 202 Cal.App.2d 288, 291 [20 Cal.Rptr. 787], reasoned that "if the oncoming vehicle in the lane closest to the left turning vehicle surrenders its right of way by indicating to the operator of the left turning vehicle that it desires him to proceed, such operator may not proceed beyond that first lane of traffic, now effectively blocked by the waiving vehicle, if in fact other vehicles approaching in any of the other oncoming lanes will constitute a hazard to the left turning vehicle during the turning movement."

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 879, 880

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 4.10-4.11

2 Levy et al., California Torts, Ch. 20, *Motor Vehicles*, § 20.68[2][g] (Matthew Bender)

705. Turning (Veh. Code, § 22107)

A driver must use reasonable care when turning [or moving to the right or to the left].

New September 2003

Directions for Use

An instruction on this point should be given only if the jury is instructed on Vehicle Code section 22107. It should be read after that section has been given. (*Anderson v. Latimer* (1985) 166 Cal.App.3d 667, 672-673 [212 Cal.Rptr. 544].)

Sources and Authority

- Turning and Changing Lanes. Vehicle Code section 22107. ~~provides: "No person shall turn a vehicle from a direct course or move right or left upon a roadway until such movement can be made with reasonable safety and then only after the giving of an appropriate signal in the manner provided in this chapter in the event any other vehicle may be affected by the movement."~~

- "This provision does not require the driver to know that a turn can be made with safety but only that he must exercise reasonable care, and whether such care has been exercised is normally a question of fact." (*Butigan v. Yellow Cab Co.* (1958) 49 Cal.2d 652, 656 [320 P.2d 500].)

- Courts have held that a reading of section 22107 should be followed by an instruction clarifying that the driver is under a duty to exercise only as much care as a reasonably prudent person when making a turn or movement: "An instruction to a jury concerning Vehicle Code, section 544 [now 22107] must make it clear that the driver who is about to turn must exercise such care as would a reasonably prudent man under similar circumstances, no more and no less." (*Lewis v. Franklin* (1958) 161 Cal.App.2d 177, 184 [326 P.2d 625].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 883, 884, 886

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 4.10-4.11

2 Levy et al., California Torts, Ch. 20, *Motor Vehicles*, § 20.67 (Matthew Bender)

8 California Forms of Pleading and Practice, Ch. 82, *Automobiles: Causes of Action*, §§ 82.66, 82.67 (Matthew Bender)

706. Basic Speed Law (Veh. Code, § 22350)

A person must drive at a reasonable speed. Whether a particular speed is reasonable depends on the circumstances such as traffic, weather, visibility, and road conditions. Drivers must not drive so fast that they create a danger to people or property.

If [*name of plaintiff/defendant***] has proved that [***name of defendant/plaintiff***] was not driving at a reasonable speed at the time of the accident, then [***name of defendant/plaintiff***] was negligent.**

New September 2003

Sources and Authority

- Speeding. Vehicle Code section 22350. ~~provides: "No person shall drive a vehicle upon a highway at a speed greater than is reasonable or prudent having due regard for weather, visibility, the traffic on, and the surface and width of, the highway, and in no event at a speed which endangers the safety of persons or property."~~

- "The so-called basic speed law is primarily a regulation of the conduct of the operators of vehicles. They are bound to know the conditions which dictate the speeds at which they can drive with a reasonable degree of safety. They know, or should know, their cars and their own ability to handle them, and especially their ability to come to a stop at different speeds and under different conditions of the surface of the highway." (*Wilding v. Norton* (1957) 156 Cal.App.2d 374, 379 [319 P.2d 440].)

- "Whether Vehicle Code section 22350 has been violated is a question of fact." (*Leighton v. Dodge* (1965) 236 Cal.App.2d 54, 57 [45 Cal.Rptr. 820], internal citation omitted.)

- "A number of cases have held that it is proper to give an instruction in the terms of this section and to inform the jury that a violation of the statute is negligence." (*Hardin v. San Jose City Lines, Inc.* (1953) 41 Cal.2d 432, 438 [260 P.2d 63].)

- The burden of proving negligence in a civil action is on the party charging negligence, and even if such party has established speed in excess of the applicable prima facie limit the party must establish negligence under the circumstances. (*Faselli v. Southern Pacific Co.* (1957) 150 Cal.App.2d 644, 648 [310 P.2d 698].)

- Compliance with the posted speed law does not negate negligence as a matter of law. (*Maxwell v. Colburn* (1980) 105 Cal.App.3d 180, 186 [163 Cal.Rptr. 912].)

- Drivers who are driving at the maximum speed limit on a multi-lane freeway are not under a duty to move their vehicles to the right into the next slower lane when another vehicle approaches them from behind in the same lane at a speed in excess of the posted maximum speed limit. (*Monreal v. Tobin* (1998) 61 Cal.App.4th 1337, 1354-1355 [72 Cal.Rptr.2d 168].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 878

California Tort Guide (Cont.Ed.Bar 3d ed.) § 4.16

2 Levy et al., California Torts, Ch. 20, *Motor Vehicles,* § 20.63[3][a] (Matthew Bender)

707. Speed Limit (Veh. Code, § 22352)

The speed limit where the accident occurred was [*insert number***] miles per hour.**

The speed limit is a factor to consider when you decide whether or not [*name of plaintiff/name of defendant***] was negligent. A driver is not necessarily negligent just because he or she was driving faster than the speed limit. However, a driver may be negligent even if he or she was driving at or below the speed limit.**

New September 2003

Sources and Authority

- Speed Limits. ~~The prima facie speed limits are set by~~ Vehicle Code section 22352.

- Speeding as Negligence. Vehicle Code section 40831. ~~provides: "In any civil action proof of speed in excess of any prima facie limit declared in Section 22352 at a particular time and place does not establish negligence as a matter of law but in all such actions it shall be necessary to establish as a fact that the operation of a vehicle at the excess speed constituted negligence."~~

- A party is entitled to an instruction that the prima facie speed limit is a factor for the jury to consider in making its negligence determination. (*Hardin v. San Jose City Lines, Inc.* (1953) 41 Cal.2d 432, 439 [260 P.2d 63].)

- "The mere driving of an automobile in excess of the speed limit does not show negligence as a matter of law. The jury was free to find [defendant] not guilty of negligence even if they found that he was exceeding the speed limit." (*Williams v. Cole* (1960) 181 Cal.App.2d 70, 74 [5 Cal.Rptr. 24], internal citations omitted.)

- The burden of proving negligence in a civil action is on the party charging negligence, and even if such party has established speed in excess of the applicable prima facie limit the party must establish negligence under the circumstances. (*Faselli v. Southern Pacific Co.* (1957) 150 Cal.App.2d 644, 648 [310 P.2d 698].)

- "Even though the Texaco truck was traveling at a speed less than the maximum specified in the Vehicle Code, the reasonableness of its speed was a question of fact under all the circumstances, and circumstances may make travel at a speed less than the maximum rate a negligent operation of a motor vehicle." (*Scott v. Texaco, Inc.* (1966) 239 Cal.App.2d 431, 436-437 [48 Cal.Rptr. 785], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 878

California Tort Guide (Cont.Ed.Bar 3d ed.) § 4.18

2 Levy et al., California Torts, Ch. 20, *Motor Vehicles*, § 20.63[2][c], [4] (Matthew Bender)

8 California Forms of Pleading and Practice, Ch. 82, *Automobiles: Causes of Action*, § 82.10 (Matthew Bender)

708. Maximum Speed Limit (Veh. Code, §§ 22349, 22356)

The maximum speed limit where the accident occurred was [*insert number*] miles per hour.

New September 2003

Directions for Use

An instruction on maximum speed limits could be useful to help frame the issue for the jury. On the other hand, a specific instruction on the maximum speed limits may be unnecessary. In the event that there is sufficient evidence to support an instruction that one of the parties violated the maximum speed limit, the judge could give the negligence per se instructions while reciting the specific code section. In that event, the judge would not give an instruction on the basic speed law. (See *Hargrave v. Winquist* (1982) 134 Cal.App.3d 916 [185 Cal.Rptr. 30].)

Sources and Authority

~~Two statutes set the maximum speed limit.~~ Generaal Maximum Speed is 65 Miles Per Hour. Vehicle Code section 22349(a).

- ~~sets the general maximum speed at 65 miles per hour, and~~ Basic Maximum Speed for Two-Lane Undivided Highways is 55 Miles Per Hour. Vehicle Code section 22349(b).

- ~~sets the basic maximum for two-lane, undivided highways at 55 miles per hour.~~ Maximum Speed at Selected Locations is 70 Miles Per Hour.Vehicle Code section 22356. ~~sets the maximum speed at 70 miles per hour at selected locations.~~

- Driving Too Slowly. Vehicle Code section 22400(a). ~~states the "minimum speed law" and provides as follows: "No person shall drive upon a highway at such a slow speed as to impede or block the normal and reasonable movement of traffic unless the reduced speed is necessary for safe operation, because of a grade, or in compliance with law. No person shall bring a vehicle to a complete stop upon a highway so as to impede or block the normal and reasonable movement of traffic unless the stop is necessary for safe operation or in compliance with law."~~

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 878

California Tort Guide (Cont.Ed.Bar 3d ed.) § 4.17

2 Levy et al., California Torts, Ch. 20, *Motor Vehicles*, § 20.63[2][b], [4][b][iii] (Matthew Bender)

709 Driving Under the Influence (Veh. Code, §§ 23152, 23153)

The statute just read to you uses the term "under the influence." A driver is not necessarily "under the influence" just because he or she has consumed some alcohol [or drugs]. A driver is "under the influence" when he or she has consumed an amount of alcohol [or drugs] that impairs his or her ability to drive in a reasonably careful manner.

New September 2003

Directions for Use

This instruction is designed to supplement a negligence per se instruction on driving under the influence.

The presumption of intoxication based on a 0.08 blood level applies to criminal prosecutions only. There is no statutory or case authority supporting the conclusion that the presumption applies in civil cases. (*Hyatt v. Sierra Boat Co.* (1978) 79 Cal.App.3d 325, 334 [145 Cal.Rptr. 47].)

For a definition of "drug," see Vehicle Code section 312: "The term 'drug' means any substance or combination of substances, other than alcohol, which could so affect the nervous system, brain, or muscles of a person as to impair, to an appreciable degree, his ability to drive a vehicle in the manner that an ordinarily prudent and cautious man, in full possession of his faculties, using reasonable care, would drive a similar vehicle under like conditions."

Sources and Authority

- Driving Under the Influence of Alcohol or Drugs. Vehicle Code sections 23152(a), 23153(a). ~~provides: "It is unlawful for any person who is under the influence of any alcoholic beverage or drug, or under the combined influence of any alcoholic beverage and drug, to drive a vehicle."~~

- ~~Vehicle Code section 23153(a) provides: "It is unlawful for any person, while under the influence of any alcoholic beverage or drug, or under the combined influence of any alcoholic beverage and drug, to drive a vehicle and concurrently do any act forbidden by law or neglect any duty imposed by law in driving the vehicle, which act or neglect proximately causes bodily injury to any person other than the driver."~~

- "All of the decided cases on the subject recognize that it is negligence as a matter of law to drive a vehicle upon a public highway while in an intoxicated condition." (*Zamucen v. Crocker* (1957) 149 Cal.App.2d 312, 316 [308 P.2d 384], internal citations omitted.)

- The term "under the influence" was first defined in *People v. Dingle* (1922) 56 Cal.App. 445, 449 [205 P. 705], as follows: "[I]f intoxicating liquor has so far affected the nervous system, brain, or muscles of the driver of an automobile as to impair, to an appreciable degree, his ability to operate his car in the manner that an ordinarily prudent and cautious man, in the full possession of his faculties, using reasonable care, would operate or drive a similar vehicle under like conditions, then such driver

is ‘under the influence of intoxicating liquor’ within the meaning of the statute.”

- “One is not necessarily under the influence of intoxicating liquor as the result of taking one or more drinks. The circumstances and effect must be considered; whether or not a person was under the influence of intoxicating liquor at a certain time is a question of fact for the jury to decide.” (*Pittman v. Boiven* (1967) 249 Cal.App.2d 207, 217 [57 Cal.Rptr. 319].)

- Driving while “under the influence” under Vehicle Code sections 23152 and 23153 is not the same as “being under the influence” of a controlled substance under Health and Safety Code section 11550. Under the Vehicle Code provisions, “the defendant’s ability to drive must actually be impaired,” while the Health and Safety Code provision is violated as soon as the influence is present “in any detectable manner.” (*People v. Enriquez* (1996) 42 Cal.App.4th 661, 665 [49 Cal.Rptr.2d 710].)

- Courts have also distinguished the “under the influence” standard from the “obvious intoxication” standard used in Business and Professions Code section 25602.1. (*Jones v. Toyota Motor Co.* (1988) 198 Cal.App.3d 364, 368 [243 Cal.Rptr. 611]: “ ‘Under the influence’ is defined by a person’s capability to drive safely, whereas ‘obvious intoxication’ is defined by a person’s appearance.”)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 883, 884, 886

California Tort Guide (Cont.Ed.Bar 3d ed.) § 4.25

2 Levy et al., California Torts, Ch. 20, *Motor Vehicles*, § 20.02[3][b] (Matthew Bender)

2 California Civil Practice: Torts ~~(Thomson West)~~ § 25:28 (Thomson Reuters)

712. Affirmative Defense—Failure to Wear a Seat Belt

[*Name of defendant***] claims that [***name of plaintiff***] was negligent because [he/she] failed to wear a seat belt. To succeed, [***name of defendant***] must prove all of the following:**

1. **That a working seat belt was available;**

2. **That a reasonably careful person in [***name of plaintiff***]'s situation would have used the seat belt;**

3. **That [***name of plaintiff***] failed to wear a seat belt; and**

4. **That [***name of plaintiff***]'s injuries would have been avoided or less severe if [he/she] had used the seat belt.**

[In deciding whether a reasonably careful person would have used a seat belt, you may consider Vehicle Code section 27315, which states: [*insert pertinent provision***].]**

New September 2003; Revised October 2008

Directions for Use

Note that the Motor Vehicle Safety Act (Veh. Code, § 27315) applies only to persons 16 years or older. (Veh. Code, § 27315(d)(1).) No case law regarding whether persons under 16 can be found comparatively negligent for failing to wear a seat belt has been found.

Sources and Authority

- Failure to Wear Seat Belt as Negligence. Vehicle Code section 27315(i). ~~provides: "In a civil action, a violation of subdivision (d), (e), or (f), or information of a violation of subdivision (h), does not establish negligence as a matter of law or negligence per se for comparative fault purposes, but negligence may be proven as a fact without regard to the violation."~~

- "Defendants ... are required to prove two issues of fact: (1) the defendant must show whether in the exercise of ordinary care the plaintiff should have used the seat belt which was available to him. ... (2) The defendant must show what the consequence to the plaintiff would have been had seat belts been used." (*Franklin v. Gibson* (1982) 138 Cal.App.3d 340, 343 [188 Cal.Rptr. 23].)

- "Upon a retrial the court or jury will determine whether in the exercise of ordinary care [plaintiff] should have used the seat belt; expert testimony will be required to prove whether [plaintiff] would have been injured, and, if so, the extent of the injuries he would have sustained if he had been using the seat belt ... ." (*Truman v. Vargas* (1969) 275 Cal.App.2d 976, 983 [80 Cal.Rptr. 373].)

- In *Housley v. Godinez* (1992) 4 Cal.App.4th 737, 747 [6 Cal.Rptr.2d 111], the court approved of the

following jury instruction, which was read in addition to section 27315: "The Defendants have raised the seat belt defense in this case. First, you must decide whether in the exercise of ordinary care, the Plaintiff should have used seat belts, if available to him. Second you must determine with expert testimony the nature of injuries and damages Plaintiff would have sustained if he had used seat belts."

- "[Section 27315] permits the civil trial courts to instruct on the existence of the seat belt statute in appropriate cases, while allowing the jury to decide what weight, if any, to give the statute in determining the standard of reasonable care." (*Housley, supra,* 4 Cal.App.4th at p. 747.)
- "[N]othing in the statute prohibits a jury from knowing and considering its very existence when determining the reasonableness of driving without a seat belt." (*Housley, supra,* 4 Cal.App.4th at p. 744.)

- "There was evidence presented that appellant's failure to wear a seat belt worsened his injuries. The foreseeability test clearly eliminates this act as a supervening cause because it is the general likelihood of the type of injury that must be unforeseeable in order to absolve defendant; the extent of injury need not be foreseeable." (*Hardison v. Bushnell* (1993) 18 Cal.App.4th 22, 28 [22 Cal.Rptr.2d 106].)

- "Expert testimony is not always required to prove that failure to use a seat belt may cause at least some, if not all, of plaintiff's claimed injuries. [¶] Depending on the facts of the case, expert testimony may be necessary for the jury to distinguish the injuries that [plaintiff] unavoidably sustained in the collision from the injuries he could have avoided if he had worn a seat belt." (*Lara v. Nevitt* (2004) 123 Cal.App.4th 454, 458–459 [19 Cal.Rptr.3d 865], internal citation omitted.)

- "The seat belt defense does not depend on a Vehicle Code violation nor is it eviscerated by a Vehicle Code exemption from the requirement to wear seat belts." (*Lara, supra,* 123 Cal.App.4th at p. 461 fn. 3.)

Secondary Sources

California Tort Guide (Cont.Ed.Bar 3d ed.) § 4.71

2 Levy et al., California Torts, Ch. 20, *Motor Vehicles*, § 20.05[2] (Matthew Bender)

8 California Forms of Pleading and Practice, Ch. 82, *Automobiles: Causes of Action*, § 82.10 (Matthew Bender)

2 California Civil Practice: Torts § 25:26 (Thomson Reuters West)

720. Motor Vehicle Owner Liability—Permissive Use of Vehicle

[*Name of plaintiff*] claims that [he/she] was harmed and that [*name of defendant*] is responsible for the harm because [*name of defendant*] gave [*name of driver*] permission to operate the vehicle. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of driver*] was negligent in operating the vehicle;**

2. **That [*name of defendant*] was an owner of the vehicle at the time of the injury to [*name of plaintiff*]; and**

3. **That [*name of defendant*], by words or conduct, gave permission to [*name of driver*] to use the vehicle.**

In determining whether permission was given, you may consider the relationship between the owner and the operator. [For example, if the parties are related or the owner and the operator are employer and employee, such a relationship may support a finding that there was implied permission to use the vehicle.]

[If the vehicle owner has given a person permission to use the vehicle, and that person authorizes a third person to operate the vehicle, the third person may be considered to have used the vehicle with the permission of the owner.]

New September 2003

Directions for Use

Separate instructions will be necessary regarding the negligence of the driver and that it caused harm to the plaintiff. Read bracketed language if appropriate to the facts. If ownership of the vehicle is uncontested, element 2 may be deleted.

Sources and Authority

- Permissive Use. Vehicle Code section 17150. ~~provides: "Every owner of a motor vehicle is liable and responsible for death or injury to person or property resulting from a negligent or wrongful act or omission in the operation of the motor vehicle, in the business of the owner or otherwise, by any person using or operating the same with the permission, express or implied, of the owner."~~

- Permissive Use: Limitation on Liability. Vehicle Code section 17151(a). ~~provides, in part: "The liability of an owner ... is limited to the amount of fifteen thousand dollars ($15,000) for the death of or injury to one person ... and ... to the amount of thirty thousand dollars ($30,000) for the death of or injury to more than one person ... and is limited to the amount of five thousand dollars ($5,000) for damage to property."~~

- The statutory limitation under section 17151(a) "does not apply ... to a vehicle owner's own common

law negligence, as distinguished from the owner's statutory vicarious liability for the operator's negligence." (*Fremont Compensation Insurance Co. v. Hartnett* (1993) 19 Cal.App.4th 669, 675-676 [23 Cal.Rptr.2d 567].)

- "[U]nless the evidence points to one conclusion only, the question of the existence of the requisite permission under [section 17150] is one to be determined by the trier of fact, 'upon the facts and circumstances in evidence and the inferences reasonably to be drawn therefrom.' " (*Peterson v. Grieger, Inc.* (1961) 57 Cal.2d 43, 51 [17 Cal.Rptr. 828, 367 P.2d 420], internal citations omitted.)

- "[P]ermission cannot be left to speculation or conjecture nor be assumed, but must be affirmatively proved, and the fact of permission is just as important to sustain the imposition of liability as is the fact of ownership." (*Scheff v. Roberts* (1950) 35 Cal.2d 10, 12 [215 P.2d 925], internal citations omitted.)

- "Where the issue of implied permissive use is involved, the general relationship existing between the owner and the operator, is of paramount importance. Where, for example, the parties are related by blood, or marriage, or where the relationship between the owner and the operator is that of principal and agent, weaker direct evidence will support a finding of such use than where the parties are only acquaintances or strangers." (*Elkinton v. California State Automobile Assn., Interstate Insurance Bureau* (1959) 173 Cal.App.2d 338, 344 [343 P.2d 396], internal citations omitted.)

- "There is no doubt that the word 'owner' as used in [the predecessor to Vehicle Code section 17150] for the purpose of creating a liability thereunder, is not synonymous with that word as used in the ordinary sense of referring to a person or persons whose title is good as against all others. Under the Vehicle Code there may be several such 'owners' at any one time. One or more persons may be an 'owner,' and thus liable for the injuries of a third party, even though no such 'owner' possesses all of the normal incidents of ownership." (*Stoddart v. Peirce* (1959) 53 Cal.2d 105, 115 [346 P.2d 774], internal citation omitted.)

- "The question whether the [defendant] was an owner for purposes of imposition of liability for negligence [under Vehicle Code section 17150] was one of fact." (*Campbell v. Security Pacific Nat. Bank* (1976) 62 Cal.App.3d 379, 385 [133 Cal.Rptr. 77].)

- "Strict compliance with Vehicle Code section 5602 [regarding the sale or transfer of a vehicle] is required to enable a transferring owner to escape the liability imposed by section 17150 on account of an accident occurring before notice of the transfer is received by the Motor Vehicle Department." (*Laureano v. Christensen* (1971) 18 Cal.App.3d 515, 520-521 [95 Cal.Rptr. 872].)

- "[T]he true and actual owner of an automobile [is not] relieved from liability by the expedient of registration in the name of another. ... It is clear that it was the legislative intent to make the actual owners of automobiles liable for the negligence of those to whom permission is given to drive them. According to the allegations of the complaint defendants ... were in fact the true owners of the car and had control of it, the registration being in the name of defendant [driver] for the purpose of avoiding liability." (*McCalla v. Grosse* (1941) 42 Cal.App.2d 546, 549-550 [109 P.2d 358].)

- "[I]t is a question of fact in cases of co-ownership, as it is in cases of single ownership, whether the

operation of an automobile is with or without the consent, express or implied, of an owner who is not personally participating in such operation. The mere fact of co-ownership does not necessarily or conclusively establish that the common owners have consented to any usage or possession among themselves of a type for which permission is essential." (*Krum v. Malloy* (1943) 22 Cal.2d 132, 136 [137 P.2d 18].)

- "The immunity of the negligent operator under the [Workers' Compensation] Act does not insulate a vehicle owner who is neither the plaintiff's employer nor co-employee from liability under section 17150. [¶] Since the owner's liability does not arise from the status or liability of the operator, the defenses applicable to the operator are not available to the owner." (*Galvis v. Petito* (1993) 13 Cal.App.4th 551, 554 [16 Cal.Rptr.2d 560].)

- "The doctrine of 'negligent entrustment' is clearly distinguishable from the theory of 'vicarious liability.' Negligent entrustment is a common law liability doctrine. Conversely, the obligation of a lending owner of an automobile is one of statutory liability. An owner of an automobile may be independently negligent in entrusting it to an incompetent driver. California is one of several states which recognizes the liability of an automobile owner who has entrusted a car to an incompetent, reckless, or inexperienced driver, and has supplemented the common law doctrine of negligent entrustment by enactment of a specific consent statute." (*Syah v. Johnson* (1966) 247 Cal.App.2d 534, 538 [55 Cal.Rptr. 741], internal citations omitted.)

- For purposes of liability under the permissive use statute, "[s]ince defendant [car owner] had the opportunity of making such investigation as he deemed necessary to satisfy himself as to the identity of the [renter] to whom he intrusted his automobile, he should not be permitted to escape liability to a third party because of any fraudulent misrepresentation made by the renter of the car to him." (*Tuderios v. Hertz Drivurself Stations, Inc.* (1945) 70 Cal.App.2d 192, 198 [160 P.2d 554].)

- "[T]he provisions of Proposition 51 do not operate to reduce the liability of vehicle owners imposed by Vehicle Code section 17150." (*Rashtian v. BRAC-BH, Inc.* (1992) 9 Cal.App.4th 1847, 1849 [12 Cal.Rptr.2d 411].)

- "[I]f the evidence shows that an automobile was being driven by an employee of the owner at the time of an accident, the jury may infer that the employee was operating the automobile with the permission of the owner." (*Hicks v. Reis* (1943) 21 Cal.2d 654, 659 [134 P.2d 788], internal quotation marks and citations omitted.)

- "The mere fact that at the time of an accident one is driving an automobile belonging to another is not, of itself, sufficient to establish that the former was driving the car with the permission of the owner." (*Di Rebaylio v. Herndon* (1935) 6 Cal.App.2d 567, 569 [44 P.2d 581].)

- "[I]mplied permission to use an automobile may be found even where the owner and permittee expressly deny that permission was given." (*Anderson v. Wagnon* (1952) 110 Cal.App.2d 362, 366 [242 P.2d 915].)

- "[I]n determining whether there has been an implied permission, it is not necessary that the owner have prior knowledge that the driver intends to use the car, but it must be 'under circumstances from

which consent to use the car is necessarily implied.' " (*Mucci v. Winter* (1951) 103 Cal.App.2d 627, 631 [230 P.2d 22], internal citation omitted.)

- For purposes of statutory vicarious liability, "if the owner entrusts his car to another he invests him with the same authority to select an operator which the owner has in the first instance. ... [¶] ... The owner is thus liable for negligent acts by a subpermittee even though the subpermittee operated the owner's vehicle with authorization only from the permittee, since the foundation of the statutory liability is the permission given to another to use an instrumentality which if improperly used is a danger and menace to the public." (*Peterson v. Grieger, Inc.* (1961) 57 Cal.2d 43, 54 [17 Cal.Rptr. 828, 367 P.2d 420], internal quotation marks and citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1260–1265, 1271

California Tort Guide (Cont.Ed.Bar 3d ed.) Automobiles, §§ 4.28-4.32, 4.37

2 Levy et al., California Torts, Ch. 20, *Motor Vehicles*, § 20.20 (Matthew Bender)

8 California Forms of Pleading and Practice, Ch. 82, *Automobiles: Causes of Action*, §§ 82.11, 82.16 (Matthew Bender)

2 California Civil Practice: Torts (Thomson West) §§ 25:44–25:45

721. Motor Vehicle Owner Liability—Affirmative Defense—Use Beyond Scope of Permission

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[*Name of defendant***] claims that [he/she] is not responsible for [***name of plaintiff***]'s harm because [***name of driver***]'s use of the vehicle exceeded the scope of the permission given. To succeed, [***name of defendant***] must prove both of the following:**

1. **That [***name of defendant***], by words or conduct, gave permission to [***name of driver***] to use the vehicle for a limited time, place, or purpose; and**

2. **That [***name of driver***]'s use of the vehicle substantially violated the time, place, or purpose specified.**

New September 2003

Directions for Use

This instruction is intended for use when the vehicle owner contends that the use of the vehicle exceeded the scope of the permission, thereby terminating the permission.

Sources and Authority

- Permissive Use. Vehicle Code section 17150~~. provides: "Every owner of a motor vehicle is liable and responsible for death or injury to person or property resulting from a negligent or wrongful act or omission in the operation of the motor vehicle, in the business of the owner or otherwise, by any person using or operating the same with the permission, express or implied, of the owner."~~

- "[W]here the permission is granted for a limited time, any use after the expiration of the period is without consent, and the owner is not liable, unless the circumstances justify an inference of implied consent to further use. [¶] ... On principle, there is no fundamental ground of distinction between a limitation of time and one of purpose or place, insofar as permission is concerned; and it would seem clear that a substantial violation of either limitation terminates the original express consent and makes the subsequent use without permission. ... [¶] ... [T]he substantial violation of limitations as to locality or purpose of use operate in the same manner as violation of time limitations, absolving the owner from liability." (*Henrietta v. Evans* (1938) 10 Cal.2d 526, 528-529 [75 P.2d 1051], internal citations omitted.)

- "[W]here restrictions by the owner as to time, purpose, or area are involved, the owner's permission is considered terminated only where there has been a substantial violation of such restrictions, and it is a question of fact whether under all the circumstances presented, such restrictions as to time, purpose, or area have been substantially violated prior to the occurrence of the accident so as to vitiate the owner's permission and thus absolve him from the vicarious liability imposed under [the predecessor to section 17150]." (*Peterson v. Grieger, Inc.* (1961) 57 Cal.2d 43, 52 [17 Cal.Rptr. 828, 367 P.2d 420], internal citations omitted.)

- "What is a substantial deviation from a permitted use is a question of fact under the circumstances of

each case." (*Garmon v. Sebastian* (1960) 181 Cal.App.2d 254, 260 [5 Cal.Rptr. 101].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1272

California Tort Guide (Cont.Ed.Bar 3d ed.) Automobiles, §§ 4.35-4.36

2 Levy et al., California Torts, Ch. 20, *Motor Vehicles*, § 20.20[5][c] (Matthew Bender)

8 California Forms of Pleading and Practice, Ch. 82, *Automobiles: Causes of Action*, § 82.16 (Matthew Bender)

722. Adult's Liability for Minor's Permissive Use of Motor Vehicle

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[*Name of plaintiff*] claims that [he/she] was harmed and that [*name of defendant*] is responsible for the harm because [*name of defendant*] gave [*name of minor*] permission to operate the vehicle. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of minor*] was negligent in operating the vehicle;**

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

3. **That [*name of minor*]'s negligence was a substantial factor in causing the harm; and**

4. **That [*name of defendant*], by words or conduct, gave [*name of minor*] permission to use the vehicle.**

New September 2003; Revised April 2004, October 2004

Directions for Use

Under Vehicle Code section 17708, an element of this cause of action is that the defendant must have "custody" of the minor driver. The instruction omits this element because it will most likely be stipulated to or decided by the judge as a matter of law. If there are contested issues of fact regarding this element, this instruction may be augmented to include the specific factual findings necessary to arrive at a determination of custody.

Sources and Authority

- Parental Liability for Minor's Vehicle Operation. Vehicle Code section 17708. ~~provides: "Any civil liability of a minor, whether licensed or not under this code, arising out of his driving a motor vehicle upon a highway with the express or implied permission of the parents or the person or guardian having custody of the minor is hereby imposed upon the parents, person, or guardian and the parents, person, or guardian shall be jointly and severally liable with the minor for any damages proximately resulting from the negligent or wrongful act or omission of the minor in driving a motor vehicle."~~

- "[I]t was incumbent upon [plaintiffs], in order to fasten liability upon [the parents] for the minor's negligence, to establish two necessary facts. These facts were, first, that at the time the collision occurred respondents had custody of the minor and, second, that they had given to the minor their permission, either express or implied, to his driving the automobile by the negligent operation of which the injuries were caused." (*Sommers v. Van Der Linden* (1938) 24 Cal.App.2d 375, 380 [75 P.2d 83].)

- "Whether or not a sufficient custody existed, within the meaning of the statute, might well depend upon evidence of specific facts showing the nature, kind and extent of the custody and right of control which the respondent [grandfather] actually had." (*Hughes v. Wardwell* (1953) 117 Cal.App.2d 406,

409 [255 P.2d 881].)

- "In the absence of statute, ordinarily a parent is not liable for the torts of his minor child. A parent, however, becomes liable for the torts of his minor child if that child in committing a tort is his agent and acting within the child's authority." (*Van Den Eikhof v. Hocker* (1978) 87 Cal.App.3d 900, 904-905 [151 Cal.Rptr. 456], internal citations omitted.)

- " '[P]erson having custody of the minor' means person having permanent legal custody, and not a person such as a school teacher whose control over his pupils is limited in time and scope." (*Hathaway v. Siskiyou Union High School Dist.* (1944) 66 Cal.App.2d 103, 114 [151 P.2d 861].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1256–1259

California Tort Guide (Cont.Ed.Bar 3d ed.) Automobiles, §§ 4.42-4.43

2 Levy et al., California Torts, Ch. 20, *Motor Vehicles*, § 20.30[1] (Matthew Bender)

8 California Forms of Pleading and Practice, Ch. 82, *Automobiles: Causes of Action*, § 82.16, Ch. 83, *Automobiles: Bringing the Action*, § 83.133 (Matthew Bender)

2 California Civil Practice: Torts ~~(Thomson West)~~ § 25:52 (Thomson Reuters)

723. Liability of Cosigner of Minor's Application for Driver's License

[*Name of plaintiff***] claims that [he/she] was harmed by [***name of minor***]'s negligence in operating the vehicle and that [***name of defendant***] is responsible for the harm because [***name of defendant***] signed [***name of minor***]'s application for a driver's license. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of minor***] was negligent in operating the vehicle;**

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

3. **That [***name of minor***]'s negligence was a substantial factor in causing the harm;**

4. **That [***name of defendant***] signed [***name of minor***]'s application for a driver's license; and**

5. **That at the time of the collision [***name of minor***]'s driver's license had not been canceled or revoked by the Department of Motor Vehicles.**

New September 2003

Sources and Authority

- Liability of Cosigner of Minor's Driver's License Application. Vehicle Code section 17707. ~~provides, in part: "Any civil liability of a minor arising out of his driving a motor vehicle upon a highway during his minority is hereby imposed upon the person who signed and verified the application of the minor for a license and the person shall be jointly and severally liable with the minor for any damages proximately resulting from the negligent or wrongful act or omission of the minor in driving a motor vehicle, except that an employer signing the application shall be subject to the provisions of this section only if an unrestricted driver's license has been issued to the minor pursuant to the employer's written authorization."~~

- No Liability if Minor is Agent of Another. Vehicle Code section 17710. ~~provides: "The person signing a minor's application for a license is not liable under this chapter for a negligent or wrongful act or omission of the minor committed when the minor is acting as the agent or servant of any person."~~

- Application for Relief From Liability. Vehicle Code section 17711. ~~provides: "Any person who has signed and verified the application of a minor for a driver's license or any employer who has authorized the issuance of a license to a minor and who desires to be relieved from the joint and several liability imposed by reason of having signed and verified such application, may file a verified application with the department requesting that the license of the minor be canceled. The department shall cancel the license, except as provided in subdivision (e) of Section 17712. Thereafter, the person shall be relieved from the liability imposed under this chapter by reason of having signed and verified~~

~~the original application on account of any subsequent willful misconduct or negligent operation of a motor vehicle by the minor."~~

- "Cancellation accomplishes voluntarily what revocation [of minor's driver's license] accomplishes involuntarily. If termination is accomplished by the latter method, resort to the former becomes superfluous. Once revocation occurs, the driving privilege is at an end. Thereafter there is no reason and no necessity for a voluntary application to terminate that which has already been terminated involuntarily. Both means are equally effective to terminate the driving privilege and to terminate the signer's liability." (*Hamilton v. Dick* (1967) 254 Cal.App.2d 123, 125 [61 Cal.Rptr. 894].)

- "[T]he negligence of the minor son of the [parents] is imputed to them ... by virtue of their having signed his application for an operator's license, which was not revoked or cancelled at the time of the accident in question, notwithstanding the fact that the license was then temporarily suspended" and even though the parents specifically forbade the minor from operating the vehicle. (*Sleeper v. Woodmansee* (1936) 11 Cal.App.2d 595, 598 [54 P.2d 519].)

- "It seems quite evident that, in adopting [the predecessors to sections 17150 and 17707] of the Vehicle Code, the legislature intended to create a limited liability for imputed negligence against both the owner of an automobile and the signer of a driver's license. ... We must assume the legislature intended to fix a limited liability ... for imputed negligence against the owner of an automobile and the signer of a driver's license or either of them and that it did not intend to double that limited liability when the same individual was both the owner of the machine and the signer of the license." (*Rogers v. Foppiano* (1937) 23 Cal.App.2d 87, 92-93 [72 P.2d 239].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1256–1259

California Tort Guide (Cont.Ed.Bar 3d ed.) Automobiles, §§ 4.41, 4.43

2 Levy et al., California Torts, Ch. 20, *Motor Vehicles*, § 20.30[2] (Matthew Bender)

8 California Forms of Pleading and Practice, Ch. 82, *Automobiles: Causes of Action*, § 82.16, Ch. 83, *Automobiles: Bringing the Action*, § 83.134 (Matthew Bender)

2 California Civil Practice: Torts ~~(Thomson West)~~ § 25:52 (Thomson Reuters)

724. Negligent Entrustment of Motor Vehicle

[*Name of plaintiff***] claims that [he/she] was harmed because [***name of defendant***] negligently permitted [***name of driver***] to use [***name of defendant***]'s vehicle. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of driver***] was negligent in operating the vehicle;**

2. **That [***name of defendant***] [owned the vehicle operated by [***name of driver***]/had possession of the vehicle operated by [***name of driver***] with the owner's permission];**

3. **That [***name of defendant***] knew, or should have known, that [***name of driver***] was incompetent or unfit to drive the vehicle;**

4. **That [***name of defendant***] permitted [***name of driver***] to drive the vehicle; and**

5. **That [***name of driver***]'s incompetence or unfitness to drive was a substantial factor in causing harm to [***name of plaintiff***].**

New September 2003; Revised December 2009

Directions for Use

For a definition of "negligence," see CACI No. 401, *Basic Standard of Care*.

Sources and Authority

- Permissive Use by Unlicensed Driver. Vehicle Code section 14606(a). ~~provides: "A person shall not employ or hire any person to drive a motor vehicle or knowingly permit or authorize the driving of a motor vehicle, owned by him or her or under his or her control, upon the highways by any person unless that person is licensed for the appropriate class of vehicle to be driven."~~

- Permissive Use by Unlicensed Minor. Vehicle Code section 14607. ~~provides: "No person shall cause or knowingly permit his child, ward, or employee under the age of 18 years to drive a motor vehicle upon the highways unless such child, ward, or employee is then licensed under this code."~~

- Rental to Unlicensed Driver. Vehicle Code section 14608(a). ~~provides, in part: "A person shall not rent a motor vehicle to another person unless: [¶] ... (1) The person to whom the vehicle is rented is licensed under this code or is a nonresident who is licensed under the laws of the state or country of his or her residence."~~

- " ' "[I]t is generally recognized that one who places or entrusts his [or her] motor vehicle in the hands of one whom he [or she] knows, or from the circumstances is charged with knowing, is incompetent or unfit to drive, may be held liable for an injury inflicted by the use made thereof by that driver,

provided the plaintiff can establish that the injury complained of was proximately caused by the driver's disqualification, incompetency, inexperience or recklessness … ." ' " (*Flores v. Enterprise Rent-A-Car Co.* (2010) 188 Cal.App.4th 1055, 1063 [116 Cal.Rptr.3d 71].)

- "A rental car company may be held liable for negligently entrusting one of its cars to a customer. ... In determining whether defendant was negligent in entrusting its car to [the driver], defendant's conduct is to be measured by what an ordinarily prudent person would do in similar circumstances." (*Osborn v. Hertz Corp.* (1988) 205 Cal.App.3d 703, 709 [252 Cal.Rptr. 613], internal citations omitted.)

- "Liability for negligent entrustment is determined by applying general principles of negligence, and ordinarily it is for the jury to determine whether the owner has exercised the required degree of care." (*Allen v. Toledo* (1980) 109 Cal.App.3d 415, 421 [167 Cal.Rptr. 270], internal citations omitted.)

- "A claim that an employer was negligent in hiring or retaining an employee-driver rarely differs in substance from a claim that an employer was negligent in entrusting a vehicle to the employee. Awareness, constructive or actual, that a person is unfit or incompetent to drive underlies a claim that an employer was negligent in hiring or retaining that person as a driver. (See Judicial Council of Cal. Civ. Jury Instns. (2011) CACI No. 426.) That same awareness underlies a claim for negligent entrustment. (See CACI No. 724.) In a typical case, like this, the two claims are functionally identical." (*Diaz v. Carcamo* (2011) 51 Cal.4th 1148, 1157 [126 Cal.Rptr.3d 443, 253 P.3d 535].)

- "[I]f an employer admits vicarious liability for its employee's negligent driving in the scope of employment, 'the damages attributable to both employer and employee will be coextensive.' Thus, when a plaintiff alleges a negligent entrustment or hiring cause of action against the employer and the employer admits vicarious liability for its employee's negligent driving, the universe of defendants who can be held responsible for plaintiff's damages is reduced by one—the employer—for purposes of apportioning fault under Proposition 51. Consequently, the employer would not be mentioned on the special verdict form. The jury must divide fault for the accident among the listed tortfeasors, and the employer is liable only for whatever share of fault the jury assigns to the employee." (*Diaz, supra,* 41 Cal.4th at p. 1159, internal citation omitted.)

- "[O]rdinarily, in the absence of a special relationship between the parties, there is no duty to control the conduct of a third person so as to prevent him from causing harm to another and ... this rule applies even where the third person's conduct is made possible only because the defendant has relinquished control of his property to the third person, unless the defendant has reason to believe that the third person is incompetent to manage it." (*Grafton v. Mollica* (1965) 231 Cal.App.2d 860, 863 [42 Cal.Rptr. 306].)

- "[T]he tort requires demonstration of actual knowledge of facts showing or suggesting the driver's incompetence-not merely his lack of a license. ... For liability to exist, knowledge must be shown of the user's incompetence or inability safely to use the [vehicle]." (*Dodge Center v. Superior Court* (1988) 199 Cal.App.3d 332, 341 [244 Cal.Rptr. 789], internal citations omitted.)

- "Knowledge of possession of a temporary permit allowing a person to drive only if accompanied by a licensed driver is sufficient to put the entrustor 'upon inquiry as to the competency of' the unlicensed driver. ... It is then for the jury to determine under the circumstances whether the entrustor is

negligent in permitting the unlicensed driver to operate the vehicle." (*Nault v. Smith* (1961) 194 Cal.App.2d 257, 267–268 [14 Cal.Rptr. 889], internal citations omitted.)

- "[E]ntrustment of a vehicle to an intoxicated person is not negligence per se. A plaintiff must prove defendant had knowledge of plaintiff's incompetence when entrusting the vehicle." (*Blake v. Moore* (1984) 162 Cal.App.3d 700, 706 [208 Cal.Rptr. 703].)

- "[T]he mere sale of an automobile to an unlicensed and inexperienced person does not constitute negligence per se." (*Perez v. G & W Chevrolet, Inc.* (1969) 274 Cal.App.2d 766, 768 [79 Cal.Rptr. 287].)

- "It is well-settled that where a company knows that an employee has no operator's license that such knowledge is sufficient to put the employer on inquiry as to his competency; it is for the jury to determine under such circumstances whether the employer was negligent in permitting the employee to drive a vehicle." (*Syah v. Johnson* (1966) 247 Cal.App.2d 534, 545 [55 Cal.Rptr. 741].)

- "[I]t has generally been held that the owner of an automobile is under no duty to persons who may be injured by its use to keep it out of the hands of a third person in the absence of facts putting the owner on notice that the third person is incompetent to handle it." (*Richards v. Stanley* (1954) 43 Cal.2d 60, 63 [271 P.2d 23], internal citations omitted.)

- "[T]he mere fact of co-ownership does not prevent one co-owner from controlling use of the vehicle by the other co-owner. Thus, where ... plaintiff alleges that one co-owner had power over the use of the vehicle by the other and that the negligent co-owner drove with the express or implied consent of such controlling co-owner, who knew of the driver's incompetence, the basis for a cause of action for negligent entrustment has been stated." (*Mettelka v. Superior Court* (1985) 173 Cal.App.3d 1245, 1250 [219 Cal.Rptr. 697].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1221–1226

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-B, *Liability Arising From Operation Of Motor Vehicle*, ¶ 2:1040 (The Rutter Group)

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 7D-D, *Liability Based On Negligent Entrustment*, ¶ 7:1332 (The Rutter Group)

California Tort Guide (Cont.Ed.Bar 3d ed.) Automobiles, § 4.38

2 Levy et al., California Torts, Ch. 20, *Motor Vehicles*, § 20.21 (Matthew Bender)

8 California Forms of Pleading and Practice, Ch. 82, *Automobiles: Causes of Action*, § 82.11 (Matthew Bender)

2 California Civil Practice: Torts § 25:47 (Thomson Reuters ~~West~~)

730. Emergency Vehicle Exemption (Veh. Code, § 21055)

[*Name of defendant***] claims that [***name of public employee***] was not required to comply with Vehicle Code section [***insert section number***] because [he/she] was operating an authorized emergency vehicle and was responding to an emergency at the time of the accident.**

To establish that [*name of public employee***] was not required to comply with section [***insert section number***], [***name of defendant***] must prove all of the following:**

1. **That [***name of public employee***] was operating an authorized emergency vehicle;**

2. **That [***name of public employee***] was responding to an emergency situation at the time of the accident; and**

3. **That [***name of public employee***] sounded a siren when reasonably necessary and displayed front red warning lights.**

If you decide that [*name of defendant***] proved all of these things, then you cannot find it negligent for a violation of section [***insert section number***]. However, even if you decide that [***name of defendant***] proved all of these things, you may find it negligent if [***name of public employee***] failed to operate [his/her] vehicle with reasonable care, taking into account the emergency situation.**

New September 2003

Directions for Use

For a definition of "emergency," see CACI No. 731, *Definition of "Emergency."*

~~For a definition of "authorized emergency vehicle," see Vehicle Code section 165.~~

~~Note that Vehicle Code section 17004 provides: "A public employee is not liable for civil damages on account of personal injury to or death of any person or damage to property resulting from the operation, in the line of duty, of an authorized emergency vehicle while responding to an emergency call or when in the immediate pursuit of an actual or suspected violator of the law, or when responding to but not upon returning from a fire alarm or other emergency call."~~

Sources and Authority

- Authorized Emergency Vehicle Exemption. Vehicle Code section 21055. ~~provides, in part:~~

  ~~The driver of an authorized emergency vehicle is exempt from [specified Vehicle Code sections] under all of the following conditions:~~

  ~~(a) If the vehicle is being driven in response to an emergency call or while engaged in~~

~~rescue operations or is being used in the immediate pursuit of an actual or suspected violator of the law or is responding to, but not returning from, a fire alarm, except that fire department vehicles are exempt whether directly responding to an emergency call or operated from one place to another as rendered desirable or necessary by reason of an emergency call and operated to the scene of the emergency or operated from one fire station to another or to some other location by reason of the emergency call.~~

~~(b) If the driver of the vehicle sounds a siren as may be reasonably necessary and the vehicle displays a lighted red lamp visible from the front as a warning to other drivers and pedestrians.~~

- "Authorized Emergency Vehicle" Defined. Vehicle Code section 165.

- Authorized Emergency Vehicle: Public Employee Immunity. Vehicle Code section 17004.

- "The purpose of the statute is to provide a 'clear and speedy pathway' for these municipal vehicles on their flights to emergencies in which the entire public are necessarily concerned." (*Peerless Laundry Services v. City of Los Angeles* (1952) 109 Cal.App.2d 703, 707 [241 P.2d 269].)

- Vehicle Code section 21056 provides: "Section 21055 does not relieve the driver of a vehicle from the duty to drive with due regard for the safety of all persons using the highway, nor protect him from the consequences of an arbitrary exercise of the privileges granted in that section."

- "The effect of Vehicle Code sections 21055 and 21056 is: where the driver of an authorized emergency vehicle is engaged in a specified emergency function he may violate certain rules of the road, such as speed and right of way laws, if he activates his red light and where necessary his siren in order to alert other users of the road to the situation. In such circumstances the driver may not be held to be negligent solely upon the violation of specified rules of the road, but may be held to be negligent if he fails to exercise due regard for the safety of others under the circumstances. Where the driver of an emergency vehicle fails to activate his red light, and where necessary his siren, he is not exempt from the rules of the road even though he may be engaged in a proper emergency function, and negligence may be based upon the violation of the rules of the road." (*City of Sacramento v. Superior Court* (1982) 131 Cal.App.3d 395, 402-403 [182 Cal.Rptr. 443], internal citations omitted.)

- "Notwithstanding [Vehicle Code section 17004], a public entity is liable for injuries proximately caused by negligent acts or omissions in the operation of any motor vehicle by an employee of the public entity, acting within the scope of his or her employment." (*City of San Jose v. Superior Court* (1985) 166 Cal.App.3d 695, 698 [212 Cal.Rptr. 661], internal citations omitted.)

- "If the driver of an authorized emergency vehicle is responding to an emergency call and gives the prescribed warnings by red light and siren, a charge of negligence against him may not be predicated on his violation of the designated Vehicle Code sections; but if he does not give the warnings, the contrary is true; and in the event the charged negligence is premised on conduct without the scope of the exemption a common-law standard of care is applicable." (*Grant v. Petronella* (1975) 50 Cal.App.3d 281, 286 [123 Cal.Rptr. 399], internal citations omitted.)

- "Where the driver of an emergency vehicle responding to an emergency call does not give the warnings prescribed by section 21055, the legislative warning policy expressed in that section dictates the conclusion [that] the common-law standard of care governing his conduct does not include a consideration of the emergency circumstances attendant upon his response to an emergency call." (*Grant, supra,* 50 Cal.App.3d at p. 289, footnote omitted.)

- The exemption created by section 21055 is an affirmative defense, and the defendant must prove compliance with the conditions. (*Washington v. City and County of San Francisco* (1954) 123 Cal.App.2d 235, 242 [266 P.2d 828].)

- "In short the statute exempts the employer of such a driver from liability for negligence attributable to his failure to comply with specified statutory provisions, but it does not in any manner purport to exempt the employer from liability due to negligence attributable to the driver's failure to maintain that standard of care imposed by the common law." (*Torres v. City of Los Angeles* (1962) 58 Cal.2d 35, 47 [22 Cal.Rptr. 866, 372 P.2d 906].)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 297, 331–335

2 Government Tort Liability Practice (Cont.Ed.Bar 4th ed.) §§ 11.140-11.144

2 Levy et al., California Torts, Ch. 20, *Motor Vehicles*, § 20.55 (Matthew Bender)

20 California Forms of Pleading and Practice, Ch. 246, *Emergency Vehicles* (Matthew Bender)

731. Definition of "Emergency" (Veh. Code, § 21055)

An "emergency" exists if the driver of an authorized emergency vehicle is [*insert one of the following***]**

[responding to an emergency call.]

[involved in rescue operations.]

[in the immediate pursuit of an actual or suspected violator of the law.]

[responding to, but not returning from, a fire alarm.]

[operating a fire department vehicle while traveling from one place to another place because of an emergency call.]

New September 2003

Directions for Use

This instruction is based on the language of Vehicle Code section 21055(a) and is only intended for cases in which there is a factual issue regarding whether the defendant was acting in response to an emergency at the time of the accident. (*Washington v. City and County of San Francisco* (1954) 123 Cal.App.2d 235, 241 [266 P.2d 828].)

Sources and Authority

- Authorized Emergency Vehicle Exemption. Vehicle Code section 21055(a). ~~provides: "The driver of an authorized emergency vehicle is exempt from [specified Vehicle Code sections] under all of the following conditions: If the vehicle is being driven in response to an emergency call or while engaged in rescue operations or is being used in the immediate pursuit of an actual or suspected violator of the law or is responding to, but not returning from, a fire alarm, except that fire department vehicles are exempt whether directly responding to an emergency call or operated from one place to another as rendered desirable or necessary by reason of an emergency call and operated to the scene of the emergency or operated from one fire station to another or to some other location by reason of the emergency call."~~

- "Whether a vehicle is driven in response to an emergency call depends on the nature of the call received and the situation as presented to the mind of the driver and not upon whether there is an emergency in fact. The driver, of course, should have reasonable grounds to believe that there is an emergency." (*Gallup v. Sparks-Mundo Engineering Co.* (1954) 43 Cal.2d 1, 5 [271 P.2d 34], internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 297, 331–335

2 Government Tort Liability Practice (Cont.Ed.Bar 4th ed.) §§ 11.140-11.144

806. Comparative Fault—Duty to Approach Crossing With Care

A driver approaching a railroad crossing is required to use reasonable care to discover whether a train is approaching. The amount of care that is reasonable will depend on the circumstances. A railroad track is itself a warning of danger. If the driver's view of approaching trains is blocked, he or she must use greater care than when the view is clear.

If a bell or signal has been placed to warn drivers of danger, a driver is not required to use as much care as when there are no such warnings. However, even if the warning devices are not activated, a driver must use reasonable care in looking and listening for approaching trains.

New September 2003; Revised December 2009

Directions for Use

For an instruction regarding the prima facie speed limits set by Vehicle Code section 22352, see CACI No. 707, *Speed Limit.* For an instruction on the duty of care of a passenger, see CACI No. 711, *The Passenger's Duty of Care for Own Safety.* For instructions on negligence per se, see CACI Nos. 418 to 421.

Sources and Authority

- Vehicle Proceeding at Railroad Crossing. Vehicle Code section 22451. ~~provides:~~

  ~~(a) The driver of any vehicle or pedestrian approaching a railroad or rail transit grade crossing shall stop not less than 15 feet from the nearest rail and shall not proceed until he or she can do so safely, whenever the following conditions exist:~~

  ~~(1) A clearly visible electric or mechanical signal device or a flagman gives warning of the approach or passage of a train or car.~~

  ~~(2) An approaching train or car is plainly visible or is emitting an audible signal and, by reason of its speed or nearness, is an immediate hazard.~~

  ~~(b) No driver or pedestrian shall proceed through, around, or under any railroad or rail transit crossing gate while the gate is closed.~~

  ~~(c) Whenever a railroad or rail transit crossing is equipped with an automated enforcement system, a notice of a violation of this section is subject to the procedures provided in Section 40518.~~

- Speed Limit at Railroad Crossing. Vehicle Code section 22352(a)(1). ~~provides that the prima facie speed limit is 15 miles per hour under the following circumstances: "(A) When traversing a railway grade crossing, if during the last 100 feet of the approach to the crossing the driver does not have a~~

~~clear and unobstructed view of the crossing and of any traffic on the railway for a distance of 400 feet in both directions along the railway. This subdivision does not apply in the case of any railway grade crossing where a human flagman is on duty or a clearly visible electrical or mechanical railway crossing signal device is installed but does not then indicate the immediate approach of a railway train or car, and (B) When traversing any intersection of highways if during the last 100 feet of the driver's approach to the intersection the driver does not have a clear and unobstructed view of the intersection and of any traffic upon all of the highways entering the intersection for a distance of 100 feet along all those highways, except at an intersection protected by stop signs or yield right-of-way signs or controlled by official traffic control signals."~~

- "[T]hat the driver's view is somewhat obstructed does not make him contributorily negligent as a matter of law; whether his failure to stop, the place from which he looks and the character and extent of the obstruction to his view are such that a reasonably prudent person would not have so conducted himself are questions for the jury in determining whether he was guilty of contributory negligence." (*Lucas v. Southern Pacific Co.* (1971) 19 Cal.App.3d 124, 139 [96 Cal.Rptr. 356].)

- "A railroad track is itself a warning of danger and a driver intending to cross must avail himself of every opportunity to look and listen; if there are obstructions to the view, he is required to take greater care." (*Wilkinson v. Southern Pacific Co.* (1964) 224 Cal.App.2d 478, 488 [36 Cal.Rptr. 689], internal citation omitted.)

- "A railroad company will not be permitted to encourage persons to relax their vigil concerning the dangers that lurk in railroad crossings by assuring them, through the erection of safety devices, that the danger has been removed or minimized, and, at the same time, to hold them to the same degree of care as would be required if those devices had not been provided." (*Will v. Southern Pacific Co.* (1941) 18 Cal.2d 468, 474 [116 P.2d 44], internal citation omitted.)

- "[A] driver may not cross tracks in reliance upon the safety appliances installed by the railroad with complete disregard for his own safety and recover damages for injuries sustained by reason of his own failure to use reasonable care." (*Will, supra,* 18 Cal.2d at p. 475.)

- "Violation of the railroad's statutory duty to sound bell and whistle at a highway crossing does not absolve a driver from his failure to look and listen and, if necessitated by circumstances such as obstructed vision, even to stop." (*Wilkinson, supra,* 224 Cal.App.2d at p. 489.)

- "It is settled that a railroad may not encourage persons traveling on highways to rely on safety devices and then hold them to the same degree of care as if the devices were not present." (*Startup v. Pacific Electric Ry. Co.* (1947) 29 Cal.2d 866, 871 [180 P.2d 896].)

- "When a flagman or mechanical warning device has been provided at a railroad crossing, the driver of an automobile is thereby encouraged to relax his vigilance, and, in using other means to discover whether there is danger of approaching trains, he is not required to exercise the same quantum of care as would otherwise be necessary." (*Spendlove v. Pacific Electric Ry. Co.* (1947) 30 Cal.2d 632, 634 [184 P.2d 873], internal citations omitted.)

- An instruction that a driver must stop, look, and listen when his or her view is obstructed was held

prejudicially erroneous in *Anello v. Southern Pacific Co.* (1959) 174 Cal.App.2d 317, 322 [344 P.2d 843].

Secondary Sources

California Tort Guide (Cont.Ed.Bar 3d ed.) Railroad Crossings, §§ 12.10-12.12

2 Levy et al., California Torts, Ch. 23, *Carriers,* § 23.27 (Matthew Bender)

42 California Forms of Pleading and Practice, Ch. 485, *Railroads* § 485.67 (Matthew Bender)

900. Introductory Instruction

[*Name of plaintiff***] claims that [he/she] was harmed by [***name of defendant***]'s negligence while [he/she] was a passenger on [***name of defendant***]'s [***insert type of carrier - e.g., train***].**

[In this case, [*name of defendant***] was a common carrier at the time of the incident. A common carrier provides transportation to the general public.]**

[*or*]

[[*Name of plaintiff***] also claims that [***name of defendant***] was a common carrier at the time of the incident.]**

New September 2003

Directions for Use

Give either one of the bracketed sentences, depending on whether the defendant's status as a common carrier is contested or not.

This instruction is intended as an introductory instruction to frame the issues. CACI No. 400, *Negligence—Essential Factual Elements*, would still be given to set forth the elements that plaintiff has to prove in order to recover (i.e., negligence, harm, and causation).

Sources and Authority

- "Common Carrier" Defined. Civil Code section 2168. ~~provides: "Everyone who offers to the public to carry persons, property, or messages, excepting only telegraphic messages, is a common carrier of whatever he thus offers to carry."~~

- "Carriage" Defined. Civil Code section 2085. ~~provides: "[C]arriage is a contract for the conveyance of property, persons, or messages, from one place to another."~~

- "[A] common carrier within the meaning of Civil Code section 2168 is any entity which holds itself out to the public generally and indifferently to transport goods or persons from place to place for profit." (*Squaw Valley Ski Corporation v. Superior Court* (1992) 2 Cal.App.4th 1499, 1508 [3 Cal.Rptr.2d 897].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 923–932

2 Levy et al., California Torts, Ch. 23, *Carriers*, § 23.01 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 109, *Carriers* (Matthew Bender)

2 California Civil Practice: Torts § 28:1 (Thomson Reuters ~~West~~)

901. Status of Common Carrier Disputed

To prove that [*name of defendant***] was a common carrier, [***name of plaintiff***] must prove that it was in the business of transporting [the property of] the general public.**

In deciding this issue, you may consider whether any of the following factors apply. These factors suggest that a carrier is a common carrier:

(a) The carrier maintains a regular place of business for the purpose of transporting passengers [or property].

(b) The carrier advertises its services to the general public.

(c) The carrier charges standard fees for its services.

(d) [*Insert other applicable factor(s)***.]**

A carrier can be a common carrier even if it does not have a regular schedule of departures, a fixed route, or a transportation license.

If you find that [*name of defendant***] was not a common carrier, then [***name of defendant***] did not have the duty of a common carrier, only a duty of ordinary care.**

New September 2003

Directions for Use

The court should give the ordinary negligence instructions in conjunction with this one. Ordinary negligence is the standard applicable to private carriers.

Sources and Authority

- "Common Carrier" Defined. Civil Code section 2168. ~~provides: "Everyone who offers to the public to carry persons, property, or messages, excepting only telegraphic messages, is a common carrier of whatever he thus offers to carry."~~
- Contract of Carriage. Civil Code section 2085. ~~provides: "The contract of carriage is a contract for the conveyance of property, persons, or messages, from one place to another."~~
- "[A] common carrier within the meaning of Civil Code section 2168 is any entity which holds itself out to the public generally and indifferently to transport goods or persons from place to place for profit." (*Squaw Valley Ski Corp. v. Superior Court* (1992) 2 Cal.App.4th 1499, 1508 [3 Cal.Rptr.2d 897], internal citations omitted.)

- "Whether a party is a common carrier within the meaning of Civil Code section 2168 is a matter of law where … the material facts are not in dispute." (*Squaw Valley Ski Corp., supra,* 2 Cal.App.4th at p. 1506.)

- "A private carrier ... is bound only to accept carriage pursuant to special agreement." (*Webster v. Ebright* (1992) 3 Cal.App.4th 784, 787 [4 Cal.Rptr.2d 714].) Private carriers " 'make no public profession that they will carry for all who apply, but ... occasionally or upon the particular occasion undertake for compensation to carry the goods of others upon such terms as may be agreed upon.' " (*Id*. at p. 788, internal citations omitted.)

- " '[T]he law applicable to common carriers is peculiarly rigorous, and it ought not to be extended to persons who have not expressly assumed that character, or by their conduct and from the nature of their business justified the belief on the part of the public that they intended to assume it.' " (*Samuelson v. Public Utilities Com.* (1951) 36 Cal.2d 722, 730 [227 P.2d 256], internal citation omitted.)

- "To be a common carrier, the entity merely must be of the character that members of the general public may, if they choose, avail themselves of it." (*Squaw Valley Ski Corp., supra,* 2 Cal.App.4th at pp. 1509-1510, internal citation omitted.)

- In *Gradus v. Hanson Aviation, Inc.* (1984) 158 Cal.App.3d 1038 [205 Cal.Rptr. 211], the court approved of an instruction stating that the plaintiff had the burden of proving that the defendant "undertook either expressly or by course of conduct generally and for all persons indifferently to carry and deliver them for hire, so long as it had room." (*Id*. at pp. 1047-1048.) The court also approved of giving the jury the factors of regular place of business, advertising, and standard charges. (*Id*. at p. 1048.) Note that these factors may not be applicable in all cases.

- "Given the fact [defendant] indiscriminately offers its Shirley Lake chair lift to the public to carry skiers at a fixed rate from the bottom to the top of the Shirley Lake run, it logically comes within the Civil Code section 2168 definition of a common carrier." (*Squaw Valley Ski Corp., supra,* 2 Cal.App.4th at p. 1508.)

- "Plaintiff also argues the public policy of protecting passengers of a common carrier for reward, as expressed in Civil Code section 2100, precludes limiting defendant's duty to riders on [bumper cars]. In *Gomez v. Superior Court* [(2005) 35 Cal.4th 1125, 1136, fn. 5 [29 Cal. Rptr. 3d 352, 113 P.3d 41]], we held that an operator of a 'roller coaster or similar amusement park ride can be a carrier of persons for reward' for purposes of Civil Code section 2100. At the same time, however, we expressed no opinion 'whether other, dissimilar, amusement rides or attractions can be carriers of persons for reward.' " (*Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148, 1160 [150 Cal.Rptr.3d 551, 290 P.3d 1158] [bumper car ride is not common carrier].)

- "In the situation at bar, [defendant]'s motor cars were customarily and daily cruising the streets for patronage or awaiting calls of the public. It was a common carrier in transporting such patrons. But when it agreed to act as carrier of handicapped school children under agreement for its operators to escort the pupils to and from their schools and homes to the cab and to render such service exclusively for them at designated hours, the company ceased to be a common carrier while

transporting the specified children during such hours." (*Hopkins v. Yellow Cab Co.* (1952) 114 Cal.App.2d 394, 398 [250 P.2d 330].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 924

2 Levy et al., California Torts, Ch. 23, *Carriers*, § 23.01 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 109, *Carriers*, § 109.14 (Matthew Bender)

3 California Points and Authorities, Ch. 33, *Carriers*, § 33.29 (Matthew Bender)

2 California Civil Practice: Torts §§ 28:1–28:2 (Thomson Reuters ~~West~~)

902. Duty of Common Carrier

Common carriers must carry passengers [or property] safely. Common carriers must use the highest care and the vigilance of a very cautious person. They must do all that human care, vigilance, and foresight reasonably can do under the circumstances to avoid harm to passengers [or property].

While a common carrier does not guarantee the safety of its passengers [or property that it transports], it must use reasonable skill to provide everything necessary for safe transportation, in view of the transportation used and the practical operation of the business.

New September 2003

Sources and Authority

- Duty of Common Carrier. Civil Code section 2100. ~~provides: "A carrier of persons for reward must use the utmost care and diligence for their safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill."~~

- "Common carriers bind themselves to carry safely those whom they take into their vehicles, and owe both a duty of utmost care and the vigilance of a very cautious person towards their passengers. Such carriers are responsible for any, even the slightest, negligence and are required to do all that human care, vigilance, and foresight reasonably can do under all the circumstances." (*Acosta v. Southern California Rapid Transit Dist.* (1970) 2 Cal.3d 19, 27 [84 Cal.Rptr. 184, 465 P.2d 72], internal citations omitted.)

- The elevated standard of care for common carriers is "based on a recognition that the privilege of serving the public as a common carrier necessarily entails great responsibility, requiring common carriers to exercise a high duty of care towards their customers." (*Squaw Valley Ski Corporation v. Superior Court* (1992) 2 Cal.App.4th 1499, 1507 [3 Cal.Rptr.2d 897], internal citations omitted.)

- Common carriers are not insurers of their passengers' safety. "Rather, the degree of care and diligence which they must exercise is only such as can reasonably be exercised consistent with the character and mode of conveyance adopted and the practical operation of the business of the carrier." (*Lopez v. Southern Cal. Rapid Transit Dist.* (1985) 40 Cal.3d 780, 785 [221 Cal.Rptr. 840, 710 P.2d 907], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 923, 925

2 Levy et al., California Torts, Ch. 23, *Carriers*, § 23.02 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 109, *Carriers* (Matthew Bender)

2A California Points and Authorities, Ch. 33, *Carriers* (Matthew Bender)

22 California Legal Forms, Ch. 54, *Shipment of Property*, § 54.32 (Matthew Bender)

2 California Civil Practice: Torts ~~(Thomson West)~~ §§ 28:6–28:9 (Thomson Reuters)

903. Duty to Provide and Maintain Safe Equipment

Common carriers must use the highest care in constructing, servicing, inspecting, and maintaining their vehicles and equipment for transporting passengers [or property].

A common carrier is responsible for a defect in its vehicles and equipment used for transporting passengers [or property] if the common carrier

(a) Created the defect; or

(b) Knew of the defect; or

(c) Would have known of the defect if it had used the highest care.

Common carriers must keep up with modern improvements in transportation. While they are not required to seek out and use every new invention, they must adopt commonly accepted safety designs and devices in the vehicles and equipment they use for transporting passengers [or property].

New September 2003

Directions for Use

To correct the impression that a carrier is absolutely liable for unsafe equipment, this instruction should be given together with instructions stating that a common carrier does not guarantee the safety of its passengers and that the level of care is the highest that reasonably can be exercised consistent with the mode of transportation used and the practical operation of its business as a carrier (see CACI No. 902, *Duty of Common Carrier*). (*Gradus v. Hanson Aviation, Inc.* (1984) 158 Cal.App.3d 1038, 1049–1050 [205 Cal.Rptr. 211].)

Sources and Authority

- Duty of Common Carrier. Civil Code section 2101. ~~provides: "A carrier of persons for reward is bound to provide vehicles safe and fit for the purposes to which they are put, and is not excused for default in this respect by any degree of care."~~

- "The duty of care imposed on a common carrier of passengers includes the duty to furnish safe facilities for their passage." (*Cooper v. National Railroad Passenger Corporation* (1975) 45 Cal.App.3d 389, 395 [119 Cal.Rptr. 541], internal citations omitted, disapproved on other grounds in *Ewing v. Cloverleaf Bowl* (1978) 20 Cal.3d 389, 401 [143 Cal.Rptr. 13, 572 P.2d 1155].)

- Failure to give an instruction on Civil Code section 2101 may not be error where an instruction on the "utmost care" standard is given. (*Powell v. Dell-Air Aviation, Inc.* (1968) 268 Cal.App.2d 451, 457–458 [74 Cal.Rptr. 3].)

- The Supreme Court found error where an instruction omitted the duty to inspect: "An owner is bound to use the utmost care and diligence in the maintenance of elevators. In the fulfillment of this obligation something more than regular and frequent inspections is required. Perfunctory inspections, although regularly and frequently made, would not meet the obligation appellant owed to respondents. In order to fulfill the duty imposed upon it by law appellant was required to use due care in servicing, inspecting and maintaining the elevator and all the appliances appurtenant thereto. The instruction erroneously failed to include this requirement." (*Brown v. George Pepperdine Foundation* (1943) 23 Cal.2d 256, 261 [143 P.2d 929], internal citations omitted.)

- "The [equipment] must, therefore, under the standard of utmost care required of a carrier, be constructed, maintained and operated with the purpose and design to prevent injury ... ." (*Vandagriff v. J.C. Penney* (1964) 228 Cal.App.2d 579, 582 [39 Cal.Rptr. 671].)

- Notice of defect is required where the carrier did not create dangerous condition: "In our view, the high degree of care required of a common carrier might impose a greater duty to inspect and thus make notice or knowledge more easily established, but the concept of the carrier's legal responsibility does not exclude the factor of notice or knowledge. The weight of authority supports the proposition that, in cases such as the instant one, actual or constructive notice is a prerequisite to the carrier's liability." (*Gray v. City and County of San Francisco* (1962) 202 Cal.App.2d 319, 330–331 [20 Cal.Rptr. 894].)

- Common carriers "must keep pace with science and art and modern improvement in their application to the carriage of passengers." (*Greyhound Lines, Inc. v. Superior Court* (1970) 3 Cal.App.3d 356, 359 [83 Cal.Rptr. 343], citing *Treadwell v. Whittier* (1889) 80 Cal. 574, 592, 600 [22 P. 266].)

- In *Treadwell*, the court approved of a jury instruction stating that while elevator operators "were not required to seek and apply every new invention, they must adopt such as are found by experience to combine the greater safety with practical use." The court said the instruction "is but a fair deduction from the rule that the defendants must use the utmost care and diligence to carry safely those who ride in their [conveyance] ... ." (*Treadwell, supra*, 80 Cal. at pp. 599–600.) The court held that common carriers "are bound for defects in the vehicles which they furnish, which might have been discovered by the most careful examination ... ." (*Id.* at p. 595.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 923, 925

2 Levy et al., California Torts, Ch 23, *Carriers*, § 23.03[5] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 109, *Carriers* (Matthew Bender)

2 California Civil Practice: Torts ~~(Thomson West)~~ § 28:15 (Thomson Reuters)

1000. Premises Liability—Essential Factual Elements

[*Name of plaintiff***] claims that [he/she] was harmed because of the way [***name of defendant***] managed [his/her/its] property. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] [owned/leased/occupied/controlled] the property;**
2. **That [***name of defendant***] was negligent in the use or maintenance of the property;**
3. **That [***name of plaintiff***] was harmed; and**
4. **That [***name of defendant***]'s negligence was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003; Revised June 2005, December 2011

Directions for Use

For cases involving public entity defendants, see instructions on dangerous conditions of public property (CACI No. 1100 et seq.).

Sources and Authority

- General Duty to Exercise Due Care. Civil Code section 1714(a). ~~provides in part: "Everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself or herself."~~
- "Since *Rowland v. Christian* (1968) 69 Cal.2d 108 [70 Cal.Rptr. 97, 443 P.2d 561], the liability of landowners for injuries to people on their property has been governed by general negligence principles." (*Pineda v. Ennabe* (1998) 61 Cal.App.4th 1403, 1407 [72 Cal.Rptr.2d 206].)
- "Premises liability is a form of negligencebased on the holding in *Rowland v. Christian, supra*, 69 Cal.2d 108, and is described as follows: The owner of premises is under a duty to exercise ordinary care in the management of such premises in order to avoid exposing persons to an unreasonable risk of harm. A failure to fulfill this duty is negligence." (*Brooks v. Eugene Burger Management Corp.* (1989) 215 Cal.App.3d 1611, 1619 [264 Cal.Rptr. 756].)
- "[T]he duty to take affirmative action for the protection of individuals coming upon the land is grounded in the possession of the premises and the attendant right to control and manage the premises." (*Sprecher v. Adamson Companies* (1981) 30 Cal.3d 358, 368 [178 Cal.Rptr. 783, 636 P.2d 1121].)

- " '[P]roperty owners are liable for injuries on land they own, possess, or control.' But … the phrase 'own, possess, *or* control' is stated in the alternative. A defendant need not own, possess and control property in order to be held liable; control alone is sufficient." (*Alcaraz v. Vece* (1997) 14 Cal.4th 1149, 1162 [60 Cal.Rptr.2d 448, 929 P.2d 1239], original italics, internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1082–1086

1 Levy et al., California Torts, Ch. 15, *General Premises Liability*, § 15.01 (Matthew Bender)

6 California Real Estate Law and Practice, Ch. 170, *The Premises: Duties and Liabilities*, §§ 170.01, 170.20 (Matthew Bender)

11 California Real Estate Law and Practice, Ch. 381, *Tort Liability of Property Owners*, § 381.01 (Matthew Bender)

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

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

1 California Civil Practice: Torts §§ 16:1–16:3 (Thomson Reuters~~ West~~)

1100. Dangerous Condition on Public Property—Essential Factual Elements (Gov. Code, § 835)

[*Name of plaintiff***] claims that [he/she] was harmed by a dangerous condition of [***name of defendant***]'s property. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] owned [or controlled] the property;**

2. **That the property was in a dangerous condition at the time of the incident;**

3. **That the dangerous condition created a reasonably foreseeable risk of the kind of incident that occurred;**

4. **[That negligent or wrongful conduct of [***name of defendant***]'s employee acting within the scope of his or her employment created the dangerous condition;]**

   [or]

   [That [*name of defendant***] had notice of the dangerous condition for a long enough time to have protected against it;]**

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

6. **That the dangerous condition was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003; Revised October 2008

Directions for Use

The concepts of notice, "dangerous condition," "protect against," and "property of a public entity" are addressed in subsequent instructions.

For element 4, choose either or both options depending on whether liability is alleged under Government Code section 835(a), 835(b), or both.

Sources and Authority

- Liability of Public Entity for Dangerous Condition of Property. Government Code section 835. ~~provides:~~

  ~~Except as provided by statute, a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was~~

~~incurred, and either:~~

~~(a) A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or~~

~~(b) The public entity had actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.~~

- Actual Notice. Government Code section 835.2(a). ~~provides: "A public entity had actual notice of a dangerous condition within the meaning of subdivision (b) of section 835 if it had actual knowledge of the existence of the condition and knew or should have known of its dangerous character."~~

- Constructive Notice. Government Code section 835.2(b). ~~provides, in part: "A public entity had constructive notice of a dangerous condition within the meaning of subdivision (b) of Section 835 only if the plaintiff establishes that the condition had existed for such a period of time and was of such an obvious nature that the public entity, in the exercise of due care, should have discovered the condition and its dangerous character."~~

- Definitions. Government Code section 830. ~~provides:~~

  ~~As used in this chapter:~~

  ~~(a) "Dangerous condition" means a condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used.~~

  ~~(b) "Protect against" includes repairing, remedying or correcting a dangerous condition, providing safeguards against a dangerous condition, or warning of a dangerous condition.~~

  ~~(c) "Property of a public entity" and "public property" mean real or personal property owned or controlled by the public entity, but do not include easements, encroachments and other property that are located on the property of the public entity but are not owned or controlled by the public entity.~~

- "[A] public entity is not liable for injuries except as provided by statute [Gov. Code, § 815] and [Government Code] section 835 sets out the exclusive conditions under which a public entity is liable for injuries caused by a dangerous condition of public property." (*Brown v. Poway Unified School Dist.* (1993) 4 Cal.4th 820, 829 [15 Cal.Rptr.2d 679, 843 P.2d 624].)

- "Plaintiff's cause of action against [defendant] is defined by statute, specifically the portion of the Government Claims Act entitled Liability of Public Entities and Public Employees. These statutes declare a general rule of immunity and then set out exceptions to that rule. Plaintiff invokes the exception for a dangerous condition of public property, as set out in Government Code section 835.

As there laid out, the cause of action consists of the following elements: (1) a dangerous condition of public property; (2) a foreseeable risk, arising from the dangerous condition, of the kind of injury the plaintiff suffered; (3) actionable conduct in connection with the condition, i.e., either negligence on the part of a public employee in creating it, or failure by the entity to correct it after notice of its existence and dangerousness; (4) a causal relationship between the dangerous condition and the plaintiff's injuries; and (5) compensable damage sustained by the plaintiff." (*Cole v. Town of Los Gatos* (2012) 205 Cal.App.4th 749, 757–758 [140 Cal.Rptr.3d 722], internal citations and footnote omitted.)

- "Under Government Code section 835, a public entity may be liable for injury proximately caused by a dangerous condition of its property if the entity either creates a dangerous condition on its property or fails to remedy a dangerous condition when it has actual or constructive notice of the condition and had sufficient time to take preventive measures before the injury." (*Ceja v. Department of Transportation* (2011) 201 Cal.App.4th 1475, 1481 [135 Cal.Rptr.3d 436].)

- "Subdivisions (a) and (b) of section 835 obviously address two different types of cases. However, what distinguishes the two types of cases is not simply whether the public entity has notice of the dangerous condition. Instead, what distinguishes the two cases in practice is who created the dangerous condition. Because an entity must act through its employees, virtually all suits brought on account of dangerous conditions created by the entity will be brought under subdivision (a). In contrast, subdivision (b) can also support suits based on dangerous conditions not created by the entity or its employees." (*Brown, supra,* 4 Cal.4th at p. 836.)

- In section 835(a), "the term 'created' must be defined as the sort of involvement by an employee that would justify a presumption of notice on the entity's part." (*Brown, supra,* 4 Cal.4th at p. 836.) The res ipsa loquitur presumption does not satisfy section 835(a). (*Ibid*.)

- "Focusing on the language in *Pritchard, supra*, 178 Cal. App. 2d at page 256, stating that where the public entity 'has itself created the dangerous condition it is per se culpable,' plaintiff argues that the negligence that section 835, subdivision (a), refers to is not common law negligence, but something that exists whenever the public entity creates the dangerous condition of property. We disagree. If the Legislature had wanted to impose liability whenever a public entity created a dangerous condition, it would merely have required plaintiff to establish that an act or omission of an employee of the public entity within the scope of his employment created the dangerous condition. Instead, section 835, subdivision (a), requires the plaintiff to establish that a '*negligent or wrongful* act or omission of an employee of the public entity within the scope of his employment created the dangerous condition.' (Italics added.) Plaintiff's interpretation would transform the highly meaningful words 'negligent or wrongful' into meaningless surplusage, contrary to the rule of statutory interpretation that courts should avoid a construction that makes any word surplusage." (*Metcalf v. County of San Joaquin* (2008) 42 Cal.4th 1121, 1135 [72 Cal.Rptr.3d 382, 176 P.2d 654], original italics, internal citation omitted.)

- The plaintiff need not prove both that the public entity was negligent in creating the condition and that it had notice of the condition; either negligence or notice is sufficient. (*Curtis v. State of California* (1982) 128 Cal.App.3d 668, 693 [180 Cal.Rptr. 843].)

- "For liability to be imposed on a public entity for a dangerous condition of property, the entity must be in a position to protect against or warn of the hazard. Therefore, the crucial element is not ownership, but rather control." (*Mamola v. State of California ex rel. Dept. of Transportation* (1979) 94 Cal.App.3d 781, 788 [156 Cal.Rptr. 614], internal citation omitted.)

- "Liability for injury caused by a dangerous condition of property has been imposed when an unreasonable risk of harm is created by a combination of defect in the property and acts of third parties. However, courts have consistently refused to characterize harmful third party conduct as a dangerous condition-absent some concurrent contributing defect in the property itself." (*Hayes v. State of California* (1974) 11 Cal.3d 469, 472 [113 Cal.Rptr. 599, 521 P.2d 855], internal citations omitted.)

- "The existence of a dangerous condition is ordinarily a question of fact but 'can be decided as a matter of law if reasonable minds can come to only one conclusion.' " (*Cerna v. City of Oakland* (2008) 161 Cal.App.4th 1340, 1347 [75 Cal.Rptr.3d 168].)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 249–285

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 6-C, *Immunity From Liability*, ¶¶ 6:91 et seq. (The Rutter Group)

Hanning et al., California Practice Guide: Personal Injury, Ch. 2(III)-D, *Liability For "Dangerous Conditions" Of Public Property*, ¶ 2:2785 et seq. (The Rutter Group)

2 California Government Tort Liability Practice (Cont.Ed.Bar 4th ed.) §§ 12.9-12.55

5 Levy et al., California Torts, Ch. 61, *Particular Liabilities and Immunities of Public Entities and Public Employees*, § 61.01 (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 464, *Public Entities and Officers: California Tort Claims Act*, § 464.81 (Matthew Bender)

19A California Points and Authorities, Ch. 196, *Public Entities*, § 196.11 (Matthew Bender)

1101. Control

[*Name of plaintiff*] claims that [*name of defendant*] controlled the property at the time of the incident. In deciding whether [*name of defendant*] controlled the property, you should consider whether it had the power to prevent, fix, or guard against the dangerous condition. You should also consider whether [*name of defendant*] treated the property as if it were its property.

New September 2003

Directions for Use

This instruction will not be necessary in most cases. Ownership of public property is generally established as a matter of law by evidence of holding title or other similar evidence.

The power to regulate privately owned facilities is not enough, in and of itself, to impose liability on a public entity (i.e., it is not "control"). (*Aaitui v. Grande Properties* (1994) 29 Cal.App.4th 1369, 1377-1378 [35 Cal.Rptr.2d 123].)

Sources and Authority

- "Public Property" Defined. Government Code section 830(c). ~~provides: "'Property of a public entity' and 'public property' mean real or personal property owned or controlled by the public entity, but do not include easements, encroachments and other property that are located on the property of the public entity but are not owned or controlled by the public entity."~~

- "Where the public entity's relationship to the dangerous property is not clear, aid may be sought by inquiring whether the particular defendant had control, in the sense of power to prevent, remedy or guard against the dangerous condition; whether his ownership is a naked title or whether it is coupled with control; and whether a private defendant, having a similar relationship to the property, would be responsible for its safe condition." (*Low v. City of Sacramento* (1970) 7 Cal.App.3d 826, 833-834 [87 Cal.Rptr. 173] [city and county jointly liable for defect in parking strip fronting county hospital].)

- "The *Low*-type inquiry and result are only appropriate '... [where] the public entity's relationship to the dangerous property is not clear ... .' " (*Searcy v. Hemet Unified School Dist.* (1986) 177 Cal.App.3d 792, 800 [223 Cal.Rptr. 206], internal citation omitted.)

- "For liability to be imposed on a public entity for a dangerous condition of property, the entity must be in a position to protect against or warn of the hazard. Therefore, the crucial element is not ownership, but rather control." (*Mamola v. State of California ex rel. Dept. of Transportation* (1979) 94 Cal.App.3d 781, 788 [156 Cal.Rptr. 614], internal citation omitted.)

- "[I]n identifying the defendant with whom control resides, location of the power to correct the dangerous condition is an aid." (*Low*, *supra*, 7 Cal.App.3d at p. 832.)

- The issue of control may be decided as a matter of law if the facts are uncontroverted. (*Aaitui, supra,* 29 Cal.App.4th at p. 1377; *Low, supra,* 7 Cal.App.3d at p. 834.)

- In *Holmes v. City of Oakland* (1968) 260 Cal.App.2d 378, 385 [67 Cal.Rptr. 197], the court found that the city had control over a railroad right-of-way over a city street where a city ordinance had reserved extensive powers to regulate and inspect the railroad company's easement.

- The requisite ownership or control must exist at the time of the incident. (*Longfellow v. County of San Luis Obispo* (1983) 144 Cal.App.3d 379, 383 [192 Cal.Rptr. 580]; *Tolan v. State of California ex rel. Dept. of Transportation* (1979) 100 Cal.App.3d 980, 983 [161 Cal.Rptr. 307].)

- "[A] public entity can be held liable for an accident caused by a condition that exists on property adjacent to a public highway if the condition ' " 'is so connected with or in such proximity to the traveled portion of the highway as to render it unsafe to those traveling thereon.' " ' " (*Carson v. Facilities Development Co.* (1984) 36 Cal.3d 830, 841 [206 Cal.Rptr. 136, 686 P.2d 656], internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 250–257

2 California Government Tort Liability Practice (Cont.Ed.Bar 4th ed.) §§ 12.9-12.14

5 Levy et al., California Torts, Ch. 61, *Particular Liabilities and Immunities of Public Entities and Public Employees,* § 61.01[3][b] (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 464, *Public Entities and Officers: California Torts Claim Act,* § 464.81 (Matthew Bender)

19A California Points and Authorities, Ch. 196, *Public Entities,* § 196.11 (Matthew Bender)

1102. Definition of "Dangerous Condition" (Gov. Code, § 830(a))

A "dangerous condition" is a condition of public property that creates a substantial risk of injury to members of the general public when the property [or adjacent property] is used with reasonable care and in a reasonably foreseeable manner. A condition that creates only a minor risk of injury is not a dangerous condition. [Whether the property is in a dangerous condition is to be determined without regard to whether [*name of plaintiff***]/ [or] [***name of third party***] exercised or failed to exercise reasonable care in [his/her] use of the property.]**

New September 2003; Revised June 2010

Directions for Use

Give the last sentence if comparative fault is at issue. It clarifies that comparative fault does not negate the possible existence of a dangerous condition. (See *Fredette v. City of Long Beach* (1986) 187 Cal.App.3d 122, 131 [231 Cal.Rptr. 598].)

Sources and Authority

- "Dangerous Condition" Defined. Government Code section 830(a). ~~provides: " 'Dangerous condition' means a condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used."~~

- No Liability for Minor Risk. Government Code section 830.2. ~~provides: "A condition is not a dangerous condition within the meaning of this chapter if the trial or appellate court, viewing the evidence most favorably to the plaintiff, determines as a matter of law that the risk created by the condition was of such a minor, trivial or insignificant nature in view of the surrounding circumstances that no reasonable person would conclude that the condition created a substantial risk of injury when such property or adjacent property was used with due care in a manner in which it was reasonably foreseeable that it would be used."~~

- "In general, '[whether] a given set of facts and circumstances creates a dangerous condition is usually a question of fact and may only be resolved as a question of law if reasonable minds can come to but one conclusion.' " (*Peterson v. San Francisco Community College Dist.* (1984) 36 Cal.3d 799, 810 [205 Cal.Rptr. 842, 685 P.2d 1193], internal citation omitted.)

- "An initial and essential element of recovery for premises liability under the governing statutes is proof a dangerous condition existed. The law imposes no duty on a landowner—including a public entity—to repair trivial defects, or 'to maintain [its property] in an absolutely perfect condition.' " (*Stathoulis v. City of Montebello* (2008) 164 Cal.App.4th 559, 566 [78 Cal.Rptr.3d 910], internal citations omitted.)

- "The status of a condition as 'dangerous' for purposes of the statutory definition does *not* depend on

whether the plaintiff or other persons were actually exercising due care but on whether the condition of the property posed a substantial risk of injury to persons who *were* exercising due care." (*Cole v. Town of Los Gatos* (2012) 205 Cal.App.4th 749, 768 [140 Cal.Rptr.3d 722], original italics.)

- "The negligence of a plaintiff-user of public property ... is a defense which may be asserted by a public entity; it has no bearing upon the determination of a 'dangerous condition' in the first instance. … If, however, it can be shown that the property is safe when used with due care and that a risk of harm is created only when foreseeable users fail to exercise due care, then such property is not 'dangerous' within the meaning of section 830, subdivision (a)." (*Fredette, supra*, 187 Cal.App.3d at p. 131, internal citation omitted.)

- "Even though it is foreseeable that persons may use public property without due care, a public entity may not be held liable for failing to take precautions to protect such persons." (*Fredette, supra*, 187 Cal.App.3d at p. 132, internal citation omitted.)

- "With respect to public streets, courts have observed 'any property can be dangerous if used in a sufficiently improper manner. For this reason, a public entity is only required to provide roads that are safe for reasonably foreseeable careful use. [Citation.] "If [] it can be shown that the property is safe when used with due care and that a risk of harm is created only when foreseeable users fail to exercise due care, then such property is not 'dangerous' within the meaning of section 830, subdivision (a)." [Citation.]' " (*Sun v. City of Oakland* (2008) 166 Cal.App.4th 1177, 1183 [83 Cal.Rptr.3d 372], internal citations omitted.)

- "[A] prior dangerous condition may require street lighting or other means to lessen the danger but the absence of street lighting is itself not a dangerous condition." (*Mixon v. Pacific Gas & Electric Co.* (2012) 207 Cal.App.4th 124, 133 [142 Cal.Rptr.3d 633].)

- "Although public entities may be held liable for injuries occurring to reasonably foreseeable users of the property, even when the property is used for a purpose for which it is not designed or which is illegal, liability may ensue only if the property creates a substantial risk of injury when it is used with due care. Whether a condition creates a substantial risk of harm depends on how the general public would use the property exercising due care, including children who are held to a lower standard of care. (§ 830.) The standard is an objective one; a plaintiff's particular condition ... , does not alter the standard." (*Schonfeldt v. State of California* (1998) 61 Cal.App.4th 1462, 1466 [72 Cal.Rptr.2d 464], internal citations omitted.)

- "A public entity may be liable for a dangerous condition of public property even where the immediate cause of a plaintiff's injury is a third party's negligence if some physical characteristic of the property exposes its users to increased danger from third party negligence. 'But it is insufficient to show only harmful third party conduct, like the conduct of a motorist. " '[T]hird party conduct, by itself, unrelated to the condition of the property, does not constitute a "dangerous condition" for which a public entity may be held liable.' " … There must be a defect in the physical condition of the property and that defect must have some causal relationship to the third party conduct that injures the plaintiff. …' " (*Salas v. Department of Transportation* (2011) 198 Cal.App.4th 1058, 1069–1070 [129 Cal.Rptr.3d 690], internal citation omitted.)

- "The majority of cases ... have concluded that third party conduct by itself, unrelated to the condition of the property, does not constitute a 'dangerous condition' for which a public entity may be held liable. ... Nothing in the provisions of section 835, however, specifically precludes a finding that a public entity may be under a duty, given special circumstances, to protect against harmful criminal conduct on its property." (*Peterson, supra*, 36 Cal.3d at pp. 810–811, internal citations omitted.)

- "Two points applicable to this case are ... well established: first, that the location of public property, by virtue of which users are subjected to hazards on adjacent property, may constitute a 'dangerous condition' under sections 830 and 835; second, that a physical condition of the public property that increases the risk of injury from third party conduct may be a 'dangerous condition' under the statutes." (*Bonanno v. Central Contra Costa Transit Authority* (2003) 30 Cal.4th 139, 154 [132 Cal.Rptr.2d 341, 65 P.3d 807].)

- "[T]he absence of other similar accidents is 'relevant to the determination of whether a condition is dangerous.' But the city cites no authority for the proposition that the absence of other similar accidents is *dispositive* of whether a condition is dangerous, or that it compels a finding of nondangerousness absent other evidence." (*Lane v. City of Sacramento* (2010) 183 Cal.App.4th 1337, 1346 [107 Cal.Rptr.3d 730], original italics, internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, § 269

2 California Government Tort Liability Practice (Cont.Ed.Bar 4th ed.) § 12.15

5 Levy et al., California Torts, Ch. 61, *Particular Liabilities and Immunities of Public Entities and Public Employees*, § 61.01[2][a] (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 464, *Public Entities and Officers: California Torts Claim Act*, § 464.81 (Matthew Bender)

19A California Points and Authorities, Ch. 196, *Public Entities*, § 196.11 (Matthew Bender)

1104. Inspection System (Gov. Code, § 835.2(b)(1) & (2))

In deciding whether [*name of defendant***] should have discovered the dangerous condition, you may consider whether it had a reasonable inspection system and whether a reasonable system would have revealed the dangerous condition.**

[In determining whether an inspection system is reasonable, you may consider the practicality and cost of the system and balance those factors against the likelihood and seriousness of the potential danger if no such system existed.]

[*and/or***]**

[If [*name of defendant***] had a reasonable inspection system but did not detect the dangerous condition, you may consider whether it used reasonable care in maintaining and operating the system.]**

New September 2003

Directions for Use

Read the first paragraph and one or both of the bracketed paragraphs as appropriate to the facts.

Sources and Authority

- Admissible Evidence of Due Care. Government Code section 835.2(b). ~~provides, in part:~~

  ~~On the issue of due care, admissible evidence includes but is not limited to evidence as to:~~

  ~~(1) Whether the existence of the condition and its dangerous character would have been discovered by an inspection system that was reasonably adequate (considering the practicality and cost of inspection weighed against the likelihood and magnitude of the potential danger to which failure to inspect would give rise) to inform the public entity whether the property was safe for the use or uses for which the public entity used or intended others to use the public property and for uses that the public entity actually knew others were making of the public property or adjacent property.~~

  ~~(2) Whether the public entity maintained and operated such an inspection system with due care and did not discover the condition.~~

- "Constructive notice may be found where the dangerous condition would have been discovered by a reasonable inspection." (*Straughter v. State of California* (1976) 89 Cal.App.3d 102, 109 [152 Cal.Rptr. 147], citing to *Stanford v. City of Ontario* (1972) 6 Cal.3d 870, 882 [101 Cal.Rptr. 97, 495 P.2d 425].)

- "The questions of whether a dangerous condition could have been discovered by reasonable inspection and whether there was adequate time for preventive measures are properly left to the jury." (*Carson v. Facilities Development Co.* (1984) 36 Cal.3d 830, 843 [206 Cal.Rptr. 136, 686 P.2d 656], internal citations omitted.)

- "Although judicial decisions do not always link the issue of constructive notice to the reasonable inspection system ... , the Tort Claims Act indicates that, absent other persuasive evidence, the relationship between constructive notice and inspection may be crucial." (California Government Tort Liability Practice (Cont.Ed.Bar 3d ed. 1992), § 3.37.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, § 271

2 California Government Tort Liability Practice (Cont.Ed.Bar 4th ed.) §§ 12.48-12.50

5 Levy et al., California Torts, Ch. 61, *Particular Liabilities and Immunities of Public Entities and Public Employees*, § 61.03[4][b] (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 464, *Public Entities and Officers: California Torts Claim Act*, § 464.81 (Matthew Bender)

19A California Points and Authorities, Ch. 196, *Public Entities*, § 196.11 (Matthew Bender)

1120. Failure to Provide Traffic Control Signals (Gov. Code, § 830.4)

You may not find that [*name of defendant***]'s property was in a dangerous condition just because it did not provide a [***insert device or marking***]. However, you may consider the lack of a [***insert device or marking***], along with other circumstances shown by the evidence, in determining whether [***name of defendant***]'s property was dangerous.**

New September 2003

Sources and Authority

- No Liability for Failure to Provide Traffic Controls. Government Code section 830.4~~. provides: "A condition is not a dangerous condition within the meaning of this chapter merely because of the failure to provide regulatory traffic control signals, stop signs, yield right-of-way signs, or speed restriction signs, as described by the Vehicle Code, or distinctive roadway markings as described in Section 21460 of the Vehicle Code."~~

- " '[T]he statutory scheme precludes a plaintiff from imposing liability on a public entity for creating a dangerous condition merely because it did not install the described traffic control devices.' In short, '[t]he lack of a traffic signal at the intersection does not constitute proof of a dangerous condition.' " (*Mixon v. Pacific Gas & Electric Co.* (2012) 207 Cal.App.4th 124, 135 [142 Cal.Rptr.3d 633], internal citation omitted.)

- "Cases interpreting this statute have held that it provides a shield against liability only in those situations where the alleged dangerous condition exists solely as a result of the public entity's failure to provide a regulatory traffic device or street marking. If a traffic intersection is dangerous for reasons other than the failure to provide regulatory signals or street markings, the statute provides no immunity." (*Washington v. City and County of San Francisco* (1990) 219 Cal.App.3d 1531, 1534-1535 [269 Cal.Rptr. 58].)

- "A public entity does not create a dangerous condition on its property 'merely because of the failure to provide regulatory traffic control signals, stop signs, yield right-of-way signs, or speed restriction signs ... .' (§ 830.4.) If, on the other hand, the government installs traffic signals and invites the public to justifiably rely on them, liability will attach if the signals malfunction, confusing or misleading motorists, and causing an accident to occur. The reasoning behind this rule is that the government creates a dangerous condition and a trap when it operates traffic signals that, for example, direct motorists to 'go' in all four directions of an intersection simultaneously, with predictable results." (*Chowdhury v. City of Los Angeles* (1995) 38 Cal.App.4th 1187, 1194-1195 [45 Cal.Rptr.2d 657], internal citations omitted.)

- "If the government turns off traffic signals entirely to avoid confusion, liability does not attach. 'When the [traffic] lights were turned off, their defective condition could no longer mislead or misdirect the injured party.' The same result obtains whether the traffic signals are extinguished by design or by accident." (*Chowdhury*, *supra*, 38 Cal.App.4th at p. 1195, internal citations omitted.)

- "Although section 830.4 ... provides that a condition of public property is not a dangerous one merely because of the failure to provide regulatory traffic control signals, the absence of such signals for the protection of pedestrians must be taken into consideration, together with other factors. ... [T]he lack of crosswalk markings, better illumination and warning signs became important factors in the case when the [pedestrian] subway itself was in a dangerous condition." (*Gardner v. City of San Jose* (1967) 248 Cal.App.2d 798, 803 [57 Cal.Rptr. 176].)

- "In short, a dangerous condition proven to exist, for reasons other than or in addition to the mere failure to provide the controls or markings described in section 830.4, may constitute a proximate cause of injury without regard to whether such condition also constitutes a 'trap,' as described by section 830.8, to one using the public improvement with due care because of the failure to post signs different from those dealt with by section 830.4 warning of that dangerous condition." (*Washington, supra,* 219 Cal.App.3d at p. 1537.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, § 264

2 California Government Tort Liability Practice (Cont.Ed.Bar 4th ed.) § 12.75

5 Levy et al., California Torts, Ch. 61, *Particular Liabilities and Immunities of Public Entities and Public Employees*, § 61.03[4] (Matthew Bender)

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

19A California Points and Authorities, Ch. 196, *Public Entities*, §§ 196.12, 196.210 (Matthew Bender

1121. Failure to Provide Traffic Warning Signals, Signs, or Markings (Gov. Code, § 830.8)

A public entity is not responsible for harm caused by the lack of a [*insert relevant warning device***] unless a reasonably careful person would not notice or anticipate a dangerous condition of property without the [***insert relevant warning device***].**

New September 2003

Sources and Authority

- No Liability for Failure to Provide Traffic Control. Government Code section 830.8. ~~provides: "Neither a public entity nor a public employee is liable under this chapter for an injury caused by the failure to provide traffic or warning signals, signs, markings or devices described in the Vehicle Code. Nothing in this section exonerates a public entity or public employee from liability for injury proximately caused by such failure if a signal, sign, marking or device (other than one described in Section 830.4) was necessary to warn of a dangerous condition which endangered the safe movement of traffic and which would not be reasonably apparent to, and would not have been anticipated by, a person exercising due care."~~

- "Section 830.8 provides a limited immunity for public entities exercising their discretion in the placement of warning signs described in the Vehicle Code. 'The broad discretion allowed a public entity in the placement of road control signs is limited, however, by the requirement that there be adequate warning of dangerous conditions not reasonably apparent to motorists.' Thus where the failure to post a warning sign results in a concealed trap for those exercising due care, section 830.8 immunity does not apply." (*Kessler v. State of California* (1988) 206 Cal.App.3d 317, 321–322 [253 Cal.Rptr. 537], internal citations omitted.)

- "[A] concealed dangerous condition that is a trap to motorists or pedestrians may require the posting of a warning sign but the absence of a warning sign itself is not a dangerous condition." (*Mixon v. Pacific Gas & Electric Co.* (2012) 207 Cal.App.4th 124, 136 [142 Cal.Rptr.3d 633].)

- "A public entity may be liable for accidents proximately caused by its failure to provide a signal, sign, marking or device to warn of a dangerous condition which endangers the safe movement of traffic 'and which would not be reasonably apparent to, and would not have been anticipated by, a person exercising due care.' This 'concealed trap' statute applies to accidents proximately caused when, for example, the public entity fails to post signs warning of a sharp or poorly banked curve ahead on its road or of a hidden intersection behind a promontory, or where a design defect in the roadway causes moisture to freeze and create an icy road surface, a fact known to the public entity but not to unsuspecting motorists, or where road work is being performed on a highway." (*Chowdhury v. City of Los Angeles* (1995) 38 Cal.App.4th 1187, 1196–1197 [45 Cal.Rptr.2d 657], internal citations omitted.)

- "[W]arning devices are required under Government Code section 830.8 and 830 (fog) only if a dangerous condition exists." (*Callahan v. City and County of San Francisco* (1971) 15 Cal.App.3d

374, 380 [93 Cal.Rptr. 122].)

Secondary Source

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 264, 265

2 California Government Tort Liability Practice (Cont.Ed.Bar 4th ed.), §§ 12.76–12.79

5 Levy et al., California Torts, Ch. 61, *Particular Liabilities and Immunities of Public Entities and Public Employees*, § 61.03[4] (Matthew Bender)

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

19A California Points and Authorities, Ch. 196, *Public Entities*, §§ 196.12, 196.304 (Matthew Bender

1122. Affirmative Defense—Weather Conditions Affecting Streets and Highways (Gov. Code, § 831)

[*Name of defendant***] claims it cannot be held responsible for [***name of plaintiff***]'s harm because the harm was caused by [***insert weather condition, e.g., fog, wind, rain, flood, ice, or snow***] affecting the use of a public street or highway. To succeed, [***name of defendant***] must prove both of the following:**

1. **That [***insert weather condition, e.g., fog, wind, rain, flood, ice, or snow***] affecting the use of a public street or highway was the cause of [***name of plaintiff***]'s harm; and**

2. **That a reasonably careful person using the public streets and highways would have noticed the [***insert weather condition, e.g., fog, wind, rain, flood, ice, or snow***] and anticipated its effect on the use of the street or highway.**

New September 2003

Directions for Use

The immunity provided by Government Code section 831 does not apply to: (1) effects that would not be reasonably apparent to and anticipated by a person exercising reasonable care, (2) situations where the weather effect combines with other factors that make the road dangerous, (3) sunlight that blinds drivers, or (4) where the weather conditions resulted in physical damage to or deterioration of the street or highway. (*Erfurt v. State of California* (1983) 141 Cal.App.3d 837, 845–846 [190 Cal.Rptr. 569]; see *Flournoy v. State of California* (1969) 275 Cal.App.2d 806, 814 [80 Cal.Rptr. 485].)

Sources and Authority

- No Liability for Weather Conditions. Government Code section 831. ~~provides: "Neither a public entity nor a public employee is liable for an injury caused by the effect on the use of streets and highways of weather conditions as such. Nothing in this section exonerates a public entity or public employee from liability for injury proximately caused by such effect if it would not be reasonably apparent to, and would not be anticipated by, a person exercising due care. For the purpose of this section, the effect on the use of streets and highways of weather conditions includes the effect of fog, wind, rain, flood, ice or snow but does not include physical damage to or deterioration of streets and highways resulting from weather conditions."~~

- Weather immunity is an affirmative defense. (*Bossi v. State of California* (1981) 119 Cal.App.3d 313, 321 [174 Cal.Rptr. 93] [jury properly instructed regarding section 831, but issue was moot because jury did not reach it]; see also *Allyson v. Department of Transportation* (1997) 53 Cal.App.4th 1304, 1319 [62 Cal.Rptr.2d 490].)

- CalTrans's duty regarding transitory conditions affecting road surface and highway safety is discretionary, not mandatory. (*Allyson, supra,* 53 Cal.App.4th at p. 1319.) Accordingly, section 831 immunity is available to CalTrans in appropriate circumstances. (*Id.* at pp. 1320–1321.)

Secondary Source

5 Witkin, Summary of California Law (10th ed. 2005) Torts, § 279

2 California Government Tort Liability Practice (Cont.Ed.Bar 4th ed.), §§ 12.80–12.81

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

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

19A California Points and Authorities, Ch. 196, *Public Entities*, §§ 196.12, 196.301 (Matthew Bender

1224. Negligence—Negligence for Product Rental/Standard of Care

[A person who rents products to others for money is negligent if he or she fails to use reasonable care to:

1. **Inspect the products for defects;**
2. **Make them safe for their intended use; and**
3. **Adequately warn of any known dangers.]**

[*or*]

[A person who lends products to others without charge only is required to use reasonable care to warn of known defects.]

New September 2003

Directions for Use

Use this instruction in conjunction with CACI No. 1220, *Negligence—Essential Factual Elements*, and instead of CACI No. 1221, *Negligence—Basic Standard of Care*, in cases involving rentals.

If the case involves a product lent gratuitously for the mutual benefit of the parties (e.g., to a prospective purchaser), the first paragraph is applicable and the instruction needs to be modified.

In a purely gratuitous lending case, if the object is a "dangerous instrumentality" there may be a duty to conduct a reasonable inspection before lending. (See *Tierstein v. Licht* (1959) 174 Cal.App.2d 835, 842 [345 P.2d 341].)

Sources and Authority

- Duties of Lessor of Personal Property. Civil Code section 1955.

- If a bailment is for hire, or provides a mutual benefit, the bailor has a duty to the bailee and to third persons to (1) warn of actually known defects and (2) to use reasonable care to make an examination of the good before lending it "in order to make certain that it [is] fit for the use known to be intended." (*Tierstein, supra*, 174 Cal.App.2d at pp. 840-841.)

- A bailment, otherwise gratuitous, where made to induce a purchase, has been considered sufficient to give rise to the same duty of reasonable care on the part of the bailor as an ordinary bailment for hire. This is regarded as a bailment for mutual benefit. (*Tierstein, supra*, 174 Cal.App.2d at p. 842.)

- Under either a negligence or an implied warranty theory, "the essential inquiry ... is whether [the

defendants] made such inspection of their equipment as was necessary to discharge their duty of reasonable care." (*McNeal v. Greenberg* (1953) 40 Cal.2d 740, 742 [255 P.2d 810].) The bailor is not an insurer or guarantor. (*Tierstein, supra,* 174 Cal.App.2d at p. 841.)

- ~~Civil Code section 1955 provides: "Except as otherwise agreed by the lessor and the lessee in lease agreements for a term of more than 20 days, one who leases personal property must deliver it to the lessee, secure his or her quiet enjoyment thereof against all lawful claimants, put it into a condition fit for the purpose for which he or she leases it, and repair all deteriorations thereof not occasioned by the fault of the lessee and not the natural result of its use."~~

- Restatement Second of Torts, section 408, provides: "One who leases a chattel as safe for immediate use is subject to liability to those whom he should expect to use the chattel, or to be endangered by its probable use, for physical harm caused by its use in a manner for which, and by a person for whose use, it is leased, if the lessor fails to exercise reasonable care to make it safe for such use or to disclose its actual condition to those who may be expected to use it."

- This Restatement section was cited with approval in *Rae v. California Equipment Co.* (1939) 12 Cal.2d 563, 569 [86 P.2d 352].

- "The general rule is that the only duty which a gratuitous bailor owes either to the bailee or to third persons is to warn them of actually known defects which render the chattel dangerous for the purpose for which it is ordinarily used; he has no liability for injuries caused by defects in the subject matter of the bailment of which he was not aware." (*Tierstein, supra,* 174 Cal.App.2d at p. 841.)

1230. Express Warranty—Essential Factual Elements

[*Name of plaintiff***] claims that [he/she/it] was harmed by the [***product***] because [***name of defendant***] represented, either by words or actions, that the [***product***] [***insert description of alleged express warranty, e.g., "was safe"***], but the [***product***] was not as represented. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] [***insert one or more of the following:***]**

[made a [statement of fact/promise] [to/received by] [*name of plaintiff***] that the [***product***] [***insert description of alleged express warranty***];] [or]**

[gave [*name of plaintiff***] a description of the [***product***];] [or]**

[gave [*name of plaintiff***] a sample or model of the [***product***];]**

2. **That the [***product***] [***insert one or more of the following:***]**

[did not perform as [stated/promised];] [or]

[did not meet the quality of the [description/sample/model];]

3. **[That [***name of plaintiff***] took reasonable steps to notify [***name of defendant***] within a reasonable time that the [***product***] was not as represented, whether or not [***name of defendant***] received such notice;]**

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

5. **That the failure of the [***product***] to be as represented was a substantial factor in causing [***name of plaintiff***]'s harm.**

[Formal words such as "warranty" or "guarantee" are not required to create a warranty. It is also not necessary for [*name of defendant***] to have specifically intended to create a warranty. But a warranty is not created if [***name of defendant***] simply stated the value of the goods or only gave [his/her] opinion of or recommendation regarding the goods.]**

New September 2003; Revised February 2005

Directions for Use

The giving of notice to the seller is not required in personal injury or property damage lawsuits against a manufacturer or another supplier with whom the plaintiff has not directly dealt. (*Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, 61 [27 Cal.Rptr. 697, 377 P.2d 897]; *Gherna v. Ford Motor Co.* (1966) 246 Cal.App.2d 639, 652-653 [55 Cal.Rptr. 94].)

If an instruction on the giving of notice to the seller is needed, see CACI No. 1243, *Notification/Reasonable Time*.

Sources and Authority

- Express Warranties. Commercial Code section 2313.

  Applicable to "Transactions in Goods." Commercial Code section 2102.

  "Goods" Defined. Commercial Code section 2105.

- "A warranty relates to the title, character, quality, identity, or condition of the goods. The purpose of the law of warranty is to determine what it is that the seller has in essence agreed to sell." (*Keith v. Buchanan* (1985) 173 Cal.App.3d 13, 20 [220 Cal.Rptr. 392], internal citation omitted.)

- "A warranty is a contractual term concerning some aspect of the sale, such as title to the goods, or their quality or quantity." (4 Witkin, Summary of California Law (10th ed. 2005) Sales, § 51.)

- ~~California Commercial Code section 2313 provides:~~

  ~~(1) Express warranties by the seller are created as follows:~~

  ~~(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.~~

  ~~(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.~~

  ~~(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.~~

  ~~(2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.~~

- ~~California Commercial Code section 2102 provides: "Unless the context otherwise requires, this division applies to transactions in goods." Section 2105 defines "goods" as "all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale."~~

- "Privity is not required for an action based upon an express warranty." (*Hauter v. Zogarts* (1975) 14 Cal.3d 104, 115, fn. 8 [120 Cal.Rptr. 681, 534 P.2d 377].)

- " 'The determination as to whether a particular statement is an expression of opinion or an affirmation of a fact is often difficult, and frequently is dependent upon the facts and circumstances existing at the time the statement is made.' " (*Keith, supra,* 173 Cal.App.3d at p. 21, internal citation omitted.)

- "Statements made by a seller during the course of negotiation over a contract are presumptively affirmations of fact unless it can be demonstrated that the buyer could only have reasonably considered the statement as a statement of the seller's opinion. Commentators have noted several factors which tend to indicate an opinion statement. These are (1) a lack of specificity in the statement made, (2) a statement that is made in an equivocal manner, or (3) a statement which reveals that the goods are experimental in nature." (*Keith, supra,* 173 Cal.App.3d at p. 21.)

- "It is important to note ... that even statements of opinion can become warranties under the code if they become part of the basis of the bargain." (*Hauter, supra,* 14 Cal.3d at p. 115, fn. 10.)

- The California Supreme Court has stated that "[t]he basis of the bargain requirement represents a significant change in the law of warranties. Whereas plaintiffs in the past have had to prove their reliance upon specific promises made by the seller, the Uniform Commercial Code requires no such proof." (*Hauter, supra,* 14 Cal.3d at p. 115, internal citations omitted.) However, the Court also noted that there is some controversy as to the role, if any, of reliance in this area.

- The court in *Keith, supra,* 173 Cal.App.3d at p. 23, held that the seller has the burden of proving that the bargain did not rest at all on the representation, for example, by showing that the buyer inspected and discovered the defect before the contract was made.

- "It is immaterial whether defendant had actual knowledge of the contraindications. 'The obligation of a warranty is absolute, and is imposed as a matter of law irrespective of whether the seller knew or should have known of the falsity of his representations.' " (*Grinnell v. Charles Pfizer & Co.* (1969) 274 Cal.App.2d 424, 442 [79 Cal.Rptr. 369], internal citations omitted.)

- "[A] sale is ordinarily an essential element of any warranty, express or implied ... ." (*Fogo v. Cutter Laboratories, Inc.* (1977) 68 Cal.App.3d 744, 759 [137 Cal.Rptr. 417], internal citations omitted.)

Secondary Sources

4 Witkin, Summary of California Law (10th ed. 2005) Sales, §§ 56–66

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, §§ 2.31-2.33, Ch. 7, *Proof*, § 7.03 (Matthew Bender)

44 California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties*, §§ 502.23, 502.42-502.50, 502.140-502.150 (Matthew Bender)

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

1231. Implied Warranty of Merchantability—Essential Factual Elements

[*Name of plaintiff***] [also] claims that [he/she/it] was harmed by the [***product***] that [he/she/it] bought from [***name of defendant***] because the [***product***] did not have the quality that a buyer would expect. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] bought the [***product***] from [***name of defendant***];**

2. **That, at the time of purchase, [***name of defendant***] was in the business of selling these goods [or by [his/her/its] occupation held [himself/herself/itself] out as having special knowledge or skill regarding these goods];**

3. **That the [***product***] [***insert one or more of the following:***]**

   [was not of the same quality as those generally acceptable in the trade;]

   [was not fit for the ordinary purposes for which such goods are used;]

   [did not conform to the quality established by the parties' prior dealings or by usage of trade;]

   [*other ground as set forth in Commercial Code section 2314(2);***]**

4. **[That [***name of plaintiff***] took reasonable steps to notify [***name of defendant***] within a reasonable time that the [***product***] did not have the expected quality;]**

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

6. **That the failure of the [***product***] to have the expected quality was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003

Directions for Use

This cause of action could also apply to products that are leased. If so, modify the instruction accordingly.

The giving of notice to the seller is not required in personal injury or property damage lawsuits against a manufacturer or another supplier with whom the plaintiff has not directly dealt. (*Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, 61 [27 Cal.Rptr. 697, 377 P.2d 897]; *Gherna v. Ford Motor Co.* (1966) 246 Cal.App.2d 639, 652-653 [55 Cal.Rptr. 94].)

If an instruction on the giving of notice to the seller is needed, see CACI No. 1243, *Notification/Reasonable Time*.

Sources and Authority

- Implied Warranty of Merchantability. Commercial Code section 2314.
- Customary Dealings of Parties. Commercial Code section 1303.
- "A warranty is a contractual term concerning some aspect of the sale, such as title to the goods, or their quality or quantity." (4 Witkin, Summary of California Law (10th ed. 2005) Sales, § 51.)
- "Unlike express warranties, which are basically contractual in nature, the implied warranty of merchantability arises by operation of law. It does not 'impose a general requirement that goods precisely fulfill the expectation of the buyer. Instead, it provides for a minimum level of quality.' " (*American Suzuki Motor Corp. v. Superior Court* (1995) 37 Cal.App.4th 1291, 1295–1296 [44 Cal.Rptr.2d 526], internal citations omitted.)
- It has been observed that "in cases involving personal injuries resulting from defective products, the theory of strict liability in tort has virtually superseded the concept of implied warranties." (*Grinnell v. Charles Pfizer & Co.* (1969) 274 Cal.App.2d 424, 432 [79 Cal.Rptr. 369].)
- ~~Commercial Code section 2314 provides:~~

~~(1) Unless excluded or modified (Section 2316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.~~

~~(2) Goods to be merchantable must be at least such as~~

~~(a) Pass without objection in the trade under the contract description; and~~

~~(b) In the case of fungible goods, are of fair average quality within the description; and~~

~~(c) Are fit for the ordinary purposes for which such goods are used; and~~

~~(d) Run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and~~

~~(c) Are adequately contained, packaged, and labeled as the agreement may require; and~~

~~(f) Conform to the promises or affirmations of fact made on the container or label if any.~~

~~(3) Unless excluded or modified (Section 2316) other implied warranties may arise from course of dealing or usage of trade.~~

- "Vertical privity is a prerequisite in California for recovery on a theory of breach of the implied warranties of fitness and merchantability." (*United States Roofing, Inc. v. Credit Alliance Corp.* (1991) 228 Cal.App.3d 1431, 1441 [279 Cal.Rptr. 533], internal citations omitted.)

- Although privity appears to be required for actions based upon the implied warranty of merchantability, there are exceptions to this rule, such as one for members of the purchaser's family. (*Hauter v. Zogarts* (1975) 14 Cal.3d 104, 115, fn. 8 [120 Cal.Rptr. 681, 534 P.2d 377].) Vertical privity is also waived for employees. (*Peterson v. Lamb Rubber Co.* (1960) 54 Cal.2d 339 [5 Cal.Rptr. 863, 353 P.2d 575].) A plaintiff satisfies the privity requirement when he or she leases or negotiates the sale or lease of the product. (*United States Roofing, Inc., supra*.)

- Commercial Code section 2104(1) defines "merchant," in relevant part, as "a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction."

- Commercial Code section 2105(1) defines "goods," in relevant part, as "all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid."

~~- Commercial Code section 1303 provides:~~

~~(a) A "course of performance" is a sequence of conduct between the parties to a particular transaction that exists if:~~

~~(1) the agreement of the parties with respect to the transaction involves repeated occasions for performance by a party; and~~

~~(2) the other party, with knowledge of the nature of the performance and opportunity for objection to it, accepts the performance or acquiesces in it without objection.~~

~~(b) A "course of dealing" is a sequence of conduct concerning previous transactions between the parties to a particular transaction that is~~

~~fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.~~

~~(c) A "usage of trade" is any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage must be proved as facts. If it is established that such a usage is embodied in a trade code or similar record, the interpretation of the record is a question of law.~~

~~(d) A course of performance or course of dealing between the parties or usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware is relevant in ascertaining the meaning of the parties' agreement, may give particular meaning to specific terms of the agreement, and may supplement or qualify the terms of the agreement. A usage of trade applicable in the place in which part of the performance under the agreement is to occur may be so utilized as to that part of the performance.~~

~~(e) Except as otherwise provided in subdivision (f), the express terms of an agreement and any applicable course of performance, course of dealing, or usage of trade must be construed whenever reasonable as consistent with each other. If such a construction is unreasonable:~~

~~(1) express terms prevail over course of performance, course of dealing, and usage of trade;~~

~~(2) course of performance prevails over course of dealing and usage of trade;~~

~~(3) course of dealing prevails over usage of trade.~~

~~(f) Subject to Section 2209, a course of performance is relevant to show a waiver or modification of any term inconsistent with the course of performance.~~

~~(g) Evidence of a relevant usage of trade offered by one party is not admissible unless that party has given the other party notice that the court finds sufficient to prevent unfair surprise to the other party.~~

Secondary Sources

4 Witkin, Summary of California Law (10th ed. 2005) Sales, § 51

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, §§ 2.31-2.33, Ch. 7, *Proof,* § 7.03 (Matthew Bender)

44 California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties*, §§ 502.24, 502.51, 502.200-502.214 (Matthew Bender)

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

1232. Implied Warranty of Fitness for a Particular Purpose—Essential Factual Elements

[*Name of plaintiff***] claims that [he/she/it] was harmed by the [***product***] that [he/she/it] bought from [***name of defendant***] because the [***product***] was not suitable for [***name of plaintiff***]'s intended purpose. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] bought the [***product***] from [***name of defendant***];**

2. **That, at the time of purchase, [***name of defendant***] knew or had reason to know that [***name of plaintiff***] intended to use the product for a particular purpose;**

3. **That, at the time of purchase, [***name of defendant***] knew or had reason to know that [***name of plaintiff***] was relying on [his/her/its] skill and judgment to select or furnish a product that was suitable for the particular purpose;**

4. **That [***name of plaintiff***] justifiably relied on [***name of defendant***]'s skill and judgment;**

5. **That the [***product***] was not suitable for the particular purpose;**

6. **[That [***name of plaintiff***] took reasonable steps to notify [***name of defendant***] within a reasonable time that the [***product***] was not suitable;]**

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

8. **That the failure of the [***product***] to be suitable was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003

Directions for Use

This cause of action could also apply to products that are leased. If so, modify the instruction accordingly.

The giving of notice to the seller is not required in personal injury or property damage lawsuits against a manufacturer or another supplier with whom the plaintiff has not directly dealt. (*Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, 61 [27 Cal.Rptr. 697, 377 P.2d 897]; *Gherna v. Ford Motor Co.* (1966) 246 Cal.App.2d 639, 652-653 [55 Cal.Rptr. 94].)

If an instruction on the giving of notice to the seller is needed, see CACI No. 1243, *Notification/Reasonable Time*.

Sources and Authority

- Implied Warranty of Fitness for Particular Purpose. Commercial Code section 2315.

- "A warranty is a contractual term concerning some aspect of the sale, such as title to the goods, or their quality or quantity." (4 Witkin, Summary of California Law (10th ed. 2005) Sales, § 51.)

- ~~Commercial Code section 2315 provides: "Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose."~~

- "An implied warranty of fitness for a particular purpose arises only where (1) the purchaser at the time of contracting intends to use the goods for a particular purpose, (2) the seller at the time of contracting has reason to know of this particular purpose, (3) the buyer relies on the seller's skill or judgment to select or furnish goods suitable for the particular purpose, and (4) the seller at the time of contracting has reason to know that the buyer is relying on such skill and judgment." (*Keith v. Buchanan* (1985) 173 Cal.App.3d 13, 25 [220 Cal.Rptr. 392], internal citation omitted.)

- " 'A "particular purpose" differs from the ordinary purpose for which the goods are used in that it envisages a specific use by the buyer which is peculiar to the nature of his business whereas the ordinary purposes for which goods are used are those envisaged in the concept of merchantability and go to uses which are customarily made of the goods in question.' " (*American Suzuki Motor Corp. v. Superior Court* (1995) 37 Cal.App.4th 1291, 1295, fn. 2 [44 Cal.Rptr.2d 526], internal citation omitted.)

- "The warranty of fitness for a particular purpose is not limited to sales by a merchant as is the warranty of merchantability. It may be imposed on any seller possessing sufficient skill and judgment to justify the buyer's reliance. The Code drafters suggest, however, that a nonmerchant seller will only in particular circumstances have that degree of skill and judgment necessary to justify imposing the warranty." (4 Witkin, Summary of California Law (10th ed. 2005) Sales, § 75.)

- "The reliance elements are important to the consideration of whether an implied warranty of fitness for a particular purpose exists. ... The major question in determining the existence of an implied warranty of fitness for a particular purpose is the reliance by the buyer upon the skill and judgment of the seller to select an article suitable for his needs." (*Keith, supra*, 173 Cal.App.3d at p. 25, internal citations omitted.)

- In *Keith*, the reviewing court upheld the trial court's finding that there was no reliance because "the plaintiff did not rely on the skill and judgment of the defendants to select a suitable vessel, but that he rather relied on his own experts." (*Keith, supra,* 173 Cal.App.3d at p. 25.)

- "Vertical privity is a prerequisite in California for recovery on a theory of breach of the implied warranties of fitness and merchantability." (*United States Roofing, Inc. v. Credit Alliance Corp.* (1991) 228 Cal.App.3d 1431, 1441 [279 Cal.Rptr. 533], internal citations omitted.)

- Although privity appears to be required for actions based upon the implied warranty of merchantability, there are exceptions to this rule, such as one for members of the purchaser's family.

(*Hauter v. Zogarts* (1975) 14 Cal.3d 104, 115, fn. 8 [120 Cal.Rptr. 681, 534 P.2d 377].) Vertical privity is also waived for employees. (*Peterson v. Lamb Rubber Co.* (1960) 54 Cal.2d 339 [5 Cal.Rptr. 863, 353 P.2d 575].) A plaintiff satisfies the privity requirement when he or she leases or negotiates the sale or lease of the product. (*United States Roofing, supra*.)

Secondary Sources

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.31 (Matthew Bender)

44 California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties*, §§ 502.24, 502.51, 502.220 (Matthew Bender)

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

1240. Affirmative Defense to Express Warranty—Not "Basis of Bargain"

[*Name of defendant*] is not responsible for any harm to [*name of plaintiff*] if [*name of defendant*] proves that [his/her/its] [statement/description/sample/model/*other*] was not a basis of the parties' bargain.

The [statement/description/sample/model/*other*] is presumed to be a basis of the bargain. To overcome this presumption, [*name of defendant*] must prove that the resulting bargain was not based in any way on the [statement/description/sample/model/*other*].

If [*name of defendant*] proves that [*name of plaintiff*] had actual knowledge of the true condition of the [*product*] before agreeing to buy, the resulting bargain was not based in any way on the [statement/description/sample/model/*other*].

New September 2003; Revoked June 2010; Reinstated and revised December 2010

Sources and Authority

- Creation of Express Warranties. ~~California Uniform~~ Commercial Code section 2313~~. provides:~~

  ~~(1) Express warranties by the seller are created as follows:~~

  ~~(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.~~

  ~~(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.~~

  ~~(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.~~

  ~~(2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.~~

- "The key under [Uniform Commercial Code section 2313] is that the seller's statements—whether fact or opinion—must become 'part of the basis of the bargain.' The basis of the bargain requirement represents a significant change in the law of warranties. Whereas plaintiffs in the past have had to prove their reliance upon specific promises made by the seller, the Uniform Commercial Code requires no such proof. According to official comment 3 to the Uniform Commercial Code following section 2313, 'no particular reliance . . . need be shown in order to weave [the seller's affirmations of fact] into the fabric of the agreement. Rather, any fact which is to take such affirmations, once made,

out of the agreement requires clear affirmative proof.' " (*Hauter v. Zogarts* (1975) 14 Cal.3d 104, 115 [120 Cal.Rptr. 681, 534 P.2d 377, internal citations and footnote omitted.)

- "The California Supreme Court, in discussing the continued viability of the reliance factor, noted that commentators have disagreed in regard to the impact of this development. Some have indicated that it shifts the burden of proving nonreliance to the seller, and others have indicated that the code eliminates the concept of reliance altogether." (*Keith v. Buchanan* (1985) 173 Cal.App.3d 13, 22 [220 Cal.Rptr. 392], citing *Hauter, supra,* 14 Cal.3d at pp. 115–116.)

- "The official Uniform Commercial Code comment in regard to section 2-313 'indicates that in actual practice affirmations of fact made by the seller about the goods during a bargain are regarded as part of the description of those goods; hence no particular reliance on such statements need be shown in order to weave them into the fabric of the agreement.' It is clear from the new language of this code section that the concept of reliance has been purposefully abandoned." (*Keith, supra,* 173 Cal.App.3d at p. 23, internal citations omitted.)

- "The change of the language in section 2313 of the California Uniform Commercial Code modifies both the degree of reliance and the burden of proof in express warranties under the code. A warranty statement made by a seller is presumptively part of the basis of the bargain, and the burden is on the seller to prove that the resulting bargain does not rest at all on the representation." (*Keith, supra,* 173 Cal.App.3d at p. 23.)

- "[O]nce affirmations have been made, they are woven into the fabric of the agreement and the seller must present 'clear affirmative proof' to remove them from the agreement." (*Weinstat v. Dentsply International, Inc.* (2010) 180 Cal.App.4th 1213, 1234 [103 Cal.Rptr.3d 614.)

- "[W]hile the basis of the bargain of course includes dickered terms to which the buyer specifically assents, section 2313 itself does not suggest that express warranty protection is confined to them such that affirmations by the seller that are not dickered are excluded. Any affirmation, once made, is part of the agreement unless there is 'clear affirmative proof' that the affirmation has been taken out of the agreement." (*Weinstat, supra,* 180 Cal.App.4th at p. 1229.)

- "The official comment to section 2313 is also instructive on this point, providing: 'The precise time when words of description or affirmation are made … is not material. The sole question is whether the language … [is] fairly to be regarded as part of the contract.' Thus, the California Uniform Commercial Code contemplates that affirmations, promises and descriptions about the goods contained in product manuals and other materials that are given to the buyer at the time of delivery can become part of the basis of the bargain, and can be 'fairly … regarded as part of the contract,' notwithstanding that delivery occurs after the purchase price has been paid." (*Weinstat, supra,* 180 Cal.App.4th at p. 1230.)

- "The buyer's actual knowledge of the true condition of the goods prior to the making of the contract may make it plain that the seller's statement was not relied upon as one of the inducements for the purchase, but the burden is on the seller to demonstrate such knowledge on the part of the buyer. Where the buyer inspects the goods before purchase, he may be deemed to have waived the seller's express warranties. But, an examination or inspection by the buyer of the goods does not necessarily

discharge the seller from an express warranty if the defect was not actually discovered and waived." (*Keith, supra,* 173 Cal.App.3d at pp. 23-24.)

- "First, … affirmations and descriptions in product literature received at the time of delivery but after payment of the purchase price are, without more, part of the basis of the bargain, period. Second, the seller's right to rebut goes to proof that extracts the affirmations from the 'agreement' or 'bargain of the parties in fact,' not, as *Keith* would suggest, to proof that they were not an inducement for the purchase. Relying on *Keith*, the court in effect equated the concept of the 'bargain in fact of the parties' with the concept of reliance, but … the two are not synonymous. Moreover, the opinion in *Keith* contradicts itself on this matter. On the one hand the opinion states unequivocally that '[i]t is clear' section 2313 'purposefully abandoned' the concept of reliance. On the other hand, we must ask if section 2313 has eliminated the concept of reliance from express warranty law all together, by what logic can reliance reappear, by its absence, as an affirmative defense?" (*Weinstat, supra,* 180 Cal.App.4th at p. 1234, internal citation omitted.)

Secondary Sources

44 California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties*, § 502.62 (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales,* § 206.60 (Matthew Bender)

21 California Legal Forms, Ch. 52, *Sales of Goods Under the Uniform Commercial Code*, § 52.290[1] (Matthew Bender)

Matthew Bender Practice Guide: California Contract Litigation, Ch. 24, *Suing or Defending Action for Breach of Warranty*, 24.36[4]

California Products Liability Actions, Ch. 8, *Defenses,* § 8.07 (Matthew Bender)

1241. Affirmative Defense—Exclusion or Modification of Express Warranty

[*Name of defendant***] claims that [he/she/it] is not responsible for any harm to [***name of plaintiff***] because [***name of defendant***], by words or conduct, limited [his/her/its] representations regarding the [***product***]. To succeed, [***name of defendant***] must prove that [he/she/it] clearly limited the representations regarding [***insert alleged warranty, e.g., "seaworthiness"***].**

New September 2003

Directions for Use

Limitation can be by words or conduct.

Sources and Authority

- Creation of Express Warranty by Words or Conduct. Commercial Code section 2316(1). ~~provides: "Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this division on parol or extrinsic evidence (Section 2202) negation or limitation is inoperative to the extent that such construction is unreasonable."~~

- The Uniform Commercial Code Comment to section 2316 states: "This section is designed principally to deal with those frequent clauses in sales contracts which seek to exclude 'all warranties, express or implied.' It seeks to protect a buyer from unexpected and unbargained language of express warranty ... ."

- "Although section 2316 has drawn criticism for its vagueness, its purpose is clear. No warranty, express or implied, can be modified or disclaimed unless a seller *clearly* limits his liability." (*Hauter v. Zogarts* (1975) 14 Cal.3d 104, 118-119 [120 Cal.Rptr. 681, 534 P.2d 377], internal citations omitted.)

- "Because a disclaimer or modification is inconsistent with an express warranty, words of disclaimer or modification give way to words of warranty unless some clear agreement between the parties dictates the contrary relationship. At the very least, section 2316 allows limitation of warranties only by means of *words* that clearly communicate that a particular risk falls on the buyer." (*Hauter, supra,* 14 Cal.3d at p. 119, internal citation omitted.)

- ~~The Uniform Commercial Code Comment to section 2316 states: "This section is designed principally to deal with those frequent clauses in sales contracts which seek to exclude 'all warranties, express or implied.' It seeks to protect a buyer from unexpected and unbargained language of express warranty ... ."~~

- "[A]ny disclaimer or modification must be strictly construed against the seller." (*Hauter, supra,* 14 Cal.3d at p. 119.)

- "Strict construction against the person who has both warranted a particular fact to be true and then attempted to disclaim the warranty is especially appropriate in light of the fact that '[a] disclaimer of an express warranty is essentially contradictory, ...' " (*Fundin v. Chicago Pneumatic Tool Co.* (1984) 152 Cal.App.3d 951, 958 [199 Cal.Rptr. 789], internal citation omitted.)

- "A disclaimer of warranties must be specifically bargained for so that a disclaimer in a warranty given to the buyer *after* he signs the contract is *not* binding." (*Dorman v. International Harvester Co.* (1975) 46 Cal.App.3d 11, 19-20 [120 Cal.Rptr. 516].)

- "Interpretation of a written document, where extrinsic evidence is unnecessary, is a question of law for the trial court to determine." (*Temple v. Velcro USA, Inc.* (1983) 148 Cal.App.3d 1090, 1095 [196 Cal.Rptr. 531], internal citations omitted.)

Secondary Sources

California Products Liability Actions, Ch. 8, *Defenses*, § 8.07 (Matthew Bender)

44 California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties*, § 502.23 (Matthew Bender)

1242. Affirmative Defense—Exclusion of Implied Warranties

[*Name of defendant***] claims that [he/she/it] is not responsible for any harm to [***name of plaintiff***] because [***name of defendant***] eliminated any implied representations relating to [the quality that a buyer would expect from the [***product***]] [or] [the [***product***]'s fitness for a particular purpose]. To succeed, [***name of defendant***] must prove:**

[*Insert one or more of the following:***]**

[That the sale of the [*product***] included notice using words such as "with all faults," "as is," or other language that would have made a buyer aware that the [***product***] was being sold without any guarantees.]**

[That, before entering into the contract, [*name of plaintiff***] examined the [product/sample/model] as fully as desired and that a complete examination would have revealed the [***product***]'s deficiency.]**

[That [*name of plaintiff***] refused, after a demand by [***name of defendant***], to examine the [product/sample/model] and that such examination would have revealed the [***product***]'s deficiency.]**

[That the parties' prior dealings, course of performance, or usage of trade had eliminated any implied representations.]

New September 2003

Sources and Authority

- Exclusion or Modification of Implied Warranties. Commercial Code section 2316~~(2) provides, in part: "Subject to subdivision (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous ... ."~~

- The Uniform Commercial Code Comment to this section states: "Disclaimer of the implied warranty of merchantability is permitted under subsection (2), but with the safeguard that such disclaimers must mention merchantability and in case of a writing must be conspicuous."

- ~~In most cases, it appears that a jury would be instructed on this theory of disclaimer only if the alleged disclaimer was made orally: "Interpretation of a written document, where extrinsic evidence is unnecessary, is a question of law for the trial court to determine." (*Temple v. Velcro USA, Inc.* (1983) 148 Cal.App.3d 1090, 1095 [196 Cal.Rptr. 531], internal citations omitted.)~~

- ~~Commercial Code section 2316(2) also provides, in part: "Language to exclude all implied warranties of fitness is sufficient if it states, for example, that 'There are no warranties which extend beyond the~~

~~description on the face hereof.' "~~

- The Uniform Commercial Code Comment to section 2316 states: "Unlike the implied warranty of merchantability, implied warranties of fitness for a particular purpose may be excluded by general language, but only if it is in writing and conspicuous." Accordingly, disclaimers of warranties for a particular purpose are probably issues for the court only. Section 1201(10) provides: "A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as: NONNEGOTIABLE BILL OF LADING) is conspicuous. Language in the body of a form is 'conspicuous' if it is in larger or other contrasting type or color. But in a telegram any stated term is 'conspicuous.' Whether a term or clause is 'conspicuous' or not is for decision by the court."

- The Uniform Commercial Code Comment to section 2316 observes that "oral language of disclaimer may raise issues of fact as to whether reliance by the buyer occurred and whether the seller had 'reason to know' under the section on implied warranty of fitness for a particular purpose."

- ~~"A disclaimer of warranties must be specifically bargained for so that a disclaimer in a warranty given to the buyer *after* he signs the contract is *not* binding." (*Dorman v. International Harvester Co.* (1975) 46 Cal.App.3d 11, 19-20 [120 Cal.Rptr. 516].)~~

- ~~"[A]ny disclaimer or modification must be strictly construed against the seller." (*Hauter v. Zogarts* (1975) 14 Cal.3d 104, 119 [120 Cal.Rptr. 681, 534 P.2d 377].)~~

- ~~Commercial Code section 2316(3) provides~~

  ~~Notwithstanding subdivision (2)~~

  ~~(a) Unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is," "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and~~

  ~~(b) When the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and~~

  ~~(c) An implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.~~

- The Uniform Commercial Code Comment to section 2316 states that the three exceptions listed under subdivision (3) "are common factual situations in which the circumstances surrounding the transaction are in themselves sufficient to call the buyer's attention to the fact that no implied warranties are made or that a certain implied warranty is being excluded."

- The Uniform Commercial Code comment to section 2316 states: "Paragraph (a) of subsection (3)

deals with general terms such as ‘as is,’ ‘as they stand,’ ‘with all faults,’ and the like. Such terms in ordinary commercial usage are understood to mean that the buyer takes the entire risk as to the quality of the goods involved.”

- The Uniform Commercial Code comment to section 2316 states: “In order to bring the transaction within the scope of ‘refused to examine’ in paragraph (b), it is not sufficient that the goods are available for inspection. There must in addition be a demand by the seller that the buyer examine the goods fully.”

- The Uniform Commercial Code comment to section 2316 states: “The particular buyer’s skill and the normal method of examining goods in the circumstances determine what defects are excluded by the examination.”

- “Interpretation of a written document, where extrinsic evidence is unnecessary, is a question of law for the trial court to determine.” (*Temple, supra,* 148 Cal.App.3d at p. 1095, internal citations omitted.)

- “A disclaimer of warranties must be specifically bargained for so that a disclaimer in a warranty given to the buyer *after* he signs the contract is *not* binding.” (*Dorman v. International Harvester Co.* (1975) 46 Cal.App.3d 11, 19-20 [120 Cal.Rptr. 516].)

- “[A]ny disclaimer or modification must be strictly construed against the seller.” (*Hauter v. Zogarts* (1975) 14 Cal.3d 104, 119 [120 Cal.Rptr. 681, 534 P.2d 377].)

Secondary Sources

California Products Liability Actions, Ch. 8, *Defenses*, § 8.07 (Matthew Bender)

44 California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties*, § 502.24 (Matthew Bender)

1243. Notification/Reasonable Time

If a buyer is required to notify the seller that a product [is not as represented] [does not have the expected quality] [is not suitable] [is in a harmful condition], [he/she/it] must do so within a reasonable time after [he/she/it] discovers or should have discovered this. A reasonable time depends on the circumstances of the case. In determining whether notice was given within a reasonable time, you must apply a more relaxed standard to a retail consumer than you would to a merchant buyer. A buyer notifies a seller by taking such steps as may be reasonably required to inform the seller [regardless of whether the seller actually receives the notice]

New September 2003

Sources and Authority

- Notice to Seller of Breach. Uniform Commercial Code section 2-607(3). ~~provides: "Where a tender has been accepted [t]he buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy."~~

- The Uniform Commercial Code comment to section 2-607(4) states: "The time of notification is to be determined by applying commercial standards to a merchant buyer. 'A reasonable time' for notification from a retail consumer is to be judged by different standards so that in his case it will be extended, for the rule of requiring notification is designed to defeat commercial bad faith, not to deprive a good faith consumer of his remedy. [¶] The content of the notification need merely be sufficient to let the seller know that the transaction is still troublesome and must be watched. There is no reason to require that the notification which saves the buyer's rights under this section must include a clear statement of all the objections that will be relied on by the buyer, as under the section covering statements of defects upon rejection (Section 2-605). Nor is there reason for requiring the notification to be a claim for damages or of any threatened litigation or other resort to a remedy. The notification which saves the buyer's rights under this Article need only be such as informs the seller that the transaction is claimed to involve a breach, and thus opens the way for normal settlement through negotiation."

- "Notification" Defined. Commercial Code section 1202(d). ~~defines "notification" as follows: "A person 'notifies' or 'gives' a notice or notification to another person by taking such steps as may be reasonably required to inform the other person in ordinary course, whether or not the other person actually comes to know of it."~~

- What is a Reasonable Time. Commercial Code section 1205(a). ~~provides: "Whether a time for taking an action required by this code is reasonable depends on the nature, purpose, and circumstances of the action."~~

- ~~The Uniform Commercial Code comment to section 2-607(4) states: "The time of~~

~~notification is to be determined by applying commercial standards to a merchant buyer. 'A reasonable time' for notification from a retail consumer is to be judged by different standards so that in his case it will be extended, for the rule of requiring notification is designed to defeat commercial bad faith, not to deprive a good faith consumer of his remedy. [¶] The content of the notification need merely be sufficient to let the seller know that the transaction is still troublesome and must be watched. There is no reason to require that the notification which saves the buyer's rights under this section must include a clear statement of all the objections that will be relied on by the buyer, as under the section covering statements of defects upon rejection (Section 2-605). Nor is there reason for requiring the notification to be a claim for damages or of any threatened litigation or other resort to a remedy. The notification which saves the buyer's rights under this Article need only be such as informs the seller that the transaction is claimed to involve a breach, and thus opens the way for normal settlement through negotiation."~~

- A plaintiff is not required to prove that he or she gave notice of a breach of warranty in personal injury and property damage lawsuits against a manufacturer or another supplier with whom the plaintiff has not directly dealt. (*Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, 61 [27 Cal.Rptr. 697, 377 P.2d 897]; *Gherna v. Ford Motor Co.* (1966) 246 Cal.App.2d 639, 652-653 [55 Cal.Rptr. 94].)

- Notice is more likely to be required in disputes between merchants. (See *Fieldstone Co. v. Briggs Plumbing Products, Inc.* (1997) 54 Cal.App.4th 357, 369-370 [62 Cal.Rptr.2d 701].)

- When required, notice must be pleaded and proved. (*Vogel v. Thrifty Drug Co.* (1954) 43 Cal.2d 184, 188 [272 P.2d 1].)

- The purpose of the demand for notice is to protect the seller from stale claims (*Whitfield v. Jessup* (1948) 31 Cal.2d 826, 828 [193 P.2d 1]; *Metowski v. Traid Corp.* (1972) 28 Cal.App.3d 332, 339 [104 Cal.Rptr. 599]) and to give the defendant an opportunity to repair the defective item, reduce damages, improve products in the future, and negotiate settlements. (*Pollard v. Saxe & Yolles Development Co.* (1974) 12 Cal.3d 374, 380 [115 Cal.Rptr. 648, 525 P.2d 88].)

Secondary Sources

California Products Liability Actions, Ch. 8, *Defenses*, § 8.07 (Matthew Bender)

44 California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties*, §§ 502.28, 502.100 (Matthew Bender)

1302. Consent Explained

A plaintiff may express consent by words or acts that are reasonably understood by another person as consent.

A plaintiff may also express consent by silence or inaction if a reasonable person would understand that the silence or inaction intended to indicate consent.

New September 2003

Directions for Use

See CACI No. 1303, *Invalid Consent*, if there is an issue concerning the validity of plaintiff's consent.

Sources and Authority

- ~~Restatement Second of Torts, section 892 provides:~~

  ~~(1) Consent is willingness in fact for conduct to occur. It may be manifested by action or inaction and need not be communicated to the actor.~~

  ~~(2) If words or conduct are reasonably understood by another to be intended as consent, they constitute apparent consent and are as effective as consent in fact.~~

- Consent as Defense. Civil Code section 3515. ~~provides: "He who consents to an act is not wronged by it."~~

- "The element of lack of consent to the particular contact is an essential element of battery." (*Rains v. Superior Court* (1984) 150 Cal.App.3d 933, 938 [198 Cal.Rptr. 249].)

- "Consent to an act, otherwise a battery, normally vitiates the wrong." (*Barbara A. v. John G.* (1983) 145 Cal.App.3d 369, 375 [193 Cal.Rptr. 422].)

- "As a general rule, one who consents to a touching cannot recover in an action for battery. ... However, it is well-recognized a person may place conditions on the consent. If the actor exceeds the terms or conditions of the consent, the consent does not protect the actor from liability for the excessive act." (*Ashcraft v. King* (1991) 228 Cal.App.3d 604, 609-610 [278 Cal.Rptr. 900].)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 386–416

3 Levy et al., California Torts, Ch. 41, *Assault and Battery*, § 41.20 (Matthew Bender)

6 California Forms of Pleading and Practice, Ch. 58, *Assault and Battery*, § 58.91 (Matthew Bender)

2 California Points and Authorities, Ch. 21, *Assault and Battery*, § 21.24 (Matthew Bender)

1 California Civil Practice: Torts ~~(Thomson West)~~ §§ 12:9, 12:18–12:19 (Thomson Reuters)

1306. Sexual Battery—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] committed a sexual battery. To establish this claim, [***name of plaintiff***] must prove the following:**

1. [(a) That [*name of defendant***] intended to cause a harmful [or offensive] contact with [***name of plaintiff***]'s [sexual organ/anus/groin/buttocks/ [or] breast], and a sexually offensive contact with [***name of plaintiff***] resulted, either directly or indirectly;]**

[OR]

[(b) That [*name of defendant***] intended to cause a harmful [or offensive] contact with [***name of plaintiff***] by use of [***name of defendant***]'s [sexual organ/anus/groin/buttocks/ [or] breast], and a sexually offensive contact with [***name of plaintiff***] resulted, either directly or indirectly;]**

[OR]

[(c) That [*name of defendant***] caused an imminent fear of a harmful [or offensive] contact with [[***name of plaintiff***]'s [sexual organ/anus/groin/buttocks/ [or] breast]/ [or] [***name of plaintiff***] by use of [***name of defendant***]'s [sexual organ/anus/groin/buttocks/ [or] breast]], and a sexually offensive contact with [***name of plaintiff***] resulted, either directly or indirectly;]**

AND

2. That [*name of plaintiff***] did not consent to the touching; and**

3. That [*name of plaintiff***] was harmed [or offended] by [***name of defendant***]'s conduct.**

["Offensive contact" means contact that offends a reasonable sense of personal dignity.]

New October 2008

Directions for Use

Omit any of the options for element 1 that are not supported by the evidence. If more than one are at issue, include the word "OR" between them.

Give the bracketed words "or offensive" in element 1 and "or offended" in element 3 and include the optional last sentence if the offensive nature of the conduct is at issue. In most cases, it will be clear whether the alleged conduct was offensive. The offensive nature of the conduct will most likely not be at issue if the conduct was clearly harmful.

For a definition of "intent," see CACI No. 1320, *Intent.*

Sources and Authority

- Sexual Battery. Civil Code section 1708.5. ~~provides:~~

  ~~(a) A person commits a sexual battery who does any of the following:~~

  ~~(1) Acts with the intent to cause a harmful or offensive contact with an intimate part of another, and a sexually offensive contact with that person directly or indirectly results.~~

  ~~(2) Acts with the intent to cause a harmful or offensive contact with another by use of his or her intimate part, and a sexually offensive contact with that person directly or indirectly results.~~

  ~~(3) Acts to cause an imminent apprehension of the conduct described in paragraph (1) or (2), and a sexually offensive contact with that person directly or indirectly results.~~

  ~~(b) A person who commits a sexual battery upon another is liable to that person for damages, including, but not limited to, general damages, special damages, and punitive damages.~~

  ~~(c) The court in an action pursuant to this section may award equitable relief, including, but not limited to, an injunction, costs, and any other relief the court deems proper.~~

  ~~(d) For the purposes of this section "intimate part" means the sexual organ, anus, groin, or buttocks of any person, or the breast of a female.~~

  ~~(e) The rights and remedies provided in this section are in addition to any other rights and remedies provided by law.~~

  ~~(f) For purposes of this section "offensive contact" means contact that offends a reasonable sense of personal dignity.~~

- Consent as Defense. Civil Code section 3515. ~~provides: "He who consents to an act is not wronged by it."~~

- "A cause of action for sexual battery under Civil Code section 1708.5 requires the batterer intend to cause a 'harmful or offensive' contact and the batteree suffer a 'sexually offensive contact.' Moreover, the section is interpreted to require that the batteree did not consent to the contact." (*Angie M. v. Superior Court* (1995) 37 Cal.App.4th 1217, 1225 [44 Cal.Rptr.2d 197], internal citation omitted.)

- "The element of lack of consent to the particular contact is an essential element of battery." (*Rains v. Superior Court* (1984) 150 Cal.App.3d 933, 938 [198 Cal.Rptr. 249].)

- "As a general rule, one who consents to a touching cannot recover in an action for battery. ... However, it is well-recognized a person may place conditions on the consent. If the actor exceeds the

terms or conditions of the consent, the consent does not protect the actor from liability for the excessive act." (*Ashcraft v. King* (1991) 228 Cal.App.3d 604, 609–610 [278 Cal.Rptr. 900].)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 381–416

3 Levy et al., California Torts, Ch. 41, *Assault and Battery*, § 41.01[3] (Matthew Bender)

6 California Forms of Pleading and Practice, Ch. 58, *Assault and Battery*, §§ 58.27, 58.55 (Matthew Bender)

2 California Points and Authorities, Ch. 21, *Assault and Battery*, § 21.27 (Matthew Bender)

1 California Civil Practice: Torts ~~(Thomson West)~~ §§ 12:7–12:9, 12:36-12:39 (Thomson Reuters)

1401. False Arrest Without Warrant by Peace Officer—Essential Factual Elements

[*Name of plaintiff***] claims that [he/she] was wrongfully arrested by [***name of defendant***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] arrested [***name of plaintiff***] without a warrant;**

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

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

New September 2003

Directions for Use

Give CACI No. 1402, *False Arrest Without Warrant—Affirmative Defense—Peace Officer—Probable Cause to Arrest*, if applicable, immediately after this instruction.

If plaintiff is seeking nominal damages as an alternative to actual damages, insert the following paragraph above element 2:

> If you find the above, then the law assumes that [*name of plaintiff*] has been harmed and [he/she] is entitled to a nominal sum such as one dollar. [*Name of plaintiff*] is also entitled to additional damages if [he/she] proves the following:

The second sentence of the above paragraph, along with the final two elements of this instruction, should be omitted if plaintiff is seeking nominal damages only. Read "actually" in the second element only if nominal damages are also being sought.

Sources and Authority

- "Arrest" Defined. Penal Code section 834. ~~provides: "An arrest is taking a person into custody, in a case and in the manner authorized by law. An arrest may be made by a peace officer or by a private person."~~

- " '[F]alse arrest' and 'false imprisonment' are not separate torts. False arrest is but one way of committing a false imprisonment, and they are distinguishable only in terminology." (*Collins v. City and County of San Francisco* (1975) 50 Cal.App.3d 671, 673 [123 Cal.Rptr. 525].)

- Government Code section 820.4 provides: "A public employee is not liable for his act or omission, exercising due care, in the execution or enforcement of any law. Nothing in this section exonerates a public employee from liability for false arrest or false imprisonment."

- A person is liable for false imprisonment if he or she " 'authorizes, encourages, directs, or assists an officer to do an unlawful act, or procures an unlawful arrest, without process, or participates in the unlawful arrest ... .' " (*Du Lac v. Perma Trans Products, Inc.* (1980) 103 Cal.App.3d 937, 941 [163 Cal.Rptr. 335], internal citation omitted.) Where a defendant "knowingly [gives] the police false or materially incomplete information, of a character that could be expected to stimulate an arrest" ... "such conduct can be a basis for imposing liability for false imprisonment." (*Id.* at p. 942.)

- "It has long been the law that a cause of action for false imprisonment is stated where it is alleged that there was an arrest without process, followed by imprisonment and damages. Upon proof of those facts the burden is on the defendant to prove justification for the arrest." (*Cervantez v. J.C. Penney Co.* (1979) 24 Cal.3d 579, 592 [156 Cal.Rptr. 198, 595 P.2d 975].)

- Penal Code section 830 and following provisions define who are peace officers in California.

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 434–440

3 Levy et al., California Torts, Ch. 42, *False Imprisonment and False Arrest*, § 42.23 (Matthew Bender)

22 California Forms of Pleading and Practice, Ch. 257, *False Imprisonment* (Matthew Bender)

1 California Civil Practice: Torts ~~(Thomson Reuters West)~~ § 13:20 (Thomson Reuters)

1402. False Arrest Without Warrant—Affirmative Defense—Peace Officer—Probable Cause to Arrest

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[*Name of defendant***] claims the arrest was not wrongful because [he/she] had the authority to arrest [***name of plaintiff***] without a warrant.**

[If [*name of defendant***] proves that [***insert facts that, if proved, would constitute reasonable cause to believe that plaintiff had committed a crime in defendant's presence***], then [***name of defendant***] had the authority to arrest [***name of plaintiff***] without a warrant.]**

[*or***]**

[If [*name of defendant***] proves that [***insert facts that, if proved, would establish that defendant had reasonable cause to believe that plaintiff had committed a felony, whether or not a felony had actually been committed***], then [***name of defendant***] had the authority to arrest [***name of plaintiff***] without a warrant.]**

New September 2003

Directions for Use

In the brackets, the judge must insert the fact or facts that are actually controverted and that may be necessary to arrive at the probable cause determination. There may be one or more facts or combinations of facts that are necessary to make this determination, in which case they can be phrased in the alternative.

If a criminal act is alleged as justification, it may be necessary to instruct whether the crime is a felony, misdemeanor, or public offense.

Penal Code section 836 provides, in part, that a warrantless arrest may be made if a person has committed a felony, although not in the officer's presence. While the requirement of probable cause is not explicitly stated, it would seem that the officer must always have probable cause at the time of the arrest and that subsequent conviction of a felony does not sanitize an improper arrest.

If the first bracketed paragraph is used, the judge should include "in the officer's presence" as part of the facts that the jury needs to find if there is a factual dispute on this point.

Sources and Authority

- Arrest Without a Warrant. Penal Code section 836(a). ~~provides in part:~~

  ~~A peace officer ... without a warrant, may arrest a person whenever any of the following circumstances occur:~~

  ~~(1) The officer has probable cause to believe that the person to be arrested has~~

committed a public offense in the officer's presence.

(2) The person arrested has committed a felony, although not in the officer's presence.

(3) The officer has probable cause to believe that the person to be arrested has committed a felony, whether or not a felony, in fact, has been committed.

- Penal Code section 15 provides: "A crime or public offense is an act committed or omitted in violation of a law forbidding or commanding it, and to which is annexed, upon conviction, either of the following punishments: (1) death; (2) imprisonment; (3) fine; (4) removal from office; or, (5) disqualification to hold and enjoy any office of honor, trust, or profit in this State."

- Felonies and Misdemeanors. Penal Code section 17(a). provides: "A felony is a crime that is punishable with death, by imprisonment in the state prison, or notwithstanding any other provision of law, by imprisonment in a county jail under the provisions of subdivision (h) of Section 1170. Every other crime or public offense is a misdemeanor except those offenses that are classified as infractions."

- "Peace Officers" Defined. Penal Code section 830 et seq.and following provisions define who are peace officers in California.

- "An officer is not liable for false imprisonment for the arrest without a warrant of a person whom he has reasonable grounds to believe is guilty of a crime. The question of the existence of probable cause to believe that one is guilty of a crime must be determined as a matter of law from the facts and circumstances of the case." (*Allen v. McCoy* (1933) 135 Cal.App. 500, 507–508 [27 P.2d 423].)

- "It has long been the law that a cause of action for false imprisonment is stated where it is alleged that there was an arrest without process, followed by imprisonment and damages. Upon proof of those facts the burden is on the defendant to prove justification for the arrest. Considerations of both a practical and policy nature underlie this rule. The existence of justification is a matter which ordinarily lies peculiarly within the knowledge of the defendant. The plaintiff would encounter almost insurmountable practical problems in attempting to prove the negative proposition of the nonexistence of any justification. This rule also serves to assure that official intermeddling is justified, for it is a serious matter to accuse someone of committing a crime and to arrest him without the protection of the warrant process." (*Cervantez v. J. C. Penney Co.* (1979) 24 Cal.3d 579, 592 [156 Cal.Rptr. 198, 595 P.2d 975], footnote and internal citations omitted.)

- "The existence of probable cause depends upon facts known by the arresting officer at the time of the arrest." (*Hamilton v. City of San Diego* (1990) 217 Cal.App.3d 838, 844 [266 Cal.Rptr. 215], internal citations omitted.)

- "If the facts that gave rise to the arrest are undisputed, the issue of probable cause is a question of law for the trial court. When, however, the facts that gave rise to the arrest are controverted, the trial court must instruct the jury as to what facts, if established, would constitute probable cause. 'The trier of fact's function in false arrest cases is to resolve conflicts in the evidence. Accordingly, where the evidence is conflicting with respect to probable cause, " 'it [is] the duty of the court to instruct the

jury as to what facts, if established, would constitute probable cause.' " … The jury then decides whether the evidence supports the necessary factual findings.' " (*Levin v. United Air Lines, Inc.* (2008) 158 Cal.App.4th 1002, 1018–1019 [70 Cal.Rptr.3d 535], internal citations omitted.)

- " 'Presence' is not mere physical proximity but is determined by whether the offense is apparent to the officer's senses." (*People v. Sjosten* (1968) 262 Cal.App.2d 539, 543–544 [68 Cal.Rptr. 832], internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 436, 438

3 Levy et al., California Torts, Ch. 42, *False Imprisonment and False Arrest*, § 42.23 (Matthew Bender)

22 California Forms of Pleading and Practice, Ch. 257, *False Imprisonment*, § 257.20 (Matthew Bender)

10 California Points and Authorities, Ch. 103, *False Imprisonment*, § 103.65 et seq. (Matthew Bender)

1 California Civil Practice: Torts §§ 13:22–13:24 (Thomson Reuters ~~West~~)

1403. False Arrest Without Warrant by Private Citizen—Essential Factual Elements

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[*Name of plaintiff***] claims that [he/she] was wrongfully arrested by [***name of defendant***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] intentionally caused [***name of plaintiff***] to be arrested without a warrant; [and]**

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

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

[A private person does not need to physically restrain a suspect in order to make a citizen's arrest. A private person can make a citizen's arrest by calling for a peace officer, reporting the offense, and pointing out the suspect.]

New September 2003; Revised December 2011

Directions for Use

Give CACI No. 1404, *False Arrest Without Warrant—Affirmative Defense—Private Citizen—Probable Cause to Arrest*, if applicable, immediately after this instruction.

If the plaintiff is seeking nominal damages as an alternative to actual damages, insert the following paragraph above element 2:

> If you find the above, then the law assumes that [*name of plaintiff*] has been harmed and [he/she] is entitled to a nominal sum such as one dollar. [*Name of plaintiff*] is also entitled to additional damages if [he/she] proves the following:

The second sentence, along with the final two elements of this instruction, should be omitted if plaintiff is seeking nominal damages only. Read "actually" in the second element only if nominal damages are also being sought.

Sources and Authority

- "Arrest" Defined. Penal Code section 834~~. provides: "An arrest is taking a person into custody, in a case and in the manner authorized by law. An arrest may be made by a peace officer or by a private person."~~

- " '[F]alse arrest' and 'false imprisonment' are not separate torts. False arrest is but one way of committing a false imprisonment, and they are distinguishable only in terminology." (*Collins v. City and County of San Francisco* (1975) 50 Cal.App.3d 671, 673 [123 Cal.Rptr. 525].)

- "It has long been the law that a cause of action for false imprisonment is stated where it is alleged that there was an arrest without process, followed by imprisonment and damages. Upon proof of those facts the burden is on the defendant to prove justification for the arrest." (*Cervantez v. J.C. Penney Co.* (1979) 24 Cal.3d 579, 592 [156 Cal.Rptr. 198, 595 P.2d 975].)

- " '[T]he delegation of the physical act of arrest need not be express, but may be implied from the citizen's act of summoning an officer, reporting the offense, and pointing out the suspect.' " (*Johanson v. Dept. of Motor Vehicles* (1995) 36 Cal.App.4th 1209, 1216 [43 Cal.Rptr.2d 42], internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 438, 439

3 Levy et al., California Torts, Ch. 42, *False Imprisonment and False Arrest*, § 42.22 (Matthew Bender)

22 California Forms of Pleading and Practice, Ch. 257, *False Imprisonment* (Matthew Bender)

1 California Civil Practice: Torts §§ 13:8–13:10 (Thomson Reuters~~ West~~)

1404. False Arrest Without Warrant—Affirmative Defense—Private Citizen—Probable Cause to Arrest

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[*Name of defendant***] claims the citizen's arrest was not wrongful because [he/she] had the authority to cause [***name of plaintiff***] to be arrested without a warrant.**

[If [*name of defendant***] proves that [***name of plaintiff***] committed or attempted to commit a crime in [***name of defendant***]'s presence, then the arrest was lawful.]**

[*or***]**

[If [*name of defendant***] proves that a felony was committed and that [***insert facts, that if proved, would establish that defendant had reasonable cause to believe that plaintiff had committed a felony***], then the arrest was lawful.]**

New September 2003

Directions for Use

The judge must insert in the brackets the fact or facts that are actually controverted and that may be necessary to arrive at the probable cause determination. There may be one or more facts or combinations of facts that are necessary to make this determination, in which case they can be phrased in the alternative.

If a criminal act is alleged as justification, it may be necessary to instruct whether the crime is a felony, misdemeanor, or public offense.

Penal Code section 837 provides, in part, that a warrantless arrest may be made if a person has committed a felony, although not in the citizen's presence. While the requirement of probable cause is not explicitly stated, it would seem that the citizen must always have probable cause at the time of the arrest and that subsequent conviction of a felony does not sanitize an improper arrest.

Sources and Authority

- Citizen's Arrest. Penal Code section 837. ~~provides:~~

  ~~A private person may arrest another:~~

  ~~1. For a public offense committed or attempted in his presence.~~

  ~~2. When the person arrested has committed a felony, although not in his presence.~~

  ~~3. When a felony has been in fact committed, and he has reasonable cause for believing the person arrested to have committed it.~~

- ~~Penal Code section 15 provides: "A crime or public offense is an act committed or omitted in violation of a law forbidding or commanding it, and to which is annexed, upon conviction, either of the following punishments: (1) death; (2) imprisonment; (3) fine; (4) removal from office; or, (5) disqualification to hold and enjoy any office of honor, trust, or profit in this State."~~

- Felonies and Misdemeanors. Penal Code section 17(a). ~~provides: "A felony is a crime that is punishable with death, by imprisonment in the state prison, or notwithstanding any other provision of law, by imprisonment in a county jail under the provisions of subdivision (h) of Section 1170. Every other crime or public offense is a misdemeanor except those offenses that are classified as infractions."~~

- "What is probable cause, as has been often announced, is not a question of fact for the jury, but one of law for the court, to be decided in accordance with the circumstances at the time of the detention, unhampered by the outcome of the charge against the plaintiff of the public offense or by the conclusions of the trial court." (*Collyer v. S.H. Kress Co.* (1936) 5 Cal.2d 175, 181 [54 P.2d 20], internal citations omitted.)

- " 'Presence' is not mere physical proximity but is determined by whether the offense is apparent to the [person]'s senses." (*People v. Sjosten* (1968) 262 Cal.App.2d 539, 543-544 [68 Cal.Rptr. 832], internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 438, 439

3 Levy et al., California Torts, Ch. 42, *False Imprisonment and False Arrest*, § 42.22 (Matthew Bender)

22 California Forms of Pleading and Practice, Ch. 257, *False Imprisonment*, § 257.19 (Matthew Bender)

10 California Points and Authorities, Ch. 103, *False Imprisonment*, § 103.60 et seq. (Matthew Bender)

1 California Civil Practice: Torts § 13:11 (Thomson Reuters ~~West~~)

1405. False Arrest With Warrant—Essential Factual Elements

[*Name of plaintiff***] claims that [he/she] was wrongfully arrested by [***name of defendant***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **[That [***name of defendant***] arrested [***name of plaintiff***];]**

   [*or***]**

   [That [*name of defendant***] intentionally caused [***name of plaintiff***] to be wrongfully arrested;]**

2. **That [***insert facts supporting the invalidity of the warrant or the unlawfulness of the arrest, e.g., "the warrant for [name of plaintiff]'s arrest had expired"***];**

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

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

New September 2003; Revised December 2011

Directions for Use

CACI No. 1406, *False Arrest With Warrant—Peace Officer—Affirmative Defense—"Good-Faith" Exception*, should be given after this instruction if that defense is asserted.

If the plaintiff is seeking nominal damages as an alternative to actual damages, insert the following paragraph above element 3:

> If you find both of the above, then the law assumes that [*name of plaintiff*] has been harmed and [he/she] is entitled to a nominal sum such as one dollar. [*Name of plaintiff*] is also entitled to additional damages if [he/she] proves the following:

The second sentence of the above paragraph, along with the final two elements of this instruction, should be omitted if plaintiff is seeking nominal damages only. Read "actually" in the third element only if nominal damages are also being sought.

Sources and Authority

- "Arrest" Defined. Penal Code section 834~~. provides: "An arrest is taking a person into custody, in a case and in the manner authorized by law. An arrest may be made by a peace officer or by a private person."~~

- Public Employee Liability for False Arrest. Government Code section 820.4. ~~provides: "A public employee is not liable for his act or omission, exercising due care, in the execution or enforcement of any law. Nothing in this section exonerates a public employee from liability for false arrest or false imprisonment."~~

- "'[F]alse arrest' and 'false imprisonment' are not separate torts. False arrest is but one way of committing a false imprisonment, and they are distinguishable only in terminology." (*Collins v. City and County of San Francisco* (1975) 50 Cal.App.3d 671, 673 [123 Cal.Rptr. 525].)

- " 'The action for false imprisonment is frequently alleged to have been committed by reason of some wrongful arrest under some pretended or void order of some court, in which class of false imprisonment cases it is incumbent on the plaintiff to allege facts showing or tending to show that such arrest, under such court procedure, was wrongful, unauthorized and without any probable cause; ….' " (*Peters v. Bigelow* (1934) 137 Cal.App. 135, 139 [30 P.2d 450].)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 441–443

3 Levy et al., California Torts, Ch. 42, *False Imprisonment and False Arrest*, § 42.25 (Matthew Bender)

22 California Forms of Pleading and Practice, Ch. 257, *False Imprisonment*, § 257.20 (Matthew Bender)

10 California Points and Authorities, Ch. 103, *False Imprisonment*, § 103.77 et seq. (Matthew Bender)

1 California Civil Practice: Torts §§ 13:26–13:30 (Thomson Reuters ~~West~~)

1406. False Arrest With Warrant—Peace Officer—Affirmative Defense—"Good-Faith" Exception

[*Name of defendant***] claims that the arrest was not wrongful. To succeed, [***name of defendant***] must prove all of the following:**

1. **That the arrest warrant would have appeared valid to a reasonably intelligent and informed person;**

2. **That [***name of defendant***] believed the warrant was valid; and**

3. **That [***name of defendant***] had a reasonable belief that [***name of plaintiff***] was the person referred to in the warrant.**

If [*name of defendant***] has proven all of the above, then the arrest was not wrongful.**

New September 2003

Directions for Use

The absence-of-malice requirement is satisfied if the officer believes the warrant is valid and the warrant is valid on its face, notwithstanding any personal hostility or ill will.

Sources and Authority

- Immunity for Good-Faith Acts. Civil Code section 43.55(a). ~~provides: "There shall be no liability on the part of, and no cause of action shall arise against, any peace officer who makes an arrest pursuant to a warrant of arrest regular upon its face if the peace officer in making the arrest acts without malice and in the reasonable belief that the person arrested is the one referred to in the warrant."~~

- "With regard to Civil Code section 43.55, the immunity set forth therein for arrests made pursuant to a regular warrant is only conditional. A failure of any condition prevents the immunity from attaching to a public entity or employee." (*Harden v. Bay Area Rapid Transit Dist.* (1989) 215 Cal.App.3d 7, 14 [263 Cal.Rptr. 549].)

- " 'Malice,' as that term is used in section 43.55, refers not to the actual physical execution of the warrant, but to the officer's state of mind in procuring or executing the warrant. For instance, malice for purposes of section 43.55 has been found in situations where the officer purposefully withheld exculpatory evidence from the magistrate issuing the arrest warrant, where the officer knowingly used false information in order to obtain the warrant, or where the officer executes the warrant with knowledge that it has been recalled or is no longer valid." (*Ting v. U.S.* (9th Cir. 1991) 927 F.2d 1504, 1514, internal citations omitted.)

- Courts have described the meaning of a warrant "regular on its face" as follows: "Unless there is a clear absence of jurisdiction on the part of the court or magistrate issuing the process, it is sufficient if

upon its face it [the warrant] appears to be valid in the judgment of an ordinarily intelligent and informed layman." (*Allison v. County of Ventura* (1977) 68 Cal.App.3d 689, 697 [137 Cal.Rptr. 542].)

- "Peace officers are not required to investigate the supportive legal proceedings from which a warrant issues. However, they are required to exercise the judgment of an 'ordinarily intelligent and informed layman' to observe the blatant and patent inadequacy of a warrant emanating from a civil action which directs arrest and neither sets bail nor informs the arrestee of the offense charged for which arrest is ordered." (*Allison, supra*, 68 Cal.App.3d at p. 703.)

- "A police officer must use reasonable prudence and diligence to determine whether a party being arrested is the one described in the warrant. The officer may not refuse to act upon information offered him which discloses the warrant is being served on the wrong person. But, the prudence and diligence required of an arresting officer in determining whether to make an arrest must be balanced against the need to act swiftly and to make on-the-spot evaluations, often under chaotic conditions." (*Lopez v. City of Oxnard* (1989) 207 Cal.App.3d 1, 7 [254 Cal.Rptr. 556].)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 441–443

3 Levy et al., California Torts, Ch. 42, *False Imprisonment and False Arrest*, § 42.25 (Matthew Bender)

22 California Forms of Pleading and Practice, Ch. 257, *False Imprisonment* (Matthew Bender)

10 California Points and Authorities, Ch. 103, *False Imprisonment* (Matthew Bender)

1 California Civil Practice: Torts ~~(Thomson West)~~ §§ 13:26–13:30 (Thomson Reuters)

1407. Unnecessary Delay in Processing/Releasing—Essential Factual Elements

[*Name of plaintiff***] claims that [he/she] was wrongfully confined by [***name of defendant***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] held [***name of plaintiff***] in custody;**

2. **That there was an unnecessary delay [***insert facts, e.g., "in taking [name of plaintiff] before a judge" or "in releasing [name of plaintiff]"***];**

3. **That [***name of plaintiff***] did not consent to the delay;**

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

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

New September 2003; Revised December 2011

Directions for Use

If the plaintiff is seeking nominal damages as an alternative to actual damages, insert the following paragraph above element 4:

> If you find the above, then the law assumes that [*name of plaintiff*] has been harmed and [he/she] is entitled to a nominal sum such as one dollar. [*Name of plaintiff*] is also entitled to additional damages if [he/she] proves the following:

The second sentence of the above paragraph, along with the final two elements of this instruction, should be omitted if plaintiff is seeking nominal damages only. Read "actually" in the fourth element only if nominal damages are also being sought.

Sources and Authority

- "Arrest" Defined. Penal Code section 834. ~~provides: "An arrest is taking a person into custody, in a case and in the manner authorized by law. An arrest may be made by a peace officer or by a private person."~~

- Time for Arraignment. Penal Code section 825(a). ~~provides, in part: "[T]he defendant shall in all cases be taken before the magistrate without unnecessary delay, and, in any event, within 48 hours after his or her arrest, excluding Sundays and holidays."~~

- Public Employee Liability for False Arrest. Government Code section 820.4. ~~provides: "A public employee is not liable for his act or omission, exercising due care, in the execution or enforcement of~~

~~any law. Nothing in this section exonerates a public employee from liability for false arrest or false imprisonment."~~

- "The critical factor is the necessity for any delay in arraignment. These provisions do not authorize a two-day detention in all cases. Instead, 'a limit [is placed] upon what may be considered a necessary delay, and a detention of less than two days, if unreasonable under the circumstances, is in violation of the statute' and of the Constitution." (*People v. Thompson* (1980) 27 Cal.3d 303, 329 [165 Cal.Rptr. 289, 611 P.2d 883].)

- " '[F]alse arrest' and 'false imprisonment' are not separate torts. False arrest is but one way of committing a false imprisonment, and they are distinguishable only in terminology." (*Collins v. City and County of San Francisco* (1975) 50 Cal.App.3d 671, 673 [123 Cal.Rptr. 525].)

- "In determining which delays are necessary, this court has rejected arguments that the delay was 'not unusual' or made 'the work of the police and the district attorney easier.' As the Court of Appeal recently observed, '[t]here is no authority to delay for the purpose of investigating the case. Subject to obvious health considerations the only permissible delay between the time of arrest and bringing the accused before a magistrate is the time necessary: to complete the arrest; to book the accused; to transport the accused to court; or the district attorney to evaluate the evidence for the limited purpose of determining what charge, if any, is to be filed; and to complete the necessary clerical and administrative tasks to prepare a formal pleading.' " (*Youngblood v. Gates* (1988) 200 Cal.App.3d 1302, 1319 [246 Cal.Rptr. 775], internal citations omitted.)

- "Although both false imprisonment and malicious prosecution may cause a person to be restrained or confined, under *Asgari* (*Asgari v. City of Los Angeles* (1997) 15 Cal.4th 744 [63 Cal.Rptr.2d 842, 937 P.2d 273]) only damages attributable to injuries arising from false arrest and false imprisonment are compensable in an action under state law against a public entity and its employees. False imprisonment ends at the point malicious prosecution begins which, under *Asgari*, is the point at which the person is arraigned." (*County of Los Angeles v. Superior Court* (2000) 78 Cal.App.4th 212, 220-221 [92 Cal.Rptr.2d 668].)

- "[W]here the arrest is lawful, subsequent unreasonable delay in taking the person before a magistrate will not affect the legality of the arrest, although it will subject the offending person to liability for so much of the imprisonment as occurs after the period of necessary or reasonable delay." (*Dragna v. White* (1955) 45 Cal.2d 469, 473 [289 P.2d 428].)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, § 445

3 Levy et al., California Torts, Ch. 42, *False Imprisonment and False Arrest*, § 42.26 (Matthew Bender)

22 California Forms of Pleading and Practice, Ch. 257, *False Imprisonment,* § 257.24 (Matthew Bender)

10 California Points and Authorities, Ch. 103, *False Imprisonment*, § 103.110 et seq. (Matthew Bender)

1 California Civil Practice: Torts §§ 13:31–13:34 (Thomson Reuters ~~West~~)

1500. Former Criminal Proceeding

[*Name of plaintiff***] claims that [***name of defendant***] wrongfully caused a criminal proceeding to be brought against [him/her/it]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was actively involved in causing [***name of plaintiff***] to be prosecuted [or in causing the continuation of the prosecution];**

[2. That the criminal proceeding ended in [*name of plaintiff***]'s favor;]**

[3. That no reasonable person in [*name of defendant***]'s circumstances would have believed that there were grounds for causing [***name of plaintiff***] to be arrested or prosecuted;]**

4. **That [***name of defendant***] acted primarily for a purpose other than to bring [***name of plaintiff***] to justice;**

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

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

[The law requires that the trial judge, rather than the jury, decide if [*name of plaintiff***] has proven element 2 above, whether the criminal proceeding ended in [his/her/its] favor. But before I can do so, you must decide whether [***name of plaintiff***] has proven the following:**

[*List all factual disputes that must be resolved by the jury.***]**

The special [verdict/interrogatory] form will ask for your finding on [this/these] issue[s].]

[The law [also] requires that the trial judge, rather than the jury, decide if [*name of plaintiff***] has proven element 3 above, whether a reasonable person in [***name of defendant***]'s circumstances would have believed that there were grounds for causing [***name of plaintiff***] to be arrested or prosecuted. But before I can do so, you must decide whether [***name of plaintiff***] has proven the following:**

[*List all factual disputes that must be resolved by the jury.***]**

The special [verdict/interrogatory] form will ask for your finding on [this/these] issue[s].]

New September 2003; Revised April 2008, October 2008

Directions for Use

Malicious prosecution requires that the criminal proceeding have ended in the plaintiff's favor (element 2) and that the defendant did not reasonably believe that there were any grounds (probable cause) to initiate the proceeding (element 3). Probable cause is to be decided by the court as a matter of law. However, it may require the jury to find some preliminary facts before the court can make its legal determination, including facts regarding what the defendant knew or did not know at the time. (See *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 881 [254 Cal.Rptr. 336, 765 P.2d 498].) If so, include element 3 and also the bracketed part of the instruction that refers to element 3.

Favorable termination is handled in much the same way. If a proceeding is terminated other than on the merits, there may be disputed facts that the jury must find in order to determine whether there has been a favorable termination. (See *Fuentes v. Berry* (1995) 38 Cal.App.4th 1800, 1808 [45 Cal.Rptr.2d 848].) If so, include element 2 and also the bracketed part of the instruction that refers to element 2. Once these facts are determined, the jury does not then make a second determination as to whether there has been a favorable termination. The matter is determined by the court based on the resolution of the disputed facts. See *Sierra Club Found. v. Graham* (1999) 72 Cal.App.4th 1135, 1159 [85 Cal.Rptr.2d 726] [element of favorable termination is for court to decide].)

Either or both of the elements of probable cause and favorable termination should be omitted if there are no disputed facts regarding that element for the jury.

Element 4 expresses the malice requirement.

Sources and Authority

- Public Employee Immunity. Government Code section 821.6. ~~provides: "A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause."~~

- "Malicious prosecution consists of initiating or procuring the arrest and prosecution of another under lawful process, but from malicious motives and without probable cause." (*Cedars-Sinai Medical Center v. Superior Court* (1988) 206 Cal.App.3d 414, 417 [253 Cal.Rptr. 561], internal citation omitted.)

- "The remedy of a malicious prosecution action lies to recompense the defendant who has suffered out of pocket loss in the form of attorney fees and costs, as well as emotional distress and injury to reputation because of groundless allegations made in pleadings which are public records." (*Sagonowsky v. More* (1998) 64 Cal.App.4th 122, 132 [75 Cal.Rptr.2d 118], internal citations omitted.)

- "Cases dealing with actions for malicious prosecution against private persons require that the defendant has at least sought out the police or prosecutorial authorities and falsely reported facts to them indicating that plaintiff has committed a crime." (*Sullivan v. County of Los Angeles* (1974) 12 Cal.3d 710, 720 [117 Cal.Rptr. 241, 527 P.2d 865], internal citations omitted.)

- " 'One may be civilly liable for malicious prosecution without personally signing the complaint initiating the criminal proceeding.' " "The test is whether the defendant was actively instrumental in

causing the prosecution." ' " (*Greene v. Bank of America* (2013) 216 Cal.App.4th 454, 463-464 [156 Cal.Rptr.3d 901], internal citation omitted.)

- "[T]he effect of the approved instruction [in *Dreux v. Domec* (1861) 18 Cal. 83] was to impose liability upon one who had not taken part until after the commencement of the prosecution." (*Lujan v. Gordon* (1977) 70 Cal.App.3d 260, 263 [138 Cal.Rptr. 654].)

- "When, as here, the claim of malicious prosecution is based upon initiation of a criminal prosecution, the question of probable cause is whether it was objectively reasonable for the defendant … to suspect the plaintiff … had committed a crime." (*Greene, supra,* 216 Cal.App.4th at p. 465.)

- "When there is a dispute as to the state of the defendant's knowledge and the existence of probable cause turns on resolution of that dispute, … the jury must resolve the threshold question of the defendant's factual knowledge or belief. Thus, when … there is evidence that the defendant may have known that the factual allegations on which his action depended were untrue, the jury must determine what facts the defendant knew before the trial court can determine the legal question whether such facts constituted probable cause to institute the challenged proceeding." (*Sheldon Appel Co., supra,* 47 Cal.3d at p. 881, internal citations omitted.)

- "Acquittal of the criminal charge, in the criminal action, did not create a conflict of evidence on the issue of probable cause. [Citations.]" (*Verdier v. Verdier* (1957) 152 Cal.App.2d 348, 352, fn. 3 [313 P.2d 123].)

- " '[T]he plaintiff in a malicious prosecution action must plead and prove that the prior judicial proceeding of which he complains terminated in his favor.' Termination of the prior proceeding is not necessarily favorable simply because the party prevailed in the prior proceeding; the termination must relate to the merits of the action by reflecting either on the innocence of or lack of responsibility for the misconduct alleged against him." (*Sagonowsky, supra,* 64 Cal.App.4th at p. 128, internal citations omitted.)

- " 'The theory underlying the requirement of favorable termination is that it tends to indicate the innocence of the accused, and coupled with the other elements of lack of probable cause and malice, establishes the tort, that is, the malicious and unfounded charge of crime against an innocent person.' " (*Cote v. Henderson* (1990) 218 Cal.App.3d 796, 804 [267 Cal.Rptr. 274], quoting *Jaffe v. Stone* (1941) 18 Cal.2d 146, 150 [114 P.2d 335].)

- "Where a proceeding is terminated other than on the merits, the reasons underlying the termination must be examined to see if it reflects the opinion of the court or the prosecuting party that the action would not succeed. If a conflict arises as to the circumstances explaining a failure to prosecute an action further, the determination of the reasons underlying the dismissal is a question of fact." (*Fuentes, supra,* 38 Cal.App.4th at p. 1808, internal citations omitted.)

- "The plea of nolo contendere is considered the same as a plea of guilty. Upon a plea of nolo contendere the court shall find the defendant guilty, and its legal effect is the same as a plea of guilty for all purposes. It negates the element of a favorable termination, which is a prerequisite to stating a cause of action for malicious prosecution." (*Cote, supra,* 218 Cal.App.3d at p. 803, internal citation

omitted.)

- " '*Should a conflict arise as to the circumstances explaining the failure to prosecute, the trier of fact must exercise its traditional role in deciding the conflict.*' " (*Weaver v. Superior Court* (1979) 95 Cal.App.3d 166, 185 [156 Cal.Rptr. 745], original italics, internal citations omitted, disapproved on other grounds in *Sheldon Appel Co., supra,* 47 Cal.3d at p. 882.)

- " 'For purposes of a malicious prosecution claim, malice "is not limited to actual hostility or ill will toward the plaintiff. …" [Citation.]' '[I]f the defendant had no substantial grounds for believing in the plaintiff's guilt, but, nevertheless, instigated proceedings against the plaintiff, it is logical to infer that the defendant's motive was improper.' " (*Greene, supra,* 216 Cal.App.4th at pp. 464-465, internal citation omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 469–485, 511

4 Levy et al., California Torts, Ch. 43, *Malicious Prosecution and Abuse of Process,* §§ 43.01–43.06 (Matthew Bender)

31 California Forms of Pleading and Practice, Ch. 357, *Malicious Prosecution and Abuse of Process*, §§ 357.10–357.32 (Matthew Bender)

14 California Points and Authorities, Ch. 147, *Malicious Prosecution and Abuse of Process,* §§ 147.20–147.53 (Matthew Bender)

1502. Wrongful Use of Administrative Proceedings

[*Name of plaintiff***] claims that [***name of defendant***] wrongfully brought an administrative proceeding against [him/her/it]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was actively involved in bringing [or continuing] the administrative proceeding;**

2. **That [***name of administrative body***] did not conduct an independent investigation;**

[3. That the proceeding ended in [*name of plaintiff***]'s favor;]**

[4. That no reasonable person in [*name of defendant***]'s circumstances would have believed that there were reasonable grounds to bring the proceeding against [***name of plaintiff***];]**

5. **That [***name of defendant***] acted primarily for a purpose other than succeeding on the merits of the claim;**

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

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

[The law requires that the trial judge, rather than the jury, decide if [*name of plaintiff***] has proven element 3 above, whether the proceeding ended in [his/her/its] favor. But before I can do so, you must decide whether [***name of plaintiff***] has proven the following:**

[*List all factual disputes that must be resolved by the jury.***]**

The special [verdict/interrogatory] form will ask for your finding on [this/these] issue[s].]

[The law [also] requires that the trial judge, rather than the jury, decide if [*name of plaintiff***] has proven element 4 above, whether a reasonable person in [***name of defendant***]'s circumstances would have believed that there were reasonable grounds for bringing the proceeding against [***name of plaintiff***]. But before I can do so, you must decide whether [***name of plaintiff***] has proven the following:**

[*List all factual disputes that must be resolved by the jury.***]**

The special [verdict/interrogatory] form will ask for your finding on [this/these] issue[s].]

New September 2003; Revised April 2008, October 2008

Directions for Use

Malicious prosecution requires that the proceeding have ended in the plaintiff's favor (element 3) and that the defendant did not reasonably believe that there were any grounds (probable cause) to initiate the proceeding (element 4). Probable cause is to be decided by the court as a matter of law. However, it may require the jury to find some preliminary facts before the court can make its legal determination, including facts regarding what the defendant knew or did not know at the time. (See *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 881 [254 Cal.Rptr. 336, 765 P.2d 498].) If so, include element 4 and also the bracketed part of the instruction that refers to element 4.

Favorable termination is handled in much the same way. If a proceeding is terminated other than on the merits, there may be disputed facts that the jury must find in order to determine whether there has been a favorable termination. (See *Fuentes v. Berry* (1995) 38 Cal.App.4th 1800, 1808 [45 Cal.Rptr.2d 848].) If so, include element 3 and also the bracketed part of the instruction that refers to element 3. Once these facts are determined, the jury does not then make a second determination as to whether there has been a favorable termination. The matter is determined by the court based on the resolution of the disputed facts. See *Sierra Club Found. v. Graham* (1999) 72 Cal.App.4th 1135, 1159 [85 Cal.Rptr.2d 726] [element of favorable termination is for court to decide].)

Either or both of the elements of probable cause and favorable termination should be omitted if there are no disputed facts regarding that element for the jury.

Element 5 expresses the malice requirement.

Sources and Authority

- ~~Restatement Second of Torts, section 680 provides:~~

~~One who takes an active part in the initiation, continuation or procurement of civil proceedings against another before an administrative board that has power to take action adversely affecting the legally protected interests of the other, is subject to liability for any special harm caused thereby, if~~

~~(a) he acts without probable cause to believe that the charge or claim on which the proceedings are based may be well founded, and primarily for a purpose other than that of securing appropriate action by the board, and~~

~~(b) except where they are ex parte, the proceedings have terminated in favor of the person against whom they are brought.~~

- Public Employee Immunity. Government Code section 821.6. ~~provides: "A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause."~~

- " 'Where the prosecuting officer acts on an independent investigation of his own instead of on the statement of facts by the party making the complaint, the latter has not caused the prosecution and cannot be held liable in an action for malicious prosecution.' " (*Werner v. Hearst Publications, Inc.*

(1944) 65 Cal.App.2d 667, 673 [151 P.2d 308], internal citation omitted.)

- "We adopt the rule set forth in section 680 of the Restatement of Torts and hold that an action for malicious prosecution may be founded upon the institution of a proceeding before an administrative agency." (*Hardy v. Vial* (1957) 48 Cal.2d 577, 581 [311 P.2d 494].)

- "[W]e hold that the State Bar, not respondents, initiated, procured or continued the disciplinary proceedings of [plaintiff]. Therefore, [plaintiff] failed to allege the elements required for a malicious prosecution of an administrative proceeding against respondents." (*Stanwyck v. Horne* (1983) 146 Cal.App.3d 450, 459 [194 Cal.Rptr. 228].)

- "The [Board of Medical Quality Assurance] is similar to the State Bar Association. Each is empowered and directed to conduct an independent investigation of all complaints from the public prior to the filing of an accusation." (*Hogen v. Valley Hospital* (1983) 147 Cal.App.3d 119, 125 [195 Cal.Rptr. 5], internal citation omitted.)

- "*Hogen* and *Stanwyck* placed an additional pleading burden upon the plaintiff in a malicious prosecution case based upon the favorable termination of an administrative proceeding. Those cases held that since it is the administrative body, and not the individual initiating the complaint, which actually files the disciplinary proceeding, a cause of action for malicious prosecution will not lie if the administrative body conducts an independent preliminary investigation prior to initiating disciplinary proceedings." (*Johnson v. Superior Court* (1994) 25 Cal.App.4th 1564, 1568 [31 Cal.Rptr.2d 199].)

- "Where a proceeding is terminated other than on the merits, the reasons underlying the termination must be examined to see if it reflects the opinion of the court or the prosecuting party that the action would not succeed. If a conflict arises as to the circumstances explaining a failure to prosecute an action further, the determination of the reasons underlying the dismissal is a question of fact." (*Fuentes, supra,* 38 Cal.App.4th at p. 1808, internal citations omitted.)

- The same rules for determining probable cause in the wrongful institution of civil proceedings apply to cases alleging the wrongful institution of administrative proceedings. (*Nicholson v. Lucas* (1994) 21 Cal.App.4th 1657, 1666, fn. 4 [26 Cal.Rptr.2d 778].)

- "When there is a dispute as to the state of the defendant's knowledge and the existence of probable cause turns on resolution of that dispute, … the jury must resolve the threshold question of the defendant's factual knowledge or belief. Thus, when … there is evidence that the defendant may have known that the factual allegations on which his action depended were untrue, the jury must determine what facts the defendant knew before the trial court can determine the legal question whether such facts constituted probable cause to institute the challenged proceeding." (*Sheldon Appel Co., supra,* 47 Cal.3d at p. 881, internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 513–516

4 Levy et al., California Torts, Ch. 43, *Malicious Prosecution and Abuse of Process,* §§ 43.01–43.06

(Matthew Bender)

31 California Forms of Pleading and Practice, Ch. 357, *Malicious Prosecution and Abuse of Process*, §§ 357.10–357.32 (Matthew Bender)

14 California Points and Authorities, Ch. 147, *Malicious Prosecution and Abuse of Process*, §§ 147.20–147.53 (Matthew Bender)

1503. Public Entities and Employees (Gov. Code, § 821.6)

[*Name of defendant*] claims that [he/she] cannot be held responsible for [*name of plaintiff*]'s harm, if any, because [he/she] was a public employee acting within the scope of [his/her] employment. To establish this defense, [*name of defendant*] must prove that [he/she] was acting within the scope of [his/her] employment.

New September 2003; Renumbered from CACI No. 1506 June 2013

Directions for Use

For an instruction on scope of employment, see CACI No. 3720, *Scope of Employment*, in the Vicarious Responsibility series.

Sources and Authority

- Public employee Immunity. Government Code section 821.6. ~~provides: "A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause."~~

- In *Tur v. City of Los Angeles* (1996) 51 Cal.App.4th 897, 904 [59 Cal.Rptr.2d 470], the court concluded that "the failure to instruct under section 821.6 was prejudicial error." The court observed that "[d]efendants did not enjoy an unqualified immunity from suit. Their immunity would have depended on their proving by a preponderance of the evidence [that] they were acting within the scope of their employment in doing the acts alleged to constitute malicious prosecution." (*Ibid.*)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, § 368

4 Levy et al., California Torts, Ch. 43, *Malicious Prosecution and Abuse of Process*, § 43.06 (Matthew Bender)

31 California Forms of Pleading and Practice, Ch. 357, *Malicious Prosecution and Abuse of Process*, § 357.23 (Matthew Bender)

14 California Points and Authorities, Ch. 147, *Malicious Prosecution and Abuse of Process*, § 147.31 (Matthew Bender)

1701. Defamation per quod—Essential Factual Elements (Public Officer/Figure and Limited Public Figure)

[*Name of plaintiff***] claims that [***name of defendant***] harmed [him/her] by making [one or more of] the following statement(s): [***list all claimed per quod defamatory statements***].**

Liability

To establish this claim, [*name of plaintiff***] must prove that all of the following are more likely true than not true:**

1. **That [***name of defendant***] made [one or more of] the statement(s) to [a person/persons] other than [***name of plaintiff***];**

2. **That [this person/these people] reasonably understood that the statement(s) [was/were] about** [*name of plaintiff*]**;**

3. **That because of the facts and circumstances known to the [listener(s)/reader(s)] of the statement(s), [it/they] tended to injure [***name of plaintiff***] in [his/her] occupation [or to expose [him/her] to hatred, contempt, ridicule, or shame] [or to discourage others from associating or dealing with [him/her]];**

4. **That the statement(s) [was/were] false;**

5. **That [***name of plaintiff***] suffered harm to [his/her] property, business, profession, or occupation [including money spent as a result of the statement(s)]; and**

6. **That the statement(s) [was/were] a substantial factor in causing [***name of plaintiff***]'s harm.**

In addition, [*name of plaintiff***] must prove by clear and convincing evidence that [***name of defendant***] knew the statement(s) [was/were] false or had serious doubts about the truth of the statement(s).**

Actual Damages

If [*name of plaintiff***] has proved all of the above, then [he/she] is entitled to recover if [he/she] proves it is more likely true than not true that [***name of defendant***]'s wrongful conduct was a substantial factor in causing any of the following actual damages:**

a. **Harm to [***name of plaintiff***]'s property, business, trade, profession, or occupation;**

b. **Expenses [***name of plaintiff***] had to pay as a result of the defamatory statements;**

c. **Harm to [***name of plaintiff***]'s reputation; or**

d. **Shame, mortification, or hurt feelings.**

Punitive Damages

[*Name of plaintiff***] may also recover damages to punish [***name of defendant***] if [he/she] proves by clear and convincing evidence that [***name of defendant***] acted with malice, oppression, or fraud.**

[*For specific provisions, see CACI Nos. 3940–3949.***]**

New September 2003; Revised April 2008

Directions for Use

Special verdict form VF-1701, *Defamation per quod (Public Officer/Figure and Limited Public Figure)*, should be used in this type of case.

Presumed damages either are not available or will likely not be sought in a per quod case.

See also the Sources and Authority to CACI No. 1700, *Defamation per se—Essential Factual Elements (Public Officer/Figure and Limited Public Figure).*

Sources and Authority

- Defamation. Civil Code section 44.
- Libel Defined. Civil Code section 45.
- Libel Per Se. Civil Code section 45a.
- Slander Defined. Civil Code section 46.
- ~~Civil Code section 44 provides:~~

  ~~Defamation is effected by either of the following:~~

  ~~(a) Libel.~~

  ~~(b) Slander.~~

- ~~Civil Code section 45 provides: "Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation."~~
- ~~Civil Code section 45a provides: "A libel which is defamatory of the plaintiff without the necessity of~~

explanatory matter, such as an inducement, innuendo or other extrinsic fact, is said to be a libel on its face. Defamatory language not libelous on its face is not actionable unless the plaintiff alleges and proves that he has suffered special damage as a proximate result thereof. Special damage is defined in Section 48a of this code."

- Civil Code section 46 provides:

  Slander is a false and unprivileged publication, orally uttered, and also communications by radio or any mechanical or other means which:

  1. Charges any person with crime, or with having been indicted, convicted, or punished for crime;

  2. Imputes in him the present existence of an infectious, contagious, or loathsome disease;

  3. Tends directly to injure him in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profits;

  4. Imputes to him impotence or a want of chastity; or

  5. Which, by natural consequence, causes actual damage.

- Special Damages. Civil Code section 48a(4)(b). provides: " 'Special damages' are all damages which plaintiff alleges and proves that he has suffered in respect to his property, business, trade, profession or occupation, including such amounts of money as the plaintiff alleges and proves he has expended as a result of the alleged libel, and no other."

- "The elements of a defamation claim are (1) a publication that is (2) false, (3) defamatory, (4) unprivileged, and (5) has a natural tendency to injure or causes special damage." (*Wong v. Jing* (2011) 189 Cal.App.4th 1354, 1369 [117 Cal.Rptr.3d 747].)

- "If [a] defamatory meaning would appear only to readers who might be able to recognize it through some knowledge of specific facts and/or circumstances, not discernible from the face of the publication, and which are not matters of common knowledge rationally attributable to all reasonable persons, then the libel cannot be libel per se but will be libel per quod." (*Palm Springs Tennis Club v. Rangel* (1999) 73 Cal.App.4th 1, 5 [86 Cal.Rptr.2d 73], internal citation omitted.)

- "In pleading a case of libel per quod the plaintiff cannot assume that the court has access to the reader's special knowledge of extrinsic facts but must specially plead and prove those facts." (*Palm Springs Tennis Club, supra,* 73 Cal.App.4th at p. 7.)

- "A libel 'per quod,' ... requires that the injurious character or effect be established by allegation and

proof." (*Slaughter v. Friedman* (1982) 32 Cal.3d 149, 153–154 [185 Cal.Rptr. 244, 649 P.2d 886].)

- "In the libel context, 'inducement' and 'innuendo' are terms of art: '[W]here the language is ambiguous and an explanation is necessary to establish the defamatory meaning, the pleader must do two things: (1) Allege his interpretation of the defamatory meaning of the language (the "innuendo," ...); (2) support that interpretation by alleging facts showing that the readers or hearers to whom it was published would understand it in that defamatory sense (the "inducement").' " (*Barnes-Hind, Inc. v. Superior Court* (1986) 181 Cal.App.3d 377, 387 [226 Cal.Rptr. 354], internal citations omitted.)

- "A slander that falls within the first four subdivisions of Civil Code section 46 is slander per se and requires no proof of actual damages. A slander that does not fit into those four subdivisions is slander per quod, and special damages are required for there to be any recovery for that slander." (*The Nethercutt Collection v. Regalia* (2009) 172 Cal.App.4th 361, 367 [90 Cal.Rptr.3d 882], internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 529–555, 601–612

4 Levy et al., California Torts, Ch. 45, *Defamation,* §§ 45.04, 45.13 (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 340, *Libel and Slander*, §§ 340.10–340.75 (Matthew Bender)

14 California Points and Authorities, Ch. 142, *Libel and Slander (Defamation)*, §§ 142.24–142.27 (Matthew Bender)

1 California Civil Practice: Torts, §§ 21:1–21:2, 21:22–21:25, 21:44–21:52 (Thomson Reuters~~ West~~)

1703. Defamation per quod—Essential Factual Elements (Private Figure—Matter of Public Concern)

[*Name of plaintiff***] claims that [***name of defendant***] harmed [him/her] by making [one or more of] the following statement(s): [***insert all claimed per quod defamatory statements***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

Liability

1. **That [***name of defendant***] made [one or more of] the statement(s) to [a person/persons] other than [***name of plaintiff***];**

2. **That [this person/these people] reasonably understood that the statement(s) [was/were] about** [*name of plaintiff*]**;**

3. **That because of the facts and circumstances known to the [listener(s)/reader(s)] of the statement(s), [it/they] tended to injure [***name of plaintiff***] in [his/her] occupation [or to expose [him/her] to hatred, contempt, ridicule, or shame] [or to discourage others from associating or dealing with [him/her]];**

4. **That the statement(s) [was/were] false;**

5. **That [***name of defendant***] failed to use reasonable care to determine the truth or falsity of the statement(s);**

6. **That [***name of plaintiff***] suffered harm to [his/her] property, business, profession, or occupation [including money spent as a result of the statement(s)]; and**

7. **That the statements [was/were] a substantial factor in causing [***name of plaintiff***]'s harm.**

Actual Damages

If [*name of plaintiff***] has proved all of the above, then [he/she] is entitled to recover if [he/she] proves that [***name of defendant***]'s wrongful conduct was a substantial factor in causing any of the following actual damages:**

a. **Harm to [***name of plaintiff***]'s property, business, trade, profession, or occupation;**

b. **Expenses [***name of plaintiff***] had to pay as a result of the defamatory statements;**

c. **Harm to [***name of plaintiff***]'s reputation; or**

d. **Shame, mortification, or hurt feelings.**

Punitive Damages

[*Name of plaintiff***] may also recover damages to punish [***name of defendant***] if [he/she] proves by clear and convincing evidence that [***name of defendant***] either knew the statement(s) [was/were] false or had serious doubts about the truth of the statement(s), and that [he/she] acted with malice, oppression, or fraud.**

[*For specific provisions, see CACI Nos. 3940–3949.***]**

New September 2003; Revised April 2008, December 2009

Directions for Use

Special verdict form VF-1703, *Defamation per quod (Private Figure—Matter of Public Concern),* should be used in this type of case.

For statutes and cases on libel and slander and on the difference between defamation per se and defamation per quod, see the Sources and Authority to CACI No. 1701, *Defamation per quod—Essential Factual Elements (Public Officer/Figure and Limited Public Figure).*

Presumed damages either are not available or will likely not be sought in a per quod case.

Sources and Authority

- Libel per se. Civil Code section 45a. ~~provides: "A libel which is defamatory of the plaintiff without the necessity of explanatory matter, such as an inducement, innuendo or other extrinsic fact, is said to be a libel on its face. Defamatory language not libelous on its face is not actionable unless the plaintiff alleges and proves that he has suffered special damage as a proximate result thereof. Special damage is defined in Section 48a of this code."~~

- Special Damages. Civil Code section 48a(4)(b). ~~provides: " 'Special damages' are all damages which plaintiff alleges and proves that he has suffered in respect to his property, business, trade, profession or occupation, including such amounts of money as the plaintiff alleges and proves he has expended as a result of the alleged libel, and no other."~~

- "Libel is recognized as either being per se (on its face), or per quod (literally meaning, 'whereby'), and each requires a different standard of pleading." (*Palm Springs Tennis Club v. Rangel* (1999) 73 Cal.App.4th 1, 5 [86 Cal.Rptr.2d 73].)

- "If [a] defamatory meaning would appear only to readers who might be able to recognize it through some knowledge of specific facts and/or circumstances, not discernible from the face of the publication, and which are not matters of common knowledge rationally attributable to all reasonable persons, then the libel cannot be libel per se but will be libel per quod." (*Palm Springs Tennis Club,*

supra, 73 Cal.App.4th at p. 5, internal citation omitted.)

- "In pleading a case of libel per quod the plaintiff cannot assume that the court has access to the reader's special knowledge of extrinsic facts but must specially plead and prove those facts." (*Palm Springs Tennis Club, supra,* 73 Cal.App.4th at p. 7, footnote omitted.)

- "A libel 'per quod' ... requires that the injurious character or effect be established by allegation and proof." (*Slaughter v. Friedman* (1982) 32 Cal.3d 149, 153–154 [185 Cal.Rptr. 244, 649 P.2d 886].)

- "In the libel context, 'inducement' and 'innuendo' are terms of art: '[W]here the language is ambiguous and an explanation is necessary to establish the defamatory meaning, the pleader must do two things: (1) Allege his interpretation of the defamatory meaning of the language (the "innuendo," ...); (2) support that interpretation by alleging facts showing that the readers or hearers to whom it was published would understand it in that defamatory sense (the "inducement").' " (*Barnes-Hind, Inc. v. Superior Court* (1986) 181 Cal.App.3d 377, 387 [226 Cal.Rptr. 354].)

- "A defamatory publication not libelous on its face is not actionable unless the plaintiff alleges that he has suffered special damages as a result thereof." (*Selleck v. Globe Int'l, Inc.* (1985) 166 Cal.App.3d 1123, 1130 [212 Cal.Rptr. 838].)

- "The question whether a statement is reasonably susceptible to a defamatory interpretation is a question of law for the trial court. Only once the court has determined that a statement is reasonably susceptible to such a defamatory interpretation does it become a question for the trier of fact whether or not it was so understood." (*Smith v. Maldonado* (1999) 72 Cal.App.4th 637, 647 [85 Cal.Rptr.2d 397], internal citations omitted.)

- Private-figure plaintiffs must prove actual malice to recover punitive or presumed damages for defamation if the matter is one of public concern. They are only required to prove negligence to recover damages for actual injury to reputation. (*Khawar v. Globe Internat.* (1998) 19 Cal.4th 254, 273–274 [79 Cal.Rptr.2d 178, 965 P.2d 696].)

- " '[I]f the issue was being debated publicly and if it had foreseeable and substantial ramifications for nonparticipants, it was a public controversy.' " (*Copp v. Paxton* (1996) 45 Cal.App.4th 829, 845 [52 Cal.Rptr.2d 831], quoting *Waldbaum v. Fairchild Publications, Inc.* (D.C. Cir. 1980) 627 F.2d 1287, 1297.)

- If the language is not defamatory on its face, there is no distinction between libel and slander: "In either case, the fact that a statement is not defamatory on its face requires only that the plaintiff plead and prove the defamatory meaning and special damages." (*Savage v. Pacific Gas & Electric Co.* (1993) 21 Cal.App.4th 434, 447 [26 Cal.Rptr.2d 305].)

- A plaintiff must prove that the defendant was at least negligent in failing to ascertain the truth or falsity of the statement. (*Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 345–347 [94 S.Ct. 2997, 41 L.Ed.2d 789].)

- "The question whether a plaintiff is a public figure is to be determined by the court, not the jury."

(*Stolz v. KSFM 102 FM* (1994) 30 Cal.App.4th 195, 203–204 [35 Cal.Rptr.2d 740], internal citation omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 529–555, 613–615

4 Levy et al., California Torts, Ch. 45, *Defamation*, §§ 45.04, 45.13 (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 340, *Libel and Slander*, §§ 340.11, 340.13 (Matthew Bender)

14 California Points and Authorities, Ch. 142, *Libel and Slander (Defamation)*, §§ 142.30–142.40 (Matthew Bender)

1 California Civil Practice: Torts ~~(Thomson West)~~ §§ 21:1–21:2, 21:22–21:25, 21:51 (Thomson Reuters)

1705. Defamation per quod—Essential Factual Elements (Private Figure—Matter of Private Concern)

[*Name of plaintiff***] claims that [***name of defendant***] harmed [him/her] by making [one or more of] the following statement(s): [***insert all claimed per quod defamatory statements***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

Liability

1. **That [***name of defendant***] made [one or more of] the statement(s) to [a person/persons] other than [***name of plaintiff***];**

2. **That [this person/these people] reasonably understood that the statement(s) [was/were] about** [*name of plaintiff*]**;**

3. **That because of the facts and circumstances known to the [listener(s)/reader(s)] of the statement(s), [it/they] tended to injure [***name of plaintiff***] in [his/her] occupation [or to expose [him/her] to hatred, contempt, ridicule, or shame] [or to discourage others from associating or dealing with [him/her]];**

4. **That [***name of defendant***] failed to use reasonable care to determine the truth or falsity of the statement(s);**

5. **That [***name of plaintiff***] suffered harm to [his/her] property, business, profession, or occupation [including money spent as a result of the statement(s)]; and**

6. **That the statement(s) [was/were] a substantial factor in causing [***name of plaintiff***]'s harm.**

Actual Damages

If [*name of plaintiff***] has proved all of the above, then [he/she] is entitled to recover if [he/she] proves that [***name of defendant***]'s wrongful conduct was a substantial factor in causing any of the following actual damages:**

a. **Harm to [***name of plaintiff***]'s property, business, trade, profession, or occupation;**

b. **Expenses [***name of plaintiff***] had to pay as a result of the defamatory statements;**

c. **Harm to [***name of plaintiff***]'s reputation; or**

d. **Shame, mortification, or hurt feelings.**

Punitive Damages

[*Name of plaintiff***] may also recover damages to punish [***name of defendant***] if [he/she] proves by**

clear and convincing evidence that [*name of defendant***] acted with malice, oppression, or fraud.**

[*For specific provisions, see CACI Nos. 3940–3949.***]**

New September 2003; Revised April 2008, December 2009

Directions for Use

Special verdict form VF-1705, *Defamation per quod (Private Figure—Matter of Private Concern),* should be used in this type of case.

Presumed damages either are not available or will likely not be sought in a per quod case.

For statutes and cases on libel and slander and on the difference between defamation per se and defamation per quod, see the Sources and Authority to CACI No. 1701, *Defamation per quod—Essential Factual Elements (Public Officer/Figure and Limited Public Figure).*

Sources and Authority

- Libel per se. Civil Code section 45a. ~~provides: "A libel which is defamatory of the plaintiff without the necessity of explanatory matter, such as an inducement, innuendo or other extrinsic fact, is said to be a libel on its face. Defamatory language not libelous on its face is not actionable unless the plaintiff alleges and proves that he has suffered special damage as a proximate result thereof. Special damage is defined in Section 48a of this code."~~

- Special Damages. Civil Code section 48a(4)(b). ~~provides: " 'Special damages' are all damages which plaintiff alleges and proves that he has suffered in respect to his property, business, trade, profession or occupation, including such amounts of money as the plaintiff alleges and proves he has expended as a result of the alleged libel, and no other."~~

- "Libel is recognized as either being per se (on its face), or per quod (literally meaning, 'whereby'), and each requires a different standard of pleading." (*Palm Springs Tennis Club v. Rangel* (1999) 73 Cal.App.4th 1, 5 [86 Cal.Rptr.2d 73].)

- "If [a] defamatory meaning would appear only to readers who might be able to recognize it through some knowledge of specific facts and/or circumstances, not discernible from the face of the publication, and which are not matters of common knowledge rationally attributable to all reasonable persons, then the libel cannot be libel per se but will be libel per quod." (*Palm Springs Tennis Club, supra,* 73 Cal.App.4th at p. 5, internal citation omitted.)

- "In pleading a case of libel per quod the plaintiff cannot assume that the court has access to the reader's special knowledge of extrinsic facts but must specially plead and prove those facts." (*Palm Springs Tennis Club, supra,* 73 Cal.App.4th at p. 7, footnote omitted.)

- "A libel 'per quod' ... requires that the injurious character or effect be established by allegation and proof." (*Slaughter v. Friedman* (1982) 32 Cal.3d 149, 153-154 [185 Cal.Rptr. 244, 649 P.2d 886].)

- "In the libel context, 'inducement' and 'innuendo' are terms of art: '[W]here the language is ambiguous and an explanation is necessary to establish the defamatory meaning, the pleader must do two things: (1) allege his interpretation of the defamatory meaning of the language (the "innuendo," ...); (2) support that interpretation by alleging facts showing that the readers or hearers to whom it was published would understand it in that defamatory sense (the "inducement").' " (*Barnes-Hind, Inc. v. Superior Court* (1986) 181 Cal.App.3d 377, 387 [226 Cal.Rptr. 354].)

- "A defamatory publication not libelous on its face is not actionable unless the plaintiff alleges that he has suffered special damages as a result thereof." (*Selleck v. Globe Int'l, Inc.* (1985) 166 Cal.App.3d 1123, 1130 [212 Cal.Rptr. 838].)

- "The question whether a statement is reasonably susceptible to a defamatory interpretation is a question of law for the trial court. Only once the court has determined that a statement is reasonably susceptible to such a defamatory interpretation does it become a question for the trier of fact whether or not it was so understood." (*Smith v. Maldonado* (1999) 72 Cal.App.4th 637, 647 [85 Cal.Rptr.2d 397], internal citations omitted.)

- Private-figure plaintiffs must prove actual malice to recover punitive or presumed damages for defamation if the matter is one of public concern. They are required to prove only negligence to recover damages for actual injury to reputation. (*Khawar v. Globe Internat.* (1998) 19 Cal.4th 254, 273-274 [79 Cal.Rptr.2d 178, 965 P.2d 696].)

- If the language is not defamatory on its face, there is no distinction between libel and slander: "In either case, the fact that a statement is not defamatory on its face requires only that the plaintiff plead and prove the defamatory meaning and special damages." (*Savage v. Pacific Gas & Electric Co.* (1993) 21 Cal.App.4th 434, 447 [26 Cal.Rptr.2d 305].)

- A plaintiff must prove that the defendant was at least negligent in failing to ascertain the truth or falsity of the statement. (*Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 345-347 [94 S.Ct. 2997, 41 L.Ed.2d 789].)

- "The question whether a plaintiff is a public figure is to be determined by the court, not the jury." (*Stolz v. KSFM 102 FM* (1994) 30 Cal.App.4th 195, 203-204 [35 Cal.Rptr.2d 740], internal citation omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 529–555, 615

4 Levy et al., California Torts, Ch. 45, *Defamation*, §§ 45.04, 45.13 (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 340, *Libel and Slander*, §§ 340.12–340.13 (Matthew Bender)

14 California Points and Authorities, Ch. 142, *Libel and Slander (Defamation)*, §§ 142.20–142.32 (Matthew Bender)

1 California Civil Practice: Torts ~~(Thomson West)~~ §§ 21:1–21:2, 21:22–21:25, 21:51 (Thomson Reuters)

1706. Definition of Statement

The word "statement" in these instructions refers to any form of communication or representation, including spoken or written words [or] pictures [or] [*insert audible or visual representations***].**

New September 2003

Directions for Use

This instruction may be necessary in every case, but could be useful in cases where defamatory material is not written or verbal.

Sources and Authority

- Libel. Civil Code section 45. ~~provides: "Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation."~~

- Slander. Civil Code section 46. ~~provides:~~

  ~~Slander is a false and unprivileged publication, orally uttered, and also communications by radio or any mechanical or other means which:~~

  ~~1. Charges any person with crime, or with having been indicted, convicted, or punished for crime;~~

  ~~2. Imputes in him the present existence of an infectious, contagious, or loathsome disease;~~

  ~~3. Tends directly to injure him in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profits;~~

  ~~4. Imputes to him impotence or a want of chastity; or~~

  ~~5. Which, by natural consequence, causes actual damage.~~

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 529–555

4 Levy et al., California Torts, Ch. 45, *Defamation*, § 45.02 (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 340, *Libel and Slander*, § 340.18 (Matthew Bender)

14 California Points and Authorities, Ch. 142, *Libel and Slander (Defamation)*, § 142.21 (Matthew Bender)

1 California Civil Practice: Torts ~~(Thomson West)~~ § 21:2 (Thomson Reuters)

1722. Retraction: Newspaper or Broadcast (Civ. Code, § 48a)

Because [*name of defendant***] is a [newspaper/broadcaster], [***name of plaintiff***] may recover only the following:**

(a) Damages to property, business, trade, profession, or occupation; and

(b) Damages for money spent as a result of the defamation.

However, this limitation does not apply if [*name of plaintiff***] proves both of the following:**

1. That [*name of plaintiff***] demanded a correction of the statement within 20 days of discovering the statement; and**

2. That [*name of defendant***] did not publish an adequate correction;**

[or]

That [*name of defendant***]'s correction was not substantially as conspicuous as the original [publication/broadcast];**

[or]

That [*name of defendant***]'s correction was not [published/broadcast] within three weeks of [***name of plaintiff***]'s demand.**

New September 2003

Directions for Use

The judge should decide whether the demand for a retraction was served in compliance with the statute. (*O'Hara v. Storer Communications, Inc.* (1991) 231 Cal.App.3d 1101, 1110 [282 Cal.Rptr. 712].)

Sources and Authority

- Demand for Correction. Civil Code section 48a. ~~provides:~~

  ~~(1) In any action for damages for the publication of a libel in a newspaper, or of a slander by radio broadcast, plaintiff shall recover no more than special damages unless a correction be demanded and be not published or broadcast, as hereinafter provided. Plaintiff shall serve upon the publisher, at the place of publication or broadcaster at the place of broadcast, a written notice specifying the statements claimed to be libelous and demanding that the same be corrected. Said notice and demand must be served within 20 days after knowledge of the publication or~~

~~broadcast of the statements claimed to be libelous.~~

~~(2) If a correction be demanded within said period and be not published or broadcast in substantially as conspicuous a manner in said newspaper or on said broadcasting station as were the statements claimed to be libelous, in a regular issue thereof published or broadcast within three weeks after such service, plaintiff, if he pleads and proves such notice, demand and failure to correct, and if his cause of action be maintained, may recover general, special and exemplary damages; provided that no exemplary damages may be recovered unless the plaintiff shall prove that defendant made the publication or broadcast with actual malice and then only in the discretion of the court or jury, and actual malice shall not be inferred or presumed from the publication or broadcast.~~

~~(3) A correction published or broadcast in substantially as conspicuous a manner in said newspaper or on said broadcasting station as the statements claimed in the complaint to be libelous, prior to receipt of a demand therefor, shall be of the same force and effect as though such correction had been published or broadcast within three weeks after a demand therefor.~~

~~(4) [Definitions.] As used herein, the terms "general damages," "special damages," "exemplary damages" and "actual malice," are defined as follows:~~

~~(a) "General damages" are damages for loss of reputation, shame, mortification and hurt feelings;~~

~~(b) "Special damages" are all damages which plaintiff alleges and proves that he has suffered in respect to his property, business, trade, profession or occupation, including such amounts of money as the plaintiff alleges and proves he has expended as a result of the alleged libel, and no other;~~

~~(c) "Exemplary damages" are damages which may in the discretion of the court or jury be recovered in addition to general and special damages for the sake of example and by way of punishing a defendant who has made the publication or broadcast with actual malice;~~

~~(d) "Actual malice" is that state of mind arising from hatred or ill will toward the plaintiff; provided, however, that such a state of mind occasioned by a good faith belief on the part of the defendant in the truth of the libelous publication or broadcast at the time it is published or broadcast shall not constitute actual malice.~~

- "Under California law, a newspaper gains immunity from liability for all but 'special damages' when it prints a retraction satisfying the requirements of section 48a." (*Pierce v. San Jose Mercury News* (1989) 214 Cal.App.3d 1626, 1631 [263 Cal.Rptr. 410]; see also *Twin Coast Newspapers, Inc. v. Superior Court* (1989) 208 Cal.App.3d 656, 660-661 [256 Cal.Rptr. 310].)

- "An equivocal or incomplete retraction obviously serves no purpose even if it is published in 'substantially as conspicuous a manner ... as were the statements claimed to be libelous.' " (*Weller v. American Broadcasting Companies, Inc.* (1991) 232 Cal.App.3d 991, 1011 [283 Cal.Rptr. 644].)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 629–639

4 Levy et al., California Torts, Ch. 45, *Defamation*, § 45.24 (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 340, *Libel and Slander*, § 340.53 (Matthew Bender)

14 California Points and Authorities, Ch. 142, *Libel and Slander (Defamation)*, § 142.37 (Matthew Bender)

1 California Civil Practice: Torts ~~(Thomson West)~~ §§ 21:55–21:57 (Thomson Reuters)

1724. Affirmative Defense—Statute of Limitations—Defamation

[*Name of defendant***] contends that [***name of plaintiff***]'s lawsuit was not filed within the time set by law. To succeed on this defense, [***name of defendant***] must prove that [he/she/it] first communicated the alleged defamatory statement to a person other than [***name of plaintiff***] before [***insert date one year before date of filing***]. [For statements made in a publication, the claimed harm occurred when the publication was first generally distributed to the public.]**

[If, however, [*name of plaintiff***] proves that on [***insert date one year before date of filing***] [he/she/it] had not discovered the facts constituting the defamation, and with reasonable diligence could not have discovered those facts, the lawsuit was filed on time.]**

New April 2009

Directions for Use

This instruction is for use if the defendant claims that the plaintiff's action was not filed within the applicable one-year limitation period for defamation. (See Code Civ. Proc., § 340(c).)

If the defamation was published in a publication such as a book, newspaper, or magazine, include the last sentence of the first paragraph, and do not include the second paragraph. The delayed-discovery rule does not apply to these statements. (*Shively v. Bozanich* (2003) 31 Cal.4th 1230, 1250–1251 [7 Cal.Rptr.3d 576, 80 P.3d 676].) Otherwise, include the second paragraph if the plaintiff alleges that the delayed-discovery rule avoids the limitation defense.

The plaintiff bears the burden of pleading and proving delayed discovery. (See *McKelvey v. Boeing North Am. Inc.* (1999) 74 Cal.App.4th 151, 160 [86 Cal.Rptr.2d 645].) See also the Sources and Authority to CACI No. 455, *Statute of Limitations—Delayed Discovery*.

The delayed discovery rule can apply to matters published in an inherently secretive manner. (*Hebrew Academy of San Francisco v. Goldman* (2007) 42 Cal.4th 883, 894 [70 Cal.Rptr.3d 178, 173 P.3d 1004]. Modify the instruction if inherent secrecy is at issue and depends on disputed facts. It is not clear whether the plaintiff has the burden of proving inherent secrecy or the defendant has the burden of proving its absence.

Sources and Authority

- One-Year Statute of Limitations. Code of Civil Procedure section 340~~. provides in part:~~

  ~~Within one year:~~

  ~~(c) An action for libel, slander, false imprisonment, seduction of a person below the age of legal consent, or by a depositor against a bank for the payment of a forged or raised check, or a check that bears a forged or unauthorized endorsement, or against any person who boards or feeds an animal or fowl or who engages in the practice of~~

~~veterinary medicine as defined in Section 4826 of the Business and Professions Code, for that person's neglect resulting in injury or death to an animal or fowl in the course of boarding or feeding the animal or fowl or in the course of the practice of veterinary medicine on that animal or fowl.~~

- "In a claim for defamation, as with other tort claims, the period of limitations commences when the cause of action accrues. … [A] cause of action for defamation accrues at the time the defamatory statement is 'published' (using the term 'published' in its technical sense). [¶] [I]n defamation actions the general rule is that publication occurs when the defendant communicates the defamatory statement to a person other than the person being defamed. As also has been noted, with respect to books and newspapers, publication occurs (and the cause of action accrues) when the book or newspaper is first generally distributed to the public." (*Shively, supra,* 31 Cal.4th at pp. 1246–1247, internal citations omitted.)

- "This court and other courts in California and elsewhere have recognized that in certain circumstances it may be appropriate to apply the discovery rule to delay the accrual of a cause of action for defamation or to impose an equitable estoppel against defendants who assert the defense after the limitations period has expired." (*Shively, supra,* 31 Cal.4th at pp. 1248–1249.)

- "[A]pplication of the discovery rule to statements contained in books and newspapers would undermine the single-publication rule and reinstate the indefinite tolling of the statute of limitations intended to be cured by the adoption of the single-publication rule. If we were to recognize delayed accrual of a cause of action based upon the allegedly defamatory statement contained in the book … on the basis that plaintiff did not happen to come across the statement until some time after the book was first generally distributed to the public, we would be adopting a rule subjecting publishers and authors to potential liability during the entire period in which a single copy of the book or newspaper might exist and fall into the hands of the subject of a defamatory remark. Inquiry into whether delay in discovering the publication was reasonable has not been permitted for publications governed by the single-publication rule. Nor is adoption of the rule proposed by plaintiff appropriate simply because the originator of a privately communicated defamatory statement may, together with the author and the publisher of a book, be liable for the defamation contained in the book. Under the rationale for the single-publication rule, the originator, who is jointly responsible along with the author and the publisher, should not be liable for millions of causes of action for a single edition of the book. Similarly, consistent with that rationale, the originator, like the author or the publisher, should not be subject to suit many years after the edition is published." (*Shively, supra,* 31 Cal.4th at p. 1251.)

- "The single-publication rule as described in our opinion in *Shively* and as codified in Civil Code section 3425.3 applies without limitation to all publications." (*Hebrew Academy of San Francisco, supra,* 42 Cal.4th at p. 893.)

- "[T]he single-publication rule applies not only to books and newspapers that are published with general circulation (as we addressed in *Shively*), but also to publications like that in the present case that are given only limited circulation and, thus, are not generally distributed to the public. Further, the discovery rule, which we held in *Shively* does not apply when a book or newspaper is generally distributed to the public, does not apply even when, as in the present case, a publication

is given only limited distribution." (*Hebrew Academy of San Francisco, supra,* 42 Cal.4th at p. 890.)

- " '… [C]ourts uniformly have *rejected* the application of the discovery rule to libels published in books, magazines, and newspapers,' stating that 'although application of the discovery rule may be justified when the defamation was communicated in confidence, that is, "in an inherently secretive manner," the justification does not apply when the defamation occurred by means of a book, magazine, or newspaper that was distributed to the public. [Citation.]' " (*Hebrew Academy of San Francisco, supra,* 42 Cal.4th at p. 894, original italics, internal citations omitted.)

Secondary Sources

Haning et al., California Practice Guide: Personal Injury (The Rutter Group) ¶ 5:176.10

4 Levy et al., California Torts, Ch. 45, *Defamation,* § 45.21 (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 340, *Libel and Slander,* § 340.290 (Matthew Bender)

14 California Points and Authorities, Ch. 142, *Libel and Slander (Defamation),* § 142.56 (Matthew Bender)

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

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

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

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

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

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

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

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

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

Directions for Use

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

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

If plaintiff alleges that the use was not covered by Civil Code section 3344(d) (e.g., not a "news"

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

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

Sources and Authority

- Liability for Use of Another's Name or Likeness. Civil Code section 3344~~.(a) provides: "Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent, or, in the case of a minor, the prior consent of his parent or legal guardian, shall be liable for any damages sustained by the person or persons injured as a result thereof. In addition, in any action brought under this section, the person who violated the section shall be liable to the injured party or parties in an amount equal to the greater of seven hundred fifty dollars ($750) or the actual damages suffered by him or her as a result of the unauthorized use, and any profits from the unauthorized use that are attributable to the use and are not taken into account in computing the actual damages. In establishing such profits, the injured party or parties are required to present proof only of the gross revenue attributable to such use, and the person who violated this section is required to prove his or her deductible expenses. Punitive damages may also be awarded to the injured party or parties. The prevailing party in any action under this section shall also be entitled to attorney's fees and costs."~~

- ~~Civil Code section 3344(d) provides: "For purposes of this section, a use of a name, voice, signature, photograph, or likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign, shall not constitute a use for which consent is required under subdivision (a)."~~

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

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

- "There are two vehicles a plaintiff can use to protect this right: a common law cause of action for commercial misappropriation and a section 3344 claim. To prove the common law cause of action, the plaintiff must establish: ' "(1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury." [Citation.]' To prove the statutory remedy, a plaintiff must present evidence of 'all the elements of the common law cause of action' and must also prove 'a knowing use by the defendant as well as a direct connection between the alleged use and the commercial purpose.' " (*Orthopedic Systems, Inc. v. Schlein* (2011) 202 Cal.App.4th 529, 544 [135 Cal.Rptr.3d 200],

internal citations omitted.)

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

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

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

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 681–683

Chin et al., California Practice Guide: Employment Litigation, Ch. 5-K, *Invasion Of Privacy*, ¶¶ 5:710–5:891 (The Rutter Group)

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

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

18 California Points and Authorities, Ch. 184, *Privacy: Invasion of Privacy*, §§ 184.22–184.24 (Matthew Bender)

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

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

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

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

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

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

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

   [*or***]**

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

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

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

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

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

Directions for Use

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

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

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

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

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

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

Sources and Authority

- Liability for Use of Another's Name or Likeness. Civil Code section 3344.~~(a) provides: "Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent, or, in the case of a minor, the prior consent of his parent or legal guardian, shall be liable for any damages sustained by the person or persons injured as a result thereof. In addition, in any action brought under this section, the person who violated the section shall be liable to the injured party or parties in an amount equal to the greater of seven hundred fifty dollars ($750) or the actual damages suffered by him or her as a result of the unauthorized use, and any profits from the unauthorized use that are attributable to the use and are not taken into account in computing the actual damages. In establishing such profits, the injured party or parties are required to present proof only of the gross revenue attributable to such use, and the person who violated this section is required to prove his or her deductible expenses. Punitive damages may also be awarded to the injured party or parties. The prevailing party in any action under this section shall also be entitled to attorney's fees and costs."~~

- ~~Civil Code section 3344(d) provides: "For purposes of this section, a use of a name, voice, signature, photograph, or likeness in connection with any news, public affairs, or sports broadcast or account, or~~

~~any political campaign, shall not constitute a use for which consent is required under subdivision (a).”~~

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

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

- “There are two vehicles a plaintiff can use to protect this right: a common law cause of action for commercial misappropriation and a section 3344 claim. To prove the common law cause of action, the plaintiff must establish: ‘ “(1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury.” [Citation.]’ To prove the statutory remedy, a plaintiff must present evidence of ‘all the elements of the common law cause of action’ and must also prove ‘a knowing use by the defendant as well as a direct connection between the alleged use and the commercial purpose.’ ” (*Orthopedic Systems, Inc. v. Schlein* (2011) 202 Cal.App.4th 529, 544 [135 Cal.Rptr.3d 200], internal citations omitted.)

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

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

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

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

- “Any facts which tend to disprove one of the allegations raised in a complaint may be offered in the defendant’s answer based upon a general denial and need not be raised by affirmative defense. ... Throughout this litigation plaintiffs have borne the burden of establishing that their names and likenesses were used in violation of section 3344, and this burden has always required proof that the disputed uses fell outside the exemptions granted by subdivision (d).” (*Gionfriddo v. Major League*

Baseball (2001) 94 Cal.App.4th 400, 416-417 [114 Cal.Rptr.2d 307], internal citation omitted.)

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

- "[N]o cause of action will lie for the 'publication of matters in the public interest, which rests on the right of the public to know and the freedom of the press to tell it.' " (*Montana v. San Jose Mercury News* (1995) 34 Cal.App.4th 790, 793 [40 Cal.Rptr.2d 639], internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 681–683

Chin et al., California Practice Guide: Employment Litigation, Ch. 5-K, *Invasion Of Privacy*, ¶¶ 5:710–5:891 (The Rutter Group)

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

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

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

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

1808. Stalking (Civ. Code, § 1708.7)

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

1. **That [***name of defendant***] engaged in a pattern of conduct with the intent to [follow/alarm/harass] [***name of plaintiff***]. The pattern of conduct must be supported by evidence in addition to [***name of plaintiff***]'s testimony;**

2. **That as a result of this conduct [***name of plaintiff***] reasonably feared for [his/her] own safety [or for the safety of an immediate family member]; and**

3. **(a) That, as part of the pattern of conduct, [***name of defendant***] made a believable threat with the intent to place [***name of plaintiff***] in reasonable fear for [his/her] safety [or the safety of an immediate family member]; and**

   (b) That [*name of plaintiff***] clearly demanded at least once that [***name of defendant***] stop; and**

   (c) That [*name of defendant***] persisted in [his/her] pattern of conduct;**

   [or]

   That [*name of defendant***] violated a restraining order prohibiting the pattern of conduct;**

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

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

["Harass" means a knowing and willful course of conduct directed at [*name of plaintiff***] that seriously alarms, annoys, torments, or terrorizes [him/her], and which serves no legitimate purpose. The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to [***name of plaintiff***]].**

A "pattern of conduct" means a series of words or actions over a period of time, however short, that reflects an ongoing purpose.

New September 2003

Sources and Authority

- Stalking. Civil Code section 1708.7. ~~provides:~~

~~(a) A person is liable for the tort of stalking when the plaintiff proves all of the following elements of the tort:~~

~~(1) The defendant engaged in a pattern of conduct the intent of which was to follow, alarm, or harass the plaintiff. In order to establish this element, the plaintiff shall be required to support his or her allegations with independent corroborating evidence.~~

~~(2) As a result of that pattern of conduct, the plaintiff reasonably feared for his or her safety, or the safety of an immediate family member. For purposes of this paragraph, "immediate family" means a spouse, parent, child, any person related by consanguinity or affinity within the second degree, or any person who regularly resides, or, within the six months preceding any portion of the pattern of conduct, regularly resided, in the plaintiff's household.~~

~~(3) One of the following:~~

~~(A) The defendant, as a part of the pattern of conduct specified in paragraph (1), made a credible threat with the intent to place the plaintiff in reasonable fear for his or her safety, or the safety of an immediate family member and, on at least one occasion, the plaintiff clearly and definitively demanded that the defendant cease and abate his or her pattern of conduct and the defendant persisted in his or her pattern of conduct.~~

~~(B) The defendant violated a restraining order, including, but not limited to, any order issued pursuant to Section 527.6 of the Code of Civil Procedure, prohibiting any act described in subdivision (a).~~

~~(b) For the purposes of this section:~~

~~(1) "Pattern of conduct" means conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose. Constitutionally protected activity is not included within the meaning of "pattern of conduct."~~

~~(2) "Credible threat" means a verbal or written threat, including that communicated by means of an electronic communication device, or a threat implied by a pattern of conduct or a combination of verbal, written, or electronically communicated statements and conduct, made with the intent and apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety or the safety of his or her immediate family.~~

~~(3) "Electronic communication device" includes, but is not limited to, telephones, cellular telephones, computers, video recorders, fax machines, or pagers. "Electronic communication" has the same meaning as the term defined in Subsection 12 of Section 2510 of Title 18 of the United States Code.~~

~~(4) "Harass" means a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, torments, or terrorizes the person, and which serves no legitimate purpose. The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the person.~~

~~(c) A person who commits the tort of stalking upon another is liable to that person for damages, including, but not limited to, general damages, special damages, and punitive damages pursuant to Section 3294.~~

~~(d) In an action pursuant to this section, the court may grant equitable relief, including, but not limited to, an injunction.~~

~~(e) The rights and remedies provided in this section are cumulative and in addition to any other rights and remedies provided by law.~~

~~(f) This section shall not be construed to impair any constitutionally protected activity, including, but not limited to, speech, protest, and assembly.~~

Secondary Sources

5 Witkin, Summary of California Law (10th edition 2005) Torts, §662

6 California Forms of Pleading and Practice, Ch. *Assault and Battery*, Ch. 58, § 58.28 (Matthew Bender)

2 California Points and Authorities, Ch. 21, *Assault and Battery*, § 21.28 (Matthew Bender)

1809. Recording of Confidential Information (Pen. Code, §§ 632, 637.2)

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

1. **That [***name of defendant***] intentionally [eavesdropped on/recorded] [***name of plaintiff***]'s conversation by using an electronic device;**

2. **That [***name of plaintiff***] had a reasonable expectation that the conversation was not being overheard or recorded; [and]**

3. **That [***name of defendant***] did not have the consent of all parties to the conversation to [eavesdrop on/record] it;**

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

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

New September 2003

Directions for Use

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

Elements 4 and 5 are in brackets because if there is no actual harm, plaintiff can recover the statutory penalty. If plaintiff is seeking actual damages, such damages must be proven along with causation.

Sources and Authority

- Recording Confidential Communication. Penal Code section 632(a). ~~provides: "Every person who, intentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device, eavesdrops upon or records the confidential communication, whether the communication is carried on among the parties in the presence of one another or by means of a telegraph, telephone, or other device, except a radio, shall be punished by a fine not exceeding two thousand five hundred dollars ($2,500), or imprisonment in the county jail not exceeding one year, or in the state prison, or by both that fine and imprisonment. If the person has previously been convicted of a violation of this section or Section 631, 632.5, 632.6, 632.7, or 636, the person shall be punished by a fine not exceeding ten thousand dollars ($10,000), by imprisonment in the county jail not exceeding one year, or in the state prison, or by both that fine and imprisonment."~~

- Civil Action for Recording Confidential Communication. Penal Code section 637.2. ~~provides:~~

~~(a) Any person who has been injured by a violation of this chapter may bring an action against the person who committed the violation for the greater of the following amounts:~~

~~(1) Five thousand dollars ($5,000).~~

~~(2) Three times the amount of actual damages, if any, sustained by the plaintiff.~~

~~(b) Any person may, in accordance with Chapter 3 (commencing with Section 525) of Title 7 of Part 2 of the Code of Civil Procedure, bring an action to enjoin and restrain any violation of this chapter, and may in the same action seek damages as provided by subdivision (a).~~

~~(c) It is not a necessary prerequisite to an action pursuant to this section that the plaintiff has suffered, or be threatened with, actual damages.~~

- "[A] conversation is confidential under section 632 if a party to that conversation has an objectively reasonable expectation that the conversation is not being overheard or recorded." (*Flanagan v. Flanagan* (2002) 27 Cal.4th 766, 776–777 [117 Cal.Rptr.2d 574, 41 P.3d 575].)

- " 'A communication must be protected if either party reasonably expects the communication to be confined to the parties.' " (*Coulter v. Bank of America National Trust and Savings Assn.* (1994) 28 Cal.App.4th 923, 929 [33 Cal.Rptr.2d 766], internal citation omitted.)

- "While one who imparts private information risks the betrayal of his confidence by the other party, a substantial distinction has been recognized between the secondhand repetition of the contents of a conversation and its simultaneous dissemination to an unannounced second auditor, whether that auditor be a person or a mechanical device." (*Ribas v. Clark* (1985) 38 Cal.3d 355, 360-361 [212 Cal.Rptr. 143, 696 P.2d 637].)

- "We hold that an actionable violation of section 632 does not require disclosure of a confidential communication to a third party." (*Friddle v. Epstein* (1993) 16 Cal.App.4th 1649, 1660 [21 Cal.Rptr.2d 85].)

- "The right to recover [the] statutory minimum accrue[s] at the moment the privacy act [is] violated." (*Friddle, supra,* 16 Cal.App.4th at p. 1661.)

- "If the plaintiff has suffered injuries akin to those for emotional distress, 'i.e., anxiety, embarrassment, humiliation, shame, depression, feelings of powerlessness, anguish, etc.,' these are 'actual' damages which shall be trebled." (*Friddle, supra,* 16 Cal.App.4th at p. 1660.)

- "Because the right to [the statutory] award accrues at the moment of the violation, it is not barred by the judicial privilege. ... Section 637.2 therefore permits him to pursue his statutory remedy of a civil lawsuit for $3,000, even though the judicial privilege bars his recovery for the only actual damage he claims to have suffered." (*Ribas, supra,* 38 Cal.3d at p. 365.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 660, 661, 666

4 Levy et al., California Torts, Ch. 46, *Invasion of Privacy*, § 46.07[8] (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 429, *Privacy*, § 429.283 (Matthew Bender)

18 California Points and Authorities, Ch. 184, *Privacy: Invasion of Privacy*, § 184.25A (Matthew Bender)

1821. Damages for Use of Name or Likeness (Civ. Code § 3344(a))

If you decide that [*name of plaintiff***] has proved [his/her] claim against [***name of defendant***], you also must decide how much money will reasonably compensate [***name of plaintiff***] for the harm. This compensation is called "damages."**

[*Name of plaintiff***] must prove the amount of [his/her] damages. [***Name of plaintiff***] does not have to prove the exact amount of damages that will provide reasonable compensation for the harm. However, you must not speculate or guess in awarding damages.**

The following are the specific items of damages claimed by [*name of plaintiff***]:**

1. **[Humiliation, embarrassment, and mental distress, including any physical symptons;]**

2. **[Harm to [***name of plaintiff***]'s reputation;] [and]**

3. **[***Insert other item(s) of claimed harm***].**

In addition, [*name of plaintiff***] may recover any profits that [***name of defendant***] received from the use of [***name of plaintiff***]'s [name/voice/signature/photograph/likeness] [that have not already been taken into account with regard to the above damages]. To establish the amount of these profits you must:**

1. **Determine the gross, or total, revenue that [***name of defendant***] received from the use;**

2. **Determine the expenses that [***name of defendant***] had in obtaining the gross revenue; and**

3. **Deduct [***name of defendant***]'s expenses from the gross revenue.**

[*Name of plaintiff***] must prove the amount of gross revenue, and [***name of defendant***] must prove the amount of expenses.**

New September 2003; Revised June 2012, December 2012

Directions for Use

Under Civil Code section 3344(a), an injured party may recover either actual damages or $750, whichever is greater, as well as profits from the unauthorized use that were not taken into account in calculating actual damages. (*Orthopedic Systems Inc. v. Schlein* (2011) 202 Cal.App.4th 529, 547 [135 Cal.Rptr.3d 200].) If no actual damages are sought, the first part of the instruction may be deleted or modified to simply instruct the jury to award $750 if it finds liability.

The plaintiff might claim that he or she would have earned the same profits that the defendant wrongfully

earned. In such a case, to avoid a double recovery, the advisory committee recommends computing damages to recover the defendant's wrongful profits separately from actual damages, that is, under the second part of the instruction and not under actual damages item 3 ("other item(s) of claimed harm"). See also CACI No. VF-1804, *Privacy—Use of Name or Likeness.* Give the bracketed phrase in the paragraph that introduces the second part of the instruction if the plaintiff alleges lost profits that are different from the defendant's wrongful profits and that are claimed under actual damages item 3.

Sources and Authority

- Liability for Use of Name or Likeness. Civil Code section 3344.~~(a) provides: "Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent, or, in the case of a minor, the prior consent of his parent or legal guardian, shall be liable for any damages sustained by the person or persons injured as a result thereof. In addition, in any action brought under this section, the person who violated the section shall be liable to the injured party or parties in an amount equal to the greater of seven hundred fifty dollars ($750) or the actual damages suffered by him or her as a result of the unauthorized use, and any profits from the unauthorized use that are attributable to the use and are not taken into account in computing the actual damages. In establishing such profits, the injured party or parties are required to present proof only of the gross revenue attributable to such use, and the person who violated this section is required to prove his or her deductible expenses. Punitive damages may also be awarded to the injured party or parties. The prevailing party in any action under this section shall also be entitled to attorney's fees and costs."~~

- "[Plaintiff] alleges, and submits evidence to show, that he was injured economically because the ad will make it difficult for him to endorse other automobiles, and emotionally because people may be led to believe he has abandoned his current name and assume he has renounced his religion. These allegations suffice to support his action. Injury to a plaintiff's right of publicity is not limited to present or future economic loss, but 'may induce humiliation, embarrassment, and mental distress.' " (*Abdul-Jabbar v. General Motors Corp.* (9th Cir. 1996) 85 F.3d 407, 416, internal citation omitted.)

- "We can conceive no rational basis for the Legislature to limit the $750 as an alternative to all other damages, including profits. If someone profits from the unauthorized use of another's name, it makes little sense to preclude the injured party from recouping those profits because he or she is entitled to statutory damages as opposed to actual damages. Similar reasoning appears to be reflected in the civil jury instructions for damages under section 3344, which provides: 'If [name of plaintiff] has not proved the above damages, or has proved an amount of damages less than $750, then you must award [him/her] $750. [¶] In addition, [name of plaintiff] may recover any profits that [name of defendant] received from the use of [name of plaintiff]'s [name …] [that have not already been taken into account in computing the above damages].' (CACI No. 1821, italics omitted.)." (*Orthopedic Systems Inc., supra,* 202 Cal.App.4th at p. 546.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1548–1556

Chin et al., California Practice Guide: Employment Litigation, Ch. 5-K, *Invasion Of Privacy*, ¶¶ 5:710–5:891 (The Rutter Group)

4 Levy et al., California Torts, Ch. 46, *Invasion of Privacy*, § 46.13 (Matthew Bender)

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

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

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

1902. False Promise

[*Name of plaintiff***] claims [he/she] was harmed because [***name of defendant***] made a false promise. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] made a promise to [***name of plaintiff***];**
2. **That [***name of defendant***] did not intend to perform this promise when [he/she] made it;**
3. **That [***name of defendant***] intended that [***name of plaintiff***] rely on this promise;**
4. **That [***name of plaintiff***] reasonably relied on [***name of defendant***]'s promise;**
5. **That [***name of defendant***] did not perform the promised act;**
6. **That [***name of plaintiff***] was harmed; and**
7. **That [***name of plaintiff***]'s reliance on [***name of defendant***]'s promise was a substantial factor in causing [his/her/its] harm.**

New September 2003; Revised December 2012, December 2013

Directions for Use

Give this instruction in a case in which it is alleged that the defendant made a promise without any intention of performing it. (See Civ. Code, § 1710(4).) If element 4 is contested, give CACI No. 1907, *Reliance*, and CACI No. 1908, *Reasonable Reliance*.

Sources and Authority

- Deceit. Civil Code section 1710. ~~provides:~~

  ~~A deceit, within the meaning of [section 1709], is either:~~

  ~~1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;~~

  ~~2. The assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true;~~

  ~~3. The suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact; or,~~

~~4. A promise, made without any intention of performing it.~~

- " ' "Promissory fraud" is a subspecies of fraud and deceit. A promise to do something necessarily implies the intention to perform; hence, where a promise is made without such intention, there is an implied misrepresentation of fact that may be actionable fraud. [¶] An action for promissory fraud may lie where a defendant fraudulently induces the plaintiff to enter into a contract.' " (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 973−974 [64 Cal.Rptr.2d 843, 938 P.2d 903], internal citations omitted.)

- "Under Civil Code section 1709, one is liable for fraudulent deceit if he 'deceives another with intent to induce him to alter his position to his injury or risk … .' Section 1710 of the Civil Code defines deceit for the purposes of Civil Code section 1709 as, inter alia, '[a] promise, made without any intention of performing it.' ' "The elements of fraud, which give rise to the tort action for deceit, are (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." [Citations.]' Each element must be alleged with particularity." (*Beckwith v. Dahl* (2012) 205 Cal.App.4th 1039, 1059–1060 [141 Cal.Rptr.3d 142], internal citations omitted.)

- "A promise of future conduct is actionable as fraud only if made without a present intent to perform. 'A declaration of intention, although in the nature of a promise, made in good faith, without intention to deceive, and in the honest expectation that it will be fulfilled, even though it is not carried out, does not constitute a fraud.' Moreover, ' "something more than nonperformance is required to prove the defendant's intent not to perform his promise." ... [I]f plaintiff adduces no further evidence of fraudulent intent than proof of nonperformance of an oral promise, he will never reach a jury.' " (*Magpali v. Farmers Group, Inc.* (1996) 48 Cal.App.4th 471, 481 [55 Cal.Rptr.2d 225], internal citations omitted.)

- "[I]n a promissory fraud action, to sufficiently allege defendant made a misrepresentation, the complaint must allege (1) the defendant made a representation of intent to perform some future action, i.e., the defendant made a promise, and (2) the defendant did not really have that intent at the time that the promise was made, i.e., the promise was false." (*Beckwith, supra,* 205 Cal.App.4th at p. 1060.)

- "[F]raudulent intent is an issue for the trier of fact to decide." (*Beckwith, supra,* 205 Cal.App.4th at p. 1061.)

- "[T]here are two causation elements in a fraud cause of action. First, the plaintiff's actual and justifiable reliance on the defendant's misrepresentation must have caused him to take a detrimental course of action. Second, the detrimental action taken by the plaintiff must have caused his alleged damage." (*Beckwith, supra,* 205 Cal.App.4th at p. 1062.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 781–786

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts,* § 40.03[1][a]

(Matthew Bender)

23 California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit,* § 269.12 (Matthew Bender)

10 California Points and Authorities, Ch. 105, *Fraud and Deceit,* § 105.30 et seq. (Matthew Bender)

2 California Civil Practice: Torts § 22:20 (Thomson Reuters)

1906. Misrepresentations Made to Persons Other Than the Plaintiff

[*Name of defendant***] is responsible for a representation that was not made directly to [***name of plaintiff***] if [he/she/it] made the representation [to a group of persons including [***name of plaintiff***]] [or] [to another person, intending or reasonably expecting that it would be repeated to [***name of plaintiff***]].**

New September 2003

Directions for Use

An instruction on concealment made to a person other than the plaintiff is not necessary; this point is covered by the third option of element 1 in CACI No. 1901, *Concealment*.

Sources and Authority

- Intent to Defraud Class. Civil Code section 1711. ~~provides: "One who practices a deceit with intent to defraud the public, or a particular class of persons, is deemed to have intended to defraud every individual in that class, who is actually misled by the deceit."~~

- "It is true that in order for a defendant to be liable for fraud, he or she must intend that a particular representation (or concealment) be relied upon by a specific person or persons. However, it is also established that a defendant cannot escape liability if he or she makes a representation to one person while intending or having reason to expect that it will be repeated to and acted upon by the plaintiff (or someone in the class of persons of which plaintiff is a member). This is the principle of indirect deception described in section 533 of the Restatement Second of Torts (section 533): 'The maker of a fraudulent misrepresentation is subject to liability for pecuniary loss to another who acts in justifiable reliance upon it if the misrepresentation, although not made directly to the other, is made to a third person and the maker intends or has reason to expect that its terms will be repeated or its substance communicated to the other, and that it will influence his conduct in the transaction or type of transaction involved.' Comment d to section 533 makes it clear the rule of section 533 applies where the maker of the misrepresentation has information that gives him special reason to expect that the information will be communicated to others and will influence their conduct. Comment g goes on to explain that it is not necessary that the maker of the misrepresentation have the particular person in mind. It is enough that it is intended to be repeated to a particular class of persons." (*Shapiro v. Sutherland* (1998) 64 Cal.App.4th 1534, 1548 [76 Cal.Rptr.2d 101], internal citations omitted; see also *Geernaert v. Mitchell* (1995) 31 Cal.App.4th 601, 605-606 [37 Cal.Rptr.2d 483].)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 802–806

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.05[3] (Matthew Bender)

23 California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit* (Matthew Bender)

10 California Points and Authorities, Ch. 105, *Fraud and Deceit* (Matthew Bender)

2 California Civil Practice: Torts ~~(Thomson West)~~ § 22:34 (Thomson Reuters)

1910. Real Estate Seller's Nondisclosure of Material Facts

[*Name of plaintiff***] claims that [***name of defendant***] failed to disclose certain information, and that because of this failure to disclose, [***name of plaintiff***] was harmed. In order to establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] purchased [***describe real property***] from [***name of defendant***];**
2. **That [***name of defendant***] knew that [***specify information that was not disclosed***];**
3. **That [***name of defendant***] did not disclose this information to [***name of plaintiff***];**
4. **That [***name of plaintiff***] did not know, and could not reasonably have discovered, this information;**
5. **That [***name of defendant***] knew that [***name of plaintiff***] did not know, and could not reasonably have discovered, this information;**
6. **That this information significantly affected the value or desirability of the property;**
7. **That [***name of plaintiff***] was harmed; and**
8. **That [***name of defendant***]'s failure to disclose the information was a substantial factor in causing [***name of plaintiff***]'s harm.**

New December 2009

Directions for Use

This instruction sets forth the common law duty of disclosure that a real estate seller has to his or her buyer. Nondisclosure is tantamount to a misrepresentation. (See *Calemine v. Samuelson* (2009) 171 Cal.App.4th 153, 161 [89 Cal.Rptr.3d 495].)

For certain transfers, there is also a statutory duty of disclosure. (See Civ. Code, § 1102 et seq.) The scope of the required disclosure is set forth on a statutory form. (See Civ. Code, § 1102.6.) The common law duty is not preempted by the statutory duty (see Civ. Code, § 1102.1(a)), but breach of the statutory duty can constitute proof of breach of the common law duty if all of the elements are established. (See, e.g., *Calemine, supra,* 171 Cal.App.4th at pp. 164–165 [seller did not disclose earlier lawsuits, as required by statutory form].)

Sources and Authority

- Real Estate Buyer's Action Against Seller. Civil Code section 1102.13. ~~provides: "No transfer~~

~~subject to this article shall be invalidated solely because of the failure of any person to comply with any provision of this article. However, any person who willfully or negligently violates or fails to perform any duty prescribed by any provision of this article shall be liable in the amount of actual damages suffered by a transferee."~~

- "A real estate seller has both a common law and statutory duty of disclosure. [Under the common law duty]: 'In the context of a real estate transaction, " … where the seller knows of facts materially affecting the value or desirability of the property … and also knows that such facts are not known to, or within the reach of the diligent attention and observation of the buyer, the seller is under a duty to disclose them to the buyer. [Citations.]" [Citations.] Undisclosed facts are material if they would have a significant and measurable effect on market value. [Citation.]' A seller's duty of disclosure is limited to material facts; once the essential facts are disclosed a seller is not under a duty to provide details that would merely serve to elaborate on the disclosed facts. Where a seller fails to disclose a material fact, he may be subject to liability 'for mere nondisclosure since his conduct in the transaction amounts to a representation of the nonexistence of the facts which he has failed to disclose [citation].' Generally, whether the undisclosed matter was of sufficient materiality to have affected the value or desirability of the property is a question of fact." (*Calemine, supra,* 171 Cal.App.4th at p. 161, internal citations omitted.)

- "Generally, where one party to a transaction has sole knowledge or access to material facts and knows that such facts are not known or reasonably discoverable by the other party, then a duty to disclose exists." (See *Shapiro v. Sutherland* (1998) 64 Cal.App.4th 1534, 1544 [76 Cal.Rptr.2d 101].)

- "Failure of the seller to fulfill [the] duty of disclosure constitutes actual fraud." (*Lingsch v. Savage* (1963) 213 Cal.App.2d 729, 736 [29 Cal.Rptr. 201].)

- "When and where the action by the purchaser is based on conditions that are visible and that a personal inspection at once discloses and, when it is admitted that such personal inspection was in fact made, then manifestly it cannot be successfully contended that the purchaser relied upon any alleged misrepresentations with regard to such visible conditions. But personal inspection is no defense when and where the conditions are not visible and are known only to the seller, and 'where material facts are accessible to the vendor only and he knows them not to be within the reach of the diligent attention and observation of the vendee, the vendor is bound to disclose such facts to the vendee.' " (*Buist v. C. Dudley De Velbiss Corp.* (1960) 182 Cal.App.2d 325, 331 [6 Cal.Rptr. 259].)

- "In enacting [Civil Code section 1102 et seq.], the Legislature made clear it did not intend to alter a seller's common law duty of disclosure. The purpose of the enactment was instead to make the required disclosures specific and clear. (*Calemine, supra,* 171 Cal.App.4th at pp. 161–162.)

- "The legislation was sponsored by the California Association of Realtors to provide a framework for formal disclosure of facts relevant to a decision to purchase realty. The statute therefore confirms and perhaps clarifies a disclosure obligation that existed previously at common law." (*Shapiro, supra,* 64 Cal.App.4th at p. 1539, fn. 6.)

Secondary Sources

1 California Real Estate Law and Practice, Ch. 71, *Real Property Purchase and Sale Agreements*, § 71.30 (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 103, *Brokers*, § 103.31 (Matthew Bender)

50 California Forms of Pleading and Practice, Ch. 569, *Vendor and Purchaser of Real Property*, § 569.11 (Matthew Bender)

2A California Points and Authorities, Ch. 31, *Brokers and Salesperson*, § 31.142 (Matthew Bender)

Greenwald et al., California Practice Guide: Real Property Transactions (The Rutter Group) ¶ 4:351 et seq.

1920. Buyer's Damages for Purchase or Acquisition of Property

If you decide that [*name of plaintiff***] has proved [his/her/its] claim against [***name of defendant***], you also must decide how much money will reasonably compensate [***name of plaintiff***] for the harm. This compensation is called "damages."**

[*Name of plaintiff***] must prove the amount of [his/her/its] damages. However, [***name of plaintiff***] does not have to prove the exact amount of damages that will provide reasonable compensation for the harm. You must not speculate or guess in awarding damages.**

The following are the specific items of damages claimed by [*name of plaintiff***]:**

1. **The difference between [the amount that [***name of plaintiff***] paid] [or] [the fair market value of what [***name of plaintiff***] exchanged for the property] and the fair market value of the property at the time of sale;**

2. **Amounts that [***name of plaintiff***] reasonably spent in reliance on [***name of defendant***]'s [false representation/failure to disclose/promise] if those amounts would not otherwise have been spent in the purchase or acquisition of the property; [and]**

3. [*Insert additional harm arising from the transaction*] **to the extent that [***name of defendant***]'s [false representation/failure to disclose/promise] was a substantial factor in causing that [***insert additional harm arising from the transaction***]; [and]**

4. **[Lost profits [or other gains].]**

New September 2003

Directions for Use

For an instruction on damages for loss of use, see CACI No. 3903G, *Loss of Use of Real Property (Economic Damage).*

The first element of this instruction should be modified in cases involving promissory fraud: "In cases of promissory fraud, the damages are measured by market value as of the date the promise was breached because that is the date when the damage occurred." (*Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co.* (1977) 66 Cal.App.3d 101, 145-146 [135 Cal.Rptr. 802].)

Sources and Authority

- Fraud in Sale of Property: Buyer's Damages. Civil Code section 3343. ~~provides:~~

  (a) One defrauded in the purchase, sale or exchange of property is entitled to recover the difference between the actual value of that with which the defrauded person parted and the actual value of that which he received, together with any additional

damage arising from the particular transaction, including any of the following:

(1) Amounts actually and reasonably expended in reliance upon the fraud.

(2) An amount which would compensate the defrauded party for loss of use and enjoyment of the property to the extent that any such loss was proximately caused by the fraud.

(3) Where the defrauded party has been induced by reason of the fraud to sell or otherwise part with the property in question, an amount which will compensate him for profits or other gains which might reasonably have been earned by use of the property had he retained it.

(4) Where the defrauded party has been induced by reason of the fraud to purchase or otherwise acquire the property in question, an amount which will compensate him for any loss of profits or other gains which were reasonably anticipated and would have been earned by him from the use or sale of the property had it possessed the characteristics fraudulently attributed to it by the party committing the fraud, provided that lost profits from the use or sale of the property shall be recoverable only if and only to the extent that all of the following apply:

(i) The defrauded party acquired the property for the purpose of using or reselling it for a profit.

(ii) The defrauded party reasonably relied on the fraud in entering into the transaction and in anticipating profits from the subsequent use or sale of the property.

(iii) Any loss of profits for which damages are sought under this paragraph have been proximately caused by the fraud and the defrauded party's reliance on it.

(b) Nothing in this section shall do either of the following:

(1) Permit the defrauded person to recover any amount measured by the difference between the value of property as represented and the actual value thereof.

(2) Deny to any person having a cause of action for fraud or deceit any legal or equitable remedies to which such person may be entitled.

- "As they apply to damages for fraud, subdivisions (a)(2) and (a)(3) of section 3343 are limited to recovery of damages by sellers of real property, while subdivision (a)(4) deals with purchasers of real property." (*Channell v. Anthony* (1976) 58 Cal.App.3d 290, 309 [129 Cal.Rptr. 704], footnote omitted.)

- "Before 1935 the California courts had no statutory mandate on the measure of damages for fraud. While the 'benefit of the bargain' measure of damages was generally employed, on occasion California courts sometimes applied the 'out of pocket' rule when the 'loss of bargain' rule was difficult to apply or would work a hardship on plaintiff or defendant." (*Channell, supra,* 58 Cal.App.3d at p. 309.)

- "We find nothing in section 3343 as amended which requires that a plaintiff show 'out-of-pocket' loss (i.e., an amount by which the consideration paid exceeded the value of the property received) in order to be entitled to any recovery for fraud in a property transaction." (*Stout v. Turney* (1978) 22 Cal.3d 718, 729 [150 Cal.Rptr. 637, 586 P.2d 1228].)

- "All doubt concerning this matter was set at rest, however, in the carefully considered opinion in *Bagdasarian v. Gragnon* (1948) 31 Cal.2d 744, 753 [192 P.2d 935] where it was definitely and finally determined that the term 'actual value,' as used in the statute, was that same market value so frequently defined in actions for condemnation." (*Nece v. Bennett* (1963) 212 Cal.App.2d 494, 497 [28 Cal.Rptr. 117], internal citation omitted.)

- "[P]ursuant to Civil Code section 3343, amounts paid for escrow fees, moving to and from the property, building permits, telephone connections, fences, yard cleaning, garage materials, door locks, shrubbery, taxes, rent and labor are examples of recoverable damages when reasonably expended in reliance on the fraud." (*Cory v. Villa Properties* (1986) 180 Cal.App.3d 592, 603 [225 Cal.Rptr. 628], internal citations omitted.)

- "To recover damages for fraud, a plaintiff must have sustained damages proximately caused by the misrepresentation. A damage award for fraud will be reversed where the injury is not related to the misrepresentation." (*Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1252 [1 Cal.Rptr.2d 301], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1714–1716

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.23 (Matthew Bender)

23 California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit* (Matthew Bender)

10 California Points and Authorities, Ch. 105, *Fraud and Deceit* (Matthew Bender)

1921. Buyer's Damages for Purchase or Acquisition of Property—Lost Profits

[*Name of plaintiff*] may recover damages for profits [or other gains] [he/she/it] would have made if the property had been as represented. [*Name of plaintiff*] can recover these profits [or other gains] only if [he/she/it] has proved all of the following:

1. **That [*name of plaintiff*] acquired the property for the purpose of using or reselling it for a [profit/gain];**

2. **That [*name of plaintiff*] reasonably relied on [*name of defendant*]'s [false representation/failure to disclose/promise] in entering into the transaction and in anticipating [profits/gains] from the use or sale of the property; and**

3. **That [*name of defendant*]'s [false representation/failure to disclose/promise] and [*name of plaintiff*]'s reliance on it were both substantial factors in causing the lost profits.**

You do not have to calculate the amount of the lost profits with mathematical precision, but there must be a reasonable basis for computing the loss.

New September 2003

Directions for Use

This instruction should be read immediately after CACI No. 1920, *Buyer's Damages for Purchase or Acquisition of Property,* if the plaintiff is claiming lost profits.

Sources and Authority

- Fraud in Sale of Property: Buyer's Damages for Lost Profits. Civil Code section 3343(a)(4). ~~provides:~~

  ~~Where the defrauded party has been induced by reason of the fraud to purchase or otherwise acquire the property in question, an amount which will compensate him for any loss of profits or other gains which were reasonably anticipated and would have been earned by him from the use or sale of the property had it possessed the characteristics fraudulently attributed to it by the party committing the fraud, provided that lost profits from the use or sale of the property shall be recoverable only if and only to the extent that all of the following apply:~~

  ~~(i) The defrauded party acquired the property for the purpose of using or reselling it for a profit.~~

  ~~(ii) The defrauded party reasonably relied on the fraud in entering into the transaction and in anticipating profits from the subsequent use or sale of the property.~~

  ~~(iii) Any loss of profits for which damages are sought under this paragraph have been~~

~~proximately caused by the fraud and the defrauded party's reliance on it.~~

- "With glaring inconsistency, California's statutory structure before 1971 permitted recovery of lost profits and earnings under Civil Code section 3333 in fraud cases which did not concern the 'purchase, sale or exchange of property,' and even in simple negligence cases and breach of contract cases the injured parties could recover lost profits and earnings, while the 'out of pocket' rule barred the fraud victim in property transaction cases from recovering more than the difference between the amount he paid for the property and its actual value." (*Channell v. Anthony* (1976) 58 Cal.App.3d 290, 312 [129 Cal.Rptr. 704], internal citations and footnote omitted.)

- "The Legislature removed all doubt concerning the recovery of loss of profits resulting from the fraudulently induced property acquisition. Clearly and specifically, lost profits proximately caused are recoverable. The cases cited, the arguments made concerning Civil Code section 3343 limitations are simply not relevant to post-1971 proceedings, where profits are the claimed loss. Civil Code section 3343 as amended, in so many words, authorizes recovery of lost profits." (*Hartman v. Shell Oil Co.* (1977) 68 Cal.App.3d 240, 247 [137 Cal.Rptr. 244].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1714–1716

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.23 (Matthew Bender)

23 California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit* (Matthew Bender)

10 California Points and Authorities, Ch. 105, *Fraud and Deceit* (Matthew Bender)

1922. Seller's Damages for Sale or Exchange of Property

If you decide that [*name of plaintiff***] has proved [his/her/its] claim against [***name of defendant***], you also must decide how much money will reasonably compensate [***name of plaintiff***] for the harm. This compensation is called ``damages.''**

[*Name of plaintiff***] must prove the amount of [his/her/its] damages. However, [***name of plaintiff***] does not have to prove the exact amount of damages that will provide reasonable compensation for the harm. You must not speculate or guess in awarding damages.**

The following are the specific items of damages claimed by [*name of plaintiff***]:**

1. **The difference between the fair market value of the property at the time of sale and [the amount that [***name of plaintiff***] received] [or] [the fair market value of what [***name of plaintiff***] received in exchange for the property];**

2. **Amounts that [***name of plaintiff***] reasonably spent in reliance on [***name of defendant***]'s [false representation/failure to disclose/promise] if those amounts would not otherwise have been spent in the sale or exchange of the property;**

3. **Loss of use and enjoyment of the property from [***insert beginning date***] to [***insert end date***], to the extent that [***name of defendant***]'s [false representation/failure to disclose/promise] was a substantial factor in causing that loss of use and enjoyment of the property;**

4. **Profits or other gains from [***insert beginning date***] to [***insert end date***], that [***name of plaintiff***] might reasonably have earned by use of the property if [he/she] had kept it; and**

5. **Any additional damage arising from the particular transaction.**

New September 2003

Directions for Use

This instruction should be tailored to fit the facts and evidence in the particular case: "If the seller parts with title and elects to forego his right of rescission and sue for damages only, then of course subdivisions (a)(2) and (a)(3) of section 3343 do not apply and should not be given by the trial court (unless, as here, the contract itself creates such rights). In each case in which a seller of property is defrauded by a buyer, the trial court will have to examine the circumstances of the particular case and decide whether the questioned portions of section 3343 do or do not apply." (*Channell v. Anthony* (1976) 58 Cal.App.3d 290, 317 [129 Cal.Rptr. 704].)

The first element of this instruction should be modified in cases involving promissory fraud: "In cases of promissory fraud, the damages are measured by market value as of the date the promise was breached

because that is the date when the damage occurred." (*Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co.* (1977) 66 Cal.App.3d 101, 145-146 [135 Cal.Rptr. 802].)

For an instruction on lost profits, see CACI No. 3903N, *Lost Profits (Economic Damage).*

Sources and Authority

- Fraud in Sale of Property: Seller's Damages. Civil Code section 3343. ~~provides~~

~~(a) One defrauded in the purchase, sale or exchange of property is entitled to recover the difference between the actual value of that with which the defrauded person parted and the actual value of that which he received, together with any additional damage arising from the particular transaction, including any of the following:~~

~~(1) Amounts actually and reasonably expended in reliance upon the fraud.~~

~~(2) An amount which would compensate the defrauded party for loss of use and enjoyment of the property to the extent that any such loss was proximately caused by the fraud.~~

~~(3) Where the defrauded party has been induced by reason of the fraud to sell or otherwise part with the property in question, an amount which will compensate him for profits or other gains which might reasonably have been earned by use of the property had he retained it.~~

~~(4) Where the defrauded party has been induced by reason of the fraud to purchase or otherwise acquire the property in question, an amount which will compensate him for any loss of profits or other gains which were reasonably anticipated and would have been earned by him from the use or sale of the property had it possessed the characteristics fraudulently attributed to it by the party committing the fraud, provided that lost profits from the use or sale of the property shall be recoverable only if and only to the extent that all of the following apply:~~

~~(i) The defrauded party acquired the property for the purpose of using or reselling it for a profit.~~

~~(ii) The defrauded party reasonably relied on the fraud in entering into the transaction and in anticipating profits from the subsequent use or sale of the property.~~

~~(iii) Any loss of profits for which damages are sought under this paragraph have been proximately caused by the fraud and the defrauded party's reliance on it.~~

~~(b) Nothing in this section shall do either of the following:~~

~~(1) Permit the defrauded person to recover any amount measured by the difference between the value of property as represented and the actual value thereof.~~

~~(2) Deny to any person having a cause of action for fraud or deceit any legal or equitable remedies to which such person may be entitled.~~

- "As they apply to damages for fraud, subdivisions (a)(2) and (a)(3) of section 3343 are limited to recovery of damages by sellers of real property, while subdivision (a)(4) deals with purchasers of real property." (*Channell, supra,* 58 Cal.App.3d at p. 309, footnote omitted.)

- "Before 1935 the California courts had no statutory mandate on the measure of damages for fraud. While the `benefit of the bargain' measure of damages was generally employed, on occasion California courts sometimes applied the `out of pocket' rule when the 'loss of bargain' rule was difficult to apply or would work a hardship on plaintiff or defendant." (*Channell, supra,* 58 Cal.App.3d at p. 309, footnote omitted.)

- "The 1971 amendment to section 3343 took the form of an addition to the 'out of pocket' rule. The statute had previously permitted recovery of 'additional damages,' but the 1971 amendment enumerated specific types of consequential damages which are included within the term 'additional damages.' " (*Channell, supra,* 58 Cal.App.3d at p. 312, footnote omitted.)

- "[T]he legislature clearly ruled out by the 1971 amendment any recovery of damages for fraud measured by the traditional 'loss of bargain' formula." (*Channell, supra,* 58 Cal.App.3d at p. 313, footnote omitted.)

- "[O]ut of pocket" loss under section 3343 is "the difference between what [plaintiffs] received for their property and the fair market value of the same at the time of the transfer." (*Channell, supra,* 58 Cal.App.3d at p. 314.)

- "[N]othing in section 3343 as amended ... requires that a plaintiff show 'out-of-pocket' loss (i.e., an amount by which the consideration paid exceeded the value of the property received) in order to be entitled to any recovery for fraud in a property transaction." (*Stout v. Turney* (1978) 22 Cal.3d 718, 730 [150 Cal.Rptr. 637, 586 P.2d 1228].)

- "In the absence of a fiduciary relationship, section 3343 governs the measure of damages in fraudulent property transactions." (*Croeni v. Goldstein* (1994) 21 Cal.App.4th 754, 759 [26 Cal.Rptr.2d 412].)

- "In the case of a seller ... the defrauded victim is entitled to recover not only the difference between the actual value of that with which he parted and the actual value of that which he received (out-of-pocket) but also any additional damage arising from the particular transaction including any of the following: 1. amounts expended in reliance upon the fraud; 2. amounts compensating for loss of use and enjoyment of the property due to the fraud; and 3. an amount which would compensate him for the profits or other gains by the use of the property had he retained it." (*Channell, supra,* 58 Cal.App.3d at p. 312, internal citation omitted.)

- "What that time span [for damages for lost use and lost profits] should be would be determined by the peculiar circumstances of the particular case before the court and should present no insurmountable difficulty for a court in fixing a reasonable period contemplated by the statute." (*Channell, supra,* 58 Cal.App.3d at p. 317, footnote omitted.)

- "To recover damages for fraud, a plaintiff must have sustained damages proximately caused by the misrepresentation. A damage award for fraud will be reversed where the injury is not related to the misrepresentation." (*Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1252 [1 Cal.Rptr.2d 301], internal citations omitted.)

- "Mental distress is not an element of damages allowable under Civil Code section 3343." (*Channell, supra,* 58 Cal.App.3d at p. 315, internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1714–1716

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts,* § 40.23 (Matthew Bender)

23 California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit* (Matthew Bender)

10 California Points and Authorities, Ch. 105, *Fraud and Deceit* (Matthew Bender)

1923. Damages—"Out of Pocket" Rule

If you decide that [*name of plaintiff***] has proved [his/her/its] claim against [***name of defendant***], you also must decide how much money will reasonably compensate [***name of plaintiff***] for the harm. This compensation is called "damages."**

The amount of damages must include an award for all harm that [*name of defendant***] was a substantial factor in causing, even if the particular harm could not have been anticipated.**

[*Name of plaintiff***] must prove the amount of [his/her/its] damages. However, [***name of plaintiff***] does not have to prove the exact amount of damages that will provide reasonable compensation for the harm. You must not speculate or guess in awarding damages.**

To decide the amount of damages you must determine the [fair market] value of what [*name of plaintiff***] gave and subtract from that amount the [fair market] value of what [he/she/it] received.**

["Fair market value" is the highest price that a willing buyer would have paid on the date of the transaction to a willing seller, assuming:

1. **That there is no pressure on either one to buy or sell; and**

2. **That the buyer and seller know all the uses and purposes for which the [***insert item***] is reasonably capable of being used.]**

[*Name of plaintiff***] may also recover amounts that [he/she/it] reasonably spent in reliance on [***name of defendant***]'s [false representation/failure to disclose/false promise] if those amounts would not otherwise have been spent.**

New September 2003; Revised December 2009

Directions for Use

For discussion of damages if there is both a breach of fiduciary duty and intentional misrepresentation, see the Directions for Use to CACI No. 1924, *Damages—"Benefit of the Bargain" Rule.*

Sources and Authority

- Damages for Fraud. Civil Code section 1709. ~~provides: "One who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers."~~

- Measure of Damages in Tort. Civil Code section 3333. ~~provides: "For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not."~~

- Damages for Fraud in Sale of Property. Civil Code section 3343. ~~provides, in part: "One defrauded in the purchase, sale or exchange of property is entitled to recover the difference between the actual value of that with which the defrauded person parted and the actual value of that which he received . . . ."~~

- This instruction should be modified in cases involving promissory fraud: "In cases of promissory fraud, the damages are measured by market value as of the date the promise was breached because that is the date when the damage occurred." (*Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co.* (1977) 66 Cal.App.3d 101, 145-146 [135 Cal.Rptr. 802].)

- "There are two measures of damages for fraud: out of pocket and benefit of the bargain. The 'out-of-pocket' measure of damages 'is directed to restoring the plaintiff to the financial position enjoyed by him prior to the fraudulent transaction, and thus awards the difference in actual value at the time of the transaction between what the plaintiff gave and what he received. The "benefit-of-the-bargain" measure, on the other hand, is concerned with satisfying the expectancy interest of the defrauded plaintiff by putting him in the position he would have enjoyed if the false representation relied upon had been true; it awards the difference in value between what the plaintiff actually received and what he was fraudulently led to believe he would receive.' 'In California, a defrauded party is ordinarily limited to recovering his "out-of-pocket" loss ... .' " (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1240 [44 Cal.Rptr.2d 352, 900 P.2d 601], internal citations omitted.)

- "Of the two measures the 'out-of-pocket' rule has been termed more consistent with the logic and purpose of the tort form of action (i.e., compensation for loss sustained rather than satisfaction of contractual expectations) while the 'benefit-of-the-bargain' rule has been observed to be a more effective deterrent (in that it contemplates an award even when the property received has a value equal to what was given for it)." (*Stout v. Turney* (1978) 22 Cal.3d 718, 725 [150 Cal.Rptr. 637, 586 P.2d 1228].)

- "In fraud cases involving the 'purchase, sale or exchange of property,' the Legislature has expressly provided that the 'out-of-pocket' rather than the 'benefit-of-the-bargain' measure of damages should apply. Civil Code section 3343 provides the exclusive measure of damages for fraud in such cases." (*Fragale v. Faulkner* (2003) 110 Cal.App.4th 229, 236 [1 Cal.Rptr.3d 616].)

- "Civil Code section 3343 does not apply, however, 'when a victim is defrauded by its fiduciaries.' Instead, in the case of fraud by a fiduciary, 'the "broader" measure of damages provided by sections 1709 and 3333 applies.' … [¶] In the case of a negligent misrepresentation by a fiduciary, 'a plaintiff is only entitled to its actual or "out-of-pocket" losses suffered because of [the] fiduciary's negligent misrepresentation under section 3333.' [¶] The Supreme Court has not decided whether 'the measure of damages under section 3333 might be greater for a fiduciary's *intentional* misrepresentation … .' " (*Fragale, supra,* 110 Cal.App.4th at pp. 236–237, original italics, internal citations omitted.)

- "We have previously held that a plaintiff is only entitled to its actual or 'out-of-pocket' losses suffered because of fiduciary's negligent misrepresentation under section 3333. While the measure of damages under section 3333 might be greater for a fiduciary's intentional misrepresentation, we need not address that issue here." (*Alliance Mortgage Co., supra,* 10 Cal.4th at pp. 1249–1250.)

- "To recover damages for fraud, a plaintiff must have sustained damages proximately caused by the misrepresentation. A damage award for fraud will be reversed where the injury is not related to the misrepresentation." (*Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1252 [1 Cal.Rptr.2d 301], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1710–1717

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.23 (Matthew Bender)

23 California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit* § 269.27 (Matthew Bender)

10 California Points and Authorities, Ch. 105, *Fraud and Deceit* § 105.252 (Matthew Bender)

1924. Damages—"Benefit of the Bargain" Rule

If you decide that [*name of plaintiff***] has proved [his/her/its] claim against [***name of defendant***], you also must decide how much money will reasonably compensate [***name of plaintiff***] for the harm. This compensation is called ``damages.''**

The amount of damages must include an award for all harm that [*name of defendant***] was a substantial factor in causing, even if the particular harm could not have been anticipated.**

[*Name of plaintiff***] must prove the amount of [his/her/its] damages. However, [***name of plaintiff***] does not have to prove the exact amount of damages that will provide reasonable compensation for the harm. You must not speculate or guess in awarding damages.**

To determine the amount of damages, you must:

1. **Determine the fair market value that [***name of plaintiff***] would have received if the representations made by [***name of defendant***] had been true; and**

2. **Subtract the fair market value of what [he/she/it] did receive.**

The resulting amount is [*name of plaintiff***]'s damages. "Fair market value" is the highest price that a willing buyer would have paid to a willing seller, assuming:**

1. **That there is no pressure on either one to buy or sell; and**

2. **That the buyer and seller know all the uses and purposes for which the [***insert item***] is reasonably capable of being used.**

Fair market value must be determined as of the date that [*name of plaintiff***] discovered [***name of defendant***]'s [false representation/failure to disclose].**

[*Name of plaintiff***] may also recover amounts that [he/she/it] reasonably spent in reliance on [***name of defendant***]'s [false representation/failure to disclose/false promise] if those amounts would not otherwise have been spent.**

New September 2003; Revised December 2009

Directions for Use

There is a split of authority regarding whether benefit-of-the-bargain damages can ever be recovered for intentional misrepresentation in the sale or exchange of property. It is settled that in a nonfiduciary relationship, damages are limited to the out-of-pocket measure, even if the misrepresentation is intentional. (See *Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1240 [44 Cal.Rptr.2d 352, 900 P.2d 601]; Civ. Code, § 3343.) However, there is disagreement on the proper measure if there is a

fiduciary relationship.

Some courts have held that benefit-of-the-bargain damages are available if there is both a fiduciary relationship and intentional misrepresentation. (See *Fragale v. Faulkner* (2003) 110 Cal.App.4th 229, 235–239 [1 Cal.Rptr.3d 616]; *Salahutdin v. Valley of California, Inc.* (1994) 24 Cal.App.4th 555, 564 [29 Cal.Rptr.2d 463]; see also *Alfaro v. Community Housing Improvement System & Planning Assn., Inc.* (2009) 171 Cal.App.4th 1356, 1383 [89 Cal.Rptr.3d 659].) At least one court has held to the contrary, that only out-of-pocket losses may be recovered. (See *Hensley v. McSweeney* (2001) 90 Cal.App.4th 1081, 1086 [109 Cal.Rptr.2d 489].)

This instruction should be modified in cases involving promissory fraud: "In cases of promissory fraud, the damages are measured by market value as of the date the promise was breached because that is the date when the damage occurred." (*Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co.* (1977) 66 Cal.App.3d 101, 145-146 [135 Cal.Rptr. 802].)

Sources and Authority

- Damages for Fraud. Civil Code section 1709. ~~provides: "One who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers."~~

- Measure of Damages in Tort. Civil Code section 3333. ~~provides: "For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not."~~

- "There are two measures of damages for fraud: out of pocket and benefit of the bargain. The 'out-of-pocket' measure of damages 'is directed to restoring the plaintiff to the financial position enjoyed by him prior to the fraudulent transaction, and thus awards the difference in actual value at the time of the transaction between what the plaintiff gave and what he received. The "benefit-of-the-bargain" measure, on the other hand, is concerned with satisfying the expectancy interest of the defrauded plaintiff by putting him in the position he would have enjoyed if the false representation relied upon had been true; it awards the difference in value between what the plaintiff actually received and what he was fraudulently led to believe he would receive.' 'In California, a defrauded party is ordinarily limited to recovering his "out-of-pocket" loss ... .' " (*Alliance Mortgage Co., supra,* 10 Cal.4th at p. 1240, internal citations omitted.)

- "Of the two measures the 'out-of-pocket' rule has been termed more consistent with the logic and purpose of the tort form of action (i.e., compensation for loss sustained rather than satisfaction of contractual expectations) while the 'benefit-of-the-bargain' rule has been observed to be a more effective deterrent (in that it contemplates an award even when the property received has a value equal to what was given for it.)" (*Stout v. Turney* (1978) 22 Cal.3d 718, 725 [150 Cal.Rptr. 637, 586 P.2d 1228].)

- "We have previously held that a plaintiff is only entitled to its actual or 'out-of-pocket' losses suffered because of fiduciary's negligent misrepresentation under section 3333. While the measure of

damages under section 3333 might be greater for a fiduciary's intentional misrepresentation, we need not address that issue here." (*Alliance Mortgage Co., supra,* 10 Cal.4th at pp. 1249-1250.)

- "The measure of damages for a real estate broker's intentional misrepresentation to a buyer for whom he acts as agent is not limited to the out-of-pocket losses suffered by the buyer. Because the broker is a fiduciary, damages for intentional fraud may be measured by the broader benefit-of-the-bargain rule." (*Fragale, supra,* 110 Cal.App.4th at p. 232.)

- "[T]he measure of damages for fraud by a fiduciary is out-of-pocket damages, not the benefit of the bargain computation normally applicable to contract causes of action." (*Hensley, supra,* 90 Cal.App.4th at p. 1085.)

- "Recognizing a split of authority on the matter, we follow those cases adopting the broader measure of damages under sections 1709 and 3333, a course that is not only consonant with the position we have taken in the past but just. This division has consistently applied the broader measure of damages for fiduciary fraud, refusing to limit damages to the 'out of pocket' measure." (*Salahutdin, supra,* 24 Cal.App.4th at pp. 566–567.)

- "Unlike the 'out of pocket' measure of damages, which are usually calculated at the time of the transaction, 'benefit of the bargain' damages may appropriately be calculated as of the date of discovery of the fraud." (*Salahutdin, supra,* 24 Cal.App.4th at p. 568.)

- "To recover damages for fraud, a plaintiff must have sustained damages proximately caused by the misrepresentation. A damage award for fraud will be reversed where the injury is not related to the misrepresentation." (*Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1252 [1 Cal.Rptr.2d 301], internal citations omitted.)

- "[O]ne may recover compensation for time and effort expended in reliance on a defendant's misrepresentation." (*Block v. Tobin* (1975) 45 Cal.App.3d 214, 220 [119 Cal.Rptr. 288], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1710–1717

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts,* § 40.23

23 California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit,* § 269.27 (Matthew Bender)

10 California Points and Authorities, Ch. 105, *Fraud and Deceit,* § 105.131 et seq. (Matthew Bender)

2002. Trespass to Timber—Essential Factual Elements (Civ. Code, § 3346)

[*Name of plaintiff***] claims that [***name of defendant***] trespassed on [his/her/its] property and [cut down or damaged trees/took timber]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

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

2. **That [***name of defendant***] intentionally entered [***name of plaintiff***]'s property and [cut down or damaged trees/took timber] located on the property;**

   [*or***]**

   That [*name of defendant***], although not intending to do so, [recklessly/ [or] negligently] entered [***name of plaintiff***]'s property and damaged trees located on the property;**

3. **That [***name of plaintiff***] did not give permission to [cut down or damage the trees/take timber] [or that [***name of defendant***] exceeded [***name of plaintiff***]'s permission];**

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

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

[In considering whether [*name of plaintiff***] was harmed, you may take into account the lost aesthetics and functionality of an injured tree.]**

New September 2003; Revised June 2013

Directions for Use

Give this instruction for loss of timber or damages to trees. Note that actual damages are to be doubled regardless of the defendant's intent. (See Civ. Code, § 3346(a).) If treble damages for willful and malicious conduct are sought, also give CACI No. 2003, *Damage to Timber—Willful and Malicious Conduct*.

With regard to element 2, liability for trespass may be imposed for conduct that is intentional, reckless, negligent, or the result of an extra-hazardous activity. (*Staples v. Hoefke* (1987) 189 Cal.App.3d 1397, 1406 [235 Cal.Rptr. 165].) However, intent to trespass means only that the person intended to be in the particular place where the trespass is alleged to have occurred. (*Miller v. National Broadcasting Corp.* (1986) 187 Cal.App.3d 1463, 1480-1481 [232 Cal.Rptr. 668].) Liability may be also based on the defendant's unintentional, but negligent or reckless, act; for example an automobile accident that damages a tree. An intent to damage is not necessary. (*Meyer v. Pacific Employers Insurance Co.* (1965)

233 Cal.App.2d 321 [43 Cal.Rptr. 542].)

It is no defense that the defendant mistakenly, but in good faith, believed that he or she had a right to be in that location. (*Cassinos v. Union Oil Co.* (1993) 14 Cal.App.4th 1770, 1780 [18 Cal.Rptr.2d 574].) In such a case, the word "intentionally" in element 2 might be confusing to the jury. To alleviate this possible confusion, give the third option to CACI No. 2004, *"Intentional Entry" Explained*. See also the Sources and Authority to CACI No. 2000, *Trespass—Essential Factual Elements*.

Include the last paragraph if the plaintiff claims harm based on lost aesthetics and functionality.

Sources and Authority

- Damages for Injury to Timber. Civil Code section 3346(a). ~~provides: "For wrongful injuries to timber, trees, or underwood upon the land of another, or removal thereof, the measure of damages is three times such sum as would compensate for the actual detriment, except that where the trespass was casual or involuntary, or that the defendant in any action brought under this section had probable cause to believe that the land on which the trespass was committed was his own or the land of the person in whose service or by whose direction the act was done, the measure of damages shall be twice the sum as would compensate for the actual detriment, and excepting further that where the wood was taken by the authority of highway officers for the purpose of repairing a public highway or bridge upon the land or adjoining it, in which case judgment shall only be given in a sum equal to the actual detriment."~~

- "Although an award of double the actual damages is mandatory under section 3346, the court retains discretion whether to triple them under that statute or Code of Civil Procedure section 733. [¶] 'So, the effect of section 3346 as amended, read together with section 733, is that the Legislature intended, insofar as wilful and malicious trespass is concerned under either section, to leave the imposition of treble damages discretionary with the court, but to place a floor upon that discretion at double damages which must be applied whether the trespass be wilful and malicious or casual and involuntary, etc. There are now three measures of damages applicable to the pertinent types of trespass: (1) for wilful and malicious trespass the court may impose treble damages but must impose double damages; (2) for casual and involuntary trespass, etc., the court must impose double damages; and (3) for trespass under authority actual damages.' " (*Ostling v. Loring* (1994) 27 Cal.App.4th 1731, 1742 [33 Cal.Rptr.2d 391], internal citation omitted.)

- The damages provisions in sections 3346 and 733 must be "treated as penal and punitive." (*Baker v. Ramirez* (1987) 190 Cal.App.3d 1123, 1138 [235 Cal.Rptr. 857], internal citation omitted.)

- " 'However, due to the penal nature of these provisions, the damages should be neither doubled nor tripled under section 3346 if punitive damages are awarded under section 3294. That would amount to punishing the defendant twice and is not necessary to further the policy behind section 3294 of educating blunderers (persons who mistake location of boundary lines) and discouraging rogues (persons who ignore boundary lines).' " (*Hassoldt v. Patrick Media Group, Inc.* (2000) 84 Cal.App.4th 153, 169 [100 Cal.Rptr.2d 662], internal citations omitted.)

- "Diminution in market value ... is not an absolute limitation; several other theories are available to fix

appropriate compensation for the plaintiff's loss. ... [¶] One alternative measure of damages is the cost of restoring the property to its condition prior to the injury. Courts will normally not award costs of restoration if they exceed the diminution in the value of the property; the plaintiff may be awarded the lesser of the two amounts." (*Heninger v. Dunn* (1980) 101 Cal.App.3d 858, 862 [162 Cal.Rptr. 104], internal citations omitted.)

- "The rule precluding recovery of restoration costs in excess of diminution in value is, however, not of invariable application. Restoration costs may be awarded even though they exceed the decrease in market value if 'there is a reason personal to the owner for restoring the original condition,' or 'where there is reason to believe that the plaintiff will, if fact, make the repairs.' " (*Heninger, supra,* 101 Cal.App.3d at p. 863, internal citations omitted.)

- "Courts have stressed that only reasonable costs of replacing destroyed trees with identical or substantially similar trees may be recovered." (*Heninger, supra,* 101 Cal.App.3d at p. 865.)

- "As a tree growing on a property line, the Aleppo pine tree was a 'line tree.' Civil Code section 834 provides: 'Trees whose trunks stand partly on the land of two or more coterminous owners, belong to them in common.' As such, neither owner 'is at liberty to cut the tree without the consent of the other, nor to cut away the part which extends into his land, if he thereby injures the common property in the tree.' " (*Kallis v. Sones* (2012) 208 Cal.App.4th 1274, 1278 [146 Cal.Rptr.3d 419].)

- "[W]hen considering the diminished value of an injured tree, the finder of fact may account for lost aesthetics and functionality." (*Rony v. Costa* (2012) 210 Cal.App.4th 746, 755 [148 Cal.Rptr.3d 642].)

- "Although [plaintiff] never quantified the loss of aesthetics at $15,000, she need not have done so. As with other hard-to-quantify injuries, such as emotional and reputational ones, the trier of fact court was free to place any dollar amount on aesthetic harm, unless the amount was ' "so grossly excessive as to shock the moral sense, and raise a reasonable presumption that the [trier of fact] was under the influence of passion or prejudice." ' " (*Rony, supra,* 210 Cal.App.4th at p. 756.)

- "[P]laintiffs here showed (i) the tree's unusual size and form made it very unusual for a 'line tree'—it functioned more like two trees growing on the separate properties; (ii) the tree's attributes, such as its broad canopy, provided significant benefits to the [plaintiffs'] property; and (iii) the [plaintiffs] placed great personal value on the tree. The trial court correctly recognized that it could account for these factors when determining damages, including whether or not damages should be reduced." (*Kallis, supra,* 208 Cal.App.4th at p. 1279.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1732−1734

2 Levy et al., California Torts, Ch. 17, *Nuisance and Trespass,* § 17.20 (Matthew Bender)

48 California Forms of Pleading and Practice, Ch. 550, *Trespass,* § 550.10 (Matthew Bender)

22 California Points and Authorities, Ch. 225, *Trespass*, § 225.161 et seq. (Matthew Bender)

2003. Damage to Timber—Willful and Malicious Conduct

[*Name of plaintiff*] also claims that [*name of defendant*]'s conduct in cutting down, damaging, or harvesting [*name of plaintiff*]'s trees was willful and malicious.

"Willful" simply means that [*name of defendant*]'s conduct was intentional.

"Malicious" means that [*name of defendant*] acted with intent to vex, annoy, harass, or injure, or that [*name of defendant*]'s conduct was done with a knowing disregard of the rights or safety of another. A person acts with knowing disregard when he or she is aware of the probable dangerous consequences of his or her conduct and deliberately fails to avoid those consequences.

New September 2003; Revised December 2010

Directions for Use

Read this instruction if the plaintiff is seeking double or treble damages because the defendant's conduct was willful and malicious. (See Civ. Code, § 3346; Code Civ. Proc., § 733; *Ostling v. Loring* (1994) 27 Cal.App.4th 1731, 1742 [33 Cal.Rptr.2d 391].) The judge should ensure that this finding is noted on the special verdict form. The jury should find the actual damages suffered. If the jury finds willful and malicious conduct, the court must award double damages and may award treble damages. (See *Ostling*, *supra*, 27 Cal.App.4th at p. 1742.)

Sources and Authority

- Damages for Injury to Timber. Civil Code section 3346(a). ~~provides: "For wrongful injuries to timber, trees, or underwood upon the land of another, or removal thereof, the measure of damages is three times such sum as would compensate for the actual detriment, except that where the trespass was casual or involuntary, or that the defendant in any action brought under this section had probable cause to believe that the land on which the trespass was committed was his own or the land of the person in whose service or by whose direction the act was done, the measure of damages shall be twice the sum as would compensate for the actual detriment, and excepting further that where the wood was taken by the authority of highway officers for the purpose of repairing a public highway or bridge upon the land or adjoining it, in which case judgment shall only be given in a sum equal to the actual detriment."~~

- Code of Civil Procedure section 733 provides, in part: "Any person who cuts down or carries off any wood or underwood, tree, or timber ... or otherwise injures any tree or timber on the land of another person ... is liable to the owner of such land ... for treble the amount of damages which may be assessed therefor, in a civil action, in any Court having jurisdiction."

- The damages provisions in sections 3346 and 733 must be "treated as penal and punitive." (*Baker v. Ramirez* (1987) 190 Cal.App.3d 1123, 1138 [235 Cal.Rptr. 857], internal citation omitted.)

- " 'However, due to the penal nature of these provisions, the damages should be neither doubled nor tripled under section 3346 if punitive damages are awarded under section 3294. That would amount to punishing the defendant twice and is not necessary to further the policy behind section 3294 of educating blunderers (persons who mistake location of boundary lines) and discouraging rogues (persons who ignore boundary lines).' " (*Hassoldt v. Patrick Media Group, Inc.* (2000) 84 Cal.App.4th 153, 169 [100 Cal.Rptr.2d 662], internal citations omitted.)

- "Although an award of double the actual damages is mandatory under section 3346, the court retains discretion whether to triple them under that statute or Code of Civil Procedure section 733. [¶] 'So, the effect of section 3346 as amended, read together with section 733, is that the Legislature intended, insofar as wilful and malicious trespass is concerned under either section, to leave the imposition of treble damages discretionary with the court, but to place a floor upon that discretion at double damages which must be applied whether the trespass be wilful and malicious or casual and involuntary, etc. There are now three measures of damages applicable to the pertinent types of trespass: (1) for wilful and malicious trespass the court may impose treble damages but must impose double damages; (2) for casual and involuntary trespass, etc., the court must impose double damages; and (3) for trespass under authority actual damages.' " (*Ostling, supra,*27 Cal.App.4th at p. 1742, internal citation omitted.)

- "Treble damages could only be awarded under [section 3346] where the wrongdoer intentionally acted wilfully or maliciously. The required intent is one to vex, harass or annoy, and the existence of such intent is a question of fact for the trial court." (*Sills v. Siller* (1963) 218 Cal.App.2d 735, 743 [32 Cal.Rptr. 621], internal citation omitted.)

- "Although neither section [3346 or 733] expressly so provides, it is now settled that to warrant such an award of treble damages it must be established that the wrongful act was willful and malicious." (*Caldwell v. Walker* (1963) 211 Cal.App.2d 758, 762 [27 Cal.Rptr. 675], internal citations omitted.)

- "A proper and helpful analogue here is the award of exemplary damages under section 3294 of the Civil Code when a defendant has been guilty, inter alia, of 'malice, express or implied.' … 'In order to warrant the allowance of such damages the act complained of must not only be wilful, in the sense of intentional, but it must be accompanied by some aggravating circumstance, amounting to malice. Malice implies an act conceived in a spirit of mischief or with criminal indifference towards the obligations owed to others. There must be an intent to vex, annoy or injure. Mere spite or ill will is not sufficient.' … Malice may consist of a state of mind determined to perform an act with reckless or wanton disregard of or indifference to the rights of others. Since a defendant rarely admits to such a state of mind, it must frequently be established from the circumstances surrounding his allegedly malicious acts." (*Caldwell, supra*, 211 Cal.App.2d at pp. 763-764, internal citations omitted.)

- "Under [Health and Safety Code] section 13007, a tortfeasor generally is liable to the owner of property for damage caused by a negligently set fire. '[T]he statute places no restrictions on the type of property damage that is compensable.' Such damages might include, for example, damage to structures, to movable personal property, to soil, or to undergrowth; damages may even include such elements as the lost profits of a business damaged by fire. If the fire also damages trees—that is, causes 'injuries to … trees … upon the land of another'—then the actual damages recoverable under section 13007 may be doubled (for negligently caused fires) or trebled (for fires intended to spread to

the plaintiff's property) pursuant to section 3346." (*Kelly v. CB&I Constructors, Inc.* (2009) 179 Cal.App.4th 442, 461 [102 Cal.Rptr.3d 32], internal citations omitted; but see *Gould v. Madonna* (1970) 5 Cal.App.3d 404, 407–408 [85 Cal.Rptr. 457] [Civ. Code, § 3346 does not apply to fires negligently set; Health & Saf. Code, § 13007 provides sole remedy].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1733

4 Levy et al., California Torts, Ch. 52, *Recovery for Medical Expenses and Economic Loss*, § 52.34 (Matthew Bender)

31 California Forms of Pleading and Practice, Ch. 350, *Logs and Timber*, § 350.12 (Matthew Bender)

22 California Points and Authorities, Ch. 225, *Trespass*, § 225.161 et seq. (Matthew Bender)

2020. Public Nuisance—Essential Factual Elements

[*Name of plaintiff***] claims that [he/she] suffered harm because [***name of defendant***] created a nuisance. To establish this claim, [***name of plaintiff***] must prove all of the following:**

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

   [was harmful to health;] [or]

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

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

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

2. **That the condition affected a substantial number of people at the same time;**

3. **That an ordinary person would be reasonably annoyed or disturbed by the condition;**

4. **That the seriousness of the harm outweighs the social utility of [***name of defendant***]'s conduct;**

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

6. **That [***name of plaintiff***] suffered harm that was different from the type of harm suffered by the general public; and**

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

New September 2003; Revised December 2007

Directions for Use

Private nuisance concerns injury to a property interest. Public nuisance is not dependent on an interference with rights of land: "[A] private nuisance is a civil wrong based on disturbance of rights in land while a public nuisance is not dependent upon a disturbance of rights in land but upon an interference with the rights of the community at large." (*Venuto v. Owens-Corning Fiberglas Corp.* (1971) 22 Cal.App.3d 116, 124 [99 Cal.Rptr. 350], internal citation omitted.)

Sources and Authority

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

- Public Nuisance. Civil Code section 3480. ~~provides: "A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal."~~

- Action by Private Person for Public Nuisance. Civil Code section 3493. ~~provides: "A private person may maintain an action for a public nuisance, if it is specially injurious to himself, but not otherwise."~~

- Act Done Under Express Authority of Statute. Civil Code section 3482. ~~provides: "Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance."~~

- Property Used for Dogfighting and Cockfighting. Civil Code section 3482.8. ~~provides: "Any building or property used for the purpose of willfully conducting dogfighting in violation of Section 597.5 of the Penal Code or cockfighting in violation of subdivision (b) of Section 597b of the Penal Code is a public nuisance."~~

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

- "Where the nuisance alleged is not also a private nuisance as to a private individual he does not have a cause of action on account of a public nuisance unless he alleges facts showing special injury to himself in person or property of a character different in kind from that suffered by the general public." (*Venuto, supra*, 22 Cal.App.3d at p. 124, internal citations omitted; but see *Birke v. Oakwood Worldwide* (2009) 169 Cal.App.4th 1540, 1550 [87 Cal.Rptr.3d 602] ["to the extent *Venuto* … can be read as precluding an action to abate a public nuisance by a private individual who has suffered personal injuries as a result of the challenged condition, we believe it is an incorrect statement of the law"].)

- "Unlike the private nuisance-tied to and designed to vindicate individual ownership interests in land-the 'common' or public nuisance emerged from distinctly different historical origins. The public nuisance doctrine is aimed at the protection and redress of community interests and, at least in theory, embodies a kind of collective ideal of civil life which the courts have vindicated by equitable

remedies since the beginning of the 16th century." (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1103 [60 Cal.Rptr.2d 277, 929 P.2d 596].)

- "[W]hen the nuisance is a private as well as a public one, there is no requirement the plaintiff suffer damage different in kind from that suffered by the general public. That is, the plaintiff ' "does not lose his rights as a landowner merely because others suffer damage of the same kind, or even of the same degree … ." ' " (*Birke, supra,* 169 Cal.App.4th at p. 1551, internal citations omitted.)

- "Of course, not every interference with collective social interests constitutes a public nuisance. To qualify ... the interference must be both substantial and unreasonable." (*People ex rel. Gallo, supra,* 14 Cal.4th at p. 1105.)

- "The fact that the defendants' alleged misconduct consists of omission rather than affirmative actions does not preclude nuisance liability." (*Birke, supra,* 169 Cal.App.4th at p. 1552 [citing this instruction], internal citation omitted.)

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

- "An essential element of a cause of action for nuisance is damage or injury." (*Helix Land Co., Inc. v. City of San Diego* (1978) 82 Cal.App.3d 932, 950 [147 Cal.Rptr. 683].)

- "By analogy to the rules governing tort liability, courts apply the same elements to determine liability for a public nuisance." (*People ex rel. Gallo, supra,* 14 Cal.4th at p. 1105, fn. 3, internal citation omitted.)

- "The elements 'of a cause of action for public nuisance include the existence of a duty and causation.' Public nuisance liability 'does not hinge on whether the defendant owns, possesses or controls the property, nor on whether he is in a position to abate the nuisance; the critical question is whether the defendant created or assisted in the creation of the nuisance.' " (*Melton v. Boustred* (2010) 183 Cal.App.4th 521, 542 [107 Cal.Rptr.3d 481], internal citations omitted.)

- " 'Where negligence and nuisance causes of action rely on the same facts about lack of due care, the nuisance claim is a negligence claim.' The nuisance claim 'stands or falls with the determination of the negligence cause of action' in such cases." (*Melton, supra,* 183 Cal.App.4th at p. 542, internal citations omitted.)

Secondary Sources

13 Witkin, Summary of California Law (10th ed. 2005) Equity, § 133

Greenwald & Asimow, California Practice Guide: Real Property Transactions, Ch. 5-D, *Common Law Environmental Hazards Liability*, ¶¶ 5:140-5:179 (The Rutter Group)

California Real Property Remedies and Damages (Cont.Ed.Bar 2d ed.) Ch. 11, Remedies for Nuisance and Trespass, § 11.7

2 Levy et al., California Torts, Ch. 17, *Nuisance and Trespass*, §§ 17.01–17.04, 17.06 (Matthew Bender)

34 California Forms of Pleading and Practice, Ch. 391, *Nuisance*, § 391.12 (Matthew Bender)

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

1 California Civil Practice: Torts §§ 17:1–17:3 (Thomson Reuters ~~West~~)

2021. Private Nuisance—Essential Factual Elements

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

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

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

   [was harmful to health;] [or]

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

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

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

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

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

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

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

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

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

New September 2003; Revised February 2007, December 2011

Directions for Use

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

Sources and Authority

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

- Acts Done Under Express Authority of Statute. Civil Code section 3482. ~~provides: "Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance."~~

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

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

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

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

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

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

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

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

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

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

- Restatement Second of Torts, section 822 provides:
  One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of

an invasion of another's interest in the private use and enjoyment of land, and the invasion is either

(a) intentional and unreasonable, or

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

- Restatement Second of Torts, section 826 provides:

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

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

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

- Restatement Second of Torts, section 827 provides:

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

  (a) the extent of the harm involved;

  (b) the character of the harm involved;

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

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

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

- Restatement Second of Torts, section 828 provides:

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

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

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

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

Secondary Sources

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

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

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

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

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

2030. Affirmative Defense—Statute of Limitations—Trespass or Private Nuisance

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[*Name of defendant***] contends that [***name of plaintiff***]'s lawsuit was not filed within the time set by law. To succeed on this defense, [***name of defendant***] must prove that [***name of plaintiff***]'s claimed harm occurred before [***insert date three years before date of filing***].**

[If [*name of defendant***] proves that [***name of plaintiff***]'s claimed harm occurred before [***insert date three years before date of filing***], the lawsuit was still filed on time if [***name of plaintiff***] proves that the [trespass/nuisance] is continuous. A [trespass/nuisance] is continuous if it can be discontinued. Among the factors that indicate that the [trespass/nuisance] can be discontinued are the following:**

(a) That the [trespass/nuisance] is currently continuing;

(b) That the impact of the condition will vary over time;

(c) That the [trespass/nuisance] can be discontinued at any time, in a reasonable manner, and for reasonable cost, considering the benefits and detriments if it is discontinued.

[You must consider the continuous nature of the damage to the property that a nuisance causes, not the continuous nature of the acts causing the nuisance to occur.]]

New April 2008

Directions for Use

This instruction is for use if the defendant claims that the plaintiff's action was not filed within the applicable three-year period for injury to real property. (See Code Civ. Proc., § 338(b).) This instruction may be used for a permanent trespass other than an action for damages for wrongful damage to timber, to which a five-year statute applies. (See Civ. Code, § 3346(c).) It may also be used for a permanent private nuisance. There is no limitation period for a public nuisance. (See Civ. Code, § 3490.) There is also essentially no statute of limitation for a continuing trespass or continuing private nuisance, but damages for future harm are not recoverable. (See *Lyles v. State of California* (2007) 153 Cal.App.4th 281, 291 [62 Cal.Rptr.3d 696] [nuisance]; *Starrh & Starrh Cotton Growers v. Aera Energy LLC* (2007) 153 Cal.App.4th 583, 592 [63 Cal.Rptr.3d 165] [trespass].)

Include the optional second paragraph if there is an issue of fact as to whether the trespass or nuisance is permanent or continuous. If applicable, include the last sentence in the case of a nuisance.

If the plaintiff alleges that the delayed-discovery rule applies to avoid the limitation defense, CACI No. 455, *Statute of Limitations—Delayed Discovery,* may be adapted for use.

See also CACI No. 3903F, *Damage to Real Property (Economic Damage),* and CACI No. 3903G, *Loss of Use of Real Property (Economic Damage).*

Sources and Authority

- Three-Year Statute of Limitations. Code of Civil Procedure section 338. ~~provides in part:~~

  ~~Within three years:~~

  ~~(b) An action for trespass upon or injury to real property.~~

- No Lapse of Time Can Legalize Public Nuisance. Civil Code section 3490. ~~provides: "No lapse of time can legalize a public nuisance, amounting to an actual obstruction of public right."~~

- "[A] trespass may be continuing or permanent. A permanent trespass is an intrusion on property under circumstances that indicate an intention that the trespass shall be permanent. In these cases, the law considers the wrong to be completed at the time of entry and allows recovery of damages for past, present, and future harm in a single action, generally the diminution in the property's value. The cause of action accrues and the statute of limitations begins to run at the time of entry. … [¶] In contrast, a continuing trespass is an intrusion under circumstances that indicate the trespass may be discontinued or abated. In these circumstances, damages are assessed for present and past damages only; prospective damages are not awarded because the trespass may be discontinued or abated at some time, ending the harm. … Continuing trespasses are essentially a series of successive injuries, and the statute of limitations begins anew with each injury. In order to recover for all harm inflicted by a continuing trespass, the plaintiff is required to bring periodic successive actions." (*Starrh & Starrh Cotton Growers, supra*, 153 Cal.App.4th at p. 592.)

- "Two distinct classifications have emerged in nuisance law which determine the remedies available to injured parties and the applicable statute of limitations. On the one hand, permanent nuisances are of a type where 'by one act a permanent injury is done, [and] damages are assessed once for all.' … In such cases, plaintiffs ordinarily are required to bring one action for all past, present and future damage within three years after the permanent nuisance is erected. The statutory period is shorter for claims against public entities. (Gov. Code, § 911.2.) Damages are not dependent upon any subsequent use of the property but are complete when the nuisance comes into existence. [¶] On the other hand, if a nuisance is a use which may be discontinued at any time, it is considered continuing in character and persons harmed by it may bring successive actions for damages until the nuisance is abated. Recovery is limited, however, to actual injury suffered prior to commencement of each action. Prospective damages are unavailable." (*Baker v. Burbank-Glendale-Pasadena Airport Auth.* (1985) 39 Cal.3d 862, 868–869 [218 Cal.Rptr. 293, 705 P.2d 866], internal citations and footnotes omitted.)

- "Historically, the application of the statute of limitations for trespass has been the same as for nuisance and has depended on whether the trespass has been continuing or permanent." (*Mangini v. Aerojet-General Corp.* (1991) 230 Cal.App.3d 1125, 1148 [281 Cal.Rptr. 827].)

- "[G]enerally the principles governing the permanent or continuing nature of a trespass or nuisance are the same and the cases discuss the two causes of action without distinction." (*Starrh & Starrh Cotton Growers, supra*, 153 Cal.App.4th at p. 594.)

- "Generally, whether a trespass is continuing or permanent is a question of fact properly submitted

to the jury. A trial court may remove the issue of fact from the jury by directed verdict only if there is no evidence tending to prove the case of the party opposing the motion." (*Starrh & Starrh Cotton Growers, supra,* 153 Cal.App.4th at p. 597, internal citations omitted.)

- "[T]he key question [in determining whether a trespass is continuous or permanent] is whether the trespass or nuisance can be discontinued or abated and there are a number of tests used to answer this question. A respected legal treatise summarizes the various tests as follows: '[W]hether (1) the offense activity is currently continuing, which indicates that the nuisance is continuing, (2) the impact of the condition will vary over time, indicating a continuing nuisance, or (3) the nuisance can be abated at any time, in a reasonable manner and for reasonable cost, and is feasible by comparison of the benefits and detriments to be gained by abatement.' " (*Starrh & Starrh Cotton Growers, supra,* 153 Cal.App.4th at pp. 593–594, citing 8 Miller & Starr, Cal. Real Estate (3d ed. 2000) § 22.39, pp. 148–149.)

- "The jury's conclusion that it was unknown whether the soil contamination could be abated by reasonable means at a reasonable cost means that plaintiff had failed to prove her claims of continuing nuisance and trespass." (*McCoy v. Gustafson* (2009) 180 Cal.App.4th 56, 86 [103 Cal.Rptr.3d 37].)

- "[T]he 'continuing' nature of a nuisance 'refers to the continuing damage caused by the offensive condition, not to the acts causing the offensive condition to occur.' " (*Lyles, supra,* 153 Cal.App.4th at p. 291, internal citation omitted.)

- "[A] cause of action for damage to real property accrues when the defendant's act causes '*immediate and permanent* injury' to the property or, to put it another way, when there is '[a]ctual and appreciable harm' to the property." (*Siegel v. Anderson Homes, Inc.* (2004) 118 Cal.App.4th 994, 1005 [13 Cal.Rptr.3d 462], original italics, internal citations omitted.)

- "Property damage cases … are different from medical malpractice cases in the sense that, when property is damaged, there is ordinarily some wrongful cause. Thus, when one's property is damaged, one should reasonably suspect that someone has done something wrong to him and, accordingly, be charged with knowledge of the information that would have been revealed by an investigation. That particular property damage could result from natural causes does not mean that the same property damage could result only from natural causes." (*Lyles, supra,* 153 Cal.App.4th at pp. 287–288.)

- "The traditional rule in tort cases is that the statute of limitations begins to run upon the *occurrence* of the last fact essential to the cause of action. Although sometimes harsh, the fact that plaintiff is neither aware of his cause of action nor of the identity of a wrongdoer will not toll the statute. [¶] The harshness of this rule has been ameliorated in some cases where it is manifestly unjust to deprive plaintiffs of a cause of action before they are aware that they have been injured. This modified rule has been applied to latent defects in real property and improvements. In the case of such latent defects the statute of limitations begins to run only when 'noticeable damage occurs.' " (*Leaf v. City of San Mateo* (1980) 104 Cal.App.3d 398, 406–407 [163 Cal.Rptr. 711], internal citations omitted, disapproved on another ground in *Trope v. Katz* (1995) 11 Cal.4th 274, 292 [45 Cal.Rptr.2d 241, 902 P.2d 259], original italics.)

Secondary Sources

2 Levy et al., California Torts, Ch. 17, *Nuisance and Trespass,* § 17.09[5] (Matthew Bender)

Brown et al., California Practice Guide: Civil Procedure Before Trial (The Rutter Group) ¶¶ 6:462–6:462.2

2 California Real Property Remedies and Damages, Ch. 11, *Remedies for Nuisance and Trespass* (Cont.Ed.Bar 2d ed.) §§ 11.38–11.40

1 California Forms of Pleading and Practice, Ch. 11, *Adjoining Landowners,* § 11.24 (Matthew Bender)

22 California Points and Authorities, Ch. 225, *Trespass,* §§ 225.240–225.245 (Matthew Bender)

16 California Points and Authorities, Ch. 167, *Nuisance,* § 167.44 (Matthew Bender)

2102. Presumed Measure of Damages for Conversion (Civ. Code, § 3336)

If you decide that [*name of plaintiff***] has proved [his/her/its] claim against [***name of defendant***], you also must decide how much money will reasonably compensate [***name of plaintiff***] for the harm. This compensation is called "damages."**

[*Name of plaintiff***] must prove the amount of [his/her/its] damages. However, [***name of plaintiff***] does not have to prove the exact amount of damages that will provide reasonable compensation for the harm. You must not speculate or guess in awarding damages.**

The following are the specific items of damages claimed by [*name of plaintiff***]:**

1. **[The fair market value of the [***insert item of personal property***] at the time [***name of defendant***] wrongfully exercised control over it;]**

   [*or*]

   [Special damages resulting from [*name of defendant***]'s conduct;] [and]**

2. **Reasonable compensation for the time and money spent by [***name of plaintiff***] in attempting to recover the [***insert item of personal property***]; [and]**

3. **[Emotional distress suffered by [***name of plaintiff***] as a result of [***name of defendant***]'s conduct.]**

[In order to recover special damages, [*name of plaintiff***] must prove:**

1. **That [***describe special circumstances that require a measure of damages other than value***];**

2. **That it was reasonably foreseeable that special injury or harm would result from the conversion; and**

3. **That reasonable care on [***name of plaintiff***]'s part would not have prevented the loss.]**

["Fair market value" is the highest price that a willing buyer would have paid to a willing seller, assuming:

1. **That there is no pressure on either one to buy or sell; and**

2. **That the buyer and seller know all the uses and purposes for which the [***insert item***] is reasonably capable of being used.]**

(New September 2003)

Directions for Use

The third element of listed damages, emotional distress, is bracketed because it appears that such damages are recoverable only if the second alternative measure of damages stated in the first paragraph of Civil Code section 3336 applies. (See *Gonzales v. Pers. Storage* (1997) 56 Cal.App.4th 464, 477 [65 Cal.Rptr.2d 473].)

~~See Commercial Code section 3420 regarding conversion of negotiable instruments.~~

Sources and Authority

- Damages for Wrongful Conversion. Civil Code section 3336~~. provides:~~

  ~~The detriment caused by the wrongful conversion of personal property is presumed to be:~~

  ~~First-The value of the property at the time of the conversion, with the interest from that time, or, an amount sufficient to indemnify the party injured for the loss which is the natural, reasonable and proximate result of the wrongful act complained of and which a proper degree of prudence on his part would not have averted; and~~

  ~~Second-A fair compensation for the time and money properly expended in pursuit of the property.~~

- ~~Conversion of Negotiable Instruments. Commercial Code section 3420.Civil Code section 3337 provides: "The presumption declared by the last section cannot be repelled, in favor of one whose possession was wrongful from the beginning, by his subsequent application of the property to the benefit of the owner, without his consent."~~

- "[W]e are of the opinion that section 3337 can only be held to apply to a situation where the property was voluntarily applied by the party guilty of conversion to the benefit of the injured party, and can have no application to a situation such as here where the application was compelled by a legal duty." (*Goldberg v. List* (1938) 11 Cal.2d 389, 393 [79 P.2d 1087].)

- "Although the first part of section 3336 appears to provide for alternative measures of recovery, the first of the two measures, namely the value of the property converted at the time and place of conversion with interest from that time, is generally considered to be the appropriate measure of damages in a conversion action. The determination of damages under the alternative provision is resorted to only where the determination on the basis of value at the time of conversion would be manifestly unjust." (*Myers v. Stephens* (1965) 233 Cal.App.2d 104, 116 [43 Cal.Rptr. 420], internal citations omitted.)

- "As a general rule, the value of the converted property is the appropriate measure of damages, and resort to the alternative occurs only where a determination of damages on the basis of value would be manifestly unjust. Accordingly, a person claiming damages under the alternative provision must plead and prove special circumstances that require a measure of damages other than value, and the jury must determine whether it was reasonably foreseeable that special injury or damage would result

from the conversion." (*Lueter v. State of California* (2002) 94 Cal.App.4th 1285, 1302 [115 Cal.Rptr.2d 68], internal citations omitted.)

- "The damage measures set forth in the first paragraph of section 3336 are in the alternative. The first alternative is to compensate for the value of the property at the time of conversion with interest from the time of the taking. The second alternative is compensation in a sum equal to the amount of loss legally caused by the conversion and which could have been avoided with a proper degree of prudence. Both of these alternatives are in addition to the damage element for the time spent pursuing the converted property set forth in the second paragraph of section 3336." (*Moreno v. Greenwood Auto Center* (2001) 91 Cal.App.4th 201, 209 [110 Cal.Rptr.2d 177], internal citations omitted.)

- "Civil Code section 3336 sets out the presumptive measure of damages in conversion, which is rebuttable, save and except when section 3337 applies. Under Civil Code section 3337, a defendant cannot rebut the presumption by claiming that he applied the converted property to plaintiff's benefit when he took unlawful possession of the property from the beginning. Consequently, the effect of section 3337 is to prevent mitigation when property is stolen from the plaintiff and subsequently applied to his benefit. In this situation, the defendant will not be able to claim that his conversion benefited plaintiff; he will thereby be prevented from claiming an offset derived from his original wrong. In contrast to this situation, if the particular facts of a case indicate, as in the instant case, that the possession was lawful before the conversion occurred ... Civil Code section 3337 is inapplicable, and a converter is not precluded from claiming mitigation of damages." (*Dakota Gardens Apartment Investors "B" v. Pudwill* (1977) 75 Cal.App.3d 346, 351-352 [142 Cal.Rptr. 126].)

- "[W]e conclude that notwithstanding further developments in the law of negligence, damages for emotional distress growing out of a defendant's conversion of personal property are recoverable." (*Gonzales, supra,* 56 Cal.App.4th at p. 477, internal citations omitted.)

- "In the absence of special circumstances the appropriate measure of damages for conversion of personal property is the fair market value of that property plus interest from the date of conversion, the standard first listed in section 3336, Civil Code. However, where proof establishes an injury beyond that which would be adequately compensated by the value of the property and interest, the court may award such amounts as will indemnify for all proximate reasonable loss caused by the wrongful act. Where damages for loss of use exceeds the legal rate of interest, it is appropriate to award the former, but not both." (*Lint v. Chisholm* (1981) 121 Cal.App.3d 615, 624-625 [177 Cal.Rptr. 314], internal citations omitted.)

- " 'To entitle a party to such compensation the [evidence] should tend to show that money was properly paid out and time properly lost in pursuit of the property, and how much.' Such evidence should be definite and certain. Expenses 'incurred in preparation for litigation and not in pursuit of property' cannot be allowed as damages under Civil Code section 3336. Additionally, any such compensation must be fair, i.e., reasonable." (*Haines v. Parra* (1987) 193 Cal.App.3d 1553, 1559 [239 Cal.Rptr. 178], internal citations omitted.)

- "[A]lthough good faith and mistake are not defenses to an action for conversion, the plaintiff's damages will be reduced if the defendant returns the property or the plaintiff otherwise recovers the property." (*Krusi v. Bear, Stearns & Co.* (1983) 144 Cal.App.3d 664, 673 [192 Cal.Rptr. 793],

internal citations omitted.)

- "Causes of action for conversion and trespass support an award for exemplary damages." (*Krieger v. Pacific Gas & Electric Co.* (1981) 119 Cal.App.3d 137, 148 [173 Cal.Rptr. 751], internal citation omitted.)

- "Ordinarily 'value of the property' at the time of the conversion is determined by its market value at the time. However, '[w]here certain property has a peculiar value to a person recovering damages for deprivation thereof, or injury thereto, that may be deemed to be its value ... against a willful wrongdoer.' " (*In re Brian S.* (1982) 130 Cal.App.3d 523, 530 [181 Cal.Rptr. 778], internal citations omitted.)

- "In an action for damages for conversion, it is the rule that the plaintiff, although owning but a limited or qualified interest in the property, may, as against a stranger who has no ownership therein, recover the full value of the property converted." (*Camp v. Ortega* (1962) 209 Cal.App.2d 275, 286 [25 Cal.Rptr. 873], internal citations omitted.)

- "A plaintiff seeking recovery under the alternative provision of the statute must therefore plead and prove the existence of 'special circumstances which require a different measure of damages to be applied.' Having done so, the trier of fact must then determine 'whether it was reasonably forseeable to a prudent person, having regard for the accompanying circumstances, that injury or damage would likely result from his wrongful act.' " (*Krueger v. Bank of America* (1983) 145 Cal.App.3d 204, 215 [193 Cal.Rptr. 322], internal citations omitted.)

- "Defendants contend that the anticipated loss of profits is not 'the natural, reasonable and proximate result of the wrongful act complained of,' within the meaning of section 3336. Although no California case which has applied the alternative measure of damages in a conversion case has specifically defined this language, we are satisfied that its meaning is synonymous with the term 'proximate cause' or 'legal cause.' These terms mean, in essence, 'that there be some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered.' In determining whether this connection exists, the question is whether it was reasonably foreseeable to a prudent person, having regard for the accompanying circumstances, that injury or damage would likely result from his wrongful act. This question being one of fact to be determined generally by the trier of fact." (*Myers, supra,* 233 Cal.App.2d at pp. 119–120, internal citations omitted.)

- "In exceptional circumstances, to avoid injustice, loss of profits may be the measure." (*Newhart v. Pierce* (1967) 254 Cal.App.2d 783, 794 [62 Cal.Rptr. 553], internal citation omitted.)

- Code of Civil Procedure section 1263.320(a) provides: "The fair market value of the property taken is the highest price on the date of valuation that would be agreed to by a seller, being willing to sell but under no particular or urgent necessity for so doing, nor obliged to sell, and a buyer, being ready, willing, and able to buy but under no particular necessity for so doing, each dealing with the other with full knowledge of all the uses and purposes for which the property is reasonably adaptable and available."

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1722

4 Levy et al., California Torts, Ch. 50, *Damages*, §§ 50.01–50.03 (Matthew Bender)

13 California Forms of Pleading and Practice, Ch. 150, *Conversion*, §§ 150.10, 150.40–150.41 (Matthew Bender)

5 California Points and Authorities, Ch. 51, *Conversion* (Matthew Bender)

2301. Breach of Insurance Binder—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] breached its duty to pay [him/her/it] for a loss or liability covered under a temporary insurance contract called an insurance binder. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] or its authorized agent agreed, orally or in writing, to provide [***name of plaintiff***] with an insurance binder;**

2. **That [***name of plaintiff***] [paid/was obligated to pay] for the insurance binder [or that payment was waived];**

3. **That [***name of plaintiff***] suffered a loss during the time the insurance binder was in effect;**

4. **That [all or part of] the loss was covered under the [insurance binder] [terms of the insurance policy [***name of defendant***] would have issued to [***name of plaintiff***]];**

5. **That [***name of defendant***] was notified of the loss [as required by the insurance binder]; and**

6. **The amount of the covered loss or liability that [***name of defendant***] failed to pay.**

New September 2003

Directions for Use

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

This instruction is intended for an alleged breach of a contract of temporary insurance coverage. The court must interpret as a matter of law whether an ordinary person in the applicant's circumstances would conclude, based on the language of the application, that coverage began immediately. Do not use this instruction unless the court has decided this issue.

Use bracketed language in element 5 if the jury is required to resolve a factual dispute over whether the manner in which the insurer received notice conformed to the policy requirements for notice. Element 4 should be modified if there is an issue regarding whether the insurance company's agent made oral statements at variance with the policy language.

Note that the statutory requirements for a "binder" under Insurance Code section 382.5 do not apply to life or disability insurance, for insurance of any kind in the amount of $1 million or more, or to an oral binder (see Ins. Code, § 382.5(a)).

Sources and Authority

- Binders. Insurance Code section 382.5. ~~provides, in part: "A binder which is issued in accordance with this section shall be deemed an insurance policy for the purpose of proving that the insured has the insurance coverage specified in the binder. ... Except as superseded by the clear and express terms of the binder, a binder shall be deemed to include all of the usual terms of the policy as to which the binder was given, together with applicable endorsements as are designated in the binder."~~

- Cancelation of Temporary Insurance. Insurance Code section 481.1. ~~provides:~~

  ~~(a) In the event any conditional receipt, binder, or other evidence of temporary or implied insurance [with specified exceptions] is canceled, rejected, or surrendered by the insurer, the coverage thereby extended shall terminate 10 days after written notice to the named insured is deposited, properly addressed with postage prepaid, with the United States Postal Service.~~

  ~~(b) Any conditional receipt, binder, or other evidence of temporary or implied insurance described in subdivision (a) shall remain in force for a period of at least 30 days from the date of its issuance unless sooner canceled, rejected, or surrendered pursuant to the provisions of subdivision (a).~~

- "Under California law, a contract of temporary insurance may arise from completion of an application for insurance and payment of the first premium if the language of the application would lead an ordinary lay person to conclude that coverage was immediate." (*Ahern v. Dillenback* (1991) 1 Cal.App.4th 36, 47 [1 Cal.Rptr.2d 339].)

- "[A] binder is an independent contract, separate and distinct from the permanent insurance policy. It is intended to give temporary protection pending the investigation of the risk by the insurer and until issuance of a formal policy or rejection of the insurance application by the insurer." (*Ahern, supra*, 1 Cal.App.4th at p. 48.)

- "[P]racticality dictates that a temporary insurance binder issued upon an application for insurance cannot contain all of the details and terms of the proposed insurance contract. ... [I]nsurance binders are adequate if they indicate the subject matter, the coverage period, the rate and the amount of insurance. (*National Emblem Insurance Co. v. Rios* (1969) 275 Cal.App.2d 70, 76 [79 Cal.Rptr. 583], internal citations omitted.)

- "Whether or not a valid binder exists is a question of fact insofar as a finding comprehends issues relating to the credibility of witnesses or the weight of the evidence, but a question of law insofar as a finding embraces a conclusion that such factual elements do not constitute a valid oral binder." (*Spott Electrical Co. v. Industrial Indemnity Co.* (1973) 30 Cal.App.3d 797, 805 [106 Cal.Rptr. 710], internal citations omitted.)

- " 'For the sake of convenience, contracts of insurance sometimes exist in two forms: (1) A preliminary contract intended to protect the applicant pending investigation of the risk by the

company or until the policy can be properly issued. (2) The final contract or policy itself. ... An agent possessing authority to bind the company by contracts of insurance has authority to bind it by a preliminary or temporary contract of insurance. ...' This preliminary contract is sometimes called 'cover note' or 'binder.' ... 'A valid temporary or preliminary contract of present insurance may be made orally, or it may be partly in parol and partly in writing.' " (*Parlier Fruit Co. v. Fireman's Fund Insurance Co.* (1957) 151 Cal.App.2d 6, 19-20 [311 P.2d 62], internal quotation marks and citation omitted.)

Secondary Sources

2 Witkin, Summary of California Law (10th ed. 2005) Insurance, §§ 37, 38

Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group) ¶¶ 2:101–2:137

1 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar) Determining Whether Enforceable Obligation Exists, §§ 5.17–5.20

2 California Insurance Law & Practice, Ch. 9, *Issuance of Insurance Policies*, § 9.06[1]–[7] (Matthew Bender)

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

12 California Points and Authorities, Ch. 120, *Insurance*, § 120.15 (Matthew Bender)

11 California Legal Forms: Transaction Guide, Ch. 26A, *Title Insurance*, §§ 26A.15, 26A.220 (Matthew Bender)

2302. Breach of Contract for Temporary Life Insurance—Essential Factual Elements

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[*Name of plaintiff***] claims that [***name of defendant***] breached an agreement to pay life insurance benefits. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] or its authorized agent received [***name of decedent***]'s application for life insurance;**

2. **That [***name of decedent***] paid the first insurance premium;**

3. **That [***name of decedent***] died [on/after/before] [***insert relevant date***]; and**

4. **The amount of the insurance benefits that [***name of defendant***] failed to pay.**

New September 2003

Directions for Use

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

This instruction is intended for an alleged breach of a contract of temporary life insurance coverage. The court must interpret as a matter of law whether an ordinary person in the applicant's circumstances would conclude, based on the language of the application, that coverage began immediately. Do not use this instruction unless the court has decided this issue.

Sources and Authority

- Death of Insured Before Issuance of Policy. Insurance Code section 10115. ~~provides, in pertinent part: "When a payment is made equal to the full first premium at the time an application for life insurance ... is signed by the applicant and ... the insurer ... approves the application ... and the person to be insured dies ... before such policy is issued and delivered, the insurer shall pay such amount as would have been due under the terms of the policy in the same manner and subject to the same rights, conditions and defenses as if such policy had been issued and delivered on the date the application was signed by the applicant. The provisions of this section shall not prohibit an insurer from limiting the maximum amount ... if a statement to this effect is included in the application."~~

- "We are of the view that a contract of insurance arose upon defendant's receipt of the completed application and the first premium payment. ... The understanding of an ordinary person is the standard [that] must be used in construing the contract, and such a person upon reading the application would believe that he would secure the benefit of immediate coverage by paying the premium in advance of delivery of the policy." (*Ransom v. The Penn Mutual Life Insurance Co.* (1954) 43 Cal.2d 420, 425 [274 P.2d 633].)

- "[A]n insurance company is not precluded from imposing conditions precedent to the effectiveness of insurance coverage despite the advance payment of the first premium. However, ... any such condition must be stated in conspicuous, unambiguous and unequivocal language which an ordinary layman can understand." (*Thompson v. Occidental Life Insurance Co. of California* (1973) 9 Cal.3d 904, 912 [109 Cal.Rptr. 473, 513 P.2d 353].)

- Temporary life insurance coverage "is not terminated until the applicant receives from the insurer both a notice of the rejection of his application and a refund of his premium." (*Smith v. Westland Life Insurance Co*. (1975) 15 Cal.3d 111, 120 [123 Cal.Rptr. 649, 539 P.2d 433].)

- "Under California law, a contract of temporary insurance may arise from completion of an application for insurance and payment of the first premium if the language of the application would lead an ordinary lay person to conclude that coverage was immediate." (*Ahern v. Dillenback* (1991) 1 Cal.App.4th 36, 47 [1 Cal.Rptr.2d 339] [automobile insurance].)

Secondary Sources

2 Witkin, Summary of California Law (10th ed. 2005) Insurance, §§ 37–39

Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group) ¶¶ 2:134-2:137, 6:428-6:448

2 California Insurance Law & Practice, Ch. 9, *Issuance of Insurance Policies*, § 9.07 (Matthew Bender)

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

12 California Points and Authorities, Ch. 120, *Insurance*, §§ 120.19-120.20 (Matthew Bender)

2305. Lost or Destroyed Insurance Policy

[*Name of plaintiff***] claims that [he/she/it] was covered under an insurance policy that was lost or destroyed. To establish coverage under a lost policy, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was insured under the lost policy during the period in question; and**

2. **That the terms of the policy included the following:**

   a. [*describe each policy provision essential to the claimed coverage*]**.**

[*Name of plaintiff***] is not required to prove the exact words of the lost policy, but only the substance of the policy's terms essential to [his/her/its] claim for insurance benefits.**

New September 2003

Directions for Use

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

Read this instruction in conjunction with CACI No. 2300, *Breach of Contractual Duty to Pay a Covered Claim—Essential Factual Elements.* Whether the terms of a lost policy must be established by a heightened degree of proof appears to be an open issue. The Supreme Court in *Dart Industries, Inc. v. Commercial Union Insurance Co.* (2002) 28 Cal.4th 1059 [124 Cal.Rptr.2d 142, 52 P.3d 79], expressly declined to address the issue of the necessary degree of proof. (*Id* at p. 1072, fn. 4.)

This instruction is intended for use in cases where the plaintiff insured claims coverage for a loss under an insurance policy that was lost or destroyed without fraudulent intent on the part of the insured. The admission of oral testimony of the contents of a lost document requires the court to determine certain preliminary facts: (1) the proponent does not have possession or control of a copy of the policy; and (2) the policy was lost or destroyed without fraudulent intent on the part of the proponent. (Evid. Code, §§ 402(b), 1521, 1523(b).)

Sources and Authority

- ~~Evidence Code section 402(b) provides, in pertinent part: "The court may hear and determine the question of the admissibility of evidence out of the presence or hearing of the jury."~~

- Proof of Content of Writing. Evidence Code section 1521(a)~~. provides:~~

~~The content of a writing may be proved by otherwise admissible secondary evidence. The court shall exclude secondary evidence of the content of writing if the court determines either of the following:~~

~~(1) A genuine dispute exists concerning material terms of the writing and justice requires the exclusion.~~

~~(2) Admission of the secondary evidence would be unfair.~~

- Oral Testimony of Content of Writing. Evidence Code section 1523(b). ~~provides, in pertinent part: "Oral testimony of the content of a writing is not ... inadmissible ... if the proponent does not have possession or control of a copy of the writing and the original is lost or has been destroyed without fraudulent intent on the part of the proponent of the evidence."~~

- "In an action on an insurance policy that has not been lost or destroyed, it is well settled that '[t]he burden is on an insured to establish that the occurrence forming the basis of its claim is within the basic scope of insurance coverage. And, once an insured has made this showing, the burden is on the insurer to prove the claim is specifically excluded.' ... [¶] We see no reason not to apply this rule to a policy that has been lost or destroyed without fraudulent intent on the part of the insured. Thus, the claimant has the burden of proving (1) the fact that he or she was insured under the lost policy during the period in issue, and (2) the substance of each policy provision essential to the claim for relief, i.e., essential to the particular coverage that the insured claims. Which provisions those are will vary from case to case; the decisions often refer to them simply as the material terms of the lost policy. In turn, the insurer has the burden of proving the substance of any policy provision 'essential to the ... defense,' i.e., any provision that functions to defeat the insured's claim. Those provisions, too, will be case specific." (*Dart Industries, Inc., supra*, 28 Cal.4th at p. 1068, internal citations and footnotes omitted.)

- "A corollary of the rule that the contents of lost documents may be proved by secondary evidence is that the law does not require the contents of such documents be proved verbatim." (*Dart Industries, Inc., supra*, 28 Cal.4th at p. 1069.)

- "The rule ... for the admission of secondary evidence of a lost paper, requires 'that a bona fide and diligent search has been unsuccessfully made for it in the place where it was most likely to be found;' and further, 'the party is expected to show that he has in good faith exhausted in a reasonable degree all the sources of information and means of discovery which the nature of the case would naturally suggest, and which were accessible to him.' " (*Dart Industries, Inc., supra*, 28 Cal.4th at p. 1068, internal citation omitted.)

- "No fixed rule as to the necessary proof to establish loss [of a written instrument], or what constitutes reasonable search, can be formulated. ... The sole object of such proof is to raise a reasonable presumption merely that the instrument is lost, and this is a preliminary inquiry addressed to the discretion of the judge." (*Kenniff v. Caulfield* (1903) 140 Cal. 34, 41 [73 P. 803].)

- "Preliminary proof of the loss or destruction is required and it is committed to the trial court's discretion to determine whether the evidence so offered is or is not sufficient." (*Guardianship of Levy* (1955) 137 Cal.App.2d 237, 249 [290 P.2d 320].)

Secondary Sources

3 Witkin, California Evidence (4th ed. 2000) Presentation at Trial, §§ 48–50, 59–60, 63, 65

Croskey, et al., California Practice Guide: Insurance Litigation, Ch. 15-I, *Trial*, ¶¶ 15:978–15:994 (The Rutter Group)

1 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar) Identifying Sources of Coverage, § 8.8

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

12 California Points and Authorities, Ch. 120, *Insurance*, § 120.42 (Matthew Bender)

2306. Covered and Excluded Risks—Predominant Cause of Loss

You have heard evidence that the claimed loss was caused by a combination of covered and excluded risks under the insurance policy. When a loss is caused by a combination of covered and excluded risks under the policy, the loss is covered only if the most important or predominant cause is a covered risk.

[[*Name of defendant***] claims that [***name of plaintiff***]'s loss is not covered because the loss was caused by a risk excluded under the policy. To succeed, [***name of defendant***] must prove that the most important or predominant cause of the loss was [***describe excluded peril or event***], which is a risk excluded under the policy.]**

[or]

[[*Name of plaintiff***] claims that the loss was caused by a risk covered under the policy. To succeed, [***name of plaintiff***] must prove that the most important or predominant cause of the loss was [***describe covered peril or event***], which is a risk covered under the policy.]**

New September 2003

Directions for Use

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

This instruction in intended for use in first party property insurance cases where there is evidence that a loss was caused by both covered and excluded perils. In most cases the court will determine as a question of law what perils are covered and excluded under the policy.

Depending on the type of insurance at issue, the court must select the bracketed paragraph that presents the correct burden of proof. For all-risk homeowner's policies, for example, once the insured establishes basic coverage, the insurer bears the burden of proving the loss was caused by an excluded peril. In contrast, for "named perils" policies (for example, fire insurance) the insured bears the burden of proving the loss was caused by the specified peril. (See *Strubble v. United Services Automobile Assn.* (1973) 35 Cal.App.3d 498, 504 [110 Cal.Rptr. 828].)

Sources and Authority

- Remote Cause of Loss. Insurance Code section 530. ~~provides: "An insurer is liable for a loss of which a peril insured against was the proximate cause, although a peril not contemplated by the contract may have been a remote cause of the loss; but he is not liable for a loss of which the peril insured against was only a remote cause."~~

- Excluded Peril: But-For Causation. Insurance Code section 532. ~~provides: "If a peril is specially~~

~~excepted in a contract of insurance and there is a loss which would not have occurred but for such peril, such loss is thereby excepted even though the immediate cause of the loss was a peril which was not excepted."~~

- "[In] determining whether a loss is within an exception in a policy, where there is a concurrence of different causes, the efficient cause-the one that sets others in motion-is the cause to which the loss is to be attributed, though the other causes may follow it, and operate more immediately in producing the disaster." (*Sabella v. Wisler* (1963) 59 Cal.2d 21, 31–32 [27 Cal.Rptr. 689, 377 P.2d 889], internal quotation marks and citation omitted.)

- "*Sabella* defined 'efficient proximate cause' alternatively as the 'one that sets others in motion,' and as 'the predominating or moving efficient cause.' We use the term 'efficient proximate cause' (meaning predominating cause) when referring to the *Sabella* analysis because we believe the phrase 'moving cause' can be misconstrued to deny coverage erroneously, particularly when it is understood literally to mean the 'triggering' cause." (*Garvey v. State Farm Fire & Casualty Co.* (1989) 48 Cal.3d 395, 403 [257 Cal.Rptr. 292, 770 P.2d 704], internal citations omitted.)

- "[T]he 'cause' of loss in the context of a property insurance contract is totally different from that in a liability policy. This distinction is critical to the resolution of losses involving multiple causes. Frequently property losses occur which involve more than one peril that might be considered legally significant. ... 'The task becomes one of identifying the most important cause of the loss and attributing the loss to that cause.' [¶] On the other hand, the right to coverage in the third party liability insurance context draws on traditional tort concepts of fault, proximate cause and duty." (*Garvey*, *supra*, 48 Cal.3d at pp. 406–407, internal quotation marks, italics, and citations omitted.)

- "[I]n an action upon an all-risks policy such as the one before us (unlike a specific peril policy), the insured does not have to prove that the peril proximately causing his loss was covered by the policy. This is because the policy covers all risks save for those risks specifically excluded by the policy. The insurer, though, since it is denying liability upon the policy, must prove the policy's noncoverage of the insured's loss." (*Strubble*, *supra*, 35 Cal.App.3d at p. 504.)

- "[T]he scope of coverage under an all-risk homeowner's policy includes all risks except those specifically excluded by the policy. When a loss is caused by a combination of a covered and specifically excluded risks, the loss is covered if the covered risk was the efficient proximate cause of the loss. ... [T]he question of what caused the loss is generally a question of fact, and the loss is not covered if the covered risk was only a remote cause of the loss, or the excluded risk was the efficient proximate, or predominate, cause." (*State Farm Fire & Casualty Co. v. Von Der Lieth* (1991) 54 Cal.3d 1123, 1131–1132 [2 Cal.Rptr.2d 183, 820 P.2d 285], internal citation omitted.)

- "[A]n insurer is not absolutely prohibited from drafting and enforcing policy provisions that provide or leave intact coverage for some, but not all, manifestations of a particular peril. This is, in fact, an everyday practice that normally raises no questions regarding section 530 or the efficient proximate cause doctrine." (*Julian v. Hartford Underwriters Ins. Co.* (2005) 35 Cal.4th 747, 759 [27 Cal.Rptr.3d 648, 110 P.3d 903].)

Secondary Sources

Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group) ¶¶ 6:134-6:143, 6:253

1 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar) Analyzing Coverage: Reading and Interpreting Insurance Policies, § 3.42

3 California Insurance Law & Practice, Ch. 9, *Homeowners and Related Policies*, § 36.42 (Matthew Bender)

26 California Forms of Pleading and Practice, Ch. 308, *Insurance*, § 308.113 (Matthew Bender)

12 California Points and Authorities, Ch. 120, *Insurance*, § 120.50 (Matthew Bender)

2307. Insurance Agency Relationship Disputed

[*Name of plaintiff***] claims that [***name of agent***] was [***name of defendant***]'s agent and that [***name of defendant***] is therefore [responsible for/bound by] [***name of agent***]'s [conduct/representations].**

If [*name of plaintiff***] proves that [***name of defendant***] gave [***name of agent***] the [authority/apparent authority] to act on behalf of [***name of defendant***], then [***name of agent***] was [***name of defendant***]'s agent. This authority may be shown by words or may be implied by the parties' conduct. This authority cannot be shown by the words of [***name of agent***] alone.**

[In some circumstances, an individual can be the agent of both the insured and the insurance company. [*Name of plaintiff***] claims that [***name of agent***] was [[***name of defendant***]/[***name of plaintiff***]]'s agent for the purpose of [***describe limited agency; e.g., "collecting insurance payments"***] and therefore [***describe dispute; e.g., "the insurer received plaintiff's payment"***]. [***Name of defendant***] claims that [***name of agent***] was [[***name of defendant***]/[***name of plaintiff***]]'s agent for the purpose of [***describe limited agency***] and therefore [***describe dispute***].]**

New September 2003

Directions for Use

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

This instruction must be modified based on the evidence presented and theories of liability in the case. The distinction between an agent and a broker relationship may be crucial in determining, for example, whether an insurance salesperson's representations bind the insurer, or whether the insurance salesperson has assumed a specific duty to the insured.

If ostensible agency is an issue, the court may modify and give CACI No. 3709, *Ostensible Agent*, in the Vicarious Responsibility series.

Sources and Authority

- "Insurance Agent" Defined. Insurance Code section 31. ~~provides, in part: " 'Insurance agent' means a person authorized, by and on behalf of an insurer, to transact all classes of insurance other than life, disability, or health insurance, on behalf of an admitted insurance company." (See also Ins. Code, § 1621.)~~

- "Insurance Broker" Defined. Insurance Code section 33. ~~provides: " 'Insurance broker' means a person who, for compensation and on behalf of another person, transacts insurance other than life, disability, or health with, but not on behalf of, an insurer." (See also Ins. Code, § 1623.)~~

- Actual or Ostensible Authority of Agent. Civil Code section 2315. ~~provides: "An agent has such~~

~~authority as the principal, actually or ostensibly, confers upon him."~~

- "An individual cannot act as an insurance agent in California without a valid license issued by the commissioner of insurance. In addition to possessing a license, an insurance agent must be authorized by an insurance carrier to transact insurance business on the carrier's behalf. This authorization must be evidenced by a notice of agency appointment on file with the Department of Insurance. An agent is generally not limited in the number of agency appointments that he or she may have; thus, an agent may solicit business on behalf of a variety of different insurance carriers, and still technically be an agent of each of those carriers." (*Loehr v. Great Republic Insurance Co.* (1990) 226 Cal.App.3d 727, 732-733 [276 Cal.Rptr. 667], internal citations omitted.)

- "[S]tatutes defining 'broker' are not determinative of the actual relationship in a particular case. The actual relationship is determined by what the parties do and say, not by the name they are called." (*Maloney v. Rhode Island Insurance Co.* (1953) 115 Cal.App.2d 238, 245 [251 P.2d 1027], internal citations omitted.)

- "While we note many similarities in the services performed and the monetary functions of agents and brokers, there is a more fundamental legal distinction between insurance agents and brokers. Put quite simply, insurance brokers, with no binding authority, are not agents of insurance companies, but are rather independent contractors ... ." (*Marsh & McLennan of California, Inc. v. City of Los Angeles* (1976) 62 Cal.App.3d 108, 118 [132 Cal.Rptr. 796].)

- "Although an insurance broker is ordinarily the agent of the insured and not of the insurer, he may become the agent of the insurer as well as for the insured." (*Fraser-Yamor Agency, Inc. v. County of Del Norte* (1977) 68 Cal.App.3d 201, 213 [137 Cal.Rptr. 118], internal citations omitted.)

- "When the broker accepts the policy from the insurer and the premium from the assured, he has elected to act for the insurer to deliver the policy and to collect the premium." (*Maloney, supra,* 115 Cal.App.2d at p. 244.)

- "Generally speaking, a person may do by agent any act which he might do himself. An agency is either actual or ostensible. 'An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him.' To establish ostensible authority in an agent, it must be shown the principal, intentionally or by want of ordinary care has caused or allowed a third person to believe the agent possesses such authority." (*Preis v. American Indemnity Co.* (1990) 220 Cal.App.3d 752, 761 [269 Cal.Rptr. 617], internal citations omitted.)

- Sending notice of an automobile accident to the insured's broker did not satisfy the insured's obligation under the policy to provide prompt notice of a claim to the insurer since the broker was the agent of the insured and not of the insurer. (*Arthur v. London Guarantee and Accident Co., Ltd.* (1947) 78 Cal.App.2d 198, 202-203 [177 P.2d 625].)

Secondary Sources

Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group) ¶¶ 2:12–2:24, 2:31–

2:43

1 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar) Determining Whether Enforceable Obligation Exists, §§ 5.4–5.8

2 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar) Actions Against Agents and Brokers, §§ 29.2–29.5

2 California Insurance Law & Practice, Ch. 9, *Issuance of Insurance Policies*, § 9.02 (Matthew Bender)

5 California Insurance Law & Practice, Ch. 61, *Operating Requirements of Agents and Brokers*, § 61.01[4] (Matthew Bender)

2 California Uninsured Motorist Law, Ch. 24, *Bad Faith in Uninsured Motorist Law*, § 24.40 (Matthew Bender)

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

12 California Points and Authorities, Ch. 120, *Insurance*, §§ 120.18, 120.110, 120.170, 120.383, 120.392, 120.403 (Matthew Bender)

2308. Rescission for Misrepresentation or Concealment in Insurance Application—Essential Factual Elements

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[*Name of insurer***] claims that no insurance contract was created because [***name of insured***] [concealed an important fact/made a false representation] in [his/her/its] application for insurance. To establish this claim, [***name of insurer***] must prove all of the following:**

1. **That [***name of insured***] submitted an application for insurance with [***name of insurer***];**

2. **That in the application for insurance [***name of insured***] [intentionally] [failed to state/represented] that [***insert omission or alleged misrepresentation***];**

3. **[That the application asked for that information;]**

4. **That [***name of insured***] [***select one of the following:***]**

   [knew that [*insert omission***];]**

   [knew that this representation was not true;]

5. **That [***name of insurer***] would not have issued the insurance policy if [***name of insured***] had stated the true facts in the application;**

6. **That [***name of insurer***] gave [***name of insured***] notice that it was rescinding the insurance policy; and**

7. **That [***name of insurer*] **[returned/offered to return] the insurance premiums paid by [***name of insured*].

New September 2003; Revised April 2004, October 2004

Directions for Use

Use the bracketed word "intentionally" for cases involving Insurance Code section 2071.

Element 3 applies only if plaintiff omitted information, not if he or she misrepresented information. Elements 5 and 6 may be resolved by the language of the complaint, in which case these could be decided as a matter of law. (Civ. Code, § 1691.)

If the insured's misrepresentation or concealment in the insurance application is raised as an affirmative defense by the insurer, this instruction may be modified for use. The elements of the defense would be the same as stated above.

If it is alleged that omission occurred in circumstances other than a written application, this instruction

should be modified accordingly.

Sources and Authority

- Rescission of Contract. Civil Code section 1689(b)(1). ~~provides that a party may rescind a contract under the following circumstances: "If the consent of the party rescinding, or of any party jointly contracting with him, was given by mistake, or obtained through duress, menace, fraud, or undue influence, exercised by or with the connivance of the party as to whom he rescinds, or of any other party to the contract jointly interested with such party."~~

- Time of Insurer's Rescission of Policy. Insurance Code section 650. ~~provides: "Whenever a right to rescind a contract of insurance is given to the insurer by any provision of this part such right may be exercised at any time previous to the commencement of an action on the contract. The rescission shall apply to all insureds under the contract, including additional insureds, unless the contract provides otherwise."~~

- Concealment by Failure to Communicate. Insurance Code section 330. ~~provides: "Neglect to communicate that which a party knows, and ought to communicate, is concealment."~~

- Concealment Entitles Insurer to Rescind. Insurance Code section 331. ~~provides: "Concealment, whether intentional or unintentional, entitles the injured party to rescind insurance."~~

- Duty to Communicate in Good Faith. Insurance Code section 332. ~~provides: "Each party to a contract of insurance shall communicate to the other, in good faith, all facts within his knowledge which are or which he believes to be material to the contract and as to which he makes no warranty, and which the other has not the means of ascertaining."~~

- Materiality. Insurance Code section 334. ~~provides: "Materiality is to be determined not by the event, but solely by the probable and reasonable influence of the facts upon the party to whom the communication is due, in forming his estimate of the disadvantages of the proposed contract, or in making his inquiries."~~

- Intentional Omission of Information Tending to Prove Falsity. Insurance Code section 338. ~~provides: "An intentional and fraudulent omission, on the part of one insured, to communicate information of matters proving or tending to prove the falsity of a warranty, entitles the insurer to rescind."~~

- False Represeintation: Time for Rescission. Insurance Code section 359. ~~provides: "If a representation is false in a material point ... the injured party is entitled to rescind the contract from the time the representation becomes false."~~

- "When the [automobile] insurer fails ... to conduct ... a reasonable investigation [of insurability] it cannot assert ... a right of rescission" under section 650 of the Insurance Code as an affirmative defense to an action by an injured third party. (*Barrera v. State Farm Mutual Automobile Insurance Co.* (1969) 71 Cal.2d 659, 678 [79 Cal.Rptr. 106, 456 P.2d 674].)

- "[A]n insurer has a right to know all that the applicant for insurance knows regarding the state of his

health and medical history. Material misrepresentation or concealment of such facts [is] grounds for rescission of the policy, and an actual intent to deceive need not be shown. Materiality is determined solely by the probable and reasonable effect [that] truthful answers would have had upon the insurer. The fact that the insurer has demanded answers to specific questions in an application for insurance is in itself usually sufficient to establish materiality as a matter of law." (*Thompson v. Occidental Life Insurance Co. of California* (1973) 9 Cal.3d 904, 915-916 [109 Cal.Rptr. 473, 513 P.2d 353], internal citations omitted.)

- "[I]f the applicant for insurance had no present knowledge of the facts sought, or failed to appreciate the significance of information related to him, his incorrect or incomplete responses would not constitute grounds for rescission. Moreover, '[questions] concerning illness or disease do not relate to minor indispositions but are to be construed as referring to serious ailments which undermine the general health.' Finally, as the misrepresentation must be a material one, 'incorrect answer on an insurance application does not give rise to the defense of fraud where the true facts, if known, would not have made the contract less desirable to the insurer.' And the trier of fact is not required to believe the 'post mortem' testimony of an insurer's agents that insurance would have been refused had the true facts been disclosed." (*Thompson, supra,* 9 Cal.3d at p. 916, internal citations omitted.)

- "[T]he burden of proving misrepresentation [for purposes of rescission] rests upon the insurer." (*Thompson, supra,* 9 Cal.3d at p. 919.)

- "The materiality of a representation made in an application for a contract of insurance is determined by a *subjective* standard (i.e., its effect on the *particular* insurer to whom it was made) and rescission will be allowed even though the misrepresentation was the result of negligence or the product of innocence. On the other hand, in order to void a policy based upon the insured's violation of the standard fraud and concealment clause ... , the false statement must have been knowingly and wilfully made with the intent (express or implied) of deceiving the insurer. The materiality of the statement will be determined by the *objective* standard of its effect upon a *reasonable* insurer." (*Cummings v. Fire Insurance Exchange* (1988) 202 Cal.App.3d 1407, 1415, fn.7 [249 Cal.Rptr. 568], original italics, internal citation omitted.)

- "Cancellation and rescission are not synonymous. One is prospective, while the other is retroactive." (*Fireman's Fund American Insurance Co. v. Escobedo* (1978) 80 Cal.App.3d 610, 619 [145 Cal.Rptr. 785].)

- "[U]pon a rescission of a policy of insurance, based upon a material concealment or misrepresentation, all rights of the insured thereunder (except the right to recover any consideration paid in the purchase of the policy) are extinguished ... ." (*Imperial Casualty & Indemnity Co. v. Sogomonian* (1988) 198 Cal.App.3d 169, 184 [243 Cal.Rptr. 639].)

- "The consequence of rescission is not only the termination of further liability, but also the restoration of the parties to their former positions by requiring each to return whatever consideration has been received. ... [T]his would require the refund by [the insurer] of any premiums and the repayment by the defendants of any proceed advance which they may have received." (*Imperial Casualty & Indemnity Co., supra,* 198 Cal.App.3d at p. 184, internal citation omitted.)

Secondary Sources

Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group) ¶¶ 5:143–5:146, 5:153–5:159.1, 5:160–5:287, 15:241–15:256

2 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar) Rescission and Reformation, §§ 21.2–21.12, 21.35–21.37

2 California Insurance Law & Practice, Ch. 8, *The Insurance Contract*, § 8.10[1] (Matthew Bender)

2 California Uninsured Motorist Law, Ch. 24, *Bad Faith in Uninsured Motorist Law*, § 24.40 (Matthew Bender)

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

12 California Points and Authorities, Ch. 120, *Insurance*, §§ 120.250–120.251, 120.260 (Matthew Bender)

2309. Termination of Insurance Policy for Fraudulent Claim

[*Name of insurer***] claims that [***name of insured***] [is not entitled to recover under/is not entitled to benefits under] the insurance policy because [he/she] made a false claim. To establish this claim, [***name of insurer***] must prove all of the following:**

1. **That [***name of insured***] made a claim for insurance benefits under a policy with [***name of insurer***];**

2. **That [***name of insured***] represented to [***name of insurer***] that [***insert allegedly false representation***];**

3. **That [***name of insured***]'s representation was not true;**

4. **That [***name of insured***] knew that the representation was not true;**

5. **That [***name of insured***] intended that [***name of insurer***] rely on this representation in [investigating/paying] [***name of insured***]'s claim for insurance benefits; and**

6. **That the representation that [***insert allegedly false representation***], if true, would affect a reasonable insurance company's [investigation of/decision to pay] a claim for insurance benefits.**

New September 2003

Directions for Use

If the insured's misrepresentation or concealment in the insurance application is raised as an affirmative defense by the insurer, this instruction may be modified for use. The elements of the defense would be the same as stated above.

Sources and Authority

- Rescission of Contract. Civil Code section 1689(b)(1). ~~provides that a party may rescind a contract "[i]f the consent of the party rescinding, or of any party jointly contracting with him, was given by mistake, or obtained through duress, menace, fraud, or undue influence, exercised by or with the connivance of the party as to whom he rescinds, or of any other party to the contract jointly interested with such party."~~

- Intentional Omission of Information Tending to Prove Falsity. Insurance Code section 338. ~~provides: "An intentional and fraudulent omission, on the part of one insured, to communicate information of matters proving or tending to prove the falsity of a warranty, entitles the insurer to rescind."~~

- False Represeintation: Time for Rescission. Insurance Code section 359. ~~provides: "If a~~

~~representation is false in a material point ... the injured party is entitled to rescind the contract from the time the representation becomes false."~~

- "The materiality of a representation made in an application for a contract of insurance is determined by a *subjective* standard (i.e., its effect on the *particular* insurer to whom it was made) and rescission will be allowed even though the misrepresentation was the result of negligence or the product of innocence. On the other hand, in order to void a policy based upon the insured's violation of the standard fraud and concealment clause ..., the false statement must have been knowingly and wilfully made with the intent (express or implied) of deceiving the insurer. The materiality of the statement will be determined by the *objective* standard of its effect upon a *reasonable* insurer." (*Cummings v. Fire Insurance Exchange* (1988) 202 Cal.App.3d 1407, 1415, fn.7 [249 Cal.Rptr. 568], original italics, internal citation omitted.)

- "The consequence of rescission is not only the termination of further liability, but also the restoration of the parties to their former positions by requiring each to return whatever consideration has been received. ... [T]his would require the refund by [the insurer] of any premiums and the repayment by the [insureds] of any proceed advance which they may have received." (*Imperial Casualty & Indemnity Co. v. Sogomonian* (1988) 198 Cal.App.3d 169, 184 [243 Cal.Rptr. 639], internal citation omitted.)

Secondary Sources

Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group) ¶¶ 5:143–5:146, 5:153–5:159.1, 5:160, 5:249–5:260.5, 15:241–15:256

2 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar) Rescission and Reformation, §§ 21.2–21.4, 21.35–21.37

2 California Insurance Law & Practice, Ch. 8, *The Insurance Contract*, § 8.10[1] (Matthew Bender)

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

12 California Points and Authorities, Ch. 120, *Insurance*, §§ 120.250–120.251 (Matthew Bender)

2337. Factors to Consider in Evaluating Insurer's Conduct

In determining whether [*name of defendant***] acted unreasonably or without proper cause, you may consider whether the defendant did any of the following:**

[(a) Misrepresented to [*name of plaintiff***] relevant facts or insurance policy provisions relating to any coverage at issue.]**

[(b) Failed to acknowledge and act reasonably promptly after receiving communications about [*name of plaintiff***]'s claim arising under the insurance policy.]**

[(c) Failed to adopt and implement reasonable standards for the prompt investigation and processing of claims arising under its insurance policies.]

[(d) Failed to accept or deny coverage of claims within a reasonable time after [*name of plaintiff***] completed and submitted proof-of-loss requirements.]**

[(e) Did not attempt in good faith to reach a prompt, fair, and equitable settlement of [*name of plaintiff***]'s claim after liability had become reasonably clear.]**

[(f) Required [*name of plaintiff***] to file a lawsuit to recover amounts due under the policy by offering substantially less than the amount that [he/she/it] ultimately recovered in the lawsuit, even though [***name of plaintiff***] had made a claim for an amount reasonably close to the amount ultimately recovered.]**

[(g) Attempted to settle [*name of plaintiff***]'s claim for less than the amount to which a reasonable person would have believed he or she was entitled by referring to written or printed advertising material accompanying or made part of the application.]**

[(h) Attempted to settle the claim on the basis of an application that was altered without notice to, or knowledge or consent of, [*name of plaintiff***], [his/her/its] representative, agent, or broker.]**

[(i) Failed, after payment of a claim, to inform [*name of plaintiff***] at [his/her/its] request, of the coverage under which payment was made.]**

[(j) Informed [*name of plaintiff***] of its practice of appealing from arbitration awards in favor of insureds or claimants for the purpose of forcing them to accept settlements or compromises less than the amount awarded in arbitration.]**

[(k) Delayed the investigation or payment of the claim by requiring [*name of plaintiff***], [or [his/her] physician], to submit a preliminary claim report, and then also required the submission of formal proof-of-loss forms, both of which contained substantially the same information.]**

[(*l*) Failed to settle a claim against [*name of plaintiff***] promptly once [his/her/its] liability had become apparent, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage.]**

[(m) Failed to promptly provide a reasonable explanation of its reasons for denying the claim or offering a compromise settlement, based on the provisions of the insurance policy in relation to the facts or applicable law.]

[(n) Directly advised [*name of plaintiff***] not to hire an attorney.]**

[(o) Misled [*name of plaintiff***] as to the applicable statute of limitations, that is, the date by which an action against [***name of defendant***] on the claim had to be filed.]**

[(p) Delayed the payment or provision of hospital, medical, or surgical benefits for services provided with respect to acquired immune deficiency syndrome (AIDS) or AIDS-related complex for more than 60 days after it had received [*name of plaintiff***]'s claim for those benefits, doing so in order to investigate whether [***name of plaintiff***] had the condition before obtaining the insurance coverage. However, the 60-day period does not include any time during which [***name of defendant***] was waiting for a response for relevant medical information from a healthcare provider.]**

The presence or absence of any of these factors alone is not enough to determine whether [*name of defendant***]'s conduct was or was not unreasonable or without proper cause. You must consider [***name of defendant***]'s conduct as a whole in making this determination.**

New April 2008

Directions for Use

Although there is no private cause of action under Insurance Code section 790.03(h) (see *Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, 304–305 [250 Cal.Rptr. 116, 758 P.2d 58]), this instruction may be given in an insurance bad-faith action to assist the jury in determining whether the insurer's conduct was unreasonable or without proper cause. (See *Jordan v. Allstate Ins. Co.* (2007) 148 Cal.App.4th 1062, 1078 [56 Cal.Rptr.3d 312], internal citations omitted.)

Include only the factors that are relevant to the case.

Sources and Authority

- Bad-Faith Insurance Practices. Insurance Code section 790.03. ~~provides in part:~~

  ~~The following are hereby defined as unfair methods of competition and unfair and deceptive acts or practices in the business of insurance.~~

  ~~(h) Knowingly committing or performing with such frequency as to indicate a general business practice any of the following unfair claims settlement practices:~~

  ~~(1) Misrepresenting to claimants pertinent facts or insurance policy provisions relating to any coverages at issue.~~

~~(2) Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies.~~

~~(3) Failing to adopt and implement reasonable standards for the prompt investigation and processing of claims arising under insurance policies.~~

~~(4) Failing to affirm or deny coverage of claims within a reasonable time after proof of loss requirements have been completed and submitted by the insured.~~

~~(5) Not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear.~~

~~(6) Compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by the insureds, when the insureds have made claims for amounts reasonably similar to the amounts ultimately recovered.~~

~~(7) Attempting to settle a claim by an insured for less than the amount to which a reasonable person would have believed he or she was entitled by reference to written or printed advertising material accompanying or made part of an application.~~

~~(8) Attempting to settle claims on the basis of an application that was altered without notice to, or knowledge or consent of, the insured, his or her representative, agent, or broker.~~

~~(9) Failing, after payment of a claim, to inform insureds or beneficiaries, upon request by them, of the coverage under which payment has been made.~~

~~(10) Making known to insureds or claimants a practice of the insurer of appealing from arbitration awards in favor of insureds or claimants for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration.~~

~~(11) Delaying the investigation or payment of claims by requiring an insured, claimant, or the physician of either, to submit a preliminary claim report, and then requiring the subsequent submission of formal proof of loss forms, both of which submissions contain substantially the same information.~~

~~(12) Failing to settle claims promptly, where liability has become apparent, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage.~~

~~(13) Failing to provide promptly a reasonable explanation of the basis relied on in the insurance policy, in relation to the facts or applicable law, for the denial of a claim or for the offer of a compromise settlement.~~

~~(14) Directly advising a claimant not to obtain the services of an attorney.~~

~~(15) Misleading a claimant as to the applicable statute of limitations.~~

~~(16) Delaying the payment or provision of hospital, medical, or surgical benefits for services provided with respect to acquired immune deficiency syndrome or AIDS-related complex for more than 60 days after the insurer has received a claim for those benefits, where the delay in claim payment is for the purpose of investigating whether the condition preexisted the coverage. However, this 60-day period shall not include any time during which the insurer is awaiting a response for relevant medical information from a health care provider.~~

- "[Plaintiff] was not seeking to recover on a claim based on a violation of Insurance Code section 790.03, subdivision (h). Rather, her claim was based on a claim of common law bad faith arising from [defendant]'s breach of the implied covenant of good faith and fair dealing which she is entitled to pursue. [Plaintiff]'s reliance upon the [expert's] declaration was for the purpose of providing evidence supporting her contention that [defendant] had breached the implied covenant by its actions. This is a *proper* use of evidence of an insurer's violations of the statute and the corresponding regulations." (*Jordan, supra,* 148 Cal.App.4th at p. 1078, original italics, internal citations omitted.)

Secondary Sources

2 Witkin, Summary of California Law (10th ed. 2005) Insurance §§ 252, 253, 255, 321

Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group) ¶ 14:109 et seq.

1 California Liability Insurance Practice: Claims and Litigation, Ch. 24, *General Principles of Contract and Bad Faith* (Cont.Ed.Bar) § 24.30 et seq.

26 California Forms of Pleading and Practice, Ch. 308, *Insurance*, § 308.25 (Matthew Bender)

1 Rushing et al., Matthew Bender Practice Guide: California Unfair Competition and Business Torts, Ch. 2, *Unfair Competition*, 2.11 (Matthew Bender)

2360. Judgment Creditor's Action Against Insurer—Essential Factual Elements

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[*Name of plaintiff***] claims that [***name of defendant***] must pay [all or part of] a judgment against [***name of insured***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] brought a lawsuit for [personal injury/wrongful death/property damage] against [***name of insured***] and a judgment was entered against [***name of insured***];**

2. **That [all or part of] [***name of insured***]'s liability under the judgment is covered by an insurance policy with [***name of defendant***]; and**

3. **The amount of the judgment [covered by the policy].**

New September 2003

Directions for Use

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

This instruction is intended for a judgment creditor's action against an insurer to collect on an insurance policy pursuant to Insurance Code section 11580(b)(2). This instruction should be used only where there are factual issues on any of the above elements. This instruction may need to be augmented with instructions on specific factual findings.

Note that Insurance Code section 11580 requires that the policy be "issued or delivered to [a] person in this state." This issue should be added as an element if it is disputed in the case.

Sources and Authority

- Judgment Creditor's Action Against Insurer. Insurance Code section 11580(b)(2). ~~provides, in pertinent part, that a liability policy must contain, and will be construed as containing if it does not: "[a] provision that whenever judgment is secured against the insured or the executor or administrator of a deceased insured in an action based upon bodily injury, death, or property damage, then an action may be brought against the insurer on the policy and subject to its terms and limitations, by such judgment creditor to recover on the judgment."~~

- "A direct action under section 11580 is a contractual action on the policy to satisfy a judgment up to policy limits." (*Wright v. Fireman's Fund Insurance Co.* (1992) 11 Cal.App.4th 998, 1015 [14 Cal.Rptr.2d 588].)

- "[I]t is not necessary for property damage to be caused by a vehicle or draught animal in order to bring a direct action against an insurer under section 11580." (*People ex rel. City of Willits v. Certain*

Underwriters at Lloyd's of London (2002) 97 Cal.App.4th 1125, 1131-1132 [118 Cal.Rptr.2d 868].)

- "Because the insurer's duties flow to its insured alone, a third party claimant may not bring a direct action against an insurance company. As a general rule, a third party may directly sue an insurer only when there has been an assignment of rights by, or a final judgment against, the insured." (*Shaolian v. Safeco Insurance Co.* (1999) 71 Cal.App.4th 268, 271 [83 Cal.Rptr.2d 702], internal citations omitted.)

- "Under section 11580 a third party claimant bringing a direct action against an insurer should ... prove 1) it obtained a judgment for bodily injury, death, or property damage, 2) the judgment was against a person insured under a policy that insures against [the] loss or damage ... , 3) the liability insurance policy was issued by the defendant insurer, 4) the policy covers the relief awarded in the judgment, 5) the policy either contains a clause that authorizes the claimant to bring an action directly against the insurer or the policy was issued or delivered in California and insures against [the] loss or damage ... ." (*Wright, supra,* 11 Cal.App.4th at p. 1015.)

- "Under Insurance Code section 11580, a third party creditor bringing a direct action against an insurer to recover the proceeds of an insurance policy must *plead and prove* not only that it obtained a judgment for bodily injury, but that 'the judgment was against a person insured under a policy ...' and 'the policy covers the relief awarded in the judgment ... .' " (*Miller v. American Home Assurance Co.* (1996) 47 Cal.App.4th 844, 847-848 [54 Cal.Rptr.2d 765], original italics, internal citation omitted.)

- "[Insurance Code Section 11580(b)(2)] and the standard policy language permit an action against an insurer only when the underlying judgment is final and 'final,' for this purpose, means an appeal from the underlying judgment has been concluded or the time within which to appeal has passed." (*McKee v. National Union Fire Insurance Co. of Pittsburgh, PA.* (1993) 15 Cal.App.4th 282, 285 [19 Cal.Rptr.2d 286].)

- "[W]here the insurer may be subject to a direct action under Insurance Code section 11580 by a judgment creditor who has or will obtain a default judgment in a third party action against the insured, intervention is appropriate. ... Where an insurer has failed to intervene in the underlying action or to move to set aside the default judgment, the insurer is bound by the default judgment." (*Reliance Insurance Co. v. Superior Court* (2000) 84 Cal.App.4th 383, 386-387 [100 Cal.Rptr.2d 807], internal citations omitted.)

- "The [standard] 'no action' clause gives the insurer the right to control the defense of the claim-to decide whether to settle or to adjudicate the claim on its merits. When the insurer provides a defense to its insured, the insured has no right to interfere with the insurer's control of the defense, and a stipulated judgment between the insured and the injured claimant, without the consent of the insurer, is ineffective to impose liability upon the insurer." (*Safeco Ins. Co. of Am. v. Superior Court* (1999) 71 Cal.App.4th 782, 787 [84 Cal.Rptr.2d 43], internal citations omitted.)

- A standard "no action" clause in an indemnity insurance policy "provides that [the insurer] may be sued directly if the amount of the insured's obligation to pay was finally determined either by judgment against the insured after actual trial or by 'written agreement of the insured, the claimant and the company.' " (*Rose v. Royal Insurance Co. of America* (1991) 2 Cal.App.4th 709, 716-717 [3

Cal.Rptr.2d 483].)

- "[A] trial does not have to be adversarial to be considered an 'actual trial' under the 'no action' clause, or to be considered binding against the insurer in a section 11580 proceeding. ... [W]e conclude that the term 'actual trial' in the standard 'no action' clause has two components: (1) an independent adjudication of facts based on an evidentiary showing; and (2) a process that does not create the potential for abuse, fraud or collusion." (*National Union Fire Insurance Co. v. Lynette C.* (1994) 27 Cal.App.4th 1434, 1449 [33 Cal.Rptr.2d 496].)

- "A defending insurer cannot be bound by a settlement made without its participation and without any actual commitment on its insured's part to pay the judgment, even where the settlement has been found to be in good faith for purposes of [Code of Civil Procedure] section 877.6." (*Hamilton v. Maryland Casualty Co.* (2002) 27 Cal.4th 718, 730 [117 Cal.Rptr.2d 318, 41 P.3d 128].)

- "[W]hen ... a liability insurer wrongfully denies coverage or refuses to provide a defense, then the insured is free to negotiate the best possible settlement consistent with his or her interests, including a stipulated judgment accompanied by a covenant not to execute. Such a settlement will raise an evidentiary presumption in favor of the insured (or the insured's assignee) with respect to the existence and amount of the insured's liability. The effect of such presumption is to shift the burden of proof to the insurer to prove that the settlement was unreasonable or the product of fraud or collusion. If the insurer is unable to meet that burden of proof then the stipulated judgment will be binding on the insurer and the policy provision proscribing a direct action against an insurer except upon a judgment against the insured after an 'actual trial' will not bar enforcement of the judgment." (*Pruyn v. Agricultural Insurance Co.* (1995) 36 Cal.App.4th 500, 509 [42 Cal.Rptr.2d 295].)

Secondary Sources

Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group) ¶¶ 15:1028–15:1077, 15:1123–15:1136

2 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar) Claimant's Direct Action for Recovery of Judgment, §§ 27.1–27.7, 27.17–27.27

4 California Insurance Law & Practice, Ch. 41, *Liability Insurance in General*, §§ 41.60–41.63 (Matthew Bender)

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

12 California Points and Authorities, Ch. 120, *Insurance*, §§ 120.186, 120.198, 120.206 (Matthew Bender)

2400. Breach of Employment Contract—Unspecified Term—"At-Will" Presumption

An employment relationship may be ended by either the employer or the employee, at any time, for any [lawful] reason, or for no reason at all. This is called "at-will employment."

An employment relationship is not "at will" if the employee proves that the parties, by words or conduct, agreed that the employee would be discharged only for good cause.

New September 2003; Revised June 2006

Directions for Use

If the plaintiff has made no claim other than the contract claim, then the word "lawful" may be omitted. If the plaintiff has made a claim for wrongful termination or violation of the Fair Employment and Housing Act, then the word "lawful" should be included in order to avoid confusing the jury.

Sources and Authority

- At-Will Employment. Labor Code section 2922. ~~provides, in pertinent part: "An employment, having no specified term, may be terminated at the will of either party on notice to the other."~~
- Contract of Employment. Labor Code section 2750.
- "Labor Code section 2922 has been recognized as creating a presumption. The statute creates a presumption of at-will employment which may be overcome 'by evidence that despite the absence of a specified term, the parties agreed that the employer's power to terminate would be limited in some way, e.g., by a requirement that termination be based only on "good cause." ' " (*Haycock v. Hughes Aircraft Co.* (1994) 22 Cal.App.4th 1473, 1488 [28 Cal.Rptr.2d 248], internal citations omitted.)
- ~~Labor Code section 2750 provides: "The contract of employment is a contract by which one, who is called the employer, engages another, who is called the employee, to do something for the benefit of the employer or a third person."~~
- "Where there is no express agreement, the issue is whether other evidence of the parties' conduct has a 'tendency in reason' to demonstrate the existence of an actual mutual understanding on particular terms and conditions of employment. If such evidence logically permits conflicting inferences, a question of fact is presented. But where the undisputed facts negate the existence or the breach of the contract claimed, summary judgment is proper." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 337 [100 Cal.Rptr.2d 352, 8 P.3d 1089], internal citations omitted.)
- "Because the presumption of at-will employment is premised upon public policy considerations, it is one affecting the burden of proof. Therefore, even if no substantial evidence was presented by defendants that plaintiff's employment was at-will, the presumption of Labor Code section 2922

required the issue to be submitted to the jury." (*Alexander v. Nextel Communications, Inc.* (1997) 52 Cal.App.4th 1376, 1381–1382 [61 Cal.Rptr.2d 293], internal citations omitted.)

- "The presumption that an employment relationship of indefinite duration is intended to be terminable at will is therefore 'subject, like any presumption, to contrary evidence. This may take the form of an agreement, express or implied, that … the employment relationship will continue indefinitely, pending the occurrence of some event such as the employer's dissatisfaction with the employee's services or the existence of some "cause" for termination.' " (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 680 [254 Cal.Rptr. 211, 765 P.2d 373], internal citation omitted.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, § 231

Chin et al., Cal. Practice Guide: Employment Litigation ~~(The Rutter Group)~~ ¶¶ 4:2-4:4, 4:65 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Contract Actions, §§ 8.4-8.14

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.02 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.10, 249.11, 249.13, 249.21, 249.43 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Wrongful Termination and Discipline*, §§ 100.20–100.23 (Matthew Bender)

2401. Breach of Employment Contract—Unspecified Term—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] breached their employment contract. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] and [***name of defendant***] entered into an employment relationship. [An employment contract or a provision in an employment contract may be [written or oral/partly written and partly oral/created by the conduct of the parties]];**

2. **That [***name of defendant***] promised, by words or conduct, to [discharge/demote] [***name of plaintiff***] only for good cause;**

3. **That [***name of plaintiff***] substantially performed [his/her] job duties [unless [***name of plaintiff***]'s performance was excused [or prevented]];**

4. **That [***name of defendant***] [discharged/demoted] [***name of plaintiff***] without good cause; and**

5. **That [***name of plaintiff***] was harmed by the [discharge/demotion].**

New September 2003

Directions for Use

In cases where constructive discharge is alleged, use CACI No. 2402 instead of this one.

The element of substantial performance should not be confused with the "good cause" defense: "The action is primarily for breach of contract. It was therefore incumbent upon plaintiff to prove that he was able and offered to fulfill all obligations imposed upon him by the contract. Plaintiff failed to meet this requirement; by voluntarily withdrawing from the contract he excused further performance by defendant." (*Kane v. Sklar* (1954) 122 Cal.App.2d 480, 482 [265 P.2d 29], internal citation omitted.) Element 3 may be deleted if substantial performance is not a disputed issue.

See also CACI No. 304, *Oral or Written Contract Terms*, and CACI No. 305, *Implied-in-Fact Contract*.

The California Supreme Court has extended the implied contract theory to encompass demotions or other similar employment decisions that violate the terms of an implied contract. (See *Scott v. Pac. Gas & Elec. Co.* (1995) 11 Cal.4th 454, 473-474 [46 Cal.Rptr.2d 427, 904 P.2d 834].) As a result, the bracketed language regarding an alleged wrongful demotion may be given, or other appropriate language for other similar employment decisions, depending on the facts of the case.

Sources and Authority

- At-Will Employment. Labor Code section 2922. ~~provides: "An employment, having no specified term, may be terminated at the will of either party on notice to the other. Employment for a specified term means an employment for a period greater than one month."~~

- Contractual Conditions Precedent. Civil Code section 1439. ~~provides, in part: "Before any party to an obligation can require another party to perform any act under it, he must fulfill all conditions precedent thereto imposed upon himself; and must be able and offer to fulfill all conditions concurrent so imposed upon him on the like fulfillment by the other party ... ."~~

- "Where there is no express agreement, the issue is whether other evidence of the parties' conduct has a 'tendency in reason' to demonstrate the existence of an actual mutual understanding on particular terms and conditions of employment. If such evidence logically permits conflicting inferences, a question of fact is presented. But where the undisputed facts negate the existence or the breach of the contract claimed, summary judgment is proper." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 337 [100 Cal.Rptr.2d 352, 8 P.3d 1089], internal citations omitted.)

- The employee bears the ultimate burden of proving that he or she was wrongfully terminated. (*Pugh v. See's Candies, Inc.* (*Pugh I*) (1981) 116 Cal.App.3d 311, 330 [171 Cal.Rptr. 917].)

- "The presumption that an employment relationship of indefinite duration is intended to be terminable at will is therefore 'subject, like any presumption, to contrary evidence. This may take the form of an agreement, express or implied, that ... the employment relationship will continue indefinitely, pending the occurrence of some event such as the employer's dissatisfaction with the employee's services or the existence of some "cause" for termination.' " (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 680 [254 Cal.Rptr. 211, 765 P.2d 373], internal citation omitted.)

- "In *Foley*, we identified several factors, apart from express terms, that may bear upon 'the existence and content of an ... [implied-in-fact] agreement' placing limits on the employer's right to discharge an employee. These factors might include ' "the personnel policies or practices of the employer, the employee's longevity of service, actions or communications by the employer reflecting assurances of continued employment, and the practices of the industry in which the employee is engaged." ' " (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 336-337 [100 Cal.Rptr.2d 352, 8 P.3d 1089], internal citations omitted.)

- Civil Code sections 1619-1621 together provide as follows: "A contract is either express or implied. An express contract is one, the terms of which are stated in words. An implied contract is one, the existence and terms of which are manifested by conduct."

- " 'Good cause' or 'just cause' for termination connotes ' "a fair and honest cause or reason," ' regulated by the good faith of the employer. The term is relative. Whether good cause exists is dependent upon the particular circumstances of each case. In deciding whether good cause exists, there must be a balance between the employer's interest in operating its business efficiently and profitably and the employee's interest in continued employment. Care must be exercised so as not to interfere with the employer's legitimate exercise of managerial discretion. While the scope of such discretion is substantial, it is not unrestricted. Good cause is not properly found where the asserted reasons for discharge are 'trivial, capricious, unrelated to business needs or goals, or pretextual.'

Where there is a contract to terminate only for good cause, the employer has no right to terminate for an arbitrary or unreasonable decision." (*Walker v. Blue Cross of California* (1992) 4 Cal.App.4th 985, 994 [6 Cal.Rptr.2d 184], internal citations omitted, abrogated on another ground in *Guz, supra*, 24 Cal.4th at p. 351.)

- "The general rule is that the measure of recovery by a wrongfully discharged employee is the amount of salary agreed upon for the period of service, less the amount which the employer affirmatively proves the employee has earned or with reasonable effort might have earned from other employment." (*Parker v. Twentieth Century-FoxFilm Corp.* (1970) 3 Cal.3d 176, 181 [89 Cal.Rptr. 737, 474 P.2d 689], internal citations omitted.)

Secondary Sources

Chin et al., Cal. Practice Guide: Employment Litigation ~~(The Rutter Group)~~ ¶¶ 4:2, 4:8, 4:15, 4:65, 4:81, 4:105, 4:270–4:273 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Contract Actions, §§ 8.4–8.20B

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, §§ 60.05, 60.07 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.90, 249.43, Ch. 250, *Employment Law: Wage and Hour Disputes*, § 250.66 (Matthew Bender)

5 California Points and Authorities, Ch. 50, *Contracts*, §§ 50.10, 50.11, 50.350 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, §§ 100.21, 100.22, 100.28, 100.29 (Matthew Bender)

California Civil Practice: Employment Litigation ~~(Thomson West)~~ §§ 6:9–6:11 (Thomson Reuters)

2402. Breach of Employment Contract—Unspecified Term—Constructive Discharge—Essential Factual Elements

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[*Name of plaintiff***] claims that [***name of defendant***] breached their employment contract by forcing [***name of plaintiff***] to resign. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] and [***name of defendant***] entered into an employment relationship. [An employment contract or a provision in an employment contract may be [written or oral/partly written and partly oral/created by the conduct of the parties]];**

2. **That [***name of defendant***] promised, by words or conduct, to discharge [***name of plaintiff***] only for good cause;**

3. **That [***name of plaintiff***] substantially performed [his/her] job duties [unless [***name of plaintiff***]'s performance was excused [or prevented]];**

4. **That [***name of defendant***] intentionally created or knowingly permitted working conditions to exist that were so intolerable that a reasonable person in [***name of plaintiff***]'s position would have had no reasonable alternative except to resign;**

5. **That [***name of plaintiff***] resigned because of the intolerable conditions; and**

6. **That [***name of plaintiff***] was harmed by the loss of employment.**

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

New September 2003

Directions for Use

The element of substantial performance should not be confused with the "good cause" defense: "The action is primarily for breach of contract. It was therefore incumbent upon plaintiff to prove that he was able and offered to fulfill all obligations imposed upon him by the contract. Plaintiff failed to meet this requirement; by voluntarily withdrawing from the contract he excused further performance by defendant." (*Kane v. Sklar* (1954) 122 Cal.App.2d 480, 482 [265 P.2d 29], internal citation omitted.) Element 3 may be deleted if substantial performance is not a disputed issue.

Sources and Authority

- At-Will Employment. Labor Code section 2922. ~~provides: "An employment, having no specified term, may be terminated at the will of either party on notice to the other. Employment for a specified~~

~~term means an employment for a period greater than one month."~~

- Contractual Conditions Precedent. Civil Code section 1439. ~~provides, in part: "Before any party to an obligation can require another party to perform any act under it, he must fulfill all conditions precedent thereto imposed upon himself; and must be able and offer to fulfill all conditions concurrent so imposed upon him on the like fulfillment by the other party ... ."~~

- "Where there is no express agreement, the issue is whether other evidence of the parties' conduct has a 'tendency in reason' to demonstrate the existence of an actual mutual understanding on particular terms and conditions of employment. If such evidence logically permits conflicting inferences, a question of fact is presented. But where the undisputed facts negate the existence or the breach of the contract claimed, summary judgment is proper." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 337 [100 Cal.Rptr.2d 352, 8 P.3d 1089], internal citations omitted.)

- The employee bears the ultimate burden of proving that he or she was wrongfully terminated. (*Pugh v. See's Candies, Inc.* (*Pugh I*) (1981) 116 Cal.App.3d 311, 330 [171 Cal.Rptr. 917].)

- "Standing alone, constructive discharge is neither a tort nor a breach of contact, but a doctrine that transforms what is ostensibly a resignation into a firing. Even after establishing constructive discharge, an employee must independently prove a breach of contract or tort in connection with employment termination in order to obtain damages for wrongful discharge." (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1251 [32 Cal.Rptr.2d 223, 876 P.2d 1022], internal citation omitted.)

- "The presumption that an employment relationship of indefinite duration is intended to be terminable at will is therefore 'subject, like any presumption, to contrary evidence. This may take the form of an agreement, express or implied, that ... the employment relationship will continue indefinitely, pending the occurrence of some event such as the employer's dissatisfaction with the employee's services or the existence of some "cause" for termination.' " (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 680 [254 Cal.Rptr. 211, 765 P.2d 373], internal citation omitted.)

- "In *Foley*, we identified several factors, apart from express terms, that may bear upon 'the existence and content of an ... [implied-in-fact] agreement' placing limits on the employer's right to discharge an employee. These factors might include "'the personnel policies or practices of the employer, the employee's longevity of service, actions or communications by the employer reflecting assurances of continued employment, and the practices of the industry in which the employee is engaged." ' " (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 336-337 [100 Cal.Rptr.2d 352, 8 P.3d 1089], internal citations omitted.)

- Civil Code sections 1619–1621 together provide as follows: "A contract is either express or implied. An express contract is one, the terms of which are stated in words. An implied contract is one, the existence and terms of which are manifested by conduct."

- " 'Good cause' or 'just cause' for termination connotes ' "a fair and honest cause or reason," ' regulated by the good faith of the employer. The term is relative. Whether good cause exists is dependent upon the particular circumstances of each case. In deciding whether good cause exists,

there must be a balance between the employer's interest in operating its business efficiently and profitably and the employee's interest in continued employment. Care must be exercised so as not to interfere with the employer's legitimate exercise of managerial discretion. While the scope of such discretion is substantial, it is not unrestricted. Good cause is not properly found where the asserted reasons for discharge are 'trivial, capricious, unrelated to business needs or goals, or pretextual.' Where there is a contract to terminate only for good cause, the employer has no right to terminate for an arbitrary or unreasonable decision." (*Walker v. Blue Cross of California* (1992) 4 Cal.App.4th 985, 994 [6 Cal.Rptr.2d 184], internal citations omitted, abrogated on another ground in *Guz, supra,* 24 Cal.4th at p. 351.)

- "Constructive discharge occurs when the employer's conduct effectively forces an employee to resign. Although the employee may say, 'I quit,' the employment relationship is actually severed involuntarily by the employer's acts, against the employee's will. As a result, a constructive discharge is legally regarded as a firing rather than a resignation." (*Turner, supra,* 7 Cal.4th at pp. 1245-1246, internal citation omitted.)

- "In order to amount to constructive discharge, adverse working conditions must be unusually 'aggravated' or amount to a 'continuous pattern' before the situation will be deemed intolerable. In general, '[s]ingle, trivial, or isolated acts of [misconduct] are insufficient' to support a constructive discharge claim. Moreover, a poor performance rating or a demotion, even when accompanied by reduction in pay, does not by itself trigger a constructive discharge." (*Turner, supra*, 7 Cal.4th at p. 1247, internal citation and fns. omitted.)

- "Whether conditions were so intolerable as to justify a reasonable employee's decision to resign is normally a question of fact." (*Valdez v. City of Los* Angeles (1991) 231 Cal.App.3d 1043, 1056 [282 Cal.Rptr. 726].)

- "In some circumstances, a single intolerable incident, such as a crime of violence against an employee by an employer, or an employer's ultimatum that an employee commit a crime, may constitute a constructive discharge. Such misconduct potentially could be found 'aggravated.' " (*Turner, supra,* 7 Cal.4th at p. 1247, fn. 3.)

- "[T]he standard by which a constructive discharge is determined is an objective one-the question is 'whether a reasonable person faced with the allegedly intolerable employer actions or conditions of employment would have no reasonable alternative except to quit.' " (*Turner, supra,* 7 Cal.4th at p. 1248, internal citations omitted.)

- "In order to establish a constructive discharge, an employee must plead and prove, by the usual preponderance of the evidence standard, that the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign. [¶] For purposes of this standard, the requisite knowledge or intent must exist on the part of either the employer or those persons who effectively represent the employer, i.e., its officers, directors, managing agents, or supervisory employees." (*Turner, supra,* 7 Cal.4th at p. 1251.)

- "The length of time the plaintiff remained on the job may be one relevant factor in determining the intolerability of employment conditions from the standpoint of a reasonable person. Neither logic nor precedent suggests it should always be dispositive." (*Turner, supra,* 7 Cal.4th at p. 1254.)

- "The general rule is that the measure of recovery by a wrongfully discharged employee is the amount of salary agreed upon for the period of service, less the amount which the employer affirmatively proves the employee has earned or with reasonable effort might have earned from other employment." (*Parker v. Twentieth Century-FoxFilm Corp.* (1970) 3 Cal.3d 176, 181 [89 Cal.Rptr. 737, 474 P.2d 689], internal citations omitted.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§223–227

Chin et al., Cal. Practice Guide: Employment Litigation ~~(The Rutter Group)~~ ¶¶ 4:2, 4:65, 4:81, 4:105, 4:405–4:407, 4:409–4:410, 4:270–4:273, 4:420, 4:422, 4:440 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Contract Actions, §§ 8.1–8.21

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline,* §§ 60.05, 60.07 (Matthew Bender)

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

California Civil Practice: Employment Litigation ~~(Thomson West)~~ §§ 6:9–6:11 (Thomson Reuters)

2403. Breach of Employment Contract—Unspecified Term—Implied-in-Fact Promise Not to Discharge Without Good Cause

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An employer promises to [discharge/demote] an employee only for good cause if it is reasonable for an employee to conclude, from the employer's words or conduct, that [he/she] will be [discharged/demoted] only for good cause.

In deciding whether [*name of defendant***] promised to [discharge/demote] [***name of plaintiff***] only for good cause, you may consider, among other factors, the following:**

(a) **[***Name of defendant***]'s personnel policies [and/or] practices;**

(b) **[***Name of plaintiff***]'s length of service;**

(c) **Any raises, commendations, positive evaluations, and promotions received by [***name of plaintiff***]; [and]**

(d) **Whether [***name of defendant***] said or did anything to assure [***name of plaintiff***] of continued employment; [and]**

(e) **[***Insert other relevant factor(s).***]**

Length of service, raises, and promotions by themselves are not enough to imply such a promise, although they are factors for you to consider.

New September 2003; Revised April 2009, June 2013

Directions for Use

This instruction should be read when an employee is basing his or her claim of wrongful discharge on an implied covenant not to terminate except for good cause. Only those factors that apply to the facts of the particular case should be read.

In certain cases, it may be necessary to instruct the jury that if it finds there is an at-will provision in an express written agreement, there may not be an implied agreement to the contrary. (See *Faigin v. Signature Group Holdings, Inc.* (2012) 211 Cal.App.4th 726, 739 [150 Cal.Rptr.3d 123] [there cannot be a valid express contract and an implied contract, each embracing the same subject, but requiring different results].)

Sources and Authority

- Express and Implied Contracts. Civil Code sections 1619-1621. ~~together provide as follows: "A contract is either express or implied. An express contract is one, the terms of which are stated in words. An implied contract is one, the existence and terms of which are manifested by conduct."~~

- "Labor Code section 2922 establishes a statutory presumption of at-will employment. However, an employer and an employee are free to depart from the statutory presumption and specify that the employee will be terminated only for good cause, either by an express, or an implied, contractual agreement." (*Stillwell v. The Salvation Army* (2008) 167 Cal.App.4th 360, 380 [84 Cal.Rptr.3d 111], internal citations omitted.)

- "[M]ost cases applying California law … have held that an at-will provision in an *express written agreement*, signed by the employee, *cannot* be overcome by proof of an implied contrary understanding." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 340 fn. 10 [100 Cal.Rptr.2d 352, 8 P.3d 1089], original italics.)

- "Where there is no express agreement, the issue is whether other evidence of the parties' conduct has a 'tendency in reason' to demonstrate the existence of an actual mutual understanding on particular terms and conditions of employment. If such evidence logically permits conflicting inferences, a question of fact is presented." (*Guz, supra*, 24 Cal.4th at p. 337, internal citations omitted.)

- "The question whether such an implied-in-fact agreement [to termination only for cause] exists is a factual question for the trier of fact unless the undisputed facts can support only one reasonable conclusion." (*Faigin, supra,* 211 Cal.App.4th at p. 739.)

- "In the employment context, factors apart from consideration and express terms may be used to ascertain the existence and content of an employment agreement, including 'the personnel policies or practices of the employer, the employee's longevity of service, actions or communications by the employer reflecting assurances of continued employment, and the practices of the industry in which the employee is engaged.' " (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 680 [254 Cal.Rptr. 211, 765 P.2d 373], internal citation omitted.)

- "[A]n employee's *mere* passage of time in the employer's service, even where marked with tangible indicia that the employer approves the employee's work, cannot *alone* form an implied-in-fact contract that the employee is no longer at will. Absent other evidence of the employer's intent, longevity, raises and promotions are their own rewards for the employee's continuing valued service; they do not, *in and of themselves*, additionally constitute a contractual guarantee of future employment security." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 341–342 [100 Cal.Rptr.2d 352, 8 P.3d 1089], original italics.)

- "We agree that disclaimer language in an employee handbook or policy manual does not necessarily mean an employee is employed at will. But even if a handbook disclaimer is not controlling in every case, neither can such a provision be ignored in determining whether the parties' conduct was intended, and reasonably understood, to create binding limits on an employer's statutory right to terminate the relationship at will. Like any direct expression of employer intent, communicated to employees and intended to apply to them, such language must be taken into account, along with all other pertinent evidence, in ascertaining the terms on which a worker was employed." (*Guz, supra,* 24 Cal.4th at p. 340, internal citations omitted.)

- "Conceptually, there is no rational reason why an employer's policy that its employees will not be

demoted except for good cause, like a policy restricting termination or providing for severance pay, cannot become an implied term of an employment contract. In each of these instances, an employer promises to confer a significant benefit on the employee, and it is a question of fact whether that promise was reasonably understood by the employee to create a contractual obligation." (*Scott v. Pac. Gas & Elec. Co.* (1995) 11 Cal.4th 454, 464 [46 Cal.Rptr.2d 427, 904 P.2d 834].)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 233, 237, 238

Chin et al., California~~.~~ Practice Guide: Employment Litigation, Ch. 4-B, *Agreements Limiting At–Will Termination*, ¶¶ 4:81, 4:105, 4:112 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Contract Actions, §§ 8.6–8.16

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.05[2][a]–[e] (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.01, 249.13, 249.15, 249.50 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, §§ 100.21, 100.22, 100.25–100.27, 100.29, 100.34 (Matthew Bender)

California Civil Practice: Employment Litigation §§ 6:14–6:16 (Thomson Reuters ~~West~~)

2406. Breach of Employment Contract—Unspecified Term—Damages

If you find that [*name of defendant***] [discharged/demoted] [***name of plaintiff***] in breach of an employment contract, then you must decide the amount of damages, if any, that [***name of plaintiff***] has proved [he/she] is entitled to recover. To make that decision, you must:**

1. **Decide the amount that [***name of plaintiff***] would have earned from [***name of defendant***] up to today, including any benefits and pay increases; [and]**

2. **Add the present cash value of any future wages and benefits that [he/she] would have earned after today for the length of time the employment with [***name of defendant***] was reasonably certain to continue; [and]**

3. **[***Describe any other contract damages that were allegedly caused by defendant's conduct.***]**

In determining the period that [*name of plaintiff***]'s employment was reasonably certain to have continued, you should consider, among other factors, the following:**

(a) [*Name of plaintiff***]'s age, work performance, and intent regarding continuing employment with [***name of defendant***];**

(b) [*Name of defendant***]'s prospects for continuing the operations involving [***name of plaintiff***]; and**

(c) Any other factor that bears on how long [*name of plaintiff***] would have continued to work.**

New September 2003; Revised December 2011

Directions for Use

For an instruction on mitigation, see CACI No. 2407, *Employee's Duty to Mitigate Damages*. This instruction should be given when plaintiff claims loss of employment from a wrongful discharge or demotion or a breach of the covenant of good faith and fair dealing. For instructions on present cash value, see CACI No. 3904A, *Present Cash Value*, and CACI No. 3904B, *Use of Present-Value Tables*.

Sources and Authority

- Damages for Breach of Contract. Civil Code section 3300.

- "The general rule is that the measure of recovery by a wrongfully discharged employee is the amount of salary agreed upon for the period of service, less the amount which the employer affirmatively proves the employee has earned or with reasonable effort might have earned from other employment. However, before projected earnings from other employment opportunities not sought or accepted by

the discharged employee can be applied in mitigation, the employer must show that the other employment was comparable, or substantially similar, to that of which the employee has been deprived; the employee's rejection of or failure to seek other available employment of a different or inferior kind may not be resorted to in order to mitigate damages." (*Parker v. Twentieth Century-Fox Film Corp.* (1970) 3 Cal.3d 176, 181-182 [89 Cal.Rptr. 737, 474 P.2d 689], internal citations omitted.)

- ~~Civil Code section 3300 provides: "For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom."~~

- "[I]t is our view that in an action for wrongful discharge, and pursuant to the present day concept of employer-employee relations, the term 'wages' should be deemed to include not only the periodic monetary earnings of the employee but also the other benefits to which he is entitled as a part of his compensation." (*Wise v. Southern Pac. Co.* (1970) 1 Cal.3d 600, 607 [83 Cal.Rptr. 202, 463 P.2d 426].)

- In determining the period that plaintiff's employment was reasonably certain to have continued, the trial court took into consideration plaintiff's " 'physical condition, his age, his propensity for hard work, his expertise in managing defendants' offices, the profit history of his operation, [and] the foreseeability of the continued future demand for tax return service to small taxpayers ... .' " (*Drzewiecki v. H & R Block, Inc.* (1972) 24 Cal.App.3d 695, 705 [101 Cal.Rptr. 169].)

- In cases for wrongful demotion, the measure of damages is "the difference in compensation before and after the demotion." (*Scott v. Pac. Gas & Elec. Co.* (1995) 11 Cal.4th 454, 468 [46 Cal.Rptr.2d 427, 904 P.2d 834].)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 267, 268

Chin et al., Cal. Practice Guide: Employment Litigation, Ch. 17-B, *Contract Damages*, ¶¶ 17:81, 17:95, 17:105 (The Rutter Group)

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.08[3] (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.01, 249.17, 249.50 (Matthew Bender)

2420. Breach of Employment Contract—Specified Term—Essential Factual Elements

[*Name of plaintiff*] claims that [*name of defendant*] breached an employment contract for a specified term. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of plaintiff*] and [*name of defendant*] entered into an employment contract that specified a length of time that [*name of plaintiff*] would remain employed;**

2. **That [*name of plaintiff*] substantially performed [his/her] job duties [unless [*name of plaintiff*]'s performance was excused [or prevented]];**

3. **That [*name of defendant*] breached the employment contract by [discharging/demoting] [*name of plaintiff*] before the end of the term of the contract; and**

4. **That [*name of plaintiff*] was harmed by the [discharge/demotion].**

New September 2003

Directions for Use

The element of substantial performance should not be confused with the "good cause" defense: "The action is primarily for breach of contract. It was therefore incumbent upon plaintiff to prove that he was able and offered to fulfill all obligations imposed upon him by the contract. Plaintiff failed to meet this requirement; by voluntarily withdrawing from the contract he excused further performance by defendant." (*Kane v. Sklar* (1954) 122 Cal.App.2d 480, 482 [265 P.2d 29], internal citation omitted.) Element 2 may be deleted if substantial performance is not an issue.

See also CACI No. 304, *Oral or Written Contract Terms*, and CACI No. 305, *Implied-in-Fact Contract.*

Sources and Authority

- At-Will Employment. Labor Code section 2922. ~~provides: "An employment, having no specified term, may be terminated at the will of either party on notice to the other. Employment for a specified term means employment for a period of greater than one month."~~

- Termination of Employment for Specified Term. Labor Code section 2924. ~~provides: "An employment for a specified term may be terminated at any time by the employer in case of any willful breach of duty by the employee in the course of his employment, or in case of his habitual neglect of his duty or continued incapacity to perform it."~~

- Contractual Conditions Precedent. Civil Code section 1439. ~~provides, in part: "Before any party to an obligation can require another party to perform any act under it, he must fulfill all conditions precedent thereto imposed upon himself; and must be able and offer to fulfill all conditions~~

~~concurrent so imposed upon him on the like fulfillment by the other party ... .”~~

- “[L]abor Code section 2924 has traditionally been interpreted to ‘inhibit[] the termination of employment for a specified term except in case of a wilful breach of duty, of habitual neglect of, or continued incapacity to perform, a duty.’ ” (*Khajavi v. Feather River Anesthesia Medical Group* (2000) 84 Cal.App.4th 32, 57 [100 Cal.Rptr.2d 627], internal citations omitted.)

- “Stated simply, the contract compensation for the unexpired period of the contract affords a prima facie measure of damages; the actual measured damage, however, is the contract amount reduced by compensation received during the unexpired term; if, however, such other compensation has not been received, the contract amount may still be reduced or eliminated by a showing that the employee, by the exercise of reasonable diligence and effort, could have procured comparable employment and thus mitigated the damages.” (*Erler v. Five Points Motors, Inc.* (1967) 249 Cal.App.2d 560, 562 [57 Cal.Rptr. 516].)

Secondary Sources

Chin et al., Cal~~.~~ ifornia Practice Guide: Employment Litigation ~~(The Rutter Group)~~ ¶¶ 4:2, 4:47 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Contract Actions, §§ 8.2–8.20

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, § 249.21 (Matthew Bender)

2421. Breach of Employment Contract—Specified Term—Good-Cause Defense (Lab. Code, § 2924)

[*Name of defendant***] claims that [he/she/it] did not breach the employment contract because [he/she/it] [discharged/demoted] [***name of plaintiff***] for good cause. To establish good cause, [***name of defendant***] must prove:**

[that [*name of plaintiff***] willfully breached a job duty] [or]**

[that [*name of plaintiff***] continually neglected [his/her] job duties] [or]**

[that a continued incapacity prevented [*name of plaintiff***] from performing [his/her] job duties.]**

New September 2003; Revised June 2012

Directions for Use

This instruction sets forth the statutory grounds under which an employer may terminate an employment contract for a specified term. (See Lab. Code, § 2924.) It should be given when the employee alleges wrongful discharge in breach of the contract and the employer defends by asserting plaintiff was justifiably discharged.

This instruction may not be appropriate if the parties have agreed to a particular meaning of "good cause" (e.g., a written employment agreement specifically defining "good cause" for discharge). (See *Uecker & Assocs. v. Lei* (*In re San Jose Med. Mgmt.*) (2007 B.A.P. 9th Cir.) 2007 Bankr. LEXIS 4829.) If so, the instruction should be modified to set forth the contractual grounds for good cause. In the absence of grounds for termination in the contract, the employer is limited to those set forth in the statute. (See *Khajavi v. Feather River Anesthesia Medical Group* (2000) 84 Cal.App.4th 32, 57 [100 Cal.Rptr.2d 627].)

The third option may not be asserted if the plaintiff has a statutory right to be absent from work (for example, for family or medical leave or to accommodate a disability) throughout the entire period of incapacity.

Sources and Authority

- At-Will Employment. Labor Code section 2922. ~~provides: "An employment, having no specified term, may be terminated at the will of either party on notice to the other. Employment for a specified term means employment for a period of greater than one month."~~

- Termination of Employment for Specified Term. Labor Code section 2924. ~~provides: "An employment for a specified term may be terminated at any time by the employer in case of any willful breach of duty by the employee in the course of his employment, or in case of his habitual neglect of~~

~~his duty or continued incapacity to perform it.”~~

- “[L]abor Code section 2924 has traditionally been interpreted to ‘inhibit[] the termination of employment for a specified term except in case of a wilful breach of duty, of habitual neglect of, or continued incapacity to perform, a duty.’ ” (*Khajavi v. Feather River Anesthesia Medical Group* (2000) 84 Cal.App.4th 32, 57 [100 Cal.Rptr.2d 627], internal citations omitted.)

- “Unlike a wrongful discharge based on an implied-in-fact contract, an employee who has a contract for a specified term may not be terminated prior to the term's expiration based on an honest but mistaken belief that the employee breached the contract: Such a right would treat a contract with a specified term no better than an implied contract that has no term; such a right would dilute the enforceability of the contract's specified term because an employee who had properly performed his or her contract could still be terminated before the term's end; and such a right would run afoul of the plain language of Labor Code section 2924, which allows termination of an employment for a specified term only ‘in case of any willful breach of duty . . . habitual neglect of . . . duty or continued incapacity to perform it.’ Termination of employment for a specified term, before the end of the term, based solely on the mistaken belief of a breach, cannot be reconciled with either the governing statute's text or settled principles of contract law.” (*Khajavi, supra*, 84 Cal.App.4th at pp. 38-39.)

- Good cause in the context of wrongful termination based on an implied contract “ ‘is quite different from the standard applicable in determining the propriety of an employee’s termination under a contract for a specified term.’ ” (*Khajavi, supra*, 84 Cal.App.4th at p. 58, internal citations omitted.)

- “An employer is justified in discharging his employee, when the latter fails to perform his duty, even though injury does not result to the employer as a result of the employee’s failure to do his duty.” (*Bank of America National Trust & Savings Ass’n v. Republic Productions, Inc.* (1941) 44 Cal.App.2d 651, 654 [112 P.2d 972], internal citation omitted.)

- “To terminate an employment without the expiration of its contractual term ‘there must be good cause.’ The grounds for terminating such an employment are stated in Labor Code section 2924. … It is therefore not every deviation of the employee from the standard of performance sought by his employer that will justify a discharge. There must be some ‘wilful act or wilful misconduct ...’ when the employee uses his best efforts to serve the interests of his employer.” (*Holtzendorff v. Housing Authority of the City of Los Angeles* (1967) 250 Cal.App.2d 596, 610 [58 Cal.Rptr. 886], internal citation omitted.)

- “ ‘Willful’ disobedience of a specific, peremptory instruction of the master, if the instruction be reasonable and consistent with the contract, is a breach of duty-a breach of the contract of service; and, like any other breach of the contract, of itself entitles the master to renounce the contract of employment.” (*May v. New York Motion Picture Corp.* (1920) 45 Cal.App. 396, 403 [187 P. 785].)

- “An employment agreement that specifies the length of employment (e.g., two years) limits the employer's right to discharge the employee within that period. Unless the agreement provides otherwise (e.g., by reserving the right to discharge for cause), the employer may terminate employment for a specified term only for [the grounds specified in Labor Code section 2924].” (Chin et al., California Practice Guide: Employment Litigation, Ch. 4-A, *Employment Presumed At Will*, ¶

4:47 (The Rutter Group)

Secondary Sources

Chin et al., California Practice Guide: Employment Litigation, Ch. 4-A, *Employment Presumed At Will*, ¶¶ 4:2, 4:47, 4:56, 4:57 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 4-B, *Agreements Limiting At-Will Termination*, ¶¶ 4:47, 4:56, 4:57 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Contract Actions, §§ 8.22–8.26

4 Wilcox, California Employment Law, Ch. 62, *Avoiding Wrongful Termination and Discipline Claims*, § 62.02 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.13, 249.21, 249.60–249.63 (Matthew Bender)

2422. Breach of Employment Contract—Specified Term—Damages

If you find that [*name of defendant***] [discharged/demoted] [***name of plaintiff***] in breach of an employment contract for a specified term, then you must decide the damages, if any, that [***name of plaintiff***] has proved [he/she] is entitled to recover. To make that decision, you must:**

1. **Decide the amount that [***name of plaintiff***] would have earned up to today, including any benefits and pay increases; [and]**

2. **Add the present cash value of any future wages and benefits that [he/she] would have earned up to the end of the term of the contract; [and]**

3. **[***Describe any other contract damages that were allegedly caused by defendant's conduct.***]**

[If you find that [*name of plaintiff***] would have exercised [his/her] option to extend the term of the employment contract, then you may consider the total term of [***name of plaintiff***]'s employment contract to be [***specify length of original contract term plus option term***].]**

New September 2003

Directions for Use

Use CACI No. 2407, *Employee's Duty to Mitigate Damages*, if the defendant seeks an offset for wages plaintiff could have earned from similar employment.

Sources and Authority

- Damages for Breach of Contract. Civil Code section 3300. ~~provides: "For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom."~~

- "Stated simply, the contract compensation for the unexpired period of the contract affords a prima facie measure of damages; the actual measured damage, however, is the contract amount reduced by compensation received during the unexpired term; if, however, such other compensation has not been received, the contract amount may still be reduced or eliminated by a showing that the employee, by the exercise of reasonable diligence and effort, could have procured comparable employment and thus mitigated the damages." (*Erler v. Five Points Motors, Inc.* (1967) 249 Cal.App.2d 560, 562 [57 Cal.Rptr. 516].)

- In appropriate circumstances, the court may authorize the trier of fact to "consider the probability the employee would exercise the option in determining the length of the unexpired term of employment when applying the applicable measure of damages ... ." (*Oldenkott v. American Electric, Inc.* (1971)

14 Cal.App.3d 198, 204 [92 Cal.Rptr. 127].)

- "The trial court correctly found that defendants wrongfully terminated the employment contract and that the measure of damages was the difference between the amount Silva would have received under the contract and that amount which Silva actually received from his other employment." (*Silva v. McCoy* (1968) 259 Cal.App.2d 256, 260 [66 Cal.Rptr. 364].)

- "The plaintiff has the burden of proving his damage. The law is settled that he has the duty of minimizing that damage. While the contract wages are prima facie [evidence of] his damage, his actual damage is the amount of money he was out of pocket by reason of the wrongful discharge." (*Erler v. Five Points Motors, Inc., supra,* 249 Cal.App.2d at pp. 567-568.)

- "The burden of proof is on the party whose breach caused damage, to establish matters relied on to mitigate damage." (*Steelduct Co. v. Henger-Seltzer Co.* (1945) 26 Cal.2d 634, 654 [160 P.2d 804], internal citations omitted.)

Secondary Sources

Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group) ¶¶ 17:81, 17:95, 17:105, 17:495

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline,* § 249.21 (Matthew Bender)

2423. Breach of the Implied Covenant of Good Faith and Fair Dealing—Essential Factual Elements

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

1. **That [***name of plaintiff***] and [***name of defendant***] entered into an employment relationship;**

2. **That [***name of plaintiff***] substantially performed [his/her] job duties [unless [***name of plaintiff***]'s performance was excused [or prevented]];**

3. **That [***name of defendant***] [***specify conduct that plaintiff claims prevented him/her from receiving the benefits that he/she was entitled to have received under the contract***];**

4. **That [***name of defendant***]'s conduct was a failure to act fairly and in good faith; and**

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

Both parties to an employment relationship have a duty not to do anything that prevents the other party from receiving the benefits of their agreement. Good faith means honesty of purpose without any intention to mislead or to take unfair advantage of another. Generally speaking, it means being faithful to one's duty or obligation.

New September 2003

Directions for Use

If the existence of a contract is at issue, see instructions on contract formation in the 300 series.

This instruction must be completed by inserting an explanation of the conduct that violated the duty to act in good faith.

The element of substantial performance should not be confused with the "good cause" defense: "The action is primarily for breach of contract. It was therefore incumbent upon plaintiff to prove that he was able and offered to fulfill all obligations imposed upon him by the contract. Plaintiff failed to meet this requirement; by voluntarily withdrawing from the contract he excused further performance by defendant." (*Kane v. Sklar* (1954) 122 Cal.App.2d 480, 482 [265 P.2d 29], internal citation omitted.) Element 2 may be deleted if substantial performance is not an issue.

Do not give this instruction if the alleged breach is only the termination of an at-will contract. (See *Eisenberg v. Alameda Newspapers* (1999) 74 Cal.App.4th 1359, 1391 [88 Cal.Rptr.2d 802].)

Sources and Authority

- Contractual Conditions Precedent. Civil Code section 1439.

- ~~Restatement Second of Contracts, section 205, provides: "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." Comment (a) to this section provides, in part: "The phrase 'good faith' is used in a variety of contexts, and its meaning varies somewhat with the context. Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving 'bad faith' because they violate community standards of decency, fairness or reasonableness. The appropriate remedy for a breach of the duty of good faith also varies with the circumstances."~~

- ~~Civil Code section 1439 provides, in part: "Before any party to an obligation can require another party to perform any act under it, he must fulfill all conditions precedent thereto imposed upon himself; and must be able and offer to fulfill all conditions concurrent so imposed upon him on the like fulfillment by the other party ... ."~~

- "We therefore conclude that the employment relationship is not sufficiently similar to that of insurer and insured to warrant judicial extension of the proposed additional tort remedies in view of the countervailing concerns about economic policy and stability, the traditional separation of tort and contract law, and finally, the numerous protections against improper terminations already afforded employees." (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 693 [254 Cal.Rptr. 211, 765 P.2d 373].)

- "The covenant of good faith and fair dealing, implied by law in every contract, exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive the benefits of the agreement actually made. The covenant thus cannot ' "be endowed with an existence independent of its contractual underpinnings." ' It cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 349-350 [100 Cal.Rptr.2d 352, 8 P.3d 1089], internal citations omitted.)

- "A breach of the contract may also constitute a breach of the implied covenant of good faith and fair dealing. But insofar as the employer's acts are directly actionable as a breach of an implied-in-fact contract term, a claim that merely realleges that breach as a violation of the covenant is superfluous. This is because, as we explained at length in *Foley*, the remedy for breach of an employment agreement, including the covenant of good faith and fair dealing implied by law therein, is solely contractual. In the employment context, an implied covenant theory affords no separate measure of recovery, such as tort damages." (*Guz, supra,* 24 Cal.4th at p. 352, internal citation omitted.)

- "Where there is no underlying contract there can be no duty of good faith arising from the implied covenant." (*Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 819 [85 Cal.Rptr.2d 459].)

- "We do not suggest the covenant of good faith and fair dealing has no function whatever in the interpretation and enforcement of employment contracts. As indicated above, the covenant prevents a party from acting in bad faith to frustrate the contract's actual benefits. Thus, for example, the

covenant might be violated if termination of an at-will employee was a mere pretext to cheat the worker out of another contract benefit to which the employee was clearly entitled, such as compensation already earned." (*Guz, supra*, 24 Cal.4th at p. 353, fn. 18.)

- "The reason for an employee's dismissal and whether that reason constitutes bad faith are evidentiary questions most properly resolved by the trier of fact." (*Luck v. Southern Pacific Transportation Co.* (1990) 218 Cal.App.3d 1, 26 [267 Cal.Rptr. 618], internal citations omitted.)

Secondary Sources

Chin et al., Cal.–ifornia Practice Guide: Employment Litigation (The Rutter Group) ¶¶ 4:330, 4:331, 4:340, 4:343, 4:346 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Contract Actions, §§ 8.27–8.28

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, §§ 60.02[2][c], 60.06 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, § 249.14 (Matthew Bender)

California Civil Practice: Employment Litigation (Thomson West) §§ 6:21–6:22 (Thomson Reuters)

2433. Wrongful Discharge in Violation of Public Policy—Damages

If you find that [*name of defendant***] [discharged/constructively discharged] [***name of plaintiff***] in violation of public policy, then you must decide the amount of damages that [***name of plaintiff***] has proven [he/she] is entitled to recover, if any. To make that decision, you must:**

1. **Decide the amount that [***name of plaintiff***] would have earned up to today, including any benefits and pay increases; [and]**

2. **Add the present cash value of any future wages and benefits that [he/she] would have earned for the length of time the employment with [***name of defendant***] was reasonably certain to continue; [and]**

3. **[Add damages for [***describe any other damages that were allegedly caused by defendant's conduct, e.g., "emotional distress"***] if you find that [***name of defendant***]'s conduct was a substantial factor in causing that harm.]**

In determining the period that [*name of plaintiff***]'s employment was reasonably certain to have continued, you should consider such things as:**

(a) **[***Name of plaintiff***]'s age, work performance, and intent regarding continuing employment with [***name of defendant***];**

(b) **[***Name of defendant***]'s prospects for continuing the operations involving [***name of plaintiff***]; and**

(c) **Any other factor that bears on how long [***name of plaintiff***] would have continued to work.**

New September 2003

Directions for Use

This instruction should be followed by CACI No. 2407, *Employee's Duty to Mitigate Damages,* in cases where the employee's duty to mitigate damages is at issue.

Other types of tort damages may be available to a plaintiff. For an instruction on emotional distress damages, see CACI No. 3905A, *Physical Pain, Mental Suffering, and Emotional Distress (Noneconomic Damage).* See punitive damages instructions in the damages section (CACI No. 3940 et seq.).

Sources and Authority

- Standard for Punitive Damages. Civil Code section 3294(a).

- Employer Liability for Punitive Damages. Civil Code section 3294(b).

- A tortious termination subjects the employer to " 'liability for compensatory and punitive damages under normal tort principles.' " (*Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1101 [4 Cal.Rptr.2d 874, 824 P.2d 680], internal citation omitted.)

- "The general rule is that the measure of recovery by a wrongfully discharged employee is the amount of salary agreed upon for the period of service, less the amount which the employer affirmatively proves the employee has earned or with reasonable effort might have earned from other employment." (*Parker v. Twentieth Century-FoxFilm Corp.* (1970) 3 Cal.3d 176, 181 [89 Cal.Rptr. 737, 474 P.2d 689], internal citations omitted; see *Smith v. Brown-Forman Distillers Corp.* (1987) 196 Cal.App.3d 503, 518 [241 Cal.Rptr. 916].)

- "A plaintiff may recover for detriment reasonably certain to result in the future. While there is no clearly established definition of 'reasonable certainty,' evidence of future detriment has been held sufficient based on expert medical opinion which considered the plaintiff's particular circumstances and the expert's experience with similar cases." (*Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 995 [16 Cal.Rptr.2d 787], internal citations omitted, disapproved of on another ground in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664 [25 Cal.Rptr.2d 109, 863 P.2d 179].)

- "[I]t is our view that in an action for wrongful discharge, and pursuant to the present day concept of employer-employee relations, the term 'wages' should be deemed to include not only the periodic monetary earnings of the employee but also the other benefits to which he is entitled as a part of his compensation." (*Wise v. Southern Pac. Co.* (1970) 1 Cal.3d 600, 607 [83 Cal.Rptr. 202, 463 P.2d 426].)

- In determining the period that plaintiff's employment was reasonably certain to have continued, the trial court took into consideration plaintiff's " 'physical condition, his age, his propensity for hard work, his expertise in managing defendants' offices, the profit history of his operation, [and] the foreseeability of the continued future demand for tax return service to small taxpayers ... .' " (*Drzewiecki v. H & R Block, Inc.* (1972) 24 Cal.App.3d 695, 705 [101 Cal.Rptr. 169].)

- ~~Civil Code section 3294(a) allows a plaintiff to seek punitive damages "for the breach of an obligation not arising from contract" when the plaintiff can show by "clear and convincing evidence" that a defendant "has been guilty of oppression, fraud, or malice."~~

- ~~Civil Code section 3294(b) provides: "An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights and safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation."~~

- In adding subdivision (b) to section 3294 in 1980, "[t]he drafters' goals were to avoid imposing punitive damages on employers who were merely negligent or reckless and to distinguish ordinary respondeat superior liability from corporate liability for punitive damages." (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572 [88 Cal.Rptr.2d 19, 981 P.2d 944], see *Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1150-1151 [74 Cal.Rptr.2d 510].)

Secondary Sources

Chin et al., Cal~~.~~ifornia Practice Guide: Employment Litigation ~~(The Rutter Group)~~ ¶¶ 17:237, 17:362, 17:365 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Public Policy Violations, §§ 5.64–5.67

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.08[2] (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.18, 249.50–249.55, 249.80–249.81, 249.90 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, §§ 100.41–100.59 (Matthew Bender)

2440. False Claims Act: Whistleblower Protection—Essential Factual Elements (Gov. Code, § 12653)

[*Name of plaintiff***] claims that [***name of defendant***] discharged [him/her] because [he/she] acted [in furtherance of a false claims action/ to stop a false claim by [***name of false claimant***]]. A false claims action is a lawsuit against a person or entity that is alleged to have submitted a false claim to a government agency for payment or approval. A false claim is a claim for payment with the intent to defraud the government. In order to establish [his/her] unlawful discharge claim, [***name of plaintiff***] must prove all of the following:**

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

2. **That [***name of false claimant***] was alleged to have defrauded the government of money, property, or services by submitting a false or fraudulent claim to the government for payment or approval;**

3. **That [***name of plaintiff***] [***specify acts done in furthering the false claims action or to stop a false claim***];**

4. **That [***name of plaintiff***] acted [in furtherance of a false claims action/to stop a false claim];**

5. **That [***name of defendant***] discharged [***name of plaintiff***];**

6. **That [***name of plaintiff***]'s acts [in furtherance of a false claims action/to stop a false claim] were a substantial motivating reason for [***name of defendant***]'s decision to discharge [him/her];**

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

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

[An act is "in furtherance of" a false claims action if

[[*name of plaintiff***] actually filed a false claims action [himself/herself].]**

[*or***]**

[someone else filed a false claims action but [*name of plaintiff***] [***specify acts in support of action, e.g., gave a deposition in the action***], which resulted in the retaliatory acts.]**

[*or***]**

[no false claims action was ever actually filed, but [*name of plaintiff***] had reasonable suspicions of a false claim, and it was reasonably possible for [***name of plaintiff***]'s conduct to lead to a false claims action.]**

The potential false claims action need not have turned out to be meritorious. [*Name of plaintiff*] need only show a genuine and reasonable concern that the government was being defrauded.]

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

Directions for Use

The whistle-blower protection statute of the False Claims Act (Gov. Code, § 12653) prohibits adverse employment actions against an employee who either (1) takes steps in furtherance of a false claims action or (2) makes efforts to stop a false claim violation. (See Gov. Code, § 12653(a).)

The second sentence of the opening paragraph defines a false claims action in its most common form: a lawsuit against someone who has submitted a false claim for payment. (See Gov. Code, § 12651(a)(1).) This sentence and element 2 may be modified if a different prohibited act is involved. (See Gov. Code, § 12651(a)(2)–(8).)

In element 3, specify the steps that the plaintiff took that are alleged to have led to the adverse action.

The statute reaches a broad range of adverse employment actions short of actual discharge. (See Gov. Code, § 12653(a).) Elements 5 and 6 may be modified to allege constructive discharge or adverse acts other than actual discharge. See CACI No. 2509, *"Adverse Employment Action" Explained*, and CACI No. 2510, *"Constructive Discharge" Explained*, for instructions under the Fair Employment and Housing Act that may be adapted for use with this instruction.

Element 6 uses the term "substantial motivating reason" to express both intent and causation between the employee's actions and the discharge. "Substantial motivating reason" has been held to be the appropriate standard under the Fair Employment and Housing Act to address the possibility of both discriminatory and nondiscriminatory motives. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; CACI No. 2507, *"Substantial Motivating Reason" Explained*.) Whether the FEHA standard applies to cases under the False Claims Act has not been addressed by the courts.

Give the last part of the instruction if the claim is that the plaintiff was discharged for acting in furtherance of a false claims action.

Sources and Authority

- False Claims Act: Whistleblower Protection. Government Code section 12653~~. provides:~~

  ~~(a) Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of his or her employment because of lawful acts done by the employee, contractor, agent, or associated others in furtherance of an action under this section or other~~

~~efforts to stop one or more violations of this article.~~

~~(b) Relief under this section shall include reinstatement with the same seniority status that the employee, contractor, or agent would have had but for the discrimination, two times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, and where appropriate, punitive damages. The defendant shall also be required to pay litigation costs and reasonable attorneys' fees. An action under this section may be brought in the appropriate superior court of the state.~~

~~(c) A civil action under this section shall not be brought more than three years after the date when the retaliation occurred.~~

- "The False Claims Act prohibits a 'person' from defrauding the government of money, property, or services by submitting to the government a 'false or fraudulent claim' for payment." (*Cordero-Sacks v. Housing Authority of City of Los Angeles* (2011) 200 Cal.App.4th 1267, 1273 [134 Cal.Rptr.3d 883].)

- "To establish a prima facie case, a plaintiff alleging retaliation under the CFCA must show: '(1) that he or she engaged in activity protected under the statute; (2) that the employer knew the plaintiff engaged in protected activity; and (3) that the employer discriminated against the plaintiff because he or she engaged in protected activity.' " (*McVeigh v. Recology San Francisco* (2013) 213 Cal.App.4th 443, 455 [152 Cal.Rptr.3d 595].)

- " 'As a statute obviously designed to prevent fraud on the public treasury, [Government Code] section 12653 plainly should be given the broadest possible construction consistent with that purpose.' " (*McVeigh, supra,* 213 Cal.App.4th at p. 456.)

- "The False Claims Act bans retaliatory discharge in section 12653, which speaks not of a 'person' being liable for defrauding the government, but of an 'employer' who retaliates against an employee who assists in the investigation or pursuit of a false claim. Section 12653 has been 'characterized as the whistleblower protection provision of the [False Claims Act and] is construed broadly.' " (*Cordero-Sacks, supra,* 200 Cal.App.4th at p. 1274.)

- "[T]he act's retaliation provision applies not only to qui tam actions but to false claims in general. Section 12653 makes it unlawful for an employer to retaliate against an employee who is engaged 'in furthering a false claims action, including investigation for, initiation of, testimony for, or assistance in, an action filed or to be filed under Section 12652.' " (*Cordero-Sacks, supra,* 200 Cal.App.4th at p. 1276.)

- "Generally, to constitute protected activity under the CFCA, the employee's conduct must be in furtherance of a false claims action. The employee does not have to file a false claims action or show a false claim was actually made; however, the employee must have reasonably based suspicions of a false claim and it must be reasonably possible for the employee's conduct to lead to a false claims action." (*Kaye v. Board of Trustees of San Diego County Public Law Library* (2009) 179 Cal.App.4th 48, 60 [101 Cal.Rptr.3d 456], internal citation omitted.)

- "We do not construe *Kaye's* requirement that it be 'reasonably possible for [the employee's conduct] to lead to a false claims action' to mean that a plaintiff is not protected under the CFCA unless he or she has discovered grounds for a *meritorious* false claim action. … [T]he plaintiff need only show a genuine and reasonable concern that the government was possibly being defrauded in order to establish that he or she engaged in protected conduct. Any more limiting construction or significant burden would deny whistleblowers the broad protection the CFCA was intended to provide." (*McVeigh, supra*, 213 Cal.App.4th at pp. 457−458, original italics.)

- "There is a dearth of California authority discussing what constitutes protected activity under the CFCA. However, because the CFCA is patterned on a similar federal statute (31 U.S.C. § 3729 et seq.), we may rely on cases interpreting the federal statute for guidance in interpreting the CFCA. (*Kaye, supra*, 179 Cal.App.4th at pp. 59–60.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, § 288

5 Witkin, Summary of California Law (10th ed. 2005) Torts, § 767

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

40 California Forms of Pleading and Practice, Ch. 468, *Public Entities and Officers: False Claims Actions*, § 468.25 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Public Entities and Officers: False Claims Actions*, § 100.61 (Matthew Bender)

2501. Affirmative Defense—Bona fide Occupational Qualification

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[*Name of defendant***] claims that [his/her/its] decision to [discharge/[***other adverse employment action***]] [***name of plaintiff***] was lawful because [he/she/it] was entitled to consider [***protected status—for example, race, gender, or age***] as a job requirement. To succeed, [***name of defendant***] must prove all of the following:**

1. **That the job requirement was reasonably necessary for the operation of [***name of defendant***]'s business;**

2. **That [***name of defendant***] had a reasonable basis for believing that substantially all [***members of protected group***] are unable to safely and efficiently perform that job;**

3. **That it was impossible or highly impractical to consider whether each [applicant/employee] was able to safely and efficiently perform the job; and**

4. **That it was impossible or highly impractical for [***name of defendant***] to rearrange job responsibilities to avoid using [***protected status***] as a job requirement.**

New September 2003

Directions for Use

An employer may assert the bona fide occupational qualification (BFOQ) defense where the employer has a practice that on its face excludes an entire group of individuals because of their protected status.

Sources and Authority

- Bona fide Ocuupational Qualifcation. Government Code section 12940(a)(1) ~~provides that certain discriminatory employment practices are unlawful "unless based upon a bona fide occupational qualification."~~

- Bona fide Occupational Qualification. ~~The Fair Employment and Housing Commission's regulations provide: "Where an employer ... has a practice which on its face excludes an entire group of individuals on a basis enumerated in the [FEHA], ... the employer ... must prove that the practice is justified because all or substantially all of the excluded individuals are unable to safely and efficiently perform the job in question and because the essence of the business operation would otherwise be undermined." (~~Cal. Code Regs., tit. 2, § 7286.7(a).~~)~~

- Bona fide Occupational Qualification Under Federal Law. ~~Federal title VII provides that "a bona fide occupational qualification [is] reasonably necessary to the normal operation of [the] particular business or enterprise." (~~42 U.S.C. § 2000e-2(e)(1).~~)~~

- The BFOQ defense is a narrow exception to the general prohibition on discrimination. (*Bohemian*

Club v. Fair Employment & Housing Com. (1986) 187 Cal.App.3d 1, 19 [231 Cal.Rptr. 769]; *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW v. Johnson Controls, Inc.* (1991) 499 U.S. 187, 201 [111 S.Ct. 1196, 113 L.Ed.2d 158].)

- " '[I]n order to rely on the bona fide occupational qualification exception an employer has the burden of proving that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved.' " (*Bohemian Club, supra,* 187 Cal.App.3d at p. 19, quoting *Weeks v. Southern Bell Telephone & Telegraph Co.* (5th Cir. 1969) 408 F.2d 228, 235.)

- "First, the employer must demonstrate that the occupational qualification is 'reasonably necessary to the normal operation of [the] particular business.' Secondly, the employer must show that the categorical exclusion based on [the] protected class characteristic is justified, i.e., that 'all or substantially all' of the persons with the subject class characteristic fail to satisfy the occupational qualification." (*Johnson Controls, Inc. v. Fair Employment & Housing Com.* (1990) 218 Cal.App.3d 517, 540 [267 Cal.Rptr. 158], quoting *Weeks, supra,* 408 F.2d at p. 235.)

- "Even if an employer can demonstrate that certain jobs require members of one sex, the employer must also 'bear the burden of proving that because of the nature of the operation of the business they could not rearrange job responsibilities ...' in order to reduce the BFOQ necessity." (*Johnson Controls, Inc., supra,* 218 Cal.App.3d at p. 541; see *Hardin v. Stynchcomb* (11th Cir. 1982) 691 F.2d 1364, 1370–1371.)

- "Alternatively, the employer could establish that age was a legitimate proxy for the safety-related job qualifications by proving that it is 'impossible or highly impractical' to deal with the older employees on an individualized basis." (*Western Airlines, Inc. v. Criswell* (1985) 472 U.S. 400, 414–415 [105 S.Ct. 2743, 86 L.Ed.2d 321], internal citation and footnote omitted.)

- "The Fair Employment and Housing Commission has interpreted the BFOQ defense in a manner incorporating all of the federal requirements necessary for its establishment. ... [¶] The standards of the Commission are ... in harmony with federal law regarding the availability of a BFOQ defense." (*Bohemian Club, supra,* 187 Cal.App.3d at p. 19.)

- "By modifying 'qualification' with 'occupational,' Congress narrowed the term to qualifications that affect an employee's ability to do the job." (*International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, supra,* 499 U.S. at p. 201.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 925

Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group) ¶¶ 9:2380, 9:2382, 9:2400, 9:2430

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Sexual Harassment, §§ 2.91–2.94

2 Wilcox, California Employment Law, Ch. 41, *Civil Actions Under Equal Employment Opportunity Laws*, §§ 41.94[3], 41.108 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.54[4], 115.101 (Matthew Bender)

California Civil Practice: Employment Litigation ~~(Thomson West)~~ § 2:84 (Thomson Reuters)

2502. Disparate Impact—Essential Factual Elements (Gov. Code, § 12940(a))

[*Name of plaintiff***] claims that [***name of defendant***] had [an employment practice/a selection policy] that wrongfully discriminated against [him/her]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was [an employer/[***other covered entity***]];**

2. **That [***name of plaintiff***] [was an employee of [***name of defendant***]/applied to [***name of defendant***] for a job/[***other covered relationship to defendant***]];**

3. **That [***name of defendant***] had [an employment practice of [***describe practice***]/a selection policy of [***describe policy***]] that had a disproportionate adverse effect on [***describe protected group-for example, persons over the age of 40***];**

4. **That [***name of plaintiff***] is [***protected status***];**

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

6. **That [***name of defendant***]'s [employment practice/selection policy] was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003; Revised June 2011

Directions for Use

This instruction is intended for disparate impact employment discrimination claims. Disparate impact occurs when an employer has an employment practice that appears neutral but has an adverse impact on members of a protected group and cannot be justified by business necessity.

If element 1 is given, the court may need to instruct the jury on the statutory definition of "employer" under the FEHA. Other covered entities under the FEHA include labor organizations, employment agencies, and apprenticeship training programs. (See Gov. Code, § 12940(a)–(d).)

The court should consider instructing the jury on the meaning of "adverse impact," tailored to the facts of the case and the applicable law.

Sources and Authority

- Discrimination Prohibited Under Fair Employment and Housing Act. Government Code section 12940(a). ~~provides that it is an unlawful employment practice "[f]or an employer, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, or sexual orientation of any person, to refuse to hire or employ the person or to refuse to select the~~

~~person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment."~~

- Disparate Impact May Prove Age Discrimination. Government Code section 12941.1. ~~expresses the Legislature's rejection of the opinion in *Marks v. Loral Corp.* (1997) 57 Cal.App.4th 30 [68 Cal.Rptr.2d 1] and states, in part: "The Legislature declares its intent that the use of salary as the basis for differentiating between employees when terminating employment may be found to constitute age discrimination if use of that criterion adversely impacts older workers as a group, and further declares its intent that the disparate impact theory of proof may be used in claims of age discrimination."~~

- Justification for Disparate Impact. ~~The California Fair Employment and Housing Commission's regulations state: "Where an employer or other covered entity has a facially neutral practice which has an adverse impact (i.e., is discriminatory in effect), the employer or other covered entity must prove that there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business and that the challenged practice effectively fulfills the business purpose it is supposed to serve. The practice may still be impermissible where it is shown that there exists an alternative practice which would accomplish the business purpose equally well with a lesser discriminatory impact." (~~Cal. Code Regs., tit. 2, §§ ~~7286.7~~11010(b), 11017(a), (e).~~)~~

- ~~The California Fair Employment and Housing Commission's regulations state: "Any policy or practice of an employer or other covered entity which has an adverse impact on employment opportunities of individuals on a basis enumerated in the Act is unlawful unless the policy or practice is job-related. ... A testing device or other means of selection which is facially neutral, but which has an adverse impact (as described in the Uniform Guidelines on Employee Selection Procedures (29 CFR 1607 (1978)) upon persons on a basis enumerated in the Act, is permissible only upon a showing that the selection practice is sufficiently related to an essential function of the job in question to warrant its use." (Cal. Code Regs., tit. 2, § 7287.4(a), (e).)~~

- "Prohibited discrimination may ... be found on a theory of disparate impact, i.e., that regardless of motive, a *facially neutral* employer practice or policy, bearing no manifest relationship to job requirements, *in fact* had a disproportionate adverse effect on members of the protected class." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354, fn. 20 [100 Cal.Rptr.2d 352, 8 P.3d 1089], internal citations omitted.)

- "A 'disparate impact' plaintiff ... may prevail without proving intentional discrimination ... [However,] a disparate impact plaintiff 'must not merely prove circumstances raising an inference of discriminatory impact; he must prove the discriminatory impact at issue.' " (*Ibarbia v. Regents of the University of California* (1987) 191 Cal.App.3d 1318, 1329–1330 [237 Cal.Rptr. 92], quoting *Lowe v. City of Monrovia* (9th Cir. 1985) 775 F.2d 998, 1004.)

- " 'To establish a prima facie case of discrimination, a plaintiff must show that the facially neutral employment practice had a significantly discriminatory impact. If that showing is made, the employer must then demonstrate that "any given requirement [has] a manifest relationship to the employment in question," in order to avoid a finding of discrimination ... Even in such a case, however, the plaintiff may prevail, if he shows that the employer was using the practice as a mere pretext for

discrimination.' " (*City and County of San Francisco v. Fair Employment and Housing Com.* (1987) 191 Cal.App.3d 976, 985 [236 Cal.Rptr. 716], quoting *Connecticut v. Teal* (1982) 457 U.S. 440, 446-447 [102 S.Ct. 2525, 73 L.Ed.2d 130], internal citation omitted.)

- Under federal title VII, a plaintiff may establish an unlawful employment practice based on disparate impact in one of two ways: (1) the plaintiff demonstrates that a defendant uses a particular employment practice that causes a disparate impact on the basis of a protected status, and the defendant "fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity"; or (2) the plaintiff demonstrates that there is an alternative employment practice with less adverse impact, and the defendant "refuses to adopt such alternative employment practice." (42 U.S.C. § 2000e-2(k)(1)(A).)

Secondary Sources

Chin et al., California Practice Guide: Employment Litigation, Ch. 4-A, *Employment Presumed At Will*, ¶ 4:25 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 7-A, *Title VII And The California Fair Employment And Housing Act*, ¶¶ 7:530, 7:531, 7:535 (The Rutter Group)
1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, § 2.65

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.21 (Matthew Bender)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01[2][c] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.23[4] (Matthew Bender)

California Civil Practice: Employment Litigation, § 2:23 (Thomson Reuters ~~West~~)

2503. Affirmative Defense—Business Necessity/Job Relatedness

[*Name of defendant***] claims that the [employment practice/selection policy] is lawful because it is necessary to [his/her/its] business. To succeed, [***name of defendant***] must prove both of the following:**

1. **That the purpose of the [employment practice/selection policy] is to operate the business safely and efficiently; and**

2. **That the [employment practice/selection policy] substantially accomplishes this business purpose.**

New September 2003

Directions for Use

The defense of business necessity is available for disparate impact claims but may not be used as a defense against a claim of intentional discrimination.

CACI No. 2504, *Disparate Impact—Rebuttal to Business Necessity/Job Relatedness Defense*, must be given if defendant asserts the defense of business necessity to a disparate impact employment discrimination claim.

Sources and Authority

- Justification of Disparate Impact. ~~The California Fair Employment and Housing Commission's regulations provide: "Where an employer or other covered entity has a facially neutral practice which has an adverse impact (i.e., is discriminatory in effect), the employer or other covered entity must prove that there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business and that the challenged practice effectively fulfills the business purpose it is supposed to serve. The practice may still be impermissible where it is shown that there exists an alternative practice which would accomplish the business purpose equally well with a lesser discriminatory impact." (~~Cal. Code Regs., tit. 2, §§ ~~7286.7~~11010(b), 11017(a), (e)~~.~~)

- ~~The California Fair Employment and Housing Commission's regulations provide: "Any policy or practice of an employer or other covered entity which has an adverse impact on employment opportunities of individuals on a basis enumerated in the Act is unlawful unless the policy or practice is job-related ... . A testing device or other means of selection which is facially neutral, but which has an adverse impact (as described in the Uniform Guidelines on Employee Selection Procedures (29 CFR 1607 (1978)) upon persons on a basis enumerated in the Act, is permissible only upon a showing that the selection practice is sufficiently related to an essential function of the job in question to warrant its use." (Cal. Code Regs., tit. 2, § 7287.4(a), (e).)~~

- "In order to meet its burden the [employer] must demonstrate a business necessity for use of the [discriminatory employment practice] ... . 'The test is whether there exists an overriding legitimate

business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any [discriminatory] impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact.' " (*City and County of San Francisco v. Fair Employment and Housing Com.* (1987) 191 Cal.App.3d 976, 989-990 [236 Cal.Rptr. 716], quoting *Robinson v. Lorillard Corp.* (4th Cir. 1971) 444 F.2d 791, 798.)

- The federal Civil Rights Act of 1991 states that one of its purposes is "to codify the concepts of 'business necessity' and 'job related' enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) [91 S.Ct. 849, 28 L.Ed.2d 158], and in other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) [109 S.Ct. 2115, 104 L.Ed.2d 733]." (Civil Rights Act of 1991, Pub.L. No. 102-166, § 3(2) (Nov. 21, 1991) 105 Stat. 1071, 1071.)

- Federal title VII provides that while business necessity is a defense to a claim of disparate impact discrimination, "[a] demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination." (42 U.S.C. § 2000e-2(k)(2).)

- "The touchstone is business necessity. If an employment practice which operates to exclude [a protected group] cannot be shown to be related to job performance, the practice is prohibited ... Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question." (*Griggs, supra,* 401 U.S. at pp. 431–432.)

- "[T]he employer may defend its policy or practice by proving that it is 'job related for the position in question and consistent with business necessity.' Though the key terms have been used since *Griggs,* their meaning remains unclear." (1 Lindemann and Grossman, Employment Discrimination Law (3d ed. 1996) Adverse Impact, p. 106, footnotes omitted.)

- "[T]here is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business for it to pass muster: this degree of scrutiny would be almost impossible for most employers to meet ... ." (*Wards Cove Packing Co., Inc., supra,* 490 U.S. at p. 659.) [Note: This portion of *Wards Cove* may have been superseded by the Civil Rights Act of 1991.]

Secondary Sources

Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group) ¶¶ 7:571, 7:581, 7:915

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, § 2.90

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws,* §§ 41.21[4], 41.95[1] (Matthew Bender)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws,* § 43.01[2][c] (Matthew Bender)

1 Lindemann and Grossman, Employment Discrimination Law (3d ed.) Adverse Impact, pp. 106–110; *id.* (2000 supp.) at pp. 62–64

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.23[4][d], 115.54[5], 115.102–115.103 (Matthew Bender)

California Civil Practice: Employment Litigation ~~(Thomson West)~~ § 2:25 (Thomson Reuters)

2504. Disparate Impact—Rebuttal to Business Necessity/Job Relatedness Defense

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If [*name of defendant***] proves that the [employment practice/selection policy] is necessary to [his/her/its] business, then the [employment practice/selection policy] is lawful unless [***name of plaintiff***] proves both of the following:**

1. **That there was an alternative [employment practice/selection policy] that would have accomplished the business purpose equally well; and**

2. **That the alternative [employment practice/selection policy] would have had less adverse impact on [***describe members of protected group-for example, "persons over the age of 40"***].**

New September 2003

Directions for Use

Federal title VII requires a plaintiff to demonstrate that the employer refused to adopt the alternative employment practice (see 42 U.S.C. § 2000e-2(K)(1)(A)(ii)). There are no published court opinions determining if a similar requirement exists under California law.

This instruction must be given if defendant asserts the defense of business necessity to a disparate impact employment discrimination claim. (See CACI No. 2503, *Affirmative Defense—Business Necessity/Job Relatedness*.)

Sources and Authority

- Justification for Disparate Impact. Cal. Code Regs., tit. 2, § 11010(b).
- Disparate Impact Under Federal Law. 42 U.S.C. § 2000e-2(k)(1)(A).
- " 'The test [of the business necessity defense] is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any [discriminatory] impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential [discriminatory] impact.' " (*City and County of San Francisco v. Fair Employment and Housing Com.* (1987) 191 Cal.App.3d 976, 989-990 [236 Cal.Rptr. 716].)
- ~~The California Fair Employment and Housing Commission's regulations provide: "Where an employer or other covered entity has a facially neutral practice which has an adverse impact (i.e., is discriminatory in effect), the employer or other covered entity must prove that there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient~~

~~operation of the business and that the challenged practice effectively fulfills the business purpose it is supposed to serve. The practice may still be impermissible where it is shown that there exists an alternative practice which would accomplish the business purpose equally well with a lesser discriminatory impact." (Cal. Code Regs., tit. 2, § 7286.7(b).)~~

- "[T]he standards established by the FEHC for evaluating a facially neutral selection criterion which has a discriminatory impact on a protected group are identical to federal standards under Title VII." (*City and County of San Francisco, supra*, 191 Cal.App.3d at p. 986.)

- ~~Under federal title VII, a plaintiff may establish an unlawful employment practice based on disparate impact in one of two ways: (1) the plaintiff demonstrates that a defendant uses a particular employment practice that causes a disparate impact on the basis of a protected status, and the defendant "fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity"; or (2) the plaintiff demonstrates that there is an alternative employment practice with less adverse impact, and the defendant "refuses to adopt such alternative employment practice." (42 U.S.C. § 2000e-2(k)(1)(A).)~~

- "If an employer does then meet the burden of proving that its tests are 'job related,' it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable [discriminatory] effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.' " (*Albemarle Paper Co. v. Moody* (1975) 422 U.S. 405, 425 [95 S.Ct. 2362, 45 L.Ed.2d 280], internal citation omitted.)

Secondary Sources

Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group) ¶¶ 7:581, 7:590, 7:591, 7:915

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.21[2] (Matthew Bender

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01[2][d] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.23[2][c] (Matthew Bender)

California Civil Practice: Employment Litigation ~~(Thomson West)~~ § 2:26 (Thomson Reuters)

2507. "Substantial Motivating Reason" Explained

A "substantial motivating reason" is a reason that actually contributed to the [*specify adverse employment action***]. It must be more than a remote or trivial reason. It does not have to be the only reason motivating the [***adverse employment action***].**

New December 2007; Revised June 2013

Directions for Use

Read this instruction with CACI No. 2500, *Disparate Treatment—Essential Factual Elements*, CACI No. 2505, *Retaliation—Essential Factual Elements*, CACI No. 2540, *Disability Discrimination—Disparate Treatment—Essential Factual Elements*, CACI No. 2560, *Religious Creed Discrimination—Failure to Accommodate—Essential Factual Elements*, or CACI No. 2570, *Age Discrimination—Disparate Treatment—Essential Factual Elements*.

Sources and Authority

- Discrimination Prohibited Under Fair Employment and Housing Act. ~~Government Code section 12940(a) provides:~~

  ~~It is an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California:~~

  ~~(a) For an employer, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, or sexual orientation of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment.~~

  Causation Under Federal Law. Title 42 United States Code section 2000e-2(m). ~~(a provision of the Civil Rights Action of 1991 amending Title VII of the Civil Rights Act of 1964) provides: "Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."~~

- "Because of the similarity between state and federal employment discrimination laws, California courts look to pertinent federal precedent when applying our own statutes." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354 [100 Cal.Rptr.2d 352, 8 P.3d 1089].)

- "While a complainant need not prove that [discriminatory] animus was the sole motivation behind a challenged action, he must prove by a preponderance of the evidence that there was a 'causal connection' between the employee's protected status and the adverse employment decision." (*Mixon v. Fair Employment and Housing Com.* (1987) 192 Cal.App.3d 1306, 1319 [237 Cal.Rptr. 884].)

- "The employee need not show 'he would have in any event been rejected or discharged solely on the basis of his race, without regard to the alleged deficiencies. ...' In other words, 'while a complainant need not prove that racial animus was the sole motivation behind the challenged action, he must prove by a preponderance of the evidence that there was a "causal connection" between the employee's protected status and the adverse employment decision.' " (*Clark v. Claremont University Center* (1992) 6 Cal.App.4th 639, 665 [8 Cal.Rptr.2d 151], citing *McDonald v. Santa Fe Trail Transp. Co.* (1976) 427 U.S. 273, 282, fn. 10 [96 S.Ct. 2574, 49 L.Ed.2d 493, 502] and *Mixon, supra,* 192 Cal.App.3d at p. 1319.)

- "Requiring the plaintiff to show that discrimination was a *substantial* motivating factor, rather than simply *a* motivating factor, more effectively ensures that liability will not be imposed based on evidence of mere thoughts or passing statements unrelated to the disputed employment decision. At the same time, … proof that discrimination was a *substantial* factor in an employment decision triggers the deterrent purpose of the FEHA and thus exposes the employer to liability, even if other factors would have led the employer to make the same decision at the time." (*Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49], original italics.)

- "We do not suggest that discrimination must be alone sufficient to bring about an employment decision in order to constitute a substantial motivating factor. But it is important to recognize that discrimination can be serious, consequential, and even by itself determinative of an employment decision without also being a "but for" cause." (*Harris, supra,* 56 Cal.4th at p. 229.)

- "Although [plaintiff] contends that a jury in an employment discrimination case would not draw any meaningful distinction between 'a motivating reason' and 'a substantial motivating reason' in deciding whether there was unlawful discrimination, the Supreme Court reached a contrary conclusion in *Harris* [*supra*]. The court specifically concluded that '[r]equiring the plaintiff to show that discrimination was a substantial motivating factor, rather than simply a motivating factor, more effectively ensures that liability will not be imposed based on evidence of mere thoughts or passing statements unrelated to the disputed employment decision.' " (*Alamo v. Practice Management Information Corp.* (2013) 219 Cal.App.4th 466, 479 [161 Cal.Rptr.3d 758].)

Secondary Sources

Chin et al., California Practice Guide: Employment Litigation, Ch. 7-A, *Title VII And The California Fair Employment And Housing Act,* ¶¶ 7:485–7:508 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.61–2.65, 2.87

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws,* § 41.11[1] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.23[2] (Matthew Bender)

1 California Civil Practice: Employment Litigation Discrimination in Employment, §§ 2:20–2:21, 2:75 (Thomson Reuters)

2520. Quid pro quo Sexual Harassment—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] subjected [him/her] to sexual harassment. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [was an employee of [***name of defendant***]/applied to [***name of defendant***] for a job/was a person providing services pursuant to a contract with [***name of defendant***]];**

2. **That [***name of alleged harasser***] made unwanted sexual advances to [***name of plaintiff***] or engaged in other unwanted verbal or physical conduct of a sexual nature;**

3. **[That job benefits were conditioned, by words or conduct, on [***name of plaintiff***]'s acceptance of [***name of alleged harasser***]'s sexual advances or conduct;]**

   [or]

   [That employment decisions affecting [*name of plaintiff***] were made based on [his/her] acceptance or rejection of [***name of alleged harasser***]'s sexual advances or conduct;]**

4. **That at the time of [his/her] conduct, [***name of alleged harasser***] was a supervisor or agent for [***name of defendant***];**

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

6. **That [***name of alleged harasser***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003

Directions for Use

Employers may be liable for the conduct of certain agents. (See Gov. Code, §§ 12925(d), 12926(d), and 12940(j)(1), and *Reno v. Baird* (1998) 18 Cal.4th 640, 648 [76 Cal.Rptr.2d 499, 957 P.2d 1333] [California Supreme Court declined to express opinion whether "agent" language in the FEHA merely incorporates respondeat superior principles or has some other meaning]).

Sources and Authority

- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1). ~~provides that it is an unlawful employment practice for "an employer ... or any other person, because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, or sexual orientation, to harass an employee, an applicant, or a person providing services pursuant to a contract. Harassment of an employee, an applicant, or a person providing~~

~~services pursuant to a contract by an employee other than an agent or supervisor shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action. An entity shall take all reasonable steps to prevent harassment from occurring. Loss of tangible job benefits shall not be necessary in order to establish harassment."~~

- "Employer" Defined: Harassment. Government Code section 12940(j)(4)(A). ~~provides: "For purposes of this subdivision only, 'employer' means any person regularly employing one or more persons or regularly receiving the services of one or more persons providing services pursuant to a contract, or any person acting as an agent of an employer, directly or indirectly, the state, or any political or civil subdivision of the state, and cities. The definition of 'employer' in subdivision (d) of Section 12926 applies to all provisions of this section other than this subdivision."~~

- "Person Providing Services Under Contract: Harassment. Government Code section 12940(j)(5) ~~provides: "For purposes of this subdivision, 'a person providing services pursuant to a contract' means a person who meets all of the following criteria:~~

  ~~(A) The person has the right to control the performance of the contract for services and discretion as to the manner of performance.~~

  ~~(B) The person is customarily engaged in an independently established business.~~

  ~~(C) The person has control over the time and place the work is performed, supplies the tools and instruments used in the work, and performs work that requires a particular skill not ordinarily used in the course of the employer's work.~~

- Sexual Harassment. ~~The Fair Employment and Housing Commission's regulations provide: "Sexual harassment is unlawful as defined in Section 7287.6(b), and includes verbal, physical, and visual harassment, as well as unwanted sexual advances." (~~Cal. Code Regs., tit. 2, § ~~7291.1~~11034(f)(1).~~)~~

- "Courts have generally recognized two distinct categories of sexual harassment claims: quid pro quo and hostile work environment. Quid pro quo harassment occurs when submission to sexual conduct is made a condition of concrete employment benefits." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 607 [262 Cal.Rptr. 842], internal citation omitted.)

- "A cause of action for quid pro quo harassment involves the behavior most commonly regarded as sexual harassment, including, e.g., sexual propositions, unwarranted graphic discussion of sexual acts, and commentary on the employee's body and the sexual uses to which it could be put. To state a cause of action on this theory, it is sufficient to allege that a term of employment was expressly or impliedly conditioned upon acceptance of a supervisor's unwelcome sexual advances." (*Mogilefsky v. Superior Court* (1993) 20 Cal.App.4th 1409, 1414 [26 Cal.Rptr.2d 116], internal citations omitted.)

- "Cases based on threats which are carried out are referred to often as quid pro quo cases, as distinct from bothersome attentions or sexual remarks that are sufficiently severe or pervasive to create a hostile work environment. The terms quid pro quo and hostile work environment are helpful, perhaps, in making a rough demarcation between cases in which threats are carried out and those where they

> are not or are absent altogether, but beyond this are of limited utility ... [¶] We do not suggest the terms quid pro quo and hostile work environment are irrelevant to Title VII litigation. To the extent they illustrate the distinction between cases involving a threat which is carried out and offensive conduct in general, the terms are relevant when there is a threshold question whether a plaintiff can prove discrimination in violation of Title VII. When a plaintiff proves that a tangible employment action resulted from a refusal to submit to a supervisor's sexual demands, he or she establishes that the employment decision itself constitutes a change in the terms and conditions of employment that is actionable under Title VII. For any sexual harassment preceding the employment decision to be actionable, however, the conduct must be severe or pervasive." (*Burlington Industries, Inc. v. Ellerth* (1998) 524 U.S. 742, 751, 753–754 [118 S.Ct. 2257, 141 L.Ed.2d 633].)

Secondary Sources

Chin et al., California Practice Guide: Employment Litigation, Ch. 7-A, *Title VII And The California Fair Employment And Housing Act*, ¶¶ 7:150, 7:166, 7:168–7:169, 7:194 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 10-A, *Sources Of Law Prohibiting Harassment*, ¶¶ 10:18–10:19, 10:22, 10:31 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 10-B, *Sexual Harassment*, ¶¶ 10:40, 10:50 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Sexual Harassment, §§ 3.31–3.35

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.81[1][a], [6] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.36[5][b] (Matthew Bender)

California Civil Practice: Employment Litigation § 2:55 (Thomson Reuters~~ West~~)

2521B. Hostile Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Employer or Entity Defendant (Gov. Code, § 12940(j))

[*Name of plaintiff***] claims that [he/she] was subjected to a hostile or abusive work environment because coworkers at [***name of defendant***] were subjected to harassment based on [***describe protected status, e.g., race, gender, or age***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was [an employee of/a person providing services under a contract with] [***name of defendant***];**

2. **That [***name of plaintiff***], although not personally subjected to unwanted harassing conduct, personally witnessed harassing conduct that took place in [his/her] immediate work environment;**

3. **That the harassing conduct was severe or pervasive;**

4. **That a reasonable [***describe member of protected group, e.g., woman***] in [***name of plaintiff***]'s circumstances would have considered the work environment to be hostile or abusive;**

5. **That [***name of plaintiff***] considered the work environment to be hostile or abusive toward [***e.g., women***];**

6. **[***Select applicable basis of defendant's liability:***]**

   [That a supervisor engaged in the conduct;]

   [*or***]**

   [That [*name of defendant***] [or [his/her/its] supervisors or agents] knew or should have known of the conduct and failed to take immediate and appropriate corrective action;]**

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

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

Derived from former CACI No. 2521 December 2007; Revised June 2013

Directions for Use

This instruction is for use in a hostile work environment case if the plaintiff was not the target of the harassing conduct and the defendant is an employer or other entity covered by the FEHA. For an individual defendant, such as the alleged harasser or plaintiff's coworker, see CACI No. 2522B, *Hostile Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual*

Defendant. For a case in which the plaintiff is the target of the harassment, see CACI No. 2521A, *Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant.* For an instruction for use if the hostile environment is due to widespread sexual favoritism, see CACI No. 2521C, *Hostile Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Employer or Entity Defendant*. Also read CACI No. 2523, *"Harassing Conduct" Explained*, and CACI No. 2524, *"Severe or Pervasive" Explained*.

In element 6, select the applicable basis of employer liability: (a) vicarious liability for a supervisor's harassing conduct, or (b) the employer's ratification of the conduct. For a definition of "supervisor," see CACI No. 2525, *Harassment—"Supervisor" Defined.*

Sources and Authority

- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1). ~~provides that it is an unlawful employment practice for "an employer . . . or any other person, because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, or sexual orientation, to harass an employee, an applicant, or a person providing services pursuant to a contract. Harassment of an employee, an applicant, or a person providing services pursuant to a contract by an employee other than an agent or supervisor shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action. An employer may also be responsible for the acts of nonemployees, with respect to sexual harassment of employees, applicants, or persons providing services pursuant to a contract in the workplace, where the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing cases involving the acts of nonemployees, the extent of the employer's control and any other legal responsibility that the employer may have with respect to the conduct of those nonemployees shall be considered. An entity shall take all reasonable steps to prevent harassment from occurring. Loss of tangible job benefits shall not be necessary in order to establish harassment."~~

- "Employer" Defined for Harassment. Government Code section 12940(j)(4)(A). ~~provides: "For purposes of this subdivision only, 'employer' means any person regularly employing one or more persons or regularly receiving the services of one or more persons providing services pursuant to a contract, or any person acting as an agent of an employer, directly or indirectly, the state, or any political or civil subdivision of the state, and cities."~~

- Person Providing Services Under Contract. Government Code section 12940(j)(5). ~~provides: "For purposes of this subdivision, 'a person providing services pursuant to a contract' means a person who meets all of the following criteria:~~

  ~~(A) The person has the right to control the performance of the contract for services and discretion as to the manner of performance.~~

  ~~(B) The person is customarily engaged in an independently established business.~~

  ~~(C) The person has control over the time and place the work is performed, supplies the tools~~

~~and instruments used in the work, and performs work that requires a particular skill not ordinarily used in the course of the employer's work."~~

- Harassment Because of Sex. Government Code section 12940(j)(4)(C)~~. provides, in part: " '[H]arassment' because of sex includes sexual harassment, gender harassment, and harassment based on pregnancy, childbirth, or related medical conditions."~~

- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i)~~. provides that it is an unlawful employment practice "[f]or any person to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under this part, or to attempt to do so."~~

- Perception and Association. Government Code section 12926(~~n~~o)~~. provides: " 'Race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, age, or sexual orientation' includes a perception that the person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics."~~

- "The plaintiff's work environment is affected not only by conduct directed at herself but also by the treatment of others. A woman's perception that her work environment is hostile to women will obviously be reinforced if she witnesses the harassment of other female workers." (*Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 519 [76 Cal.Rptr.2d 547], internal citations omitted.)

- "Harassment against others in the workplace is only relevant to the plaintiff's case if she has personal knowledge of it. Unless plaintiff witnesses the conduct against others, or is otherwise aware of it, that conduct cannot alter the conditions of her employment and create an abusive working environment. Stated another way, a reasonable person in plaintiff's position would not find the environment hostile or abusive unless that person had knowledge of the objectionable conduct toward others." (*Beyda, supra,* 65 Cal.App.4th at p. 520.)

- "To state that an employee must be the direct victim of the sexually harassing conduct is somewhat misleading as an employee who is subjected to a hostile work environment is a victim of sexual harassment even though no offensive remarks or touchings are directed to or perpetrated upon that employee. Generally, however, sexual conduct that involves or is aimed at persons other than the plaintiff is considered less offensive and severe than conduct that is directed at the plaintiff. A hostile work environment sexual harassment claim by a plaintiff who was not personally subjected to offensive remarks and touchings requires 'an even higher showing' than a claim by one who had been sexually harassed without suffering tangible job detriment: such a plaintiff must 'establish that the sexually harassing conduct permeated [her] direct work environment**.**' [¶] To meet this burden, the plaintiff generally must show that the harassment directed at others was in her immediate work environment, and that she personally witnessed it. The reason for this is obvious: if the plaintiff does not witness the incidents involving others, 'those incidents cannot affect ... her perception of the hostility of the work environment**.**' " (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 284-285 [42 Cal.Rptr.3d 2, 132 P.3d 211], internal citations omitted.)

- "The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the

harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)

- "[A]lthough no California cases have directly addressed racial harassment in the workplace, the California courts have applied the federal threshold standard to claims of sexual harassment and held that FEHA is violated when the harassment was 'sufficiently severe or pervasive to alter the conditions of the victim's employment.' " (*Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 464–465 [79 Cal.Rptr.2d 33], internal citations and footnote omitted.)

- "When the workplace is permeated with discriminatory intimidation, ridicule and insult that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,' the law is violated." (*Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 Cal.App.4th 397, 409 [27 Cal.Rptr.2d 457], internal citation omitted.)

- "[N]ot every utterance of a racial slur in the workplace violates the FEHA or Title VII. As the United States Supreme Court has recognized in the context of sexual harassment: '[N]ot all workplace conduct that may be described as "harassment" affects a "term, condition, or privilege" of employment within the meaning of Title VII. For sexual harassment to be actionable, it must be sufficiently severe or pervasive "to alter the conditions of [the victim's] employment and create an abusive working environment." ' . . . 'Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.' . . . California courts have adopted the same standard in evaluating claims under the FEHA." (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 129–130 [87 Cal.Rptr.2d 132, 980 P.2d 846], internal citations omitted.)

- "To be actionable, 'a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.' That means a plaintiff who subjectively perceives the workplace as hostile or abusive will not prevail under the FEHA, if a reasonable person in the plaintiff's position, considering all the circumstances, would not share the same perception. Likewise, a plaintiff who does not perceive the workplace as hostile or abusive will not prevail, even if it objectively is so." (*Lyle, supra,* 38 Cal.4th at p. 284, internal citations omitted.)

- "[U]nder the FEHA, an employer is strictly liable for *all* acts of sexual harassment by a supervisor. (*State Dep't of Health Servs. v. Superior Court* (2003) 31 Cal.4th 1026, 1041 [6 Cal.Rptr.3d 441, 79 P.3d 556], original italics.)

- "[I]n order for the employer to avoid strict liability for the supervisor's actions under the FEHA, the harassment must result from a completely private relationship unconnected with the employment. Otherwise, the employer is strictly liable for the supervisor's actions regardless of whether the supervisor was acting as the employer's agent." (*Myers v. Trendwest Resorts, Inc.* (2007) 148 Cal.App.4th 1403, 1421 [56 Cal.Rptr.3d 501].)

- "In order to be actionable, it must be shown that respondents knew, or should have known, of the alleged harassment and failed to take appropriate action." (*McCoy v. Pacific Maritime Assn.* (2013) 216 Cal.App.4th 283, 294 [156 Cal.Rptr.3d 851].)
- "If an employee other than an agent or supervisor commits the harassment, and the employer takes immediate and appropriate corrective action when it becomes or reasonably should become aware of the conduct—for example, when the victim or someone else informs the employer—there simply is no 'unlawful employment practice' that the FEHA governs." (*Carrisales v. Dept. of Corrections* (1999) 21 Cal.4th 1132, 1136 [90 Cal.Rptr.2d 804, 988 P.2d 1083], called into doubt on other grounds by statute.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 340, 346

Chin et al., Cal. Practice Guide: Employment Litigation, Ch. 10-B, *Sexual Harassment,* ¶¶ 10:40, 10:110–10:260 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75, Sexual and Other Harassment, §§ 3.1, 3.14, 3.17, 3.21, 3.36, 3.45

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws,* §§ 41.80[1][a], 41.81[1][b] (Matthew Bender)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws,* § 43.01[10][g][i] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination,* § 115.36 (Matthew Bender)

California Civil Practice: Employment Litigation § 2:56 (Thomson Reuters)

2521C. Hostile Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Employer or Entity Defendant (Gov. Code, § 12940(j))

[*Name of plaintiff***] claims that widespread sexual favoritism at [***name of defendant***] created a hostile or abusive work environment. "Sexual favoritism" means that another employee has received preferential treatment with regard to promotion, work hours, assignments, or other significant employment benefits or opportunities because of a sexual relationship with an individual representative of the employer who was in a position to grant those preferences. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was [an employee of/a person providing services under a contract with] [***name of defendant***];**

2. **That there was sexual favoritism in the work environment;**

3. **That the sexual favoritism was widespread and also severe or pervasive;**

4. **That a reasonable [***describe member of protected group, e.g., woman***] in [***name of plaintiff***]'s circumstances would have considered the work environment to be hostile or abusive;**

5. **That [***name of plaintiff***] considered the work environment to be hostile or abusive because of the widespread sexual favoritism;**

6. **[***Select applicable basis of defendant's liability:***]**

   [That a supervisor [engaged in the conduct/created the widespread sexual favoritism];]

   [That [*name of defendant***] [or [his/her/its] supervisors or agents] knew or should have known of the widespread sexual favoritism and failed to take immediate and appropriate corrective action;]**

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

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

Derived from former CACI No. 2521 December 2007

Directions for Use

This instruction is for use in a hostile work environment case involving widespread sexual favoritism when the defendant is an employer or other entity covered by the FEHA. For an individual defendant, such as the alleged harasser or plaintiff's coworker, see CACI No. 2522C, *Hostile Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Individual Defendant.* For a case in which the plaintiff is the target of harassment based on a protected status such as gender, race, or

sexual orientation, see CACI No. 2521A, *Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant.* For an instruction for use if the plaintiff is not the target of the harassment, see CACI No. 2521B, *Hostile Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Employer or Entity Defendant.* Also read CACI No. 2523, *"Harassing Conduct" Explained*, and CACI No. 2524, *"Severe or Pervasive" Explained*.

In element 6, select the applicable basis of employer liability: (a) vicarious liability for a supervisor's harassing conduct, or (b) the employer's ratification of the conduct. For a definition of "supervisor," see CACI No. 2525, *Harassment—"Supervisor" Defined.*

Sources and Authority

- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- "Employer" Defined for Harassment. Government Code section 12940(j)(4)(A).
- Person Providing Services Under Contract. Government Code section 12940(j)(5).
- Harassment Because of Sex. Government Code section 12940(j)(4)(C).
- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).
- Perception and Association. Government Code section 12926(o).
- ~~Government Code section 12940(j)(1) provides that it is an unlawful employment practice for "an employer . . . or any other person, because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, or sexual orientation, to harass an employee, an applicant, or a person providing services pursuant to a contract. Harassment of an employee, an applicant, or a person providing services pursuant to a contract by an employee other than an agent or supervisor shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action. An employer may also be responsible for the acts of nonemployees, with respect to sexual harassment of employees, applicants, or persons providing services pursuant to a contract in the workplace, where the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing cases involving the acts of nonemployees, the extent of the employer's control and any other legal responsibility that the employer may have with respect to the conduct of those nonemployees shall be considered. An entity shall take all reasonable steps to prevent harassment from occurring. Loss of tangible job benefits shall not be necessary in order to establish harassment."~~
- ~~Government Code section 12940(j)(4)(A) provides: "For purposes of this subdivision only, 'employer' means any person regularly employing one or more persons or regularly receiving the~~

~~services of one or more persons providing services pursuant to a contract, or any person acting as an agent of an employer, directly or indirectly, the state, or any political or civil subdivision of the state, and cities."~~

- ~~Government Code section 12940(j)(5) provides: "For purposes of this subdivision, 'a person providing services pursuant to a contract' means a person who meets all of the following criteria:~~

  ~~(A) The person has the right to control the performance of the contract for services and discretion as to the manner of performance.~~

  ~~(B) The person is customarily engaged in an independently established business.~~

  ~~(C) The person has control over the time and place the work is performed, supplies the tools and instruments used in the work, and performs work that requires a particular skill not ordinarily used in the course of the employer's work.~~

- ~~Government Code section 12940(j)(4)(C) provides, in part: " '[H]arassment' because of sex includes sexual harassment, gender harassment, and harassment based on pregnancy, childbirth, or related medical conditions."~~

- ~~Government Code section 12940(i) provides that it is an unlawful employment practice "[f]or any person to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under this part, or to attempt to do so."~~

- ~~Government Code section 12926(n) provides: " 'Race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, age, or sexual orientation' includes a perception that the person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics."~~

- "Following the guidance of the EEOC, and also employing standards adopted in our prior cases, we believe that an employee may establish an actionable claim of sexual harassment under the FEHA by demonstrating that widespread sexual favoritism was severe or pervasive enough to alter his or her working conditions and create a hostile work environment." (*Miller v. Dept. of Corrections* (2005) 36 Cal.4th 446, 466 [30 Cal.Rptr.3d 797, 115 P.3d 77], internal citations omitted.)

- "[S]exual favoritism by a manager may be actionable when it leads employees to believe that 'they [can] obtain favorable treatment from [the manager] if they became romantically involved with him', the affair is conducted in a manner 'so indiscreet as to create a hostile work environment,' or the manager has engaged in 'other pervasive conduct … which created a hostile work environment.' " (*Miller, supra,* 36 Cal.4th at p. 465, internal citations omitted.)

- "[A] romantic relationship between a supervisor and an employee does not, without more, give rise to a sexual discrimination or sexual harassment claim either under the FEHA or the public policy of the state." (*Proksel v. Gattis* (1996) 41 Cal.App.4th 1626, 1631 [49 Cal.Rptr.2d 322].)

- "The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)

- " '[N]ot all workplace conduct that may be described as "harassment" affects a "term, condition, or privilege" of employment within the meaning of Title VII. For sexual harassment to be actionable, it must be sufficiently severe or pervasive "to alter the conditions of [the victim's] employment and create an abusive working environment." ' . . . 'Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.' … [¶] California courts have adopted the same standard in evaluating claims under the FEHA." (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 130 [87 Cal.Rptr.2d 132, 980 P.2d 846], internal citations omitted.)

- "To be actionable, 'a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.' That means a plaintiff who subjectively perceives the workplace as hostile or abusive will not prevail under the FEHA, if a reasonable person in the plaintiff's position, considering all the circumstances, would not share the same perception. Likewise, a plaintiff who does not perceive the workplace as hostile or abusive will not prevail, even if it objectively is so." (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 284 [42 Cal.Rptr.3d 2, 132 P.3d 211], internal citations omitted.)

- "The FEHA imposes two standards of employer liability for sexual harassment, depending on whether the person engaging in the harassment is the victim's supervisor or a nonsupervisory coemployee. The employer is liable for harassment by a nonsupervisory employee only if the employer (a) knew or should have known of the harassing conduct and (b) failed to take immediate and appropriate corrective action. This is a negligence standard. Because the FEHA imposes this negligence standard only for harassment 'by an employee other than an agent or supervisor', by implication the FEHA makes the employer strictly liable for harassment by a supervisor." (*State Dep't of Health Servs. v. Superior Court* (2003) 31 Cal.4th 1026, 1040-1041 [6 Cal.Rptr.3d 441, 79 P.3d 556], original italics.)

- "[I]n order for the employer to avoid strict liability for the supervisor's actions under the FEHA, the harassment must result from a completely private relationship unconnected with the employment. Otherwise, the employer is strictly liable for the supervisor's actions regardless of whether the supervisor was acting as the employer's agent." (*Myers v. Trendwest Resorts, Inc.* (2007) 148 Cal.App.4th 1403, 1421 [56 Cal.Rptr.3d 501].)

- "In order to be actionable, it must be shown that respondents knew, or should have known, of the alleged harassment and failed to take appropriate action." (*McCoy v. Pacific Maritime Assn.* (2013) 216 Cal.App.4th 283, 294 [156 Cal.Rptr.3d 851].)

- "If an employee other than an agent or supervisor commits the harassment, and the employer takes immediate and appropriate corrective action when it becomes or reasonably should become aware of the conduct—for example, when the victim or someone else informs the employer—there simply is no 'unlawful employment practice' that the FEHA governs." (*Carrisales v. Dept. of Corrections* (1999) 21 Cal.4th 1132, 1136 [90 Cal.Rptr.2d 804, 988 P.2d 1083], called into doubt on other grounds by statute.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 340, 346

Chin et al., Cal. Practice Guide: Employment Litigation, Ch. 10-B, *Sexual Harassment,* ¶¶ 10:40, 10:110–10:260 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75, Sexual and Other Harassment, §§ 3.1, 3.14, 3.17, 3.21, 3.36, 3.45

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws,* §§ 41.80[1][a], 41.81[1][b] (Matthew Bender)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws,* § 43.01[10][g][i] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination,* § 115.36 (Matthew Bender)

California Civil Practice: Employment Litigation § 2:56 (Thomson Reuters)

2522B. Hostile Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual Defendant (Gov. Code, § 12940(j))

[*Name of plaintiff***] claims that [he/she] was subjected to a hostile or abusive work environment because coworkers at [***name of employer***] were subjected to harassment based on [***describe protected status, e.g., race, gender, or age***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was [an employee of/a person providing services under a contract with] [***name of employer***];**

2. **That [***name of plaintiff***] although not personally subjected to unwanted harassing conduct, personally witnessed harassing conduct that took place in [his/her] immediate work environment;**

3. **That the harassing conduct was severe or pervasive;**

4. **That a reasonable [***describe member of protected group, e.g., woman***] in [***name of plaintiff***]'s circumstances would have considered the work environment to be hostile or abusive;**

5. **That [***name of plaintiff***] considered the work environment to be hostile or abusive toward [***e.g., women***];**

6. **That [***name of defendant***] [participated in/assisted/ [or] encouraged] the harassing conduct;**

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

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

Derived from former CACI No. 2522 December 2007; Revised June 2013

Directions for Use

This instruction is for use in a hostile work environment case if the plaintiff was not the target of the harassing conduct and the defendant is an individual such as the alleged harasser or plaintiff's coworker. For an employer defendant, see CACI No. 2521B, *Hostile Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Employer or Entity Defendant.* For a case in which the plaintiff is the target of the harassment, see CACI No. 2522A, *Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant.* For an instruction for use if the hostile environment is due to sexual favoritism, see CACI No. 2522C, *Hostile Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Individual Defendant.* Also read CACI No. 2523, *"Harassing Conduct" Explained,* and CACI No. 2524, *"Severe*

or Pervasive" Explained.

Sources and Authority

- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- Personal Liability for Harassment. Government Code section 12940(j)(3).
- "Employer" Defined for Harassment. Government Code section 12940(j)(4)(A).
- Harassment Because of Sex. Government Code section 12940(j)(4)(C).
- Person Providing Services Under Contract. Government Code section 12940(j)(5)
- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).
- Perception and Association. Government Code section 12926(o).
- ~~Government Code section 12940(j)(1) provides that it is an unlawful employment practice for "an employer ... or any other person, because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, or sexual orientation, to harass an employee, an applicant, or a person providing services pursuant to a contract. Harassment of an employee, an applicant, or a person providing services pursuant to a contract by an employee other than an agent or supervisor shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action. An employer may also be responsible for the acts of nonemployees, with respect to sexual harassment of employees, applicants, or persons providing services pursuant to a contract in the workplace, where the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing cases involving the acts of nonemployees, the extent of the employer's control and any other legal responsibility that the employer may have with respect to the conduct of those nonemployees shall be considered. An entity shall take all reasonable steps to prevent harassment from occurring. Loss of tangible job benefits shall not be necessary in order to establish harassment."~~
- ~~Government Code section 12940(j)(3) provides: "An employee of an entity ... is personally liable for any harassment prohibited by this section that is perpetrated by the employee, regardless of whether the employer or covered entity knows or should have known of the conduct and fails to take immediate and appropriate corrective action."~~
- ~~Government Code section 12940(j)(4)(A) provides, in part: "For purposes of this subdivision only, 'employer' means any person regularly employing one or more persons or regularly receiving the services of one or more persons providing services pursuant to a contract, or any person acting as an agent of an employer, directly or indirectly, the state, or any political or civil subdivision of the state,~~

and cities."

- Government Code section 12940(j)(5) provides: "For purposes of this subdivision, 'a person providing services pursuant to a contract' means a person who meets all of the following criteria:

  (A) The person has the right to control the performance of the contract for services and discretion as to the manner of performance.

  (B) The person is customarily engaged in an independently established business.

  (C) The person has control over the time and place the work is performed, supplies the tools and instruments used in the work, and performs work that requires a particular skill not ordinarily used in the course of the employer's work.

- Government Code section 12940(i) provides that it is an unlawful employment practice "[f]or any person to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under this part, or to attempt to do so."

- Government Code section 12926(n) provides: " 'Race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, age, or sexual orientation' includes a perception that the person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics."

- "The plaintiff's work environment is affected not only by conduct directed at herself but also by the treatment of others. A woman's perception that her work environment is hostile to women will obviously be reinforced if she witnesses the harassment of other female workers." (*Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 519 [76 Cal.Rptr.2d 547], internal citations omitted.)

- "Harassment against others in the workplace is only relevant to the plaintiff's case if she has personal knowledge of it. Unless plaintiff witnesses the conduct against others, or is otherwise aware of it, that conduct cannot alter the conditions of her employment and create an abusive working environment. Stated another way, a reasonable person in plaintiff's position would not find the environment hostile or abusive unless that person had knowledge of the objectionable conduct toward others." (*Beyda, supra,* 65 Cal.App.4th at p. 520.)

- "To state that an employee must be the direct victim of the sexually harassing conduct is somewhat misleading as an employee who is subjected to a hostile work environment is a victim of sexual harassment even though no offensive remarks or touchings are directed to or perpetrated upon that employee. Generally, however, sexual conduct that involves or is aimed at persons other than the plaintiff is considered less offensive and severe than conduct that is directed at the plaintiff. A hostile work environment sexual harassment claim by a plaintiff who was not personally subjected to offensive remarks and touchings requires 'an even higher showing' than a claim by one who had been sexually harassed without suffering tangible job detriment: such a plaintiff must 'establish that the sexually harassing conduct permeated [her] direct work environment.' [¶] To meet this burden, the plaintiff generally must show that the harassment directed at others was in her immediate work

environment, and that she personally witnessed it. The reason for this is obvious: if the plaintiff does not witness the incidents involving others, 'those incidents cannot affect ... her perception of the hostility of the work environment.' " (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 284–285 [42 Cal.Rptr.3d 2, 132 P.3d 211], internal citations omitted.)

- "The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)

- "When the workplace is permeated with discriminatory intimidation, ridicule and insult that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,' the law is violated." (*Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 Cal.App.4th 397, 409 [27 Cal.Rptr.2d 457], internal citation omitted.)

- "[W]e conclude a nonharassing supervisor, who fails to take action to prevent sexual harassment, is not personally liable for sexual harassment under the Fair Employment and Housing Act (FEHA)." (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1322 [58 Cal.Rptr.2d 308].)

- "A supervisor who, without more, fails to take action to prevent sexual harassment of an employee is not personally liable as an aider and abettor of the harasser, an aider and abettor of the employer or an agent of the employer." (*Fiol, supra,* 50 Cal.App.4th at p. 1331.)

- "[A]lthough no California cases have directly addressed racial harassment in the workplace, the California courts have applied the federal threshold standard to claims of sexual harassment and held that FEHA is violated when the harassment was 'sufficiently severe or pervasive to alter the conditions of the victim's employment.' " (*Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 464-465 [79 Cal.Rptr.2d 33], internal citations and footnote omitted.)

- "To be actionable, 'a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.' That means a plaintiff who subjectively perceives the workplace as hostile or abusive will not prevail under the FEHA, if a reasonable person in the plaintiff's position, considering all the circumstances, would not share the same perception. Likewise, a plaintiff who does not perceive the workplace as hostile or abusive will not prevail, even if it objectively is so." (*Lyle, supra,* 38 Cal.4th at p. 284, internal citations omitted.)

- "[A]llegations of a racially hostile work-place must be assessed from the perspective of a reasonable person belonging to the racial or ethnic group of the plaintiff." (*McGinest v. GTE Serv. Corp.* (9th Cir. 2004) 360 F.3d 1103, 1115.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 340, 346

Chin et al., California Practice Guide: Employment Litigation, Ch. 10-B, *Sexual Harassment*, ¶¶ 10:40, 10:110–10:260 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75, Sexual and Other Harassment, §§ 3.1, 3.14, 3.17, 3.36–3.45

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.80[1][a], 41.81[1][b] (Matthew Bender)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01[10][g][i] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.36 (Matthew Bender)

California Civil Practice: Employment Litigation §§ 2:56, 2:56.50 (Thomson Reuters ~~West~~)

2522C. Hostile Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Individual Defendant (Gov. Code, § 12940(j))

[*Name of plaintiff***] claims that widespread sexual favoritism by [***name of defendant***] created a hostile or abusive work environment. "Sexual favoritism" means that another employee has received preferential treatment with regard to promotion, work hours, assignments, or other significant employment benefits or opportunities because of a sexual relationship with an individual representative of the employer who was in a position to grant these preferences. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was [an employee of/a person providing services under a contract with] [***name of employer***];**

2. **That there was sexual favoritism in the work environment;**

3. **That the sexual favoritism was widespread and also severe or pervasive;**

4. **That a reasonable [***describe member of protected group, e.g., woman***] in [***name of plaintiff***]'s circumstances would have considered the work environment to be hostile or abusive because of the widespread sexual favoritism;**

5. **That [***name of plaintiff***] considered the work environment to be hostile or abusive because of the widespread sexual favoritism;**

6. **That [***name of defendant***] [participated in/assisted/ [or] encouraged] the sexual favoritism;**

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

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

Derived from former CACI No. 2522 December 2007

Directions for Use

This instruction is for use in a hostile work environment case involving widespread sexual favoritism when the defendant is an individual such as the alleged harasser or plaintiff's coworker. For an employer defendant, see CACI No. 2521C, *Hostile Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Employer or Entity Defendant.* For a case in which the plaintiff is the target of harassment based on a protected status such as gender, race, or sexual orientation, see CACI No. 2522A, *Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant.* For an instruction for use if the plaintiff is not the target of the harassment, see CACI No. 2522B, *Hostile Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual Defendant.* Also read CACI No. 2523, *"Harassing Conduct" Explained,* and CACI No. 2524, *"Severe or Pervasive" Explained.*

Sources and Authority

- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- Personal Liability for Harassment. Government Code section 12940(j)(3).
- "Employer" Defined for Harassment. Government Code section 12940(j)(4)(A).
- Harassment Because of Sex. Government Code section 12940(j)(4)(C).
- Person Providing Services Under Contract. Government Code section 12940(j)(5)
- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).
- Perception and Association. Government Code section 12926(o).
- ~~Government Code section 12940(j)(1) provides that it is an unlawful employment practice for "an employer ... or any other person, because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, or sexual orientation, to harass an employee, an applicant, or a person providing services pursuant to a contract. Harassment of an employee, an applicant, or a person providing services pursuant to a contract by an employee other than an agent or supervisor shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action. An employer may also be responsible for the acts of nonemployees, with respect to sexual harassment of employees, applicants, or persons providing services pursuant to a contract in the workplace, where the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing cases involving the acts of nonemployees, the extent of the employer's control and any other legal responsibility that the employer may have with respect to the conduct of those nonemployees shall be considered. An entity shall take all reasonable steps to prevent harassment from occurring. Loss of tangible job benefits shall not be necessary in order to establish harassment."~~
- ~~Government Code section 12940(j)(3) provides: "An employee of an entity ... is personally liable for any harassment prohibited by this section that is perpetrated by the employee, regardless of whether the employer or covered entity knows or should have known of the conduct and fails to take immediate and appropriate corrective action."~~
- ~~Government Code section 12940(j)(4)(A) provides, in part: "For purposes of this subdivision only, 'employer' means any person regularly employing one or more persons or regularly receiving the services of one or more persons providing services pursuant to a contract, or any person acting as an agent of an employer, directly or indirectly, the state, or any political or civil subdivision of the state, and cities."~~

- ~~Government Code section 12940(j)(5) provides: "For purposes of this subdivision, 'a person providing services pursuant to a contract' means a person who meets all of the following criteria:~~

  ~~(A) The person has the right to control the performance of the contract for services and discretion as to the manner of performance.~~

  ~~(B) The person is customarily engaged in an independently established business.~~

  ~~(C) The person has control over the time and place the work is performed, supplies the tools and instruments used in the work, and performs work that requires a particular skill not ordinarily used in the course of the employer's work.~~

- ~~Government Code section 12940(i) provides that it is an unlawful employment practice "[f]or any person to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under this part, or to attempt to do so."~~

- ~~Government Code section 12926(n) provides: " 'Race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, age, or sexual orientation' includes a perception that the person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics."~~

- "Following the guidance of the EEOC, and also employing standards adopted in our prior cases, we believe that an employee may establish an actionable claim of sexual harassment under the FEHA by demonstrating that widespread sexual favoritism was severe or pervasive enough to alter his or her working conditions and create a hostile work environment." (*Miller v. Dept. of Corrections* (2005) 36 Cal.4th 446, 466 [30 Cal.Rptr.3d 797, 115 P.3d 77], internal citations omitted.)

- "[S]exual favoritism by a manager may be actionable when it leads employees to believe that 'they [can] obtain favorable treatment from [the manager] if they became romantically involved with him', the affair is conducted in a manner 'so indiscreet as to create a hostile work environment,' or the manager has engaged in 'other pervasive conduct … which created a hostile work environment.' " (*Miller, supra,* 36 Cal.4th at p. 465, internal citations omitted.)

- "[A] romantic relationship between a supervisor and an employee does not, without more, give rise to a sexual discrimination or sexual harassment claim either under the FEHA or the public policy of the state." (*Proksel v. Gattis* (1996) 41 Cal.App.4th 1626, 1631 [49 Cal.Rptr.2d 322].)

- "The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)

- "When the workplace is permeated with discriminatory intimidation, ridicule and insult that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,' the law is violated." (*Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 Cal.App.4th 397, 409 [27 Cal.Rptr.2d 457], internal citation omitted.)

- "[W]e conclude a nonharassing supervisor, who fails to take action to prevent sexual harassment, is not personally liable for sexual harassment under the Fair Employment and Housing Act (FEHA)." (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1322 [58 Cal.Rptr.2d 308].)

- "A supervisor who, without more, fails to take action to prevent sexual harassment of an employee is not personally liable as an aider and abettor of the harasser, an aider and abettor of the employer or an agent of the employer." (*Fiol, supra,* 50 Cal.App.4th at p. 1331.)

- "[A]lthough no California cases have directly addressed racial harassment in the workplace, the California courts have applied the federal threshold standard to claims of sexual harassment and held that FEHA is violated when the harassment was 'sufficiently severe or pervasive to alter the conditions of the victim's employment.' " (*Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 464–465 [79 Cal.Rptr.2d 33], internal citations and footnote omitted.)

- "To be actionable, 'a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.' That means a plaintiff who subjectively perceives the workplace as hostile or abusive will not prevail under the FEHA, if a reasonable person in the plaintiff's position, considering all the circumstances, would not share the same perception. Likewise, a plaintiff who does not perceive the workplace as hostile or abusive will not prevail, even if it objectively is so." (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 284 [42 Cal.Rptr.3d 2, 132 P.3d 211], internal citations omitted.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 340, 346

Chin et al., California Practice Guide: Employment Litigation, Ch. 10-B, *Sexual Harassment*, ¶¶ 10:40, 10:110–10:260 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75, Sexual and Other Harassment, §§ 3.1, 3.14, 3.17, 3.36–3.45

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.80[1][a], 41.81[1][b] (Matthew Bender)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01[10][g][i] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, §

115.36 (Matthew Bender)

California Civil Practice: Employment Litigation §§ 2:56, 2:56.50 (Thomson Reuters ~~West~~)

2525. Harassment—"Supervisor" Defined

[*Name of alleged harasser***] was a supervisor of [***name of defendant***] if [he/she] had the discretion and authority:**

[a. To hire, transfer, promote, assign, reward, discipline, [or] discharge [or] [*insert other employment action***] other employees [or effectively to recommend any of these actions];]**

[b. To act on the grievances of other employees or effectively to recommend action on grievances;] [or]

[c. To direct [*name of plaintiff***]'s daily work activities.]**

New September 2003; Revised June 2006

Directions for Use

If using this instruction, consider *Chapman v. Enos* (2004) 116 Cal.App.4th 920 [10 Cal.Rptr.3d 852].

Sources and Authority

- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1). ~~provides that it is an unlawful employment practice for "an employer . . . or any other person, because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, or sexual orientation, to harass an employee, an applicant, or a person providing services pursuant to a contract. Harassment of an employee, an applicant, or a person providing services pursuant to a contract by an employee other than an agent or supervisor shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action. An employer may also be responsible for the acts of nonemployees, with respect to sexual harassment of employees, applicants, or persons providing services pursuant to a contract in the workplace, where the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing cases involving the acts of nonemployees, the extent of the employer's control and any other legal responsibility that the employer may have with respect to the conduct of those nonemployees shall be considered. An entity shall take all reasonable steps to prevent harassment from occurring. Loss of tangible job benefits shall not be necessary in order to establish harassment."~~

- "Supervisor" Defined. Government Code section 12926(~~st~~). ~~provides: " 'Supervisor' means any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend that action, if, in connection~~

~~with the foregoing, the exercise of that authority is not of a merely routine or clerical nature, but requires the use of independent judgment."~~

- "This section has been interpreted to mean that the employer is strictly liable for the harassing actions of its supervisors and agents, but that the employer is only liable for harassment by a coworker if the employer knew or should have known of the conduct and failed to take immediate corrective action. Thus, characterizing the employment status of the harasser is very significant." (*Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 1046 [58 Cal.Rptr.2d 122], internal citations omitted.)

- "The case and statutory authority set forth three clear rules. First, . . . a supervisor who personally engages in sexually harassing conduct is personally liable under the FEHA. Second, . . . if the supervisor participates in the sexual harassment or substantially assists or encourages continued harassment, the supervisor is personally liable under the FEHA as an aider and abettor of the harasser. Third, under the FEHA, the employer is vicariously and strictly liable for sexual harassment by a supervisor." (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1327 [58 Cal.Rptr.2d 308].)

- "[W]hile an employer's liability under the [FEHA] for an act of sexual harassment committed by a supervisor or agent is broader than the liability created by the common law principle of respondeat superior, respondeat superior principles are nonetheless relevant in determining liability when, as here, the sexual harassment occurred away from the workplace and not during work hours." (*Doe, supra,* 50 Cal.App.4th at pp. 1048–1049.)

- "The FEHA does not define 'agent.' Therefore, it is appropriate to consider general principles of agency law. An agent is one who represents a principal in dealings with third persons. An agent is a person authorized by the principal to conduct one or more transactions with one or more third persons and to exercise a degree of discretion in effecting the purpose of the principal. A supervising employee is an agent of the employer." (*Fiol, supra,* 50 Cal.App.4th at p. 1328, internal citations omitted.)

- "A supervisor who, without more, fails to take action to prevent sexual harassment of an employee is not personally liable as an aider and abettor of the harasser, an aider and abettor of the employer or an agent of the employer." (*Fiol, supra,* 50 Cal.App.4th at p. 1331.)

- "[W]hile full accountability and responsibility are certainly indicia of supervisory power, they are not *required* elements of … the FEHA definition of supervisor. Indeed, many supervisors with responsibility to direct others using their independent judgment, and whose supervision of employees is not merely routine or clerical, would not meet these additional criteria though they would otherwise be within the ambit of the FEHA supervisor definition." (*Chapman, supra,* 116 Cal.App.4th at p. 930, footnote omitted.)

Secondary Sources

Chin et al., California Practice Guide: Employment Litigation, Ch. 10-A, *Sources Of Law Prohibiting Harassment*, ¶ 10:17 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 10-D, *Employer Liability For Workplace Harassment,* ¶¶ 10:308, 10:310, 10:315–10:317, 10:320.5, 10:320.6 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 10-E, *Harasser's Individual Liability,* ¶ 10:499 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Sexual and other Harassment, § 3.21

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws,* § 41.81 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination,* §§ 115.20, 115.36, 115.54 (Matthew Bender)

California Civil Practice: Employment Litigation § 2:56.50 (Thomson Reuters~~ West~~)

2542. Disability Discrimination—"Reasonable Accommodation" Explained

A reasonable accommodation is a reasonable change to the workplace that [*choose one or more of the following***]**

[gives a qualified applicant with a disability an equal opportunity in the job application process;]

[allows an employee with a disability to perform the essential duties of the job;] [or]

[allows an employee with a disability to enjoy the same benefits and privileges of employment that are available to employees without disabilities.]

Reasonable accommodations may include the following:

a. Making the workplace readily accessible to and usable by employees with disabilities;

b. Changing job responsibilities or work schedules;

c. Reassigning the employee to a vacant position;

d. Modifying or providing equipment or devices;

e. Modifying tests or training materials;

f. Providing qualified interpreters or readers; or

g. Providing other similar accommodations for an individual with a disability.

If more than one accommodation is reasonable, an employer makes a reasonable accommodation if it selects one of those accommodations in good faith.

New September 2003; Revised April 2009, June 2012

Directions for Use

Give this instruction to explain "reasonable accommodation" as used in CACI No. 2541, *Disability Discrimination—Reasonable Accommodation—Essential Factual Elements*. For discussion regarding the burden of proof on reasonable accommodation, see the Directions for Use to CACI No. 2541.

Sources and Authority

- Employer Obligation to Make Reasonable Accommodation. Government Code section 12940(m). ~~provides that it is an unlawful employment practice "[f]or an employer or other entity covered by this part to fail to make reasonable accommodation for the known physical or mental disability of an~~

~~applicant or employee. Nothing in this subdivision or in ... subdivision (a) shall be construed to require an accommodation that is demonstrated by the employer or other covered entity to produce undue hardship, as defined in subdivision (t) of Section 12926, to its operation."~~

- "Reasonable Accommodation" Defined. Government Code section 12926(~~o~~p). ~~provides:~~

  ~~"Reasonable accommodation" may include either of the following:~~

  ~~(1) Making existing facilities used by employees readily accessible to, and usable by, individuals with disabilities.~~

  ~~(2) Job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.~~

- "Reasonable Accommodation" Defined. Cal. Code Regs., tit. 2, § 11068(a). ~~The California Fair Employment and Housing Commission's regulations provide:~~

  ~~Reasonable accommodation may, but does not necessarily, include, nor is it limited to, such measures as:~~

  ~~(1) Accessibility. Making existing facilities used by employees readily accessible to and usable by individuals with disabilities;~~

  ~~(2) Job Restructuring. Job restructuring, reassignment to a vacant position, part-time or modified work schedules, acquisition or modification of equipment or devices, adjustment or modification of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar actions." (Cal. Code Regs., tit. 2, § 7293.9(a).)~~

- "Substantial" Limitation Not Required. Government Code section 12926.1(c). ~~provides, in part: "[T]he Legislature has determined that the definitions of 'physical disability' and 'mental disability' under the law of this state require a 'limitation' upon a major life activity, but do not require, as does the Americans with Disabilities Act of 1990, a 'substantial limitation.' This distinction is intended to result in broader coverage under the law of this state than under that federal act. Under the law of this state, whether a condition limits a major life activity shall be determined without respect to any mitigating measures, unless the mitigating measure itself limits a major life activity, regardless of federal law under the Americans with Disabilities Act of 1990. Further, under the law of this state, 'working' is a major life activity, regardless of whether the actual or perceived working limitation implicates a particular employment or a class or broad range of employments."~~

- "[T]he duty of an employer to provide reasonable accommodation for an employee with a disability is broader under the FEHA than under the ADA." (*Bagatti v. Department of Rehabilitation* (2002) 97 Cal.App.4th 344, 362 [118 Cal.Rptr.2d 443].)

- "[A]n employer who knows of the disability of an employee has an affirmative duty to make known to the employee other suitable job opportunities with the employer and to determine whether the employee is interested in, and qualified for, those positions, if the employer can do so without undue hardship or if the employer offers similar assistance or benefit to other disabled or nondisabled employees or has a policy of offering such assistance or benefit to any other employees." (*Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 950-951 [62 Cal.Rptr.2d 142].)

- "The question now arises whether it is the employees' burden to prove that a reasonable accommodation could have been made, i.e., that they were qualified for a position in light of the potential accommodation, or the employers' burden to prove that no reasonable accommodation was available, i.e., that the employees were not qualified for any position because no reasonable accommodation was available. [¶¶] Applying *Green's* burden of proof analysis to section 12940(m), we conclude that the burden of proving ability to perform the essential functions of a job with accommodation should be placed on the plaintiff under this statute as well." (*Nadaf-Rahrov v. The Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 977–978 [83 Cal.Rptr.3d 190], internal citations omitted.)

- "Under the FEHA ... an employer is relieved of the duty to reassign a disabled employee whose limitations cannot be reasonably accommodated in his or her current job only if reassignment would impose an 'undue hardship' on its operations or if there is no vacant position for which the employee is qualified." (*Spitzer v. Good Guys, Inc.* (2000) 80 Cal.App.4th 1376, 1389 [96 Cal.Rptr.2d 236].)

Secondary Sources

Chin et al., California Practice Guide: Employment Litigation, Ch. 7-A, *Title VII And The California Fair Employment And Housing Act*, ¶ 7:213 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 9-C, *California Fair Employment And Housing Act (FEHA)*, ¶¶ 9:2091, 9:2093–9:2095, 9:2197, 9:2252, 9:2265, 9:2366 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, § 2.79

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.51[3][a], [b] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.35 (Matthew Bender)

California Civil Practice: Employment Litigation § 2:50 (Thomson Reuters ~~West~~)

2543. Disability Discrimination—"Essential Job Duties" Explained (Gov. Code, §§ 12926(f), 12940(a)(1))

In deciding whether a job duty is essential, you may consider, among other factors, the following:

a. Whether the reason the job exists is to perform that duty;

b. Whether there is a limited number of employees available who can perform that duty;

c. Whether the job duty is highly specialized so that the person currently holding the position was hired for his or her expertise or ability to perform the particular duty.

Evidence of whether a particular duty is essential includes, but is not limited to, the following:

a. [*Name of defendant*]**'s judgment as to which functions are essential;**

b. Written job descriptions prepared before advertising or interviewing applicants for the job;

c. The amount of time spent on the job performing the duty;

d. The consequences of not requiring the person currently holding the position to perform the duty;

e. The terms of a collective bargaining agreement;

f. The work experiences of past persons holding the job;

g. The current work experience of persons holding similar jobs;

h. Reference to the importance of the job in prior performance reviews.

"Essential job duties" do not include the marginal duties of the position. "Marginal duties" are those that, if not performed would not eliminate the need for the job, or those that could be readily performed by another employee, or those that could be performed in another way.

New September 2003; Revoked June 2013; Restored and Revised December 2013

Directions for Use

Give this instruction with CACI No. 2540, *Disability Discrimination—Disparate Treatment—Essential Factual Elements,* or CACI No. 2541, *Disability Discrimination—Reasonable Accommodation—Essential Factual Elements,* or both, if it is necessary to explain what is an "essential job duty." (See

Gov. Code, §§ 12926(f), 12940(a)(1); see also *Furtado v. State Personnel Bd.* (2013) 212 Cal.App.4th 729, 743−744 [151 Cal.Rptr.3d 292].) While the employee has the burden to prove that he or she can perform essential job duties, with or without reasonable accommodation, it is unresolved which party has the burden of proving that a job duty is essential. (See *Lui v. City and County of San Francisco* (2012) 211 Cal.App.4th 962, 972−973 [150 Cal.Rptr.3d 385].)

Sources and Authority

- Ability to Perform Essential Duties. Government Code section 12940(a)(1). ~~provides that the FEHA "does not prohibit an employer from refusing to hire or discharging an employee with a physical or mental disability, or subject an employer to any legal liability resulting from the refusal to employ or the discharge of an employee with a physical or mental disability, where the employee, because of his or her physical or mental disability, is unable to perform his or her essential duties even with reasonable accommodations."~~

- "Essential Functions" Defined. Government Code section 12926(f). ~~provides:~~

  ~~"Essential functions" means the fundamental job duties of the employment position the individual with a disability holds or desires. 'Essential functions' does not include the marginal functions of the position.~~

  ~~(1) A job function may be considered essential for any of several reasons, including, but not limited to, any one or more of the following:~~

  ~~(A) The function may be essential because the reason the position exists is to perform that function.~~

  ~~(B) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed.~~

  ~~(C) The function may be highly specialized, so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.~~

  ~~(2) Evidence of whether a particular function is essential includes, but is not limited to, the following:~~

  ~~(A) The employer's judgment as to which functions are essential.~~

  ~~(B) Written job descriptions prepared before advertising or interviewing applicants for the job.~~

  ~~(C) The amount of time spent on the job performing the function.~~

  ~~(D) The consequences of not requiring the incumbent to perform the function.~~

~~(E) The terms of a collective bargaining agreement.~~

~~(F) The work experiences of past incumbents in the job.~~

~~(G) The current work experience of incumbents in similar jobs.~~

- Evidence of Essential Functions. 2 California Code of Regulations section ~~7293.6~~11065(e)(2). ~~provides: "Evidence of whether a particular function is essential includes, but is not limited to, the following:~~

  ~~(A) The employer's or other covered entity's judgment as to which functions are essential.~~

  ~~(B) Accurate, current written job descriptions.~~

  ~~(C) The amount of time spent on the job performing the function.~~

  ~~(D) The legitimate business consequences of not requiring the incumbent to perform the function.~~

  ~~(E) Job descriptions or job functions contained in a collective bargaining agreement.~~

  ~~(F) The work experience of past incumbents in the job.~~

  ~~(G) The current work experience of incumbents in similar jobs.~~

  ~~(H) Reference to the importance of the performance of the job function in prior performance reviews.~~

- Marginal Functions. 2 California Code of Regulations section ~~7293.6~~11065(e)(3). ~~provides: " 'Essential functions' do not include the marginal functions of the position. 'Marginal functions' of an employment position are those that, if not performed, would not eliminate the need for the job or that could be readily performed by another employee or that could be performed in an alternative way."~~

- "The identification of essential job functions is a 'highly fact-specific inquiry.' " (*Lui, supra,* 211 Cal.App.4th at p. 971.)

- "It is clear that plaintiff bore the burden of proving 'that he or she is a qualified individual under the FEHA (i.e., that he or she can perform the essential functions of the job with or without reasonable accommodation).' It is less clear whether that burden included the burden of proving what the essential functions of the position are, rather than just plaintiff's ability to perform the essential functions. Under the ADA, a number of federal decisions have held that '[a]lthough the plaintiff bears the ultimate burden of persuading the fact finder that he can perform the job's essential functions, … "an employer who disputes the plaintiff's claim that he can perform the essential functions must put

forth evidence establishing those functions." [Citation.]' … Arguably, plaintiff's burden of proving he is a qualified individual includes the burden of proving which duties are essential functions of the positions he seeks. Ultimately, we need not and do not decide in the present case which party bore the burden of proof on the issue at trial … ." (*Lui, supra,* 211 Cal.App.4th at pp. 972−973, internal citations omitted.)

- "The trial court's essential functions finding is also supported by the evidence presented by defendant corresponding to the seven categories of evidence listed in [Government Code] section 12926(f)(2). 'Usually no one listed factor will be dispositive … .' " (*Lui, supra,* 211 Cal.App.4th at p. 977.)

Secondary Sources

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

Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group) ¶¶ 8:744, 9:2298, 9:2402–9:2403, 9:2405, 9:2420

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, § 2.79

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws,* § 41.97[1] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.22, 115.54, 115.104 (Matthew Bender)

California Civil Practice: Employment Litigation § 2:86 (Thomson Reuters)

2544. Disability Discrimination—Affirmative Defense—Health or Safety Risk

[*Name of defendant***] claims that [his/her/its] conduct was lawful because, even with reasonable accommodations, [***name of plaintiff***] was unable to perform an essential job duty without endangering [[his/her] health or safety] [or] [the health or safety of others]. To succeed, [***name of defendant***] must prove both of the following:**

1. **That [***describe job duty***] was an essential job duty; and**

2. **That even with reasonable accommodations, [***name of plaintiff***] could not [***describe job duty***] without endangering [[his/her] health or safety] [or] [the health or safety of others] more than if an individual without a disability performed the job duty.**

[In determining whether [*name of plaintiff***]'s performance of the job duty would endanger [his/her] health or safety, you must decide whether the performance of the job duty presents an immediate and substantial degree of risk to [him/her].]**

In deciding whether a job duty is essential, you may consider, among other factors, the following:

a. **Whether the reason the job exists is to perform that duty;**

b. **The number of employees available who can perform that duty; and**

c. **Whether the job duty is highly specialized.**

New September 2003

Sources and Authority

- Risk to Health or Safety. Government Code section 12940(a)(1). ~~provides that the FEHA "does not prohibit an employer from refusing to hire or discharging an employee with a physical or mental disability ... where the employee, because of his or her physical or mental disability ... cannot perform those [essential] duties in a manner that would not endanger his or her health or safety or the health or safety of others even with reasonable accommodations."~~

- Risk to Health or Safety. Cal. Code Regs., tit. 2, § 11067(c)-(e). ~~The California Fair Employment and Housing Commission's regulations provide: "It is a permissible defense for an employer ... to demonstrate that after reasonable accommodation the applicant or employee cannot perform the essential functions of the position in question in a manner which would not endanger his or her health or safety because the job imposes an imminent and substantial degree of risk to the applicant or employee ... . It is a permissible defense for an employer ... to demonstrate that after reasonable accommodation has been made, the applicant or employee cannot perform the essential functions of the position in question in a manner which would not endanger the health or safety of others to a greater extent than if an individual without a disability performed the job ... . However, it is no~~

~~defense to assert that an individual with a disability has a condition or a disease with a future risk, so long as the condition or disease does not presently interfere with his or her ability to perform the job in a manner that will not immediately endanger the individual with a disability or others, and the individual is able to safely perform the job over a reasonable length of time." (Cal. Code Regs., tit. 2, § 7293.8(c)-(e).)~~

- "FEHA's 'danger to self' defense has a narrow scope; an employer must offer more than mere conclusions or speculation in order to prevail on the defense ... . As one court said, '[t]he defense requires that the employee face an "imminent and substantial degree of risk" in performing the essential functions of the job.' An employer may not terminate an employee for harm that is merely potential ... . In addition, in cases in which the employer is able to establish the 'danger to self' defense, it must also show that there are 'no "available reasonable means of accommodation which could, without undue hardship to [the employer], have allowed [the plaintiff] to perform the essential job functions ... without danger to himself." ' " (*Wittkopf v. County of Los Angeles* (2001) 90 Cal.App.4th 1205, 1218-1219 [109 Cal.Rptr.2d 543], internal citations omitted.)

- "An employer may refuse to hire persons whose physical handicap prevents them from performing their duties in a manner which does not endanger their health. Unlike the BFOQ defense, this exception must be tailored to the individual characteristics of each applicant ... in relation to specific, legitimate job requirements ... . [Defendant's] evidence, at best, shows a possibility [plaintiff] might endanger his health sometime in the future. In the light of the strong policy for providing equal employment opportunity, such conjecture will not justify a refusal to employ a handicapped person." (*Sterling Transit Co. v. Fair Employment Practice Com.* (1981) 121 Cal.App.3d 791, 798, 799 [175 Cal.Rptr. 548], internal citations and footnote omitted.)

- "FEHA does not expressly address whether the act protects an employee whose disability causes him or her to make threats against coworkers. FEHA, however, does authorize an employer to terminate or refuse to hire an employee who poses an actual threat of harm to others due to a disability … ." (*Wills v. Superior Court* (2011) 195 Cal.App.4th 143, 169 [125 Cal.Rptr.3d 1] [idle threats against coworkers do not disqualify employee from job, but rather may provide legitimate, nondiscriminatory reason for discharging employee].)

- "The employer has the burden of proving the defense of the threat to the health and safety of other workers by a preponderance of the evidence." (*Raytheon Co. v. Fair Employment & Housing Com.* (1989) 212 Cal.App.3d 1242, 1252 [261 Cal.Rptr. 197].)

Secondary Sources

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

Chin et al., Cal. Practice Guide: Employment Litigation, Ch. 9-C, *California Fair Employment And Housing Act (FEHA)*, ¶¶ 9:2298, 9:2402–9:2403, 9:2405, 9:2420 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, § 2.111

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment*

Opportunity Laws, § 41.97[1] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.54, 115.104 (Matthew Bender)

California Civil Practice: Employment Litigation § 2:86 (Thomson Reuters ~~West~~)

2545. Disability Discrimination—Affirmative Defense—Undue Hardship

[*Name of defendant***] claims that [***name of plaintiff***]'s proposed accommodations would create an undue hardship to the operation of [his/her/its] business. To succeed, [***name of defendant***] must prove that the accommodations would be significantly difficult or expensive to make. In deciding whether an accommodation would create an undue hardship, you may consider the following factors:**

a. The nature and cost of the accommodation;

b. [*Name of defendant***]'s ability to pay for the accommodation;**

c. The type of operations conducted at the facility;

d. The impact on the operations of the facility;

e. The number of [*name of defendant***]'s employees and the relationship of the employees' duties to one another;**

f. The number, type, and location of [*name of defendant***]'s facilities; and**

g. The administrative and financial relationship of the facilities to one another.

New September 2003

Directions for Use

The issue of whether undue hardship is a true affirmative defense or whether the defendant only has the burden of coming forward with the evidence of hardship as a way of negating the element of plaintiff's case concerning the reasonableness of an accommodation appears to be unclear.

Sources and Authority

- Employer Duty to Provide Reasonable Accommodation. Government Code section 12940(m). ~~provides that it is an unlawful employment practice "[f]or an employer or other entity covered by this part to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee. Nothing in this subdivision or in ... subdivision (a) shall be construed to require an accommodation that is demonstrated by the employer or other covered entity to produce undue hardship, as defined in subdivision (t) of Section 12926, to its operation."~~

- "Undue Hardship" Defined. Government Section 12926(t). ~~provides:~~

  ~~"Undue hardship" means an action requiring significant difficulty or expense, when considered in light of the following factors:~~

~~(1) the nature and cost of the accommodation needed,~~

~~(2) the overall financial resources of the facilities involved in the provision of the reasonable accommodations, the number of persons employed at the facility, and the effect on expenses and resources or the impact otherwise of these accommodations upon the operation of the facility,~~

~~(3) the overall financial resources of the covered entity, the overall size of the business of a covered entity with respect to the number of employees, and the number, type, and location of its facilities,~~

~~(4) the type of operations, including the composition, structure, and functions of the workforce of the entity, and~~

~~(5) the geographic separateness, administrative, or fiscal relationship of the facility or facilities.~~

Secondary Sources

Chin et al., California Practice Guide: Employment Litigation, Ch. 9-C, *California Fair Employment And Housing Act (FEHA)*, ¶¶ 9:2250, 9:2345, 9:2366, 9:2367 (The Rutter Group)

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

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.51[4][b] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.35, 115.54, 115.100 (Matthew Bender)

2546. Disability Discrimination—Reasonable Accommodation—Failure to Engage in Interactive Process (Gov. Code, § 12940(n))

[*Name of plaintiff***] contends that [***name of defendant***] failed to engage in a good-faith interactive process with [him/her] to determine whether it would be possible to implement effective reasonable accommodations so that [***name of plaintiff***] [***insert job requirements requiring accommodation***]. In order to establish this claim, [***name of plaintiff***] must prove the following:**

1. **That [***name of defendant***] was [an employer/[***other covered entity***]];**

2. **That [***name of plaintiff***] [was an employee of [***name of defendant***]/applied to [***name of defendant***] for a job/[***describe other covered relationship to defendant***]];**

3. **That [***name of plaintiff***] had [a] [***select term to describe basis of limitations, e.g., physical condition***] that was known to [***name of defendant***];**

4. **That [***name of plaintiff***] requested that [***name of defendant***] make reasonable accommodation for [his/her] [***e.g., physical condition***] so that [he/she] would be able to perform the essential job requirements;**

5. **That [***name of plaintiff***] was willing to participate in an interactive process to determine whether reasonable accommodation could be made so that [he/she] would be able to perform the essential job requirements;**

6. **That [***name of defendant***] failed to participate in a timely good-faith interactive process with [***name of plaintiff***] to determine whether reasonable accommodation could be made;**

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

8. **That [***name of defendant***]'s failure to engage in a good-faith interactive process was a substantial factor in causing [***name of plaintiff***]'s harm.**

New December 2007; Revised April 2009, December 2009

Directions for Use

In elements 3 and 4, select a term to describe the source of the plaintiff's limitations. It may be a statutory term such as "physical disability," "mental disability," or "medical condition." (See Gov. Code, § 12940(a).) Or it may be a general term such as "condition," "disease," or "disorder." Or it may be a specific health condition such as "diabetes."

Modify elements 3 and 4, as necessary, if the employer perceives the employee to have a disability. (See *Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 61, fn. 21 [43 Cal.Rptr.3d 874].)

In element 4, specify the position at issue and the reason why some reasonable accommodation was needed. In element 5, you may add the specific accommodation requested, though the focus of this cause of action is on the failure to discuss, not the failure to provide.

For an instruction on a cause of action for failure to make reasonable accommodation, see CACI No. 2541, *Disability Discrimination—Reasonable Accommodation—Essential Factual Elements*. For an instruction defining "reasonable accommodation," see CACI No. 2542, *Disability Discrimination—"Reasonable Accommodation" Explained*.

There is a split of authority as to whether the employee must also prove that reasonable accommodation was possible before there is a violation for failure to engage in the interactive process. (Compare *Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 424–425 [69 Cal.Rptr.3d 1] [jury's finding that no reasonable accommodation was possible is not inconsistent with its finding of liability for refusing to engage in interactive process] and *Claudio v. Regents of the University of California* (2005) 134 Cal.App.4th 224, 243 [35 Cal.Rptr.3d 837] with *Nadaf-Rahrov v. The Nieman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 980–985 [83 Cal.Rptr.3d 190] [employee who brings a section 12940(n) claim bears the burden of proving a reasonable accommodation was available before the employer can be held liable under the statute]; see also *Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1018–1019 [93 Cal.Rptr.3d 338] [attempting to reconcile conflict].)

Sources and Authority

- Good-Faith Interactive Process. Government Code section 12940(n). ~~provides that it is an unlawful employment practice, unless based on a bona fide occupational qualification or on applicable security regulations established by the United States or the State of California, "[f]or an employer or other entity covered by [the FEHA] to fail to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition."~~

- Federal Interpretive Guidance Incorporated. Government Code section 12926.1(e). ~~provides that the Legislature affirms the importance of the interactive process between the applicant or employee and the employer in determining a reasonable accommodation, as this requirement has been articulated by the Equal Employment Opportunity Commission in its interpretive guidance of the Americans with Disabilities Act of 1990.~~

- Interactive Process. The Interpretive Guidance on title I of the Americans With Disabilities Act, title 29 Code of Federal Regulations Part 1630 Appendix., ~~provides, in part:~~

  ~~When a qualified individual with a disability has requested a reasonable accommodation to assist in the performance of a job, the employer, using a problem solving approach, should:~~

  ~~(1) Analyze the particular job involved and determine its purpose and essential functions;~~

  ~~(2) Consult with the individual with a disability to ascertain the precise job-related~~

~~limitations imposed by the individual's disability and how those limitations could be overcome with a reasonable accommodation;~~

~~(3) In consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position; and~~

~~(4) Consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the employer.~~

- An employee may file a civil action based on the employer's failure to engage in the interactive process. (*Claudio, supra,* 134 Cal.App.4th at p. 243.)

- "Two principles underlie a cause of action for failure to provide a reasonable accommodation. First, the employee must request an accommodation. Second, the parties must engage in an interactive process regarding the requested accommodation and, if the process fails, responsibility for the failure rests with the party who failed to participate in good faith. While a claim of failure to accommodate is independent of a cause of action for failure to engage in an interactive dialogue, each necessarily implicates the other." (*Gelfo, supra,* 140 Cal.App.4th at p. 54, internal citations omitted.)

- "FEHA's reference to a 'known' disability is read to mean a disability of which the employer has become aware, whether because it is obvious, the employee has brought it to the employer's attention, it is based on the employer's own perception—mistaken or not—of the existence of a disabling condition or, perhaps as here, the employer has come upon information indicating the presence of a disability." (*Gelfo, supra,* 140 Cal.App.4th at p. 61, fn. 21.)

- "[Employer] asserts that, if it had a duty to engage in the interactive process, the duty was discharged. 'If anything,' it argues, 'it was [employee] who failed to engage in a good faith interactive process.' [Employee] counters [employer] made up its mind before July 2002 that it would not accommodate [employee]'s limitations, and nothing could cause it reconsider that decision. Because the evidence is conflicting and the issue of the parties' efforts and good faith is factual, the claim is properly left for the jury's consideration." (*Gelfo, supra,* 140 Cal.App.4th at p. 62, fn. 23.)

- "None of the legal authorities that [defendant] cites persuades us that the Legislature intended that after a reasonable accommodation is granted, the interactive process continues to apply in a failure to accommodate context. … To graft an interactive process intended to apply to the determination of a reasonable accommodation onto a situation in which an employer failed to provide a reasonable, agreed-upon accommodation is contrary to the apparent intent of the FEHA and would not support the public policies behind that provision." (*A.M. v. Albertsons, LLC* (2009) 178 Cal.App.4th 455, 464 [100 Cal.Rptr.3d 449].)

- "[T]he verdicts on the reasonable accommodations issue and the interactive process claim are not inconsistent. They involve separate causes of action and proof of different facts. Under FEHA, an

employer must engage in a good faith interactive process with the disabled employee to explore the alternatives to accommodate the disability. 'An employee may file a civil action based on the employer's failure to engage in the interactive process.' Failure to engage in this process is a separate FEHA violation independent from an employer's failure to provide a reasonable disability accommodation, which is also a FEHA violation. An employer may claim there were no available reasonable accommodations. But if it did not engage in a good faith interactive process, 'it cannot be known whether an alternative job would have been found.' The interactive process determines which accommodations are required. Indeed, the interactive process could reveal solutions that neither party envisioned." (*Wysinger, supra,* 157 Cal.App.4th at pp. 424–425, internal citations omitted.)

- "We disagree … with *Wysinger's* construction of section 12940(n). We conclude that the availability of a reasonable accommodation (i.e., a modification or adjustment to the workplace that enables an employee to perform the essential functions of the position held or desired) is necessary to a section 12940(n) claim. [¶] Applying the burden of proof analysis in *Green, supra,* 42 Cal.4th 254, we conclude the burden of proving the availability of a reasonable accommodation rests on the employee." (*Nadaf-Rahrov, supra,* 166 Cal.App.4th at pp. 984–985.)

- "We synthesize *Wysinger, Nadaf-Rahrov,* and *Claudio* with our analysis of the law as follows: To prevail on a claim under section 12940, subdivision (n) for failure to engage in the interactive process, an employee must identify a reasonable accommodation that would have been available at the time the interactive process should have occurred. An employee cannot necessarily be expected to identify and request all possible accommodations during the interactive process itself because ' " '[e]mployees do not have at their disposal the extensive information concerning possible alternative positions or possible accommodations which employers have. …' " ' However, as the *Nadaf-Rahrov* court explained, once the parties have engaged in the litigation process, to prevail, the employee must be able to identify an available accommodation the interactive process should have produced: 'Section 12940[, subdivision](n), which requires proof of failure to engage in the interactive process, is the appropriate cause of action where the employee is unable to identify a specific, available reasonable accommodation while in the workplace and the employer fails to engage in a good faith interactive process to help identify one, but the employee is able to identify a specific, available reasonable accommodation through the litigation process.' " (*Scotch, supra,* 173 Cal.App.4th at pp. 1018–1019.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 936(2)

Chin, et al., California Practice Guide: Employment Litigation (The Rutter Group) ¶¶ 9:2280–9:2285, 9:2345–9:2347

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, § 2.79

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.51[3][b] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.35[1][a] (Matthew Bender)

1 California Civil Practice: Employment Litigation ~~(Thomson West)~~ Discrimination in Employment, § 2:50 (Thomson Reuters)

2560. Religious Creed Discrimination—Failure to Accommodate—Essential Factual Elements (Gov. Code, § 12940(*l*))

[*Name of plaintiff***] claims that [***name of defendant***] wrongfully discriminated against [him/her] by failing to reasonably accommodate [his/her] religious [belief/observance]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was [an employer/[***other covered entity***]];**

2. **That [***name of plaintiff***] [was an employee of [***name of defendant***]/applied to [***name of defendant***] for a job/[***other covered relationship to defendant***]];**

3. **That [***name of plaintiff***] has a sincerely held religious belief that [***describe religious belief, observance, or practice***];**

4. **That [***name of plaintiff***]'s religious [belief/observance] conflicted with a job requirement;**

5. **That [***name of defendant***] knew of the conflict between [***name of plaintiff***]'s religious [belief/observance] and the job requirement;**

6. **That [***name of defendant***] did not reasonably accommodate [***name of plaintiff***]'s religious [belief/observance];**

7. **That [***name of plaintiff***]'s failure to comply with the conflicting job requirement was a substantial motivating reason for**

   [[*name of defendant***]'s decision to [discharge/refuse to hire/[***other adverse employment action***]] [***name of plaintiff***]];]**

   [**or**]

   [[*name of defendant***]'s subjecting [him/her] to an adverse employment action;]**

   [**or**]

   [[his/her] constructive discharge;]

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

9. **That [***name of defendant***]'s failure to reasonably accommodate [***name of plaintiff***]'s religious [belief/observance] was a substantial factor in causing [his/her] harm.**

If more than one accommodation is reasonable, an employer satisfies its obligation to make a reasonable accommodation if it selects one of those accommodations in good faith.

New September 2003; Revised June 2012, December 2012, June 2013

Directions for Use

If element 1 is given, the court may need to instruct the jury on the statutory definition of "employer" under the FEHA. Other covered entities under the FEHA include labor organizations, employment agencies, and apprenticeship training programs. (See Gov. Code, § 12940(a)–(d).)

Element 7 requires that the plaintiff's failure to comply with the conflicting job requirement be a substantial motivating reason for the employer's adverse action. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; see also CACI No. 2507, "*Substantial Motivating Reason" Explained*.) Read the first option if there is no dispute as to whether the employer's acts constituted an adverse employment action. Read the second option and also give CACI No. 2509, *"Adverse Employment Action" Explained*, if whether there was an adverse employment action is a question of fact for the jury. If constructive discharge is alleged, give the third option for element 7 and also give CACI No. 2510, "*Constructive Discharge" Explained*.

Federal courts construing Title VII of the Civil Rights Act of 1964 have held that the threat of an adverse employment action is a violation if the employee acquiesces to the threat and foregoes religious observance. (See, e.g., *EEOC v. Townley Engineering & Mfg. Co.* (9th Cir.1988) 859 F.2d 610, 614 fn. 5.) While no case has been found that construes the FEHA similarly, element 7 may be modified if the court agrees that this rule applies. In the first option, a threat of discharge or discipline may be inserted as an "other adverse employment action." Or in the second option, "subjected [*name of plaintiff*] to" may be replaced with "threatened [*name of plaintiff*] with."

Sources and Authority

- Religious Accommodation Required Under Fair Employment and Housing Act. Government Code section 12940(*l*). ~~provides that it is an unlawful employment practice "[f]or an employer ... to refuse to hire or employ a person, ... or to discharge a person from employment, ... or to discriminate against a person in compensation or in terms, conditions, or privileges of employment because of a conflict between the person's religious belief or observance and any employment requirement, unless the employer ... demonstrates that it has explored any available reasonable alternative means of accommodating the religious belief or observance ... but is unable to reasonably accommodate the religious belief or observance without undue hardship on the conduct of the business of the employer ... . Religious belief or observance ... includes, but is not limited to, observance of a Sabbath or other religious holy day or days, and reasonable time necessary for travel prior and subsequent to a religious observance."~~

- Scope of Religious Protection. Government Code section 12926(~~pq~~). ~~provides: "'Religious creed,' 'religion,' 'religious observance,' 'religious belief,' and 'creed' include all aspects of religious belief, observance, and practice."~~

- Scope of Religious Protection. Cal. Code Regs., tit. 2, § 11060(b). ~~The Fair Employment and Housing~~

~~Commission's regulations provide: "'Religious creed' includes any traditionally recognized religion as well as beliefs, observances, or practices which an individual sincerely holds and which occupy in his or her life a place of importance parallel to that of traditionally recognized religions. Religious creed discrimination may be established by showing: ... [t]he employer or other covered entity has failed to reasonably accommodate the applicant's or employee's religious creed despite being informed by the applicant or employee or otherwise having become aware of the need for reasonable accommodation." (Cal. Code Regs., tit. 2, § 7293.1(b).)~~

- Undue Hardship. Cal. Code Regs., tit. 2, § 11062.~~The Fair Employment and Housing Commission's regulations provide: "An employer or other covered entity shall make accommodation to the known religious creed of an applicant or employee unless the employer or other covered entity can demonstrate that the accommodation is unreasonable because it would impose an undue hardship." (Cal. Code Regs., tit. 2, § 7293.3.)~~

- "In evaluating an argument the employer failed to accommodate an employee's religious beliefs, the employee must establish a prima facie case that he or she had a bona fide religious belief, of which the employer was aware, that conflicts with an employment requirement ... . Once the employee establishes a prima facie case, then the employer must establish it initiated good faith efforts to accommodate or no accommodation was possible without producing undue hardship." (*Soldinger v. Northwest Airlines, Inc.* (1996) 51 Cal.App.4th 345, 370 [58 Cal.Rptr.2d 747], internal citation omitted.)

- "Any reasonable accommodation is sufficient to meet an employer's obligations. However, the employer need not adopt the most reasonable accommodation nor must the employer accept the remedy preferred by the employee. The reasonableness of the employer's efforts to accommodate is determined on a case by case basis ... . '[O]nce it is determined that the employer has offered a reasonable accommodation, the employer need not show that each of the employee's proposed accommodations would result in undue hardship.' '[W]here the employer has already reasonably accommodated the employee's religious needs, the ... inquiry [ends].' " (*Soldinger, supra,* 51 Cal.App.4th at p. 370, internal citations omitted.)

- "Requiring the plaintiff to show that discrimination was a *substantial* motivating factor, rather than simply *a* motivating factor, more effectively ensures that liability will not be imposed based on evidence of mere thoughts or passing statements unrelated to the disputed employment decision. At the same time, … proof that discrimination was a *substantial* factor in an employment decision triggers the deterrent purpose of the FEHA and thus exposes the employer to liability, even if other factors would have led the employer to make the same decision at the time." (*Harris, supra,* 56 Cal.4th at p. 232, original italics.)

- "We do not suggest that discrimination must be alone sufficient to bring about an employment decision in order to constitute a substantial motivating factor. But it is important to recognize that discrimination can be serious, consequential, and even by itself determinative of an employment decision without also being a "but for" cause." (*Harris, supra,* 56 Cal.4th at p. 229.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 876, 922, 940, 941

Chin et al., California Practice Guide: Employment Litigation, Ch. 7-A, *Title VII And The California Fair Employment And Housing Act,* ¶¶ 7:151, 7:215, 7:305, 7:610–7:611, 7:631–7:634, 7:641 (The Rutter Group)

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws,* § 41.52[3] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.22, 115.35[d], 115.91 (Matthew Bender)

California Civil Practice: Employment Litigation §§ 2:71–2:73 (Thomson Reuters ~~West~~)

1 Lindemann and Grossman, Employment Discrimination Law (3d ed. 1996) Religion, pp. 219–224, 226–227; *id.* (2000 supp.) at pp. 100–101

2570. Age Discrimination—Disparate Treatment—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] wrongfully discriminated against [him/her] because of [his/her] age. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was [an employer/[***other covered entity***]];**

2. **That [***name of plaintiff***] [was an employee of [***name of defendant***]/applied to [***name of defendant***] for a job/[***describe other covered relationship to defendant***]];**

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

   [or]

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

   [or]

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

4. **That [***name of plaintiff***] was age 40 or older at the time of the [discharge/[***other adverse employment action***]];**

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

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

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

New June 2011; Revised June 2012, June 2013

Directions for Use

Read the first option for element 3 if there is no dispute as to whether the employer's acts constituted an adverse employment action. Read the second option and also give CACI No. 2509, *"Adverse Employment Action" Explained,* if whether there was an adverse employment action is a question of fact for the jury. If constructive discharge is alleged, give the third option for element 3 and also give CACI

No. 2510, *"Constructive Discharge" Explained*. Select "conduct" in element 5 if the either the second or third option is included for element 3.

Note that there are two causation elements. There must be a causal link between the discriminatory animus based on age and the adverse action (see element 5), and there must be a causal link between the adverse action and the damage (see element 7). (See *Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal.App.4th 686, 713 [81 Cal.Rptr.3d 406].)

Element 5 requires that age discrimination be a substantial motivating reason for the adverse action. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; see also CACI No. 2507, *"Substantial Motivating Reason" Explained*.)

Under the *McDonnell Douglas* (*McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 [93 S.Ct. 1817, 36 L.Ed.2d 668]) process for allocating burdens of proof and producing evidence, which is used in California for disparate-treatment cases under FEHA, the employee must first present a prima facie case of discrimination. The burden then shifts to the employer to produce evidence of a nondiscriminatory reason for the adverse action. At that point, the burden shifts back to the employee to show that the employer's stated reason was in fact a pretext for a discriminatory act.

Whether or not the employee has met his or her prima facie burden, and whether or not the employer has rebutted the employee's prima facie showing, are questions of law for the trial court, not questions of fact for the jury. (See *Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 201 [48 Cal.Rptr.2d 448].) In other words, by the time that the case is submitted to the jury, the plaintiff has already established his or her prima facie case, and the employer has already proffered a legitimate, nondiscriminatory reason for the adverse employment decision. The *McDonnell Douglas* shifting burden drops from the case. The jury is left to decide which evidence it finds more convincing, that of the employer's discriminatory intent or that of the employer's age-neutral reasons for the employment decision. (See *Muzquiz v. City of Emeryville* (2000) 79 Cal.App.4th 1106, 1118, fn. 5 [94 Cal.Rptr.2d 579]).

Under FEHA, age-discrimination cases require the employee to show that his or her job performance was satisfactory at the time of the adverse employment action as a part of his or her prima facie case (see *Sandell v. Taylor-Listug, Inc.* (2010) 188 Cal.App.4th 297, 321 [115 Cal.Rptr.3d 453]), even though it is the employer's burden to produce evidence of a nondiscriminatory reason for the action. Poor job performance is the most common nondiscriminatory reason that an employer advances for the action. Even though satisfactory job performance may be an element of the employee's prima facie case, it is not an element that the employee must prove to the trier of fact. Under element 5 and CACI No. 2507, the burden remains with the employee to ultimately prove that age discrimination was a substantial motivating reason for the action. (See *Muzquiz, supra*, 79 Cal.App.4th at p. 1119.)

See also the Sources and Authority to CACI No. 2500, *Disparate Treatment—Essential Factual Elements.*

Sources and Authority

- Age Discrimination Prohibited Under Fair Employment and Housing Act. Government Code

section 12940(a). provides that it is an unlawful employment practice "[f]or an employer, because of the …*age*… of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment." (emphasis added)

- "Age" Defnined. Government Code section 12926(b). provides: " 'Age' refers to the chronological age of any individual who has reached his or her 40th birthday."

- Disparate Treatment; Layoffs Based on Salary. Government Code section 12941. provides: "The Legislature hereby declares its rejection of the court of appeal opinion in *Marks v Loral Corp.* (1997) 57 Cal. App.4th 30, and states that the opinion does not affect existing law in any way, including, but not limited to, the law pertaining to disparate treatment. The Legislature declares its intent that the use of salary as the basis for differentiating between employees when terminating employment may be found to constitute age discrimination if use of that criterion adversely impacts older workers as a group, and further declares its intent that the disparate impact theory of proof may be used in claims of age discrimination. The Legislature further reaffirms and declares its intent that the courts interpret the state's statutes prohibiting age discrimination in employment broadly and vigorously, in a manner comparable to prohibitions against sex and race discrimination, and with the goal of not only protecting older workers as individuals, but also of protecting older workers as a group, since they face unique obstacles in the later phases of their careers. Nothing in this section shall limit the affirmative defenses traditionally available in employment discrimination cases including, but not limited to, those set forth in Section 7286.7 of Title 2 of the California Code of Regulations."

- "In order to make out a prima facie case of age discrimination under FEHA, a plaintiff must present evidence that the plaintiff (1) is over the age of 40; (2) suffered an adverse employment action; (3) was performing satisfactorily at the time of the adverse action; and (4) suffered the adverse action under circumstances that give rise to an inference of unlawful discrimination, i.e., evidence that the plaintiff was replaced by someone significantly younger than the plaintiff." (*Sandell, supra,* 188 Cal.App.4th at p. 321.)

- "In other words, '[b]y the time that the case is submitted to the jury, . . . the plaintiff has already established his or her prima facie case, and the employer has already proffered a legitimate, nondiscriminatory reason for the adverse employment decision, leaving only the issue of the employer's discriminatory intent for resolution by the trier of fact. Otherwise, the case would have been disposed of as a matter of law for the trial court. That is to say, if the plaintiff cannot make out a prima facie case, the employer wins as a matter of law. If the employer cannot articulate a nondiscriminatory reason for the adverse employment decision, the plaintiff wins as a matter of law. In those instances, no fact-finding is required, and the case will never reach a jury. [¶] In short, if and when the case is submitted to the jury, the construct of the shifting burden "drops from the case," and the jury is left to decide which evidence it finds more convincing, that of the employer's discriminatory intent, or that of the employer's race or age-neutral reasons for the employment decision.' " (*Muzquiz, supra,* 79 Cal.App.4th at p. 1118, fn. 5.)

- "Because the only issue properly before the trier of fact was whether the [defendant]'s adverse

employment decision was motivated by discrimination on the basis of age, the shifting burdens of proof regarding appellant's prima facie case and the issue of legitimate nondiscriminatory grounds were actually irrelevant." (*Muzquiz, supra,* 79 Cal.App.4th at p. 1119.)

- "An employee alleging age discrimination must ultimately prove that the adverse employment action taken was based on his or her age. Since direct evidence of such motivation is seldom available, the courts use a system of shifting burdens as an aid to the presentation and resolution of age discrimination cases. That system necessarily establishes the basic framework for reviewing motions for summary judgment in such cases." (*Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1002 [67 Cal.Rptr.2d 483], internal citations omitted.)

- "Requiring the plaintiff to show that discrimination was a *substantial* motivating factor, rather than simply *a* motivating factor, more effectively ensures that liability will not be imposed based on evidence of mere thoughts or passing statements unrelated to the disputed employment decision. At the same time, … proof that discrimination was a *substantial* factor in an employment decision triggers the deterrent purpose of the FEHA and thus exposes the employer to liability, even if other factors would have led the employer to make the same decision at the time." (*Harris, supra,* 56 Cal.4th at p. 232, original italics.)

- "We do not suggest that discrimination must be alone sufficient to bring about an employment decision in order to constitute a substantial motivating factor. But it is important to recognize that discrimination can be serious, consequential, and even by itself determinative of an employment decision without also being a "but for" cause." (*Harris, supra,* 56 Cal.4th at p. 229.)

- "While we agree that a plaintiff must demonstrate some basic level of competence at his or her job in order to meet the requirements of a prima facie showing, the burden-shifting framework established in *McDonnell Douglas* compels the conclusion that any measurement of such competency should, to the extent possible, be based on objective, rather than subjective, criteria. A plaintiff's burden in making a prima facie case of discrimination is not intended to be 'onerous.' Rather, the prima facie burden exists in order to weed out patently unmeritorious claims." (*Sandell, supra,* 188 Cal.App.4th at p. 322, internal citations omitted.)

- "A discharge is not 'on the ground of age' within the meaning of this prohibition unless age is a 'motivating factor' in the decision. Thus, ' "an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision." ' '[A]n employee claiming discrimination must offer substantial evidence that the employer's stated nondiscriminatory reason for the adverse action was untrue or pretextual, or evidence the employer acted with a discriminatory animus, or a combination of the two, such that a reasonable trier of fact could conclude the employer engaged in intentional discrimination.' " (*West v. Bechtel Corp.* (2002) 96 Cal.App.4th 966, 978 [117 Cal.Rptr.2d 647].)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 932–935

Chin et al., California Practice Guide: Employment Litigation, Ch. 8-B, *California Fair Employment and*

Housing Act, ¶¶ 8:740, 8:800 et seq. (The Rutter Group)

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws,* § 41.31 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.22 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, § 100.43 (Matthew Bender)

2601. Eligibility

To show that [he/she] was eligible for [family care/medical] leave, [*name of plaintiff*] must prove all of the following:

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

2. **That [*name of defendant*] employed 50 or more employees within 75 miles of [*name of plaintiff*]'s workplace;**

3. **That at the time [*name of plaintiff*] [requested/began] leave, [he/she] had more than 12 months of service with [*name of defendant*] and had worked at least 1,250 hours for [*name of defendant*] during the previous 12 months; and**

4. **That at the time [*name of plaintiff*] [requested/began] leave [*name of plaintiff*] had taken no more than 12 weeks of family care or medical leave in the 12-month period [*define period*].**

New September 2003; Revised June 2011

Sources and Authority

- Right to Family Care and Medical Leave. Government Code section 12945.2(a). ~~provides, in part, that "it shall be an unlawful employment practice for any employer ... to refuse to grant a request by any employee with more than 12 months of service with the employer, and who has at least 1,250 hours of service with the employer during the previous 12-month period, to take up to a total of 12 workweeks in any 12-month period for family care and medical leave. Family care and medical leave ... shall not be deemed to have been granted unless the employer provides the employee, upon granting the leave request, a guarantee of employment in the same or a comparable position upon the termination of the leave."~~

- "Employer" Defined. Government Code section 12945.2(c)(2). ~~provides, in part:~~

  ~~"Employer" means either of the following:~~

  ~~(A) Any person who directly employs 50 or more persons to perform services for a wage or salary.~~

  ~~(B) The state, and any political or civil subdivision of the state and cities.~~

- Limitation on Scope. Government Code section 12945.2(b). ~~provides: "It shall not be an unlawful employment practice for an employer to refuse to grant a request for family care and medical leave by an employee if the employer employs less than 50 employees within 75 miles of the worksite where that employee is employed."~~

Secondary Sources

Chin et al., Cal. Practice Guide: Employment Litigation, ¶¶ 12:32, 12:87, 12:125, 12:390, 12:421, 12:1201, 12:1300 (The Rutter Group)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.32[6][c] (Matthew Bender)

2602. Reasonable Notice of CFRA Leave

For notice of the need for leave to be reasonable, [*name of plaintiff***] must make [***name of defendant***] aware that [he/she] needs [family care/medical] leave, when the leave will begin, and how long it is expected to last. The notice can be verbal or in writing and does not need to mention the law. An employer cannot require disclosure of any medical diagnosis, but should ask for information necessary to decide whether the employee is entitled to leave.**

New September 2003

Sources and Authority

- Reasonable Notice Required. Government Code section 12945.2(h). ~~provides: "If the employee's need for a leave ... is foreseeable, the employee shall provide the employer with reasonable advance notice of the need for the leave."~~

- "An employee 'shall provide the employer with reasonable advance notice of the need for the leave.' 'An employee shall provide at least verbal notice sufficient to make the employer aware that the employee needs CFRA-qualifying leave, and the anticipated timing and duration of the leave. The employee need not expressly assert rights under CFRA ... , or even mention CFRA ... , to meet the notice requirement; however, the employee must state the reason the leave is needed, such as, for example, the expected birth of a child or for medical treatment. The employer should inquire further of the employee if it is necessary to have more information about whether CFRA leave is being sought by the employee and obtain the necessary details of the leave to be taken.'" (*Gibbs v. American Airlines, Inc.* (1999) 74 Cal.App.4th 1, 6–7 [87 Cal.Rptr.2d 554], quoting Cal. Code Regs., tit. 2, § 7297.4(a)(1).)

- "The employee must 'provide at least verbal notice sufficient to make the employer aware that the employee needs CFRA-qualifying leave, and the anticipated timing and duration of the leave. The employer in turn is charged with responding to the leave request "as soon as practicable and in any event no later than ten calendar days after receiving the request.' " (*Olofsson v. Mission Linen Supply* (2012) 211 Cal.App.4th 1236, 1241 [150 Cal.Rptr.3d 446], internal citations omitted.)

- "That plaintiff called in sick was, by itself, insufficient to put [defendant] on notice that he needed CFRA leave for a serious health condition." (*Avila v. Continental Airlines, Inc.* (2008) 165 Cal.App.4th 1237, 1255 [82 Cal.Rptr.3d 440].)

- "Under the CFRA regulations, the employer has a duty to respond to the leave request within 10 days, but clearly and for good reason the law does not specify that the response must be tantamount to approval or denial." (*Olofsson, supra,* 211 Cal.App.4th at p. 1249.)

Secondary Sources

Chin et al., Cal. Practice Guide: Employment Litigation , Ch. 12-B, *Family And Medical Leave Act*

(FMLA)/California Family Rights Act (CFRA), ¶¶ 12:852–12:853, 12:855–12:857 (The Rutter Group)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.32[6][e] (Matthew Bender)

2603. "Comparable Job" Explained

"Comparable job" means a job that is the same or close to the employee's former job in responsibilities, duties, pay, benefits, working conditions, and schedule. It must be at the same or a nearby worksite.

New September 2003

Directions for Use

Give this instruction only if comparable job is an issue under the plaintiff's CFRA claim.

Sources and Authority

- Comparable Position. Government Code section 12945.2(c)(4). ~~provides: " 'Employment in the same or a comparable position' means employment in a position that has the same or similar duties and pay that can be performed at the same or similar geographic location as the position held prior to the leave."~~

- Comparable Position. ~~The Fair Employment and Housing Commission's regulations provide: " 'Employment in a comparable position' means employment in a position which is virtually identical to the employee's original position in terms of pay, benefits, and working conditions, including privileges, perquisites and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority. It must be performed at the same or geographically proximate worksite from where the employee was previously employed. It ordinarily means the same shift or the same or an equivalent work schedule. It has the same meaning as the term 'equivalent position' in [the Family Medical Leave Act] and its implementing regulations." (~~Cal. Code Regs., tit. 2, § ~~7297.0~~11087(g).~~)

- "[W]hile we will accord great weight and respect to the [Fair Employment and Housing Commission]'s regulations that apply to the necessity for leave, along with any applicable federal FMLA regulations that the Commission incorporated by reference, we still retain ultimate responsibility for construing [CFRA]." (*Pang v. Beverly Hospital, Inc.* (2000) 79 Cal.App.4th 986, 994-995 [94 Cal.Rptr.2d 643].)

Secondary Sources

Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group) ¶¶ 12:1138–12:1139, 12:1150, 12:1154–12:1156

1 Wilcox, California Employment Law,, Ch. 8, *Leaves of Absence*, § 8.30[1]–[2] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.32[6][h] (Matthew Bender)

2610. Affirmative Defense—No Certification From Health-Care Provider

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[*Name of defendant***] claims that [he/she/it] denied [***name of plaintiff***]'s request for leave because [he/she] did not provide a health-care provider's certification of [his/her] need for leave. To succeed, [***name of defendant***] must prove both of the following:**

1. **That [***name of defendant***] told [***name of plaintiff***] in writing that [he/she/it] required written certification from [***name of plaintiff***]'s health-care provider to [grant/extend] leave; and**

2. **That [***name of plaintiff***] did not provide [***name of defendant***] with the required certification from a health-care provider [within the time set by [***name of defendant***] or as soon as reasonably possible].**

New September 2003

Directions for Use

The time set by the defendant described in element 2 must be at least 15 days.

Sources and Authority

- Certification of Health Care Provider. Government Code section 12945.2(k). ~~provides, in part:~~

  ~~(1) An employer may require that an employee's request for leave because of the employee's own serious health condition be supported by a certification issued by his or her health care provider. That certification shall be sufficient if it includes all of the following:~~

  ~~(A) The date on which the serious health condition commenced.~~

  ~~(B) The probable duration of the condition.~~

  ~~(C) A statement that, due to the serious health condition, the employee is unable to perform the function of his or her position.~~

  ~~(2) The employer may require that the employee obtain subsequent recertification regarding the employee's serious health condition on a reasonable basis, in accordance with the procedure provided in paragraph (1), if additional leave is required.~~

- Certification of Health Care Provider: Child Care. Government Code section 12945.2(j). ~~provides, in part:~~

  ~~(1) An employer may require that an employee's request for leave to care for a child, a~~

~~spouse, or a parent who has a serious health condition be supported by a certification issued by the health care provider of the individual requiring care. That certification shall be sufficient if it includes all of the following:~~

~~(A) The date on which the serious health condition commenced.~~

~~(B) The probable duration of the condition.~~

~~(C) An estimate of the amount of time that the health care provider believes the employee needs to care for the individual requiring the care.~~

~~(D) A statement that the serious health condition warrants the participation of a family member to provide care during a period of the treatment or supervision of the individual requiring care.~~

~~(2) Upon expiration of the time estimated by the health care provider in subparagraph (C) of paragraph (1), the employer may require the employee to obtain recertification, in accordance with the procedure provided in paragraph (1), if additional leave is required.~~

- Certification of Health Care Provider: Return to Work. Government Code section 12945.2(k)(4). ~~provides, in part: "As a condition of an employee's return from leave taken because of the employee's own serious health condition, the employer may have a uniformly applied practice or policy that requires the employee to obtain certification from his or her health care provider that the employee is able to resume work."~~

- "Health Caer Provider" Defined, Government Code section 12945.2(c)(6). ~~defines "health care provider" as meaning any of the following:~~

  ~~(A) An individual holding either a physician's and surgeon's certificate issued pursuant to ... the Business and Professions Code, an osteopathic physician's and surgeon's certificate issued pursuant to ... the Business and Professions Code, or an individual duly licensed as a physician, surgeon, or osteopathic physician or surgeon in another state or jurisdiction, who directly treats or supervises the treatment of the serious health condition.~~

  ~~(B) Any other person determined by the United States Secretary of Labor to be capable of providing health care services under the FMLA.~~

- Notice and Certification. ~~The Fair Employment and Housing Commission's regulations provide: "A request to take a CFRA leave is reasonable if it complies with any applicable notice requirements ... and if it is accompanied, where required, by a certification." (~~Cal. Code Regs., tit. 2, § ~~7297.1~~11088(b).~~)~~

- "[S]ubdivision (k)(1) of [Government Code] section 12945.2 does not *require* an employer to submit disputes regarding an employee's entitlement to medical leave to a third health care provider."

(*Lonicki v. Sutter Health Central* (2008) 43 Cal.4th 201, 211 [74 Cal.Rptr.3d 570, 180 P.3d 321], original italics.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 942–944

Chin et al., Cal. Practice Guide: Employment Litigation ~~(The Rutter Group)~~ ¶¶ 12:311, 12:880, 12:883–12:884, 12:905, 12:915 (The Rutter Group)

1 Wilcox, California Employment Law, *Leaves of Absence*, § 8.26 (Matthew Bender)

2611. Affirmative Defense—Fitness for Duty Statement

[*Name of defendant***] claims that [he/she/it] refused to return [***name of plaintiff***] to work because [he/she] did not provide a written statement from [his/her] health-care provider that [he/she] was fit to return to work. To succeed, [***name of defendant***] must prove both of the following:**

1. **That [***name of defendant***] has a uniformly applied practice or policy that requires employees on leave because of their own serious health condition to provide a written statement from their health-care provider that they are able to return to work; and**

2. **That [***name of plaintiff***] did not provide [***name of defendant***] with a written statement from [his/her] health-care provider of [his/her] fitness to return to work.**

New September 2003

Sources and Authority

- Certification on Health Care Provider: Child Care. Government Code section 12945.2(j). ~~provides, in part:~~

  ~~(1) An employer may require that an employee's request for leave to care for a child, a spouse, or a parent who has a serious health condition be supported by a certification issued by the health care provider of the individual requiring care. That certification shall be sufficient if it includes all of the following:~~

  ~~(A) The date on which the serious health condition commenced.~~

  ~~(B) The probable duration of the condition.~~

  ~~(C) An estimate of the amount of time that the health care provider believes the employee needs to care for the individual requiring the care.~~

  ~~(D) A statement that the serious health condition warrants the participation of a family member to provide care during a period of the treatment or supervision of the individual requiring care.~~

  ~~(2) Upon expiration of the time estimated by the health care provider in subparagraph (C) of paragraph (1), the employer may require the employee to obtain recertification, in accordance with the procedure provided in paragraph (1), if additional leave is required.~~

- Certification of Health Care Provider: Return to Work. Government Code section 12945.2(k)(4). ~~provides, in part: "As a condition of an employee's return from leave taken because of the employee's own serious health condition, the employer may have a uniformly applied practice or policy that~~

~~requires the employee to obtain certification from his or her health care provider that the employee is able to resume work."~~

- "Health Care Provider" Defined. Government Code section 12945.2(c)(6). ~~defines "health care provider" as meaning any of the following:~~

  ~~(A) An individual holding either a physician's and surgeon's certificate issued pursuant to ... the Business and Professions Code, an osteopathic physician's and surgeon's certificate issued pursuant to ... the Business and Professions Code, or an individual duly licensed as a physician, surgeon, or osteopathic physician or surgeon in another state or jurisdiction, who directly treats or supervises the treatment of the serious health condition.~~

  ~~(B) Any other person determined by the United States Secretary of Labor to be capable of providing health care services under the FMLA.~~

- Notice and Certification. ~~The Fair Employment and Housing Commission's regulations provide: "A request to take a CFRA leave is reasonable if it complies with any applicable notice requirements ... and if it is accompanied, where required, by a certification." (~~Cal. Code Regs., tit. 2, § ~~7297.1~~11088(b).~~)~~

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 942–944

Chin et al., Cal. Practice Guide: Employment Litigation ~~(The Rutter Group)~~ ¶¶ 12:311, 12:880, 12:884, 12:915 (The Rutter Group)

1 Wilcox, California Employment Law,, Ch. 8, *Leaves of Absence*, § 8.26 (Matthew Bender)

2612. Affirmative Defense—Employment Would Have Ceased

[*Name of defendant***] claims that [he/she/it] was not required to allow [***name of plaintiff***] to return to work when [his/her] [family care/medical] leave was over because [his/her] employment would have ended for other reasons. To succeed, [***name of defendant***] must prove both of the following:**

1. **That [***name of defendant***] would have [discharged/laid off] [***name of plaintiff***] if [he/she] had continued to work during the leave period; and**

2. **That [***name of plaintiff***]'s [family care/medical] leave was not a reason for [discharging [him/her]/laying [him/her] off].**

An employee on [family care/medical] leave has no greater right to his or her job or to other employment benefits than if he or she had continued working during the leave.

New September 2003

Sources and Authority

- Limitations of Right to Reinstatement. ~~The Fair Employment and Housing Commission's regulations provide: "An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the CFRA leave period. An employer has the burden of proving, by a preponderance of the evidence, that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny reinstatement. ... [¶] ... If an employee is laid off during the course of taking CFRA leave and employment is terminated, the employer's responsibility to continue CFRA leave, maintain group health plan benefits and reinstate the employee ceases at the time the employee is laid off, provided the employer has no continuing obligations under a collective bargaining agreement or otherwise." (~~Cal. Code Regs., tit. 2, § ~~7297.2~~11089(c)(1).~~)

Secondary Sources

Chin et al., Cal. Practice Guide: Employment Litigation ~~(The Rutter Group)~~ ¶¶ 12:1189, 12:1191 (The Rutter Group)

1 Wilcox, California Employment Law,, Ch. 8, *Leaves of Absence*, § 8.30[4] (Matthew Bender)

2613. Affirmative Defense—Key Employee

[*Name of defendant***] claims that [he/she/it] was not required to return [***name of plaintiff***] to work in the same or a comparable job following [family care/medical] leave because [he/she] was employed in a highly paid, essential position. To succeed on this claim, [***name of defendant***] must prove all of the following:**

1. **That [***name of plaintiff***] was a salaried employee and among the highest paid 10 percent of [***name of defendant***]'s employees [employed within 75 miles of [his/her] workplace];**

2. **That [***name of defendant***]'s refusal to return [***name of plaintiff***] to work in the same or a comparable job was necessary to prevent severe economic injury to [***name of defendant***]'s [business] operations; [and]**

3. **That when [***name of defendant***] decided that [***name of plaintiff***] would not be allowed to return to [his/her] job or a comparable position, [***name of defendant***] notified [***name of plaintiff***] of that decision; [and]**

[4. That [*name of defendant***] gave [***name of plaintiff***] a reasonable opportunity to return to work after notifying [***name of plaintiff***] of [his/her/its] decision.]**

New September 2003

Directions for Use

Element 4 is applicable only when the employer notifies the employee of its decision to refuse to reinstate plaintiff after family care or medical leave has commenced.

Sources and Authority

- Limitation on Right to Reinstatement: Key Employee. Government Code section 12945.2(r). ~~provides, in part:~~

  ~~(1) [A]n employer may refuse to reinstate an employee returning from leave to the same or a comparable position if all of the following apply:~~

  ~~(A) The employee is a salaried employee who is among the highest paid 10 percent of the employer's employees who are employed within 75 miles of the worksite at which that employee is employed.~~

  ~~(B) The refusal is necessary to prevent substantial and grievous economic injury to the operations of the employer.~~

~~(C) The employer notifies the employee of the intent to refuse reinstatement at the time the employer determines the refusal is necessary under subparagraph (B).~~

~~(2) In any case in which the leave has already commenced, the employer shall give the employee a reasonable opportunity to return to work following the notice prescribed by subparagraph (C).~~

Secondary Sources

Chin et al., Cal. Practice Guide: Employment Litigation ~~(The Rutter Group)~~ ¶¶ 12:1167–12:1169, 12:1171, 12:1174 (The Rutter Group)

1 Wilcox, California Employment Law, Ch. 8, *Leaves of Absence*, § 8.30[5] (Matthew Bender)

2620. CFRA Rights Retaliation—Essential Factual Elements (Gov. Code, § 12945.2(*l*))

[*Name of plaintiff***] claims that [***name of defendant***] retaliated against [him/her] for [[requesting/taking] [family care/medical] leave/[***other protected activity***]]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was eligible for [family care/medical] leave;**

2. **That [***name of plaintiff***] [[requested/took] [family care/medical] leave/[***other protected activity***]];**

3. **That [***name of defendant***] [discharged/[***other adverse employment action***]] [***name of plaintiff***];**

4. **That [***name of plaintiff***]'s [[request for/taking of] [family care/medical] leave/[***other protected activity***]] was a substantial motivating reason for [discharging/[***other adverse employment action***]] [him/her];**

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

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

New September 2003; Revised December 2012, June 2013

Directions for Use

Use this instruction in cases of alleged retaliation for an employee's exercise of rights granted by the California Family Rights Act (CFRA). (See Gov. Code, § 12945.2(*l*).) The instruction assumes that the defendant is plaintiff's present or former employer, and therefore it must be modified if the defendant is a prospective employer or other person.

The statute reaches a broad range of adverse employment actions short of actual discharge. (See Gov. Code, § 12945.2(*l*).) Element 3 may be modified to allege constructive discharge or adverse acts other than actual discharge. See CACI No. 2509, *"Adverse Employment Action" Explained,* and CACI No. 2510, *"Constructive Discharge" Explained,* for instructions under the Fair Employment and Housing Act that may be adapted for use with this instruction.

Element 4 uses the term "substantial motivating reason" to express both intent and causation between the employee's exercise of a CFRA right and the adverse employment action. "Substantial motivating reason" has been held to be the appropriate standard under the discrimination prohibitions of the Fair Employment and Housing Act to address the possibility of both discriminatory and nondiscriminatory motives. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; CACI No. 2507, *"Substantial Motivating Reason" Explained*.) Whether this standard applies to

CFRA retaliation cases has not been addressed by the courts.

Sources and Authority

- Retaliation Prohibited. Government Code section 12945.2(*l*), (t). ~~provides:~~

  ~~It shall be an unlawful employment practice for an employer to refuse to hire, or to discharge, fine, suspend, expel, or discriminate against, any individual because of any of the following:~~

  ~~(1) An individual's exercise of the right to family care and medical leave ...~~

  ~~(2) An individual's giving information or testimony as to his or her own family care and medical leave, or another person's family care and medical leave, in any inquiry or proceeding related to rights guaranteed under this section.~~

- ~~Government Code section 12945.2(t) provides: "It shall be an unlawful employment practice for an employer to interfere with, restrain, or deny the exercise of, or the attempt to exercise, any right provided under this section."~~

- Retaliation Prohibited Under Fair Employment and Housing Act. Government Code section 12940(h). ~~provides that it is an unlawful employment practice "[f]or any employer, labor organization, employment agency, or person to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under [Government Code sections 12900 through 12996] or because the person has filed a complaint, testified, or assisted in any proceeding under this part."~~

- "A plaintiff can establish a prima facie case of retaliation in violation of the CFRA by showing the following: (1) the defendant was a covered employer; (2) the plaintiff was eligible for CFRA leave; (3) the plaintiff exercised his or her right to take a qualifying leave; and (4) the plaintiff suffered an adverse employment action *because he or she exercised the right to take CFRA leave*." (*Rogers v. County of Los Angeles* (2011) 198 Cal.App.4th 480, 491 [130 Cal.Rptr.3d 350], original italics.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 943, 944

Chin et al., California Practice Guide: Employment Litigation, Ch. 12-B, *Family And Medical Leave Act (FMLA)/California Family Rights Act (CFRA)*, ¶¶ 12:1300, 12:1301 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Other Employee Rights Statutes, §§ 4.18–4.20

1 Wilcox, California Employment Law, Ch. 8, *Leaves of Absence*, § 8.32 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.37[3][c] (Matthew Bender)

2700. Nonpayment of Wages—Essential Factual Elements (Lab. Code, §§ 201, 202, 218)

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

1. **That [***name of plaintiff***] performed work for [***name of defendant***];**

2. **That [***name of defendant***] owes [***name of plaintiff***] wages under the terms of the employment; and**

3. **The amount of unpaid wages.**

"Wages" includes all amounts for labor performed by an employee, whether the amount is calculated by time, task, piece, commission, or some other method.

New September 2003; Revised December 2005, December 2013

Directions for Use

This instruction is intended for use in a civil action for payment of wages. Depending on the allegations in the case, the definition of "wages" may be modified to include additional compensation, such as earned vacation, nondiscretionary bonuses, or severance pay.

The court may modify this instruction or write an appropriate instruction in cases where the defendant employer claims a permissible setoff from the plaintiff employee's unpaid wages. Under California Wage Orders, an employer may deduct from an employee's wages for cash shortage, breakage, or loss of equipment if the employer proves that this was caused by a dishonest or willful act or by the gross negligence of the employee. (See, e.g., Cal. Code Regs., tit. 8, § 11010, subd. 8.)

Sources and Authority

- Right of Action for Wage Claim. Labor Code section 218. ~~provides, in part: "Nothing in this article shall limit the right of any wage claimant to sue directly or through an assignee for any wages or penalty due ... ."~~

- Wages Due on Discharge. Labor Code section 201 ~~provides, in part: "If an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately."~~.

- Wages Due on Quitting. Labor Code section 202. ~~provides, in part: "If an employee not having a written contract for a definite period quits his or her employment, his or her wages shall become due and payable not later than 72 hours thereafter, unless the employee has given 72 hours previous notice of his or her intention to quit, in which case the employee is entitled to his or her wages at the time of quitting."~~

- "Wages" Defined, Labor Code section 200. defines "wages" as including "all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation. [¶] ... 'Labor' includes labor, work, or service whether rendered or performed under contract, subcontract, partnership, station plan, or other agreement if the labor to be paid for is performed personally by the person demanding payment."

- Wages Partially in Dispute. Labor Code section 206(a). provides: "In case of a dispute over wages, the employer shall pay, without condition and within the time set by this article, all wages, or parts thereof, conceded by him to be due, leaving to the employee all remedies he might otherwise be entitled to as to any balance claimed."

- Deductions From Pay. Labor Code section 221, Code of Regulations, Title 8, section 11010, subdivision 8. provides: "It shall be unlawful for any employer to collect or receive from an employee any part of wages theretofore paid by said employer to said employee."

- "[Labor Code] section 221 has long been held to prohibit deductions from an employee's wages for cash shortages, breakage, loss of equipment, and other business losses that may result from the employee's simple negligence." (*Hudgins v. Neiman Marcus Group, Inc.* (1995) 34 Cal.App.4th 1109, 1118 [41 Cal.Rptr.2d 46].)

- Nonapplicability to Government Employers. Labor Code section 220. provides:

  (a) Sections 201.3, 201.5, 201.7, 203.1, 203.5, 204, 204a, 204b, 204c, 204.1, 205, and 205.5 do not apply to the payment of wages of employees directly employed by the State of California. Except as provided in subdivision (b), all other employment is subject to these provisions.

  (b) Sections 200 to 211, inclusive, and Sections 215 to 219, inclusive, do not apply to the payment of wages of employees directly employed by any county, incorporated city, or town or other municipal corporation. All other employments are subject to these provisions.

- California Wage Orders provide: "No employer shall make any deduction from the wage or require any reimbursement from an employee for any cash shortage, breakage, or loss of equipment, unless it can be shown that the shortage, breakage, or loss is caused by a dishonest or willful act, or by the gross negligence of the employee." (Cal. Code Regs., tit. 8, § 11010, subd. 8.)

- Employer Not Entitled to Release. Labor Code section 206.5. provides, in part: "An employer shall not require the execution of a release of a claim or right on account of wages due, or to become due, or made as an advance on wages to be earned, unless payment of those wages has been made."

- Private Agreements Prohibited. Labor Code section 219(a). provides, in part: "[N]o provision of [Labor Code sections 200 through 243] can in any way be contravened or set aside by a private agreement, whether written, oral, or implied."

- "[Labor Code] section 221 has long been held to prohibit deductions from an employee's wages for cash shortages, breakage, loss of equipment, and other business losses that may result from the employee's simple negligence." (*Hudgins v. Neiman Marcus Group, Inc.* (1995) 34 Cal.App.4th 1109, 1118 [41 Cal.Rptr.2d 46].)

- "[A]n employer is not entitled to a setoff of debts owing it by an employee against any wages due that employee." (*Barnhill v. Robert Saunders & Co.* (1981) 125 Cal.App.3d 1, 6 [177 Cal.Rptr. 803].)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 398, 399

Chin et al., California Practice Guide: Employment Litigation, Ch.1-A, *Background*, ¶ 1:22 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-B, *Coverage And Exemptions—In General*, ¶ 11:121 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch.11-D, *Payment Of Wages*, ¶¶ 11:456, 11:470, 11:470.1, 11:512−11.514 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch.11-J, *Enforcing California Laws Regulating Employee Compensation*, ¶ 11:1459 (The Rutter Group)

1 Wilcox, California Employment Law, Ch. 5, *Administrative and Judicial Remedies Under Wage and Hour Laws*, § 5.40 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 250, *Employment Law: Wage and Hour Disputes*, §§ 250.13[1][a], 250.40[3][a], 250.65 (Matthew Bender)

California Civil Practice: Employment Litigation §§ 4:67, 4:75 (Thomson Reuters)

2703. Nonpayment of Overtime Compensation—Proof of Overtime Hours Worked

State law requires California employers to keep payroll records showing the hours worked by and wages paid to employees.

If [*name of defendant***] did not keep accurate records of the hours worked by [***name of plaintiff***], then [***name of plaintiff***] may prove the number of overtime hours worked by making a reasonable estimate of those hours.**

In determining the amount of overtime hours worked, you may consider [*name of plaintiff***]'s estimate of the number of overtime hours worked and any evidence presented by [***name of defendant***] that [***name of plaintiff***]'s estimate is unreasonable.**

New September 2003; Revised June 2005, December 2005

Directions for Use

This instruction is intended for use when the plaintiff is unable to provide evidence of the precise number of hours worked because of the employer's failure to keep accurate payroll records. (See *Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721, 727–728 [245 Cal.Rptr. 36].)

Sources and Authority

- Right of Action for Unpaid Overtime. Labor Code section 1194(a). ~~provides: "Notwithstanding any agreement to work for a lesser wage, any employee receiving less than ... the legal overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount of this ... overtime compensation, including interest thereon, reasonable attorney's fees, and costs of suit."~~

- Employer Duty to Keep Payroll Records. Labor Code section 1174(d). ~~provides:~~

  ~~"Every person employing labor in this state shall:~~

  ~~[(a)–(c) omitted]~~

  ~~(d) Keep payroll records showing the hours worked daily by and the wages paid to, and the number of piece-rate units earned by and any applicable piece rate paid to, employees employed at the respective plants or establishments. These records shall be kept in accordance with rules established for this purpose by the commission, but in any case shall be kept on file for not less than three years. An employer shall not prohibit an employee from maintaining a personal record of hours worked, or, if paid on a piece-rate basis, piece-rate units earned."~~

- "Although the employee has the burden of proving that he performed work for which he was not compensated, public policy prohibits making that burden an impossible hurdle for the employee. ...

‘In such situation ... an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee’s evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate.’ ” (*Hernandez, supra,* 199 Cal.App.3d at p. 727, internal citation omitted.)

- “It is the trier of fact’s duty to draw whatever reasonable inferences it can from the employee’s evidence where the employer cannot provide accurate information.” (*Hernandez, supra,* 199 Cal.App.3d at p. 728, internal citation omitted.)

- “Absent an explicit, mutual wage agreement, a fixed salary does not serve to compensate an employee for the number of hours worked under statutory overtime requirements. ... [¶] Since there was no evidence of a wage agreement between the parties that appellant’s ... per week compensation represented the payment of minimum wage or included remuneration for hours worked in excess of 40 hours per week, ... appellant incurred damages of uncompensated overtime.” (*Hernandez, supra,* 199 Cal.App.3d at pp. 725–726, internal citations omitted.)

Secondary Sources

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-D, *Payment of Wages,* ¶ 11:456 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-F, *Payment of Overtime Compensation,* ¶ 11:955.2 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-J, *Enforcing California Laws Regulating Employee Compensation,* ¶ 11:1478.5 (The Rutter Group)

1 Wilcox, California Employment Law, Ch. 5, *Administrative and Judicial Remedies Under Wage and Hour Laws,* § 5.72[1] (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 250, *Employment Law: Wage and Hour Disputes,* § 250.40 (Matthew Bender)

2704. Damages—Waiting-Time Penalty for Nonpayment of Wages (Lab. Code, §§ 203, 218)

If you decide that [*name of plaintiff***] has proved [his/her] claim against [***name of defendant***] for [unpaid wages/[***insert other claim***]], then [***name of plaintiff***] may be entitled to receive an award of a civil penalty based on the number of days [***name of defendant***] failed to pay [his/her] [wages/***other***] when due.**

To recover the civil penalty, [*name of plaintiff***] must prove all of the following:**

1. **The date on which [***name of plaintiff***]'s employment ended;**

2. **[That [***name of defendant***] failed to pay all wages due by [***insert date***];]**

   [or]

   [The date on which [*name of defendant***] paid [***name of plaintiff***] all wages due;]**

3. **[***Name of plaintiff***]'s daily wage rate at the time [his/her] employment with [***name of defendant***] ended; and**

4. **That [***name of defendant***] willfully failed to pay these wages.**

The term "wages" includes all amounts for labor performed by an employee, whether the amount is calculated by time, task, piece, commission, or some other method.

The term "willfully" means that the employer intentionally failed or refused to pay the wages.

New September 2003; Revised June 2005

Directions for Use

This instruction is intended to instruct the jury on factual determinations required to assist the court in calculating waiting time penalties under Labor Code section 203. The court must determine when final wages are due based on the circumstances of the case and applicable law—see Labor Code sections 201 and 202. If there is a factual dispute, for example, whether plaintiff gave advance notice of his or her intention to quit, or whether payment of final wages by mail was authorized by plaintiff, the court may be required to give further instruction to the jury. Final wages generally are due on the day an employee is discharged by the employer, but are not due for 72 hours if an employee quits without notice (see Lab. Code, §§ 201, 201.5, 201.7, 202, 205.5).

The definition of "wages" may be deleted as redundant if it is redundant with other instructions.

Sources and Authority

- Wages of Discharged Employee Due Immediately. Labor Code section 201.

- Willful Failure to Pay Wages of Discharged Employee. Labor Code section 203. ~~provides:~~

  ~~(a) If an employer willfully fails to pay, without abatement or reduction, in accordance with Sections 201, 201.3, 201.5, 202, and 205.5, any wages of an employee who is discharged or who quits, the wages of the employee shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced; but the wages shall not continue for more than 30 days. An employee who secretes or absents himself or herself to avoid payment to him or her, or who refuses to receive the payment when fully tendered to him or her, including any penalty then accrued under this section, is not entitled to any benefit under this section for the time during which he or she so avoids payment.~~

  ~~(b) Suit may be filed for these penalties at any time before the expiration of the statute of limitations on an action for the wages from which the penalties arise.~~

- Right of Action for Unpaid Wages. Labor Code section 218. ~~provides in part: "Nothing in this article shall limit the right of any wage claimant to sue directly or through an assignee for any wages or penalty due him under this article."~~

- ~~Labor Code section 201 provides in part: "If an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately."~~

- Wages of Contract Employee on Quitting. Labor Code section 202. ~~provides: "If an employee not having a written contract for a definite period quits his or her employment, his or her wages shall become due and payable not later than 72 hours thereafter, unless the employee has given 72 hours previous notice of his or her intention to quit, in which case the employee is entitled to his or her wages at the time of quitting. Notwithstanding any other provision of law, an employee who quits without providing a 72-hour notice shall be entitled to receive payment by mail if he or she so requests and designates a mailing address. The date of the mailing shall constitute the date of payment for purposes of the requirement to provide payment within 72 hours of the notice of quitting."~~

- "Wages" Defined. Labor Code section 200. ~~defines "wages" as including "all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation ... . [¶] 'Labor' includes labor, work, or service whether rendered or performed under contract, subcontract, partnership, station plan, or other agreement if the labor to be paid for is performed personally by the person demanding payment."~~

- Payment for Accrued Vacation of Terminated Employee. Labor Code section 227.3. ~~provides in part: "Unless otherwise provided by a collective-bargaining agreement, whenever a contract of employment or employer policy provides for paid vacations, and an employee is terminated without having taken off his vested vacation time, all vested vacation shall be paid to him as wages at his final rate in accordance with such contract of employment or employer policy respecting eligibility or time served ... ."~~

- Wages Partially in Dispute. Labor Code section 206(a). ~~provides: "In case of a dispute over wages, the employer shall pay, without condition and within the time set by this article, all wages, or parts thereof, conceded by him to be due, leaving to the employee all remedies he might otherwise be entitled to as to any balance claimed."~~

- " '[T]he public policy in favor of full and prompt payment of an employee's earned wages is fundamental and well established …' and the failure to timely pay wages injures not only the employee, but the public at large as well. We have also recognized that sections 201, 202, and 203 play an important role in vindicating this public policy. To that end, the Legislature adopted the penalty provision as a disincentive for employers to pay final wages late. It goes without saying that a longer statute of limitations for section 203 penalties provides additional incentive to encourage employers to pay final wages in a prompt manner, thus furthering the public policy." (*Pineda v. Bank of America, N.A.* (2010) 50 Cal.4th 1389, 1400 [117 Cal.Rptr.3d 377, 241 P.3d 870], internal citations omitted.)

- "The purpose of section 203 is to compel the prompt payment of earned wages; the section is to be given a reasonable but strict interpretation." (*Barnhill v. Robert Saunders & Co.* (1981) 125 Cal.App.3d 1, 7 [177 Cal.Rptr. 803].)

- " ' "[T]o be at fault within the meaning of [section 203], the employer's refusal to pay need not be based on a deliberate evil purpose to defraud workmen of wages which the employer knows to be due. As used in section 203, 'willful' merely means that the employer intentionally failed or refused to perform an act which was required to be done." …' " (*Gonzalez v. Downtown LA Motors, LP* (2013) 215 Cal.App.4th 36, 54 [155 Cal.Rptr.3d 18].)

- "[A]n employer's reasonable, good faith belief that wages are not owed may negate a finding of willfulness." (*Choate v. Celite Corp.* (2013) 215 Cal.App.4th 1460, 1468 [155 Cal.Rptr.3d 915].)

- "A proper reading of section 203 mandates a penalty equivalent to the employee's daily wages for each day he or she remained unpaid up to a total of 30 days. … [¶] [T]he critical computation required by section 203 is the calculation of a daily wage rate, which can then be multiplied by the number of days of nonpayment, up to 30 days." (*Mamika v. Barca* (1998) 68 Cal.App.4th 487, 493 [80 Cal.Rptr.2d 175].)

- " 'A tender of the wages due at the time of the discharge, if properly made and in the proper amount, terminates the further accumulation of penalty, but it does not preclude the employee from recovering the penalty already accrued.' " (*Oppenheimer v. Sunkist Growers, Inc.* (1957) 153 Cal.App.2d Supp. 897, 899 [315 P.2d 116], citation omitted.)

- "In light of the unambiguous statutory language, as well as the practical difficulties that would arise under defendant's interpretation, we conclude there is but one reasonable construction: section 203(b) contains a single, three-year limitations period governing all actions for section 203 penalties irrespective of whether an employee's claim for penalties is accompanied by a claim for unpaid final wages." (*Pineda, supra,* 50 Cal.4th at p. 1398.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 398, 399

Chin et al., California Practice Guide: Employment Litigation, ¶¶ 1:22, 5:173, 11:121, 11:456, 11:470.1, 11:499, 11:510, 11:513–11:515, 11:1458–11:1459, 11:1461–11:1461.1, 12:2331–11:2332, 17:148 (The Rutter Group)

1 Wilcox, California Employment Law, Ch. 5, *Administrative and Judicial Remedies Under Wage and Hour Laws*, § 5.40 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 250, *Employment Law: Wage and Hour Disputes*, § 250.16[2][d] (Matthew Bender)

California Civil Practice: Employment Litigation, §§ 4:67, 4:74 (Thomson Reuters)

2710. Solicitation of Employee by Misrepresentation—Essential Factual Elements (Lab. Code, § 970)

[*Name of plaintiff***] claims that [***name of defendant***] made [a] false representation[s] about work to persuade [him/her] to change [his/her] residence. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] made [a] representation[s] to [***name of plaintiff***] about [***insert one or more of the following***:]**

   [the kind, character, or existence of work;]

   [the length of time work would last;]

   [the compensation for work;]

   [the sanitary or housing conditions relating to work;]

   [the existence or nonexistence of any pending strike, lockout, or other labor dispute affecting work;]

2. **That [***name of defendant***]'s representation(s) [was/were] not true;**

3. **That [***name of defendant***] knew when the representation[s] [was/were] made that [it/they] [was/were] not true;**

4. **That [***name of defendant***] intended that [***name of plaintiff***] rely on the representation[s];**

5. **That [***name of plaintiff***] reasonably relied on [***name of defendant***]'s representation[s] and changed [his/her] residence for the purpose of working for [***name of defendant***];**

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

7. **That [***name of plaintiff***]'s reliance on [***name of defendant***]'s representation(s) was a substantial factor in causing [his/her] harm.**

New September 2003

Directions for Use

If the statutory action under Labor Code section 970 is applicable, do not give the common-law fraud instruction. For other jury instructions regarding opinions as statements of fact, misrepresentations to third parties, reliance, and reasonable reliance, see CACI Nos. 1904 through 1908 in the Fraud or Deceit

series.

Sources and Authority

- False Representations in Labor Recruitment. Labor Code section 970. ~~provides:~~

  ~~No person, or agent or officer thereof, directly or indirectly, shall influence, persuade, or engage any person to change from one place to another in this State or from any place outside to any place within the State, or from any place within the State to any place outside, for the purpose of working in any branch of labor, through or by means of knowingly false representations, whether spoken, written, or advertised in printed form, concerning either:~~

  ~~(a) The kind, character, or existence of such work;~~

  ~~(b) The length of time such work will last, or the compensation therefor;~~

  ~~(c) The sanitary or housing conditions relating to or surrounding the work;~~

  ~~(d) The existence or nonexistence of any strike, lockout, or other labor dispute affecting it and pending between the proposed employer and the persons then or last engaged in the performance of the labor for which the employee is sought.~~

- Violation is Misdemeanor. Labor Code section 971. ~~provides: "Any person, or agent or officer thereof, who violates Section 970 is guilty of a misdemeanor punishable by a fine of not less than fifty dollars ($50) nor more than one thousand dollars ($1,000) or imprisonment for not more than six months or both."~~

- Civil Liability for Violation. Labor Code section 972. ~~provides, in part: "[A]ny person, or agent or officer thereof who violates any provision of Section 970 is liable to the party aggrieved, in a civil action, for double damages resulting from such misrepresentations. Such civil action may be brought by an aggrieved person or his assigns or successors in interest, without first establishing any criminal liability."~~

- "[S]ection 970, although applied ... to other employment situations, was enacted to protect migrant workers from the abuses heaped upon them by unscrupulous employers and potential employers, especially involving false promises made to induce them to move in the first instance." (*Tyco Industries, Inc. v. Superior Court* (1985) 164 Cal.App.3d 148, 155 [211 Cal.Rptr. 540], internal citation and italics omitted.)

- "To establish ... a claim [for violation of section 970], [plaintiff] had to prove that defendants made a knowingly false representation regarding the length of her employment ... with the intent to persuade her to move there from another place to take the position." (*Finch v. Brenda Raceway Corp.* (1994) 22 Cal.App.4th 547, 553 [27 Cal.Rptr.2d 531].)

- "[Section 970] requires the employee to demonstrate that his or her employer made 'knowingly false representations' concerning the nature, duration or conditions of employment. ... [¶] Moreover, under

the statute an employee must establish that the employer induced him or her to relocate or change residences." (*Eisenberg v. Alameda Newspapers* (1999) 74 Cal.App.4th 1359, 1392 [88 Cal.Rptr.2d 802].)

- "The words 'to change from one place to another' import temporary as well as permanent relocation of residence, as contrasted with a mere change in the site of employment. The quantitative fact that the change of residence was to be only for two weeks rather than for a longer period would not appear to affect the qualitative misrepresentations, nor does it render the statute inapplicable." (*Collins v. Rocha* (1972) 7 Cal.3d 232, 239-240 [102 Cal.Rptr. 1, 497 P.2d 225].)

- "The construction of a statute and whether it is applicable to a factual situation present solely questions of law. Although the trial court erred in determining that the Labor Code sections 970 and 972 were not applicable and hence the issue of double damages was not submitted to the jury, the record reflects that the jury specifically found that [defendant] made false representations to induce [plaintiff] to accept the position in California. Given the express findings by the jury, it is unnecessary to remand this case for a retrial on the limited issue of damages. ... We therefore modify the judgment to reflect double damages in accordance with Labor Code section 972." (*Seubert v. McKesson Corp.* (1990) 223 Cal.App.3d 1514, 1522-1523 [273 Cal.Rptr. 296], internal citation omitted, overruled on other grounds, *Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 389 [46 Cal.Rptr.3d 668, 139 P.3d 56].)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, § 450

Chin et al., California Practice Guide: Employment Litigation (The Rutter Group) ¶¶ 4:351, 5:532, 5:540, 5:892.10, 16:493

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Other Employee Rights Statutes, § 4.51

4 Wilcox, California Employment Law, Ch. 63, *Causes of Action Related to Wrongful Termination*, § 63.06[1] (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 250, *Employment Law: Wage and Hour Disputes*, §§ 249.30, 249.80 (Matthew Bender)

California Civil Practice: Employment Litigation ~~(Thomson West)~~ § 6:27 (Thomson Reuters)

2711. Preventing Subsequent Employment by Misrepresentation—Essential Factual Elements (Lab. Code, § 1050)

[*Name of plaintiff***] claims that [***name of defendant***] made [a] false representation[s] to prevent [him/her] from obtaining employment. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That after [***name of plaintiff***]'s employment with [***name of defendant***] ended, [***name of defendant***] made [a] representation(s) to [***name of prospective employer***] about [***name of plaintiff***];**

2. **That [***name of defendant***]'s representation[s] [was/were] not true;**

3. **That [***name of defendant***] knew the representation[s] [was/were] not true when [he/she/it] made [it/them];**

4. **That [***name of defendant***] made the representation[s] with the intent of preventing [***name of plaintiff***] from obtaining employment;**

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

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

New September 2003

Directions for Use

For jury instructions regarding opinions as statements of fact and the definition of an important fact, see CACI Nos. 1904 and 1905 in the Fraud or Deceit series. For an instruction on the qualified privilege pursuant to Civil Code section 47(c), see CACI No. 1723 in the Defamation series.

It is unclear whether elements 3 and 4 are necessary elements to this cause of action.

Sources and Authority

- Preventing Later Employment by Misrepresentation. Labor Code section 1050. ~~provides: "Any person, or agent or officer thereof, who, after having discharged an employee from the service of such person or after an employee has voluntarily left such service, by any misrepresentation prevents or attempts to prevent the former employee from obtaining employment, is guilty of a misdemeanor."~~

- Permitting Violation is Misdemeanor. Labor Code section 1052. ~~provides: "Any person who knowingly causes, suffers, or permits an agent, superintendent, manager, or employee in his employ to commit a violation of section[] 1050 ... or who fails to take all reasonable steps within his power to~~

~~prevent such violation is guilty of a misdemeanor."~~

- Civil Liability for Violation. Labor Code section 1054. ~~provides, in part: "[A]ny person or agent or officer thereof, who violates any provision of sections 1050 to 1052, inclusive, is liable to the party aggrieved, in a civil action, for treble damages. Such civil action may be brought by such aggrieved person or his assigns, or successors in interest, without first establishing any criminal liability under this article."~~

- Truthful Statement for Termination of Employment. Labor Code section 1053. ~~provides: "Nothing in this chapter shall prevent an employer or an agent, employee, superintendent or manager thereof from furnishing, upon special request therefor, a truthful statement concerning the reason for the discharge of an employee or why an employee voluntarily left the service of the employer. If such statement furnishes any mark, sign, or other means conveying information different from that expressed by words therein, such fact, or the fact that such statement or other means of furnishing information was given without a special request therefor is prima facie evidence of a violation of sections 1050 to 1053."~~

- Privileged Publications. Civil Code section 47(c).

- "Section 1054 provides for a damage remedy for the party aggrieved by a violation of the section 1050 prohibition against an employer blacklisting a former employee. It is patent that the aggrieved party must be the blacklisted employee, not a union, since the latter can neither be fired nor quit." (*Service Employees Internat. Union, Local 193, AFL-CIO v. Hollywood Park, Inc.* (1983) 149 Cal.App.3d 745, 765 [197 Cal.Rptr. 316].)

- "Labor Code section 1050 applies only to misrepresentations made to prospective employers other than the defendant. [¶] ... [T]he Legislature intended that Labor Code section 1050 would apply only to misstatements to other potential employers, not to misstatements made internally by employees of the party to be charged." (*Kelly v. General Telephone Co.* (1982) 136 Cal.App.3d 278, 288-289 [186 Cal.Rptr. 184].)

- A communication without malice solicited by a prospective employer from a former employer would be privileged in accordance with Civil Code section 47(c). (See *O'Shea v. General Telephone Co.* (1987) 193 Cal.App.3d 1040, 1047 [238 Cal.Rptr. 715].)

- ~~Civil Code section 47(c) provides, in part, that a privileged publication is one made "[i]n a communication, without malice, to a person interested therein. ... This ... includes a communication concerning the job performance or qualifications of an applicant for employment, based upon credible evidence, made without malice, by a current or former employer of the applicant to, and upon request of, [the prospective employer]. This subdivision shall not apply to a communication concerning the speech or activities of an applicant for employment if the speech or activities are constitutionally protected, or otherwise protected by Section 527.3 of the Code of Civil Procedure or any other provision of law."~~

- "We ... recognize that '[t]he primary purpose of punitive damages is to punish the defendant and make an example of him.' Since this purpose is the same as the treble damages authorized by Labor

Code section 1054, we do not sanction a double recovery for the plaintiff. In the new trial on damages, the jury should be instructed on the subject of punitive damages based on malice or oppression. Any verdict finding compensatory damages must be trebled by the court. Plaintiff may then elect to have judgment entered in an amount which reflects either the statutory trebling, or the compensatory and punitive damages." (*Marshall v. Brown* (1983) 141 Cal.App.3d 408, 419 [190 Cal.Rptr. 392].)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 284, 349, 352, 354–359, 381, 413, 417

Chin et al., California Practice Guide: Employment Litigation (The Rutter Group) ¶¶ 4:351, 5:532, 5:540, 5:892.10, 16:493

4 Wilcox, California Employment Law, Ch. 63, *Causes of Action Related to Wrongful Termination*, § 63.06[2] (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 250, *Employment Law: Wage and Hour Disputes*, §§ 249.22[3][a], 249.31, 249.81 (Matthew Bender)

California Civil Practice: Employment Litigation ~~(Thomson West)~~ § 6:29 (Thomson Reuters)

2731. Affirmative Defense—Same Decision (Lab. Code, § 1102.6)

If [*name of plaintiff***] proves that [his/her] [disclosure of information of/refusal to participate in] an unlawful act was a contributing factor to [his/her] [discharge/[***other adverse employment action***]], [***name of defendant***] is not liable if [he/she/it] proves by clear and convincing evidence that [he/she/it] would have [discharged/[***other adverse employment action***]] [***name of plaintiff***] anyway for legitimate, independent reasons.**

New December 2013

Directions for Use

Give this instruction in a so-called mixed-motive case under the whistleblower protection statute of the Labor Code. (See Lab. Code, § 1102.5; CACI No. 2730, *Whistleblower Protection—Essential Factual Elements*.) A mixed-motive case is one in which there is evidence of both a retaliatory and a legitimate reason for the adverse action. Even if the jury finds that the retaliatory reason was a contributing factor, the employer may avoid liability if it can prove by clear and convincing evidence that it would have made the same decision anyway for a legitimate reason. (Lab. Code, § 1102.6.)

Sources and Authority

- Same-Decision Affirmative Defense. Labor Code section 1102.6. ~~provides: "In a civil action or administrative proceeding brought pursuant to Section 1102.5, once it has been demonstrated by a preponderance of evidence that an activity proscribed by Section 1102.5 was a contributing factor in the alleged prohibited action against the employee, the employer shall have the burden of proof to demonstrate by clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons even if the employee had not engaged in the activities protected by Section 1102.5."~~

- "[Plaintiff] points to Labor Code section 1102.6, which requires the employer to prove a same-decision defense by clear and convincing evidence when a plaintiff has proven by a preponderance of the evidence that the employer's violation of the whistleblower statute was a 'contributing factor' to the contested employment decision. Yet the inclusion of the clear and convincing evidence language in one statute does not suggest that the Legislature intended the same standard to apply to other statutes implicating the same-decision defense." (*Harris v. City of Santa Monica* (2013) 56 Cal. 4th 203, 239 [152 Cal.Rptr.3d 392, 294 P.3d 49]; internal citation omitted.)

Secondary Sources

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

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

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

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

2800. Employer's Affirmative Defense—Injury Covered by Workers' Compensation

[*Name of defendant***] claims that [he/she/it] is not responsible for any harm that [***name of plaintiff***] may have suffered because [he/she] was [***name of defendant***]'s employee and therefore can only recover under California's Workers' Compensation Act. To succeed, [***name of defendant***] must prove all of the following:**

1. **That [***name of plaintiff***] was [***name of defendant***]'s employee;**

2. **That [***name of defendant***] [had workers' compensation insurance [covering [***name of plaintiff***] at the time of injury]/was self-insured for workers' compensation claims [at the time of [***name of plaintiff***]'s injury]]; and**

3. **That [***name of plaintiff***]'s injury occurred while [he/she] was performing a task for or related to the work [***name of defendant***] hired [him/her] to do.**

Any person performing services for another, other than as an independent contractor, is presumed to be an employee.

New September 2003; Revised October 2004

Directions for Use

This instruction is intended for use if the plaintiff is suing a defendant claiming to be the plaintiff's employer. This instruction is not intended for use if the plaintiff is suing under an exception to the workers' compensation exclusivity rule.

For other instructions regarding employment status, such as special employment and independent contractors, see instructions in the Vicarious Responsibility series (CACI Nos. 3700–3726). These instructions may need to be modified to fit this context. Note that this instruction should not be given if the plaintiff/employee has been determined to fall within a statutory exception. For exceptions to Labor Code section 3351, see Labor Code section 3352.

If appropriate to the facts of the case, see instructions on the going-and-coming rule in the Vicarious Responsibility series. These instructions may need to be modified to fit this context.

Sources and Authority

- Exclusive Remedy. Labor Code section 3602(a). ~~provides: "Where the conditions of compensation set forth in Section 3600 concur, the right to recover compensation is, except as specifically provided in this section and Sections 3706 and 4558, the sole and exclusive remedy of the employee or his or her dependents against the employer. The fact that either the employee or the employer also occupied another or dual capacity prior to, or at the time of, the employee's industrial injury shall not permit the employee or his or her dependents to bring an action at law for damages against the employer."~~

- Conditions of Compensation. Labor Code section 3600(a). ~~provides, in part:~~

  ~~Liability for the compensation provided by this division, in lieu of any other liability whatsoever to any person except as otherwise specifically provided in Sections 3602, 3706, and 4558, shall, without regard to negligence, exist against an employer for any injury sustained by his or her employees arising out of and in the course of the employment and for the death of any employee if the injury proximately causes death, in those cases where the following conditions of compensation concur:~~

  ~~(1) Where, at the time of the injury, both the employer and the employee are subject to the compensation provisions of this division.~~

  ~~(2) Where, at the time of the injury, the employee is performing service growing out of and incidental to his or her employment and is acting within the course of his or her employment.~~

  ~~(3) Where the injury is proximately caused by the employment, either with or without negligence.~~

- If Conditions of Compensation Not Met. Labor Code section 3602(c). ~~provides: "In all cases where the conditions of compensation set forth in Section 3600 do not concur, the liability of the employer shall be the same as if this division had not been enacted."~~

- "Employee" Defined. Labor Code section 3351. ~~provides, in part: " 'Employee' means every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed."~~

- Presumption of Employment Status. Labor Code section 3357. ~~provides: "Any person rendering service for another, other than as an independent contractor, or unless expressly excluded herein, is presumed to be an employee."~~

- Failure to Secure Payment of Compensation. Labor Code section 3706. ~~provides: "If any employer fails to secure the payment of compensation, any injured employee or his dependents may bring an action at law against such employer for damages, as if this division did not apply."~~

- "[T]he basis for the exclusivity rule in workers' compensation law is the 'presumed "compensation bargain," pursuant to which the employer assumes liability for industrial personal injury or death without regard to fault in exchange for limitations on the amount of that liability. The employee is afforded relatively swift and certain payment of benefits to cure or relieve the effects of industrial injury without having to prove fault but, in exchange, gives up the wider range of damages potentially available in tort.' " (*Fermino v. Fedco, Inc.* (1994) 7 Cal.4th 701, 708 [30 Cal.Rptr.2d 18, 872 P.2d 559], internal citation omitted.)

- "Employer conduct is considered outside the scope of the workers' compensation scheme when the employer steps outside of its proper role, or engages in conduct unrelated to the employment

relationship, that is not a normal incident of employment, or that violates a fundamental public policy." (*Gomez v. Acquistapace* (1996) 50 Cal.App.4th 740, 751 [57 Cal.Rptr.2d 821], internal citations omitted.)

- "Because an employer faced with a civil complaint seeking to enforce a common law remedy which does not state facts indicating coverage by the act bears the burden of pleading and proving 'that the (act) is a bar to the employee's ordinary remedy,' we believe that the burden includes a showing by the employer-defendant, through appropriate pleading and proof, that he had 'secured the payment of compensation' in accordance with the provisions of the act." (*Doney v. Tambouratgis* (1979) 23 Cal.3d 91, 98, fn. 8 [151 Cal.Rptr. 347, 587 P.2d 1160], internal citations omitted.)

- "A defendant need not plead and prove that it has purchased workers' compensation insurance where the plaintiff alleges facts that otherwise bring the case within the exclusive province of workers' compensation law, and no facts presented in the pleadings or at trial negate the workers' compensation law's application or the employer's insurance coverage." (*Gibbs v. American Airlines, Inc.* (1999) 74 Cal.App.4th 1, 14 [87 Cal.Rptr.2d 554], internal citations omitted.)

- "[T]he fact that an employee has received workers' compensation benefits from some source does not bar the employee's civil action against an uninsured employer. Instead, '[t]he price that must be paid by each employer for immunity from tort liability is the purchase of a workers' compensation policy [and where the employer chooses] not to pay that price ... it should not be immune from liability.' " (*Huffman v. City of Poway* (2000) 84 Cal.App.4th 975, 987 [101 Cal.Rptr.2d 325], internal citations omitted.)

- "Under the Workers' Compensation Act, employees are automatically entitled to recover benefits for injuries 'arising out of and in the course of the employment.' 'When the conditions of compensation exist, recovery under the workers' compensation scheme "is the exclusive remedy against an employer for injury or death of an employee." ' " (*Piscitelli v. Friedenberg* (2001) 87 Cal.App.4th 953, 986 [105 Cal.Rptr.2d 88], internal citations omitted.)

- "Unlike many other states, in California workers' compensation provides the exclusive remedy for at least some intentional torts committed by an employer. *Fermino* described a 'tripartite system for classifying injuries arising in the course of employment. First, there are injuries caused by employer negligence or without employer fault that are compensated at the normal rate under the workers' compensation system. Second, there are injuries caused by ordinary employer conduct that intentionally, knowingly or recklessly harms an employee, for which the employee may be entitled to extra compensation under section 4553. Third, there are certain types of intentional employer conduct which bring the employer beyond the boundaries of the compensation bargain, for which a civil action may be brought.' " (*Gunnell v. Metrocolor Laboratories, Inc.* (2001) 92 Cal.App.4th 710, 723 [112 Cal.Rptr.2d 195], internal citations omitted.)

- "It has long been established in this jurisdiction that, generally speaking, a defendant in a civil action who claims to be one of that class of persons protected from an action at law by the provisions of the Workers' Compensation Act bears the burden of pleading and proving, as an affirmative defense to the action, the existence of the conditions of compensation set forth in the statute which are necessary to its application." (*Doney, supra,* 23 Cal.3d at p. 96, internal citations and footnote omitted.)

- "California courts have held worker's compensation proceedings to be the exclusive remedy for certain third party claims deemed collateral to or derivative of the employee's injury. Courts have held that the exclusive jurisdiction provisions bar civil actions against employers by nondependent parents of an employee for the employee's wrongful death, by an employee's spouse for loss of the employee's services or consortium, and for emotional distress suffered by a spouse in witnessing the employee's injuries." (*Snyder v. Michael's Stores, Inc.* (1997) 16 Cal.4th 991, 997 [68 Cal.Rptr.2d 476, 945 P.2d 781], internal citations omitted.)

- " 'An employer-employee relationship must exist in order to bring the ... Act into effect. (§ 3600)' However, the coverage of the Act extends beyond those who have entered into 'traditional contract[s] of hire.' '[S]ection 3351 provides broadly that for the purpose of the ... Act, " 'Employee' means every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written ... .' " Given this 'section's explicit use of the disjunctive,' a contract of hire is not 'a prerequisite' to the existence of an employment relationship. Moreover, under section 3357, '[a]ny person rendering service for another, other than as an independent contractor, or unless expressly excluded ... , is presumed to be an employee.' " (*Arriaga v. County of Alameda* (1995) 9 Cal.4th 1055, 1060−1061 [40 Cal.Rptr.2d 116, 892 P.2d 150], internal citations omitted.)

- "Given these broad statutory contours, we believe that an 'employment' relationship sufficient to bring the act into play cannot be determined simply from technical contractual or common law conceptions of employment but must instead be resolved by reference to the history and fundamental purposes underlying the Workmen's Compensation Act." (*Laeng v. Workmen's Comp. Appeals Bd.* (1972) 6 Cal.3d 771, 777 [100 Cal.Rptr. 377, 494 P.2d 1], internal citations omitted.)

- "[C]ourts generally are more exacting in requiring proof of an employment relationship when such a relationship is asserted as a defense by the employer to a common law action." (*Spradlin v. Cox* (1988) 201 Cal.App.3d 799, 808 [247 Cal.Rptr. 347], internal citation omitted.)

- "The question of whether a person is an employee may be one of fact, of mixed law and fact, or of law only. Where the facts are undisputed, the question is one of law, and the Court of Appeal may independently review those facts to determine the correct answer." (*Barragan v. Workers' Comp. Appeals Bd.* (1987) 195 Cal.App.3d 637, 642 [240 Cal.Rptr. 811], internal citations omitted.)

- "An employee may have more than one employer for purposes of workers' compensation, and, in situations of dual employers, the second or 'special' employer may enjoy the same immunity from a common law negligence action on account of an industrial injury as does the first or 'general' employer. Identifying and analyzing such situations 'is one of the most ancient and complex questions of law in not only compensation but tort law.' " (*Santa Cruz Poultry, Inc. v. Superior Court* (1987) 194 Cal.App.3d 575, 578 [239 Cal.Rptr. 578], internal citation omitted.)

- "In determining whether an employee is covered within the compensation system and thus entitled to recover compensation benefits, the 'definitional reach of these covered employment relationships is very broad.' A covered employee is 'every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written.' 'Any person

rendering service for another, other than as an independent contractor, or unless expressly excluded herein, is presumed to be an employee.' ... [T]hese provisions mandate a broad and generous interpretation in favor of inclusion in the system. Necessarily the other side of that coin is a presumption against the availability of a tort action where an employment relation exists. One result cannot exist without the other. Further, this result does not depend upon 'informed consent,' but rather on the parties' legal status. ... [W]here the facts of employment are not disputed, the existence of a covered relationship is a question of law." (*Santa Cruz Poultry, Inc., supra*, 194 Cal.App.3d at pp. 583-584, internal citations omitted.)

- "Generally, 'in the course of employment' refers to the time and place of the injury. The phrase 'arise out of employment' refers to a causal connection between the employment and the injury." (*Atascadero Unified School Dist. v. Workers' Compensation Appeals Bd.* (2002) 98 Cal.App.4th 880, 883 [120 Cal.Rptr.2d 239].)

- "The concept of 'scope of employment' in tort is more restrictive than the phrase 'arising out of and in the course of employment,' used in workers' compensation." (*Tognazzini v. San Luis Coastal Unified School Dist.* (2001) 86 Cal.App.4th 1053, 1057 [103 Cal.Rptr.2d 790], internal citations omitted.)

- "Whether an employee's injury arose out of and in the course of her employment is generally a question of fact to be determined in light of the circumstances of the particular case. However, where the facts are undisputed, resolution of the question becomes a matter of law." (*Wright v. Beverly Fabrics, Inc.* (2002) 95 Cal.App.4th 346, 353 [115 Cal.Rptr.2d 503], internal citations omitted.)

- " 'The requirement of ... section 3600 is twofold. On the one hand, the injury must occur "in the course of the employment." This concept "ordinarily refers to the time, place, and circumstances under which the injury occurs." Thus " '[a]n employee is in the "course of his employment" when he does those reasonable things which his contract with his employment expressly or impliedly permits him to do.' " And, ipso facto, an employee acts within the course of his employment when " 'performing a duty imposed upon him by his employer and one necessary to perform before the terms of the contract [are] mutually satisfied.' " ' [¶] 'On the other hand, the statute requires that an injury "arise out of" the employment. ... It has long been settled that for an injury to "arise out of the employment" it must "occur by reason of a condition or incident of [the] employment ... ." That is, the employment and the injury must be linked in some causal fashion.' " (*LaTourette v. Workers' Comp. Appeals Bd.* (1998) 17 Cal.4th 644, 651 [72 Cal.Rptr.2d 217, 951 P.2d 1184], internal citations and footnote omitted.)

- "Injuries sustained while an employee is performing tasks within his or her employment contract but outside normal work hours are within the course of employment. The rationale is that the employee is still acting in furtherance of the employer's business." (*Wright, supra*, 95 Cal.App.4th at p. 354.)

Secondary Sources

2 Witkin, Summary of California Law (10th ed. 2005) Workers' Compensation, §§ 20, 24–26, 31, 34, 39–42

Chin et al., California Practice Guide: Employment Litigation (The Rutter Group) ¶¶ 3:515, 12:192, 15:507, 15:509, 15:523.2, 15:523.10, 15:526.1, 15:556, 15:573, 15:580, 15:591

1 Hanna, California Law of Employee Injuries and Workers' Compensation (2d ed.) Ch. 4, §§ 4.03−4.06 (Matthew Bender)

1 Herlick, California Workers' Compensation Law (6th ed.), Ch. 10, *The Injury*, § 10.09 (Matthew Bender)

1 California Employment Law, Ch. 20, *Liability for Work-Related Injuries*, § 20.10 (Matthew Bender)

1 Levy et al., California Torts, Ch. 10, *Effect of Workers' Compensation Law*, §§ 10.02, 10.03[3], 10.10 (Matthew Bender)

51 California Forms of Pleading and Practice, Ch. 577, *Workers' Compensation*, §§ 577.310, 577.530 (Matthew Bender)

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

2801. Employer's Willful Physical Assault—Essential Factual Elements (Lab. Code, § 3602(b)(1))

[*Name of plaintiff***] claims that [he/she] was harmed because [***name of defendant***] assaulted [him/her]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] [***insert one of the following:***]**

   [engaged in physical conduct that a reasonable person would perceive to be a real, present, and apparent threat of bodily harm;]

   [touched [*name of plaintiff***] [or caused [***name of plaintiff***] to be touched] in a harmful or offensive manner];**

2. **That [***name of defendant***] intended to harm [***name of plaintiff***];**

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

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

New September 2003

Directions for Use

This instruction is intended for use in cases in which the employer is the defendant and the plaintiff alleges the case falls outside of the workers' compensation exclusivity rule. Use the first bracketed option in element 1 for cases involving assault. Use the second bracketed option for cases involving battery.

Do not use instructions on assault and battery (CACI No. 1300, *Battery—Essential Factual Elements*, and CACI No. 1301, *Assault—Essential Factual Elements*). For an instruction on ratification, see CACI No. 3710, *Ratification.*

Sources and Authority

- Exclusive Remedy: Willful Physical Assault Exception. Labor Code section 3602(b)(1). ~~provides: "An employee, or his or her dependents in the event of his or her death, may bring an action at law for damages against the employer, as if this division did not apply ... [w]here the employee's injury or death is proximately caused by a willful physical assault by the employer."~~

- "[T]he 1982 amendments were not intended to provide an exhaustive list of exceptions to the exclusivity rule. They did not, for example, foreclose the recognition of an exception for injuries stemming from wrongful discharges that violated public policy, an issue that neither the Legislature nor the judicial system had confronted in 1982. Section 3602 only applies '[w]here the conditions ... set forth in section 3600 concur,' and does not purport to resolve the ambiguities in that latter section

discussed above, nor to definitively delineate the scope of the compensation bargain that has been the key to construing the meaning of section 3600. Rather, section 3602 merely confirms the judicial recognition of certain types of employer acts as outside the compensation bargain, even as it reinforces the exclusivity rule by repealing the dual capacity doctrine." (*Fermino v. Fedco, Inc.* (1994) 7 Cal.4th 701, 720 [30 Cal.Rptr.2d 18, 872 P.2d 559], internal citation omitted.)

- "[In *Magliulo v. Superior Court*,] [t]he employee sued the employer for assault and battery, and the court rejected the employer's argument that workers' compensation benefits were the exclusive remedy. The court noted that section 3601 allowed lawsuits for assaults by coemployees, and reasoned that '[i]f the employee can recover both compensation and damages caused by an intentional assault by a fellow worker, he should have no less right because the fellow worker happens to be his boss.' " (*Soares v. City of Oakland* (1992) 9 Cal.App.4th 1822, 1826 [12 Cal.Rptr.2d 405], internal citation omitted.)

- "Section 3602(b)(1) was enacted in 1982, 23 years after enactment of section 3601, subdivision (a)(1), to codify the result in *Magliulo v. Superior Court*." (*Soares, supra*, 9 Cal.App.4th at p. 1826, internal citations omitted.)

- "We conclude ... that 'willful' employer assaults within the meaning of section 3602(b)(1) do not include all common law batteries, but only those batteries that are specifically intended to injure." (*Soares, supra*, 9 Cal.App.4th at pp. 1828-1829.)

- " 'The modern view respecting actionable intentional misconduct by the employer is that it must be alleged and proved that the employer "acted deliberately with the specific intent to injure" the employee.' " (*Arendell v. Auto Parts Club, Inc.* (1994) 29 Cal.App.4th 1261, 1265 [35 Cal.Rptr.2d 83], internal citations omitted.)

- "[B]odily contact is not necessary for a physical assault." (*Herrick v. Quality Hotels, Inns & Resorts, Inc.* (1993) 19 Cal.App.4th 1608, 1617 [24 Cal.Rptr.2d 203].)

- "*Herrick* explained that bodily contact was not necessary for a 'physical assault,' but that physical assault occurred when someone engaged in physical conduct which a reasonable person would perceive to be a real, present and apparent threat of bodily harm." (*Gunnell v. Metrocolor Laboratories, Inc.* (2001) 92 Cal.App.4th 710, 728 [112 Cal.Rptr.2d 195], internal citation omitted.)

- "[W]e conclude that the exception to the exclusivity rule contained in section 3602, subdivision (b)(1), does not authorize a civil action against an employer for injury resulting from the willful assault of a coemployee based on a theory of respondeat superior." (*Fretland v. County of Humboldt* (1999) 69 Cal.App.4th 1478, 1489 [82 Cal.Rptr.2d 359].)

- "[C]ourts have also recognized that an employer can be held civilly liable as a joint participant in assaultive conduct committed by its employee pursuant to the doctrine of ratification." (*Fretland, supra*, 69 Cal.App.4th at pp. 1489-1490.)

Secondary Sources

2 Witkin, Summary of California Law (10th ed. 2005) Workers' Compensation, § 43

Chin et al., California Practice Guide: Employment Litigation (The Rutter Group) ¶¶ 5:655, 5:656–5:657, 15:527, 15:566–15:567, 15:570–15:571

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

1 California Employment Law, Ch. 20, *Liability for Work-Related Injuries*, §§ 20.12[1][b], 20.41 (Matthew Bender)

51 California Forms of Pleading and Practice, Ch. 577, *Workers' Compensation*, §§ 577.17, 577.314[2] (Matthew Bender)

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

2802. Fraudulent Concealment of Injury—Essential Factual Elements (Lab. Code, § 3602(b)(2))

[*Name of plaintiff*] claims that [he/she/[*name of decedent*]] was harmed because [*name of defendant*] fraudulently concealed the fact that [*name of plaintiff/decedent*] had been injured on the job. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of plaintiff/decedent*] was injured on the job;**

2. **That [*name of defendant*] knew that [*name of plaintiff/decedent*] had suffered a job-related injury;**

3. **That [*name of defendant*] concealed this knowledge from [*name of plaintiff/decedent*]; and**

4. **That [*name of plaintiff/decedent*]'s injury was made worse as a result of this concealment.**

If [*name of plaintiff*] establishes this claim, [he/she] must prove the total damages caused by the injury. [*Name of defendant*] must prove the damages that [*name of plaintiff/decedent*] would have sustained even if [*name of defendant*] had not concealed the injury. [*Name of plaintiff*] is entitled to recover the difference between the two amounts.

New September 2003

Directions for Use

This instruction is intended for cases where the employer is the defendant and the plaintiff alleges the case falls outside of the workers' compensation exclusivity rule. This instruction pertains to aggravation of an injury caused by concealment.

Sources and Authority

- Exclusive Remedy: Fraudulent Concealment Exception. Labor Code Section 3602(b)(2). ~~provides: "An employee, or his or her dependents in the event of his or her death, may bring an action at law for damages against the employer, as if this division did not apply, ... [w]here the employee's injury is aggravated by the employer's fraudulent concealment of the existence of the injury and its connection with the employment, in which case the employer's liability shall be limited to those damages proximately caused by the aggravation. The burden of proof respecting apportionment of damages between the injury and any subsequent aggravation thereof is upon the employer."~~

- "[T]he 1982 amendments were not intended to provide an exhaustive list of exceptions to the exclusivity rule. They did not, for example, foreclose the recognition of an exception for injuries stemming from wrongful discharges that violated public policy, an issue that neither the Legislature nor the judicial system had confronted in 1982. Section 3602 only applies '[w]here the conditions ...

set forth in section 3600 concur,' and does not purport to resolve the ambiguities in that latter section discussed above, nor to definitively delineate the scope of the compensation bargain that has been the key to construing the meaning of section 3600. Rather, section 3602 merely confirms the judicial recognition of certain types of employer acts as outside the compensation bargain, even as it reinforces the exclusivity rule by repealing the dual capacity doctrine." (*Fermino v. Fedco, Inc.* (1994) 7 Cal.4th 701, 720 [30 Cal.Rptr.2d 18, 872 P.2d 559], internal citation omitted.)

- "In general, the Workers' Compensation Act provides an employee with his or her exclusive remedy for a work-related injury. Subject to narrow exceptions, 'where the ... conditions of compensation concur,' an injured employee cannot maintain a civil action against his or her employer or another employee." (*Lopez v. C.G.M. Development, Inc.* (2002) 101 Cal.App.4th 430 [124 Cal.Rptr.2d 227], internal citation omitted.)

- "[A]n employee seeking to state a cause of action against an employer under section 3602(b)(2) must 'in general terms' plead facts that if found true by the trier of fact, establish the existence of three essential elements: (1) the employer knew that the plaintiff had suffered a work-related injury; (2) the employer concealed that knowledge from the plaintiff; and (3) the injury was aggravated as a result of such concealment." (*Palestini v. General Dynamics Corp.* (2002) 99 Cal.App.4th 80, 89-90 [120 Cal.Rptr.2d 741], internal citation omitted.)

- "While there are no cases defining the term 'fraudulent concealment' as used in the section, its general meaning is not difficult to discern. According to both statute and case law, the failure to disclose facts may constitute fraud if the party with knowledge has a duty to make disclosure. We have no reason to believe that the term 'fraudulent concealment' as used in subdivision (b)(2) was intended to have a meaning other than this." (*Foster v. Xerox Corp.* (1985) 40 Cal.3d 306, 309-310 [219 Cal.Rptr. 485, 707 P.2d 858], internal citations omitted.)

- "An employer's actual knowledge of the existence of an employee's injury connected with the employment is a necessary prerequisite to establishing a claim against the employer for fraudulent concealment under section 3602(b)(2). This principle is based on the rationale that an employer cannot be held liable under section 3602(b)(2) for concealing something of which it had no knowledge." (*Palestini, supra*, 99 Cal.App.4th at p. 93, internal citations omitted.)

- "In order to succeed in their attempt to remove their case from the workers' compensation law, appellants first had to show an 'injury.' They then had to prove that the injury was aggravated by Firestone's fraudulent concealment of the existence of the injury and its connection with the employment." (*Santiago v. Firestone Tire & Rubber Co.* (1990) 224 Cal.App.3d 1318, 1330 [274 Cal.Rptr. 576], internal citation omitted.)

- "The Supreme Court in *Johns-Manville* recognized that the aggravation of an injury that results when an employer fraudulently conceals the injury's cause is a harm distinct from the injury itself. For this reason, aggravation that results when an employer fraudulently conceals an injury's cause remains actionable even though the injured party has recovered worker's compensation benefits for the injury itself." (*Aerojet General Corp. v. Superior Court* (1986) 177 Cal.App.3d 950, 956 [223 Cal.Rptr. 249], internal citation omitted.)

Secondary Sources

2 Witkin, Summary of California Law (10th ed. 2005) Workers' Compensation, §§ 44, 45

Chin et al., California Practice Guide: Employment Litigation (The Rutter Group) ¶¶ 15:526.1, 15:570, 15:570.5-15:570.6, 15:590

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

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

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

51 California Forms of Pleading and Practice, Ch. 577, *Workers' Compensation*, §§ 577.314[3], 577.525 (Matthew Bender)

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

2803. Employer's Defective Product—Essential Factual Elements (Lab. Code, § 3602(b)(3))

[*Name of plaintiff***] claims that [he/she] was harmed by a defective product manufactured by [***name of defendant***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That the [***product***] was manufactured by [***name of defendant***];**
2. **That the [***product***] was [sold/leased/transferred for valuable consideration] to an independent third person;**
3. **That the third person then provided the [***product***] for [***name of plaintiff***]'s use;**
4. **That the [***product***] was defective in design or manufacture;**
5. **That [***name of plaintiff***] was harmed; and**
6. **That the [***product***] was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003

Directions for Use

This instruction is intended for use in cases where the employer is the defendant and the plaintiff alleges that the case falls outside of the workers' compensation exclusivity rule. See the Products Liability series (CACI Nos. 1200-1243) for instructions on product defect.

Sources and Authority

- Exclusive Remedy: Defective Product Exception. Labor Code section 3602(b)(3). ~~provides: "An employee, or his or her dependents in the event of his or her death, may bring an action at law for damages against the employer, as if this division did not apply ... [w]here the employee's injury or death is proximately caused by a defective product manufactured by the employer and sold, leased, or otherwise transferred for valuable consideration to an independent third person, and that product is thereafter provided for the employee's use by a third person."~~

- "[T]he 1982 amendments were not intended to provide an exhaustive list of exceptions to the exclusivity rule. They did not, for example, foreclose the recognition of an exception for injuries stemming from wrongful discharges that violated public policy, an issue that neither the Legislature nor the judicial system had confronted in 1982. Section 3602 only applies '[w]here the conditions ... set forth in section 3600 concur,' and does not purport to resolve the ambiguities in that latter section discussed above, nor to definitively delineate the scope of the compensation bargain that has been the key to construing the meaning of section 3600. Rather, section 3602 merely confirms the judicial recognition of certain types of employer acts as outside the compensation bargain, even as it reinforces the exclusivity rule by repealing the dual capacity doctrine." (*Fermino v. Fedco, Inc.*

(1994) 7 Cal.4th 701, 720 [30 Cal.Rptr.2d 18, 872 P.2d 559], internal citation omitted.)

- "The language 'provided for the employee's use' indicates the product must be given or furnished to the employee in order for the employee to accomplish some task." (*Behrens v. Fayette Manufacturing Co.* (1992) 4 Cal.App.4th 1567, 1574 [7 Cal.Rptr.2d 264].)

- "Our interpretation is in accord with that of commentators who have noted that the exception of subdivision (b)(3) requires the employee to come into contact with the defective product as a consumer." (*Behrens, supra*, 4 Cal.App.4th at p. 1574, internal citations omitted.)

Secondary Sources

2 Witkin, Summary of California Law (10th ed. 2005) Workers' Compensation, § 63

Chin et al., California Practice Guide: Employment Litigation (The Rutter Group) ¶ 15:571

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

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

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

51 California Forms of Pleading and Practice, Ch. 577, *Workers' Compensation*, § 577.314[4] (Matthew Bender)

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

2810. Co-Employee's Affirmative Defense—Injury Covered by Workers' Compensation

[*Name of defendant***] claims that [he/she] is not responsible for any harm that [***name of plaintiff***] may have suffered because [he/she] was [***name of defendant***]'s co-employee and therefore can recover only under California's Workers' Compensation Act. To succeed, [***name of defendant***] must prove all of the following:**

1. **That [***name of plaintiff***] and [***name of defendant***] were [***name of employer***]'s employees;**

2. **That [***name of employer***] [had workers' compensation insurance [covering [***name of plaintiff***] at the time of injury]/was self-insured for workers' compensation claims [at the time of [***name of plaintiff***]'s injury]]; and**

3. **That [***name of defendant***] was acting in the scope of [his/her] employment at the time [***name of plaintiff***] claims [he/she] was harmed.**

New September 2003; Revised October 2004

Directions for Use

This instruction is intended for use in cases where a co-employee is the defendant and he or she claims that the case falls within the workers' compensation exclusivity rule. For instructions on scope of employment see instructions in the Vicarious Liability series (CACI Nos. 3700-3726). Scope of employment in this instruction is the same as in the context of respondeat superior. (*Hendy v. Losse* (1991) 54 Cal.3d 723, 740 [1 Cal.Rptr.2d 543, 819 P.2d 1].) See instructions in the Vicarious Responsibility series regarding the definition of "scope of employment."

Sources and Authority

- Exclusive Remedy. Labor Code section 3601~~. provides:~~

  ~~(a) Where the conditions of compensation set forth in Section 3600 concur, the right to recover such compensation, pursuant to the provisions of this division is, except as specifically provided in this section, the exclusive remedy for injury or death of an employee against any other employee of the employer acting within the scope of his or her employment, except that an employee, or his or her dependents in the event of his or her death, shall, in addition to the right to compensation against the employer, have a right to bring an action at law for damages against the other employee, as if this division did not apply, in either of the following cases:~~

  ~~(1) When the injury or death is proximately caused by the willful and unprovoked physical act of aggression of the other employee.~~

  ~~(2) When the injury or death is proximately caused by the intoxication of the other employee.~~

~~(b) In no event, either by legal action or by agreement whether entered into by the other employee or on his or her behalf, shall the employer be held liable, directly or indirectly, for damages awarded against, or for a liability incurred by the other employee under paragraph (1) or (2) of subdivision (a).~~

~~(c) No employee shall be held liable, directly or indirectly, to his or her employer, for injury or death of a coemployee except where the injured employee or his or her dependents obtain a recovery under subdivision (a).~~

- "Employee" Defined. Labor Code section 3351. ~~provides, in part: " 'Employee' means every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed."~~

- Presumption of Employment Status. Labor Code section 3357. ~~provides: "Any person rendering service for another, other than as an independent contractor, or unless expressly excluded herein, is presumed to be an employee."~~

- "[A] coemployee's conduct is within the scope of his or her employment if it could be imputed to the employer under the doctrine of respondeat superior. If the coemployee was not 'engaged in any active service for the employer,' the coemployee was not acting within the scope of employment." (*Hendy, supra*, 54 Cal.3d at p. 740, internal citation omitted.)

- "[G]enerally speaking, a defendant in a civil action who claims to be one of that class of persons protected from an action at law by the provisions of the Workers' Compensation Act bears the burden of pleading and proving, as an affirmative defense to the action, the existence of the conditions of compensation set forth in the statute which are necessary to its application." (*Doney v. Tambouratgis* (1979) 23 Cal.3d 91, 96 [151 Cal.Rptr. 347, 587 P.2d 1160].)

- "In general, if an employer condones what courts have described as 'horseplay' among its employees, an employee who engages in it is within the scope of employment under section 3601, subdivision (a), and is thus immune from suit, unless exceptions apply." (*Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal.4th 995, 1006 [111 Cal.Rptr.2d 564, 30 P.3d 57], internal citations omitted.)

Secondary Sources

2 Witkin, Summary of California Law (10th ed. 2005) Workers' Compensation, §§ 67, 68

Chin et al., California Practice Guide: Employment Litigation (The Rutter Group) ¶¶ 5:624, 12:192, 13:951, 15:546, 15:569, 15:632

1 Herlick, California Workers' Compensation Law (6th ed.), Ch. 12, *Tort Actions—Subrogation*, § 12.22 (Matthew Bender)

1 California Employment Law, Ch. 20, *Liability for Work-Related Injuries*, § 20.43 (Matthew Bender)

1 Levy et al., California Torts, Ch. 10, *Effect of Workers' Compensation Law*, § 10.13 (Matthew Bender)

51 California Forms of Pleading and Practice, Ch. 577, *Workers' Compensation*, § 577.316 (Matthew Bender)

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

2811. Co-Employee's Willful and Unprovoked Physical Act of Aggression—Essential Factual Elements (Lab. Code, § 3601(a)(1))

[*Name of plaintiff***] claims that [he/she] was harmed because [***name of defendant***] assaulted [him/her]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] [***insert one of the following:***]**

   [engaged in physical conduct that a reasonable person would perceive to be a real, present and apparent threat of bodily harm;]

   [touched [*name of plaintiff***] [or caused [***name of plaintiff***] to be touched] in a harmful or offensive manner;]**

   [*insert other act of physical aggression***];**

2. **That [***name of defendant***]'s conduct was unprovoked;**

3. **That [***name of defendant***] intended to harm [***name of plaintiff***];**

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

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

New September 2003

Directions for Use

This instruction is intended for use in cases where a co-employee is the defendant and the plaintiff alleges that the case falls outside of the workers' compensation exclusivity rule. If this instruction is used, do not use standard tort instructions on assault and battery.

Sources and Authority

- Exclusive Remedy: Exception for Coemployee's Willful and Unprovoked Physical Act. Labor Code section 3601(a)(1). ~~provides:~~

  ~~(a) Where the conditions of compensation set forth in Section 3600 concur, the right to recover such compensation, pursuant to the provisions of this division is, except as specifically provided in this section, the exclusive remedy for injury or death of an employee against any other employee of the employer acting within the scope of his or her employment, except that an employee, or his or her dependents in the event of his or her death, shall, in addition to the right to compensation against the~~

~~employer, have a right to bring an action at law for damages against the other employee, as if this division did not apply, in either of the following cases:~~

~~(1) When the injury or death is proximately caused by the willful and unprovoked physical act of aggression of the other employee.~~

~~(2) When the injury or death is proximately caused by the intoxication of the other employee.~~

~~(b) In no event, either by legal action or by agreement whether entered into by the other employee or on his or her behalf, shall the employer be held liable, directly or indirectly, for damages awarded against, or for a liability incurred by the other employee under paragraph (1) or (2) of subdivision (a).~~

~~(c) No employee shall be held liable, directly or indirectly, to his or her employer, for injury or death of a coemployee except where the injured employee or his or her dependents obtain a recovery under subdivision (a).~~

- "As relevant here, a civil suit is permissible when an employee proximately causes another employee's injury or death by a 'willful and unprovoked physical act of aggression' or by intoxication. If an employee brings a lawsuit against a coemployee based on either of these exceptions, the employer is not 'held liable, directly or indirectly, for damages awarded against, or for a liability incurred by the other employee ... .' This provision is consistent with the view that a coemployee is immune from suit to the extent necessary to prevent an end-run against the employer under the exclusivity rule. 'It is self-evident that Labor Code section 3601 did not establish or create a new right or cause of action in the employee but severely limited a preexisting right to freely sue a fellow employee for damages.' " (*Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal.4th 995, 1002 [111 Cal.Rptr.2d 564, 30 P.3d 57], internal citations and footnotes omitted.)

- "[W]e conclude an 'unprovoked physical act of aggression' is unprovoked conduct intended to convey an actual, present, and apparent threat of bodily injury. A 'threat,' of course, is commonly understood as 'an expression of intention to inflict evil, injury, or damage' and as '[a] communicated intent to inflict harm or loss on another ... .' Thus, 'unprovoked physical act of aggression' logically contemplates intended injurious conduct. By adding the term 'willful,' the Legislature has underscored the need for an intent to bring about the consequences of that expression, i.e., an intent to inflict injury or harm." (*Torres, supra*, 26 Cal.4th at p. 1005, internal citations omitted.)

- "As with other mental states, plaintiffs may rely on circumstantial evidence to prove the intent to injure." (*Torres, supra*, 26 Cal.4th at p. 1009.)

- "[T]o invoke civil liability under section 3601, subdivision (a)(1), a physical act causing a reasonable fear of harm must be pleaded and proved, but the resulting harm need not also be physical." (*Iverson v. Atlas Pacific Engineering* (1983) 143 Cal.App.3d 219, 225 [191 Cal.Rptr. 696].)

- "We agree that conduct constituting a common law assault may be actionable under section 3601(a)(1), provided that the conduct was intended to injure ... ." (*Soares v. City of Oakland* (1992) 9

Cal.App.4th 1822, 1829 [12 Cal.Rptr.2d 405].)

- "In general, if an employer condones what courts have described as 'horseplay' among its employees, an employee who engages in it is within the scope of employment under section 3601, subdivision (a), and is thus immune from suit, unless exceptions apply." (*Torres, supra*, 26 Cal.4th at p. 1006, internal citations omitted.)

Secondary Sources

2 Witkin, Summary of California Law (10th ed. 2005) Workers' Compensation, §§ 67, 68

Chin et al., California Practice Guide: Employment Litigation (The Rutter Group) ¶¶ 5:624, 13:951, 13:962, 15:546, 15:569, 15:632

1 Herlick, California Workers' Compensation Law (6th ed.), Ch. 12, *Tort Actions—Subrogation*, § 12.22 (Matthew Bender)

1 California Employment Law, Ch. 20, *Liability for Work-Related Injuries*, § 20.43 (Matthew Bender)

1 Levy et al., California Torts, Ch. 10, *Effect of Workers' Compensation Law*, § 10.13 (Matthew Bender)

51 California Forms of Pleading and Practice, Ch. 577, *Workers' Compensation*, § 577.316 (Matthew Bender)

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

2812. Injury Caused by Co-Employee's Intoxication—Essential Factual Elements (Lab. Code, § 3601(a)(2))

[*Name of plaintiff***] claims that [he/she] was harmed because [***name of defendant***] was intoxicated. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] [***insert description of injury-producing conduct***];**

2. **That [***name of defendant***] was intoxicated;**

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

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

New September 2003

Directions for Use

This instruction is intended for use in cases where a co-employee is the defendant and the plaintiff alleges that the case falls outside of the workers' compensation exclusivity rule.

Sources and Authority

- Exclusive Remedy: Exception for Act of Intoxicated Coemployee. Labor Code section 3601(a)(2). ~~provides:~~

  ~~(a) Where the conditions of compensation set forth in Section 3600 concur, the right to recover such compensation, pursuant to the provisions of this division is, except as specifically provided in this section, the exclusive remedy for injury or death of an employee against any other employee of the employer acting within the scope of his or her employment, except that an employee, or his or her dependents in the event of his or her death, shall, in addition to the right to compensation against the employer, have a right to bring an action at law for damages against the other employee, as if this division did not apply, in either of the following cases:~~

  ~~(1) When the injury or death is proximately caused by the willful and unprovoked physical act of aggression of the other employee.~~

  ~~(2) When the injury or death is proximately caused by the intoxication of the other employee.~~

  ~~(b) In no event, either by legal action or by agreement whether entered into by the other employee or on his or her behalf, shall the employer be held liable, directly~~

~~or indirectly, for damages awarded against, or for a liability incurred by the other employee under paragraph (1) or (2) of subdivision (a).~~

~~(c) No employee shall be held liable, directly or indirectly, to his or her employer, for injury or death of a coemployee except where the injured employee or his or her dependents obtain a recovery under subdivision (a).~~

- "As relevant here, a civil suit is permissible when an employee proximately causes another employee's injury or death by a 'willful and unprovoked physical act of aggression' or by intoxication. If an employee brings a lawsuit against a coemployee based on either of these exceptions, the employer is not 'held liable, directly or indirectly, for damages awarded against, or for a liability incurred by the other employee ... .' This provision is consistent with the view that a coemployee is immune from suit to the extent necessary to prevent an end-run against the employer under the exclusivity rule. 'It is self-evident that Labor Code section 3601 did not establish or create a new right or cause of action in the employee but severely limited a preexisting right to freely sue a fellow employee for damages.' " (*Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal.4th 995, 1002 [111 Cal.Rptr.2d 564, 30 P.3d 57], internal citations and footnotes omitted.)

Secondary Sources

2 Witkin, Summary of California Law (10th ed. 2005) Workers' Compensation, §§ 67, 68

Chin et al., California Practice Guide: Employment Litigation (The Rutter Group) ¶¶ 5:624, 13:951, 13:962, 15:546, 15:568-15:569, 15:632

1 Herlick, California Workers' Compensation Law (6th ed.), Ch. 12, *Tort Actions—Subrogation*, § 12.22 (Matthew Bender)

1 California Employment Law, Ch. 20, *Liability for Work-Related Injuries*, § 20.43 (Matthew Bender)

1 Levy et al., California Torts, Ch. 10, *Effect of Workers' Compensation Law*, § 10.13 (Matthew Bender)

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

2900. FELA—Essential Factual Elements

[*Name of plaintiff***] claims that while [he/she/[***name of decedent***]] was employed by [***name of defendant***], [[he/she] was harmed by/[his/her] death was caused by] [***name of defendant***]'s negligence. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff/decedent***] was employed by [***name of defendant***];**

2. **That [***name of defendant***] was a common carrier by railroad;**

3. **That [***name of defendant***] was engaged in interstate commerce;**

4. **That [***name of plaintiff/decedent***]'s job duties furthered, or in any way substantially affected, interstate commerce;**

5. **That [***name of plaintiff/decedent***] was acting within the scope of [his/her] employment at the time of the incident;**

6. **That [***name of defendant***] was negligent;**

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

8. **That [***name of defendant***]'s negligence was a cause of [***name of plaintiff/decedent***]'s [harm/death].**

["Interstate commerce" is commercial activity that crosses more than one country or state, such as the movement of goods from one state to another.]

New September 2003; Revised June 2011, December 2011

Directions for Use

If the plaintiff is bringing a negligence claim under the Federal Employers' Liability Act (FELA) and a claim under the Federal Safety Appliance Act (SAA) or the Boiler Inspection Act (BIA), the court may wish to add an introductory instruction that would alert the jury to the difference between the two claims.

Sources and Authority

- Federal Employers Liability Act. Title 45 United States Code section 51. ~~provides, in part:~~

  ~~Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering~~

~~injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.~~

~~Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this [chapter], be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this [chapter].~~

- The FELA is "liberally construed" to further Congress's remedial goal of protecting railroad workers. (*Consolidated Rail Corp. v. Gottshall* (1994) 512 U.S. 532, 543 [114 S.Ct. 2396, 129 L.Ed.2d 427].)

- "The elements of a FELA case are: (1) the injury occurred while the plaintiff was working within the scope of his or her employment with the railroad; (2) the employment was in furtherance of the railroad's interstate transportation business; (3) the employer railroad was negligent; and (4) the employer's negligence played some part in causing the injury for which compensation is sought under the Act." (*Monarch v. Southern Pacific Transportation Co.* (1999) 70 Cal.App.4th 1197, 1210, fn. 10 [83 Cal.Rptr.2d 247], internal citations omitted.)

- "That FELA is to be liberally construed ... does not mean that it is a workers' compensation statute. We have insisted that FELA 'does not make the employer the insurer of the safety of his employees while they are on duty. The basis of his liability is his negligence, not the fact that injuries occur.' " (*Consolidated Rail Corp., supra*, 512 U.S. at p. 543, internal citations omitted.)

- "We note that under the Federal Employers' Liability Act of 1908 an injured railroad employee may bring a cause of action without proof of negligence based on failure of the SAA-mandated safety appliances to function. When such strict liability does not apply, i.e., the injury does not result from defective equipment covered by the SAA, the employee must establish common law negligence." (*Carrillo v. ACF Industries, Inc.* (1999) 20 Cal.4th 1158, 1170, fn. 4 [86 Cal.Rptr.2d 832, 980 P.2d 386], internal citations omitted.)

- "Under the FELA, liability is established if the employer's negligence played any part in causing the employee's injury." (*McDonald v. Southern Pacific Transportation Co.* (1999) 71 Cal.App.4th 256, 260, fn. 4 [83 Cal.Rptr.2d 734], internal citation omitted.)

- "The test for coverage under the amendment is not whether the employee is engaged in transportation, but rather whether what he does in any way furthers or substantially affects transportation." (*Reed v. Pennsylvania Railroad Co.* (1956) 351 U.S. 502, 505 [76 S.Ct. 958, 100 L.Ed. 1366].)

- "Where more than one inference can be drawn from the evidence, the question whether an employee

was, at the time of receiving the injury sued for, engaged in interstate commerce, is for the jury." (*Sullivan v. Matt* (1955) 130 Cal.App.2d 134, 139 [278 P.2d 499], internal citations omitted.)

Secondary Sources

Chin et al., Cal. Practice Guide: Employment Litigation, Ch. 15-F, *California Workers' Compensation Act Preemption*, ¶¶ 15:485–15:488, 15:495 (The Rutter Group)

42 California Forms of Pleading and Practice, Ch. 485, *Railroads*, § 485.35 (Matthew Bender)

1 Matthew Bender Practice Guide: Federal Pretrial Civil Procedure in California, Ch. 3, *Removing a State Court Case to Federal Court*, 3.14

2903. Causation—Negligence

[*Name of defendant***]'s negligence, if any, was a cause of [[***name of plaintiff***]'s harm/[***name of decedent***]'s death] if it played any part, no matter how small, in bringing about the [harm/death], even if other factors also contributed to the [harm/death].**

New September 2003

Directions for Use

For an instruction on concurrent cause, see CACI No. 431, *Causation: Multiple Causes*.

Sources and Authority

- "Federal Employers Liability Act. Title 45 United States Code section 51. ~~provides in part: "Every common carrier by railroad … shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, … for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."~~

- "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." (*Rogers v. Missouri Pacific Railroad Co.* (1957) 352 U.S. 500, 506 [77 S.Ct. 443, 1 L.Ed.2d 493].)

- "In sum, the understanding of *Rogers* we here affirm 'has been accepted as settled law for several decades.' 'Congress has had [more than 50] years in which it could have corrected our decision in [*Rogers*] if it disagreed with it, and has not chosen to do so.' Countless judges have instructed countless juries in language drawn from *Rogers*. To discard or restrict the *Rogers* instruction now would ill serve the goals of 'stability' and 'predictability' that the doctrine of statutory stare decisis aims to ensure." (*CSX Transp., Inc. v. McBride* (2011) – U.S. --, -- [131 S.Ct. 2630, 2641, 180 L.Ed.2d 637], internal citations omitted.)

- "The common law concept of proximate cause ... has not been adopted as the causation test in F.E.L.A. cases. Causation in an F.E.L.A. case exists even if there is a plurality of causes, including the negligence of the defendant or of a third person. The negligence of the employer need not be the sole cause or even a substantial cause of the ensuing injury." (*Parker v. Atchison, Topeka and Santa Fe Ry. Co.* (1968) 263 Cal.App.2d 675, 678 [70 Cal.Rptr. 8].)

- "Although the burden upon the plaintiff in proving causation in an F.E.L.A. case can be weighed neither in pounds nor ounces, it is a substantially lighter burden that that imposed upon him by [the common-law jury instruction]." (*Parker, supra,* 263 Cal.App.2d at p. 678.)

- "[T]he same standard of causation applies to railroad negligence under Section 1 as to plaintiff contributory negligence under Section 3." (*Norfolk Southern Ry. v. Sorrell* (2007) 549 U.S. 158, 171 [127 S.Ct. 799, 166 L.Ed.2d 638].)

Secondary Sources

2 Witkin, Summary of California Law (10th ed. 2005) Workers' Compensation, § 121

42 California Forms of Pleading and Practice, Ch. 485, *Railroads*, § 485.35 (Matthew Bender)

2904. Comparative Fault

[*Name of defendant***] claims that [***name of plaintiff/decedent***] was negligent and that [his/her] negligence contributed to [his/her] own [harm/death]. To succeed, [***name of defendant***] must prove both of the following:**

1. **That [***name of plaintiff/decedent***] was negligent; and**

2. **That [***name of plaintiff/decedent***]'s negligence was a cause of [his/her] [harm/death].**

[*Name of plaintiff/decedent***]'s negligence, if any, was a cause of [his/her] own [harm/death] if it played any part, no matter how small, in bringing about [his/her] [harm/death], even if other factors also contributed to [his/her] [harm/death].**

If you decide that [*name of defendant***] was negligent but also decide that [***name of plaintiff/decedent***]'s negligence contributed to the harm, then you must determine the percentage of negligence that you attribute to [***name of plaintiff/decedent***].**

New September 2003; Revised December 2009

Directions for Use

This instruction does not apply if the claim is based on a violation of the Federal Safety Appliance Act or the Boiler Inspection Act.

For a definition of the term "negligence," see CACI No. 401, *Basic Standard of Care*.

Sources and Authority

- Contributory Negligence Under the FELA. Title 45 United States Code section 53~~. provides in part: "[T]he fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."~~

- "The FELA provides that defense of contributory negligence is not available to an employer to defeat an employee's claim for injury, but only to diminish the amount of damages in proportion to the amount of negligence attributable to the employee. The burden of proving contributory negligence is on the defendant." (*Torres v. Southern Pacific Co.* (1968) 260 Cal.App.2d 757, 763 [67 Cal.Rptr. 428], internal citations omitted.)

- "[T]he same standard of causation applies to railroad negligence under Section 1 as to plaintiff

contributory negligence under Section 3." (*Norfolk Southern Ry. v. Sorrell* (2007) 549 U.S. 158, 171 [127 S.Ct. 799, 166 L.Ed.2d 638].)

- "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." (*Rogers v. Missouri Pacific Railroad Co.* (1957) 352 U.S. 500, 506 [77 S.Ct. 443, 1 L.Ed.2d 493].)

- "In sum, the understanding of *Rogers* we here affirm 'has been accepted as settled law for several decades.' 'Congress has had [more than 50] years in which it could have corrected our decision in [*Rogers*] if it disagreed with it, and has not chosen to do so.' Countless judges have instructed countless juries in language drawn from *Rogers*. To discard or restrict the *Rogers* instruction now would ill serve the goals of 'stability' and 'predictability' that the doctrine of statutory stare decisis aims to ensure." (*CSX Transp., Inc. v. McBride* (2011) – U.S. --, -- [131 S.Ct. 2630, 2641, 180 L.Ed.2d 637], internal citations omitted.)

- "The common law concept of proximate cause ... has not been adopted as the causation test in F.E.L.A. cases. Causation in an F.E.L.A. case exists even if there is a plurality of causes, including the negligence of the defendant or of a third person. The negligence of the employer need not be the sole cause or even a substantial cause of the ensuing injury." (*Parker v. Atchison, Topeka and Santa Fe Ry. Co.* (1968) 263 Cal.App.2d 675, 678 [70 Cal.Rptr. 8].)

Secondary Sources

2 Witkin, Summary of California Law (10th ed. 2005) Workers' Compensation, § 123

42 California Forms of Pleading and Practice, Ch. 485, *Railroads*, § 485.42 (Matthew Bender)

2920. Federal Safety Appliance Act or Boiler Inspection Act—Essential Factual Elements

[*Name of plaintiff***] [also] claims that while [he/she/[***name of decedent***]] was employed by [***name of defendant***], [[he/she] was harmed by/[his/her] death was caused by] [***name of defendant***]'s [***describe violation of Federal Safety Appliance Act/Boiler Inspection Act***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff/decedent***] was employed by [***name of defendant***];**

2. **That [***name of defendant***] was a common carrier by railroad;**

3. **That [***name of plaintiff/decedent***] was acting within the scope of [his/her] employment at the time of the incident;**

4. **That [***name of defendant***] was engaged in interstate commerce;**

5. **That [***name of plaintiff/decedent***]'s job duties furthered, or in any way substantially affected, interstate commerce;**

6. **That [***name of defendant***] [***describe violation of Federal Safety Appliance Act/Boiler Inspection Act***];**

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

8. **That [***name of defendant***]'s conduct was a cause of [[***name of plaintiff***]'s harm/[***name of decedent***]'s death].**

[Interstate commerce is commercial activity that crosses more than one country or state, such as the movement of goods from one state to another.]

[*Name of defendant***] is responsible for harm caused by [***describe conduct that violated the FSA/BIA***] even if it was not negligent. If you find that [***name of defendant***] is responsible for [***name of plaintiff/decedent***]'s [harm/death], [***name of plaintiff***]'s recovery, if any, must not be reduced because of [***name of plaintiff/decedent***]'s own conduct.**

New September 2003; Revised December 2009, June 2011

Directions for Use

The statutory violation should be paraphrased in this instruction where indicated. Separate instructions may need to be drafted detailing the statutory requirements of the specific violation as alleged and any applicable defenses. (See 49 U.S.C. §§ 20301 et seq., 20501 et seq., and 20701.)

If the plaintiff is bringing a negligence claim under the Federal Employers' Liability Act (FELA) and a

claim under the Federal Safety Appliance Act (SAA) or the Boiler Inspection Act (BIA), the court may wish to add an introductory instruction that would alert the jury to the difference between the two claims.

Do not give a comparative fault instruction if the case is brought under this theory.

Sources and Authority

- Federal Employers Liability Act. Title 45 United States Code section 51. ~~provides, in part: "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this [chapter].~~"

- Contributory Negligence Under the FELA. Title 45 United States Code section 53. ~~provides, in part: "[T]he fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.~~"

- Assumption of Risk Under the FELA. Title 45 United States Code section 54. ~~provides: "In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.~~"

- FELA Regulations Deemed to Be Statutes. Title 45 United States Code section 54a. ~~provides: "A regulation, standard, or requirement in force, or prescribed by the Secretary of Transportation under chapter 201 of title 49, United States Code [49 USCS §§ 20101 et seq.], or by a State agency that is participating in investigative and surveillance activities under section 20105 of title 49, is deemed to be a statute under sections 3 and 4 of this Act [45 USCS §§ 53, 54].~~"

- Railroad Safety Requirements. Title 49 United States Code section 20302(a). ~~provides:~~

  ~~(a) General. Except as provided in subsection (c) of this section and section 20303 of this title, a railroad carrier may use or allow to be used on any of its railroad lines~~

  ~~(1) a vehicle only if it is equipped with~~

  ~~(A) couplers coupling automatically by impact, and capable of being uncoupled, without the necessity of individuals going between the ends of the vehicles;~~

~~(B) secure sill steps and efficient hand brakes; and~~

~~(C) secure ladders and running boards when required by the Secretary of Transportation, and, if ladders are required, secure handholds or grab irons on its roof at the top of each ladder;~~

~~(2) except as otherwise ordered by the Secretary, a vehicle only if it is equipped with secure grab irons or handholds on its ends and sides for greater security to individuals in coupling and uncoupling vehicles;~~

~~(3) a vehicle only if it complies with the standard height of drawbars required by regulations prescribed by the Secretary;~~

~~(4) a locomotive only if it is equipped with a power-driving wheel brake and appliances for operating the train-brake system; and~~

~~(5) a train only if~~

~~(A) enough of the vehicles in the train are equipped with power or train brakes so that the engineer on the locomotive hauling the train can control the train's speed without the necessity of brake operators using the common hand brakes for that purpose; and~~

~~(B) at least 50 percent of the vehicles in the train are equipped with power or train brakes and the engineer is using the power or train brakes on those vehicles and on all other vehicles equipped with them that are associated with those vehicles in the train.~~

- Installation of Railroad Signal System. Title 49 United States Code section 20502(b)~~. provides:~~

~~(b) Use. A railroad carrier may allow a signal system to be used on its railroad line only when the system, including its controlling and operating appurtenances~~

~~(1) may be operated safely without unnecessary risk of personal injury; and~~

~~(2) has been inspected and can meet any test prescribed under this chapter [49 USCS §§ 20501 et seq.].~~

- Use of Locomotive or Tender. Title 49 United States Code section 20701~~. provides:~~

~~A railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances~~

~~(1) are in proper condition and safe to operate without unnecessary danger of personal injury;~~

~~(2) have been inspected as required under this chapter and regulations prescribed by the Secretary of Transportation under this chapter; and~~

~~(3) can withstand every test prescribed by the Secretary under this chapter.~~

- "We note that under the Federal Employers' Liability Act of 1908 an injured railroad employee may bring a cause of action without proof of negligence based on failure of the SAA-mandated safety appliances to function. When such strict liability does not apply, i.e., the injury does not result from defective equipment covered by the SAA, the employee must establish common law negligence. The Supreme Court has also recognized that the SAA imposes a duty on railroads extending to nonemployee travelers at railway/highway crossings, who must bring a common law tort action in state court (absent diversity) and must prove negligence." (*Carrillo v. ACF Industries, Inc.* (1999) 20 Cal.4th 1158, 1170, fn. 4 [86 Cal.Rptr.2d 832, 980 P.2d 386], internal citations omitted.)

- "[An] FSAA violation is *per se* negligence in a FELA suit. In other words, the injured employee has to show only that the railroad violated the FSAA, and the railroad is strictly liable for any injury resulting from the violation." (*Phillips v. CSX Transportation Co.* (4th Cir. 1999) 190 F.3d 285, 288, original italics.)

- " 'The BIA and the SAA are regarded as amendments to the FELA. The BIA supplements the FELA to provide additional public protection and facilitate employee recovery. ... [T]he BIA imposes on the carrier an absolute duty to maintain the locomotive, and all its parts and appurtenances, in proper condition, and safe to operate without unnecessary peril to life or limb.' " (*Fontaine v. National Railroad Passenger Corp.* (1997) 54 Cal.App.4th 1519, 1525 [63 Cal.Rptr.2d 644], internal citation omitted.)

- "[N]either contributory negligence nor assumption of the risk is a defense to a BIA violation which has contributed to the cause of an injury." (*Fontaine, supra,* 54 Cal.App.4th at p. 1525.)

- "Where an inefficient brake causes an injury the carrier in interstate commerce under the Safety Appliance Act cannot escape liability, and proof of negligence on the part of the railroad is unnecessary." (*Leet v. Union Pacific Railroad Co.* (1943) 60 Cal.App.2d 814, 817 [142 P.2d 37].)

- "Proof of a BIA violation is enough to establish negligence as a matter of law, and neither contributory negligence nor assumption of risk can be raised as a defense." (*Law v. General Motors Corp.* (9th Cir. 1997) 114 F.3d 908, 912, internal citations omitted.)

- "The purpose in enacting the BIA was to protect train service employees and the traveling public from defective locomotive boilers and equipment. '[I]t has been held consistently that the [BIA] supplements the [FELA] by imposing on interstate railroads "an absolute and continuing duty" to provide safe equipment.' In addition to the civil penalty, a person harmed by violation of the BIA is given recourse to sue under FELA, which applies only to railroad employees injured while engaged in interstate commerce. FELA provides the exclusive remedy for recovery of damages against a railroad by its employees. FELA liability is expressly limited to common carriers." (*Viad Corp. v. Superior Court* (1997) 55 Cal.App.4th 330, 335 [64 Cal.Rptr.2d 136], internal citations omitted, disapproved

on other grounds in *Scheiding v. General Motors Corp.* (2000) 22 Cal.4th 471, 484, fn. 6 [93 Cal.Rptr.2d 342, 993 P.2d 996].)

- "The test for coverage under the amendment is not whether the employee is engaged in transportation, but rather whether what he does in any way furthers or substantially affects transportation." (*Reed v. Pennsylvania Railroad Co.* (1956) 351 U.S. 502, 505 [76 S.Ct. 958, 100 L.Ed. 1366].)

- "Where more than one inference can be drawn from the evidence, the question whether an employee was, at the time of receiving the injury sued for, engaged in interstate commerce, is for the jury." (*Sullivan v. Matt* (1955) 130 Cal.App.2d 134, 139 [278 P.2d 499], internal citations omitted.)

Secondary Sources

42 California Forms of Pleading and Practice, Ch. 485, *Railroads*, § 485.45 (Matthew Bender)

2922. Statute of Limitations—Special Verdict Form or Interrogatory

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[*Name of plaintiff***] must prove that [he/she] did not know, and could not reasonably have known, before [***date three years before action was commenced***],**

1. **That [he/she] had been harmed; and**

2. **That the harm was potentially caused by [his/her] work with [***name of defendant***].**

You will be asked a question about this on a special [verdict form/interrogatory].

New September 2003

Sources and Authority

- FELA: Statute of Limitations. 45 U.S.C. section 56~~. provides: "No action shall be maintained under this [chapter] unless commenced within three years from the day the cause of action accrued."~~

- "Compliance with the three-year statute of limitations is a condition precedent for recovery in a FELA action. In cases of latent or progressive injuries ... the 'discovery rule' directs that the cause of action does not commence to run until the plaintiff knew or should have known of the injury and its cause." (*Monarch v. Southern Pacific Transportation Co.* (1999) 70 Cal.App.4th 1197, 1203 [83 Cal.Rptr.2d 247], internal citations omitted.)

- "The burden is therefore on the claimant to allege and to prove that his cause of action was commenced within the three-year period." (*Emmons v. Southern Pacific Transportation Co.* (5th Cir. 1983) 701 F.2d 1112, 1118, internal citations omitted.)

- "Under the discovery rule, the test is an objective inquiry into whether the plaintiff knew or should have known, in the exercise of reasonable diligence, the essential facts of injury and cause. Constructive rather than actual knowledge of the fact of causation triggers a duty to investigate the possible causes of injury. Thus, in accordance with the objective test, 'definite knowledge' that the injury is work related is not necessary in order for the cause of action to accrue. Once the plaintiff believes or suspects that the 'potential cause of his injury' is work related, an affirmative duty to investigate is imposed." (*Monarch, supra,* 70 Cal.App.4th at p. 1203.)

Secondary Sources

42 California Forms of Pleading and Practice, Ch. 485, *Railroads*, § 485.41 (Matthew Bender)

2925. Status of Defendant as Common Carrier

[*Name of plaintiff*] claims that [*name of defendant*] was a common carrier by railroad. To prove this, [*name of plaintiff*] must show that [*name of defendant*] was in the business of transporting [the property of] the general public by rail.

New September 2003

Sources and Authority

- FELA: "Common Carrier" Defined. 45 U.S.C. section 57. ~~provides: "The term 'common carrier' as used in this [chapter] shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier."~~

- "A common carrier has been defined generally as one who holds himself out to the public as engaged in the business of transportation of persons or property from place to place for compensation, offering his services to the public generally. The distinctive characteristic of a common carrier is that he undertakes to carry for all people indifferently, and hence is regarded in some respects as a public servant. The dominant and controlling factor in determining the status of one as a common carrier is his public profession as to the service offered or performed." (*Kelly v. General Electric Co.* (E.D.Pa. 1953) 110 F.Supp. 4, 6.)

- "According to these cases various considerations are of prime importance in determining whether a particular entity is a common carrier. First-actual performance of rail service, second-the service being performed is part of the total rail service contracted for by a member of the public, third-the entity is performing as part of a system of interstate rail transportation by virtue of common ownership between itself and a railroad or by a contractual relationship with a railroad, and hence such entity is deemed to be holding itself out to the public, and fourth-remuneration for the services performed is received in some manner, such as a fixed charge from a railroad or by a percent of the profits from a railroad." (*Lone Star Steel Co. v. McGee* (5th Cir. 1967) 380 F.2d 640, 647.)

Secondary Sources

42 California Forms of Pleading and Practice, Ch. 485, *Railroads*, § 485.35 (Matthew Bender)

2941. Introduction to Damages for Personal Injury

If you decide that [*name of plaintiff*] has proved [his/her] claim against [*name of defendant*], you also must decide how much money will reasonably compensate [*name of plaintiff*] for the harm. This compensation is called "damages."

[*Name of plaintiff*] must prove the amount of [his/her] damages. However, [*name of plaintiff*] does not have to prove the exact amount of damages that will provide reasonable compensation for the harm. You must not speculate or guess in awarding damages.

The following are the specific items of damages claimed by [*name of plaintiff*]:

New September 2003

Directions for Use

See the Damages series (CACI No. 3900 et seq.) for instructions on specific items of damages and other topics involving damages, such as the concept of present cash value, mitigation of damages, and the effect of preexisting conditions. Care should be taken to verify that the wording of these instructions is consistent with federal law regarding damages under FELA.

Sources and Authority

- Federal Employers Liability Act. 45 U.S.C. section 51. ~~provides: "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. [¶] Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this [chapter] … ."~~

- "[I]t is settled that the propriety of jury instructions concerning the measure of damages in an FELA action is an issue of 'substance' determined by federal law." (*St. Louis Southwestern Railway Co. v. Dickerson* (1985) 470 U.S. 409, 411 [105 S.Ct. 1347, 84 L.Ed.2d 303], internal citation omitted.)

- "A FELA plaintiff is entitled to recover for all past, present and probable future harm attributable to the defendant's tortious conduct, including pain and suffering and mental anguish." (*Marchica v. Long Island Railroad Co.* (2d Cir. 1994) 31 F.3d 1197, 1207.)

- "A FELA plaintiff, upon proof of employer liability, may recover damages for loss of earnings, medical expenses and pain and suffering. The burden rests upon the plaintiff to establish by sufficient evidence a factual basis for the amount of damages sought." (*Williams v. Missouri Pacific Railroad Co.* (10th Cir. 1993) 11 F.3d 132, 135, internal citations omitted.)

- "The Act was not intended to supersede or pre-empt the common law in railroad employee injury cases, but merely to modify it in ... specific particulars. Thus, the Act contains no provisions regulating the measure of damages recoverable in an action to which the FELA applies, and courts have since held that the absence in the Act of specific provisions governing the measure of damages in FELA actions does not affect their availability as before the Act." (*Hall v. Minnesota Transfer Railway Co.* (D.Minn. 1971) 322 F.Supp. 92, 94.)

- "The seaman may thus recover for all of his pecuniary damages including such damages as the cost of employing someone else to perform those domestic services that he would otherwise have been able to render but is now incapable of doing." (*Cruz v. Hendy International Co.* (5th Cir. 1981) 638 F.2d 719, 723 [Jones Act case], overruled on other grounds in *Miles v. Apex Marine Corp.* (1990) 498 U.S. 19, 32-33 [111 S.Ct. 317, 112 L.Ed.2d 275].)

- "Although our decision in *Jones & Laughlin* makes clear that no single method for determining present value is mandated by federal law and that the method of calculating present value should take into account inflation and other sources of wage increases as well as the rate of interest, it is equally clear that an utter failure to instruct the jury that present value is the proper measure of a damages award is error." (*St. Louis Southwestern Railway, supra,* 470 U.S. at p. 412.)

- "Damages for the injury of loss of earning capacity may be recovered in a FELA action. 'Earning capacity means the potential for earning money in the future ... .' The appropriate measure is the present value of the total amount of future earnings." (*Bissett v. Burlington Northern Railroad Co.* (8th Cir. 1992) 969 F.2d 727, 731, internal citations omitted.)

- "[W]e see no reason, and defendant has presented us with no reason, to create in FELA cases an exception to the general rule that the defendant has the burden of proving that the plaintiff could, with reasonable effort, have mitigated his damages." (*Jones v. Consolidated Rail Corp.* (6th Cir. 1986) 800 F.2d 590, 594.)

- "The federal and state courts have held with virtual unanimity over more than seven decades that prejudgment interest is not available under the FELA." (*Monessen Southwestern Railway Co. v. Morgan* (1988) 486 U.S. 330, 338 [108 S.Ct. 1837, 100 L.Ed.2d 349].)

- "We therefore reaffirm the conclusion ... that punitive damages are unavailable under the FELA." (*Wildman v. Burlington Northern Railroad Co.* (9th Cir. 1987) 825 F.2d 1392, 1395, internal citation omitted.)

- "We have held specifically that the spouse of an injured railroad employee may not sue for loss of consortium under FELA." (*Kelsaw v. Union Pacific Railroad Co.* (9th Cir. 1982) 686 F.2d 819, 820, internal citation omitted.)

- 45 U.S.C. section 55 provides: "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this [chapter], shall to that extent be void: Provided, That in any action brought against any such common carrier under or by virtue of any of the provisions of this [chapter], such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought."

- "While at first glance the language of this provision seems broad enough to completely abrogate the common law collateral source rule, courts have limited the scope of the provision by focusing on the requirement that the covered payments be made 'on account of the injury.' Thus, the cases draw a distinction between payments emanating from a fringe benefit such as a retirement fund or a general hospital and medical insurance plan, and payments which the employer has undertaken voluntarily to indemnify itself against possible liabilities under the FELA." (*Clark v. Burlington Northern, Inc.* (8th Cir. 1984) 726 F.2d 448, 450, internal citation omitted.)

- "A benefit may be exempt from setoff under the collateral source rule even though the employer is the sole source of the fund. The important consideration is the character of the benefits received, rather than whether the source is actually independent of the employer. Medical expenses paid for by insurance are exempt from setoff regardless of whether the employer paid one hundred percent of the insurance premiums. Courts have also ruled private disability retirement plans established by a collective bargaining agreement and covering both job-related and non-job-related illness and injury are exempt from setoff." (*Clark, supra,* 726 F.2d at pp. 450-451, footnote and internal citations omitted.)

- "Generally, a tortfeasor need not pay twice for the damage caused, but he should not be allowed to set off compensation from a 'collateral source' against the amount he owes on account of his tort." (*Russo v. Matson Navigation Co.* (9th Cir. 1973) 486 F.2d 1018, 1020.)

- "It is well established in this circuit that the purpose and nature of the insurance benefits are controlling. Here, the purpose of the insurance coverage, as expressly described in the collective bargaining agreement, is to indemnify the employer against FELA liability. It follows that setoff should be allowed and that the benefits in this case should not be regarded as a collateral source." (*Folkestad v. Burlington Northern, Inc.* (9th Cir. 1987) 813 F.2d 1377, 1383.)

- "The mechanics of handling the setoff provided by the plan may be dealt with either by the Court instructing the jury that the amount of benefits provided by the GA-23000 contract must be set off against any damages awarded or by the Court as a matter of law reducing damages awarded by the jury." (*Brice v. National Railroad Passenger Corp.* (D.Md. 1987) 664 F.Supp. 220, 224.)

Secondary Sources

42 California Forms of Pleading and Practice, Ch. 485, *Railroads*, §§ 485.43, 485.44 (Matthew Bender)

2942. Damages for Death of Employee

If you decide that [*name of plaintiff***] has proved [his/her] claim against [***name of defendant***] for the death of [***name of decedent***], you also must decide how much money will reasonably compensate [***name of plaintiff***] for this loss. This compensation is called "damages."**

[*Name of plaintiff***] must prove the amount of [his/her] damages. However, [***name of plaintiff***] does not have to prove the exact amount of these damages. You must not speculate or guess in awarding damages.**

The following are the specific items of damages claimed by [*name of plaintiff***]:**

1. **The reasonable value of money, goods, and services that [***name of decedent***] would have provided [***name of plaintiff***] during either the life expectancy that [***name of decedent***] had before [his/her] death or the life expectancy of [***name of plaintiff***], whichever is shorter;**

2. **[The monetary value of [***name of minor child***]'s loss of any care, attention, instruction, training, advice, and guidance from [***name of decedent***];]**

3. **Any pain and suffering that [***name of decedent***] experienced as a result of [his/her] injuries; and**

4. **The reasonable expense of medical care and supplies reasonably needed by and actually provided to [***name of decedent***].**

Do not include in your award any compensation for [*name of plaintiff***]'s grief, sorrow, or mental anguish or the loss of [***name of decedent***]'s society or companionship.**

In deciding a person's life expectancy, consider, among other factors, that person's health, habits, activities, lifestyle, and occupation. Life expectancy tables are evidence of a person's life expectancy but are not conclusive.

Any award you make for the value of any money and services that you decide [*name of decedent***] would have provided [***name of plaintiff***] in the future should be reduced to present value. Any award you make for the value of any money and services you decide [***name of decedent***] would have provided [***name of plaintiff***] between the date of [his/her] death on [***date of death***] and the present should not be reduced to present value.**

[In computing damages, consider the losses suffered by all plaintiffs and return a verdict of a single amount for all plaintiffs. I will divide the amount [among/between] the plaintiffs.]

New September 2003; Revised December 2011

Directions for Use

The list of damages is optional and is intended to include those items of damage for which recovery is commonly sought in the ordinary FELA case. This list is not intended to exclude any item of damages that is supported in evidence and the authorities. There must be evidence to support each item listed.

The items of damage set forth in items number 3 and 4 are recoverable by the personal representative on behalf of the spouse, children, or parents of the decedent, if supported by the evidence.

See also CACI No. 3904A, *Present Cash Value*, CACI No. 3904B, *Use of Present-Value Tables*, and CACI No. 3932, *Life Expectancy*.

Sources and Authority

- Federal Employers Liability Act. Title 45 United States Code section 51. ~~provides: "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. [¶] Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this [chapter], be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this [chapter]."~~

- Contracts Waiving FELA Liability Are Void. Title 45 United States Code section 55. ~~provides: "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by [this chapter], shall to that extent be void: Provided, That in any action brought against any such common carrier under or by virtue of any of the provisions of this [chapter], such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought."~~

- FELA Right of Action Survives. Title 45 United States Code section 59. ~~provides: "Any right of action given by this chapter to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury."~~

- "[I]t is settled that the propriety of jury instructions concerning the measure of damages in an FELA

action is an issue of 'substance' determined by federal law." (*St. Louis Southwestern Railway Co. v. Dickerson* (1985) 470 U.S. 409, 411 [105 S.Ct. 1347, 84 L.Ed.2d 303], internal citation omitted.)

- "The elements which make up the total damage resulting to a minor child from a parent's death may be materially different from a parent's examination where the beneficiary is a spouse or collateral dependent relative; but in every instance the award must be based upon money values, the amount of which can be ascertained only upon a view of the peculiar facts presented." (*Norfolk & Western Railroad Co. v. Holbrook* (1915) 235 U.S. 625, 629 [35 S.Ct. 143, 59 L.Ed. 392], internal citations omitted.)

- "In the present case there was testimony concerning the personal qualities of the deceased and the interest which he took in his family. It was proper, therefore, to charge that the jury might take into consideration the care, attention, instruction, training, advice, and guidance which the evidence showed he reasonably might have been expected to give his children during their minority, and to include the pecuniary value thereof in the damages assessed." (*Norfolk & Western Railroad Co., supra,* 235 U.S. at p. 629.)

- " 'In the absence of evidence that an adult child is either dependent upon or had any reasonable grounds for expecting any pecuniary benefit from a continuance of the decedent's life, a recovery on behalf of such child is excluded.' " (*Kozar v. Chesapeake & Ohio Railway Co.* (6th Cir. 1971) 449 F.2d 1238, 1243, internal citation omitted.)

- "[T]he conclusion is unavoidable that the personal representative is to recover on behalf of the designated beneficiaries, not only such damages as will compensate them for their own pecuniary loss, but also such damages as will be reasonably compensatory for the loss and suffering of the injured person while he lived." (*St. Louis, I.M. & S. Railway Co. v. Craft* (1915) 237 U.S. 648, 658 [35 S.Ct. 704, 59 L.Ed. 1160].)

- "Funeral expenses ... may not be included in damages awarded in FELA actions." (*Dubose v. Kansas City Southern Railway Co.* (5th Cir. 1984) 729 F.2d 1026, 1033.)

- "In a wrongful-death action under the FELA, the measure of recovery is 'the damages ... [that] flow from the deprivation of the pecuniary benefits which the beneficiaries might have reasonably received ... .' The amount of money that a wage earner is able to contribute to the support of his family is unquestionably affected by the amount of the tax he must pay to the Federal Government. It is his after-tax income, rather than his gross income before taxes, that provides the only realistic measure of his ability to support his family. It follows inexorably that the wage earner's income tax is a relevant factor in calculating the monetary loss suffered by his dependents when he dies." (*Norfolk & W. Ry. Co. v. Liepelt* (1980) 444 U.S. 490, 493-494 [100 S.Ct. 755, 62 L.Ed.2d 689], internal citation omitted.)

- "[T]he damages are such as flow from the deprivation of the pecuniary benefits which the beneficiaries might have reasonably received if the deceased had not died from his injuries." (*Michigan Central Railroad Co. v. Vreeland* (1913) 227 U.S. 59, 70 [33 S.Ct. 192, 57 L.Ed. 417].)

- "The seaman may thus recover for all of his pecuniary damages including such damages as the cost of

employing someone else to perform those domestic services that he would otherwise have been able to render but is now incapable of doing." (*Cruz v. Hendy International Co.* (5th Cir. 1981) 638 F.2d 719, 723 [Jones Act case], overruled on other grounds in *Miles v. Apex Marine Corp.* (1990) 498 U.S. 19, 32-33 [111 S.Ct. 317, 112 L.Ed.2d 275].)

- "While at first glance the language of this provision seems broad enough to completely abrogate the common law collateral source rule, courts have limited the scope of the provision by focusing on the requirement that the covered payments be made 'on account of the injury.' Thus, the cases draw a distinction between payments emanating from a fringe benefit such as a retirement fund or a general hospital and medical insurance plan, and payments which the employer has undertaken voluntarily to indemnify itself against possible liabilities under the FELA." (*Clark v. Burlington Northern, Inc.* (8th Cir. 1984) 726 F.2d 448, 450, internal citation omitted.)

- "A benefit may be exempt from setoff under the collateral source rule even though the employer is the sole source of the fund. The important consideration is the character of the benefits received, rather than whether the source is actually independent of the employer. Medical expenses paid for by insurance are exempt from setoff regardless of whether the employer paid one hundred percent of the insurance premiums. Courts have also ruled private disability retirement plans established by a collective bargaining agreement and covering both job-related and non-job-related illness and injury are exempt from setoff." (*Clark, supra,* 726 F.2d at pp. 450-451, footnote and internal citations omitted.)

- "Generally, a tortfeasor need not pay twice for the damage caused, but he should not be allowed to set off compensation from a 'collateral source' against the amount he owes on account of his tort." (*Russo v. Matson Navigation Co.* (9th Cir. 1973) 486 F.2d 1018, 1020.)

- "It is well established in this circuit that the purpose and nature of the insurance benefits are controlling. Here, the purpose of the insurance coverage, as expressly described in the collective bargaining agreement, is to indemnify the employer against FELA liability. It follows that setoff should be allowed and that the benefits in this case should not be regarded as a collateral source." (*Folkestad v. Burlington Northern, Inc.* (9th Cir. 1987) 813 F.2d 1377, 1383.)

- "The mechanics of handling the setoff provided by the plan may be dealt with either by the Court instructing the jury that the amount of benefits provided by the GA-23000 contract must be set off against any damages awarded or by the Court as a matter of law reducing damages awarded by the jury." (*Brice v. National Railroad Passenger Corp.* (D. Md. 1987) 664 F.Supp. 220, 224.)

Secondary Sources

2 Hanna, California Law of Employee Injuries and Workers' Compensation, Ch. 21, *Jurisdiction*, § 21.01[3] (Matthew Bender)

42 California Forms of Pleading and Practice, Ch. 485, *Railroads*, §§ 485.36, 485.43, 485.44 (Matthew Bender)

3042. Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Excessive Force (42 U.S.C. § 1983)

[*Name of plaintiff***] claims that [***name of defendant***] used excessive force against [him/her]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] used force against [***name of plaintiff***];**

2. **That the force used was excessive;**

3. **That [***name of defendant***] was acting or purporting to act in the performance of [his/her] official duties;**

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

5. **That [***name of defendant***]'s use of excessive force was a substantial factor in causing [***name of plaintiff***]'s harm.**

Force is excessive if it is used maliciously and sadistically to cause harm. In deciding whether excessive force was used, you should consider, among other factors, the following:

(a) The need for the use of force;

(b) The relationship between the need and the amount of force that was used;

(c) The extent of injury inflicted;

(d) The extent of the threat to the safety of staff and inmates, as reasonably perceived by the responsible officials on the basis of the facts known to them; [and]

(e) Any efforts made to temper the severity of a forceful response; [and]

(f) [*Insert other relevant factor.***]**

Force is not excessive if it is used in a good-faith effort to protect the safety of inmates, staff, or others, or to maintain or restore discipline.

New September 2003; Revised June 2010; Renumbered from CACI No. 3010 December 2010; Renumbered from CACI No. 3013 December 2012

Directions for Use

The "official duties" referred to in element 3 must be duties created pursuant to any state, county, or municipal law, ordinance, or regulation. This aspect of color of law most likely will not be an issue for

the jury, so it has been omitted to shorten the wording of element 3.

There is law suggesting that the jury should give deference to prison officials in the adoption and execution of policies and practices that in their judgment are needed to preserve discipline and to maintain internal security in a prison. This principle is covered in the final sentence by the term "good faith."

Sources and Authority

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

- "Section 1983 claims may be brought in either state or federal court." (*Pitts v. County of Kern* (1998) 17 Cal.4th 340, 348 [70 Cal.Rptr.2d 823, 949 P.2d 920].)

- "The Constitution 'does not mandate comfortable prisons,' but neither does it permit inhumane ones, and it is now settled that 'the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment.' In its prohibition of 'cruel and unusual punishments,' the Eighth Amendment places restraints on prison officials, who may not, for example, use excessive physical force against prisoners. The Amendment also imposes duties on these officials, who must provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must 'take reasonable measures to guarantee the safety of the inmates.' " (*Farmer v. Brennan* (1994) 511 U.S. 825, 832 [114 S.Ct. 1970, 128 L.Ed.2d 811], internal citations omitted.)

- "[A]pplication of the deliberate indifference standard is inappropriate when authorities use force to put down a prison disturbance. Instead, 'the question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." ' " (*Hudson v. McMillian* (1992) 503 U.S. 1, 6 [112 S.Ct. 995, 117 L.Ed.2d 156], internal citations omitted.)

- "[W]e hold that whenever prison officials stand accused of using excessive physical force in violation of the Cruel and Unusual Punishments Clause, the core judicial inquiry is that set out in *Whitley:* whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." (*Hudson, supra,* 503 U.S. at pp. 6–7, internal citations omitted.)

- "Whether the prison disturbance is a riot or a lesser disruption, corrections officers must balance the need 'to maintain or restore discipline' through force against the risk of injury to inmates. Both situations may require prison officials to act quickly and decisively. Likewise, both implicate the principle that 'prison administrators ... should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.' " (*Hudson, supra,* 503 U.S. at p. 6, internal

citations omitted.)

- "[T]his Court rejected the notion that 'significant injury' is a threshold requirement for stating an excessive force claim. … 'When prison officials maliciously and sadistically use force to cause harm,' … 'contemporary standards of decency always are violated . . . whether or not significant injury is evident. Otherwise, the Eighth Amendment would permit any physical punishment, no matter how diabolic or inhuman, inflicting less than some arbitrary quantity of injury.' " (*Wilkins v. Gaddy* (2010) 559 U.S. 34, 37 [130 S.Ct. 1175, 175 L.Ed.2d 995].)

- "This is not to say that the 'absence of serious injury' is irrelevant to the Eighth Amendment inquiry. '[T]he extent of injury suffered by an inmate is one factor that may suggest "whether the use of force could plausibly have been thought necessary" in a particular situation.' The extent of injury may also provide some indication of the amount of force applied. … [N]ot 'every malevolent touch by a prison guard gives rise to a federal cause of action.' 'The Eighth Amendment's prohibition of "cruel and unusual" punishments necessarily excludes from constitutional recognition *de minimis* uses of physical force, provided that the use of force is not of a sort repugnant to the conscience of mankind.' An inmate who complains of a 'push or shove' that causes no discernible injury almost certainly fails to state a valid excessive force claim. … [¶] Injury and force, however, are only imperfectly correlated, and it is the latter that ultimately counts." (*Wilkins, supra*, 559 U.S. at pp. 37–38, original italics, internal citations omitted.)

- " '[S]uch factors as the need for the application of force, the relationship between the need and the amount of force that was used, [and] the extent of injury inflicted,' are relevant to that ultimate determination. From such considerations inferences may be drawn as to whether the use of force could plausibly have been thought necessary, or instead evinced such wantonness with respect to the unjustified infliction of harm as is tantamount to a knowing willingness that it occur. But equally relevant are such factors as the extent of the threat to the safety of staff and inmates, as reasonably perceived by the responsible officials on the basis of the facts known to them, and any efforts made to temper the severity of a forceful response." (*Whitley v. Albers* (1986) 475 U.S. 312, 321 [106 S.Ct. 1078, 89 L.Ed.2d 251], internal citations omitted.)

- "The Supreme Court has interpreted the phrase 'under "color" of law' to mean 'under "pretense" of law.' A police officer's actions are under pretense of law only if they are 'in some way "related to the performance of his official duties." ' By contrast, an officer who is ' "pursuing his own goals and is not in any way subject to control by [his public employer]," ' does not act under color of law, unless he 'purports or pretends' to do so. Officers who engage in confrontations for personal reasons unrelated to law enforcement, and do not 'purport[] or pretend[]' to be officers, do not act under color of law." (*Huffman v. County of Los Angeles* (9th Cir. 1998) 147 F.3d 1054, 1058, internal citations omitted.)

Secondary Sources

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

3 Civil Rights Actions, Ch. 10, *Deprivation of Rights Under Color of State Law—Law Enforcement and Prosecution*, ¶ 10.01 (Matthew Bender)

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

11 California Forms of Pleading and Practice, Ch. 114, *Civil Rights: Prisoners' Rights*, § 114.70 (Matthew Bender)

3060. Unruh Civil Rights Act—Essential Factual Elements (Civ. Code, §§ 51, 52)

[*Name of plaintiff***] claims that [***name of defendant***] denied [him/her] full and equal [accommodations/advantages/facilities/privileges/services] because of [his/her] [sex/race/color/religion/ancestry/national origin/disability/medical condition/genetic information/marital status/sexual orientation/[***insert other actionable characteristic***]]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] [denied/aided or incited a denial of/discriminated or made a distinction that denied] full and equal [accommodations/advantages/facilities/privileges/services] to [***name of plaintiff***];**

2. **[That a substantial motivating reason for** [***name of defendant***]**'s conduct was [its perception of] [***name of plaintiff***]'s [sex/race/color/religion/ancestry/national origin/ medical condition/genetic information/marital status/sexual orientation/[***insert other actionable characteristic***]];]**

   [That the [sex/race/color/religion/ancestry/national origin/medical condition/genetic information/marital status/sexual orientation/[*insert other actionable characteristic***]] of a person whom [***name of plaintiff***] was associated with was a substantial motivating reason for [***name of defendant***]'s conduct;]**

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

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

New September 2003; Revised December 2011, June 2012; Renumbered from CACI No. 3020 December 2012; Revised June 2013

Directions for Use

Select the bracketed option from element 2 that is most appropriate to the facts of the case.

Note that element 2 uses the term "substantial motivating reason" to express both intent and causation between the protected classification and the defendant's conduct. "Substantial motivating reason" has been held to be the appropriate standard under the Fair Employment and Housing Act to address the possibility of both discriminatory and nondiscriminatory motives. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; CACI No. 2507, *"Substantial Motivating Reason" Explained*.) Whether the FEHA standard applies under the Unruh Act has not been addressed by the courts.

With the exception of claims that are also violations of the Americans With Disabilites Act (ADA) (see *Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 661, 665 [94 Cal.Rptr.3d 685, 208 P.3d 623]), intentional discrimination is required for violations of the Unruh Act. (See *Harris v. Capital Growth Investors XIV*

(1991) 52 Cal.3d 1142, 1149 [278 Cal.Rptr. 614, 805 P.2d 873].) The intent requirement is encompassed within the motivating-reason element. For claims that are also violations of the ADA, do not give element 2.

Note that there are two causation elements. There must be a causal link between the discriminatory intent and the adverse action (see element 2), and there must be a causal link between the adverse action and the harm (see element 4).

For an instruction on damages under the Unruh Act, see CACI No. 3067, *Unruh Civil Rights Act—Damages*. Note that the jury may award a successful plaintiff up to three times actual damages but not less than $4,000 regardless of any actual damages. (Civ. Code, § 52(a).) In this regard, harm is presumed, and elements 3 and 4 may be considered as established if no actual damages are sought. (See *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 33 [219 Cal.Rptr. 133, 707 P.2d 195] [Unruh Act violations are per se injurious]; Civ. Code, § 52(a) [provides for minimum statutory damages for every violation regardless of the plaintiff's actual damages]; see also Civ. Code, § 52(h) ["actual damages" means special and general damages].)

The judge may decide the issue of whether the defendant is a business establishment as a matter of law. (*Rotary Club of Duarte v. Bd. of Directors* (1986) 178 Cal.App.3d 1035, 1050 [224 Cal.Rptr. 213].) Special interrogatories may be needed if there are factual issues. This element has been omitted from the instruction because it is unlikely to go to a jury.

The Act is not limited to the categories expressly mentioned in the statute. Other forms of arbitrary discrimination by business establishments are prohibited. (*In re Cox* (1970) 3 Cal.3d 205, 216 [90 Cal.Rptr. 24, 474 P.2d 992].) Therefore, this instruction allows the user to "*insert other actionable characteristic*" throughout. Nevertheless, there are limitations on expansion beyond the statutory classifications. First, the claim must be based on a personal characteristic similar to those listed in the statute. Second, the court must consider whether the alleged discrimination was justified by a legitimate business reason. Third, the consequences of allowing the claim to proceed must be taken into account. (*Semler v. General Electric Capital Corp.* (2011) 196 Cal.App.4th 1380, 1392–1393 [127 Cal.Rptr.3d 794]; see *Harris, supra,* 52 Cal.3d at pp. 1159–1162.) However, these issues are most likely to be resolved by the court rather than the jury. (See *Harris, supra,* 52 Cal.3d at p. 1165.) Therefore, no elements are included to address what may be an "other actionable characteristic." If there are contested factual issues, additional instructions or special interrogatories may be necessary.

Sources and Authority

- Unruh Civil Rights Act. Civil Code section 51. ~~provides:~~

  ~~(a) This section shall be known, and may be cited, as the Unruh Civil Rights Act.~~

  ~~(b) All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, or sexual orientation are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.~~

(c) This section shall not be construed to confer any right or privilege on a person that is conditioned or limited by law or that is applicable alike to persons of every sex, color, race, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation or to persons regardless of their genetic information.

(d) Nothing in this section shall be construed to require any construction, alteration, repair, structural or otherwise, or modification of any sort whatsoever, beyond that construction, alteration, repair, or modification that is otherwise required by other provisions of law, to any new or existing establishment, facility, building, improvement, or any other structure, nor shall anything in this section be construed to augment, restrict, or alter in any way the authority of the State Architect to require construction, alteration, repair, or modifications that the State Architect otherwise possesses pursuant to other laws.

(e) For purposes of this section:

(1) "Disability" means any mental or physical disability as defined in Section 12926 of the Government Code.

(2)

(A) "Genetic information" means, with respect to any individual, information about any of the following:

(i) The individual's genetic tests.

(ii) The genetic tests of family members of the individual.

(iii) The manifestation of a disease or disorder in family members of the individual.

(B) "Genetic information" includes any request for, or receipt of, genetic services, or participation in clinical research that includes genetic services, by an individual or any family member of the individual.

(C) "Genetic information" does not include information about the sex or age of any individual.

(3) "Medical condition" has the same meaning as defined in subdivision (h) of Section 12926 of the Government Code.

(4) "Religion" includes all aspects of religious belief, observance, and practice.

(5) "Sex" includes, but is not limited to, pregnancy, childbirth, or medical conditions related to pregnancy or childbirth. "Sex" also includes, but is not limited to, a person's gender. "Gender" means sex, and includes a person's gender identity and gender expression. "Gender expression" means a person's gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth.

(6) "Sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, or sexual orientation" includes a perception that the person has any particular characteristic or characteristics

~~within the listed categories or that the person is associated with a person who has, or is perceived to have, any particular characteristic or characteristics within the listed categories.~~

~~(7) "Sexual orientation" has the same meaning as defined in subdivision (r) of Section 12926 of the Government Code.~~

~~(f) A violation of the right of any individual under the Americans with Disabilities Act of 1990 (Public Law 101-336) shall also constitute a violation of this section.~~

- Remedies Under Unruh Act. Civil Code section 52. ~~provides:~~

~~(a) Whoever denies, aids or incites a denial, or makes any discrimination or distinction contrary to Section 51, 51.5, or 51.6, is liable for each and every offense for the actual damages, and any amount that may be determined by a jury, or a court sitting without a jury, up to a maximum of three times the amount of actual damage but in no case less than four thousand dollars ($4,000), and any attorney's fees that may be determined by the court in addition thereto, suffered by any person denied the rights provided in Section 51, 51.5, or 51.6.~~

~~(b) Whoever denies the right provided by Section 51.7 or 51.9, or aids, incites, or conspires in that denial, is liable for each and every offense for the actual damages suffered by any person denied that right and, in addition, the following:~~

~~(1) An amount to be determined by a jury, or a court sitting without a jury, for exemplary damages.~~

~~(2) A civil penalty of twenty-five thousand dollars ($25,000) to be awarded to the person denied the right provided by Section 51.7 in any action brought by the person denied the right, or by the Attorney General, a district attorney, or a city attorney.~~

~~(3) Attorney's fees as may be determined by the court.~~

~~(c) Whenever there is reasonable cause to believe that any person or group of persons is engaged in conduct of resistance to the full enjoyment of any of the rights described in this section, and that conduct is of that nature and is intended to deny the full exercise of those rights, the Attorney General, any district attorney or city attorney, or any person aggrieved by the conduct may bring a civil action in the appropriate court by filing with it a complaint. The complaint shall contain the following:~~

~~(1) The signature of the officer, or, in his or her absence, the individual acting on behalf of the officer, or the signature of the person aggrieved.~~

~~(2) The facts pertaining to the conduct.~~

~~(3) A request for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order against the person or persons responsible for the conduct, as the complainant deems necessary to ensure the full enjoyment of the rights described in this section.~~

~~(d) Whenever an action has been commenced in any court seeking relief from the denial of equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States on account of race, color, religion, sex, national origin, or disability, the Attorney General or any district attorney or city attorney for or in the name of the people of the State of California may intervene in the action upon timely application if the Attorney General or any district attorney or city attorney certifies that the case is of general public importance. In that action, the people of the State of California shall be entitled to the same relief as if it had instituted the action.~~

~~(e) Actions brought pursuant to this section are independent of any other actions, remedies, or procedures that may be available to an aggrieved party pursuant to any other law.~~

~~(f) Any person claiming to be aggrieved by an alleged unlawful practice in violation of Section 51 or 51.7 may also file a verified complaint with the Department of Fair Employment and Housing pursuant to Section 12948 of the Government Code.~~

~~(g) This section does not require any construction, alteration, repair, structural or otherwise, or modification of any sort whatsoever, beyond that construction, alteration, repair, or modification that is otherwise required by other provisions of law, to any new or existing establishment, facility, building, improvement, or any other structure, nor does this section augment, restrict, or alter in any way the authority of the State Architect to require construction, alteration, repair, or modifications that the State Architect otherwise possesses pursuant to other laws.~~

~~(h) For the purposes of this section, "actual damages" means special and general damages. This subdivision is declaratory of existing law.~~

- " 'The Legislature used the words "all" and "of every kind whatsoever" in referring to business establishments covered by the Unruh Act, and the inclusion of these words without any exception and without specification of particular kinds of enterprises, leaves no doubt that the term "business establishments" was used in the broadest sense reasonably possible. The word "business" embraces everything about which one can be employed, and it is often synonymous with "calling, occupation, or trade, engaged in for the purpose of making a livelihood or gain." The word "establishment," as broadly defined, includes not only a fixed location, such as the "place where one is permanently fixed for residence or business," but also a permanent "commercial force or organization" or "a permanent settled position, (as in life or business)." ' " (*O'Connor v. Village Green Owners Assn.* (1983) 33 Cal.3d 790, 795 [191 Cal.Rptr. 320, 662 P.2d 427], internal citations omitted.)

- Whether a defendant is a "business establishment" is decided as an issue of law. (*Rotary Club of Duarte, supra,* 178 Cal.App.3d at p. 1050.)

- "In addition to the particular forms of discrimination specifically outlawed by the Act (sex, race, color, etc.), courts have held the Act 'prohibit[s] discrimination based on several classifications which are not specifically enumerated in the statute.' These judicially recognized classifications include unconventional dress or physical appearance, families with children, homosexuality, and persons under 18." (*Hessians Motorcycle Club v. J.C. Flanagans* (2001) 86 Cal.App.4th 833, 836 [103 Cal.Rptr.2d 552], internal citations omitted.)

- "[T]he language and history of the Unruh Act indicate that the legislative object was to prohibit intentional discrimination in access to public accommodations. We have been directed to no authority, nor have we located any, that would justify extension of a disparate impact test, which has been developed and applied by the federal courts primarily in employment discrimination cases, to a general discrimination-in-public-accommodations statute like the Unruh Act. Although evidence of adverse impact on a particular group of persons may have probative value in public accommodations cases and should therefore be admitted in appropriate cases subject to the general rules of evidence, a plaintiff must nonetheless plead and prove a case of intentional discrimination to recover under the Act." (*Harris, supra,* 52 Cal.3d at p. 1149.)

- "On examining the language, statutory context, and history of section 51, subdivision (f), we conclude … [t]he Legislature's intent in adding subdivision (f) was to provide disabled Californians injured by violations of the ADA with the remedies provided by section 52. A plaintiff who establishes a violation of the ADA, therefore, need not prove intentional discrimination in order to obtain damages under section 52." (*Munson, supra,* 46 Cal.4th at p. 665.)

- "Civil Code section 51, subdivision (f) states: 'A violation of the right of any individual under the federal [ADA] shall also constitute a violation of this section.' The ADA provides in pertinent part: 'No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who … operates a place of public accommodation.' The ADA defines discrimination as 'a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations.' " (*Baughman v. Walt Disney World Co.* (2013) 217 Cal.App.4th 1438, 1446 [159 Cal.Rptr.3d 825], internal citations omitted.)

- " 'Although the Unruh Act proscribes "any form of arbitrary discrimination", certain types of discrimination have been denominated "reasonable" and, therefore, not arbitrary.' Thus, for example, 'legitimate business interests may justify limitations on consumer access to public accommodations.' " (*Hankins v. El Torito Restaurants, Inc.* (1998) 63 Cal.App.4th 510, 520 [74 Cal.Rptr.2d 684], internal citations omitted.)

- "Unruh Act issues have often been decided as questions of law on demurrer or summary judgment

when the policy or practice of a business establishment is valid on its face because it bears a reasonable relation to commercial objectives appropriate to an enterprise serving the public." (*Harris, supra,* 52 Cal.3d at p. 1165, internal citations omitted.)

- "It is thus manifested by section 51 that all persons are entitled to the full and equal privilege of associating with others in any business establishment. And section 52, liberally interpreted, makes clear that discrimination by such a business establishment against one's right of association on account of the associates' color, is violative of the Act. It follows ... that discrimination by a business establishment against persons on account of their association with others of the black race is actionable under the Act." (*Winchell v. English* (1976) 62 Cal.App.3d 125, 129 [133 Cal.Rptr. 20].)

- "Appellant is disabled as a matter of law not only because she is HIV positive, but also because it is undisputed that respondent 'regarded or treated' her as a person with a disability. The protection of the Unruh Civil Rights Act extends both to people who are currently living with a physical disability that limits a life activity and to those who are regarded by others as living with such a disability. … 'Both the policy and language of the statute offer protection to a person who is not actually disabled, but is wrongly perceived to be. The statute's plain language leads to the conclusion that the "regarded as" definition casts a broader net and protects *any* individual "regarded" or "treated" by an employer "as having, or having had, any physical condition that makes achievement of a major life activity difficult" or may do so in the future.' Thus, even an HIV-positive person who is outwardly asymptomatic is protected by the Unruh Civil Rights Act." (*Maureen K. v. Tuschka* (2013) 215 Cal.App.4th 519, 529−530 [155 Cal.Rptr.3d 620], original italics, internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 898–914

Chin et al., California Practice Guide: Employment Litigation, Ch.7-G, *Unruh Civil Rights Act*, ¶ 7:1525 et seq. (The Rutter Group)

11 California Forms of Pleading and Practice, Ch. 116, *Civil Rights: Discrimination in Business Establishments*, §§ 116.10-116.13 (Matthew Bender)

3 California Points and Authorities, Ch. 35, *Civil Rights: Unruh Civil Rights Act*, § 35.20 et seq. (Matthew Bender)

3061. Discrimination in Business Dealings—Essential Factual Elements (Civ. Code, § 51.5)

[*Name of plaintiff***] claims that [***name of defendant***] denied [him/her] full and equal rights to conduct business because of [***name of plaintiff***]'s [sex/race/color/religion/ancestry/national origin/disability/medical condition/genetic information/marital status/sexual orientation/[***insert other actionable characteristic***]]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] [discriminated against/boycotted/blacklisted/refused to buy from/refused to contract with/refused to sell to/refused to trade with] [***name of plaintiff***];**

2. **[That a substantial motivating reason for [***name of defendant***]'s conduct was [its perception of] [***name of plaintiff***]'s [sex/race/color/religion/ancestry/national origin/ disability/medical condition/genetic information/marital status/sexual orientation/[***insert other actionable characteristic***]];]**

   [*or***]**

   [That a substantial motivating reason for [*name of defendant***]'s conduct was [its perception of] the [sex/race/color/religion/ancestry/national origin/disability/medical condition/genetic information/marital status/sexual orientation/[***insert other actionable characteristic***]] of [***name of plaintiff***]'s [partners/members/stockholders/directors/officers/managers/superintendents/agents/ employees/business associates/suppliers/customers];]**

   [*or***]**

   [That a substantial motivating reason for [*name of defendant***]'s conduct was [its perception of] the [sex/race/color/religion/ancestry/national origin/disability/medical condition/genetic information/marital status/sexual orientation/[***insert other actionable characteristic***]] of a person with whom [***name of plaintiff***] was associated;]**

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

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

New September 2003; Revised June 2012; Renumbered from CACI No. 3021 and Revised December 2012; Revised June 2013

Directions for Use

Select the bracketed option from element 2 that is most appropriate to the facts of the case.

Under the Unruh Civil Rights Act (see CACI No. 3060, *Unruh Civil Rights Act—Essential Factual Elements*), the California Supreme Court has held that intentional discrimination is required. (See *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1159–1162 [278 Cal.Rptr. 614, 805 P.2d 873].) While there is no similar California case imposing an intent requirement under Civil Code section 51.5, Civil Code section 51.5 requires that the discrimination be *on account of* the protected category. (Civ. Code, § 51.5(a).) The kinds of prohibited conduct would all seem to involve intentional acts. (See *Nicole M. v. Martinez Unified Sch. Dist.* (N.D. Cal. 1997) 964 F.Supp. 1369, 1389, superseded by statute on other grounds as stated in *Sandoval v. Merced Union High Sch.* (E.D. Cal. 2006) 2006 U.S. Dist. LEXIS 28446.) The intent requirement is encompassed within the motivating-reason element (element 2).

There is an exception to the intent requirement under the Unruh Act for conduct that violates the Americans With Disabilities Act. (See *Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 661, 665 [94 Cal.Rptr.3d 685, 208 P.3d 623].). Because this exception is based on statutory construction of the Unruh Act (see Civ. Code, § 51(f)), the committee does not believe that it applies to section 51.5, which contains no similar language.

Note that there are two causation elements. There must be a causal link between the discriminatory intent and the adverse action (see element 2), and there must be a causal link between the adverse action and the harm (see element 4).

Element 2 uses the term "substantial motivating reason" to express causation between the protected classification and the defendant's conduct. "Substantial motivating reason" has been held to be the appropriate standard under the Fair Employment and Housing Act to address the possibility of both discriminatory and nondiscriminatory motives. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; CACI No. 2507, *"Substantial Motivating Reason" Explained*.) Whether the FEHA standard applies under Civil Code section 51.5 has not been addressed by the courts.

For an instruction on damages under Civil Code section 51.5, see CACI No. 3067, *Unruh Civil Rights Act—Damages*. Note that the jury may award a successful plaintiff up to three times actual damages but not less than $4,000. (Civ. Code, § 52(a).); see also Civ. Code, § 52(h) ["actual damages" means special and general damages].)

It is possible that elements 3 and 4 are not needed if only the statutory minimum $4,000 award is sought. With regard to the Unruh Act (Civ. Code, § 51), which is also governed by Civil Code section 52(a), the California Supreme Court has held that a violation is per se injurious, and that section 52 provides for minimum statutory damages for every violation regardless of the plaintiff's actual damages. (See *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 33 [219 Cal.Rptr. 133, 707 P.2d 195].)

The judge may decide the issue of whether the defendant is a business establishment as a matter of law. (*Rotary Club of Duarte v. Bd. of Directors* (1986) 178 Cal.App.3d 1035, 1050 [224 Cal.Rptr. 213].) Special interrogatories may be needed if there are factual issues. This element has been omitted from the instruction because it is unlikely to go to a jury.

Conceptually, this instruction has some overlap with CACI No. 3060, *Unruh Civil Rights Act—Essential Factual Elements.* For a discussion of the basis of this instruction, see *Jackson v. Superior Court* (1994)

30 Cal.App.4th 936, 941 [36 Cal.Rptr.2d 207].

Sources and Authority

- Discrimination in Business Dealings. Civil Code section 51.5. ~~provides:~~

  ~~(a) No business establishment of any kind whatsoever shall discriminate against, boycott or blacklist, or refuse to buy from, contract with, sell to, or trade with any person in this state on account of any characteristic listed or defined in subdivision (b) or (e) of Section 51, of the person's partners, members, stockholders, directors, officers, managers, superintendents, agents, employees, business associates, suppliers, or customers, because the person is perceived to have one or more of those characteristics, or because the person is associated with a person who has, or is perceived to have, any of those characteristics.~~

  ~~(b) As used in this section, "person" includes any person, firm, association, organization, partnership, business trust, corporation, limited liability company, or company.~~

  ~~(c) This section shall not be construed to require any construction, alteration, repair, structural or otherwise, or modification of any sort whatsoever, beyond that construction, alteration, repair, or modification that is otherwise required by other provisions of law, to any new or existing establishment, facility, building, improvement, or any other structure, nor shall this section be construed to augment, restrict, or alter in any way the authority of the State Architect to require construction, alteration, repair, or modifications that the State Architect otherwise possesses pursuant to other laws.~~

- "In 1976 the Legislature added Civil Code section 51.5 to the Unruh Civil Rights Act and amended Civil Code section 52 (which provides penalties for those who violate the Unruh Civil Rights Act), in order to, inter alia, include section 51.5 in its provisions." (*Pines v. Tomson* (1984) 160 Cal.App.3d 370, 384 [206 Cal.Rptr. 866], footnote omitted.)

- "[I]t is clear from the cases under section 51 that the Legislature did not intend in enacting section 51.5 to limit the broad language of section 51 to include only selling, buying or trading. Both sections 51 and 51.5 have been liberally applied to all types of business activities. Furthermore, section 51.5 forbids a business to 'discriminate against' 'any person' and does not just forbid a business to 'boycott or blacklist, refuse to buy from, sell to, or trade with any person.' " (*Jackson, supra,* 30 Cal.App.4th at p. 941, internal citation and footnote omitted.)

- "Although the phrase 'business establishment of every kind whatsoever' has been interpreted by the Supreme Court and the Court of Appeal in the context of section 51, we are aware of no case which interprets that term in the context of section 51.5. We believe, however, that the Legislature meant the identical language in both sections to have the identical meaning." (*Pines, supra,* 160 Cal.App.3d at p. 384, internal citations omitted.)

- "[T]he classifications specified in section 51.5, which are identical to those of section 51, are likewise not exclusive and encompass other personal characteristics identified in earlier cases." (*Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 538 [30 Cal.Rptr.2d 706], internal citations omitted.)

- "[T]he analysis under Civil Code section 51.5 is the same as the analysis we have already set forth for purposes of the [Unruh Civil Rights] Act." (*Semler v. General Electric Capital Corp*. (2011) 196 Cal.App.4th 1380, 1404 [127 Cal.Rptr.3d 794].)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 898–914

11 California Forms of Pleading and Practice, Ch. 116, *Civil Rights: Discrimination in Business Establishments*, §§ 116.10–116.13 (Matthew Bender)

3 California Points and Authorities, Ch. 35, *Civil Rights: Unruh Civil Rights Act*, § 35.20 (Matthew Bender)

3062. Gender Price Discrimination—Essential Factual Elements (Civ. Code, § 51.6)

[*Name of plaintiff***] claims that [***name of defendant***] charged [him/her] a higher price for services because of [his/her] gender. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] charged [***name of plaintiff***] more for services of similar or like kind because of [his/her] gender;**

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

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

It is not improper to charge a higher price for services if the price difference is based on the amount of time, difficulty, or cost of providing the services.

New September 2003; Renumbered from CACI No. 3022 December 2012; Revised June 2013

Directions for Use

For an instruction on damages under Civil Code section 51.6, see CACI No. 3067, *Unruh Civil Rights Act—Damages*. Note that the jury may award a successful plaintiff up to three times actual damages but not less than $4,000. (Civ. Code, § 52(a)); see also Civ. Code, § 52(h) ["actual damages" means special and general damages].)

It is possible that elements 2 and 3 are not needed if only the statutory minimum $4000 award is sought. With regard to the Unruh Act (Civ. Code, § 51), which is also governed by Civil Code section 52(a), the California Supreme Court has held that a violation is per se injurious, and that section 52 provides for minimum statutory damages for every violation regardless of the plaintiff's actual damages. (See *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 33 [219 Cal.Rptr. 133, 707 P.2d 195].)

The judge may decide the issue of whether the defendant is a business establishment as a matter of law. (*Rotary Club of Duarte v. Bd. of Directors* (1986) 178 Cal.App.3d 1035, 1050 [224 Cal.Rptr. 213].) Special interrogatories may be needed if there are factual issues. This element has been omitted from the instruction because it is unlikely to go to a jury.

Sources and Authority

- Gender Price Discrimination. Civil Code section 51.6. ~~provides:~~

  ~~(a) This section shall be known, and may be cited, as the Gender Tax Repeal Act of 1995.~~

  ~~(b) No business establishment of any kind whatsoever may discriminate, with respect to the~~

price charged for services of similar or like kind, against a person because of the person's gender.

(c) Nothing in subdivision (b) prohibits price differences based specifically upon the amount of time, difficulty, or cost of providing the services.

(d) Except as provided in subdivision (f), the remedies for a violation of this section are the remedies provided in subdivision (a) of Section 52. However, an action under this section is independent of any other remedy or procedure that may be available to an aggrieved party.

(e) This act does not alter or affect the provisions of the Health and Safety Code, the Insurance Code, or other laws that govern health care service plan or insurer underwriting or rating practices.

(f)

(1) The following business establishments shall clearly and conspicuously disclose to the customer in writing the pricing for each standard service provided:

(A) Tailors or businesses providing aftermarket clothing alterations.

(B) Barbers or hair salons.

(C) Dry cleaners and laundries providing services to individuals.

(2) The price list shall be posted in an area conspicuous to customers. Posted price lists shall be in no less than 14-point boldface type and clearly and completely display pricing for every standard service offered by the business under paragraph (1).

(3) The business establishment shall provide the customer with a complete written price list upon request.

(4) The business establishment shall display in a conspicuous place at least one clearly visible sign, printed in no less than 24-point boldface type, which reads: "CALIFORNIA LAW PROHIBITS ANY BUSINESS ESTABLISHMENT FROM DISCRIMINATING, WITH RESPECT TO THE PRICE CHARGED FOR SERVICES OF SIMILAR OR LIKE KIND, AGAINST A PERSON BECAUSE OF THE PERSON'S GENDER. A COMPLETE PRICE LIST IS AVAILABLE UPON REQUEST."

(5) A business establishment that fails to correct a violation of this subdivision within 30 days of receiving written notice of the violation is liable for a civil penalty of one thousand dollars ($1,000).

(6) For the purposes of this subdivision, "standard service" means the 15 most

~~frequently requested services provided by the business.~~

- "Section 51 by its express language applies only within California. It cannot (with its companion penalty provisions in § 52) be extended into the Hawaiian jurisdiction. A state cannot regulate or proscribe activities conducted in another state or supervise the internal affairs of another state in any way, even though the welfare or health of its citizens may be affected when they travel to that state." (*Archibald v. Cinerama Hawaiian Hotels, Inc.* (1977) 73 Cal.App.3d 152, 159 [140 Cal.Rptr. 599], internal citations omitted, disapproved on other grounds in *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24 [219 Cal.Rptr. 133, 707 P.2d 195].)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 905

11 California Forms of Pleading and Practice, Ch. 116, *Civil Rights: Discrimination in Business Establishments*, § 116.15 (Matthew Bender)

3 California Points and Authorities, Ch. 35, *Civil Rights: Unruh Civil Rights Act*, § 35.44 (Matthew Bender)

3063. Acts of Violence—Ralph Act—Essential Factual Elements (Civ. Code, § 51.7)

[*Name of plaintiff***] claims that [***name of defendant***] committed an act of violence against [him/her] because of [his/her] [race/color/religion/ancestry/national origin/political affiliation/sex/sexual orientation/age/disability/position in a labor dispute/[***insert other actionable characteristic***]]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] committed a violent act against [***name of plaintiff***] [or [his/her] property];**

2. **That a substantial motivating reason for [***name of defendant***]'s conduct was [[his/her] perception of] [***name of plaintiff***]'s [race/color/religion/ancestry/national origin/political affiliation/sex/sexual orientation/age/disability/position in a labor dispute/[***insert other actionable characteristic***]];**

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

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

Derived from former CACI No. 3023 December 2009; Renumbered from CACI No. 3023A December 2012; Revised June 2013

Directions for Use

Use this instruction for a cause of action under the Ralph Act involving actual acts of violence alleged to have been committed by the defendant against the plaintiff. For an instruction involving only threats of violence, see CACI No. 3064, *Threats of Violence—Ralph Act—Essential Factual Elements*.

Note that element 2 uses the term "substantial motivating reason" to express both intent and causation between the protected classification and the defendant's acts. "Substantial motivating reason" has been held to be the appropriate standard under the Fair Employment and Housing Act to address the possibility of both discriminatory and nondiscriminatory motives. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; CACI No. 2507, *"Substantial Motivating Reason" Explained*.) Whether the FEHA standard applies under the Ralph Act has not been addressed by the courts.

Liability may also be found if a defendant "aids, incites, or conspires" in the denial of a right protected under Civil Code section 51.7. (Civ. Code, § 52(b).) This instruction should be modified if aiding, inciting, or conspiring is asserted as theories of liability. See also instructions in the Conspiracy series (CACI No. 3600 et seq.).

Sources and Authority

- Ralph Act. Civil Code section 51.7. ~~provides:~~

~~(a) All persons within the jurisdiction of this state have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property because of their race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age, disability, or position in a labor dispute, or because another person perceives them to have one or more of those characteristics. The identification in this subdivision of particular bases of discrimination is illustrative rather than restrictive. This section does not apply to statements concerning positions in a labor dispute which are made during otherwise lawful labor picketing.~~

~~(b) As used in this section, "sexual orientation" means heterosexuality, homosexuality, or bisexuality.~~

- Remedies Under Ralph Act. Civil Code section 52(b)~~. provides:~~

~~Whoever denies the right provided by Section 51.7 or 51.9, or aids, incites, or conspires in that denial, is liable for each and every offense for the actual damages suffered by any person denied that right and, in addition, the following:~~

~~(1) An amount to be determined by a jury, or a court sitting without a jury, for exemplary damages.~~

~~(2) A civil penalty of twenty-five thousand dollars ($25,000) to be awarded to the person denied the right provided by Section 51.7 in any action brought by the person denied the right, or by the Attorney General, a district attorney, or a city attorney.~~

~~(3) Attorney's fees as may be determined by the court.~~

- "The unambiguous language of this section gives rise to a cause of action in favor of a person against whom violence or intimidation has been committed or threatened." (*Coon v. Joseph* (1987) 192 Cal.App.3d 1269, 1277 [237 Cal.Rptr. 873].)

- "Nor do we agree with defendants that 'because of' logically means 'hatred.' Section 51.7 provides that all persons 'have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property because of …' specified characteristics, including sex, and provides for a civil remedy for violation of that right. Nothing in the statute requires that a plaintiff prove that the offending act was motivated by hate." (*Ventura v. ABM Industries Inc.* (2012) 212 Cal.App.4th 258, 269 [150 Cal.Rptr.3d 861].)

- "Section 51 by its express language applies only within California. It cannot (with its companion penalty provisions in § 52) be extended into the Hawaiian jurisdiction. A state cannot regulate or proscribe activities conducted in another state or supervise the internal affairs of another state in any way, even though the welfare or health of its citizens may be affected when they travel to that state." (*Archibald v. Cinerama Hawaiian Hotels, Inc.* (1977) 73 Cal.App.3d 152, 159 [140 Cal.Rptr. 599], internal citations omitted, disapproved on other grounds in *Koire v. Metro Car Wash* (1985) 40

Cal.3d 24 [219 Cal.Rptr. 133, 707 P.2d 195].)

Secondary Sources

11 California Forms of Pleading and Practice, Ch. 116, *Civil Rights: Discrimination in Business Establishments*, § 116.80 (Matthew Bender)

California Civil Practice: Civil Rights Litigation §§ 3:1–3:15 (Thomson Reuters)

3064. Threats of Violence—Ralph Act—Essential Factual Elements (Civ. Code, § 51.7)

[*Name of plaintiff***] claims that [***name of defendant***] intimidated [him/her] by threat of violence because of [his/her] [race/color/religion/ancestry/national origin/political affiliation/sex/sexual orientation/age/disability/position in a labor dispute/[***insert other actionable characteristic***]]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] intentionally threatened violence against [***name of plaintiff***] [or [his/her] property], [whether or not [***name of defendant***] actually intended to carry out the threat];**

2. **That a substantial motivating reason for [***name of defendant***]'s conduct was [[his/her] perception of] [***name of plaintiff***]'s [race/color/religion/ancestry/national origin/political affiliation/sex/sexual orientation/age/disability/position in a labor dispute/[***insert other actionable characteristic***]];**

3. **That a reasonable person in [***name of plaintiff***]'s position would have believed that [***name of defendant***] would carry out [his/her] threat;**

4. **That a reasonable person in [***name of plaintiff***]'s position would have been intimidated by [***name of defendant***]'s conduct;**

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

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

Derived from former CACI No. 3023 December 2009; Renumbered from CACI No. 3023B December 2012; Revised June 2013

Directions for Use

Use this instruction for a cause of action under the Ralph Act involving threats of violence alleged to have been directed by the defendant toward the plaintiff. For an instruction involving actual acts of violence, see CACI No. 3063, *Acts of Violence—Ralph Act—Essential Factual Elements*.

Note that element 2 uses the term "substantial motivating reason" to express both intent and causation between the protected classification and the defendant's threats. "Substantial motivating reason" has been held to be the appropriate standard under the Fair Employment and Housing Act to address the possibility of both discriminatory and nondiscriminatory motives. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; CACI No. 2507, *"Substantial Motivating Reason" Explained*.) Whether the FEHA standard applies under the Ralph Act has not been addressed by the courts.

No published California appellate opinion establishes elements 3 and 4. However, the Ninth Circuit

Court of Appeals and the California Fair Employment and Housing Commission have held that a reasonable person in the plaintiff's position must have been intimidated by the actions of the defendant and have perceived a threat of violence. (See *Winarto v. Toshiba America Electronics Components, Inc.* (9th Cir. 2001) 274 F.3d 1276, 1289–1290; *Dept. Fair Empl. & Hous. v. Lake Co. Dept. of Health Serv.* (July 22, 1998) 1998 CAFEHC LEXIS 16, 55–56.)

Liability may also be found if a defendant "aids, incites, or conspires" in the denial of a right protected under Civil Code section 51.7. (Civ. Code, § 52(b).) This instruction should be modified if aiding, inciting, or conspiring is asserted as theories of liability. See also instructions in the Conspiracy series (CACI No. 3600 et seq.).

Sources and Authority

- Ralph Act. Civil Code section 51.7. ~~provides:~~

  ~~(a) All persons within the jurisdiction of this state have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property because of their race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age, disability, or position in a labor dispute, or because another person perceives them to have one or more of those characteristics. The identification in this subdivision of particular bases of discrimination is illustrative rather than restrictive. This section does not apply to statements concerning positions in a labor dispute which are made during otherwise lawful labor picketing.~~

  ~~(b) As used in this section, "sexual orientation" means heterosexuality, homosexuality, or bisexuality.~~

- Remedies Under Ralph Act. Civil Code section 52(b). ~~provides:~~

  ~~Whoever denies the right provided by Section 51.7 or 51.9, or aids, incites, or conspires in that denial, is liable for each and every offense for the actual damages suffered by any person denied that right and, in addition, the following:~~

  ~~(1) An amount to be determined by a jury, or a court sitting without a jury, for exemplary damages.~~

  ~~(2) A civil penalty of twenty-five thousand dollars ($25,000) to be awarded to the person denied the right provided by Section 51.7 in any action brought by the person denied the right, or by the Attorney General, a district attorney, or a city attorney.~~

  ~~(3) Attorney's fees as may be determined by the court.~~

- "The unambiguous language of this section gives rise to a cause of action in favor of a person against

whom violence or intimidation has been committed or threatened." (*Coon v. Joseph* (1987) 192 Cal.App.3d 1269, 1277 [237 Cal.Rptr. 873].)

- "Nor do we agree with defendants that 'because of' logically means 'hatred.' Section 51.7 provides that all persons 'have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property because of …' specified characteristics, including sex, and provides for a civil remedy for violation of that right. Nothing in the statute requires that a plaintiff prove that the offending act was motivated by hate." (*Ventura v. ABM Industries Inc.* (2012) 212 Cal.App.4th 258, 269 [150 Cal.Rptr.3d 861].)

- "The test is: 'would a reasonable person, standing in the shoes of the plaintiff, have been intimidated by the actions of the defendant and have perceived a threat of violence?' " (*Winarto, supra,* 274 F.3d at pp. 1289–1290, internal citation omitted.)

- "When a threat of violence would lead a reasonable person to believe that the threat will be carried out, in light of the 'entire factual context,' including the surrounding circumstances and the listeners' reactions, then the threat does not receive First Amendment protection, and may be actionable under the Ralph Act. The only intent requirement is that respondent 'intentionally or knowingly communicates his [or her] threat, not that he intended or was able to carry out his threat.' A threat exists if the 'target of the speaker reasonably believes that the speaker has the ability to act him or herself or to influence others. . . . It is the perception of a reasonable person that is dispositive, not the actual intent of the speaker.' " (*Dept. Fair Empl. & Hous., supra,* 1998 CAFEHC LEXIS at pp. 55–56, internal citations omitted.)

- "Section 51 by its express language applies only within California. It cannot (with its companion penalty provisions in § 52) be extended into the Hawaiian jurisdiction. A state cannot regulate or proscribe activities conducted in another state or supervise the internal affairs of another state in any way, even though the welfare or health of its citizens may be affected when they travel to that state." (*Archibald v. Cinerama Hawaiian Hotels, Inc.* (1977) 73 Cal.App.3d 152, 159 [140 Cal.Rptr. 599], internal citations omitted, disapproved on other grounds in *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24 [219 Cal.Rptr. 133, 707 P.2d 195].)

Secondary Sources

Chin et al., California Practice Guide: Employment Litigation (The Rutter Group) ¶ 5:892.11, ¶¶ 7:1528–7:1529

11 California Forms of Pleading and Practice, Ch. 116, *Civil Rights: Discrimination in Business Establishments*, § 116.80 (Matthew Bender)

California Civil Practice: Civil Rights Litigation §§ 3:1–3:15 (Thomson Reuters)

3065. Sexual Harassment in Defined Relationship—Essential Factual Elements (Civ. Code, § 51.9)

[*Name of plaintiff***] claims that [***name of defendant***] sexually harassed [him/her]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] had a business, service, or professional relationship with [***name of defendant***];**

2. **[That [***name of defendant***] made [sexual advances/solicitations/sexual requests/demands for sexual compliance/[***insert other actionable conduct***]] to [***name of plaintiff***];]**

   [or]

   [That [*name of defendant***] engaged in [verbal/visual/physical] conduct of a [sexual nature/hostile nature based on gender];]**

3. **That [***name of defendant***]'s conduct was unwelcome and also pervasive or severe;**

4. **That [***name of plaintiff***] was unable to easily end the relationship with [***name of defendant***]; and**

5. **That [***name of plaintiff***] has suffered or will suffer [economic loss or disadvantage/personal injury/the violation of a statutory or constitutional right] as a result of [***name of defendant***]'s conduct.**

New September 2003; Revised April 2008; Renumbered from CACI No. 3024 December 2012

Directions for Use

Select either or both options for element 2 depending on the defendant's conduct.

See also CACI No. 2524, *"Severe or Pervasive" Explained*.

Sources and Authority

- Sexual Harassment in Defined Relationship. Civil Code section 51.9. ~~provides:~~

  ~~(a) A person is liable in a cause of action for sexual harassment under this section when the plaintiff proves all of the following elements:~~

  ~~(1) There is a business, service, or professional relationship between the plaintiff and defendant. Such a relationship may exist between a plaintiff and a person, including, but not limited to, any of the following persons:~~

~~(A) Physician, psychotherapist, or dentist. For purposes of this section, "psychotherapist" has the same meaning as set forth in paragraph (1) of subdivision (c) of Section 728 of the Business and Professions Code.~~

~~(B) Attorney, holder of a master's degree in social work, real estate agent, real estate appraiser, accountant, banker, trust officer, financial planner loan officer, collection service, building contractor, or escrow loan officer.~~

~~(C) Executor, trustee, or administrator.~~

~~(D) Landlord or property manager.~~

~~(E) Teacher.~~

~~(F) A relationship that is substantially similar to any of the above.~~

~~(2) The defendant has made sexual advances, solicitations, sexual requests, demands for sexual compliance by the plaintiff, or engaged in other verbal, visual, or physical conduct of a sexual nature or of a hostile nature based on gender, that were unwelcome and pervasive or severe.~~

~~(3) There is an inability by the plaintiff to easily terminate the relationship.~~

~~(4) The plaintiff has suffered or will suffer economic loss or disadvantage or personal injury, including, but not limited to, emotional distress or the violation of a statutory or constitutional right, as a result of the conduct described in paragraph (2).~~

~~(b) In an action pursuant to this section, damages shall be awarded as provided by subdivision (b) of Section 52.~~

~~(c) Nothing in this section shall be construed to limit application of any other remedies or rights provided under the law.~~

~~(d) The definition of sexual harassment and the standards for determining liability set forth in this section shall be limited to determining liability only with regard to a cause of action brought under this section.~~

- "[The] history of the [1999] amendments to Civil Code section 51.9 leaves no doubt of the Legislature's intent to conform the requirements governing liability for sexual harassment in professional relationships outside the workplace to those of the federal law's Title VII and California's FEHA, both of which pertain to liability for sexual harassment in the workplace. Under both laws, an employee plaintiff who cannot prove a demand for sexual favors in return for a job benefit (that is, quid pro quo harassment) must show that the sexually harassing conduct was so

pervasive or severe as to alter the conditions of employment. With respect to liability under section 51.9, which covers a wide variety of business relationships outside the workplace, the relevant inquiry is whether the alleged sexually harassing conduct was sufficiently pervasive or severe as to alter the conditions of the business relationship. This inquiry must necessarily take into account the nature and context of the particular business relationship." (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1048 [95 Cal.Rptr.3d 636, 209 P.3d 963].)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law § 896

1 California Landlord-Tenant Practice, Ch. 3, *Liability for Sexual Harassment* (Cont.Ed.Bar 2d ed.) § 3.70A

1 Wrongful Employment Termination Practice, Ch. 3, *When Plaintiff is Not Employee, Applicant, or Independent Contractor* (Cont.Ed.Bar 2d ed.) § 3.12

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.36, Ch. 116, *Civil Rights: Discrimination in Business Establishments*, §§ 116.35, 116.90, Ch. 117, *Civil Rights: Housing Discrimination*, § 117.32 (Matthew Bender)

1 Westley et al., Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 2, *Creation of Tenancy*, 2.13 (Matthew Bender)

3066. Bane Act—Essential Factual Elements (Civ. Code, § 52.1)

[*Name of plaintiff***] claims that [***name of defendant***] intentionally interfered with [or attempted to interfere with] [his/her] civil rights by threats, intimidation, or coercion. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. [**That [***name of defendant***] made threats of violence against [***name of plaintiff***] causing [***name of plaintiff***] to reasonably believe that if [he/she] exercised [his/her] right [***insert right, e.g., "to vote"***], [***name of defendant***] would commit violence against [[him/her]/ [or] [his/her] property] and that [***name of defendant***] had the apparent ability to carry out the threats;]**

[*or***]**

[That [*name of defendant***] acted violently against [[***name of plaintiff***]/ [and] [***name of plaintiff***]'s property] [to prevent [him/her] from exercising [his/her] right [***insert right***]/to retaliate against [***name of plaintiff***] for having exercised [his/her] right [***insert right***]];]**

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

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

New September 2003; Renumbered from CACI No. 3025 and Revised December 2012

Directions for Use

Select the first option for element 1 if the defendant's conduct involved threats of violence. (See Civ. Code, § 52.1(j).) Select the second option if the conduct involved actual violence.

The Bane Act provides that speech alone is not sufficient to constitute a violation unless it involves a credible threat of violence. (Civ. Code, § 52.1(j).) This limitation would appear to foreclose a claim based on threats, intimidation, or coercion involving a nonviolent consequence. (See *Cabesuela v. Browning-Ferris Industries* (1998) 68 Cal.App.4th 101, 111 [80 Cal.Rptr.2d 60] [to state a cause of action under Bane Act there must first be violence or intimidation by threat of violence].) For example, it would not be a violation to threaten to report someone to immigration if the person exercises a right granted under labor law. No case has been found, however, that applies the speech limitation to foreclose such a claim, and several courts have suggested that this point is not fully settled. (See *Shoyoye v. County of Los Angeles* (2012) 203 Cal.App.4th 947, 959 [137 Cal.Rptr.3d 839] [we "need not decide that every plaintiff must allege violence or threats of violence in order to maintain an action under section 52.1"]; *City and County of San Francisco v. Ballard* (2006) 136 Cal.App.4th 381, 408 [39 Cal.Rptr.3d 1] [also noting issue but finding it unnecessary to address].) To assert such a claim, modify element 2 to allege coercion based on a nonviolent threat with severe consequences.

Civil Code section 52(a) provides for damages up to three times actual damages but a minimum of $4,000 for violations of Civil Code section 51 (Unruh Act), 51.5, and 51.6. Civil Code section 52(b) provides for punitive damages for violations of Civil Code sections 51.7 (Ralph Act) and 51.9. Neither subsection of Section 52 mentions the Bane Act or Civil Code section 52.1. Nevertheless, the reference to section 52 in subsection (b) of the Bane Act would seem to indicate that damages may be recovered under both subsections (a) and (b) of section 52.

Under the Unruh Act, if only the statutory minimum damages of $4,000 is sought, it is not necessary to prove harm and causation. (See *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 33 [219 Cal.Rptr. 133, 707 P.2d 195]. [Section 52 provides for minimum statutory damages for every violation of section 51, regardless of the plaintiff's actual damages]; see also Civ. Code, § 52(h) [“actual damages” means special and general damages].) Presumably, the same rule applies under the Bane Act as the statutory minimum of section 52(a) should be recoverable Therefore, omit elements 2 and 3 unless actual damages are sought. If actual damages are sought, combine CACI No. 3067, *Unruh Civil Rights Act—Damages* and CACI No. 3068, *Ralph Act—Damages and Penalty*, to recover damages under both subsections (a) and (b) of section 52.

Sources and Authority

- Bane Act. Civil Code section 52.1. ~~provides in part:~~

  ~~(a) If a person or persons, whether or not acting under color of law, interferes by threats, intimidation, or coercion, or attempts to interfere by threats, intimidation, or coercion, with the exercise or enjoyment by any individual or individuals of rights secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of this state, the Attorney General, or any district attorney or city attorney may bring a civil action for injunctive and other appropriate equitable relief in the name of the people of the State of California, in order to protect the peaceable exercise or enjoyment of the right or rights secured.~~

  ~~(b) Any individual whose exercise or enjoyment of rights secured by the Constitution or laws of the United States, or of rights secured by the Constitution or laws of this state, has been interfered with, or attempted to be interfered with, as described in subdivision (a), may institute and prosecute in his or her own name and on his or her own behalf a civil action for damages, including, but not limited to, damages under Section 52, injunctive relief, and other appropriate equitable relief to protect the peaceable exercise or enjoyment of the right or rights secured.~~

  ~~[(c) (i) omitted]~~

  ~~(j) Speech alone is not sufficient to support an action brought pursuant to subdivision (a) or (b), except upon a showing that the speech itself threatens violence against a specific person or group of persons; and the person or group of persons against whom the threat is directed reasonably fears that, because of the speech, violence will be committed against them or their property and that the person threatening violence had the apparent ability to carry out the threat.~~

- Remedies Under Bane Act. Civil Code section 52. ~~provides:~~

  ~~(a) Whoever denies, aids or incites a denial, or makes any discrimination or distinction contrary to Section 51, 51.5, or 51.6, is liable for each and every offense for the actual damages, and any amount that may be determined by a jury, or a court sitting without a jury, up to a maximum of three times the amount of actual damage but in no case less than four thousand dollars ($4,000), and any attorney's fees that may be determined by the court in addition thereto, suffered by any person denied the rights provided in Section 51, 51.5, or 51.6.~~

  ~~(b) Whoever denies the right provided by Section 51.7 or 51.9, or aids, incites, or conspires in that denial, is liable for each and every offense for the actual damages suffered by any person denied that right and, in addition, the following:~~

  ~~(1) An amount to be determined by a jury, or a court sitting without a jury, for exemplary damages.~~

  ~~(2) A civil penalty of twenty-five thousand dollars ($25,000) to be awarded to the person denied the right provided by Section 51.7 in any action brought by the person denied the right, or by the Attorney General, a district attorney, or a city attorney.~~

  ~~(3) Attorney's fees as may be determined by the court.~~

- "[S]ection 52.1, was enacted a decade [after the Ralph Act] as part of Assembly Bill No. 63 (1987–1988 Reg. Sess.) (Assembly Bill No. 63) and is known as the Tom Bane Civil Rights Act. It was intended to supplement the Ralph Civil Rights Act as an additional legislative effort to deter violence. The stated purpose of the bill was 'to fill in the gaps left by the Ralph Act' by allowing an individual to seek relief to prevent the violence from occurring before it was committed and providing for the filing of criminal charges. (*Stamps v. Superior Court* (2006) 136 Cal.App.4th 1441, 1447 [39 Cal.Rptr.3d 706], internal citation omitted.)

- "The Legislature enacted section 52.1 to stem a tide of hate crimes." (*Jones v. Kmart Corp.* (1998) 17 Cal.4th 329, 338 [70 Cal.Rptr.2d 844, 949 P.2d 941], internal citation omitted.)

- "However, the statutory language does not limit its application to hate crimes. Notably, the statute does not require a plaintiff to allege the defendant acted with discriminatory animus or intent based upon the plaintiff's membership in a protected class of persons." (*Shoyoye*, *supra,* 203 Cal.App.4th at p. 956.)

- "Civil Code section 52.1, the Bane Act civil counterpart of [Penal Code] section 422.6, recognizes a private right of action for damages and injunctive relief for interference with civil rights." (*In re M.S.* (1995) 10 Cal.4th 698, 715 [42 Cal.Rptr.2d 355, 896 P.2d 1365].)

- "[S]ection 52.1 does require an attempted or completed act of interference with a legal right, accompanied by a form of coercion." (*Jones, supra,* 17 Cal.4th at p. 334.)

- "The statutory framework of section 52.1 indicates that the Legislature meant the statute to address interference with constitutional rights involving more egregious conduct than mere negligence." (*Shoyoye, supra,* 203 Cal.App.4th at p. 958.)

- Section 52.1 is not a remedy to be used against private citizens for violations of rights that apply only to the state or its agents. (*Jones, supra,* 17 Cal.4th at p. 337 [right to be free from unreasonable search and seizure].)

- "[I]t is clear that to state a cause of action under section 52.1 there must first be violence or intimidation by threat of violence." (*Cabesuela, supra,* 68 Cal.App.4th at p. 111.)

- Assembly Bill 2719 (Stats. 2000, ch. 98) abrogated the holding of *Boccato v. City of Hermosa Beach* (1994) 29 Cal.App.4th 1797 [35 Cal.Rptr.2d 282], which held that a plaintiff was required to be a member of a specified protected class in order to bring an action under section 52.1: "It is the intent of the Legislature in enacting this act to clarify that an action brought pursuant to Section 52.1 of the Civil Code does not require the individual whose rights are secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of California, to be a member of a protected class identified by its race, color, religion, or sex, among other things."

- "Subdivision (j) of Civil Code section 52.1 provides that speech alone is insufficient to support such an action, except upon a showing that the speech itself threatens violence against a specific person or group of persons, the person or group of persons against whom the speech is directed 'reasonably fears that, because of the speech, violence will be committed against them or their property and that the person threatening violence has the apparent ability to carry out the threat.' ... The presence of the express 'reasonable fear' element, in addition to the 'apparent ability' element, in Civil Code section 52.1, governing civil actions for damages, most likely reflects the Legislature's determination [that] a defendant's civil liability should depend on the harm actually suffered by the victim." (*In re M.S., supra,* 10 Cal.4th at p. 715, internal citation omitted.)

- "[Q]ualified immunity of the kind applied to actions brought under section 1983 does not apply to actions brought under Civil Code section 52.1." (*Venegas v. County of Los Angeles* (2007) 153 Cal.App.4th 1230, 1246 [63 Cal.Rptr.3d 741].)

- "[A] wrongful detention that is 'accompanied by the requisite threats, intimidation, or coercion'—'coercion independent from the coercion inherent in the wrongful detention itself' that is 'deliberate or spiteful'—is a violation of the Bane Act." (*Bender v. County of Los Angeles* (2013) 217 Cal.App.4th 968, 981 [159 Cal.Rptr.3d 204], internal citations omitted.)

- "Here, there clearly *was* a showing of coercion separate and apart from the coercion inherent in an unlawful arrest. [Defendant officer] wrongfully detained and arrested plaintiff, because he had no probable cause to believe plaintiff had committed any crime. But, in addition, [defendant officer] deliberately and unnecessarily beat and pepper sprayed the unresisting, already handcuffed plaintiff. That conduct was not the coercion that is inherent in a wrongful arrest." (*Bender, supra,* 217 Cal.App.4th at p. 979, original italics.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 895

2 Wilcox, California Employment Law, Ch. 40, *Overview of Equal Employment Opportunity Laws*, § 40.12 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 117A, *Civil Rights: Interference With Civil Rights by Threats, Intimidation, Coercion, or Violence*, § 117A.11 (Matthew Bender)

3 California Points and Authorities, Ch. 35, *Civil Rights: Unruh Civil Rights Act*, §§ 35.01, 35.27 (Matthew Bender)

3067. Unruh Civil Rights Act—Damages (Civ. Code, §§ 51, 52(a))

If you decide that [*name of plaintiff*] has proved [his/her] claim against [*name of defendant*], you also must decide how much money will reasonably compensate [him/her] for the harm. This compensation is called "damages."

[*Name of plaintiff*] must prove the amount of [his/her] damages. However, [*name of plaintiff*] does not have to prove the exact amount of the harm or the exact amount of damages that will provide reasonable compensation for the harm. You must not speculate or guess in awarding damages.

The following are the specific items of damages claimed by [*name of plaintiff*]:

[*Insert item(s) of claimed harm.***]**

In addition, you may award [*name of plaintiff*] up to three times the amount of [his/her] actual damages as a penalty against [*name of defendant*].

New September 2003; Revised June 2012; Renumbered from CACI No. 3026 December 2012; Revised June 2013

Directions for Use

Give this instruction for violations of the Unruh Civil Rights Act in which actual damages are claimed. (See Civ. Code, § 51; CACI No. 3060, *Unruh Civil Rights Act—Essential Factual Elements.*) This instruction may also be given for claims under Civil Code section 51.5 (see CACI No. 3061, *Discrimination in Business Dealings—Essential Factual Elements*) and Civil Code section 51.6 (see CACI No. 3062, *Gender Price Discrimination—Essential Factual Elements*). If the only claim is for statutory damages of $4,000 (see Civ. Code, § 52(a)), this instruction is not needed. (See *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 33 [219 Cal.Rptr. 133, 707 P.2d 195] [Unruh Act violations are per se injurious; Civ. Code, § 52(a) provides for minimum statutory damages for every violation regardless of the plaintiff's actual damages]; see also Civ. Code, § 52(h) ["actual damages" means special and general damages].)

See the instructions in the Damages series (CACI Nos. 3900 et seq.) for additional instructions on actual damages and punitive damages. Note that the statutory minimum amount of recovery for a plaintiff is $4,000 in addition to actual damages. If the verdict is for less than that amount, the judge should modify the verdict to reflect the statutory minimum.

Sources and Authority

- Remedies Under Unruh Act and Other Civil Rights Statutes. Civil Code section 52(a). ~~provides: "Whoever denies, aids or incites a denial, or makes any discrimination or distinction contrary to Section 51, 51.5, or 51.6, is liable for each and every offense for the actual damages, and any amount that may be determined by a jury, or a court sitting without a jury, up to a maximum of three times the~~

~~amount of actual damage but in no case less than four thousand dollars ($4,000), and any attorney's fees that may be determined by the court in addition thereto, suffered by any person denied the rights provided in Section 51, 51.5, or 51.6."~~

- "[B]y passing the Unruh Act, the Legislature established that arbitrary sex discrimination by businesses is *per se* injurious. Section 51 provides that all patrons are entitled to *equal* treatment. Section 52 provides for minimum statutory damages … for *every* violation of section 51, *regardless* of the plaintiff's actual damages." (*Koire, supra*, 40 Cal.3d at p. 33, original italics.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 898, 1548–1556

8 Witkin, Summary of California Law (10th ed. 2005), Constitutional Law § 898 et seq.

Chin et al., California Practice Guide: Employment Litigation, Ch. 7-G, *Unruh Civil Rights Act*, ¶ 7:1525 et seq. (The Rutter Group)

11 California Forms of Pleading and Practice, Ch. 116, *Civil Rights: Discrimination in Business Establishments*, § 116.15 (Matthew Bender)

3068. Ralph Act—Damages and Penalty (Civ. Code, §§ 51.7, 52(b))

If you decide that [*name of plaintiff***] has proved [his/her] claim against [***name of defendant***], you must award the following:**

1. **Actual damages sufficient to reasonably compensate [***name of plaintiff***] for the harm;**

2. **A civil penalty of $25,000; and**

3. **Punitive damages.**

[*Name of plaintiff***] must prove the amount of [his/her] actual damages. However, [***name of plaintiff***] does not have to prove the exact amount of the harm or the exact amount of damages that will provide reasonable compensation for the harm. You must not speculate or guess in awarding damages.**

The following are the specific items of actual damages claimed by [*name of plaintiff***]:**

[*Insert item(s) of claimed harm.***]**

New September 2003; Revised June 2012; Renumbered from CACI No. 3027 December 2012

Directions for Use

Give this instruction for violations of the Ralph Act. (See Civ. Code, § 51.7; CACI No. 3063, *Acts of Violence—Ralph Act—Essential Factual Elements*, and CACI No. 3064, *Threats of Violence—Ralph Act—Essential Factual Elements*.) This instruction may also be given for claims under Civil Code section 51.9 (see CACI No. 3065, *Sexual Harassment in Defined Relationship—Essential Factual Elements*) with item 2 omitted. (See Civ. Code, § 52(b)(2).)

See the Damages series (CACI Nos. 3900 et seq.) for additional instructions on actual damages and punitive damages. CACI No. 3942, *Punitive Damages—Individual Defendant—Bifurcated Trial (Second Phase)*, instructs the jury on how to calculate the amount of punitive damages.

Sources and Authority

- Remedies Under Ralph Act. Civil Code section 52(b). ~~provides:~~

  ~~Whoever denies the right provided by Section 51.7 or 51.9, or aids, incites, or conspires in that denial, is liable for each and every offense for the actual damages suffered by any person denied that right and, in addition, the following:~~

  ~~(1) An amount to be determined by a jury, or a court sitting without a jury, for exemplary damages.~~

~~(2) A civil penalty of twenty-five thousand dollars ($25,000) to be awarded to the person denied the right provided by Section 51.7 in any action brought by the person denied the right, or by the Attorney General, a district attorney, or a city attorney.~~

~~(3) Attorney's fees as may be determined by the court.~~

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 898–914

Chin, et al., California Practice Guide: Employment Litigation, Ch. 7-G, *Unruh Civil Rights Act*, ¶ 7:1525 et seq. (The Rutter Group)

11 California Forms of Pleading and Practice, Ch. 116, *Civil Rights: Discrimination in Business Establishments*, § 116.15 (Matthew Bender)

3 California Points and Authorities, Ch. 35, *Civil Rights: Unruh Civil Rights Act*, § 35.48 (Matthew Bender)

3069. Harassment in Educational Institution (Ed. Code, § 220)

[*Name of plaintiff***] claims that [he/she] was harmed by being subjected to harassment at school because of [his/her] [***specify characteristic, e.g., sexual orientation***] and that [***name of defendant***] is responsible for that harm. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] suffered harassment that was so severe, pervasive, and offensive that it effectively deprived [him/her] of the right of equal access to educational benefits and opportunities;**

2. **That [***name of defendant***] had actual knowledge of that harassment; and**

3. **That [***name of defendant***] acted with deliberate indifference in the face of that knowledge.**

[*Name of defendant***] acted with deliberate indifference if [his/her/its] response to the harassment was clearly unreasonable in light of all the known circumstances.**

New April 2009; Renumbered from CACI No. 3028 December 2012

Directions for Use

This instruction does not include language that elaborates on what does or does not constitute "deliberate indifference" beyond the broad standard of "clearly unreasonable in light of all the known circumstances." In *Donovan v. Poway Unified School Dist.*, the court noted that "deliberate indifference" will often be a fact-based question for which bright line rules are ill-suited. However, the court noted numerous examples from federal cases in which the standard was applied. The failure of school officials to undertake a timely investigation of a complaint of discrimination may amount to deliberate indifference. School officials also must take timely and reasonable measures to end known harassment. A response may be clearly unreasonable if a school official ignores a complaint of discrimination or if the initial measures chosen to respond to the harassment are ineffective. (*Donovan v. Poway Unified School Dist.* (2008) 167 Cal.App.4th 567, 611 [84 Cal.Rptr.3d 285].) Any of these factors that are applicable to the facts of the case may be added at the end of the instruction.

Sources and Authority

- Harassment in Educational Institution. Education Code section 201. ~~provides:~~

  ~~(a) All pupils have the right to participate fully in the educational process, free from discrimination and harassment.~~

  ~~(b) California's public schools have an affirmative obligation to combat racism, sexism, and other forms of bias, and a responsibility to provide equal educational opportunity.~~

(c) Harassment on school grounds directed at an individual on the basis of personal characteristics or status creates a hostile environment and jeopardizes equal educational opportunity as guaranteed by the California Constitution and the United States Constitution.

(d) There is an urgent need to prevent and respond to acts of hate violence and bias-related incidents that are occurring at an increasing rate in California's public schools.

(e) There is an urgent need to teach and inform pupils in the public schools about their rights, as guaranteed by the federal and state constitutions, in order to increase pupils' awareness and understanding of their rights and the rights of others, with the intention of promoting tolerance and sensitivity in public schools and in society as a means of responding to potential harassment and hate violence.

(f) It is the intent of the Legislature that each public school undertake educational activities to counter discriminatory incidents on school grounds and, within constitutional bounds, to minimize and eliminate a hostile environment on school grounds that impairs the access of pupils to equal educational opportunity.

(g) It is the intent of the Legislature that this chapter shall be interpreted as consistent with Article 9.5 (commencing with Section 11135) of Chapter 1 of Part 1 of Division 3 of Title 2 of the Government Code, Title VI of the federal Civil Rights Act of 1964 (42 U.S.C. Sec. 1981, et seq.), Title IX of the Education Amendments of 1972 (20 U.S.C. Sec. 1681, et seq.), Section 504 of the federal Rehabilitation Act of 1973 (29 U.S.C. Sec. 794(a)), the federal Individuals with Disabilities Education Act (20 U.S.C. Sec. 1400 et seq.), the federal Equal Educational Opportunities Act (20 U.S.C. Sec. 1701, et seq.), the Unruh Civil Rights Act (Secs. 51 to 53, incl., Civ. C.), and the Fair Employment and Housing Act (Pt. 2.8 (commencing with Sec. 12900), Div. 3, Gov. C.), except where this chapter may grant more protections or impose additional obligations, and that the remedies provided herein shall not be the exclusive remedies, but may be combined with remedies that may be provided by the above statutes.

- Discrimination in Educational Institutions. Education Code section 220. provides: "No person shall be subjected to discrimination on the basis of disability, gender, gender identity, gender expression, nationality, race or ethnicity, religion, sexual orientation, or any other characteristic that is contained in the definition of hate crimes set forth in Section 422.55 of the Penal Code in any program or activity conducted by an educational institution that receives, or benefits from, state financial assistance or enrolls pupils who receive state student financial aid."

- Duty to Inform of Remedies. Education Code section 262.3(b). provides: "Persons who have filed a complaint, pursuant to this chapter, with an educational institution shall be advised by the educational institution that civil law remedies, including, but not limited to, injunctions, restraining orders, or other remedies or orders may also be available to complainants. The educational institution shall make this information available by publication in appropriate informational materials."

- "We conclude that to prevail on a claim under section 220 for peer sexual orientation harassment, a plaintiff must show (1) he or she suffered "severe, pervasive and offensive" harassment that effectively deprived the plaintiff of the right of equal access to educational benefits and opportunities; (2) the school district had 'actual knowledge' of that harassment; and (3) the school district acted with 'deliberate indifference' in the face of such knowledge. We further conclude that from the words of section 262.3, subdivision (b), as well as from other markers of legislative intent, money damages are available in a private enforcement action under section 220." (*Donovan, supra,* 167 Cal.App.4th at p. 579.)

- "Like Title IX, … enforcement of the Education Code's antidiscrimination law rests on the assumption of 'actual notice' to the funding recipient. … [¶¶] We decline to adopt a liability standard for damages under section 220 based on principles of respondeat superior and/or constructive notice, particularly in light of the circumstances presented here when the claim of discrimination is not, for example, based on an official policy of the District, but is instead the result of peer sexual orientation harassment and the District's response (or lack thereof) to such harassment. … [N]egligence principles should not apply to impose liability under a statutory scheme when administrative enforcement of that scheme contemplates actual notice to the funding recipient, with an opportunity to take corrective action before a private action may lie. By requiring actual notice, we ensure liability for money damages under section 220 is based on a funding recipient's *own* misconduct, determined by its *own* deliberate indifference to known acts of harassment." (*Donovan, supra,* 167 Cal.App.4th at pp. 604–605, original italics, internal citations omitted.)

- "The decisions of federal courts interpreting Title IX provide a meaningful starting point to determine whether the response of defendants here amounted to deliberate indifference under section 220. Under federal law, deliberate indifference is a ' "very high standard." ' Actions that in hindsight are 'unfortunate' or even 'imprudent' will not suffice." (*Donovan, supra,* 167 Cal.App.4th at p. 610, internal citations omitted.)

Secondary Sources

Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 798

11 California Forms of Pleading and Practice, Ch. 112, *Civil Rights: Government-Funded Programs and Activities*, §§ 112.11, 112.16 (Matthew Bender)

3 California Points and Authorities, Ch. 35A, *Civil Rights: Equal Protection*, § 35A.32A (Matthew Bender)

3101. Financial Abuse—Decedent's Pain and Suffering (Welf. & Inst. Code, § 15657.5)

[*Name of plaintiff***] also seeks to recover damages for [***name of decedent***]'s pain and suffering. To recover these damages, [***name of plaintiff***] must also prove by clear and convincing evidence that [***name of individual defendant/***[***name of employer defendant***]'s employee] acted with [recklessness/oppression/fraud/ [or] malice] in committing the financial abuse.**

New September 2003; Revised June 2005, October 2008, April 2009

Directions for Use

Give this instruction along with CACI No. 3100, *Financial Abuse—Essential Factual Elements,* if the plaintiff seeks survival damages for pain and suffering in addition to conventional tort damages and attorney fees and costs. (See Welf. & Inst. Code, § 15657.5.) Although one would not normally expect that financial abuse alone would lead to a wrongful death action, the Legislature has provided this remedy should the situation arise.

If the individual responsible for the neglect is a defendant in the case, use "[*name of individual defendant*]." If only the individual's employer is a defendant, use "[*name of employer defendant*]'s employee."

The instructions in this series are not intended to cover every circumstance in which a plaintiff may bring a cause of action under the Elder Abuse and Dependent Adult Civil Protection Act.

Sources and Authority

- Enhanced Remedies for Financial Abuse. Welfare and Institutions Code section 15657.5. ~~provides:~~

  ~~(a) Where it is proven by a preponderance of the evidence that a defendant is liable for financial abuse, as defined in Section 15610.30, in addition to compensatory damages and all other remedies otherwise provided by law, the court shall award to the plaintiff reasonable attorney's fees and costs. The term "costs" includes, but is not limited to, reasonable fees for the services of a conservator, if any, devoted to the litigation of a claim brought under this article.~~

  ~~(b) Where it is proven by a preponderance of the evidence that a defendant is liable for financial abuse, as defined in Section 15610.30, and where it is proven by clear and convincing evidence that the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of the abuse, in addition to reasonable attorney's fees and costs set forth in subdivision (a), compensatory damages, and all other remedies otherwise provided by law, the limitations imposed by Section 377.34 of the Code of Civil Procedure on the damages recoverable shall not apply.~~

~~(c) The standards set forth in subdivision (b) of Section 3294 of the Civil Code regarding the imposition of punitive damages on an employer based upon the acts of an employee shall be satisfied before any punitive damages may be imposed against an employer found liable for financial abuse as defined in Section 15610.30. This subdivision shall not apply to the recovery of compensatory damages, or attorney's fees and costs.~~

~~(d) Nothing in this section affects the award of punitive damages under Section 3294 of the Civil Code.~~

~~(e) Any money judgment in an action under this section shall include a statement that the damages are awarded based on a claim for financial abuse of an elder or dependent adult, as defined in Section 15610.30. If only part of the judgment is based on that claim, the judgment shall specify what amount was awarded on that basis.~~

- "The purpose of the [Elder Abuse Act] is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect." (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33 [82 Cal.Rptr.2d 610, 971 P.2d 986].)

- "In order to obtain the remedies available in section 15657, a plaintiff must demonstrate by clear and convincing evidence that defendant is guilty of something more than negligence; he or she must show reckless, oppressive, fraudulent, or malicious conduct. The latter three categories involve 'intentional,' 'willful,' or 'conscious' wrongdoing of a 'despicable' or 'injurious' nature. 'Recklessness' refers to a subjective state of culpability greater than simple negligence, which has been described as a 'deliberate disregard' of the 'high degree of probability' that an injury will occur. Recklessness, unlike negligence, involves more than 'inadvertence, incompetence, unskillfulness, or a failure to take precautions' but rather rises to the level of a 'conscious choice of a course of action ... with knowledge of the serious danger to others involved in it.' " (*Delaney, supra,* 20 Cal.4th at pp. 31–32, internal citations omitted.)

- "As amended in 1991, the Elder Abuse Act was designed to protect elderly and dependent persons from abuse, neglect, or abandonment. In addition to adopting measures designed to encourage reporting of abuse and neglect, the Act authorizes the court to award attorney fees to the prevailing plaintiffs and allows survivors to recover pain and suffering damages in cases of intentional and reckless abuse where the elder has died." (*Mack v. Soung* (2000) 80 Cal.App.4th 966, 971–972 [95 Cal.Rptr.2d 830], internal citations omitted.)

- "The effect of the 1991 amendment to the elder abuse law was to ... permit a decedent's personal representative or successor to recover pain and suffering damages when plaintiff can prove by clear and convincing evidence recklessness, oppression, fraud, or malice in the commission of elder abuse. Even then, those damages would be subject to the $250,000 cap placed by Civil Code section 3333.2, subdivision (b) for noneconomic damages against a health care provider. In this limited circumstance, the decedent's right to pain and suffering damages would not die with him or her; the damages would be recoverable by a survivor." (*ARA Living Centers—Pacific, Inc. v. Superior Court* (1993) 18 Cal.App.4th 1556, 1563 [23 Cal.Rptr.2d 224].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1686–1688

California Elder Law Litigation (Cont.Ed.Bar 2003) §§ 6.23, 6.30–6.34, 6.45–6.47

1 California Forms of Pleading and Practice, Ch. 5, *Abuse of Minors and Elderly*, § 5.35 (Matthew Bender)

3102A. Employer Liability for Enhanced Remedies—Both Individual and Employer Defendants (Welf. & Inst. Code, §§ 15657, 15657.05; Civ. Code, § 3294(b))

[*Name of plaintiff***] also claims that [***name of employer defendant***] is responsible for [attorney fees and costs/ [and] [***name of decedent***]'s pain and suffering before death]. To establish this claim, [***name of plaintiff***] must prove by clear and convincing evidence [***insert one or more of the following four options:***]**

1. **[That [***name of individual defendant***] was an officer, a director, or a managing agent of [***name of employer defendant***] acting on behalf of [***name of defendant***];] [or]**

2. **[That an officer, a director, or a managing agent of [***name of employer defendant***] had advance knowledge of the unfitness of [***name of individual defendant***] and employed [him/her] with a knowing disregard of the rights or safety of others;] [or]**

3. **[That an officer, a director, or a managing agent of [***name of employer defendant***] authorized [***name of individual defendant***]'s conduct;] [or]**

4. **[That an officer, a director, or a managing agent of [***name of employer defendant***] knew of [***name of individual defendant***]'s wrongful conduct and adopted or approved the conduct after it occurred.]**

An employee is a "managing agent" if he or she exercises substantial independent authority and judgment in his or her corporate decision-making such that his or her decisions ultimately determine corporate policy.

[If [*name of plaintiff***] proves the above, I will decide the amount of attorney fees and costs.]**

Derived from former CACI No. 3102 October 2008; Revised April 2009

Directions for Use

This instruction should be given with CACI No. 3104 (neglect), CACI No. 3107 (physical abuse), or CACI No. 3110 (abduction) if the plaintiff is seeking the enhanced remedies of attorney fees and costs and/or damages for a decedent's pain and suffering against an employer and the employee is also a defendant. (See Civ. Code, § 3294(b); Welf. & Inst. Code, §§ 15657(c), 15657.05.) If the employer is the only defendant, give CACI No. 3102B, *Employer Liability for Enhanced Remedies—Employer Defendant Only*. The requirements of Civil Code section 3294(b) need not be met in order to obtain enhanced remedies from an employer for financial abuse. (See Welf. & Inst. Code, § 15657.5(c).)

The instructions in this series are not intended to cover every circumstance in which a plaintiff may bring a cause of action under the Elder Abuse and Dependent Adult Civil Protection Act.

Sources and Authority

- Enhanced Remedies for Physical Abuse or Neglect. Welfare and Institutions Code section 15657. ~~provides:~~

  ~~Where it is proven by clear and convincing evidence that a defendant is liable for physical abuse as defined in Section 15610.63, or neglect as defined in Section 15610.57, and that the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of this abuse, the following shall apply, in addition to all other remedies otherwise provided by law:~~

  ~~(a) The court shall award to the plaintiff reasonable attorney's fees and costs. The term "costs" includes, but is not limited to, reasonable fees for the services of a conservator, if any, devoted to the litigation of a claim brought under this article.~~

  ~~(b) The limitations imposed by Section 377.34 of the Code of Civil Procedure on the damages recoverable shall not apply. However, the damages recovered shall not exceed the damages permitted to be recovered pursuant to subdivision (b) of Section 3333.2 of the Civil Code.~~

  ~~(c) The standards set forth in subdivision (b) of Section 3294 of the Civil Code regarding the imposition of punitive damages on an employer based upon the acts of an employee shall be satisfied before any damages or attorney's fees permitted under this section may be imposed against an employer.~~

Enhanced Remedies Against Employer Based on Acts of Employee. Welfare and Institutions Code, section 15657.5(c). ~~provides: "The standards set forth in subdivision (b) of Section 3294 of the Civil Code regarding the imposition of punitive damages on an employer based upon the acts of an employee shall be satisfied before any punitive damages may be imposed against an employer found to be liable for financial abuse as defined in Section 15610.30. This subdivision shall not apply to the recovery of compensatory damages, or attorney's fees and costs."~~

- Enhanced Remedies for Abduction. Welfare and Institutions Code section 15657.05. ~~provides:~~

  ~~Where it is proven by clear and convincing evidence that an individual is liable for abduction, as defined in Section 15610.06, in addition to all other remedies otherwise provided by law:~~

  ~~(a)~~

  ~~(1) The court shall award to the plaintiff reasonable attorney's fees and costs. The term "costs" shall include, but is not limited to, costs of representing the abductee and his or her family in this state and any other state in any action related to the abduction and returning of the abductee to this state, as well as travel expenses for returning the abductee to this state and reasonable fees for the services of a conservator, if any, devoted to the litigation of a claim brought under this article.~~

  ~~(2) The award of attorney's fees shall be governed by the principles set forth in Section 15657.1.~~

~~(b) The limitations imposed by Section 377.34 of the Code of Civil Procedure on the damages recoverable shall not apply. However, the damages recovered shall not exceed the damages permitted to be recovered pursuant to subdivision (b) of Section 3333.2 of the Civil Code.~~

~~(c) The standards set forth in subdivision (b) of Section 3294 of the Civil Code regarding the imposition of punitive damages on an employer based upon the acts of an employee shall be satisfied before any damages or attorney's fees permitted under this section may be imposed against an employer.~~

- Punitive Damages Against Employer. Civil Code section 3294(b). ~~provides: "An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation."~~

- "[A] finding of ratification of [agent's] actions by [employer], and any other findings made under Civil Code section 3294, subdivision (b), must be made by clear and convincing evidence." (*Barton v. Alexander Hamilton Life Ins. Co. of America* (2003) 110 Cal.App.4th 1640, 1644 [3 Cal.Rptr.3d 258].)

- "The purpose of the [Elder Abuse Act] is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect." (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33 [82 Cal.Rptr.2d 610, 971 P.2d 986].)

- "In order to obtain the remedies available in section 15657, a plaintiff must demonstrate by clear and convincing evidence that defendant is guilty of something more than negligence; he or she must show reckless, oppressive, fraudulent, or malicious conduct. The latter three categories involve 'intentional,' 'willful,' or 'conscious' wrongdoing of a 'despicable' or 'injurious' nature. 'Recklessness' refers to a subjective state of culpability greater than simple negligence, which has been described as a 'deliberate disregard' of the 'high degree of probability' that an injury will occur. Recklessness, unlike negligence, involves more than 'inadvertence, incompetence, unskillfulness, or a failure to take precautions' but rather rises to the level of a 'conscious choice of a course of action ... with knowledge of the serious danger to others involved in it.' " (*Delaney, supra,* 20 Cal.4th at pp. 31-32, internal citations omitted.)

- "As amended in 1991, the Elder Abuse Act was designed to protect elderly and dependent persons from abuse, neglect, or abandonment. In addition to adopting measures designed to encourage reporting of abuse and neglect, the Act authorizes the court to award attorney fees to the prevailing plaintiffs and allows survivors to recover pain and suffering damages in cases of intentional and reckless abuse where the elder has died." (*Mack v. Soung* (2000) 80 Cal.App.4th 966, 971–972 [95 Cal.Rptr.2d 830], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1686–1688

California Elder Law Litigation (Cont.Ed.Bar 2003) §§ 6.41–6.44

1 California Forms of Pleading and Practice, Ch. 5, *Abuse of Minors and Elderly*, § 5.35 (Matthew Bender)

3102B. Employer Liability for Enhanced Remedies—Employer Defendant Only (Welf. & Inst. Code, §§ 15657, 15657.05; Civ. Code, § 3294(b))

[*Name of plaintiff***] also claims that [***name of defendant***] is responsible for [attorney fees and costs/ [and] [***name of decedent***]'s pain and suffering before death]. To establish this claim, [***name of plaintiff***] must prove by clear and convincing evidence [***insert one or more of the following four options:***]**

1. **[That the employee who committed the acts was an officer, a director, or a managing agent of [***name of defendant***] acting on behalf of [***name of defendant***]]; [or]**

2. **[That an officer, a director, or a managing agent of [***name of defendant***] had advance knowledge of the unfitness of the employee who committed the acts and employed [him/her/] with a knowing disregard of the rights or safety of others;] [or]**

3. **[That an officer, a director, or a managing agent of [***name of defendant***] authorized the conduct of the employee who committed the acts;] [or]**

4. **[That an officer, a director, or a managing agent of [***name of defendant***] knew of the wrongful conduct of the employee who committed the acts and adopted or approved the conduct after it occurred.]**

An employee is a "managing agent" if he or she exercises substantial independent authority and judgment in his or her corporate decision-making such that his or her decisions ultimately determine corporate policy.

[If [*name of plaintiff***] proves the above, I will decide the amount of attorney fees and costs.]**

Derived from former CACI No. 3102 October 2008; Revised April 2009

Directions for Use

This instruction should be given with CACI No. 3104 (neglect), CACI No. 3107 (physical abuse), or CACI No. 3110 (abduction) if the plaintiff is seeking the enhanced remedies of attorney fees and costs and/or damages for a decedent's pain and suffering against an employer and the employee is not also a defendant. (See Civ. Code, § 3294(b); Welf. & Inst. Code, §§ 15657(c), 15677.05.) If the employee is also a defendant, give CACI No. 3102A, *Employer Liability for Enhanced Remedies—Both Individual and Employer Defendants*. The requirements of Civil Code section 3294(b) need not be met in order to obtain enhanced remedies from an employer for financial abuse. (See Welf. & Inst. Code, § 15657.5(c).)

Sources and Authority

- Enhanced Remedies for Physical Abuse or Neglect. Welfare and Institutions Code section 15657. ~~provides:~~

~~Where it is proven by clear and convincing evidence that a defendant is liable for physical abuse as defined in Section 15610.63, or neglect as defined in Section 15610.57, and that the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of this abuse, the following shall apply, in addition to all other remedies otherwise provided by law:~~

~~(a) The court shall award to the plaintiff reasonable attorney's fees and costs. The term "costs" includes, but is not limited to, reasonable fees for the services of a conservator, if any, devoted to the litigation of a claim brought under this article.~~

~~(b) The limitations imposed by Section 377.34 of the Code of Civil Procedure on the damages recoverable shall not apply. However, the damages recovered shall not exceed the damages permitted to be recovered pursuant to subdivision (b) of Section 3333.2 of the Civil Code.~~

~~(c) The standards set forth in subdivision (b) of Section 3294 of the Civil Code regarding the imposition of punitive damages on an employer based upon the acts of an employee shall be satisfied before any damages or attorney's fees permitted under this section may be imposed against an employer.~~

- Enhanced Remedies Against Employer for Acts of Employee. Welfare and Institutions Code, section 15657.5(c)~~. provides: "The standards set forth in subdivision (b) of Section 3294 of the Civil Code regarding the imposition of punitive damages on an employer based upon the acts of an employee shall be satisfied before any punitive damages may be imposed against an employer found to be liable for financial abuse as defined in Section 15610.30. This subdivision shall not apply to the recovery of compensatory damages, or attorney's fees and costs."~~

- Enhanced Remedies for Abduction. Welfare and Institutions Code section 15657.05~~. provides:~~

~~Where it is proven by clear and convincing evidence that an individual is liable for abduction, as defined in Section 15610.06, in addition to all other remedies otherwise provided by law:~~

~~(a)~~

~~(1) The court shall award to the plaintiff reasonable attorney's fees and costs. The term "costs" shall include, but is not limited to, costs of representing the abductee and his or her family in this state and any other state in any action related to the abduction and returning of the abductee to this state, as well as travel expenses for returning the abductee to this state and reasonable fees for the services of a conservator, if any, devoted to the litigation of a claim brought under this article.~~

~~(2) The award of attorney's fees shall be governed by the principles set forth in Section 15657.1.~~

~~(b) The limitations imposed by Section 377.34 of the Code of Civil Procedure on the damages recoverable shall not apply. However, the damages recovered shall not exceed the damages permitted to be recovered pursuant to subdivision (b) of~~

~~Section 3333.2 of the Civil Code.~~

~~(c) The standards set forth in subdivision (b) of Section 3294 of the Civil Code regarding the imposition of punitive damages on an employer based upon the acts of an employee shall be satisfied before any damages or attorney's fees permitted under this section may be imposed against an employer.~~

- Punitive Damages Against Employer. Civil Code section 3294(b). ~~provides: "An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation."~~

- "[A] finding of ratification of [agent's] actions by [employer], and any other findings made under Civil Code section 3294, subdivision (b), must be made by clear and convincing evidence." (*Barton v. Alexander Hamilton Life Ins. Co. of America* (2003) 110 Cal.App.4th 1640, 1644 [3 Cal.Rptr.3d 258].)

- "The purpose of the [Elder Abuse Act] is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect." (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33 [82 Cal.Rptr.2d 610, 971 P.2d 986].)

- "As amended in 1991, the Elder Abuse Act was designed to protect elderly and dependent persons from abuse, neglect, or abandonment. In addition to adopting measures designed to encourage reporting of abuse and neglect, the Act authorizes the court to award attorney fees to the prevailing plaintiffs and allows survivors to recover pain and suffering damages in cases of intentional and reckless abuse where the elder has died." (*Mack v. Soung* (2000) 80 Cal.App.4th 966, 971–972 [95 Cal.Rptr.2d 830], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1686–1688

California Elder Law Litigation (Cont.Ed.Bar 2003) §§ 6.41–6.44

1 California Forms of Pleading and Practice, Ch. 5, *Abuse of Minors and Elderly*, § 5.35 (Matthew Bender)

3103. Neglect—Essential Factual Elements (Welf. & Inst. Code, § 15610.57)

[*Name of plaintiff***] claims that [he/she/[***name of decedent***]] was neglected by [[***name of individual defendant***]/ [and] [***name of employer defendant***]] in violation of the Elder Abuse and Dependent Adult Civil Protection Act. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [[***name of individual defendant***]/[***name of employer defendant***]'s employee] had care or custody of [***name of plaintiff/decedent***];**

2. **That [***name of plaintiff/decedent***] was [65 years of age or older/a dependent adult] while [he/she] was in [[***name of individual defendant***]'s/[***name of employer defendant***]'s employee's] care or custody;**

3. **That [[***name of individual defendant***]/[***name of employer defendant***]'s employee] failed to use the degree of care that a reasonable person in the same situation would have used in [***insert one or more of the following:***]**

   [assisting in personal hygiene or in the provision of food, clothing, or shelter;]

   [providing medical care for physical and mental health needs;]

   [protecting [*name of plaintiff/decedent***] from health and safety hazards;]**

   [preventing malnutrition or dehydration;]

   [*insert other grounds for neglect;***]**

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

5. **That [[***name of individual defendant***]'s/[***name of employer defendant***]'s employee's] conduct was a substantial factor in causing [***name of plaintiff/decedent***]'s harm.**

New September 2003; Revised December 2005, June 2006, October 2008

Directions for Use

This instruction may be given in cases brought under the Elder Abuse and Dependent Adult Civil Protection Act by the victim of elder neglect, or by the survivors of the victim. If the victim is the plaintiff and is seeking damages for pain and suffering, see CACI No. 3905A, *Physical Pain, Mental Suffering, and Emotional Distress (Noneconomic Damage)*, in the Damages series.

If the plaintiff seeks the enhanced remedies of attorney fees and costs, and in the case of a wrongful death, the decedent's pain and suffering, give CACI No. 3104, *Neglect—Enhanced Remedies Sought*, in addition to this instruction. (See Welf. & Inst. Code, § 15657.)

If the individual responsible for the neglect is a defendant in the case, use "[*name of individual defendant*]" throughout. If only the individual's employer is a defendant, use "[*name of employer defendant*]'s employee" throughout.

If the plaintiff is seeking enhanced remedies against the individual's employer, also give either CACI No. 3102A, *Employer Liability for Enhanced Remedies—Both Individual and Employer Defendants,* or CACI No. 3102B, *Employer Liability for Enhanced Remedies—Employer Defendant Only.* To recover damages against the employer under a theory of vicarious liability, see instructions in the Vicarious Responsibility series (CACI No. 3700 et seq.).

This instruction is not intended for cases involving professional negligence against health-care providers as defined by the California Medical Injury Compensation Reform Act of 1975 (MICRA) (see Welf. & Inst. Code, § 15657.2, Civ. Code, § 3333.2(c)(2)).

The instructions in this series are not intended to cover every circumstance in which a plaintiff may bring a cause of action under the Elder Abuse and Dependent Adult Civil Protection Act.

Sources and Authority

- "Elder Abuse" Defined. Welfare and Institutions Code section 15610.07. ~~provides:~~

  ~~"Abuse of an elder or a dependent adult" means either of the following:~~
  ~~(a) Physical abuse, neglect, financial abuse, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering.~~
  ~~(b) The deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering.~~

- "Dependent Adult" Defined. Welfare and Institutions Code section 15610.23. ~~provides:~~

  ~~(a) "Dependent adult" means any person residing in this state between the ages of 18 and 64 years who has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights, including, but not limited to, persons who have physical or developmental disabilities, or whose physical or mental abilities have diminished because of age.~~
  ~~(b) "Dependent adult" includes any person between the ages of 18 and 64 years who is admitted as an inpatient to a 24-hour health facility, as defined in Sections 1250, 1250.2, and 1250.3 of the Health and Safety Code.~~

- "Elder" Defined. Welfare and Institutions Code section 15610.27. ~~provides: " 'Elder' means any person residing in this state, 65 years of age or older."~~

- "Neglect" Defined. Welfare and Institutions Code section 15610.57. ~~provides:~~

  ~~(a) "Neglect" means either of the following:~~

(1) The negligent failure of any person having the care or custody of an elder or a dependent adult to exercise that degree of care that a reasonable person in a like position would exercise.
(2) The negligent failure of an elder or dependent adult to exercise that degree of self care that a reasonable person in a like position would exercise.

(b) Neglect includes, but is not limited to, all of the following:

(1) Failure to assist in personal hygiene, or in the provision of food, clothing, or shelter.
(2) Failure to provide medical care for physical and mental health needs. No person shall be deemed neglected or abused for the sole reason that he or she voluntarily relies on treatment by spiritual means through prayer alone in lieu of medical treatment.
(3) Failure to protect from health and safety hazards.
(4) Failure to prevent malnutrition or dehydration.
(5) Failure of an elder or dependent adult to satisfy the needs specified in paragraphs (1) to (4), inclusive, for himself or herself as a result of poor cognitive functioning, mental limitation, substance abuse, or chronic poor health.

- Claims for Professional Negligence Excluded. Welfare and Institutions Code section 15657.2. provides: "Notwithstanding this article, any cause of action for injury or damage against a health care provider, as defined in Section 340.5 of the Code of Civil Procedure, based on the health care provider's alleged professional negligence, shall be governed by those laws which specifically apply to those professional negligence causes of action."

- "It is true that statutory elder abuse includes 'neglect as defined in Section 15610.57,' which in turn includes negligent failure of an elder custodian 'to provide medical care for [the elder's] physical and mental health needs.' … '[N]eglect' within the meaning of Welfare and Institutions Code section 15610.57 covers an area of misconduct distinct from 'professional negligence.' As used in the Act, neglect refers not to the substandard performance of medical services but, rather, to the 'failure of those responsible for attending to the basic needs and comforts of elderly or dependent adults, regardless of their professional standing, to carry out their custodial obligations.' Thus, the statutory definition of 'neglect' speaks not of the *undertaking* of medical services, but of the failure to *provide* medical care." (*Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 783 [11 Cal.Rptr.3d 222, 86 P.3d 290], original italics, internal citations omitted.)

- "The purpose of the [Elder Abuse Act] is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect." (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33 [82 Cal.Rptr.2d 610, 971 P.2d 986].)

- "[T]he statutory definition of neglect set forth in the first sentence of Welfare and Institutions Code section 15610.57 is substantially the same as the ordinary definition of neglect." (*Conservatorship of Gregory v. Beverly Enterprises, Inc.* (2000) 80 Cal.App.4th 514, 521 [95 Cal.Rptr.2d 336].)

- "The Act was expressly designed to protect elders and other dependent adults who 'may be subjected

to abuse, neglect, or abandonment ... .' Within the Act, two groups of persons who ordinarily assume responsibility for the 'care and custody' of the elderly are identified and defined: health practitioners and care custodians. A 'health practitioner' is defined in section 15610.37 as a 'physician and surgeon, psychiatrist, psychologist, dentist, ...' etc., who 'treats an elder ... for any condition.' 'Care custodians,' on the other hand, are administrators and employees of public and private institutions that provide 'care or services for elders or dependent adults,' including nursing homes, clinics, home health agencies, and similar facilities which house the elderly. The Legislature thus recognized that both classes of professionals—health practitioners as well as care custodians—should be charged with responsibility for the health, safety and welfare of elderly and dependent adults." (*Mack v. Soung* (2000) 80 Cal.App.4th 966, 974 [95 Cal.Rptr.2d 830], internal citations omitted.)

- "[N]eglect as a form of abuse under the Elder Abuse Act refers 'to the failure of those responsible for attending to the basic needs and comforts of elderly or dependent adults, regardless of their professional standing, to carry out their custodial obligations.' " (*Carter v. Prime Healthcare Paradise Valley LLC* (2011) 198 Cal.App.4th 396, 404 [129 Cal.Rptr.3d 895].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1686–1688

California Elder Law Litigation (Cont.Ed.Bar 2003) §§ 2.70–2.71

3 Levy et al., California Torts, Ch. 31 *Liability of Physicians and Other Medical Practitioners*, § 31.50[4][d] (Matthew Bender)

1 California Forms of Pleading and Practice, Ch. 5, *Abuse of Minors and Elderly*, § 5.33[3] (Matthew Bender)

3104. Neglect—Enhanced Remedies Sought (Welf. & Inst. Code, § 15657)

[*Name of plaintiff***] also seeks to recover [attorney fees and costs/ [and] damages for [***name of decedent***]'s pain and suffering]. To recover these remedies, [***name of plaintiff***] must prove all of the requirements for neglect by clear and convincing evidence, and must also prove by clear and convincing evidence that [[***name of individual defendant***]/[***name of employer defendant***]'s employee] acted with [recklessness/oppression/fraud/ [or] malice] in neglecting [***name of plaintiff/decedent***].**

[If [*name of plaintiff***] proves the above, I will decide the amount of attorney fees and costs.]**

New September 2003; Revised June 2005, October 2008

Directions for Use

Give this instruction along with CACI No. 3103, *Neglect—Essential Factual Elements*, if the plaintiff seeks the enhanced remedies of attorney fees and costs and damages for the decedent's predeath pain and suffering. (See Welf. & Inst. Code, § 15657.)

If the individual responsible for the neglect is a defendant in the case, use "[*name of individual defendant*]." If only the individual's employer is a defendant, use "[*name of employer defendant*]'s employee."

If the plaintiff is seeking enhanced remedies against the individual's employer, also give CACI No. 3102A, *Employer Liability for Enhanced Remedies—Both Individual and Employer Defendants*, or CACI No. 3102B, *Employer Liability for Enhanced Remedies—Employer Defendant Only*.

The instructions in this series are not intended to cover every circumstance in which a plaintiff may bring a cause of action under the Elder Abuse and Dependent Adult Civil Protection Act.

Sources and Authority

- Enhanced Remedies for Neglect. Welfare and Institutions Code section 15657. ~~provides:~~

  ~~Where it is proven by clear and convincing evidence that a defendant is liable for physical abuse as defined in Section 15610.63, or neglect as defined in Section 15610.57, and that the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of this abuse, the following shall apply, in addition to all other remedies otherwise provided by law:~~

  ~~(a) The court shall award to the plaintiff reasonable attorney's fees and costs. The term "costs" includes, but is not limited to, reasonable fees for the services of a conservator, if any, devoted to the litigation of a claim brought under this article.~~

  ~~(b) The limitations imposed by Section 377.34 of the Code of Civil Procedure on the damages recoverable shall not apply. However, the damages recovered shall not~~

~~exceed the damages permitted to be recovered pursuant to subdivision (b) of Section 3333.2 of the Civil Code.~~

~~(c) The standards set forth in subdivision (b) of Section 3294 of the Civil Code regarding the imposition of punitive damages on an employer based upon the acts of an employee shall be satisfied before any damages or attorney's fees permitted under this section may be imposed against an employer.~~

- "In order to obtain the remedies available in section 15657, a plaintiff must demonstrate by clear and convincing evidence that defendant is guilty of something more than negligence; he or she must show reckless, oppressive, fraudulent, or malicious conduct. The latter three categories involve 'intentional,' 'willful,' or 'conscious' wrongdoing of a 'despicable' or 'injurious' nature. [¶] 'Recklessness' refers to a subjective state of culpability greater than simple negligence, which has been described as a 'deliberate disregard' of the 'high degree of probability' that an injury will occur. Recklessness, unlike negligence, involves more than 'inadvertence, incompetence, unskillfulness, or a failure to take precautions' but rather rises to the level of a 'conscious choice of a course of action ... with knowledge of the serious danger to others involved in it.' " (*Delaney v. Baker* (1999) 20 Cal.4th 23, 31-32 [82 Cal.Rptr.2d 610, 971 P.2d 986], internal citations omitted.)

- "As amended in 1991, the Elder Abuse Act was designed to protect elderly and dependent persons from abuse, neglect, or abandonment. In addition to adopting measures designed to encourage reporting of abuse and neglect, the Act authorizes the court to award attorney fees to the prevailing plaintiffs and allows survivors to recover pain and suffering damages in cases of intentional and reckless abuse where the elder has died." (*Mack v. Soung* (2000) 80 Cal.App.4th 966, 971–972 [95 Cal.Rptr.2d 830], internal citations omitted.)

- "The effect of the 1991 amendment to the elder abuse law was to ... permit a decedent's personal representative or successor to recover pain and suffering damages when plaintiff can prove by clear and convincing evidence recklessness, oppression, fraud, or malice in the commission of elder abuse. Even then, those damages would be subject to the $250,000 cap placed by Civil Code section 3333.2, subdivision (b) for noneconomic damages against a health care provider. In this limited circumstance, the decedent's right to pain and suffering damages would not die with him or her; the damages would be recoverable by a survivor." (*ARA Living Centers—Pacific, Inc. v. Superior Court* (1993) 18 Cal.App.4th 1556, 1563 [23 Cal.Rptr.2d 224].)

- "[I]f the neglect is 'reckless[],' or done with 'oppression, fraud or malice,' then the action falls within the scope of section 15657 and as such cannot be considered simply 'based on ... professional negligence' within the meaning of section 15657.2. The use of such language in section 15657, and the explicit exclusion of 'professional negligence' in section 15657.2, make clear the Elder Abuse Act's goal was to provide heightened remedies for, as stated in the legislative history, 'acts of egregious abuse' against elder and dependent adults, while allowing acts of negligence in the rendition of medical services to elder and dependent adults to be governed by laws specifically applicable to such negligence. That only these egregious acts were intended to be sanctioned under section 15657 is further underscored by the fact that the statute requires liability to be proved by a heightened 'clear and convincing evidence' standard." (*Delaney, supra,* 20 Cal.4th at p. 35, internal citation omitted.)

- "[W]e distill several factors that must be present for conduct to constitute neglect within the meaning of the Elder Abuse Act and thereby trigger the enhanced remedies available under the Act. The plaintiff must allege (and ultimately prove by clear and convincing evidence) facts establishing that the defendant (1) had responsibility for meeting the basic needs of the elder or dependent adult, such as nutrition, hydration, hygiene or medical care; (2) knew of conditions that made the elder or dependent adult unable to provide for his or her own basic needs; and (3) denied or withheld goods or services necessary to meet the elder or dependent adult's basic needs, either with knowledge that injury was substantially certain to befall the elder or dependent adult (if the plaintiff alleges oppression, fraud or malice) or with conscious disregard of the high probability of such injury (if the plaintiff alleges recklessness). The plaintiff must also allege (and ultimately prove by clear and convincing evidence) that the neglect caused the elder or dependent adult to suffer physical harm, pain or mental suffering." (*Carter v. Prime Healthcare Paradise Valley LLC* (2011) 198 Cal.App.4th 396, 406–407 [129 Cal.Rptr.3d 895], internal citations omitted.)

- " 'Liability' under section 15657 includes as an element 'causation,' which, as all elements of liability, must be proved by clear and convincing evidence for purposes of an award of attorney fees." (*Perlin v. Fountain View Management, Inc.* (2008) 163 Cal.App.4th 657, 664 [77 Cal.Rptr.3d 743].)

- "We reject plaintiffs' argument that a violation of the Act does not constitute an independent cause of action. Accordingly, plaintiffs' failure to obtain a verdict establishing causation—one element of liability—by clear and convincing evidence, precludes an award of attorney fees." (*Perlin, supra*, 163 Cal.App.4th at p. 666.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1686–1688

California Elder Law Litigation (Cont.Ed.Bar 2003) § 2.72

3 Levy et al., California Torts, Ch. 31 *Liability of Physicians and Other Medical Practitioners*, § 31.50[4][d] (Matthew Bender)

1 California Forms of Pleading and Practice, Ch. 5, *Abuse of Minors and Elderly*, § 5.35 (Matthew Bender)

3106. Physical Abuse—Essential Factual Elements (Welf. & Inst. Code, § 15610.63)

[*Name of plaintiff***] claims that [he/she/[***name of decedent***]] was physically abused by [[***name of individual defendant***]/ [and] [***name of employer defendant***]] in violation of the Elder Abuse and Dependent Adult Civil Protection Act. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [[***name of individual defendant***]/[***name of employer defendant***]'s employee] physically abused [***name of plaintiff/decedent***] by [***insert applicable grounds for abuse***];**

2. **That [***name of plaintiff/decedent***] was [65 years of age or older/a dependent adult] at the time of the conduct;**

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

4. **That [[***name of individual defendant***]'s/[***name of employer defendant***]'s employee's] conduct was a substantial factor in causing [***name of plaintiff/decedent***]'s harm.**

New September 2003; Revised December 2005, October 2008

Directions for Use

This instruction may be given in cases brought under the Elder Abuse and Dependent Adult Civil Protection Act by the victim of elder physical abuse, or by the survivors of the victim. If the victim is the plaintiff and is seeking damages for pain and suffering, see CACI No. 3905A, *Physical Pain, Mental Suffering, and Emotional Distress (Noneconomic Damage)* in the Damages series.

If the plaintiff seeks the enhanced remedies of attorney fees and costs, and in the case of a wrongful death, the decedent's pain and suffering, give CACI No. 3107, *Physical Abuse—Enhanced Remedies Sought,* in addition to this instruction. (See Welf. & Inst. Code, § 15657.)

If the individual responsible for the physical abuse is a defendant in the case, use "[*name of individual defendant*]" throughout. If only the individual's employer is a defendant, use "[*name of employer defendant*]'s employee" throughout.

If the plaintiff is seeking enhanced remedies against the individual's employer, also give either CACI No. 3102A, *Employer Liability for Enhanced Remedies—Both Individual and Employer Defendants,* or CACI No. 3102B, *Employer Liability for Enhanced Remedies—Employer Defendant Only.* To recover damages against the employer under a theory of vicarious liability, see instructions in the Vicarious Responsibility series (CACI No. 3700 et seq.).

The instructions in this series are not intended to cover every circumstance in which a plaintiff may bring a cause of action under the Elder Abuse and Dependent Adult Civil Protection Act.

Sources and Authority

- "Elder Abuse" Defined. Welfare and Institutions Code section 15610.07. ~~provides:~~

  ~~"Abuse of an elder or a dependent adult" means either of the following:~~

  ~~(a) Physical abuse, neglect, financial abuse, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering.~~

  ~~(b) The deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering.~~

- "Dependent Adult" Defined. Welfare and Institutions Code section 15610.23. ~~provides:~~

  ~~(a) "Dependent adult" means any person residing in this state between the ages of 18 and 64 years who has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights, including, but not limited to, persons who have physical or developmental disabilities, or whose physical or mental abilities have diminished because of age.~~

  ~~(b) "Dependent adult" includes any person between the ages of 18 and 64 years who is admitted as an inpatient to a 24-hour health facility, as defined in Sections 1250, 1250.2, and 1250.3 of the Health and Safety Code.~~

- "Elder" Defined. Welfare and Institutions Code section 15610.27. ~~provides: " 'Elder' means any person residing in this state, 65 years of age or older."~~

- "Physical Abuse" Defined. Welfare and Institutions Code section 15610.63. ~~provides:~~

  ~~"Physical abuse" means any of the following:~~

  ~~(a) Assault, as defined in Section 240 of the Penal Code.~~

  ~~(b) Battery, as defined in Section 242 of the Penal Code.~~

  ~~(c) Assault with a deadly weapon or force likely to produce great bodily injury, as defined in Section 245 of the Penal Code.~~

  ~~(d) Unreasonable physical constraint, or prolonged or continual deprivation of food or water.~~

  ~~(e) Sexual assault, that means any of the following:~~

  ~~(1) Sexual battery, as defined in Section 243.4 of the Penal Code.~~

  ~~(2) Rape, as defined in Section 261 of the Penal Code.~~

~~(3) Rape in concert, as described in Section 264.1 of the Penal Code.~~

~~(4) Spousal rape, as defined in Section 262 of the Penal Code.~~

~~(5) Incest, as defined in Section 285 of the Penal Code.~~

~~(6) Sodomy, as defined in Section 286 of the Penal Code.~~

~~(7) Oral copulation, as defined in Section 288a of the Penal Code.~~

~~(8) Sexual penetration, as defined in Section 289 of the Penal Code.~~

~~(f) Use of a physical or chemical restraint or psychotropic medication under any of the following conditions:~~

~~(1) For punishment.~~

~~(2) For a period beyond that for which the medication was ordered pursuant to the instructions of a physician and surgeon licensed in the State of California, who is providing medical care to the elder or dependent adult at the time the instructions are given.~~

~~(3) For any purpose not authorized by the physician and surgeon.~~

- "The purpose of the [Elder Abuse Act] is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect." (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33 [82 Cal.Rptr.2d 610, 971 P.2d 986].)

- "The Act was expressly designed to protect elders and other dependent adults who 'may be subjected to abuse, neglect, or abandonment ... .' Within the Act, two groups of persons who ordinarily assume responsibility for the 'care and custody' of the elderly are identified and defined: health practitioners and care custodians. A 'health practitioner' is defined in section 15610.37 as a '*physician* and surgeon, psychiatrist, psychologist, dentist, ...' etc., who 'treats an elder ... for any condition.' 'Care custodians,' on the other hand, are administrators and employees of public and private institutions that provide 'care or services for elders or dependent adults,' including nursing homes, clinics, home health agencies, and similar facilities which house the elderly. The Legislature thus recognized that both classes of professionals—health practitioners as well as care custodians—should be charged with responsibility for the health, safety and welfare of elderly and dependent adults." (*Mack v. Soung* (2000) 80 Cal.App.4th 966, 974 [95 Cal.Rptr.2d 830], original italics, internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1686–1688

California Elder Law Litigation (Cont.Ed.Bar 2003) §§ 2.69, 2.71

1 California Forms of Pleading and Practice, Ch. 5, *Abuse of Minors and Elders*, § 5.33[2] (Matthew Bender)

3107. Physical Abuse—Enhanced Remedies Sought (Welf. & Inst. Code, § 15657)

[*Name of plaintiff***] also seeks to recover [attorney fees and costs/ [and] damages for [***name of decedent***]'s pain and suffering]. To recover these remedies, [***name of plaintiff***] must prove all of the requirements for the physical abuse by clear and convincing evidence, and must also prove by clear and convincing evidence that [[***name of individual defendant***]/[***name of employer defendant***]'s employee] acted with [recklessness/oppression/fraud/ [or] malice] in physically abusing [***name of plaintiff***].**

[If [*name of plaintiff***] proves the above, I will decide the amount of attorney fees and costs.]**

New September 2003; Revised June 2005, October 2008

Directions for Use

Give this instruction along with CACI No. 3106, *Physical Abuse—Essential Factual Elements*, if the plaintiff seeks the enhanced remedies of attorney fees and costs and damages for the decedent's predeath pain and suffering. (See Welf. & Inst. Code, § 15657.)

If the individual responsible for the physical abuse is a defendant in the case, use "[*name of individual defendant*]." If only the individual's employer is a defendant, use "[*name of employer defendant*]'s employee."

If the plaintiff is seeking enhanced remedies against the individual's employer, also give CACI No. 3102A, *Employer Liability for Enhanced Remedies—Both Individual and Employer Defendants*, or CACI No. 3102B, *Employer Liability for Enhanced Remedies—Employer Defendant Only*.

The instructions in this series are not intended to cover every circumstance in which a plaintiff may bring a cause of action under the Elder Abuse and Dependent Adult Civil Protection Act.

Sources and Authority

- Enhanced Remedies for Physical Abuse. Welfare and Institutions Code section 15657. ~~provides:~~

  ~~Where it is proven by clear and convincing evidence that a defendant is liable for physical abuse as defined in Section 15610.63, or neglect as defined in Section 15610.57, and that the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of this abuse, the following shall apply, in addition to all other remedies otherwise provided by law:~~

  ~~(a) The court shall award to the plaintiff reasonable attorney's fees and costs. The term "costs" includes, but is not limited to, reasonable fees for the services of a conservator, if any, devoted to the litigation of a claim brought under this article.~~

  ~~(b) The limitations imposed by Section 377.34 of the Code of Civil Procedure on the~~

~~damages recoverable shall not apply. However, the damages recovered shall not exceed the damages permitted to be recovered pursuant to subdivision (b) of Section 3333.2 of the Civil Code.~~

~~(c) The standards set forth in subdivision (b) of Section 3294 of the Civil Code regarding the imposition of punitive damages on an employer based upon the acts of an employee shall be satisfied before any damages or attorney's fees permitted under this section may be imposed against an employer.~~

- "In order to obtain the remedies available in section 15657, a plaintiff must demonstrate by clear and convincing evidence that defendant is guilty of something more than negligence; he or she must show reckless, oppressive, fraudulent, or malicious conduct. The latter three categories involve 'intentional,' 'willful,' or 'conscious' wrongdoing of a 'despicable' or 'injurious' nature. [¶] 'Recklessness' refers to a subjective state of culpability greater than simple negligence, which has been described as a 'deliberate disregard' of the 'high degree of probability' that an injury will occur. Recklessness, unlike negligence, involves more than 'inadvertence, incompetence, unskillfulness, or a failure to take precautions' but rather rises to the level of a 'conscious choice of a course of action ... with knowledge of the serious danger to others involved in it.' " (*Delaney v. Baker* (1999) 20 Cal.4th 23, 31-32 [82 Cal.Rptr.2d 610, 971 P.2d 986], internal citations omitted.)

- "As amended in 1991, the Elder Abuse Act was designed to protect elderly and dependent persons from abuse, neglect, or abandonment. In addition to adopting measures designed to encourage reporting of abuse and neglect, the Act authorizes the court to award attorney fees to the prevailing plaintiffs and allows survivors to recover pain and suffering damages in cases of intentional and reckless abuse where the elder has died." (*Mack v. Soung* (2000) 80 Cal.App.4th 966, 971–972 [95 Cal.Rptr.2d 830], internal citations omitted.)

- "The effect of the 1991 amendment to the elder abuse law was to ... permit a decedent's personal representative or successor to recover pain and suffering damages when plaintiff can prove by clear and convincing evidence recklessness, oppression, fraud, or malice in the commission of elder abuse. Even then, those damages would be subject to the $250,000 cap placed by Civil Code section 3333.2, subdivision (b) for noneconomic damages against a health care provider. In this limited circumstance, the decedent's right to pain and suffering damages would not die with him or her; the damages would be recoverable by a survivor." (*ARA Living Centers—Pacific, Inc. v. Superior Court* (1993) 18 Cal.App.4th 1556, 1563 [23 Cal.Rptr.2d 224].)

- "[I]f the neglect is 'reckless[],' or done with 'oppression, fraud or malice,' then the action falls within the scope of section 15657 and as such cannot be considered simply 'based on ... professional negligence' within the meaning of section 15657.2. The use of such language in section 15657, and the explicit exclusion of 'professional negligence' in section 15657.2, make clear the Elder Abuse Act's goal was to provide heightened remedies for, as stated in the legislative history, 'acts of egregious abuse' against elder and dependent adults, while allowing acts of negligence in the rendition of medical services to elder and dependent adults to be governed by laws specifically applicable to such negligence. That only these egregious acts were intended to be sanctioned under section 15657 is further underscored by the fact that the statute requires liability to be proved by a heightened 'clear and convincing evidence' standard." (*Delaney, supra,* 20 Cal.4th at p. 35, internal

citation omitted.)

- " 'Liability' under section 15657 includes as an element 'causation,' which, as all elements of liability, must be proved by clear and convincing evidence for purposes of an award of attorney fees." (*Perlin v. Fountain View Management, Inc.* (2008) 163 Cal.App.4th 657, 664 [77 Cal.Rptr.3d 743].)

- "We reject plaintiffs' argument that a violation of the Act does not constitute an independent cause of action. Accordingly, plaintiffs' failure to obtain a verdict establishing causation—one element of liability—by clear and convincing evidence, precludes an award of attorney fees." (*Perlin, supra*, 163 Cal.App.4th at p. 666.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1686–1688

California Elder Law Litigation (Cont.Ed.Bar 2003) § 2.72

1 California Forms of Pleading and Practice, Ch. 5, *Abuse of Minors and Elderly*, § 5.35 (Matthew Bender)

3109. Abduction—Essential Factual Elements (Welf. & Inst. Code, § 15610.06)

[*Name of plaintiff***] claims that [[***name of individual defendant***]/ [and] [***name of employer defendant***]] abducted [him/her/[***name of decedent***]] in violation of the Elder Abuse and Dependent Adult Civil Protection Act. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [[***name of individual defendant***]/[***name of employer defendant***]'s employee] [removed [***name of plaintiff/decedent***] from California and] restrained [him/her/[***name of decedent***]] from returning to California;**

2. **That [***name of plaintiff/decedent***] was [65 years of age or older/a dependent adult] at the time of the conduct;**

3. **[That [***name of plaintiff/decedent***] did not have the capacity to consent to the [removal and] restraint;]**

   [*or***]**

   [That [[*name of conservator***]/the court] did not consent to the [removal and] restraint;]**

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

5. **That [[***name of individual defendant***]'s/[***name of employer defendant***]'s employee's] conduct was a substantial factor in causing [***name of plaintiff/decedent***]'s harm.**

New September 2003; Revised December 2005, October 2008

Directions for Use

This instruction may be given in cases brought under the Elder Abuse and Dependent Adult Civil Protection Act by the victim of elder abduction, or by the survivors of the victim. If the victim is the plaintiff and is seeking damages for pain and suffering, see CACI No. 3905A, *Physical Pain, Mental Suffering, and Emotional Distress (Noneconomic Damage)*, in the Damages series.

If the individual responsible for the abduction is a defendant in the case, use "[*name of individual defendant*]" throughout. If only the individual's employer is a defendant, use "[*name of employer defendant*]'s employee" throughout.

If the plaintiff seeks the enhanced remedies of attorney fees and costs, and in the case of a wrongful death, the decedent's pain and suffering, give CACI No. 3110, *Abduction—Enhanced Remedies Sought*. (See Welf. & Inst. Code, § 15657.05.)

If the plaintiff is seeking enhanced remedies against the individual's employer, also give either CACI No.

3102A, *Employer Liability for Enhanced Remedies—Both Individual and Employer Defendants*, or CACI No. 3102B, *Employer Liability for Enhanced Remedies—Employer Defendant Only*. To recover damages against the employer under a theory of vicarious liability, see instructions in the Vicarious Responsibility series (CACI No. 3700 et seq.).

The instructions in this series are not intended to cover every circumstance under which a plaintiff may bring a cause of action under the Elder Abuse and Dependent Adult Civil Protection Act.

Sources and Authority

- "Abduction" Defined. Welfare and Institutions Code section 15610.06. ~~provides: " 'Abduction' means the removal from this state and the restraint from returning to this state, or the restraint from returning to this state, of any elder or dependent adult who does not have the capacity to consent to the removal from this state and the restraint from returning to this state, or the restraint from returning to this state, as well as the removal from this state or the restraint from returning to this state, of any conservatee without the consent of the conservator or the court."~~

- "Elder Abuse" Defined. Welfare and Institutions Code section 15610.07. ~~provides:~~

  ~~"Abuse of an elder or a dependent adult" means either of the following:~~

  ~~(a) Physical abuse, neglect, financial abuse, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering.~~

  ~~(b) The deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering.~~

- "Dependent Adult" Defined. Welfare and Institutions Code section 15610.23. ~~provides:~~

  ~~(a) "Dependent adult" means any person residing in this state between the ages of 18 and 64 years who has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights, including, but not limited to, persons who have physical or developmental disabilities, or whose physical or mental abilities have diminished because of age.~~

  ~~(b) "Dependent adult" includes any person between the ages of 18 and 64 years who is admitted as an inpatient to a 24-hour health facility, as defined in Sections 1250, 1250.2, and 1250.3 of the Health and Safety Code.~~

- "Elder" Defined. Welfare and Institutions Code section 15610.27. ~~provides: " 'Elder' means any person residing in this state, 65 years of age or older."~~

- "The purpose of the [Elder Abuse Act] is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect." (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33 [82 Cal.Rptr.2d 610, 971 P.2d 986].)

- "As amended in 1991, the Elder Abuse Act was designed to protect elderly and dependent persons from abuse, neglect, or abandonment. In addition to adopting measures designed to encourage reporting of abuse and neglect, the Act authorizes the court to award attorney fees to the prevailing plaintiffs and allows survivors to recover pain and suffering damages in cases of intentional and reckless abuse where the elder has died." (*Mack v. Soung* (2000) 80 Cal.App.4th 966, 971-972 [95 Cal.Rptr.2d 830], internal citations omitted.)

- "The effect of the 1991 amendment to the elder abuse law was to ... permit a decedent's personal representative or successor to recover pain and suffering damages when plaintiff can prove by clear and convincing evidence recklessness, oppression, fraud, or malice in the commission of elder abuse. Even then, those damages would be subject to the $250,000 cap placed by Civil Code section 3333.2, subdivision (b) for noneconomic damages against a health care provider. In this limited circumstance, the decedent's right to pain and suffering damages would not die with him or her; the damages would be recoverable by a survivor." (*ARA Living Centers—Pacific, Inc. v. Superior Court* (1993) 18 Cal.App.4th 1556, 1563 [23 Cal.Rptr.2d 224].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1686–1688

1 California Forms of Pleading and Practice, Ch. 5, *Abuse of Minors and Elders*, § 5.33[5] (Matthew Bender)

3110. Abduction—Enhanced Remedies Sought (Welf. & Inst. Code, § 15657.05)

[*Name of plaintiff***] also seeks to recover [attorney fees and costs/ [and] damages for [***name of decedent***]'s pain and suffering]. To recover these remedies, [***name of plaintiff***] must prove all of the requirements for the abduction by clear and convincing evidence.**

[If [*name of plaintiff***] proves the above, I will decide the amount of attorney fees and costs.]**

New September 2003; Revised December 2005, April 2008, October 2008

Directions for Use

Give this instruction along with CACI No. 3109, *Abduction—Essential Factual Elements,* if the plaintiff seeks the enhanced remedies of attorney fees and costs and/or damages for the decedent's predeath pain and suffering. (See Welf. & Inst. Code, § 15657.05.)

If the plaintiff is seeking enhanced remedies against the individual's employer, also give CACI No. 3102A, *Employer Liability for Enhanced Remedies—Both Individual and Employer Defendants,* or CACI No. 3102B, *Employer Liability for Enhanced Remedies—Employer Defendant Only.*

The instructions in this series are not intended to cover every circumstance in which a plaintiff may bring a cause of action under the Elder Abuse and Dependent Adult Civil Protection Act.

Sources and Authority

- Enhanced Remedies for Abduction. Welfare and Institutions Code section 15657.05. ~~provides:~~

  ~~Where it is proven by clear and convincing evidence that an individual is liable for abduction, as defined in Section 15610.06, in addition to all other remedies otherwise provided by law:~~

  ~~(a)~~

  ~~(1) The court shall award to the plaintiff reasonable attorney's fees and costs. The term "costs" shall include, but is not limited to, costs of representing the abductee and his or her family in this state and any other state in any action related to the abduction and returning of the abductee to this state, as well as travel expenses for returning the abductee to this state and reasonable fees for the services of a conservator, if any, devoted to the litigation of a claim brought under this article.~~

  ~~(2) The award of attorney's fees shall be governed by the principles set forth in Section 15657.1.~~

  ~~(b) The limitations imposed by Section 377.34 of the Code of Civil Procedure on the damages recoverable shall not apply. However, the damages recovered shall not~~

~~exceed the damages permitted to be recovered pursuant to subdivision (b) of Section 3333.2 of the Civil Code.~~

~~(c) The standards set forth in subdivision (b) of Section 3294 of the Civil Code regarding the imposition of punitive damages on an employer based upon the acts of an employee shall be satisfied before any damages or attorney's fees permitted under this section may be imposed against an employer.~~

- "The purpose of the [Elder Abuse Act] is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect." (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33 [82 Cal.Rptr.2d 610, 971 P.2d 986].)

- "As amended in 1991, the Elder Abuse Act was designed to protect elderly and dependent persons from abuse, neglect, or abandonment. In addition to adopting measures designed to encourage reporting of abuse and neglect, the Act authorizes the court to award attorney fees to the prevailing plaintiffs and allows survivors to recover pain and suffering damages in cases of intentional and reckless abuse where the elder has died." (*Mack v. Soung* (2000) 80 Cal.App.4th 966, 971–972 [95 Cal.Rptr.2d 830], internal citations omitted.)

- " 'Liability' under section 15657 includes as an element 'causation,' which, as all elements of liability, must be proved by clear and convincing evidence for purposes of an award of attorney fees." (*Perlin v. Fountain View Management, Inc.* (2008) 163 Cal.App.4th 657, 664 [77 Cal.Rptr.3d 743].)

- "We reject plaintiffs' argument that a violation of the Act does not constitute an independent cause of action. Accordingly, plaintiffs' failure to obtain a verdict establishing causation—one element of liability—by clear and convincing evidence, precludes an award of attorney fees." (*Perlin, supra*, 163 Cal.App.4th at p. 666.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1686–1688

3112. "Dependent Adult" Explained (Welf. & Inst. Code, § 15610.23)

A "dependent adult" is a person between the ages of 18 and 64 years [*insert one of the following:***]**

> **[who has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights. This includes persons who have physical or developmental disabilities or whose physical or mental abilities have diminished because of age.]**
>
> **[who is admitted as an inpatient to [a/an] [***insert 24-hour health facility***].]**

New September 2003

Directions for Use

Read the alternative that is most appropriate to the facts of the case.

Sources and Authority

- "Dependent Adult" Defined. Welfare and Institutions Code section 15610.23. ~~provides:~~

  > ~~(a) "Dependent adult" means any person residing in this state between the ages of 18 and 64 years who has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights, including, but not limited to, persons who have physical or developmental disabilities, or whose physical or mental abilities have diminished because of age.~~
  >
  > ~~(b) "Dependent adult" includes any person between the ages of 18 and 64 years who is admitted as an inpatient to a 24-hour health facility, as defined in Sections 1250, 1250.2, and 1250.3 of the Health and Safety Code.~~

- "Developmentally Disabled Person" Defined. Welfare and Institutions Code section 15610.25. ~~provides:~~

  > ~~" 'Developmentally disabled person' means a person with a developmental disability specified by or as described in subdivision (a) of Section 4512."~~

Secondary Sources

California Elder Law Litigation (Cont.Ed.Bar) § 6.22

1 California Forms of Pleading and Practice, Ch. 5, *Abuse of Minors and Elderly*, § 5.31 (Matthew Bender)

3115. "Oppression" Explained

"Oppression" means that [[*name of individual defendant***]'s/[***name of employer defendant***]'s employee 's] conduct was despicable and subjected [***name of plaintiff/decedent***] to cruel and unjust hardship in knowing disregard of [his/her] rights.**

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

New September 2003; Revised October 2008

Directions for Use

If the individual responsible for the elder abuse is a defendant in the case, use "[*name of individual defendant*]'s". If only the individual's employer is a defendant, use "[*name of employer defendant*]'s employee's."

Sources and Authority

- "Oppression" for Punitive Damages. Civil Code section 3294(c)(2). ~~provides: " 'Oppression' means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights."~~

- "Used in its ordinary sense, the adjective 'despicable' is a powerful term that refers to circumstances that are 'base,' 'vile,' or 'contemptible.' As amended to include this word, the statute plainly indicates that absent an intent to injure the plaintiff, 'malice' requires more than a 'willful and conscious' disregard of the plaintiffs' interests. The additional component of 'despicable conduct' must be found." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 725 [34 Cal.Rptr.2d 898, 882 P.2d 894], internal citations omitted.)

Secondary Sources

1 California Forms of Pleading and Practice, Ch. 5, *Abuse of Minors and Elders*, § 5.33[1] (Matthew Bender)

3116. "Fraud" Explained

"Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact with the intention of depriving [*name of plaintiff/decedent***] of property or of a legal right or otherwise to cause [***name of plaintiff/decedent***] injury.**

New September 2003; Revised October 2008

Sources and Authority

- "Fraud" for Punitive Damages. Civil Code section 3294(c)(3). ~~provides: " 'Fraud' means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury."~~

- "Although neglect that is fraudulent may be sufficient to trigger the enhanced remedies available under the Elder Abuse Act, without detrimental reliance, there is no fraud." (*Carter v. Prime Healthcare Paradise Valley LLC* (2011) 198 Cal.App.4th 396, 409 [129 Cal.Rptr.3d 895], internal citations omitted.)

Secondary Sources

1 California Forms of Pleading and Practice, Ch. 5, *Abuse of Minors and Elders*, § 5.33[4] (Matthew Bender)

17 California Forms of Pleading and Practice, Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake*, § 215.70 (Matthew Bender)

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

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

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

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

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

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

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

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

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

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

   [*or***]**

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

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

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

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

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

Directions for Use

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

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

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

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

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

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

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

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

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

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

Sources and Authority

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

- "Express Warranty" Defined. Civil Code section 1791.2. ~~provides:~~

  ~~(a) "Express warranty" means:~~

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

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

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

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

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

- Replacement or Reimbursement After Reasonable Number of Repair Attempts. Civil Code section 1793.2(d). ~~provides, in part:~~

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

  ~~(2) If the manufacturer or its representative in this state is unable to service or repair a~~

~~new motor vehicle ... to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either promptly replace the new motor vehicle ... or promptly make restitution to the buyer ... . However, the buyer shall be free to elect restitution in lieu of replacement, and in no event shall the buyer be required to accept a replacement vehicle.~~

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

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

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

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

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

- Tolling of Warranty Period for Nonconforming Goods. Civil Code section 1795.6~~. provides, in part:~~

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

~~the buyer is notified the goods are repaired or serviced and are available for the buyer's possession or (3) the buyer is notified that repairs or service is completed, if repairs or service is made at the buyer's residence.~~

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

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

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

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

- The act does not require a consumer to give a manufacturer, in addition to its local representative, at least one opportunity to fix a problem. Regarding previous repair efforts entitling an automobile buyer to reimbursement, "[t]he legislative history of [Civil Code section 1793.2] demonstrates

beyond any question that ... a differentiation between manufacturer and local representative is unwarranted." (*Ibrahim v. Ford Motor Co.* (1989) 214 Cal.App.3d 878, 888 [263 Cal.Rptr. 64].)

Secondary Sources

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

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

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

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

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

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

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

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

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

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

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

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

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

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

   [*or***]**

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

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

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

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

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

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

Directions for Use

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

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

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

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

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

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

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

Sources and Authority

- Song-Beverly Consumer Warranty Act: Right of Action. Civil Code section 1794(a).
- ~~Under~~ Extension of Warranty Period. Civil Code section 1793.1(a)(2), if the warranty period has been extended, it cannot expire any sooner than 60 days after the last repair of a claimed defect.
- ~~Civil Code section 1794(a) provides, in part: "Any buyer of consumer goods who is damaged by a failure to comply with any obligation under this [Act] or under an ... express warranty ... may bring an action for the recovery of damages and other legal and equitable relief."~~
- Song-Beverly Does Not Preempt Commercial Code. Civil Code section 1790.3~~, provides: "The provisions of [the Song-Beverly Consumer Warranty Act] shall not affect the rights and obligations of parties determined by reference to the Commercial Code except that, where the provisions of the Commercial Code conflict with the rights guaranteed to buyers of consumer goods under the provisions of [the act], the provisions of [the act] shall prevail."~~
- "Express Warranty" Defined. Civil Code section 1791.2~~. provides:~~

~~(a) "Express warranty" means:~~

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

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

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

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

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

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

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

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

~~manufacturer or its service and repair facility shall constitute return of the goods for purposes of this section."~~

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

- Tolling of Warranty Period for Nonconforming Goods. Civil Code section 1795.6. ~~provides, in part:~~

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

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

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

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

- "A plaintiff pursuing an action under the Act has the burden to prove that (1) the vehicle had a nonconformity covered by the express warranty that substantially impaired the use, value or safety of the vehicle (the nonconformity element); (2) the vehicle was presented to an authorized representative of the manufacturer of the vehicle for repair (the presentation element); and (3) the manufacturer or his representative did not repair the nonconformity after a reasonable number of repair attempts (the failure to repair element)." (*Donlen v. Ford Motor Co.* (2013) 217 Cal.App.4th 138, 152 [158 Cal.Rptr.3d 180].)

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

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

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

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

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

- The act does not require a consumer to give a manufacturer, in addition to its local representative, at least one opportunity to fix a problem. Regarding previous repair efforts entitling an automobile buyer to reimbursement, "[t]he legislative history of [Civil Code section 1793.2] demonstrates

beyond any question that ... a differentiation between manufacturer and local representative is unwarranted." (*Ibrahim v. Ford Motor Co.* (1989) 214 Cal.App.3d 878, 888 [263 Cal.Rptr. 64].)

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

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

- "[Defendant] argues allowing evidence of postwarranty repairs extends the term of its warranty to whatever limit an expert is willing to testify. We disagree. Evidence that a problem was fixed for a period of time but reappears at a later date is relevant to determining whether a fundamental problem in the vehicle was ever resolved. Indeed, that a defect first appears after a warranty has expired does not necessarily mean the defect did not exist when the product was purchased. Postwarranty repair evidence may be admitted on a case-by-case basis where it is relevant to showing the vehicle was not repaired to conform to the warranty during the warranty's existence." (*Donlen, supra,* 217 Cal.App.4th at p. 149, internal citations omitted.)

Secondary Sources

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

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

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

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

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

3202. "Repair Opportunities" Explained

Each time the [*consumer good/new motor vehicle***] was given to [***name of defendant***] [or its authorized repair facility] for repair counts as an opportunity to repair, even if [it/they] did not do any repair work.**

In determining whether [*name of defendant***] had a reasonable number of opportunities to fix the [***consumer good/new motor vehicle***], you should consider all the circumstances surrounding each repair visit. [***Name of defendant***] [or its authorized repair facility] must have been given at least two opportunities to fix the [***consumer good/new motor vehicle***] [unless only one repair attempt was possible because the [***consumer good/new motor vehicle***] was later destroyed or because [***name of defendant***] [or its authorized repair facility] refused to attempt the repair].**

New September 2003; Revised February 2005, December 2005, June 2006

Directions for Use

This instruction applies only to claims under Civil Code section 1793.2(d) and not to other claims, such as claims for breach of the implied warranty of merchantability. (See *Mocek v. Alfa Leisure, Inc.* (2003) 114 Cal.App.4th 402, 406–407 [7 Cal.Rptr.3d 546].)

The final bracketed portion of the last sentence of this instruction is intended for use only in cases where the evidence shows that only one repair attempt was possible because of the subsequent malfunction and destruction of the vehicle or where the defendant refused to attempt the repair. (See *Bishop v. Hyundai Motor America* (1996) 44 Cal.App.4th 750 [52 Cal.Rptr.2d 134]; *Gomez v. Volkswagen of America, Inc.* (1985) 169 Cal.App.3d 921 [215 Cal.Rptr. 507].)

Sources and Authority

- Replacement or Reimbursement After Reasonable Number of Repair Attempts. Civil Code section 1793.2(d). ~~provides, in part:~~
  ~~(1) Except as provided in paragraph (2), if the manufacturer or its representative in this state does not service or repair the goods to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either replace the goods or reimburse the buyer. …~~

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

- "[T]he only affirmative step the Act imposes on consumers is to 'permit[] the manufacturer a reasonable *opportunity* to repair the vehicle.' Whether or not the manufacturer's agents choose to take advantage of the opportunity, or are unable despite that opportunity to isolate and make an effort to repair the problem, are matters for which the consumer is not responsible." (*Oregel v. American Isuzu*

Motors, Inc. (2001) 90 Cal.App.4th 1094, 1103–1104 [109 Cal.Rptr.2d 583], internal citation omitted.)

- "Section 1793.2(d) requires the manufacturer to afford the specified remedies of restitution or replacement if that manufacturer is unable to repair the vehicle 'after a reasonable number of attempts.' 'Attempts' is plural. The statute does not require the manufacturer to make restitution or replace a vehicle if it has had only one opportunity to repair that vehicle." (*Silvio v. Ford Motor Co.* (2003) 109 Cal.App.4th 1205, 1208 [135 Cal.Rptr.2d 846].)

Secondary Sources

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

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

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

3203. Reasonable Number of Repair Opportunities—Rebuttable Presumption (Civ. Code, § 1793.22(b))

The number of opportunities to make repairs is presumed to be reasonable if [*name of plaintiff***] proves that within [18 months from delivery of the [***new motor vehicle***] to [him/her/it]] [or] [the first 18,000 miles] [***insert option A, B, and/or C:***]**

[A.

1. **The vehicle was made available to [***name of defendant***] [or its authorized repair facility] for repair of the same substantially impairing defect two or more times; [and]**

2. **The defect resulted in a condition that was likely to cause death or serious bodily injury if the vehicle were driven; [and]**

3. **[[***Name of plaintiff***] directly notified [***name of manufacturer***] in writing about the need to repair the defect;] [or]]**

[B.

1. **The vehicle was made available to [***name of defendant***] [or its authorized repair facility] for repair of the same substantially impairing defect four or more times; [and]**

2. **[[***Name of plaintiff***] directly notified [***name of manufacturer***] in writing about the need to repair the defect;] [or]]**

[C. The vehicle was out of service for repair of substantially impairing defects by [*name of defendant***] [or its authorized repair facility] for more than 30 days.]**

If [*name of plaintiff***] has proved these facts, then the number of opportunities to make repairs was reasonable unless [***name of defendant***] proves that under all the circumstances [***name of defendant***] [or its authorized repair facility] was not given a reasonable opportunity to repair the defect.**

[The 30-day limit for repairing defects will be lengthened if [*name of defendant***] proves that repairs could not be made because of conditions beyond the control of [***name of defendant***] or its authorized repair facility.]**

New September 2003; Revised February 2005

Directions for Use

This instruction should not be given if none of the enumerated situations apply to the plaintiff's case. (*Jiagbogu v. Mercedes-Benz USA* (2004) 118 Cal.App.4th 1235, 1245 [13 Cal.Rptr.3d 679].)

Note that the factfinder's inquiry should be focused on overall reasonableness of the opportunities plaintiff gave defendant to make repairs. Therefore, while satisfying the rebuttable presumption (without having it overcome by defendant) is one way for plaintiff to satisfy the reasonable opportunities requirement, he or she may do so in other ways instead. Likewise, because the statutory presumption is rebuttable, defendant is allowed an opportunity to overcome it.

The rebuttable presumption concerning the number of repair attempts applies only to new motor vehicles-see the Tanner Consumer Protection Act. (Civ. Code, § 1793.22(b).)

The bracketed language in the first two optional paragraphs concerning notice made directly to the manufacturer are applicable only if "the manufacturer has clearly and conspicuously disclosed to the buyer, with the warranty or the owner's manual, the provisions of [the Tanner Consumer Protection Act] and that of [Civil Code section 1793.2(d)], including the requirement that the buyer must notify the manufacturer directly." (See Civ. Code, § 1793.22(b)(3).) This is a matter that the judge should determine ahead of time as an issue of law.

Sources and Authority

- Replacement or Reimbursement After Reasonable Number of Repair Attempts. Civil Code section 1793.2(d)(2). ~~provides, in part: "If the manufacturer or its representative in this state is unable to service or repair a new motor vehicle ... to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either promptly replace the new motor vehicle ... or promptly make restitution to the buyer."~~

- Reasonable Number of Repair Opportunities. Civil Code section 1793.22(b).

- "We believe ... that the only affirmative step the Act imposes on consumers is to 'permit[] the manufacturer a reasonable *opportunity* to repair the vehicle.' Whether or not the manufacturer's agents choose to take advantage of the opportunity, or are unable despite that opportunity to isolate and make an effort to repair the problem, are matters for which the consumer is not responsible." (*Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1103-1104 [109 Cal.Rptr.2d 583], internal citations and footnote omitted.)

- ~~Civil Code section 1793.22(b) provides, in part:~~

  ~~It shall be presumed that a reasonable number of attempts have been made to conform a new motor vehicle to the applicable express warranties if, within 18 months from delivery to the buyer or 18,000 miles on the odometer of the vehicle, whichever occurs first, one or more of the following occurs:~~

  ~~(1) The same nonconformity results in a condition that is likely to cause death or serious bodily injury if the vehicle is driven and the nonconformity has been subject to repair two or more times by the manufacturer or its agents, and the buyer or lessee has at least once directly notified the manufacturer of the need for the repair of the nonconformity.~~

~~(2) The same nonconformity has been subject to repair four or more times by the manufacturer or its agents and the buyer has at least once directly notified the manufacturer of the need for the repair of the nonconformity.~~

~~(3) The vehicle is out of service by reason of repair of nonconformities by the manufacturer or its agents for a cumulative total of more than 30 calendar days since delivery of the vehicle to the buyer. The 30-day limit shall be extended only if repairs cannot be performed due to conditions beyond the control of the manufacturer or its agents. The buyer shall be required to directly notify the manufacturer pursuant to paragraphs (1) and (2) only if the manufacturer has clearly and conspicuously disclosed to the buyer, with the warranty or the owner's manual, the provisions of this section and that of subdivision (d) of Section 1793.2, including the requirement that the buyer must notify the manufacturer directly pursuant to paragraphs (1) and (2). The notification, if required, shall be sent to the address, if any, specified clearly and conspicuously by the manufacturer in the warranty or owner's manual. This presumption shall be a rebuttable presumption affecting the burden of proof, and it may be asserted by the buyer in any civil action."~~

Secondary Sources

2 California UCC Sales & Leases (Cont.Ed.Bar) Prelitigation Remedies, § 17.10

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

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

5 California Civil Practice: Business Litigation (Thomson West) § 53:27

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

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

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

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

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

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

New December 2011; Revised December 2012

Directions for Use

Give this instruction for the defendant's alleged breach of Civil Code section 1793.2(b), which requires that repairs be commenced within a reasonable time and finished within 30 days unless the buyer otherwise agrees in writing. This instruction assumes that the statute contains two separate requirements, one for starting repairs and one for finishing them, either of which would be a violation.

The damages recoverable for unreasonable delay in repairs are uncertain. A violation of Civil Code section 1793.2(b) would not entitle the consumer to the remedies of restitution or replacement for a consumer good or new motor vehicle as provided in section 1793.2(d). Before those remedies are available, the manufacturer is entitled to a reasonable number of repair opportunities. (*Gavaldon v.DaimlerChrysler Corp.* (2004) 32 Cal.4th 1246, 1262 [13 Cal.Rptr.3d 793, 90 P.3d 752]; see Civ. Code, §§ 1793.2(d), 1793.22.) Commercial Code remedies that are generally available under Song-Beverly permit the buyer to cancel the sale and recover the price paid, or to accept the goods and recover diminution in value. (See Civ. Code, § 1794(b); Cal. U. Comm. Code, §§ 2711–2715.) It seems questionable, however, that a buyer could cancel the sale and get the purchase price back solely for delay in completing repairs, particularly if the repairs were ultimately successful.

Delay caused by conditions beyond the control of the defendant extends the 30-day requirement. (Civ. Code, § 1793.2(b).) It would most likely be the defendant's burden to prove that conditions beyond its control caused the delay.

Sources and Authority

- Song-Beverly Consumer Warranty Act: Right of Action. Civil Code section 1794(a).

- Repairs to Start Within Reasonable Time. Civil Code section 1793.2(b). ~~provides as follows: "Where those service and repair facilities are maintained in this state and service or repair of the goods is necessary because they do not conform with the applicable express warranties, service and repair shall be commenced within a reasonable time by the manufacturer or its representative in this state. Unless the buyer agrees in writing to the contrary, the goods shall be serviced or repaired so as to conform to the applicable warranties within 30 days. Delay caused by conditions beyond the control of the manufacturer or its representatives shall serve to extend this 30-day requirement. Where delay arises, conforming goods shall be tendered as soon as possible following termination of the condition giving rise to the delay."~~

- ~~Civil Code section 1794(a) provides as follows: "Any buyer of consumer goods who is damaged by a failure to comply with any obligation under this chapter or under an implied or express warranty or service contract may bring an action for the recovery of damages and other legal and equitable relief."~~

- "[T]he fifth cause of action in each complaint clearly stated a cause of action under Civil Code section 1794 … . Plaintiff had pleaded that he was such a buyer who was injured by a 'willful' violation of Civil Code section 1793.2, subdivision (b) which in pertinent part requires that with respect to consumer goods sold in this state for which the manufacturer has made an express warranty and service and repair facilities are maintained in this state (undisputed herein) and 'repair of the goods is necessary because they do not conform with the applicable express warranties, service and repair shall be commenced within a reasonable time by the manufacturer or its representative.' " (*Gomez v. Volkswagen of Am.* (1985) 169 Cal.App.3d 921, 925 [215 Cal.Rptr. 507], footnote omitted.)

Secondary Sources

4 Witkin, Summary of California Law (10th ed. 2005) Sales, § 317 et seq.

44 California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties*, §§ 502.43, 502.161 (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales*, § 206.103 (Matthew Bender)

30 California Legal Forms, Ch. 92, *Service Contracts*, § 92.52 (Matthew Bender)

3206. Breach of Disclosure Obligations—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] violated California's motor vehicle warranty laws. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [bought/leased] a [***motor vehicle***] from [***name of defendant***];**

2. **[That the vehicle was returned by a previous [buyer/lessee] to [***name of manufacturer***] under [California/[***name of state***]]'s motor vehicle warranty laws; and]**

   [*or***]**

   [That [*name of defendant***] knew or should have known that the vehicle had been returned to the manufacturer under [California/[***name of state***]]'s motor vehicle warranty laws; and]**

3. **[That before the [sale/leasing], [***name of defendant***] failed to tell [***name of plaintiff***], in clear and simple language, about the nature of the defect experienced by the original [buyer/lessee] of the vehicle; [or]]**

   [That before the [sale/leasing] to [*name of plaintiff***], the defect experienced by the vehicle's original [buyer/lessee] was not fixed; [or]]**

   [That [*name of defendant***] did not provide a written warranty to [***name of plaintiff***] that the vehicle would be free for one year of the defect experienced by the vehicle's original [buyer/lessee].]**

New September 2003; Revised June 2011; Renumbered from CACI No. 3230 June 2012

Directions for Use

Use the first bracketed option in element 2 if the defendant is the manufacturer. Otherwise, use the second option.

This instruction is based on the disclosure and warranty obligations set forth in Civil Code section 1793.22(f). The instruction may be modified for use with claims involving the additional disclosure obligations set forth in California's Automotive Consumer Notification Act. (Civ. Code, §§ 1793.23, 1793.24.)

Sources and Authority

- Song-Beverly Consumer Warranty Act: Right of Action. Civil Code section 1794(a). Civil Code section 1794(a).

- Notice to Buyer on Resale of Nonconforming Motor Vehicle. Civil Code section 1793.22(f)(1). ~~provides, in part: "[N]o person shall sell, either at wholesale or retail, lease, or transfer a motor vehicle transferred by a buyer or lessee to a manufacturer pursuant to paragraph (2) of subdivision (d) of Section 1793.2 or a similar statute of any other state [i.e., a "lemon law" buyback], unless the nature of the nonconformity experienced by the original buyer or lessee is clearly and conspicuously disclosed to the prospective buyer, lessee, or transferee, the nonconformity is corrected, and the manufacturer warrants to the new buyer, lessee, or transferee in writing for a period of one year that the motor vehicle is free of that nonconformity."~~

- ~~Civil Code section 1794(a) provides, in part: "Any buyer of consumer goods who is damaged by a failure to comply with any obligation under this [act] ... may bring an action for the recovery of damages and other legal and equitable relief."~~

- Automotive Consumer Notification Act. Civil Code section 1793.23. ~~provides, in part:~~

  ~~(b) This section and Section 1793.24 shall be known, and may be cited as, the Automotive Consumer Notification Act.~~

  ~~(c) Any manufacturer who reacquires or assists a dealer or lienholder to reacquire a motor vehicle registered in this state, any other state, or a federally administered district shall, prior to any sale, lease, or transfer of the vehicle in this state, or prior to exporting the vehicle to another state for sale, lease, or transfer if the vehicle was registered in this state and reacquired pursuant to paragraph (2) of subdivision (d) of Section 1793.2, cause the vehicle to be retitled in the name of the manufacturer, request the Department of Motor Vehicles to inscribe the ownership certificate with the notation "Lemon Law Buyback," and affix a decal to the vehicle in accordance with Section 11713.12 of the Vehicle Code if the manufacturer knew or should have known that the vehicle is required by law to be replaced, accepted for restitution due to the failure of the manufacturer to conform the vehicle to applicable warranties pursuant to paragraph (2) of subdivision (d) of Section 1793.2, or accepted for restitution by the manufacturer due to the failure of the manufacturer to conform the vehicle to warranties required by any other applicable law of the state, any other state, or federal law.~~

  ~~(d) Any manufacturer who reacquires or assists a dealer or lienholder to reacquire a motor vehicle in response to a request by the buyer or lessee that the vehicle be either replaced or accepted for restitution because the vehicle did not conform to express warranties shall, prior to the sale, lease, or other transfer of the vehicle, execute and deliver to the subsequent transferee a notice and obtain the transferee's written acknowledgment of a notice, as prescribed by Section 1793.24.~~

  ~~(e) Any person, including any dealer, who acquires a motor vehicle for resale and knows or should have known that the vehicle was reacquired by the vehicle's manufacturer in response to a request by the last retail owner or lessee of the vehicle that it be replaced or accepted for restitution because the vehicle did not conform to express warranties shall, prior to the sale, lease, or other transfer,~~

~~execute and deliver to the subsequent transferee a notice and obtain the transferee's written acknowledgment of a notice, as prescribed by Section 1793.24.~~

~~(f) Any person, including any manufacturer or dealer, who sells, leases, or transfers ownership of a motor vehicle when the vehicle's ownership certificate is inscribed with the notation "Lemon Law Buyback" shall, prior to the sale, lease, or ownership transfer of the vehicle, provide the transferee with a disclosure statement signed by the transferee that states:~~

~~"THIS VEHICLE WAS REPURCHASED BY ITS MANUFACTURER DUE TO A DEFECT IN THE VEHICLE PURSUANT TO CONSUMER WARRANTY LAWS. THE TITLE TO THIS VEHICLE HAS BEEN PERMANENTLY BRANDED WITH THE NOTATION 'LEMON LAW BUYBACK'."~~

~~(g) The disclosure requirements in subdivisions (d), (e), and (f) are cumulative with all other consumer notice requirements and do not relieve any person, including any dealer or manufacturer, from complying with any other applicable law, including any requirement of subdivision (f) of Section 1793.22.~~

Secondary Sources

4 Witkin, Summary of California Law (10th ed. 2005) Sales, § 320

8 California Forms of Pleading and Practice, Ch. 91, *Automobiles: Actions Involving Defects and Repairs*, § 91.19 (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales*, § 206.08 et seq. (Matthew Bender)

30 California Legal Forms: Transaction Guide, Ch. 92, *Service Contracts*, § 92.53 (Matthew Bender)

5 California Civil Practice: Business Litigation, § 53:29 (Thomson Reuters West)

3211. Breach of Implied Warranty of Fitness for a Particular Purpose—Essential Factual Elements

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[*Name of plaintiff***] claims that [he/she] was harmed because the [***consumer good***] was not suitable for [his/her] intended use. This is known as a "breach of an implied warranty." To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] bought a[n] [***consumer good***] [from/manufactured by/distributed by] [***name of defendant***];**

2. **That, at the time of purchase, [***name of defendant***] knew or had reason to know that [***name of plaintiff***] intended to use the [***consumer good***] for a particular purpose;**

3. **That, at the time of purchase, [***name of defendant***] knew or had reason to know that [***name of plaintiff***] was relying on [his/her/its] skill and judgment to select or provide a [***consumer good***] that was suitable for that particular purpose;**

4. **That [***name of plaintiff***] justifiably relied on [***name of defendant***]'s skill and judgment; and**

5. **That the [***consumer good***] was not suitable for the particular purpose.**

New September 2003

Directions for Use

If remedies are sought under the Commercial Code, the plaintiff may be required to prove reasonable notification within a reasonable time. (Cal. U. Com. Code, § 2607(3).) If the court determines such proof is necessary, add the following element to this instruction:

> That [*name of plaintiff*] took reasonable steps to notify [*name of defendant*] within a reasonable time that the [*consumer good*] was not suitable for its intended use;

See also CACI No. 1243, *Notification/Reasonable Time.*

If appropriate to the facts, add: "It is not necessary for [*name of plaintiff*] to prove the cause of a defect of the [*consumer good*]." The Song-Beverly Consumer Warranty Act does not require a consumer to prove the cause of the defect or failure, only that the consumer good "did not conform to the express warranty." (See *Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1102, fn. 8 [109 Cal.Rptr.2d 583].)

In addition to sales of consumer goods, the Consumer Warranty Act applies to leases of consumer goods-see Civil Code sections 1791(g)-(i) and 1795.4. This instruction may be modified for use in cases involving the implied warranty of fitness in a lease of consumer goods.

Sources and Authority

- "Implied Warranty of Finness" Defined. Civil Code section 1791.1(b). ~~provides, in part: " 'Implied warranty of fitness' means ... that when the retailer, distributor, or manufacturer has reason to know any particular purpose for which the consumer goods are required, and further, that the buyer is relying on the skill and judgment of the seller to select and furnish suitable goods, then there is an implied warranty that the goods shall be fit for such purpose."~~

- Song-Beverly Consumer Warranty Act: Right of Action. Civil Code section 1794(a). Civil Code section 1794(a).
- Manufacturer's Implied Warranty of Fitness. Civil Code section 1792.1. ~~provides: "Every sale of consumer goods that are sold at retail in this state by a manufacturer who has reason to know at the time of the retail sale that the goods are required for a particular purpose and that the buyer is relying on the manufacturer's skill or judgment to select or furnish suitable goods shall be accompanied by such manufacturer's implied warranty of fitness."~~

- Retailer's or Distributor's Implied Warranty of Fitness. Civil Code section 1792.2(a). ~~provides: "Every sale of consumer goods that are sold at retail in this state by a retailer or distributor who has reason to know at the time of the retail sale that the goods are required for a particular purpose, and that the buyer is relying on the retailer's or distributor's skill or judgment to select or furnish suitable goods shall be accompanied by such retailer's or distributor's implied warranty that the goods are fit for that purpose."~~

- Damages for Breach of Warranty. Commercial Code section 2714(2). ~~provides: "The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount."~~

- "The Consumer Warranty Act makes ... an implied warranty [of fitness for a particular purpose] applicable to retailers, distributors, and manufacturers. ... An implied warranty of fitness for a particular purpose arises only where (1) the purchaser at the time of contracting intends to use the goods for a particular purpose, (2) the seller at the time of contracting has reason to know of this particular purpose, (3) the buyer relies on the seller's skill or judgment to select or furnish goods suitable for the particular purpose, and (4) the seller at the time of contracting has reason to know that the buyer is relying on such skill and judgment." (*Keith v. Buchanan* (1985) 173 Cal.App.3d 13, 25 [220 Cal.Rptr. 392], internal citations omitted.)

- " 'A "particular purpose" differs from the ordinary purpose for which the goods are used in that it envisages a specific use by the buyer which is peculiar to the nature of his business whereas the ordinary purposes for which goods are used are those envisaged in the concept of merchantability and go to uses which are customarily made of the goods in question.' " (*American Suzuki Motor Corp. v. Superior Court* (1995) 37 Cal.App.4th 1291, 1295, fn. 2 [44 Cal.Rptr.2d 526], internal citation omitted.)

- "The reliance elements are important to the consideration of whether an implied warranty of fitness for a particular purpose exists. ... The major question in determining the existence of an implied warranty of fitness for a particular purpose is the reliance by the buyer upon the skill and judgment of the seller to select an article suitable for his needs." (*Keith, supra*, 173 Cal.App.3d at p. 25, internal citations omitted.)

- Civil Code section 1792.3 provides, in part: "[N]o implied warranty of fitness shall be waived, except in the case of a sale of consumer goods on an 'as is' or 'with all faults' basis where the provisions of this [act] affecting 'as is' or 'with all faults' sales are strictly complied with."

- "The question of reimbursement or replacement is relevant only under [Civil Code] section 1793.2. ... [T]his section applies only when goods cannot be made to conform to the 'applicable *express* warranties.' It has no relevance to the implied warranty of merchantability." (*Music Acceptance Corp. v. Lofing* (1995) 32 Cal.App.4th 610, 620 [39 Cal.Rptr.2d 159].)

- Civil Code section 1791.1(d) provides, in part: "Any buyer of consumer goods injured by a breach of ... the implied warranty of fitness has the remedies provided in Chapter 6 (commencing with Section 2601) and Chapter 7 (commencing with Section 2701) of Division 2 of the Commercial Code, and, in any action brought under such provisions, [Civil Code] Section 1794 ... shall apply."

- "The Song-Beverly Act incorporates the provisions of [Commercial Code] sections 2314 and 2315. It 'supplements, rather than supersedes, the provisions of the California Uniform Commercial Code' by broadening a consumer's remedies to include costs, attorney's fees, and civil penalties." (*American Suzuki Motor Corp., supra*, 37 Cal.App.4th at p. 1295, fn. 2, internal citation omitted.)

- Civil Code section 1794(b) provides, in part:
  The measure of the buyer's damages in an action under this section shall include the following:

  (1) Where the buyer has rightfully rejected or justifiably revoked acceptance of the goods or has exercised any right to cancel the sale, Sections 2711, 2712, and 2713 of the Commercial Code shall apply.

  (2) Where the buyer has accepted the goods, Sections 2714 and 2715 of the Commercial Code shall apply, and the measure of damages shall include the cost of repairs necessary to make the goods conform.

- Commercial Code section 2714(1) provides: "Where the buyer has accepted goods and given notification (subdivision (3) of Section 2607) he or she may recover, as damages for any nonconformity of tender, the loss resulting in the ordinary course of events from the seller's breach as determined in any manner that is reasonable."

- "The notice requirement of [former Civil Code] section 1769 ... is not an appropriate one for the court to adopt in actions by injured consumers against manufacturers with whom they have not dealt. As between the immediate parties to the sale [the notice requirement] is a sound commercial rule, designed to protect the seller against unduly delayed claims for damages. As applied to personal injuries, and notice to a remote seller, it becomes a booby-trap for the unwary.' " (*Greenman v. Yuba*

Power Products, Inc. (1963) 59 Cal.2d 57, 61 [27 Cal.Rptr. 697, 377 P.2d 897], internal citations omitted.)

Secondary Sources

4 Witkin, Summary of California Law (10th ed. 2005) Sales, §§ 72, 73

1 California UCC Sales & Leases (Cont.Ed.Bar) Warranties, §§ 3.33–3.40

2 California UCC Sales & Leases (Cont.Ed.Bar) Leasing of Goods, §§ 19.31–19.32

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.31[2][b] (Matthew Bender)

44 California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties*, § 502.51 (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales*, § 206.64 et seq. (Matthew Bender)

5 California Civil Practice: Business Litigation ~~(Thomson West)~~ §§ 53:5–53:7 (Thomson Reuters

3212. Duration of Implied Warranty

An implied warranty is in effect for one year after the sale of the [*consumer good***], unless a shorter period is stated in a writing that comes with the [***consumer good***], provided that the shorter period is reasonable. In no event will an implied warranty be in effect for less than 60 days.**

[The time period of an implied warranty is lengthened by the number of days that the [*consumer good***] was made available by [***name of plaintiff***] for repairs under the warranty, including any delays caused by circumstances beyond [***name of plaintiff***]'s control].**

New September 2003

Directions for Use

If the consumer goods at issue are not new, the instruction must be modified to reflect the shorter implied warranty period provided in Civil Code section 1795.5(c) (i.e., no less than 30 days but no more than three months).

Sources and Authority

- Duration of Implied Warranties. Civil Code section 1791.1(c). ~~provides: "The duration of the implied warranty of merchantability and where present the implied warranty of fitness shall be coextensive in duration with an express warranty which accompanies the consumer goods, provided the duration of the express warranty is reasonable; but in no event shall such implied warranty have a duration of less than 60 days nor more than one year following the sale of new consumer goods to a retail buyer. Where no duration for an express warranty is stated with respect to consumer goods, or parts thereof, the duration of the implied warranty shall be the maximum period prescribed above."~~

- Tolling of Warranty Period for Nonconforming Goods. Civil Code section 1795.6. ~~provides, in part:~~

  ~~(a) Every warranty period relating to an implied ... warranty accompanying a sale or consignment for sale of consumer goods selling for fifty dollars ($50) or more shall automatically be tolled for the period from the date upon which the buyer either (1) delivers nonconforming goods to the manufacturer or seller for warranty repairs or service or (2), pursuant to subdivision (c) of Section 1793.2 or Section 1793.22, notifies the manufacturer or seller of the nonconformity of the goods up to, and including, the date upon which (1) the repaired or serviced goods are delivered to the buyer, (2) the buyer is notified the goods are repaired or serviced and are available for the buyer's possession or (3) the buyer is notified that repairs or service is completed, if repairs or service is made at the buyer's residence.~~

  ~~(b) Notwithstanding the date or conditions set for the expiration of the warranty period, such warranty period shall not be deemed expired if ... : (1) after the buyer has satisfied the requirements of subdivision (a), the warranty repairs or service has~~

~~not been performed due to delays caused by circumstances beyond the control of the buyer or (2) the warranty repairs or service performed upon the nonconforming goods did not remedy the nonconformity for which such repairs or service was performed and the buyer notified the manufacturer or seller of this failure within 60 days after the repairs or service was completed. When the warranty repairs or service has been performed so as to remedy the nonconformity, the warranty period shall expire in accordance with its terms, including any extension to the warranty period for warranty repairs or service.~~

- Distributor or Seller of Used Consumer Goods. Civil Code section 1795.5~~. provides, in part: "[T]he obligation of a distributor or retail seller of used consumer goods in a sale in which an express warranty is given shall be the same as that imposed on manufacturers under [the act] except: ... [t]he duration of the implied warranty of merchantability and where present the implied warranty of fitness with respect to used consumer goods sold in this state, where the sale is accompanied by an express warranty, shall be coextensive in duration with an express warranty which accompanies the consumer goods, provided the duration of the express warranty is reasonable, but in no event shall such implied warranties have a duration of less than 30 days nor more than three months following the sale of used consumer goods to a retail buyer. Where no duration for an express warranty is stated with respect to such goods, or parts thereof, the duration of the implied warranties shall be the maximum period prescribed above."~~

- "On appeal, [defendants] concede that the duration provision is not a statute of limitations and that the applicable statute of limitations is four years. They argue, however, that the judgment can be affirmed on other grounds. Among other arguments, they contend that the duration provision of the Song-Beverly Act should be interpreted as barring an action for breach of the implied warranty of merchantability when the purchaser fails to discover and report the defect to the seller within the time period specified in that provision. We reject this argument because the plain language of the statute, particularly in light of the consumer protection policies supporting the Song-Beverly Act, make clear that the statute merely creates a limited, prospective duration for the implied warranty of merchantability; it does not create a deadline for discovering latent defects or for giving notice to the seller." (*Mexia v. Rinker Boat Co., Inc.* (2009) 174 Cal.App.4th 1297, 1301 [95 Cal.Rptr.3d 285].)

Secondary Sources

4 Witkin, Summary of California Law (10th ed. 2005) Sales, § 325

1 California UCC Sales & Leases (Cont.Ed.Bar) Warranties, § 3.17

44 California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties*, §§ 502.51-502.52 (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales*, § 206.117 (Matthew Bender)

5 California Civil Practice: Business Litigation ~~(Thomson West)~~ § 53:7 (Thomson Reuters)

3220. Affirmative Defense—Unauthorized or Unreasonable Use

[*Name of defendant***] is not responsible for any harm to [***name of plaintiff***] if [***name of defendant***] proves that any [defect[s] in the [***consumer good***]] [failure to match any [written/implied] warranty] [was/were] caused by unauthorized or unreasonable use of the [***consumer good***] after it was sold.**

New September 2003; Revised February 2005

Sources and Authority

- Unauthorized or Unreasonable Use. Civil Code section 1794.3. ~~provides: "The provisions of this [act] shall not apply to any defect or nonconformity in consumer goods caused by the unauthorized or unreasonable use of the goods following sale."~~

Secondary Sources

4 Witkin, Summary of California Law (10th ed. 2005) Sales, §§ 314, 315

California Products Liability Actions, Ch. 8, *Defenses*, § 8.07[7] (Matthew Bender)

44 California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties*, § 502.51 (Matthew Bender)

5 California Civil Practice: Business Litigation ~~(Thomson West)~~ § 53:59 (Thomson Reuters)

3221. Affirmative Defense—Disclaimer of Implied Warranties

[*Name of defendant***] claims that it did not breach any implied warranties because the [***consumer good***] was sold on an "as is" or "with all faults" basis. To succeed, [***name of defendant***] must prove both of the following:**

1. **That at the time of sale a clearly visible written notice was attached to the [***consumer good***]; and**

2. **That the written notice, in clear and simple language, told the buyer each of the following:**

   a. **That the [***consumer good***] was being sold on an "as is" or "with all faults" basis;**

   b. **That the buyer accepted the entire risk of the quality and performance of the [***consumer good***]; and**

   c. **That if the [***consumer good***] were defective, the buyer would be responsible for the cost of all necessary servicing or repair.**

New September 2003; Revised June 2010

Directions for Use

If the consumer goods in question were sold by means of a mail-order catalog, the instruction must be modified in accordance with Civil Code section 1792.4(b).

In addition to sales of consumer goods, the Consumer Warranty Act applies to leases—see Civil Code sections 1791(g)-(i) and 1795.4. This instruction may be modified for use in cases involving leases of consumer goods.

If at the time of sale, or within 90 days thereafter, the defendant sold the plaintiff a service contract that applied to the product, the federal Magnuson-Moss Warranty—Federal Trade Commission Improvement Act preempts use of this defense. (See 15 U.S.C. § 2308.)

Sources and Authority

- Waiver of Implied Warranties. Civil Code section 1792.3. ~~provides: "No implied warranty of merchantability and, where applicable, no implied warranty of fitness shall be waived, except in the case of a sale of consumer goods on an 'as is' or 'with all faults' basis where the provisions of this chapter affecting 'as is' or 'with all faults' sales are strictly complied with."~~

- "As Is" Sale. Civil Code section 1791.3. ~~provides: "[A] sale 'as is' or 'with all faults' means that the~~

manufacturer, distributor, and retailer disclaim all implied warranties that would otherwise attach to the sale of consumer goods under the provisions of this [act].”

- Conspicuous Writing Required. Civil Code section 1792.4. provides:

  (a) No sale of goods, governed by the provisions of this [act], on an “as is” or “with all faults” basis, shall be effective to disclaim the implied warranty of merchantability or, where applicable, the implied warranty of fitness, unless a conspicuous writing is attached to the goods which clearly informs the buyer, prior to the sale, in simple and concise language of each of the following:

  (1) The goods are being sold on an “as is” or “with all faults” basis.

  (2) The entire risk as to the quality and performance of the goods is with the buyer.

  (3) Should the goods prove defective following their purchase, the buyer and not the manufacturer, distributor, or retailer assumes the entire cost of all necessary servicing or repair.

  (b) In the event of sale of consumer goods by means of a mail order catalog, the catalog offering such goods shall contain the required writing as to each item so offered in lieu of the requirement of notification prior to the sale.

- Express Warrany Does Not Preempt Implied Warranty. Civil Code section 1793. provides, in part: “[A] manufacturer, distributor, or retailer, in transacting a sale in which express warranties are given, may not limit, modify, or disclaim the implied warranties guaranteed by this chapter to the sale of consumer goods.”

- When Waiver of Implied Warranties Allowed. Civil Code section 1792.5. provides: “Every sale of goods that are governed by the provisions of this [act], on an ‘as is’ or ‘with all faults’ basis, made in compliance with the provisions of this [act], shall constitute a waiver by the buyer of the implied warranty of merchantability and, where applicable, of the implied warranty of fitness.”

- Lessor’s Disclaimer of Warranties on Re-lease. Civil Code section 1795.4(e). provides: “A lessor who re-leases goods to a new lessee and does not retake possession of the goods prior to consummation of the re-lease may, notwithstanding the provisions of Section 1793, disclaim as to that lessee any and all warranties created by this chapter by conspicuously disclosing in the lease that these warranties are disclaimed.”

- Title 15 United States Code section 2308 provides:

  (a) Restrictions on disclaimers or modifications. No supplier may disclaim or modify (except as provided in subsection (b)) any implied warranty to a consumer with respect to such consumer product if (1) such supplier makes any written warranty to the consumer with respect to such consumer product, or (2) at the time of sale, or within 90 days thereafter, such supplier enters into

~~a service contract with the consumer which applies to such consumer product.~~

~~(b) Limitation on duration. For purposes of this title [15 USCS §§ 2301 et seq.] (other than section 104(a)(2)) [15 USCS § 2304(a)(2)] implied warranties may be limited in duration to the duration of a written warranty of reasonable duration, if such limitation is conscionable and is set forth in clear and unmistakable language and prominently displayed on the face of the warranty.~~

~~(c) Effectiveness of disclaimers, modifications, or limitations. A disclaimer, modification, or limitation made in violation of this section shall be ineffective for purposes of this title [15 USCS § 2304(a)] and State law.~~

- "Unless specific disclaimer methods are followed, an implied warranty of merchantability accompanies every retail sale of consumer goods in the state." (*Music Acceptance Corp. v. Lofing* (1995) 32 Cal.App.4th 610, 619 [39 Cal.Rptr.2d 159].)

Secondary Sources

4 Witkin, Summary of California Law (10th ed. 2005) Sales, § 90

1 California UCC Sales & Leases (Cont.Ed.Bar) Warranties, §§ 3.53-3.61

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.34[3], Ch. 8, *Defenses*, § 8.07[5][c] (Matthew Bender)

44 California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties*, § 502.51 (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales*, § 206.72 et seq. (Matthew Bender)

5 California Civil Practice: Business Litigation ~~(Thomson West)~~ §§ 53:8–53:9, 53.58 (Thomson Reuters)

3222. Affirmative Defense—Statute of Limitations (U. Com. Code, § 2725)

[*Name of defendant***] contends that [***name of plaintiff***]'s lawsuit was not filed within the time set by law. To succeed on this defense, [***name of defendant***] must prove that**

[the date of [tender of] delivery occurred before [*insert date four years before filing of complaint***].]**

[*or***]**

[any breach was discovered or should have been discovered before [*insert date four years before filing of complaint***].]**

New June 2010; Renumbered from CACI No. 3213 June 2012

Directions for Use

Use this instruction to assert a limitation defense based on the four-year period of California's Uniform Commercial Code section 2725. (See *Mexia v. Rinker Boat Co., Inc.* (2009) 174 Cal.App.4th 1297, 1305 [95 Cal.Rptr.3d 285] [four-year statute of U. Com. Code, § 2725 applies to warranty claims under the Song-Beverly Consumer Warranty Act].)

A breach of warranty occurs when tender of delivery is made. (U. Com. Code, § 2725(2).) Include "tender of" if actual delivery was not made or if delivery was made after tender. If whether a proper tender was made is at issue, the jury should be instructed on the meaning of "tender." (See U. Com. Code, § 2503.)

Under the statute, a breach of warranty occurs when tender of delivery is made regardless of the aggrieved party's knowledge of the breach—that is, there is no delayed-discovery rule. However, if an express warranty explicitly extends to future performance of the goods (for example, a warranty to repair defects for three years or 30,000 miles) and discovery of the breach must await the time of the performance, the cause of action accrues when the breach is or should have been discovered. (U. Com. Code, § 2725(2).) In such a case, give the second option in the second sentence. If delayed discovery is alleged, CACI No. 455, *Statute of Limitations—Delayed Discovery*, may be adapted for use. (See *Krieger v. Nick Alexander Imports, Inc.* (1991) 234 Cal.App.3d 205, 215–220 [285 Cal.Rptr. 717].)

Under the Uniform Commercial Code, by the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it. (U. Com. Code, § 2725(1).) Presumably, this provision does not apply to claims under the Song-Beverly Act. (See Civ. Code, §§ 1790.1 [buyer's waiver of rights under Song-Beverly Act is unenforceable], 1790.3 [in case of conflict, provisions of Song-Beverly Act control over U. Com. Code].)

Sources and Authority

- Statute of Limitations Under Commercial Code. Uniform Commercial Code section 2725. ~~provides:~~

  ~~(1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.~~

  ~~(2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.~~

  ~~(3) Where an action commenced within the time limited by subdivision (1) is so terminated as to leave available a remedy by another action for the same breach such other action may be commenced after the expiration of the time limited and within six months after the termination of the first action unless the termination resulted from voluntary discontinuance or from dismissal for failure or neglect to prosecute.~~

  ~~(4) This section does not alter the law on tolling of the statute of limitations nor does it apply to causes of action which have accrued before this code becomes effective.~~

- Buyer's Waiver of Song-Beverly Protections Not Enforceable. Civil Code section 1790.1. ~~provides: "Any waiver by the buyer of consumer goods of the provisions of this chapter, except as expressly provided in this chapter, shall be deemed contrary to public policy and shall be unenforceable and void."~~

- Song-Beverly Does Not Preempt Commercial Code. Civil Code section 1790.3. ~~provides: "The provisions of this chapter shall not affect the rights and obligations of parties determined by reference to the Commercial Code except that, where the provisions of the Commercial Code conflict with the rights guaranteed to buyers of consumer goods under the provisions of this chapter, the provisions of this chapter shall prevail."~~

- "The [Song Beverly] Act was intended to supplement the provisions of the California Uniform Commercial Code, rather than to supersede the rights and obligations created by that statutory scheme. (See Civ. Code, § 1790.3.) California Uniform Commercial Code section 2725 specifically governs actions for breach of warranty in a sales context. We conclude that this special statute of limitations controls rather than the general provision of Code of Civil Procedure section 338, subdivision (a) for liabilities created by statute." (*Krieger, supra,* 234 Cal.App.3d at p. 215.)

- "[Defendants] now concede that the statute of limitations for an action for breach of warranty under the Song-Beverly Act is four years pursuant to section 2725 of the California Uniform Commercial Code. Under that statute, a cause of action for breach of warranty accrues, at the earliest, upon tender of delivery. Thus, the earliest date the implied warranty of merchantability regarding [plaintiff]'s boat could have accrued was the date [plaintiff]

purchased it … . Because he filed this action three years seven months after that date, he did so within the four-year limitations period. Therefore, [plaintiff]'s action is not barred by a statute of limitations." (*Mexia, supra,* 174 Cal.App.4th at p. 1306.)

Secondary Sources

4 Witkin, Summary of California Law (10th ed. 2005) Sales, § 213

3 Witkin, California Procedure (5th ed. 2008) Actions, §§ 474, 519, 962

1 California Products Liability Actions, Ch. 8, *Statute of Limitations* § 8.02[2] (Matthew Bender)

44 California Forms of Pleading and Practice, Ch. 500, *Sales Under the Commercial Code,* § 500.78 (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales,* §§ 206.38, 206.61, 206.62 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 4, *Determining Applicable Statute of Limitations and Effect on Potential Action,* 4.05

3231. Continuation of Express or Implied Warranty During Repairs (Civ. Code, § 1795.6)

Regardless of what the warranty says, if a defect exists within the warranty period and the [*consumer good/new motor vehicle***] has been returned for repairs, the warranty will not expire until the defect has been fixed. [***Name of plaintiff***] must have notified [***name of defendant***] of the failure of the repairs within 60 days after they were completed. The warranty period will also be extended for the amount of time that the warranty repairs have not been performed because of delays caused by circumstances beyond the control of [***name of plaintiff***].**

New June 2012

Directions for Use

Give this instruction if it might appear to the jury from the language of an express or implied warranty that the warranty should have expired during the course of repairs. By statute, the warranty cannot expire until the problem has been resolved as long as the defendant had notice that the defect had not been repaired. (Civ. Code, § 1795.6(b).)

Sources and Authority

- Continuation of Express Warranty During Repairs. Civil Code section 1795.6. ~~provides:~~

  ~~(a) Every warranty period relating to an implied or express warranty accompanying a sale or consignment for sale of consumer goods selling for fifty dollars ($50) or more shall automatically be tolled for the period from the date upon which the buyer either (1) delivers nonconforming goods to the manufacturer or seller for warranty repairs or service or (2), pursuant to subdivision (c) of Section 1793.2 or Section 1793.22, notifies the manufacturer or seller of the nonconformity of the goods up to, and including, the date upon which (1) the repaired or serviced goods are delivered to the buyer, (2) the buyer is notified the goods are repaired or serviced and are available for the buyer's possession or (3) the buyer is notified that repairs or service is completed, if repairs or service is made at the buyer's residence.~~

  ~~(b) Notwithstanding the date or conditions set for the expiration of the warranty period, such warranty period shall not be deemed expired if either or both of the following situations occur: (1) after the buyer has satisfied the requirements of subdivision (a), the warranty repairs or service has not been performed due to delays caused by circumstances beyond the control of the buyer or (2) the warranty repairs or service performed upon the nonconforming goods did not remedy the nonconformity for which such repairs or service was performed and the buyer notified the manufacturer or seller of this failure within 60 days after the repairs or service was completed. When the warranty repairs or service has been performed so as to remedy the nonconformity, the warranty period shall expire in accordance with its terms, including any extension to the warranty period for warranty repairs or service.~~

  ~~(c) For purposes of this section only, "manufacturer" includes the manufacturer's service or repair facility.~~

~~(d) Every manufacturer or seller of consumer goods selling for fifty dollars ($50) or more shall provide a receipt to the buyer showing the date of purchase. Every manufacturer or seller performing warranty repairs or service on the goods shall provide to the buyer a work order or receipt with the date of return and either the date the buyer was notified that the goods were repaired or serviced or, where applicable, the date the goods were shipped or delivered to the buyer.~~

- Notice Required in Work Order or Repair Invoice. Civil Code section 1793.1(a)(2). ~~provides: "Every work order or repair invoice for warranty repairs or service shall clearly and conspicuously incorporate in 10-point boldface type the following statement either on the face of the work order or repair invoice, or on the reverse side, or on an attachment to the work order or repair invoice: 'A buyer of this product in California has the right to have this product serviced or repaired during the warranty period. The warranty period will be extended for the number of whole days that the product has been out of the buyer's hands for warranty repairs. If a defect exists within the warranty period, the warranty will not expire until the defect has been fixed. The warranty period will also be extended if the warranty repairs have not been performed due to delays caused by circumstances beyond the control of the buyer, or if the warranty repairs did not remedy the defect and the buyer notifies the manufacturer or seller of the failure of the repairs within 60 days after they were completed. If, after a reasonable number of attempts, the defect has not been fixed, the buyer may return this product for a replacement or a refund subject, in either case, to deduction of a reasonable charge for usage. This time extension does not affect the protections or remedies the buyer has under other laws.' "~~

Secondary Sources

4 Witkin, Summary of California Law (10th ed. 2005) Sales, § 316

3 Witkin, California Procedure (5th ed. 2008) Actions, §§ 539, 760

44 California Forms of Pleading and Practice, Ch. 502, *Sales*, § 502.52 (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales*, §§ 206.100, 206.102 (Matthew Bender)

21 California Legal Forms: Transaction Guide, Ch. 52, *Sales of Goods Under the Uniform Commercial Code*, § 52.128 (Matthew Bender)

30 California Legal Forms: Transaction Guide, Ch. 92, *Service Contracts*, § 92.52 (Matthew Bender)

3240. Reimbursement Damages—Consumer Goods (Civ. Code, §§ 1793.2(d)(1), 1794(b))

If you decide that [*name of defendant***] or its representative failed to repair or service the [***consumer good***] to match the [written warranty/represented quality] after a reasonable number of opportunities, then [***name of plaintiff***] is entitled to be reimbursed for the purchase price of the [***consumer good***], less the value of its use by [***name of plaintiff***] before discovering the defect.**

[*Name of plaintiff***] must prove the amount of the purchase price, and [***name of defendant***] must prove the value of the use of the [***consumer good***].**

New September 2003; Revised December 2011

Directions for Use

This instruction is intended for use with claims involving consumer goods under the Song-Beverly Consumer Warranty Act. The remedy is replacement of the goods or reimbursement measured by the purchase price minus the value of the plaintiff's use before discovery of the defect. (Civ. Code, § 1793.2(d)(1).) For claims involving new motor vehicles, see CACI No. 3241, *Restitution From Manufacturer—New Motor Vehicle*.

The basic measure of damages provided for in the Song-Beverly Act for all claims is replacement or reimbursement plus additional remedies provided by the Commercial Code. (Civ. Code, § 1794(b); see Comm. Code, §§ 2711–2715.) The remedies for consumer goods are also available for implied-warranty claims. (See Civ. Code, § 1791.1(d).) The first paragraph of this instruction can be modified if it is being used for claims other than those brought under Civil Code section 1793.2(d)(1). See also CACI No. 3242, *Incidental Damages*, and CACI No. 3243, *Consequential Damages*.

Sources and Authority

- Replacement or Reimbursement After Reasonable Number of Repair Attempts. Civil Code section 1793.2(d)(1). ~~provides, in part: "[I]f the manufacturer or its representative in this state does not service or repair the goods to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either replace the goods or reimburse the buyer in an amount equal to the purchase price paid by the buyer, less that amount directly attributable to use by the buyer prior to the discovery of the nonconformity."~~

- Commercial Code Remedies Available. Civil Code section 1794(b). ~~provides:~~

  ~~The measure of the buyer's damages in an action under this section shall include the rights of replacement or reimbursement as set forth in subdivision (d) of Section 1793.2, and the following:~~

  ~~(1) Where the buyer has rightfully rejected or justifiably revoked acceptance of the goods or has exercised any right to cancel the sale, Sections 2711, 2712, and 2713 of the Commercial Code shall apply.~~

~~(2) Where the buyer has accepted the goods, Sections 2714 and 2715 of the Commercial Code shall apply, and the measure of damages shall include the cost of repairs necessary to make the goods conform.~~

- Commercial Code Remedies for Breach of Implied Warranty. Civil Code section 1791.1(d). ~~provides: "Any buyer of consumer goods injured by a breach of the implied warranty of merchantability and where applicable by a breach of the implied warranty of fitness has the remedies provided in Chapter 6 (commencing with Section 2601) and Chapter 7 (commencing with Section 2701) of Division 2 of the Commercial Code, and, in any action brought under such provisions, Section 1794 of this chapter shall apply."~~

- "The clear mandate of section 1794 ... is that the compensatory damages recoverable for breach of the [Song-Beverly Consumer Warranty] Act are those available to a buyer for a seller's breach of a sales contract." (*Kwan v. Mercedes-Benz of N. Am.* (1994) 23 Cal.App.4th 174, 188 [28 Cal.Rptr.2d 371].)

- "[I]n the usual situation, emotional distress damages are *not* recoverable under the Song-Beverly Consumer Warranty Act." (*Music Acceptance Corp. v. Lofing* (1995) 32 Cal.App.4th 610, 625, fn. 15 [39 Cal.Rptr.2d 159]); see also *Kwan, supra*, 23 Cal.App.4th at pp. 187-192.)

Secondary Sources

4 Witkin, Summary of California Law (10th ed. 2005) Sales, §§ 321–324

1 California UCC Sales & Leases (Cont.Ed.Bar) Warranties, § 3.90

44 California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties*, § 502.43 (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales*, § 206.103 (Matthew Bender)

5 California Civil Practice: Business Litigation § 53:32 (Thomson Reuters ~~West~~)

3241. Restitution From Manufacturer—New Motor Vehicle (Civ. Code, §§ 1793.2(d)(2), 1794(b))

If you decide that [*name of defendant***] or its authorized repair facility failed to repair the defect(s) after a reasonable number of opportunities, then [***name of plaintiff***] is entitled to recover the amounts [he/she] proves [he/she] paid for the car, including:**

1. **The amount paid to date for the vehicle, including finance charges [and any amount still owed by [***name of plaintiff***]];**

2. **Charges for transportation and manufacturer-installed options; and**

3. **Sales tax, use tax, license fees, registration fees, and other official fees.**

In determining the purchase price, do not include any charges for items supplied by someone other than [*name of defendant***].**

[[*Name of plaintiff***]'s recovery must be reduced by the value of the use of the vehicle before it was [brought in/submitted] for repair. [***Name of defendant***] must prove how many miles the vehicle was driven between the time when [***name of plaintiff***] took possession of the vehicle and the time when [***name of plaintiff***] first delivered it to [***name of defendant***] or its authorized repair facility to fix the defect. [***Insert one of the following:***]**

[Using this mileage number, I will reduce [*name of plaintiff***]'s recovery based on a formula.]**

[Multiply this mileage number by the purchase price, including any charges for transportation and manufacturer-installed options, and divide that amount by 120,000. Deduct the resulting amount from [*name of plaintiff***]'s recovery.]]**

New September 2003; Revised February 2005, June 2005, December 2011, June 2012

Directions for Use

This instruction is intended for use with claims involving new motor vehicles under the Song-Beverly Consumer Warranty Act. The remedy is replacement of the vehicle or restitution. (Civ. Code, § 1793.2(d)(2).) For claims involving other consumer goods, see CACI No. 3240, *Reimbursement Damages—Consumer Goods*.

Incidental damages are recoverable as part of restitution. (Civ. Code, § 1793.2(d)(2)(B).) For an instruction on incidental damages, see CACI No. 3242, *Incidental Damages*. See also CACI No. 3243, *Consequential Damages*.

The remedies for new motor vehicles provided by Civil Code section 1793.2(d)(2) apply to all claims under the Song-Beverly Consumer Warranty Act. (Civ. Code, § 1794(b).) These remedies are also available for implied-warranty claims. (See Civ. Code, § 1791.1(d).) The first paragraph of this

instruction can be modified if it is being used for claims other than those brought under Civil Code section 1793.2(d)(2).

Modify element 1 depending on whether plaintiff still has an outstanding obligation on the financing of the vehicle.

The last two bracketed options are intended to be read in the alternative. Use the last bracketed option if the court desires for the jury to make the calculation of the deduction. The "formula" referenced in the last bracketed paragraph can be found at Civil Code section 1793.2(d)(2)(C).

Additional remedies under the Commercial Code are provided for "goods." (See Civ. Code, § 1794(b).) Although consumer goods and new motor vehicles are treated differently under Civil Code section 1793.2, "consumer goods" are defined broadly under Song-Beverly (see Civ. Code, § 1791(a) ["consumer goods" means any new product or part thereof that is used, bought, or leased for use primarily for personal, family, or household purposes, except for clothing and consumables]). At least one court has applied the Commercial Code remedies for new motor vehicles. (See *Krotin v. Porsche Cars North America, Inc.* (1995) 38 Cal.App.4th 294, 302 [45 Cal.Rptr.2d 10].)

Sources and Authority

- Measure of Buyer's Damages. Civil Code section 1794(b). ~~provides:~~

  ~~The measure of the buyer's damages in an action under this section shall include the rights of replacement or reimbursement as set forth in subdivision (d) of Section 1793.2, and the following:~~

  ~~(1) Where the buyer has rightfully rejected or justifiably revoked acceptance of the goods or has exercised any right to cancel the sale, Sections 2711, 2712, and 2713 of the Commercial Code shall apply.~~

  ~~(2) Where the buyer has accepted the goods, Sections 2714 and 2715 of the Commercial Code shall apply, and the measure of damages shall include the cost of repairs necessary to make the goods conform.~~

- Replacement or Reimbursement After Reasonable Number of Repair Attempts: New Motor Vehicle. Civil Code section 1793.2(d)(2). ~~provides, in part:~~

  ~~If the manufacturer or its representative in this state is unable to service or repair a new motor vehicle ... to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either promptly replace the new motor vehicle in accordance with subparagraph (A) or promptly make restitution to the buyer in accordance with subparagraph (B). However, the buyer shall be free to elect restitution in lieu of replacement, and in no event shall the buyer be required by the manufacturer to accept a replacement vehicle.~~

  ~~(A) In the case of replacement, the manufacturer shall replace the buyer's vehicle with a new motor vehicle substantially identical to the vehicle replaced. The replacement vehicle shall be accompanied by all express and implied warranties~~

~~that normally accompany new motor vehicles of that specific kind. The manufacturer also shall pay for, or to, the buyer the amount of any sales or use tax, license fees, registration fees, and other official fees which the buyer is obligated to pay in connection with the replacement, plus any incidental damages to which the buyer is entitled under Section 1794, including, but not limited to, reasonable repair, towing, and rental car costs actually incurred by the buyer.~~

~~(B) In the case of restitution, the manufacturer shall make restitution in an amount equal to the actual price paid or payable by the buyer, including any charges for transportation and manufacturer-installed options, but excluding nonmanufacturer items installed by a dealer or the buyer, and including any collateral charges such as sales or use tax, license fees, registration fees, and other official fees, plus any incidental damages to which the buyer is entitled under Section 1794, including, but not limited to, reasonable repair, towing, and rental car costs actually incurred by the buyer.~~

~~(C) When the manufacturer replaces the new motor vehicle pursuant to subparagraph (A), the buyer shall only be liable to pay the manufacturer an amount directly attributable to use by the buyer of the replaced vehicle prior to the time the buyer first delivered the vehicle to the manufacturer or distributor, or its authorized service and repair facility for correction of the problem that gave rise to the nonconformity. When restitution is made pursuant to subparagraph (B), the amount to be paid by the manufacturer to the buyer may be reduced by the manufacturer by that amount directly attributable to use by the buyer prior to the time the buyer first delivered the vehicle to the manufacturer or distributor, or its authorized service and repair facility for correction of the problem that gave rise to the nonconformity. The amount directly attributable to use by the buyer shall be determined by multiplying the actual price of the new motor vehicle paid or payable by the buyer, including any charges for transportation and manufacturer-installed options, by a fraction having as its denominator 120,000 and having as its numerator the number of miles traveled by the new motor vehicle prior to the time the buyer first delivered the vehicle to the manufacturer or distributor, or its authorized service and repair facility for correction of the problem that gave rise to the nonconformity. Nothing in this paragraph shall in any way limit the rights or remedies available to the buyer under any other law.~~

~~(D) Pursuant to Section 1795.4, a buyer of a new motor vehicle shall also include a lessee of a new motor vehicle.~~

- "[A]s the conjunctive language in Civil Code section 1794 indicates, the statute itself provides an additional measure of damages beyond replacement or reimbursement and permits, at the option of the buyer, the Commercial Code measure of damages which includes 'the cost of repairs necessary to make the goods conform.' " (*Krotin, supra,* 38 Cal.App.4th at p. 302, internal citation omitted.)

- "[I]n the usual situation, emotional distress damages are *not* recoverable under the Song-Beverly Consumer Warranty Act." (*Music Acceptance Corp. v. Lofing* (1995) 32 Cal.App.4th 610, 625, fn. 15

[39 Cal.Rptr.2d 159], emphasis in original; see also *Kwan v. Mercedes-Benz of N. Am.* (1994) 23 Cal.App.4th 174, 187-192 [28 Cal.Rptr.2d 371].)

- "[F]inding an implied prohibition on recovery of finance charges would be contrary to both the Song-Beverly Consumer Warranty Act's remedial purpose and section 1793.2(d)(2)(B)'s description of the refund remedy as restitution. A more reasonable construction is that the Legislature intended to allow a buyer to recover the entire amount actually expended for a new motor vehicle, including paid finance charges, less any of the expenses expressly excluded by the statute." (*Mitchell v. Blue Bird Body Co.* (2000) 80 Cal.App.4th 32, 37 [95 Cal.Rptr.2d 81].)

- "[Defendant] argues that [plaintiff] would receive a windfall if he is not required to pay for using the car after his buyback request. But to give [defendant] an offset for that use would reward it for its delay in replacing the car or refunding [plaintiff]'s money when it had complete control over the length of that delay, and an affirmative statutory duty to replace or refund promptly." (*Jiagbogu v. Mercedes-Benz USA* (2004) 118 Cal.App.4th 1235, 1244 [13 Cal.Rptr.3d 679].)

- "[T]he imposition of a requirement that [plaintiff] mitigate his damages so as to avoid rental car expenses—after [defendant] had a duty to respond promptly to [plaintiff]'s demand for restitution—would reward [defendant] for its delay in refunding [plaintiff]'s money." (*Lukather v. General Motors, LLC* (2010) 181 Cal.App.4th 1041, 1053 [104 Cal.Rptr.3d 853].)

Secondary Sources

4 Witkin, Summary of California Law (10th ed. 2005) Sales, §§ 321–324

1 California UCC Sales & Leases (Cont.Ed.Bar) Warranties, § 3.90

44 California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties*, § 502.43 (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales*, §§ 206.127, 206.128 (Matthew Bender)

5 California Civil Practice: Business Litigation § 53:26 (Thomson Reuters~~ West~~)

3242. Incidental Damages

[*Name of plaintiff***] also claims additional reasonable expenses for [***list claimed incidental damages***].**

To recover these expenses, [*name of plaintiff***] must prove all of the following:**

1. **That the expense was actually charged;**

2. **That the expense was reasonable; and**

3. **That [***name of defendant***]'s [breach of warranty/[***other violation of Song-Beverly Consumer Warranty Act***]] was a substantial factor in causing the expense.**

New September 2003; Revised December 2011

Directions for Use

This instruction is for use if incidental damages are sought in an action under the Song-Beverly Consumer Warranty Act. Incidental damages are allowed as part of the restitution remedy for new motor vehicles. (Civ. Code, § 1793.2(d)(2)(B).) See also CACI No. 3241, *Restitution From Manufacturer—New Motor Vehicle*.

With regard to claims for consumer goods, the availability of incidental damages may be limited. If the plaintiff has elected to accept the goods, incidental damages under Commercial Code section 2715 and the cost of repairs required to make the goods conform to the warranty are allowed. (Civ. Code, § 1794(b)(2).) If the buyer has rightfully rejected or justifiably revoked acceptance, incidental damages are allowed under Commercial Code sections 2711, 2712, and 2713 for the seller's nondelivery or repudiation of the contract or in connection with cover (obtaining replacement goods from another seller). (Civ. Code, § 1794(b)(1).) If any of these matters are disputed, additional instructions will be required on these points.

If incidental damages are otherwise recoverable, they are recoverable regardless of the nature of the claim under Song-Beverly. (See Civ. Code, § 1794(b) [statute covers all Song-Beverly actions].)

Sources and Authority

- Measure of Buyer's Damages: Commercial Code Remedies Available. Civil Code section 1794(b). ~~provides in part:~~

  ~~The measure of the buyer's damages in an action under this section shall include the rights of replacement or reimbursement as set forth in subdivision (d) of Section 1793.2, and the following:~~

  ~~(1) Where the buyer has rightfully rejected or justifiably revoked acceptance of the goods or has exercised any right to cancel the sale, Sections 2711, 2712, and 2713 of the Commercial Code shall apply.~~

(2) Where the buyer has accepted the goods, Sections 2714 and 2715 of the Commercial Code shall apply, and the measure of damages shall include the cost of repairs necessary to make the goods conform.

- Restitution Includes Incidental Damages. Civil Code section 1793.2(d)(2)(B). provides in part: "In the case of restitution, the manufacturer shall make restitution in an amount equal to the actual price paid or payable by the buyer ... plus any incidental damages to which the buyer is entitled under Section 1794, including, but not limited to, reasonable repair, towing, and rental car costs actually incurred by the buyer."

- Buyer's Remedies for Seller's Breach. Commercial Code section 2711(1). provides:

  Where the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance then with respect to any goods involved, and with respect to the whole if the breach goes to the whole contract (Section 2612), the buyer may cancel and whether or not he has done so may in addition to recovering so much of the price as has been paid

  (a) "Cover" and have damages under the next section as to all the goods affected whether or not they have been identified to the contract; or

  (b) Recover damages for nondelivery as provided in this division (Section 2713).

- Incidental Damages Recoverable. Commercial Code sections 2712(2), 2713(1). provides: "The buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages as hereinafter defined (Section 2715), but less expenses saved in consequence of the seller's breach."

- Commercial Code section 2713(1) provides: "Subject to the provisions of this division with respect to proof of market price (Section 2723), the measure of damages for non-delivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages provided in this division (Section 2715), but less expenses saved in consequence of the seller's breach."

- "Incidental Damages" Defined. Commercial Code section 2715(1). provides:Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.

- "In light of the relevant legislative history and express language in the Act, we conclude California Uniform Commercial Code section 2715's reference to losses must be construed and applied in the context of monetary losses *actually* incurred." (*Bishop v. Hyundai Motor America* (1996) 44 Cal.App.4th 750, 756 [52 Cal.Rptr.2d 134], original italics.)

Secondary Sources

4 Witkin, Summary of California Law (10th ed. 2005) Sales, § 318

44 California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties*, § 502.160 (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales*, § 206.43 (Matthew Bender)

5 California Civil Practice: Business Litigation § 53:32 (Thomson Reuters ~~West~~)

3243. Consequential Damages

[*Name of plaintiff***] also claims additional amounts for [***list claimed consequential damages***].**

To recover these damages, [*name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***]'s [***describe violation of Song-Beverly Consumer Warranty Act***] was a substantial factor in causing damages to [***name of plaintiff***];**

2. **That the damages resulted from [***name of plaintiff***]'s requirements and needs;**

3. **That [***name of defendant***] had reason to know of those requirements and needs at the time of the [sale/lease] to [***name of plaintiff***];**

4. **That [***name of plaintiff***] could not reasonably have prevented the damages; and**

5. **The amount of the damages.**

New September 2003; Revised December 2011

Directions for Use

This instruction is for use if the plaintiff claims consequential damages under the Song-Beverly Consumer Warranty Act based on the plaintiff's foreseeable needs or requirements. (See Civ. Code, § 1794(b); Comm. Code, § 2715(2)(a).)

The availability of consequential damages under Song-Beverly may be limited. If the plaintiff has elected to accept the goods, consequential damages under Commercial Code section 2715 and the cost of repairs required to make the goods conform to the warranty are allowed. (Civ. Code, § 1794(b)(2).) If the buyer has rightfully rejected or justifiably revoked acceptance, consequential damages are allowed under Commercial Code sections 2711, 2712, and 2713 for the seller's nondelivery or repudiation of the contract or in connection with cover (obtaining replacement goods from another seller). (Civ. Code, § 1794(b)(1).)

If consequential damages are otherwise recoverable, they are recoverable regardless of the nature of the claim under Song-Beverly. (See Civ. Code, § 1794(b) [statute covers all Song-Beverly actions].)

Sources and Authority

- Measure of Buyer's Damages: Commercial Code Remedies Available. Civil Code section 1794(b). ~~provides in part:~~
  ~~The measure of the buyer's damages in an action under this section shall include the rights of replacement or reimbursement as set forth in subdivision (d) of Section 1793.2, and the following:~~

(1) Where the buyer has rightfully rejected or justifiably revoked acceptance of the goods or has exercised any right to cancel the sale, Sections 2711, 2712, and 2713 of the Commercial Code shall apply.

(2) Where the buyer has accepted the goods, Sections 2714 and 2715 of the Commercial Code shall apply, and the measure of damages shall include the cost of repairs necessary to make the goods conform.

- Buyer's Remedies for Seller's Breach. Commercial Code section 2711(1). provides:

  Where the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance then with respect to any goods involved, and with respect to the whole if the breach goes to the whole contract (Section 2612), the buyer may cancel and whether or not he has done so may in addition to recovering so much of the price as has been paid

  (a) "Cover" and have damages under the next section as to all the goods affected whether or not they have been identified to the contract; or

  (b) Recover damages for nondelivery as provided in this division (Section 2713).

- Consequential Damages Recoverable. Commercial Code section 2712(2), 2713(1). provides: "The buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages as hereinafter defined (Section 2715), but less expenses saved in consequence of the seller's breach."

- Commercial Code section 2713(1) provides: "Subject to the provisions of this division with respect to proof of market price (Section 2723), the measure of damages for non-delivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages provided in this division (Section 2715), but less expenses saved in consequence of the seller's breach."

- "Consequential Damages" Defined. Commercial Code section 2715(2) provides:.

  Consequential damages resulting from the seller's breach include

  (a) Any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and

  (b) Injury to person or property proximately resulting from any breach of warranty.

- "In light of the relevant legislative history and express language in the Act, we conclude California Uniform Commercial Code section 2715's reference to losses must be construed and applied in the context of monetary losses *actually* incurred." (*Bishop v. Hyundai Motor America* (1996) 44

Cal.App.4th 750, 756 [52 Cal.Rptr.2d 134], original italics.)

Secondary Sources

4 Witkin, Summary of California Law (10th ed. 2005) Sales, § 206

44 California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties*, § 502.160 (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales*, § 206.43 et seq. (Matthew Bender)

5 California Civil Practice: Business Litigation § 53:32 (Thomson Reuters ~~West~~)

3244. Civil Penalty—Willful Violation (Civ. Code, § 1794(c))

[*Name of plaintiff***] claims that [***name of defendant***]'s failure to [***describe violation of Song-Beverly Consumer Warranty Act, e.g., repurchase or replace the vehicle after a reasonable number of repair opportunities***] was willful and therefore asks that you impose a civil penalty against [***name of defendant***]. A civil penalty is an award of money in addition to a plaintiff's damages. The purpose of this civil penalty is to punish a defendant or discourage [him/her/it] from committing such violations in the future.**

If [*name of plaintiff***] has proved that [***name of defendant***]'s failure was willful, you may impose a civil penalty against [him/her/it]. "Willful" means that [***name of defendant***] knew what [he/she/it] was doing and intended to do it. However, you may not impose a civil penalty if you find that [***name of defendant***] believed reasonably and in good faith that [***describe facts negating statutory obligation***].**

The penalty may be in any amount you find appropriate, up to a maximum of two times the amount of [*name of plaintiff***]'s actual damages.**

New September 2003; Revised February 2005, December 2005, December 2011

Directions for Use

This instruction is intended for use when the plaintiff requests a civil penalty under Civil Code section 1794(c). In the opening paragraph, set forth all claims for which a civil penalty is sought.

Depending on the nature of the claim at issue, factors that the jury may consider in determining willfulness may be added. (See, e.g., *Jensen v. BMW of North America, Inc.* (1995) 35 Cal.App.4th 112, 136 [41 Cal.Rptr.2d 295] [among factors to be considered by the jury are whether (1) the manufacturer knew the vehicle had not been repaired within a reasonable period or after a reasonable number of attempts, and (2) whether the manufacturer had a written policy on the requirement to repair or replace].)

Sources and Authority

- Civil Penalty for Willful Violation. Civil Code section 1794(c). ~~provides, in part:~~

  ~~(a) Any buyer of consumer goods who is damaged by a failure to comply with any obligation under this chapter or under an implied or express warranty or service contract may bring an action for the recovery of damages and other legal and equitable relief.~~

  ~~....~~

  ~~(c) If the buyer establishes that the failure to comply was willful, the judgment may include, in addition to the amounts recovered under subdivision (a), a civil penalty which shall not exceed two times the amount of actual damages. This subdivision shall not apply in any class action ... or with respect to a claim based solely on a~~

~~breach of an implied warranty.~~

- "[I]f the trier of fact finds the defendant willfully violated its legal obligations to plaintiff, it has discretion under [Civil Code section 1794,] subdivision (c) to award a penalty against the defendant. Subdivision (c) applies to suits concerning any type of 'consumer goods,' as that term is defined in section 1791 of the Act." (*Suman v. Superior Court* (1995) 39 Cal.App.4th 1309, 1315 [46 Cal.Rptr.2d 507].)

- "Whether a manufacturer willfully violated its obligation to repair the car or refund the purchase price is a factual question for the jury that will not be disturbed on appeal if supported by substantial evidence." (*Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1104 [109 Cal.Rptr.2d 583].

- " 'In civil cases, the word "willful," as ordinarily used in courts of law, does not necessarily imply anything blamable, or any malice or wrong toward the other party, or perverseness or moral delinquency, but merely that the thing done or omitted to be done was done or omitted intentionally. It amounts to nothing more than this: That the person knows what he is doing, intends to do what he is doing, and is a free agent.' " (*Ibrahim v. Ford Motor Co.* (1989) 214 Cal.App.3d 878, 894 [263 Cal.Rptr. 64], internal citations omitted.)

- "[A] violation … is not willful if the defendant's failure to replace or refund was the result of a good faith and reasonable belief the facts imposing the statutory obligation were not present. This might be the case, for example, if the manufacturer reasonably believed the product *did* conform to the warranty, or a reasonable number of repair attempts had not been made, or the buyer desired further repair rather than replacement or refund. [¶] Our interpretation of section 1794(c) is consistent with the general policy against imposing forfeitures or penalties against parties for their good faith, reasonable actions. Unlike a standard requiring the plaintiff to prove the defendant *actually knew* of its obligation to refund or replace, which would allow manufacturers to escape the penalty by deliberately remaining ignorant of the facts, the interpretation we espouse will not vitiate the intended deterrent effect of the penalty. And unlike a simple equation of willfulness with volition, which would render 'willful' virtually all cases of refusal to replace or refund, our interpretation preserves the Act's distinction between willful and nonwillful violations. Accordingly, '[a] decision made without the use of reasonably available information germane to that decision is not a reasonable, good faith decision.' " (*Lukather v. General Motors, LLC* (2010) 181 Cal.App.4th 1041, 1051 [104 Cal.Rptr.3d 853], original italics, internal citation omitted.)

- "There is evidence [defendant] was aware that numerous efforts to find and fix the oil leak had been unsuccessful, which is evidence a jury may consider on the question of willfulness. Additionally, the jury could conclude that [defendant]'s policy, which requires a part be replaced or adjusted before [defendant] deems it a repair attempt but excludes from repair attempts any visit during which a mechanic searches for but is unable to locate the source of the problem, is unreasonable and not a good faith effort to honor its statutory obligations to repurchase defective cars. Finally, there was evidence that [defendant] adopted internal policies that erected hidden obstacles to the ability of an unwary consumer to obtain redress under the Act. This latter evidence would permit a jury to infer that [defendant] impedes and resists efforts by a consumer to force [defendant] to repurchase a defective car, regardless of the presence of an unrepairable defect, and that [defendant]'s decision to

reject [plaintiff]'s demand was made pursuant to [defendant]'s policies rather than to its good faith and reasonable belief the car did not have an unrepairable defect covered by the warranty or that a reasonable number of attempts to effect a repair had not yet occurred." (*Oregel, supra,* 90 Cal.App.4th at pp. 1104–1105, internal citations omitted.)

- "[T]he penalty under section 1794(c), like other civil penalties, is imposed as punishment or deterrence of the defendant, rather than to compensate the plaintiff. In this, it is akin to punitive damages." (*Kwan v. Mercedes Benz of N. Am.* (1994) 23 Cal.App.4th 174, 184 [28 Cal.Rptr.2d 371].)

Secondary Sources

4 Witkin, Summary of California Law (10th ed. 2005) Sales, §§ 321–324

1 California UCC Sales & Leases (Cont.Ed.Bar) Warranties, § 3.90

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.30 (Matthew Bender)

44 California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties*, § 502.53[1][b] (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales*, § 206.129 (Matthew Bender)

5 California Civil Practice: Business Litigation § 53:32 (Thomson Reuters~~ West~~)

3300. Locality Discrimination—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] engaged in unlawful locality discrimination. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] [offered to sell/sold/furnished] [***product/service***] at a lower price in one [location/section/community/city] in California than in another [location/section/community/city] in California;**

2. **That [***name of defendant***] intended to destroy competition from an established dealer [or to prevent competition from any person who in good faith intended and attempted to become such a dealer];**

3. **That [***name of plaintiff***] was harmed; and**

4. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003

Directions for Use

The word "price" as used here should be read sufficiently broadly to include "special rebates, collateral contracts, or any device of any nature whereby such discrimination is in substance or fact effected." (Bus. & Prof. Code, § 17049.) To the extent the circumstances of the case warrant it, the word "price" in the instruction may be supplemented or supplanted by other price-related terms.

Business and Professions Code sections 17071 and 17071.5 create rebuttable presumptions regarding the purpose or intent to injure competitors or destroy competition. The Supreme Court has observed: "The obvious and only effect of this provision is to require the defendants to go forward with such proof as would bring them within one of the exceptions or which would negative the prima facie showing of wrongful intent." (*People v. Pay Less Drug Store* (1944) 25 Cal.2d 108, 114 [153 P.2d 9].)

Sources and Authority

- "Locality Discrimination" Defined. Business and Professions Code section 17031. ~~provides: "Locality discrimination means a discrimination between different sections, communities or cities or portions thereof, or between different locations in such sections, communities, cities or portions thereof in this State, by selling or furnishing an article or product, at a lower price in one section, community or city, or any portion thereof, or in one location in such section, community, or city or any portion thereof, than in another."~~

- Locality Discrimination Prohibited. Business and Professions Code section 17040. ~~provides: "It is unlawful for any person engaged in the production, manufacture, distribution or sale of any article or product of general use or consumption, with intent to destroy the competition of any regular~~

~~established dealer in such article or product, or to prevent the competition of any person who in good faith, intends and attempts to become such dealer, to create locality discriminations. [¶] Nothing in this section prohibits the meeting in good faith of a competitive price."~~

- "Article or Product" Defined. Business and Professions Code section 17024. ~~provides, in part: " 'Article or product' includes any article, product, commodity, thing of value, service or output of a service trade."~~

- "Actual Damages or Injury Not Required. Business and Professions Code section 17082.

- "The purpose of the Unfair Practices Act (UPA) is 'to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair, dishonest, deceptive, destructive, fraudulent and discriminatory practices by which fair and honest competition is destroyed or prevented.' It forbids most locality discriminations, the use of loss leaders, gifts, secret rebates, boycotts, and 'deceptive, untrue or misleading advertising.' It also prohibits the sale of goods and services below cost." (*Pan Asia Venture Capital Corp. v. Hearst Corp.* (1999) 74 Cal.App.4th 424, 431-432 [88 Cal.Rptr.2d 118], internal citations omitted.)

- "Sections 17031 and 17040 are tailored to address the problem of a distributor, typically a retailer, selling out of many locations, who might use geographical price discrimination as a predatory practice against its own competitors." (*ABC International Traders, Inc. v. Matsushita Electric Corp. of America* (1997) 14 Cal.4th 1247, 1266 [61 Cal.Rptr.2d 112, 931 P.2d 290].)

- "As section 17031 is presently worded, we conclude that the smallest geographic unit it envisages is the individual store or outlet, not the individual purchaser regardless of location." (*Harris v. Capitol Records Distributing Corp.* (1966) 64 Cal.2d 454, 460 [50 Cal.Rptr. 539, 413 P.2d 139].)

- "[T]o fall within [the] prohibition a seller must have at least two different places of business and must sell at a lower price in one than in the other." (*Harris, supra,* 64 Cal.2d at p. 460.)

- ~~Business and Professions Code section 17082 provides, in part: "In any action under this chapter, it is not necessary to allege or prove actual damages or the threat thereof, or actual injury or the threat thereof, to the plaintiff. But, in addition to injunctive relief, any plaintiff in any such action shall be entitled to recover three times the amount of the actual damages, if any, sustained by the plaintiff, as well as three times the actual damages, if any, sustained by any person who has assigned to the plaintiff his claim for damages resulting from a violation of this chapter."~~

- "While, similar to other cases, damages cannot be awarded in antitrust cases upon sheer guesswork or speculation, the plaintiff seeking damages for loss of profits is required to establish only with reasonable probability the existence of some causal connection between defendant's wrongful act and some loss of the anticipated revenue. Once that has been accomplished, the jury will be permitted to act upon probable and inferential proof and to 'make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly.' " (*Suburban Mobile Homes, Inc. v. AMFAC Communities, Inc.* (1980) 101 Cal.App.3d 532, 545 [161 Cal.Rptr. 811], internal citations omitted.)

- The federal law most comparable to the Unfair Practices Act is the Robinson-Patman Act (15 U.S.C. § 13 et seq.); that act differs substantially from the Unfair Practices Act, however. For a discussion of this subject, see *Turnbull & Turnbull v. ARA Transportation* (1990) 219 Cal.App.3d 811 [268 Cal.Rptr. 856]. One notable difference is that the Robinson-Patman Act requires at least two actual sales. Thus, mere offers to sell cannot violate that act.

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 609–615

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.153 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender)

23 California Points and Authorities, Ch. 235, *Unfair Competition* (Matthew Bender)

1 Matthew Bender Practice Guide: California Unfair Competition and Business Torts, Ch. 5, *Antitrust*, 5.44, 5.46[2], 5.47[1]

3301. Below Cost Sales—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] engaged in unlawful sales below cost. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **[That [***name of defendant***] [offered to sell/sold] [***product/service***] at a price that was below cost;]**

   [or]

   [That [*name of defendant***] gave away [***product/service***];]**

2. **That [***name of defendant***]'s purpose was to injure competitors or destroy competition;**

3. **That [***name of plaintiff***] was harmed; and**

4. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

If [*name of plaintiff***] proves that [***name of defendant***] [[offered to sell/sold] [***product/service***] at a price that was below cost/ [or] gave away [***product/service***]] and that [***name of defendant***]'s acts harmed [***name of plaintiff***], you may assume that [***name of defendant***]'s purpose was to injure competitors or destroy competition. To overcome this presumption, [***name of defendant***] must present evidence of a different purpose. [***Name of defendant***] has presented evidence that [his/her/its purpose was [***specify other purpose***]. Considering all of the evidence presented, you must decide whether [***name of plaintiff***] proved that [***name of defendant***]'s purpose was to injure competitors or destroy competition.**

New September 2003; Revised June 2011

Directions for Use

The word "price" as used here should be read sufficiently broadly to include "special rebates, collateral contracts, or any device of any nature whereby such sale below cost is in substance or fact effected." (Bus. & Prof. Code, § 17049.) To the extent the circumstances of the case warrant it, the word "price" in the instruction may be supplemented or supplanted by other such price-related terms.

For instructions on "cost," see CACI No. 3303, *Definition of "Cost,"* CACI No. 3304, *Presumptions Concerning Costs—Manufacturer*, CACI No. 3305, *Presumptions Concerning Costs—Distributor*, and CACI No. 3306, *Methods of Allocating Costs to an Individual Product.*

Business and Professions Code sections 17071 and 17071.5 create a rebuttable presumption of the purpose or intent to injure competitors or destroy competition. The presumption requires the defendants to go forward with evidence that would establish an affirmative defense or otherwise rebut the

presumption of wrongful intent. (See *People v. Pay Less Drug Store* (1944) 25 Cal.2d 108, 114 [153 P.2d 9].) The plaintiff is entitled to an instruction on the presumption. (See *Bay Guardian Co. v. New Times Media LLC* (2010) 187 Cal.App.4th 438, 465 [114 Cal.Rptr.3d 392.) For possible affirmative defenses, see CACI No. 3331, *Affirmative Defense to Locality Discrimination, Below Cost Sales, and Loss Leader Sales Claims—Closed-out, Discontinued, Damaged, or Perishable Items,* CACI No. 3332, *Affirmative Defense to Locality Discrimination, Below Cost Sales, Loss Leader Sales, and Secret Rebates—Functional Classifications,* and CACI No. 3333, *Affirmative Defense to Locality Discrimination, Below Cost Sales, and Loss Leader Sales Claims—Meeting Competition.*

Sources and Authority

- "Below-Cost Sales Prohibited. Business and Professions Code section 17043. ~~provides: "It is unlawful for any person engaged in business within this State to sell any article or product at less than the cost thereof to such vendor, or to give away any article or product, for the purpose of injuring competitors or destroying competition."~~

- "Article or Product" Defined. Business and Professions Code section 17024. ~~provides in part: " 'Article or product' includes any article, product, commodity, thing of value, service or output of a service trade."~~

- "Presumption of Intent to Injure Competitiors or Destroy Competition. Business and Professions Code section 17071. ~~provides: "In all actions brought under this chapter proof of one or more acts of selling or giving away any article or product below cost or at discriminatory prices, together with proof of the injurious effect of such acts, is presumptive evidence of the purpose or intent to injure competitors or destroy competition."~~

- Actual Damages or Injury Not Required. Business and Professions Code section 17082. ~~provides in part: "In any action under this chapter, it is not necessary to allege or prove actual damages or the threat thereof, or actual injury or the threat thereof, to the plaintiff. But, in addition to injunctive relief, any plaintiff in any such action shall be entitled to recover three times the amount of the actual damages, if any, sustained by the plaintiff, as well as three times the actual damages, if any, sustained by any person who has assigned to the plaintiff his claim for damages resulting from a violation of this chapter."~~

- "The purpose of the Unfair Practices Act (UPA) is 'to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair, dishonest, deceptive, destructive, fraudulent and discriminatory practices by which fair and honest competition is destroyed or prevented.' It forbids most locality discriminations, the use of loss leaders, gifts, secret rebates, boycotts, and 'deceptive, untrue or misleading advertising.' It also prohibits the sale of goods and services below cost." (*Pan Asia Venture Capital Corp. v. Hearst Corp.* (1999) 74 Cal.App.4th 424, 431–432 [88 Cal.Rptr.2d 118], internal citations omitted.)

- "Section 17043 uses the word 'purpose,' not 'intent,' not 'knowledge.' We therefore conclude that to violate section 17043, a company must act with the purpose, i.e., the desire, of injuring competitors or destroying competition." (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 174–175 [83 Cal.Rptr.2d 548, 973 P.2d 527].**)**

- "Proof that a defendant sold or distributed articles or products below cost will be 'presumptive evidence of the purpose or intent to injure competitors or destroy competition.' " (*Pan Asia Venture Capital Corp., supra,* 74 Cal.App.4th at p. 432, internal citation omitted.)

- "[W]e conclude that the section 17071 presumption is properly categorized as one that affects the burden of proof rather than merely the burden of persuasion. 'A presumption affecting the burden of proof shifts the burden of persuasion on an ultimate fact to the party against whom the presumption operates upon a finding of the predicate facts.' 'A presumption meant to establish or implement some public policy other than facilitation of the particular action in which it applies is a presumption affecting the burden of proof.' As we view section 17071, the presumption is indicative of an effort by the Legislature to implement the public policy of facilitating proof of unlawful purpose of below-cost sales which injure a competitor by shifting the burden of proof to the party more in possession of relevant evidence demonstrating the true intent associated with the pricing scheme." (*Bay Guardian Co., supra,* 187 Cal.App.4th at p. 464, internal citations omitted.)

- " '[T]he allocation of evidentiary burdens [under section 17071 is] as follows: "Assuming proof of injury to a competitor has been made, California law allows plaintiffs to establish a prima facie case with proof of prices below average total cost. The defendant then has the burden of negating the inference of illegal intent or establishing an affirmative defense." … [Citation.]' The presumption 'may be rebutted by establishing one of the statute's affirmative defenses, such as meeting competition, see Cal.Bus. & Prof.Code § 17050, or by showing that the sales "were made in good faith and not for the purpose of injuring competitors or destroying competition." [Citation.]' 'After proof of the sales below cost and injury resulting therefrom, there is no undue hardship cast upon the defendants to require them to come forward with evidence of their true intent as against the prima facie showing, or with evidence which will bring them within a specified exception in the act.' Once the presumption is rebutted, 'the burden shifts back to the moving party to offer actual proof of injurious intent.' " (*Bay Guardian Co., supra,* 187 Cal.App.4th at pp. 464–465, internal citations omitted; but see *Haycock v. Hughes Aircraft Co.* (1994) 22 Cal.App.4th 1473, 1492 [28 Cal.Rptr.2d 248] [Evid. Code § 606 indicates that a presumption affecting the burden of proof imposes upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact].)

- "The section 17071 presumption, being one that in both nature and consequence alters the burden of proof, did ' "*not* disappear in the face of evidence as to the *nonexistence* of the presumed fact. …" [Citations.]' Therefore, the fact that defendants denied any purpose to harm competition, and produced some evidence of good faith efforts to compete in the marketplace, did not negate plaintiff's right to an instruction on a presumption affecting the burden of proof of unlawful purpose. Defendants may have offered rebuttal evidence, but they did not negate the presumption by conclusive proof that negated unlawful purpose as a matter of law or compelled a finding on the issue in their favor based on this record." (*Bay Guardian Co., supra,* 187 Cal.App.4th at p. 465, original italics.)

- "Determination of the defendant's cost has always been treated as an issue of fact." (*Pan Asia Venture Capital Corp., supra,* 74 Cal.App.4th at p. 432.)

- "While, similar to other cases, damages cannot be awarded in antitrust cases upon sheer guesswork or

speculation, the plaintiff seeking damages for loss of profits is required to establish only with reasonable probability the existence of some causal connection between defendant's wrongful act and some loss of the anticipated revenue. Once that has been accomplished, the jury will be permitted to act upon probable and inferential proof and to 'make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly.' " (*Suburban Mobile Homes, Inc. v. AMFAC Communities, Inc.* (1980) 101 Cal.App.3d 532, 545 [161 Cal.Rptr. 811], internal citations omitted.)

- "Even the objectives of the [federal and state] laws, though certainly similar, are not identical. The Sherman Act and Robinson-Patman Act (15 U.S.C. § 13(a)) seek to prevent anticompetitive acts that impair competition or harm competitors, whereas the UPA reflects a broader '[l]egislative concern not only with the maintenance of competition, but with the maintenance of "*fair and honest* competition." [Citations.]' We disagree with defendants' characterization of the UPA as legislation that was merely 'intended to protect the public, not individual competitors.' The UPA has been described by our high court 'as a legislative attempt "to regulate business as a whole by prohibiting practices which the legislature has determined constitute unfair trade practices." ' " (*Bay Guardian Co., supra,* 187 Cal.App.4th at p. 457, original italics, internal citations omitted.)

- "In light of the distinctions we discern, some glaring, some subtle, between section 17043 and the federal or other state predatory pricing laws, and particularly in light of the conspicuous focus of section 17043 upon the mental state of defendants' purpose rather than ultimate impact of below-cost pricing, we decline to imply a recoupment element in the statute where none has been expressed." (*Bay Guardian Co., supra,* 187 Cal.App.4th at p. 459, internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 609–615

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts,* § 40.153 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition,* § 565.52 (Matthew Bender)

23 California Points and Authorities, Ch. 235, *Unfair Competition,* § 235.22 et seq. (Matthew Bender)

1 Matthew Bender Practice Guide: California Unfair Competition and Business Torts, Ch. 5, *Antitrust,* 5.46[3], 5.47[2]

3302. Loss Leader Sales—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] [offered to sell/sold/offered the use of] [***product/service***] as an unlawful loss leader. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] [offered to sell/sold/offered the use of] [***product/service***] at prices that were below [his/her/its] costs;**

2. **[***Insert one or more of the following:***]**

   [That [*name of defendant***]'s purpose was to influence, promote, or encourage the purchase of other merchandise from [him/her/it]; [or]]**

   [That the [offer/sale] had a tendency or capacity to mislead or deceive purchasers or potential purchasers; [or]]

   [That the [offer/sale] took business away from or otherwise injured competitors;]

3. **That [***name of defendant***]'s intent was to injure competitors or destroy competition;**

4. **That [***name of plaintiff***] was harmed; and**

5. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003

Directions for Use

The word "price" as used here should be read sufficiently broadly to include "special rebates, collateral contracts, or any device of any nature whereby such sale below cost is in substance or fact effected." (Bus. & Prof. Code, § 17049.) To the extent the circumstances of the case warrant it, the word "price" in the instruction may be supplemented or supplanted by other price-related terms.

For instructions on "cost," see CACI No. 3303, *Definition of "Cost"*; CACI No. 3304, *Presumptions Concerning Costs—Manufacturer*; CACI No. 3305, *Presumptions Concerning Costs—Distributor*; and CACI No. 3306, *Methods of Allocating Costs to an Individual Product.*

Business and Professions Code sections 17071 and 17071.5 create rebuttable presumptions regarding the purpose or intent to injure competitors or destroy competition. The Supreme Court has observed: "The obvious and only effect of this provision is to require the defendants to go forward with such proof as would bring them within one of the exceptions or which would negative the prima facie showing of

wrongful intent." (*People v. Pay Less Drug Store* (1944) 25 Cal.2d 108, 114 [153 P.2d 9].)

Sources and Authority

- "Loss Leader" Sales Prohibited. Business and Professions Code section 17044. ~~provides: "It is unlawful for any person engaged in business within this State to sell or use any article or product as a 'loss leader' as defined in Section 17030 of this chapter."~~

- "Loss Leader" Defined. Business and Professions Code section 17030. ~~provides:~~
  ~~"Loss leader" means any article or product sold at less than cost:~~

  ~~(a) Where the purpose is to induce, promote or encourage the purchase of other merchandise; or~~

  ~~(b) Where the effect is a tendency or capacity to mislead or deceive purchasers or prospective purchasers; or~~

  ~~(c) Where the effect is to divert trade from or otherwise injure competitors.~~

- "Article or Product" Defined. Business and Professions Code section 17024. ~~provides, in part: " 'Article or product' includes any article, product, commodity, thing of value, service or output of a service trade."~~

- Actual Damages or Injury Not Required. Business and Professions Code section 17082.

- "The purpose of the Unfair Practices Act (UPA) is 'to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair, dishonest, deceptive, destructive, fraudulent and discriminatory practices by which fair and honest competition is destroyed or prevented.' It forbids most locality discriminations, the use of loss leaders, gifts, secret rebates, boycotts, and 'deceptive, untrue or misleading advertising.' It also prohibits the sale of goods and services below cost." (*Pan Asia Venture Capital Corp. v. Hearst Corp.* (1999) 74 Cal.App.4th 424, 431-432 [88 Cal.Rptr.2d 118], internal citations omitted.)

- "[N]otwithstanding the absence of any language to this effect in either section 17044 or section 17030, intent to injure competitors or to destroy competition is required for violation of section 17044. In other words, for competition to be unfair under the Act, the person engaging in the challenged practice must possess an intent to injure his competitors or destroy his competition." (*Dooley's Hardware Mart v. Food Giant Markets, Inc.* (1971) 21 Cal.App.3d 513, 517 [98 Cal.Rptr. 543].)

- "We conclude that to violate sections 17043 and 17044, part of the Unfair Practices Act, which prohibit below-cost sales and loss leaders, a company must act with the purpose, i.e., the desire, of injuring competitors or destroying competition." (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 169 [83 Cal.Rptr.2d 548, 973 P.2d 527].)

- It has been held by one federal district court interpreting California's loss leader statute that it applies

only to product sales, not giveaways. (*Co-Opportunities, Inc. v. National Broadcasting Co., Inc.* (N.D. Cal. 1981) 510 F.Supp. 43, 50.)

- ~~Business and Professions Code section 17082 provides, in part: "In any action under this chapter, it is not necessary to allege or prove actual damages or the threat thereof, or actual injury or the threat thereof, to the plaintiff. But, in addition to injunctive relief, any plaintiff in any such action shall be entitled to recover three times the amount of the actual damages, if any, sustained by the plaintiff, as well as three times the actual damages, if any, sustained by any person who has assigned to the plaintiff his claim for damages resulting from a violation of this chapter."~~

- "While, similar to other cases, damages cannot be awarded in antitrust cases upon sheer guesswork or speculation, the plaintiff seeking damages for loss of profits is required to establish only with reasonable probability the existence of some causal connection between defendant's wrongful act and some loss of the anticipated revenue. Once that has been accomplished, the jury will be permitted to act upon probable and inferential proof and to 'make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly.' " (*Suburban Mobile Homes, Inc. v. AMFAC Communities, Inc.* (1980) 101 Cal.App.3d 532, 545 [161 Cal.Rptr. 811], internal citations omitted.)

- The federal law most comparable to the Unfair Practices Act is the Robinson-Patman Act (15 U.S.C. § 13 et seq.); that act differs substantially from the Unfair Practices Act, however. For a discussion of this subject, see *Turnbull & Turnbull v. ARA Transportation* (1990) 219 Cal.App.3d 811 [268 Cal.Rptr. 856]. One notable difference is that the Robinson-Patman Act requires at least two actual sales. Thus, mere offers to sell cannot violate that act.

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, § 614

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts,* § 40.153 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender)

23 California Points and Authorities, Ch. 235, *Unfair Competition* (Matthew Bender)

1 Matthew Bender Practice Guide: California Unfair Competition and Business Torts, Ch. 5, *Antitrust,* 5.46[4], 5.47[3]

3303. Definition of "Cost"

The term "cost" means all costs of doing business, including fixed costs that do not tend to change with sales, such as heat and light, as well as variable costs that do tend to change with sales, such as sales commissions.

Costs of doing business may include the following:

1. **Labor, including salaries of executives and officers;**
2. **Rent and utilities;**
3. **Interest on loans;**
4. **Depreciation;**
5. **Selling cost;**
6. **Maintenance of equipment;**
7. **Delivery costs;**
8. **Credit losses;**
9. **Advertising costs;**
10. **Licenses, taxes; [and]**
11. **Insurance; [and]**
12. **[***Insert other cost(s).***]**

[The term "cost" as applied to warranty service agreements also includes the cost of parts and delivery of the parts.]

[The term "cost" as applied to distribution also includes either the invoice cost or replacement cost of the product, whichever is lower.]

[The term "cost" as applied to services also includes the prevailing wage at the time and place these services were provided if [*name of defendant***] was paying less than the prevailing wage.]**

Any discounts given for cash payments may not be used to lower costs.

New September 2003

Directions for Use

The bracketed paragraphs should be inserted as appropriate to the facts.

In cases involving the sale of cellular telephones and cigarettes, Business and Professions Code sections 17026.1 and 17026.5 measure "cost" somewhat differently.

Sources and Authority

- "Cost" Defined. Business and Professions Code section 17026. ~~provides:~~

  ~~"Cost" as applied to production includes the cost of raw materials, labor and all overhead expenses of the producer.~~

  ~~"Cost" as applied to distribution means the invoice or replacement cost, whichever is lower, of the article or product to the distributor and vendor, plus the cost of doing business by the distributor and vendor and in the absence of proof of cost of doing business a markup of 6 percent on such invoice or replacement cost shall be prima facie proof of such cost of doing business.~~

  ~~"Cost" as applied to warranty service agreements includes the cost of parts, transporting the parts, labor, and all overhead expenses of the service agency.~~
  ~~Discounts granted for cash payments shall not be used to reduce costs.~~

- "Cost of Doing Business" or "Overhead" Defined. Business and Professions Code section 17029. ~~provides: " 'Cost of doing business' or 'overhead expense' means all costs of doing business incurred in the conduct of the business and shall include without limitation the following items of expense: labor (including salaries of executives and officers), rent, interest on borrowed capital, depreciation, selling cost, maintenance of equipment, delivery costs, credit losses, all types of licenses, taxes, insurance and advertising."~~

- Prevailing Wage Used to Determine Cost. Business and Professions Code section 17076. ~~provides: "In any action brought under this chapter, where persons are employed or performing services for any person or in the conduct of the business wherein such person is charged with a violation of this chapter, and are so employed or performing such services without compensation or at a wage lower than that prevailing at the time and place of the service for the particular services performed, such services shall be charged as an expense of the business in which rendered and at the rate of the wage for the services rendered prevailing at the time of the service at the place where rendered."~~

- "Determination of the defendant's cost has always been treated as an issue of fact." (*Pan Asia Venture Capital Corp. v. Hearst Corp.* (1999) 74 Cal.App.4th 424, 433 [88 Cal.Rptr.2d 118].)

- "These statutes embody California's fully allocated cost standard, that is, a fair allocation of all fixed or variable costs associated with production of the article or product." (*Pan Asia Venture Capital Corp., supra,* 74 Cal.App.4th at p. 432, footnote omitted.)

- “Cost is to be measured as ‘the fair average cost of production over a reasonable time, rather than the cost of one item on a particular occasion.’ ” (*Pan Asia Venture Capital Corp.*, *supra,* 74 Cal.App.4th at p. 432, fn. 6, internal citation omitted.)

- “Variable costs are costs that vary with changes in output, while fixed costs are those that do not vary with changes in output.” (*Turnbull & Turnbull v. ARA Transportation Inc.* (1990) 219 Cal.App.3d 811, 820 [268 Cal.Rptr. 856].)

- “California employs a fully allocated cost standard to determine whether a sale has violated section 17043. Under sections 17026 and 17029 ... cost means invoice cost plus the vendor’s full cost of doing business or six percent.” (*G.H.I.I. v. Mts, Inc.* (1983) 147 Cal.App.3d 256, 275 [195 Cal.Rptr. 211], internal citations omitted.)

- “We find the use of the fully allocated cost method, when viewed in conjunction with the injurious intent requirement of section 17043, is rationally related to the valid legislative purpose ... as it assists in preventing the creation or perpetuation of monopolies.” (*Turnbull & Turnbull, supra,* 219 Cal.App.3d at p. 822.)

- “To be legally acceptable, the allocation of indirect or fixed overhead costs to a particular product or service must be reasonably related to the burden such product or service imposes on the overall cost of doing business.” (*Turnbull & Turnbull, supra,* 219 Cal.App.3d at p. 822.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 609–615

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.153 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender)

23 California Points and Authorities, Ch. 235, *Unfair Competition* (Matthew Bender)

3304. Presumptions Concerning Costs—Manufacturer

A manufacturer's costs include the cost of raw materials and the cost of manufacturing.

The cost of manufacturing is the average cost of manufacture over a reasonable time, rather than the cost of one item at a particular time.

[If [*name of defendant***]'s cost for raw materials cannot be computed, the cost is presumed to be the prevailing price for similar raw materials at the time and place those materials would usually be purchased.]**

[If [*name of defendant***]'s trade or industry has an established cost study or survey for the geographic area in this case, that cost survey may be considered in calculating [***name of defendant***]'s costs.]**

[[*Name of defendant***]'s delivery costs are presumed to be the tariffs set by the California Public Utilities Commission, but this presumption may be overcome by other evidence.]**

New September 2003

Directions for Use

The bracketed sentences should be inserted as necessary.

Sources and Authority

- "Cost" Defined. Business and Professions Code section 17026. ~~provides, in part: " 'Cost' as applied to production includes the cost of raw materials, labor and all overhead expenses of the producer."~~
- Cost Survey Is Competent Evidence. Business and Professions Code section 17072. ~~provides: "Where a particular trade or industry, of which a person complained against is a member, has an established cost survey for the locality and vicinity in which the offense is committed, that cost survey is competent evidence to be used in proving the costs of such person."~~
- Presumptive Evidence of Cost. Business and Professions Code section 17073. ~~provides: "Proof of average overall cost of doing business for any particular inventory period when added to the cost of production of each article or product, as to a producer, or invoice or replacement cost, whichever is lower, of each article or product, as to a distributor, is presumptive evidence of cost of each such article or product involved in any action brought under this chapter."~~
- Transportation Tariffs Are Presumptive Evidence of Delivery Costs. Business and Professions Code section 17074. ~~provides: "Proof of transportation tariffs when fixed and approved by the Public Utilities Commission of the State of California is presumptive evidence of delivery cost."~~

- Prevailing Market Price is Presumptive Evidence of Cost of Raw Materials. Business and Professions Code section 17077. ~~provides: "In any action or prosecution for sales below cost in violation of this chapter, if the defendant acquires his raw materials for a consideration not wholly or definitely computable in money, the cost of the raw materials shall be presumed to be the prevailing market price for similar raw materials in the ordinary channels of trade in the locality or vicinity in which such raw materials were acquired, at the time of the acquisition."~~

- "Determination of the defendant's cost has always been treated as an issue of fact." (*Pan Asia Venture Capital Corp. v. Hearst Corp.* (1999) 74 Cal.App.4th 424, 432 [88 Cal.Rptr.2d 118].)

- "California appears to have adopted a very expansive approach to the evidence that may be used to establish cost; no formula has been expressly sustained or denounced." (*Pan Asia Venture Capital Corp.*, *supra*, 74 Cal.App.4th at p. 436.)

- "These statutes embody California's fully allocated cost standard, that is, a fair allocation of all fixed or variable costs associated with production of the article or product." (*Pan Asia Venture Capital Corp.*, *supra*, 74 Cal.App.4th at p. 432, footnote omitted.)

- "Cost is to be measured as 'the fair average cost of production over a reasonable time, rather than the cost of one item on a particular occasion.' " (*Pan Asia Venture Capital Corp.*, *supra*, 74 Cal.App.4th at p. 432, fn. 6, internal citation omitted.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 609–615

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.153 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender)

23 California Points and Authorities, Ch. 235, *Unfair Competition* (Matthew Bender)

3305. Presumptions Concerning Costs—Distributor

A distributor's costs include the cost of the product being distributed and the cost of doing business as a distributor.

The cost of the product being distributed is the amount [*name of defendant***] paid for the product or [his/her/its] cost of replacing the product, whichever is less.**

[*Name of defendant***]'s cost of doing business as a distributor is the average cost of distribution over a reasonable time, rather than the cost of distributing one item at a particular time.**

[If [*name of defendant***]'s trade or industry has an established cost study or survey for the geographic area in this case, that cost survey may be considered in calculating [***name of defendant***]'s costs.]**

[If there is no other proof of the cost of doing business, a markup of six percent on the invoice or replacement cost of an article or product is presumed to be [*name of defendant***]'s additional cost of doing business.]**

[[*Name of defendant***]'s delivery costs are presumed to be the tariffs set by the California Public Utilities Commission, but this presumption may be overcome by other evidence.]**

New September 2003

Directions for Use

Presumably, this instruction would also apply to sellers that are denominated "retailers."

The bracketed sentences should be inserted as necessary.

There is an additional presumption regarding costs in Business and Professions Code section 17026 for warranty service providers: " 'Cost' as applied to warranty service agreements includes the cost of parts, transporting the parts, labor, and all overhead expenses of the service agency."

Sources and Authority

- Cost of Distribution. Business and Professions Code section 17026. ~~provides, in part: " 'Cost' as applied to distribution means the invoice or replacement cost, whichever is lower, of the article or product to the distributor and vendor, plus the cost of doing business by the distributor and vendor and in the absence of proof of cost of doing business a markup of 6 percent on such invoice or replacement cost shall be prima facie proof of such cost of doing business."~~

- Cost Survey is Evidence of Cost. Business and Professions Code section 17072. ~~provides: "Where a particular trade or industry, of which a person complained against is a member, has an established~~

~~cost survey for the locality and vicinity in which the offense is committed, that cost survey is competent evidence to be used in proving the costs of such person."~~

- Presumptive Evidence of Distribution Costs. Business and Professions Code section 17073. ~~provides: "Proof of average overall cost of doing business for any particular inventory period when added to the cost of production of each article or product, as to a producer, or invoice or replacement cost, whichever is lower, of each article or product, as to a distributor, is presumptive evidence of cost of each such article or product involved in any action brought under this chapter."~~

- Transportation Tariffs Presumptive Evidence of Delivery Costs. Business and Professions Code section 17074. ~~provides: "Proof of transportation tariffs when fixed and approved by the Public Utilities Commission of the State of California is presumptive evidence of delivery cost."~~

- "Determination of the defendant's cost has always been treated as an issue of fact." (*Pan Asia Venture Capital Corp. v. Hearst Corp.* (1999) 74 Cal.App.4th 424, 432 [88 Cal.Rptr.2d 118].)

- "California appears to have adopted a very expansive approach to the evidence that may be used to establish cost; no formula has been expressly sustained or denounced." (*Pan Asia Venture Capital Corp., supra,* 74 Cal.App.4th at p. 436.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 609–615

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts,* § 40.153 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender)

23 California Points and Authorities, Ch. 235, *Unfair Competition* (Matthew Bender)

3320. Secret Rebates—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] [***insert one or both of the following:***]**

> **[secretly [gave/received] [payments/rebates/refunds/commissions/unearned discounts;]] [or] [secretly [gave to some buyers/received] services or privileges that were not given to other buyers purchasing on like terms and conditions.]**

To establish this claim, [*name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] secretly [[gave/received] [payments/rebates/refunds/commissions/unearned discounts]] [or] [[gave to some buyers/received] services or privileges that were not given to other buyers purchasing on like terms and conditions];**

2. **That a competitor was harmed;**

3. **That the [payment/allowance] had a tendency to destroy competition;**

4. **That [***name of plaintiff***] was harmed; and**

5. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003

Directions for Use

Element 2 should be omitted if the plaintiff is a competitor of the defendant; that issue is covered by element 4.

Sources and Authority

- Secret Rebates Prohibited. Business and Professions Code § 17045. ~~provides: "The secret payment or allowance of rebates, refunds, commissions, or unearned discounts, whether in the form of money or otherwise, or secretly extending to certain purchasers special services or privileges not extended to all purchasers purchasing upon like terms and conditions, to the injury of a competitor and where such payment or allowance tends to destroy competition, is unlawful."~~

- Actual Damages or Injury Not Required. Business and Professions Code section 17082.

- "The purpose of the Unfair Practices Act (UPA) is 'to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair, dishonest, deceptive, destructive, fraudulent and discriminatory practices by which fair and honest competition

is destroyed or prevented.' It forbids most locality discriminations, the use of loss leaders, gifts, secret rebates, boycotts, and 'deceptive, untrue or misleading advertising.' It also prohibits the sale of goods and services below cost." (*Pan Asia Venture Capital Corp. v. Hearst Corp.* (1999) 74 Cal.App.4th 424, 431-432 [88 Cal.Rptr.2d 118], internal citations omitted.)

- "[T]here are three elements to a violation of section 17045. First, there must be a 'secret' allowance of an 'unearned' discount. Second, there must be 'injury' to a competitor. Third, the allowance must tend to destroy competition." (*Diesel Elec. Sales & Serv., Inc. v. Marco Marine San Diego* (1993) 16 Cal.App.4th 202, 212 [20 Cal.Rptr.2d 62].)

- "By its terms, section 17045 requires the plaintiff to prove not only injury to a competitor, but, *in addition*, a tendency 'to destroy competition.' " (*ABC International Traders, Inc. v. Matsushita Electric Corp. of America* (1997) 14 Cal.4th 1247, 1262 [61 Cal.Rptr.2d 112, 931 P.2d 290], original italics.)

- "[P]roof of a knowing or intentional receipt by a buyer of a secret, unearned discount is not required under section 17045." (*Diesel Elec. Sales & Serv., Inc., supra,* 16 Cal.App.4th at p. 214, fn. 4.)

- "[S]ection 17045 does not require a proof of an 'intent' to destroy competition, but only that the secret, unearned discount had a *tendency* to destroy competition." (*Diesel Elec. Sales & Serv., Inc., supra,* 16 Cal.App.4th at p. 215, original italics.)

- Those competing against a seller who provides the secret rebate, on the "primary line," have standing to sue under the statute. Likewise, a customer of the seller who is disfavored by that seller providing a secret rebate to competitors of that customer, creating so-called "secondary line" injury, also has standing to sue. (*ABC International Traders, supra,* 14 Cal.4th at p. 1257.)

- ~~Business and Professions Code section 17082 provides, in part: "In any action under this chapter, it is not necessary to allege or prove actual damages or the threat thereof, or actual injury or the threat thereof, to the plaintiff. But, in addition to injunctive relief, any plaintiff in any such action shall be entitled to recover three times the amount of the actual damages, if any, sustained by the plaintiff, as well as three times the actual damages, if any, sustained by any person who has assigned to the plaintiff his claim for damages resulting from a violation of this chapter."~~

- "While, similar to other cases, damages cannot be awarded in antitrust cases upon sheer guesswork or speculation, the plaintiff seeking damages for loss of profits is required to establish only with reasonable probability the existence of some causal connection between defendant's wrongful act and some loss of the anticipated revenue. Once that has been accomplished, the jury will be permitted to act upon probable and inferential proof and to 'make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly.' " (*Suburban Mobile Homes, Inc. v. AMFAC Communities, Inc.* (1980) 101 Cal.App.3d 532, 545 [161 Cal.Rptr. 811], internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 609–615

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts,* § 40.153 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender)

23 California Points and Authorities, Ch. 235, *Unfair Competition* (Matthew Bender)

1 Matthew Bender Practice Guide: California Unfair Competition and Business Torts, Ch. 5, *Antitrust,* 5.46[5], 5.47[4]

3330. Affirmative Defense to Locality Discrimination Claim—Cost Justification

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[*Name of defendant***] claims that any locality discrimination proven by [***name of plaintiff***] is within the law. To succeed, [***name of defendant***] must prove that the difference in [his/her/its] price is justified by: [***insert one or more of the following:***]**

[A difference in the [grade/quality/quantity] of the [*product*] [he/she/it] sold in the different locations;] [or]

[The difference in the cost of the [manufacture/sale/delivery] of [his/her/its] [*product*] in the different locations;] [or]

[A difference in the actual cost of transportation from the place the [*product*] was [produced/manufactured/shipped] to the place where the [*product*] was sold.]

New September 2003

Directions for Use

This defense applies to locality discrimination only.

Sources and Authority

- Costs Justification for Locality Discrimination. Business and Professions Code section 17041. ~~provides: "Nothing in this chapter prohibits locality discriminations which make allowances for differences, if any, in the grade, quality or quantity when based and justified in the cost of manufacture, sale or delivery, or the actual cost of transportation from the point of production, if a raw product or commodity, or from the point of manufacture if a manufactured product or commodity, or from the point of shipment to the point of destination."~~

- "We ... conclude that appellants are not required to negative the exception for differences in grade or other enumerated factors found in section 17041, and deem the complaint sufficient to withstand demurrer without such allegations." (*G.H.I.I. v. Mts, Inc.* (1983) 147 Cal.App.3d 256, 273 [195 Cal.Rptr. 211], internal citations and footnote omitted.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 609–615

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.153 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender)

23 California Points and Authorities, Ch. 235, *Unfair Competition* (Matthew Bender)

1 Matthew Bender Practice Guide: California Unfair Competition and Business Torts, Ch. 5, *Antitrust,* 5.46[2], 5.100[2]

3331. Affirmative Defense to Locality Discrimination, Below Cost Sales, and Loss Leader Sales Claims—Closed-out, Discontinued, Damaged, or Perishable Items

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[*Name of defendant***] claims that any [locality discrimination/below cost sales/loss leader sales] proven by [***name of plaintiff***] [is/are] within the law because the [***product***] was being sold as [a close-out/seasonal goods/damaged goods/perishable goods]. To succeed, [***name of defendant***] must prove both of the following:**

1. **That [his/her/its] sales were [***insert one or more of the following:***]**

   [in the course of closing out, in good faith, all or any part of [his/her/its] supply of [*product***], in order to stop trade in [***product***];] [or]**

   [of seasonal goods to prevent loss by depreciation;] [or]

   [of perishable goods to prevent loss by spoilage or depreciation;] [or] [of goods that were damaged or deteriorated in quality;] and

2. **That [***name of defendant***] gave sufficient notice of the sale to the public.**

Notice is sufficient only if:

1. **The sale goods are kept separate from other goods;**

2. **The sale goods are clearly marked with the reason[s] for the sales; and**

3. **Any advertisement of such goods sets forth the reason[s] for the sale and indicates the number of items to be sold.**

New September 2003

Directions for Use

This defense applies to locality discrimination, below cost sales, and loss leader sales only.

Sources and Authority

- Exceptions for Close-out, Discontinued, Damaged, or Perishable Items. Business and Professions Code section 17050. ~~provides, in part:~~

  ~~The prohibitions of this chapter against locality discriminations, sales below cost, and loss leaders do not apply to any sale made:~~

  ~~(a) In closing out in good faith the owner's stock or any part thereof for the purpose of~~

~~discontinuing his trade in any such article or product and in the case of the sale of seasonal goods or to the bona fide sale of perishable goods to prevent loss to the vendor by spoilage or depreciation; provided, notice is given to the public thereof.~~

~~(b) When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.~~

~~...~~

~~The notice required to be given under this section shall not be sufficient unless the subject of such sales is kept separate from other stocks and clearly and legibly marked with the reason for such sales, and any advertisement of such goods must indicate the same facts and the number of items to be sold.~~

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 609–615

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.153 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender)

23 California Points and Authorities, Ch. 235, *Unfair Competition* (Matthew Bender)

1 Matthew Bender Practice Guide: California Unfair Competition and Business Torts, Ch. 5, *Antitrust*, 5.100[3]

3332. Affirmative Defense to Locality Discrimination, Below Cost Sales, Loss Leader Sales, and Secret Rebates—Functional Classifications

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[*Name of defendant***] claims that any [locality discrimination/below cost sales/loss leader sales/secret rebates] proven by [***name of plaintiff***] [is/are] within the law because they apply to different classes of customers. To succeed, [***name of defendant***] must prove all of the following:**

1. **That [***name of defendant***] created different classes of customers, such as [broker/jobber/wholesaler/retailer/[***insert other***]];**

2. **That customers in the different classes performed different functions and assumed the risk, investment, and costs involved;**

3. **That the difference in [price/rebate/discount/special services/privileges] for [***product/service***] was given only in those sales where the favored buyer performed the function on which the claim of a different class is based; and**

4. **That the difference in price was reasonably related to the value of such function.**

New September 2003

Directions for Use

This defense applies to locality discrimination, sales below cost, loss leader sales, and secret rebates.

Sources and Authority

- Functional Classifications. Business and Professions Code section 17042. ~~provides:~~

  ~~Nothing in this chapter prohibits any of the following:~~

  ~~(a) A selection of customers.~~

  ~~(b) A functional classification by any person of any customer as broker, jobber, wholesaler or retailer.~~

  ~~(c) A differential in price for any article or product as between any customers in different functional classifications.~~

- " '[T]he law should tolerate no subterfuge. For instance, where a wholesaler-retailer buys only part of his goods as a wholesaler, he must not claim a functional discount on all. Only to the extent that a buyer actually performs certain functions, assuming all the risk, investment, and costs involved, should he legally qualify for a functional discount. Hence a distributor should be eligible for a discount corresponding to any part of the function he actually performs on that part of the goods for

which he performs it.' " (*Diesel Elec. Sales & Serv., Inc. v. Marco Marine San Diego* (1993) 16 Cal.App.4th 202, 217 [20 Cal.Rptr.2d 62], internal citations omitted.)

- "[A] pricing structure in which a distributor sells to a retailer at one discount and to a rack-jobber at another is expressly permitted by section 17042." (*Harris v. Capitol Records Distributing Corp.* (1966) 64 Cal.2d 454, 463 [50 Cal.Rptr. 539, 413 P.2d 139], footnote omitted.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 609–615

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.153 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender)

23 California Points and Authorities, Ch. 235, *Unfair Competition* (Matthew Bender)

1 Matthew Bender Practice Guide: California Unfair Competition and Business Torts, Ch. 5, *Antitrust*, 5.100[4]

3333. Affirmative Defense to Locality Discrimination, Below Cost Sales, and Loss Leader Sales Claims—Meeting Competition

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[*Name of defendant***] claims that any [locality discrimination/below cost sales/loss leader sales] proven by [***name of plaintiff***] [is/are] justified by the need to meet competition. To succeed, [***name of defendant***] must prove that the sales of [***product/service***] were made in an attempt, in good faith, to meet the legal prices of a competitor selling the same [***product/service***] in the ordinary course of business in the same area.**

To meet legal prices means to lower the price to a point that the seller believes in good faith is at or above the legal price of the competitor it is trying to meet. That is, a seller may attempt to "meet," but not "beat," what in good faith it believes to be that competitor's legal price.

New September 2003

Directions for Use

This defense applies to locality discrimination, sales below cost, and loss leader sales only.

Sources and Authority

- Good-Faith Price to Meet Competition Permitted. Business and Professions Code section 17050(~~ed~~). ~~provides, in part: "The prohibitions of this chapter against locality discriminations, sales below cost, and loss leaders do not apply to any sale made: ... [i]n an endeavor made in good faith by a manufacturer, selling an article or product of his own manufacture, in a transaction and sale to a wholesaler or retailer for resale to meet the legal prices of a competitor selling the same or a similar or comparable article or product, in the same locality or trade area and in the ordinary channels of trade."~~

- ~~Business and Professions Code section 17050(d) and (e) provides: "The prohibitions of this chapter against locality discriminations, sales below cost, and loss leaders do not apply to any sale made: ... [i]n an endeavor made in good faith to meet the legal prices of a competitor selling the same article or product, in the same locality or trade area and in the ordinary channels of trade [or] [i]n an endeavor made in good faith by a manufacturer, selling an article or product of his own manufacture, in a transaction and sale to a wholesaler or retailer for resale to meet the legal prices of a competitor selling the same or a similar or comparable article or product, in the same locality or trade area and in the ordinary channels of trade."~~

- "It is safe to assume that merchants generally know who are their competitors, and from what locality or trade area they draw their customers." (*People v. Pay Less Drug Store* (1944) 25 Cal.2d 108, 116 [153 P.2d 9].)

- "The requirement [to ascertain the 'legal prices' of competitors] is not absolute. It is merely that the defendants shall have endeavored 'in good faith' to meet the legal prices of a competitor." (*Pay Less*

Drug Store, supra, 25 Cal.2d at p. 117.)

- "The operator of a service industry cannot legally reduce its prices to a below-cost figure with intent to injure another or offer free service to prevent further loss of business to a competitor 'who is indiscriminately and deliberately offering free service and below cost prices to such operator's customers.' Each side must obey the law; the fact that one competing party disregards the statute does not give the other side a legal excuse to do so." (*G.B. Page v. Bakersfield Uniform & Towel Supply Co.* (1966) 239 Cal.App.2d 762, 770 [49 Cal.Rptr. 46].)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 609–615

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.153 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender)

23 California Points and Authorities, Ch. 235, *Unfair Competition* (Matthew Bender)

1 Matthew Bender Practice Guide: California Unfair Competition and Business Torts, Ch. 5, *Antitrust,* 5.100[5]

3334. Affirmative Defense to Locality Discrimination Claim—Manufacturer Meeting Downstream Competition

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[*Name of defendant*] claims that any locality discrimination proven by [*name of plaintiff*] was justified by the need to meet competition. To succeed, [*name of defendant*] must prove that [his/her/its] sales of [*product/service*] to [*name of reselling customer*] were made in an attempt, in good faith, to meet the legal prices of [*name of competitor's reseller*] selling in the ordinary course of business in the same locality or trade area.

To meet legal prices means to lower the price to a point that the seller believes in good faith is at or above the legal price of the competitor of the reseller whose price it is trying to meet. That is, a seller may attempt to "meet," but not "beat," what in good faith it believes to be that competitor's legal price.

New September 2003

Directions for Use

This defense applies to locality discrimination when the manufacturer is providing a lower price to its reseller, so that the reseller can compete fairly against the lower prices charged by the reseller of another manufacturer.

Sources and Authority

- Manufacturer's Good-Faith Price to Meet Downstream Competition Permitted. Business and Professions Code section 17050~~(d) and~~ (e)~~. provides: "The prohibitions of this chapter against locality discriminations, sales below cost, and loss leaders do not apply to any sale made ... [i]n an endeavor made in good faith to meet the legal prices of a competitor selling the same article or product, in the same locality or trade area and in the ordinary channels of trade [or] [i]n an endeavor made in good faith by a manufacturer, selling an article or product of his own manufacture, in a transaction and sale to a wholesaler or retailer for resale to meet the legal prices of a competitor selling the same or a similar or comparable article or product, in the same locality or trade area and in the ordinary channels of trade."~~

- "The requirement [to ascertain the 'legal prices' of competitors] is not absolute. It is merely that the defendants shall have endeavored 'in good faith' to meet the legal prices of a competitor." (*People v. Pay Less Drug Store* (1944) 25 Cal.2d 108, 117 [153 P.2d 9].)

- "The operator of a service industry cannot legally reduce its prices to a below-cost figure with intent to injure another or offer free service to prevent further loss of business to a competitor 'who is indiscriminately and deliberately offering free service and below cost prices to such operator's customers.' Each side must obey the law; the fact that one competing party disregards the statute does not give the other side a legal excuse to do so." (*G.B. Page v. Bakersfield Uniform & Towel Supply Co.* (1966) 239 Cal.App.2d 762, 770 [49 Cal.Rptr. 46].)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 609-615

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts,* § 40.153 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender)

23 California Points and Authorities, Ch. 235, *Unfair Competition* (Matthew Bender)

1 Matthew Bender Practice Guide: California Unfair Competition and Business Torts, Ch. 5, *Antitrust,* 5.100[6]

3335. Affirmative Defense—"Good Faith" Explained

In deciding whether [*name of defendant***] acted in good faith in attempting to meet competition, you must decide whether [his/her/its] belief was based on facts that would lead a reasonable person to believe that the price he or she was offering would meet the legal price of his or her competitor. You must consider all of the facts and circumstances present, including, but not limited to:**

1. **The nature and source of the information on which [***name of defendant***] relied;**

2. **[***Name of defendant***]'s prior experience, if any, with similar information or with persons who provided the information;**

3. **[***Name of defendant***]'s prior pricing practices; and**

4. **[***Name of defendant***]'s general business practices.**

[*Name of defendant***] does not have to prove that [his/her/its] price did actually meet the legal price of its competitor; only that [he/she/it] reasonably believed that [he/she/it] was offering a price that would meet the competitor's price.**

New September 2003

Directions for Use

This instruction provides the jury with a general listing of circumstances against which it might consider evidence in the record to decide whether a defendant's attempts to meet competition were in good faith. The final paragraph eases the defendant's burden of proof with respect to the "meet but don't beat" element because a defendant is required only to prove its reasonable belief that its prices would meet, but not beat, a competitor's prices.

Sources and Authority

- Good-Faith Price to Meet Competition Permitted. Business and Professions Code section 17050(d), ~~and~~ (e)~~. provides, in part: "The prohibitions of this chapter against locality discriminations, sales below cost, and loss leaders do not apply to any sale made ... [i]n an endeavor made in good faith to meet the legal prices of a competitor selling the same article or product, in the same locality or trade area and in the ordinary channels of trade [or] [i]n an endeavor made in good faith by a manufacturer, selling an article or product of his own manufacture, in a transaction and sale to a wholesaler or retailer for resale to meet the legal prices of a competitor selling the same or a similar or comparable article or product, in the same locality or trade area and in the ordinary channels of trade."~~

- "The requirement [to ascertain the 'legal prices' of competitors] is not absolute. It is merely that the defendants shall have endeavored 'in good faith' to meet the legal prices of a competitor." (*People v. Pay Less Drug Store* (1944) 25 Cal.2d 108, 117 [153 P.2d 9].)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 609–615

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts,* § 40.153 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender)

23 California Points and Authorities, Ch. 235, *Unfair Competition* (Matthew Bender)

1 Matthew Bender Practice Guide: California Unfair Competition and Business Torts, Ch. 5, *Antitrust,* 5.46[2], 5.51, 5.100[7]

3400. Horizontal and Vertical Restraints (Use for Direct Competitors)—Price Fixing—Essential Factual Elements

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[*Name of plaintiff***] claims [***name of defendant***] was involved in price fixing. Price fixing is an agreement to set, raise, lower, maintain, or stabilize the prices or other terms of trade charged or to be charged for a product or service, whether the prices agreed on were high or low, reasonable or unreasonable. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] [and [***name(s) of alleged coparticipant(s)***]] agreed to fix [or] [set/raise/lower/maintain/stabilize] prices [or other terms of trade] charged or to be charged for [***product/service***];**

2. **That [***name of plaintiff***] was harmed; and**

3. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003

Directions for Use

This instruction is intended to apply to both actual and potential competitors. For cases involving vertical restraints, use this instruction but see additional special vertical restraint instructions contained in this series (CACI No. 3409, *Vertical Restraints—Termination of Reseller*, and CACI No. 3410, *Vertical Restraints—Agreement Between Seller and Reseller's Competitor*).

In addition to price, price fixing includes any combination that "tampers with price structures." Like its federal counterpart, the Cartwright Act would seem to prohibit combinations that fix aspects of price such as costs, discounts, credits, financing, warranty, and delivery terms. Therefore, if this case concerns the fixing of an aspect of price, other than price itself, this instruction and those that are related to it should be adapted accordingly.

Sources and Authority

- Trusts Unlawful and Void. Business and Professions Code section 16726. ~~provides: "Except as provided in this chapter, every trust is unlawful, against public policy and void."~~

- "Trust" Defined. Business and Professions Code section 16720. ~~(d) and (e) provides:~~

  ~~A trust is a combination of capital, skill or acts by two or more persons for any of the following purposes:~~

  ~~(d) To fix at any standard or figure, whereby its price to the public or consumer shall be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, barter, use or consumption in~~

~~this State.~~

~~(e) To make or enter into or execute or carry out any contracts, obligations or agreements of any kind or description, by which they do all or any or any combination of any of the following:~~

~~(1) Bind themselves not to sell, dispose of or transport any article or any commodity or any article of trade, use, merchandise, commerce or consumption below a common standard figure, or fixed value.~~

~~(2) Agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure.~~

~~(3) Establish or settle the price of any article, commodity or transportation between them or themselves and others, so as directly or indirectly to preclude a free and unrestricted competition among themselves, or any purchasers or consumers in the sale or transportation of any such article or commodity.~~

~~(4) Agree to pool, combine or directly or indirectly unite any interests that they may have connected with the sale or transportation of any such article or commodity, that its price might in any manner be affected.~~

- Private Right of Action for Anti-Trust Violations. Business and Professions Code section 16750(a). ~~confers a private right of action for treble damages and attorney fees on "[a]ny person who is injured in his business or property by reason of anything forbidden or declared unlawful by this chapter."~~

- " ' "To state a cause of action for conspiracy, the complaint must allege (1) the formation and operation of the conspiracy, (2) the wrongful act or acts done pursuant thereto, and (3) the damage resulting from such act or acts." ' Thus, the Supreme Court applied the pleading requirements for a civil conspiracy action under common law to a statutory action under the Cartwright Act for antitrust conspiracies." (*Cellular Plus, Inc. v. Superior Court* (1993) 14 Cal.App.4th 1224, 1236 [18 Cal.Rptr.2d 308], quoting *Chicago Title Insurance Co. v. Great Western Financial Corp.* (1968) 69 Cal.2d 305, 316 [70 Cal.Rptr. 849, 444 P.2d 481].)

- "A complaint for unlawful price fixing must allege facts demonstrating that separate entities conspired together. Only separate entities pursuing separate economic interests can conspire within the proscription of the antitrust laws against price fixing combinations." (*Freeman v. San Diego Assn. of Realtors* (1999) 77 Cal.App.4th 171, 188-189 [91 Cal.Rptr.2d 534], internal citations omitted.)

- "The Cartwright Act prohibits every trust, defined as 'a combination of capital, skill or acts by two or more persons' for specified anticompetitive purposes. The federal Sherman Act prohibits every 'contract, combination ... or conspiracy, in restraint of trade.' The similar language of the two acts reflects their common objective to protect and promote competition. Since the Cartwright Act and the federal Sherman Act share similar language and objectives, California courts often look to federal precedents under the Sherman Act for guidance." (*Chavez v. Whirlpool Corp.* (2001) 93 Cal.App.4th

363, 369 [113 Cal.Rptr.2d 175], internal citations omitted.)

- "The Cartwright Act, like the Sherman Act, prohibits 'combinations' for the purpose of restraining trade. '[A] combination means a concert of action by individuals or entities maintaining separate and independent interests.' " (*Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 543 [30 Cal.Rptr.2d 706], internal citations omitted.)

- "Two forms of conspiracy may be used to establish a violation of the antitrust laws: a horizontal restraint, consisting of a collaboration among competitors; or a vertical restraint, based upon an agreement between business entities occupying different levels of the marketing chain." (*G.H.I.I. v. Mts, Inc.* (1983) 147 Cal.App.3d 256, 267 [195 Cal.Rptr. 211], internal citations omitted.)

- " 'Horizontal combinations are cartels or agreements among competitors which restrain competition among enterprises at the same level of distribution. They are ordinarily illegal per se. Vertical restraints are imposed by persons or firms further up the chain of distribution of a specific product (or in rare cases, further down the chain) than the enterprise restrained. Vertical non-price restraints are tested under the rule of reason; that is, the plaintiff must prove that the restraint had an anticompetitive effect in the relevant market in order to prevail.' " (*Exxon Corp. v. Superior Court* (1997) 51 Cal.App.4th 1672, 1680-1681 [60 Cal.Rptr.2d 195], internal citations and footnote omitted.)

- "In general, a Cartwright Act price fixing complaint must allege specific facts in addition to stating the purpose or effect of the price fixing agreement and that the accused was a member of or acted pursuant to the price fixing agreement." (*Cellular Plus, Inc., supra,* 14 Cal.App.4th at p. 1237.)

- "[A] conspiracy among competitors to restrict output and/or raise prices [is] unlawful per se without regard to any of its effects … ." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 851 [107 Cal.Rptr.2d 841, 24 P.3d 493].)

- " 'Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing, division of markets, group boycotts, and tying arrangements.' 'The "per se" doctrine means that a particular practice and the setting in which it occurs is sufficient to compel the conclusion that competition is unreasonably restrained and the practice is consequently illegal.' " (*Oakland-Alameda County Builders' Exchange v. F. P. Lathrop Construction Co.* (1971) 4 Cal.3d 354, 361-362 [93 Cal.Rptr. 602, 482 P.2d 226], internal citations omitted.)

- "It has long been settled that an agreement to fix prices is unlawful per se. It is no excuse that the prices fixed are themselves reasonable." (*Catalano Inc. v. Target Sales, Inc.* (1980) 446 U.S. 643, 647 [100 S.Ct. 1925, 64 L.Ed.2d 580].)

- "Under both California and federal law, agreements fixing or tampering with prices are illegal per se." (*Oakland-Alameda County Builders' Exchange, supra,* 4 Cal.3d at p. 363.)

- "These rules apply whether the price-fixing scheme is horizontal or vertical; that is, whether the price is fixed among competitors or businesses at different economic levels." (*Mailand v. Burckle* (1978) 20 Cal.3d 367, 377 [143 Cal.Rptr. 1, 572 P.2d 1142], internal citations omitted.)

- "Under the authorities ... the agreement between plaintiffs and defendants and between defendants and Powerine were unlawful per se. It is, therefore, not necessary to inquire whether these arrangements had an actual anticompetitive effect." (*Mailand, supra*, 20 Cal.3d at p. 380.)

- "The alleged antitrust violation need not be the sole or controlling cause of the injury in order to establish proximate cause, but only need be a substantial factor in bringing about the injury." (*Saxer v. Philip Morris, Inc.* (1975) 54 Cal.App.3d 7, 23 [126 Cal.Rptr. 327], internal citation omitted.)

- "The plaintiff in a Cartwright Act proceeding must show that an antitrust violation was the proximate cause of his injuries. The frequently stated 'standing to sue' requirement is merely a rule that an action for violation of the antitrust laws may be maintained only by a party within the 'target area' of the antitrust violation, and not by one incidentally injured thereby. An 'antitrust injury' must be proved; that is, the type of injury the antitrust laws were intended to prevent, and which flows from the invidious conduct which renders defendants' acts unlawful. Finally, a plaintiff must show an injury within the area of the economy that is endangered by a breakdown of competitive conditions." (*Kolling v. Dow Jones & Co.* (1982) 137 Cal.App.3d 709, 723-724 [187 Cal.Rptr. 797], internal citations and footnote omitted.)

- "We acknowledge that a plaintiff ... must often rely on inference rather than evidence since, usually, unlawful conspiracy is conceived in secrecy and lives its life in the shadows. But, when he does so, he must all the same rely on an inference implying unlawful conspiracy *more likely than* permissible competition, either in itself or together with other inferences or evidence." (*Aguilar, supra*, 25 Cal.4th at p. 857, internal citations omitted.)

- "The exact parameters of 'antitrust injury' under section 16750 have not yet been established through either court decisions or legislation." (*Cellular Plus, Inc., supra*, 14 Cal.App.4th at p. 1234.)

- "Should an antitrust conspirator be permitted to raise as a defense that the direct purchaser passed on some or all of the overcharge to indirect purchasers downstream in the chain of distribution? [¶¶] We conclude that under the Cartwright Act, as under federal law, generally no pass-on defense is permitted." (*Clayworth v. Pfizer, Inc.* (2010) 49 Cal.4th 758, 763 [111 Cal.Rptr.3d 666, 233 P.3d 1066].)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 591–607

6 Antitrust Laws & Trade Regulation, Ch. 105, *California*, § 105.02[1] (Matthew Bender)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.168[2] (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.77[2] (Matthew Bender)

1 Matthew Bender Practice Guide: California Unfair Competition and Business Torts, Ch. 1, *Elements of Unfair Competition and Business Torts Causes of Action*, 1.05[4][a], Ch. 5, *Antitrust*, 5.04, 5.08, 5.09[1], 5.12

3401. Horizontal Restraints (Use for Direct Competitors)—Allocation of Trade or Commerce—Essential Factual Elements

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[*Name of plaintiff***] claims that [***name of defendant***] agreed to allocate or divide [customers/territories/products]. An agreement to allocate [customers/territories/products] is an agreement between two or more competitors not to compete [for the business of particular customers/with each other in particular territories/in the sale of a particular product]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] and [***name of alleged coparticipant***] were or are competitors in the same or related markets;**

2. **That [***name of defendant***] and [***name alleged coparticipant***] agreed to allocate or divide [customers/territories/products];**

3. **That [***name of plaintiff***] was harmed; and**

4. **That [***name of defendant***]'s [and [***name of alleged coparticipant***]'s] conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003

Directions for Use

The appropriate bracketed option(s) should be selected and the balance deleted, depending on the specific facts.

Sources and Authority

- Trusts Unlawful and Void. Business and Professions Code section 16726. ~~provides: "Except as provided in this chapter, every trust is unlawful, against public policy and void."~~

- "Trust" Defined. Business and Professions Code section 16720(a). ~~provides: "A trust is a combination of capital, skill or acts by two or more persons for any of the following purposes: To create or carry out restrictions in trade or commerce."~~

- "The Cartwright Act, like the Sherman Act, prohibits 'combinations' for the purpose of restraining trade. '[A] combination means a concert of action by individuals or entities maintaining separate and independent interests.' " (*Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 543 [30 Cal.Rptr.2d 706], internal citations omitted.)

- "It is settled that distributors cannot lawfully agree to divide territories or customers. Such conduct is sometimes called a 'horizontal restraint,' and is a per se violation of the Sherman Act." (*Guild Wineries & Distilleries v. J. Sosnick and Son* (1980) 102 Cal.App.3d 627, 633 [162 Cal.Rptr. 87],

internal citations omitted.)

- " 'One of the classic examples of a per se violation ... is an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition. … This Court has reiterated time and time again that "[h]orizontal territorial limitations ... are naked restraints of trade with no purpose except stifling of competition." Such limitations are per se violations of the Sherman Act.' " (*Palmer v. BRG of Georgia, Inc.* (1990) 498 U.S. 46, 49 [111 S.Ct. 401, 112 L.Ed.2d 349], internal citations omitted.)

- "Two forms of conspiracy may be used to establish a violation of the antitrust laws: a horizontal restraint, consisting of a collaboration among competitors; or a vertical restraint, based upon an agreement between business entities occupying different levels of the marketing chain." (*G.H.I.I. v. Mts, Inc.* (1983) 147 Cal.App.3d 256, 267 [195 Cal.Rptr. 211], internal citations omitted.)

- " 'Horizontal combinations are cartels or agreements among competitors which restrain competition among enterprises at the same level of distribution. They are ordinarily illegal per se. Vertical restraints are imposed by persons or firms further up the chain of distribution of a specific product (or in rare cases, further down the chain) than the enterprise restrained. Vertical non-price restraints are tested under the rule of reason; that is, the plaintiff must prove that the restraint had an anticompetitive effect in the relevant market in order to prevail.' " (*Exxon Corp. v. Superior Court* (1997) 51 Cal.App.4th 1672, 1680-1681 [60 Cal.Rptr.2d 195], internal citations and footnote omitted.)

- "The alleged antitrust violation need not be the sole or controlling cause of the injury in order to establish proximate cause, but only need be a substantial factor in bringing about the injury." (*Saxer v. Philip Morris, Inc.* (1975) 54 Cal.App.3d 7, 23 [126 Cal.Rptr. 327], internal citation omitted.)

- "The plaintiff in a Cartwright Act proceeding must show that an antitrust violation was the proximate cause of his injuries. The frequently stated 'standing to sue' requirement is merely a rule that an action for violation of the antitrust laws may be maintained only by a party within the 'target area' of the antitrust violation, and not by one incidentally injured thereby. An 'antitrust injury' must be proved; that is, the type of injury the antitrust laws were intended to prevent, and which flows from the invidious conduct which renders defendants' acts unlawful. Finally, a plaintiff must show an injury within the area of the economy that is endangered by a breakdown of competitive conditions." (*Kolling v. Dow Jones & Co.* (1982) 137 Cal.App.3d 709, 723-724 [187 Cal.Rptr. 797], internal citations and footnote omitted.)

- "The exact parameters of 'antitrust injury' under section 16750 have not yet been established through either court decisions or legislation." (*Cellular Plus, Inc. v. Superior Court* (1993) 14 Cal.App.4th 1224, 1234 [18 Cal.Rptr.2d 308].)

- Business and Professions Code section 16750(a) confers a private right of action for treble damages and attorneys fees on "[a]ny person who is injured in his business or property by reason of anything forbidden or declared unlawful by this chapter."

- "The Cartwright Act prohibits every trust, defined as 'a combination of capital, skill or acts by two or

more persons' for specified anticompetitive purposes. The federal Sherman Act prohibits every 'contract, combination ... or conspiracy, in restraint of trade.' The similar language of the two acts reflects their common objective to protect and promote competition. Since the Cartwright Act and the federal Sherman Act share similar language and objectives, California courts often look to federal precedents under the Sherman Act for guidance." (*Chavez v. Whirlpool Corp.* (2001) 93 Cal.App.4th 363, 369 [113 Cal.Rptr.2d 175], internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 591–607

2 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 2001), §§ 9.03, 9.04, 9.07

6 Antitrust Laws & Trade Regulation, Ch. 105, *California*, § 105.02[2] (Matthew Bender)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.168[3] (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.52 (Matthew Bender)

1 Matthew Bender Practice Guide: California Unfair Competition and Business Torts, Ch. 1, *Elements of Unfair Competition and Business Torts Causes of Action*, 1.05[4][b]

3402. Horizontal Restraints—Dual Distributor Restraints—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] [stopped doing business with/refused to deal with/restrained] [[him/her/it]/a reseller]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] sold [***products***] directly in competition with [[***name of plaintiff***]/a reseller] to a significant portion of [[***name of plaintiff***]/the reseller]'s customers or potential customers;**

2. **That [***name of defendant***] [stopped doing business with/refused to deal with/restrained] [[***name of plaintiff***]/the reseller];**

3. **That a motivating reason for the decision to [end business with/refuse to deal with/restrain] [[***name of plaintiff***]/the reseller] was [his/her/its] refusal to agree to [***name of defendant***]'s [***specify the claimed restraint, e.g., territorial or customer restrictions***];**

4. **That [***name of plaintiff***] was harmed; and**

5. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003

Directions for Use

The appropriate bracketed options should be selected and the balance deleted depending on the specific facts. For example, the word "reseller" should be used instead of plaintiff if the plaintiff is not the reseller-such as, when the plaintiff is a government enforcer.

Sources and Authority

- Trusts Unlawful and Void. Business and Professions Code section 16726. ~~provides: "Except as provided in this chapter, every trust is unlawful, against public policy and void."~~

- "Trust" Defined. Business and Professions Code section 16720(a). ~~provides: "A trust is a combination of capital, skill or acts by two or more persons for any of the following purposes: To create or carry out restrictions in trade or commerce."~~

- "We hold that it is unlawful for a manufacturer who also distributes its own products in one geographic area to terminate an independent distributor when a substantial factor in bringing about the termination is the distributor's refusal to accept the manufacturer's attempt to enforce or impose territorial or customer restrictions among distributors." (*Guild Wineries & Distilleries v. J. Sosnick*

and Son (1980) 102 Cal.App.3d 627, 630 [162 Cal.Rptr. 87].)

- " '[A] refusal of a manufacturer to deal with a distributor can constitute a "combination" in restraint of trade within the purview' of the Sherman Act. ... We conclude that this case ... is governed by a per se principle." (*Guild Wineries & Distilleries, supra,* 102 Cal.App.3d at p. 633.)

- In *Dimidowich v. Bell & Howell* (9th Cir. 1986) 803 F.2d 1473, 1482-1484, opn. mod. (9th Cir. 1987) 810 F.2d 1517, the Ninth Circuit Court of Appeals rejected the holding in *Guild Wineries, supra,* that the per se standard applied, and predicted that the California Supreme Court would overrule *Guild Wineries*. This has not yet occurred. In the meantime, the decision in the *Guild* court remains binding on all subordinate state courts. (*Auto Equity Sales v. Superior Court* (1962) 57 Cal.2d 450, 455 [20 Cal.Rptr. 321, 369 P.2d 937].)

- "It is settled that distributors cannot lawfully agree to divide territories or customers. Such conduct is sometimes called a 'horizontal restraint,' and is a per se violation of the Sherman Act. ... When Guild became a distributor the same rule became applicable to it. Guild could not lawfully coerce a fellow distributor into allocating customers any more than Sosnick and other distributors could lawfully agree to such an allocation." (*Guild Wineries & Distilleries, supra,* 102 Cal.App.3d at p. 633.)

- "The alleged antitrust violation need not be the sole or controlling cause of the injury in order to establish proximate cause, but only need be a substantial factor in bringing about the injury." (*Saxer v. Philip Morris, Inc.* (1975) 54 Cal.App.3d 7, 23 [126 Cal.Rptr. 327], internal citation omitted.)

- "The plaintiff in a Cartwright Act proceeding must show that an antitrust violation was the proximate cause of his injuries. The frequently stated 'standing to sue' requirement is merely a rule that an action for violation of the antitrust laws may be maintained only by a party within the 'target area' of the antitrust violation, and not by one incidentally injured thereby. An 'antitrust injury' must be proved; that is, the type of injury the antitrust laws were intended to prevent, and which flows from the invidious conduct which renders defendants' acts unlawful. Finally, a plaintiff must show an injury within the area of the economy that is endangered by a breakdown of competitive conditions." (*Kolling v. Dow Jones & Co.* (1982) 137 Cal.App.3d 709, 723-724 [187 Cal.Rptr. 797], internal citations and footnote omitted.)

- "The exact parameters of 'antitrust injury' under section 16750 have not yet been established through either court decisions or legislation." (*Cellular Plus, Inc. v. Superior Court* (1993) 14 Cal.App.4th 1224, 1234 [18 Cal.Rptr.2d 308].)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 591–607

6 Antitrust Laws & Trade Regulation, Ch. 105, *California,* § 105.02 (Matthew Bender)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts,* § 40.168 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.77[3] (Matthew Bender)

3403. Horizontal Restraints (Use for Direct Competitors)—Group Boycott—Per Se Violation—Essential Factual Elements

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[*Name of plaintiff***] claims that [***name of defendant***] agreed not to deal with [him/her/it] [or to deal with [him/her/it] only on specified terms]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] [and [***name of alleged coparticipant[s]***]] agreed to [***specify claimed refusal to deal, e.g., "refuse to sell to [name of plaintiff]"***];**

2. **That [***name of plaintiff***] was harmed; and**

3. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003

Directions for Use

This instruction applies to agreements between competitors that are directly intended to affect competition facing them. In determining whether to give this per se instruction or the rule of reason instructions, it is important whether the challenged combination was horizontal (between competitors), vertical (between sellers and buyers), or some combination of the two. Horizontal combinations are subject to per se instructions; vertical combinations to the rule of reason instructions. Those combinations falling in between must be carefully scrutinized to determine whether their principal purpose is to restrain competition between competitors or to downstream resellers by the seller.

Sources and Authority

- Trusts Unlawful and Void. Business and Professions Code section 16726. ~~provides: "Except as provided in this chapter, every trust is unlawful, against public policy and void."~~

- "Trust" Defined. Business and Professions Code section 16720(c). ~~provides: "A trust is a combination of capital, skill or acts by two or more persons for any of the following purposes: To prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity."~~

- "The antitrust laws do not preclude a party from unilaterally determining the parties with which, or the terms on which, it will transact business. However, it is a violation of the antitrust laws for a group of competitors with separate and independent economic interests, or a single competitor with sufficient leverage, to force another to boycott a competitor at the same level of distribution." (*Freeman v. San Diego Assn. of Realtors* (1999) 77 Cal.App.4th 171, 195 [91 Cal.Rptr.2d 534], internal citation omitted.)

- "It is well settled that the antitrust laws do not preclude a trader from unilaterally determining the parties with whom it will deal and the terms on which it will transact business. An antitrust case must be based upon conspiratorial rather than unilateral conduct. Thus, only group boycotts are unlawful under the Sherman and Cartwright Acts." (*G.H.I.I. v. Mts, Inc.* (1983) 147 Cal.App.3d 256, 267-268 [195 Cal.Rptr. 211], internal citations omitted.)

- " 'Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category. They have not been saved by allegations that they were reasonable in the specific circumstances, nor by a failure to show that they "fixed or regulated prices, parcelled out or limited production, or brought about a deterioration in quality." Even when they operated to lower prices or temporarily to stimulate competition they were banned. For ... such agreements, no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment.' " (*Oakland-Alameda County Builders' Exchange v. F. P. Lathrop Construction Co.* (1971) 4 Cal.3d 354, 365 [93 Cal.Rptr. 602, 482 P.2d 226], internal citations omitted.)

- "The Cartwright Act, like the Sherman Act, prohibits 'combinations' for the purpose of restraining trade. '[A] combination means a concert of action by individuals or entities maintaining separate and independent interests.' " (*Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 543 [30 Cal.Rptr.2d 706], internal citations omitted.)

- " '[T]there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.' Among these per se violations is the concerted refusal to deal with other traders, or, as it is often called, the group boycott." (*Marin County Bd. of Realtors v. Palsson* (1976) 16 Cal.3d 920, 930-931 [130 Cal.Rptr. 1, 549 P.2d 833], internal citation omitted.)

- In *Marin County Bd. of Realtors, supra,* the Supreme Court explained that there is a distinction between "direct boycotts aimed at coercing parties to adopt noncompetitive practices and indirect boycotts which result in refusals to deal only as a by-product of the agreement." (*Marin County Bd. of Realtors, supra,* 16 Cal.3d at p. 932.)

- Not all group boycotts are evaluated as per se violations: "This limitation on the per se rule is particularly applicable to trade association agreements not directly aimed at coercing third parties and eliminating competitors. In cases involving such agreements, courts have generally applied the rule of reason test." (*Marin County Bd. of Realtors, supra,* 16 Cal.3d at p. 932.)

- "The alleged antitrust violation need not be the sole or controlling cause of the injury in order to establish proximate cause, but only need be a substantial factor in bringing about the injury." (*Saxer v. Philip Morris, Inc.* (1975) 54 Cal.App.3d 7, 23 [126 Cal.Rptr. 327], internal citation omitted.)

- "The plaintiff in a Cartwright Act proceeding must show that an antitrust violation was the proximate cause of his injuries. The frequently stated 'standing to sue' requirement is merely a rule that an action for violation of the antitrust laws may be maintained only by a party within the 'target area' of the antitrust violation, and not by one incidentally injured thereby. An 'antitrust injury' must be

proved; that is, the type of injury the antitrust laws were intended to prevent, and which flows from the invidious conduct which renders defendants' acts unlawful. Finally, a plaintiff must show an injury within the area of the economy that is endangered by a breakdown of competitive conditions." (*Kolling v. Dow Jones & Co.* (1982) 137 Cal.App.3d 709, 723-724 [187 Cal.Rptr. 797], internal citations and footnote omitted.)

- "The exact parameters of 'antitrust injury' under section 16750 have not yet been established through either court decisions or legislation." (*Cellular Plus, Inc. v. Superior Court* (1993) 14 Cal.App.4th 1224, 1234 [18 Cal.Rptr.2d 308].)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 591–607

6 Antitrust Laws & Trade Regulation, Ch. 105, *California*, § 105.02[3] (Matthew Bender)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.168[5] (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.77[5] (Matthew Bender)

1 Matthew Bender Practice Guide: California Unfair Competition and Business Torts, Ch. 5, *Antitrust*, 5.08, 5.09[3], 5.14

3404. Horizontal Restraints—Group Boycott—Rule of Reason—Essential Factual Elements

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[*Name of plaintiff***] claims that [***name of defendant***] agreed to [***describe conduct, e.g., "formulate an arbitrary membership limitation rule with [identify other participant[s]]"***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] and [***name of alleged coparticipant[s]***] agreed to [***describe conduct, e.g., "formulate an arbitrary membership limitation rule"***];**

2. **That the purpose or effect of [***name of defendant***]'s conduct was to restrain competition;**

3. **That the anticompetitive effect of the restraint[s] outweighed any beneficial effect on competition;**

4. **That [***name of plaintiff***] was harmed; and**

5. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003

Directions for Use

This instruction applies to agreements between competitors that are directly intended to affect competition facing them. In determining whether to give this per se instruction or the rule of reason instructions, it is important whether the challenged combination was horizontal (between competitors), vertical (between sellers and buyers), or some combination of the two. Horizontal combinations are subject to per se instructions; vertical combinations to the rule of reason instructions. Those combinations falling in between must be carefully scrutinized to determine whether their principal purpose is to restrain competition between competitors or to downstream resellers by the seller.

For additional instructions regarding the rule of reason, see CACI Nos. 3411 through 3414.

Sources and Authority

- Trusts Unlawful and Void. Business and Professions Code section 16726. ~~provides: "Except as provided in this chapter, every trust is unlawful, against public policy and void."~~

- "Trust" Defined. Business and Professions Code section 16720(c). ~~provides: "A trust is a combination of capital, skill or acts by two or more persons for any of the following purposes: To prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity."~~

- Trade Groups Not Unlawful. Business and Professions Code section 16725. ~~provides: "It is not unlawful to enter into agreements or form associations or combinations, the purpose and effect of which is to promote, encourage or increase competition in any trade or industry, or which are in furtherance of trade."~~

- "A group boycott can involve an agreement that a group of buyers will purchase only from a designated seller. … [A]n unlawful group boycott requires an express or implicit agreement among competitors to restrict commerce in some manner." (*UAS Management, Inc. v. Mater Misericordiae Hospital* (2008) 169 Cal.App.4th 357, 365–366 [87 Cal.Rptr.3d 81].)

- "It is well settled that the antitrust laws do not preclude a trader from unilaterally determining the parties with whom it will deal and the terms on which it will transact business. An antitrust case must be based upon conspiratorial rather than unilateral conduct. Thus, only group boycotts are unlawful under the Sherman and Cartwright Acts." (*G.H.I.I. v. Mts, Inc.* (1983) 147 Cal.App.3d 256, 267-268 [195 Cal.Rptr. 211], internal citations omitted.)

- In *Marin County Bd. of Realtors v. Palsson* (1976) 16 Cal.3d 920, 931 [130 Cal.Rptr. 1, 549 P.2d 833], the Supreme Court explained that there is a distinction between "direct boycotts aimed at coercing parties to adopt noncompetitive practices and indirect boycotts which result in refusals to deal only as a by-product of the agreement."

- Not all group boycotts are evaluated as per se violations: "This limitation on the per se rule is particularly applicable to trade association agreements not directly aimed at coercing third parties and eliminating competitors. In cases involving such agreements, courts have generally applied the rule of reason test." (*Marin County Bd. of Realtors, supra,* 16 Cal.3d at p. 932.)

- "Although the Sherman Act and the Cartwright Act by their express terms forbid all restraints on trade, each has been interpreted to permit by implication those restraints found to be reasonable." (*Corwin v. Los Angeles Newspaper Service Bureau, Inc.* (1971) 4 Cal.3d 842, 853 [94 Cal.Rptr. 785, 484 P.2d 953], internal citation omitted.)

- "To determine whether the restrictions are reasonable, 'the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be obtained, are all relevant facts.' The court should consider 'the percentage of business controlled, the strength of the remaining competition [and] whether the action springs from business requirements or purpose to monopolize ... .' Whether a restraint of trade is reasonable is a question of fact to be determined at trial." (*Corwin, supra,* 4 Cal.3d at pp. 854-855, internal citations omitted.)

- "Generally, in determining whether conduct unreasonably restrains trade, '[a] rule of reason analysis requires a determination of whether ... its anti-competitive effects outweigh its pro-competitive effects.' " (*Bert G. Gianelli Distrib. Co. v. Beck & Co.* (1985) 172 Cal.App.3d 1020, 1048 [219 Cal.Rptr. 203], internal citation omitted, overruled on other grounds in *Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 389 [46 Cal.Rptr.3d 668, 139 P.3d 56].)

- "The alleged antitrust violation need not be the sole or controlling cause of the injury in order to establish proximate cause, but only need be a substantial factor in bringing about the injury." (*Saxer v. Philip Morris, Inc.* (1975) 54 Cal.App.3d 7, 23 [126 Cal.Rptr. 327], internal citation omitted.)

- "The plaintiff in a Cartwright Act proceeding must show that an antitrust violation was the proximate cause of his injuries. The frequently stated 'standing to sue' requirement is merely a rule that an action for violation of the antitrust laws may be maintained only by a party within the 'target area' of the antitrust violation, and not by one incidentally injured thereby. An 'antitrust injury' must be proved; that is, the type of injury the antitrust laws were intended to prevent, and which flows from the invidious conduct which renders defendants' acts unlawful. Finally, a plaintiff must show an injury within the area of the economy that is endangered by a breakdown of competitive conditions." (*Kolling v. Dow Jones & Co.* (1982) 137 Cal.App.3d 709, 723-724 [187 Cal.Rptr. 797], internal citations and footnote omitted.)

- "The exact parameters of 'antitrust injury' under section 16750 have not yet been established through either court decisions or legislation." (*Cellular Plus, Inc. v. Superior Court* (1993) 14 Cal.App.4th 1224, 1234 [18 Cal.Rptr.2d 308].)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 591–607

6 Antitrust Laws & Trade Regulation, Ch. 105, *California*, § 105.02[3] (Matthew Bender)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.168[5] (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.77 (Matthew Bender)

1 Matthew Bender Practice Guide: California Unfair Competition and Business Torts, Ch. 5, *Antitrust*, 5.05, 5.11, 5.17–5.22

3405. Horizontal and Vertical Restraints (Use for Direct Competitors or Supplier/Reseller Relations)—Other Unreasonable Restraint of Trade—Rule of Reason—Essential Factual Elements

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[*Name of plaintiff***] claims that [***name of defendant***] agreed to [***insert unreasonable restraint of trade***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] [and [***name of alleged coparticipant[s]***]] agreed to [***describe conduct constituting an unreasonable restraint of trade***];**

2. **That the purpose or effect of [***name of defendant***]'s conduct was to restrain competition;**

3. **That the anticompetitive effect of the restraint[s] outweighed any beneficial effect on competition;**

4. **That [***name of plaintiff***] was harmed; and**

5. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003

Directions for Use

This instruction is intended for actions that are limited only by the bounds of human ingenuity. Any such conduct, if it does not fit into a per se category, is judged under the rule of reason. Thus, the illegality of a termination that results from a buyer's disobedience with a seller's exclusive "dealing," territorial location, or customer restrictions, unless ancillary to price fixing, should be resolved under the rule of reason. For cases involving vertical restraints, see also the vertical restraint instructions contained in this series.

It is possible for a complaint to include both per se and rule of reason claims. Also, per se claims alternatively may be tested under the rule of reason if there is reason to believe that proof of the per se claims may fall short. If either is the case, connecting language between the pertinent instructions should be provided, such as: "If you find that [*name of defendant*]'s conduct did not amount to an agreement to [*specify conduct, e.g., "fix resale prices," "boycott," "allocate markets"*], [*name of plaintiff*] may still prove that the conduct otherwise lessened competition."

For additional instructions regarding the rule of reason, see CACI Nos. 3411 through 3414.

Sources and Authority

- Trusts Unlawful and Void. Business and Professions Code section 16726. ~~provides: "Except as provided in this chapter, every trust is unlawful, against public policy and void."~~

- "Trust" Defined. Business and Professions Code section 16720(a). ~~provides: "A trust is a combination of capital, skill or acts by two or more persons for any of the following purposes: To create or carry out restrictions in trade or commerce."~~

- Trade Groups Not Unlawful. Business and Professions Code section 16725. ~~provides: "It is not unlawful to enter into agreements or form associations or combinations, the purpose and effect of which is to promote, encourage or increase competition in any trade or industry, or which are in furtherance of trade."~~

- "The Cartwright Act, like the Sherman Act, prohibits 'combinations' for the purpose of restraining trade. '[A] combination means a concert of action by individuals or entities maintaining separate and independent interests.' " (*Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 543 [30 Cal.Rptr.2d 706], internal citations omitted.)

- " 'Horizontal combinations are cartels or agreements among competitors which restrain competition among enterprises at the same level of distribution. They are ordinarily illegal per se. Vertical restraints are imposed by persons or firms further up the chain of distribution of a specific product (or in rare cases, further down the chain) than the enterprise restrained. Vertical non-price restraints are tested under the rule of reason; that is, the plaintiff must prove that the restraint had an anticompetitive effect in the relevant market in order to prevail.' " (*Exxon Corp. v. Superior Court* (1997) 51 Cal.App.4th 1672, 1680-1681 [60 Cal.Rptr.2d 195], internal citations and footnote omitted.)

- "Although the Sherman Act and the Cartwright Act by their express terms forbid all restraints on trade, each has been interpreted to permit by implication those restraints found to be reasonable." (*Corwin v. Los Angeles Newspaper Service Bureau, Inc.* (1971) 4 Cal.3d 842, 853 [94 Cal.Rptr. 785, 484 P.2d 953], internal citation omitted.)

- "To determine whether the restrictions are reasonable, 'the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be obtained, are all relevant facts.' The court should consider 'the percentage of business controlled, the strength of the remaining competition [and] whether the action springs from business requirements or purpose to monopolize ... .' Whether a restraint of trade is reasonable is a question of fact to be determined at trial." (*Corwin, supra,* 4 Cal.3d at pp. 854-855, internal citations omitted.)

- "Generally, in determining whether conduct unreasonably restrains trade, '[a] rule of reason analysis requires a determination of whether ... its anti-competitive effects outweigh its pro-competitive effects.' " (*Bert G. Gianelli Distrib. Co. v. Beck & Co.* (1985) 172 Cal.App.3d 1020, 1048 [219 Cal.Rptr. 203], internal citation omitted, overruled on other grounds, *Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 389 [46 Cal.Rptr.3d 668, 139 P.3d 56].)

- "The alleged antitrust violation need not be the sole or controlling cause of the injury in order to establish proximate cause, but only need be a substantial factor in bringing about the injury." (*Saxer*

v. Philip Morris, Inc. (1975) 54 Cal.App.3d 7, 23 [126 Cal.Rptr. 327], internal citation omitted.)

- "The plaintiff in a Cartwright Act proceeding must show that an antitrust violation was the proximate cause of his injuries. The frequently stated 'standing to sue' requirement is merely a rule that an action for violation of the antitrust laws may be maintained only by a party within the 'target area' of the antitrust violation, and not by one incidentally injured thereby. An 'antitrust injury' must be proved; that is, the type of injury the antitrust laws were intended to prevent, and which flows from the invidious conduct which renders defendants' acts unlawful. Finally, a plaintiff must show an injury within the area of the economy that is endangered by a breakdown of competitive conditions." (*Kolling v. Dow Jones & Co.* (1982) 137 Cal.App.3d 709, 723-724 [187 Cal.Rptr. 797], internal citations and footnote omitted.)

- "The exact parameters of 'antitrust injury' under section 16750 have not yet been established through either court decisions or legislation." (*Cellular Plus, Inc. v. Superior Court* (1993) 14 Cal.App.4th 1224, 1234 [18 Cal.Rptr.2d 308].)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 591–607

1 Antitrust Laws & Trade Regulation, Ch. 12, *The Per Se Rule and the Rule of Reason*, § 12.03 (Matthew Bender)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts,* § 40.165[2] (Matthew Bender)

1 Matthew Bender Practice Guide: California Unfair Competition and Business Torts, Ch. 5, *Antitrust,* 5.05, 5.11, 5.17–5.22

3406. Horizontal and Vertical Restraints—"Agreement" Explained

An agreement exists if two or more persons or companies combine or join together for a common purpose. No written document or specific understanding is necessary for an agreement to exist. For [*name of defendant***] to be part of an agreement, [he/she/it] must have known [he/she/it] was joining in an agreement, even if [he/she/it] was not aware of all of its aspects.**

[An agreement also may exist if a [person/company] unwillingly participates-that is, if another person coerces [him/her/it] to join the agreement against [his/her/its] wishes.]

[To prove the existence of an agreement, [*name of plaintiff***] must show more than a similarity between [***name of defendant***]'s conduct and the conduct of others. Independent business judgment in response to market forces sometimes leads competitors to act in a similar way because of their individual self-interests. That conduct alone is not enough to prove an agreement. However, similar behavior, along with other evidence suggesting joint conduct, may be used to decide whether there was an agreement.]**

In deciding whether [*name of defendant***]'s conduct was the result of an agreement, you may consider, among other factors, the following:**

(a) The nature of the acts;

(b) The relationship between the parties;

(c) Whether the conduct was contrary to the best interests of some of the persons or companies in question;

(d) Whether the conduct lacked a legitimate business purpose; and

(e) Whether the conduct occurred following communications concerning the subject of the conduct.

New September 2003

Directions for Use

The third paragraph should be read only where a horizontal agreement is involved.

Sources and Authority

- "Trust" Defined. Business and Professions Code section 16720(a). ~~provides, in part: "A trust is a combination of capital, skill or acts by two or more persons for any of the following purposes: To create or carry out restrictions in trade or commerce. ..."~~

- "The Cartwright Act, like the Sherman Act, requires an illegal 'combination' or 'conspiracy' to restrain trade." (*Kolling v. Dow Jones & Co.* (1982) 137 Cal.App.3d 709, 720 [187 Cal.Rptr. 797], internal citations omitted.)

- " '[A] combination means a concert of action by individuals or entities maintaining separate and independent interests.' " (*Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 543 [30 Cal.Rptr.2d 706], internal citations omitted.)

- "[A] necessary 'conspiracy' or 'combination' cognizable as an antitrust action is formed where a trader uses coercive tactics to impose restraints upon otherwise uncooperative businesses. If a 'single trader' pressures customers or dealers into pricing arrangements, an unlawful combination is established, irrespective of any monopoly or conspiracy, and despite the recognized right of a trader to determine with whom it will deal." (*G.H.I.I. v. Mts, Inc.* (1983) 147 Cal.App.3d 256, 268 [195 Cal.Rptr. 211], internal citations omitted.)

- "In *United States v. International Harvester Co.*, 274 U.S. 693, 47 S.Ct. 748, 71 L.Ed. 1302 (1927), the Court acknowledged as lawful, competitors' practice of independently, and as a matter of business judgment, following the prices of an industry leader. '[T]he fact that competitors may see proper, in the exercise of their own judgment, to follow the prices of another manufacturer, does not establish any suppression of competition or show any sinister domination.' " (*Wilcox v. First Interstate Bank of Oregon* (9th Cir. 1987) 815 F.2d 522, 526.)

- "[P]arallel changes in prices and exchanges of price information by competitors may be motivated by legitimate business concerns." (*City of Long Beach v. Standard Oil Co.* (9th Cir. 1989) 872 F.2d 1401, 1406.)

- "Price information published without 'plus factors,' which indicate an agreement, is judged under the rule of reason. If the exchange of price information constitutes reasonable business behavior the exchange is not an illegal agreement. In order to prevail, 'plaintiff must demonstrate that the allegedly parallel acts were against each conspirator's self interest, that is, that the decision to act was not based on a good faith business judgment.' " (*Supermarket of Homes, Inc. v. San Fernando Valley Bd. of Realtors* (9th Cir. 1986) 786 F.2d 1400, 1407, internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 591–607

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.160[2] (Matthew Bender)

3420. Tying—Real Estate, Products, or Services—Essential Factual Elements (Bus. & Prof. Code, § 16720)

[*Name of plaintiff***] claims that there is an unlawful tying arrangement in which [***specify the particular real estate, product, or services***] is the tying product and [***specify the particular real estate, product, or services***] is the tied product. A "tying arrangement" is the sale of one product, called the "tying product," in which the buyer is required or coerced to also purchase a different, separate product, called the "tied product." For example, if a supermarket sells flour only if its customers also buy sugar, that supermarket would be engaged in tying. Flour would be the tying product and sugar the tied product.**

To establish this claim against [*name of defendant***], [***name of plaintiff***] must prove all of the following:**

1. **That [***tying item***] and [***tied item***] are separate and distinct;**

2. **That [***name of defendant***] will sell [***tying item***] only if the buyer also purchases [***tied item***], or that [***name of defendant***] sold [***tying item***] and required or otherwise coerced buyers to [also purchase [***tied item***]] [agree not to purchase [***tied item***] from any other supplier];**

3. **That [***name of defendant***] has sufficient economic power in the market for [***tying item***] to coerce at least some buyers of [***tying item***] into [purchasing [***tied item***]] [agreeing not to purchase [***tied item***] from a competitor of [***name of defendant***]];**

4. **That the conduct involves a substantial amount of sales, in terms of the total dollar value of [***tied item***];**

5. **That [***name of plaintiff***] was harmed; and**

6. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003; Revised October 2008

Directions for Use

This instruction is written for claims brought under Business and Professions Code section 16720. A claim under this section may involve products, land, or services as the tying item and products, land, or services as the tied item. Section 16720 applies a stricter test for unlawful tying than does Business and Professions Code section 16727. (See CACI No. 3421, *Tying—Products or Services—Essential Factual Elements.*) Therefore, if products are the tying item and products or services the tied item, CACI No. 3421 should be used instead.

The example given in the instruction involving flour and sugar was used in two federal cases, *Northern Pacific Railway Co. v. United States* (1958) 356 U.S. 1, 5-6 [78 S.Ct. 514, 2 L.Ed.2d 545] and *Jefferson Parish Hospital District No. 2 v. Hyde* (1984) 466 U.S. 2, 12 [104 S.Ct. 1551, 80 L.Ed.2d 2], but also can help explain the Cartwright Act. The terms "product," "sell," and "purchase" used in this instruction may need to be modified to reflect the facts of the particular case, since tying arrangements challenged under Business and Professions Code section 16720 may involve services, real property, intangibles, leases, licenses, and the like.

An unlawful tying arrangement may also be shown if the buyer agrees not to purchase the tied product or service from any other supplier as a condition of obtaining the tying product. If the tying claim involves such a "tie-out" agreement, select the appropriate options in elements 2 and 3.

If the "tying product" is land and the "tied product" is a service or a commodity, logic suggests that the first element, i.e., their distinctness, is beyond dispute and that including this element may create confusion. In such a case, the court may recite this element and then advise the jury that it has been established by the plaintiff or is undisputed by the defendant. The word "parcels," "lots," or similar terms should be used if both items are land, as in these cases the separateness of the tying and tied land could be in dispute.

Sources and Authority

- "Trust" Defined. Business and Professions Code section 16720. ~~provides:~~

  ~~A trust is a combination of capital, skill or acts by two or more persons for any of the following purposes:~~

  ~~(a) To create or carry out restrictions in trade or commerce.~~

  ~~(b) To limit or reduce the production, or increase the price of merchandise or of any commodity.~~

  ~~(c) To prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity.~~

  ~~(d) To fix at any standard or figure, whereby its price to the public or consumer shall be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, barter, use or consumption in this State.~~

  ~~(e) To make or enter into or execute or carry out any contracts, obligations or agreements of any kind or description, by which they do all or any or any combination of any of the following:~~

  ~~(1) Bind themselves not to sell, dispose of or transport any article or any commodity or any article of trade, use, merchandise, commerce or consumption below a common standard figure, or fixed value.~~

~~(2) Agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure.~~

~~(3) Establish or settle the price of any article, commodity or transportation between them or themselves and others, so as directly or indirectly to preclude a free and unrestricted competition among themselves, or any purchasers or consumers in the sale or transportation of any such article or commodity.~~

~~(4) Agree to pool, combine or directly or indirectly unite any interests that they may have connected with the sale or transportation of any such article or commodity, that its price might in any manner be affected.~~

- "It is unlawful under California's Cartwright Act, as relevant here, for a seller to use its market power in one market to force or coerce a buyer to purchase its product or service in a distinct market in which the seller does not have such market power or to refrain from buying from the seller's competitor. The result of such coercion is called a tying arrangement, in which the market controlled by the seller consists of sales of the 'tying' product or service, and the market over which derivative power is exercised consists of sales of the 'tied' product or service. Where such an arrangement is found, it is illegal per se; that is, the seller's justifications for the arrangement are not measured by a rule of reasonableness." (*UAS Management, Inc. v. Mater Misericordiae Hospital* (2008) 169 Cal.App.4th 357, 368–369 [87 Cal.Rptr.3d 81].)

- "Antitrust laws against tying arrangements seek to eradicate the evils that (1) competitors are denied free access to the market for the tied product not because the seller imposing the tying requirement has a better or less expensive tied product, but because of the seller's power or leverage in the market for the tying product; and (2) buyers are forced to forego their free choice between competing tied products. Tying arrangements are illegal per se 'whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product' and when 'a total amount of business, substantial enough in terms of dollar-volume so as not to be merely de minimis, is foreclosed to competitors by the tie.' " (*Freeman v. San Diego Assn. of Realtors* (1999) 77 Cal.App.4th 171, 184 [91 Cal.Rptr.2d 534], internal citations omitted.)

- "Even when not per se illegal, a tying arrangement violates the Cartwright Act if it unreasonably restrains trade." (*Morrison v. Viacom, Inc.* (1997) 52 Cal.App.4th 1514, 1524 [61 Cal.Rptr.2d 544], internal citations omitted.)

- "The threshold element for a tying claim is the existence of separate products or services in separate markets. Absent separate products in separate markets, the alleged tying and tied products are in reality a single product." (*Freeman, supra*, 77 Cal.App.4th at p. 184, internal citations omitted.)

- "Plaintiff alleged the conspiratorial agreement among defendants constituted an illegal tying arrangement per se pursuant to Business and Professions Code section 16720. 'The elements of a per se tying arrangement violative of section 16720 are: "(1) a tying agreement, arrangement or condition existed whereby the sale of the tying product was linked to the sale of the tied product or service; (2)

the party had sufficient economic power in the tying market to coerce the purchase of the tied product; (3) a substantial amount of sale was affected in the tied product; and (4) the complaining party sustained pecuniary loss as a consequence of the unlawful act." ' " (*SC Manufactured Homes, Inc. v. Liebert* (2008) 162 Cal.App.4th 68, 86 [76 Cal.Rptr.3d 73], footnotes and internal citations omitted.)

- " ' "[T]ying agreements serve hardly any purpose beyond the suppression of competition." They deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market. At the same time buyers are forced to forego their free choice between competing products. For these reasons "tying agreements fare harshly under the laws forbidding restraints of trade." ' " (*Suburban Mobile Homes v. AMFAC Communities* (1980) 101 Cal.App.3d 532, 542 [161 Cal.Rptr. 811], internal citations omitted.)

- "[T]he burden of proving an illegal tying arrangement differs somewhat under section 16720 and section 16727. Under section 16727 the plaintiff must establish that the tie-in substantially lessens competition. This standard is met if either the seller enjoys sufficient economic power in the tying product to appreciably restrain competition in the tied product or if a not insubstantial volume of commerce in the tied product is restrained. Under section 16720 standard, both conditions must be met." (*Suburban Mobile Homes, supra*, 101 Cal.App.3d at p. 549, internal citation omitted.)

- "The alleged antitrust violation need not be the sole or controlling cause of the injury in order to establish proximate cause, but only need be a substantial factor in bringing about the injury." (*Saxer v. Philip Morris, Inc.* (1975) 54 Cal.App.3d 7, 23 [126 Cal.Rptr. 327], internal citation omitted.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 591–607

6 Antitrust Laws & Trade Regulation, Ch. 105, *California*, § 105.04 (Matthew Bender)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.168[4] (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.77 (Matthew Bender)

1 Matthew Bender Practice Guide: California Unfair Competition and Business Torts, Ch. 5, *Antitrust*, 5.09[4], 5.15, 5.81, 5.82

3421. Tying—Products or Services—Essential Factual Elements (Bus. & Prof. Code, § 16727)

[*Name of plaintiff***] claims that there is an unlawful tying arrangement in which [***specify the particular product***] is the tying product and [***specify the particular product or services***] is the tied product. A "tying arrangement" is the sale of one product, called the "tying product," where the buyer is required or coerced to also purchase a different, separate product, called the "tied product." For example, if a supermarket sells flour only if its customers also buy sugar, that supermarket would be engaged in tying. Flour would be the tying product and sugar the tied product.**

To establish this claim, [*name of plaintiff***] must prove all of the following:**

1. **That [***tying product***] and [***tied product or service***] are separate and distinct;**

2. **That [***name of defendant***] will sell [***tying product***] only if the buyer also purchases [***tied product or service***], or that [***name of defendant***] sold [***tying product***] and required or otherwise coerced buyers to [also purchase [***tied product or service***]] [agree not to purchase [***tied product or service***] from any other supplier];**

3. **That [***insert one or both of the following***]:**

   [[*name of defendant***] has sufficient economic power in the market for [***tying product***] to coerce at least some consumers into purchasing [***tied product or service***];] [or]**

   [the claimed tying arrangement has restrained competition for a substantial amount of sales, in terms of total dollar volume of [*tied product or service***]];**

4. **That [***name of plaintiff***] was harmed; and**

5. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003

Directions for Use

This instruction applies to claims under Business and Professions Code section 16727, which applies only where the tying product consists of "goods, merchandise, machinery, supplies, [or] commodities" and the tied product consists of "goods, merchandise, supplies, commodities, or services." Section 16727 does not apply if the tying product is land or services, nor does it apply if the tied product is land.

The example given was used in two federal cases, *Northern Pacific Railway Co. v. United States* (1958) 356 U.S. 1, 5-6 [78 S.Ct. 514, 2 L.Ed.2d 545] and *Jefferson Parish Hospital District No. 2 v. Hyde* (1984) 466 U.S. 2, 12 [104 S.Ct. 1551, 80 L.Ed.2d 2], but also can help explain the Cartwright Act. The terms "product," "sell," and "purchase" used in this instruction may need to be modified to reflect the facts of

the particular case, since tying arrangements challenged under Business and Professions Code section 16720 may involve services, real property, intangibles, leases, licenses, and the like.

Also, an unlawful tying arrangement may be shown where the buyer agrees not to purchase the tied product or service from any other supplier as a condition of obtaining the tying product. If the tying claim involves such a "tie-out" agreement, this instruction must be modified accordingly.

Sources and Authority

- Covenants Prohbiting Dealing With Competitors Unlawful. Business and Professions Code section 16727. ~~provides: "It shall be unlawful for any person to lease or make a sale or contract for the sale of goods, merchandise, machinery, supplies, commodities for use within the State, or to fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, merchandise, machinery, supplies, commodities, or services of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of trade or commerce in any section of the State."~~

- "It is unlawful under California's Cartwright Act, as relevant here, for a seller to use its market power in one market to force or coerce a buyer to purchase its product or service in a distinct market in which the seller does not have such market power or to refrain from buying from the seller's competitor. The result of such coercion is called a tying arrangement, in which the market controlled by the seller consists of sales of the 'tying' product or service, and the market over which derivative power is exercised consists of sales of the 'tied' product or service. Where such an arrangement is found, it is illegal per se; that is, the seller's justifications for the arrangement are not measured by a rule of reasonableness." (*UAS Management, Inc. v. Mater Misericordiae Hospital* (2008) 169 Cal.App.4th 357, 368–369 [87 Cal.Rptr.3d 81].)

- "[T]he specific elements of an unlawful tying cause of action have been stated as follows: '(1) a tying agreement, arrangement or condition … whereby the sale of the tying product [or service] was linked to the sale of the tied product or service; (2) the party had sufficient economic power in the tying market to coerce the purchase of the tied product; (3) a substantial amount of sale was effected in the tied product; and (4) the complaining party sustained pecuniary loss as a consequence of the unlawful act.' " (*UAS Management, Inc.*, *supra*, 169 Cal.App.4th at p. 369, internal citation omitted.)

- "[T]he burden of proving an illegal tying arrangement differs somewhat under section 16720 and section 16727. Under section 16727 the plaintiff must establish that the tie-in substantially lessens competition. This standard is met if either the seller enjoys sufficient economic power in the tying product to appreciably restrain competition in the tied product or if a not insubstantial volume of commerce in the tied product is restrained. Under the section 16720 standard, both conditions must be met." (*Suburban Mobile Homes v. AMFAC Communities* (1980) 101 Cal.App.3d 532, 549 [161 Cal.Rptr. 811], internal citation omitted.)

- "Case law construing Business and Professions Code section 16727 defines a tying arrangement as 'an agreement by a party to sell one product but only on the condition that the buyer also purchases a

different (or tied) product, or at least agrees that he will not purchase that product from any other supplier.' Tying arrangements are illegal per se if the party has sufficient economic power and substantially forecloses competition in the relevant market. Even when not per se illegal, a tying arrangement violates the Cartwright Act if it unreasonably restrains trade." (*Morrison v. Viacom, Inc.* (1997) 52 Cal.App.4th 1514, 1524 [61 Cal.Rptr.2d 544], internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 591–607

6 Antitrust Laws & Trade Regulation, Ch. 105, *California*, § 105.04 (Matthew Bender)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.168[4] (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.77 (Matthew Bender)

1 Matthew Bender Practice Guide: California Unfair Competition and Business Torts, Ch. 5, *Antitrust*, 5.09[4], 5.15, 5.81, 5.82

3440. Damages

If you decide that [*name of plaintiff***] has proved [his/her/its] claim against [***name of defendant***], you also must decide how much money will reasonably compensate [***name of plaintiff***] for the harm. This compensation is called "damages."**

The amount of damages must include an award for all harm that was caused by [*name of defendant***], even if the particular harm could not have been anticipated.**

[*Name of plaintiff***] must prove the amount of [his/her/its] damages. However, [***name of plaintiff***] does not have to prove the exact amount of damages that will provide reasonable compensation for the harm. You must not speculate or guess in awarding damages.**

The following are the specific items of damages claimed by [*name of plaintiff***]:**

1. **[Loss of reasonably anticipated sales and profits];**
2. **[An increase in [***name of plaintiff***]'s expenses];**
3. **[***Insert other applicable item of damage***].**

New September 2003

Sources and Authority

- Private Right of Action for Anti-Trust Violation. Business and Professions Code section 16750(a). ~~confers a private right of action for treble damages and attorneys fees on "[a]ny person who is injured in his business or property by reason of anything forbidden or declared unlawful by this chapter."~~

- "The plaintiff in a Cartwright Act proceeding must show that an antitrust violation was the proximate cause of his injuries. The frequently stated 'standing to sue' requirement is merely a rule that an action for violation of the antitrust laws may be maintained only by a party within the 'target area' of the antitrust violation, and not by one incidentally injured thereby. An 'antitrust injury' must be proved; that is, the type of injury the antitrust laws were intended to prevent, and which flows from the invidious conduct which renders defendants' acts unlawful. Finally, a plaintiff must show an injury within the area of the economy that is endangered by a breakdown of competitive conditions." (*Kolling v. Dow Jones & Co.* (1982) 137 Cal.App.3d 709, 723-724 [187 Cal.Rptr. 797], internal citations and footnote omitted.)

- " '[D]amage issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts. ... [I]n the absence of more precise proof, the factfinder may "conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had

caused damage to the plaintiffs." ' " (*Diesel Elec. Sales and Serv., Inc. v. Marco Marine San Diego* (1993) 16 Cal.App.4th 202, 219-220 [20 Cal.Rptr.2d 62], internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, § 602

6 Antitrust Laws & Trade Regulation, Ch. 105, *California*, § 105.09 (Matthew Bender)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.172 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.34[3] (Matthew Bender)

1 Matthew Bender Practice Guide: California Unfair Competition and Business Torts, Ch. 5, *Antitrust*, 5.45, 5.48–5.50, 5.66[5], 5.67–5.75

3500. Introductory Instruction

Public agencies such as the [*name of condemnor*] have the right to take private property for public use if they pay the owner just compensation.

New September 2003

Sources and Authority

- Constitutional Right of Eminent Domain. Article I, section 19, of the California Constitution. ~~provides: "Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner. The Legislature may provide for possession by the condemnor following commencement of eminent domain proceedings upon deposit in court and prompt release to the owner of money determined by the court to be the probable amount of just compensation."~~

- Just Compensation. The Fifth Amendment of the U.S. Constitution. ~~provides, in part: "[N]or shall private property be taken for public use, without just compensation."~~

- Acquisition of Property for Public Use. Code of Civil Procedure section 1240.010. ~~provides: "The power of eminent domain may be exercised to acquire property only for a public use. Where the Legislature provides by statute that a use, purpose, object, or function is one for which the power of eminent domain may be exercised, such action is deemed to be a declaration by the Legislature that such use, purpose, object, or function is a public use."~~

- "The power of eminent domain arises as an inherent attribute of sovereignty that is necessary for government to exist. Properly exercised, the eminent domain power effects a compromise between the public good for which private land is taken, and the protection and indemnification of private citizens whose property is taken to advance that public good. The Fifth Amendment of the United States Constitution, made applicable to the states by the Fourteenth Amendment, and California Constitution, article I, section 19 require this protection of private citizens' property." (*Burbank-Glendale-Pasadena Airport Authority v. Hensler* (2000) 83 Cal.App.4th 556, 561 [99 Cal.Rptr.2d 729], internal citation omitted.)

- " 'An inverse condemnation action is an eminent domain proceeding initiated by the property owner rather than the condemner. The principles which affect the parties' rights in an inverse condemnation suit are the same as those in an eminent domain action.' " (*Customer Co. v. City of Sacramento* (1995) 10 Cal.4th 368, 377, fn. 4 [41 Cal.Rptr.2d 658, 895 P.2d 900], internal citations omitted.)

- "The principle sought to be achieved by this concept 'is to reimburse the owner for the property interest taken and to place the owner in as good a position pecuniarily as if the property had not been taken.' " (*Redevelopment Agency of the City of Long Beach v. First Christian Church of Long Beach* (1983) 140 Cal.App.3d 690, 705 [189 Cal.Rptr. 749], internal citation omitted, disapproved on other grounds in *Los Angeles County Metropolitan Transportation Authority v. Continental Development*

Corp. (1997) 16 Cal.4th 694, 720-721 [66 Cal.Rptr.2d 630, 941 P.2d 809].)

- The only issue for the jury is valuation; all others are tried by the court. (*People v. Ricciardi* (1943) 23 Cal.2d 390, 402 [144 P.2d 799].)

- "While article I, section 14 [now 19], of the California Constitution guarantees a jury trial in condemnation cases on the issue of the defendant's damages, this is the only issue to be decided by the jury; all other issues of law or fact must be decided by the court." (*Pacific Gas & Electric Co. v. Peterson* (1969) 270 Cal.App.2d 434, 438 [75 Cal.Rptr. 673], internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 1223, 1229

1 Condemnation Practice in California (Cont.Ed.Bar 3d ed.) § 4.1

1 Nichols on Eminent Domain, Ch. 1, *The Nature, Origin, Evolution and Characteristics of the Power*, §§ 1.1, 1.11 (Matthew Bender)

20 California Forms of Pleading and Practice, Ch. 247, *Eminent Domain and Inverse Condemnation*, § 247.12 (Matthew Bender)

3501. "Fair Market Value" Explained

Just compensation includes the fair market value of the property as of [*insert date of valuation***]. Fair market value is the highest price for the property that a willing buyer would have paid in cash to a willing seller, assuming that:**

1. **There is no pressure on either one to buy or sell; and**

2. **The buyer and seller know all the uses and purposes for which the property is reasonably capable of being used.**

New September 2003

Directions for Use

Do not give this instruction in cases where there is no relevant market for the property. Instead, instruct on the appropriate alternative method of valuation.

Sources and Authority

- "Fair Market Value" Defined. Code of Civil Procedure section 1263.320. ~~provides:~~

  ~~(a) The fair market value of the property taken is the highest price on the date of valuation that would be agreed to by a seller, being willing to sell but under no particular or urgent necessity for so doing, nor obliged to sell, and a buyer, being ready, willing, and able to buy but under no particular necessity for so doing, each dealing with the other with full knowledge of all the uses and purposes for which the property is reasonably adaptable and available.~~

  ~~(b) The fair market value of property taken for which there is no relevant, comparable market is its value on the date of valuation as determined by any method of valuation that is just and equitable.~~

- " 'Market value,' in turn, traditionally has been defined as 'the highest price estimated in terms of money which the land would bring if exposed for sale in the open market, with reasonable time allowed in which to find a purchaser, buying with knowledge of all of the uses and purposes to which it was adapted and for which it was capable.' " (*Klopping v. City of Whittier* (1972) 8 Cal.3d 39, 43 [104 Cal.Rptr. 1, 500 P.2d 1345], internal citation omitted.)

- "Recognized alternatives to the market data approach to valuation are reproduction or replacement costs less depreciation or obsolescence." (*Redevelopment Agency of the City of Long Beach v. First Christian Church of Long Beach* (1983) 140 Cal.App.3d 690, 698 [189 Cal.Rptr. 749], internal citation omitted, disapproved on other grounds in *Los Angeles County Metropolitan Transportation Authority v. Continental Development Corp*. (1997) 16 Cal.4th 694, 720-721 [66 Cal.Rptr.2d 630,

941 P.2d 809].)

- Alternative methods of valuation particularly apply to properties such as schools, churches, cemeteries, parks, and utilities for which there is no relevant market; therefore these properties may be valued on any basis that is just and equitable. (*County of San Diego v. Rancho Vista Del Mar, Inc.* (1993) 16 Cal.App.4th 1046, 1060 [20 Cal.Rptr.2d 675].)

- "[T]he fair market value of property taken has not been limited to the value of the property as used at the time of the taking, but has long taken into account the 'highest and most profitable use to which the property might be put in the reasonable near future, to the extent that the probability of such a prospective use affects the market value.' " (*City of San Diego v. Neumann* (1993) 6 Cal.4th 738, 744 [25 Cal.Rptr.2d 480, 863 P.2d 725], internal citations omitted.)

- "In condemnation actions, California courts have long recognized what has been referred to as the 'appraisal trinity.' This term encompasses three methods or approaches used by appraisers to determine the fair market value of real estate: (1) the current cost of reproducing (or replacing) the property less depreciation from all sources; (2) the 'market data' value as indicated by recent sale of comparable properties; and (3) the 'income approach,' or the value of which the property's net earning power will support based upon the capitalization of net income. In 1965, the state Legislature codified these three approaches in Evidence Code section 815-820. A qualified appraiser in an eminent domain proceeding may use one or more of these valuation techniques to ascertain the fair market value of the condemned property." (*Redevelopment Agency of the City of Long Beach, supra,* 140 Cal.App.3d at p. 705, internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 1230

1 Condemnation Practice in California (Cont.Ed.Bar 3d ed.) §§ 4.1-4.2

4 Nichols on Eminent Domain, Ch. 12, *Valuation Generally*, §§ 12.01-12.05, Ch. 13, *Fair Market Value-Physical Character*, § 13.01 (Matthew Bender)

20 California Forms of Pleading and Practice, Ch. 247, *Eminent Domain and Inverse Condemnation*, § 247.135 (Matthew Bender)

3504. Project Enhanced Value

You must consider any increase or decrease in the property's fair market value caused by public knowledge of [*insert entity's purpose for condemning the property***] until [***insert date of property's probable inclusion***]. You may not consider any change in value caused by [***insert entity's purpose for condemning the property***] after that date. You may, however, consider other factors that changed the property's value after [***insert date of property's probable inclusion***], but before [***insert date of valuation***].**

New September 2003

Sources and Authority

- Exclusions From Fair Market Value. Code of Civil Procedure section 1263.330. ~~provides:~~
  ~~The fair market value of the property taken shall not include any increase or decrease in the value of the property that is attributable to any of the following:~~

  ~~(a) The project for which the property is taken.~~

  ~~(b) The eminent domain proceeding in which the property is taken.~~

  ~~(c) Any preliminary actions of the plaintiff relating to the taking of the property.~~

- "A legitimate element of just compensation lies in the increase in value resulting from a reasonable expectation that a particular piece of property will be outside a proposed public improvement, and thus will reap the benefits of that improvement." (*Merced Irrigation Dist. v. Woolstenhulme* (1971) 4 Cal.3d 478, 488 [93 Cal.Rptr. 833, 483 P.2d 1].)

- "The 'market value' of a given piece of property, of course, reflects a great variety of factors independent of the size, nature, or condition of the property itself. The general character of the neighborhood, the quality of the public and private services, and the availability of public facilities all play important roles in establishing market value. Thus, widespread knowledge of a proposed public improvement, planned for an indefinite location within a given region or neighborhood, will frequently cause the market value of land in the region or neighborhood to rise." (*Merced Irrigation Dist., supra,* 4 Cal.3d at p. 488.)

- "[W]e now hold that increases in value, attributable to a project but reflecting a reasonable expectation that property will not be taken for the improvement, should properly be considered in determining 'just compensation.' " (*Merced Irrigation Dist., supra,* 4 Cal.3d at p. 495.)

- "[I]n computing 'just compensation' in such a case, a jury should only consider the increase in value attributable to the project up until the time when it became probable that the land would be needed for the improvement." (*Merced Irrigation Dist., supra,* 4 Cal.3d at p. 498.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 1234

1 Condemnation Practice in California (Cont.Ed.Bar 3d ed.) §§ 4.3-4.8

3 Nichols on Eminent Domain, Ch. 8A, *Enhancement*, §§ 8A.01-8A.02 (Matthew Bender)

4 Nichols on Eminent Domain, Ch. 12B, *Valuation of the Fee Interest*, § 12B.17 (Matthew Bender)tt

3506. Effect of Improvements

In determining the fair market value of the property you must consider both the value of the land and whether any buildings, machinery, or other equipment attached to the property increase or decrease the value of the property.

New September 2003

Directions for Use

The court decides as a legal issue whether an improvement is a fixture "pertaining to the realty." (Code Civ. Proc., § 1260.030.)

Sources and Authority

- Improvements to Property Compensible. Code of Civil Procedure section 1263.210(a). ~~provides: "Except as otherwise provided by statute, all improvements pertaining to the realty shall be taken into account in determining compensation."~~

- "Improvements" Defined. Code of Civil Procedure section 1263.205(a). ~~defines "improvements pertaining to the realty" as including "any machinery or equipment installed for use on property taken by eminent domain, or on the remainder if such property is part of a larger parcel, that cannot be removed without a substantial economic loss or without substantial damage to the property on which it is installed, regardless of the method of installation."~~

- Removal of Property Withoug Substantial Economic Loss. Code of Civil Procedure section 1263.205(b). ~~provides: "In determining whether particular property can be removed 'without a substantial economic loss' within the meaning of this section, the value of the property in place considered as a part of the realty should be compared with its value if it were removed and sold."~~

- "[T]he market value of land and the improvements thereon is the market value thereof viewed as a whole and not separately." (*South Bay Irrigation Dist. v. California-American Water Co.* (1976) 61 Cal.App.3d 944, 986 [133 Cal.Rptr. 166], internal citation omitted.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 1225

1 Condemnation Practice in California (Cont.Ed.Bar 3d ed.) § 4.55

4 Nichols on Eminent Domain, Ch. 13, *Fair Market Value-Physical Character*, §§ 13.02, 13.12 (Matthew Bender)

20 California Forms of Pleading and Practice, Ch. 247, *Eminent Domain and Inverse Condemnation*, §

247.136 (Matthew Bender)

3508. Bonus Value of Leasehold Interest

[Some/All] of the property taken was leased to [*name of lessee***]. You must determine the amount of compensation that [***name of lessee***] can recover.**

To do this, you must determine the difference between:

1. **The present value of the total rent that [***name of lessee***] agreed to pay during the time remaining on the lease after [***insert date of possession when lessee no longer occupied the premises***]; and**

2. **The present value of the total fair market rent for the leased property from [***date of valuation***] for the time remaining on the lease.**

If the present value of the total agreed rent is less than the present value of the total fair market rent, then [*name of lessee***] is entitled to the difference.**

New September 2003

Directions for Use

Do not give this instruction if bonus value is allocated under the lease to the owner.

This instruction may not be appropriate in every case involving a lessee.

This instruction would be applicable to the apportionment phase of the case under Code of Civil Procedure section 1260.220(b).

Sources and Authority

- Lessee's Right to Compensation. Code of Civil Procedure section 1265.150. ~~provides: "Nothing in this article affects or impairs any right a lessee may have to compensation for the taking of his lease in whole or in part or for the taking of any other property in which he has an interest."~~

- Terms of Lease Define Rights of Parties. Code of Civil Procedure section 1265.160. ~~provides: "Nothing in this article affects or impairs the rights and obligations of the parties to a lease to the extent that the lease provides for such rights and obligations in the event of the acquisition of all or a portion of the property for public use."~~

- "Under the Eminent Domain Law, a provision of a lease that declares that the lease terminates if all the property subject thereto is acquired for public use does *not* deprive the lessee of any right he may have to compensation for the taking of his leasehold or other property. The Eminent Domain Law itself declares the generally applicable rules that the lease terminates if all the property subject thereto is acquired for public use, and that such termination does not affect any right of the lessee to

compensation related thereto." (*City of Vista v. W.O. Fielder* (1996) 13 Cal.4th 612, 618 [54 Cal.Rptr.2d 861, 919 P.2d 151], original italics.)

- "Usually the rental value of the property is measured in terms of existing tenancies. Tenants, like owners in fee, are also entitled to compensation in condemnation." (*People ex rel. Dept. of Water Resources v. Andresen* (1987) 193 Cal.App.3d 1144, 1163 [238 Cal.Rptr. 826].)

- "The bonus value can be more precisely defined as the present value of the difference between economic rent, i.e., the value of market rental, and the contract rent through the remaining lease term. The bonus value usually assumes importance only in long-term commercial leases." (*New Haven Unified School Dist. v. Taco Bell Corp.* (1994) 24 Cal.App.4th 1473, 1478-1479 [30 Cal.Rptr.2d 469], internal citations omitted.)

- "Whether or not the lessor and lessee are joined in a single proceeding, these rules will ordinarily result in an aggregate award to both lessor and lessee equal to market value of the property. Where the lease rental falls below market value, the lessor will have a claim to less than the full market value of the property, since he is restricted to the present value of actual contract rental; but the lessee will have a right to recover the balance of the market value, above that recovered by the lessor, as lease bonus value." (*New Haven, supra*, 24 Cal.App.4th at p. 1479, internal citation omitted.)

- "Although generally a tenant is entitled to all compensation attributable to the tenant's interest in a lease, it is well recognized that the parties to a lease may contractually agree to allocate a condemnation award to the landlord rather than the tenant." (*City of South San Francisco v. Mayer* (1998) 67 Cal.App.4th 1350, 1354 [79 Cal.Rptr.2d 704], internal citations omitted.)

- "A lessee's option to renew a lease should be considered to the extent that the option enhances the value of the leasehold." (*San Francisco Bay Area Rapid Transit Dist. v. McKeegan* (1968) 265 Cal.App.2d 263, 272 [71 Cal.Rptr. 204].)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 1250

1 Condemnation Practice in California (Cont.Ed.Bar 3d ed.) §§ 4.57-4.63

4 Nichols on Eminent Domain, Ch. 12D, *Valuation of Interests Other Than Fee Interests*, § 12D.01[3] (Matthew Bender)

20 California Forms of Pleading and Practice, Ch. 247, *Eminent Domain and Inverse Condemnation*, § 247.136 (Matthew Bender)

3511. Severance Damages

The [*name of condemnor***] has taken only a part of [***name of property owner***]'s property. [***Name of property owner***] claims that [his/her/its] remaining property has lost value as a result of the taking. This loss in value is called "severance damages" and must be included in determining just compensation.**

Severance damages are the damages to [*name of property owner***]'s remaining property caused by the taking, or by the construction and use of the [***name of condemnor***]'s proposed project, or by both.**

Severance damages are determined as follows:

1. **Determine the fair market value of the remaining property on [***date of valuation***] by subtracting the fair market value of the part taken from the fair market value of the entire property;**

2. **Determine the fair market value of the remaining property after the [***name of condemnor***]'s proposed project is completed; and**

3. **Subtract the fair market value of the remaining property after the [***name of condemnor***]'s proposed project is completed from the fair market value of the remaining property on [***date of valuation***].**

New September 2003

Directions for Use

Read CACI No. 3512, *Severance Damages—Offset for Benefits*, if benefits are at issue.

Sources and Authority

- Right to Severance Damages. Code of Civil Procedure section 1263.410. ~~provides:~~

  ~~(a) Where the property acquired is part of a larger parcel, in addition to the compensation awarded pursuant to Article 4 (commencing with Section 1263.310) for the part taken, compensation shall be awarded for the injury, if any, to the remainder.~~

  ~~(b) Compensation for injury to the remainder is the amount of the damage to the remainder reduced by the amount of the benefit to the remainder. If the amount of the benefit to the remainder equals or exceeds the amount of the damage to the remainder, no compensation shall be awarded under this article. If the amount of the benefit to the remainder exceeds the amount of damage to the remainder, such~~

~~excess shall be deducted from the compensation provided in Section 1263.510, if any, but shall not be deducted from the compensation required to be awarded for the property taken or from the other compensation required by this chapter.~~

- Damages to Remainder After Severance. Code of Civil Procedure section 1263.420. ~~provides:~~

  ~~Damage to the remainder is the damage, if any, caused to the remainder by either or both of the following:~~

  ~~(a) The severance of the remainder from the part taken.~~

  ~~(b) The construction and use of the project for which the property is taken in the manner proposed by the plaintiff whether or not the damage is caused by a portion of the project located on the part taken.~~

- Benefit to Remainder. Code of Civil Procedure section 1263.430. ~~provides: "Benefit to the remainder is the benefit, if any, caused by the construction and use of the project for which the property is taken in the manner proposed by the plaintiff whether or not the benefit is caused by a portion of the project located on the part taken."~~

- "When property acquired by eminent domain is part of a larger parcel, compensation must be awarded for the injury, if any, to the remainder. Such compensation is commonly called severance damages. When the property taken is but part of a single legal parcel, the property owner need only demonstrate injury to the portion that remains to recover severance damages." (*City of San Diego v. Neumann* (1993) 6 Cal.4th 738, 741 [25 Cal.Rptr.2d 480, 863 P.2d 725], internal citations omitted.)

- "The claimed loss in market value must directly and proximately flow from the taking. Thus, recovery may not be based on ' " 'speculative, remote, imaginary, contingent, or merely possible' " ' events." (*City of Livermore v. Baca* (2012) 205 Cal.App.4th 1460, 1466 [141 Cal.Rptr.3d 271].)

- The court determines as a matter of law what constitutes the "larger parcel" for which severance damages may be obtained: "The Legislature has framed the question of whether property should be viewed as an integrated whole in terms of whether the land remaining after the taking forms part of a 'larger parcel'." (*City of San Diego, supra*, 6 Cal.4th at p. 745, internal citations omitted.)

- "As we said in *Pierpont Inn*, 'Where the property taken constitutes only a part of a larger parcel, the owner is entitled to recover, inter alia, the difference in the fair market value of his property in its "before" condition and the fair market value of the remaining portion thereof after the construction of the improvement on the portion taken. Items such as view, access to beach property, freedom from noise, etc. are unquestionably matters which a willing buyer in the open market would consider in determining the price he would pay for any given piece of real property.' Severance damages are not limited to special and direct damages, but can be based on any factor, resulting from the project, that causes a decline in the fair market value of the property." (*Los Angeles County Metropolitan Transportation Authority v. Continental Development Corp.* (1997) 16 Cal.4th 694, 712 [66 Cal.Rptr.2d 630, 941 P.2d 809], internal citations omitted.)

- "Both sides here thus agree that the court, not the jury, must make certain determinations that are a predicate to the award of severance damages. But [condemnor] is on weaker ground when it attempts to derive … a general rule that 'as a matter of constitutional and decisional law, *all* issues having to do with the existence of, or entitlement to, severance damages are entrusted to the trial judge,' such that '[o]nly after the trial judge has determined that severance damages exist does the jury consider the amount of those severance damages.' [Condemnor]'s proposed rule assumes that questions relating to the measurement of severance damages can be readily distinguished from questions relating to the entitlement to them in the first place but, as we have previously cautioned, the two concepts are not necessarily 'so easily separable.' " (*Metropolitan Water Dist. of So. California v. Campus Crusade for Christ, Inc.* (2007) 41 Cal.4th 954, 972 [62 Cal.Rptr.3d 623, 161 P.3d 1175, original italics, internal citations omitted.)

- "[W]here the property owner produces evidence tending to show that some other aspect of the taking … 'naturally tends to and actually does decrease the market value' of the remaining property, it is for the jury to weigh its effect on the value of the property, as long as the effect is not speculative, conjectural, or remote." (*Metropolitan Water Dist. of So. California, supra,* 41 Cal.4th at p. 973.)

- "In determining severance damage, the jury must assume 'the most serious damage' which will be caused to the remainder by the taking of the easement and construction of the property. The value of the remainder after the condemnation has occurred is referred to as the 'after' value of the property. The diminution in fair market value is determined by comparing the before and after values. This is the amount of the severance damage." (*San Diego Gas & Electric Co. v. Daley* (1988) 205 Cal.App.3d 1334, 1345 [253 Cal.Rptr. 144], internal citations omitted, disapproved on other grounds in *Los Angeles County Metropolitan Transportation Authority, supra,* 16 Cal.4th at p. 720.)

- "[S]everance damages are not limited to specific direct damages but can be based on any indirect factors that cause a decline in the market value of the property. California decisions have indicated the following are compensable as direct damages under section 1263.410: (1) impairment of view, (2) restriction of access, (3) increased noise, (4) invasion of privacy, (5) unsightliness of the project, (6) lack of maintenance of the easement and (7) nuisances in general such as trespassers and safety risks. Several courts have recognized that the condemnee should be compensated for any characteristic of the project which causes 'an adverse impact on the fair market value of the remainder.'" (*San Diego Gas & Electric Co., supra,* 205 Cal.App.3d at p. 1345.)

- "When 'the property acquired [by eminent domain] is part of a larger parcel,' in addition to compensation for the property actually taken, the property owner must be compensated for the injury, if any, to the land that he retains. Once it is determined that the owner is entitled to severance damages, they, too, normally are measured by comparing the fair market value of the remainder before and after the taking." (*City of San Diego, supra*, 6 Cal.4th at p. 745, internal citations and footnote omitted.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 1236–1244

1 Condemnation Practice in California (Cont.Ed.Bar 3d ed.) Ch. 5

14 California Real Estate Law and Practice, Ch. 508, *Evidence: General*, §§ 508.24, 508.25 (Matthew Bender)

4A Nichols on Eminent Domain, Ch. 14, *Damages for Partial Takings*, §§ 14.01–14.03 (Matthew Bender)

5 Nichols on Eminent Domain, Ch. 16, *Consequential Damages as a Result of Proposed Use*, §§ 16.01–16.05 (Matthew Bender)

20 California Forms of Pleading and Practice, Ch. 247, *Eminent Domain and Inverse Condemnation*, § 247.140 (Matthew Bender)

3512. Severance Damages—Offset for Benefits

The [*name of condemnor***] claims that the remainder of [***name of property owner***]'s property has received a benefit from the project as proposed.**

You must determine the amount of benefit by determining any reasonably certain increase in the fair market value of the remaining property caused by the project.

[You must then subtract that amount from the severance damages. If the project's benefit to the remaining property is equal to or greater than the loss caused by the taking, then you must award zero severance damages. Any benefits to the remaining property should not be subtracted from the value of the property that [*name of condemnor***] has taken.]**

New September 2003

Directions for Use

A special verdict form may be used to have the jury set forth separately the determination of severance damages and benefits. Use the bracketed paragraph if the judge will not be calculating the offset to severance damages for the benefit to the remaining property.

Sources and Authority

- Compensation for Remainder After Severance. Code of Civil Procedure section 1263.410. ~~provides:~~

  ~~(a) Where the property acquired is part of a larger parcel, in addition to the compensation awarded pursuant to Article 4 (commencing with Section 1263.310) for the part taken, compensation shall be awarded for the injury, if any, to the remainder.~~

  ~~(b) Compensation for injury to the remainder is the amount of the damage to the remainder reduced by the amount of the benefit to the remainder. If the amount of the benefit to the remainder equals or exceeds the amount of the damage to the remainder, no compensation shall be awarded under this article. If the amount of the benefit to the remainder exceeds the amount of damage to the remainder, such excess shall be deducted from the compensation provided in Section 1263.510, if any, but shall not be deducted from the compensation required to be awarded for the property taken or from the other compensation required by this chapter.~~

- "Benefit to Remainder" Defined. Code of Civil Procedure section 1263.430. ~~provides: "Benefit to the remainder is the benefit, if any, caused by the construction and use of the project for which the property is taken in the manner proposed by the plaintiff whether or not the benefit is caused by a portion of the project located on the part taken."~~

- Functions of Trier of Fact. Code of Civil Procedure section 1260.230. ~~provides:~~

  ~~As far as practicable, the trier of fact shall assess separately each of the following:~~

  ~~(a) Compensation for the property taken as required by Article 4 (commencing with Section 1263.310) of Chapter 9.~~

  ~~(b) Where the property acquired is part of a larger parcel:~~

  ~~(1) The amount of the damage, if any, to the remainder as required by Article 5 (commencing with Section 1263.410) of Chapter 9.~~

  ~~(2) The amount of the benefit, if any, to the remainder as required by Article 5 (commencing with Section 1263.410) of Chapter 9.~~

  ~~(c) Compensation for loss of goodwill, if any, as required by Article 6 (commencing with Section 1263.510) of Chapter 9.~~

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 1236–1244

1 Condemnation Practice in California (Cont.Ed.Bar 3d ed.) §§ 5.33-5.40

5 Nichols on Eminent Domain, Ch. 16, *Consequential Damages as a Result of Proposed Use*, §§ 16.01-16.05 (Matthew Bender)

20 California Forms of Pleading and Practice, Ch. 247, *Eminent Domain and Inverse Condemnation*, § 247.140 (Matthew Bender)

3513. Goodwill

In this case, [*name of business owner***] is entitled to compensation for any loss of goodwill as a part of just compensation. "Goodwill" is the benefit that a business gains as a result of its location, reputation for dependability, skill, or quality, and any other circumstances that cause a business to keep old customers or gain new customers. You must include the amount of any loss of goodwill as an item in your award for just compensation.**

New September 2003; Revised February 2007

Sources and Authority

- Compensation for Loss of Goodwill. Code of Civil Procedure section 1263.510. ~~provides:~~

  ~~(a) The owner of a business conducted on the property taken, or on the remainder if the property is part of a larger parcel, shall be compensated for loss of goodwill if the owner proves all of the following:~~

  ~~(1) The loss is caused by the taking of the property or the injury to the remainder.~~

  ~~(2) The loss cannot reasonably be prevented by a relocation of the business or by taking steps and adopting procedures that a reasonably prudent person would take and adopt in preserving the goodwill.~~

  ~~(3) Compensation for the loss will not be included in payments under Section 7262 of the Government Code.~~

  ~~(4) Compensation for the loss will not be duplicated in the compensation otherwise awarded to the owner.~~

  ~~(b) Within the meaning of this article, "goodwill" consists of the benefits that accrue to a business as a result of its location, reputation for dependability, skill or quality, and any other circumstances resulting in probable retention of old or acquisition of new patronage.~~

  ~~(c) If the public entity and the owner enter into a leaseback agreement pursuant to Section 1263.615, the following shall apply:~~

  ~~(1) No additional goodwill shall accrue during the lease.~~

  ~~(2) The entering of a leaseback agreement shall not be a factor in determining goodwill. Any liability for goodwill shall be established and paid at the time of acquisition of the property by eminent domain or subsequent to notice that the property may be taken by eminent domain.~~

- "Goodwill is the amount by which a business's overall value exceeds the value of its constituent assets, often due to a recognizable brand name, a sterling reputation, or an ideal location. Regardless of the cause, however, goodwill almost always translates into a business's profitability." (*People ex rel. Dept. of Transportation v. Dry Canyon Enterprises, LLC* (2012) 211 Cal.App.4th 486, 493−494 [149 Cal.Rptr.3d 601], internal citation omitted.)

- "Historically, lost business goodwill was not recoverable under eminent domain law. However, in 1975 the Legislature enacted section 1263.510 'in response to widespread criticism of the injustice wrought by the Legislature's historic refusal to compensate condemnees whose ongoing businesses were diminished in value by a forced relocation. [Citations.] The purpose of the statute was unquestionably to provide monetary compensation for the kind of losses which typically occur when an ongoing small business is forced to move and give up the benefits of its former location.' Thus, a business owner's right to compensation for loss of goodwill is a statutory right, not a constitutional right." (*City and County of San Francisco v. Coyne* (2008) 168 Cal.App.4th 1515, 1522 [86 Cal.Rptr.3d 255], internal citations omitted.)

- "Compensation for loss of goodwill in eminent domain proceedings 'involves a two-step process. Whether the qualifying conditions for such compensation [citation] have been met is a matter for the trial court to resolve. Only if the court finds these conditions exist does the remaining issue of the value of the goodwill loss, if any, go to the jury. [Citations.]' 'Under section 1263.510, subdivision (a), the business owner has the initial burden of showing entitlement to compensation for lost goodwill.' " (*City and County of San Francisco, supra,* 168 Cal.App.4th at pp. 1522–1523, internal citations omitted.)

- "After entitlement to goodwill is shown (which includes a showing that compensation for the loss will not be duplicated) neither party has the burden of proof with regard to valuation." (*Redevelopment Agency of the City of Pomona v. Thrifty Oil Co.* (1992) 4 Cal.App.4th 469, 475 [5 Cal.Rptr.2d 687], internal citations omitted.)

- "Only an owner of a business conducted on the real property taken may claim compensation for loss of goodwill." (*San Diego Metropolitan Transit Development Bd. v. Handlery Hotel, Inc.* (1999) 73 Cal.App.4th 517, 537 [86 Cal.Rptr.2d 473], internal citation omitted.)

- "[W]hile there are no explicit statutory requirements regarding an expert's use of a particular methodology for valuing lost goodwill, the expert's methodology must provide a fair estimate of *actual value* and cannot be based on hypothetical or speculative uses of a condemned business … ." (*City and County of San Francisco, supra,* 168 Cal.App.4th at p. 1523, original italics.)

- "The underlying purpose of this statute is to provide compensation for the kind of losses which typically occur when an ongoing business is forced to move and give up the benefits of its former location. It includes not only compensation for lost patronage itself, but also for expenses reasonably incurred in an effort to prevent a loss of patronage." (*San Diego Metropolitan Transit Development Bd., supra,* 73 Cal.App.4th at p. 537, internal citations omitted.)

- "Goodwill must, of course, be measured by a method which excludes the value of tangible assets or the normal return on those assets. However, the courts have wisely maintained that there is no single acceptable method of valuing goodwill. Valuation methods will differ with the nature of the business or practice and with the purpose for which the evaluation is conducted." (*People ex rel. Dept. of Transportation v. Muller* (1984) 36 Cal.3d 263, 271, fn. 7 [203 Cal.Rptr. 772, 681 P.2d 1340], internal citations omitted.)

- "Although the statutory scheme applies only to eminent domain proceedings, the right to recover lost goodwill has been extended to the indirect condemnee. Thus, 'goodwill is compensable in an inverse condemnation action to the same extent and with the same limitations on recovery found in ... section 1263.510.' " (*San Diego Metropolitan Transit Development Bd.*, *supra,* 73 Cal.App.4th at p. 537, internal citations omitted.)

- "Goodwill may be measured by the capitalized value of the net income or profits of a business or some similar method of calculating present value of anticipated profits. Valuation methods differ with the nature of the business and the purpose for which the evaluation is conducted. There is no single method to evaluate goodwill." (*People ex rel. Dept. of Transportation v. Leslie* (1997) 55 Cal.App.4th 918, 922–923 [64 Cal.Rptr.2d 252], internal citations omitted.)

- "[A] 'cost to create' approach is a permissible means by which to value goodwill under [Code of Civil Procedure] section 1263.510 where, as here, a nascent business has not yet experienced excess profits but clearly has goodwill within the meaning of the statute and experiences a total loss of goodwill due to condemnation of the property on which the business is operated." (*Inglewood Redevelopment Agency v. Aklilu* (2007) 153 Cal.App.4th 1095, 1102 [64 Cal.Rptr.3d 519].)

- "As *Aklilu* implicitly recognized, unless there is independent proof that a business possesses goodwill in the first place, the cost-to-create methodology does not reflect the cost of creating any actual goodwill. Instead, it simply adds up costs and calls the total 'goodwill.' The relationship between goodwill and the costs to create breaks down even further when the condemnation takes only a portion of the business's goodwill. In that situation, it becomes necessary to figure out which costs match up with which portions of goodwill that are lost; in most cases, this will devolve into an exercise in futility or fiction." (*Dry Canyon Enterprises, LLC, supra,* 211 Cal.App.4th at p. 494.)

- "A business which is required to move because of the taking of the property on which it operates has suffered a loss from the taking. This is true whether the tenancy is for a fixed term, or is a periodic tenancy as in this case. The value of the lost goodwill is affected by the probable remaining term of the tenancy. Evidence of the remaining length of a lease and the existence of an option to renew a lease are, of course, relevant for determining the amount of compensation, if any, to be paid for loss of goodwill. Similarly, evidence of the pre-condemnation duration of a periodic tenancy and the quality and mutual satisfaction in the landlord and tenant relationship are probative for determination of compensation for loss of goodwill." (*Los Angeles Unified Sch. Dist. v. Pulgarin* (2009) 175 Cal.App.4th 101, 107 [95

Cal.Rptr.3d 527], internal citation omitted.)

- "[I]n some circumstances, there may be a limited right to reimbursement for costs incurred to mitigate loss of goodwill." (*Los Angeles Unified School Dist. v. Casasola* (2010) 187 Cal.App.4th 189, 208 [114 Cal.Rptr.3d 318].)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 1245, 1246

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 7-C, *Bases For Terminating Tenancy*, ¶¶ 7:314−7.316.3 (The Rutter Group)

Wegner et al., California Practice Guide: Civil Trials & Evidence, Ch. 8C-H, *Foundation*, ¶ 8:748.2 (The Rutter Group)

1 Condemnation Practice in California (Cont.Ed.Bar 3d ed.) §§ 4.64–4.78

14 California Real Estate Law and Practice, Ch. 508, *Evidence: General*, § 508.19; Ch. 512, *Compensation*, § 512.13 (Matthew Bender)

4 Nichols on Eminent Domain, Ch. 13, *Loss of Business Goodwill*, § 13.18[5] (Matthew Bender)

6A Nichols on Eminent Domain, Ch. 29, *Loss of Business Goodwill*, §§ 29.01–29.08 (Matthew Bender)

20 California Forms of Pleading and Practice, Ch. 247, *Eminent Domain and Inverse Condemnation*, § 247.136 (Matthew Bender)

3514. Burden of Proof

Neither the [*name of condemnor***] nor [***name of property owner***] has the burden of proving the amount of just compensation.**

New September 2003

Sources and Authority

- Order of Presenting Evidence; No Burden of Proof. Code of Civil Procedure section 1260.210. ~~provides:~~

  ~~(a) The defendant shall present his evidence on the issue of compensation first and shall commence and conclude the argument.~~

  ~~(b) Except as otherwise provided by statute, neither the plaintiff nor the defendant has the burden of proof on the issue of compensation.~~

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 1221

1 Condemnation Practice in California (Cont.Ed.Bar 3d ed.) § 9.14

5 Nichols on Eminent Domain, Ch. 18, *Evidence in Condemnation Proceedings*, § 18.02 (Matthew Bender)

3515. Valuation Testimony

You must decide the value of property based solely on the testimony of the witnesses who have given their opinion of fair market value. You may consider other evidence only to help you understand and weigh the testimony of those witnesses.

You may find the same fair market value testified to by a witness, or you may find a value anywhere between the highest and lowest values stated by the witnesses.

If the witnesses disagreed with one another, you should weigh each opinion against the others based on the reasons given for each opinion, the facts or other matters that each witness relied on, and the witnesses' qualifications.

New September 2003

Sources and Authority

- Evidence of Value of Property. Evidence Code section 813(a). ~~provides:~~

  ~~The value of property may be shown only by the opinions of any of the following:~~

  ~~(1) Witnesses qualified to express such opinions.~~

  ~~(2) The owner or the spouse of the owner of the property or property interest being valued.~~

  ~~(3) An officer, regular employee, or partner designated by a corporation, partnership, or unincorporated association that is the owner of the property or property interest being valued, if the designee is knowledgeable as to the value of the property or property interest.~~

- "The only type of evidence which can be used to establish value in eminent domain cases is the opinion of qualified experts and the property owners." (*Aetna Life and Casualty Co. v. City of Los Angeles* (1985) 170 Cal.App.3d 865, 877 [216 Cal.Rptr. 831], internal citations omitted.)

- "A jury hearing a condemnation action may not disregard the evidence as to value and render a verdict which either exceeds or falls below the limits established by the testimony of the witnesses. The trier of fact in an eminent domain action is not an appraiser, and does not make a determination of market value based on its opinion thereof. Instead it determines the market value of the property, based on the opinions of the valuation witnesses." (*Aetna Life and Casualty Co., supra*, 170 Cal.App.3d at p. 877, internal citations omitted.)

- " 'The trier of fact may accept the evidence of any one expert or choose a figure between them based on all of the evidence.' There is insufficient evidence to support a verdict 'only when "no reasonable

interpretation of the record" supports the figure ... .' " (*San Diego Metropolitan Transit Development Bd. v. Cushman* (1997) 53 Cal.App.4th 918, 931 [62 Cal.Rptr.2d 121], internal citations omitted.)

Secondary Sources

1 Witkin, California Evidence (4th ed. 2000) Opinion Evidence, § 102

1 Condemnation Practice in California (Cont.Ed.Bar 3d ed.) §§ 9.62-9.64

5 Nichols on Eminent Domain, Ch. 23, *Expert and Opinion Evidence*, §§ 23.01-23.11 (Matthew Bender)

3516. View

You have viewed the property and its surrounding area. The purpose of this view was to help you understand and weigh the testimony of the witnesses.

New September 2003

Sources and Authority

- View of Property. Evidence Code section 813(b). ~~provides: "Nothing in this section prohibits a view of the property being valued or the admission of any other admissible evidence (including but not limited to evidence as to the nature and condition of the property and, in an eminent domain proceeding, the character of the improvement proposed to be constructed by the plaintiff) for the limited purpose of enabling the court, jury, or referee to understand and weigh the testimony ... and such evidence, except evidence of the character of the improvement proposed to be constructed by the plaintiff in an eminent domain proceeding, is subject to impeachment and rebuttal."~~

Secondary Sources

2 Witkin, California Evidence (4th ed. 2000) Demonstrative, Experimental, and Scientific Evidence, § 31

1 Condemnation Practice in California (Cont.Ed.Bar 3d ed.) § 9.95

3517. Comparable Sales (Evid. Code, § 816)

To assist you in determining the fair market value of the property, you have heard evidence of comparable sales. It is up to you to decide the importance of this evidence in determining the fair market value.

New December 2013

Directions for Use

Use this instruction if the court has allowed evidence of comparable sales to be presented to the jury.

Sources and Authority

- Comparable Sales. Evidence Code section 816. ~~provides:~~

  ~~When relevant to the determination of the value of property, a witness may take into account as a basis for his opinion the price and other terms and circumstances of any sale or contract to sell and purchase comparable property if the sale or contract was freely made in good faith within a reasonable time before or after the date of valuation. In order to be considered comparable, the sale or contract must have been made sufficiently near in time to the date of valuation, and the property sold must be located sufficiently near the property being valued, and must be sufficiently alike in respect to character, size, situation, useability, and improvements, to make it clear that the property sold and the property being valued are comparable in value and that the price realized for the property sold may be fairly considered as shedding light on the value of the property being valued.~~

- "[T]he essence of comparability is recent and local sales '*sufficiently* alike in respect to character, size, situation, usability, and improvements' so that the price 'may fairly be considered as *shedding light*' on the value of the condemned property. … After the trial court resolves this preliminary legal question, it is then ultimately for the jury to determine the extent to which the other property is in fact comparable." (*County of Glenn v. Foley* (2012) 212 Cal.App.4th 393, 401 [151 Cal.Rptr.3d 8], original italics, internal citations omitted.)

- "This whole 'shedding light on value' standard is nothing more than a restatement of the general rule for the introduction of circumstantial evidence, which is admissible if *relevant*, 'i.e., if it can provide any rational inference in support of the issue.' " (*County of Glenn, supra,* 212 Cal.App.4th at p. 402, original italics, footnote omitted.)

- "[No] general rule can be laid down regarding the degree of similarity that must exist to make [comparable sales] evidence admissible. It must necessarily vary with the circumstances of each particular case. Whether the properties are sufficiently similar to have some bearing on the value under consideration, and to be of any aid to the jury, must necessarily rest largely in the sound discretion of the trial court, which will not be interfered with unless abused." (*Merced Irrigation Dist. v. Woolstenhulme* (1971) 4 Cal.3d 478, 500 [93 Cal.Rptr. 833, 483 P.2d 1].)

- “The trial judge's prima facie determination that a sale is sufficiently ‘comparable’ to be admitted into evidence has never been thought to foreclose the question of ‘comparability’ altogether. ‘[If] at the discretion of the court, such [sales] are admissible on the grounds of comparability, the degree of comparability is a question of fact for the jury.’ ” (*County of San Luis Obispo v. Bailey* (1971) 4 Cal.3d 518, 525 [93 Cal.Rptr. 859, 483 P.2d 27].)

- “We have never declared properties noncomparable per se merely because they differ in size or shape. On the contrary, the trial court's obligation, pursuant to section 816, is to determine whether the sale price of one property could *shed light* upon the value of the condemned property, notwithstanding any differences that might exist between them. If it resolves that question affirmatively, it can admit the evidence. The jury then, on the basis of all the evidence, determines the extent to which any differences between the condemned property and the comparable property affect their relative values.” (*Los Angeles v. Retlaw Enterprises, Inc.* (1976) 16 Cal.3d 473, 482 [128 Cal.Rptr. 436, 546 P.2d 1380], original italics.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005), Constitutional Law §§ 1234, 1246

Witkin, California Evidence (4th ed. 2000) Opinion Evidence, § 107

14 California Real Estate Law and Practice, Ch. 508, *Evidence: General*, § 508.11 (Matthew Bender)

Cotchett, California Courtroom Evidence, Ch. 17, *Nonexpert and Expert Opinion*, 17.14 (Matthew Bender)

20 California Forms of Pleading and Practice, Ch. 247, *Eminent Domain and Inverse Condemnation*, § 247.147 (Matthew Bender)

3701. Tort Liability Asserted Against Principal—Essential Factual Elements

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[*Name of plaintiff***] claims that [he/she] was harmed by [***name of agent***]'s [***insert tort theory, e.g., "negligence"***].**

[*Name of plaintiff***] also claims that [***name of defendant***] is responsible for the harm because [***name of agent***] was acting as [his/her/its] [agent/employee/[***insert other relationship, e.g., "partner"***]] when the incident occurred.**

If you find that [*name of agent***]'s [***insert tort theory***] harmed [***name of plaintiff***], then you must decide whether [***name of defendant***] is responsible for the harm. [***Name of defendant***] is responsible if [***name of plaintiff***] proves both of the following:**

1. **That [***name of agent***] was [***name of defendant***]'s [agent/employee/[***insert other relationship***]]; and**

2. **That [***name of agent***] was acting within the scope of [his/her] [agency/employment/[***insert other relationship***]] when [he/she] harmed [***name of plaintiff***].**

New September 2003

Directions for Use

The term "name of agent," in brackets, is intended in the general sense, to denote the person or entity whose wrongful conduct is alleged to have created the principal's liability.

Under other principles of law, a principal may be directly liable for authorizing or directing an agent's wrongful acts. (See 2 Witkin, Summary of Cal. Law (10th ed. 2005) Agency and Employment, § 163.)

One of the two bracketed first sentences would be used, depending on whether the plaintiff is suing both the principal and the agent or the principal alone.

If there is no issue regarding whether a principal-agent exists, see CACI No. 3703, *Legal Relationship Not Disputed.*

This instruction may not apply where employer liability is statutory, such as under the Fair Employment and Housing Act.

Sources and Authority

- "Agent" Defined. Civil Code section 2295. ~~provides: "An agent is one who represents another, called the principal, in dealings with third persons. Such representation is called agency."~~

- "The rule of respondeat superior is familiar and simply stated: an employer is vicariously liable for the torts of its employees committed within the scope of the employment. Equally well established, if somewhat surprising on first encounter, is the principle that an employee's willful, malicious and even criminal torts may fall within the scope of his or her employment for purposes of respondeat superior, even though the employer has not authorized the employee to commit crimes or intentional torts." (*Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal.4th 291, 296-297 [48 Cal.Rptr.2d 510, 907 P.2d 358], internal citations and footnote omitted.)

- "The employer is liable not because the employer has control over the employee or is in some way at fault, but because the employer's enterprise creates inevitable risks as a part of doing business." (*Bailey v. Filco, Inc.* (1996) 48 Cal.App.4th 1552, 1559 [56 Cal.Rptr.2d 333], internal citations omitted.)

- "Respondeat superior is based on a 'deeply rooted sentiment' that it would be unjust for an enterprise to disclaim responsibility for injuries occurring in the course of its characteristic activities." (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 208 [285 Cal.Rptr. 99, 814 P.2d 1341], internal citation omitted.)

- The Supreme Court has articulated three reasons for applying the doctrine of respondeat superior: "(1) to prevent recurrence of the tortious conduct; (2) to give greater assurance of compensation for the victim; and (3) to ensure that the victim's losses will be equitably borne by those who benefit from the enterprise that gave rise to the injury." (*Mary M., supra,* 54 Cal.3d at p. 209.)

- "[W]here recovery of damages is sought against a principal and an agent, and the negligence of the agent is the cause of the injury, a verdict releasing the agent from liability releases the principal." (*Lehmuth v. Long Beach Unified School Dist.* (1960) 53 Cal.2d 544, 550 [2 Cal.Rptr. 279, 348 P.2d 887].)

- The doctrine of respondeat superior applies equally to public and private employers. (*Mary M., supra*, 54 Cal.3d at p. 209.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 163–168

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, §§ 8.03-8.04 (Matthew Bender)

2 California Employment Law, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, § 30.01 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts*, § 248.14 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent* (Matthew Bender)

10 California Points and Authorities, Ch. 100A, *Employer and Employee: Respondeat Superior* (Matthew

Bender)

1 California Civil Practice: Torts, ~~(Thomson West)~~ §§ 3:1–3:4 (Thomson Reuters)

3705. Existence of "Agency" Relationship Disputed

[*Name of plaintiff***] claims that [***name of agent***] was [***name of defendant***]'s agent and that [***name of defendant***] is therefore responsible for [***name of agent***]'s conduct.**

If [*name of plaintiff***] proves that [***name of defendant***] gave [***name of agent***] authority to act on [his/her/its] behalf, then [***name of agent***] was [***name of defendant***]'s agent. This authority may be shown by words or may be implied by the parties' conduct. This authority cannot be shown by the words of [***name of agent***] alone.**

New September 2003

Directions for Use

This instruction should be used when the factual setting involves relationships such as homeowner-real estate agent or franchisor-franchisee.

Sources and Authority

- "Agent" Defined. Civil Code section 2295. ~~provides: "An agent is one who represents another, called the principal, in dealings with third persons. Such representation is called agency."~~

- "The existence of an agency is a factual question within the province of the trier of fact whose determination may not be disturbed on appeal if supported by substantial evidence." (*L. Byron Culver & Associates v. Jaoudi Industrial & Trading Corp.* (1991) 1 Cal.App.4th 300, 305 [1 Cal.Rptr.2d 680], internal citation omitted.)

- The burden of proving the existence of an agency rests on the one affirming its existence. (*Burbank v. National Casualty Co.* (1941) 43 Cal.App.2d 773, 781 [111 P.2d 740].)

- One who performs a mere favor for another without being subject to any legal duty of service and without assenting to right of control is not an agent, because the agency relationship rests upon mutual consent. (*Hanks v. Carter & Higgins of Cal., Inc.* (1967) 250 Cal.App.2d 156, 161 [58 Cal.Rptr. 190].)

- An agency must rest upon an agreement. (*D'Acquisto v. Evola* (1949) 90 Cal.App.2d 210, 213 [202 P.2d 596].) "Agency may be implied from the circumstances and conduct of the parties." (*Michelson v. Hamada* (1994) 29 Cal.App.4th 1566, 1579 [36 Cal.Rptr.2d 343], internal citations omitted.)

- "Whether a person performing work for another is an agent or an independent contractor depends primarily upon whether the one for whom the work is done has the legal right to control the activities of the alleged agent. ... It is not essential that the right of control be exercised or that there be actual supervision of the work of the agent. The existence of the right of control and supervision establishes the existence of an agency relationship." (*Malloy v. Fong* (1951) 37 Cal.2d 356, 370 [232 P.2d 241],

internal citations omitted.)

- When the principal controls only the results of the work and not the means by which it is accomplished, an independent contractor relationship is established. (*White v. Uniroyal, Inc.* (1984) 155 Cal.App.3d 1, 25 [202 Cal.Rptr. 141], overruled on other grounds in *Soule v. GM Corp.* (1994) 8 Cal.4th 548 [34 Cal.Rptr.2d 607, 882 P.2d 298].)

- "Agency and independent contractorship are not necessarily mutually exclusive legal categories as independent contractor and servant or employee are. ... One who contracts to act on behalf of another and subject to the other's control, except with respect to his physical conduct, is both an agent and an independent contractor." (*City of Los Angeles v. Meyers Brothers Parking System* (1975) 54 Cal.App.3d 135, 138 [126 Cal.Rptr. 545], internal citations omitted; accord *Mottola v. R. L. Kautz & Co.* (1988) 199 Cal.App.3d 98, 108 [244 Cal.Rptr. 737].)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 92–96

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, § 8.04 (Matthew Bender)

2 California Employment Law, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, § 30.04 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts*, § 248.51 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent* (Matthew Bender)

10 California Points and Authorities, Ch. 100A, *Employer and Employee: Respondeat Superior* (Matthew Bender)

1 California Civil Practice: Torts, ~~(Thomson West)~~ §§ 3:26–3:27 (Thomson Reuters)

3709. Ostensible Agent

[*Name of plaintiff***] claims that [***name of defendant***] is responsible for [***name of agent***]'s conduct because [he/she] was [***name of defendant***]'s apparent [employee/agent]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] intentionally or carelessly created the impression that [***name of agent***] was [***name of defendant***]'s [employee/agent];**

2. **That [***name of plaintiff***] reasonably believed that [***name of agent***] was [***name of defendant***]'s [employee/agent]; and**

3. **That [***name of plaintiff***] was harmed because [he/she] reasonably relied on [his/her] belief.**

New September 2003

Sources and Authority

- Agency is Actual or Ostensible. Civil Code section 2298. ~~provides: "An agency is either actual or ostensible."~~

- "Ostensible Agency" Defined. Civil Code section 2300. ~~provides: "An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him."~~

- "Ostensible Authority" Defined. Civil Code section 2317. ~~provides: "Ostensible authority is such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess."~~

- " '[O]stensible authority arises as a result of conduct of the principal which causes the *third party* reasonably to believe that the agent possesses the authority to act on the principal's behalf.' 'Ostensible authority may be established by proof that the principal approved prior similar acts of the agent.' ' "[W]here the principal knows that the agent holds himself out as clothed with certain authority, and remains silent, such conduct on the part of the principal may give rise to liability. …" …' " (*Chicago Title Ins. Co. v. AMZ Ins. Services, Inc.* (2010) 188 Cal.App.4th 401, 426–427 [115 Cal.Rptr.3d 707], original italics, internal citations omitted.)

- "Whether ostensible agency exist[s] is a question of fact and may be implied from [the] circumstances." (*Yanchor v. Kagan* (1971) 22 Cal.App.3d 544, 550 [99 Cal.Rptr. 367].)

- " 'It is elementary that there are three requirements necessary before recovery may be had against a principal for the act of an ostensible agent. The person dealing with the agent must do so with belief in the agent's authority and this belief must be a reasonable one; such belief must be generated by

some act or neglect of the principal sought to be charged; and the third person in relying on the agent's apparent authority must not be guilty of negligence.' " (*Associated Creditors' Agency v. Davis* (1975) 13 Cal.3d 374, 399 [118 Cal.Rptr. 772, 530 P.2d 1084], internal citations omitted.)

- "Ostensible agency cannot be established by the representations or conduct of the purported agent; the statements or acts of the principal must be such as to cause the belief the agency exists." (*American Way Cellular, Inc. v. Travelers Property Casualty Co. of America* (2013) 216 Cal.App.4th 1040, 1053 [157 Cal.Rptr.3d 385].)

- "Liability of the principal for the acts of an ostensible agent rests on the doctrine of 'estoppel,' the essential elements of which are representations made by the principal, justifiable reliance by a third party, and a change of position from such reliance resulting in injury." (*Preis v. American Indemnity Co.* (1990) 220 Cal.App.3d 752, 761 [269 Cal.Rptr. 617], internal citation omitted.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 144–149

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-A, *Vicarious Liability*, ¶¶ 2:676, 2:677 (The Rutter Group)

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, § 8.04[6] (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent*, §§ 427.11, 427.22 (Matthew Bender)

18 California Points and Authorities, Ch. 182, *Principal and Agent*, § 182.120 et seq. (Matthew Bender)

1 California Civil Practice: Torts, § 3:29 (Thomson Reuters)

3710. Ratification

[*Name of plaintiff***] claims that [***name of defendant***] is responsible for the harm caused by [***name of agent***]'s conduct because [he/she/it] approved that conduct after it occurred. If you find that [***name of agent***] harmed [***name of plaintiff***], you must decide whether [***name of defendant***] approved that conduct. To establish [his/her] claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of agent***] intended to act on behalf of [***name of defendant***];**

2. **That [***name of defendant***] learned of [***name of agent***]'s conduct after it occurred; and**

3. **That [***name of defendant***] approved [***name of agent***]'s conduct.**

Approval can be shown through words, or it can be inferred from a person's conduct. [Approval can be inferred if a person voluntarily keeps the benefits of [his/her/its] [representative/employee]'s unauthorized conduct after [he/she/it] learns of the unauthorized conduct.]

New September 2003

Directions for Use

The last bracketed sentence should be read only if it is appropriate to the facts of the case.

Sources and Authority

- Agency Created by Ratification. Civil Code section 2307. ~~provides: "An agency may be created, and an authority may be conferred, by a ... subsequent ratification."~~

- Ratification by Acceptance of Benefits. Civil Code section 2310. ~~provides: "A ratification can be made ... by accepting or retaining the benefit of the act, with notice thereof."~~

- Partial Ratification. Civil Code section 2311. ~~provides: "Ratification of part of an indivisible transaction is a ratification of the whole."~~

- Vicarious Liability for Ratified Acts. Civil Code section 2339. ~~provides in part: "A principal is responsible for ... wrongs committed by his agent [if] ... he has ... ratified them ... ."~~

- The concept of ratification is more commonly associated with contract law than tort law. Nevertheless, "[r]atification has, in fact, been a basis for imputed tort liability under the common law for centuries." (Kraus, *Ratification of Torts: An Overview and Critique of the Traditional Doctrine and Its Recent Extension to Claims of Workplace Harassment* (1997) 32 Tort & Ins. L.J. 807.)

- "Ratification is the voluntary election by a person to adopt in some manner as his own an act which was purportedly done on his behalf by another person, the effect of which, as to some or all persons,

is to treat the act as if originally authorized by him. A purported agent's act may be adopted expressly or it may be adopted by implication based on conduct of the purported principal from which an intention to consent to or adopt the act may be fairly inferred, including conduct which is 'inconsistent with any reasonable intention on his part, other than that he intended approving and adopting it.' " (*Rakestraw v. Rodrigues* (1972) 8 Cal.3d 67, 73 [104 Cal.Rptr. 57, 500 P.2d 1401].)

- "[A]n employer may be liable for an employee's act where the employer … subsequently ratified an originally unauthorized tort. [Citations.] The failure to discharge an employee who has committed misconduct may be evidence of ratification. [Citation.] The theory of ratification is generally applied where an employer fails to investigate or respond to charges that an employee committed an intentional tort, such as assault or battery. [Citations.] Whether an employer has ratified an employee's conduct is generally a factual question. [Citation.]" (*Ventura v. ABM Industries Inc.* (2012) 212 Cal.App.4th 258, 272 [150 Cal.Rptr.3d 861].)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 139–143

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability,* § 8.04[7] (Matthew Bender)

2 California Employment Law, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees,* §§ 30.02, 30.07 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts,* § 248.13 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent,* § 427.18 (Matthew Bender)

10 California Points and Authorities, Ch. 100A, *Employer and Employee: Respondeat Superior,* § 100A.21 et seq. (Matthew Bender)

1 California Civil Practice: Torts § 3:4 (Thomson Reuters)

3711. Partnerships

A partnership and each of its partners are responsible for the wrongful conduct of a partner acting within the scope of his or her authority.

You must decide whether a partnership existed in this case. A partnership is a group of two or more persons who own a business in which all the partners agree to share the profits and losses. A partnership can be formed by a written or oral agreement or by an agreement implied by the parties' conduct.

New September 2003

Directions for Use

This instruction is not intended for cases involving limited liability partnerships.

Sources and Authority

- Formation of Partnership. Corporations Code section 16202. ~~provides, in part: "[T]he association of two or more persons to carry on as coowners a business for profit forms a partnership, whether or not the persons intend to form a partnership."~~

- Liability of Partnership. Corporations Code section 16305(a). ~~provides: "A partnership is liable for loss or injury caused to a person, or for a penalty incurred, as a result of a wrongful act or omission, or other actionable conduct, of a partner acting in the ordinary course of business of the partnership or with authority of the partnership."~~

- "Under traditional legal concepts the partnership is regarded as an aggregate of individuals with each partner acting as agent for all other partners in the transaction of partnership business, and the agents of the partnership act as agents for all of the partners." (*Marshall v. International Longshoremen's and Warehousemen's Union* (1962) 57 Cal.2d 781, 783 [22 Cal.Rptr. 211, 371 P.2d 987].)

- "[T]he partners of a partnership are jointly and severally liable for the conduct and torts injuring a third party committed by one of the partners." (*Black v. Sullivan* (1975) 48 Cal.App.3d 557, 569 [122 Cal.Rptr. 119], internal citations omitted.)

- "In determining whether a relationship such as that of partners has been created, the courts are guided not only by the spoken or written words of the contracting parties, but also by their acts." (*Singleton v. Fuller* (1953) 118 Cal.App.2d 733, 740-741 [259 P.2d 687], internal citation omitted.)

- "It is essential, however, to the existence of a partnership that there be a community of interest and an agreement to share jointly in the profits and losses resulting from the enterprise." (*Sandberg v. Jacobson* (1967) 253 Cal.App.2d 663, 668 [61 Cal.Rptr. 436], internal citation omitted.)

Secondary Sources

9 Witkin, Summary of California Law (10th ed. 2005) Partnership, § 39

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, § 8.06 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent* (Matthew Bender)

10 California Points and Authorities, Ch. 100A, *Employer and Employee: Respondeat Superior* (Matthew Bender)

1 California Civil Practice: Torts, ~~(Thomson West)~~ §§ 3:36–3:37 (Thomson Reuters)

3900. Introduction to Tort Damages—Liability Contested

If you decide that [*name of plaintiff***] has proved [his/her] claim against [***name of defendant***], you also must decide how much money will reasonably compensate [***name of plaintiff***] for the harm. This compensation is called "damages."**

The amount of damages must include an award for each item of harm that was caused by [*name of defendant***]'s wrongful conduct, even if the particular harm could not have been anticipated.**

[*Name of plaintiff***] does not have to prove the exact amount of damages that will provide reasonable compensation for the harm. However, you must not speculate or guess in awarding damages.**

[The following are the specific items of damages claimed by [*name of plaintiff***]:]**

[*Insert applicable instructions on items of damage.***]**

New September 2003

Directions for Use

Read last bracketed sentence and insert instructions on items of damages here only if CACI No. 3902, *Economic and Noneconomic Damages*, is not being read. If CACI No. 3902 is not used, this instruction should be followed by applicable instructions (see CACI Nos. 3903A through 3903N, and 3905A) concerning the items of damage claimed by the plaintiff. These instructions should be inserted into this instruction as sequentially numbered items.

Sources and Authority

- Measure of Tort Damages. Civil Code section 3333. ~~provides: "For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not."~~

- Recovery of Damages Generally. Civil Code section 3281. ~~provides: "Every person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation in money, which is called damages."~~

- Recovery of Future Damages. Civil Code section 3283. ~~provides: "Damages may be awarded, in a judicial proceeding, for detriment resulting after the commencement thereof, or certain to result in the future."~~

- Damages Must Be Reasonable. Civil Code section 3359. ~~provides: "Damages must, in all cases, be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be~~

~~recovered."~~

- Under Civil Code section 3333 "[t]ort damages are awarded to compensate a plaintiff for all of the damages suffered as a legal result of the defendant's wrongful conduct." (*North American Chemical Co. v. Superior Court* (1997) 59 Cal.App.4th 764, 786 [69 Cal.Rptr.2d 466], italics omitted.)

- "Whatever its measure in a given case, it is fundamental that 'damages which are speculative, remote, imaginary, contingent, or merely possible cannot serve as a legal basis for recovery.' However, recovery is allowed if claimed benefits are reasonably certain to have been realized but for the wrongful act of the opposing party." (*Piscitelli v. Friedenberg* (2001) 87 Cal.App.4th 953, 989 [105 Cal.Rptr.2d 88], internal citations omitted.)

- "In general, one who has been tortiously injured is entitled to be compensated for the harm and the injured party must establish 'by proof the extent of the harm and the amount of money representing adequate compensation with as much certainty as the nature of the tort and the circumstances permit.' However, '[t]here is no general requirement that the injured person should prove with like definiteness the extent of the harm that he has suffered as a result of the tortfeasor's conduct. It is desirable that responsibility for harm should not be imposed until it has been proved with reasonable certainty that the harm resulted from the wrongful conduct of the person charged. It is desirable, also, that there be definiteness of proof of the amount of damage as far as is reasonably possible. It is even more desirable, however, that an injured person not be deprived of substantial compensation merely because he cannot prove with complete certainty the extent of harm he has suffered.' " (*Clemente v. State of California* (1985) 40 Cal.3d 202, 219 [219 Cal.Rptr. 445, 707 P.2d 818], internal citations omitted.)

- "If plaintiff's inability to prove his damages with certainty is due to defendant's actions, the law does not generally require such proof." (*Clemente, supra,* 40 Cal.3d at p. 219, internal citations omitted.)

- "While a defendant is liable for all the damage that his tortuous act proximately causes to the plaintiff, regardless of whether or not it could have been anticipated, nevertheless a proximate causal connection must still exist between the damage sustained by the plaintiff and the defendant's wrongful act or omission, and the detriment inflicted on the plaintiff must still be the natural and probable result of the defendant's conduct." (*Chaparkas v. Webb* (1960) 178 Cal.App.2d 257, 260 [2 Cal.Rptr. 879], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1548–1552, 1555–1558

California Tort Damages (Cont.Ed.Bar) Bodily Injury, §§ 1.2-1.6

4 Levy et al., California Torts, Ch. 50, *Damages*, § 50.02 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender)

6 California Points and Authorities, Ch. 65, *Damages* (Matthew Bender)

1 California Civil Practice: Torts, ~~(Thomson West)~~ § 5:1 (Thomson Reuters)

3901. Introduction to Tort Damages—Liability Established

If you decide that [*name of plaintiff***] was harmed and that [***name of defendant***]'s [***insert description of cause of action, e.g., "negligence"***] was a substantial factor in causing the harm, you also must decide how much money will reasonably compensate [***name of plaintiff***] for the harm. This compensation is called "damages."**

The amount of damages must include an award for each item of harm that was caused by [*name of defendant***]'s wrongful conduct, even if the particular harm could not have been anticipated.**

[*Name of plaintiff***] does not have to prove the exact amount of damages that will provide reasonable compensation for the harm. However, you must not speculate or guess in awarding damages.**

[The following are the specific items of damages claimed by [*name of plaintiff***]:]**

[*Insert applicable instructions on items of damage.***]**

New September 2003; Revised October 2004, June 2005

Directions for Use

This instruction is intended for cases in which the defendant "admits" liability, but contests causation and damages. See CACI No. 424, *Negligence Not Contested—Essential Factual Elements*.

Read last bracketed sentence and insert instructions on items of damage here only if CACI No. 3902, *Economic and Noneconomic Damages*, is not being read. If CACI No. 3902 is not used, this instruction should be followed by applicable instructions (see CACI Nos. 3903A through 3903N, and CACI No. 3905A) concerning the items of damage claimed by the plaintiff. These instructions should be inserted into this instruction as sequentially numbered items

Read CACI No. 430, *Causation: Substantial Factor*, as the definition of "substantial factor."

Sources and Authority

- Measure of Tort Damages. Civil Code section 3333. ~~provides: "For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not."~~

- Recovery of Damages Generally. Civil Code section 3281. ~~provides: "Every person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation therefor in money, which is called damages."~~

- Recovery of Future Damages. Civil Code section 3283. ~~provides: "Damages may be awarded, in a~~

~~judicial proceeding, for detriment resulting after the commencement thereof, or certain to result in the future."~~

- Damages Must Be Reasonable. Civil Code section 3359. ~~provides: "Damages must, in all cases, be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered."~~

- Under Civil Code section 3333 "[t]ort damages are awarded to compensate a plaintiff for *all* of the damages suffered as a legal result of the defendant's wrongful conduct." (*North American Chemical Co. v. Superior Court* (1997) 59 Cal.App.4th 764, 786 [69 Cal.Rptr.2d 466], italics omitted.)

- "Whatever its measure in a given case, it is fundamental that 'damages which are speculative, remote, imaginary, contingent, or merely possible cannot serve as a legal basis for recovery.' However, recovery is allowed if claimed benefits are reasonably certain to have been realized but for the wrongful act of the opposing party." (*Piscitelli v. Friedenberg* (2001) 87 Cal.App.4th 953, 989 [105 Cal.Rptr.2d 88], internal citations omitted.)

- "In general, one who has been tortiously injured is entitled to be compensated for the harm and the injured party must establish 'by proof the extent of the harm and the amount of money representing adequate compensation with as much certainty as the nature of the tort and the circumstances permit.' However, '[there] is no general requirement that the injured person should prove with like definiteness the extent of the harm that he has suffered as a result of the tortfeasor's conduct. It is desirable that responsibility for harm should not be imposed until it has been proved with reasonable certainty that the harm resulted from the wrongful conduct of the person charged. It is desirable, also, that there be definiteness of proof of the amount of damage as far as is reasonably possible. It is even more desirable, however, that an injured person not be deprived of substantial compensation merely because he cannot prove with complete certainty the extent of harm he has suffered.' " (*Clemente v. State of California* (1985) 40 Cal.3d 202, 219 [219 Cal.Rptr. 445, 707 P.2d 818], internal citations omitted.)

- "If plaintiff's inability to prove his damages with certainty is due to defendant's actions, the law does not generally require such proof." (*Clemente, supra,* 40 Cal.3d at p. 219.)

- "While a defendant is liable for all the damage that his tortuous act proximately causes to the plaintiff, regardless of whether or not it could have been anticipated, nevertheless a proximate causal connection must still exist between the damage sustained by the plaintiff and the defendant's wrongful act or omission, and the detriment inflicted on the plaintiff must still be the natural and probable result of the defendant's conduct." (*Chaparkas v. Webb* (1960) 178 Cal.App.2d 257, 260 [2 Cal.Rptr. 879].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1548–1552, 1555–1558

California Tort Damages (Cont.Ed.Bar) Bodily Injury, §§ 1.2-1.6

4 Levy et al., California Torts, Ch. 50, *Damages*, § 50.02 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender)

6 California Points and Authorities, Ch. 65, *Damages* (Matthew Bender)

1 California Civil Practice: Torts, ~~(Thomson West)~~ § 5:1 (Thomson Reuters)

3902. Economic and Noneconomic Damages

The damages claimed by [*name of plaintiff*] for the harm caused by [*name of defendant*] fall into two categories called economic damages and noneconomic damages. You will be asked on the verdict form to state the two categories of damages separately.

New September 2003

Directions for Use

This instruction may not be necessary in every case.

Sources and Authority

- Proposition 51. Civil Code section 1431.2. ~~(Prop. 51) provides:~~

  ~~(a) In any action for personal injury, property damage, or wrongful death, based upon principles of comparative fault, the liability of each defendant for non-economic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be rendered against that defendant for that amount.~~

  ~~(b) (1) For purposes of this section, the term "economic damages" means objectively verifiable monetary losses including medical expenses, loss of earnings, burial costs, loss of use of property, costs of repair or replacement, costs of obtaining substitute domestic services, loss of employment and loss of business or employment opportunities.~~

  ~~(2) For the purposes of this section, the term "non-economic damages" means subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation.~~

- MICRA Limitiation on Noneconomic Damages From Health Care Provider. Civil Code section 3333.2. ~~provides, in part: "In any action for injury against a health care provider based on professional negligence, the injured plaintiff shall be entitled to recover noneconomic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement and other nonpecuniary damage." The statute sets the limit for such damages at $250,000.~~

- The Supreme Court has noted that section 1431.2 "carefully" defines the "important distinction" between economic and noneconomic damages. (*DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 600 [7 Cal.Rptr.2d 238, 828 P.2d 140].) The court stated: "Proposition 51 ... retains the joint liability of all

tortfeasors, regardless of their respective shares of fault, with respect to all objectively provable expenses and monetary losses. On the other hand, the more intangible and subjective categories of damages were limited by Proposition 51 to a rule of strict proportionate liability. With respect to these noneconomic damages, the plaintiff alone now assumes the risk that a proportionate contribution cannot be obtained from each person responsible for the injury." (*Ibid.*, internal citation omitted.)

- "Proposition 51 ... allows an injured plaintiff to recover the full amount of economic damages suffered, regardless of which tortfeaser or tortfeasors are named as defendants. The tortfeasors are left to sort out payment in proportion to fault amongst themselves, and they must bear the risk of nonrecovery from impecunious tortfeasors. As to noneconomic damages, however, the plaintiff must sue all the tortfeasors to enable a full recovery. Failure to name a defendant will preclude recovery of that defendant's proportional share of damages, and the plaintiff will bear the risk of nonrecovery from an impecunious tortfeasor." (*Aetna Health Plans of California, Inc. v. Yucaipa-Calimesa Joint Unified School Dist.* (1999) 72 Cal.App.4th 1175, 1190 [85 Cal.Rptr.2d 672].)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 53, 61, 62

California Tort Damages (Cont.Ed.Bar) Bodily Injury, § 1.5

4 Levy et al., California Torts, Ch. 74, *Resolving Multiparty Tort Litigation*, § 74.04 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender)

6 California Points and Authorities, Ch. 65, *Damages* (Matthew Bender)

1 California Civil Practice: Torts~~, (Thomson West)~~ § 5:4 (Thomson Reuters)

3903F. Damage to Real Property (Economic Damage)

[*Insert number, e.g.,* "6."**] The harm to [***name of plaintiff***]'s property.**

To recover damages for harm to property, [*name of plaintiff***] must prove [the reduction in the property's value/ [or] the reasonable cost of repairing the harm]. [If there is evidence of both, [***name of plaintiff***] is entitled to the lesser of the two amounts. [However, if [***name of plaintiff***] has a genuine desire to repair the property for personal reasons, and if the costs of repair are reasonable given the damage to the property and the value after repair, then the costs of repair may be awarded even if they exceed the property's loss of value.]]**

[To determine the reduction in value, you must determine the fair market value of the property before the harm occurred and then subtract the fair market value of the property immediately after the harm occurred. The difference is the reduction of value.

"Fair market value" is the highest price for the property that a willing buyer would have paid to a willing seller, assuming:

1. **That there is no pressure on either one to buy or sell; and**

2. **That the buyer and seller know all the uses and purposes for which the property is reasonably capable of being used.]**

[To determine whether the cost of repairing the harm is reasonable, you must decide if there is a reasonable relationship between the cost of repair and the harm caused by [*name of defendant***]'s conduct. You must consider the expense and time involved to restore the property to its original condition compared to the value of the property [and [***insert other applicable factors.***]].**

If you find that the cost of repairing the harm is not reasonable, then you may award any reduction in the property's value.]

New September 2003; Revised April 2008, April 2009

Directions for Use

Give this instruction for damages to real property caused by trespass, permanent nuisance, or other tortious conduct. See also CACI No. 3903G, *Loss of Use of Real Property (Economic Damage).*

If there is evidence of both diminution in value and cost of repair, include all optional paragraphs. However, include the last bracketed sentence in the first paragraph only if the judge has determined that the claimed personal reasons are legally sufficient to justify the costs of repair.

If only the cost of repair is at issue, give just the first paragraph. However, if the reasonableness of the

cost of repair is at issue, then the value of the property must be considered, and all paragraphs must be included. If only diminution of value is at issue, omit the last two optional paragraphs.

Sources and Authority

- Damages for Wrongful Occupation of Real Property. Civil Code section 3334(a). ~~provides: "The detriment caused by the wrongful occupation of real property, in cases not embraced in Section 3335 of this code, the Eminent Domain Law (Title 7 (commencing with Section 1230.010) of Part 3 of the Code of Civil Procedure), or Section 1174 of the Code of Civil Procedure, is deemed to include the value of the use of the property for the time of that wrongful occupation, not exceeding five years next preceding the commencement of the action or proceeding to enforce the right to damages, the reasonable cost of repair or restoration of the property to its original condition, and the costs, if any, of recovering the possession."~~

- "For tortious injury to real property, the general rule is that the plaintiff may recover the lesser of (1) the diminution in the property's fair market value, as measured immediately before and immediately after the damage; or (2) the cost to repair the damage and restore the property to its pretrespass condition, plus the value of any lost use. The practical effect of this rule is to limit damages to property to the fair market value of the property prior to the damage." (*Kelly v. CB&I Constructors, Inc.* (2009) 179 Cal.App.4th 442, 450 [102 Cal.Rptr.3d 32].)

- "Diminution in market value ... is not an absolute limitation; several other theories are available to fix appropriate compensation for the plaintiff's loss. 'There is no fixed, inflexible rule for determining the measure of damages for injury to, or destruction of, property; whatever formula is most appropriate to compensate the injured party for the loss sustained in the particular case will be adopted.' " (*Heninger v. Dunn* (1980) 101 Cal.App.3d 858, 862 [162 Cal.Rptr. 104].)

- "Defendant ... contends that the trial court awarded excessive damages, on the ground that when the cost of restoration is less than the depreciation in value, the former is the measure of damages. This contention cannot be sustained. Plaintiffs established their damages by showing the depreciation in value. It was then incumbent upon defendants to come forward with proof that the cost of restoration would be less." (*Herzog v. Grosso* (1953) 41 Cal.2d 219, 226 [259 P.2d 429], internal citations omitted.)

- "Where a plaintiff establishes damages by showing depreciation in the value of real property, courts have held defendants to the burden of coming forward with proof that cost of restoration would be less. It follows that when a plaintiff proves damages by showing the cost of repairs it should be incumbent on the defendant to introduce evidence that the repair costs exceed the value of the property." (*Armitage v. Decker* (1990) 218 Cal.App.3d 887, 905 [267 Cal.Rptr. 399], internal citations omitted.)

- "The 'fair market value' of real property is 'the best price obtainable from a purchaser on a cash sale.' It 'is measured by the highest price the property would command if offered for sale in the open market with a reasonable time allowed to the seller to find a purchaser who will buy with a knowledge of all the uses to which it may be put.' " (*CMSH Co. v. Antelope Development, Inc.* (1990) 223 Cal.App.3d 174, 182 [272 Cal.Rptr. 605], internal citations omitted.)

- "Civil Code section 3334 requires that restoration costs be *reasonable*. In addition, general principles of damages in trespass cases require that the damages bear a *reasonable* relationship to the harm caused by the trespass. *Mangini* explains that whether abatement costs are *reasonable* requires an evaluation of a number of fundamental considerations, including the expense and time required to perform the abatement, along with other legitimate competing interests. (*Mangini, supra,* 12 Cal.4th at p. 1100; see also *Beck, supra,* 44 Cal.App.4th at pp. 1221–1222 [reasonableness includes consideration of monetary expense, burden on public, and costs of remediation versus value of land].)" (*Starrh & Starrh Cotton Growers v. Aera Energy LLC* (2007) 153 Cal.App.4th 583, 601 [63 Cal.Rptr.3d 165], original italics.)

- "The trial court must instruct the jury on how to determine whether the statutory requirement that any restoration costs be reasonable was met. It must also advise the jury what to do if the jury concludes the evidence shows the proposed restoration project to be unreasonable." (*Starrh & Starrh Cotton Growers, supra,* 153 Cal.App.4th at pp. 600–601.)

- "Whether the restoration costs are reasonable is a question for the trier of fact in the first instance, but an award of such costs may be unreasonable as a matter of law if it is grossly disproportionate to the value of the property or the harm caused by the defendant." (*Kelly, supra,* 179 Cal.App.4th at p. 451.)

- "Trial courts in trespass actions have historically been given great flexibility to award damages that fit the particular facts of the case." (*Starrh & Starrh Cotton Growers, supra,* 153 Cal.App.4th at p. 604.)

- "[I]f a plaintiff has a personal reason to restore the property to its former condition, he or she may recover the restoration costs even if such costs exceed the diminution in value. This rule is sometimes referred to as the ' "personal reason" exception.' Even when this exception applies, however, restoration costs 'are allowed only if they are reasonable in light of the value of the real property before the injury and the actual damage sustained.' " (*Kelly, supra,* 179 Cal.App.4th at pp. 450-451, internal citations omitted.)

- "Contrary to the defendants' argument, the 'personal reason' exception does not require that the [plaintiffs] own a 'unique' home. Rather, all that is required is some personal use by them and a bona fide desire to repair or restore." (*Orndorff v. Christiana Community Builders* (1990) 217 Cal.App.3d 683, 688 [266 Cal.Rptr. 193].)

- "Under California law, damages for diminution in value may only be recovered for permanent, not continuing, nuisances." (*Gehr v. Baker Hughes Oil Field Operations, Inc.* (2008) 165 Cal.App.4th 660, 663 [81 Cal.Rptr.3d 219].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1727, 1728

California Real Property Remedies Practice (Cont.Ed.Bar) Damages for Injury to Real Property, § 11.5

4 Levy et al., California Torts, Ch. 52, *Medical Expenses and Economic Loss,* § 52.35 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.44 (Matthew Bender)

22 California Points and Authorities, Ch. 225, *Trespass*, § 225.147 (Matthew Bender)

1 California Civil Practice: Torts~~, (Thomson West)~~ § 5:19 (Thomson Reuters)

3903G. Loss of Use of Real Property (Economic Damage)

[*Insert number, e.g.,* "7."**] The loss of use of [***name of plaintiff***]'s [***insert identification of real property***].**

To recover damages for the loss of use, [*name of plaintiff***] must prove [the reasonable cost to rent similar property for the time when [he/she/it] could not use [his/her/its] own property/ [or] the benefits obtained by [***name of defendant***] because of [his/her/its] wrongful occupation]. [If there is evidence of both, [***name of plaintiff***] is entitled to the greater of the two amounts.]**

[Benefits obtained may include [*name of defendant***]'s profits if they are directly linked to the wrongful occupation.]**

New September 2003; Revised April 2008

Directions for Use

Use this instruction along with CACI No. 3903F, *Damage to Real Property (Economic Damage)*. Include the optional last paragraph if plaintiff claims that the measure of damages is the benefits obtained by the defendant and that these include the defendant's profits obtained because of the tortious conduct.

This instruction may be used if the general measure of damages under CACI No. 3903F will be the cost of repair rather than diminution in value. (See *Erlich v. Menezes* (1999) 21 Cal.4th 543, 555 [87 Cal.Rptr.2d 886, 981 P.2d 978].)

If the jury determines that the cost of repair is not reasonable, it is not clear whether loss-of-use damages are recoverable. The rule has been that when real property has been damaged so that it cannot be restored, damages for loss of use may not be recovered. (*Ferraro v. Southern California Gas Co.* (1980) 102 Cal.App.3d 33, 50–51 [162 Cal.Rptr. 238].) But in 1992, the Legislature amended Civil Code section 3334 to allow for "benefits obtained" as an alternative to rental value as a measure of damages for loss of use. The legislative intent was to deter polluters from dumping toxic material on land of little value. (See *Starrh & Starrh Cotton Growers v. Aera Energy LLC* (2007) 153 Cal.App.4th 583, 603 [63 Cal.Rptr.3d 165].) In *Starrh & Starrh Cotton Growers,* the court indicated that it was extremely unlikely in that case that the cost of repair could be considered to be reasonable, but also allowed the jury to consider awarding the defendant's profits as "benefits obtained." (*Id.* at pp. 598–606.) The court did not limit the jury's right to award profits as damages only if it found the cost of repair to be reasonable. And it seems that if the court believed there was such a limitation, it would have expressly said so. The legislative objective would not be achieved if one could pollute land to the point that it could not reasonably be restored and also not be required to pay for the benefits obtained. Therefore, it seems most likely that this limitation on loss-of-use damages no longer applies in light of the 1992 amendment and its legislative history.

This instruction is not intended for cases in which the plaintiff is a landlord seeking to recover compensation for lost rents. A more appropriate instruction for that situation is CACI No. 3903N, *Lost Profits (Economic Damage)*

Sources and Authority

- Damages for Wrongful Occupation of Real Property. Civil Code section 3334. ~~provides:~~

  ~~(a) The detriment caused by the wrongful occupation of real property, in cases not embraced in Section 3335 of this code, the Eminent Domain Law (Title 7 (commencing with Section 1230.010) of Part 3 of the Code of Civil Procedure), or Section 1174 of the Code of Civil Procedure, is deemed to include the value of the use of the property for the time of that wrongful occupation, not exceeding five years next preceding the commencement of the action or proceeding to enforce the right to damages, the reasonable cost of repair or restoration of the property to its original condition, and the costs, if any, of recovering the possession.~~

  ~~(b) (1) Except as provided in paragraph (2), for purposes of subdivision (a), the value of the use of the property shall be the greater of the reasonable rental value of that property or the benefits obtained by the person wrongfully occupying the property by reason of that wrongful occupation.~~

  ~~(2) If a wrongful occupation of real property subject to this section is the result of a mistake of fact of the wrongful occupier, the value of the use of the property, for purposes of subdivision (a), shall be the reasonable rental value of the property.~~

- "[T]he general measure of damages where injury to property is capable of being repaired is the reasonable cost of repair together with the value of lost use during the period of injury." (*Erlich, supra,* 21 Cal.4th at p.555, internal citation omitted.)

- "There is no question that when cost of restoration is the correct measure of damages for injury to real property, compensation for loss of use ... would be appropriate." (*Ferraro, supra,* 102 Cal.App.3d at p 51.)

- "There is nothing in Civil Code section 3334 or its legislative history to suggest that the phrase 'benefits obtained' should be read narrowly. To the contrary, the intent of the Legislature was to eliminate *any* economic incentive to trespass as a means of waste disposal. (Sen. Com. on Judiciary, com. on Assem. Bill No. 2663 (1991–1992 Reg. Sess.) for June 23, 1992, hearing, p. 2.) If the Legislature had wanted to limit the phrase 'benefits obtained' to costs avoided, it could easily have done so. [¶] Further, this interpretation is consistent with the fundamental rule that the prime consideration in interpreting a statute is to achieve the objective of the statute. As we have indicated, the evil to be prevented by the 1992 amendments is identified in the legislative history—to prevent any economic advantage for polluters resulting from the wrongful dumping on another's land." (*Starrh & Starrh Cotton Growers, supra,* 153 Cal.App.4th at p. 604, original italics, internal citation omitted,)

- "Trial courts in trespass actions have historically been given great flexibility to award damages that fit the particular facts of the case. [Defendant] has admitted that it chose the challenged method for disposing of produced water because it was the least expensive alternative and maximized its profits. In light of these factors, we conclude that the term 'benefits obtained' may include profits enjoyed by

[defendant] that are directly linked to the wrongful trespass." (*Starrh & Starrh Cotton Growers, supra,* 153 Cal.App.4th at p. 604, internal citations omitted.)

- Restatement Second of Torts section 931 provides:

  If one is entitled to a judgment for the detention of, or for preventing the use of, land or chattels, the damages include compensation for

  (a) the value of the use during the period of detention or prevention or the value of the use of or the amount paid for a substitute, and

  (b) harm to the subject matter or other harm of which the detention is the legal cause.

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1728

California Real Property Remedies Practice (Cont.Ed.Bar) Damages for Injury to Real Property, § 11.5

4 Levy et al., California Torts, Ch. 52, *Medical Expenses and Economic Loss*, § 52.36 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.44 (Matthew Bender)

6 California Points and Authorities, Ch. 65, *Damages*, § 65.40 et seq. (Matthew Bender)

1 California Civil Practice: Torts~~. (Thomson West)~~ § 5:19 (Thomson Reuters)

3903L. Damage to Personal Property Having Special Value (Civ. Code, § 3355) (Economic Damage)

[*Insert number, e.g.,* "12."**] The unique value of [***name of plaintiff***]'s [***item of personal property***].**

To recover damages for the unique value, [*name of plaintiff***] must prove all of the following:**

1. **That the [***item of personal property***] had some market value;**

2. **That the [***item of personal property***] had unique value to [***name of plaintiff***]; and**

3. **[That [***name of defendant***] had notice of this unique value before the harm;]**

   [or]

   [That [*name of defendant***]'s conduct was intentional and wrongful.]**

No fixed standard exists for deciding the amount of this value. You must use your judgment to decide a reasonable amount based on the evidence and your common sense.

New September 2003

Directions for Use

The judge should determine whether the peculiar value claimed by the plaintiff is legally sufficient. While the subcommittee been unable to locate cases that state this rule explicitly, cases have upheld the giving of this type of instruction where there is substantial evidence of peculiar value.

Sources and Authority

- Damages for Loss of Property With Special Value. Civil Code section 3355. ~~provides: "Where certain property has a peculiar value to a person recovering damages for deprivation thereof, or injury thereto, that may be deemed to be its value against one who had notice thereof before incurring a liability to damages in respect thereof, or against a willful wrongdoer."~~

- "[T]his section deals with property which has a market value and also a peculiar value to the owner, and not with property having no market value." (*Zvolanek v. Bodger Seeds, Ltd.* (1935) 5 Cal.App.2d 106, 110 [42 P.2d 92].)

- "Peculiar value under Civil Code section 3355 refers to a property's unique economic value, not its sentimental or emotional value." (*McMahon v. Craig* (2009) 176 Cal.App.4th 1502, 1518 [97 Cal.Rptr.3d 555] ["peculiar value" refers to special characteristics that increase an animal's monetary value, not its abstract value as a companion to its owner].)

- "[T]he question of whether plaintiff proved 'peculiar value' was a factual question for the determination of the jury and that question was properly submitted to it for decision." (*King v. Karpe* (1959) 170 Cal.App.2d 344, 349 [338 P.2d 979].)

Secondary Sources
California Tort Damages (Cont.Ed.Bar) Vehicles and Other Personal Property, § 13.7

4 Levy et al., California Torts, Ch. 52, *Medical Expenses and Economic Loss*, § 52.33 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.47 (Matthew Bender)

1 California Civil Practice: Torts, § 5:17 (Thomson Reuters~~ West~~)

3920. Loss of Consortium (Noneconomic Damage)

[*Name of plaintiff***] claims that [he/she] has been harmed by the injury to [his/her] [husband/wife]. If you decide that [***name of injured spouse***] has proved [his/her] claim against [***name of defendant***], you also must decide how much money, if any, will reasonably compensate [***name of plaintiff***] for loss of [his/her] [husband/wife]'s companionship and services, including:**

1. **The loss of love, companionship, comfort, care, assistance, protection, affection, society, and moral support; and**

2. **The loss of the enjoyment of sexual relations [or the ability to have children].**

[[*Name of plaintiff***] may recover for harm [he/she] proves [he/she] has suffered to date and for harm [he/she] is reasonably certain to suffer in the future.**

For future harm, determine the amount in current dollars paid at the time of judgment that will compensate [*name of plaintiff***] for that harm. This amount of noneconomic damages should not be further reduced to present cash value because that reduction should only be performed with respect to economic damages.]**

No fixed standard exists for deciding the amount of these damages. You must use your judgment to decide a reasonable amount based on the evidence and your common sense.

Do not include in your award any compensation for the following:

1. **The loss of financial support from [***name of injured spouse***];**

2. **Personal services, such as nursing, that [***name of plaintiff***] has provided or will provide to [***name of injured spouse***];**

3. **Any loss of earnings that [***name of plaintiff***] has suffered by giving up employment to take care of [***name of injured spouse***]; or**

4. **The cost of obtaining domestic household services to replace services that would have been performed by [***name of injured spouse***].**

New September 2003; Revised December 2010

Directions for Use

Loss of consortium is considered a noneconomic damages item under Proposition 51. (Civ. Code, § 1431.2(b)(2).) Loss of future consortium is recoverable, including loss of consortium because of reduced life expectancy. (See *Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 799–800 [108 Cal.Rptr.3d

806, 230 P.3d 342].) In such a case, this instruction may need to be modified.

Give the second and third paragraphs if recovery for loss of future consortium is sought. Future noneconomic damages should not be reduced to present value. (See *Salgado v. County of L.A.* (1998) 19 Cal.4th 629, 646–647 [80 Cal.Rptr.2d 46, 967 P.2d 585].)

Sources and Authority

- Noneconomic Damages for Loss of Consortium. Civil Code section 1431.2(b)(2). ~~provides in part: "For purposes of this section, the term 'non-economic damages' means subjective, non-monetary losses including ... loss of consortium ... ."~~

- "We ... declare that in California each spouse has a cause of action for loss of consortium, as defined herein, caused by a negligent or intentional injury to the other spouse by a third party." (*Rodriguez v. Bethlehem Steel Corp.* (1974) 12 Cal.3d 382, 408 [115 Cal.Rptr. 765, 525 P.2d 669].)

- "There are four elements to a cause of action for loss of consortium: '(1) a valid and lawful marriage between the plaintiff and the person injured at the time of the injury; [¶] (2) a tortious injury to the plaintiff's spouse; [¶] (3) loss of consortium suffered by the plaintiff; and [¶] (4) the loss was proximately caused by the defendant's act.' " (*Vanhooser v. Superior Court* (2012) 206 Cal.App.4th 921, 927 [142 Cal.Rptr.3d 230].)

- "The concept of consortium includes not only loss of support or services; it also embraces such elements as love, companionship, comfort, affection, society, sexual relations, the moral support each spouse gives the other through the triumph and despair of life, and the deprivation of a spouse's physical assistance in operating and maintaining the family home." (*Ledger v. Tippitt* (1985) 164 Cal.App.3d 625, 633 [210 Cal.Rptr. 814], disapproved of on other grounds in *Elden v. Sheldon* (1988) 46 Cal.3d 267, 277 [250 Cal.Rptr. 254, 758 P.2d 582].)

- "Since he has no cause of action in tort his spouse has no cause of action for loss of consortium." (*Blain v. Doctor's Co.* (1990) 222 Cal.App.3d 1048, 1067 [272 Cal.Rptr. 250].)

- "The California Supreme Court in *Rodriguez, supra,* 12 Cal.3d at page 409, expressly recognized the right to recover damages for the 'loss or impairment' of the plaintiff's rights of consortium, and we see no basis to conclude that a loss of consortium must be so extensive as to be considered complete in order to be compensable. Instead, a partial loss, or diminution, of consortium is compensable." (*Mealy v. B-Mobile, Inc.* (2011) 195 Cal.App. 4th 1218, 1224 [124 Cal.Rptr.3d 804].)

- "[S]hould [husband] prevail in his own cause of action against these defendants, he will be entitled to recover, among his medical expenses, the full cost of whatever home nursing is necessary. To allow [wife] also to recover the value of her nursing services, however personalized, would therefore constitute double recovery." (*Rodriguez, supra,* 12 Cal.3d at p. 409, internal citations omitted.)

- "For the same reason, [wife] cannot recover for the loss of her earnings and earning capacity assertedly incurred when she quit her job in order to furnish [husband] these same nursing services. To do so would be to allow her to accomplish indirectly that which we have just held she cannot do

directly." (*Rodriguez, supra,* 12 Cal.3d at p. 409.)

- "The deprivation of a husband's physical assistance in operating and maintaining the home is a compensable item of loss of consortium." (*Rodriguez, supra,* 12 Cal.3d at p. 409, fn. 31, internal citations omitted.)

- "Although the trial court labeled the damages awarded [plaintiff] as being for 'loss of consortium' (a noneconomic damages item under Proposition 51), much of the testimony at trial actually involved the 'costs of obtaining substitute domestic services' on her behalf (an economic damage item in the statute)." (*Kellogg v. Asbestos Corp. Ltd.* (1996) 41 Cal.App.4th 1397, 1408 [49 Cal.Rptr.2d 256].)

- "Whether the degree of harm suffered by the plaintiff's spouse is sufficiently severe to give rise to a cause of action for loss of consortium is a matter of proof. When the injury is emotional rather than physical, the plaintiff may have a more difficult task in proving negligence, causation, and the requisite degree of harm; but these are questions for the jury, as in all litigation for loss of consortium. In *Rodriguez* we acknowledged that the loss is 'principally a form of mental suffering,' but nevertheless declared our faith in the ability of the jury to exercise sound judgment in fixing compensation. We reaffirm that faith today." (*Molien v. Kaiser Foundation Hospitals* (1980) 27 Cal.3d 916, 933 [167 Cal.Rptr. 831, 616 P.2d 813], internal citations omitted.)

- "We ... conclude that we should not recognize a cause of action by a child for loss of parental consortium." (*Borer v. American Airlines, Inc.* (1977) 19 Cal.3d 441, 451 [138 Cal.Rptr. 302, 563 P.2d 858].)

- A parent may not recover loss of consortium damages for injury to his or her child. (*Baxter v. Superior Court* (1977) 19 Cal.3d 461 [138 Cal.Rptr. 315, 563 P.2d 871].)

- Unmarried cohabitants may not recover damages for loss of consortium. (*Elden, supra,* 46 Cal.3d at p. 277.)

- Under Proposition 51, damages for loss of consortium may be reduced by the negligence of the injured spouse. (*Craddock v. Kmart Corp.* (2001) 89 Cal.App.4th 1300, 1309–1310 [107 Cal.Rptr.2d 881]; *Hernandez v. Badger Construction Equipment Co.* (1994) 28 Cal.App.4th 1791, 1810–1811 [34 Cal.Rptr.2d 732].)

- " 'To entitle a plaintiff to recover present damages for apprehended future consequences, there must be evidence to show such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury.' " (*Bellman v. San Francisco High School Dist.* (1938) 11 Cal.2d 576, 588 [81 P.2d 894], internal citation omitted.)

- "[I]n a common law action for loss of consortium, the plaintiff can recover not only for the loss of companionship and affection through the time of the trial but also for any future loss of companionship and affection that is sufficiently certain to occur. In *Rodriguez*, we held that when a plaintiff's spouse is permanently disabled as a result of a defendant's wrongdoing, future (posttrial) loss of companionship and affection is sufficiently certain to permit an award of prospective damages. If instead the injured spouse will soon die as a result of his or her injuries, the future (posttrial) loss of

companionship and affection is no less certain. In short, we see no reason to make an exception here to the general rule permitting an award of prospective damages in civil tort actions. Therefore, under long-standing principles of tort liability, the recovery of prospective damages in a common law action for loss of consortium includes damages for lost companionship and affection resulting from the anticipated (and sufficiently certain) premature death of the injured spouse." (*Boeken, supra,* 48 Cal.4th at pp. 799–800, internal citation omitted.)

- "[T]he plaintiff in a common law action for loss of consortium may not recover for loss during a period in which the companionship and affection of the injured spouse would have been lost anyway, irrespective of the defendant's wrongdoing, and therefore the life expectancy of the plaintiff and the life expectancy of the injured spouse, whichever is shorter, necessarily places an outer limit on damages." (*Boeken, supra,* 48 Cal.4th at p. 800.)

- "[W]here an injury to a spouse that in turn causes injury to the plaintiff's right to consortium in the marital relationship is not discovered or discoverable until after the couple's marriage, and the underlying cause of action thus accrues during the marriage, the plaintiff has a valid claim for loss of consortium even though the negligent conduct may have predated the marriage." (*Leonard v. John Crane, Inc.* (2012) 206 Cal.App.4th 1274, 1290 [142 Cal.Rptr.3d 700]; see also *Vanhooser, supra,* 206 Cal.App.4th at pp. 927–930 [reaching same result].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1678–1685

California Tort Damages (Cont.Ed.Bar) Loss of Consortium, §§ 2.6–2.7

4 Levy et al., California Torts, Ch. 56, *Loss of Consortium,* § 56.08 (Matthew Bender)

31 California Forms of Pleading and Practice, Ch. 354, *Loss of Consortium,* §§ 354.12, 354.14 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort,* § 64.25 (Matthew Bender)

1 California Civil Practice: Torts §§ 10:10–10:16 (Thomson Reuters~~West~~)

3921. Wrongful Death (Death of an Adult)

If you decide that [*name of plaintiff***] has proved [his/her] claim against [***name of defendant***] for the death of [***name of decedent***], you also must decide how much money will reasonably compensate [***name of plaintiff***] for the death of [***name of decedent***]. This compensation is called "damages."**

[*Name of plaintiff***] does not have to prove the exact amount of these damages. However, you must not speculate or guess in awarding damages.**

The damages claimed by [*name of plaintiff***] fall into two categories called economic damages and noneconomic damages. You will be asked to state the two categories of damages separately on the verdict form.**

[*Name of plaintiff***] claims the following economic damages:**

1. **The financial support, if any, that [***name of decedent***] would have contributed to the family during either the life expectancy that [***name of decedent***] had before [his/her] death or the life expectancy of [***name of plaintiff***], whichever is shorter;**

2. **The loss of gifts or benefits that [***name of plaintiff***] would have expected to receive from [***name of decedent***];**

3. **Funeral and burial expenses; and**

4. **The reasonable value of household services that [***name of decedent***] would have provided.**

Your award of any future economic damages must be reduced to present cash value.

[*Name of plaintiff***] also claims the following noneconomic damages:**

1. **The loss of [***name of decedent***]'s love, companionship, comfort, care, assistance, protection, affection, society, moral support[; [and]/.]**

[2. The loss of the enjoyment of sexual relations[; [and]/.]]

[3. The loss of [*name of decedent***]'s training and guidance.]**

No fixed standard exists for deciding the amount of noneconomic damages. You must use your judgment to decide a reasonable amount based on the evidence and your common sense.

[For these noneconomic damages, determine the amount in current dollars paid at the time of judgment that will compensate [*name of plaintiff***] for those damages. This amount of noneconomic damages should not be further reduced to present cash value because that reduction should only be performed with respect to future economic damages.]**

In determining [*name of plaintiff***]'s loss, do not consider:**

1. **[***Name of plaintiff***]'s grief, sorrow, or mental anguish;**

2. **[***Name of decedent***]'s pain and suffering; or**

3. **The poverty or wealth of [***name of plaintiff***].**

In deciding a person's life expectancy, you may consider, among other factors, the average life expectancy of a person of that age, as well as that person's health, habits, activities, lifestyle, and occupation. According to [*insert source of information***], the average life expectancy of a [***insert number***]-year-old [male/female] is [***insert number***] years, and the average life expectancy of a [***insert number***]-year-old [male/female] is [***insert number***] years. This published information is evidence of how long a person is likely to live but is not conclusive. Some people live longer and others die sooner.**

[In computing these damages, consider the losses suffered by all plaintiffs and return a verdict of a single amount for all plaintiffs. I will divide the amount [among/between] the plaintiffs.]

New September 2003; Revised December 2005, February 2007, April 2008, December 2009, June 2011, December 2013

Directions for Use

If the decedent recovered damages for lost earning capacity in his or her lifetime, an heir's recovery for lost financial support (economic damages item 1) is to be measured by the decedent's physical condition at the time of death. There is no similar limitation on recovery for loss of consortium (noneconomic damages item 1). (*Boeken v. Philip Morris USA Inc.* (2013) 217 Cal.App.4th 992, 997−1000 [159 Cal.Rptr.3d 195]; see *Blackwell v. American Film Co.* (1922) 189 Cal. 689, 694 [209 P. 999].)

One of the life-expectancy subjects in the second sentence of the second-to-last paragraph should be the decedent, and the other should be the plaintiff. This definition is intended to apply to the element of damages pertaining to the financial support that the decedent would have provided to the plaintiff.

Use of the life tables in *Vital Statistics of the United States*, published by the National Center for Health Statistics, is recommended. (See Life Expectancy Table—Male and Life Expectancy Table—Female, following the Damages series.) The first column shows the age interval

between the two exact ages indicated. For example, 50–51 means the one-year interval between the fiftieth and fifty-first birthdays.

For an instruction, worksheets, and tables for use in reducing future economic damages to present value, see CACI No. 3904B, *Use of Present-Value Tables*.

The paragraph concerning not reducing noneconomic damages to present cash value is bracketed because the law is not completely clear. It has been held that all damages, pecuniary and nonpecuniary, must be reduced to present value. (See *Fox v. Pacific Southwest Airlines* (1982) 133 Cal.App.3d 565, 569 [184 Cal.Rptr. 87]; cf. Restat 2d of Torts, § 913A [future *pecuniary* losses must be reduced to present value].) The view of the court in *Fox* was that damages for lost value of society, comfort, care, protection and companionship must be monetarily quantified, and thus become pecuniary and subject to reduction to present value. However, the California Supreme Court subsequently held that with regard to future pain and suffering, the amount that the jury is to award should already encompass the idea of today's dollars for tomorrow's loss (See *Salgado v. County of L.A.* (1998) 19 Cal.4th 629, 646–647 [80 Cal.Rptr.2d 46, 967 P.2d 585]), so there is no further reduction to present value. (See CACI No. 3904A, *Present Cash Value*, and CACI No. 3904B, *Use of Present-Value Tables*.) While it seems probable that *Salgado* should apply to wrongful death actions, no court has expressly so held.

Assuming that *Salgado* applies to wrongful death, this paragraph is important to ensure that the jury does not apply any tables and worksheets provided to reduce future economic damages to present value (see CACI No. 3904B) to the noneconomic damages also. Note that because only future economic damages are to be reduced to present value, the jury must find separate amounts for economic and noneconomic damages and for past and present economic damages. (See CACI No. VF-3905, *Damages for Wrongful Death (Death of an Adult)*.)

Sources and Authority

- Cause of Action for Wrongful Death. Code of Civil Procedure section 377.60. ~~provides:~~

  ~~A cause of action for the death of a person caused by the wrongful act or neglect of another may be asserted by any of the following persons or by the decedent's personal representative on their behalf:~~

  ~~(a) The decedent's surviving spouse, domestic partner, children, and issue of deceased children, or, if there is no surviving issue of the decedent, the persons, including the surviving spouse or domestic partner, who would be entitled to the property of the decedent by intestate succession.~~

  ~~(b) Whether or not qualified under subdivision (a), if they were dependent on the decedent, the putative spouse, children of the putative spouse, stepchildren, or parents. As used in this subdivision, "putative spouse" means the surviving spouse of a void or voidable marriage who is found by the court to have believed in good faith that the marriage to the decedent was valid.~~

~~(c) A minor, whether or not qualified under subdivision (a) or (b), if, at the time of the decedent's death, the minor resided for the previous 180 days in the decedent's household and was dependent on the decedent for one-half or more of the minor's support.~~

~~(d) This section applies to any cause of action arising on or after January 1, 1993.~~

~~(e) The addition of this section by Chapter 178 of the Statutes of 1992 was not intended to adversely affect the standing of any party having standing under prior law, and the standing of parties governed by that version of this section as added by Chapter 178 of the Statutes of 1992 shall be the same as specified herein as amended by Chapter 563 of the Statutes of 1996.~~

~~(f) For the purpose of this section, "domestic partner" has the meaning provided in Section 297 of the Family Code.~~

- Damages for Wrongful Death. Code of Civil Procedure section 377.61. ~~provides: "In an action under this article, damages may be awarded that, under all the circumstances of the case, may be just, but may not include damages recoverable under Section 377.34. The court shall determine the respective rights in an award of the persons entitled to assert the cause of action."~~

- "A cause of action for wrongful death is purely statutory in nature, and therefore 'exists only so far and in favor of such person as the legislative power may declare.' " (*Barrett v. Superior Court* (1990) 222 Cal.App.3d 1176, 1184 [272 Cal.Rptr. 304], internal citations omitted.)

- "There are three distinct public policy considerations involved in the legislative creation of a cause of action for wrongful death: '(1) compensation for survivors, (2) deterrence of conduct and (3) limitation, or lack thereof, upon the damages recoverable.' " (*Barrett, supra,* 222 Cal.App.3d at p. 1185, internal citation omitted.)

- "We therefore conclude, on this basis as well, that 'wrongful act' as used in section 377 means any kind of tortious act, including the tortious act of placing defective products into the stream of commerce." (*Barrett, supra,* 222 Cal.App.3d at p. 1191.)

- "In any action for wrongful death resulting from negligence, the complaint must contain allegations as to all the elements of actionable negligence." (*Jacoves v. United Merchandising Corp.* (1992) 9 Cal.App.4th 88, 105 [11 Cal.Rptr.2d 468], internal citation omitted.)

- "Under Code of Civil Procedure section 377.61, damages for wrongful death "are measured by the financial benefits the heirs were receiving at the time of death, those reasonably to be expected in the future, and the monetary equivalent of loss of comfort, society, and protection." (*Boeken, supra,* 217 Cal.App.4th at p. 997.)

- “These benefits include the personal services, advice, and training the heirs would have received from the deceased, and the value of her society and companionship. ‘The services of children, elderly parents, or nonworking spouses often do not result in measurable net income to the family unit, yet unquestionably the death of such a person represents a substantial “injury” to the family for which just compensation should be paid.’ ” (*Allen v. Toledo* (1980) 109 Cal.App.3d 415, 423 [167 Cal.Rptr. 270], internal citations omitted.)

- “California permits recovery in a child's wrongful death action for loss of a parent's consortium.” (*Boeken, supra,* 217 Cal.App.4th at pp. 997−998.)

- The wrongful death statute “has long allowed the recovery of funeral expenses in California wrongful death actions.” (*Vander Lind v. Superior Court* (1983) 146 Cal.App.3d 358, 364 [194 Cal.Rptr. 209].)

- “Where, as here, decedent was a husband and father, a significant element of damages is the loss of financial benefits he was contributing to his family by way of support at the time of his death and that support reasonably expected in the future. The total future lost support must be reduced by appropriate formula to a present lump sum which, when invested to yield the highest rate of return consistent with reasonable security, will pay the equivalent of lost future benefits at the times, in the amounts and for the period such future benefits would have been received.” (*Canavin v. Pacific Southwest Airlines* (1983) 148 Cal.App.3d 512, 52–521 [196 Cal.Rptr. 82], internal citations omitted.)

- “To avoid confusion regarding the jury’s task in future cases, we conclude that when future noneconomic damages are sought, the jury should be instructed expressly that they are to assume that an award of future damages is a present value sum, i.e., they are to determine the amount *in current dollars paid at the time of judgment* that will compensate a plaintiff for future pain and suffering. In the absence of such instruction, unless the record clearly establishes otherwise, awards of future damages will be considered to be stated in terms of their present or current value.” (*Salgado, supra,* 19 Cal.4th at pp. 646–647, original italics.)

- “The California statutes and decisions ... have been interpreted to bar the recovery of punitive damages in a wrongful death action.” (*Tarasoff v. Regents of the University of California* (1976) 17 Cal.3d 425, 450 [131 Cal.Rptr. 14, 551 P.2d 334], internal citation omitted.) There is an exception to this rule for death by felony homicide for which the defendant has been convicted. (Civ. Code, § 3294(d).)

- “Punitive damages are awardable to the decedent’s estate in an action by the estate representative based on the cause of action the decedent would have had if he or she had survived.” (*Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 616 [103 Cal.Rptr.2d 492], internal citation omitted.)

- “California cases have uniformly held that damages for mental and emotional distress, including grief and sorrow, are not recoverable in a wrongful death action.” (*Krouse v. Graham* (1977) 19 Cal.3d 59, 72 [137 Cal.Rptr. 863, 562 P.2d 1022], internal citations omitted.)

- "[A] simple instruction excluding considerations of grief and sorrow in wrongful death actions will normally suffice." (*Krouse, supra,* 19 Cal.3d at p. 69.)

- "[T]he competing and conflicting interests of the respective heirs, the difficulty in ascertaining individual shares of lost economic support when dealing with minors, the lack of any reason under most circumstances to apportion the lump-sum award attributable to loss of monetary support where minors are involved, the irrelevance of the heirs' respective interests in that portion of the award pertaining to lost economic support in determining the aggregate award, and the more efficient nature of court proceedings without a jury, cumulatively establish apportionment by the court, rather than the jury, is consistent with the efficient administration of justice." (*Canavin, supra,* 148 Cal.App.3d at pp. 535–536.)

- "[W]here all statutory plaintiffs properly represented by legal counsel waive judicial apportionment, the trial court should instruct the jury to return separate verdicts unless the remaining considerations enumerated above mandate refusal." (*Canavin, supra,* 148 Cal.App.3d at p. 536.)

- "We note that the court instructed the jury that in determining pecuniary loss they should consider inter alia the age, state of health and respective life expectancies of the deceased and each plaintiff but should be concerned only with 'the shorter of the life expectancies, that of one of the plaintiffs or that of the deceased. ...' This was a correct statement of the law." (*Francis v. Sauve* (1963) 222 Cal.App.2d 102, 120–121 [34 Cal.Rptr. 754], internal citation omitted.)

- "It is the shorter expectancy of life that is to be taken into consideration; for example, if, as in the case here, the expectancy of life of the parents is shorter than that of the son, the benefits to be considered are those only which might accrue during the life of the surviving parents." (*Parsons v. Easton* (1921) 184 Cal. 764, 770–771 [195 P. 419], internal citation omitted.)

- "The life expectancy of the deceased is a question of fact for the jury to decide, considering all relevant factors including the deceased's health, lifestyle and occupation. Life expectancy figures from mortality tables are admissible but are not conclusive." (*Allen, supra,* 109 Cal.App.3d at p. 424, internal citations omitted.)

- "Accordingly, the trial court in this case did not err in refusing [defendant]'s two proposed jury instructions, and in denying its request to modify CACI No. 3921, its motion for a directed verdict, its motion for a judgment notwithstanding the verdict, and its motion for a new trial, all of which were based on the erroneous ground that [plaintiff]'s loss of consortium damages were to be measured from [decedent]'s physical condition at the time of his death." (*Boeken, supra,* 217 Cal.App.4th at p. 1000.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1690–1697

California Tort Damages (Cont.Ed.Bar 2d ed.) Wrongful Death, §§ 3.1–3.58

4 Levy et al., California Torts, Ch. 55, *Death and Survival Actions*, §§ 55.10–55.13 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, §§ 177.162–177.167 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort*, § 64.25 (Matthew Bender)

California Civil Practice: Torts, §§ 23:8–23:8.2 (Thomson Reuters)

3922. Wrongful Death (Parents' Recovery for Death of a Minor Child)

If you decide that [*name of plaintiff***] has proved [his/her] claim against [***name of defendant***] for the death of [***name of minor***], you also must decide how much money will reasonably compensate [***name of plaintiff***] for the death of [***name of minor***]. This compensation is called "damages."**

[*Name of plaintiff***] does not have to prove the exact amount of these damages. However, you must not speculate or guess in awarding damages.**

The damages claimed by [*name of plaintiff***] fall into two categories called economic damages and noneconomic damages. You will be asked to state the two categories of damages separately on the verdict form.**

[*Name of plaintiff***] claims the following economic damages:**

1. **The value of the financial support, if any, that [***name of minor***] would have contributed to the family during either the life expectancy that [***name of minor***] had before [his/her] death or the life expectancy of [***name of plaintiff***], whichever is shorter;**

2. **The loss of gifts or benefits that [***name of plaintiff***] could have expected to receive from [***name of minor***];**

3. **Funeral and burial expenses; and**

4. **The reasonable value of household services that [***name of minor***] would have provided.**

Your award of any future economic damages must be reduced to present cash value.

[*Name of plaintiff***] also claims the following noneconomic damages: The loss of [***name of minor***]'s love, companionship, comfort, care, assistance, protection, affection, society, and moral support.**

No fixed standard exists for deciding the amount of noneconomic damages. You must use your judgment to decide a reasonable amount based on the evidence and your common sense.

[For these noneconomic damages, determine the amount in current dollars paid at the time of judgment that will compensate [*name of plaintiff***] for those damages. This amount of noneconomic damages should not be further reduced to present cash value because that reduction should only be performed with respect to future economic damages.]**

Do not include in your award any compensation for the following:

1. **[***Name of plaintiff***]'s grief, sorrow, or mental anguish; or**

2. [*Name of minor*]'s pain and suffering.

In computing these damages, you should deduct the present cash value of the probable costs of [*name of minor*]'s support and education.

In deciding a person's life expectancy, consider, among other factors, that person's health, habits, activities, lifestyle, and occupation. Life expectancy tables are evidence of a person's life expectancy but are not conclusive.

[In computing these damages, consider the losses suffered by all plaintiffs and return a verdict of a single amount for all plaintiffs. I will divide the amount [among/between] the plaintiffs.]

New September 2003; Revised December 2005, April 2008, December 2009, June 2011

Directions for Use

Use of the life tables in *Vital Statistics of the United States*, published by the National Center for Health Statistics, is recommended. (See Life Expectancy Table—Male and Life Expectancy Table—Female, following the Damages series.) The first column shows the age interval between the two exact ages indicated. For example, 50–51 means the one-year interval between the fiftieth and fifty-first birthdays.

For an instruction, worksheets, and tables for use in reducing future economic damages to present value, see CACI No. 3904B, *Use of Present-Value Tables*.

The paragraph concerning not reducing noneconomic damages to present cash value is bracketed because the law is not completely clear. It has been held that all damages, pecuniary and nonpecuniary, must be reduced to present value. (See *Fox v. Pacific Southwest Airlines* (1982) 133 Cal.App.3d 565, 569 [184 Cal.Rptr. 87]; cf. Restat 2d of Torts, § 913A [future *pecuniary* losses must be reduced to present value].) The view of the court in *Fox* was that damages for lost value of society, comfort, care, protection and companionship must be monetarily quantified, and thus become pecuniary and subject to reduction to present value. However, the California Supreme Court subsequently held that with regard to future pain and suffering, the amount that the jury is to award should already encompass the idea of today's dollars for tomorrow's loss (See *Salgado v. County of L.A.* (1998) 19 Cal.4th 629, 646–647 [80 Cal.Rptr.2d 46, 967 P.2d 585]), so there is no further reduction to present value. (See CACI No. 3904A, *Present Cash Value,* and CACI No. 3904B, *Use of Present-Value Tables*.) While it seems probable that *Salgado* should apply to wrongful death actions, no court has expressly so held.

Assuming that *Salgado* applies to wrongful death, this paragraph is important to ensure that the jury does not apply any tables and worksheets provided to reduce future economic damages to present value (see CACI No. 3904B) to the noneconomic damages also. Note thatbecause only future economic damages are to be reduced to present value, the jury must find separate amounts for economic and noneconomic damages and for past and present economic damages. (See CACI No. VF-3906, *Damages for Wrongful Death (Parents' Recovery for Death of a Minor Child)*.)

Sources and Authority

- Cause of Action for Wrongful Death. Code of Civil Procedure section 377.60. ~~provides:~~

  ~~A cause of action for the death of a person caused by the wrongful act or neglect of another may be asserted by any of the following persons or by the decedent's personal representative on their behalf:~~

  ~~(a) The decedent's surviving spouse, domestic partner, children, and issue of deceased children, or, if there is no surviving issue of the decedent, the persons, including the surviving spouse or domestic partner, who would be entitled to the property of the decedent by intestate succession.~~

  ~~(b) Whether or not qualified under subdivision (a), if they were dependent on the decedent, the putative spouse, children of the putative spouse, stepchildren, or parents. As used in this subdivision, 'putative spouse' means the surviving spouse of a void or voidable marriage who is found by the court to have believed in good faith that the marriage to the decedent was valid.~~

  ~~(c) A minor, whether or not qualified under subdivision (a) or (b), if, at the time of the decedent's death, the minor resided for the previous 180 days in the decedent's household and was dependent on the decedent for one-half or more of the minor's support.~~

  ~~(d) This section applies to any cause of action arising on or after January 1, 1993.~~

  ~~(e) The addition of this section by Chapter 178 of the Statutes of 1992 was not intended to adversely affect the standing of any party having standing under prior law, and the standing of parties governed by that version of this section as added by Chapter 178 of the Statutes of 1992 shall be the same as specified herein as amended by Chapter 563 of the Statutes of 1996.~~

  ~~(f) For the purpose of this section, "domestic partner" has the meaning provided in Section 297 of the Family Code.~~

- Damages for Wrongful Death. Code of Civil Procedure section 377.61. ~~provides: "In an action under this article, damages may be awarded that, under all the circumstances of the case, may be just, but may not include damages recoverable under Section 377.34. The court shall determine the respective rights in an award of the persons entitled to assert the cause of action."~~

- "A cause of action for wrongful death is purely statutory in nature, and therefore 'exists only so far and in favor of such person as the legislative power may declare.' " (*Barrett v. Superior Court* (1990) 222 Cal.App.3d 1176, 1184 [272 Cal.Rptr. 304], internal citations omitted.)

- "Where the deceased was a minor child, recovery is based on the present value of reasonably probable future services and contributions, deducting the probable cost of rearing the child." (6 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 1695.)

- “There is authority in such cases for deducting from the loss factors-including the pecuniary loss a parent suffers by being deprived of the comfort, protection and society of a child-the prospective cost to the parent of the child’s support and education. [¶] Although neither the loss factors nor such offsets are readily measurable in a particular case—nor need they be measured in precise terms of dollars and cents—in the case at bench the jury had before it for consideration a court order subject to mathematical computation which required plaintiff to pay support for his child in the sum of $125 monthly. The jury was entitled and required to take into consideration the prospective cost to plaintiff of the boy’s maintenance and rearing, and they may well have offset their reasonable appraisal of such costs, under the general verdict, against any pecuniary loss which they found that plaintiff suffered.” (*Fields v. Riley* (1969) 1 Cal.App.3d 308, 315 [81 Cal.Rptr. 671], internal citations omitted.)

- “There are three distinct public policy considerations involved in the legislative creation of a cause of action for wrongful death: ‘(1) compensation for survivors, (2) deterrence of conduct and (3) limitation, or lack thereof, upon the damages recoverable.’ ” (*Barrett, supra,* 222 Cal.App.3d at p. 1185, internal citation omitted.)

- “We therefore conclude, on this basis as well, that ‘wrongful act’ as used in section 377 means any kind of tortious act, including the tortious act of placing defective products into the stream of commerce.” (*Barrett, supra,* 222 Cal.App.3d at p. 1191.)

- “In any action for wrongful death resulting from negligence, the complaint must contain allegations as to all the elements of actionable negligence.” (*Jacoves v. United Merchandising Corp.* (1992) 9 Cal.App.4th 88, 105 [11 Cal.Rptr.2d 468], internal citation omitted.)

- “Damages for wrongful death are not limited to compensation for losses with ‘ascertainable economic value.’ Rather, the measure of damages is the value of the benefits the heirs could reasonably expect to receive from the deceased if she had lived.” (*Allen v. Toledo* (1980) 109 Cal.App.3d 415, 423 [167 Cal.Rptr. 270], internal citations omitted.)

- The wrongful death statute “has long allowed the recovery of funeral expenses in California wrongful death actions.” (*Vander Lind v. Superior Court* (1983) 146 Cal.App.3d 358, 364 [194 Cal.Rptr. 209].)

- “The California statutes and decisions ... have been interpreted to bar the recovery of punitive damages in a wrongful death action.” (*Tarasoff v. Regents of Univ. of Cal.* (1976) 17 Cal.3d 425, 450 [131 Cal.Rptr. 14, 551 P.2d 334], internal citation omitted.) There is an exception to this rule for death by felony homicide for which the defendant has been convicted. (Civ. Code, § 3294(d).)

- “Punitive damages are awardable to the decedent’s estate in an action by the estate representative based on the cause of action the decedent would have had if he or she had survived.” (*Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 616 [103 Cal.Rptr.2d 492], internal citation omitted.)

- “California cases have uniformly held that damages for mental and emotional distress, including grief and sorrow, are not recoverable in a wrongful death action.” (*Krouse v. Graham* (1977) 19 Cal.3d 59, 72 [137 Cal.Rptr. 863, 562 P.2d 1022], internal citations omitted.)

- "[A] simple instruction excluding considerations of grief and sorrow in wrongful death actions will normally suffice." (*Krouse, supra,* 19 Cal.3d at p. 69.)

- "To avoid confusion regarding the jury's task in future cases, we conclude that when future noneconomic damages are sought, the jury should be instructed expressly that they are to assume that an award of future damages is a present value sum, i.e., they are to determine the amount *in current dollars paid at the time of judgment* that will compensate a plaintiff for future pain and suffering. In the absence of such instruction, unless the record clearly establishes otherwise, awards of future damages will be considered to be stated in terms of their present or current value." (*Salgado, supra,* 19 Cal.4th at pp. 646–647, original italics.)

- "[T]he competing and conflicting interests of the respective heirs, the difficulty in ascertaining individual shares of lost economic support when dealing with minors, the lack of any reason under most circumstances to apportion the lump-sum award attributable to loss of monetary support where minors are involved, the irrelevance of the heirs' respective interests in that portion of the award pertaining to lost economic support in determining the aggregate award, and the more efficient nature of court proceedings without a jury, cumulatively establish [that] apportionment by the court, rather than the jury, is consistent with the efficient administration of justice." (*Canavin v. Pacific Southwest Airlines* (1983) 148 Cal.App.3d 512, 535–536 [196 Cal.Rptr. 82].)

- "[W]here all statutory plaintiffs properly represented by legal counsel waive judicial apportionment, the trial court should instruct the jury to return separate verdicts unless the remaining considerations enumerated above mandate refusal." (*Canavin, supra,* 148 Cal.App.3d at p. 536.)

- "We note that the court instructed the jury that in determining pecuniary loss they should consider inter alia the age, state of health and respective life expectancies of the deceased and each plaintiff but should be concerned only with 'the shorter of the life expectancies, that of one of the plaintiffs or that of the deceased. …' This was a correct statement of the law." (*Francis v. Sauve* (1963) 222 Cal.App.2d 102, 120–121 [34 Cal.Rptr. 754], internal citation omitted.)

- "It is the shorter expectancy of life that is to be taken into consideration; for example, if, as in the case here, the expectancy of life of the parents is shorter than that of the son, the benefits to be considered are those only which might accrue during the life of the surviving parents." (*Parsons v. Easton* (1921) 184 Cal. 764, 770–771 [195 P. 419], internal citation omitted.)

- "The life expectancy of the deceased is a question of fact for the jury to decide, considering all relevant factors including the deceased's health, lifestyle and occupation. Life expectancy figures from mortality tables are admissible but are not conclusive." (*Allen, supra,* 109 Cal.App.3d at p. 424, internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1695

California Tort Damages (Cont.Ed.Bar) Wrongful Death, §§ 3.1–3.52

4 Levy et al., California Torts, Ch. 55, *Death and Survival Actions*, §§ 55.10–55.13 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, §§ 177.162–177.167 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort*, § 64.25 (Matthew Bender)

2 California Civil Practice: Torts, §§ 23:8–23:8.2 (Thomson Reuters ~~West~~)

3923. Public Entities—Collateral Source Payments (Gov. Code, § 985)

You shall award damages in an amount that fully compensates plaintiff for damages in accordance with instructions from the court. You shall not speculate or consider any other possible sources of benefit the plaintiff may have received. After you have returned your verdict the court will make whatever adjustments are necessary in this regard.

New September 2003

Directions for Use

Per Government Code section 985, this language is mandatory.

Sources and Authority

- Collateral Source Evidence Inadmissible in Action Against Public Entity. Government Code section 985(b). ~~provides, in part: "Any collateral source payment paid or owed to or on behalf of a plaintiff shall be inadmissible in any action for personal injuries or wrongful death where a public entity is a defendant."~~

- Mandatory Instruction. Government Code section 985(j). ~~provides: "In all actions affected by this section, the court shall instruct the jury with the following language: 'You shall award damages in an amount that fully compensates plaintiff for damages in accordance with instructions from the court. You shall not speculate or consider any other possible sources of benefit the plaintiff may have received. After you have returned your verdict the court will make whatever adjustments are necessary in this regard.' "~~

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1637

California Tort Damages (Cont.Ed.Bar) Restrictions on Recovery, § 15.21

15 California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender)

6 California Points and Authorities, Ch. 65, *Damages* (Matthew Bender)

2 California Civil Practice: Torts, ~~(Thomson West)~~ § 31:47 (Thomson Reuters)

3924. No Punitive Damages

You must not include in your award any damages to punish or make an example of [*name of defendant***]. Such damages would be punitive damages, and they cannot be a part of your verdict. You must award only the damages that fairly compensate [***name of plaintiff***] for [his/her/its] loss.**

New September 2003

Directions for Use

Do not use this instruction if punitive damages are being sought in the phase of the trial in which these instructions are given.

Sources and Authority

- No Governmental Liability for Punitive Damages. Government Code section 818.

- "Punitive damages are not permitted in wrongful death actions." (*Cortez v. Macias* (1980) 110 Cal.App.3d 640, 657 [167 Cal.Rptr. 905].)

- "The punitive damages theory cannot be predicated on the breach of contract cause of action without an underlying tort." (*Palmer v. Ted Stevens Honda, Inc.* (1987) 193 Cal.App.3d 530, 536 [238 Cal.Rptr. 363], internal citations omitted.)

- "An award of punitive damages is not supported by a verdict based on breach of contract, even where the defendant's conduct in breaching the contract was wilful, fraudulent, or malicious. Even in those cases in which a separate tort action is alleged, if there is 'but one verdict based upon contract' a punitive damage award is improper." (*Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 960 [17 Cal.Rptr.2d 242], internal citations omitted.)

- ~~Government Code section 818 provides: "Notwithstanding any other provision of law, a public entity is not liable for damages awarded under Section 3294 of the Civil Code or other damages imposed primarily for the sake of example and by way of punishing the defendant."~~

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1580

California Tort Damages (Cont.Ed.Bar) Punitive Damages, § 14.3

4 Levy et al., California Torts, Ch. 54, *Punitive Damages*, §§ 54.05, 54.08 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender)

6 California Points and Authorities, Ch. 65, *Damages* (Matthew Bender)

3926. Settlement Deduction

You have heard evidence that [*name of plaintiff***] has settled [his/her/its] claim against [***name of defendant***]. Any award of damages to [***name of plaintiff***] should be made without considering any amount that [he/she/it] may have received under this settlement. I will make the proper deduction from any award of damages.**

New September 2003; Revised December 2010

Sources and Authority

- Effect of Good-Faith Settlement. Code of Civil Procedure section 877. ~~provides, in pertinent part: "Where a release, dismissal with or without prejudice, or a covenant not to sue or not to enforce judgment is given in good faith before verdict or judgment to one or more of a number of tortfeasors claimed to be liable for the same tort ... it shall have the following effect: ... It shall not discharge any other such party from liability unless its terms so provide, but it shall reduce the claims against the others in the amount stipulated by the release, the dismissal or the covenant, or in the amount of the consideration paid for it whichever is the greater."~~

- "When the plaintiff stipulates to the fact and amount of settlement before the court, an approved procedure is for the court to reduce the verdict award by the amount paid in settlement before entering judgment on the verdict." (*Syverson v. Heitmann* (1985) 171 Cal.App.3d 106, 111 [214 Cal.Rptr. 581], internal citations omitted.)

- Courts have held that it is "proper to exclude evidence of the pretrial settlement by one joint tortfeasor from the jury's consideration, leaving it to the court to apply Code of Civil Procedure section 877 to reduce the verdict." (*Knox v. County of Los Angeles* (1980) 109 Cal.App.3d 825, 834-835 [167 Cal.Rptr. 463], internal citation omitted.)

- "[W]here there is an admission 'that a settlement has been made with one or more joint tortfeasors in a certain amount there is no factual question to be resolved by the jury respecting the settlement.' " (*Albrecht v. Broughton* (1970) 6 Cal.App.3d 173, 177 [85 Cal.Rptr. 659], internal citation omitted.)

- "Where the purpose of introducing evidence of a settlement is to reduce any recovery that might be awarded pro tanto, this result can be achieved by a simple calculation made by the court after the verdict has been rendered." (*Shepherd v. Walley* (1972) 28 Cal.App.3d 1079, 1082 [105 Cal.Rptr. 387], footnote omitted.)

- "The presentation of evidence concerning the amount or fact of settlement to the jury ... is not only confusing, but also can lead to abuse in argument as it did here." (*Shepherd, supra,* 28 Cal.App.3d at p. 1083.)

- "[E]vidence of the fact and amount of settlement made by [plaintiff] with [settling witness] might be admissible under proper limiting instructions for the purpose of showing bias since he was a witness."

(*Shepherd, supra*, 28 Cal.App.3d at p. 1082, fn. 2, internal citation omitted.)

- "Under Civil Code section 1431.2, a defendant is only responsible for its share of noneconomic damages as that share has been determined by the jury. 'Therefore, a nonsettling defendant may not receive any setoff under [Code of Civil Procedure] section 877 for the portion of a settlement by another defendant that is attributable to noneconomic damages.' After application of Civil Code section 1431.2, '... there is no amount that represents a common claim for noneconomic damages against the settling and nonsettling defendants' and thus Code of Civil Procedure section 877 has no applicability to noneconomic damages." (*Ehret v. Congoleum Corp.* (1999) 73 Cal.App.4th 1308, 1319 [87 Cal.Rptr.2d 363], internal citations omitted.)

- "[A]n undifferentiated settlement must be apportioned between economic and noneconomic damages so that the setoff applies only to economic damages." (*Ehret, supra*, 73 Cal.App.4th at p. 1320, internal citation omitted.)

- It has been held that, "[i]n the absence of any other allocation ... the percentage of economic damages reflected in the jury verdict [should] be applied to determine the percentage of the settlements to be offset." (*Ehret, supra*, 73 Cal.App.4th at p. 1320, internal citation omitted.)

- "Where there is a complete dismissal of a defendant, and a plaintiff seeks an allocation of the settlement with that defendant for purposes of limiting the setoff against another defendant's liability, the burden is on the plaintiff to establish facts to justify the allocation." (*Ehret, supra*, 73 Cal.App.4th at p. 1322, internal citation omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 95, 98

California Tort Damages (Cont.Ed.Bar) Restrictions on Recovery, § 15.12

4 Levy et al., California Torts, Ch. 74, *Resolving Multiparty Tort Litigation*, §§ 74.20-74.28 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.45 (Matthew Bender)

25 California Forms of Pleading and Practice, Ch. 300, *Indemnity and Contribution*, § 300.73 (Matthew Bender)

11 California Points and Authorities, Ch. 115, *Indemnity and Contribution*, § 115.150 et seq. (Matthew Bender)

3933. Damages From Multiple Defendants

In this case, [*name of plaintiff***] seeks damages from more than one defendant. You must determine the liability of each defendant to [***name of plaintiff***] separately.**

If you determine that more than one defendant is liable to [*name of plaintiff***] for damages, you will be asked to find [***name of plaintiff***]'s total damages [and the comparative fault of [[***name of plaintiff***]/each defendant/ [and] other nonparties]].**

In deciding on the amount of damages, consider only [*name of plaintiff***]'s claimed losses. Do not attempt to divide the damages [between/among] the defendants. The allocation of responsibility for payment of damages among multiple defendants is to be done by the court after you reach your verdict.**

New December 2010

Directions for Use

Give this instruction in any case involving the joint and several liability of multiple defendants or several liability only for noneconomic damages under Proposition 51. (See Civ. Code, § 1431.2.) It is designed to deter the jury from awarding different damages against each defendant after factoring in the respective culpability of the defendants. Do not give this instruction in a case in which separate tortfeasors have caused separate injuries. (See *Carr v. Cove* (1973) 33 Cal.App.3d 851, 854 [109 Cal.Rptr. 449].)

If comparative fault is at issue, give the bracketed language in the second paragraph. Comparative fault may involve each defendant, the plaintiff, and other nonparties. "Nonparties" include the universe of tortfeasors who are not present at trial, including defendants who settled before trial and nonjoined alleged tortfeasors. (*Dafonte v. Up-Right* (1992) 2 Cal.4th 593, 603 [7 Cal.Rptr.2d 238, 828 P.2d 140].) See also CACI No. 406, *Apportionment of Responsibility,* and CACI No. VF-402, *Negligence—Fault of Plaintiff and Others at Issue*.

Sources and Authority

- Proposition 51. Civil Code section 1431.2(a). ~~(Proposition 51) provides: "In any action for personal injury, property damage, or wrongful death, based upon principles of comparative fault, the liability of each defendant for non-economic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be rendered against that defendant for that amount."~~

- "The *pro tanto* reduction provision works to prevent settlements from producing double recoveries in the case of a *single* injury caused by joint tortfeasors. The general theory of compensatory damages bars double recovery for the *same wrong*. The principal situation is where joint or concurrent tortfeasors are jointly and severally liable for the same wrong. Only one complete satisfaction is

permissible, and, if partial satisfaction is received from one, the liability of others will be correspondingly reduced." (*Carr, supra,* 33 Cal.App.3d at p. 854, original italics.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1358 et seq.

1 Levy et al., California Torts, Ch. 11, *Conflicts of Law and Preemption*, § 11.07 (Matthew Bender)

25 California Forms of Pleading and Practice, Ch. 300, *Indemnity and Contribution,* § 300.60 et seq. (Matthew Bender)

11 California Points and Authorities, Ch. 115, *Indemnity and Contribution,* § 115.130 et seq. (Matthew Bender)

3942. Punitive Damages—Individual Defendant—Bifurcated Trial (Second Phase)

You must now decide the amount, if any, that you should award [*name of plaintiff***] in punitive damages. The purposes of punitive damages are to punish a wrongdoer for the conduct that harmed the plaintiff and to discourage similar conduct in the future.**

There is no fixed formula for determining the amount of punitive damages, and you are not required to award any punitive damages. If you decide to award punitive damages, you should consider all of the following factors in determining the amount:

(a) How reprehensible was [*name of defendant***]'s conduct? In deciding how reprehensible [***name of defendant***]'s conduct was, you may consider, among other factors:**

1. **Whether the conduct caused physical harm;**
2. **Whether [***name of defendant***] disregarded the health or safety of others;**
3. **Whether [***name of plaintiff***] was financially weak or vulnerable and [***name of defendant***] knew [***name of plaintiff***] was financially weak or vulnerable and took advantage of [him/her/it];**
4. **Whether [***name of defendant***]'s conduct involved a pattern or practice; and**
5. **Whether [***name of defendant***] acted with trickery or deceit.**

(b) Is there a reasonable relationship between the amount of punitive damages and [*name of plaintiff***]'s harm [or between the amount of punitive damages and potential harm to [***name of plaintiff***] that [***name of defendant***] knew was likely to occur because of [his/her/its] conduct]?**

(c) In view of [*name of defendant***]'s financial condition, what amount is necessary to punish [him/her/it] and discourage future wrongful conduct? You may not increase the punitive award above an amount that is otherwise appropriate merely because [***name of defendant***] has substantial financial resources. [Any award you impose may not exceed [***name of defendant***]'s ability to pay.]**

[Punitive damages may not be used to punish [*name of defendant***] for the impact of [his/her/its] alleged misconduct on persons other than [***name of plaintiff***].]**

New September 2003; Revised April 2004, October 2004, June 2006, April 2007, August 2007, October 2008

Directions for Use

Read the bracketed language at the end of the first sentence of factor (b) only if there is evidence that the

conduct of defendant that allegedly gives rise to liability and punitive damages either caused or foreseeably threatened to cause harm to plaintiff that would not be included in an award of compensatory damages. (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159 [29 Cal.Rptr.3d 379, 113 P.3d 63].) The bracketed phrase concerning "potential harm" might be appropriate, for example, if damages actually caused by the defendant's acts are not recoverable because they are barred by statute (*id.* at p. 1176, citing *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 929 [148 Cal.Rptr. 389, 582 P.2d 980] [in a bad faith insurance case, plaintiff died before judgment, precluding her estate's recovery of emotional distress damages]), or if the harm caused by defendant's acts could have been great but by chance only slight harm was inflicted. (*Simon, supra,* 35 Cal.4th at p. 1177, citing *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, 459 [113 S.Ct. 2711, 125 L.Ed.2d 366] [considering the hypothetical of a person wildly firing a gun into a crowd but by chance only damaging a pair of glasses].) The bracketed phrase should not be given if an award of compensatory damages is the "true measure" of the harm or potential harm caused by defendant's wrongful acts. (*Simon, supra,* 35 Cal.4th at pp. 1178–1179 [rejecting consideration for purposes of assessing punitive damages of the plaintiff's loss of the benefit of the bargain if the jury had found that there was no binding contract].)

Read the optional final sentence of factor (c) only if the defendant has presented relevant evidence regarding that issue.

Read the optional final sentence if there is a possibility that in arriving at an amount of punitive damages, the jury might consider harm that the defendant's conduct may have caused to nonparties. (See *Philip Morris USA v. Williams* (2007) 549 U.S. 346, 353–354 [127 S.Ct. 1057, 166 L.Ed.2d 940].) Harm to others may be relevant to determining reprehensibility based on factors (a)(2) (disregard of health or safety of others) and (a)(4) (pattern or practice). (See *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408, 419 [123 S.Ct. 1513, 155 L.Ed.2d 585].)

"A jury must be instructed … that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 422.) An instruction on this point should be included within this instruction if appropriate to the facts.

Courts have stated that "[p]unitive damages previously imposed for the same conduct are relevant in determining the amount of punitive damages required to sufficiently punish and deter. The likelihood of future punitive damage awards may also be considered, although it is entitled to considerably less weight." (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661 [57 Cal.Rptr.2d 525], internal citations omitted.) The court in *Stevens* suggested that the following instruction be given if evidence of other punitive damage awards is introduced into evidence:

> If you determine that a defendant has already been assessed with punitive damages based on the same conduct for which punitive damages are requested in this case, you may consider whether punitive damages awarded in other cases have sufficiently punished and made an example of the defendant. You must not use the amount of punitive damages awarded in other cases to determine the amount of the punitive damage award in this case, except to the extent you determine that a lesser award, or no award at all, is justified in light of the penalties already imposed. (*Stevens, supra,* 49 Cal.App.4th at p. 1663, fn. 7.)

Sources and Authority

- When Punitive Damages Permitted. Civil Code section 3294. ~~provides, in part: "In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant."~~

- Evidence of Profits or Financial Condition. Civil Code section 3295(d). ~~provides: "The court shall, on application of any defendant, preclude the admission of evidence of that defendant's profits or financial condition until after the trier of fact returns a verdict for plaintiff awarding actual damages and finds that a defendant is guilty of malice, oppression, or fraud in accordance with Section 3294. Evidence of profit and financial condition shall be admissible only as to the defendant or defendants found to be liable to the plaintiff and to be guilty of malice, oppression, or fraud. Evidence of profit and financial condition shall be presented to the same trier of fact that found for the plaintiff and found one or more defendants guilty of malice, oppression, or fraud."~~

- "[Section 3295(d)] affects the order of proof at trial, precluding the admission of evidence of defendants' financial condition until after the jury has returned a verdict for plaintiffs awarding actual damages and found that one or more defendants were guilty of 'oppression, fraud or malice,' in accordance with Civil Code section 3294." (*City of El Monte v. Superior Court* (1994) 29 Cal.App.4th 272, 274–275 [34 Cal.Rptr.2d 490], internal citations omitted.)

- "Evidence of the defendant's financial condition is a prerequisite to an award of punitive damages. In order to protect defendants from the premature disclosure of their financial position when punitive damages are sought, the Legislature enacted Civil Code section 3295." (*City of El Monte, supra*, 29 Cal.App.4th at p. 276, internal citations omitted.)

- "[C]ourts have held it is reversible error to try the punitive damages issue to a new jury after the jury which found liability has been excused." (*Rivera v. Sassoon* (1995) 39 Cal.App.4th 1045, 1048 [46 Cal.Rptr.2d 144], internal citations omitted.)

- "The purpose of punitive damages is to punish wrongdoers and thereby deter the commission of wrongful acts." (*Neal, supra,* 21 Cal.3d at p. 928, fn. 13.)

- "Punitive damages are to be assessed in an amount which, depending upon the defendant's financial worth and other factors, will deter him and others from committing similar misdeeds. Because compensatory damages are designed to make the plaintiff 'whole,' punitive damages are a 'windfall' form of recovery." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 712 [34 Cal.Rptr.2d 898, 882 P.2d 894], internal citations omitted.)

- "It follows that the wealthier the wrongdoing defendant, the larger the award of exemplary damages need be in order to accomplish the statutory objective." (*Bertero v. National General Corp*. (1974) 13 Cal.3d 43, 65 [118 Cal.Rptr. 184, 529 P.2d 608].)

- " 'A plaintiff, upon establishing his case, is always entitled of right to compensatory damages. But even after establishing a case where punitive damages are permissible, he is never entitled to them. The granting or withholding of the award of punitive damages is wholly within the control of the jury, and may not legally be influenced by any direction of the court that in any case a plaintiff is entitled to them. Upon the clearest proof of malice in fact, it is still the exclusive province of the jury to say whether or not punitive damages shall be awarded. A plaintiff is entitled to such damages only after the jury, in the exercise of its untrammeled discretion, has made the award.' " (*Brewer v. Second Baptist Church of Los Angeles* (1948) 32 Cal.2d 791, 801 [197 P.2d 713], internal citation omitted.)

- "In light of our holding that evidence of a defendant's financial condition is essential to support an award of punitive damages, Evidence Code section 500 mandates that the plaintiff bear the burden of proof on the issue. A plaintiff seeking punitive damages is not seeking a mere declaration by the jury that he is entitled to punitive damages in the abstract. The plaintiff is seeking an award of real money in a specific amount to be set by the jury. Because the award, whatever its amount, cannot be sustained absent evidence of the defendant's financial condition, such evidence is 'essential to the claim for relief.' " (*Adams v. Murakami* (1991) 54 Cal.3d 105, 119 [284 Cal.Rptr. 318, 813 P.2d 1348], internal citation omitted.)

- "[W]e are afforded guidance by certain established principles, all of which are grounded in the purpose and function of punitive damages. One factor is the particular nature of the defendant's acts in light of the whole record; clearly, different acts may be of varying degrees of reprehensibility, and the more reprehensible the act, the greater the appropriate punishment, assuming all other factors are equal. Another relevant yardstick is the amount of compensatory damages awarded; in general, even an act of considerable reprehensibility will not be seen to justify a proportionally high amount of punitive damages if the actual harm suffered thereby is small. Also to be considered is the wealth of the particular defendant; obviously, the function of deterrence will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort. By the same token, of course, the function of punitive damages is not served by an award which, in light of the defendant's wealth and the gravity of the particular act, exceeds the level necessary to properly punish and deter." (*Neal, supra,* 21 Cal.3d at p. 928, internal citations and footnote omitted.)

- "[T]he Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation." (*Philip Morris USA, supra,* 549 U.S. at p. 353.)

- "Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible—although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse. Yet for the reasons given above, a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties." (*Philip Morris USA, supra,* 549 U.S. at p. 355.)

- " 'Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility

analysis … . Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct … .' This does not mean, however, that the defendant's similar wrongful conduct toward others should not be considered in determining the amount of punitive damages." (*Bullock v. Philip Morris USA, Inc.* (2011) 198 Cal.App.4th 543, 560 [131 Cal.Rptr.3d 382].)

- "[A] specific instruction encompassing both the permitted and prohibited uses of evidence of harm caused to others would be appropriate in the new trial if requested by the parties. We believe that an instruction on these issues should clearly distinguish between the permitted and prohibited uses of such evidence and thus make clear to the jury the purposes for which it can and cannot consider that evidence. A jury may consider evidence of harm caused to others for the purpose of determining the degree of reprehensibility of a defendant's conduct toward the plaintiff in deciding the amount of punitive damages, but it may not consider that evidence for the purpose of punishing the defendant directly for harm caused to others. In our view, Judicial Council of California Civil Jury Instructions (Aug. 2007 rev.) CACI Nos. 3940, 3942, 3943, 3945, 3947, and 3949 could convey this distinction better by stating more explicitly that evidence of harm caused to others may be considered for the one purpose but not for the other, and by providing that explanation together with the reprehensibility factors rather than in connection with the reasonable relationship issue." (*Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 695, fn. 21 [71 Cal.Rptr.3d 775], internal citation omitted.)

- " '[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.' We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 419, internal citation omitted.)

- "[I]n a case involving physical harm, the physical or physiological vulnerability of the target of the defendant's conduct is an appropriate factor to consider in determining the degree of reprehensibility, particularly if the defendant deliberately exploited that vulnerability." (*Bullock, supra,* 198 Cal.App.4th at p. 562, internal citation omitted.)

- "[W]e have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. … [A]n award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. … While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1 … ." (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at pp. 424–425, internal citation omitted.)

- "Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages.' The converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at p. 425, internal citation omitted.)

- "The decision to award punitive damages is exclusively the function of the trier of fact. So too is the amount of any punitive damage award. The relevant considerations are the nature of the defendant's conduct, the defendant's wealth, and the plaintiff's actual damages." (*Gagnon v. Continental Casualty Co.* (1989) 211 Cal.App.3d 1598, 1602 [260 Cal.Rptr. 305], internal citations omitted.)

- "The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 427, internal citation omitted.)

- "[T]he purpose of punitive damages is not served by financially destroying a defendant. The purpose is to deter, not to destroy." (*Adams, supra,* 54 Cal.3d at p. 112.)

- "[A] punitive damages award is excessive if it is disproportionate to the defendant's ability to pay." (*Adams, supra,* 54 Cal.3d at p. 112, internal citations omitted.)

- "It has been recognized that punitive damages awards generally are not permitted to exceed 10 percent of the defendant's net worth." (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1166 [74 Cal.Rptr.2d 510].)

- "[N]et worth is not the only measure of a defendant's wealth for punitive damages purposes that is recognized by the California courts. 'Indeed, it is likely that blind adherence to any one standard [of determining wealth] could sometimes result in awards which neither deter nor punish or which deter or punish too much.' " (*Bankhead v. ArvinMeritor, Inc.* (2012) 205 Cal.App.4th 68, 79 [139 Cal.Rptr.3d 849].)

- "In light of our discussion, we conclude that even where, as here, punitive but not compensatory damages are available to the plaintiff, the defendant is entitled to an instruction that punitive damages must bear a reasonable relation to the injury, harm, or damage actually suffered by the plaintiff and proved at trial. Consequently, the trial court erred in failing to so instruct the jury." (*Gagnon, supra,* 211 Cal.App.3d at p. 1605.)

- "We conclude that the rule … that an award of exemplary damages must be accompanied by an award of compensatory damages [or its equivalent] is still sound. That rule cannot be deemed satisfied where the jury has made an express determination not to award compensatory damages." (*Cheung v. Daley* (1995) 35 Cal.App.4th 1673, 1677 [42 Cal.Rptr.2d 164], footnote omitted.)

- "With the focus on the plaintiff's injury rather than the amount of compensatory damages, the ['reasonable relation'] rule can be applied even in cases where only equitable relief is obtained or

where nominal damages are awarded or, as here, where compensatory damages are unavailable." (*Gagnon, supra,* 211 Cal.App.3d at p. 1605.)

- "The high court in *TXO* [*TXO Production Corp., supra*] and *BMW* [*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559 [116 S.Ct. 1589, 134 L.Ed.2d 809]] has refined the disparity analysis to take into account the *potential* loss to plaintiffs, as where a scheme worthy of punitive damages does not fully succeed. In such cases, the proper ratio would be the ratio of punitive damages to the potential harm to plaintiff." (*Sierra Club Found. v. Graham* (1999) 72 Cal.App.4th 1135, 1162, fn. 15 [85 Cal.Rptr.2d 726], original italics.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1559, 1562, 1572–1577, 1607–1623

Hanning et al., California Practice Guide: Personal Injury, Ch. 3-E, *Punitive Damages,* ¶¶ 3:255–3:281.15 (The Rutter Group)

California Tort Damages (Cont.Ed.Bar 2d ed.) Punitive Damages, §§ 14.1–14.12, 14.37–14.39

4 Levy et al., California Torts, Ch. 54, *Punitive Damages,* §§ 54.20–54.25 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages,* § 177.51 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort,* §§ 64.141 et seq., 64.174 et seq. (Matthew Bender)

3944. Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee—Bifurcated Trial (First Phase)

If you decide that [*name of employee/agent***]'s conduct caused [***name of plaintiff***] harm, you must decide whether that conduct justifies an award of punitive damages against [***name of defendant***] for [***name of employee/agent***]'s conduct. At this time, you must decide whether [***name of plaintiff***] has proved by clear and convincing evidence that [***name of employee/agent***] engaged in that conduct with malice, oppression, or fraud. The amount of punitive damages, if any, will be decided later.**

"Malice" means that [*name of employee/agent***] acted with intent to cause injury or that [***name of employee/agent***]'s conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A person acts with knowing disregard when he or she is aware of the probable dangerous consequences of his or her conduct and deliberately fails to avoid those consequences.**

"Oppression" means that [*name of employee/agent***]'s conduct was despicable and subjected [***name of plaintiff***] to cruel and unjust hardship in knowing disregard of [his/her] rights.**

"Despicable conduct" is conduct that is so vile, base, or contemptible that it would be looked down on and despised by reasonable people.

"Fraud" means that [*name of employee/agent***] intentionally misrepresented or concealed a material fact and did so intending to harm [***name of plaintiff***].**

[*Name of plaintiff***] must also prove [one of] the following by clear and convincing evidence:**

1. **[That [***name of employee/agent***] was an officer, a director, or a managing agent of [***name of defendant***] who was acting on behalf of [***name of defendant***]; [or]]**

2. **[That an officer, a director, or a managing agent of [***name of defendant***] had advance knowledge of the unfitness of [***name of employee/agent***] and employed [him/her] with a knowing disregard of the rights or safety of others; [or]]**

3. **[That an officer, a director, or a managing agent of [***name of defendant***] authorized [***name of employee/agent***]'s conduct; [or]]**

4. **[That an officer, a director, or a managing agent of [***name of defendant***] knew of [***name of employee/agent***]'s wrongful conduct and adopted or approved the conduct after it occurred.]**

An employee is a "managing agent" if he or she exercises substantial independent authority and judgment in his or her corporate decision making such that his or her decisions ultimately determine corporate policy.

New September 2003; Revised April 2004, December 2005

Directions for Use

CACI No. 3942, *Punitive Damages—Individual Defendant—Bifurcated Trial (Second Phase)* may be used for the second phase of a bifurcated trial.

This instruction is intended for use when the plaintiff is seeking to hold only an employer or principal liable for punitive damages based on the conduct of a specific employee or agent. When the plaintiff is seeking punitive damages from both the employer/principal and the employee/agent, use CACI No. 3948, *Punitive Damages—Individual and Corporate Defendants (Corporate Liability Based on Acts of Named Individual)—Bifurcated Trial (First Phase)*. When punitive damages are sought against a corporation or other entity for the conduct of its directors, officers, and managing agents, use CACI No. 3946, *Punitive Damages—Entity Defendant—Bifurcated Trial (First Phase).*

For an instruction explaining "clear and convincing evidence," see CACI No. 201, *More Likely True—Clear and Convincing Proof.*

If any of the alternative grounds for seeking punitive damages are inapplicable to the facts of the case, they may be omitted.

In an appropriate case, the jury may be instructed that a false promise or a suggestion of a fact known to be false may constitute a misrepresentation as the word "misrepresentation" is used in the instruction's definition of "fraud."

Sources and Authority

- When Punitive Damages Permitted. Civil Code section 3294.

- Deferral of Financial Condition Evidence to Second Stage. Civil Code section 3295(d). ~~provides: "The court shall, on application of any defendant, preclude the admission of evidence of that defendant's profits or financial condition until after the trier of fact returns a verdict for plaintiff awarding actual damages and finds that a defendant is guilty of malice, oppression, or fraud in accordance with Section 3294. Evidence of profit and financial condition shall be admissible only as to the defendant or defendants found to be liable to the plaintiff and to be guilty of malice, oppression, or fraud. Evidence of profit and financial condition shall be presented to the same trier of fact that found for the plaintiff and found one or more defendants guilty of malice, oppression, or fraud."~~

- "[E]vidence of ratification of [agent's] actions by [~~Hamilton~~defendant], and any other findings made under Civil Code section 3294, subdivision (b), must be made by clear and convincing evidence." (*Barton v. Alexander Hamilton Life Ins. Co. of America* (2003) 110 Cal.App.4th 1640, 1644 [3 Cal.Rptr.3d 258].)

- ~~Civil Code section 3295(d) provides: "The court shall, on application of any defendant, preclude the admission of evidence of that defendant's profits or financial condition until after the trier of fact~~

~~returns a verdict for plaintiff awarding actual damages and finds that a defendant is guilty of malice, oppression, or fraud in accordance with Section 3294. Evidence of profit and financial condition shall be admissible only as to the defendant or defendants found to be liable to the plaintiff and to be guilty of malice, oppression, or fraud. Evidence of profit and financial condition shall be presented to the same trier of fact that found for the plaintiff and found one or more defendants guilty of malice, oppression, or fraud."~~

- "[Section 3295(d)] affects the order of proof at trial, precluding the admission of evidence of defendants' financial condition until after the jury has returned a verdict for plaintiffs awarding actual damages and found that one or more defendants were guilty of 'oppression, fraud or malice,' in accordance with Civil Code section 3294." (*City of El Monte v. Superior Court* (1994) 29 Cal.App.4th 272, 274-275 [34 Cal.Rptr.2d 490].)

- "Evidence of the defendant's financial condition is a prerequisite to an award of punitive damages. In order to protect defendants from the premature disclosure of their financial position when punitive damages are sought, the Legislature enacted Civil Code section 3295." (*City of El Monte, supra*, 29 Cal.App.4th at p. 276.)

- "[C]ourts have held it is reversible error to try the punitive damages issue to a new jury after the jury which found liability has been excused." (*Rivera v. Sassoon* (1995) 39 Cal.App.4th 1045, 1048 [46 Cal.Rptr.2d 144].)

- "Under the statute, 'malice does not require actual intent to harm. [Citation.] Conscious disregard for the safety of another may be sufficient where the defendant is aware of the probable dangerous consequences of his or her conduct and he or she willfully fails to avoid such consequences. [Citation.] Malice may be proved either expressly through direct evidence or by implication through indirect evidence from which the jury draws inferences. [Citation.]' " (*Pfeifer v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270, 1299 [164 Cal.Rptr.3d 112].)

- "Used in its ordinary sense, the adjective 'despicable' is a powerful term that refers to circumstances that are 'base,' 'vile,' or 'contemptible.' As amended to include this word, the statute plainly indicates that absent an intent to injure the plaintiff, 'malice' requires more than a 'willful and conscious' disregard of the plaintiffs' interests. The additional component of 'despicable conduct' must be found." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 725 [34 Cal.Rptr.2d 898, 882 P.2d 894], internal citations omitted.)

- "Section 3294 is no longer silent on who may be responsible for imputing punitive damages to a corporate employer. For corporate punitive damages liability, section 3294, subdivision (b), requires that the wrongful act giving rise to the exemplary damages be committed by an 'officer, director, or managing agent.' " (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572 [88 Cal.Rptr.2d 19, 981 P.2d 944].)

- "[I]n performing, ratifying, or approving the malicious conduct, the agent must be acting as the organization's representative, not in some other capacity." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 723.)

- "[T]he concept [of managing agent] assumes that such individual was acting in a corporate or employment capacity when the conduct giving rise to the punitive damages claim against the employer occurred." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 723.)

- "No purpose would be served by punishing the employer for an employee's conduct that is wholly unrelated to its business or to the employee's duties therein." (*College Hospital, Inc., supra,* 8 Cal.4th at pp. 723-724.)

- "[T]he determination of whether certain employees are managing agents ' "does not necessarily hinge on their 'level' in the corporate hierarchy. Rather, the critical inquiry is the degree of discretion the employees possess in making decisions … ." ' " (*Powerhouse Motorsports Group, Inc. v. Yamaha Motor Corp., U.S.A.* (2013) 221 Cal.App.4th 867, 886 [164 Cal.Rptr.3d 811].)

- "Although it is generally true … that an employee's hierarchy in a corporation is not necessarily determinative of his or her status as a managing agent of a corporation, evidence showing an employee's hierarchy and job duties, responsibilities, and authority may be sufficient, absent conclusive proof to the contrary, to support a reasonable inference by a trier of fact that the employee is a managing agent of a corporation." (*Davis v. Kiewit Pacific Co.* (2013) 220 Cal.App.4th 358, 370 [162 Cal.Rptr.3d 805].)

- "[W]e conclude the Legislature intended the term 'managing agent' to include only those corporate employees who exercise substantial independent authority and judgment in their corporate decisionmaking so that their decisions ultimately determine corporate policy. The scope of a corporate employee's discretion and authority under our test is therefore a question of fact for decision on a case-by-case basis." (*White, supra,* 21 Cal.4th at pp. 566-567.)

- "In order to demonstrate that an employee is a true managing agent under section 3294, subdivision (b), a plaintiff seeking punitive damages would have to show that the employee exercised substantial discretionary authority over significant aspects of a corporation's business." (*White, supra,* 21 Cal.4th at p. 577.)

- " '[C]orporate policy' is the general principles which guide a corporation, or rules intended to be followed consistently over time in corporate operations. A 'managing agent' is one with substantial authority over decisions that set these general principles and rules." (*Cruz v. Homebase* (2000) 83 Cal.App.4th 160, 167-168 [99 Cal.Rptr.2d 435].)

- " '[R]atification' is the '[c]onfirmation and acceptance of a previous act.' A corporation cannot confirm and accept that which it does not actually know about." (*Cruz, supra,* 83 Cal.App.4th at p. 168.)

- "For purposes of determining an employer's liability for punitive damages, ratification generally occurs where, under the particular circumstances, the employer demonstrates an intent to adopt or approve oppressive, fraudulent, or malicious behavior by an employee in the performance of his job duties." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 726.)

- "Corporate ratification in the punitive damages context requires actual knowledge of the conduct and

its outrageous nature." (*College Hospital, Inc., supra*, 8 Cal.4th at p. 726.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1581–1585

California Tort Damages (Cont.Ed.Bar 1988) Punitive Damages, §§ 14.13-14.14, 14.23

4 Levy et al., California Torts, Ch. 54, *Punitive Damages*, §§ 54.07, 54.24[4][d] (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages,* § 177.51 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort,* § 64.24 et seq. (Matthew Bender)

3948. Punitive Damages—Individual and Corporate Defendants (Corporate Liability Based on Acts of Named Individual)—Bifurcated Trial (First Phase)

If you decide that [*name of individual defendant***]'s conduct caused [***name of plaintiff***] harm, you must decide whether that conduct justifies an award of punitive damages against [***name of individual defendant***] and, if so, against [***name of corporate defendant***]. The amount, if any, of punitive damages will be an issue decided later.**

You may award punitive damages against [*name of individual defendant***] only if [***name of plaintiff***] proves by clear and convincing evidence that [***name of individual defendant***] engaged in that conduct with malice, oppression, or fraud.**

"Malice" means that a defendant acted with intent to cause injury or that a defendant's conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A defendant acts with knowing disregard when the defendant is aware of the probable dangerous consequences of his, her, or its conduct and deliberately fails to avoid those consequences.

"Oppression" means that a defendant's conduct was despicable and subjected [*name of plaintiff***] to cruel and unjust hardship in knowing disregard of [his/her] rights.**

"Despicable conduct" is conduct that is so vile, base, or contemptible that it would be looked down on and despised by reasonable people.

"Fraud" means that a defendant intentionally misrepresented or concealed a material fact and did so intending to harm [*name of plaintiff***].**

You may also award punitive damages against [*name of corporate defendant***] based on [***name of individual***]'s conduct if [***name of plaintiff***] proves [one of] the following by clear and convincing evidence:**

1. **[That [***name of individual defendant***] was an officer, a director, or a managing agent of [***name of corporate defendant***] who was acting on behalf of [***name of corporate defendant***] at the time of the conduct constituting malice oppression or fraud; [or]]**

2. **[That an officer, a director, or a managing agent of [***name of corporate defendant***] had advance knowledge of the unfitness of [***name of individual defendant***] and employed [him/her] with a knowing disregard of the rights or safety of others; [or]]**

3. **[That [***name of individual defendant***]'s conduct constituting malice, oppression, or fraud was authorized by an officer, a director, or a managing agent of [***name of corporate defendant***]; [or]]**

4. **[That an officer, a director, or a managing agent of [***name of corporate defendant***] knew of [***name of individual defendant***]'s conduct constituting malice, oppression, or**

fraud and adopted or approved that conduct after it occurred.]

An employee is a "managing agent" if he or she exercises substantial independent authority and judgment in his or her corporate decision making such that his or her decisions ultimately determine corporate policy.

New September 2003; Revised April 2004, December 2005

Directions for Use

Use CACI No. 3949, *Punitive Damages—Individual and Corporate Defendants (Corporate Liability Based on Acts of Named Individual)—Bifurcated Trial (Second Phase),* for the second phase of a bifurcated trial.

This instruction is intended to apply to cases where punitive damages are sought against both an individual person and a corporate defendant. When damages are sought only against a corporate defendant, use CACI No. 3944, *Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee—Bifurcated Trial (First Phase),* or CACI No. 3946, *Punitive Damages—Entity Defendant—Bifurcated Trial (First Phase).* When damages are sought against individual defendants, use CACI No. 3941, *Punitive Damages--Individual Defendant—Bifurcated Trial (First Phase).*

For an instruction explaining "clear and convincing evidence," see CACI No. 201, *More Likely True—Clear and Convincing Proof.*

If any of the alternative grounds for seeking punitive damages are inapplicable to the facts of the case, they may be omitted.

See CACI No. 3940, *Punitive Damages—Individual Defendant—Trial Not Bifurcated,* for additional sources and authority.

In an appropriate case, the jury may be instructed that a false promise or a suggestion of a fact known to be false may constitute a misrepresentation as the word "misrepresentation" is used in the instruction's definition of "fraud."

Sources and Authority

- When Punitive Damages Permitted. Civil Code section 3294.~~.~~
- ~~"[E]vidence of ratification of [agent's] actions by Hamilton, and any other findings made under Civil Code section 3294, subdivision (b), must be made by clear and convincing evidence." (*Barton v. Alexander Hamilton Life Ins. Co. of America* (2003) 110 Cal.App.4th 1640, 1644 [3 Cal.Rptr.3d 258].)~~
- Deferral of Financial Condition Evidence to Second Stage. Civil Code section 3295(d)~~. provides:~~

~~"The court shall, on application of any defendant, preclude the admission of evidence of that defendant's profits or financial condition until after the trier of fact returns a verdict for plaintiff awarding actual damages and finds that a defendant is guilty of malice, oppression, or fraud in accordance with Section 3294. Evidence of profit and financial condition shall be admissible only as to the defendant or defendants found to be liable to the plaintiff and to be guilty of malice, oppression, or fraud. Evidence of profit and financial condition shall be presented to the same trier of fact that found for the plaintiff and found one or more defendants guilty of malice, oppression, or fraud."~~

- "[E]vidence of ratification of [agent's] actions by [~~Hamilton~~defendant], and any other findings made under Civil Code section 3294, subdivision (b), must be made by clear and convincing evidence." (*Barton v. Alexander Hamilton Life Ins. Co. of America* (2003) 110 Cal.App.4th 1640, 1644 [3 Cal.Rptr.3d 258].)

- "[Section 3295(d)] affects the order of proof at trial, precluding the admission of evidence of defendants' financial condition until after the jury has returned a verdict for plaintiffs awarding actual damages and found that one or more defendants were guilty of 'oppression, fraud or malice,' in accordance with Civil Code section 3294." (*City of El Monte v. Superior Court* (1994) 29 Cal.App.4th 272, 274-275 [34 Cal.Rptr.2d 490], internal citations omitted.)

- "Evidence of the defendant's financial condition is a prerequisite to an award of punitive damages. In order to protect defendants from the premature disclosure of their financial position when punitive damages are sought, the Legislature enacted Civil Code section 3295." (*City of El Monte, supra,* 29 Cal.App.4th at p. 276, internal citations omitted.)

- "[C]ourts have held it is reversible error to try the punitive damages issue to a new jury after the jury which found liability has been excused." (*Rivera v. Sassoon* (1995) 39 Cal.App.4th 1045, 1048 [46 Cal.Rptr.2d 144], internal citations omitted.)

- "Under the statute, 'malice does not require actual intent to harm. [Citation.] Conscious disregard for the safety of another may be sufficient where the defendant is aware of the probable dangerous consequences of his or her conduct and he or she willfully fails to avoid such consequences. [Citation.] Malice may be proved either expressly through direct evidence or by implication through indirect evidence from which the jury draws inferences. [Citation.]' " (*Pfeifer v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270, 1299 [164 Cal.Rptr.3d 112].)

- "Used in its ordinary sense, the adjective 'despicable' is a powerful term that refers to circumstances that are 'base,' 'vile,' or 'contemptible.' As amended to include this word, the statute plainly indicates that absent an intent to injure the plaintiff, 'malice' requires more than a 'willful and conscious' disregard of the plaintiffs' interests. The additional component of 'despicable conduct' must be found." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 725 [34 Cal.Rptr.2d 898, 882 P.2d 894], internal citations omitted.)

- "Section 3294 is no longer silent on who may be responsible for imputing punitive damages to a corporate employer. For corporate punitive damages liability, section 3294, subdivision (b), requires that the wrongful act giving rise to the exemplary damages be committed by an 'officer, director, or

managing agent.' " (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572 [88 Cal.Rptr.2d 19, 981 P.2d 944].)

- "[I]n performing, ratifying, or approving the malicious conduct, the agent must be acting as the organization's representative, not in some other capacity." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 723.)

- "[T]he concept [of managing agent] assumes that such individual was acting in a corporate or employment capacity when the conduct giving rise to the punitive damages claim against the employer occurred." (*College Hospital, Inc., supra*, 8 Cal.4th at p. 723.)

- "No purpose would be served by punishing the employer for an employee's conduct that is wholly unrelated to its business or to the employee's duties therein." (*College Hospital, Inc., supra*, 8 Cal.4th at pp. 723-724.)

- "[T]he determination of whether certain employees are managing agents ' "does not necessarily hinge on their 'level' in the corporate hierarchy. Rather, the critical inquiry is the degree of discretion the employees possess in making decisions … ." ' " (*Powerhouse Motorsports Group, Inc. v. Yamaha Motor Corp., U.S.A.* (2013) 221 Cal.App.4th 867, 886 [164 Cal.Rptr.3d 811].)

- "Although it is generally true … that an employee's hierarchy in a corporation is not necessarily determinative of his or her status as a managing agent of a corporation, evidence showing an employee's hierarchy and job duties, responsibilities, and authority may be sufficient, absent conclusive proof to the contrary, to support a reasonable inference by a trier of fact that the employee is a managing agent of a corporation." (*Davis v. Kiewit Pacific Co.* (2013) 220 Cal.App.4th 358, 370 [162 Cal.Rptr.3d 805].)

- "[W]e conclude the Legislature intended the term 'managing agent' to include only those corporate employees who exercise substantial independent authority and judgment in their corporate decision making so that their decisions ultimately determine corporate policy. The scope of a corporate employee's discretion and authority under our test is therefore a question of fact for decision on a case-by-case basis." (*White, supra,* 21 Cal.4th at pp. 566-567.)

- "In order to demonstrate that an employee is a true managing agent under section 3294, subdivision (b), a plaintiff seeking punitive damages would have to show that the employee exercised substantial discretionary authority over significant aspects of a corporation's business." (*White, supra,* 21 Cal.4th at p. 577.)

- " '[C]orporate policy' is the general principles which guide a corporation, or rules intended to be followed consistently over time in corporate operations. A 'managing agent' is one with substantial authority over decisions that set these general principles and rules." (*Cruz v. Homebase* (2000) 83 Cal.App.4th 160, 167-168 [99 Cal.Rptr.2d 435].)

- " '[R]atification' is the '[c]onfirmation and acceptance of a previous act.' A corporation cannot confirm and accept that which it does not actually know about." (*Cruz, supra,* 83 Cal.App.4th at p. 168.)

- "For purposes of determining an employer's liability for punitive damages, ratification generally occurs where, under the particular circumstances, the employer demonstrates an intent to adopt or approve oppressive, fraudulent, or malicious behavior by an employee in the performance of his job duties." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 726.)

- "Corporate ratification in the punitive damages context requires actual knowledge of the conduct and its outrageous nature." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 726.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1581–1585

California Tort Damages (Cont.Ed.Bar) Punitive Damages, §§ 14.13-14.14, 14.23

4 Levy et al., California Torts, Ch. 54, *Punitive Damages,* §§ 54.07, 54.24[4][d] (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages,* § 177.51[17] (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort,* § 64.24 et seq. (Matthew Bender)

3949. Punitive Damages—Individual and Corporate Defendants (Corporate Liability Based on Acts of Named Individual)—Bifurcated Trial (Second Phase)

You must now decide the amount, if any, that you should award [*name of plaintiff***] in punitive damages. The purposes of punitive damages are to punish a wrongdoer for the conduct that harmed the plaintiff and to discourage similar conduct in the future.**

There is no fixed formula for determining the amount of punitive damages, and you are not required to award any punitive damages. If you decide to award punitive damages, you should consider all of the following factors separately for each defendant in determining the amount:

(a) How reprehensible was that defendant's conduct? In deciding how reprehensible a defendant's conduct was, you may consider, among other factors:

1. Whether the conduct caused physical harm;

2. Whether the defendant disregarded the health or safety of others;

3. Whether [*name of plaintiff***] was financially weak or vulnerable and the defendant knew [***name of plaintiff***] was financially weak or vulnerable and took advantage of [him/her/it];**

4. Whether the defendant's conduct involved a pattern or practice; and

5. Whether the defendant acted with trickery or deceit.

(b) Is there a reasonable relationship between the amount of punitive damages and [*name of plaintiff***]'s harm [or between the amount of punitive damages and potential harm to [***name of plaintiff***] that the defendant knew was likely to occur because of [his/her/its] conduct]?**

(c) In view of that defendant's financial condition, what amount is necessary to punish [him/her/it] and discourage future wrongful conduct? You may not increase the punitive award above an amount that is otherwise appropriate merely because a defendant has substantial financial resources. [Any award you impose may not exceed that defendant's ability to pay.]

[Punitive damages may not be used to punish a defendant for the impact of [his/her/its] alleged misconduct on persons other than [*name of plaintiff***].]**

New September 2003; Revised April 2004, October 2004, June 2006, April 2007, August 2007, October 2008

Directions for Use

Read the bracketed language at the end of the first sentence of factor (b) only if there is evidence that the conduct of defendant that allegedly gives rise to liability and punitive damages either caused or foreseeably threatened to cause harm to plaintiff that would not be included in an award of compensatory damages. (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159 [29 Cal.Rptr.3d 379, 113 P.3d 63].) The bracketed phrase concerning "potential harm" might be appropriate, for example, if damages actually caused by the defendant's acts are not recoverable because they are barred by statute (*id.* at p. 1176, citing *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 929 [148 Cal.Rptr. 389, 582 P.2d 980] [in a bad faith insurance case, plaintiff died before judgment, precluding her estate's recovery of emotional distress damages]), or if the harm caused by defendant's acts could have been great, but by chance only slight harm was inflicted. (*Simon, supra,* 35 Cal.4th at p. 1177, citing *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, 459 [113 S.Ct. 2711, 125 L.Ed.2d 366] [considering the hypothetical of a person wildly firing a gun into a crowd but by chance only damaging a pair of glasses].) The bracketed phrase should not be given if an award of compensatory damages is the "true measure" of the harm or potential harm caused by defendant's wrongful acts. (*Simon, supra,* 35 Cal.4th at pp. 1178–1179 [rejecting consideration for purposes of assessing punitive damages of the plaintiff's loss of the benefit of the bargain if the jury had found that there was no binding contract].)

Read the optional final sentence of factor (c) only if the defendant has presented relevant evidence regarding that issue.

Read the optional final sentence if there is a possibility that in arriving at an amount of punitive damages, the jury might consider harm that the defendant's conduct may have caused to nonparties. (See *Philip Morris USA v. Williams* (2007) 549 U.S. 346, 353–354 [127 S.Ct. 1057, 166 L.Ed.2d 940].) Harm to others may be relevant to determining reprehensibility based on factors (a)(2) (disregard of health or safety of others) and (a)(4) (pattern or practice). (See *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408, 419 [123 S.Ct. 1513, 155 L.Ed.2d 585].)

"A jury must be instructed ... that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 422].) An instruction on this point should be included within this instruction if appropriate to the facts.

Courts have stated that "[p]unitive damages previously imposed for the same conduct are relevant in determining the amount of punitive damages required to sufficiently punish and deter. The likelihood of future punitive damage awards may also be considered, although it is entitled to considerably less weight." (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661 [57 Cal.Rptr.2d 525], internal citations omitted.) The court in *Stevens* suggested that the following instruction be given if evidence of other punitive damage awards is introduced into evidence:

> If you determine that a defendant has already been assessed with punitive damages based on the same conduct for which punitive damages are requested in this case, you may consider whether punitive damages awarded in other cases have sufficiently punished and made an example of the defendant. You must not use the amount of punitive damages awarded in other cases to determine the amount of the punitive damage award in this case, except to the extent you determine that a lesser award, or no award at all, is justified in light of the penalties already imposed. (*Stevens,*

supra, 49 Cal.App.4th at p. 1663, fn. 7.)

Sources and Authority

- When Punitive Damages Permitted. Civil Code section 3294. ~~provides, in part: "In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant."~~

- Evidence of Profits or Financial Condition. Civil Code section 3295(d). ~~provides: "The court shall, on application of any defendant, preclude the admission of evidence of that defendant's profits or financial condition until after the trier of fact returns a verdict for plaintiff awarding actual damages and finds that a defendant is guilty of malice, oppression, or fraud in accordance with Section 3294. Evidence of profit and financial condition shall be admissible only as to the defendant or defendants found to be liable to the plaintiff and to be guilty of malice, oppression, or fraud. Evidence of profit and financial condition shall be presented to the same trier of fact that found for the plaintiff and found one or more defendants guilty of malice, oppression, or fraud."~~

- "[Section 3295(d)] affects the order of proof at trial, precluding the admission of evidence of defendants' financial condition until after the jury has returned a verdict for plaintiffs awarding actual damages and found that one or more defendants were guilty of 'oppression, fraud or malice,' in accordance with Civil Code section 3294." (*City of El Monte v. Superior Court* (1994) 29 Cal.App.4th 272, 274–275 [34 Cal.Rptr.2d 490], internal citations omitted.)

- "Evidence of the defendant's financial condition is a prerequisite to an award of punitive damages. In order to protect defendants from the premature disclosure of their financial position when punitive damages are sought, the Legislature enacted Civil Code section 3295." (*City of El Monte, supra*, 29 Cal.App.4th at p. 276, internal citations omitted.)

- "[C]ourts have held it is reversible error to try the punitive damages issue to a new jury after the jury which found liability has been excused." (*Rivera v. Sassoon* (1995) 39 Cal.App.4th 1045, 1048 [46 Cal.Rptr.2d 144], internal citations omitted.)

- "The purpose of punitive damages is to punish wrongdoers and thereby deter the commission of wrongful acts." (*Neal, supra,* 21 Cal.3d at p. 928, fn. 13.)

- "Punitive damages are to be assessed in an amount which, depending upon the defendant's financial worth and other factors, will deter him and others from committing similar misdeeds. Because compensatory damages are designed to make the plaintiff 'whole,' punitive damages are a 'windfall' form of recovery." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 712 [34 Cal.Rptr.2d 898, 882 P.2d 894], internal citations omitted.)

- "It follows that the wealthier the wrongdoing defendant, the larger the award of exemplary damages need be in order to accomplish the statutory objective." (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 65 [118 Cal.Rptr. 184, 529 P.2d 608].)

- " 'A plaintiff, upon establishing his case, is always entitled of right to compensatory damages. But even after establishing a case where punitive damages are permissible, he is never entitled to them. The granting or withholding of the award of punitive damages is wholly within the control of the jury, and may not legally be influenced by any direction of the court that in any case a plaintiff is entitled to them. Upon the clearest proof of malice in fact, it is still the exclusive province of the jury to say whether or not punitive damages shall be awarded. A plaintiff is entitled to such damages only after the jury, in the exercise of its untrammeled discretion, has made the award.' " (*Brewer v. Second Baptist Church of Los Angeles* (1948) 32 Cal.2d 791, 801 [197 P.2d 713], internal citations omitted.)

- "In light of our holding that evidence of a defendant's financial condition is essential to support an award of punitive damages, Evidence Code section 500 mandates that the plaintiff bear the burden of proof on the issue. A plaintiff seeking punitive damages is not seeking a mere declaration by the jury that he is entitled to punitive damages in the abstract. The plaintiff is seeking an award of real money in a specific amount to be set by the jury. Because the award, whatever its amount, cannot be sustained absent evidence of the defendant's financial condition, such evidence is 'essential to the claim for relief.' " (*Adams v. Murakami* (1991) 54 Cal.3d 105, 119 [284 Cal.Rptr. 318, 813 P.2d 1348], internal citation omitted.)

- "[W]e are afforded guidance by certain established principles, all of which are grounded in the purpose and function of punitive damages. One factor is the particular nature of the defendant's acts in light of the whole record; clearly, different acts may be of varying degrees of reprehensibility, and the more reprehensible the act, the greater the appropriate punishment, assuming all other factors are equal. Another relevant yardstick is the amount of compensatory damages awarded; in general, even an act of considerable reprehensibility will not be seen to justify a proportionally high amount of punitive damages if the actual harm suffered thereby is small. Also to be considered is the wealth of the particular defendant; obviously, the function of deterrence will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort. By the same token, of course, the function of punitive damages is not served by an award which, in light of the defendant's wealth and the gravity of the particular act, exceeds the level necessary to properly punish and deter." (*Neal, supra,* 21 Cal.3d at p. 928, internal citations and footnote omitted.)

- "[T]he Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation." (*Philip Morris USA, supra,* 549 U.S. at p. 353.)

- "Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible—although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse. Yet for the reasons given above, a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties." (*Philip Morris USA, supra,* 549 U.S. at p. 355.)

- " 'Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits

of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis … . Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct … .' This does not mean, however, that the defendant's similar wrongful conduct toward others should not be considered in determining the amount of punitive damages." (*Bullock v. Philip Morris USA, Inc.* (2011) 198 Cal.App.4th 543, 560 [131 Cal.Rptr.3d 382].)

- "[A] specific instruction encompassing both the permitted and prohibited uses of evidence of harm caused to others would be appropriate in the new trial if requested by the parties. We believe that an instruction on these issues should clearly distinguish between the permitted and prohibited uses of such evidence and thus make clear to the jury the purposes for which it can and cannot consider that evidence. A jury may consider evidence of harm caused to others for the purpose of determining the degree of reprehensibility of a defendant's conduct toward the plaintiff in deciding the amount of punitive damages, but it may not consider that evidence for the purpose of punishing the defendant directly for harm caused to others. In our view, Judicial Council of California Civil Jury Instructions (Aug. 2007 rev.) CACI Nos. 3940, 3942, 3943, 3945, 3947, and 3949 could convey this distinction better by stating more explicitly that evidence of harm caused to others may be considered for the one purpose but not for the other, and by providing that explanation together with the reprehensibility factors rather than in connection with the reasonable relationship issue." (*Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 695, fn. 21 [71 Cal.Rptr.3d 775], internal citation omitted.)

- " '[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.' We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 419, internal citation omitted.)

- "[I]n a case involving physical harm, the physical or physiological vulnerability of the target of the defendant's conduct is an appropriate factor to consider in determining the degree of reprehensibility, particularly if the defendant deliberately exploited that vulnerability." (*Bullock, supra,* 198 Cal.App.4th at p. 562, internal citation omitted.)

- "[W]e have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. … [A]n award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. … While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1 … ." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at pp. 424–425, internal citation omitted.)

- “Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where ‘a particularly egregious act has resulted in only a small amount of economic damages.’ The converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff.” (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 425, internal citation omitted.)

- “The decision to award punitive damages is exclusively the function of the trier of fact. So too is the amount of any punitive damage award. The relevant considerations are the nature of the defendant’s conduct, the defendant’s wealth, and the plaintiff’s actual damages.” (*Gagnon v. Continental Casualty Co.* (1989) 211 Cal.App.3d 1598, 1602 [260 Cal.Rptr. 305], internal citations omitted.)

- “The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.” (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 427, internal citation omitted.)

- “[T]he purpose of punitive damages is not served by financially destroying a defendant. The purpose is to deter, not to destroy.” (*Adams, supra,* 54 Cal.3d at p. 112.)

- “[A] punitive damages award is excessive if it is disproportionate to the defendant’s ability to pay.” (*Adams, supra,* 54 Cal.3d at p. 112, internal citations omitted.)

- “It has been recognized that punitive damages awards generally are not permitted to exceed 10 percent of the defendant’s net worth.” (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1166 [74 Cal.Rptr.2d 510].)

- “[N]et worth is not the only measure of a defendant’s wealth for punitive damages purposes that is recognized by the California courts. ‘Indeed, it is likely that blind adherence to any one standard [of determining wealth] could sometimes result in awards which neither deter nor punish or which deter or punish too much.’ ” (*Bankhead v. ArvinMeritor, Inc.* (2012) 205 Cal.App.4th 68, 79 [139 Cal.Rptr.3d 849].)

- “In light of our discussion, we conclude that even where, as here, punitive but not compensatory damages are available to the plaintiff, the defendant is entitled to an instruction that punitive damages must bear a reasonable relation to the injury, harm, or damage actually suffered by the plaintiff and proved at trial. Consequently, the trial court erred in failing to so instruct the jury.” (*Gagnon, supra,* 211 Cal.App.3d at p. 1605.)

- “We conclude that the rule ... that an award of exemplary damages must be accompanied by an award of compensatory damages [or its equivalent] is still sound. That rule cannot be deemed satisfied where the jury has made an express determination not to award compensatory damages.” (*Cheung v. Daley* (1995) 35 Cal.App.4th 1673, 1677 [42 Cal.Rptr.2d 164], footnote omitted.)

- “With the focus on the plaintiff’s injury rather than the amount of compensatory damages, the

['reasonable relation'] rule can be applied even in cases where only equitable relief is obtained or where nominal damages are awarded or, as here, where compensatory damages are unavailable." (*Gagnon, supra*, 211 Cal.App.3d at p. 1605.)

- "The high court in *TXO* [*TXO Production Corp., supra*] and *BMW* [*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559 [116 S.Ct. 1589, 134 L.Ed.2d 809]] has refined the disparity analysis to take into account the *potential* loss to plaintiffs, as where a scheme worthy of punitive damages does not fully succeed. In such cases, the proper ratio would be the ratio of punitive damages to the potential harm to plaintiff." (*Sierra Club Found. v. Graham* (1999) 72 Cal.App.4th 1135, 1162, fn. 15 [85 Cal.Rptr.2d 726], original italics.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1581–1585

Hanning et al., California Practice Guide: Personal Injury, Ch. 3-E, *Punitive Damages*, ¶¶ 3:255–3:281.15 (The Rutter Group)

California Tort Damages (Cont.Ed.Bar 2d ed.) Punitive Damages, §§ 14.1–14.12, 14.21, 14.39

4 Levy et al., California Torts, Ch. 54, *Punitive Damages*, §§ 54.07, 54.24[4][d] (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.51 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort*, §§ 64.141 et seq., 64.174 et seq. (Matthew Bender)

4000. Conservatorship—Essential Factual Elements

[*Name of petitioner***] claims that [***name of respondent***] is gravely disabled due to [a mental disorder/impairment by chronic alcoholism] and therefore should be placed in a conservatorship. In a conservatorship, a conservator is appointed to oversee, under the direction of the court, the care of persons who are gravely disabled due to a mental disorder or chronic alcoholism. To succeed on this claim, [***name of petitioner***] must prove beyond a reasonable doubt all of the following:**

1. **That [***name of respondent***] [has a mental disorder/is impaired by chronic alcoholism];**

2. **That [***name of respondent***] is gravely disabled as a result of the [mental disorder/chronic alcoholism]; and**

3. **That [***name of respondent***] is unwilling or unable voluntarily to accept meaningful treatment.**

New June 2005

Directions for Use

Element 3 may not be necessary in every case (see *Conservatorship of Symington* (1989) 209 Cal.App.3d 1464, 1467 [257 Cal.Rptr. 860] ["[M]any gravely disabled individuals are simply beyond treatment."]).

Sources and Authority

- Right to Jury Trial. Welfare and Institutions Code section 5350(d). ~~provides, in part: "The person for whom conservatorship is sought shall have the right to demand a court or jury trial on the issue whether he or she is gravely disabled."~~

- "Gravely Disabled" Defined. Welfare and Institutions Code section 5008(h)~~(1)(A) provides, in part: " '[G]ravely disabled' ... [means a] condition in which a person, as a result of a mental disorder, is unable to provide for his or her basic personal needs for food, clothing, or shelter."~~

- ~~Welfare and Institutions Code section 5008(h)(2) provides, in part: " '[G]ravely disabled' means a condition in which a person, as a result of impairment by chronic alcoholism, is unable to provide for his or her basic personal needs for food, clothing, or shelter."~~

- "The Lanterman-Petris-Short Act (the act) governs the involuntary treatment of the mentally ill in California. Enacted by the Legislature in 1967, the act includes among its goals ending the inappropriate and indefinite commitment of the mentally ill, providing prompt evaluation and treatment of persons with serious mental disorders, guaranteeing and protecting public safety, safeguarding the rights of the involuntarily committed through judicial review, and providing individualized treatment, supervision and placement services for the gravely disabled by means of a

conservatorship program." (*Conservatorship of Susan T.* (1994) 8 Cal.4th 1005, 1008–1009 [36 Cal.Rptr.2d 40, 884 P.2d 988].)

- "The right to a jury trial upon the establishment of conservatorship is fundamental to the protections afforded by the LPS. As related, that right is expressly extended to the reestablishment of an LPS conservatorship." (*Conservatorship of Benvenuto* (1986) 180 Cal.App.3d 1030, 1037 [226 Cal.Rptr. 33], internal citations omitted.)

- "Noting that a finding of grave disability may result in serious deprivation of personal liberty, the [Supreme Court] held that the due process clause of the California Constitution requires that proof beyond a reasonable doubt and jury unanimity be applied to conservatorship proceedings under the LPS Act." (*Conservatorship of Benvenuto, supra,* 180 Cal.App.3d at p. 1038, internal citations omitted.)

- "We ... hold that a person sought to be made an LPS conservatee subject to involuntary confinement in a mental institution, is entitled to have a unanimous jury determination of all of the questions involved in the imposition of such a conservatorship, and not just on the issue of grave disability in the narrow sense of whether he or she can safely survive in freedom and provide food, clothing or shelter unaided by willing, responsible relatives, friends or appropriate third persons." (*Conservatorship of Davis* (1981) 124 Cal.App.3d 313, 328 [177 Cal.Rptr. 369].)

- "The jury should determine if the person voluntarily accepts meaningful treatment, in which case no conservatorship is necessary. If the jury finds the person will not accept treatment, then it must determine if the person can meet his basic needs on his own or with help, in which case a conservatorship is not justified." (*Conservatorship of Walker* (1987) 196 Cal.App.3d 1082, 1092–1093 [242 Cal.Rptr. 289].)

- "Our research has failed to reveal any authority for the proposition [that] without a finding that the proposed conservatee is unable or unwilling to voluntarily accept treatment, the court must reject a conservatorship in the face of grave disability. ... Some persons with grave disabilities are beyond treatment. Taken to its logical conclusion, they would be beyond the LPS Act's reach, according to the argument presented in this appeal." (*Conservatorship of Symington, supra,* 209 Cal.App.3d at p. 1469.)

- "The party seeking imposition of the conservatorship must prove the proposed conservatee's grave disability beyond a reasonable doubt and the verdict must be issued by a unanimous jury." (*Conservatorship of Susan T., supra,* 8 Cal.4th at p. 1009, internal citation omitted.)

Secondary Sources

14 Witkin, Summary of California Law (10th ed. 2005) Wills and Probate, § 945

3 Witkin, California Procedure (5th ed. 2008) Actions, § 97

2 California Conservatorship Practice (Cont.Ed.Bar) Ch. 23

32 California Forms of Pleading and Practice, Ch. 361A, *Mental Health and Mental Disabilities: Judicial Commitment, Health Services, and Civil Rights*, § 361A.30 et seq. (Matthew Bender)

4002. "Gravely Disabled" Explained

The term "gravely disabled" means that a person is presently unable to provide for his or her basic needs for food, clothing, or shelter because of [a mental disorder/impairment by chronic alcoholism]. [The term "gravely disabled" does not include mentally retarded persons by reason of being mentally retarded alone.]

[[*Insert one or more of the following*:**] [psychosis/bizarre or eccentric behavior/delusions/hallucinations/[***insert other***]] [is/are] not enough, by [itself/themselves], to find that [***name of respondent***] is gravely disabled. [He/She] must be unable to provide for the basic needs of food, clothing, or shelter because of [a mental disorder/impairment by chronic alcoholism].]**

[If you find [*name of respondent***] will not take [his/her] prescribed medication without supervision and that a mental disorder makes [him/her] unable to provide for [his/her] basic needs for food, clothing, or shelter without such medication, then you may conclude [***name of respondent***] is presently gravely disabled.**

In determining whether [*name of respondent***] is presently gravely disabled, you may consider evidence that [he/she] did not take prescribed medication in the past. You may also consider evidence of [his/her] lack of insight into [his/her] mental condition.]**

In considering whether [*name of respondent***] is presently gravely disabled, you may not consider the likelihood of future deterioration or relapse of a condition.**

New June 2005

Directions for Use

Read the bracketed sentence at the end of the first paragraph if appropriate to the facts of the case.

The principle regarding the likelihood of future deterioration may not apply in cases where the respondent has no insight into his or her mental disorder. (*Conservatorship of Walker* (1989) 206 Cal.App.3d 1572, 1576–1577 [254 Cal.Rptr. 552].)

If there is evidence concerning the availability of third parties that are willing to provide assistance to the proposed conservatee, see CACI No. 4007, *Third Party Assistance*.

Sources and Authority

- "Gravely Disabled" Defined. Welfare & Institutions Code section 5008(h).~~(1)(A) provides, in part: " '[G]ravely disabled' ... [means] a condition in which a person, as a result of a mental disorder, is unable to provide for his or her basic personal needs for food, clothing, or shelter."~~

- ~~Welfare & Institutions Code section 5008(h)(2) provides, in part: " '[G]ravely disabled' means a~~

~~condition in which a person, as a result of impairment by chronic alcoholism, is unable to provide for his or her basic personal needs for food, clothing, or shelter."~~

- ~~Welfare & Institutions Code section 5008(h)(3) provides: "The term 'gravely disabled' does not include intellectually disabled persons by reason of being intellectually disabled alone."~~

- "The enactment of the LPS and with it the substitution of 'gravely disabled' for 'in need of treatment' as the basis for commitment of individuals not dangerous to themselves or others reflects a legislative determination to meet the constitutional requirements of precision. The term 'gravely disabled' is sufficiently precise to exclude unusual or nonconformist lifestyles. It connotes an inability or refusal on the part of the proposed conservatee to care for basic personal needs of food, clothing and shelter." (*Conservatorship of Chambers* (1977) 71 Cal.App.3d 277, 284 [139 Cal.Rptr. 357], footnotes omitted.)

- "The public guardian must prove the proposed conservatee was 'gravely disabled' beyond a reasonable doubt. The stricter criminal standard is used because the threat to the conservatee's individual liberty and personal reputation is no different than the burdens associated with criminal prosecutions." (*Conservatorship of Smith* (1986) 187 Cal.App.3d 903, 909 [232 Cal.Rptr. 277] internal citations omitted.)

- "Bizarre or eccentric behavior, even if it interferes with a person's normal intercourse with society, does not rise to a level warranting conservatorship except where such behavior renders the individual helpless to fend for herself or destroys her ability to meet those basic needs for survival." (*Conservatorship of Smith, supra*, 187 Cal.App.3d at p. 909.)

- "We ... hold that a person sought to be made an LPS conservatee subject to involuntary confinement in a mental institution, is entitled to have a unanimous jury determination of all of the questions involved in the imposition of such a conservatorship, and not just on the issue of grave disability in the narrow sense of whether he or she can safely survive in freedom and provide food, clothing or shelter unaided by willing, responsible relatives, friends or appropriate third persons." (*Conservatorship of Davis* (1981) 124 Cal.App.3d 313, 328 [177 Cal.Rptr. 369].)

- "[A]n individual who will not voluntarily accept mental health treatment is not for that reason alone gravely disabled." (*Conservatorship of Symington* (1989) 209 Cal.App.3d 1464, 1468 [257 Cal.Rptr. 860].)

- "[T]he pivotal issue is whether [respondent] was 'presently' gravely disabled and the evidence demonstrates that he was not. Accordingly, the order granting the petition must be overturned." (*Conservatorship of Benvenuto* (1986) 180 Cal.App.3d. 1030, 1034 [226 Cal.Rptr. 33], fn. omitted, citing to *Conservatorship of Murphy* (1982) 134 Cal.App.3d 15, 18 [184 Cal.Rptr. 363].)

- "[A] conservatorship cannot be established because of a perceived likelihood of future relapse. To do so could deprive the liberty of persons who will not suffer such a relapse solely because of the pessimistic statistical odds. Because of the promptness with which a conservatorship proceeding can be invoked the cost in economic and liberty terms is unwarranted." (*Conservatorship of Neal* (1987) 190 Cal.App.3d 685, 689 [235 Cal.Rptr. 577].)

- "A perceived likelihood of future relapse, without more, is not enough to justify establishing a conservatorship. Neither can such a likelihood justify keeping a conservatorship in place if its subject is not presently gravely disabled, in light of the statutory provisions allowing rehearings to evaluate a conservatee's current status." (*Conservatorship of Jones* (1989) 208 Cal.App.3d 292, 302 [256 Cal.Rptr. 415], internal citation omitted.)

Secondary Sources

3 Witkin, California Procedure (5th ed. 2008) Actions, § 97

2 California Conservatorship Practice (Cont.Ed.Bar) §§ 23.3, 23.5

32 California Forms of Pleading and Practice, Ch. 361A, *Mental Health and Mental Disabilities: Judicial Commitment, Health Services, and Civil Rights*, §§ 361A.33, 361A.42 (Matthew Bender)

4003. "Gravely Disabled" Minor Explained

The term "gravely disabled" means that a minor is presently unable to use those things that are essential to health, safety, and development, including food, clothing, and shelter, even if they are provided to the minor by others, because of a mental disorder. [The term "gravely disabled" does not include mentally retarded persons by reason of being mentally retarded alone.]

[[*Insert one or more of the following:***] [physical or mental immaturity/developmental disabilities/epilepsy/alcoholism/drug abuse/repeated antisocial behavior/psychosis/bizarre or eccentric behavior/delusions/hallucinations/[***insert other***]] [is/are] not enough, by [itself/themselves], to find that [***name of respondent***] is gravely disabled. [He/She] must be unable to use those things that are essential to health, safety, or development because of a mental disorder.]**

[If you find [*name of respondent***] will not take [his/her] medication without supervision and that a mental disorder makes [him/her] unable to use those things that are essential to health, safety, or development without such medication, then you may conclude [***name of respondent***] is presently gravely disabled.**

In determining whether [*name of respondent***] is presently gravely disabled, you may consider evidence that [he/she] did not take prescribed medication in the past. You may consider evidence of [his/her] lack of insight into [his/her] mental condition.]**

In considering whether [*name of respondent***] is presently gravely disabled, you may not consider the likelihood of future deterioration relapse of a condition.**

New June 2005

Directions for Use

Read the bracketed sentence at the end of the first paragraph if appropriate to the facts of the case.

The principle regarding the likelihood of future deterioration may not apply in cases where the respondent has no insight into his or her mental disorder. (*Conservatorship of Walker* (1989) 206 Cal.App.3d 1572, 1576–1577 [254 Cal.Rptr. 552].)

If there is evidence concerning the availability of third parties that are willing to provide assistance to the proposed conservatee, see CACI No. 4008, *Third Party Assistance to Minor.*

Sources and Authority

- "Gravely Disabled Minor" Defined. Welfare and Institutions Code section 5585.25. ~~provides: " 'Gravely disabled minor' means a minor who, as a result of a mental disorder, is unable to use the elements of life that are essential to health, safety, and development, including food, clothing, and shelter, even though provided to the minor by others. Intellectual disability, epilepsy, or other~~

~~developmental disabilities, alcoholism, other drug abuse, or repeated antisocial behavior do not, by themselves, constitute a mental disorder."~~

- "[T]he actual commitment of a mentally disordered minor who is also a ward of the juvenile court can be accomplished *only* in accordance with the LPS Act." (*In re Michael E.* (1975) 15 Cal.3d 183, 189 [123 Cal.Rptr. 103, 538 P.2d 231].)

- "The actual commitment of a minor ward of a juvenile court to a state hospital can be lawfully accomplished only through the appointment of a conservator who is vested with authority to place the minor in such a hospital. Such conservator may be appointed only for a 'gravely disabled' minor who is entitled to a jury trial on the issue whether he is in fact 'gravely disabled.' Conservatorship shall be recommended to the court only if, on investigation, no suitable alternatives are available. The conservator's proposed powers and duties are to be recommended to the court. A conservator may commit the minor to a medical facility, including a state hospital, only when specifically authorized by the court. Conservatorships automatically terminate at the end of one year, and every six months a conservatee may petition for a rehearing as to his status. Finally, the entertainment of a petition for conservatorship is a function of the superior and not the juvenile court." (*In re Michael E., supra*, 15 Cal.3d at pp. 192–193, internal citations and footnotes omitted.)

- "Although a minor may not be legally responsible to provide for his basic personal needs, or may suffer disabilities other than a mental disorder which preclude him from so providing, the [statutory] definition is nevertheless applicable. A minor is 'gravely disabled' within the meaning of section 5008, subdivision (h)(1), when the trier of fact, on expert and other testimony, finds that disregarding other disabilities, if any, the minor, because of the further disability of a mental disorder, would be unable to provide for his basic personal needs. Immaturity, either physical or mental when not brought about by a mental disorder, is not a disability which would render a minor 'gravely disabled' within the meaning of section 5008." (*In re Michael E., supra*, 15 Cal.3d at p. 192, fn. 12.)

Secondary Sources

3 Witkin, California Procedure (5th ed. 2008) Actions, §§ 90, 97

Ross, California Practice Guide: Probate, Ch. 1-B, *Premortem Planning*, ¶ 1:112 et seq. (The Rutter Group)

2 California Conservatorship Practice (Cont.Ed.Bar) § 23.16

28 California Forms of Pleading and Practice, Ch. 329, *Juvenile Courts: Delinquency Proceedings*, § 329.73 (Matthew Bender)

32 California Forms of Pleading and Practice, Ch. 361A, *Mental Health and Mental Disabilities: Judicial Commitment, Health Services, and Civil Rights*, §§ 361A.42, 361A.45 (Matthew Bender)

4007. Third Party Assistance

A person is not "gravely disabled" if [he/she] can survive safely with the help of third party assistance. Third party assistance is the aid of family, friends, or others who are responsible, willing, and able to help provide for the person's basic needs for food, clothing, or shelter.

You must not consider offers by family, friends, or others unless they [have testified to/stated specifically in writing] their willingness and ability to help provide [*name of respondent***] with food, clothing, or shelter. Well-intended offers of assistance are not sufficient unless they will ensure the person can survive safely.**

[Assistance provided by a correctional facility does not constitute third party assistance.]

New June 2005

Sources and Authority

- Help of Family or Friends. Welfare and Institutions Code section 5350(e)~~. provides:~~

  ~~(1) Notwithstanding subparagraph (A) of paragraph (1) of subdivision (h) of Section 5008, a person is not "gravely disabled" if that person can survive safely without involuntary detention with the help of responsible family, friends, or others who are both willing and able to help provide for the person's basic personal needs for food, clothing, or shelter.~~

  ~~(2) However, unless they specifically indicate in writing their willingness and ability to help, family, friends, or others shall not be considered willing or able to provide this help.~~

  ~~(3) The purpose of this subdivision is to avoid the necessity for, and the harmful effects of, requiring family, friends, and others to publicly state, and requiring the court to publicly find, that no one is willing or able to assist the mentally disordered person in providing for the person's basic needs for food, clothing, or shelter.~~

- "[A] person is not 'gravely disabled' within the meaning of section 5008, subdivision (h)(1) if he or she is capable of surviving safely in freedom with the help of willing and responsible family members, friends or third parties." (*Conservatorship of Davis* (1981) 124 Cal.App.3d 313, 321 [177 Cal.Rptr. 369].)

- "As we view the broad purpose of the LPS Act, imposition of a conservatorship should be made only in situations where it is truly necessary. To accomplish this purpose evidence of the availability of third party assistance must be considered." (*Conservatorship of Early* (1983) 35 Cal.3d 244, 253 [197 Cal.Rptr. 539, 673 P.2d 209].)

- "The California Supreme Court in *Conservatorship of Early* ... concluded although a person might be gravely disabled if left to his or her own devices, he or she may be able to function successfully in freedom with the support and assistance of family and friends. The court recognized almost everyone depends to a greater or lesser extent upon others in order to survive in our complex society." (*Conservatorship of Jones* (1989) 208 Cal.App.3d 292, 299 [256 Cal.Rptr. 415].)

- "In *Conservatorship of Early* ... the Supreme Court held that it was error for the trial court to refuse to admit evidence of and to fail to instruct on the 'availability of assistance of others to meet the basic needs of a person afflicted with a mental disorder.' " (*Conservatorship of Baber* (1984) 153 Cal.App.3d 542, 552–553 [200 Cal.Rptr. 262], citation omitted.)

- "Corrections custody does not qualify as third party assistance under the LPS Act as interpreted by case law." (*Conservatorship of Jones, supra,* 208 Cal.App.3d at p. 303.)

- "Under section 5350, subdivision (e)(1), a person is not gravely disabled only if he or she can *survive safely* with the assistance of a third party. There is substantial evidence that the assistance offered by [respondent's mother], while well-intended, would not meet this requirement." (*Conservatorship of Johnson* (1991) 235 Cal.App.3d 693, 699 [1 Cal.Rptr.2d 46], original italics, footnote omitted.)

- "The parties have raised the issue of whether section 5350, subdivision (e)(2), precluded the trial court from considering [petitioner's mother's] testimony on the issue of third party assistance. This section provides that third parties shall not be considered willing or able to provide assistance unless they so indicate in writing. This section has no application in this case. The purpose of section 5350, subdivision (e), 'is to avoid the necessity for, and the harmful effects of, requiring family, friends, and others to publicly state, and requiring the court to publicly find, that no one is willing or able to assist the mentally disordered person in providing for the person's basic needs for food, clothing, or shelter.' This was not the case here; [petitioner's mother] took the stand at trial and testified as to her willingness to provide assistance to her daughter. No purpose of section 5350, subdivision (e), would be served by requiring her to also execute a writing to this effect." (*Conservatorship of Johnson, supra,* 235 Cal.App.3d at p. 699, n. 5.)

Secondary Sources

3 Witkin, California Procedure (5th ed. 2008) Actions, §§ 98, 100

2 California Conservatorship Practice (Cont.Ed.Bar) § 23.4

32 California Forms of Pleading and Practice, Ch. 361A, *Mental Health and Mental Disabilities: Judicial Commitment, Health Services, and Civil Rights*, § 361A.42 (Matthew Bender)

4008. Third Party Assistance to Minor

A minor is not "gravely disabled" if [he/she] can survive safely with the help of third party assistance. Third party assistance is the aid of family, friends, or others who are responsible, willing, and able to help provide for the minor's health, safety, and development, including food, shelter, and clothing.

You must not consider offers by family, friends, or others unless they [have testified to/stated specifically in writing] their willingness and ability to help provide for [*name of respondent***]'s health, safety, and development. Well-intended offers of assistance are not sufficient unless they will ensure the person can survive safely.**

[Assistance provided by a correctional facility does not constitute third party assistance.]

New June 2005

Sources and Authority

- Help of Family and Friends. Welfare and Institutions Code section 5350(e). ~~provides:~~

  ~~(1) Notwithstanding subparagraph (A) of paragraph (1) of subdivision (h) of Section 5008, a person is not "gravely disabled" if that person can survive safely without involuntary detention with the help of responsible family, friends, or others who are both willing and able to help provide for the person's basic personal needs for food, clothing, or shelter.~~

  ~~(2) However, unless they specifically indicate in writing their willingness and ability to help, family, friends, or others shall not be considered willing or able to provide this help.~~

  ~~(3) The purpose of this subdivision is to avoid the necessity for, and the harmful effects of, requiring family, friends, and others to publicly state, and requiring the court to publicly find, that no one is willing or able to assist the mentally disordered person in providing for the person's basic needs for food, clothing, or shelter.~~

- "[A] person is not 'gravely disabled' within the meaning of section 5008, subdivision (h)(1) if he or she is capable of surviving safely in freedom with the help of willing and responsible family members, friends or third parties." (*Conservatorship of Davis* (1981) 124 Cal.App.3d 313, 321 [177 Cal.Rptr. 369].)

- "Although a minor may not be legally responsible to provide for his basic personal needs, or may suffer disabilities other than a mental disorder which preclude him from so providing, the [statutory] definition is nevertheless applicable. A minor is 'gravely disabled' within the meaning of section

5008, subdivision (h)(1), when the trier of fact, on expert and other testimony, finds that disregarding other disabilities, if any, the minor, because of the further disability of a mental disorder, would be unable to provide for his basic personal needs. Immaturity, either physical or mental when not brought about by a mental disorder, is not a disability which would render a minor 'gravely disabled' within the meaning of section 5008." (*In re Michael E.* (1975) 15 Cal.3d 183, 192, fn. 12 [123 Cal.Rptr. 103, 538 P.2d 231].)

- "As we view the broad purpose of the LPS Act, imposition of a conservatorship should be made only in situations where it is truly necessary. To accomplish this purpose evidence of the availability of third party assistance must be considered." (*Conservatorship of Early* (1983) 35 Cal.3d 244, 253 [673 P.2d 209, 197 Cal.Rptr. 539].)

- "The California Supreme Court in *Conservatorship of Early* ... concluded although a person might be gravely disabled if left to his or her own devices, he or she may be able to function successfully in freedom with the support and assistance of family and friends. The court recognized almost everyone depends to a greater or lesser extent upon others in order to survive in our complex society." (*Conservatorship of Jones* (1989) 208 Cal.App.3d 292, 299 [256 Cal.Rptr. 415].)

- "Corrections custody does not qualify as third party assistance under the LPS Act as interpreted by case law." (*Conservatorship of Jones, supra,* 208 Cal.App.3d at p. 303.)

- "Under section 5350, subdivision (e)(1), a person is not gravely disabled only if he or she can *survive safely* with the assistance of a third party. There is substantial evidence that the assistance offered by [respondent's mother], while well-intended, would not meet this requirement." (*Conservatorship of Johnson* (1991) 235 Cal.App.3d 693, 699 [1 Cal.Rptr.2d 46], original italics, footnote omitted.)

- "The parties have raised the issue of whether section 5350, subdivision (e)(2), precluded the trial court from considering [petitioner's mother's] testimony on the issue of third party assistance. This section provides that third parties shall not be considered willing or able to provide assistance unless they so indicate in writing. This section has no application in this case. The purpose of section 5350, subdivision (e), 'is to avoid the necessity for, and the harmful effects of, requiring family, friends, and others to publicly state, and requiring the court to publicly find, that no one is willing or able to assist the mentally disordered person in providing for the person's basic needs for food, clothing, or shelter.' This was not the case here; [petitioner's mother] took the stand at trial and testified as to her willingness to provide assistance to her daughter. No purpose of section 5350, subdivision (e), would be served by requiring her to also execute a writing to this effect." (*Conservatorship of Johnson, supra,* 235 Cal.App.3d at p. 699, n. 5.)

Secondary Sources

3 Witkin, California Procedure (5th ed. 2008) Actions, §§ 90, 97, 100

2 California Conservatorship Practice (Cont.Ed.Bar) § 23.4

28 California Forms of Pleading and Practice, Ch. 329, *Juvenile Courts: Delinquency Proceedings*, § 329.73 (Matthew Bender)

32 California Forms of Pleading and Practice, Ch. 361A, *Mental Health and Mental Disabilities: Judicial Commitment, Health Services, and Civil Rights*, §§ 361A.42, 361A.45 (Matthew Bender)

4010. Limiting Instruction—Expert Testimony

You have heard testimony by an expert witness regarding reports and statements from hospital staff and other persons who have come into contact with [*name of respondent***]. This testimony was admitted for the limited purpose of establishing the basis for the opinion expressed by the testifying expert. You may consider those reports and statements to help you examine the basis of the expert's opinion. You may not use the reports and statements as independent proof of respondent's mental condition or [his/her] ability to provide for food, clothing, or shelter.**

New June 2005

Sources and Authority

- Limited Admissibility of Evidence. Evidence Code section 355. ~~provides: "When evidence is admissible as to one party or for one purpose and is inadmissible as to another party or for another purpose, the court upon request shall restrict the evidence to its proper scope and instruct the jury accordingly."~~

- "A psychiatrist is permitted to testify on a person's mental capacities and can rely on hearsay including statements made by the patient or by third persons." (*Conservatorship of Torres* (1986) 180 Cal.App.3d 1159, 1163 [226 Cal.Rptr. 142].)

- "When records are admitted ... a limiting instruction need not be given, *sua sponte*, but must be given upon request of counsel." (*Conservatorship of Buchanan* (1978) 78 Cal.App.3d 281, 288 [144 Cal.Rptr. 241], internal citation omitted, disapproved on other grounds in *Conservatorship of Early* (1983) 35 Cal.3d 244, 255 [197 Cal.Rptr. 539, 673 P.2d 209].)

Secondary Sources

3 Witkin, California Procedure (5th ed. 2008) Actions, § 102

32 California Forms of Pleading and Practice, Ch. 361A, *Mental Health and Mental Disabilities: Judicial Commitment, Health Services, and Civil Rights*, § 361A.43 (Matthew Bender)

4011. History of Disorder Relevant to the Determination of Grave Disability

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You must consider information about the history of [*name of respondent***]'s alleged mental disorder if you believe this information has a direct bearing on whether [he/she] is presently gravely disabled as a result of a mental disorder. Such information may include testimony from persons who have provided, or are providing, mental health or related support services to [***name of respondent***], [his/her] medical records, including psychiatric records, or testimony from family members, [***name of respondent***], or any other person designated by [***name of respondent***].**

You must not consider any evidence that you believe is irrelevant because it occurred either too long ago or under circumstances that are not similar to those involved in this case.

New June 2005

Sources and Authority

- Historical Course of Mental Disorder. Welfare and Institutions Code section 5008.2(a). ~~provides: "When applying the definition of mental disorder ... , the historical course of the person's mental disorder, as determined by available relevant information about the course of the person's mental disorder, shall be considered when it has a direct bearing on the determination of whether the person is a danger to others, or to himself or herself, or is gravely disabled, as a result of a mental disorder. The historical course shall include, but is not limited to, evidence presented by persons who have provided, or are providing, mental health or related support services to the patient, the patient's medical records as presented to the court, including psychiatric records, or evidence voluntarily presented by family members, the patient, or any other person designated by the patient. Facilities shall make every reasonable effort to make information provided by the patient's family available to the court. The hearing officer, court, or jury shall exclude from consideration evidence it determines to be irrelevant because of remoteness of time or dissimilarity of circumstances."~~

Secondary Sources

2 California Conservatorship Practice (Cont.Ed.Bar) § 23.84

32 California Forms of Pleading and Practice, Ch. 361A, *Mental Health and Mental Disabilities: Judicial Commitment, Health Services, and Civil Rights*, § 361A.33 (Matthew Bender)

4013. Affidavit of Voter Registration

If you find that [*name of respondent*], as a result of [a mental disorder/impairment by chronic alcoholism], is gravely disabled, then you must also decide whether [he/she] is capable of completing an affidavit of voter registration. To reach a verdict that [*name of respondent*] is not capable of completing an affidavit of voter registration, all 12 jurors must agree to that decision.

To complete an affidavit of voter registration, [*name of respondent*] must be able to state: the facts necessary to establish the [*name of respondent*] as a voter; [his/her] full name, residential address, and telephone number; [his/her] mailing address, if different from the residential address; [his/her] date of birth; the state or county of birth; [his/her] occupation; [his/her] political party affiliation; that [he/she] is not currently imprisoned or on parole for the conviction of a felony; and whether [he/she] has been registered at another address, under another name, or is intending to affiliate with another party, and if so the prior address, name, or party.

New June 2005

Directions for Use

This instruction should be given if the petition prays for this relief.

Sources and Authority

- Jury Finding on Completion of Affidavit of Voter Registration. Elections Code section 2208(b). ~~provides, in part:~~

  ~~(a) A person shall be deemed mentally incompetent, and therefore disqualified from voting, if, during the course of any of the proceedings set forth below, the court finds that the person is not capable of completing an affidavit of voter registration in accordance with Section 2150 and any of the following apply:~~

  ~~***~~

  ~~(2) A conservator for the person or the person and estate is appointed pursuant to Chapter 3 (commencing with Section 5350) of Part 1 of Division 5 of the Welfare and Institutions Code.~~

  ~~***~~

  ~~(b) If the proceeding under the Welfare and Institutions Code is heard by a jury, the jury shall unanimously find that the person is not capable of completing an affidavit of voter registration before the person shall be disqualified from voting.~~

- Affidavit of Voter Registration. Elections Code section 2150. ~~provides, in part:~~

~~(a) The affidavit of registration shall show:~~

~~(1) The facts necessary to establish the affiant as an elector.~~

~~(2) The affiant's name at length, including his or her given name, and a middle name or initial, or if the initial of the given name is customarily used, then the initial and middle name.~~

~~(3) The affiant's place of residence, residence telephone number, if furnished, and e-mail address, if furnished.~~

~~(4) The affiant's mailing address, if different from the place of residence.~~

~~(5) The affiant's date of birth to establish that he or she will be at least 18 years of age on or before the date of the next election.~~

~~(6) The state or country of the affiant's birth.~~

~~(7) The affiant's California driver's license number, California identification card number, or other identification number as specified by the Secretary of State.~~

~~(8) The affiant's political party affiliation.~~

~~(9) That the affiant is currently not imprisoned or on parole for the conviction of a felony.~~

~~(10) A prior registration portion indicating whether the affiant has been registered at another address, under another name, or as intending to affiliate with another party. If the affiant has been so registered, he or she shall give an additional statement giving that address, name, or party.~~

~~(b) The affiant shall certify the content of the affidavit as to its truth and correctness, under penalty of perjury, with the signature of his or her name and the date of signing. If the affiant is unable to write he or she shall sign with a mark or cross.~~

~~(c) The affidavit of registration shall also contain a space that would enable the affiant to state his or her ethnicity or race, or both. An affiant may not be denied the ability to register because he or she declines to state his or her ethnicity or race.~~

~~(d) If any person, including a deputy registrar, assists the affiant in completing the affidavit, that person shall sign and date the affidavit below the signature of the affiant.~~

Secondary Sources

2 California Conservatorship Practice (Cont.Ed.Bar) § 11.34

32 California Forms of Pleading and Practice, Ch. 361A, *Mental Health and Mental Disabilities: Judicial Commitment, Health Services, and Civil Rights*, § 361A.42 (Matthew Bender)

4108. Failure of Seller's Real Estate Broker to Conduct Reasonable Inspection—Essential Factual Elements (Civ. Code, § 2079)

[*Name of defendant***], as the real estate [broker/salesperson] for [***name of seller***], must conduct a reasonably competent and diligent visual inspection of the property offered for sale. Before the sale, [***name of defendant***] must then disclose to [***name of plaintiff***], the buyer, all facts that materially affect the value or desirability of the property that the investigation revealed or should have revealed.**

[*Name of plaintiff***] claims that [he/she/it] was harmed by [***name of defendant***]'s breach of this duty. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was [***name of seller***]'s real estate [broker/salesperson];**

2. **That [***name of defendant***] acted on [***name of seller***]'s behalf for purposes of [***insert description of transaction, e.g., "selling a residential property"***];**

3. **That [***name of defendant***] failed to conduct a reasonably competent and diligent visual inspection of the property;**

4. **That before the sale, [***name of defendant***] failed to disclose to [***name of plaintiff***] all facts that materially affected the value or desirability of the property that such an inspection would have revealed;**

5. **That [***name of plaintiff***] was harmed; and**

6. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New June 2013

Directions for Use

Give this instruction if the seller's real estate broker or salesperson did not conduct a visual inspection of the property and make disclosures to the buyer as required by Civil Code section 2079(a). For an instruction on the fiduciary duty of a real estate broker to his or her own client, see CACI No. 4107, *Duty of Disclosure of Real Estate Broker to Client*.

The duty created by Civil Code section 2079 is not a fiduciary duty; it is strictly a limited duty created by statute. (See *Michel v. Moore & Associates, Inc.* (2007) 156 Cal.App.4th 756, 762 [67 Cal.Rptr.3d 797].)

Sources and Authority

- Statutory Duties of Seller's Real Estate Broker. Civil Code section 2079(a). ~~provides:~~

~~It is the duty of a real estate broker or salesperson, licensed under Division 4 (commencing with Section 10000) of the Business and Professions Code, to a prospective purchaser of residential real property comprising one to four dwelling units, or a manufactured home as defined in Section 18007 of the Health and Safety Code, to conduct a reasonably competent and diligent visual inspection of the property offered for sale and to disclose to that prospective purchaser all facts materially affecting the value or desirability of the property that an investigation would reveal, if that broker has a written contract with the seller to find or obtain a buyer or is a broker who acts in cooperation with that broker to find and obtain a buyer.~~

- Scope of Required Inspection. Civil Code section 2079.3~~. provides:~~

  ~~The inspection to be performed pursuant to this article does not include or involve an inspection of areas that are reasonably and normally inaccessible to such an inspection, nor an affirmative inspection of areas off the site of the subject property or public records or permits concerning the title or use of the property, and, if the property comprises a unit in a planned development as defined in Section 11003 of the Business and Professions Code, a condominium as defined in Section 783, or a stock cooperative as defined in Section 11003.2 of the Business and Professions Code, does not include an inspection of more than the unit offered for sale, if the seller or the broker complies with the provisions of Section 1368.~~

- "Section 2079 requires sellers' real estate brokers, and their cooperating brokers, to conduct a 'reasonably competent and diligent visual inspection of the property,' and to disclose all material facts such an investigation would reveal to a prospective buyer." (*Field v. Century 21 Klowden-Forness Realty* (1998) 63 Cal.App.4th 18, 23 [73 Cal.Rptr.2d 784], footnote omitted.)

- "Section 2079 was enacted to codify and focus the holding in *Easton v. Strassburger*, *supra,* 152 Cal. App. 3d 90. In *Easton,* the court recognized that case law imposed a duty on *sellers'* brokers to disclose material facts *actually known* to the broker. *Easton* expanded the holdings of former decisions to include a requirement that sellers' brokers must diligently inspect residential property and disclose material facts they obtain from that investigation. Further, the case held sellers' brokers are chargeable with knowledge they *should have known* had they conducted an adequate investigation." (*Field, supra,* 63 Cal.App.4th at p. 24, original italics.)

- "Section 2079 statutorily limits the duty of inspection recognized in *Easton* to one requiring only a *visual* inspection. Further, the statutory scheme expressly states a selling broker has no obligation to purchasers to investigate public records or permits pertaining to title or use of the property." (*Field, supra,* 63 Cal.App.4th at p. 24, original italics; see Civ. Code, § 2079.3.)

- "The statutory duties owed by sellers' brokers under section 2079 are separate and independent of the duties owed by brokers to their own clients who are buyers." (*William L. Lyon & Associates, Inc. v. Superior Court* (2012) 204 Cal.App.4th 1294, 1305 [139 Cal.Rptr.3d 670].)

- "In accordance with the clear and unambiguous language of section 2079, the inspection and disclosure duties of residential real estate brokers and their agents apply exclusively to prospective buyers, and not to other persons who are not parties to the real estate transaction. Only a transferee, that is, the ultimate purchaser, can recover from a broker or agent for breach of these duties."

(*Coldwell Banker Residential Brokerage Co. v. Superior Court* (2004) 117 Cal.App.4th 158, 165 [11 Cal.Rptr.3d 564].)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency, § 66

Greenwald et al., California Practice Guide: Real Property Transactions, Ch. 2-C, *Broker's Relationship And Obligations To Principal And Third Parties*, ¶ 2:173 et seq. (The Rutter Group)

3 California Real Estate Law and Practice, Ch. 63, *Duties and Liabilities of Brokers,* § 63.20 (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 103, *Brokers*, § 103.31 et seq. (Matthew Bender)

2A California Points and Authorities, Ch. 31, *Brokers and Salespersons,* § 31.142 et seq. (Matthew Bender)

9 California Legal Forms, Ch. 23, *Real Property Sales Agreements*, § 23.20 (Matthew Bender)

Miller & Starr, California Real Estate (3d ed. 2008) Ch. 1, *Duty of Seller of Real Property to Disclose*, § 1:41 (Thomson Reuters West)

4201. Factors to Consider in Determining Actual Intent to Defraud (Civ. Code, § 3439.04(b))

In determining whether [*name of debtor***] intended to hinder, delay, or defraud any creditors by [transferring property/incurring an obligation] to [***name of defendant***], you may consider, among other factors, the following:**

[(a) Whether the [transfer/obligation] was to [a/an] [*insert relevant description of insider, e.g., "relative," "business partner," etc.***];]**

[(b) Whether [*name of debtor***] retained possession or control of the property after it was transferred;]**

[(c) Whether the [transfer/obligation] was disclosed or concealed;]

[(d) Whether before the [transfer was made/obligation was incurred] [*name of debtor***] had been sued or threatened with suit;]**

[(e) Whether the transfer was of substantially all of [*name of debtor***]'s assets;]**

[(f) Whether [*name of debtor***] fled;]**

[(g) Whether [*name of debtor***] removed or concealed assets;]**

[(h) Whether the value received by [*name of debtor***] was not reasonably equivalent to the value of the [asset transferred/amount of the obligation incurred];]**

[(i) Whether [*name of debtor***] was insolvent or became insolvent shortly after the [transfer was made/obligation was incurred];]**

[(j) Whether the transfer occurred shortly before or shortly after a substantial debt was incurred;]

[(k) Whether [*name of debtor***] transferred the essential assets of the business to a lienholder who transferred the assets to an insider of [***name of defendant***];] [and]**

[(l) [*insert other appropriate factor***].]**

Evidence of one or more factors does not automatically require a finding that [*name of defendant***] acted with the intent to hinder, delay, or defraud creditors. The presence of one or more of these factors is evidence that may suggest the intent to delay, hinder, or defraud.**

New June 2006

Directions for Use

Some or all of the stated factors may not be necessary in every case. Other factors may be added as appropriate depending on the facts of the case.

Sources and Authority

- Determination of Actual Intent. Civil Code section 3439.04(b). ~~provides:~~
  ~~(b) In determining actual intent under paragraph (1) of subdivision (a), consideration may be given, among other factors, to any or all of the following:~~
  ~~(1) Whether the transfer or obligation was to an insider.~~
  ~~(2) Whether the debtor retained possession or control of the property transferred after the transfer.~~
  ~~(3) Whether the transfer or obligation was disclosed or concealed.~~
  ~~(4) Whether before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit.~~
  ~~(5) Whether the transfer was of substantially all the debtor's assets.~~
  ~~(6) Whether the debtor absconded.~~
  ~~(7) Whether the debtor removed or concealed assets.~~
  ~~(8) Whether the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred.~~
  ~~(9) Whether the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred.~~
  ~~(10) Whether the transfer occurred shortly before or shortly after a substantial debt was incurred.~~
  ~~(11) Whether the debtor transferred the essential assets of the business to a lienholder who transferred the assets to an insider of the debtor.~~

- "Over the years, courts have considered a number of factors, the 'badges of fraud' described in a Legislative Committee comment to section 3439.04, in determining actual intent. Effective January 1, 2005, those factors are now codified as section 3439.04, subdivision (b) and include considerations such as whether the transfer was made to an insider, whether the transferee retained possession or control after the property was transferred, whether the transfer was disclosed, whether the debtor had been sued or threatened with suit before the transfer was made, whether the value received by the debtor was reasonably equivalent to the value of the transferred asset, and similar concerns. According to section 3439.04, subdivision (c), this amendment 'does not constitute a change in, but is declaratory of, existing law.' " (*Filip v. Bucurenciu* (2005) 129 Cal.App.4th 825, 834 [28 Cal.Rptr.3d 884], internal citations omitted.)

- "[The factors in Civil Code section 3439.04(b)] do not create a mathematical formula to establish actual intent. There is no minimum number of factors that must be present before the scales tip in favor of finding of actual intent to defraud. This list of factors is meant to provide guidance to the trial court, not compel a finding one way or the other." (*Filip, supra,* 129 Cal.App.4th at p. 834.)

- "Even the existence of several 'badges of fraud' may be insufficient to raise a triable issue of material fact." (*Annod Corp. v. Hamilton & Samuels* (2002) 100 Cal.App.4th 1286, 1299 [123 Cal.Rptr.2d 924], internal citation omitted.)

- "Whether a conveyance was made with fraudulent intent is a question of fact, and proof often consists of inferences from the circumstances surrounding the transfer." (*Filip, supra,* 129 Cal.App.4th at p. 834, internal citation omitted.)

Secondary Sources

9 California Forms of Pleading and Practice, Ch. 94, *Bankruptcy*, § 94.55[4][b] (Matthew Bender)

23 California Forms of Pleading and Practice, Ch. 270, *Fraudulent Conveyances*, § 270.40 (Matthew Bender)

4202. Constructive Fraudulent Transfer—Essential Factual Elements (Civ. Code, § 3439.04(a)(2))

[*Name of plaintiff***] claims [he/she/it] was harmed because [***name of debtor***] [transferred property/incurred an obligation] to [***name of defendant***] and, as a result, was unable to pay [***name of plaintiff***] money that was owed. [This is called "constructive fraud."] To establish this claim against [***name of defendant***], [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] has a right to payment from [***name of debtor***] for [***insert amount of claim***];**

2. **That [***name of debtor***] [transferred property/incurred an obligation] to [***name of defendant***];**

3. **That [***name of debtor***] did not receive a reasonably equivalent value in exchange for the [transfer/obligation];**

4. **[That [***name of debtor***] was in business or about to start a business or enter a transaction when [his/her/its] remaining assets were unreasonably small for the business or transaction;] [or]**

   [That [*name of debtor***] intended to incur debts beyond [his/her/its] ability to pay as they became due;] [or]**

   [That [*name of debtor***] believed or reasonably should have believed that [he/she/it] would incur debts beyond [his/her/its] ability to pay as they became due;]**

5. **That [***name of plaintiff***] was harmed; and**

6. **That [***name of debtor***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

If you decide that [*name of plaintiff***] has proved all of the above, [he/she/it] does not have to prove that [***name of debtor***] intended to defraud any creditors.**

[It does not matter whether [*name of plaintiff***]'s right to payment arose before or after [***name of debtor***] [transferred property/incurred an obligation].]**

New June 2006

Directions for Use

This instruction assumes the defendant is a transferee of the original debtor. Read the bracketed second sentence in cases in which the plaintiff is asserting causes of action for both actual and constructive fraud. Read the last bracketed sentence in cases where the plaintiff's alleged claim arose after the defendant's property was transferred or the obligation was incurred.

Courts have held that there is a right to a jury trial whenever the remedy sought is monetary relief, including even the return of a "determinate sum of money." (*Wisden v. Superior Court* (2004) 124 Cal.App.4th 750, 757 [21 Cal.Rptr.3d 523], internal citation omitted.) If the only remedy sought is the return of a particular nonmonetary asset, the action is an equitable action. However, even where a specific nonmonetary asset is involved, a conspiracy claim or an action against any party other than the transferee who possesses the asset (e.g., "the person for whose benefit the transfer was made" (Civ. Code, § 3439.08(b)(1)) necessarily would seek monetary relief and give rise to a right to a jury trial.

Sources and Authority

- When Transfer is Fraudulent. Civil Code section 3439.04(a)(2). ~~provides:~~

  ~~A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation as follows:~~

  ~~Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor either:~~

  ~~(A) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction.~~

  ~~(B) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.~~

- When Value is Given. Civil Code section 3439.03. ~~provides: "Value is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied, but value does not include an unperformed promise made otherwise than in the ordinary course of the promisor's business to furnish support to the debtor or another person."~~

- "There are two forms of constructive fraud under the UFTA. Civil Code section 3439.04 … provides that a transfer is fraudulent if the debtor did not receive reasonably equivalent consideration and either '(1) Was engaged or about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or (2) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.' Civil Code section 3439.05 provides that a transfer is fraudulent as to an existing creditor if the debtor does not receive reasonably equivalent value and 'was insolvent at that time or ... became insolvent as a result of the transfer ... .' " (*Mejia v. Reed* (2003) 31 Cal.4th 657, 669–670 [3 Cal.Rptr.3d 390, 74 P.3d 166].)

- "A well-established principle of the law of fraudulent transfers is, 'A transfer in fraud of creditors may be attacked only by one who is injured thereby. Mere intent to delay or defraud is not sufficient; injury to the creditor must be shown affirmatively. In other words, prejudice to the plaintiff is essential. It cannot be said that a creditor has been injured unless the transfer puts beyond [her] reach

property [she] otherwise would be able to subject to the payment of [her] debt.' " (*Mehrtash v. Mehrtash* (2001) 93 Cal.App.4th 75, 80 [112 Cal.Rptr.2d 802], internal citations omitted.)

Secondary Sources

17 California Forms of Pleading and Practice, Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake*, §§ 215.70[5], 215.111[2][c] (Matthew Bender)

23 California Forms of Pleading and Practice, Ch. 270, *Fraudulent Conveyances*, §§ 270.42, 270.193, 270.194 (Matthew Bender)

4203. Constructive Fraudulent Transfer (Insolvency)—Essential Factual Elements (Civ. Code, § 3439.05)

[*Name of plaintiff***] claims [he/she/it] was harmed because [***name of debtor***] [transferred property/incurred an obligation] to [***name of defendant***] and was unable to pay [***name of plaintiff***] money that was owed. [This is called "constructive fraud."] To establish this claim against [***name of defendant***], [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] has a right to payment from [***name of debtor***] for [***insert amount of claim***];**
2. **That [***name of debtor***] [transferred property/incurred an obligation] to [***name of defendant***];**
3. **That [***name of debtor***] did not receive a reasonably equivalent value in exchange for the [transfer/obligation];**
4. **That [***name of plaintiff***]'s right to payment from [***name of debtor***] arose before [***name of debtor***] [transferred property/incurred an obligation];**
5. **That [***name of debtor***] was insolvent at that time or became insolvent as a result of the transfer or obligation;**
6. **That [***name of plaintiff***] was harmed; and**
7. **That [***name of debtor***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

If you decide that [*name of plaintiff***] has proved all of the above, [he/she/it] does not have to prove that [***name of debtor***] intended to defraud creditors.**

New June 2006

Directions for Use

This instruction assumes the defendant is a transferee of the debtor. This instruction may be used along with CACI No. 4202, *Constructive Fraudulent Transfer—Essential Factual Elements,* in cases where it is alleged that the plaintiff became a creditor before the transfer was made or the obligation was incurred. Read the bracketed second sentence in cases in which the plaintiff is asserting causes of action for both actual and constructive fraud.

Courts have held that there is a right to a jury trial whenever the remedy sought is monetary relief, including even the return of a "determinate sum of money." (*Wisden v. Superior Court* (2004) 124 Cal.App.4th 750, 757 [21 Cal.Rptr.3d 523], internal citation omitted.) If the only remedy sought is the return of a particular nonmonetary asset, the action is an equitable action. However, even where a specific nonmonetary asset is involved, a conspiracy claim or an action against any party other than the transferee

who possesses the asset (e.g., "the person for whose benefit the transfer was made" (Civ. Code, § 3439.08(b)(1)) necessarily would seek monetary relief and give rise to a right to a jury trial.

Sources and Authority

- When Transfer is Fraudulent. Civil Code section 3439.05. ~~provides: "A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation."~~

- When Value is Given. Civil Code section 3439.03. ~~provides: "Value is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied, but value does not include an unperformed promise made otherwise than in the ordinary course of the promisor's business to furnish support to the debtor or another person."~~

- "There are two forms of constructive fraud under the UFTA. Civil Code section 3439.04 … provides that a transfer is fraudulent if the debtor did not receive reasonably equivalent consideration and either '(1) Was engaged or about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or (2) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.' Civil Code section 3439.05 provides that a transfer is fraudulent as to an existing creditor if the debtor does not receive reasonably equivalent value and 'was insolvent at that time or ... became insolvent as a result of the transfer ... .' " (*Mejia v. Reed* (2003) 31 Cal.4th 657, 669–670 [3 Cal.Rptr.3d 390, 74 P.3d 166].)

- "A well-established principle of the law of fraudulent transfers is, 'A transfer in fraud of creditors may be attacked only by one who is injured thereby. Mere intent to delay or defraud is not sufficient; injury to the creditor must be shown affirmatively. In other words, prejudice to the plaintiff is essential. It cannot be said that a creditor has been injured unless the transfer puts beyond [her] reach property [she] otherwise would be able to subject to the payment of [her] debt.' " (*Mehrtash v. Mehrtash* (2001) 93 Cal.App.4th 75, 80 [112 Cal.Rptr.2d 802], internal citations omitted.)

Secondary Sources

17 California Forms of Pleading and Practice, Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake*, §§ 215.70[5], 215.111[2][c] (Matthew Bender)

23 California Forms of Pleading and Practice, Ch. 270, *Fraudulent Conveyances*, §§ 270.42, 270.191, 270.192 (Matthew Bender)

4204. "Transfer" Explained

"Transfer" means every method of parting with a debtor's property or an interest in a debtor's property.

[*Read one of the following options:***]**

[A transfer may be direct or indirect, absolute or conditional, or voluntary or involuntary. A transfer includes [payment of money/release/lease/the creation of a lien or other encumbrance].]

[In this case, [*describe transaction***] is a transfer.]**

New June 2006

Directions for Use

Include only the bracketed terms at the end of the third sentence that are at issue in the case. Read the second bracketed sentence if the transaction has been stipulated to or determined as a matter of law. Otherwise, read the first bracketed option.

Sources and Authority

- "Transfer" Defined. Civil Code section 3439.01(i). ~~provides: " 'Transfer' means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance."~~

- Nonvoidable Transfers. Civil Code section 3439.08(e). ~~provides:~~
  ~~A transfer is not voidable under paragraph (2) of subdivision (a) of Section 3439.04 or Section 3439.05 if the transfer results from the following:~~

  ~~(1) Termination of a lease upon default by the debtor when the termination is pursuant to the lease and applicable law.~~
  ~~(2) Enforcement of a lien in a noncollusive manner and in compliance with applicable law, including Division 9 (commencing with Section 9101) of the Commercial Code, other than a retention of collateral under Sections 9620 and 9621 of the Commercial Code and other than a voluntary transfer of the collateral by the debtor to the lienor in satisfaction of all or part of the secured obligation.~~

- "On its face, the UFTA applies to all transfers. Civil Code, section § 3439.01, subdivision (i) defines '[t]ransfer' as 'every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset ... .' The UFTA excepts only certain transfers resulting from lease terminations or lien enforcement." (*Mejia v. Reed* (2003) 31 Cal.4th 657, 664 [3 Cal.Rptr.3d 390, 74 P.3d 166], internal citations omitted.)

Secondary Sources

23 California Forms of Pleading and Practice, Ch. 270, *Fraudulent Conveyances*, §§ 270.35[1], 270.37 (Matthew Bender)

4205. "Insolvency" Explained

[[*Name of debtor***] was insolvent [at the time/as a result] of the transaction if, at fair valuations, the total amount of [his/her/its] debts was greater than the total amount of [his/her/its] assets.]**

In determining [*name of debtor***]'s assets, do not include property that has been transferred, concealed, or removed with intent to hinder, delay, or defraud creditors. [In determining [***name of debtor***]'s debts, do not include a debt to the extent it is secured by a valid lien on [his/her/its] property that is not included as an asset.]**

New June 2006

Directions for Use

If the debtor is a partnership, refer to Civil Code section 3439.02(b). If there are issues regarding specific assets, see Civil Code sections 3439.02(e) and 3439.01(a).

Read the bracketed last sentence if appropriate to the facts.

Sources and Authority

- When Debtor is Insolvent. Civil Code section 3439.02. ~~provides:~~
  ~~(a) A debtor is insolvent if, at fair valuations, the sum of the debtor's debts is greater than all of the debtor's assets.~~
  ~~(b) A debtor which is a partnership is insolvent if, at fair valuations, the sum of the partnership's debts is greater than the aggregate of all of the partnership's assets and the sum of the excess of the value of each general partner's nonpartnership assets over the partner's nonpartnership debts.~~
  ~~(c) A debtor who is generally not paying his or her debts as they become due is presumed to be insolvent.~~
  ~~(d) Assets under this section do not include property that has been transferred, concealed, or removed with intent to hinder, delay, or defraud creditors or that has been transferred in a manner making the transfer voidable under this chapter.~~
  ~~(e) Debts under this section do not include an obligation to the extent it is secured by a valid lien on property of the debtor not included as an asset.~~

- "Asset" Defined. Civil Code section 3439.01(a). ~~provides:~~
  ~~"Asset" means property of a debtor, but the term does not include the following:~~

  ~~(1) Property to the extent it is encumbered by a valid lien.~~
  ~~(2) Property to the extent it is generally exempt under nonbankruptcy law.~~
  ~~(3) An interest in property held in tenancy by the entireties to the extent it is not subject to process by a creditor holding a claim against only one tenant.~~

- "To determine solvency, the value of a debtor's assets and debts are compared. By statutory definition, a debtor's assets exclude property that is exempt from judgment enforcement. Retirement accounts are generally exempt." (*Mejia v. Reed* (2003) 31 Cal.4th 657, 670 [3 Cal.Rptr.3d 390, 74 P.3d 166], internal citations omitted.)

- "We conclude … that future child support payments should not be viewed as a debt under the UFTA." (*Mejia, supra*, 31 Cal.4th at p. 671.)

Secondary Sources

23 California Forms of Pleading and Practice, Ch. 270, *Fraudulent Conveyances*, §§ 270.42[3], 270.192 (Matthew Bender)

26 California Forms of Pleading and Practice, Ch. 307, *Insolvency* (Matthew Bender)

4206. Presumption of Insolvency

A debtor who is generally not paying [his/her/its] debts as they become due is presumed to be insolvent.

In determining whether [*name of debtor***] was generally not paying [his/her/its] debts as they became due, you may consider all of the following:**

(a) The number of [*name of debtor***]'s debts;**

(b) The percentage of debts that were not being paid;

(c) How long those debts remained unpaid;

(d) Whether legitimate disputes or other special circumstances explain any failure to pay the debts; and

(e) [*Name of debtor***]'s payment practices before the period of alleged nonpayment [and the payment practices of [***name of debtor***]'s [trade/industry]].**

If [*name of plaintiff***] proves that [***name of debtor***] was generally not paying debts as they became due, then you should find that [***name of debtor***] was insolvent unless [***name of defendant***] proves that [***name of debtor***] was solvent.**

New June 2006

Directions for Use

This instruction should be read in conjunction with CACI No. 4205, *Insolvency Explained*.

Sources and Authority

- Presumption of Insolvency. Civil Code section 3439.02(c). ~~provides: "A debtor who is generally not paying his or her debts as they become due is presumed to be insolvent."~~
- The Legislative Committee Comment to Civil Code section 3439.02 states: "Subdivision (c) establishes a rebuttable presumption of insolvency from the fact of general nonpayment of debts as they become due. … The presumption imposes on the party against whom the presumption is directed the burden of proving that the nonexistence of insolvency as defined in subdivision (a) is more probable than its existence."
- The Legislative Committee Comment to Civil Code section 3439.02 states: "In determining whether a debtor is paying its debts generally as they become due, the court should look at more than the amount and due dates of the indebtedness. The court should also take into account such factors as the

number of the debtor's debts, the proportion of those debts not being paid, the duration of the nonpayment, and the existence of bona fide disputes or other special circumstances alleged to constitute an explanation for the stoppage of payments. The court's determination may be affected by a consideration of the debtor's payment practices prior to the period of alleged nonpayment and the payment practices of the trade or industry in which the debtor is engaged."

Secondary Sources

23 California Forms of Pleading and Practice, Ch. 270, *Fraudulent Conveyances*, § 270.42[3][e], [4] (Matthew Bender)

26 California Forms of Pleading and Practice, Ch. 307, *Insolvency* (Matthew Bender)

4207. Affirmative Defense—Good Faith (Civ. Code, § 3439.08)

[*Name of defendant***] claims [he/she/it] is not liable to [***name of plaintiff***] [on the claim for actual fraud] because [***name of defendant***] [***insert one of the following:***]**

[took the property from [*name of debtor***] in good faith and for a reasonably equivalent value.]**

[or]

[received the property from someone who had taken the property from [*name of debtor***] in good faith and for a reasonably equivalent value.]**

To succeed on this defense, [*name of defendant***] must prove both of the following:**

[Use one of the following two sets of elements:]

[1. That [*name of defendant***] took the property from [***name of debtor***] in good faith; and**

2. That [he/she/it] took the property for a reasonably equivalent value.]

[or]

[1. That [*name of defendant***] received the property from [***name of third party***], who had taken the property from [***name of debtor***] in good faith; and**

2. That [*name of third party***] had taken the property for a reasonably equivalent value.]**

"Good faith" means that [*name of defendant/third party***] acted without actual fraudulent intent and that [he/she/it] did not conspire with [***name of debtor***] or otherwise actively participate in any fraudulent scheme. If you decide that [***name of debtor***] had fraudulent intent and that [***name of defendant/third party***] knew it, then you may consider [his/her/its] knowledge in combination with other facts in deciding the question of [***name of defendant/third party***]'s good faith.**

New June 2006

Directions for Use

This instruction is appropriate in cases involving allegations of actual fraud under the Uniform Fraudulent Transfer Act. The bracketed language in the first sentence is not necessary if the plaintiff is bringing a claim for actual fraud only.

Sources and Authority

- Good-Faith Transferee; Remedies. Civil Code section 3439.08. ~~provides:~~

~~(a) A transfer or an obligation is not voidable under paragraph (1) of subdivision (a) of Section 3439.04, against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee.~~

~~(b) Except as otherwise provided in this section, to the extent a transfer is voidable in an action by a creditor under paragraph (1) of subdivision (a) of Section 3439.07, the creditor may recover judgment for the value of the asset transferred, as adjusted under subdivision (c), or the amount necessary to satisfy the creditor's claim, whichever is less. The judgment may be entered against the following:~~

~~(1) The first transferee of the asset or the person for whose benefit the transfer was made.~~

~~(2) Any subsequent transferee other than a good faith transferee who took for value or from any subsequent transferee.~~

~~(c) If the judgment under subdivision (b) is based upon the value of the asset transferred, the judgment shall be for an amount equal to the value of the asset at the time of the transfer, subject to adjustment as the equities may require.~~

~~(d) Notwithstanding voidability of a transfer or an obligation under this chapter, a good faith transferee or obligee is entitled, to the extent of the value given the debtor for the transfer or obligation, to the following:~~

~~(1) A lien on or a right to retain any interest in the asset transferred.~~

~~(2) Enforcement of any obligation incurred.~~

~~(3) A reduction in the amount of the liability on the judgment.~~

~~(e) A transfer is not voidable under paragraph (2) of subdivision (a) of Section 3439.04 or Section 3439.05 if the transfer results from the following:~~

~~(1) Termination of a lease upon default by the debtor when the termination is pursuant to the lease and applicable law.~~

~~(2) Enforcement of a lien in a noncollusive manner and in compliance with applicable law, including Division 9 (commencing with Section 9101) of the Commercial Code, other than a retention of collateral under Sections 9620 and 9621 of the Commercial Code and other than a voluntary transfer of the collateral by the debtor to the lienor in satisfaction of all or part of the secured obligation.~~

- When Value is Given. Civil Code section 3439.03~~. provides: "Value is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied, but value does not include an unperformed promise made otherwise than in the ordinary course of the promisor's business to furnish support to the debtor or another person."~~

- "The Legislative Committee comment to Civil Code section 3439.08, subdivision (a), provides that 'good faith,' within the meaning of the provision, 'means that the transferee acted without actual fraudulent intent and that he or she did not collude with the debtor or otherwise actively participate in the fraudulent scheme of the debtor. The transferee's knowledge of the transferor's fraudulent intent may, in combination with other facts, be relevant on the issue of the transferee's good faith … .' " (*Annod Corp. v. Hamilton & Samuels* (2002) 100 Cal.App.4th 1286, 1299 [123 Cal.Rptr.2d 924], internal citations omitted.)

Secondary Sources

23 California Forms of Pleading and Practice, Ch. 270, *Fraudulent Conveyances*, §§ 270.35[2], 270.44[1], 270.47[2], [3] (Matthew Bender)

4208. Affirmative Defense—Statute of Limitations—Actual and Constructive Fraud (Civ. Code, § 3439.09)

[*Name of defendant***] contends that [***name of plaintiff***]'s lawsuit was not filed within the time set by law.**

[[With respect to [*name of plaintiff***]'s claim of actual fraud,] [To/to] succeed on this defense, [***name of defendant***] must prove that [***name of plaintiff***] did not file [his/her/its] lawsuit within four years after the [transfer was made/obligation was incurred] [or, if later than four years, within one year after the [transfer/obligation] was or could reasonably have been discovered by [***name of plaintiff***]]. But in any event, the lawsuit must have been filed within seven years after the [transfer was made/the obligation was incurred].]**

[[With respect to [*name of plaintiff***]'s claim of constructive fraud,] [To/to] succeed on this defense, [***name of defendant***] must prove that [***name of plaintiff***] did not file [his/her/its] lawsuit within four years after the [transfer was made/obligation was incurred].]**

New June 2006; Revised December 2007

Directions for Use

Read the first bracketed paragraph regarding delayed discovery in cases involving actual fraud, and the second in cases involving constructive fraud. Do not read the first bracketed phrases in those paragraphs unless the plaintiff has brought both actual and constructive fraud claims. This instruction applies only to claims brought under the UFTA.

Sources and Authority

- Statute of Limitations. Civil Code section 3439.09. ~~provides:~~
  ~~A cause of action with respect to a fraudulent transfer or obligation under this chapter is extinguished unless action is brought pursuant to subdivision (a) of Section 3439.07 or levy made as provided in subdivision (b) or (c) of Section 3439.07:~~

  ~~(a) Under paragraph (1) of subdivision (a) of Section 3439.04, within four years after the transfer was made or the obligation was incurred or, if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant.~~

  ~~(b) Under paragraph (2) of subdivision (a) of Section 3439.04 or Section 3439.05, within four years after the transfer was made or the obligation was incurred.~~

  ~~(c) Notwithstanding any other provision of law, a cause of action with respect to a fraudulent transfer or obligation is extinguished if no action is brought or levy made within seven years after the transfer was made or the obligation was incurred.~~

- "[T]he UFTA is not the exclusive remedy by which fraudulent conveyances and transfers may be attacked. They may also be attacked by, as it were, a common law action. If and as such an action is brought, the applicable statute of limitations is section 338 (d) and, more importantly, the cause of action accrues not when the fraudulent transfer occurs but when the judgment against the debtor is secured (or maybe even later, depending upon the belated discovery issue)." (*Macedo v. Bosio* (2001) 86 Cal.App.4th 1044, 1051 [104 Cal.Rptr.2d 1].)

- "In the context of the scheme of law of which section 3934.09 is a part, where an alleged fraudulent transfer occurs while an action seeking to establish the underlying liability is pending, and where a judgment establishing the liability later becomes final, we construe the four-year limitation period, i.e., the language, 'four years after the transfer was made or the obligation was incurred,' " to accommodate a tolling until the underlying liability becomes fixed by a final judgment." (*Cortez v. Vogt* (1997) 52 Cal.App.4th 917, 920 [60 Cal.Rptr.2d 841].)

Secondary Sources

23 California Forms of Pleading and Practice, Ch. 270, *Fraudulent Conveyances*, §§ 270.49, 270.50 (Matthew Bender)

UNLAWFUL DETAINER

4300. Introductory Instruction

This is an action for what is called unlawful detainer. [*Name of plaintiff***], the [landlord/tenant], claims that [***name of defendant***] is [his/her/its] [tenant/subtenant] under a [lease/rental agreement/sublease] and that [***name of defendant***] no longer has the right to occupy the property [by subleasing to [***name of subtenant***]]. [***Name of plaintiff***] seeks to recover possession of the property from [***name of defendant***]. [***Name of defendant***] claims that [he/she/it] still has the right to occupy the property because [***insert defenses at issue***].**

The property involved in this case is [*describe property: e.g., "an apartment," "a house," "space in a commercial building"***] located in [***city or area***] at [***address***].**

New August 2007

Directions for Use

If the plaintiff is the landlord or owner and the defendant is the tenant, select "landlord" and "tenant," in the first sentence. If the plaintiff is a tenant seeking to recover possession from a subtenant, select "tenant" and "subtenant." (Code Civ. Proc., § 1161(3).)

If the plaintiff is the landlord or owner, select either "lease" or "rental agreement" in the first sentence. Commercial documents are usually called "leases" while residential documents are often called "rental agreements." Select the term that is used on the written document. If the plaintiff is a tenant seeking to recover possession from a subtenant, select "sublease."

If the defendant is a tenant who has subleased the premises to someone else, add the bracketed language in the first paragraph referring to subleasing.

Sources and Authority

- Right to Jury Trial. Code of Civil Procedure section 1171. ~~provides: "Whenever an issue of fact is presented by the pleadings, it must be tried by a jury, unless such jury be waived as in other cases. The jury shall be formed in the same manner as other trial juries in an action of the same jurisdictional classification in the Court in which the action is pending."~~

- Right of Tenant to Bring Unlawful Detainer Against Subtenant. Code of Civil Procedure section 1161(3). ~~provides, in part: "A tenant may take proceedings, similar to those prescribed in this chapter, to obtain possession of the premises let to a subtenant or held by a servant, employee, agent, or licensee, in case of his or her unlawful detention of the premises underlet to him or her or held by him or her."~~

- "The remedy of unlawful detainer is designed to provide means by which the timely possession of premises which are wrongfully withheld may be secured to the person entitled thereto." (*Knowles v. Robinson* (1963) 60 Cal.2d 620, 625 [36 Cal.Rptr. 33, 387 P.2d 833].)

- "Chapter 4 of title 3 of part 3 of the Code of Civil Procedure is commonly known as the Unlawful Detainer Act (hereafter, the Act). The Act is broad in scope and available to both lessors and lessees who have suffered certain wrongs committed by the other. Procedures and proceedings in unlawful detainer were not known at common law and are entirely creatures of statute. As such, they are governed solely by the statutes which created them. Thus, where the Act 'deals with matters of practice, its provisions supersede the rules of practice contained in other portions of the code.' " (*Losornio v. Motta* (1998) 67 Cal.App.4th 110, 113 [78 Cal.Rptr.2d 799], internal citations omitted.)

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2006) Real Property, § 703

2 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 9.5, 9.34–9.36

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) §§ 1.4–1.5

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, § 210.01 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.02

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.12 (Matthew Bender)

Miller & Starr, California Real Estate, ~~(Thomson West)~~ Ch. 19, *Landlord-Tenant*, § 19:214 (Thomson Reuters)

UNLAWFUL DETAINER

4301. Expiration of Fixed-Term Tenancy—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] [and [***name of subtenant***], a subtenant of [***name of defendant***],] no longer [has/have] the right to occupy the property because the [lease/rental agreement/sublease] has ended. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [owns/leases] the property;**

2. **That [***name of plaintiff***] [leased/subleased] the property to [***name of defendant***] until [***insert end date***];**

3. **That [***name of plaintiff***] did not give [***name of defendant***] permission to continue occupying the property after the [lease/rental agreement/sublease] ended; and**

4. **That [***name of defendant***] [or subtenant [***name of subtenant***]] is still occupying the property.**

New August 2007; Revised June 2011

Directions for Use

If the plaintiff is the landlord or owner, select “lease” or “rental agreement” in the first sentence and in element 3 as appropriate, “owns” in element 1, and “leased” in element 2. Commercial documents are usually called "leases" while residential documents are often called “rental agreements.” Select the term that is used on the written document.

If the plaintiff is a tenant seeking to recover possession from a subtenant, select “sublease” in the first paragraph and in element 3, “leases” in element 1, and “subleased” in element 2. (Code Civ. Proc., § 1161(3).)

If persons other than the tenant-defendant are occupying the premises, include the bracketed language in the first paragraph and in element 4.

Sources and Authority

- Holding Over After Expiration of Lease Term. Code of Civil Procedure section 1161. ~~provides, in part:~~

  ~~A tenant of real property … is guilty of unlawful detainer:~~

  ~~1. When he or she continues in possession, in person or by subtenant … after the expiration of the term for which it is let to him or her; provided the expiration is of a nondefault~~

nature however brought about without the permission of his or her landlord, or the successor in estate of his or her landlord, if applicable; including the case where the person to be removed became the occupant of the premises as a servant, employee, agent, or licensee and the relation of master and servant, or employer and employee, or principal and agent, or licensor and licensee, has been lawfully terminated or the time fixed for occupancy by the agreement between the parties has expired; but nothing in this subdivision shall be construed as preventing the removal of the occupant in any other lawful manner; but in case of a tenancy at will, it must first be terminated by notice, as prescribed in the Civil Code.

3 A tenant may take proceedings, similar to those prescribed in this chapter, to obtain possession of the premises let to a subtenant or held by a servant, employee, agent, or licensee, in case of his or her unlawful detention of the premises underlet to him or her or held by him or her.

- Conversion to Ordinary Civil Action If Possession Not at Issue. Civil Code section 1952.3(a). provides, in part: "[I]f the lessor brings an unlawful detainer proceeding and possession of the property is no longer in issue because possession of the property has been delivered to the lessor before trial or, if there is no trial, before judgment is entered, the case becomes an ordinary civil action . . . ."

- " 'In order that such an action may be maintained the conventional relation of landlord and tenant must be shown to exist. In other words, the action is limited to those cases in which the tenant is estopped to deny the landlord's title.' " (*Fredericksen v. McCosker* (1956) 143 Cal.App.2d 114, 116 [299 P.2d 908], internal citations omitted.)

- "The most important difference between a periodic tenancy and a tenancy for a fixed term—such as six months—is that the latter terminates at the end of such term, without any requirement of notice as in the former. In order to create an estate for a definite period, the duration must be capable of exact computation when it becomes possessory, otherwise no such estate is created." (*Camp v. Matich* (1948) 87 Cal.App.2d 660, 665–666 [197 P.2d 345], internal citations omitted.)

- "It is well established that it is the duty of the tenant as soon as his tenancy expires by its own limitations, to surrender the possession of the premises and that no notice of termination is necessary, the lease itself terminating the tenancy; and if he continues in possession beyond that period without the permission of the landlord, he is guilty of unlawful detainer, and an action may be commenced against him at once, under the provisions of subdivision 1 of section 1161 of the Code of Civil Procedure, without the service upon him of any notice." (*Ryland v. Appelbaum* (1924) 70 Cal.App. 268, 270 [233 P. 356], internal citations omitted.)

- "If the tenant gives up possession of the property after the commencement of an unlawful detainer proceeding, the action becomes an ordinary one for damages." (*Fish Construction Co. v. Moselle Coach Works, Inc.* (1983) 148 Cal.App.3d 654, 658 [196 Cal.Rptr. 174].)

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2006) Real Property, §§ 664, 678, 721

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) § 8.82

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) §§ 5.4, 7.8

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.10 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, § 236.42 (Matthew Bender)

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, §§ 210.21, 210.27 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.07

Miller & Starr, California Real Estate (3d ed. 2008) Ch. 19, *Landlord-Tenant*, § 19:43 (Thomson Reuters ~~West~~)

UNLAWFUL DETAINER

4302. Termination for Failure to Pay Rent—Essential Factual Elements

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[*Name of plaintiff***] claims that [***name of defendant***] [and [***name of subtenant***], a subtenant of [***name of defendant***],] no longer [has/have] the right to occupy the property because [***name of defendant***] has failed to pay the rent. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [owns/leases] the property;**

2. **That [***name of plaintiff***] [rented/subleased] the property to [***name of defendant***];**

3. **That under the [lease/rental agreement/sublease], [***name of defendant***] was required to pay rent in the amount of $[***specify amount***] per [***specify period, e.g., month***];**

4. **That [***name of plaintiff***] properly gave [***name of defendant***] three days' written notice to pay the rent or vacate the property;**

5. **That as of [***date of three-day notice***], at least the amount stated in the three-day notice was due;**

6. **That [***name of defendant***] did not pay the amount stated in the notice within three days after [service/receipt] of the notice; and**

7. **That [***name of defendant***] [or subtenant [***name of subtenant***]] is still occupying the property.**

New August 2007; Revised June 2011, December 2011, December 2013

Directions for Use

Include the bracketed references to a subtenancy in the opening paragraph and in element 7 if persons other than the tenant-defendant are occupying the premises.

If the plaintiff is the landlord or owner, select "owns" in element 1, "rented" in element 2, and either "lease" or "rental agreement" in element 3. Commercial documents are usually called "leases" while residential documents are often called "rental agreements." Select the term that is used on the written document. If the plaintiff is a tenant seeking to recover possession from a subtenant, select "leases" in element 1, "subleased" in element 2, and "sublease" in element 3. (Code Civ. Proc., § 1161(3).)

Defective service may be waived if defendant admits receipt of notice. (See *Valov v. Tank* (1985) 168 Cal.App.3d 867, 876 [214 Cal.Rptr. 546].) However, if the fact of service is contested,

compliance with the statutory requirements must be shown. (*Palm Property Investments, LLC v. Yadegar* (2011) 194 Cal.App.4th 1419, 1425 [123 Cal.Rptr.3d 816].) Therefore, this instruction does not provide an option for the jury to determine whether or not defective service was waived if there was actual receipt.

If a commercial lease requires service by a particular method, actual receipt by the tenant will not cure the landlord's failure to comply with the service requirements of the lease. (*Culver Center Partners East #1, L.P. v. Baja Fresh Westlake Village, Inc.* (2010) 185 Cal.App.4th 744, 752 [110 Cal.Rptr.3d 833].) Whether the same rule applies to a residential lease that specifies a method of service has not yet been decided.

If the lease specifies a time period for notice other than the three-day period, substitute that time period in elements 4, 5, and 6, provided that it is not less than three days.

There is a conflict in the case law with respect to when the three-day period begins if substituted service is used. Compare *Davidson v. Quinn* (1982) 138 Cal.App.3d Supp. 9, 14 [188 Cal.Rptr. 421] [tenant must be given three days to pay, so period does not begin until actual notice is received] with *Walters v. Meyers* (1990) 226 Cal.App.3d Supp. 15, 19–20 [277 Cal.Rptr. 316] [notice is effective when posted and mailed]. This conflict is accounted for in element 6.

See CACI No. 4303, *Sufficiency and Service of Notice of Termination for Failure to Pay Rent*, for an instruction regarding proper notice.

Sources and Authority

- Unlawful Detainer for Tenant's Default in Rent Payments. Code of Civil Procedure section 1161(2). ~~provides in part:~~

  ~~A tenant of real property … is guilty of unlawful detainer:~~

  ~~2. When he or she continues in possession, in person or by subtenant, without the permission of his or her landlord … after default in the payment of rent, pursuant to the lease or agreement under which the property is held, and three days' notice, in writing, requiring its payment … shall have been served upon him or her and if there is a subtenant in actual occupation of the premises, also upon the subtenant.~~

- Conversion to Civil Action if Possession No Longer at Issue. Civil Code section 1952.3(a). ~~provides, in part: "[I]f the lessor brings an unlawful detainer proceeding and possession of the property is no longer in issue because possession of the property has been delivered to the lessor before trial or, if there is no trial, before judgment is entered, the case becomes an ordinary civil action … ."~~

- "[M]ere failure of a tenant to quit the premises during the three-day notice period does not necessarily justify an unlawful detainer action. If a tenant vacates the premises and surrenders possession to the landlord prior to the complaint being filed, then no action for unlawful detainer will lie even though the premises were not surrendered during the notice

period. This is true because the purpose of an unlawful detainer action is to recover possession of the premises for the landlord. Since an action in unlawful detainer involves a forfeiture of the tenant's right to possession, one of the matters that must be pleaded and proved for unlawful detainer is that the tenant remains in possession of the premises. Obviously this cannot be established where the tenant has surrendered the premises to landlord prior to the filing of the complaint. In such a situation the landlord's remedy is an action for damages and rent." (*Briggs v. Electronic Memories & Magnetics Corp.* (1975) 53 Cal.App.3d 900, 905–906 [126 Cal.Rptr. 34], footnote and internal citations omitted.)

- "Proper service on the lessee of a valid three-day notice to pay rent or quit is an essential prerequisite to a judgment declaring a lessor's right to possession under section 1161, subdivision 2. A lessor must allege and prove proper service of the requisite notice. Absent evidence the requisite notice was properly served pursuant to section 1162, no judgment for possession can be obtained." (*Liebovich v. Shahrokhkhany* (1997) 56 Cal.App.4th 511, 513 [65 Cal.Rptr.2d 457], internal citations omitted.)

- "Section 1162 does not authorize service of a three-day notice to pay rent or quit by mail delivery alone, certified or otherwise. It provides for service by: personal delivery; leaving a copy with a person of suitable age and discretion at the renter's residence or usual place of business *and* sending a copy through the mail to the tenant's *residence*; or posting *and* delivery of a copy to a person there residing, if one can be found, *and* sending a copy through the mail. Strict compliance with the statute is required." (*Liebovich, supra,* 56 Cal.App.4th at p. 516, original italics, internal citations omitted.)

- "In the cases discussed … , a finding of proper service turned on a party's acknowledgment or admission the notice in question was in fact received. In the present case, defendant denied, in his answer and at trial, that he had ever received the three-day notice. Because there was no admission of receipt in this case, service by certified mail did not establish or amount to personal delivery. Further, there was no evidence of compliance with any of the three methods of service of a three-day notice to pay rent or quit provided in [Code of Civil Procedure] section 1162. Therefore, the judgment must be reversed." (*Liebovich, supra,* 56 Cal.App.4th at p. 518.)

- "[Code of Civil Procedure section 1162 specifies] three ways in which service of the three-day notice may be effected on a residential tenant: … . As explained in *Liebovich, supra,* … , '[w]hen the fact of service is contested, compliance with one of these methods must be shown or the judgment must be reversed.' " (*Palm Property Investments, LLC, supra,* 194 Cal.App.4th at p. 1425.)

- "If the tenant gives up possession of the property after the commencement of an unlawful detainer proceeding, the action becomes an ordinary one for damages." (*Fish Construction Co. v. Moselle Coach Works, Inc.* (1983) 148 Cal.App.3d 654, 658 [196 Cal.Rptr. 174].)

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2005) Real Property, §§ 720, 723–725

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.35–8.45

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) §§ 5.2, 6.17–6.37

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 5-G, *Eviction Controls*, ¶¶ 5:224.3, 5:277.1 et seq. (The Rutter Group)

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 7-C, *Bases For Terminating Tenancy*, ¶ 7:96 (The Rutter Group)

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, §§ 210.21, 210.22 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.07

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.10 (Matthew Bender)

Miller & Starr, California Real Estate, Ch. 19, *Landlord-Tenant*, § 19:200 (Thomson Reuters)

UNLAWFUL DETAINER

4303. Sufficiency and Service of Notice of Termination for Failure to Pay Rent

[*Name of plaintiff***] contends that [he/she/it] properly gave [***name of defendant***] three days' notice to pay the rent or vacate the property. To prove that the notice contained the required information and was properly given, [***name of plaintiff***] must prove all of the following:**

1. **That the notice informed [***name of defendant***] in writing that [he/she/it] must pay the amount due within three days or vacate the property;**

2. **That the notice stated [no more than/a reasonable estimate of] the amount due, and the name, telephone number, and address of the person to whom the amount should be paid, and**

   [*Use if payment was to be made personally:*

   the usual days and hours that the person would be available to receive the payment; and]

   [*or: Use if payment was to be made into a bank account:*

   the number of an account in a bank located within five miles of the rental property into which the payment could be made, and the name and street address of the bank; and]

   [*or: Use if an electronic funds transfer procedure had been previously established:*

   that payment could be made by electronic funds transfer; and]

3. **That the notice was given to [***name of defendant***] at least three days before [***insert date on which action was filed***].**

Notice was properly given if [*select one or more of the following manners of service:***]**

[the notice was delivered to [*name of defendant***] personally[./; or]]**

[[*name of defendant***] was not at [home or work/the commercial rental property], and the notice was left with a responsible person at [[***name of defendant***]'s residence or place of work/the commercial property], and a copy was also mailed in an envelope addressed to [***name of defendant***] at [[his/her] residence/the commercial property]. In this case, notice is considered given on the date the second notice was [received by [***name of defendant***]/placed in the mail][./; or]]**

[*for a residential tenancy:*

[*name of defendant***]'s place of residence and work could not be discovered, or a responsible person could not be found at either place, and (1) the notice was posted on the property in a place where it would easily be noticed, (2) a copy was given to a person living there if someone could be found, and (3) a copy was also mailed to the address of the rented property in an envelope addressed to [***name of defendant***]. In this case, notice is considered given on the date the second notice was [received by [***name of defendant***]/placed in the mail].]**

[*or for a commercial tenancy:*

at the time of attempted service, a responsible person could not be found at the commercial rental property through the exercise of reasonable diligence, and (1) the notice was posted on the property in a place where it would easily be noticed, and (2) a copy was also mailed to the address of the commercial property in an envelope addressed to [*name of defendant***]. In this case, notice is considered given on the date the second notice was [received by [***name of defendant***]/placed in the mail].]**

[The three-day notice period begins the day after the notice was given to [*name of defendant***]. If the last day of the notice period falls on a Saturday, Sunday, or holiday, [***name of defendant***]'s time to pay the rent or vacate the property is extended to include the first day after the Saturday, Sunday, or holiday that is not also a Saturday, Sunday, or holiday.]**

[A notice stating a reasonable estimate of the amount of rent due that is within 20 percent of the amount actually due is reasonable unless [*name of defendant***] proves that it was not reasonable. In determining the reasonableness of the estimate, you may consider whether calculating the amount of rent required information primarily within the knowledge of [***name of defendant***] and whether [***name of defendant***] accurately furnished that information to [***name of plaintiff***].]**

New August 2007; Revised December 2010; June 2011, December 2011

Directions for Use

Use the reasonable-estimate option in the first sentence of element 2 and include the final paragraph only in cases involving commercial leases. (Code Civ. Proc., § 1161.1(a); see also Code Civ. Proc., § 1161.1(e) [presumption that if amount found to be due is within 20 percent of amount stated in notice, then estimate was reasonable].)

In element 2, select the applicable manner in which the notice specifies that payment is to be made; directly to the landlord, into a bank account, or by electronic funds transfer. (Code Civ. Proc., § 1161(2).)

Select the manner of service used: personal service, substituted service by leaving the notice at the defendant's home or place of work or at the commercial rental property, or substituted service by posting on the property. (See Code Civ. Proc., § 1162.)

There is a conflict in the case law with respect to when the three-day period begins if substituted service is used. Compare *Davidson v. Quinn* (1982) 138 Cal.App.3d Supp. 9, 14 [188 Cal.Rptr. 421] [tenant must be given three days to pay, so period does not begin until actual notice is received] with *Walters v. Meyers* (1990) 226 Cal.App.3d Supp. 15, 19–20 [277 Cal.Rptr. 316] [notice is effective when posted and mailed]. This conflict is accounted for in the second, third, and fourth bracketed options for the manner of service.

Read the third-to-last paragraph if the last day of the notice period fell on a Saturday, Sunday, or holiday.

If a lease specifies a time period for giving notice other than the three-day period, substitute that time period for three days throughout, provided that it is not less than three days.

Defective service may be waived if defendant admits receipt of notice. (See *Valov v. Tank* (1985) 168 Cal.App.3d 867, 876 [214 Cal.Rptr. 546].) However, if the fact of service is contested, compliance with the statutory requirements must be shown. (*Palm Property Investments, LLC v. Yadegar* (2011) 194 Cal.App.4th 1419, 1425 [123 Cal.Rptr.3d 816].) Therefore, this instruction does not provide an option for the jury to determine whether or not defective service was waived if there was actual receipt.

If a commercial lease requires service by a particular method, actual receipt by the tenant will not cure the landlord's failure to comply with the service requirements of the lease. (*Culver Center Partners East #1, L.P. v. Baja Fresh Westlake Village, Inc.* (2010) 185 Cal.App.4th 744, 752 [110 Cal.Rptr.3d 833].) Whether the same rule applies to a residential lease that specifies a method of service has not yet been decided.

Local ordinances may impose additional notice requirements for the termination of a rental agreement. This instruction should be modified accordingly.

Sources and Authority

- Conclusive Presumption of Receit of Rent Sent to Address Provided in Notice. Code Civil Procedure section 1161(2). ~~provides in part: "When he or she continues in possession … without the permission of his or her landlord … after default in the payment of rent … and three days' notice, in writing, requiring its payment, stating the amount which is due, the name, telephone number, and address of the person to whom the rent payment shall be made, and, if payment may be made personally, the usual days and hours that person will be available to receive the payment (provided that, if the address does not allow for personal delivery, then it shall be conclusively presumed that upon the mailing of any rent or notice to the owner by the tenant to the name and address provided, the notice or rent is deemed received by the owner on the date posted, if the tenant can show proof of mailing to the name and address provided by the owner), or the number of an account in a financial institution~~

into which the rental payment may be made, and the name and street address of the institution (provided that the institution is located within five miles of the rental property), or if an electronic funds transfer procedure has been previously established, that payment may be made pursuant to that procedure, or possession of the property, shall have been served upon him or her and if there is a subtenant in actual occupation of the premises, also upon the subtenant."

- Commercial Tenancy: Estimate of Rent Due in Notice. Code of Civil Procedure 1161.1. provides in part:

With respect to application of Section 1161 in cases of possession of commercial real property after default in the payment of rent:

(a) If the amount stated in the notice provided to the tenant pursuant to subdivision (2) of Section 1161 is clearly identified by the notice as an estimate and the amount claimed is not in fact correct, but it is determined upon the trial or other judicial determination that rent was owing, and the amount claimed in the notice was reasonably estimated, the tenant shall be subject to judgment for possession and the actual amount of rent and other sums found to be due. However, if (1) upon receipt of such a notice claiming an amount identified by the notice as an estimate, the tenant tenders to the landlord within the time for payment required by the notice, the amount which the tenant has reasonably estimated to be due and (2) if at trial it is determined that the amount of rent then due was the amount tendered by the tenant or a lesser amount, the tenant shall be deemed the prevailing party for all purposes. If the court determines that the amount so tendered by the tenant was less than the amount due, but was reasonably estimated, the tenant shall retain the right to possession if the tenant pays to the landlord within five days of the effective date of the judgment (1) the amount previously tendered if it had not been previously accepted, (2) the difference between the amount tendered and the amount determined by the court to be due, and (3) any other sums as ordered by the court.

(e) For the purposes of this section, there is a presumption affecting the burden of proof that the amount of rent claimed or tendered is reasonably estimated if, in relation to the amount determined to be due upon the trial or other judicial determination of that issue, the amount claimed or tendered was no more than 20 percent more or less than the amount determined to be due. However, if the rent due is contingent upon information primarily within the knowledge of the one party to the lease and that information has not been furnished to, or has not accurately been furnished to, the other party, the court shall consider that fact in determining the reasonableness of the amount of rent claimed or tendered pursuant to subdivision (a).

- Manner of Service of Notice. Code of Civil Procedure section 1162. provides:

(a) Except as provided in subdivision (b), the notices required by Sections 1161 and 1161a may be served by any of the following methods:

~~(1) By delivering a copy to the tenant personally;~~

~~(2) If he or she is absent from his or her place of residence, and from his or her usual place of business, by leaving a copy with some person of suitable age and discretion at either place, and sending a copy through the mail addressed to the tenant at his or her place of residence;~~

~~(3) If such place of residence and business cannot be ascertained, or a person of suitable age or discretion there can not be found, then by affixing a copy in a conspicuous place on the property, and also delivering a copy to a person there residing, if such person can be found; and also sending a copy through the mail addressed to the tenant at the place where the property is situated. Service upon a subtenant may be made in the same manner.~~

~~(b) The notices required by Section 1161 may be served upon a commercial tenant by any of the following methods:~~

~~(1) By delivering a copy to the tenant personally.~~

~~(2) If he or she is absent from the commercial rental property, by leaving a copy with some person of suitable age and discretion at the property, and sending a copy through the mail addressed to the tenant at the address where the property is situated.~~

~~(3) If, at the time of attempted service, a person of suitable age or discretion is not found at the rental property through the exercise of reasonable diligence, then by affixing a copy in a conspicuous place on the property, and also sending a copy through the mail addressed to the tenant at the address where the property is situated. Service upon a subtenant may be made in the same manner.~~

~~(c) For purposes of subdivision (b), "commercial tenant" means a person or entity that hires any real property in this state that is not a dwelling unit, as defined in subdivision (c) of Section 1940 of the Civil Code, or a mobilehome, as defined in Section 798.3 of the Civil Code.~~

- "A valid three-day pay rent or quit notice is a prerequisite to an unlawful detainer action. Because of the summary nature of an unlawful detainer action, a notice is valid only if the lessor strictly complies with the statutorily mandated notice requirements. [¶] A three-day notice must contain 'the amount which is due.' A notice which demands rent in excess of the amount due does not satisfy this requirement. This rule ensures that a landlord will not be entitled to regain possession in an unlawful detainer action unless the tenant has had the opportunity to pay the delinquent rent." (*Bevill v. Zoura* (1994) 27 Cal.App.4th 694, 697 [32 Cal.Rptr.2d 635], internal citations and footnote omitted.)

- "[W]e do not agree that a proper notice may not include anything other than technical rent. It is true that subdivision 2 of Code of Civil Procedure section 1161 relates to a default in the

payment of rent. However, the subdivision refers to the 'lease or agreement under which the property is held' and requires the notice state 'the amount which is due.' The language is not 'the amount of rent which is due' or 'the rent which is due.' We think the statutory language is sufficiently broad to encompass any sums due under the lease or agreement under which the property is held." (*Canal-Randolph Anaheim, Inc. v. Wilkoski* (1978) 78 Cal.App.3d 477, 492 [144 Cal.Rptr. 474].)

- "[T]he service and notice provisions in the unlawful detainer statutes and [Code of Civil Procedure] section 1013 are mutually exclusive, and thus, section 1013 does not extend the notice periods that are a prerequisite to filing an unlawful detainer action." (*Losornio v. Motta* (1998) 67 Cal.App.4th 110, 112 [78 Cal.Rptr.2d 799].)

- "Section 1162 does not authorize service of a three-day notice to pay rent or quit by mail delivery alone, certified or otherwise. It provides for service by: personal delivery; leaving a copy with a person of suitable age and discretion at the renter's residence or usual place of business and sending a copy through the mail to the tenant's *residence*; or posting *and* delivery of a copy to a person there residing, if one can be found, *and* sending a copy through the mail. Strict compliance with the statute is required." (*Liebovich v. Shahrokhkhany* (1997) 56 Cal.App.4th 511, 516 [65 Cal.Rptr.2d 457], original italics, internal citation omitted.)

- "We … hold that service made in accordance with section 1162, subdivision 3, as applied to section 1161, subdivision 2, must be effected in such a manner as will give a tenant the three days of written notice required by the Legislature in which he may cure his default in the payment of rent." (*Davidson, supra,* 138 Cal.App.3d Supp. at p. 14.)

- "We … hold that service of the three-day notice by posting and mailing is effective on the date the notice is posted and mailed." (*Walters, supra,* 226 Cal.App.3d Supp. at p. 20.)

- "An unlawful detainer action based on failure to pay rent must be preceded by a three-day notice to the tenant to pay rent or quit the premises. Failure to state the exact amount of rent due in the notice is fatal to the subsequent unlawful detainer action." (*Lynch & Freytag v. Cooper* (1990) 218 Cal.App.3d 603, 606, fn. 2 [267 Cal.Rptr. 189], internal citations omitted.)

- "[D]efendant admitted in his answer that he 'ultimately received [the relevant] notice' but 'affirmatively allege[d] that he was not properly and legally served' with a valid notice. We find that, under the circumstances of this case, the defendant waived any defect in the challenged service of the notice under section 1162, subdivision 1." (*Valov, supra,* 168 Cal.App.3d at p. 876.)

- "In the cases discussed … , a finding of proper service turned on a party's acknowledgment or admission the notice in question was in fact received. In the present case, defendant denied, in his answer and at trial, that he had ever received the three-day notice. Because there was no admission of receipt in this case, service by certified mail did not establish or amount to personal delivery. Further, there was no evidence of compliance with any of the

three methods of service of a three-day notice to pay rent or quit provided in section 1162. Therefore, the judgment must be reversed." (*Liebovich, supra,* 56 Cal.App.4th at p. 518.)

- "[Code of Civil Procedure section 1162 specifies] three ways in which service of the three-day notice may be effected on a residential tenant: … . As explained in *Liebovich, supra,* … , '[w]hen the fact of service is contested, compliance with one of these methods must be shown or the judgment must be reversed.' " (*Palm Property Investments, LLC, supra,* 194 Cal.App.4th at p. 1425.)

- "In commercial leases the landlord and commercial tenant may lawfully agree to notice procedures that differ from those provided in the statutory provisions governing unlawful detainer." (*Culver Center Partners East #1, L.P., supra,* 185 Cal.App.4th at p.750.)

- "[E]ven if some policy rationale might support such a waiver/forfeiture [by actual receipt] rule in the residential lease context, there is no basis to apply it in the commercial context where matters of service and waiver are prescribed in the lease itself. Nothing in the parties' lease suggests actual receipt of a notice to quit results in the waiver or forfeiture of [tenant]'s right to service accomplished in the manner prescribed. To the contrary, the lease specifically provides, 'No covenant, term or condition, or breach' of the lease 'shall be deemed waived except if expressly waived in a written instrument executed by the waiving party.' Although [tenant's agent] acted on the notice to quit by attempting to deliver the rent check, neither her fortuitous receipt of the notice nor her actions in response to it constitutes an express waiver of the notice provisions in the lease." (*Culver Center Partners East #1, L.P., supra,* 185 Cal.App.4th at p. 752, internal citation omitted.)

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2006) Real Property, §§ 720, 722–725, 727

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.26–8.68

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) §§ 5.2, 6.10–6.30, Ch. 8

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 5-G, *Eviction Controls*, ¶¶ 5:224.3, 5:277.1 et seq. (The Rutter Group)

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 7-C, *Bases For Terminating Tenancy*, ¶¶ 7:98.10, 7:327 (The Rutter Group)

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, §§ 210.21, 210.22 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.11, 5.12

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.11 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, §§ 236.13, 236.13A (Matthew Bender)

Miller & Starr, California Real Estate, Ch. 19, *Landlord-Tenant*, §§ 19:202–19:204 (Thomson Reuters ~~West~~)

UNLAWFUL DETAINER

4304. Termination for Violation of Terms of Lease/Agreement—Essential Factual Elements

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[*Name of plaintiff***] claims that [***name of defendant***] [and [***name of subtenant***], a subtenant of [***name of defendant***],] no longer [has/have] the right to occupy the property because [***name of defendant***] has failed to perform [a] requirement(s) under [his/her/its] [lease/rental agreement/sublease]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [owns/leases] the property;**

2. **That [***name of plaintiff***] [rented/subleased] the property to [***name of defendant***];**

3. **That under the [lease/rental agreement/sublease], [***name of defendant***] agreed [***insert required condition(s) that were not performed***];**

4. **That [***name of defendant***] failed to perform [that/those] requirement(s) by [***insert description of alleged failure to perform***];**

5. **That [***name of plaintiff***] properly gave [***name of defendant***] [and [***name of subtenant***]] three days' written notice to [either [***describe action to correct failure to perform***] or] vacate the property; [and]**

[6. That [*name of defendant***] did not [***describe action to correct failure to perform***]; and]**

7. **That [***name of defendant***] [or subtenant [***name of subtenant***]] is still occupying the property.**

[[*Name of defendant***]'s failure to perform the requirement(s) of the [lease/rental agreement/sublease] must not be trivial, but must be a substantial violation of [an] important obligation(s).]**

New August 2007; Revised June 2010, December 2010, June 2011, December 2011

Directions for Use

Include the bracketed references to a subtenancy in the opening paragraph, in element 5, and in the last element if persons other than the tenant-defendant are in occupancy of the premises.

If the plaintiff is the landlord or owner, select either "lease" or "rental agreement" in the opening paragraph and in element 3, "owns" in element 1, and "rented" in element 2. Commercial documents are usually called "leases" while residential documents are often called "rental agreements." Select the term that is used on the written document.

If the plaintiff is a tenant seeking to recover possession from a subtenant, select "sublease" in the opening paragraph and in element 3, "leases" in element 1, and "subleased" in element 2. (Code Civ. Proc., § 1161(3).)

Defective service may be waived if defendant admits timely receipt of notice. (See *Valov v. Tank* (1985) 168 Cal.App.3d 867, 876 [214 Cal.Rptr. 546].) However, if the fact of service is contested, compliance with the statutory requirements must be shown. (*Palm Property Investments, LLC v. Yadegar* (2011) 194 Cal.App.4th 1419, 1425 [123 Cal.Rptr.3d 816].) Therefore, this instruction does not provide an option for the jury to determine whether or not defective service was waived if there was actual receipt.

If a commercial lease requires service by a particular method, actual receipt by the tenant will not cure the landlord's failure to comply with the service requirements of the lease. (*Culver Center Partners East #1, L.P. v. Baja Fresh Westlake Village, Inc.* (2010) 185 Cal.App.4th 744, 752 [110 Cal.Rptr.3d 833].) Whether the same rule applies to a residential lease that specifies a method of service has not yet been decided.

If the lease specifies a time period for notice other than the three-day period, substitute that time period in element 5.

If the violation of the condition or covenant involves assignment, sublet, or waste, or if the breach cannot be cured, the landlord is entitled to possession on service of a three-day notice to quit; no opportunity to cure by performance is required. (Code Civ. Proc., § 1161(4) ; *Salton Community Services Dist. v. Southard* (1967) 256 Cal.App.2d 526, 529 [64 Cal.Rptr. 246].) In such a case, omit the bracketed language in element 5 and also omit element 6. If the violation involves nuisance or illegal activity, give CACI No. 4308, *Termination for Nuisance or Unlawful Use—Essential Factual Elements.*

Include the last paragraph if the tenant alleges that the violation was trivial. It is not settled whether the landlord must prove the violation was substantial or the tenant must prove triviality as an affirmative defense. (See *Superior Motels, Inc. v. Rinn Motor Hotels, Inc.* (1987) 195 Cal.App.3d 1032, 1051 [241 Cal.Rptr. 487]; *Keating v. Preston* (1940) 42 Cal.App.2d 110, 118 [108 P.2d 479].)

Local or federal law may impose additional requirements for the termination of a rental agreement based on breach of a condition. This instruction should be modified accordingly.

See CACI No. 4305, *Sufficiency and Service of Notice of Termination for Violation of Terms of Agreement,* for an instruction on proper written notice.

See also CACI No. 312, *Substantial Performance.*

Sources and Authority

- Unlawful Detainer Based on Failure to Perform Conditions. Code of Civil Procedure section 1161(3), (4)., ~~repealed and replaced with a new version January 1, 2012, provides in part:~~

  ~~A tenant of real property … is guilty of unlawful detainer:~~

  ~~3. When he or she continues in possession, in person or by subtenant, after a neglect or failure to perform other conditions or covenants of the lease or agreement under which the property is held, including any covenant not to assign or sublet, than the one for the payment of rent, and three days' notice, in writing, requiring the performance of such conditions or covenants, or the possession of the property, shall have been served upon him or her, and if there is a subtenant in actual occupation of the premises, also, upon the subtenant. Within three days after the service of the notice, the tenant, or any subtenant in actual occupation of the premises, or any mortgagee of the term, or other person interested in its continuance, may perform the conditions or covenants of the lease or pay the stipulated rent, as the case may be, and thereby save the lease from forfeiture; provided, if the conditions and covenants of the lease, violated by the lessee, cannot afterward be performed, then no notice, as last prescribed herein, need be given to the lessee or his or her subtenant, demanding the performance of the violated conditions or covenants of the lease.~~

  ~~4. Any tenant, subtenant, or executor or administrator of his or her estate heretofore qualified and now acting, or hereafter to be qualified and act, assigning or subletting or committing waste upon the demised premises, contrary to the conditions or covenants of his or her lease, or maintaining, committing, or permitting the maintenance or commission of a nuisance upon the demised premises or using the premises for an unlawful purpose, thereby terminates the lease, and the landlord, or his or her successor in estate, shall upon service of three days' notice to quit upon the person or persons in possession, be entitled to restitution of possession of the demised premises under this chapter. For purposes of this subdivision, a person who commits an offense described in subdivision (c) of Section 3485 of the Civil Code, or subdivision (c) of Section 3486 of the Civil Code, or uses the premises to further the purpose of that offense shall be deemed to have committed a nuisance upon the premises. For purposes of this subdivision, if a person commits an act of domestic violence as defined in Section 6211 of the Family Code, sexual assault as defined in Section 261, 261.5, 262, 286, 288a, or 289 of the Penal Code, or stalking as defined in Section 1708.7 of the Civil Code, against another tenant or subtenant on the premises there is a rebuttable presumption affecting the burden of proof that the person has committed a nuisance upon the premises, provided, however, that this shall not apply if the victim of the act of domestic violence, sexual assault, or stalking, or a household member of the victim, other than the perpetrator, has not vacated the premises. This subdivision shall not be construed to supersede the provisions of the Violence Against Women and Department of Justice Reauthorization Act of 2005 (Public Law 109-162) that permit the removal from a lease of a tenant who engages in criminal acts of physical violence against cotenants.~~

- Conversion of Unlawful Detainer to Ordinary Civil Action if Possession No Longer at Issue. Civil Code section 1952.3(a). ~~provides in part: "[I]f the lessor brings an unlawful detainer proceeding and possession of the property is no longer in issue because possession of the property has been delivered to the lessor before trial or, if there is no trial, before judgment is entered, the case becomes an ordinary civil action … ."~~

- "[Code of Civil Procedure section 1161(3)] provides, that where the conditions or covenants of a lease can be performed, a lessee may within three days after the service of the notice perform them, and so save a forfeiture of his lease. By performing, the tenant may defeat the landlord's claim for possession. Where, however, the covenants cannot be performed, the law recognizes that it would be an idle and useless ceremony to demand their performance, and so dispenses with the demand to do so. And this is all that it does dispense with. It does not dispense with the demand for the possession of the premises. It requires that in any event. If the covenants can be performed, the notice is in the alternative, either to perform them or deliver possession. When the covenants are beyond performance an alternative notice would be useless, and demand for possession alone is necessary. Bearing in mind that the object of this statute is to speedily permit a landlord to obtain possession of his premises where the tenant has violated the covenants of the lease, the only reasonable interpretation of the statute is, that before bringing suit he shall take that means which should be most effectual for the purpose of obtaining possession, which is to demand it. If upon demand the tenant surrenders possession, the necessity for any summary proceeding is at an end, and by the demand is accomplished what the law otherwise would accord him under the proceeding." (*Schnittger v. Rose* (1903) 139 Cal. 656, 662 [73 P. 449].)

- "It is well settled that the notice required under [Code Civ. Proc., § 1161] subdivisions 2 and 3 (where the condition or covenant assertedly violated is capable of being performed) must be framed in the alternative, viz., pay the rent *or* quit, perform the covenant *or* quit, and a notice which merely directs the tenant to quit is insufficient to render such tenant guilty of unlawful detainer upon his continued possession." (*Hinman v. Wagnon* (1959) 172 Cal.App.2d 24, 27 [341 P.2d 749], original italics.

- "Plaintiff argues, however, that he should be allowed to amend his complaint so as to bring his action under section 1161, subdivision 4. The notice thereunder required need not be framed in the alternative. However, plaintiff has at no time, either by his three days' notice or in any of his pleadings, suggested that defendant had assigned the lease or sublet the property, or had committed waste contrary to the conditions or covenants of the lease, or maintained a nuisance on the premises, or had used the property for an unlawful purpose. Plaintiff had three opportunities to state a cause of action; if he was of the belief that facts existed which brought his case under 1161, subdivision 4, it would have been a simple matter to allege such facts, but this he did not do." (*Hinman, supra,* 172 Cal.App.2d at p. 29.)

- "The law sensibly recognizes that although every instance of noncompliance with a contract's terms constitutes a breach, not every breach justifies treating the contract as terminated. Following the lead of the Restatements of Contracts, California courts allow termination only if the breach can be classified as 'material,' 'substantial,' or 'total.' " (*Superior Motels, Inc., supra,* 195 Cal.App.3d at p. 1051, internal citations omitted.)

- "California too accepts that '[whether] a breach is so material as to constitute cause for the injured party to terminate a contract is ordinarily a question for the trier of fact.' " (*Superior Motels, Inc., supra,* 195 Cal.App.3d at pp. 1051–1052, internal citations omitted.)

- "As to the substantiality of the violation, the evidence shows that the violation was wilful. Therefore, the court will not measure the extent of the violation." (*Hignell v. Gebala* (1949) 90 Cal.App.2d 61, 66 [202 P.2d 378].)

- "Where a covenant in a lease has been breached and the breach cannot be cured, a demand for performance is not a condition precedent to an unlawful detainer action." (*Salton Community Services Dist., supra,* 256 Cal.App.2d at p. 529.)

- "If the tenant gives up possession of the property after the commencement of an unlawful detainer proceeding, the action becomes an ordinary one for damages." (*Fish Construction Co. v. Moselle Coach Works, Inc.* (1983) 148 Cal.App.3d 654, 658 [196 Cal.Rptr. 174].)

- "Proper service on the lessee of a valid three-day notice to pay rent or quit is an essential prerequisite to a judgment declaring a lessor's right to possession under section 1161, subdivision 2. A lessor must allege and prove proper service of the requisite notice. Absent evidence the requisite notice was properly served pursuant to section 1162, no judgment for possession can be obtained." (*Liebovich v. Shahrokhkhany* (1997) 56 Cal.App.4th 511, 513 [65 Cal.Rptr.2d 457], internal citations omitted.)

- "Section 1162 does not authorize service of a three-day notice to pay rent or quit by mail delivery alone, certified or otherwise. It provides for service by: personal delivery; leaving a copy with a person of suitable age and discretion at the renter's residence or usual place of business *and* sending a copy through the mail to the tenant's *residence*; or posting *and* delivery of a copy to a person there residing, if one can be found, *and* sending a copy through the mail. Strict compliance with the statute is required." (*Liebovich, supra,* 56 Cal.App.4th at p. 516, original italics, internal citations omitted.)

- "In the cases discussed … , a finding of proper service turned on a party's acknowledgment or admission the notice in question was in fact received. In the present case, defendant denied, in his answer and at trial, that he had ever received the three-day notice. Because there was no admission of receipt in this case, service by certified mail did not establish or amount to personal delivery. Further, there was no evidence of compliance with any of the three methods of service of a three-day notice to pay rent or quit provided in [Code of Civil Procedure] section 1162. Therefore, the judgment must be reversed." (*Liebovich, supra,* 56 Cal.App.4th at p. 518.)

- "[Code of Civil Procedure section 1162 specifies] three ways in which service of the three-day notice may be effected on a residential tenant: … . As explained in *Liebovich, supra,* … , '[w]hen the fact of service is contested, compliance with one of these methods must be shown or the judgment must be reversed.' " (*Palm Property Investments, LLC, supra,* 194 Cal.App.4th at p. 1425.)

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2006) Real Property, §§ 720, 726

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.50–8.54

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) §§ 5.2, 6.38–6.49

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 12-G, *Termination Of Section 8 Tenancies*, ¶ 12:200 et seq. (The Rutter Group)

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 7-C, *Bases For Terminating Tenancy*, ¶ 7:93 et seq. (The Rutter Group)

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, §§ 210.21, 210.23, 210.24 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.07

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.10 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, §§ 236.11, 236.20 (Matthew Bender)

Miller & Starr, California Real Estate (3d ed. 2008) Ch. 19, *Landlord-Tenant*, §§ 19:200–19.205 (Thomson Reuters ~~West~~)

UNLAWFUL DETAINER

4305. Sufficiency and Service of Notice of Termination for Violation of Terms of Agreement

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[*Name of plaintiff***] contends that [he/she/it] properly gave [***name of defendant***] three days' notice to [either comply with the requirements of the [lease/rental agreement/sublease] or] vacate the property. To prove that the notice contained the required information and was properly given, [***name of plaintiff***] must prove all of the following:**

1. **That the notice informed [***name of defendant***] in writing that [he/she/it] must, within three days, [either comply with the requirements of the [lease/rental agreement/sublease] or] vacate the property;**

2. **That the notice described how [***name of defendant***] failed to comply with the requirements of the [lease/rental agreement/sublease] [and how to correct the failure];**

3. **That the notice was given to [***name of defendant***] at least three days before [***insert date on which action was filed***].**

Notice was properly given if [*select one or more of the following manners of service:***]**

[the notice was delivered to [*name of defendant***] personally[./; or]]**

[[*name of defendant***] was not at [home or work/the commercial rental property], and the notice was left with a responsible person at [[***name of defendant***]'s home or place of work/the commercial property], and a copy was also mailed in an envelope addressed to [***name of defendant***] at [[his/her] residence/the commercial property]. In this case, notice is considered given on the date the second notice was [received by [***name of defendant***]/placed in the mail][./; or]]**

[*for a residential tenancy:*

[*name of defendant***]'s place of residence and work could not be discovered, or a responsible person could not be found at either place, and (1) the notice was posted on the property in a place where it would easily be noticed, (2) a copy was given to a person living there if someone could be found, and (3) a copy was also mailed to the address of the rented property in an envelope addressed to [***name of defendant***]. In this case, notice is considered given on the date the second notice was [received by [***name of defendant***]/placed in the mail].]**

[*or for a commercial tenancy:*

at the time of attempted service, a responsible person could not be found at the commercial rental property through the exercise of reasonable diligence, and (1) the

notice was posted on the property in a place where it would easily be noticed, and (2) a copy was also mailed to the address of the commercial property in an envelope addressed to [*name of defendant***]. In this case, notice is considered given on the date the second notice was [received by [***name of defendant***]/placed in the mail].]**

[The three-day notice period begins on the day after the notice was given to [*name of defendant***]. If the last day of the notice period falls on a Saturday, Sunday, or holiday, [***name of defendant***]'s time to correct the failure or to vacate the property is extended to include the first day after the Saturday, Sunday, or holiday that is not also a Saturday, Sunday, or holiday.]**

New August 2007; Revised December 2010, June 2011, December 2011

Directions for Use

If the violation of the condition or covenant involves assignment, subletting, or waste, or if the breach cannot be cured, the landlord is entitled to possession on service of a three-day notice to quit; no opportunity to cure by performance is required. (Code Civ. Proc., § 1161(4); *Salton Community Services Dist. v. Southard* (1967) 256 Cal.App.2d 526, 529 [64 Cal.Rptr. 246].) In such a case, omit the bracketed language in the first paragraph and in elements 1 and 2. If the violation involves nuisance or illegal activity, give CACI No. 4309, *Sufficiency and Service of Notice of Termination for Nuisance or Unlawful Use*.

If the plaintiff is the landlord or owner, select either "lease" or "rental agreement" in the optional language in the opening paragraph and in elements 1 and 2. Commercial documents are usually called "leases" while residential documents are often called "rental agreements." Select the term that is used on the written document. If the plaintiff is a tenant seeking to recover possession from a subtenant, select "sublease." (Code Civ. Proc., § 1161(3).)

Select the manner of service used: personal service, substituted service by leaving the notice at the defendant's home or place of work or at the commercial rental property, or substituted service by posting on the property. (See Code Civ. Proc., § 1162.)

There is a conflict in the case law with respect to when the three-day period begins if substituted service is used. Compare *Davidson v. Quinn* (1982) 138 Cal.App.3d Supp. 9, 14 [188 Cal.Rptr. 421] [tenant must be given three days to pay, so period does not begin until actual notice is received] with *Walters v. Meyers* (1990) 226 Cal.App.3d Supp. 15, 19–20 [277 Cal.Rptr. 316] [notice is effective when posted and mailed]. This conflict is accounted for in the second, third, and fourth bracketed options for the manner of service.

Read the next-to-last paragraph if the last day of the notice period fell on a Saturday, Sunday, or holiday.

If a lease specifies a time period for giving notice other than the three-day period, substitute that time period for three days throughout the instruction, provided that it is not less than three days.

Defective service may be waived if defendant admits timely receipt of notice. (See *Valov v. Tank* (1985) 168 Cal.App.3d 867, 876 [214 Cal.Rptr. 546].) However, if the fact of service is contested, compliance with the statutory requirements must be shown. (*Palm Property Investments, LLC v. Yadegar* (2011) 194 Cal.App.4th 1419, 1425 [123 Cal.Rptr.3d 816].) Therefore, this instruction does not provide an option for the jury to determine whether or not defective service was waived if there was actual receipt.

If a commercial lease requires service by a particular method, actual receipt by the tenant will not cure the landlord's failure to comply with the service requirements of the lease. (*Culver Center Partners East #1, L.P. v. Baja Fresh Westlake Village, Inc.* (2010) 185 Cal.App.4th 744, 752 [110 Cal.Rptr.3d 833].) Whether the same rule applies to a residential lease that specifies a method of service has not yet been decided.

Local ordinances may impose additional notice requirements for the termination of a rental agreement. This instruction should be modified accordingly.

Sources and Authority

- Unlawful Detainer Based on Failure to Perform Conditions. Code of Civil Procedure section 1161(3), (4)., ~~repealed and replaced with a new version January 1, 2012, provides in part:~~

  ~~A tenant of real property … is guilty of unlawful detainer:~~

  > ~~3. When he or she continues in possession, in person or by subtenant, after a neglect or failure to perform other conditions or covenants of the lease or agreement under which the property is held, including any covenant not to assign or sublet, than the one for the payment of rent, and three days' notice, in writing, requiring the performance of such conditions or covenants, or the possession of the property, shall have been served upon him or her, and if there is a subtenant in actual occupation of the premises, also, upon the subtenant. Within three days after the service of the notice, the tenant, or any subtenant in actual occupation of the premises, or any mortgagee of the term, or other person interested in its continuance, may perform the conditions or covenants of the lease or pay the stipulated rent, as the case may be, and thereby save the lease from forfeiture; provided, if the conditions and covenants of the lease, violated by the lessee, cannot afterward be performed, then no notice, as last prescribed herein, need be given to the lessee or his or her subtenant, demanding the performance of the violated conditions or covenants of the lease.~~
  >
  > ~~4. Any tenant, subtenant, or executor or administrator of his or her estate heretofore qualified and now acting, or hereafter to be qualified and act, assigning or subletting or committing waste upon the demised premises, contrary to the conditions or covenants of his or her lease, or maintaining, committing, or permitting the maintenance or commission of a nuisance upon the demised premises or using the premises for an unlawful purpose, thereby terminates the lease, and the landlord, or his or her successor in estate, shall upon service of three days' notice to quit upon the~~

~~person or persons in possession, be entitled to restitution of possession of the demised premises under this chapter. For purposes of this subdivision, a person who commits an offense described in subdivision (c) of Section 3485 of the Civil Code, or subdivision (c) of Section 3486 of the Civil Code, or uses the premises to further the purpose of that offense shall be deemed to have committed a nuisance upon the premises. For purposes of this subdivision, if a person commits an act of domestic violence as defined in Section 6211 of the Family Code, sexual assault as defined in Section 261, 261.5, 262, 286, 288a, or 289 of the Penal Code, or stalking as defined in Section 1708.7 of the Civil Code, against another tenant or subtenant on the premises there is a rebuttable presumption affecting the burden of proof that the person has committed a nuisance upon the premises, provided, however, that this shall not apply if the victim of the act of domestic violence, sexual assault, or stalking, or a household member of the victim, other than the perpetrator, has not vacated the premises. This subdivision shall not be construed to supersede the provisions of the Violence Against Women and Department of Justice Reauthorization Act of 2005 (Public Law 109-162) that permit the removal from a lease of a tenant who engages in criminal acts of physical violence against cotenants.~~

- Manner of Service of Notice. Code of Civil Procedure section 1162. ~~provides:~~

~~(a) Except as provided in subdivision (b), the notices required by Sections 1161 and 1161a may be served by any of the following methods:~~

~~(1) By delivering a copy to the tenant personally;~~

~~(2) If he or she is absent from his or her place of residence, and from his or her usual place of business, by leaving a copy with some person of suitable age and discretion at either place, and sending a copy through the mail addressed to the tenant at his or her place of residence;~~

~~(3) If such place of residence and business can not be ascertained, or a person of suitable age or discretion there can not be found, then by affixing a copy in a conspicuous place on the property, and also delivering a copy to a person there residing, if such person can be found; and also sending a copy through the mail addressed to the tenant at the place where the property is situated. Service upon a subtenant may be made in the same manner.~~

~~(b) The notices required by Section 1161 may be served upon a commercial tenant by any of the following methods:~~

~~(1) By delivering a copy to the tenant personally.~~

~~(2) If he or she is absent from the commercial rental property, by leaving a copy with some person of suitable age and discretion at the property, and sending a copy through the mail addressed to the tenant at the address where the property is situated.~~

~~(3) If, at the time of attempted service, a person of suitable age or discretion is not found at the rental property through the exercise of reasonable diligence, then by affixing a copy in a conspicuous place on the property, and also sending a copy through the mail addressed to the tenant at the address where the property is situated. Service upon a subtenant may be made in the same manner.~~

~~(c) For purposes of subdivision (b), "commercial tenant" means a person or entity that hires any real property in this state that is not a dwelling unit, as defined in subdivision (c) of Section 1940 of the Civil Code, or a mobilehome, as defined in Section 798.3 of the Civil Code.~~

- "[T]he service and notice provisions in the unlawful detainer statutes and [Code of Civil Procedure] section 1013 are mutually exclusive, and thus, section 1013 does not extend the notice periods that are a prerequisite to filing an unlawful detainer action." (*Losornio v. Motta* (1998) 67 Cal.App.4th 110, 112 [78 Cal.Rptr.2d 799].)

- "Section 1162 does not authorize service of a three-day notice to pay rent or quit by mail delivery alone, certified or otherwise. It provides for service by: personal delivery; leaving a copy with a person of suitable age and discretion at the renter's residence or usual place of business and sending a copy through the mail to the tenant's *residence*; or posting *and* delivery of a copy to a person there residing, if one can be found, *and* sending a copy through the mail. Strict compliance with the statute is required." (*Liebovich v. Shahrokhkhany* (1997) 56 Cal.App.4th 511, 516 [65 Cal.Rptr.2d 457], original italics, internal citation omitted.)

- "We … hold that service made in accordance with section 1162, subdivision 3, as applied to section 1161, subdivision 2, must be effected in such a manner as will give a tenant the three days of written notice required by the Legislature in which he may cure his default in the payment of rent." (*Davidson, supra,* 138 Cal.App.3d Supp. at p. 14.)

- "We … hold that service of the three-day notice by posting and mailing is effective on the date the notice is posted and mailed." (*Walters, supra,* 226 Cal.App.3d Supp. at p. 20.)

- "It is well settled that the notice required under [Code Civ. Proc., § 1161] subdivisions 2 and 3 (where the condition or covenant assertedly violated is capable of being performed) must be framed in the alternative, viz., pay the rent *or* quit, perform the covenant *or* quit, and a notice which merely directs the tenant to quit is insufficient to render such tenant guilty of unlawful detainer upon his continued possession." (*Hinman v. Wagnon* (1959) 172 Cal.App.2d 24, 27 [341 P.2d 749], original italics.

- "Plaintiff argues, however, that he should be allowed to amend his complaint so as to bring his action under section 1161, subdivision 4. The notice thereunder required need not be framed in the alternative. However, plaintiff has at no time, either by his three days' notice or in any of his pleadings, suggested that defendant had assigned the lease or sublet the property, or had committed waste contrary to the conditions or covenants of the lease, or maintained a nuisance on the premises, or had used the property for an unlawful purpose. Plaintiff had three opportunities to state a cause of action; if he was of the belief that facts

existed which brought his case under 1161, subdivision 4, it would have been a simple matter to allege such facts, but this he did not do." (*Hinman, supra,* 172 Cal.App.2d at p. 29.)

- "Where a covenant in a lease has been breached and the breach cannot be cured, a demand for performance is not a condition precedent to an unlawful detainer action." (*Salton Community Services Dist., supra,* 256 Cal.App.2d at p. 529.)

- "[D]efendant admitted in his answer that he 'ultimately received [the relevant] notice' but 'affirmatively allege[d] that he was not properly and legally served' with a valid notice. We find that, under the circumstances of this case, the defendant waived any defect in the challenged service of the notice under section 1162, subdivision 1." (*Valov, supra,* 168 Cal.App.3d at p. 876.)

- "In the cases discussed … , a finding of proper service turned on a party's acknowledgment or admission the notice in question was in fact received. In the present case, defendant denied, in his answer and at trial, that he had ever received the three-day notice. Because there was no admission of receipt in this case, service by certified mail did not establish or amount to personal delivery. Further, there was no evidence of compliance with any of the three methods of service of a three-day notice to pay rent or quit provided in section 1162. Therefore, the judgment must be reversed." (*Liebovich, supra,* 56 Cal.App.4th at p. 518.)

- "[Code of Civil Procedure section 1162 specifies] three ways in which service of the three-day notice may be effected on a residential tenant: … . As explained in *Liebovich, supra, …* , '[w]hen the fact of service is contested, compliance with one of these methods must be shown or the judgment must be reversed.' " (*Palm Property Investments, LLC, supra,* 194 Cal.App.4th at p. 1425.)

- "In commercial leases the landlord and commercial tenant may lawfully agree to notice procedures that differ from those provided in the statutory provisions governing unlawful detainer." (*Culver Center Partners East #1, L.P., supra,* 185 Cal.App.4th at p.750.)

- "[E]ven if some policy rationale might support such a waiver/forfeiture [by actual receipt] rule in the residential lease context, there is no basis to apply it in the commercial context where matters of service and waiver are prescribed in the lease itself. Nothing in the parties' lease suggests actual receipt of a notice to quit results in the waiver or forfeiture of [tenant]'s right to service accomplished in the manner prescribed. To the contrary, the lease specifically provides, 'No covenant, term or condition, or breach' of the lease 'shall be deemed waived except if expressly waived in a written instrument executed by the waiving party.' Although [tenant's agent] acted on the notice to quit by attempting to deliver the rent check, neither her fortuitous receipt of the notice nor her actions in response to it constitutes an express waiver of the notice provisions in the lease." (*Culver Center Partners East #1, L.P., supra,* 185 Cal.App.4th at p. 752, internal citation omitted.)

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2006) Real Property, §§ 720, 726, 727

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.26–8.68

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) §§ 5.2, 6.10–6.16, 6.25–6.29, 6.38–6.49, Ch. 8

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, §§ 210.21, 210.23, 210.24 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.11, 5.12

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.11 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, §§ 236.11, 236.12 (Matthew Bender)

Miller & Starr, California Real Estate (3d ed. 2008) Ch. 19, *Landlord-Tenant*, §§ 19:202–19:204 (Thomson Reuters ~~West~~)

UNLAWFUL DETAINER

4306. Termination of Month-to-Month Tenancy—Essential Factual Elements

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[*Name of plaintiff***] claims that [***name of defendant***] [and [***name of subtenant***], a subtenant of [***name of defendant***],] no longer [has/have] the right to occupy the property because the tenancy has ended. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [owns/leases] the property;**

2. **That [***name of plaintiff***] [rented/subleased] the property to [***name of defendant***] under a month-to-month [lease/rental agreement/sublease];**

3. **That [***name of plaintiff***] gave [***name of defendant***] proper [30/60] days' written notice that the tenancy was ending; and**

4. **That [***name of defendant***] [or subtenant [***name of subtenant***]] is still occupying the property.**

New August 2007; Revised June 2011, December 2011

Directions for Use

Include the bracketed references to a subtenancy in the opening paragraph and in element 4 if persons other than the tenant-defendant are in occupancy of the premises.

If the plaintiff is the landlord or owner, select "owns" in element 1 and "rented" and either "lease" or "rental agreement" in element 2. Commercial documents are usually called "leases" while residential documents are often called "rental agreements." Select the term that is used on the written document.

If the plaintiff is a tenant seeking to recover possession from a subtenant, select "leases" in element 1 and "subleased" and "sublease" in element 2. (Code Civ. Proc., § 1161(3).)

In element 3, select the applicable number of days' notice required by statute. Thirty days is sufficient for commercial tenancies, residential tenancies of less than a year's duration, and certain transfers of the ownership interest to a bona fide purchaser. For residential tenancies of a year or more's duration, 60 days' notice is generally required. (Civ. Code, §§ 1946, 1946.1(b)–(d).)

Defective service may be waived if defendant admits timely receipt of notice. (See *Valov v. Tank* (1985) 168 Cal.App.3d 867, 876 [214 Cal.Rptr. 546].) However, if the fact of service is contested, compliance with the statutory requirements must be shown. (*Palm Property Investments, LLC v. Yadegar* (2011) 194 Cal.App.4th 1419, 1425 [123 Cal.Rptr.3d 816].)

Therefore, this instruction does not provide an option for the jury to determine whether or not defective service was waived if there was actual receipt.

If a commercial lease requires service by a particular method, actual receipt by the tenant will not cure the landlord's failure to comply with the service requirements of the lease. (*Culver Center Partners East #1, L.P. v. Baja Fresh Westlake Village, Inc.* (2010) 185 Cal.App.4th 744, 752 [110 Cal.Rptr.3d 833].) Whether the same rule applies to a residential lease that specifies a method of service has not yet been decided.

Do not give this instruction to terminate a tenancy if the tenant is receiving federal financial assistance through the Section 8 program. (See *Wasatch Property Management v. Degrate* (2005) 35 Cal.4th 1111, 1115 [29 Cal.Rptr.3d 262, 112 P.3d 647]; Civ. Code, § 1954.535 (90 days' notice required).) Specific grounds for terminating a federally subsidized low-income housing tenancy are required and must be set forth in the notice. (See, e.g., 24 C.F.R. § 982.310.)

See CACI No. 4307, *Sufficiency and Service of Notice of Termination of Month-to-Month Tenancy*, for an instruction on proper advanced written notice.

Sources and Authority

- Unlawful Detainer Based on Holdover After Expiration of Term. Code of Civil Procedure section 1161(1). ~~provides in part:~~

  ~~A tenant of real property … is guilty of unlawful detainer:~~

  ~~1. When he or she continues in possession, in person or by subtenant … after the expiration of the term for which it is let to him or her; provided the expiration is of a nondefault nature however brought about without the permission of his or her landlord … including the case where the person to be removed became the occupant of the premises as a servant, employee, agent, or licensee and the relation of master and servant, or employer and employee, or principal and agent, or licensor and licensee, has been lawfully terminated or the time fixed for occupancy by the agreement between the parties has expired; but nothing in this subdivision shall be construed as preventing the removal of the occupant in any other lawful manner; but in case of a tenancy at will, it must first be terminated by notice, as prescribed in the Civil Code.~~

- ~~Automatic Renewal Absent Notice of Termination on Expiration of Term.~~ Civil Code section 1946. ~~provides in part: "A hiring of real property, for a term not specified by the parties, is deemed to be renewed as stated in Section 1945, at the end of the term implied by law unless one of the parties gives written notice to the other of his intention to terminate the same, at least as long before the expiration thereof as the term of the hiring itself, not exceeding 30 days; provided, however, that as to tenancies from month to month either of the parties may terminate the same by giving at least 30 days' written notice thereof at any time and the rent shall be due and payable to and including the date of termination. It shall be competent for the parties to provide by an agreement at the time such tenancy is created that a notice of the~~

~~intention to terminate the same may be given at any time not less than seven days before the expiration of the term thereof. The notice herein required shall be given in the manner prescribed in Section 1162 of the Code of Civil Procedure or by sending a copy by certified or registered mail addressed to the other party. In addition, the lessee may give such notice by sending a copy by certified or registered mail addressed to the agent of the lessor to whom the lessee has paid the rent for the month prior to the date of the notice or by delivering a copy to the agent personally."~~

- Time and Manner of Giving Notice of Termination. Civil Code section 1946.1. ~~provides in part:~~

  ~~(a) Notwithstanding Section 1946, a hiring of residential real property for a term not specified by the parties, is deemed to be renewed as stated in Section 1945, at the end of the term implied by law unless one of the parties gives written notice to the other of his or her intention to terminate the tenancy, as provided in this section.~~

  ~~(b) An owner of a residential dwelling giving notice pursuant to this section shall give notice at least 60 days prior to the proposed date of termination. A tenant giving notice pursuant to this section shall give notice for a period at least as long as the term of the periodic tenancy prior to the proposed date of termination.~~

  ~~(c) Notwithstanding subdivision (b), an owner of a residential dwelling giving notice pursuant to this section shall give notice at least 30 days prior to the proposed date of termination if any tenant or resident has resided in the dwelling for less than one year.~~

  ~~(d) Notwithstanding subdivision (b), an owner of a residential dwelling giving notice pursuant to this section shall give notice at least 30 days prior to the proposed date of termination if all of the following apply:~~

  ~~(1) The dwelling or unit is alienable separate from the title to any other dwelling unit.~~
  ~~(2) The owner has contracted to sell the dwelling or unit to a bona fide purchaser for value, and has established an escrow with a title insurer or an underwritten title company, as defined in Sections 12340.4 and 12340.5 of the Insurance Code, respectively, a licensed escrow agent, as defined in Sections 17004 and 17200 of the Financial Code, or a licensed real estate broker, as defined in Section 10131 of the Business and Professions Code.~~
  ~~(3) The purchaser is a natural person or persons.~~
  ~~(4) The notice is given no more than 120 days after the escrow has been established.~~
  ~~(5) Notice was not previously given to the tenant pursuant to this section.~~
  ~~(6) The purchaser in good faith intends to reside in the property for at least one full year after the termination of the tenancy.~~

  ~~(e) (*omitted*)~~

~~(f) The notices required by this section shall be given in the manner prescribed in Section 1162 of the Code of Civil Procedure or by sending a copy by certified or registered mail.~~

~~(g), (h) (*omitted*)~~

- Presumption That Term is Based on Period for Which Rent is Paid. Civil Code section 1944. ~~provides: "A hiring of lodgings or a dwelling-house for an unspecified term is presumed to have been made for such length of time as the parties adopt for the estimation of the rent. Thus a hiring at a monthly rate of rent is presumed to be for one month. In the absence of any agreement respecting the length of time or the rent, the hiring is presumed to be monthly."~~

- Conversion of Unlawful Detainer to Ordinary Civil Action if Possession Not at Issue. Civil Code section 1952.3(a). ~~provides in part: "[I]f the lessor brings an unlawful detainer proceeding and possession of the property is no longer in issue because possession of the property has been delivered to the lessor before trial or, if there is no trial, before judgment is entered, the case becomes an ordinary civil action … ."~~

- " 'In order that such an action may be maintained the conventional relation of landlord and tenant must be shown to exist. In other words, the action is limited to those cases in which the tenant is estopped to deny the landlord's title.' " (*Fredericksen v. McCosker* (1956) 143 Cal.App.2d 114, 116 [299 P.2d 908], internal citations omitted.)

- "If the tenant gives up possession of the property after the commencement of an unlawful detainer proceeding, the action becomes an ordinary one for damages." (*Fish Construction Co. v. Moselle Coach Works, Inc.* (1983) 148 Cal.App.3d 654, 658 [196 Cal.Rptr. 174].)

- "The Act provides that as a prerequisite to filing an unlawful detainer action based on a terminated month-to-month tenancy, the landlord must serve the tenant with a 30-day written notice of termination." (*Losornio v. Motta* (1998) 67 Cal.App.4th 110, 113 [78 Cal.Rptr.2d 799], internal citations omitted.)

- "Proper service on the lessee of a valid … notice … is an essential prerequisite to a judgment declaring a lessor's right to possession under section 1161, subdivision 2. A lessor must allege and prove proper service of the requisite notice. Absent evidence the requisite notice was properly served pursuant to section 1162, no judgment for possession can be obtained." (*Liebovich v. Shahrokhkhany* (1997) 56 Cal.App.4th 511, 513 [65 Cal.Rptr.2d 457], internal citations omitted.)

- "Section 1162 does not authorize service of a … notice … by mail delivery alone, certified or otherwise. It provides for service by: personal delivery; leaving a copy with a person of suitable age and discretion at the renter's residence or usual place of business *and* sending a copy through the mail to the tenant's *residence*; or posting *and* delivery of a copy to a person there residing, if one can be found, *and* sending a copy through the mail. Strict compliance

with the statute is required." (*Liebovich, supra,* 56 Cal.App.4th at p. 516, original italics, internal citations omitted.)

- "In the cases discussed … , a finding of proper service turned on a party's acknowledgment or admission the notice in question was in fact received. In the present case, defendant denied, in his answer and at trial, that he had ever received the … notice. Because there was no admission of receipt in this case, service by certified mail did not establish or amount to personal delivery. Further, there was no evidence of compliance with any of the three methods of service of a … notice … provided in [Code of Civil Procedure] section 1162. Therefore, the judgment must be reversed." (*Liebovich, supra,* 56 Cal.App.4th at p. 518.)

- "[Code of Civil Procedure section 1162 specifies] three ways in which service of the … notice may be effected on a residential tenant: … . As explained in *Liebovich, supra,* … , '[w]hen the fact of service is contested, compliance with one of these methods must be shown or the judgment must be reversed.' " (*Palm Property Investments, LLC, supra,* 194 Cal.App.4th at p. 1425.)

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2005) Real Property, § 680

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 8-B, *Unlawful Detainer Complaint*, ¶ 8:85 (The Rutter Group)

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.69–8.80

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) §§ 5.3, 7.5, 7.11

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, §§ 210.21, 210.27 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.07

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.10 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, §§ 236.11, 236.40 (Matthew Bender)

Miller & Starr, California Real Estate 3d, § 19:188 (Thomson Reuters ~~West~~)

UNLAWFUL DETAINER

4307. Sufficiency and Service of Notice of Termination of Month-to-Month Tenancy

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[*Name of plaintiff***] contends that [he/she/it] properly gave [***name of defendant***] written notice that the tenancy was ending. To prove that the notice contained the required information and was properly given, [***name of plaintiff***] must prove all of the following:**

1. **That the notice informed [***name of defendant***] in writing that the tenancy would end on a date at least [30/60] days after notice was given to [him/her/it];**

2. **That the notice was given to [***name of defendant***] at least [30/60] days before the date that the tenancy was to end; and**

3. **That the notice was given to [***name of defendant***] at least [30/60] days before [***insert date on which action was filed***];**

Notice was properly given if [*select one or more of the following manners of service:***]**

[the notice was delivered to [*name of defendant***] personally[./; or]]**

[the notice was sent by certified or registered mail in an envelope addressed to [*name of defendant***], in which case notice is considered given on the date the notice was placed in the mail[./; or]]**

[[*name of defendant***] was not at [home or work/the commercial rental property], and the notice was left with a responsible person at [[***name of defendant***]'s home or place of work/the commercial property], and a copy was also mailed in an envelope addressed to [***name of defendant***] at [[his/her] residence/the commercial property]. In this case, notice is considered given on the date the second notice was placed in the mail[./; or]]**

[*for a residential tenancy:*

[*name of defendant***]'s place of residence and work could not be discovered, or a responsible person could not be found at either place, and (1) the notice was posted on the property in a place where it would easily be noticed, (2) a copy was given to a person living there if someone could be found, and (3) a copy was also mailed to the property in an envelope addressed to [***name of defendant***]. In this case, notice is considered given on the date the second notice was placed in the mail.]**

[*or for a commercial tenancy:*

at the time of attempted service, a responsible person could not be found at the commercial rental property through the exercise of reasonable diligence, and (1) the notice was posted on the property in a place where it would easily be noticed, and (2) a

copy was also mailed to the address of the commercial property in an envelope addressed to [*name of defendant***]. In this case, notice is considered given on the date the second notice was placed in the mail.]**

[The [30/60]-day notice period begins on the day after the notice was given to [*name of defendant***]. If the last day of the notice period falls on a Saturday, Sunday, or holiday, [***name of defendant***]'s time to vacate the property is extended to include the first day after the Saturday, Sunday, or holiday that is not also a Saturday, Sunday, or holiday.]**

New August 2007; Revised December 2010, June 2011, December 2011

Directions for Use

Select the applicable number of days' notice required by statute. Thirty days is sufficient for commercial tenancies, residential tenancies of less than a year's duration, and certain transfers of the ownership interest to a bona fide purchaser. For residential tenancies of a year or more's duration, 60 days is generally required. (Civ. Code, §§ 1946, 1946.1(b)–(d).)

If 30 days' notice is sufficient and the lease provided for a notice period other than the statutory 30-day period (but not less than 7), insert that number instead of "30" or "60" throughout the instruction. (Civ. Code, § 1946.)

Select all manners of service used, including personal service, certified or registered mail, substituted service by leaving the notice at the defendant's home or place of work or at the rental property, and substituted service by posting on the property. (See Civ. Code, §§ 1946, 1946.1(f); Code Civ. Proc., § 1162.)

Read the next-to-last paragraph if the last day of the notice period fell on a Saturday, Sunday, or holiday.

Defective service may be waived if defendant admits timely receipt of notice. (See *Valov v. Tank* (1985) 168 Cal.App.3d 867, 876 [214 Cal.Rptr. 546].) However, if the fact of service is contested, compliance with the statutory requirements must be shown. (*Palm Property Investments, LLC v. Yadegar* (2011) 194 Cal.App.4th 1419, 1425 [123 Cal.Rptr.3d 816].) Therefore, this instruction does not provide an option for the jury to determine whether or not defective service was waived if there was actual receipt.

If a commercial lease requires service by a particular method, actual receipt by the tenant will not cure the landlord's failure to comply with the service requirements of the lease. (*Culver Center Partners East #1, L.P. v. Baja Fresh Westlake Village, Inc.* (2010) 185 Cal.App.4th 744, 752 [110 Cal.Rptr.3d 833].) Whether the same rule applies to a residential lease that specifies a method of service has not yet been decided.

Local ordinances may impose additional notice requirements for the termination of a rental agreement. This instruction should be modified accordingly.

Sources and Authority

- Automatic Renewal of Tenancy at End of Term. Civil Code section 1946. ~~provides in part: "A hiring of real property, for a term not specified by the parties, is deemed to be renewed as stated in Section 1945, at the end of the term implied by law unless one of the parties gives written notice to the other of his intention to terminate the same, at least as long before the expiration thereof as the term of the hiring itself, not exceeding 30 days; provided, however, that as to tenancies from month to month either of the parties may terminate the same by giving at least 30 days' written notice thereof at any time and the rent shall be due and payable to and including the date of termination. It shall be competent for the parties to provide by an agreement at the time such tenancy is created that a notice of the intention to terminate the same may be given at any time not less than seven days before the expiration of the term thereof. The notice herein required shall be given in the manner prescribed in Section 1162 of the Code of Civil Procedure or by sending a copy by certified or registered mail addressed to the other party. In addition, the lessee may give such notice by sending a copy by certified or registered mail addressed to the agent of the lessor to whom the lessee has paid the rent for the month prior to the date of the notice or by delivering a copy to the agent personally."~~

- Time and Manner of Giving Notice of Termination. Civil Code section 1946.1. ~~provides in part:~~

  ~~(a) Notwithstanding Section 1946, a hiring of residential real property for a term not specified by the parties, is deemed to be renewed as stated in Section 1945, at the end of the term implied by law unless one of the parties gives written notice to the other of his or her intention to terminate the tenancy, as provided in this section.~~

  ~~(b) An owner of a residential dwelling giving notice pursuant to this section shall give notice at least 60 days prior to the proposed date of termination. A tenant giving notice pursuant to this section shall give notice for a period at least as long as the term of the periodic tenancy prior to the proposed date of termination.~~

  ~~(c) Notwithstanding subdivision (b), an owner of a residential dwelling giving notice pursuant to this section shall give notice at least 30 days prior to the proposed date of termination if any tenant or resident has resided in the dwelling for less than one year.~~

  ~~(d) Notwithstanding subdivision (b), an owner of a residential dwelling giving notice pursuant to this section shall give notice at least 30 days prior to the proposed date of termination if all of the following apply:~~

  ~~(1) The dwelling or unit is alienable separate from the title to any other dwelling unit.~~
  ~~(2) The owner has contracted to sell the dwelling or unit to a bona fide purchaser for value, and has established an escrow with a title insurer or an underwritten~~

title company, as defined in Sections 12340.4 and 12340.5 of the Insurance Code, respectively, a licensed escrow agent, as defined in Sections 17004 and 17200 of the Financial Code, or a licensed real estate broker, as defined in Section 10131 of the Business and Professions Code.

(3) The purchaser is a natural person or persons.

(4) The notice is given no more than 120 days after the escrow has been established.

(5) Notice was not previously given to the tenant pursuant to this section.

(6) The purchaser in good faith intends to reside in the property for at least one full year after the termination of the tenancy.

(c) (*omitted*)

(f) The notices required by this section shall be given in the manner prescribed in Section 1162 of the Code of Civil Procedure or by sending a copy by certified or registered mail.

(g), (h) (*omitted*)

- Manner of Service of Notice. Code of Civil Procedure section 1162. provides in part:

(a) Except as provided in subdivision (b), the notices required … may be served by any of the following methods:

(1) By delivering a copy to the tenant personally;

(2) If he or she is absent from his or her place of residence, and from his or her usual place of business, by leaving a copy with some person of suitable age and discretion at either place, and sending a copy through the mail addressed to the tenant at his or her place of residence;

(3) If such place of residence and business can not be ascertained, or a person of suitable age or discretion there can not be found, then by affixing a copy in a conspicuous place on the property, and also delivering a copy to a person there residing, if such person can be found; and also sending a copy through the mail addressed to the tenant at the place where the property is situated. Service upon a subtenant may be made in the same manner.

(b) The notices required by Section 1161 may be served upon a commercial tenant by any of the following methods:

(1) By delivering a copy to the tenant personally.

(2) If he or she is absent from the commercial rental property, by leaving a copy with some person of suitable age and discretion at the property, and sending a copy through the mail addressed to the tenant at the address where the property is situated.

~~(3) If, at the time of attempted service, a person of suitable age or discretion is not found at the rental property through the exercise of reasonable diligence, then by affixing a copy in a conspicuous place on the property, and also sending a copy through the mail addressed to the tenant at the address where the property is situated. Service upon a subtenant may be made in the same manner.~~

~~(c) For purposes of subdivision (b), "commercial tenant" means a person or entity that hires any real property in this state that is not a dwelling unit, as defined in subdivision (c) of Section 1940 of the Civil Code, or a mobilehome, as defined in Section 798.3 of the Civil Code.~~

- "[T]he service and notice provisions in the unlawful detainer statutes and [Code of Civil Procedure] section 1013 are mutually exclusive, and thus, section 1013 does not extend the notice periods that are a prerequisite to filing an unlawful detainer action." (*Losornio v. Motta* (1998) 67 Cal.App.4th 110, 112 [78 Cal.Rptr.2d 799].)

- "Section 1162 does not authorize service of a … notice … by mail delivery alone, certified or otherwise. It provides for service by: personal delivery; leaving a copy with a person of suitable age and discretion at the renter's residence or usual place of business and sending a copy through the mail to the tenant's *residence*; or posting *and* delivery of a copy to a person there residing, if one can be found, *and* sending a copy through the mail. Strict compliance with the statute is required." (*Liebovich v. Shahrokhkhany* (1997) 56 Cal.App.4th 511, 516 [65 Cal.Rptr.2d 457], original italics, internal citation omitted.)

- "[D]efendant admitted in his answer that he 'ultimately received [the relevant] notice' but 'affirmatively allege[d] that he was not properly and legally served' with a valid notice. We find that, under the circumstances of this case, the defendant waived any defect in the challenged service of the notice under section 1162, subdivision 1." (*Valov, supra,* 168 Cal.App.3d at p. 876.)

- "In the cases discussed … , a finding of proper service turned on a party's acknowledgment or admission the notice in question was in fact received. In the present case, defendant denied, in his answer and at trial, that he had ever received the … notice. Because there was no admission of receipt in this case, service by certified mail did not establish or amount to personal delivery. Further, there was no evidence of compliance with any of the three methods of service of a … notice … provided in section 1162. Therefore, the judgment must be reversed." (*Liebovich, supra,* 56 Cal.App.4th at p. 518.)

- "[Code of Civil Procedure section 1162 specifies] three ways in which service of the … notice may be effected on a residential tenant: … . As explained in *Liebovich, supra, …* , '[w]hen the fact of service is contested, compliance with one of these methods must be shown or the judgment must be reversed.' " (*Palm Property Investments, LLC, supra,* 194 Cal.App.4th at p. 1425.)

- "In commercial leases the landlord and commercial tenant may lawfully agree to notice procedures that differ from those provided in the statutory provisions governing unlawful detainer." (*Culver Center Partners East #1, L.P., supra*, 185 Cal.App.4th at p.750.)

- "[E]ven if some policy rationale might support such a waiver/forfeiture [by actual receipt] rule in the residential lease context, there is no basis to apply it in the commercial context where matters of service and waiver are prescribed in the lease itself. Nothing in the parties' lease suggests actual receipt of a notice to quit results in the waiver or forfeiture of [tenant]'s right to service accomplished in the manner prescribed. To the contrary, the lease specifically provides, 'No covenant, term or condition, or breach' of the lease 'shall be deemed waived except if expressly waived in a written instrument executed by the waiving party.' Although [tenant's agent] acted on the notice to quit by attempting to deliver the rent check, neither her fortuitous receipt of the notice nor her actions in response to it constitutes an express waiver of the notice provisions in the lease." (*Culver Center Partners East #1, L.P., supra*, 185 Cal.App.4th at p. 752, internal citation omitted.)

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2005) Real Property, §§ 680, 727

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 8-B, *Unlawful Detainer Complaint*, ¶¶ 8:68, 8:69 (The Rutter Group)

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 7-C, *Bases For Terminating Tenancy*, ¶¶ 7:119, 7:190 et seq. (The Rutter Group)

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.69–8.80

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) § 5.3, Ch. 7

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, §§ 210.21, 210.27 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.11, 5.12

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.11 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, §§ 236.10–236.12 (Matthew Bender)

Miller & Starr, California Real Estate 3d, §§ 19:188, 19:192 (Thomson Reuters~~West~~)

UNLAWFUL DETAINER

4308. Termination for Nuisance or Unlawful Use—Essential Factual Elements (Code Civ. Proc, § 1161(4))

[*Name of plaintiff***] claims that [***name of defendant***] [and [***name of subtenant***], a subtenant of [***name of defendant***],] no longer [has/have] the right to occupy the property because [***name of defendant***] has [created a nuisance on the property/ [or] used the property for an illegal purpose]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [owns/leases] the property;**

2. **That [***name of plaintiff***] [rented/subleased] the property to [***name of defendant***];**

3. **That [***name of defendant***] [***include one or both of the following:***]**

   created a nuisance on the property by [*specify conduct constituting nuisance***];**

   [or]

   used the property for an illegal purpose by [*specify illegal activity***];**

4. **That [***name of plaintiff***] properly gave [***name of defendant***] [and [***name of subtenant***]] three days' written notice to vacate the property; and**

5. **That [***name of defendant***] [or subtenant [***name of subtenant***]] is still occupying the property.**

New December 2010; Revised June 2011, December 2011

Directions for Use

Include the bracketed references to a subtenancy in the opening paragraph and in elements 4 and 5 if persons other than the tenant-defendant are in occupancy of the premises.

If the plaintiff is the landlord or owner, select "owns" in element 1, and "rented" in element 2.

If the plaintiff is a tenant seeking to recover possession from a subtenant, include the bracketed language on subtenancy in the opening paragraph and in element 4, "leases" in element 1, and "subleased" in element 2. (Code Civ. Proc., § 1161(3).)

Certain conduct or statutory violations that constitute or create a rebuttable presumption of a nuisance are set forth in Code of Civil Procedure section 1161(4). If applicable, insert the appropriate ground in element 3. (See also Health & Saf. Code, § 17922 [adopting various uniform housing and building codes].)

Defective service may be waived if defendant admits timely receipt of notice. (See *Valov v. Tank* (1985) 168 Cal.App.3d 867, 876 [214 Cal.Rptr. 546].) However, if the fact of service is contested, compliance with the statutory requirements must be shown. (*Palm Property Investments, LLC v. Yadegar* (2011) 194 Cal.App.4th 1419, 1425 [123 Cal.Rptr.3d 816].) Therefore, this instruction does not provide an option for the jury to determine whether or not defective service was waived if there was actual receipt.

If a commercial lease requires service by a particular method, actual receipt by the tenant will not cure the landlord's failure to comply with the service requirements of the lease. (*Culver Center Partners East #1, L.P. v. Baja Fresh Westlake Village, Inc.* (2010) 185 Cal.App.4th 744, 752 [110 Cal.Rptr.3d 833].) Whether the same rule applies to a residential lease that specifies a method of service has not yet been decided.

If the lease specifies a time period for notice other than the three-day period, substitute that time period in element 4.

For nuisance or unlawful use, the landlord is entitled to possession on service of a three-day notice to quit; no opportunity to cure by performance is required. (Code Civ. Proc., § 1161(4).)

Local or federal law may impose additional requirements for the termination of a rental agreement based on nuisance or illegal activity. This instruction should be modified accordingly.

See CACI No. 4309, *Sufficiency and Service of Notice of Termination for Nuisance or Unlawful Use*, for an instruction on proper written notice.

See also CACI No. 312, *Substantial Performance*.

Sources and Authority

- Unlawful Detainer Based on Tenant Conduct. Code of Civil Procedure section 1161(4).~~, repealed and replaced with a new version January 1, 2012, provides in part:~~

  ~~A tenant of real property … is guilty of unlawful detainer:~~

  ~~4. Any tenant, subtenant, or executor or administrator of his or her estate heretofore qualified and now acting, or hereafter to be qualified and act, assigning or subletting or committing waste upon the demised premises, contrary to the conditions or covenants of his or her lease, or maintaining, committing, or permitting the maintenance or commission of a nuisance upon the demised premises or using the premises for an unlawful purpose, thereby terminates the lease, and the landlord, or his or her successor in estate, shall upon service of three days' notice to quit upon the person or persons in possession, be entitled to restitution of possession of the demised premises under this chapter. For purposes of this subdivision, a person who commits an offense described in subdivision (c) of Section 3485 of the Civil Code, or~~

~~subdivision (c) of Section 3486 of the Civil Code, or uses the premises to further the purpose of that offense shall be deemed to have committed a nuisance upon the premises. For purposes of this subdivision, if a person commits an act of domestic violence as defined in Section 6211 of the Family Code, sexual assault as defined in Section 261, 261.5, 262, 286, 288a, or 289 of the Penal Code, or stalking as defined in Section 1708.7 of the Civil Code, against another tenant or subtenant on the premises there is a rebuttable presumption affecting the burden of proof that the person has committed a nuisance upon the premises, provided, however, that this shall not apply if the victim of the act of domestic violence, sexual assault, or stalking, or a household member of the victim, other than the perpetrator, has not vacated the premises. This subdivision shall not be construed to supersede the provisions of the Violence Against Women and Department of Justice Reauthorization Act of 2005 (Public Law 109-162) that permit the removal from a lease of a tenant who engages in criminal acts of physical violence against cotenants.~~

- "Nuisance" Defined. Civil Code section 3479. ~~provides: "Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance."~~

- "Plaintiff argues, however, that he should be allowed to amend his complaint so as to bring his action under section 1161, subdivision 4. The notice thereunder required need not be framed in the alternative. However, plaintiff has at no time, either by his three days' notice or in any of his pleadings, suggested that defendant had assigned the lease or sublet the property, or had committed waste contrary to the conditions or covenants of the lease, or maintained a nuisance on the premises, or had used the property for an unlawful purpose. Plaintiff had three opportunities to state a cause of action; if he was of the belief that facts existed which brought his case under 1161, subdivision 4, it would have been a simple matter to allege such facts, but this he did not do." (*Hinman v. Wagnon* (1959) 172 Cal.App.2d 24, 29 [341 P.2d 749].)

- "Proper service on the lessee of a valid three-day notice to pay rent or quit is an essential prerequisite to a judgment declaring a lessor's right to possession under section 1161, subdivision 2. A lessor must allege and prove proper service of the requisite notice. Absent evidence the requisite notice was properly served pursuant to section 1162, no judgment for possession can be obtained." (*Liebovich v. Shahrokhkhany* (1997) 56 Cal.App.4th 511, 513 [65 Cal.Rptr.2d 457], internal citations omitted.)

- "Section 1162 does not authorize service of a three-day notice to pay rent or quit by mail delivery alone, certified or otherwise. It provides for service by: personal delivery; leaving a copy with a person of suitable age and discretion at the renter's residence or usual place of business *and* sending a copy through the mail to the tenant's *residence*; or posting *and* delivery of a copy to a person there residing, if one can be found, *and* sending a copy through

the mail. Strict compliance with the statute is required." (*Liebovich, supra*, 56 Cal.App.4th at p. 516, original italics, internal citations omitted.)

- "In the cases discussed … , a finding of proper service turned on a party's acknowledgment or admission the notice in question was in fact received. In the present case, defendant denied, in his answer and at trial, that he had ever received the three-day notice. Because there was no admission of receipt in this case, service by certified mail did not establish or amount to personal delivery. Further, there was no evidence of compliance with any of the three methods of service of a three-day notice to pay rent or quit provided in [Code of Civil Procedure] section 1162. Therefore, the judgment must be reversed." (*Liebovich, supra*, 56 Cal.App.4th at p. 518.)

- "[Code of Civil Procedure section 1162 specifies] three ways in which service of the three-day notice may be effected on a residential tenant: … . As explained in *Liebovich, supra*, … , '[w]hen the fact of service is contested, compliance with one of these methods must be shown or the judgment must be reversed.' " (*Palm Property Investments, LLC, supra*, 194 Cal.App.4th at p. 1425.)

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2006) Real Property, §§ 674, 726

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.55, 8.58, 8.59

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) §§ 6.46, 6.48, 6.49

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 7-C, *Bases For Terminating Tenancy*, ¶ 7:136 et seq. (The Rutter Group)

7 California Real Estate Law and Practice, Ch. 200, *Termination of Tenancies*, § 200.38 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 4, *Termination of Tenancy*, 4.23

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.10 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, § 236.11 (Matthew Bender)

Miller & Starr, California Real Estate (3d ed. 2008) Ch. 19, Landlord-Tenant, §§ 19:200–19.205 (Thomson Reuters ~~West~~)

UNLAWFUL DETAINER

4309. Sufficiency and Service of Notice of Termination for Nuisance or Unlawful Use

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[*Name of plaintiff***] contends that [he/she/it] properly gave [***name of defendant***] three days' notice to vacate the property. To prove that the notice contained the required information and was properly given, [***name of plaintiff***] must prove all of the following:**

1. **That the notice informed [***name of defendant***] in writing that [he/she/it] must vacate the property within three days;**

2. **That the notice described how [***name of defendant***] [created a nuisance on the property/ [or] used the property for an illegal purpose]; and**

3. **That the notice was given to [***name of defendant***] at least three days before [***insert date on which action was filed***].**

Notice was properly given if [*select one or more of the following manners of service:***]**

[the notice was delivered to [*name of defendant***] personally[./; or]]**

[[*name of defendant***] was not at [home or work/the commercial rental property], and the notice was left with a responsible person at [[***name of defendant***]'s residence or place of work/the commercial property], and a copy was also mailed in an envelope addressed to [***name of defendant***] at [[his/her] residence/the commercial property]. In this case, notice is considered given on the date the second notice was [received by [***name of defendant***]/placed in the mail][./; or]]**

[*for a residential tenancy:*

[*name of defendant***]'s place of residence and work could not be discovered, or a responsible person could not be found at either place, and (1) the notice was posted on the property in a place where it would easily be noticed, (2) a copy was given to a person living there if someone could be found, and (3) a copy was also mailed to the address of the rented property in an envelope addressed to [***name of defendant***]. In this case, notice is considered given on the date the second notice was [received by [***name of defendant***]/placed in the mail].]**

[*or for a commercial tenancy:*

at the time of attempted service, a responsible person could not be found at the commercial rental property through the exercise of reasonable diligence, and (1) the notice was posted on the property in a place where it would easily be noticed, and (2) a copy was also mailed to the address of the commercial property in an envelope

addressed to [*name of defendant***]. In this case, notice is considered given on the date the second notice was [received by [***name of defendant***]/placed in the mail].]**

[The three-day notice period begins on the day after the notice was given to [*name of defendant***]. If the last day of the notice period falls on a Saturday, Sunday, or holiday, [***name of defendant***]'s time to correct the failure or to vacate the property is extended to include the first day after the Saturday, Sunday, or holiday that is not also a Saturday, Sunday, or holiday.]**

New December 2010; Revised June 2011, December 2011

Directions for Use

Select the manner of service used: personal service, substituted service by leaving the notice at the defendant's home or place of work or at the commercial property, or substituted service by posting on the property. (See Code Civ. Proc., § 1162.)

There is a conflict in the case law with respect to when the three-day period begins if substituted service is used. Compare *Davidson v. Quinn* (1982) 138 Cal.App.3d Supp. 9, 14 [188 Cal.Rptr. 421] [tenant must be given three days to pay, so period does not begin until actual notice is received] with *Walters v. Meyers* (1990) 226 Cal.App.3d Supp. 15, 19–20 [277 Cal.Rptr. 316] [notice is effective when posted and mailed]. This conflict is accounted for in the second, third, and fourth bracketed options for the manner of service.

Read the next-to-last paragraph if the last day of the notice period fell on a Saturday, Sunday, or holiday.

If a lease specifies a time period for giving notice other than the three-day period, substitute that time period for three days throughout the instruction, provided that it is not less than three days.

Defective service may be waived if defendant admits timely receipt of notice. (See *Valov v. Tank* (1985) 168 Cal.App.3d 867, 876 [214 Cal.Rptr. 546].) However, if the fact of service is contested, compliance with the statutory requirements must be shown. (*Palm Property Investments, LLC v. Yadegar* (2011) 194 Cal.App.4th 1419, 1425 [123 Cal.Rptr.3d 816].) Therefore, this instruction does not provide an option for the jury to determine whether or not defective service was waived if there was actual receipt.

If a commercial lease requires service by a particular method, actual receipt by the tenant will not cure the landlord's failure to comply with the service requirements of the lease. (*Culver Center Partners East #1, L.P. v. Baja Fresh Westlake Village, Inc.* (2010) 185 Cal.App.4th 744, 752 [110 Cal.Rptr.3d 833].) Whether the same rule applies to a residential lease that specifies a method of service has not yet been decided.

Local ordinances may impose additional notice requirements for the termination of a rental agreement. This instruction should be modified accordingly.

Sources and Authority

- Unlawful Detainer Based on Tenant Conduct. Code of Civil Procedure section 1161(4).~~, repealed and replaced with a new version January 1, 2012, provides in part:~~

  ~~A tenant of real property … is guilty of unlawful detainer:~~

  ~~4. Any tenant, subtenant, or executor or administrator of his or her estate heretofore qualified and now acting, or hereafter to be qualified and act, assigning or subletting or committing waste upon the demised premises, contrary to the conditions or covenants of his or her lease, or maintaining, committing, or permitting the maintenance or commission of a nuisance upon the demised premises or using the premises for an unlawful purpose, thereby terminates the lease, and the landlord, or his or her successor in estate, shall upon service of three days' notice to quit upon the person or persons in possession, be entitled to restitution of possession of the demised premises under this chapter. For purposes of this subdivision, a person who commits an offense described in subdivision (c) of Section 3485 of the Civil Code, or subdivision (c) of Section 3486 of the Civil Code, or uses the premises to further the purpose of that offense shall be deemed to have committed a nuisance upon the premises. For purposes of this subdivision, if a person commits an act of domestic violence as defined in Section 6211 of the Family Code, sexual assault as defined in Section 261, 261.5, 262, 286, 288a, or 289 of the Penal Code, or stalking as defined in Section 1708.7 of the Civil Code, against another tenant or subtenant on the premises there is a rebuttable presumption affecting the burden of proof that the person has committed a nuisance upon the premises, provided, however, that this shall not apply if the victim of the act of domestic violence, sexual assault, or stalking, or a household member of the victim, other than the perpetrator, has not vacated the premises. This subdivision shall not be construed to supersede the provisions of the Violence Against Women and Department of Justice Reauthorization Act of 2005 (Public Law 109-162) that permit the removal from a lease of a tenant who engages in criminal acts of physical violence agai~~nst cotenants.

- Manner of Service of Notice. Code of Civil Procedure section 1162.~~ provides:~~

~~(a) Except as provided in subdivision (b), the notices required by Sections 1161 and 1161a may be served by any of the following methods:~~

~~(1) By delivering a copy to the tenant personally;~~

~~(2) If he or she is absent from his or her place of residence, and from his or her usual place of business, by leaving a copy with some person of suitable age and discretion at either place, and sending a copy through the mail addressed to the tenant at his or her place of residence;~~

~~(3) If such place of residence and business can not be ascertained, or a person of suitable age or discretion there can not be found, then by affixing a copy in a conspicuous place on the property, and also delivering a copy to a person there residing, if such person can be found; and also sending a copy through the mail addressed to the tenant at the place where the property is situated. Service upon a subtenant may be made in the same manner.~~

~~(b) The notices required by Section 1161 may be served upon a commercial tenant by any of the following methods:~~

~~(1) By delivering a copy to the tenant personally.~~

~~(2) If he or she is absent from the commercial rental property, by leaving a copy with some person of suitable age and discretion at the property, and sending a copy through the mail addressed to the tenant at the address where the property is situated.~~

~~(3) If, at the time of attempted service, a person of suitable age or discretion is not found at the rental property through the exercise of reasonable diligence, then by affixing a copy in a conspicuous place on the property, and also sending a copy through the mail addressed to the tenant at the address where the property is situated. Service upon a subtenant may be made in the same manner.~~

~~(c) For purposes of subdivision (b), "commercial tenant" means a person or entity that hires any real property in this state that is not a dwelling unit, as defined in subdivision (c) of Section 1940 of the Civil Code, or a mobilehome, as defined in Section 798.3 of the Civil Code.~~

- "[T]he service and notice provisions in the unlawful detainer statutes and [Code of Civil Procedure] section 1013 are mutually exclusive, and thus, section 1013 does not extend the notice periods that are a prerequisite to filing an unlawful detainer action." (*Losornio v. Motta* (1998) 67 Cal.App.4th 110, 112 [78 Cal.Rptr.2d 799].)

- "Section 1162 does not authorize service of a three-day notice to pay rent or quit by mail delivery alone, certified or otherwise. It provides for service by: personal delivery; leaving a copy with a person of suitable age and discretion at the renter's residence or usual place of business and sending a copy through the mail to the tenant's *residence*; or posting *and* delivery of a copy to a person there residing, if one can be found, *and* sending a copy through the mail. Strict compliance with the statute is required." (*Liebovich v. Shahrokhkhany* (1997) 56 Cal.App.4th 511, 516 [65 Cal.Rptr.2d 457], original italics, internal citation omitted.)

- "We … hold that service made in accordance with section 1162, subdivision 3, as applied to section 1161, subdivision 2, must be effected in such a manner as will give a tenant the three days of written notice required by the Legislature in which he may cure his default in the payment of rent." (*Davidson, supra*, 138 Cal.App.3d Supp. at p. 14.)

- "We … hold that service of the three-day notice by posting and mailing is effective on the date the notice is posted and mailed." (*Walters, supra,* 226 Cal.App.3d Supp. at p. 20.)

- "Plaintiff argues, however, that he should be allowed to amend his complaint so as to bring his action under section 1161, subdivision 4. The notice thereunder required need not be framed in the alternative. However, plaintiff has at no time, either by his three days' notice or in any of his pleadings, suggested that defendant had assigned the lease or sublet the property, or had committed waste contrary to the conditions or covenants of the lease, or maintained a nuisance on the premises, or had used the property for an unlawful purpose. Plaintiff had three opportunities to state a cause of action; if he was of the belief that facts existed which brought his case under 1161, subdivision 4, it would have been a simple matter to allege such facts, but this he did not do." (*Hinman v. Wagnon* (1959) 172 Cal.App.2d 24, 29 [341 P.2d 749].)

- "[D]efendant admitted in his answer that he 'ultimately received [the relevant] notice' but 'affirmatively allege[d] that he was not properly and legally served' with a valid notice. We find that, under the circumstances of this case, the defendant waived any defect in the challenged service of the notice under section 1162, subdivision 1." (*Valov, supra,* 168 Cal.App.3d at p. 876.)

- "In the cases discussed … , a finding of proper service turned on a party's acknowledgment or admission the notice in question was in fact received. In the present case, defendant denied, in his answer and at trial, that he had ever received the … notice. Because there was no admission of receipt in this case, service by certified mail did not establish or amount to personal delivery. Further, there was no evidence of compliance with any of the three methods of service of a … notice … provided in section 1162. Therefore, the judgment must be reversed." (*Liebovich, supra,* 56 Cal.App.4th at p. 518.)

- "[Code of Civil Procedure section 1162 specifies] three ways in which service of the … notice may be effected on a residential tenant: … . As explained in *Liebovich, supra, …* , '[w]hen the fact of service is contested, compliance with one of these methods must be shown or the judgment must be reversed.' " (*Palm Property Investments, LLC, supra,* 194 Cal.App.4th at p. 1425.)

- "In commercial leases the landlord and commercial tenant may lawfully agree to notice procedures that differ from those provided in the statutory provisions governing unlawful detainer." (*Culver Center Partners East #1, L.P., supra,* 185 Cal.App.4th at p.750.)

- "[E]ven if some policy rationale might support such a waiver/forfeiture [by actual receipt] rule in the residential lease context, there is no basis to apply it in the commercial context where matters of service and waiver are prescribed in the lease itself. Nothing in the parties' lease suggests actual receipt of a notice to quit results in the waiver or forfeiture of [tenant]'s right to service accomplished in the manner prescribed. To the contrary, the lease specifically provides, 'No covenant, term or condition, or breach' of the lease 'shall be deemed waived except if expressly waived in a written instrument executed by the waiving party.' Although [tenant's agent] acted on the notice to quit by attempting to deliver the rent check, neither her

fortuitous receipt of the notice nor her actions in response to it constitutes an express waiver of the notice provisions in the lease." (*Culver Center Partners East #1, L.P., supra*, 185 Cal.App.4th at p. 752, internal citation omitted.)

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2006) Real Property, §§ 674, 726, 727

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.62–8.68

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) §§ 6.25–6.29

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 7-C, *Bases For Terminating Tenancy*, ¶¶ 7:98.5 et seq., 7:137 et seq. (The Rutter Group)

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, § 210.24 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 4, *Termination of Tenancy*, 4.23

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.10 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, § 236.11 (Matthew Bender)

Miller & Starr, California Real Estate (3d ed. 2008) Ch. 19, Landlord-Tenant, §§ 19:200–19:205 (Thomson Reuters ~~West~~)

UNLAWFUL DETAINER

4323. Affirmative Defense—Discriminatory Eviction (Unruh Act)

[*Name of defendant***] claims that [***name of plaintiff***] is not entitled to evict [him/her] because [***name of defendant***] is discriminating against [him/her] because of [***insert protected class, e.g., her national origin, or other characteristic protected from arbitrary discrimination***]. To succeed on this defense, [***name of defendant***] must prove both of the following:**

1. **That [***name of defendant***] is [perceived as/associated with someone who is [perceived as]] [***insert protected class, e.g., Hispanic, or other characteristic***]; and**

2. **That [***name of plaintiff***] filed this lawsuit because of [***insert one of the following:***]**

   [[his/her/its] [perception of] [*name of defendant***]'s [***insert protected class, e.g., national origin, or other characteristic***].]**

   [[*name of defendant***]'s association with someone who is [perceived as] [***insert protected class, e.g., Hispanic, or other characteristic***].]**

New August 2007

Directions for Use

Throughout the instruction, insert either the defendant's protected status under the Unruh Act (see Civ. Code, § 51) or other characteristic on the basis of which the defendant alleges that he or she has been arbitrarily discriminated against. (See *Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 725–726 [180 Cal.Rptr. 496, 640 P.2d 115] [excluding all tenants with children is arbitrary illegal discrimination].)

In element 1, select the appropriate language based on whether the defendant (1) is a member of the protected class, (2) is perceived as a member of the protected class, (3) is associated with someone who is a member of the protected class, or (4) is associated with someone who is perceived as a member of the protected class.

In element 2, include the bracketed language regarding perception if the defendant is not actually a member of the protected class, but the allegation is that the plaintiff believes that the defendant is a member.

See also the Sources and Authority section under CACI No. 3060, *Unruh Civil Rights Act—Essential Factual Elements.*

Sources and Authority

- Discrimination in Public Accommodations Prohibited (Unruh Act). Civil Code section 51. ~~(Unruh Act) provides, in part: "(b) All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, or sexual orientation are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever."~~

- "In evaluating the legality of the challenged exclusionary policy in this case, we must recognize at the outset that in California, unlike many other jurisdictions, the Legislature has sharply circumscribed an apartment owner's traditional discretion to accept and reject tenants on the basis of the landlord's own likes or dislikes. California has brought such landlords within the embrace of the broad statutory provisions of the Unruh Act, Civil Code section 51. Emanating from and modeled upon traditional 'public accommodations' legislation, the Unruh Act expanded the reach of such statutes from common carriers and places of public accommodation and recreation, e.g., railroads, hotels, restaurants, theaters and the like, to include 'all business establishments of every kind whatsoever.' " (*Marina Point, Ltd., supra,* 30 Cal.3d at pp. 730–731, footnote omitted.)

- "[T]he 'identification of particular bases of discrimination -- color, race, religion, ancestry, and national origin -- *is illustrative rather than restrictive*. Although the legislation has been invoked primarily by persons alleging discrimination on racial grounds, its language and its history compel the conclusion that the Legislature intended to prohibit *all arbitrary discrimination by business establishments*.' " (*Marina Point, Ltd., supra,* 30 Cal.3d at p. 732, original italics.)

- "We hold that defendant should have been permitted to produce proof of the allegations of his special defenses of discrimination, which if proven would bar the court from ordering his eviction because such 'state action' would be violative of both federal and state Constitutions." (*Abstract Inv. Co. v. Hutchinson* (1962) 204 Cal.App.2d 242, 255 [22 Cal.Rptr. 309].)

- Evictions that contravene statutory or constitutional strictures provide a valid defense to unlawful detainer actions. (*Marina Point, Ltd., supra,* 30 Cal.3d at p. 727.)

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2005) Real Property, §§ 682–683

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.118–8.128

2 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 10.53, 10.67, 10.68

7 California Real Estate Law and Practice, Ch. 214, *Government Regulation and Enforcement*, § 214.10 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.21

11 California Forms of Pleading and Practice, Ch. 117, *Civil Rights: Housing Discrimination*, § 117.31 (Matthew Bender)

3 California Points and Authorities, Ch. 35, *Unlawful Detainer*, § 35.45 (Matthew Bender)

Miller & Starr, California Real Estate, Ch. 19, *Landlord-Tenant*, § 19:223 (Thomson Reuters ~~West~~)

4324. Affirmative Defense—Waiver by Acceptance of Rent

[*Name of defendant***] claims that [***name of plaintiff***] is not entitled to evict [him/her/it] because [***name of plaintiff***] accepted payment of rent after [the three-day notice period had expired/[***name of defendant***] had violated the [lease/rental agreement]]. To succeed on this defense, [***name of defendant***] must prove:**

[1]. That [*name of plaintiff***] accepted a [partial] payment of rent after [the three-day notice period had expired/[***name of plaintiff***] knew that [***name of defendant***] had violated the [lease/rental agreement]] [./; and]**

[2. That [*name of plaintiff***] failed to provide actual notice to [***name of defendant***] that partial payment would be insufficient to avoid eviction.]**

If [*name of defendant***] has proven that [he/she/it] paid rent, then [he/she/it] has the right to continue occupying the property unless [***name of plaintiff***] proves [one of the following:]**

[1. That even though [*name of plaintiff***] received [***name of defendant***]'s [***specify noncash form of payment, e.g., check***], [he/she/it] rejected the rent payment because [***e.g., it never cashed the check***]][./; or]**

[2. That the lease contained a provision stating that acceptance of [late rent/rent after knowing of a violation of the [lease/rental agreement]] would not affect [his/her/its] right to evict [*name of defendant***]][./; or]**

[3. That [*name of plaintiff***] clearly and continuously objected to the violation of the [lease/rental agreement].]**

New August 2007; Revised April 2008, June 2010, December 2011

Directions for Use

The affirmative defense in this instruction applies to an unlawful detainer for nonpayment of rent or breach of another condition of the lease if either the landlord accepts a rent payment after the three-day period to cure or quit has expired or the landlord waived a breach of a condition by accepting rent after the breach and then subsequently served a notice of forfeiture and filed an unlawful detainer. Acceptance of rent may also be a defense to an unlawful detainer if the tenant remains in possession after the expiration of the terms of the lease. (See Civ. Code, § 1945; *Kaufman v. Goldman* (2011) 195 Cal.App.4th 734, 740 [124 Cal.Rptr.3d 555].) This defense is available for breach of a covenant prohibiting a sublease or assignment only if the landlord received written notice of the sublease or assignment from the tenant and accepted rent thereafter. (See Civ. Code, § 1954.53(d)(4).)

With regard to the tenant-defendant's burden, include the word "partial" in element 1 and read element 2 only in cases involving commercial tenancies and partial payment. (Code Civ. Proc., § 1161.1(c).)

With regard to the landlord plaintiff's burden, give option 3 if there is evidence that the landlord at all times made it clear that acceptance of rent was not a waiver of the breach. (See *Thriftmart, Inc. v. Me & Tex* (1981) 123 Cal.App.3d 751, 754 [177 Cal.Rptr. 24] [accepting rent for five years was not a waiver].)

Sources and Authority

- Commercial Tenancy: Acceptance of Partial Payment Not Waiver. Code Civil Procedure section 1161.1(c). , applicable only to commercial real property, provides: "If the landlord accepts a partial payment of rent after filing the complaint pursuant to Section 1166, the landlord's acceptance of the partial payment is evidence only of that payment, without waiver of any rights or defenses of any of the parties. The landlord shall be entitled to amend the complaint to reflect the partial payment without creating a necessity for the filing of an additional answer or other responsive pleading by the tenant, and without prior leave of court, and such an amendment shall not delay the matter from proceeding. However, this subdivision shall apply only if the landlord provides actual notice to the tenant that acceptance of the partial rent payment does not constitute a waiver of any rights, including any right the landlord may have to recover possession of the property."

- Acceptance of Rent After Expiration of Term. Civil Code section 1945. provides: "If a lessee of real property remains in possession thereof after the expiration of the hiring, and the lessor accepts rent from him, the parties are presumed to have renewed the hiring on the same terms and for the same time, not exceeding one month when the rent is payable monthly, nor in any case one year."

- When Acceptance of Rent is Not Waiver. Civil Code section 1954.53(d)(4). provides: "Acceptance of rent by the owner does not operate as a waiver or otherwise prevent enforcement of a covenant prohibiting sublease or assignment or as a waiver of an owner's rights to establish the initial rental rate, unless the owner has received written notice from the tenant that is party to the agreement and thereafter accepted rent."

- "It is a general rule that the right of a lessor to declare a forfeiture of the lease arising from some breach by the lessee is waived when the lessor, with knowledge of the breach, accepts the rent specified in the lease. While waiver is a question of intent, the cases have required some positive evidence of rejection on the landlord's part or a specific reservation of rights in the lease to overcome the presumption that tender and acceptance of rent creates." (*EDC Assocs. v. Gutierrez* (1984) 153 Cal.App.3d 167, 170 [200 Cal.Rptr. 333], internal citations omitted.)

- "The acceptance of rent by the landlord from the tenant, after the breach of a condition of the lease, with full knowledge of all the facts, is a waiver of the breach and precludes the landlord from declaring a forfeiture of the lease by reason of said breach. This is the general

rule and is supported by ample authority. … 'The most familiar instance of the waiver of the forfeiture of a lease arises from the acceptance of rent by the landlord after condition broken, and it is a universal rule that if the landlord accepts rent from his tenant after full notice or knowledge of a breach of a covenant or condition in his lease for which a forfeiture might have been demanded, this constitutes a waiver of forfeiture which cannot afterward be asserted for that particular breach or any other breach which occurred prior to the acceptance of the rent. In other words, the acceptance by a landlord of the rents, with full knowledge of a breach in the conditions of the lease, and of all of the circumstances, is an affirmation by him that the contract of lease is still in force, and he is thereby estopped from setting up a breach in any of the conditions of the lease, and demanding a forfeiture thereof.' " (*Kern Sunset Oil Co. v. Good Roads Oil Co.* (1931) 214 Cal. 435, 440-441 [6 P.2d 71], internal citations omitted.)

- "Here the lessor not only relied upon the express agreement in the contract of the lease against waiver of its right to assert a forfeiture for the acceptance of rent after knowledge of the breach of covenant prohibiting assignment of the lease without its written consent first obtained, but it also gave notice that its acceptance of the rent after the breach of covenant became known was not to be construed as a consent to the assignment of the lease or a waiver of its right to assert a forfeiture." (*Karbelnig v. Brothwell* (1966) 244 Cal.App.2d 333, 342 [53 Cal.Rptr. 335].)

- "The landlord had the obligation of going forward with the evidence in order to prove that the money orders were not negotiated or that it took other action to insure that there was no waiver. 'Although a plaintiff ordinarily has the burden of proving every allegation of the complaint and a defendant of proving any affirmative defense, fairness and policy may sometimes require a different allocation. Where the evidence necessary to establish a fact essential to a claim lies peculiarly within the knowledge and competence of one of the parties, that party has the burden of going forward with the evidence on the issue although it is not the party asserting the claim.' " (*EDC Assocs., supra,* 153 Cal.App.3d at p. 171, internal citations omitted.)

- "Waiver is a matter of intent. Here plaintiff, from the start, evidenced, not a willingness to waive -- which would have kept the original lease in force at the contractual rent -- but a willingness to lease the land encroached upon and, if that extended lease were arrived at, to continue the lease on the original parcel. We cannot impose on plaintiff a penalty for a reasonable effort to achieve an amicable adjustment of the breach." (*Thriftmart, Inc., supra,* 123 Cal.App.3d at p. 754.)

- " 'When the term of a lease expires but the lessee holds over without the owner's consent, he becomes a tenant at sufferance. [Citation.] "Since the possession of the tenant at sufferance is wrongful, the owner may elect to regard the tenant as a trespasser … ." [Citation.] If instead the owner accepts rent from a tenant at sufferance he accepts the tenant's possession as rightful and the tenancy is converted into a periodic one.' " (*Kaufman, supra,* 195 Cal.App.4th at p. 740.)

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2006) Real Property, § 669

2 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) § 10.60

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) §§ 6.31–6.37, 6.41, 6.42

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, § 210.64 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.21

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.10 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, § 236.65 (Matthew Bender)

Miller & Starr, California Real Estate, ~~(Thomson Reuters West)~~ Ch. 19, *Landlord-Tenant*, § 19:205 (Thomson Reuters)

4326. Affirmative Defense—Repair and Deduct

[*Name of defendant***] claims that [he/she] does not owe [any/the full amount of] rent because [he/she] was not given credit against the rent for repairs performed during the period for which rent was not paid. To succeed on this defense, [***name of defendant***] must prove the following:**

1. [*Name of defendant***] gave notice to [***name of plaintiff***][’s agent] of one or more conditions on the premises in need of repair;**

2. [*Name of plaintiff***] did not make the requested repairs within a reasonable time after receiving notice;**

3. [*Name of defendant***] spent $_____ to make the repairs and gave [***name of plaintiff***] notice of this expenditure;**

4. [*Name of plaintiff***] did not give [***name of defendant***] credit for this amount against the rent that was due; and**

5. [*Name of defendant***] had not exercised the right to repair and deduct more than once within the 12 months before the month for which the cost of repairs was deducted from the rent.**

If [*name of defendant***] acts to repair and deduct more than 30 days after the notice, [he/she] is presumed to have waited a reasonable time. This presumption may be overcome by evidence showing that a [shorter/ [or] longer] period is more reasonable. [[***Name of defendant***] may repair and deduct after a shorter notice if all the circumstances require shorter notice.]**

[Even if [*name of defendant***] proves all of the above requirements, [***name of defendant***] was not entitled to repair and deduct if [***name of plaintiff***] proves that [***name of defendant***] has done any of the following that contributed substantially to the need for repair or interfered substantially with [***name of plaintiff***]’s ability to make the necessary repairs:**

[Failed to keep [his/her] living area as clean and sanitary as the condition of the property permits][./; or]

[Failed to dispose of all rubbish, garbage, and other waste in a clean and sanitary manner][./; or]

[Failed to properly use and operate all electrical, gas, and plumbing fixtures and keep them as clean and sanitary as their condition permits][./; or]

[Intentionally destroyed, defaced, damaged, impaired, or removed any part of the property, equipment, or accessories, or allowed others to do so][./; or]

[Failed to use the property for living, sleeping, cooking, or dining purposes only as appropriate based on the design of the property][./;or]

[Otherwise failed to exercise reasonable care.]]

New April 2008

Directions for Use

Give this instruction if the tenant alleges the affirmative defense of having exercised the right to make repairs and deduct their cost from the rent. (See Civ. Code, § 1942.) If the landlord alleges that repair and deduct is not available because of the tenant's affirmative misconduct, select the applicable reasons. The first two reasons do not apply if the landlord has expressly agreed in writing to perform those acts. (Civ. Code, § 1941.2(b).)

Sources and Authority

- Tenant's Right to Repair and Deduct. Civil Code section 1942. ~~provides:~~

  ~~(a) If within a reasonable time after written or oral notice to the landlord or his agent, as defined in subdivision (a) of Section 1962, of dilapidations rendering the premises untenantable which the landlord ought to repair, the landlord neglects to do so, the tenant may repair the same himself where the cost of such repairs does not require an expenditure more than one month's rent of the premises and deduct the expenses of such repairs from the rent when due, or the tenant may vacate the premises, in which case the tenant shall be discharged from further payment of rent, or performance of other conditions as of the date of vacating the premises. This remedy shall not be available to the tenant more than twice in any 12-month period.~~

  ~~(b) For the purposes of this section, if a tenant acts to repair and deduct after the 30th day following notice, he is presumed to have acted after a reasonable time. The presumption established by this subdivision is a rebuttable presumption affecting the burden of producing evidence and shall not be construed to prevent a tenant from repairing and deducting after a shorter notice if all the circumstances require shorter notice.~~

  ~~(c) The tenant's remedy under subdivision (a) shall not be available if the condition was caused by the violation of Section 1929 or 1941.2.~~

  ~~(d) The remedy provided by this section is in addition to any other remedy provided by this chapter, the rental agreement, or other applicable statutory or common law.~~

- Repairs Caused by Lack of Ordinary Care. Civil Code section 1929. ~~provides: "The hirer of a thing must repair all deteriorations or injuries thereto occasioned by his want of ordinary care."~~

- When Landlord Not Obligated to Repair. Civil Code section 1941.2. ~~provides:~~

  ~~(a) No duty on the part of the landlord to repair a dilapidation shall arise under Section 1941 or~~

~~1942 if the tenant is in substantial violation of any of the following affirmative obligations, provided the tenant's violation contributes substantially to the existence of the dilapidation or interferes substantially with the landlord's obligation under Section 1941 to effect the necessary repairs:~~

~~(1) To keep that part of the premises which he occupies and uses clean and sanitary as the condition of the premises permits.~~

~~(2) To dispose from his dwelling unit of all rubbish, garbage and other waste, in a clean and sanitary manner.~~

~~(3) To properly use and operate all electrical, gas and plumbing fixtures and keep them as clean and sanitary as their condition permits.~~

~~(4) Not to permit any person on the premises, with his permission, to willfully or wantonly destroy, deface, damage, impair or remove any part of the structure or dwelling unit or the facilities, equipment, or appurtenances thereto, nor himself do any such thing.~~

~~(5) To occupy the premises as his abode, utilizing portions thereof for living, sleeping, cooking or dining purposes only which were respectively designed or intended to be used for such occupancies.~~

~~(b) Paragraphs (1) and (2) of subdivision (a) shall not apply if the landlord has expressly agreed in writing to perform the act or acts mentioned therein.~~

- "[T]he limited nature of the 'repair and deduct' remedy, in itself, suggests that it was not designed to serve as an exclusive remedy for tenants in this area. As noted above, section 1942 only permits a tenant to expend up to one month's rent in making repairs, and now also provides that this self-help remedy can be invoked only once in any 12-month period. These limitations demonstrate that the Legislature framed the section only to encompass relatively minor dilapidations in leased premises. As the facts of the instant case reveal, in the most serious instances of deterioration, when the costs of repair are at all significant, section 1942 does not provide, and could not have been designed as, a viable solution." (*Green v. Superior Court of San Francisco* (1974) 10 Cal.3d 616, 630–631 [111 Cal.Rptr. 704, 517 P.2d 1168, internal citations omitted.)

- "Clearly, sections 1941 and 1942 express the policy of this state that landlords in the interest of public health and safety have the duty to maintain leased premises in habitable condition and that tenants have the right, after notice to the landlord, to repair dilapidations and deduct the cost of the repairs from the rent. The policy expressed in these sections cannot be effectuated if landlords may evict tenants who invoke the provisions of the statute. Courts would be withholding with one hand what the Legislature has granted with the other if they order evictions instituted in retaliation against the exercise of statutory rights." (*Schweiger v. Superior Court of Alameda County* (1970) 3 Cal.3d 507, 516 [90 Cal.Rptr. 729, 476 P.2d 97].)

- "[T]he statutory remedies provided a tenant under Civil Code section 1941 et seq. were not intended by the Legislature as the tenant's exclusive remedy for the landlord's failure to repair.

> ‘Although past cases have held that the Legislature intended the remedies afforded by section 1942 to be the sole procedure for enforcing the statutory duty on landlords imposed by section 1941 [citations], no decision has suggested that the Legislature designed these statutory provisions to displace the common law in fixing the respective rights of landlord and tenant. On the contrary, the statutory remedies of section 1942 have traditionally been viewed as additional to, and complementary of, the tenant's common law rights.’ Thus, ‘. . . *the statutory framework of section 1941 et seq. has never been viewed as a curtailment of the growth of the common law in this field*.’ ” (*Stoiber v. Honeychuck* (1980) 101 Cal.App.3d 903, 914–915 [162 Cal.Rptr. 194], original italics, internal citations and footnote omitted.)

Secondary Sources

1 California Landlord-Tenant Practice, Ch. 3, *Rights and Duties During Tenancy* (Cont.Ed.Bar 2d ed.) § 3.12 et seq.

6 California Real Estate Law and Practice, Ch. 170, *The Premises: Duties and Liabilities,* § 170.42[3] (Matthew Bender)

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer,* § 210.64[10] (Matthew Bender)

29 California Forms of Pleading and Practice, Ch. 334, *Landlord and Tenant: Claims for Damage,* § 334.117 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, § 236.62 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.30 (Matthew Bender)

4327. Affirmative Defense—Landlord's Refusal of Rent

[*Name of defendant***] claims that [***name of plaintiff***] is not entitled to evict [him/her/it] because [***name of plaintiff***] refused to accept [***name of defendant***]'s payment of the rent. To succeed on this defense, [***name of defendant***] must prove:**

1. **That after service of the three-day notice but before the three-day period had expired, [***name of defendant***] presented the full amount of rent that was due to [***name of plaintiff***]; and**

2. **That [***name of plaintiff***] refused to accept the payment.**

[Giving a check constitutes payment if [*name of plaintiff***]'s practice was to accept payment by check unless [***name of plaintiff***] had previously notified [***name of defendant***] that payment by check was no longer acceptable.]**

New October 2008

Directions for Use

Give the last bracketed paragraph if the tender was by check and there is an issue as to the landlord's motive in refusing the check.

Sources and Authority

- Debtor's Deposit on Amount of Debt. Civil Code section 1500. ~~provides: "An obligation for the payment of money is extinguished by a due offer of payment, if the amount is immediately deposited in the name of the creditor, with some bank or savings and loan association within this state, of good repute, and notice thereof is given to the creditor."~~

- "The mere giving of a check or checks does not constitute payment." (*Mau v. Hollywood Commercial Bldgs., Inc.* (1961) 194 Cal.App.2d 459, 470 [15 Cal.Rptr. 181], internal citation omitted.)

- "On this appeal appellants do not discuss or mention the above finding of their bad faith, but argue that respondent was in default because its rental debt was not extinguished within the three-day period as respondent tendered checks instead of money, sent the checks by mail without checking delivery instead of making personal tender and did not keep the tender alive by deposit in a bank as provided by section 1500 of the Civil Code within the three-day period. However, we think that the finding of bad faith, which is supported by the evidence showing the facts, as stated hereinbefore, is of primary importance where appellants try to enforce a forfeiture." (*Strom v. Union Oil Co.* (1948) 88 Cal.App.2d 78, 81 [198 P.2d 347].)

- "With respect to appellants there is no doubt that they could have had timely payment if they had so desired, but that they were intentionally evasive and uncooperative, hoping thereby to induce some technical shortcoming on which to terminate a lease which they thought disadvantageous."

(*Strom, supra,* 88 Cal.App.2d at pp. 83-84.)

- "Appellants complain that respondent mailed checks for the rent instead of tendering money in person. The lease does not contain any place or mode of payment of rent. Payment of rent to the original lessor had been made by mailing of checks to his assignee. Appellant was entitled to continue payment by mailing of checks so long as he had not been notified that this form of payment was no longer acceptable. … If the payment by mailing of check, a normal mode of payment though not a legal tender, was not acceptable to appellants, as it had been to their predecessors, they should have notified respondent to that effect. Neither was respondent after the mailing under duty to take special measures to check timely receipt of the checks. 'The ordinary principles of reason, common sense, and justice should govern in questions of this kind. The lessee, in law, had a right to assume that the Postoffice Department would do its duty and deliver the envelop containing the rent in due time, and that the lessor would, in justice, accept such rent; and if for any reason it was not received or delivered the lessee should, as a matter of ordinary fairness and justice, be advised of such fact and have a chance to remedy the same.' This principle was held applicable even where the letter containing the rent was lost in the mail. It must govern a fortiori here, where the mail functioned correctly and the fact that the checks did not reach appellants was solely attributable to circumstances for which they were responsible. No further action of any kind could be expected from respondent until it was informed, by the return of the unclaimed letter, of the fact that the payment had not been effectuated. If respondent's action is open to any criticism it would be that the deposit of the rent in a bank … did not follow soon enough after the checks were returned …. However the delay did not cause any prejudice or make any difference to appellants as they had then already launched the action in unlawful detainer at which they had been aiming ever since respondent refused increase of rent. The shortcoming of respondent is trivial compared to appellants' bad faith." (*Strom, supra,* 88 Cal.App.2d at p. 84.)

- "Nor does the rejection of the 'tender' that appellants made by letter, unaccompanied by payment, and conditioned upon dismissal of the action, after the action was brought, compel a finding of bad faith. It did not extinguish the debt, since the procedure prescribed by Civil Code, section 1500, was not followed. Nor was there a showing of continuous readiness to pay after the tender." (*Budaeff v. Huber* (1961) 194 Cal.App.2d 12, 21 [14 Cal.Rptr. 729].)

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2006) Real Property, § 759

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 7.53–7.56

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) § 17.21

3 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer,* § 210.22 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer,* 5.21

UNLAWFUL DETAINER

4340. Damages for Reasonable Rental Value

[*Name of plaintiff***] also claims that [he/she/it] was harmed by [***name of defendant***]'s wrongful occupancy of the property. If you decide that [***name of defendant***] wrongfully occupied the property, you must also decide how much money will reasonably compensate [***name of plaintiff***] for the harm. This compensation is called "damages."**

The amount of damages is the reasonable rental value of the premises during the time [*name of defendant***] occupied the property after the [___]-day notice period expired. The amount agreed between the parties as rent is evidence of the reasonable rental value of the property, but you may award a greater or lesser amount based on all the evidence presented during the trial.**

[In determining the reasonable rental value of the premises, do not consider any limitations on the amount of rent that can be charged because of a local rent control ordinance.]

New August 2007

Directions for Use

In the second paragraph, insert the applicable number of days' notice required, whether 3, 30, 60, or some other number provided for in the lease. (Civ. Code, §§ 1946, 1946.1; Code Civ. Proc., § 1161.)

Include the optional last paragraph if the property is subject to rent control.

Sources and Authority

- Damages. Code of Civil Procedure section 1174(b). ~~provides: "The jury or the court, if the proceedings be tried without a jury, shall also assess the damages occasioned to the plaintiff by any forcible entry, or by any forcible or unlawful detainer, alleged in the complaint and proved on the trial, and find the amount of any rent due, if the alleged unlawful detainer be after default in the payment of rent. If the defendant is found guilty of forcible entry, or forcible or unlawful detainer, and malice is shown, the plaintiff may be awarded statutory damages of up to six hundred dollars ($600), in addition to actual damages, including rent found due. The trier of fact shall determine whether actual damages, statutory damages, or both, shall be awarded, and judgment shall be entered accordingly."~~

- "It is well established that losses sustained after termination of a tenancy may be recovered, and that 'damages awarded ... in an unlawful detainer action for withholding possession of the property are not "rent" but are in fact damages.' Thus, a landlord is entitled to recover as damages the reasonable value of the use of the premises during the

time of the unlawful detainer either on a tort theory or a theory of implied-in-law contract. It is also settled that rent control regulations have no application to an award of damages for unlawfully withholding property." (*Adler v. Elphick* (1986) 184 Cal.App.3d 642, 649-650 [229 Cal.Rptr. 254], internal citations omitted.)

- "In unlawful detainer, recovery of possession is the main object and recovery of rent a mere incident." (*Harris v. Bissell* (1921) 54 Cal.App. 307, 313 [202 P. 453].)

- "It is well established that unlawful detainer actions are wholly created and strictly controlled by statute in California. The 'mode and measure of plaintiff's recovery' are limited by these statutes. The statutes prevail over inconsistent general principles of law and procedure because of the special function of unlawful detainer actions to restore immediate possession of real property." (*Balassy v. Superior Court* (1986) 181 Cal.App.3d 1148, 1151 [226 Cal.Rptr. 817], internal citations omitted.)

- "It is well settled that damages allowed in unlawful detainer proceedings are only those which *result from* the unlawful detention and accrue during that time. Although a lessee guilty of unlawful detention may have also breached the terms of the lease contract, damages resulting therefrom are not necessarily damages resulting from the unlawful detention. As such, he is precluded from litigating a cause of action for these breaches in unlawful detainer proceedings." (*Vasey v. California Dance Co.* (1977) 70 Cal.App.3d 742, 748 [139 Cal.Rptr. 72], original italics, internal citations omitted.)

- "[W]hen a 30-day notice is used to terminate a month-to-month tenancy, and any default in the payment of rents to that time are not claimed in a 3-day notice to pay rent or quit, the unlawful detainer proceeding thereon is not founded on a default in the payment of rent within the meaning of section 1174, subdivision (b); damages for the detention of the premises commencing with the end of the tenancy may be recovered, but rents accrued and unpaid prior to the end of the tenancy may not be recovered in that unlawful detainer proceeding." (*Castle Park No. 5 v. Katherine* (1979) 91 Cal.App.3d Supp. 6, 12 [154 CalRptr. 498].)

- " 'If a tenant unlawfully detains possession after the termination of a lease, the landlord is entitled to recover as damages the reasonable value of the use of the premises during the time of such unlawful detainer. He is not entitled to recover rent for the premises because the leasehold interest has ended.' [¶] The amount agreed between the parties as rent is evidence of the rental value of the property. But, '[since] the action is not upon contract, but for recovery of possession and, incidentally, for the damages occasioned by the unlawful detainer, such rental value may be greater or less than the rent provided for in the lease.' " (*Lehr v. Crosby* (1981) 123 Cal.App.3d Supp. 1, 9 [177 Cal.Rptr. 96], internal citations and footnote omitted.)

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2006) Real Property, § 738

2 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 12.27–12.30, 13.19

2 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) §§ 26.5–26.12

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, § 210.94 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.27

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.13 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, § 236.22 (Matthew Bender)

Miller & Starr, California Real Estate, ~~(Thomson West)~~ Ch. 19, *Landlord-Tenant*, § 19:208 (Thomson Reuters)

UNLAWFUL DETAINER

4341. Statutory Damages on Showing of Malice (Code Civ. Proc., § 1174(b))

[*Name of plaintiff***] claims that [he/she/it] is entitled to statutory damages in addition to actual damages. To recover statutory damages, [***name of plaintiff***] must prove that [***name of defendant***] acted with malice.**

A tenant acts with malice if he or she willfully continues to occupy the property with knowledge that he or she no longer has the right to do so.

You must determine how much, if any, statutory damages should be awarded, up to a maximum of $600. You should not award any statutory damages if you find that [*name of defendant***] had a good-faith and a reasonable belief in [his/her/its] right to continue to occupy the premises.**

New August 2007

Sources and Authority

- Statutory Damages on Showing of Malice. Code of Civil Procedure section 1174(b). ~~provides: "The jury or the court, if the proceedings be tried without a jury, shall also assess the damages occasioned to the plaintiff by any forcible entry, or by any forcible or unlawful detainer, alleged in the complaint and proved on the trial, and find the amount of any rent due, if the alleged unlawful detainer be after default in the payment of rent. If the defendant is found guilty of forcible entry, or forcible or unlawful detainer, and malice is shown, the plaintiff may be awarded statutory damages of up to six hundred dollars ($600), in addition to actual damages, including rent found due. The trier of fact shall determine whether actual damages, statutory damages, or both, shall be awarded, and judgment shall be entered accordingly."~~

- "The rule appears to be well established in California that a lessee of real property who wilfully, deliberately, intentionally and obstinately withholds possession of the property, with knowledge of the termination of his lease and against the will of the landlord, is liable for [statutory] damages." (*Erbe Corp. v. W & B Realty Co.* (1967) 255 Cal.App.2d 773, 780 [63 Cal.Rptr. 462].)

- "Authorities … do not hold that the [penalty should be imposed] where the conduct of the tenant is characterized by good faith and a reasonable belief in his right to remain … ." (*Board of Public Service Comm'rs v. Spear* (1924) 65 Cal.App. 214, 217–218 [223 P.423], internal citations omitted, overruled, other grounds, *Richard v. Degen & Brody, Inc.* (1960) 181 Cal.App.2d 289, 302–304, 5 Cal.Rptr. 263.)

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2006) Real Property, § 738

2 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 12.32–12.34

2 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) § 26.13

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, § 210.95 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.27

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.13 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, § 236.22 (Matthew Bender)

Miller & Starr, California Real Estate, ~~(Thomson West)~~ Ch. 19, *Landlord-Tenant*, § 19:208 (Thomson Reuters)

4405. Misappropriation by Acquisition

[*Name of defendant***] misappropriated [***name of plaintiff***]'s trade secret[s] by acquisition if [***name of defendant***] acquired the trade secret[s] and knew or had reason to know that [he/she/it/[***name of third party***]] used improper means to acquire [it/them].**

New December 2007

Directions for Use

Read this instruction with CACI No. 4401, *Misappropriation of Trade Secrets—Essential Factual Elements,* if the plaintiff claims that the defendant's acquisition of the information alleged to be a trade secret is a misappropriation. Give also CACI No. 4408, *Improper Means of Acquiring Trade Secret*.

Civil Code section 3426.1(b)(1) defines "misappropriation" as improper "[a]cquisition" of a trade secret, and subsection (b)(2) defines it as improper "[d]isclosure or use" of a trade secret. In some cases, the mere acquisition of a trade secret, as distinguished from a related disclosure or use, will not result in damages and will only be relevant to injunctive relief. Because generally the jury should only be instructed on matters relevant to damage claims, this instruction should not be given unless there is evidence that the acquisition resulted in damages, other than damages from related disclosure or use.

Sources and Authority

- « Misappropriation » Defined. Civil Code section 3426.1(b)(1). ~~provides:~~

  ~~(b) "Misappropriation" means:~~

  ~~(1) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means.~~

- "Defendants … obtained these secrets improperly. Their tortious acts resulted from a breach of confidence by [defendant] in copying or stealing plans, designs and other documents related to [plaintiff]'s products which defendants themselves wanted to produce in competition with [plaintiff]. The protection which is extended to trade secrets fundamentally rests upon the theory that they are improperly acquired by a defendant, usually through theft or a breach of confidence." (*Vacco Indus. v. Van Den Berg* (1992) 5 Cal.App.4th 34, 50 [6 Cal.Rptr.2d 602].)

- "One does not ordinarily 'acquire' a thing inadvertently; the term implies conduct directed to that objective. The choice of that term over 'receive' suggests that inadvertently coming into possession of a trade secret will not constitute acquisition. Thus one who passively receives a trade secret, but neither discloses nor uses it, would not be guilty of misappropriation. We need not decide the outer limits of acquisition as contemplated by CUTSA, however, for there is no suggestion here of acquisition even in the broadest sense, i.e., that [defendant] ever came into possession of the source code constituting the claimed trade secrets. Indeed [plaintiff] does not directly argue that [defendant] acquired the trade secrets at issue but only that, under the terms of

> the statute, it could have done so without itself having 'knowledge' of them. We doubt the soundness of this suggestion, but assuming it is correct, it remains beside the point unless [defendant] came into possession of the secret. Since there is no basis to find that it did, the mental state required for actionable acquisition appears to be academic." (*Silvaco Data Systems v. Intel Corp*. (2010) 184 Cal.App.4th 210, 223 [109 Cal.Rptr.3d 27], internal citations omitted.)

Secondary Sources

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.53[1][a] (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.103[4][c] (Matthew Bender)

Edelson & Kay, eds., Trade Secret Litigation and Protection in California (State Bar of California 2009) Chs. 2, 6, 12

4406. Misappropriation by Disclosure

[*Name of defendant***] misappropriated [***name of plaintiff***]'s trade secret[s] by disclosure if [***name of defendant***]**

1. **disclosed [it/them] without [***name of plaintiff***]'s consent; and**

2. **[did any of the following:]**

   [*insert one or more of the following:***]**

   [acquired knowledge of the trade secret[s] by improper means][./; **or]**

   [at the time of disclosure, knew or had reason to know that [his/her/its] knowledge of [*name of plaintiff***]'s trade secret[s] came from or through [***name of third party***], and that [***name of third party***] had previously acquired the trade secret[s] by improper means][.**/; **or]**

   [at the time of disclosure, knew or had reason to know that [his/her/its] knowledge of [*name of plaintiff***]'s trade secret[s] was acquired [***insert circumstances giving rise to duty to maintain secrecy***], which created a duty to keep the [***select short term to describe, e.g., information***] secret][.**/; **or]**

   [at the time of disclosure, knew or had reason to know that [his/her/its] knowledge of [*name of plaintiff***]'s trade secret[s] came from or through [***name of third party***], and that [***name of third party***] had a duty to [***name of plaintiff***] to keep the [***e.g., information***] secret][.**/; **or]**

   [Before a material change of [his/her/its] position, knew or had reason to know that [it was/they were] [a] trade secret[s] and that knowledge of [it/them] had been acquired by accident or mistake.]

New December 2007; Revised December 2010

Directions for Use

Read this instruction with CACI No. 4401, *Misappropriation of Trade Secrets—Essential Factual Elements*, if the plaintiff claims that the defendant's disclosure of the information alleged to be a trade secret is a misappropriation.

If consent is at issue, CACI No. 1302, *Consent Explained*, and CACI No. 1303, *Invalid Consent*, may also be given.

In element 2, select the applicable statutory act(s) alleged to constitute misappropriation by disclosure. (See Civ. Code, § 3624.1(b)(2).) If only one act is selected, omit the words "did any of the following."

If either of the first two acts constituting misappropriation by disclosure is alleged, give also CACI No. 4408, *Improper Means of Acquiring Trade Secret*.

Sources and Authority

- "Misappropriation" Defined. Civil Code section 3426.1(b)(2). ~~provides:~~

  ~~(b) "Misappropriation" means:~~

  ~~(2) Disclosure or use of a trade secret of another without express or implied consent by a person who:~~

  ~~(A) Used improper means to acquire knowledge of the trade secret; or~~

  ~~(B) At the time of disclosure or use, knew or had reason to know that his or her knowledge of the trade secret was:~~

  ~~(i) Derived from or through a person who had utilized improper means to acquire it;~~

  ~~(ii) Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or~~

  ~~(iii) Derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or~~

  ~~(C) Before a material change of his or her position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.~~

- Constructive Notice. Civil Code section 19. ~~provides: "Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact."~~

- "The fact that [defendant]'s postings were not of the 'entire secret,' and included only portions of courses, does not mean that [defendant]'s disclosures are not misappropriations. While previous partial disclosures arguably made public only those parts disclosed, [defendant]'s partial disclosures of non-public portions of the secrets may themselves be actionable because they constitute 'disclosure ... without ... consent by a person who ... knew or had reason to know that his ... knowledge of the trade secret was ... [either] derived from or through a person who had utilized improper means to acquire it [or] acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use.' " (*Religious Tech. Ctr. v. Netcom On-Line Commun. Servs.* (N.D. Cal. 1995) 923 F.Supp. 1231, 1257, fn. 31.)

- "Under the UTSA, simple disclosure or use may suffice to create liability. It is no longer necessary, if it ever was, to prove that the purpose to which the acquired information is put is outweighed by the interests of the trade secret holder or that use of a trade secret cannot be

prohibited if it is infeasible to do so." (*Morlife, Inc. v. Perry* (1997) 56 Cal.App.4th 1514, 1527 [66 Cal.Rptr.2d 731].)

- "[N]othing in the UTSA requires that the defendant gain any advantage from the disclosure; it is sufficient to show 'use' by disclosure of a trade secret with actual or constructive knowledge that the secret was acquired under circumstances giving rise to a duty to maintain its secrecy." (*Religious Tech. Ctr., supra,* 923 F.Supp. at p. 1257, fn. 31.)

- "Liability under CUTSA is not dependent on the defendant's 'comprehension' of the trade secret but does require 'knowledge' of it." (*Silvaco Data Systems v. Intel Corp*. (2010) 184 Cal.App.4th 210, 229 [109 Cal.Rptr.3d 27].)

- " 'Knowledge,' of course, is '[t]he fact or condition of knowing,' … and in this context, '[t]he fact of knowing a thing, state, etc. …' (8 Oxford English Dict., *supra,* p. 517.) To 'know' a thing is to have information of that thing at one's command, in one's possession, subject to study, disclosure, and exploitation. To say that one 'knows' a fact is also to say that one *possesses information* of that fact. Thus, although the Restatement Third of Unfair Competition does not identify knowledge of the trade secret as an element of a trade secrets cause of action, the accompanying comments make it clear that liability presupposes the defendant's 'possession' of misappropriated information." (*Silvaco, supra,* 184 Cal.App.4th at pp. 225–226, original italics.)

- "The record contains no evidence that [defendant] ever possessed or had knowledge of any source code connected with either [software product]. So far as the record shows, [defendant] never had access to that code, could not disclose any part of it to anyone else, and had no way of using it to write or improve code of its own. [Defendant] appears to have been in substantially the same position as the customer in the pie shop who is accused of stealing the secret recipe because he bought a pie with knowledge that a rival baker had accused the seller of using the rival's stolen recipe. The customer does not, by buying or eating the pie, gain knowledge of the recipe used to make it." (*Silvaco, supra,* 184 Cal.App.4th at p. 226.)

- "When a competitor hires a former employee of plaintiff who is likely to disclose trade secrets, '[i]t is a question of fact whether the competitor had constructive notice of the plaintiff's right in the secret.' " (*Ralph Andrews Productions, Inc. v. Paramount Pictures Corp.* (1990) 222 Cal.App.3d 676, 682–683 [271 Cal.Rptr. 797], internal citation omitted.)

Secondary Sources

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts,* § 40.53[1][b] (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition,* § 565.103[4][c] (Matthew Bender)

Edelson & Kay, eds., Trade Secret Litigation and Protection in California (State Bar of California 2009) Chs. 2, 6, 12

4407. Misappropriation by Use

[*Name of defendant***] misappropriated [***name of plaintiff***]'s trade secret[s] by use if [***name of defendant***]**

1. **used [it/them] without [***name of plaintiff***]'s consent; and**

2. **[did any of the following:]**

   [*insert one or more of the following:***]**

   [acquired knowledge of the trade secret[s] by improper means][./; **or]**

   [at the time of use, knew or had reason to know that [his/her/its] knowledge of [*name of plaintiff***]'s trade secret[s] came from or through [***name of third party***], and that [***name of third party***] had previously acquired the trade secret[s] by improper means][./**; **or]**

   [at the time of use, knew or had reason to know that [his/her/its] knowledge of [*name of plaintiff***]'s trade secret[s] was acquired under circumstances creating a legal obligation to limit use of the [***select short term to describe, e.g., information***]][./**; **or]**

   [at the time of use, knew or had reason to know that [his/her/its] knowledge of [*name of plaintiff***]'s trade secret[s] came from or through [***name of third party***], and that [***name of third party***] had a duty to [***name of plaintiff***] to limit use of the [***e.g., information***]][./**; **or]**

   [Before a material change of [his/her/its] position, knew or had reason to know that [it was/they were] [a] trade secret[s] and that knowledge of [it/them] had been acquired by accident or mistake.]

New December 2007; Revised December 2010

Directions for Use

Read this instruction with CACI No. 4401, *Misappropriation of Trade Secrets—Essential Factual Elements,* if the plaintiff claims that the defendant's use of the information alleged to be a trade secret is a misappropriation.

If consent is at issue, CACI No. 1302, *Consent Explained,* and CACI No. 1303, *Invalid Consent,* may also be given.

In element 2, select the applicable statutory act(s) alleged to constitute misappropriation by use. (See Civ. Code, § 3624.1(b)(2).) If only one act is selected, omit the words "did any of the following."

If either of the first two acts constituting misappropriation by disclosure is alleged, give also CACI No. 4408, *Improper Means of Acquiring Trade Secret*.

Sources and Authority

- "Misapproriation" Defined. Civil Code section 3426.1(b)(2). ~~provides:~~

  ~~(b) "Misappropriation" means:~~

  ~~(2) Disclosure or use of a trade secret of another without express or implied consent by a person who:~~

  ~~(A) Used improper means to acquire knowledge of the trade secret; or~~

  ~~(B) At the time of disclosure or use, knew or had reason to know that his or her knowledge of the trade secret was:~~

  ~~(i) Derived from or through a person who had utilized improper means to acquire it;~~

  ~~(ii) Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or~~

  ~~(iii) Derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or~~

  ~~(C) Before a material change of his or her position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.~~

- Constructive Notice. Civil Code section 19. ~~provides: "Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact."~~

- "Under the plain terms of the Uniform Trade Secrets Act, defendants may be personally liable if: they used, through the corporation, [plaintiff]'s trade secrets; at the time of the use of the confidential information they knew or had reason to know that knowledge of the trade secrets was derived from or through a person who had improperly acquired the knowledge, or the secrets were obtained by a person who owed a duty to plaintiffs to maintain the secrecy. Employing the confidential information in manufacturing, production, research or development, marketing goods that embody the trade secret, or soliciting customers through the use of trade secret information, all constitute use. Use of a trade secret without knowledge it was acquired by improper means does not subject a person to liability unless the person receives notice that its use of the information is wrongful." (*PMC, Inc. v. Kadisha* (2000) 78 Cal.App.4th 1368, 1383 [93 Cal.Rptr.2d 663], internal citations omitted.)

- "Under the UTSA, simple disclosure or use may suffice to create liability. It is no longer necessary, if it ever was, to prove that the purpose to which the acquired information is put is outweighed by the interests of the trade secret holder or that use of a trade secret cannot be prohibited if it is infeasible to do so." (*Morlife, Inc. v. Perry* (1997) 56 Cal.App.4th 1514, 1527 [66 Cal.Rptr.2d 731].)

- “One clearly engages in the ‘use’ of a secret, in the ordinary sense, when one directly exploits it for his own advantage, e.g., by incorporating it into his own manufacturing technique or product. But ‘use’ in the ordinary sense is not present when the conduct consists entirely of possessing, and taking advantage of, something that was made using the secret. One who bakes a pie from a recipe certainly engages in the ‘use’ of the latter; but one who eats the pie does not, by virtue of that act alone, make ‘use’ of the recipe in any ordinary sense, and this is true even if the baker is accused of stealing the recipe from a competitor, and the diner knows of that accusation. Yet this is substantially the same situation as when one runs software that was compiled from allegedly stolen source code. The source code is the recipe from which the pie (executable program) is baked (compiled). Nor is the analogy weakened by the fact that a diner is not ordinarily said to make ‘use’ of something he eats. His metabolism may be said to do so, or the analogy may be adjusted to replace the pie with an instrument, such as a stopwatch. A coach who employs the latter to time a race certainly makes ‘use’ of it, but only a sophist could bring himself to say that coach ‘uses’ trade secrets involved in the manufacture of the watch.” (*Silvaco Data Systems v. Intel Corp*. (2010) 184 Cal.App.4th 210, 224 [109 Cal.Rptr.3d 27].)

- “Liability under CUTSA is not dependent on the defendant's ‘comprehension’ of the trade secret but does require ‘knowledge’ of it. So far as the record shows, [defendant] did not know and had no way to get the information constituting the trade secret. It therefore could not, within the contemplation of the act, ‘use’ that information.” (*Silvaco Data Systems, supra*, 184 Cal.App.4th at p. 229.)

- “ ‘Knowledge,’ of course, is ‘[t]he fact or condition of knowing,’ … and in this context, ‘[t]he fact of knowing a thing, state, etc. …’ (8 Oxford English Dict., *supra*, p. 517.) To ‘know’ a thing is to have information of that thing at one's command, in one's possession, subject to study, disclosure, and exploitation. To say that one ‘knows’ a fact is also to say that one *possesses information* of that fact. Thus, although the Restatement Third of Unfair Competition does not identify knowledge of the trade secret as an element of a trade secrets cause of action, the accompanying comments make it clear that liability presupposes the defendant's ‘possession’ of misappropriated information.” (*Silvaco, supra*, 184 Cal.App.4th at pp. 225–226, original italics.)

- “When a competitor hires a former employee of plaintiff who is likely to disclose trade secrets, ‘[i]t is a question of fact whether the competitor had constructive notice of the plaintiff's right in the secret.’ ” (*Ralph Andrews Productions, Inc. v. Paramount Pictures Corp.* (1990) 222 Cal.App.3d 676, 682–683 [271 Cal.Rptr. 797], internal citation omitted.)

- “Our Supreme Court has previously distinguished solicitation--which is actionable--from announcing a job change--which is not: ‘Merely informing customers of one's former employer of a change of employment, without more, is not solicitation. Neither does the willingness to discuss business upon invitation of another party constitute solicitation on the part of the invitee. Equity will not enjoin a former employee from receiving business from the customers of his former employer, even though the circumstances be such that he should be prohibited from soliciting such business.’ ” (*Hilb v. Robb* (1995) 33 Cal.App.4th 1812, 1821 [39 Cal.Rptr. 2d 887], internal citation omitted; but see *Morlife, Inc., supra*, 56 Cal.App.4th at p. 1527, fn. 8 [“we need not decide whether the ‘professional announcement’ exception … has continued vitality in light of the

expansive definition of misappropriation under the UTSA”].)

- “[T]o prove misappropriation of a trade secret under the UTSA, a plaintiff must establish (among other things) that the defendant improperly ‘used’ the plaintiff's trade secret. Thus, under Evidence Code sections 500 and 520, the plaintiff bears the burden of proof on that issue, both at the outset and during trial.” (*Sargent Fletcher, Inc. v. Able Corp.* (2003) 110 Cal.App.4th 1658, 1668 [3 Cal.Rptr.3d 279], internal citation omitted.)

- “[I]nformation relative to customers (e.g., their identities, locations, and individual preferences), obtained by a former employee in his contacts with them during his employment, may amount to ‘trade secrets’ which will warrant his being enjoined from exploitation or disclosure after leaving the employment. [¶] It is equally clear, however, that the proscriptions inhibiting the ex-employee reach only his use of such information, not to his mere possession or knowledge of it.” (*Golden State Linen Service, Inc. v. Vidalin* (1977) 69 Cal.App.3d 1, 7–8 [137 Cal.Rptr. 807], internal citations omitted.)

- “Since these ‘Marks’ likely encompass any trade secrets, it is reasonable to conclude that one party's use of the trade secrets that affects the other party's rights in the mark would constitute the misappropriation of the trade secrets ‘of another.’ ” (*Morton v. Rank Am., Inc.* (C.D. Cal. 1993) 812 F.Supp. 1062, 1074 [one can misappropriate trade secret jointly owned with another].)

Secondary Sources

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.53[1][b] (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.103[4][c] (Matthew Bender)

Edelson & Kay, eds., Trade Secret Litigation and Protection in California (State Bar of California 2009) Chs. 2, 6, 12

4408. Improper Means of Acquiring Trade Secret

Improper means of acquiring a trade secret or knowledge of a trade secret include, but are not limited to, [theft/bribery/misrepresentation/breach or inducing a breach of a duty to maintain secrecy/ [or] wiretapping, electronic eavesdropping, [or] [*insert other means of espionage***]].**

[However, it is not improper to acquire a trade secret or knowledge of the trade secret by [any of the following]:

[1. Independent efforts to invent or discover the information;]

[2. Reverse engineering; that is, examining or testing a product to determine how it works, by a person who has a right to possess the product;]

[3. Obtaining the information as a result of a license agreement with the owner of the information;]

[4. Observing the information in public use or on public display;] [or]

[5. Obtaining the information from published literature, such as trade journals, reference books, the Internet, or other publicly available sources.]]

New December 2007

Directions for Use

In the first paragraph, include only those statutory examples of "improper means" supported by the evidence. (See Civ. Code, § 3426.1(a).) The option for "wiretapping, eavesdropping, [or] [*insert other means of espionage*]" expresses the statutory term "espionage."

Include the optional last paragraph if any of those methods of obtaining the information are supported by the evidence. Omit any methods that are not at issue. If only one is at issue, omit "any of the following."

Sources and Authority

- "Improper Means" Defined. Civil Code section 3426.1(a). ~~provides that " 'Improper means' includes theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means. Reverse engineering or independent derivation alone shall not be considered improper means."~~

- "The Restatement of Torts, Section 757, Comment (f), notes: 'A complete catalogue of improper means is not possible,' but Section 1(1) includes a partial listing. Proper means include: 1. Discovery by independent invention; 2. Discovery by "reverse engineering," that is, by starting with the known product and working backward to find the method by which it was developed. The acquisition of the known product must of course, also be by a fair and honest means, such as purchase of the item on the open market for reverse engineering to be lawful; 3. Discovery under a license from the owner of the trade secret; 4. Observation of the item in public use or on public

display; 5. Obtaining the trade secret from published literature. … [T]he assertion that a matter is readily ascertainable by proper means remains available as a defense to a claim of misappropriation. Information is readily ascertainable if it is available in trade journals, reference books, or published materials." (Civ. Code, § 3426.1, Legis. Comm. Comment (Senate), 1984 Addition.)

- Electronic Eavesdropping. Penal Code section 630~~. provides in part:~~

  ~~The Legislature hereby declares that advances in science and technology have led to the development of new devices and techniques for the purpose of eavesdropping upon private communications and that the invasion of privacy resulting from the continual and increasing use of such devices and techniques has created a serious threat to the free exercise of personal liberties and cannot be tolerated in a free and civilized society.~~

  ~~The Legislature by this chapter intends to protect the right of privacy of the people of this state.~~

Secondary Sources

13 Witkin, Summary of California Law (10th ed. 2005) Equity, § 81(1)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.53[1][b] (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.103[4][b] (Matthew Bender)

Edelson & Kay, eds., Trade Secret Litigation and Protection in California (State Bar of California 2009) § 2.01(D)

4411. Punitive Damages for Willful and Malicious Misappropriation

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If you decide that [*name of defendant***]'s misappropriation caused [***name of plaintiff***] harm, you must decide whether that conduct justifies an award of punitive damages. The purposes of punitive damages are to punish a wrongdoer for the conduct that harmed [***name of plaintiff***] and to discourage similar conduct in the future.**

In order to recover punitive damages, [*name of plaintiff***] must prove [by clear and convincing evidence] that [***name of defendant***] acted willfully and maliciously. You must determine whether [***name of defendant***] acted willfully and maliciously, but you will not be asked to determine the amount of any punitive damages. I will calculate the amount later.**

"Willfully" means that [*name of defendant***] acted with a purpose or willingness to commit the act or engage in the conduct in question, and the conduct was not reasonable under the circumstances at the time and was not undertaken in good faith.**

"Maliciously" means that [*name of defendant***] acted with an intent to cause injury, or that [***name of defendant***]'s conduct was despicable and was done with a willful and knowing disregard for the rights of others. "Despicable conduct" is conduct so vile, base, or wretched that it would be looked down on and despised by ordinary decent people. [***Name of defendant***] acted with knowing disregard if [he/she/it] was aware of the probable consequences of [his/her/its] conduct and deliberately failed to avoid those consequences.**

New December 2007

Directions for Use

Give this instruction if there is evidence that the defendant acted willfully and maliciously, so as to support an award of punitive damages. (See Civ. Code, § 3426.3(c).)

No reported California state court case has addressed whether the jury or the court should decide whether any misappropriation was "willful and malicious," and if so, whether the finding must be made by clear and convincing evidence rather than a preponderance of the evidence. In *Ajaxo Inc. v. E*Trade Group, Inc.* (2005) 135 Cal.App.4th 21, 66 [37 Cal.Rptr.3d 221], the court affirmed a jury's finding by clear and convincing evidence that the defendant's misappropriation was willful and malicious. If the court decides to require the "clear and convincing" standard, include the bracketed language in the first paragraph and also give CACI No. 201, *More Likely True—Clear and Convincing Proof.*

Once the jury finds "willful and malicious" conduct, it appears that the court should decide the amount of punitive damages. (See *Robert L. Cloud & Assocs. v. Mikesell* (1999), 69 Cal.App.4th 1141, 1151, fn. 8 [82 Cal.Rptr.2d 143].). This would be consistent with the Uniform Trade Secrets Act, on which the California Uniform Trade Secrets Act is based. (See Uniform Trade Secrets Act § 3, 2005 com. ["This provision follows federal patent law in leaving discretionary trebling to the judge even though there may be a jury, compare 35 U.S.C. Section 284 (1976)"].)

Sources and Authority

- Exemplary Damages for Willful and Malicious Misappropriation. Civil Code section 3426.3(c). ~~provides: "If willful and malicious misappropriation exists, the court may award exemplary damages in an amount not exceeding twice any award made under subdivision (a) or (b)."~~

- Attorney Fees and Costs. Civil Code section 3426.4. ~~provides: "If a claim of misappropriation is made in bad faith, a motion to terminate an injunction is made or resisted in bad faith, or willful and malicious misappropriation exists, the court may award reasonable attorney's fees and costs to the prevailing party."~~

- "The court instructed the jury that 'willful' means 'a purpose or willingness to commit the act or engage in the conduct in question, and the conduct was not reasonable under the circumstances then present and was not undertaken in good faith.' Further, the court instructed the jury that 'malice' means 'conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard for the rights of others when the defendant is aware [of] the probable consequences of its conduct and willfully and deliberately fails to avoid those consequences. Despicable conduct is conduct which is so vile and wretched that it would be looked down upon and despised by ordinary decent people.' In addition, the court instructed the jury that a finding of willful and malicious misappropriation must be supported by clear and convincing evidence. [¶] Our Supreme Court has recognized that malice may be proven either expressly by direct evidence probative of the existence of hatred or ill will, or by implication from indirect evidence from which the jury may draw inferences." (*Ajaxo Inc., supra,* 135 Cal.App.4th at pp. 66-67, internal citations and footnote omitted.)

- "The limitation on punitive damages under the UTSA to twice the compensatory damages does not create an equivalency between an award of punitive damages under the UTSA and an award of treble damages under another statutory scheme. … While an award of treble damages is equally punitive in its effect, the computation of the penalty is strictly mechanical. In contrast, an award of punitive damages under the UTSA is subject to no fixed standard; the statute merely sets a cap on the amount of the award. The trial court retains wide discretion to set the amount anywhere between zero and two times the actual loss. (§ 3426.3, subd. (c).) Thus, evidence of the defendant's financial condition remains essential for evaluating whether the amount of punitive damages actually awarded is appropriate." (*Robert L. Cloud & Assocs. supra,* 69 Cal.App.4th at p. 1151, fn. 8.)

- "In order to justify [attorney] fees under Civil Code section 3426.4, the court must find that a 'willful and malicious misappropriation' occurred. That requirement is satisfied, in our view, by the jury's determination, upon clear and convincing evidence, that defendants' acts of misappropriation were done with malice. This finding was necessary to the award of punitive damages which was made by the jury." (*Vacco Industries, Inc. v. Van Den Berg* (1992) 5 Cal.App.4th 34, 54 [6 Cal.Rptr.2d 602].)

Secondary Sources

13 Witkin, Summary of California Law (10th ed. 2005) Equity, § 90(1)(c)

1 Milgrim on Trade Secrets, Ch. 15, *Trial Considerations,* § 15.02[3][i] (Matthew Bender)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts,* § 40.54[5] (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition,* § 565.103[7][c] (Matthew Bender)

Edelson & Kay, eds., Trade Secret Litigation and Protection in California (State Bar of California 2009) § 11.05

4420. Affirmative Defense--Information Was Readily Ascertainable by Proper Means

[*Name of defendant***] did not misappropriate [***name of plaintiff***]'s trade secret[s] if [***name of defendant***] proves that the [***select short term to describe, e.g., information***] [was/were] readily ascertainable by proper means at the time of the alleged [acquisition/use/ [or] disclosure].**

There is no fixed standard for determining what is "readily ascertainable by proper means." In general, information is readily ascertainable if it can be obtained, discovered, developed, or compiled without significant difficulty, effort, or expense. For example, information is readily ascertainable if it is available in trade journals, reference books, or published materials. On the other hand, the more difficult information is to obtain, and the more time and resources that must be expended in gathering it, the less likely it is that the information is readily ascertainable by proper means.

New December 2007; Revised December 2009

Directions for Use

Give also CACI No. 4408, *Improper Means of Acquiring Trade Secret.*

One case has suggested in a footnote that in order for the defense to apply, the defendant must have actually obtained plaintiff's secrets through readily ascertainable means rather than improperly. (See *ABBA Rubber Co. v. Seaquist* (1991) 235 Cal.App.3d 1, 21–22, fn. 9 [286 Cal.Rptr. 518].) Such a requirement would not constitute an affirmative defense but rather would be a denial of the improper-means element of the plaintiff's claim. (See 5 Witkin, California Procedure (4th ed. 1996) Pleadings, § 1081 [affirmative defense admits the truth of the essential allegations of the complaint].) Because the advisory committee believes that this is an affirmative defense, no such requirement has been included in this instruction. (See *San Jose Construction, Inc. v. S.B.C.C., Inc.* (2007) 155 Cal.App.4th 1528, 1542–1543 [67 Cal.Rptr.3d 54] [triable issue of fact as to whether information was readily ascertainable, that is, whether defendant *could have* replicated it within short period of time].)

Sources and Authority

- "Trade Secret" Defined. Civil Code section 3426.1(d)(1). ~~provides:~~

  ~~(d) "Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:~~

  ~~(1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use;~~

- "The Legislative Committee Comment [to Civ. Code, § 3426.1] further explains the original draft defined a trade secret in part as 'not being readily ascertainable by proper means' and that 'the assertion that a matter is readily ascertainable by proper means remains available as a defense to a claim of misappropriation. Information is readily ascertainable if it is available in trade journals, reference books, or published materials.' " (*DVD Copy Control Assn., Inc. v. Bunner* (2003) 31

Cal.4th 864, 899 [4 Cal.Rptr.3d 69, 75 P.3d 1], conc. opn. of Werdegar, J.; see Legis. Comm. Comment (Senate), 1984 Addition.)

- "The focus of the first part of the statutory definition is on whether the information is generally known to or readily ascertainable by business competitors or others to whom the information would have some economic value. Information that is readily ascertainable by a business competitor derives no independent value from not being generally known." (*Syngenta Crop Protection, Inc. v. Helliker* (2006) 138 Cal.App.4th 1135, 1172 [42 Cal.Rptr.3d 191], internal citations omitted.)

- "With respect to the general availability of customer information, courts are reluctant to protect customer lists to the extent they embody information which is 'readily ascertainable' through public sources, such as business directories. On the other hand, where the employer has expended time and effort identifying customers with particular needs or characteristics, courts will prohibit former employees from using this information to capture a share of the market. Such lists are to be distinguished from mere identities and locations of customers where anyone could easily identify the entities as potential customers. As a general principle, the more difficult information is to obtain, and the more time and resources expended by an employer in gathering it, the more likely a court will find such information constitutes a trade secret." (*Morlife, Inc. v. Perry* (1997) 56 Cal.App.4th 1514, 1521–1522 [66 Cal.Rptr.2d 731], internal citations omitted.)

- "[Defendant] argues that even if reverse engineering … did not actually occur, the binder contents were not trade secrets because they could have been reverse engineered—that is, they were readily ascertainable. … Considering the length of time that each proposal took to create and finalize and the urgency with which four of the project owners impressed upon the prospective contractors to begin the work, we cannot overlook the possibility that the information was not readily ascertainable in the circumstances presented. … Thus, a triable issue of fact exists as to whether the entire proposal for each project was indeed readily ascertainable—that is, whether [defendant] could have replicated each offer within the short period it claimed to have needed." (*San Jose Construction, Inc., supra,* 155 Cal.App.4th at pp. 1542–1543, footnote omitted.)

- "While ease of ascertainability is irrelevant to the definition of a trade secret, 'the assertion that a matter is readily ascertainable by proper means remains available as a defense to a claim of misappropriation.' Therefore, if the defendants can convince the finder of fact at trial (1) that 'it is a virtual certainty that anyone who manufactures' certain types of products uses rubber rollers, (2) that the manufacturers of those products are easily identifiable, and (3) that the defendants' knowledge of the plaintiff's customers resulted from that identification process and not from the plaintiff's records, then the defendants may establish a defense to the misappropriation claim. That defense, however, will be based upon an absence of misappropriation, rather than the absence of a trade secret." (*ABBA Rubber Co., supra,* 235 Cal.App.3d at pp. 21–22, fn. 9, internal citations omitted.)

- "[T]he evidence established that [plaintiff]'s customer list and related information was the product of a substantial amount of time, expense and effort on the part of [plaintiff]. Moreover, the nature and character of the subject customer information, i.e., billing rates, key contacts, specialized requirements and markup rates, is sophisticated information and irrefutably of commercial value and not readily ascertainable to other competitors. Thus, [plaintiff's] customer list and related

proprietary information satisfy the first prong of the definition of ‘trade secret’ under section 3426.1.” (*Courtesy Temporary Serv., Inc. v. Camacho* (1990) 222 Cal.App.3d 1278, 1288 [272 Cal.Rptr. 352].)

- “In viewing the evidence presented in the light most favorable to the prevailing party, it is difficult to find a protectable trade secret as that term exists under Civil Code section 3426.1, subdivision (d). While the information sought to be protected here, that is lists of customers who operate manufacturing concerns and who need shipping supplies to ship their products to market, may not be generally known to the public, they certainly would be known or readily ascertainable to other persons in the shipping business. The compilation process in this case is neither sophisticated nor difficult nor particularly time consuming. The evidence presented shows that the shipping business is very competitive and that manufacturers will often deal with more than one company at a time. There is no evidence that all of appellant's competition comes from respondents’ new employer. Obviously, all the competitors have secured the same information that appellant claims and, in all likelihood, did so in the same manner as appellant -- a process described herein by respondents.” (*American Paper & Packaging Prods., Inc. v. Kirgan* (1986) 183 Cal.App.3d 1318, 1326 [228 Cal.Rptr. 713].)

Secondary Sources

1 Milgrim on Trade Secrets, Ch. 1, *Definitional Aspects*, § 1.07[1] (Matthew Bender)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, §§ 40.52[1], 40.53[1][b] (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.103[4][a] (Matthew Bender)

4421. Affirmative Defense—Statute of Limitations—Three-Year Limit (Civ. Code, § 3426.6)

[*Name of defendant***] claims that [***name of plaintiff***]'s lawsuit was not filed within the time set by law. To succeed on this defense, [***name of defendant***] must prove that the claimed misappropriation of [***name of plaintiff***]'s trade secrets occurred before [***insert date three years before date of filing***].**

However, the lawsuit was still filed on time if [*name of plaintiff***] proves that before [***insert date three years before date of filing***], [he/she/it] did not discover, nor with reasonable diligence should have discovered, facts that would have caused a reasonable person to suspect that [***name of defendant***] had misappropriated [***name of plaintiff***]'s [***select short term to describe, e.g., information***].**

New April 2009

Directions for Use

Give this instruction if the California Uniform Trade Secrets Act statute of limitations is at issue. (See Civ. Code, § 3426.6.) In an action in which the defendant is or was a customer of the initial misappropriator, modifications may be required. (See *Cypress Semiconductor Corp. v. Superior Court* (2008) 163 Cal.App.4th 575 [77 Cal.Rptr.3d 685].)

It is not necessary that the plaintiff know the identity of the defendant in order to trigger the duty to discover. (*Cypress Semiconductor Corp., supra,* 163 Cal.App.4th at p. 587.) Therefore, "[*name of defendant*]" in the last sentence will need to be modified if inquiry notice may have been triggered against an actual, but unidentified, misappropriator. (See *Cypress Semiconductor Corp., supra,* 163 Cal.App.4th at p. 585.)

This instruction places the burden on the plaintiff to prove that it did not know nor have any reason to suspect the misappropriation earlier than three years before filing. (See Civ. Code, § 3426.6.) This is the rule for the burden of proof under the nonstatutory delayed-discovery rule. (See *Glue-Fold, Inc. v. Slautterback Corp.* (2000) 82 Cal.App.4th 1018, 1030 [98 Cal.Rptr.2d 661]; CACI No. 455, *Statute of Limitations—Delayed Discovery*.) Certain statutes that have their own delayed discovery language (as does Civil Code section 3426.6) have been construed to place the burden on the defendant to prove that the plaintiff knew or should have suspected the facts giving rise to the cause of action earlier than the limitation date. (See, e.g., *Samuels v. Mix* (1999) 22 Cal.4th 1, 8–10 [91 Cal.Rptr.2d 273, 989 P.2d 701] [construing Code Civ. Proc., § 340.6 on legal malpractice]; CACI No. 610, *Affirmative Defense—Statute of Limitations—Attorney Malpractice—One-Year Limit*.) No court has construed Civil Code section 3426.6 to transfer the burden of proof on delayed discovery to the defendant, so presumably the burden of proof remains with the plaintiff under the nonstatutory rule.

Sources and Authority

- Statute of Limitations. Civil Code Section 3426.6. ~~provides:~~

  ~~An action for misappropriation must be brought within three years after the misappropriation is~~

~~discovered or by the exercise of reasonable diligence should have been discovered. For the purposes of this section, a continuing misappropriation constitutes a single claim.~~

- "The unanimous conclusion of courts considering the issue—i.e., from federal courts construing section 3426.6—is that it is the first discovered (or discoverable) misappropriation of a trade secret which commences the limitation period." (*Glue-Fold, Inc., supra,* 82 Cal.App.4th at p. 1026.)

- "The statute is triggered when the plaintiff knows or has reason to know the third party has knowingly acquired, used, or disclosed its trade secrets." (*Cypress Semiconductor Corp., supra,* 163 Cal.App.4th 585.)

- "[T]he misappropriation that triggers the running of the statute is that which the plaintiff suspects, not that which may or may not actually exist." (*Cypress Semiconductor Corp., supra,* 163 Cal.App.4th at p. 587.)

- "[A] plaintiff may have more than one *claim* for misappropriation, each with its own statute of limitations, when more than one defendant is involved. This is different from saying that each *misappropriation* gives rise to a separate claim, which is what section 3426.6 precludes." (*Cypress Semiconductor Corp., supra,* 163 Cal.App.4th at p. 583, original italics.)

- "A *misappropriation* within the meaning of the UTSA occurs not only at the time of the initial acquisition of the trade secret by wrongful means, but also with each misuse or wrongful disclosure of the secret. But a *claim* for misappropriation of a trade secret arises for a given plaintiff against a given defendant only once, at the time of the initial misappropriation, subject to the discovery rule provided in section 3426.6. Each new misuse or wrongful disclosure is viewed as augmenting a single claim of continuing misappropriation rather than as giving rise to a separate claim." (*Cadence Design Systems, Inc. v. Avant! Corp.* (2002) 29 Cal.4th 215, 223 [127 Cal.Rptr.2d 169, 57 P.3d 647], original italics.)

- "It [is appropriate] to construe section 3426.6 as meaning that a cause of action for misappropriation against a third party defendant accrues with the plaintiff's discovery of that defendant's misappropriation. Any continuing misappropriation by that defendant constitutes a single claim." (*Cypress Semiconductor Corp., supra,* 163 Cal.App.4th at p. 583.)

- "If someone steals a trade secret and then sells it to a third party, when does the statute of limitations begin to run on any misappropriation claim the trade secret owner might have against the third party? … We conclude that with respect to the element of knowledge, the statute of limitations on a cause of action for misappropriation begins to run when the *plaintiff* has any reason to suspect that the third party knows or reasonably should know that the information is a trade secret. The third party's actual state of mind does not affect the running of the statute." (*Cypress Semiconductor Corp., supra,* 163 Cal.App.4th at p. 579, original italics.)

- "We conclude that the trial court erred in ruling, under the stipulated facts, that the statute of limitations did not begin to run until August 2003, when [defendant] actually learned that the DynaSpice program contained [plaintiff] 's trade secrets. Rather, the question is: When did

[plaintiff] first have any reason to suspect that a … customer [of the initial misappropriator] had obtained or used DynaSpice knowing, *or with reason to know,* that the software contained [plaintiff]'s trade secrets?" (*Cypress Semiconductor Corp., supra,* 163 Cal.App.4th at p. 588, original italics.)

- "[I]t is not necessary that the plaintiff be able to identify the person or persons causing the harm. Since the identity of the defendant is not an element of a cause of action, the failure to discover the identity of the defendant does not postpone accrual of the cause of action. ' "Although never fully articulated, the rationale for distinguishing between ignorance" of the defendant and "ignorance" of the cause of action itself "appears to be premised on the commonsense assumption that once the plaintiff is aware of" the latter, he "normally" has "sufficient opportunity," within the "applicable limitations period," "to discover the identity" of the former.' In this case, therefore, the statute began to run when [plaintiff] had any reason to suspect that the CSI customers knew or should have known that they had acquired [plaintiff]'s trade secrets." (*Cypress Semiconductor Corp., supra,* 163 Cal.App.4th at p. 587, internal citations omitted.)

Secondary Sources

Witkin, Summary of California Law (10th ed. 2005) Equity, § 88

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts,* § 40.55 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition,* § 565.274 (Matthew Bender)

Matthew Bender Practice Guide: California Unfair Competition and Business Torts, Ch. 8, *Trade Secrets,* 8.28

4500. Breach of Implied Warranty of Correctness of Plans and Specifications—Essential Factual Elements

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[*Name of plaintiff*] **claims that** [*name of defendant*] **provided plans and specifications for the** [**project***/describe construction project, e.g., kitchen remodeling*] **that were not correct. To establish this claim,** [*name of plaintiff*] **must prove all of the following:**

1. **That** [*name of defendant*] **provided** [*name of plaintiff*] **with plans and specifications for** [*name of defendant*]**'s** [*short name for project, e.g., remodeling*] **project;**

2. **That** [*name of plaintiff*] **was required to follow the plans and specifications provided** by [*name of defendant*] **in** [**bidding on/ [and] constructing**] **the** [*e.g., remodeling*] **project;**

3. **That** [*name of plaintiff*] **reasonably relied on the plans and specifications for the** [*e.g., remodeling*] **project;**

4. **That the plans and/or specifications provided by** [*name of defendant*] **were not correct; and**

5. **That** [*name of plaintiff*] **was harmed because the plans or specifications were not correct.**

New December 2010; Revised June 2011

Directions for Use

This instruction should be given when a contractor makes a claim for breach of the implied warranty of correctness on the grounds that the plans and specifications provided by the owner for its construction project were not correct. Also give CACI No. 303, *Breach of Contract—Essential Factual Elements*, for other contested elements of a breach-of-contract claim.

The word "project" may be used if the meaning will be clear to the jury. Alternatively, describe the project in the first paragraph, and then select a shorter term for use thereafter.

This implied warranty also applies to a general contractor who is responsible for the correctness of plans and specifications that are provided to subcontractors. (See *Healy v. Brewster* (1967) 251 Cal.App.2d 541, 550 [59 Cal.Rptr. 752].)

An implied-warranty claim can arise when the contractor is required to rely on the owner's plans and specifications in preparing a fixed price bid for a project. A claim can also arise when the contractor must follow the owner's plans and specifications and, as a result, encounters difficulty in constructing the project. In either case, the contractor may assert a claim for breach of the implied warranty if the contractor is damaged by incorrect plans or specifications.

A breach of the implied warranty can also be asserted as an affirmative defense to an owner's

claim for nonperformance (see CACI No. 4511, *Affirmative Defense—Contractor Followed Plans and Specifications*) if the contractor's alleged breach was caused by the owner's incorrect plans and specifications.

The implied warranty applies in particular to plans and specifications provided by public owners, who are required by statute to prepare accurate and complete plans and specification for public works projects. (See Public Contract Code, §§ 1104, 10120.) It can also apply to private construction projects if the owner requires the contractor to follow plans and specifications that turn out to be incorrect. (See, e.g., *Coleman Engineering Co. v. North American Aviation, Inc*. (1966) 65 Cal.2d 396, 404 [55 Cal.Rptr. 1, 420 P.2d 713].)

An owner's obligation to provide correct plans and specifications cannot be disclaimed by general language requiring the contractor to examine the plans and specifications for errors and omissions. (See *Warner Constr. Corp. v. L.A.* (1970) 2 Cal.3d 285, 292 [85 Cal.Rptr. 444, 466 P.2d 996].)

Sources and Authority

- Architectural or Engineering Plans and Specifications on Public Works Projects. Public Contract Code section 1104 (applicable to local government agencies). ~~provides: "No local public entity, charter city, or charter county shall require a bidder to assume responsibility for the completeness and accuracy of architectural or engineering plans and specifications on public works projects, except on clearly designated design build projects. Nothing in this section shall be construed to prohibit a local public entity, charter city, or charter county from requiring a bidder to review architectural or engineering plans and specifications prior to submission of a bid, and report any errors and omissions noted by the contractor to the architect or owner. The review by the contractor shall be confined to the contractor's capacity as a contractor, and not as a licensed design professional."~~

- Plans and Specifications on State Agency Projects. Public Contract Code section 10120 (applicable to state agencies). ~~provides: "Before entering into any contract for a project, the department shall prepare full, complete, and accurate plans and specifications and estimates of cost, giving such directions as will enable any competent mechanic or other builder to carry them out."~~

- "[I]f the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications. This responsibility of the owner is not overcome by the usual clauses requiring builders to visit the site, to check the plans, and to inform themselves of the requirements of the work … . (*United States v. Spearin* (1918) 248 U.S. 132, 136 [39 S.Ct. 59, 63 L.Ed. 166], internal citations omitted.)

- "A contractor of public works who, acting reasonably, is misled by incorrect plans and specifications issued by the public authorities as the basis for bids and who, as a result, submits a bid which is lower than he would have otherwise made may recover in a

contract action for extra work or expenses necessitated by the conditions being other than as represented. This rule is mainly based on the theory that the furnishing of misleading plans and specifications by the public body constitutes a breach of an implied warranty of their correctness. The fact that a breach is fraudulent does not make the rule inapplicable." (*Souza & McCue Constr. Co. v. Superior Court of San Benito County* (1962) 57 Cal.2d 508, 510–511 [20 Cal.Rptr. 634, 370 P.2d 338], internal citations omitted.)

- "We have long recognized that '[a] contractor of public works who, acting reasonably, is misled by incorrect plans and specifications issued by the public authorities as the basis for bids and who, as a result, submits a bid which is lower than he would have otherwise made may recover in a contract action for extra work or expenses necessitated by the conditions being other than as represented.' " (*Los Angeles Unified School District v. Great American Ins. Co.* (2010) 49 Cal.4th 739, 744 [112 Cal.Rptr.3d 230, 234 P.3d 490].)

- "The responsibility of a governmental agency for positive representations it is deemed to have made through defective plans and specifications 'is not overcome by the general clauses requiring the contractor, to examine the site, to check up the plans, and to assume responsibility for the work … .' " (*E. H. Morrill Co. v. State* (1967) 65 Cal.2d 787, 792–793 [56 Cal.Rptr. 479, 423 P.2d 551], internal citations omitted.)

- "If a contractor makes a misinformed bid because a public entity issued incorrect plans and specifications, precedent establishes that the contractor can sue for breach of the implied warranty that the plans and specifications are correct. The contractor may recover 'for extra work or expenses necessitated by the conditions being other than as represented.' " (*Dillingham-Ray Wilson v. City of Los Angeles* (2010) 182 Cal.App.4th 1396, 1401, fn. 5 [106 Cal.Rptr.3d 691].)

- "Courts have recognized a cause of action in contract against a public entity based upon the theory that 'the furnishing of misleading plans and specifications by the public body constitutes a breach of implied warranty of their correctness.' " (*Thompson Pacific Construction, Inc. v. City of Sunnyvale* (2007) 155 Cal.App.4th 525, 551 [66 Cal.Rptr.3d 175].)

- "Second, [private owner] breached its contract by providing [contractor] with plans that were both erroneous and extremely late in issuance. Although construction started on May 1, 1976, lengthy drawing reviews became necessary and final drawings were still being furnished as late as July through September 1977. The furnishing of misleading plans and specifications by an owner is a breach of an implied warranty of their correctness." (*C. Norman Peterson Co. v. Container Corp. of Am.* (1985) 172 Cal.App.3d 628, 643 [218 Cal.Rptr. 592], internal citations omitted.)

- "The trial court … read the section 158 disclaimer to the jury, but instructed them that 'if a public agency makes a positive and material representation as to a condition presumably within the knowledge of the agency and upon which the plaintiff had a right

to rely, the agency is deemed to have warranted such facts despite a general provision requiring an on-site inspection by the contractor.' In submitting the issue of the effect of the section 158 disclaimer to the jury, and its instructions to the jury, the trial court complied with our decision in *Morrill*, and the verdict must be taken as resolving that issue against defendant." (*Warner Constr. Corp., supra,* 2 Cal.3d at p. 292, fn. 2].)

- "Since the plans and specifications were prepared by the owners' architect and not by the subcontractor, and since the subcontractor undertook to do the work in accordance with his specific proposal, we cannot reasonably conclude that the subcontractor assumed responsibility for the adequacy of the plans and specifications … . The language upon which the plaintiff relies constituted a statement of the purpose sought to be achieved by means of the owners' plans and specifications rather than an undertaking on the part of the subcontractor of responsibility for the adequacy of such plans and specifications as the design of a system capable of producing the desired result." (*Kurland v. United Pacific Ins. Co.* (1967) 251 Cal.App.2d 112, 117 [59 Cal.Rptr. 258].)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, § 998

1 California Construction Contracts, Defects, and Litigation (Cont.Ed.Bar) Ch. 6, *Public Contracts: Disputes and Remedies,* §§ 6.73–6.76

5 Stein, Construction Law, Ch. 18, *Warranties,* ¶ 18.02 (Matthew Bender)

12 California Real Estate Law and Practice, Ch. 440, *Construction Contract Remedies,* § 440.14 (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts,* § 104.24 (Matthew Bender)

42 California Forms of Pleading and Practice, Ch. 481, *Public Works,* § 481.311 (Matthew Bender)

10 Miller & Starr, California Real Estate (3d ed. 2008) Ch. 27, *Construction Law and Contracting,* §§ 27:63–27:64 (Thomson Reuters West)

Acret, California Construction Law Manual (6th ed. 2005) Ch. 7, *Public Contracts,* § 7:78 (Thomson Reuters West)

3 Bruner & O'Connor on Construction Law, Ch. 9, *Warranties,* §§ 9:78, 9:84 (Thomson Reuters ~~West~~)

Gibbs & Hunt, California Construction Law (Aspen Pub. 16th ed. 1999) Ch. 4, *Breach of Contract by Owner,* §§ 4.06, 4.07

Kamine, Public Works Construction Manual (BNI Publications, Inc. 1996) Ch. 13, *Everything You Ever Wanted to Know About Extra Work and the Changes Clause*, pp. 99–100

4502. Breach of Implied Covenant to Provide Necessary Items Within Owner's Control—Essential Factual Elements

In every construction contract, it is understood that the owner will provide access to the project site and do those things within the owner's control that are necessary for the contractor to reasonably and timely perform its work. [*Name of plaintiff***] claims that [***name of defendant***] breached the contract by [***specify what owner failed to do, e.g., failing to procure a disposal permit for hazardous materials***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] could not reasonably or timely perform [his/her/its] work without [***insert short name for item, e.g., a disposal permit***];**

2. **That [***name of defendant***] knew or reasonably should have known that [***e.g., a disposal permit***] was necessary for [***name of plaintiff***] to reasonably and timely perform the work;**

3. **That [***name of defendant***] had the ability to [***e.g., procure a disposal permit***];**

4. **That [***name of plaintiff***] could not [***e.g., obtain a disposal permit***] without [***name of defendant***]'s assistance;**

5. **That [***name of defendant***] failed to [***e.g., procure a disposal permit***] in a timely manner; and**

6. **That [***name of plaintiff***] was harmed by [***name of defendant***]'s failure.**

New December 2010; Revised June 2011

Directions for Use

This instruction should be used when a contractor claims the owner breached an implied covenant to provide necessary access to the project site, easements, permits, or other things uniquely within the owner's control in order for the contractor to reasonably and timely perform the contract. Also give CACI No. 303, *Breach of Contract—Essential Factual Elements,* for other contested elements of a breach-of-contract claim.

This implied covenant can arise in both private and public contracts unless it is expressly precluded by the contract documents. (See *Hensler v. City of Los Angeles* (1954) 124 Cal.App.2d 71, 82 [268 P.2d 12] [covenant is implied in every construction contract]; see also *Bomberger v. McKelvey* (1950) 35 Cal.2d 607, 613 [220 P.2d 729] [covenant implied in private contract].) This instruction may also be used when the contractor claims the owner breached a general duty of cooperation by failing to control and/or coordinate third parties, such as other contractors on the project site.

This instruction is based on CACI 325, *Breach of Covenant of Good Faith and Fair Dealing—Essential Factual Elements*.

Sources and Authority

- Implied Stipulations to Make Contract Reasonable. Civil Code section 1655. ~~provides: "Stipulations which are necessary to make a contract reasonable, or conformable to usage, are implied, in respect to matters concerning which the contract manifests no contrary intention."~~

- Implied Contract Terms. Civil Code section 1656. ~~provides: "All things that in law or usage are considered as incidental to a contract, or as necessary to carry it into effect, are implied therefrom, unless some of them are expressly mentioned therein, when all other things of the same class are deemed to be excluded."~~

- "In every building contract which contains no express covenants on the subjects there are implied covenants to the effect that the contractor shall be permitted to proceed with the construction of the building in accordance with the other terms of the contract without interference by the owner and that he shall be given such possession of the premises as will enable him to adequately carry on the construction and complete the work agreed upon. Such terms are necessarily implied from the very nature of the contract and a failure to observe them not consented to by the contractor constitutes a breach of contract on the part of the owner entitling the contractor to rescind, although it may not amount to a technical prevention of performance." (*Gray v. Bekins* (1921) 186 Cal. 389, 395 [199 P. 767], internal citations omitted.)

- "Under the contract as thus construed, there was an implied covenant that plaintiffs would be given possession of the premises for the agreed purpose at a reasonable time to be chosen by them. Defendant's conduct in forbidding plaintiffs to enter, therefore, was sufficient not only to excuse their performance but also to constitute a breach or anticipatory breach of the contract." (*Bomberger*, *supra*, 35 Cal.2d at p. 613, internal citations omitted.)

- "The rule is plain that in every construction contract the law implies a covenant, where necessary, that the owner will furnish the selected site of operations to the contractor in order to enable him 'to adequately carry on the construction and complete the work agreed upon.' The rule applies with equal force to construction contracts entered into by a municipality." (*Hensler*, *supra*, 124 Cal.App.2d at p. 83, internal citations omitted.)

- "In general, where plans, specifications and conditions of contract do not otherwise provide, there is an implied covenant that the owner of the project is required to furnish whatever easements, permits or other documentation are reasonably required for the construction to proceed in an orderly manner." (*COAC, Inc. v. Kennedy Engineers* (1977) 67 Cal.App.3d 916, 920 [136 Cal.Rptr. 890].)

- "The rule is well settled that in every construction contract the law implies a covenant that the owner will provide the contractor timely access to the project site to facilitate

performance of work. When necessary permits relating to the project are not available or access to the site is limited by the owner, the implied covenant is breached. The trial court found the delays were caused by the [defendant]'s breaches of contract and implied covenant in failing to disclose known restrictions on project performance, to obtain necessary permits, and to provide timely access to perform the work." (*Howard Contracting, Inc. v. G.A. MacDonald Construction Co.* (1998) 71 Cal.App.4th 38, 50 [83 Cal.Rptr.2d 590], internal citations omitted.)

- "[A] contract includes not only the terms that have been expressly stated but those implied provisions indispensable to effectuate the intention of the parties. … [¶] Clearly an implied term of the contract herein was that once the notice to proceed was issued, the dredge would be available for work on the project … . [¶] [Plaintiff], acting as a reasonable public works contractor, was misled by this incorrect implied representation in its submission of a bid. [Plaintiff] justifiably relied on this representation in determining the cost of constructing the seawall. Accordingly, it did not include in its bid the cost of maintaining the seawall for an indefinite period of time while awaiting the arrival of the dredge. As the [defendant] impliedly warranted the correctness of these representations, it is liable for the cost of extra work which was necessitated by the dredge's failure to arrive." (*Tonkin Constr. Co. v. County of Humboldt* (1987) 188 Cal.App.3d 828, 832 [233 Cal.Rptr. 587], internal citations omitted.)

- " '[T]he covenant is implied as a *supplement* to the express contractual covenants, to prevent a contracting party from engaging in conduct which (while not technically transgressing the express covenants) frustrates the other party's rights to the benefits of the contract.' " (*Racine & Laramie, Ltd. v. Department of Parks & Recreation* (1992) 11 Cal.App.4th 1026, 1031–1032 [14 Cal.Rptr.2d 335], original italics.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, § 803

1 California Construction Contracts, Defects, and Litigation (Cont.Ed.Bar) Ch. 6, *Public Contracts: Disputes and Remedies,* § 6.84, 6.85

5 Stein, Construction Law, Ch. 18, *Warranties,* ¶ 18.02 (Matthew Bender)

12 California Real Estate Law and Practice, Ch. 140, *Contracts,* § 140.45 (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts,* § 104.24 (Matthew Bender)

5 California Points and Authorities, Ch. 50, *Contracts,* § 50.242 (Matthew Bender)

Acret, California Construction Law Manual (6th ed. 2005) Ch. 1, *Contracts,* §§ 1:80, 1:82 (Thomson Reuters West)

Acret, California Construction Law Manual (6th ed. 2005) Ch. 7, *Public Contracts*, §§ 7:48, 7:77 (Thomson Reuters West)

3 Bruner & O'Connor on Construction Law, Ch. 9, *Warranties*, § 9:99 (Thomson Reuters ~~West~~)

Kamine, Public Works Construction Manual (BNI Publications, Inc. 1996) p. 10

4521. Owner's Claim That Contract Procedures Regarding Change Orders Were Not Followed

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The contract between the parties provided for certain procedures that had to be followed if [*name of plaintiff***] wanted to be paid for changed or additional work that was not required by the contract. These procedures are called "change-order requirements." [The change-order requirements of the contract provide as follows: [***specify***].]**

[*Name of plaintiff***] seeks additional compensation beyond that provided for in the contract for [***specify, e.g., fill and grading***] because [***specify, e.g., the soil conditions at the project site were not as represented***]. [***Name of defendant***] claims that [***name of plaintiff***] failed to comply with the contract's change-order requirements, and that therefore [he/she/it] is not entitled to payment for the changed or additional work that [he/she/it] performed.**

To obtain additional compensation, [*name of plaintiff***] must prove that [he/she/it] [followed/was excused from having to follow] the change-order requirements.**

New December 2010

Directions for Use

This instruction should be given if the owner claims that the contract required the contractor to request a change order for any claimed changed or additional work before performing the work as a condition precedent to being permitted to assert a claim for additional compensation. It is an adaptation of CACI No. 321, *Existence of Condition Precedent Disputed,* and CACI No. 322, *Occurrence of Agreed Condition Precedent*.

The owner's claim for strict compliance with the contract's change-order procedures is potentially subject to several recognized defenses, including waiver (see CACI No. 4522, *Waiver of Written Approval or Notice Requirements for Changed or Additional Work*), estoppel, and oral modification (see CACI No. 313, *Modification*; Civ. Code, § 1698; *Girard v. Ball* (1981) 125 Cal.App.3d 772, 785 [178 Cal.Rptr. 406].) If one of these defenses is asserted, select "was excused from having to follow" in the last paragraph and give the appropriate instruction on the excuse from performance that is at issue.

Sources and Authority

- Modification of Contract. Civil Code section 1698. ~~provides:~~

  ~~(a) A contract in writing may be modified by a contract in writing.~~

  ~~(b) A contract in writing may be modified by an oral agreement to the extent that the oral agreement is executed by the parties.~~

~~(c) Unless the contract otherwise expressly provides, a contract in writing may be modified by an oral agreement supported by new consideration. The statute of frauds (section 1624) is required to be satisfied if the as contact modified is within its provisions;~~

~~(d) Nothing in this section precludes in an appropriate case the application of rules of law concerning estoppel, oral novation and substitution of a new agreement, rescission of a written contract by an oral agreement, waiver of a provision of a written contract, or oral independent collateral contracts.~~

- "California courts generally have upheld the necessity of compliance with contractual provisions regarding written 'change orders'." (*Weeshoff Constr. Co. v. Los Angeles County Flood Control Dist*. (1979) 88 Cal.App.3d 579, 589 [152 Cal.Rptr. 19].)

- "It is frequently provided that change orders for extra work must be in writing. *In the absence of a waiver or modification*, no recovery can be had for alterations or extra work performed without compliance with such a provision." (*G. Voskanian Construction, Inc. v. Alhambra Unified School Dist.* (2012) 204 Cal.App.4th 981, 987 [139 Cal.Rptr.3d 286], original italics.)

- "Compliance with contractual provisions for written orders is indispensible in order to recover for alleged extra work." (*Acoustics, Inc. v. Trepte Construction* (1971) 14 Cal.App.3d 887, 912 [92 Cal.Rptr. 723].)

- "It is elementary a plaintiff suing for breach of contract must prove it has performed all conditions on its part or that it was excused from performance. Similarly, where defendant's duty to perform under the contract is conditioned on the happening of some event, the plaintiff must prove the event transpired." (*Consolidated World Investments, Inc. v. Lido Preferred Ltd.* (1992) 9 Cal.App.4th 373, 380 [11 Cal.Rptr.2d 524], internal citation omitted.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, § 155

1 California Construction Contracts, Defects, and Litigation (Cont.Ed.Bar) Ch. 5, *Private Contracts: Disputes and Remedies,* § 5.44

1 California Construction Contracts, Defects, and Litigation (Cont.Ed.Bar) Ch. 6, *Public Contracts: Disputes and Remedies,* §§ 6.65, 6.67

2 California Construction Contracts, Defects, and Litigation (Cont.Ed.Bar) Ch. 9, *Handling Disputes During Construction,* § 9.68

1 Stein, Construction Law, Ch. 3, *Construction and Design Contracts*, ¶ 3.05 (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, § 104.15 (Matthew Bender)

5 California Points and Authorities, Ch. 50, *Contracts*, § 50.40 (Matthew Bender)

15 California Legal Forms, Ch. 30D, *Construction Contracts and Subcontracts*, § 30D.14 (Matthew Bender)

Matthew Bender Practice Guide: California Contract Litigation, Ch.15, *Attacking or Defending Existence of Contract--Failure to Comply With Applicable Formalities*, 15.25

10 Miller & Starr, California Real Estate ~~(Thomson Reuters West 3d ed.)~~ Ch. 27, *Construction Law and Contracting*, §§ 27:61, 27:65 (Thomson Reuters 3d ed.)

Acret, California Construction Law Manual ~~(Thomson Reuters West 6th ed. 2005)~~ Ch. 7, *Public Contracts*, § 7:34 (Thomson Reuters 6th ed. 2005)

1 Bruner & O'Connor on Construction Law ~~(Thomson Reuters West 2002)~~ Ch. 4, *Contract "Changes" and "Extras,"* §§ 4:35–4:47 (Thomson Reuters 2002)

Kamine, Public Works Construction Manual (BNI Publications, Inc. 1996) Ch. 13, *Everything You Ever Wanted to Know About Extra Work and the Changes Clause*, pp. 100–103

4522. Waiver of Written Approval or Notice Requirements for Changed or Additional Work

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The contract between the parties required [*name of plaintiff***] [to obtain [***name of defendant***]'s written approval/to give written notice to [***name of defendant***]] in order to be paid for changed or additional work that [he/she/it] performed.**

[*Name of defendant***] claims that [***name of plaintiff***] failed to comply with the contract's [written approval/ notice] requirements, and that therefore [***name of plaintiff***] is not entitled to payment for the changed or additional work that [he/she/it] performed. [***Name of plaintiff***] claims that [he/she/it] was not required to comply with the contract's [written approval/notice] requirement because [***name of defendant***] gave up [his/her/its] right to insist on [written approval/notice]. Giving up a contract right is called a "waiver."**

To succeed on this waiver claim, [*name of plaintiff***] must prove [by clear and convincing evidence] that [***name of defendant***] freely and knowingly gave up [his/her/its] right to require [***name of plaintiff***] to follow the contract's [written approval/notice] requirements.**

A waiver may be oral or written or may arise from conduct that shows [*name of defendant***] clearly gave up that right.**

New December 2010; Revised June 2011

Directions for Use

This instruction is a variation of CACI No. 336, *Affirmative Defense—Waiver*. Use of this instruction is almost certainly limited to private contract disputes. (See *P&D Consultants, Inc. v. City of Carlsbad* (2010) 190 Cal.App.4th 1332, 1344 [119 Cal.Rptr.3d 253] [public contract change-order requirements not subject to oral modification or modification by conduct] ; cf. *Weeshoff Constr. Co. v. Los Angeles County Flood Control Dist.* (1979) 88 Cal.App.3d 579, 589 [152 Cal.Rptr. 19] [public agency may waive written change order requirements].)

When a contractor asserts a claim for compensation for changed or additional work (see CACI No. 4520, *Contractor's Claim for Changed or Extra Work*), the owner may assert that the contractor is not entitled to payment because it failed to obtain the owner's written approval or failed to give written notice before performing the changed or additional work. (See CACI No. 4521, *Owner's Claim That Contract Procedures Regarding Change Orders Were Not Followed*.) The contractor is entitled to counter this defense by showing that the owner expressly or impliedly waived the contract's requirements.

The general rule of contract law is that waiver must be proved by clear and convincing evidence. (*Ukiah v. Fones* (1966) 64 Cal.2d 104, 107–108 [48 Cal.Rptr. 865, 410 P.2d 369].) Some construction law cases, however, have not mentioned this requirement, though there was no discussion of the burden of proof. (See *Healy v. Brewster* (1967) 251 Cal.App.2d 541, 552 [59 Cal.Rptr. 752]; *Howard J. White, Inc. v. Varian Associates* (1960) 178 Cal.App.2d 348, 353–355 [2 Cal.Rptr. 871].) If the clear-and-convincing-evidence requirement is included, also give

CACI No. 201, *More Likely True—Clear and Convincing Proof.*

Sources and Authority

- Modification of Contract. Civil Code section 1698. ~~provides:~~

  ~~(a) A contract in writing may be modified by a contract in writing.~~

  ~~(b) A contract in writing may be modified by an oral agreement to the extent that the oral agreement is executed by the parties.~~

  ~~(c) Unless the contract otherwise expressly provides, a contract in writing may be modified by an oral agreement supported by new consideration. The statute of frauds (Section 1624) is required to be satisfied if the contract as modified is within its provisions.~~

  ~~(d) Nothing in this section precludes in an appropriate case the application of rules of law concerning estoppel, oral novation and substitution of a new agreement, rescission of a written contract by an oral agreement, waiver of a provision of a written contract, or oral independent collateral contracts.~~

- Enforceability of Change Orders. Business and Professions Code section 7159.6, applicable to "home improvement contractors" as defined in Business and Professions Code section 7150.1. ~~, provides:~~

  ~~(a) An extra work or change order is not enforceable against a buyer unless the change order sets forth all of the following:~~

  ~~(1) The scope of work encompassed by the order.~~

  ~~(2) The amount to be added or subtracted from the contract.~~

  ~~(3) The effect the order will make in the progress payments or the completion date.~~

  (b) The buyer may not require a contractor to perform extra or change-order work without providing written authorization.

  (c) Failure to comply with the requirements of this section does not preclude the recovery of compensation for work performed based upon legal or equitable remedies designed to prevent unjust enrichment.

  (d) This section shall become operative on January 1, 2006.

- " '[W]aiver is the intentional relinquishment of a known right after knowledge of the facts.' … The burden … is on the party claiming a waiver of a right to prove it by clear and convincing evidence that does not leave the matter to speculation, and 'doubtful cases will be

decided against a waiver.' … The waiver may be either express, based on the words of the waiving party, or implied, based on conduct indicating an intent to relinquish the right." (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 31 [44 Cal.Rptr.2d 370, 900 P.2d 619], internal citations omitted.)

- "It is settled law that the parties may by their conduct waive the requirement of a written contract that no extra work shall be done except upon written order. … [¶¶] 'Waiver may be shown by conduct, and it may be the result of an act which, according to its natural import, is so inconsistent with the intent to enforce the right in question as to induce a reasonable belief that such right has been relinquished.' " (*Howard J. White, Inc, supra*, 178 Cal.App.2d at pp. 353–355.)

- "Where the terms of a written contract require that extra work be approved in writing, such provision may be altered or waived by an executed oral modification of the contract." (*Healy, supra,* 251 Cal.App.2d at p. 552, internal citations omitted.)

- "[Defendant] places reliance on the provision of the subcontract which provides that any work involving extra compensation shall not be proceeded with unless written authority is given by [defendant]. But under section 1698 of the Civil Code, an executed oral agreement may alter an agreement in writing, even though, as here, the original contract provides that extra work must be approved in writing. The oral request for and approval of extra work by [defendant] was, when fully performed, an oral modification of the written June 8th subcontract. … [¶] Whether a written contract has been modified by an executed oral agreement is a question of fact, and the finding, in the instant case, is supported by substantial evidence. … [¶] Defendant cannot be heard to say that a written order was not first obtained as required under the subcontract. [Defendant] by its acts and conduct waived and is estopped to rely upon the subcontract provision requiring its prior written approval before proceeding with work involving extra compensation." (*MacIsaac & Menke Co. v. Cardox Corp.* (1961) 193 Cal.App.2d 661, 669–670 [14 Cal.Rptr. 523], internal citations omitted.)

- "The written contract provided that the defendant should not be charged for 'extras' unless ordered in writing. Upon this basis defendant contends that recovery for the 'extras' furnished by plaintiff is barred. The provision in a building contract that an owner may be charged only for 'extras' which are ordered in writing may be waived or modified by an executed oral agreement. As a consequence, recovery by the contractor for the reasonable value of 'extras' has been upheld where they have been furnished at the request of the owner, became a part of the construction work generally described in the building contract, and are accepted by him, even though the request therefor was oral and the building contract provided that he should be chargeable only for such 'extras' as were requested in writing." (*1st Olympic Corp. v. Hawryluk* (1960) 185 Cal.App.2d 832, 841 [8 Cal.Rptr. 728], internal citations omitted.)

- "Defendants concede that the labor for which payment is sought was actually performed and that the backfill was supplied. They accept the finding that the charges were reasonable, and the record discloses that the benefits of the labor and material have accrued to the premises.

Defendants rest their contentions on the provision of the contract requiring written change orders. The parties may, by their conduct, waive such a provision with the result that the subcontractor does extra work without a written order. If the circumstances indicate that the parties intended to waive the provision, the subcontractor will be protected." (*Frank T. Hickey, Inc. v. Los Angeles Jewish Community Council* (1954) 128 Cal.App.2d 676, 682–683 [276 P.2d 52], internal citations omitted.)

- "The record shows that extras were ordered and approved by [cross-defendant] in the amount of $8,097.50. Under the law this amounted to a modification of the written contract. [Cross-defendant] places great reliance on the provision of the contract which provides that alterations must be in writing, and points out here that he only approved one alteration in writing. But under section 1698 of the Civil Code, an executed oral agreement may alter an agreement in writing, even though, as here, the original contract provides that all changes must be approved in writing. This is so because the executed oral agreement may alter or modify that provision of the contract as well as other portions." (*Miller v. Brown* (1955) 136 Cal.App.2d 763, 775 [289 P.2d 572], internal citation omitted.)

- "The evidence showed that the extra work on the building was done with the knowledge and consent of defendant and his agent, and that they waived the written stipulation that a separate written estimate of extra work should be submitted, by orally agreeing to and countenancing the work without written estimates. Had it not been for defendant's consent thus given, the work would not have been thus done. He will not now be permitted to repudiate work done in the manner that he consented to, on any ground that it was not done in accordance with a previous written agreement." (*Wyman v. Hooker* (1905) 2 Cal.App. 36, 41 [83 P. 79].)

- "Unlike private contracts, public contracts requiring written change orders cannot be modified orally or through the parties' conduct. Thus, even if [plaintiff]'s evidence pertaining to the oral authorizations of a city employee for extra work is fully credited, [plaintiff] cannot prevail." (*P&D Consultants, Inc., supra,* 190 Cal.App.4th at p. 1335.)

- "California courts generally have upheld the necessity of compliance with contractual provisions regarding written 'change orders.' … However, California decisions have also established that particular circumstances may provide waivers of written 'change order' requirements. If the parties, by their conduct, clearly assent to a change or addition to the contractor's required performance, a written 'change order' requirement may be waived." (*Weeshoff Constr. Co., supra,* 88 Cal.App.3d at p. 589, internal citations omitted.)

- "In addition to being factually inapposite, the continuing viability of *Weeshoff* is questionable. In pronouncing that 'California decisions have also established that particular circumstances may provide waivers of written "change order" requirements,' and '[i]f the parties, by their conduct, clearly assent to a change or addition to the contractor's required performance, a written "change order" requirement may be waived,' the court cited cases involving private parties, not public agencies … . Since its publication 28 years ago, no case has cited *Weeshoff* for this point. This is understandable as it is contrary to the great weight of authority, cited above, to the contrary." (*Katsura v. City of San Buenaventura* (2007) 155

Cal.App.4th 104, 111 [65 Cal.Rptr.3d 762], internal citation omitted.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, § 969

1 California Construction Contracts, Defects, and Litigation (Cont.Ed.Bar) Ch. 5, *Private Contracts: Disputes and Remedies,* §§ 5.44–5.47

2 California Construction Contracts, Defects, and Litigation (Cont.Ed.Bar) Ch. 9, *Handling Disputes During Construction,* § 9.69

1 Stein, Construction Law, Ch. 3, *Construction and Design Contracts,* § 3.02 (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, § 104.15 (Matthew Bender)

5 California Points and Authorities, Ch. 50, *Contracts,* § 50.522 et seq. (Matthew Bender)

15 California Legal Forms, Ch. 30D, *Construction Contracts and Subcontracts*, § 30D.14 (Matthew Bender)

10 Miller & Starr, California Real Estate (3d ed. 2008) Ch. 27, *Construction Law and Contracting*, §§ 27:61, 27:65–27:66 (Thomson Reuters ~~West~~)

Acret, California Construction Law Manual (6th ed. 2005) Ch. 1, *Contracts,* §§ 1:40–1:47 (Thomson Reuters ~~West~~)

Acret, California Construction Law Manual (6th ed. 2005) Ch. 7, *Public Contracts,* § 7:71 (Thomson Reuters ~~West~~)

1 Bruner & O'Connor on Construction Law, Ch. 4, *Contract "Changes" and "Extras,"* §§ 4:39–4:40 (Thomson Reuters ~~West~~)

Kamine, Public Works Construction Manual (BNI Publications, Inc. 1996) Ch. 13, *Everything You Ever Wanted to Know About Extra Work and the Changes Clause*, pp. 103–106

Kamine, Public Works Construction Manual (BNI Publications, Inc. 1996) Ch. 16, *Written Extra Work Order Gotcha*

4530. Owner's Damages for Breach of Construction Contract—Work Does Not Conform to Contract

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If you decide that [*name of plaintiff***] has proved [his/her] claim against [***name of defendant***] for failure to properly build the [project/***describe construction project, e.g., apartment building***], you also must decide how much money will reasonably compensate [***name of plaintiff***] for the harm. This compensation is called "damages."**

To recover damages, [*name of plaintiff***] must prove the reasonable cost of repairing the [project/***short term for project, e.g., building***] so that it complies with the terms of the contract, including the plans and specifications, agreed to by the parties.**

If, however, [*name of defendant***] proves that the cost of repair is unreasonable in light of the damage to the property and the property's value after repair, then [***name of plaintiff***] is entitled only to the difference between the value of the [project/***short term for project, e.g., remodeling***] as it was performed by [***name of defendant***] and what it would be worth if it had been completed according to the contract, including the plans and specifications, agreed to by the parties. The cost of repair may be unreasonable if the repair would require the destruction of a substantial part of [***name of defendant***]'s work.**

New December 2010

Directions for Use

This instruction should be used when the owner claims that the contractor has breached the construction contract by failing to meet the requirements of the contract or its plans and specifications. If the owner claims that the contractor breached the contract by failing to complete all work required by the contract, see CACI No. 4531, *Owner's Damages for Breach of Construction Contract—Failure to Complete Work.*

The basic measure of damages is the cost of repair to bring the project into compliance with the contract. (*Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev.* (1977) 66 Cal.App.3d 101, 123–124 [135 Cal.Rptr. 802].) However, the contractor may attempt to prove that the cost of repair is unreasonable in light of the damage to the property and the value of the property after repair. (*Orndorff v. Christiana Community Builders* (1990) 217 Cal.App.3d 683, 687 [266 Cal.Rptr. 193]; see *Shell v. Schmidt* (1958) 164 Cal.App.2d 350, 366 [330 P.2d 817] [burden of proof on contractor].) If the cost of repair is unreasonable, the measure of damages is the diminution in the value of the property because of the defective work. (*Shell, supra,* 164 Cal.App.2d at pp. 360–361.)

There is no cap, however, at diminution of value. The cost of repair may be awarded even if greater than diminution in value if the owner has a personal reason for wanting to repair and the costs are not unreasonable in light of the damage to the property and the value after repair (*Orndorff, supra,* 217 Cal.App.3d at p. 687.)

For a related instruction on damages for tortious injury to property, see CACI No. 3903F, *Damage to*

Real Property (Economic Damage). For additional instructions on contract damages generally, see CACI No. 350 et seq. in the Contracts series.

Sources and Authority

- Damages for Breach of Contract. Civil Code section 3300. ~~provides: "For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom."~~

- Damages Must Be Reasonable. Civil Code section 3359. ~~provides: "Damages must, in all cases, be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered."~~

- "The available damages for defective construction are limited to the cost of repairing the home, including lost use or relocation expenses, or the diminution in value." (*Erlich v. Menezes* (1999) 21 Cal.4th 543, 561 [87 Cal.Rptr.2d 886, 981 P.2d 978].)

- "The proper measure of damages for breach of a contract to construct improvements on real property where the work is to be done on plaintiff's property is ordinarily the reasonable cost to the plaintiff of completing the work and not the difference between the value of the property and its value had the improvements been constructed. A different rule applies, however, where improvements are to be made on property not owned by the injured party. 'In that event the injured party is unable to complete the work himself and, subject to the restrictions of sections 3300 and 3359 of the Civil Code, the proper measure of damages is the difference in value of the property with and without the promised performance, since that is the contractual benefit of which the injured party is deprived.' " (*Glendale Fed. Sav. & Loan Assn., supra,* 66 Cal.App.3d at pp. 123–124 , internal citations omitted.)

- "[E]ven where the repair costs are reasonable in relation to the value of the property, those costs must also be reasonable in relation to the harm caused. Here the trial court's finding that fill settlement was likely to continue and the [plaintiff]s' appraiser's opinion the home was worth only $67,500 in its present condition, suggest the damage sustained was indeed significant. Plainly this is not a case where the tortfeasors' conduct improved the value of the real property or only diminished it slightly. Rather we believe where, as here, the damage to a home has deprived it of most of its value, an award of substantial repair costs is appropriate." (*Orndorff, supra,* 217 Cal.App.3d at pp. 690–691.)

- "[T]he defendant did not prove, or offer to prove, the other factors of the American Jurisprudence rule, to wit: 'a substantial part of what has been done must be undone.' To the contrary, defendant's expert witness … testified that it would not be necessary to undo any of the work. [¶] As quoted, Professor Corbin argues that the burden is on the defendant to affirmatively and convincingly prove that economic waste would result from the replacement of the omissions and defects. In all fairness this would appear proper as it is the defendant who is seeking to prove a

situation whereby he will get equitable relief from a rule of law. The same reasoning would apply as to proof that a substantial part of what has been done must be undone." (*Shell, supra,* 164 Cal.App.2d at p. 366.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, § 909

1 California Construction Contracts, Defects, and Litigation (Cont.Ed.Bar) Ch. 5, *Private Contracts: Disputes and Remedies,* § 5.90 et seq.

2 California Construction Contracts, Defects, and Litigation (Cont.Ed.Bar) Ch. 9, *Handling Disputes During Construction*, §§ 9.92–9.93

2 Stein, Construction Law, Ch. 5B, *Contractor's and Construction Manager's Rights and Duties*, ¶ 5B.01 (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, § 104.25 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.47 (Matthew Bender)

10 Miller & Starr, California Real Estate ~~(Thomson Reuters West 3d ed.)~~ Ch. 27, *Construction Law and Contracting*, § 27:99 (Thomson Reuters 3d ed.)

11 Miller & Starr, California Real Estate ~~(Thomson Reuters West 3d ed.)~~ Ch. 29, *Defective Construction*, §§ 29:3, 29:10 (Thomson Reuters 3d ed.)

Acret, California Construction Law Manual ~~(Thomson Reuters West 6th ed. 2005)~~ Ch. 1, *Contracts*, §§ 1:71, 1:72 (Thomson Reuters 6th ed. 2005)

6 Bruner & O'Connor on Construction Law ~~(Thomson Reuters West 2002)~~ Ch. 19, *Remedies and Damage Measures*, §§ 19:57–19:61 (Thomson Reuters 2002)

4531. Owner's Damages for Breach of Construction Contract—Failure to Complete Work

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If you decide that [*name of plaintiff***] has proved [his/her/its] claim against [***name of defendant***] for failure to complete the [project/***describe construction project, e.g., kitchen remodeling***], you also must decide how much money will reasonably compensate [***name of plaintiff***] for the harm. This compensation is called "damages."**

To recover damages, [*name of plaintiff***] must prove the reasonable cost of completing the [project/***short term for project, e.g., remodeling***] so that it complies with the terms of the contract, including the plans and specifications, agreed to by the parties.**

New December 2010

Directions for Use

This instruction should be used when the owner claims that the contractor has breached the construction contract by failing to complete all the work required by the contract. For an instruction for use if the owner claims that the contractor breached the contract by failing to complete the work in conformity with the contract, see CACI No. 4530, *Owner's Damages for Breach of Construction Contract—Work Does Not Conform to Contract.*

The basic measure of damages for failing to complete a construction project is ordinarily the reasonable cost to the owner of completing the work. (*Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co.* (1977) 66 Cal.App.3d 101, 123 [135 Cal.Rptr. 802].) With regard to defective or nonconforming work, the contractor may attempt to prove that the cost or repair is unreasonable in light of the damage to the property and the value of the property after repair. If the cost of repair is unreasonable, the measure of damages is the diminution in the value of the property because of the defective work. (*Shell v. Schmidt* (1958) 164 Cal.App.2d 350, 366 [330 P.2d 817]; see also *Orndorff v. Christiana Community Builders* (1990) 217 Cal.App.3d 683, 687 [266 Cal.Rptr. 193] [cost of repair may exceed diminution in value if owner has personal reason for wanting repairs].)

No reported case has been found that applies a reasonableness limitation on the cost of completing a contract, though the Restatement Second of Contracts requires that the cost of completion not be clearly disproportionate to the probable loss in value. (See Rest.2d of Contracts, § 348(2).) The last paragraph of CACI No. 4530 may be adapted to provide for a reasonableness limitation on cost of repair. There may, however, be different concerns regarding the cost of completing a contract as opposed to the cost of repairing construction defects. It might be argued that the owner is entitled to have the work completed as required by the contract, regardless of any unexpected increases in the cost of completion.

For a related instruction on damages for tortious injury to property, see CACI No. 3903F, *Damage to Real Property (Economic Damage).* For additional instructions on contract damages generally, see CACI No. 350 et seq. in the Contracts series.

Sources and Authority

- Damages for Breach of Contract. Civil Code section 3300. ~~provides: "For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom."~~

- Damages Must Be Reasonable. Civil Code section 3359. ~~provides: "Damages must, in all cases, be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered."~~

- "The measure of damages for breach of contract to construct improvements on real property where the work is to be done on plaintiff's property is the reasonable cost to the plaintiff to finish the work in accordance with the contract." (*Walker v. Signal Companies, Inc.* (1978) 84 Cal.App.3d 982, 993 [149 Cal.Rptr. 119].)

- "Although the defendants inferentially contend to the contrary, the plaintiff was entitled to recover damages from them for their breach of the contract even though [plaintiff] had not completed the work in question." (*Fairlane Estates, Inc. v. Carrico Constr. Co.* (1964) 228 Cal.App.2d 65, 72–73 [39 Cal.Rptr. 35].)

- Restatement Second of Contracts, section 348(2) provides: "If a breach results in defective or unfinished construction and the loss in value to the injured party is not proved with sufficient certainty, he may recover damages based on: (a) the diminution in the market price of the property caused by the breach, or (b) the reasonable cost of completing performance or of remedying the defects if that cost is not clearly disproportionate to the probable loss in value to him."

Secondary Sources

1 California Construction Contracts, Defects, and Litigation (Cont.Ed.Bar) Ch. 5, *Private Contracts: Disputes and Remedies*, § 5.96

3 Stein, Construction Law, Ch. 11, *Remedies and Damages*, & 11.02 (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, § 104.256 (Matthew Bender)

5 California Points and Authorities, Ch. 50, *Contracts*, § 50.41 (Matthew Bender)

10 Miller & Starr, California Real Estate ~~(Thomson Reuters West 3d ed.)~~ Ch. 27, *Construction Law and Contracting*, §§ 27:106, 27:107 (Thomson Reuters 3d ed.)

11 Miller & Starr, California Real Estate ~~(Thomson Reuters West 3d ed.)~~ Ch. 29, *Defective Construction*, § 29:10 (Thomson Reuters 3d ed.)

Acret, California Construction Law Manual ~~(Thomson Reuters West 6th ed. 2005)~~ Ch. 1, *Contracts*, §§ 1:71, 1:72 (Thomson Reuters 6th ed. 2005)

6 Bruner & O'Connor on Construction Law ~~(Thomson Reuters West 2002)~~ Ch. 19, *Remedies and Damage Measures*, § 19:56 (Thomson Reuters 2002)

4532. Owner's Damages for Breach of Construction Contract—Liquidated Damages Under Contract for Delay

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[*Name of plaintiff***] claims that [***name of defendant***] breached the parties' contract by failing to [substantially] complete the [project/***describe construction project, e.g., apartment building***] by the completion date required by the contract. If you find that [***name of plaintiff***] has proven this claim, the parties' contract calls for damages in the amount of $ _____ for each day between [***insert contract completion date***] and the date on which the project was [substantially] completed. You will be asked to find the date on which the project was [substantially] completed. I will then calculate the amount of damages.**

[If you find that [*name of plaintiff***] granted or should have granted time extensions to [***name of defendant***], you will be asked to find the number of days of the time extension and add these days to the completion date set forth in the contract. I will then calculate [***name of plaintiff***]'s total damages.]**

New December 2010; Revised December 2011

Directions for Use

This instruction should be used when the owner seeks to recover liquidated damages against the contractor for delay in completing the project under a provision of the contract. Include the optional second paragraph if there is a dispute over whether the contractor is entitled to an extension of time. Give CACI No. 4520, *Contractor's Claim for Changed or Extra Work*, to guide the jury on how to determine if the contractor is entitled to a time extension for extra work. A special instruction may be required to guide the jury on how to determine if the contractor is entitled to a time extension for excusable or compensable delays.

Include "substantially" throughout if there is a dispute of fact as to when the project should be considered as finished. Unless otherwise defined by the contract to mean actual completion or some other measure of completion (see, e.g., *London Guarantee & Acc. Co. v. Las Lomitas School Dist.* (1961) 191 Cal.App.2d 423, 427 [12 Cal.Rptr. 598]), "completion" for the purpose of determining liquidated damages ordinarily is understood to mean "substantial completion." (See *Vrgora v. L.A. Unified Sch. Dist.* (1984) 152 Cal.App.3d 1178, 1186 [200 Cal.Rptr. 130]; see generally *Perini Corp. v. Greate Bay Hotel & Casino, Inc.* (1992) 129 N.J. 479, 500–501, overruled on other grounds in *Tretina v. Fitzpatrick & Assocs.* (1994) 135 N.J. 349, 358 [discussing standard practices in the construction industry].)

There are few or no general principles set forth in California case law as to what may constitute substantial completion. It would seem to be dependent on the unique facts of each case. (See, e.g., *Continental Illinois Nat'l Bank & Trust Co. v. United States* (1952) 121 Ct.Cl. 203, 243–244.) The related doctrine of substantial performance, which allows the contractor to obtain payment for its work even if there are some minor or trivial deviations from the contract requirements, may perhaps be looked to for guidance for when a project is substantially complete for purposes of stopping the running of the clock on liquidated damages. (See CACI No. 4524, *Contractor's Claim for Compensation Due Under*

Contract—Substantial Performance.) But they are separate doctrines. Substantial performance focuses on *what* was done. Substantial completion focuses on *when* it was done. (See *Hill v. Clark* (1908) 7 Cal.App. 609, 612 [95 P. 382] [only substantial performance, not substantial completion, was at issue].) See also Code Civ. Proc., § 337.15 and CACI No. 4551, *Affirmative Defense—Statute of Limitations—Latent Construction Defect* (limitation period begins to run on substantial completion).

If the liquidated damages provision is found to be unenforceable because its enforcement would constitute a penalty rather than an approximation of actual damages that are difficult to ascertain, the owner may be entitled to recover its general and special damages, as those damages are defined in CACI No. 350, *Introduction to Contract Damages*, and CACI No. 351, *Special Damages*.

Sources and Authority

- Excused Performance of Contract. Civil Code section 1511(1). ~~provides in part:~~

~~The want of performance of an obligation, or of an offer of performance, in whole or in part, or any delay therein, is excused by the following causes, to the extent to which they operate:~~

~~1. When such performance or offer is prevented or delayed by the act of the creditor, or by the operation of law, even though there may have been a stipulation that this shall not be an excuse; however, the parties may expressly require in a contract that the party relying on the provisions of this paragraph give written notice to the other party or parties, within a reasonable time after the occurrence of the event excusing performance, of an intention to claim an extension of time or of an intention to bring suit or of any other similar or related intent, provided the requirement of such notice is reasonable and just.~~

- Liquidated Damages. Civil Code section 1671(b). ~~provides: "Except as provided in subdivision (c), a provision in a contract liquidating the damages for the breach of the contract is valid unless the party seeking to invalidate the provision establishes that the provision was unreasonable under the circumstances existing at the time the contract was made."~~

- Time for Completion: Liquidated Damages. Public Contract Code section 10226. ~~provides: "Every contract shall contain a provision in regard to the time when the whole or any specified portion of the work contemplated shall be completed, and shall provide that for each day completion is delayed beyond the specified time, the contractor shall forfeit and pay to the state a specified sum of money, to be deducted from any payments due or to become due to the contractor. The sum so specified is valid as liquidated damages unless manifestly unreasonable under the circumstances existing at the time the contract was made. A contract for a road project, flood control project, or project involving facilities of the State Water Resources Development System may also provide for the payment of extra compensation to the contractor, as a bonus for completion prior to the specified time, the provision, if used, to be included in the specifications and to clearly set forth the basis for the payment."~~

- "Liquidated damage clauses in public contracts are frequently validated precisely because delay in the completion of projects such as highways 'would cause incalculable inconvenience and damage to the public.' … Thus, it is accepted that damage in the nature of inconvenience and loss

of use by the public are real but often, as a matter of law, not measurable." (*Westinghouse Electric Corp. v. County of Los Angeles* (1982) 129 Cal.App.3d 771, 782–783 [181 Cal.Rptr. 332], internal citations omitted.)

- "[I]n the absence of a contractual provision for extensions of time, the rule generally followed is that an owner is precluded from obtaining liquidated damages not only for late completion caused entirely by him but also for a delay to which he has contributed, even though the contractor has caused some or most of the delay. … Acceptance of the reasoning urged by defendant would mean that, solely because there has been noncompliance with an extension-of-time provision, the position of an owner could be completely changed so that he could withhold liquidated damages for all of the period of late completion even though he alone caused the delay." (*Peter Kiewit Sons' Co. v. Pasadena City Junior College Dist.* (1963) 59 Cal.2d 241, 245 [28 Cal.Rptr. 714, 379 P.2d 18], internal citation omitted.)

- "If the contractor wished to claim it needed an extension of time because of delays caused by the city, the contractor was required to obtain a written change order by mutual consent or submit a claim in writing requesting a formal decision by the engineer. It did neither. The court was correct to rely on its failure and enforce the terms of the contract. It makes no difference whether [contractor]'s timely performance was possible or impossible under these circumstances. The purpose of contract provisions of the type authorized by the 1965 amendment to Civil Code section 1511, subdivision 1, is to allocate to the contractor the risk of delay costs—even for delays beyond the contractor's control—unless the contractor follows the required procedures for notifying the owner of its intent to claim a right to an extension." (*Greg Opinski Construction, Inc. v. City of Oakdale* (2011) 199 Cal.App.4th 1107, 1117–1118 [132 Cal.Rptr.3d 170].)

- "[A]cceptance may not be arbitrarily delayed to the prejudice of a contractor, and work should be viewed as accepted when it is finished even though a governmental body specifies a later date." (*Peter Kiewit Sons' Co., supra*, 59 Cal.2d at p. 246.)

- "Lacking any authority, appellant asserts 'that something is wrong here' and '[it] does not make sense to compensate the owner for the loss of use of something that it is actually using.' For all practical purposes, we perceive appellant as attempting to invoke the equitable doctrine of unjust enrichment and therein seek a setoff. The No. 1 problem with the applicability of said theory is that although [defendant] may have benefitted by using the facility, the fact that the facility had not been fully or even substantially completed suggests that the enrichment obtained is de minimis or is at best undefinable." (*Vrgora, supra,* 152 Cal.App.3d at p. 1186, footnote omitted.)

- "Was the contract completed on September 5, 1953? The trial court did not find that the building was completed on that date. It found that it was 'substantially completed.' On September 8, 1953, the uncontradicted evidence shows that some of the class rooms were insufficiently complete to be used; the plumbing was not complete; and the fencing of the playground had not been started. There were workmen in the building and there was grading equipment in the yard area. The salary of the inspector for the school district, who was required by state law, had to be paid until October 22, 1953. The inspector's report made on September 1, 1953, showed that the work was 94 per cent complete as of that time. His report made on September 16, 1953 showed the work to be 96 per cent complete. On September 16 there was admittedly about $ 9,800 worth of work yet to be

done. The contract called for a complete building and not a substantially complete one. [¶] The fact that the school district occupied portions of the building on September 8, 1953, does not change the situation. [The contract] provides that occupancy of any portion of the building ' … shall not constitute an acceptance of any part of the work, unless so stated in writing by the Board of the District.' The board of the district did not so state." (*London Guarantee & Acc. Co., supra*, 191 Cal.App.2d at pp. 426-427.)

- "In *London Guar. & Acc. Co. v. Las Lomitas School Dist., supra,* 191 Cal.App.2d 423, the appellate court reviewed the efficacy of an 'adjusted' liquidated damages award by the trial court on the basis of the date of 'substantial completion' as opposed to 'actual completion.' … The appellate court reversed the trial court's judgment, finding no validity to the argument employed at trial, that once the contractor had substantially performed his obligation (96 percent completion of the building), the school district was not entitled to liquidated damages. In effect, the court held that since the parties contracted for 'actual' performance in the form of a '. . . complete building and not a substantially complete one', liquidated damages were appropriate." (*Vrgora, supra,* 152 Cal.App.3d at p. 1187, internal citation omitted.)

- "We perceive no error in the action of the court sustaining the objection to a question asked defendant, as follows: 'Can you state to the court how much and to what extent you have been injured by the failure of the plaintiff to complete this work; the question is, can you tell?' The contract provided for a fixed sum as liquidated damages for delay in the completion of the work beyond the time specified in the contract. No issue was presented as to the amount of the liquidated damages, or claim on account thereof, and the question objected to could have no reference thereto; and the court finding that the contract was substantially completed, there was no room for inquiry as to the damages, and no prejudice could result to defendant from such ruling." (*Hill, supra,* 7 Cal.App. at p. 612.)

- "Finding 51 shows that the work … was 99.6% complete on December 30, as of which day liquidated damages began, and that the only work remaining to be done had to do with the boiler house equipment, and certain 'punch list items' which are usually minor adjustments which recur for an indefinite time after the completion of an extensive building project. The boiler house work would, apparently, not have interfered with the occupancy of the houses by tenants, and tenants in new houses expect to be troubled for a while by adjustments due to tests. Two hundred dollars a day was a severe penalty for so slight an asserted delinquency and our observation of other cases tells us that it is not customary to draw the line so strictly. The refusal, which we hold unjustified, of the Government to accept the project on December 30, 1936, subjected the contractor, not only to the liquidated damages discussed above, but to continued expenditures for coal, light, power and fire insurance in the amount of $2,454.75. The plaintiff may recover this amount." (*Continental Illinois Nat'l Bank & Trust Co., supra,* 121 Ct.Cl. at pp. 243–244.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, § 503 et seq.

1 California Construction Contracts, Defects, and Litigation (Cont.Ed.Bar) Ch. 5, *Private Contracts: Disputes and Remedies*, § 5.112

1 California Construction Contracts, Defects, and Litigation (Cont.Ed.Bar) Ch. 6, *Public Contracts: Disputes and Remedies*, § 6.91 et seq.

2 California Construction Contracts, Defects, and Litigation (Cont.Ed.Bar) Ch. 9, *Handling Disputes During Construction*, §§ 9.103, 9.107

3 Stein, Construction Law, Ch. 11, *Remedies and Damages*, ¶ 11.02 (Matthew Bender)

12 California Real Estate Law and Practice, Ch. 434, *Government Contracts*, § 434.41 (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, §§ 104.27, 104.226 (Matthew Bender)

5 California Points and Authorities, Ch. 50, *Contracts*, § 50.211 (Matthew Bender)

15 California Legal Forms, Ch. 30D, *Construction Contracts and Subcontracts*, § 30D.224 (Matthew Bender)

27 California Legal Forms, Ch. 75, *Formation of Contracts and Standard Contractual Provisions*, § 75.243 (Matthew Bender)

Matthew Bender Practice Guide: California Contract Litigation, Ch. 7, *Seeking or Opposing Damages in Contract Actions*, 7.05[3]

10 Miller & Starr, California Real Estate ~~(Thomson Reuters West 3d ed.)~~ Ch. 27, *Construction Law and Contracting*, § 27:81 (Thomson Reuters 3d ed.)

Acret, California Construction Law Manual ~~(Thomson Reuters West 6th ed. 2005)~~ Ch. 1, *Contracts*, §§ 1:86–1:88 (Thomson Reuters 6th ed. 2005)

Acret, California Construction Law Manual ~~(Thomson Reuters West 6th ed. 2005)~~ Ch. 7, *Public Contracts*, §§ 7:84, 7:85 (Thomson Reuters 6th ed. 2005)

5 Bruner & O'Connor on Construction Law (Thomson Reuters West 2002) Ch. 15, *Risks of Construction Time: Delay, Suspension, Acceleration and Disruption*, § 15:15, 15:82

Gibbs & Hunt, California Construction Law (Aspen Pub. 16th ed. 1999) Ch. 5, *Breach of Contract by Contractor*, § 5.02

4543. Contractor's Damages for Breach of Construction Contract—Owner-Caused Delay or Acceleration

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[*Name of plaintiff*] claims that [*name of defendant*] breached the parties' contract by [delaying/accelerating] [*name of plaintiff*]'s work, causing [*name of plaintiff*] harm. If you find that [*name of defendant*] [delayed/accelerated] the work, you may award damages to [*name of plaintiff*] for all harm caused by the [delay/acceleration], including the following:

1. **Expenditures that [*name of plaintiff*] made for labor, services, equipment, or materials that [he/she/it] otherwise would not have made but for the [delay/acceleration];**

2. **Overhead that [*name of plaintiff*] otherwise would not have incurred but for the [delay/acceleration]; and**

3. **Increase in the cost of labor, services, equipment, or materials already required under the contract that resulted from the [delay/acceleration].**

New December 2010

Directions for Use

This instruction should be used in an action by the contractor against the owner for economic loss incurred because the owner either delayed or demanded acceleration of the work.

For additional instructions on contract damages generally, see CACI No. 350 et seq. in the Contracts series, particularly CACI No. 351, *Special Damages*.

Sources and Authority

- Unreasonable Delay. Public Contract Code, section 7102. ~~provides in part: "Contract provisions in construction contracts of public agencies and subcontracts thereunder which limit the contractee's liability to an extension of time for delay for which the contractee is responsible and which delay is unreasonable under the circumstances involved, and not within the contemplation of the parties, shall not be construed to preclude the recovery of damages by the contractor or subcontractor."~~

- "Overhead expense allocable to the period of delay is allowed to the extent the evidence shows an increase in overhead because of the breach; or where other jobs, but for the delay, would have been obtained to absorb such overhead." (*A. A. Baxter Corp. v. Colt Industries, Inc.* (1970) 10 Cal.App.3d 144, 158 [88 Cal.Rptr. 842], internal citations omitted.)

- "[A] contractor cannot recover on a claim for unabsorbed office overhead where it is able to meet the original contract deadline or finish early despite a government-caused delay. An exception applies where the contractor demonstrates from the outset an intent to complete the work early, a

capacity to do so, and a likelihood of early completion but for the government's delay. Application of the three-prong test requirement … , however, is required only where the contractor finishes the work by the original specified contract completion date or earlier." (*Howard Contracting, Inc. v. G.A. MacDonald Construction Co.* (1998) 71 Cal.App.4th 38, 54–55, [83 Cal.Rptr.2d 590].)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, § 999

1 California Construction Contracts, Defects, and Litigation (Cont.Ed.Bar) Ch. 5, *Private Contracts: Disputes and Remedies*, § 5.107

1 California Construction Contracts, Defects, and Litigation (Cont.Ed.Bar) Ch. 6, *Public Contracts: Disputes and Remedies*, § 6.86

2 California Construction Contracts, Defects, and Litigation (Cont.Ed.Bar) Ch. 9, *Handling Disputes During Construction*, §§ 9.105–9.106

12 California Real Estate Law and Practice, Ch. 434, *Government Contracts*, § 434.90 (Matthew Bender)

42 California Forms of Pleading and Practice, Ch. 481, *Public Works*, § 481.90 (Matthew Bender)

10 Miller & Starr, California Real Estate ~~(Thomson Reuters West 3d ed.)~~ Ch. 27, *Construction Law and Contracting*, §§ 27:65, 27:83–27:85 (Thomson Reuters 3d ed.)

Acret, California Construction Law Manual ~~(Thomson Reuters West 6th ed. 2005)~~ Ch. 1, *Contracts*, §§ 1:89–1:91 (Thomson Reuters 6th ed. 2005)

Acret, California Construction Law Manual ~~(Thomson Reuters West 6th ed. 2005)~~ Ch. 7, *Public Contracts*, §§ 7:88–7:90 (Thomson Reuters 6th ed. 2005)

6 Bruner & O'Connor on Construction Law ~~(Thomson Reuters West 2002)~~ Ch. 19, *Remedies and Damage Measures*, § 19:73 (Thomson Reuters 2002)

Gibbs & Hunt, California Construction Law (Aspen Pub. 16th ed. 1999), Ch. 4, *Breach of Contract by Owner*, § 4.10

Kamine, Public Works Construction Manual (BNI Publications, Inc. 1996) Ch. 19, *Recovery of Delay Damages When the Owner Prevents Early Completion*

4551. Affirmative Defense—Statute of Limitations—Latent Construction Defect (Code Civ. Proc., § 337.15)

[*Name of defendant***] contends that [***name of plaintiff***]'s lawsuit was not filed within the time set by law. To succeed on this defense, [***name of defendant***] must prove that the date on which the [construction project/survey of real property/[***specify project, e.g., roof replacement***]] was substantially complete was more than 10 years before [***insert date***], the date on which this action was filed.**

New December 2011

Directions for Use

Give this instruction if the defendant asserts the running of the statute of limitations in Code of Civil Procedure section 337.15 as a defense. This section provides a 10-year outside limitation period for harm caused by a latent construction defect regardless of delayed discovery.

The jury may also be instructed on the limitations periods for the particular theories of recovery alleged. (See, e.g., Code Civ. Proc., §§ 338 [three years for injury to real property], 337 [four years for breach of written contract].) However, for latent defects, delayed discovery (see CACI No. 455, *Statute of Limitations—Delayed Discovery*) generally defeats that otherwise applicable statute.

The most likely question of fact for the jury is the date of substantial completion. The statute provides four possible events, the earliest of which may constitute substantial completion of an improvement. (See Code Civ. Proc., § 337.15(g).) The latest date is one year from cessation of all work on the improvement. However, substantial completion of an improvement may occur before any of these dates. (See *Nelson v. Gorian & Assocs.* (1998) 61 Cal.App.4th 93, 97 [71 Cal.Rptr.2d 345].) The statute of limitations may start to run at a later date against the developer if the development includes many improvements. (*Id.* at p. 99; cf. *Schwetz v. Minnerly* (1990) 220 Cal.App.3d 296, 298 [269 Cal.Rptr. 417] ["developer" can be an "improver" and a "development" is a "work of improvement" for purposes of subsection (g)].) For further discussion of substantial completion, see the Directions for Use to CACI No. 4532, *Owner's Damages for Breach of Construction Contract—Liquidated Damages Under Contract for Delay*. See also CACI No. 4524, *Contractor's Claim for Compensation Due Under Contract—Substantial Performance*.

Sources and Authority

- Statute of Limitations: Latent Defects. Code of Civil Procedure section 337.15. ~~provides:~~

  ~~(a) No action may be brought to recover damages from any person, or the surety of a person, who develops real property or performs or furnishes the design, specifications, surveying, planning, supervision, testing, or observation of construction or construction of an improvement to real property more than 10 years after the substantial completion of the development or improvement for any of the following:~~

~~(1) Any latent deficiency in the design, specification, surveying, planning, supervision, or observation of construction or construction of an improvement to, or survey of, real property.~~

~~(2) Injury to property, real or personal, arising out of any such latent deficiency.~~

~~(b) As used in this section, "latent deficiency" means a deficiency which is not apparent by reasonable inspection.~~

~~(c) As used in this section, "action" includes an action for indemnity brought against a person arising out of that person's performance or furnishing of services or materials referred to in this section, except that a cross-complaint for indemnity may be filed pursuant to subdivision (b) of Section 428.10 in an action which has been brought within the time period set forth in subdivision (a) of this section.~~

~~(d) Nothing in this section shall be construed as extending the period prescribed by the laws of this state for bringing any action.~~

~~(e) The limitation prescribed by this section shall not be asserted by way of defense by any person in actual possession or the control, as owner, tenant or otherwise, of such an improvement, at the time any deficiency in the improvement constitutes the proximate cause for which it is proposed to bring an action.~~

~~(f) This section shall not apply to actions based on willful misconduct or fraudulent concealment.~~

~~(g) The 10-year period specified in subdivision (a) shall commence upon substantial completion of the improvement, but not later than the date of one of the following, whichever first occurs:~~

~~(1) The date of final inspection by the applicable public agency.~~

~~(2) The date of recordation of a valid notice of completion.~~

~~(3) The date of use or occupation of the improvement.~~

~~(4) One year after termination or cessation of work on the improvement.~~

~~The date of substantial completion shall relate specifically to the performance or furnishing design, specifications, surveying, planning, supervision, testing, observation of construction or construction services by each profession or trade rendering services to the improvement.~~

- "The purpose of section 337.15 has been stated as 'to protect developers of real estate against liability extending indefinitely into the future.' … [We have] noted that '[a] contractor is in the business of constructing improvements and must devote his capital to that end; the need to provide reserves against an uncertain liability extending indefinitely into the future could seriously impinge upon the conduct of his enterprise.' " (*Martinez v. Traubner* (1982) 32 Cal.3d 755, 760 [187 Cal.Rptr. 251, 653 P.2d 1046], internal citations omitted.)

- "A 'latent' construction defect is one that is 'not apparent by reasonable inspection.' As to a latent defect that is alleged in the context of the challenged causes of action here—negligence, breach of warranty, and breach of contract—three statutes of limitations are in play: sections 338, 337 and 337.15. 'The interplay between these [three] statutes sets up a two-step process: (1) actions for a latent defect must be filed within three years (§ 338 [injury to real property]) or four years (§ 337 [breach of written contract]) of discovery, but (2) in any event must be filed within ten years (§ 337.15) of substantial completion.' " (*Creekridge Townhome Owners Assn., Inc. v. C. Scott Whitten, Inc.* (2009) 177 Cal.App.4th 251, 257–258 [99 Cal.Rptr.3d 258], internal citations omitted.)

- "The test to determine whether a construction defect is patent is an objective test that asks 'whether the average consumer, during the course of a reasonable inspection, would discover the defect. The test assumes that an inspection takes place.' This test generally presents a question of fact, unless the defect is obvious in the context of common experience; then a determination of patent defect may be made as a matter of law (including on summary judgment)." (*Creekridge Townhome Owners Assn., Inc., supra,* 177 Cal.App.4th at p. 256, internal citations omitted.)

- "Our reading of the express words of section 337.15, our giving consideration to its legislative history, and harmonizing that section in the context of the statutory framework as a whole, leads us to conclude that section 337.15 does not limit the time within which direct actions for personal injury damages or wrongful death may be brought against the persons specified in the statute." (*Martinez, supra,* 32 Cal.3d at p. 759.)

- "The 10-year period commences to run in respect to a person who has contributed towards 'an improvement' when such improvement has been substantially completed irrespective of whether or not the improvement is part of a development." (*Liptak v. Diane Apartments, Inc.* (1980) 109 Cal.App.3d 762, 772 [167 Cal.Rptr. 440].)

- "In 1981, the Legislature codified the holding in *Liptak* by adding subdivision (g) to section 337.15. 'The Senate Committee on Judiciary and the Senate Republican Caucus digests for the bill that became Code of Civil Procedure section 337.15, subdivision (g) state in pertinent part: " 'In [*Liptak*], the [C]ourt of [A]ppeal held that with respect to a developer, the ten-year limitation period does not commence until the development is substantially completed. [¶] With respect to a person who has contributed to an improvement on the developed property, the court held that the period commences when that particular improvement has been substantially completed, regardless of the completion time of the development itself. [¶] AB 605 would codify the *Liptak* holding on these issues.' " [Citation.]' " (*Nelson, supra,* 61 Cal.App.4th at pp. 96–97, internal citations omitted.)

- "Turning to the plain meaning of the statute as well as the legislative intent of enactment of section 337.15, subdivision (g), it is clear the intent was to define what event triggered the 10-year period and not what label is used to define the person who performed the work of improvement. The particular development or work of improvement can be one 'improvement' such as grading. It can also be a 'particular development,' i.e., a completed structure or dwelling. When the work of improvement meets one of the four criteria of section 337.15, subdivision (g), the 'improver'—

whether an architect, engineer, subcontractor, contractor, or developer—is entitled to raise the provisions of section 337.15, subdivision (g), as a bar to an action which seeks damages for latent defects after the 10-year period has passed." (*Schwetz, supra,* 220 Cal.App.3d at p. 308.)

- "Appellants claim that the 10-year period is calculated pursuant to section 337.15, subdivision (g)(1)–(4), which describes four events: (1) a final inspection, (2) the notice of completion, (3) use or occupancy of the property, or (4) termination or cessation of work for one year. Subdivision (g), however, states that the 10-year period '*shall commence upon substantial completion of the improvement,* but not later than' the occurrence of any one of the four events described in subdivision (g)(1) through (g)(4). … [¶] The trial court correctly ruled that the notice of completion date (§ 337.15, subd. (g)(2)) did not control if the improvement was substantially completed at an earlier date." (*Nelson, supra,* 61 Cal.App.4th at p. 97, original italics.)

- " 'As used in section 337.15 "an improvement" is in the singular and refers separately to each of the individual changes or additions to real property that qualifies as an "improvement" irrespective of whether the change or addition is grading and filling, putting in curbs and streets, laying storm drains or of other nature.' " (*Nelson, supra,* 61 Cal.App.4th at p. 97.)

Secondary Sources

3 Witkin, California Procedure (5th ed. 2008) Actions, § 488

12 California Real Estate Law and Practice, Ch. 441, *Consumer's Remedies*, § 441.08A (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, §§ 104.25, 104.267 (Matthew Bender)

14 California Points and Authorities, Ch. 143, *Limitation of Actions*, § 143.49 (Matthew Bender)

5000. Duties of the Judge and Jury

Members of the jury, you have now heard all the evidence [and the closing arguments of the attorneys]. [The attorneys will have one last chance to talk to you in closing argument. But before they do, it] [It] is my duty to instruct you on the law that applies to this case. You must follow these instructions [as well as those that I previously gave you]. You will have a copy of my instructions with you when you go to the jury room to deliberate. [I have provided each of you with your own copy of the instructions.] [I will display each instruction on the screen.]

You must decide what the facts are. You must consider all the evidence and then decide what you think happened. You must decide the facts based on the evidence admitted in this trial.

Do not allow anything that happens outside this courtroom to affect your decision. Do not talk about this case or the people involved in it with anyone, including family and persons living in your household, friends and coworkers, spiritual leaders, advisors, or therapists. Do not do any research on your own or as a group. Do not use dictionaries or other reference materials.

These prohibitions on communications and research extend to all forms of electronic communications. Do not use any electronic devices or media, such as a cell phone or smart phone, PDA, computer, tablet device, the Internet, any Internet service, any text or instant-messaging service, any Internet chat room, blog, or website, including social networking websites or online diaries, to send or receive any information to or from anyone about this case or your experience as a juror until after you have been discharged from your jury duty.

Do not investigate the case or conduct any experiments. Do not contact anyone to assist you, such as a family accountant, doctor, or lawyer. Do not visit or view the scene of any event involved in this case. If you happen to pass by the scene, do not stop or investigate. All jurors must see or hear the same evidence at the same time. [Do not read, listen to, or watch any news accounts of this trial.] You must not let bias, sympathy, prejudice, or public opinion influence your decision.

[If you violate any of these prohibitions on communications and research, including prohibitions on electronic communications and research, you may be held in contempt of court or face other sanctions. That means that you may have to serve time in jail, pay a fine, or face other punishment for that violation.]

I will now tell you the law that you must follow to reach your verdict. You must follow the law exactly as I give it to you, even if you disagree with it. If the attorneys [have said/say] anything different about what the law means, you must follow what I say.

In reaching your verdict, do not guess what I think your verdict should be from something I may have said or done.

Pay careful attention to all the instructions that I give you. All the instructions are important because together they state the law that you will use in this case. You must consider all of the instructions together.

After you have decided what the facts are, you may find that some instructions do not apply. In that case, follow the instructions that do apply and use them together with the facts to reach your verdict.

If I repeat any ideas or rules of law during my instructions, that does not mean that these ideas or rules are more important than the others. In addition, the order in which the instructions are given does not make any difference.

[Most of the instructions are typed. However, some handwritten or typewritten words may have been added, and some words may have been deleted. Do not discuss or consider why words may have been added or deleted. Please treat all the words the same, no matter what their format. Simply accept the instruction in its final form.]

New September 2003; Revised April 2004, October 2004, February 2005, December 2009, June 2011, December 2013

Directions for Use

As indicated by the brackets in the first paragraph, this instruction can be read either before or after closing arguments. The advisory committee recommends that this instruction be read to the jury before reading instructions on the substantive law.

Sources and Authority

- Charge to the Jury. Code of Civil Procedure section 608. ~~provides that "[i]n charging the jury the court may state to them all matters of law which it thinks necessary for their information in giving their verdict." It also provides that the court "must inform the jury that they are the exclusive judges of all questions of fact." (See also Code Civ. Proc., § 592.)~~

- Contempt of Court for Juror Misconduct. Code of Civil Procedure section 1209(a)(6). ~~provides in part:~~

  ~~(a) The following acts or omissions in respect to a court of justice, or proceedings therein, are contempts of the authority of the court:~~

  ~~(1)–(5) omitted~~

  ~~(6) Willful disobedience by a juror of a court admonishment related to the prohibition on any form of communication or research about the case, including all forms of electronic or wireless communication or research.~~

  ~~(7)–(12) omitted~~

- Jury as Trier of Fact. Evidence Code section 312(a). ~~provides that "[e]xcept as otherwise provided by law, where the trial is by jury [a]ll questions of fact are to be decided by the jury."~~

- An instruction to disregard any appearance of bias on the part of the judge is proper. (*Gist v. French* (1955) 136 Cal.App.2d 247, 257–259 [288 P.2d 1003], disapproved on other grounds in *Deshotel v. Atchinson, Topeka & Santa Fe Ry. Co.* (1958) 50 Cal.2d 664, 667 [328 P.2d 449] and *West v. City of San Diego* (1960) 54 Cal.2d 469, 478–479 [6 Cal.Rptr. 289, 353 P.2d 929].)

- Jurors must avoid bias: " 'The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to trial by jury guaranteed by the constitution.' " (*Weathers v. Kaiser Foundation Hospitals* (1971) 5 Cal.3d 98, 110 [95 Cal.Rptr. 516, 485 P.2d 1132], internal citations omitted.) Evidence of racial prejudice and bias on the part of jurors amounts to misconduct and may constitute grounds for ordering a new trial. (*Ibid*.)

- An instruction to consider all the instructions together can help avoid instructional errors of conflict, omission, and undue emphasis. (*Escamilla v. Marshburn Brothers* (1975) 48 Cal.App.3d 472, 484 [121 Cal.Rptr. 891].)

- Providing an instruction stating that, depending on what the jury finds to be the facts, some of the instructions may not apply can help avoid reversal on the grounds of misleading jury instructions. (See *Rodgers v. Kemper Construction Co.* (1975) 50 Cal.App.3d 608, 629–630 [124 Cal.Rptr. 143].)

- "[T]he jury was charged that (1) no undue emphasis was intended by repetition of any rule, direction or idea; (2) instructions on the measure of damages should not be interpreted to mean that liability must be found; and (3) the judge did not intend to intimate how any issue should be decided and if any juror believed such intimation was present such should be disregarded. Of course such admonitions will not salvage an inherently one-sided charge although the giving of such instructions should be considered in weighing the net effect of the charge." (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 57 [118 Cal.Rptr. 184, 529 P.2d 608].)

Secondary Sources

7 Witkin, California Procedure (5th ed. 2008) Trial, § 281

Wegner et al., California Practice Guide: Civil Trials & Evidence, Ch. 14-D, *Preparing Jury Instructions*, ¶¶ 14:151, 14:190 (The Rutter Group)

4 California Trial Guide, Unit 91, *Jury Deliberations and Rendition of Verdict*, § 91.20 (Matthew Bender)

28 California Forms of Pleading and Practice, Ch. 326, *Jury Instructions*, § 326.21 (Matthew Bender)

1 Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 16, *Jury Instructions*, 16.19 et seq.

5001. Insurance

You must not consider whether any of the parties in this case has insurance. The presence or absence of insurance is totally irrelevant. You must decide this case based only on the law and the evidence.

New September 2003; Revised April 2004

Directions for Use

If this instruction is used, the advisory committee recommends that it be read to the jury before reading instructions on the substantive law.

Sources and Authority

- Evidence of Insurance Inadmissible. Evidence Code section 1155. ~~provides: "Evidence that a person was, at the time a harm was suffered by another, insured wholly or partially against loss arising from liability for that harm is inadmissible to prove negligence or other wrongdoing."~~

- As a rule, evidence that the defendant has insurance is both irrelevant and prejudicial to the defendant. (*Neumann v. Bishop* (1976) 59 Cal.App.3d 451, 469 [130 Cal.Rptr. 786].)

- Generally, evidence that the plaintiff was insured is not admissible under the "collateral source rule." (*Helfend v. Southern California Rapid Transit Dist.* (1970) 2 Cal.3d 1, 16-18 [84 Cal.Rptr. 173, 465 P.2d 61]; *Acosta v. Southern California Rapid Transit Dist.* (1970) 2 Cal.3d 19, 25–26 [84 Cal.Rptr. 184, 465 P.2d 72].)

- Evidence of insurance coverage may be admissible where it is coupled with other relevant evidence, provided that the probative value of the other evidence outweighs the prejudicial effect of the mention of insurance. (*Blake v. E. Thompson Petroleum Repair Co., Inc.* (1985) 170 Cal.App.3d 823, 831 [216 Cal.Rptr. 568].)

- An instruction to disregard whether a party has insurance may, in some cases, cure the effect of counsel's improper reference to insurance. (*Scally v. Pacific Gas & Electric Co.* (1972) 23 Cal.App.3d 806, 814 [100 Cal.Rptr. 501].)

Secondary Sources

7 Witkin, California Procedure (4th ed. 1997) Trial, §§ 230–233

Jefferson, California Evidence Benchbook (3d ed. 1997) §§ 34.32–34.36

California Practice Guide: Civil Trials and Evidence, § 5:371

5003. Witnesses

A witness is a person who has knowledge related to this case. You will have to decide whether you believe each witness and how important each witness's testimony is to the case. You may believe all, part, or none of a witness's testimony.

In deciding whether to believe a witness's testimony, you may consider, among other factors, the following:

(a) How well did the witness see, hear, or otherwise sense what he or she described in court?

(b) How well did the witness remember and describe what happened?

(c) How did the witness look, act, and speak while testifying?

(d) Did the witness have any reason to say something that was not true? For example, did the witness show any bias or prejudice or have a personal relationship with any of the parties involved in the case or have a personal stake in how this case is decided?

(e) What was the witness's attitude toward this case or about giving testimony?

Sometimes a witness may say something that is not consistent with something else he or she said. Sometimes different witnesses will give different versions of what happened. People often forget things or make mistakes in what they remember. Also, two people may see the same event but remember it differently. You may consider these differences, but do not decide that testimony is untrue just because it differs from other testimony.

However, if you decide that a witness deliberately testified untruthfully about something important, you may choose not to believe anything that witness said. On the other hand, if you think the witness testified untruthfully about some things but told the truth about others, you may accept the part you think is true and ignore the rest.

Do not make any decision simply because there were more witnesses on one side than on the other. If you believe it is true, the testimony of a single witness is enough to prove a fact.

You must not be biased against any witness because of his or her disability, gender, race, religion, ethnicity, sexual orientation, age, national origin, [or] socioeconomic status[, or [*insert any other impermissible form of bias***]].**

New September 2003; Revised April 2004, April 2007, December 2012

Directions for Use

This instruction may be given as either an introductory instruction before trial (see CACI No. 107) or as a concluding instruction.

The advisory committee recommends that this instruction be read to the jury before reading instructions on the substantive law.

In the last paragraph, the court may delete inapplicable categories of potential jury bias.

Sources and Authority

- Role of Jury. Evidence Code section 312. ~~provides:~~

  ~~Except as otherwise provided by law, where the trial is by jury:~~

  ~~(a) All questions of fact are to be decided by the jury.~~

  ~~(b) Subject to the control of the court, the jury is to determine the effect and value of the evidence addressed to it, including the credibility of witnesses and hearsay declarants.~~

- Considerations for ~~evaluating~~ evaluating the ~~credibility~~ credibility of ~~witnesses~~ witnesses.~~are contained in~~ Evidence Code section 780~~:~~.

  ~~Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following:~~

  ~~(a) His demeanor while testifying and the manner in which he testifies.~~

  ~~(b) The character of his testimony.~~

  ~~(c) The extent of his capacity to perceive, to recollect, or to communicate any matter about which he testifies.~~

  ~~(d) The extent of his opportunity to perceive any matter about which he testifies.~~

  ~~(e) His character for honesty or veracity or their opposites.~~

  ~~(f) The existence or nonexistence of a bias, interest, or other motive.~~

  ~~(g) A statement previously made by him that is consistent with his testimony at the hearing.~~

  ~~(h) A statement made by him that is inconsistent with any part of his testimony at the hearing.~~

~~(i) The existence or nonexistence of any fact testified to by him.~~

~~(j) His attitude toward the action in which he testifies or toward the giving of testimony.~~

~~(k) His admission of untruthfulness.~~

- Direct Evidence of Single Witness Sufficient. Evidence Code section 411. ~~provides that "[e]xcept where additional evidence is required by statute, the direct evidence of one witness who is entitled to full credit is sufficient proof of any fact." According to former Code of Civil Procedure section 2061, the jury should be instructed that "they are not bound to decide in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a less number or against a presumption or other evidence satisfying their minds."~~

- The willfully false witness instruction was formerly codified at Code of Civil Procedure section 2061. This statute was repealed in 1965 to avoid giving undue emphasis to this rule compared to other common-law rules. Refusal to give an instruction on this point is not error: "It should certainly not be deemed of vital importance to tell the ordinary man of the world that he should distrust the statements of a witness whom he believes to be a liar." (*Wallace v. Pacific Electric Ry. Co.* (1930) 105 Cal.App. 664, 671 [288 P. 834].)

- Standard 10.20(a)(2) of the Standards for Judicial Administration provides: "In all courtroom proceedings, refrain from engaging in conduct and prohibit others from engaging in conduct that exhibits bias, including but not limited to bias based on disability, gender, race, religion, ethnicity, and sexual orientation, whether that bias is directed toward counsel, court personnel, witnesses, parties, jurors, or any other participants."

- Canon 3(b)(5) of the Code of Judicial Ethics provides: "A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, engage in speech, gestures, or other conduct that would reasonably be perceived as (1) bias or prejudice, including but not limited to bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, or (2) sexual harassment." Canon 3(b)(6) requires the judge to impose these standards on attorneys also.

Secondary Sources

7 Witkin, Cal. Procedure (5th ed. 2008) Trial, § 299

Wegner, et al., California Practice Guide: Civil Trials & Evidence, Ch. 10-D, *Objectives Of Cross-Examination*, ¶ 10:91 et seq. (The Rutter Group)

Wegner, et al., California Practice Guide: Civil Trials & Evidence, Ch. 8E-F, *Limitations On Impeachment And Rehabilitation*, ¶ 8:2990 et seq. (The Rutter Group)

1A California Trial Guide, Unit 20, *Procedural Rules for Presentation of Evidence* (Matthew Bender)

14 California Forms of Pleading and Practice, Ch. 551, *Trial,* § 551.110 et seq. (Matthew Bender)

Cotchett, California Courtroom Evidence, § 16.45 (Matthew Bender)

1 Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 11, *Questioning Witnesses and Objections*, 11.03 et seq.

5004. Service Provider for Juror With Disability

[*Name or number of juror***] has been assisted by [a/an] [***insert type of service provider***] to communicate and receive information. The [***service provider***] will be with you during your deliberations. You may not discuss the case with the [***service provider***]. The [***service provider***] is not a member of the jury and is not to participate in the deliberations in any way other than as necessary to provide the service to [***name or number of juror***].**

All jurors must be able to fully participate in deliberations. In order to allow the [*service provider***] to properly assist [***name or number of juror***], jurors should not talk at the same time and should not have side conversations. Jurors should speak directly to [***name or number of juror***], not to the [***service provider***].**

[Two [*service provider***s] will be present during deliberations and will take turns in assisting [***name or number of juror***].]**

New September 2003; Revised April 2004, December 2012

Directions for Use

If this instruction is used, the advisory committee recommends that it be read to the jury before reading instructions on the substantive law.

Sources and Authority

- Eligibility to Serve as Juror. Code of Civil Procedure section 203(a)(6). ~~provides: "All persons are eligible and qualified to be prospective trial jurors, except the following: ... Persons who are not possessed of sufficient knowledge of the English language, provided that no person shall be deemed incompetent solely because of the loss of sight or hearing in any degree or other disability which impedes the person's ability to communicate or which impairs or interferes with the person's mobility."~~

- Service Provider for Juror With Disability. Code of Civil Procedure section 224. ~~provides:~~

  ~~(a) If a party does not cause the removal by challenge of an individual juror who is deaf, hearing impaired, blind, visually impaired, or speech impaired and who requires auxiliary services to facilitate communication, the party shall (1) stipulate to the presence of a service provider in the jury room during jury deliberations, and (2) prepare and deliver to the court proposed jury instructions to the service provider.~~

  ~~(b) As used in this section, "service provider" includes, but is not limited to, a person who is a sign language interpreter, oral interpreter, deaf-blind interpreter, reader, or speech interpreter. If auxiliary services are required during the course of jury~~

~~deliberations, the court shall instruct the jury and the service provider that the service provider for the juror with a disability is not to participate in the jury's deliberations in any manner except to facilitate communication between the juror with a disability and other jurors.~~

~~(c) The court shall appoint a service provider whose services are needed by a juror with a disability to facilitate communication or participation. A sign language interpreter, oral interpreter, or deaf-blind interpreter appointed pursuant to this section shall be a qualified interpreter, as defined in subdivision (f) of Section 754 of the Evidence Code. Service providers appointed by the court under this subdivision shall be compensated in the same manner as provided in subdivision (i) of Section 754 of the Evidence Code.~~

Secondary Sources

7 Witkin, California Procedure (5th ed. 2008) Trial, §§ 320, 330

27 California Forms of Pleading and Practice, Ch. 322, *Juries and Jury Selection*, § 322.32 (Matthew Bender)

1 Matthew Bender Practice Guide: Trial and Post-Trial Civil Procedure, Ch. 8 *Interpreters*, 8.31

5006. Nonperson Party

A [corporation/partnership/city/county/[*other entity*]], [*name of entity*], is a party in this lawsuit. [*Name of entity*] is entitled to the same fair and impartial treatment that you would give to an individual. You must decide this case with the same fairness that you would use if you were deciding the case between individuals.

When I use words like "person" or "he" or "she" in these instructions to refer to a party, those instructions also apply to [*name of entity*].

New April 2004

Directions for Use

This instruction should be given if one of the parties is an entity. Select the type of entity and insert the name of the entity where indicated in the instruction. If this instruction is used, the advisory committee recommends that it be read to the jury before reading instructions on the substantive law.

Sources and Authority

- Corporations Have Powers of Natural Person. Corporations Code section 207. ~~provides that a corporation "shall have all of the powers of a natural person in carrying out its business activities." Civil Code section 14 defines the word "person," for purposes of that code, to include corporations as well as natural persons.~~

- "Person" Includes Corporation. Civil Code section 14.

- As a general rule, a corporation is considered to be a legal entity that has an existence separate from that of its shareholders. (*Erkenbrecher v. Grant* (1921) 187 Cal. 7, 9 [200 P. 641].)

- "In general, any person or entity has capacity to sue or defend a civil action in the California courts. This includes artificial 'persons' such as corporations, partnerships and associations." (*American Alternative Energy Partners II, 1985 v. Windridge, Inc.* (1996) 42 Cal.App.4th 551, 559 [49 Cal.Rptr.2d 686], internal citations omitted.)

Secondary Sources

9 Witkin, Summary of California Law (10th ed. 2005) Corporations, § 1

5010. Taking Notes During the Trial

If you have taken notes during the trial, you may take your notebooks with you into the jury room.

You may use your notes only to help you remember what happened during the trial. Your independent recollection of the evidence should govern your verdict. You should not allow yourself to be influenced by the notes of other jurors if those notes differ from what you remember.

At the end of the trial, your notes will be [collected and destroyed/collected and retained by the court but not as a part of the case record/[*specify other disposition***]].**

New April 2004; Revised February 2005, April 2007, December 2007

Directions for Use

If CACI No. 102, *Taking Notes During the Trial*, is given as a pretrial instruction, the court may also give this instruction as a concluding instruction.

In the last paragraph, specify the court's disposition of the notes after trial. No statute or rule of court requires any particular disposition.

Sources and Authority

- Juror Notes. Rule 2.1031 of the California Rules of Court. ~~provides: "Jurors must be permitted to take written notes in all civil and criminal trials. At the beginning of a trial, a trial judge must inform jurors that they may take written notes during the trial. The court must provide materials suitable for this purpose."~~

- "Because of [the risks of note-taking], a number of courts have held that a cautionary instruction is required. For example, [one court] held that the instruction should include 'an explanation ... that [jurors] should not permit their note-taking to distract them from the ongoing proceedings; that their notes are only an aid to their memory and should not take precedence over their independent recollection; that those jurors who do not take notes should rely on their independent recollection of the evidence and not be influenced by the fact that another juror has taken notes; and that the notes are for the note taker's own personal use in refreshing his recollection of the evidence. The jury must be reminded that should any discrepancy exist between their recollection of the evidence and their notes, they should request that the record of the proceedings be read back and that it is the transcript that must prevail over their notes.' " (*People v. Whitt* (1984) 36 Cal.3d 724, 747 [205 Cal.Rptr. 810, 685 P.2d 1161], internal citations and footnote omitted.)

- "In *People v. Whitt*, we recognized the risks inherent in juror note-taking and observed that it is 'the better practice' for courts to give, sua sponte, a cautionary instruction on note-taking. Although the ideal instruction would advert specifically to all the dangers of note-taking, we found the less

complete instruction given in *Whitt* to be adequate: ‘Be careful as to the amount of notes that you take. I’d rather that you observe the witness, observe the demeanor of that witness, listen to how that person testifies rather than taking copious notes ... . [I]f you do not recall exactly as to what a witness might have said or you disagree, for instance, during the deliberation [*sic*] as to what a witness may have said, we can reread that transcript back ... .’ ” (*People v. Silbertson* (1985) 41 Cal.3d 296, 303 [221 Cal.Rptr. 152, 709 P.2d 1321], internal citations and footnote omitted.)

Secondary Sources

Deskbook on the Management of Complex Civil Litigation, Ch. 2, *Case Management*, § 2.81[5] (Matthew Bender)

28 California Forms of Pleading and Practice, Ch. 326, *Jury Instructions*, § 326.32 (Matthew Bender)

5011. Reading Back of Trial Testimony in Jury Room

You may request in writing that trial testimony be read to you. I will have the court reporter read the testimony to you. You may request that all or a part of a witness's testimony be read.

Your request should be as specific as possible. It will be helpful if you can state:

1. **The name of the witness;**
2. **The subject of the testimony you would like to have read; and**
3. **The name of the attorney or attorneys asking the questions when the testimony was given.**

The court reporter is not permitted to talk with you when she or he is reading the testimony you have requested.

While the court reporter is reading the testimony, you may not deliberate or discuss the case.

You may not ask the court reporter to read testimony that was not specifically mentioned in a written request. If your notes differ from the testimony, you must accept the court reporter's record as accurate.

New April 2004, Revised February 2005

Directions for Use

The read-back should not be conducted in the jury room unless the attorneys stipulate to that location.

Sources and Authority

- Jury Request for Additional Information During Deliberations. Code of Civil Procedure section 614. ~~provides: "After the jury have retired for deliberation, if there be a disagreement between them as to any part of the testimony, or if they desire to be informed of any point of law arising in the cause, they may require the officer to conduct them into court. Upon their being brought into court, the information required must be given in the presence of, or after notice to, the parties or counsel."~~

- "Section 614 of the Code of Civil Procedure provides that if there is a disagreement among jurors during their deliberations as to any part of the testimony which they have heard they may return into court and secure from the court in the presence of counsel for all parties the desired information as to the record. If they ask for testimony relating to a specified subject, they are entitled to hear all of it. However, it is equally clear that the trial judge does not have to order read any part of the record which is not thus requested by the jury foreman." (*McGuire v. W. A. Thompson Distributing Co.* (1963) 215 Cal.App.2d 356, 365-366 [30 Cal.Rptr. 113], internal citations omitted.)

- "When the jury requests a repetition of certain testimony, the trial court is not required to furnish the jury with testimony not requested." (*Allen v. Toledo* (1980) 109 Cal.App.3d 415, 422 [167 Cal.Rptr. 270], internal citations omitted.)

- "Appellants assign as error the court's refusal to comply with their counsel's request for testimony reading. It was not. It is not the party to whom the law gives the right to *select* testimony to be read. And the law does not make the party or his attorney the arbiter to determine the jury's wishes." (*Asplund v. Driskell* (1964) 225 Cal.App.2d 705, 714 [37 Cal.Rptr. 652], original italics.)

Secondary Sources

28 California Forms of Pleading and Practice, Ch. 326, *Jury Instructions*, § 326.32 (Matthew Bender)

4 California Trial Guide, Unit 91, *Jury Deliberations and Rendition of Verdict*, § 91.01 (Matthew Bender)

5013. Deadlocked Jury Admonition

You should reach a verdict if you reasonably can. You have spent time trying to reach a verdict, and this case is important to the parties so that they can move on with their lives with this matter resolved.

[If you are unable to reach a verdict, the case will have to be tried before another jury selected in the same manner and from the same community from which you were chosen and at additional cost to everyone.]

Please carefully consider the opinions of all the jurors, including those with whom you disagree. Keep an open mind and feel free to change your opinion if you become convinced that it is wrong.

You should not, however, surrender your beliefs concerning the truth and the weight of the evidence. Each of you must decide the case for yourself and not merely go along with the conclusions of your fellow jurors.

New September 2003; Revised April 2004, June 2012

Directions for Use

Give the optional second paragraph if desired. Similar language has been found to be noncoercive in a civil case as long as it is accompanied by language such as that included in the last paragraph of the instruction. (See *Inouye v. Pacific Southwest Airlines* (1981) 126 Cal.App.3d 648, 650–652 [179 Cal.Rptr. 13]; cf. *People v. Gainer* (1977) 19 Cal. 3d 835, 852 [139 Cal.Rptr. 861, 566 P.2d 997] [in criminal case, it is error for a trial court to give an instruction that states or implies that if the jury fails to agree, the case will necessarily be retried].)

Sources and Authority

- Deadlocked Jury. Rule 2.1036 of the California Rules of Court. ~~provides:~~

  ~~(a) Determination~~

  ~~After a jury reports that it has reached an impasse in its deliberations, the trial judge may, in the presence of counsel, advise the jury of its duty to decide the case based on the evidence while keeping an open mind and talking about the evidence with each other. The judge should ask the jury if it has specific concerns which, if resolved, might assist the jury in reaching a verdict.~~

  ~~(b) Possible further action~~

  ~~If the trial judge determines that further action might assist the jury in reaching a verdict, the judge may:~~

  ~~(1) Give additional instructions;~~

~~(2) Clarify previous instructions;~~
~~(3) Permit attorneys to make additional closing arguments; or~~
~~(4) Employ any combination of these measures.~~

- "The court told the jury they should reach a verdict if they reasonably could; they should not surrender their conscious convictions of the truth and the weight of the evidence; each juror must decide the case for himself and not merely acquiesce in the conclusion of his fellows; the verdict should represent the opinion of each individual juror; and in reaching a verdict each juror should not violate his individual judgment and conscience. These remarks clearly outweighed any offensive portions of the charge. The court did not err in giving the challenged instruction." (*Inouye, supra*, 126 Cal.App.3d at p. 652.)

- "A trial court may properly advise a jury of the importance of arriving at a verdict and of the duty of individual jurors to hear and consider each other's arguments with open minds, rather than to prevent agreement by obstinate adherence to first impressions. But, as the exclusive right to agree or not to agree rests with the jury, the judge may not tell them that they must agree nor may he harry their deliberations by coercive threats or disparaging remarks." (*Cook v. Los Angeles Ry. Corp.* (1939) 13 Cal.2d 591, 594 [91 P.2d 118], internal citations omitted.)

- "Only when the instruction has coerced the jurors into surrendering their conscientious convictions in order to reach agreement should the verdict be overturned." (*Inouye, supra*, 126 Cal.App.3d at p. 651.)

- "The instruction says if the jury did not reach a verdict, the case would have to be retried. It also says the jurors should listen with deference to the arguments and distrust their own judgment if they find a large majority taking a different view of the case. In a criminal case the mere presence of these remarks in a jury instruction is error. However, civil cases are subject to different considerations; the special protections given criminal defendants are absent." (*Inouye, supra*, 126 Cal.App.3d at p. 651, internal citation omitted.)

Secondary Sources

7 Witkin, California Procedure (5th ed. 2008) Trial, § 281

Wegner et al., California Practice Guide: Civil Trials & Evidence, Ch. 15-D, *Juror Requests For Additional Information During Deliberations*, ¶ 15:137 et seq. (The Rutter Group)

1 Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 17, *Dealing With the Jury*, 17.39

5015. Instruction to Alternate Jurors on Submission of Case to Jury

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The jury [will soon begin/is now] deliberating, but you are still alternate jurors and are bound by my earlier instructions about your conduct.

Until the jury is discharged, do not talk about the case or about any of the people or any subject involved in it with anyone, not even your family or friends[, and not even with each other]. Do not have any contact with the deliberating jurors. Do not decide how you would vote if you were deliberating. Do not form or express an opinion about the issues in this case, unless you are substituted for one of the deliberating jurors.

New February 2005; Revised December 2012

Directions for Use

If an alternate juror is substituted, see CACI No. 5014, *Substitution of Alternate Juror*.

Sources and Authority

- Alternate Jurors. Code of Civil Procedure section 234~~. provides:~~

  ~~Whenever, in the opinion of a judge of a superior court about to try a civil or criminal action or proceeding, the trial is likely to be a protracted one, or upon stipulation of the parties, the court may cause an entry to that effect to be made in the minutes of the court and thereupon, immediately after the jury is impaneled and sworn, the court may direct the calling of one or more additional jurors, in its discretion, to be known as "alternate jurors."~~

  ~~These alternate jurors shall be drawn from the same source, and in the same manner, and have the same qualifications, as the jurors already sworn, and shall be subject to the same examination and challenges. However, each side, or each defendant, as provided in Section 231, shall be entitled to as many peremptory challenges to the alternate jurors as there are alternate jurors called.~~

  ~~The alternate jurors shall be seated so as to have equal power and facilities for seeing and hearing the proceedings in the case, and shall take the same oath as the jurors already selected, and shall, unless excused by the court, attend at all times upon the trial of the cause in company with the other jurors, but shall not participate in deliberation unless ordered by the court, and for a failure to do so are liable to be punished for contempt.~~

  ~~They shall obey the orders of and be bound by the admonition of the court, upon each adjournment of the court; but if the regular jurors are ordered to be kept in the custody of the sheriff or marshal during the trial of the cause, the alternate jurors shall also be kept in confinement with the other jurors; and upon final submission of the case to the jury, the alternate jurors shall be kept in the custody of the sheriff or marshal who shall not suffer any communication to be made to them except by order of the court, and shall not be discharged until~~

~~the original jurors are discharged, except as provided in this section.~~

~~If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty, or if a juror requests a discharge and good cause appears therefor, the court may order the juror to be discharged and draw the name of an alternate, who shall then take his or her place in the jury box, and be subject to the same rules and regulations as though he or she had been selected as one of the original jurors.~~

~~All laws relative to fees, expenses, and mileage or transportation of jurors shall be applicable to alternate jurors, except that in civil cases the sums for fees and mileage or transportation need not be deposited until the judge directs alternate jurors to be impaneled.~~

- "Alternate jurors are members of the jury panel which tries the case. They are selected at the same time as the regular jurors. They take the same oath and are subject to the same qualifications as the regular jurors. Alternate jurors hear the same evidence and are subject to the same admonitions as the regular jurors and, unless excused by the court, are available to participate as regular jurors." (*Rivera v. Sassoon* (1995) 39 Cal.App.4th 1045, 1048 [46 Cal.Rptr.2d 144], internal citations omitted.)

- ~~Code of Civil Procedure section 234 provides:~~

~~Whenever, in the opinion of a judge of a superior court about to try a civil or criminal action or proceeding, the trial is likely to be a protracted one, or upon stipulation of the parties, the court may cause an entry to that effect to be made in the minutes of the court and thereupon, immediately after the jury is impaneled and sworn, the court may direct the calling of one or more additional jurors, in its discretion, to be known as "alternate jurors."~~

~~These alternate jurors shall be drawn from the same source, and in the same manner, and have the same qualifications, as the jurors already sworn, and shall be subject to the same examination and challenges. However, each side, or each defendant, as provided in Section 231, shall be entitled to as many peremptory challenges to the alternate jurors as there are alternate jurors called.~~

~~The alternate jurors shall be seated so as to have equal power and facilities for seeing and hearing the proceedings in the case, and shall take the same oath as the jurors already selected, and shall, unless excused by the court, attend at all times upon the trial of the cause in company with the other jurors, but shall not participate in deliberation unless ordered by the court, and for a failure to do so are liable to be punished for contempt.~~

~~They shall obey the orders of and be bound by the admonition of the court, upon each adjournment of the court; but if the regular jurors are ordered to be kept in the custody of the sheriff or marshal during the trial of the cause, the alternate jurors shall also be kept in confinement with the other jurors; and upon final submission of the case to the jury, the alternate jurors shall be kept in the custody of the sheriff or marshal who shall not suffer any communication to be made to them except by order of the court, and shall not be discharged until the original jurors are discharged, except as provided in this section.~~

~~If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty, or if a juror requests a discharge and good cause appears therefor, the court may order the juror to be discharged and draw the name of an alternate, who shall then take his or her place in the jury box, and be subject to the same rules and regulations as though he or she had been selected as one of the original jurors.~~

~~All laws relative to fees, expenses, and mileage or transportation of jurors shall be applicable to alternate jurors, except that in civil cases the sums for fees and mileage or transportation need not be deposited until the judge directs alternate jurors to be impaneled.~~

Secondary Sources

27 California Forms of Pleading and Practice, Ch. 322, *Juries and Jury Selection*, §§ 322.44, 322.52, 322.101 (Matthew Bender)

1 California Trial Guide, Unit 10, *Voir Dire Examination*, § 10.01 (Matthew Bender)

1 Matthew Bender Practice Guide: Trial and Post-Trial Civil Procedure, Ch. 17 *Dealing With the Jury*, 17.38

5016. Judge's Commenting on Evidence

In this case, I have exercised my right to comment on the evidence. However, you the jury are the exclusive judges of all questions of fact and of the credibility of the witnesses. You are free to completely ignore my comments on the evidence and to reach whatever verdict you believe to be correct, even if it is contrary to any or all of those comments.

New April 2007

Directions for Use

Read this instruction before deliberations if the judge has exercised the right under article VI, section 10 of the California Constitution to comment on the evidence. This instruction should also be given if after deliberations have begun, the jury asks for additional guidance and the judge then comments on the evidence. (See *People v. Rodriguez* (1986) 42 Cal.3d 730 [230 Cal.Rptr. 667, 726 P.2d 113].)

Sources and Authority

- Judge May Comment on the Evidence. Article VI, section 10 of the California Constitution. ~~permits the court to "make any comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the cause."~~

- "[T]he decisions admonish that judicial comment on the evidence must be accurate, temperate, nonargumentative, and scrupulously fair. The trial court may not, in the guise of privileged comment, withdraw material evidence from the jury's consideration, distort the record, expressly or impliedly direct a verdict, or otherwise usurp the jury's ultimate factfinding power." (*People v. Rodriguez, supra,* 42 Cal.3d at p. 766, internal citations omitted.)

- "[A] trial court has 'broad latitude in fair commentary, so long as it does not effectively control the verdict. For example, it is settled that the court need not confine itself to neutral, bland, and colorless summaries, but *may focus critically on particular evidence,* expressing views about its persuasiveness.' … '[A] judge may restrict his comments to portions of the evidence or to the *credibility of a single witness* and need not sum up all the testimony, both favorable and unfavorable.' " (*People v. Proctor* (1992) 4 Cal.4th 499, 542 [15 Cal.Rptr.2d 340, 842 P.2d 1100], original italics.)

- "[A] judge's power to comment on the evidence is not unlimited. He cannot withdraw material evidence from the jury or distort the testimony, and he must inform the jurors that they are the exclusive judges of all questions of fact and of the credibility of the witnesses. In civil cases, the court's powers of comment are less limited than in criminal cases, but they still must be kept within certain bounds. The court may express an opinion on negligence, but the court's remarks must be appropriate and fair." (*Lewis v. Bill Robertson & Sons Inc.* (1984) 162 Cal.App.3d 650, 654 [208 Cal.Rptr. 699], internal citation omitted.)

Secondary Sources

7 Witkin, California Procedure (4th ed. 1997) Trial, § 265

California Trial Objections (Cont.Ed.Bar 10th ed.) §§ 29.21, 29.23

28 California Forms of Pleading and Practice, Ch. 326, *Jury Instructions*, § 326.20 (Matthew Bender)

5017. Polling the Jury

After your verdict is read in open court, you may be asked individually to indicate whether the verdict expresses your personal vote. This is referred to as "polling" the jury and is done to ensure that at least nine jurors have agreed to each decision.

The verdict form[s] that you will receive ask[s] you to answer several questions. You must vote separately on each question. Although nine or more jurors must agree on each answer, it does not have to be the same nine for each answer. Therefore, it is important for each of you to remember how you have voted on each question so that if the jury is polled, each of you will be able to answer accurately about how you voted.

[Each of you will be provided a draft copy of the verdict form[s] for your use in keeping track of your votes.]

New October 2008

Directions for Use

Use this instruction to explain the process of polling the jury, particularly if a long special verdict form will be used to assess the liability of multiple parties and the damages awarded to each plaintiff from each defendant.

Sources and Authority

- Verdict by Three-Fourths in Civil Case. Article I, section 16 of the California Constitution~~s provides in part: "Trial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict."~~

- Polling the Jury. Code of Civil Procedure section 618~~. provides: "When the jury, or three-fourths of them, have agreed upon a verdict, they must be conducted into court and the verdict rendered by their foreperson. The verdict must be in writing, signed by the foreperson, and must be read to the jury by the clerk, and the inquiry made whether it is their verdict. Either party may require the jury to be polled, which is done by the court or clerk, asking each juror if it is the juror's verdict. If upon inquiry or polling, more than one-fourth of the jurors disagree thereto, the jury must be sent out again, but if no disagreement is expressed, the verdict is complete and the jury discharged from the case."~~

- "The polling process is designed to reveal mistakes in the written verdict, or to show 'that one or more jurors acceded to a verdict in the jury room but was unwilling to stand by it in open court.' " (*Keener v. Jeld-Wen, Inc.* (2009) 46 Cal.4th 247, 256 [92 Cal.Rptr.3d 862, 206 P.3d 403].)

- "[A] juror may change his or her vote at the time of polling." (*Keener, supra*, 46 Cal.4th at p. 256.)

- "[I]t is quite apparent that when a poll discloses that more than one-quarter of the members of the jury disagree with the verdict, the trial judge retains control of the proceedings, and may properly order the jury to retire and again consider the case." (*Van Cise v. Lencioni* (1951) 106 Cal.App.2d 341, 348 [235 P.2d 236].)

- "[W]e begin with the requirement that at least nine of twelve jurors agree that each element of a cause of action has been proved by a preponderance of the evidence. The elements of a cause of action constitute the essential or ultimate facts in a civil case comparable to the elements of a single, discrete criminal offense in a criminal case. Analogizing a civil 'cause of action' to a single, discrete criminal offense, and applying the criminal law jury agreement principles to civil law, we conclude that jurors need not agree from among a number of alternative acts which act is proved, so long as the jurors agree that each element of the cause of action is proved." (*Stoner v. Williams* (1996) 46 Cal.App.4th 986, 1002 [54 Cal.Rptr.2d 243], footnote omitted.)

- "In civil cases in which there exist multiple causes of action for which multiple or alternative acts could support elements of more than one cause of action, possible jury confusion could result as to whether a specific cause of action is proved. In those cases, … we presume that jury instructions may be appropriate to inform the jury that it must agree on specific elements of each specific cause of action. Yet, this still does not require that the jurors agree on exactly how each particular element of a particular cause of action is proved." (*Stoner, supra,* 46 Cal.App.4th at p. 1002.)

- "[I]f nine identical jurors agree that a party is negligent and that such negligence is the proximate cause of the other party's injuries, special verdicts apportioning damages are valid so long as they command the votes of any nine jurors. To hold otherwise would be to prohibit jurors who dissent on the question of a party's liability from participation in the important remaining issue of allocating responsibility among the parties, a result that would deny all parties the right to a jury of 12 persons deliberating on all issues." (*Juarez v. Superior Court* (1982) 31 Cal.3d 759, 768 [183 Cal.Rptr. 852, 647 P.2d 128].)

Secondary Sources

7 Witkin, California Procedure (5th ed. 2008) Trial, §§ 339, 350

4 California Trial Guide, Unit 91, *Jury Deliberations and Rendition of Verdict*, § 91.30[3][b] (Matthew Bender)

28 California Forms of Pleading and Practice, Ch. 326A, *Jury Verdicts*, § 326A.14 (Matthew Bender)

1 Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 18, *Jury Verdicts*, 18.43

5018. Audio or Video Recording and Transcript

A [sound/video] recording has been admitted into evidence, and a transcript of the recording has been provided to you. The recording itself is the evidence. The transcript may not be completely accurate. It may contain errors, omissions, or notations of inaudible portions of the recording. Therefore, you should use the transcript only as a guide to help you in following along with the recording. If there is a discrepancy between your understanding of the recording and the transcript, your understanding of the recording must prevail.

[[Portions of the recording have been deleted.] [The transcript [also] contains strikeouts or other deletions.] You must disregard any deleted portions of the recording or transcript and must not speculate as to why there are deletions or guess what might have been said or done.]

[For the video deposition(s) of [*name(s) of deponent(s)***], the transcript is the official record that you should consider as evidence.]**

New December 2010

Directions for Use

Give this instruction if an audio or a video recording was played at trial and accepted into evidence. Include the second paragraph if only a portion of the recording was received into evidence or if parts of the transcript have been redacted. Give the last paragraph if a transcript of a deposition was provided to the jury. (See Code Civ. Proc., § 2025.510(g); see also CACI No. 208, *Deposition as Substantive Evidence*.)

Sources and Authority

- Electronic Recordings of Deposition. Cal. Rules of Court, Rule 2.1040.

- "Defendant contends the trial court erred in permitting the prosecution to provide the jury with a written transcript of the tape recording, because the transcript was not properly authenticated as an accurate rendition of the tape recording. [¶] Following the testimony of [witness] during the prosecution's case-in-chief, the prosecutor proposed to play the tape recording to the jury. Defense counsel suggested the jury should be informed that portions of the tape recording were unintelligible. When the trial court observed that a transcript of the tape recording would be submitted to the jury, defense counsel voiced concern that the jury would follow the transcript rather than independently consider the tape recording. The trial court indicated it would listen to the tape recording and, in the event the court determined that the transcript would assist the jury in its understanding of the interview, a copy of the transcript would be provided to the jury at the time of its deliberations. … The trial court instructed the jury that in the event there was any discrepancy between the jury's understanding of the tape recording and the typed transcript, the jury's understanding of the recording should control." (*People v. Sims* (1993) 5 Cal.4th 405, 448 [20 Cal.Rptr.2d 537, 853 P.2d 992], internal citation omitted.)

- " 'To be admissible, tape recordings need not be completely intelligible for the entire conversation as long as enough is intelligible to be relevant without creating an inference of speculation or unfairness.' [¶] Thus, partially unintelligible tape is admissible unless the audible portions of the tape are so incomplete the tape's relevance is destroyed. The fact a tape recording 'may not be clear in its entirety does not of itself require its exclusion from evidence since a witness may testify to part of a conversation if that is all he heard and it appears to be intelligible.' " (*People v. Polk* (1996) 47 Cal.App.4th 944, 952–953 [54 Cal.Rptr.2d 921], internal citations omitted.)

- "[T]ranscripts of admissible tape recordings are only prejudicial if it is shown they are so inaccurate that the jury might be misled into convicting an innocent man." (*Polk, supra*, 47 Cal.App.4th at p. 955.)

- "During closing arguments all counsel cautioned the jury the transcript was only a guide and to just listen to the tape. Before the jury left to deliberate, the court again instructed it to disregard the transcript and sent that instruction into the jury room. We presume the jurors followed the court's instructions regarding the tape and the use of the transcript." (*People v. Brown* (1990) 225 Cal.App.3d 585, 598 [275 Cal.Rptr. 268].)

- *(Text of Rule 2.1040 here is deleted.)*

Secondary Sources

3 Witkin, California Evidence (~~4th~~ 5th ed. ~~2010~~2012) Presentation at Trial, § 148

5 California Trial Guide, Unit 100, *The Oral Deposition*, § 100.27 (Matthew Bender)

16 California Forms of Pleading and Practice, Ch. 193, *Discovery: Depositions*, §§ 193.70 et seq., 193.172 (Matthew Bender)

5019. Questions From Jurors

If, during the trial, any of you had a question that you believed should be asked of a witness, you were instructed to write out the question and provide it to me through my courtroom staff. I shared your questions with the attorneys, after which, I decided whether the question could be asked.

If a question was asked and answered, you are to consider the answer as you would any other evidence received in the trial. Do not give the answer any greater or lesser weight because it was initiated by a juror question.

If the question was not asked, do not speculate as to what the answer might have been or why it was not asked. There are many legal reasons why a suggested question cannot be asked of a witness. Give the question no further consideration.

New June 2011

Directions for Use

This is an optional instruction for use if the jurors will be allowed to ask questions of the witnesses. For a similar instruction to be given at the beginning of the trial, see CACI No. 112, *Questions From Jurors*. This instruction may be modified to account for an individual judge's practice.

Sources and Authority

- Juror Questions Allowed. Rule 2.1033 of the California Rules of Court. ~~provides: "A trial judge should allow jurors to submit written questions directed to witnesses. An opportunity must be given to counsel to object to such questions out of the presence of the jury."~~

- "In a proper case there may be a real benefit from allowing jurors to submit questions under proper control by the court. However, in order to permit the court to exercise its discretion and maintain control of the trial, the correct procedure is to have the juror write the questions for consideration by the court and counsel prior to their submission to the witness." (*People v. McAlister* (1985) 167 Cal.App.3d 633, 644 [213 Cal.Rptr. 271].)

- "[T]he judge has discretion to ask questions submitted by jurors or to pass those questions on and leave to the discretion of counsel whether to ask the questions." (*People v. Cummings* (1993) 4 Cal.4th 1233, 1305 [18 Cal.Rptr.2d 796, 850 P.2d 1].)

- "The appellant urges that when jurymen ask improper questions the defendant is placed in the delicate dilemma of either allowing such question to go in without objection or of offending the jurors by making the objection and the appellant insists that the court of its own motion should check the putting of such improper questions by the jurymen, and thus relieve the party injuriously affected thereby from the odium which might result from making that objection thereto. There is no force in this contention. Objections to questions, whether asked by a juror or by opposing counsel, are

presented to the court, and its ruling thereon could not reasonably affect the rights or standing of the party making the objection before the jury in the one case more than in the other." (*Maris v. H. Crummey, Inc.* (1921) 55 Cal.App. 573, 578–579 [204 P. 259].)

Secondary Sources

3 Witkin, California Evidence (4th ed. 2000) Presentation at Trial, § 85

Wegner et al., California Practice Guide: Civil Trials & Evidence, Ch. 7-E, *Juror Questioning of Witnesses*, ¶ 7:45.10 et seq. (The Rutter Group)

4 California Trial Guide, Unit 91, *Jury Deliberations and Rendition of Verdict*, §§ 91.01–91.03 (Matthew Bender)