Item number: 01

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Recommend JC approval (has circulated for comment)**

RUPRO Meeting: May 18, 2016

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Amend Cal. Rules of Court, rule 10.855; and approve rotation assignment

Committee or other entity submitting the proposal:
Court Executives Advisory Committee

Staff contact (name, phone and e-mail):
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Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: NA
Project description from annual agenda: Circulate rule and legislative proposals to amend rule 10.855 of the California Rules of Court, which governs the records sampling program and Government Code section 68153, which mandates the reporting requirement in the rule. If the rules proposal is adopted by the council, it would go into effect on July 1, 2016. If the legislative proposal is sponsored by the Judicial Council and enacted by the Legislature, it would go into effect January 1, 2018. This project listed on the CEAC annual agenda has been approved by Executive and Planning Committee on January 25, 2016.

If requesting July 1 or out of cycle, explain:
The change is urgently needed to remedy a problem that is causing significant cost or inconvenience to the courts. Current rules impose a substantial hardship on superior courts because they require to retain voluminous number of court records causing significant cost and inconvenience to the courts. The proposal would substantially reduce the overall number of court records preserved, while still retaining a sample of court records that is statistically significant sample of statewide records. The proposal seeks to strike a reasonable balance between storage costs and possible research requirements. Overall, the rule proposal would result in substantial cost savings for the courts because it would significantly reduce the number of court records that courts must preserve forever.

Furthermore, courts across the state are rapidly rolling out new case management systems and moving to paperless case environments. They are scanning old paper records, which is an expensive and time consuming process. If the effective date of the new sampling program were delayed until January 1, 2017, many courts will scan court records unnecessarily at significant cost.

Additional Information: (To facilitate RUPRO's review of your proposal, please include any relevant information not contained in the attached summary.)
This proposal was originally a joint legislative and rules proposal. The legislative proposal was circulated for public comment during the winter cycle. There were no comments received in response to the circulation. The legislative proposal will be presented to PCLC for its review and recommendation for Judicial Council sponsorship during its October 2016 meeting and to the council during its December 2016 meeting.

JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue · San Francisco, California 94102-3688

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REPORT TO THE JUDICIAL COUNCIL

For business meeting on: June 23–24, 2016

Title
Court Records: Records Sampling and Destruction

Rules, Forms, Standards, or Statutes Affected
Amend Cal. Rules of Court, rule 10.855; and approve rotation assignment

Recommended by
Court Executives Advisory Committee
Richard D. Feldstein, Chair

Agenda Item Type
Action Required

Effective Date
July 1, 2016

Date of Report
May 10, 2016

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Executive Summary

The Court Executives Advisory Committee (CEAC) recommends amending the rule relating to the sampling of court records to substantially reduce the number of records that superior courts are required to keep. The amendments would significantly decrease court costs, while still ensuring that courts preserve a statistically significant sample of court records for future research purposes. To implement these amendments, CEAC also recommends a new rotation assignment that lists when each court must retain sample court records.

Recommendation

CEAC recommends that the Judicial Council:

1. Amend rule 10.855 of the California Rules of Court, effective July 1, 2016, to eliminate the systematic, subjective, and augmented samples, and to revise the longitudinal sample and comprehensive records requirements;
2. Approve the new rotation assignment.

The text of the amended rule is attached at pages 11–16. The new rotation assignment is at pages 17–20.

Previous Council Action

Before the enactment of Assembly Bill 796 in 1989, all court records had to be microfilmed before they could be destroyed. To reduce the high annual costs of storage and microfilming, the County Clerks Association and the Association of Municipal Clerks cosponsored AB 796. As introduced, AB 796 would have allowed for the destruction of all court records after their retention periods expired. As finally enacted, AB 796 included former section 69503(e) of the Government Code, which provided that superior courts must keep "a scientifically valid sample of cases" in order "to preserve judicial records of historical or other research interest." AB 796 also directed the Judicial Council to develop a plan for implementing the sampling program statewide; the Judicial Council adopted a rule to that effect in 1992. Although this rule has since been amended and renumbered as rule 10.855, it remains substantially the same today.[1]

In 1994, the Legislature enacted AB 1374, which repealed Government Code section 69503(e) and replaced it with section 68150(f), which has since been relettered as subdivision (i). This provision requires only that superior courts preserve comprehensive historical and sample court records for research purposes, but has not defined these categories or specified how many court records must be preserved.

Rationale for Recommendation

Rule 10.855 "establishes a program to preserve in perpetuity for study by historians and other researchers all superior court records filed before 1911 and a sample of superior court records filed after December 31, 1910, to document the progress and development of the judicial system, and to preserve evidence of significant events and social trends." As part of this program, this rule has included specific requirements for courts to retain comprehensive historical records and either a longitudinal or a combination of a systematic and a subjective sample of court records; the specifics of each of these requirements are discussed in more detail below. The rule has also allowed the Judicial Council to determine if an augmented sample is needed.

CEAC has concluded that the goal of rule 10.855 can be achieved without retaining the voluminous number of court records that are currently kept by the courts. The rule amendments are intended to substantially reduce the overall number of court records preserved, while still retaining a statistically significant sample of statewide records. They seek to strike a reasonable balance between storage costs and possible future research requirements.

[1] For example, the Judicial Council amended the rule in 2000, after unification of the superior and municipal courts, to clarify that the scope of the rule had not expanded to include records that were previously filed in municipal courts. Accordingly, the rule was amended to exclude "records of limited civil, small claim, misdemeanor, or infraction cases" from the scope of the rule. Today, the rule continues to exclude these records from its scope. (See Cal. Rules of Court, rule 10.855(b).)

Rule 10.855 would be amended to eliminate the systematic, subjective, and augmented samples, and to revise the longitudinal sample and comprehensive records requirements. The benefits of this proposal include (1) reducing the storage needs of superior courts to retain sample court records by over 90 percent, (2) eliminating the need for superior courts to identify and select systematic and subjective sample court records every year, (3) eliminating subjective criteria that cause implementation difficulties, and (4) requiring courts to preserve sample court records only once every 19 years. The committee strongly endorses these amendments because they would alleviate the substantial burden imposed on the courts by the current sampling program. To implement these amendments, CEAC developed a chart listing the rotation assignment of each court.

Comprehensive historical records

Rule 10.855(c) requires that courts preserve forever all comprehensive court records, which are defined as (1) all records filed before 1911; (2) if practicable, all records filed after 1910 and before 1950; (3) all case indexes; (4) all judgment books if the court maintains judgment records separate from the case files; (5) all minute books if the court maintains minutes separate from the case files; and (6) all registers of action.

These rule amendments would revise this requirement by keeping current items (1)–(3), eliminating items (4)–(6), and adding a new requirement to preserve records for cases in which the California Supreme Court has issued a written opinion.

Pre-1950 records and case indexes. The amendments would maintain the requirements in subdivisions (c)(1), (2), and (3) of rule 10.855 that courts preserve all records filed before 1911; if practicable, all records filed after 1910 and before 1950; and all case indexes. The committee's view is that retaining these records is consistent with the requirement in Government Code section 68150(i) for comprehensive historical court records. In addition, the preservation of these pre-1950 records does not impose a significant burden on the superior courts. The costs related to storing these records are relatively minimal.

Judgment books. The amendments would eliminate the requirement in subdivision (c)(4) to preserve judgment books because it is redundant and unnecessary. All judgments for unlimited civil and felony cases[2]—whether they are kept in the case files or kept separately[3]—must already be preserved permanently under Government Code section 68152.[4]

[2] Rule 10.855 does not apply to records of limited civil, small claims, misdemeanor, or infraction cases. (Cal. Rules of Court, rule 10.855(b).)

[3] Judgments must be entered into a judgment book. (Code Civ. Proc., § 668.) But this requirement does not apply if the court files the judgment in the court file, so long as either (1) a microfilm copy of the individual judgment is made, or (2) the judgment is first entered in the register of actions or into the court's electronic data-processing system. (*Id.*, § 668.5.)

[4] See Gov. Code, § 68152(a)(3), (c)(2), (g)(8).

Minute books. The amendments would eliminate the requirement in subdivision (c)(5) to preserve minute books because it creates varying records retention practices among courts statewide. Government Code section 68152 does not differentiate between minutes kept in the case files and those kept separately in minute books;[5] both are eligible for destruction under the statute once the retention period for the underlying case type has expired.[6] Nonetheless, rule 10.855(c)(5) requires those courts that keep minute books to preserve them permanently, resulting in different records retention practices depending on whether the court keeps minute books or files minute orders in case files.

Registers of action. The amendments would eliminate the requirement in subdivision (c)(6) to preserve registers of actions because it also creates divergent records retention practices among courts statewide. In lieu of keeping a register of actions, the court "may maintain a register of actions by preserving all the court records filed, lodged, or maintained in connection with the case."[7] Government Code section 68152(g)(16) provides that registers of action must be retained for the same retention period as records in the underlying case.[8] Yet, as with minute books, rule 10.855(c)(6) requires only those courts that keep registers of action to preserve them permanently, resulting in varying records retention practices depending on whether the court creates and maintains registers of action or preserves all court records filed, lodged, or maintained in connection with the case in the case file.

Cases in which there is a Supreme Court opinion. Lastly, the amendments would add to rule 10.855(c) the requirement that courts preserve the court records for cases in which the California Supreme Court has issued a written opinion. As discussed further below, the Judicial Council would be responsible for making available to the superior courts a list of all noncapital cases in which the California Supreme Court issues a written opinion. These records are currently labeled as "subjective sample" records. The amendments would relocate this requirement from subdivision (f)(2) to subdivision (c), with the modification described below.

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[5] The clerk of the superior court is required to keep the minutes of the court, entering "any order, judgment, and decree of the court which is required to be entered and showing the date when each entry is made." (Gov. Code, § 69844.) The clerk may maintain the permanent minutes of court orders in minute books, which are kept separately from case files. (2 Witkin, Cal. Proc. (5th ed. 2008) Courts, § 364, p. 464.) Alternatively, where a court order or local rule requires placing individual minute orders chronologically in the case file, clerks do not need to keep a minute book. (Gov. Code, § 69844.7.)

[6] Gov. Code, § 68152(g)(11) (minute orders kept separately). Because Government Code section 68151(a) defines "court record" as including "[a]ll filed papers and documents in the case folder," the court record would include minute orders placed in the case file under section 69844.7. These minute orders would then become eligible for destruction once the retention period for the underlying case type has expired.

[7] Gov. Code, § 69845.5.

[8] Government Code section 68152(g)(16) does provide an exception for civil and small claims cases, which must be retained for at least 10 years. This exception would have no bearing here because rule 10.855 applies only to unlimited civil cases (Cal. Rules of Courts, rule 10.855(b)), which already must be retained for a period of 10 years. (Gov. Code, § 68152(a)(2).)

Longitudinal sample

Rule 10.855(f) currently requires that all courts preserve a longitudinal sample of court records. In the longitudinal sample, three courts assigned in rotation by the Judicial Council must preserve 100 percent of their court records for a calendar year. In practice, each court is selected roughly every 19 years.

These rule amendments would modify this requirement to ensure that the sample is less burdensome on the courts while remaining representative and statistically significant. Similar to the current longitudinal sample, three courts would continue to be randomly selected in a given year, and each court would be required to preserve the longitudinal sample roughly every 19 years. However, the longitudinal sample would be amended in two significant ways, described below.

Preservation of a partial sample. Courts would be required to maintain only a percentage of records for their selected year sufficient to ensure a statistically valid sample, instead of 100 percent of their court records, as is currently required. All courts except for the Superior Court of Los Angeles County would be required in proposed subdivision (f)(1) to retain 25 percent of their records (i.e., every fourth case filed) for the year they are selected to participate in the longitudinal sample. Given the considerably greater number of cases filed with the court compared to other courts, the Superior Court of Los Angeles County would be required in proposed subdivision (f)(1) to retain only 10 percent of its records (i.e., every tenth case filed) for the year that it is selected.[9]

Preservation of judgment books, minute books, and registers of action. As described further above, these amendments would eliminate the requirement in rule 10.855(c) that the court must retain all judgment books kept separately from the case files, all minute books kept separately from the case files, and all registers of action. To ensure that all records relevant to the longitudinal sample cases are retained, proposed subdivision (f)(2) would require courts to preserve all judgment books, minute books, and registers of action for their assigned longitudinal year sample.

Systematic sample records

Current rule 10.855(f) requires that any court not participating in the longitudinal sample in a given year must preserve a systematic sample consisting of 10 percent or more—but no less than 100 cases—of that year's court records. Rule 10.855 would be amended to eliminate this requirement in its entirety.

[9] With the assistance of the Judicial Council's Office of Court Research, CEAC has determined that retaining 10 percent of court records would provide a sufficient sample for research purposes. CEAC decided to require that courts other than the Superior Court of Los Angeles County retain 25 percent of their records to provide for a more robust sample.

Eliminating the systematic sampling requirement would result in significant savings for superior courts in terms of operational and storage costs. Moreover, these savings would not result in the loss of a statistically valid statewide sample because courts would still be required to preserve the longitudinal sample.

Subjective sample records

Current rule 10.855(f) also requires that those courts not participating in the longitudinal sample must preserve a subjective sample of at least 2 percent, but no fewer than 20 cases, of each year's court records. The subjective sample must include (1) all cases accepted for review by the California Supreme Court; (2) "fat files," or the thickest perceived case files; and (3) cases deemed by the court to be of local, national, or international significance.

Elimination of the subjective sample. With one exception (described below), the rule amendments would eliminate the subjective sample due to implementation problems. The lack of clear-cut guidelines and criteria has made it difficult for courts to determine which cases are "fat files" or are "of local, national, or international significance." CEAC members also reasoned from their experience that the thickness of a case file was often a better indicator of the litigiousness of the parties than the significance of the issues involved.

Because the destruction of court records is discretionary under Government Code section 68152, superior courts would still be authorized to retain any court records identified internally as significant; for example, high-profile cases covered by the media. (See also Cal. Rules of Court, rule 10.855(a) ["This rule is not intended to restrict a court from preserving more records than the minimum required"].) Under this proposal, however, superior courts would no longer be required to preserve 2 percent of their court records each year and would be free from employing arbitrary indicators of significance, such as the size of the case file.

Preservation of cases in which there is a Supreme Court opinion. These amendments would slightly modify the requirement that courts preserve records for "all cases accepted for review by the California Supreme Court." To better reflect which cases are of potential interest for historical and research purposes, this proposal would revise this requirement to provide for the preservation of records in "[a]ll noncapital cases in which the California Supreme Court has issued a written opinion."

The California Supreme Court grants review in hundreds of cases for which it never issues, and never intends to issue, a written opinion. Instead, it holds these cases in abeyance pending its adjudication of a lead case expected to resolve issues presented in these "grant and hold" cases. This practice has evolved since the sampling program was first introduced in the early 1990s and has come to include a growing number of cases. Under these amendments, superior courts would preserve the records of only those cases in which the court issues a written opinion; they would not be required to preserve records in the "grant and hold" cases.

In addition, the amendments exclude capital cases for several reasons. Capital cases are excluded under the current rule because these cases are not "accepted for review"; instead, capital cases are automatically appealable to the California Supreme Court. Moreover, all capital cases resulting in a death sentence must already be retained forever under Government Code section 68152(c)(1). The amendments would add an Advisory Committee Comment to explain why capital cases are not included in this requirement.

In response to the comments submitted by the Superior Court of Los Angeles County when this rules proposal was first circulated, CEAC modified the proposal by adding to this Advisory Committee Comment the requirement, previously located in subdivision (f)(2), that the Judicial Council must make available to the superior courts a list of all noncapital cases in which the California Supreme Court issues a written opinion.

Augmented sample records

Rule 10.855(g) grants the Judicial Council discretion to "designate a consultant to review, under the guidance of a qualified historian or archivist, court records scheduled for destruction and determine if the court's systematic sample should be augmented to improve representation of the variety of the cases filed." Since the rule was adopted in 1994, the Judicial Council has not opted to exercise its discretion under subdivision (g). Nor are CEAC members aware of any superior courts that have preserved an augmented sample under this subdivision. The rule would be amended to eliminate the augmented sample because it has not been utilized.

Retroactive implementation

A new subdivision (k) would be added to clarify the application of the rule amendments. The rule amendments would be applicable retroactively to all courts. Because the destruction of court records is discretionary, all courts would be allowed—but not required—to apply the amendments retroactively.

Although some superior courts regularly review their court records for destruction, others do not and have instead preserved all records by default. Applying the rule amendments retroactively would be relatively straightforward for those courts that have preserved all records by default. However, for those courts that have preserved court records under the current sampling program, it is foreseeable that they may have preserved only 10 percent of their court records (the current "systematic" sample) for the years that they might be assigned under the new sampling program to have preserved 25 percent of their court records (the proposed, modified "longitudinal" sample). With the exception of the Superior Court of Los Angeles County, these courts would not be able to fully comply with the proposed rule amendments if they were to apply them retroactively. For this reason, CEAC first circulated a rules proposal that would have applied the proposed rule amendments retroactively only to those courts that had not previously preserved their court records under the current rule.

After circulating the initial proposal for public comment, CEAC gave further consideration (1) to the practical difficulties that would result from applying the rule amendments retroactively only

to some courts, and (2) to the need to alleviate the financial and operational burden for all courts caused by the current rule. Based on discussions with the Judicial Council's Office of Court Research, CEAC ascertained that a 10-percent sample would be sufficient for research purposes. Accordingly, CEAC decided to recommend that the amendments apply retroactively to all courts. An Advisory Committee Comment would be added to explain how the rule amendments would apply retroactively to courts that preserved court records under the prior rule.

Other proposed amendments to rule 10.855

Government Code section 68151(a) defines the term "court record" for purposes of the statutes governing records creation, retention, and destruction. (Gov. Code, § 68150 et seq.) Senate Bill 1489 amended subdivision (a)(2), effective January 1, 2013, to delete the reference to "paper exhibits." (Stats. 2012, ch. 283.) These amendments would similarly eliminate the reference to "paper exhibits" from the definition of "court record" in rule 10.855(e)(3).

Lastly, these amendments would combine current subdivisions (i) and (k) into one subdivision because both address the storage of comprehensive and sample court records in local archival facilities.

Rotation assignment

In preparing the proposed rotation assignment, CEAC divided courts into clusters based on size to ensure a representative sample of small, medium, and large courts every year. It then randomly selected courts from each court cluster for the assigned year. Recognizing that it would be burdensome for those courts that had recently been assigned under the current rule to be selected again in the near future under this proposal, CEAC applied a rule moving those courts that had been assigned in the past seven years to preserve the current longitudinal sample to the end of the 19-year rotational cycle. To ensure a representative sample for the retroactive application of the proposed amendments, the same assignment order was applied to prior years.

CEAC made one minor adjustment to the rotation assignment after circulating the second rules proposal. The circulated rotation assignment removed the three courts—Alameda, Fresno, and Del Norte—that are currently assigned to preserve the longitudinal sample for the 2016 year, and replace them with Sonoma, Santa Cruz, and Colusa.

After further reflection, CEAC concluded that the better approach would be to leave in the rotation assignment the three courts that are currently assigned to preserve the 2016 longitudinal sample. This would ease implementation of the rule amendments by the July 1, 2016, effective date. The courts that are currently assigned to the 2016 year are already preserving 100 percent of their cases as part of the longitudinal sample. On or after July 1, 2016, these courts would have the option of either continuing to preserve 100 percent of their cases or reducing the number of cases preserved to 25 percent. Compared with the alternative—requiring three courts that may be preserving only the 10-percent systematic sample in 2016 to start preserving 25 percent of their cases by July 1, 2016—either option would be relatively less disruptive for these courts. Moreover, the 2016 longitudinal sample would still be representative in that it would

consist of a small (Del Norte), medium (Fresno), and large court (Alameda). To implement this change, minor adjustments were made to the rotation assignment.

Comments, Alternatives Considered, and Policy Implications

This proposal was circulated for comment twice, first from December 11, 2015, to January 22, 2016, during the winter 2016 cycle, and then from February 26 to March 26, 2016, on a special cycle.

Five organizations provided comment during the first comment cycle: three agreed with the proposal, one agreed if modified, and one did not indicate its position. As discussed above, CEAC incorporated the specific recommendations of the State Bar's Litigation Section and the Superior Court of Los Angeles County into the rules proposal before it was circulated again. Three organizations and one individual provided comments during the second comment cycle. Two agreed with the proposal, and two did not indicate their position. A chart with the full text of the comments received from both cycles and the committee's responses is attached at pages 21–43.

Alternatives

CEAC considered four alternatives to the proposed amendments to rule 10.855. Because Government Code section 68150(i) requires the preservation of "comprehensive historical and sample court record[s]," none of the alternatives contemplated completely eliminating the list of comprehensive records identified in rule 10.855(c) or eliminating the requirement that superior courts retain a sample of their court records.

Alternative one: maintain the longitudinal sample as is. The first alternative would have eliminated the systematic, subjective, and augmented samples, but maintained the current longitudinal sample without any modification. CEAC decided against recommending this alternative primarily because courts would still have to retain 100 percent of their records during their selected year when this is unnecessary to produce a statistically valid sample.

Alternative two: maintain the current systematic sample. The second alternative would have maintained the systematic sample but eliminated the longitudinal, subjective, and augmented samples. Under this alternative, all superior courts would have been required to retain 10 percent of their records every year. This alternative has the advantage of allowing for research into trends within particular courts, which will not be possible under the rule amendments the committee is proposing because records from an individual court would be available only every 19 years.

Nonetheless, CEAC decided against recommending this alternative for two reasons. First, this alternative would still impose a substantial burden on the courts in terms of operational and storage costs. It would require courts to preserve considerably more court records each year than they would under this proposal. Second, CEAC inferred from the stated purpose of rule 10.855—"to document the progress and development of the judicial system, and to preserve evidence of significant events and social trends"—that the council intended to preserve records for research

into broader questions of a statewide nature. This rule proposal would advance this purpose by preserving a statistically valid statewide sample of court records.

Alternative three: modify the systematic sample. The third alternative considered by CEAC would have eliminated the longitudinal, subjective, and augmented samples and maintained the systematic sample, but with modifications. Under this alternative, the 10-percent annual sampling rate for the systematic sample would vary depending on the size of the court.

This alternative presents the same benefit as alternative two in that researchers could study trends within a particular court. At the same time, it would more closely approximate the reduction in total court records presented in the rule amendments the committee is proposing. CEAC ultimately decided against this alterative because (1) it would differentially impact the courts, with smaller courts retaining a larger systematic sample than they do currently; and (2) courts would still have to comply with the sampling process yearly, resulting in significant operational costs.

Alternative four: Apply the rule amendments retroactively only to some courts. The last alternative considered by CEAC would have applied the proposed rule amendments retroactively only to those superior courts that had not preserved court records under the current rule. After initially circulating a proposal that would have implemented this alternative, CEAC circulated a revised proposal that would instead apply the proposed amendments retroactively to all courts. CEAC decided that full retroactive application was preferable because it would avoid complications that might arise in applying the rule amendments retroactively only to some courts and would help ease the financial and operational burden that the prior rule imposed on courts.

Implementation Requirements, Costs, and Operational Impacts

Overall, these amendments would result in substantial cost savings for the courts because they would significantly reduce the number of court records that courts must preserve forever. They would positively affect operations by simplifying the destruction process: courts would no longer be required to set aside 10 percent of court records each year.

For any superior court that actively reviews its court records to determine whether they are eligible for destruction, implementation of the rule proposal would require establishing new records management procedures and processes for identifying which court records must be preserved as sample and historical court records under the amended rule. It would also require training court staff on the new procedures and processes.

Attachments and Links

1. Cal. Rules of Court, rule 10.855, at pages 11–16
2. New rotation assignment, at pages 17–20
3. Chart of comments, at pages 21–43

Rule 10.855 of the California Rules of Court is amended, effective July 1, 2016, to read:

Rule 10.855. Superior court records sampling program

(a) Purpose

This rule establishes a program to preserve in perpetuity for study by historians and other researchers all superior court records filed before 1911 and a sample of superior court records filed after December 31, 1910, to document the progress and development of the judicial system, and to preserve evidence of significant events and social trends. This rule is not intended to restrict a court from preserving more records than the minimum required.

(b) Scope

"Records" of the superior court, as used in this rule, does not include records of limited civil, small claims, misdemeanor, or infraction cases.

(c) Comprehensive and significant records

Each superior court must preserve forever comprehensive and significant court records as follows:

(1) All records filed before 1911;

(2) If practicable, all records filed after 1910 and before 1950;

(3) All case indexes; and

~~(4) All judgment books if the court maintains judgment records separate from the case files;~~

~~(5) All minute books if the court maintains minutes separate from the case files; and~~

~~(6) All registers of action if the court maintains them.~~

(4) All noncapital cases in which the California Supreme Court has issued a written opinion.

(d) Sample records

If a superior court destroys court records without preserving them in a medium described in ~~(h)~~ (g), the court must preserve forever a sample of ~~each year's~~ court

records as provided by this rule of all cases, including sealed, expunged, and other confidential records to the extent permitted by law.

(e) Court record defined

The "court record" under this rule consists of the following:

(1) All papers and documents in the case folder; but if no case folder is created by the court, all papers and documents that would have been in the case folder if one had been created; and

(2) The case folder, unless all information on the case folder is in papers and documents preserved in a medium described in ~~(h)~~ (g); and

(3) If available, corresponding depositions, ~~paper exhibits,~~ daily transcripts, and tapes of electronically recorded proceedings.

(f) Sampling technique

Three courts assigned in rotation by the Judicial Council must preserve ~~100 percent of their court records for a calendar year ("longitudinal sample").~~ the following:

(1) A random sample of 25 percent of their court records for a calendar year, with the exception of the Superior Court of Los Angeles County, which must preserve a random sample of 10 percent of its court records for a calendar year.

(2) All judgment books, minute books, and registers of action if maintained separately from the case files, for the calendar year. ~~All other courts must preserve a systematic sample of 10 percent or more of each year's court records and a 2 percent subjective sample of the court records scheduled to be destroyed, as follows:~~

~~(1) The "systematic sample" must be selected as follows after grouping all cases scheduled to be destroyed by filing year:~~

~~(A) If the cases scheduled to be destroyed for a filing year number more than 1,000 cases, the sample must consist of all cases in which the last digit of the case number (0–9) coincides with the last digit of the year in which the case was filed.~~

~~(B) If the cases scheduled to be destroyed for a filing year number from 100 to 1,000, the sample must consist of cases selected by (1) dividing~~

~~the number of cases filed by 100, rounding fractions down to the next lower number, and (2) counting the cases and preserving each case with a position number in the files or other record that corresponds with the number computed (for example, 670 cases ÷ 100 = 6.7; select every sixth case).~~

~~(C) If fewer than 100 cases of a filing year are scheduled to be destroyed, all of the cases must be preserved.~~

~~(D) If the records to be destroyed are old, unnumbered cases, the sample must consist of cases identified by counting the cases (0–9) and preserving each case with a position number in the file or other record that corresponds with the number determined under (A) or (B), unless fewer than 100 cases are to be destroyed.~~

~~(2) The "subjective sample" must consist of at least 2 percent of all cases scheduled to be destroyed, but not fewer than the court records of 20 cases, and must include (1) all cases accepted for review by the California Supreme Court, (2) "fat files" or the thickest perceived case files, and (3) cases deemed by the court to be of local, national, or international significance. These cases must be identified by stamp or mark to distinguish them from the systematic sample. The Judicial Council will provide each court with a list of cases accepted for review by the California Supreme Court each year.~~

~~(g) Augmented sample; designated advisory consultant~~

~~(1) The Judicial Council may designate a consultant to review, under the guidance of a qualified historian or archivist, court records scheduled for destruction and determine if the court's systematic sample should be augmented to improve representation of the variety of cases filed.~~

~~(2) The court should give the designated consultant 60 days' notice of intent to destroy any court records that it does not plan to retain for the sample.~~

~~(3) The designated consultant's role is advisory to the court. If the consultant determines that the systematic sample does not represent the variety of cases filed in a sample year, the court should select a random sample of cases to augment the systematic sample.~~

~~(4) Final selection of the court records to augment the sample is to be made by the clerk of the superior court.~~

~~(h)~~ (g) Preservation medium

(1) Comprehensive and significant court records under (c) filed before 1911 must be preserved in their original paper form unless the paper is not available.

(2) Comprehensive and significant court records under (c) ~~that are part of the comprehensive sample~~ filed after 1910 and sample records under (d)~~, the systematic sample, and the subjective~~ must be retained permanently in accord with the requirements of the *Trial Court Records Manual.*

~~(i) Storage~~

~~Until statewide or regional archival facilities are established, each court is responsible for maintaining its comprehensive and sample court records in a secure and safe environment consistent with the archival significance of the records. The court may deposit the court records in a suitable California archival facility such as a university, college, library, historical society, museum, archive, or research institution whether publicly supported or privately endowed. The court must ensure that the records are kept and preserved according to commonly recognized archival principles and practices of preservation.~~

~~(j)~~ (h) Access

The court must ensure the following:

(1) The comprehensive, significant, and sample court records are made reasonably available to all members of the public.

(2) Sealed and confidential records are made available to the public only as provided by law.

(3) If the records are preserved in a medium other than paper, equipment is provided to permit public viewing of the records.

(4) Reasonable provision is made for duplicating the records at cost.

~~(k)~~ (i) ~~Choosing an archival facility~~ Storage

(1) Until statewide or regional archival facilities are established, each court is responsible for maintaining its comprehensive, significant, and sample court records in a secure and safe environment consistent with the archival significance of the records. The court may deposit the court records in a suitable California archival facility such as a university, college, library,

historical society, museum, archive, or research institution whether publicly supported or privately endowed. The court must ensure that the records are kept and preserved according to commonly recognized archival principles and practices of preservation.

(2) If a local archival facility is maintaining the court records, the court may continue to use that facility's services if it meets the storage and access requirements under (h) and ~~(j)~~(i)(1). If the court solicits archival facilities interested in maintaining the comprehensive, significant, and sample court records, the court must follow the procedures specified under rule 10.856, except that the comprehensive, significant, and sample court records must not be destroyed. Courts may enter into agreements for long-term deposit of records subject to the storage and access provisions of this rule.

~~(l)~~ (j) Reporting requirement

Each superior court must submit semiannually to the Judicial Council a *Report to the Judicial Council: Superior Court Records Destroyed, Preserved, and Transferred* (form REC-003), including the following information:

(1) A list by year of filing of the court records destroyed;

(2) A list by year of filing and location of the court records of the comprehensive and sample court records preserved; and

(3) A list by year of filing and location of the court records transferred to entities under rule 10.856.

(k) Application

The sampling program provided in this rule, as amended effective July 1, 2016, applies retroactively to all superior courts.

Advisory Committee Comment

Subdivision (c)(4). Capital cases are excluded under subdivision (c)(4) because these cases have an automatic right of appeal to the California Supreme Court, and trial court records are retained permanently under Government Code section 68152(c)(1) if the defendant is sentenced to death. Each year, the Judicial Council will make available to the superior courts a list of all noncapital cases in which the California Supreme Court has issued a written opinion.

Subdivision (k). Because the destruction of court records is discretionary, all courts may elect to apply the rule retroactively and destroy court records that are not required to be preserved under subdivisions (c), (d), and (f), but they are not required to do so.

Superior courts that destroyed court records under the prior sampling rule may have preserved only 10 percent of their records (formerly known as the "systematic sample") for the year that they are now assigned to preserve the sample defined in subdivision (f). Except for the Superior Court of Los Angeles County, these courts would not be able to meet the requirement in subdivision (f)(1). So long as these courts continue preserving the 10-percent sample for their assigned year, they will be deemed to have satisfied subdivision (f)(1).

ROTATION ASSIGNMENT FOR LONGITUDINAL SAMPLE
California Rules of Court, rule 10.855
As of July 1, 2016

Year of Filing	CALIFORNIA SUPERIOR COURTS		
	Group 1	Group 2	Group 3
1912	Alpine	Placer	Kern
1913	Amador	Sutter	Monterey
1914	Del Norte	Tuolumne	Santa Clara
1915	Trinity	Yuba	Ventura
1916	Colusa	Tehama	Alameda
1917	Plumas	Siskiyou	Stanislaus
1918	Butte	Fresno	Tulare
1919	Humboldt	Yolo	Solano
1920	Mariposa	Santa Cruz	Sonoma
1921	Inyo	Lake	San Diego
1922	Glenn	Lake	San Diego
1923	Mono	Marin	Santa Barbara
1924	San Benito	Napa	San Bernardino
1925	Sierra	Mendocino	San Joaquin
1926	Imperial	Merced	San Mateo
1927	Kings	Madera	San Francisco
1928	Modoc	Shasta	Los Angeles
1929	Lassen	Contra Costa	Riverside
1930	El Dorado	Nevada	Sacramento
1931	Calaveras	San Luis Obispo	Orange
1932	Alpine	Placer	Kern
1933	Amador	Sutter	Monterey
1934	Del Norte	Tuolumne	Santa Clara
1935	Trinity	Yuba	Ventura
1936	Colusa	Tehama	Alameda
1937	Plumas	Siskiyou	Stanislaus
1938	Butte	Fresno	Tulare
1939	Humboldt	Yolo	Solano
1940	Mariposa	Santa Cruz	Sonoma
1941	Inyo	Lake	San Diego
1942	Glenn	Marin	Santa Barbara
1943	Mono	Napa	San Bernardino
1944	San Benito	Mendocino	San Joaquin
1945	Sierra	Merced	San Mateo
1946	Imperial	Madera	San Francisco
1947	Kings	Shasta	Los Angeles
1948	Modoc	Contra Costa	Riverside

ROTATION ASSIGNMENT FOR LONGITUDINAL SAMPLE
California Rules of Court, rule 10.855
As of July 1, 2016

Year of Filing	CALIFORNIA SUPERIOR COURTS		
	Group 1	Group 2	Group 3
1949	Lassen	Nevada	Sacramento
1950	El Dorado	San Luis Obispo	Orange
1951	Calaveras	Placer	Kern
1952	Alpine	Sutter	Monterey
1953	Amador	Tuolumne	Santa Clara
1954	Del Norte	Yuba	Ventura
1955	Trinity	Tehama	Alameda
1956	Colusa	Siskiyou	Stanislaus
1957	Plumas	Fresno	Tulare
1958	Butte	Yolo	Solano
1959	Humboldt	Santa Cruz	Sonoma
1960	Mariposa	Lake	San Diego
1961	Inyo	Marin	Santa Barbara
1962	Glenn	Napa	San Bernardino
1963	Mono	Mendocino	San Joaquin
1964	San Benito	Merced	San Mateo
1965	Sierra	Madera	San Francisco
1966	Imperial	Shasta	Los Angeles
1967	Kings	Contra Costa	Riverside
1968	Modoc	Nevada	Sacramento
1969	Lassen	San Luis Obispo	Orange
1970	El Dorado	Placer	Kern
1971	Calaveras	Sutter	Monterey
1972	Alpine	Tuolumne	Santa Clara
1973	Amador	Yuba	Ventura
1974	Del Norte	Tehama	Alameda
1975	Trinity	Siskiyou	Stanislaus
1976	Colusa	Fresno	Tulare
1977	Plumas	Yolo	Solano
1978	Butte	Santa Cruz	Sonoma
1979	Humboldt	Lake	San Diego
1980	Mariposa	Marin	Santa Barbara
1981	Inyo	Napa	San Bernardino
1982	Glenn	Mendocino	San Joaquin
1983	Mono	Merced	San Mateo
1984	San Benito	Madera	San Francisco
1985	Sierra	Shasta	Los Angeles
1986	Imperial	Contra Costa	Riverside

ROTATION ASSIGNMENT FOR LONGITUDINAL SAMPLE
California Rules of Court, rule 10.855
As of July 1, 2016

Year of Filing	CALIFORNIA SUPERIOR COURTS		
	Group 1	Group 2	Group 3
1987	Kings	Nevada	Sacramento
1988	Modoc	San Luis Obispo	Orange
1989	Lassen	Placer	Kern
1990	El Dorado	Sutter	Monterey
1991	Calaveras	Tuolumne	Santa Clara
1992	Alpine	Yuba	Ventura
1993	Amador	Tehama	Alameda
1994	Del Norte	Siskiyou	Stanislaus
1995	Trinity	Fresno	Tulare
1996	Colusa	Yolo	Solano
1997	Plumas	Santa Cruz	Sonoma
1998	Butte	Lake	San Diego
1999	Humboldt	Marin	Santa Barbara
2000	Mariposa	Napa	San Bernardino
2001	Inyo	Mendocino	San Joaquin
2002	Glenn	Merced	San Mateo
2003	Mono	Madera	San Francisco
2004	San Benito	Shasta	Los Angeles
2005	Sierra	Contra Costa	Riverside
2006	Imperial	Nevada	Sacramento
2007	Kings	San Luis Obispo	Orange
2008	Modoc	Placer	Kern
2009	Lassen	Sutter	Monterey
2010	El Dorado	Tuolumne	Santa Clara
2011	Calaveras	Yuba	Ventura
2012	Alpine	Tehama	Sonoma
2013	Amador	Siskiyou	Stanislaus
2014	Colusa	Santa Cruz	Tulare
2015	Trinity	Yolo	Solano
2016	Del Norte	Fresno	Alameda
2017	Plumas	Lake	San Diego
2018	Butte	Marin	Santa Barbara
2019	Humboldt	Napa	San Bernardino
2020	Mariposa	Mendocino	San Joaquin
2021	Inyo	Merced	San Mateo
2022	Glenn	Madera	San Francisco
2023	Mono	Shasta	Los Angeles
2024	San Benito	Contra Costa	Riverside
2025	Sierra	Nevada	Sacramento
2026	Imperial	San Luis Obispo	Orange

ROTATION ASSIGNMENT FOR LONGITUDINAL SAMPLE
California Rules of Court, rule 10.855
As of July 1, 2016

Year of Filing	CALIFORNIA SUPERIOR COURTS		
	Group 1	Group 2	Group 3
2027	Kings	Placer	Kern
2028	Modoc	Sutter	Monterey
2029	Lassen	Tuolumne	Santa Clara
2030	El Dorado	Yuba	Ventura
2031	Calaveras	Tehama	Alameda
2032	Alpine	Siskiyou	Stanislaus
2033	Amador	Fresno	Tulare
2034	Del Norte	Yolo	Solano
2035	Trinity	Santa Cruz	Sonoma
2036	Colusa	Lake	San Diego
2037	Plumas	Marin	Santa Barbara
2038	Butte	Napa	San Bernardino
2039	Humboldt	Mendocino	San Joaquin
2040	Mariposa	Merced	San Mateo
2041	Inyo	Madera	San Francisco
2042	Glenn	Shasta	Los Angeles
2043	Mono	Contra Costa	Riverside
2044	San Benito	Nevada	Sacramento
2045	Sierra	San Luis Obispo	Orange
2046	Imperial	Placer	Kern
2047	Kings	Sutter	Monterey
2048	Modoc	Tuolumne	Santa Clara
2049	Lassen	Yuba	Ventura
2050	El Dorado	Tehama	Alameda
2051	Calaveras	Siskiyou	Stanislaus
2052	Alpine	Fresno	Tulare
2053	Amador	Yolo	Solano
2054	Del Norte	Santa Cruz	Sonoma
2055	Trinity	Lake	San Diego
2056	Colusa	Marin	Santa Barbara

W16-16 and SP16-01

Court Records: Records Sampling and Destruction (Amend Government Code section 68153; amend Cal. Rules of Court, rule 10.855)

All comments are verbatim unless indicated by an asterisk (*).

First Comment Cycle				
	Commentator	**Position**	**Comment**	**Response**
1.	State Bar of California, Litigation Section by Reuben A. Ginsburg, Chair, Rules and Legislation Committee	NI	We see no indication in the invitation to comment that the advisory committee has consulted historians and other researchers to determine whether the proposed limited sampling would be adequate for purposes of future historical research. We believe that such consultation is essential. We therefore urge the advisory committee to postpone presenting this proposal until after it has consulted a qualified historian. We suggest that a later invitation to comment be issued containing the results of that consultation and specifically inviting comment from historians and archivists. We suggest that the language "[a]ll noncapital cases in which the California Supreme Court has issued a written decision" in proposed rule 10.855(c)(4) be modified to clarify whether it encompasses only those cases in which the Supreme Court has issued a written opinion or also those cases in which the Supreme Court has issued a written order constituting a decision.	CEAC appreciates this input from the State Bar's Litigation Section. During the second public comment cycle, CEAC distributed the revised ITC for comment to those archivists and historians who are notified of the destruction of court records. CEAC did not receive any comments from these individuals and entities. This recommendation was incorporated into the revised ITC that was circulated during the second public comment cycle. The rule amendments now refer to "[a]ll noncapital cases in which the California Supreme Court has issued a written *opinion*." (Italics added.)
2.	Superior Court of Los Angeles County	AM	**General Comments** • Page 10, lines 36-37: As to the addition of (c)(4) *All noncapital cases in which the California Supreme Court has issued a written decision…*, will the Judicial Council continue to provide this information to courts? Currently, the CRC states that the Judicial Council will maintain the list.	This recommendation was incorporated into the revised ITC that was circulated during the second public comment cycle. An Advisory Committee Comment has been added to instruct the Judicial Council to make available to the superior courts a list of all noncapital cases in which the California Supreme Court has issued a written opinion.

W16-16 and SP16-01

Court Records: Records Sampling and Destruction (Amend Government Code section 68153; amend Cal. Rules of Court, rule 10.855)

All comments are verbatim unless indicated by an asterisk (*).

First Comment Cycle				
	Commentator	**Position**	**Comment**	**Response**
			• Page 11, lines 18-26: Suggest adding a (1) and (2) in section (f) Sampling Technique to distinguish two different types of inventory to retain. For example, three courts in their rotation have to retain the 25% sample (10% for LASC); however, only those courts in rotation that maintain judgment books, minute books, and registers of action separately from the case files are required to retain these permanently for the entire respective calendar year. It may assist courts in knowing there are two parts to this section and that the latter requirement is 100% of their books and registers of action for the entire year, not just 25%.	This recommendation was incorporated into the revised ITC that was circulated during the second public comment cycle. As recommended by the court, subdivision (f) of rule 10.855 now has two paragraphs: paragraph (1) addresses sampling and paragraph (2) addresses judgment books, minute books, and registers of action maintained separately from case files.
			• Page 14, lines 11-23: Should this be lined out as it was suggested to remove this requirement? Or, can it not be removed effective July 1, 2016 until the Government Code section 68153 is modified in January 2017 to remove the reporting requirement to Judicial Council?	This requirement cannot be modified until Government Code section 68153 is amended. If the Legislature amends section 68153 as recommended by CEAC, CEAC will consider proposing rule amendments to implement this change.
			Responses to Request for Specific Comments **Does the proposal appropriately address the stated purpose?** *Yes, the proposed revisions to the CRC are an appropriate balance to cost- and time-savings for courts while continuing to provide sufficient historical and statistical values.*	CEAC appreciates the court's input.

First Comment Cycle				
	Commentator	**Position**	**Comment**	**Response**
			Would the proposal provide cost savings? If so, please quantify. *Yes, the proposal will definitely provide cost savings to the courts. Whereas current requirements of 100% retention every 19 years, Los Angeles would have to store roughly 870,000 cases, as estimated by Judicial Council, equal to about 34,800 linear feet of space each rotation. That is in addition to each year's 10% systematic sampling which for Los Angeles equates to about 27,500 cases or 1,100 linear feet of space each year. Essentially, from filing year 1978 to present, Los Angeles would have to permanently retain about 2,647,500 files taking up roughly 105,900 linear feet of space. This can be estimated at $3,500,000 in annual savings in for an electronic conversion project.* *In addition, the amount of time it would take staff to separate these files, label them accordingly, and store them in an area for permanent retention would be saved. These could save hundreds of hours of time given the volume of files being retained under the current requirements. For example, for Los Angeles, if 40 employees were working on permanent retention of the required cases for all courthouses, it could take about 20 working days to complete. This can be estimated at about $130,000 in savings per year.*	

W16-16 and SP16-01

Court Records: Records Sampling and Destruction (Amend Government Code section 68153; amend Cal. Rules of Court, rule 10.855)

All comments are verbatim unless indicated by an asterisk (*).

First Comment Cycle				
	Commentator	**Position**	**Comment**	**Response**
			What would the implementation requirements be for courts? 1. *Communication to all operations/records managers and administrators will be required.* 2. *Revised policies and procedures for all general jurisdiction court records maintenance and destruction will be necessary. This would include revising processes to indicate the inventory range of cases for the rotation year, appropriate labeling of case files for permanent retention, removing directives to retain systematic and subjective sampling, and removing system requirements when pulling destruction inventory reports from the respective case management systems. In addition, new procedures will have to be created to address the requirement of permanently retaining all cases that have a California Supreme Court written decision. This requirement will impact not only records management functions, but will also require case processing/courtroom operations staff to flag these files in some manner to reflect permanent retention in both the case management system and on the physical file or in the document management system for the electronic file.*	

First Comment Cycle				
	Commentator	**Position**	**Comment**	**Response**
			3. *Training of staff will be required once the revised policies and procedures are implemented. This would include training all supervisory and management staff, then all staff directly impacted by these changes. In addition to records management staff, training other staff to flag cases which a Supreme Court written decision exists will also be required. A rough estimate for hours of training would be from 1-2 hours, depending on the complexity of the requirements.* 4. *Technical programming will also be necessary to accommodate the new requirements. Programming changes include adding a docket code or flag in the various case management systems to reflect the case is permanent retention due to longitudinal sampling and also due to Supreme Court written decision. Coding for current destruction eligibility reports will also need to be modified to remove the systematic sampling exemptions and to add Supreme Court written decision exemption.*	
3.	Superior Court of California, County of Riverside by Marita Ford, Sr. Management Analyst	A	No specific comment.	CEAC appreciates the court's support.
4.	Superior Court of Sacramento County by Rebecca Reddish, Business Analyst	A	No specific comment.	CEAC appreciates the court's support.

W16-16 and SP16-01

Court Records: Records Sampling and Destruction (Amend Government Code section 68153; amend Cal. Rules of Court, rule 10.855)

All comments are verbatim unless indicated by an asterisk (*).

First Comment Cycle				
	Commentator	**Position**	**Comment**	**Response**
5.	Superior Court of San Diego County by Michael M. Roddy, Court Executive Officer	A	No specific comment.	CEAC appreciates the court's support.

Second Comment Cycle				
	Commentator	**Position**	**Comment**	**Response**
6.	Diana Molina	NI	These documents are critical and should be retained. They can be scanned to jpeg files with minimal effort. These records are a record of our legal history. Keep the documentation. It's not that difficult or costly. Record retention. I must object to widespread destruction of records. In particular, records from criminal proceedings. There are far too many procedurally flawed records and evidence should be retained.	CEAC appreciates Ms. Molina's input. Because of the volume of records involved, scanning and maintaining these court records in electronic form is a considerable costs for courts. These amendments modify only the rule governing the sampling of court records for historical and research purposes. They do not have any bearing on the statutory records retention periods. Accordingly, CEAC expects that the amendments will have only a limited impact on the retention of court records in criminal cases. Because misdemeanor cases are outside the scope of rule 10.855, these amendments would affect only the retention of court records in felony cases. Superior courts must still retain the court records for felony cases for 50 years after final disposition of the case under Government Code section 68152(c)(2). Only after the 50-year period has elapsed (and only if the record is not subject to being preserved as a sample court record) would courts have the discretion to destroy these court records.

W16-16 and SP16-01
Court Records: Records Sampling and Destruction (Amend Government Code section 68153; amend Cal. Rules of Court, rule 10.855)
All comments are verbatim unless indicated by an asterisk (*).

Second Comment Cycle				
	Commentator	**Position**	**Comment**	**Response**
7.	Superior Court of Fresno County by Fran Raley, Archives Division Manager	NI	**Comprehensive historical records** Rule 10.855(c) requires that courts preserve forever all comprehensive court records, which are defined as (1) all records filed before 1911; (2) if practicable, all records filed after 1910 and before 1950; (3) all case indexes; (4) all judgment books if the court maintains judgment records separate from the case files; (5) all minute books if the court maintains minutes separate from the case files; and (6) all registers of action. This proposal would retain but revise this requirement by keeping current items (1)–(3), eliminating items (4)–(6), and adding a new requirement to preserve records for cases in which the California Supreme Court has issued a written opinion. *(4) Any judgment books maintained separately form the case files would be destroyed.* *(5) Any minute books separate from the case files would be destroyed.* *(6) All registers of action separate from CMS or case files would be destroyed.*	CEAC appreciates the court's input. Based on a follow-up conversation with Ms. Raley, staff learned that the court does not retain judgment books separately from case files. Accordingly, the amendment to subdivision (c)(4) would have no effect on the court. To provide further clarification, judgment books, minute books, and registers of action are still subject to the records retention provisions in Government Code section 68152, which require that judgments in felony and unlimited civil cases be preserved permanently and that minutes and registers of action be preserved for the same

Second Comment Cycle				
	Commentator	**Position**	**Comment**	**Response**
			Would add a new requirement to preserve records for cases in which the California Supreme Court has issued a written opinion. *There currently is nothing in place to track these types of cases.*	retention period as the underlying case type. Under current rule 10.855(f)(2), superior courts are required to retain "all cases accepted for review by the California Supreme Court." These amendments provide that the Supreme Court must issue an opinion for the court records to be subject to preservation. In effect, they would reduce the number of Supreme Court cases that must be preserved under the rule by eliminating the requirement that superior courts preserve court records for "grant and hold" cases. These amendments would also add an Advisory Committee comment that would require the Judicial Council to make available a list of all noncapital cases in which the California Supreme Court issues a written opinion. This list is intended to assist superior courts in identifying which Supreme Court cases must be preserved.
			Pre-1950 records and case indexes. The proposal would maintain the requirements in subdivisions (c)(1), (2), and (3) of rule 10.855 that courts preserve all records filed before 1911; if practicable, all records filed after 1910 and before 1950; and all case indexes. The committee's view is that retaining these records is consistent with Government Code section 68150(i)'s requirement for the preservation of comprehensive historical court records. In addition, the preservation of these pre-1950 records does not impose a significant burden on	CEAC appreciates the court's input.

Second Comment Cycle				
	Commentator	**Position**	**Comment**	**Response**
			the superior courts. The costs related to storing these records are relatively minimal. *This is already done. This would not impact us at all.*	
			Judgment books. The proposed amendments would eliminate the requirement in subdivision (c)(4) to preserve judgment books because it is redundant and unnecessary. All judgments for unlimited civil and felony cases—whether they are kept in the case files or kept separately—must already be preserved permanently under Government Code section 68152. *This would allow us to destroy Judgment Books since the Judgments must be preserved permanently.*	CEAC appreciates the court's input. Based on a follow-up conversation with Ms. Raley, staff learned that the court does not retain judgment books separately from case files. Accordingly, this amendment to subdivision (c) would have no effect on the court. To provide further clarification, CEAC does not intend this amendment to subdivision (c) to effect any changes in records retention practices. Because Government Code section 68152 separately requires that superior courts permanently preserve judgments in felony and unlimited civil cases, the committee decided that it was unnecessary to repeat this requirement in the rule.
			Minute books. The proposed amendments would eliminate the requirement in subdivision (c)(5) to preserve minute books because it	To clarify, these amendments would not affect the records retention provisions in Government Code section 68152, which provide that minutes

Second Comment Cycle				
	Commentator	**Position**	**Comment**	**Response**
			creates varying records retention practices among courts statewide. Government Code section 68152 does not differentiate between minutes kept in the case files and those kept separately in minute books; both are eligible for destruction under the statute once the retention period for the underlying case type has expired. Nonetheless, rule 10.855(c)(5) requires those courts that keep minute books to preserve them permanently, resulting in different records retention practices depending on whether the court keeps minute books or files minute orders in case files. *We will have to preserve any minute books we have permanently.*	must be retained for the same period as the underlying case type. Accordingly, superior courts may destroy minute books after that retention period has elapsed. For unlimited civil cases, the retention period is 10 years; for felony cases, 50 years. (See Gov. Code, § 68152(a)(2), (c)(2).)
			Registers of action. The proposed amendments would eliminate the requirement in subdivision (c)(6) to preserve registers of actions because it also creates divergent records retention practices among courts statewide. In lieu of keeping a register of actions, the court "may maintain a register of actions by preserving all the court records filed, lodged, or maintained in connection with the case." Government Code section 68152(g)(16) provides that registers of action must be retained for the same retention period as records in the underlying case. Yet, as with minute books, rule 10.855(c)(6) requires only those courts that keep registers of action to preserve them permanently, resulting in varying records retention practices depending on whether the court creates and maintains	To clarify, these amendments would not affect the records retention provisions in Government Code section 68152, which provide that registers of action must be retained for the same period as the underlying case type. Accordingly, superior courts may destroy minute books after that retention period has elapsed. For unlimited civil cases, the retention period is 10 years; for felony cases, 50 years. (See Gov. Code, § 68152(a)(2), (c)(2).)

Second Comment Cycle				
	Commentator	**Position**	**Comment**	**Response**
			registers of action or preserves all court records filed, lodged, or maintained in connection with the case in the case file. *We will have to preserve any register of actions we have permanently.*	
			Cases in which there is a Supreme Court opinion. Lastly, the proposed amendments would add to rule 10.855(c) the requirement that courts preserve the court records for cases in which the California Supreme Court has issued a written opinion. These records are currently labeled as "subjective sample" records. The proposed amendments would relocate this requirement from subdivision (f)(2) to subdivision (c), with the modification described below. *A procedure must be put in place to identify those cases in which the California Supreme Court has issued a written opinion.* *The best way to track this is to stamp every fourth file as it is produced at Archives. Since we are already three months into the year, we should provide a list to all departments indicating every fourth file and provide them with a stamp "Longitudinal Sample. DO NOT*	These amendments would add an Advisory Committee comment that would require the Judicial Council to make available a list of all noncapital cases in which the California Supreme Court issues a written opinion. This list is intended to assist superior courts in identifying which Supreme Court cases must be preserved. CEAC appreciates the court's input.

Second Comment Cycle				
	Commentator	**Position**	**Comment**	**Response**
			DESTROY". Otherwise, we would have to make sure that the files are stamped when returned to Archives. This would greatly impact the Stock Clerks and greatly slow down the File Pick Up process.	
			Longitudinal sample Rule 10.855(f) currently requires that all courts preserve a longitudinal sample of court records. In the longitudinal sample, three courts assigned in rotation by the Judicial Council must preserve 100 percent of their court records for a calendar year. In practice, each court is selected roughly every 19 years. This proposal would retain this requirement but modify it to ensure that the sample is less burdensome on the courts while ensuring that the sample is representative and statistically significant. Similar to the current longitudinal sample, three courts would continue to be randomly selected in a given year, and each court would be required to preserve the longitudinal sample roughly every 19 years. However, the proposal would revise the longitudinal sample in two significant ways, described below. ***Preservation of a partial sample.*** Fresno Superior Court's year is 2016. This will reduce the amount of files we have to maintain for 2016. Instead of keeping 100% of our court records we would be required to keep 25% (i.e. every fourth case) for our selection year.	

Second Comment Cycle				
	Commentator	**Position**	**Comment**	**Response**
			The best way to track this is to stamp every fourth file as it is produced at Archives. Since we are already three months into the year, we should provide a list to all departments indicating every fourth file and provide them with a stamp "Longitudinal Sample. DO NOT DESTROY". Otherwise, we would have to make sure that the files are stamped when returned to Archives. This would greatly impact the Stock Clerks and greatly slow down the File Pick Up process. ***Preservation of judgment books, minute books, and registers of action.*** The court will be required to preserve all judgment books, minute books, and registers of action for their assigned longitudinal year sample. *Judgement books – No impact. Separate judgment books are not kept.* *Minute Books – No impact. Separate minute books are not kept. All minutes are kept in the file.* *Registers of action – No impact. Registers of action are kept on the CMS.*	CEAC appreciates the court's input. CEAC appreciates the court's input.
			Systematic sample records Rule 10.855(f) requires that any court not participating in the longitudinal sample in a given year must preserve a systematic sample consisting of 10 percent or more—but no less than 100 cases—of that year's court records. This proposal would amend rule 10.855 to	

Second Comment Cycle				
	Commentator	**Position**	**Comment**	**Response**
			eliminate this requirement in its entirety. Eliminating the systematic sampling requirement would result in significant savings for superior courts in terms of operational and storage costs. Moreover, these savings would not result in the loss of a statistically valid statewide sample because courts would still be required to preserve the longitudinal sample. *If the new proposal is accepted, the requirement that when not participating in the longitudinal sample a systematic sample of 10% or more, but no less than 100 cases of that year's records would be eliminated. This would reduce operational and storage costs significantly.*	CEAC appreciates the court's input.
			Subjective sample records Rule 10.855(f) also requires that those courts not participating in the longitudinal sample must preserve a subjective sample of at least 2 percent, but no fewer than 20 cases, of each year's court records. The subjective sample must include (1) all cases accepted for review by the California Supreme Court; (2) "fat files," or the thickest perceived case files; and (3) cases deemed by the court to be of local, national, or international significance. ***Eliminating the subjective sample.*** With one exception (described below), this proposal would eliminate the subjective sample due to implementation problems. The lack of clear-cut guidelines and criteria has made it difficult for	CEAC appreciates the court's input.

Second Comment Cycle				
	Commentator	**Position**	**Comment**	**Response**
			courts to determine which cases are "fat files" or are "of local, national, or international significance." CEAC members also reasoned from their experience that the thickness of a case file was often a better indicator of the litigiousness of the parties than the significance of the issues involved. *The elimination of the subjective sample record requirement would benefit the Court.* *1. We may be able to destroy some of the green bars under this new proposed amendment.* *2. A procedure would have to be developed to track cases accepted for review by the California Supreme Court, other than Capital cases.* *a. The Appeals Department would receive a copy and could track these cases by creating a log. Normally the file has already been returned to Archives. In that case, Appeals would share the log with Archives and we would identify the file by a stamp. Those files receiving an opinion still housed in the department would be stamped by that department.* *3. Although the Court would still be authorized to retain records identified internally as significant, i.e high-profile*	CEAC appreciates the court's input. Based on a follow-up conversation with Ms. Raley, staff learned that most of the "green bar" court records are misdemeanor and infraction cases, which are not subject to rule 10.855's sampling program. Instead, the court is largely preserving these records because there is no final disposition in these cases. These amendments would add an Advisory Committee comment that would require the Judicial Council to make available a list of all noncapital cases in which the California Supreme Court issues a written opinion. This list is intended to assist superior courts in identifying which Supreme Court cases must be preserved.

Second Comment Cycle				
	Commentator	**Position**	**Comment**	**Response**
			cases covered by the media. The court would no longer have to preserve 2 percent of their court records each year and would not have to retain a case according to its size.	
			Preservation of cases in which there is a Supreme Court opinion (revised). This proposal would retain, but slightly modify, the requirement that courts preserve records for "all cases accepted for review by the California Supreme Court." To better reflect which cases are of potential interest for historical and research purposes, this proposal would revise this requirement to provide for the preservation of records in "[a]ll noncapital cases in which the California Supreme Court has issued a written opinion." Under the proposed language, superior courts would preserve the records of only those cases where the court issues a written opinion; they would not be required to preserve records in the "grant and hold" cases. In addition, the proposed amendment excludes capital cases for several reasons. Capital cases are excluded under the current rule because these cases are not "accepted for review"; instead, capital cases are automatically appealable to the California Supreme Court. Moreover, all capital cases resulting in a death sentence must already be retained forever under Government Code section 68152(c)(1). This proposal would add an Advisory Committee	

Second Comment Cycle				
	Commentator	**Position**	**Comment**	**Response**
			Comment to explain why capital cases are not included in this requirement. *This will apply to all noncapital cases as well. This will impact the Court by requiring that a procedure be developed and the cases identified by a stamp on the file folder.* *1. Logs will have to be created.* *2. Stamps created.* *3. Training staff.* *4. Communication between all departments.*	CEAC appreciates the court's input. These amendments would add an Advisory Committee comment that would require the Judicial Council to make available a list of all noncapital cases in which the California Supreme Court issues a written opinion. This list is intended to assist superior courts in identifying which Supreme Court cases must be preserved.
			Augmented sample records Rule 10.855(g) grants the Judicial Council discretion to "designate a consultant to review, under the guidance of a qualified historian or archivist, court records scheduled for destruction and determine if the court's systematic sample should be augmented to improve representation of the variety of the cases filed." Since the rule was adopted in 1994, the Judicial Council has not opted to exercise its discretion under subdivision (g). Nor are CEAC members aware of any superior courts that have preserved an augmented sample under this subdivision. The proposal would amend the rule to eliminate the augmented sample because it has not been utilized. *This will not impact the Court, because we do not have this procedure in place and the Judicial Council is eliminating it.*	CEAC appreciates the court's input.

Second Comment Cycle				
	Commentator	**Position**	**Comment**	**Response**
			Retroactive implementation (revised) New subdivision (k) would be added to clarify the application of the rule amendments. This revised rules proposal provides that the rule amendments would apply retroactively to all courts. Because the destruction of court records is discretionary, all courts would be allowed, but not required, to apply the proposed amendments retroactively. Although some superior courts regularly review their court records for destruction, others do not and have instead preserved all records by default. Applying the rule amendments retroactively would be relatively straightforward for those courts that have preserved all records by default. However, for those courts that have preserved court records under the current sampling program, it is foreseeable that they may have preserved only 10 percent of their court records (the current "systematic" sample) for the years that they might be assigned under the new sampling program to have preserved 25 percent of their court records (the proposed modified "longitudinal" sample). With the exception of the Superior Court of Los Angeles County, these courts would not be able to fully comply with the proposed rule amendments if they were to apply them retroactively. For this reason, CEAC first circulated a rules proposal that would apply the proposed rule amendments retroactively only to those courts that had not	

Second Comment Cycle				
	Commentator	**Position**	**Comment**	**Response**
			previously preserved their court records under the current rule. After circulating the initial proposal for public comment, CEAC gave further consideration (1) to the practical difficulties that would result from applying the rule amendments retroactively only to some courts and (2) to the need to alleviate the financial and operational burden for all courts caused by the current rule. Based on discussions with the Judicial Council's Office of Court Research, CEAC ascertained that a 10-percent sample would be sufficient for research purposes. Accordingly, CEAC decided to revise the rules proposal to apply the proposed amendments retroactively to all courts and to recirculate the revised proposal for public comment. The revised proposal would also add an Advisory Committee Comment to explain how the rule amendments would apply retroactively to courts that preserved court records under the current rule. *Under the proposed amendment of retroactive implementation, since Fresno regularly reviews its court records for destruction, we did not preserve 10 percent of Civil limited and Small Claims. We do however have more than 10 percent of the other case types for 1995 per the current systematic sample. Under the proposed amendment we have to preserve 25 percent per the proposed longitudinal sample. The year 2016 is our next sampling period.*	CEAC appreciates the court's input. To clarify, the amendments to rule 10.855 do not expand its scope to include civil limited and small claims cases. If the court applies the amendments retroactively, it would not be required to retain a sample of these cases.

W16-16 and SP16-01
Court Records: Records Sampling and Destruction (Amend Government Code section 68153; amend Cal. Rules of Court, rule 10.855)
All comments are verbatim unless indicated by an asterisk (*).

Second Comment Cycle				
	Commentator	**Position**	**Comment**	**Response**
			*The plus is that we may be able to destroy some of the green bars and daily file folders according to this proposal. We have well over **43,000 green bars** stored at Archives. Destroying these files would free up needed space.*	Based on a follow-up conversation with Ms. Raley, staff learned that most of the "green bar" court records are misdemeanor and infraction cases, which are not subject to the sampling program in rule 10.855. Instead, the court is preserving these records largely because there is no final disposition in these cases.
			Request for Specific Comments In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following: *As a whole, the proposed amendments would be a benefit. It would result in decreased record retention. Eliminating the subjective sample that requires the court to retain 2% of its files per year. Also with the modification of the longitudinal sample from 100% to 25%. And allowing destruction of any judgment books, minute books kept separately from case files, and all registers of action for their non-longitudinal sample year would free up much needed space. The impact to those courts that must retain judgment books, minute books kept separately from case files, and all registers of action for their longitudinal sample year, the impact would be minimal.* *With changes come new procedures and training of staff. Not only in the Archives record retention, but the court as a whole. It will require close monitoring and communication*	CEAC appreciates the court's input.

Second Comment Cycle				
	Commentator	**Position**	**Comment**	**Response**
			between all departments. **Does the proposal appropriately address the stated purpose?** *Yes, see a benefit to all courts. Even to those that have contracted out their record storage.* **Would applying the proposed amendments retroactively to all courts be beneficial? Would it cause any issues or raise any concerns?** *Applying the proposed amendments retroactively to all courts would raise concerns as to being in compliance for past sampling years. There is also an issue as to record storage and staffing. Many of the records require research and the court will need time to implement the changes and possible work space and staff.* The advisory committee also seeks comments from *courts* on the following cost and implementation matters: **Would the proposal provide cost savings? If so please quantify.** *Need for space in the future can be limited.* **What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising**	CEAC has added an Advisory Committee Comment to rule 10.855 to provide that courts would still be compliant with the sampling requirements if they apply them retroactively. CEAC appreciates the court's input.

Second Comment Cycle				
	Commentator	**Position**	**Comment**	**Response**
			processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems? *Training Staff* *1. Managers 4 hrs.* *2. Stock Clerks 4 hrs.* *3. Office Assistants 4 hrs.* *4. Judicial Assistants 4 hrs.* *5. Labeling Staff (SVS) 4 hrs.* *6. Over time needed to track cases and identify cases for sample year* *Revising processes and procedures* *1. Tracking Cases with Supreme Court Opinions* *2. Creating stamps to identify files* *3. Possibly identifying files with a different color file folder (if advance notice had been given)* *4. Anticipating storage of 2016 files for 2019* *Docket Codes* *1. Creating new docket codes to flag CMS* *2. Supreme Court Opinion* *3. Longitudinal study* *Modifying case management system* *1. To automatically identify a case in longitudinal (every fourth case)* 2. *Identify cases Supreme Court Opinions*	

W16-16 and SP16-01
Court Records: Records Sampling and Destruction (Amend Government Code section 68153; amend Cal. Rules of Court, rule 10.855)
All comments are verbatim unless indicated by an asterisk (*).

Second Comment Cycle				
	Commentator	**Position**	**Comment**	**Response**
			Would two months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? *I do not believe two months from approval is sufficient time for implementation. Staff training, supplies, creation of docket codes, modification of CMS needed. We will be further along in the year and will have to play catch up to get these cases identified.* **How well would this proposal work in courts of different sizes?** *I see this proposal as a benefit to all courts. Procedures, training, tracking, and modifications to the court's CMS will have to occur. It will impact a court whether it is big or small.*	CEAC appreciates the court's input. Because the court is currently preserving 100 percent of its court records for 2016, it would not need to make any changes to its records management practices by July 1, 2016. To take advantage of the reduction in court records that must be preserved under the new sampling program, the court may make implementing changes at a later date.
8.	Superior Court of Riverside County by Marita Ford, Senior Management Analyst	A	No specific comment.	CEAC appreciates the court's support.
9.	Superior Court of Solano County by Lezlee Offutt, Supervising LPC - Records	A	Extremely glad the rule is now retroactive to those courts whom have been destroying records. This will alleviate numerous cases in storage. Changing the rotation assignment years is not burdensome since retroactive applies.	CEAC appreciates the court's input.

Item number: 02a

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Recommend JC approval (has circulated for comment)**

RUPRO Meeting: May 18, 2016

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Civil Jury Instructions: Recommend to Judicial Council That It Approve Publication of Legally Significant Additions and Revisions (Action Required)

Committee or other entity submitting the proposal:
Advisory Commitee on Civil Jury Instructions

Staff contact (name, phone and e-mail): Bruce Greenlee, Attorney, Legal Services 415-865-7698 bruce.greenlee@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: Maintaining and expanding CACI (the committee's ongoing project)
Project description from annual agenda:

If requesting July 1 or out of cycle, explain:
Rules 2.1050(d) and 10.58(a) of the California Rules of Court require the advisory committee to update, amend, and add topics to CACI on a regular basis and to submit its recommendations to the council for approval. Jury instructions are currently revised twice a year, and more often if necessary. Release 28 is the first CACI release for 2016. Release 27 was approved by the Judicial Council on December 13, 2015.

Additional Information: (To facilitate RUPRO's review of your proposal, please include any relevant information not contained in the attached summary.)
In addition to recommending approval of 48 new and revised CACI instructions and verdict forms to the council, the advisory committee also requests that RUPRO give final approval to 49 revised CACI instructions under the provisions of the guidelines adopted on December 19, 2006 regarding Jury Instructions Corrections and Technical and Minor Substantive Changes.

This proposal is presented in two parts because of the extensive controversy generated by proposed changes to CACI No. 2334, Bad Faith (Third Party)—Refusal to Accept Reasonable Settlement Within Liability Policy Limits—Essential Factual Elements. The principal report covers all instructions proposed except 2334. A separate chart includes the committee's responses to all comments other than 2334. There is a supplemental report covering 2334 only A separate document includes the committee's repsonses to the many comments received on 2334..

JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue · San Francisco, California 94102-3688

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REPORT TO THE JUDICIAL COUNCIL

For business meeting on: June 24, 2016

Title
Jury Instructions: New and Revised Civil Jury Instructions and Verdict Forms

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

Recommended by
Advisory Committee on Civil Jury Instructions
Hon. Martin J. Tangeman, Chair

Agenda Item Type
Action Required

Effective Date
June 24, 2016

Date of Report
May 6, 2016

Contact
Bruce Greenlee, 415-865-7698
bruce.greenlee@jud.ca.gov

Executive Summary

The Advisory Committee on Civil Jury Instructions recommends approving for publication the new and revised civil jury instructions and verdict forms prepared by the committee.

Recommendation

The Advisory Committee on Civil Jury Instructions recommends that the Judicial Council, effective June 24, 2016, approve for publication under rules 2.1050 and 10.58 of the California Rules of Court the civil jury instructions prepared by the committee. On Judicial Council approval, the instructions will be published in the official June supplement to the 2016 edition of the *Judicial Council of California Civil Jury Instructions*.

A table of contents and the proposed new and revised civil jury instructions and verdict forms are attached at pages 47–201.

Previous Council Action

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

This is the 28th release of *CACI.* The council approved *CACI* release 27 at its December 2015 meeting.

Rationale for Recommendation

The committee recommends proposed revisions to the following 40 instructions and verdict forms: 426, 461, 1100, 1123, 1700, 1701, 1702, 1703, 1704, 1705, 1722, 2020, 2021, 2332, 2334, 2505, 2506, 2512, 3020, 3021, 3060, 3710, 3923, 4000, 4005, 4013, 4200, 4201, 4202, 4203, 4204, 4205, 4206, 4207, 4208, VF-4200, VF-4201, VF-4202, 4603, and 5018. The committee further recommends addition of 8 new instructions: 440, 450C, 1248, 2210, 3051, 4560, 4561, and 4606.

The Judicial Council's Rules and Projects Committee (RUPRO) has also approved changes to 49 additional instructions under a delegation of authority from the council to RUPRO.[2]

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

New instructions

Two recent cases, *Green v. County of Riverside*[3] and *Hayes v. County of San Diego*,[4] address the issue of the reasonableness of the use of lethal force in law enforcement and the extent to which officers' decisions in the lead-up to the use of force affect the reasonableness determination.

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

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

Under the implementing guidelines that RUPRO approved on December 14, 2006, which were submitted to the council on February 15, 2007, RUPRO has the final authority to approve (among other things) additional cases and statutes cited in the Sources and Authority and additions or changes to the Directions for Use.

[3] *Green v. County of Riverside* (2015) 238 Cal.App.4th 1363.

[4] *Hayes v. County of San Diego* (2013) 57 Cal.4th 622.

Under *Hayes*, California law differs from federal constitutional and civil rights law on this issue. Proposed new CACI No. 440, *Unreasonable Force by Law Enforcement Officer in Arrest or Other Seizure—Essential Factual Elements,* presents the standard under California negligence law. Current CACI No. 3020, *Excessive Use of Force—Unreasonable Arrest or Other Seizure—Essential Factual Elements,* presents the standard under federal law.

Several recent cases[5] address the doctrine of negligent undertaking, which is set forth in the Restatement Second of Torts, section 324A. A negligent undertaking is a variation on the Good Samaritan rule of CACI No. 450A. CACI No. 450A is for use in a case in which the person aided is the injured plaintiff.[6] Proposed new CACI No. 450C, *Negligent Undertaking,* is for use in a case in which the defendant's failure to exercise reasonable care in acting to aid one person has resulted in harm to another person.

Another recent case, *Fiorini v. City Brewing Co., LLC*,[7] discussed Civil Code section 1714.45, which provides an affirmative defense for injury from an inherently unsafe consumer product. Proposed new CACI No. 1248, *Affirmative Defense—Inherently Unsafe Consumer Product,* addresses this statute.

An attorney informed the committee that in preparing for a trial, counsel and court realized that there was no existing *CACI* affirmative defense instruction to respond to CACI No. 2201, *Intentional Interference With Contractual Relations—Essential Factual Elements*. A defense allows the defendant to claim that its conduct was justified if the defendant acted to protect its own financial interest, acted reasonably and in good faith to protect it, and used appropriate means to protect it. The committee proposes new CACI No. 2210, *Affirmative Defense—Privilege to Protect Own Financial Interest*.

An active area of constitutional law is the wrongful, warrantless removal of a child from parental custody by social services. Three 2015 Ninth Circuit cases involved this claim,[8] as well as a 2012 California case.[9] In response, the committee proposes new CACI No. 3051, *Unlawful Removal of Child From Parental Custody Without a Warrant—Essential Factual Elements*.

For some time, the committee has been looking at the issue of claims involving unlicensed contractors under Business and Professions Code section 7031 for the Construction Law series. But there was no clear indication of any jury role in resolving these cases. But a recent case,

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[5] See *Scott v. C. R. Bard, Inc.* (2014) 231 Cal.App.4th 763 and *Conti v. Watchtower Bible & Tract Society of New York, Inc.* (2015) 235 Cal.App.4th 1214.

[6] See Restatement 2d of Torts, § 323.

[7] *Fiorini v. City Brewing Co., LLC* (2014) 231 Cal.App.4th 306.

[8] *Kirkpatrick v. County of Washoe* (9th Cir. 2015) 792 F.3d 1184; *Watson v. City of San Jose* (9th Cir. 2015) 800 F.3d 1135; *Jones v. County of L.A.* (9th Cir. 2015) 802 F.3d 990.

[9] *Arce v. Childrens Hospital Los Angeles* (2012) 211 Cal.App.4th 1455.

Jeff Tracy, Inc. v. City of Pico Rivera[10] did identify an issue of fact to be resolved by the jury. The committee now proposes two new instructions, CACI No. 4560, *Recovery of Payments to Unlicensed Contractor*, and CACI No. 4561, *Damages—All Payments Made to Unlicensed Contractor*, for use in unlicensed contractor cases.

In release 26 (June 2015), the council approved a new series on Whistleblower Protection (CACI No. 4600 et seq.). The committee now proposes expanding the series with an instruction under Health and Safety Code section 1278.5, which creates a private right of action for a patient or medical professional who was retaliated against for exercising enumerated rights with regard to unsafe conditions in a medical facility. The committee proposes new CACI No. 4606, *Whistleblower Protection—Unsafe Patient Care and Conditions—Essential Factual Elements*.

CACI Nos. 1700–1705: elements of defamation claims

A committee member judge wondered why the CACI defamation instructions did not include an element that the communication was unprivileged. In researching a demurrer on defamation (libel), she realized that CACI No. 1702, *Defamation per se—Essential Factual Elements (Private Figure—Matter of Public Concern)*, did not have an element that the alleged defamatory statement was "unprivileged." She correctly noted that whether or not a statement is unprivileged is an element of a defamation cause of action.[11]

But an element that simply says that the communication was "unprivileged" would mean nothing to a jury. A specific privilege would have to be expressed in plain English.

The privilege that is usually at issue in a defamation case is the common interest privilege of Civil Code section 47(c), which is the subject of CACI No. 1723, *Common Interest Privilege—Malice*. For this privilege, the defense must raise the possible application of the privilege. The plaintiff then has to prove malice to defeat the privilege.[12] If the common interest privilege is alleged, CACI No. 1723 must be given to state the "unprivileged" element of the basic claim.

To better guide the court and counsel with regard to lack of privilege, the interplay between the defamation essential factual elements instructions (CACI Nos. 1700−1705) and CACI No. 1723 is now explained in the Directions for Use to each of the essential factual elements instructions.

CACI No. 2505, *Retaliation—Essential Factual Elements*

Changes are proposed to CACI No. 2505 based on three different sources: a request from a committee member trial judge, a response to 2015 legislation, and a response to a recent unpublished case.

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[10] *Jeff Tracy, Inc. v. City of Pico Rivera* (2015) 240 Cal.App.4th 510.

[11] *Hui v. Sturbaum* (2014) 222 Cal.App.4th 1109, 1118.

[12] *Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1203.

In *Miller v. Department of Corrections*,[13] the California Supreme Court held that an employee is protected against retaliation if the employee reasonably and in good faith believed that what he or she was opposing constituted unlawful employer conduct such as sexual harassment or sexual discrimination, even if it is ultimately determined that no violation occurred. The member-judge reported that this situation arises often. She requested that the point be included in the text of the instruction. A new paragraph is proposed at the end of the instruction to set forth this rule.

In *Nealy v. City of Santa Monica*,[14] the court held that activity protected from retaliation does not include a mere request for reasonable accommodation. This holding has now been reversed by statute. In Assembly Bill 987,[15] Government Code section 12940, subdivisions (*l*) (religious accommodation) and (m) (disability accommodation) were amended to make it an unlawful practice

> [f]or an employer or other entity covered by this part to . . . retaliate or otherwise discriminate against a person for requesting accommodation under this subdivision, regardless of whether the request was granted.

This new rule is now noted in the Directions for Use, and the excerpt from *Nealy* has been removed from the Sources and Authority.

Finally, the recent unpublished case of *Moore v. JMK Golf* [16] had a result that caused the committee some significant concerns. In a FEHA case, the jury failed to grasp the difference between the two causation elements: causation between the protected activity and the adverse action, and that the adverse action was a substantial factor in causing harm.[17] The jury found for the plaintiff on the first causation element, finding that her pregnancy was a motivating reason for her dismissal. But it found that her dismissal was not a substantial factor in causing her harm. This result would seem to be impossible given that lost future income was clearly implicated.

While the difference between the two causation elements is clearly noted in the Directions for Use, the committee wondered if anything more could be done to the instruction itself to avoid this confusion. The committee proposes a small change to the substantial-factor element 5. The element currently reads:

> 5. That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.

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[13] *Miller v. Department of Corr.* (2005) 36 Cal.4th 446, 473–474.

[14] *Nealy v. City of Santa Monica* (2015) 234 Cal.App.4th 359, 381.

[15] Stats. 2015, ch. 122.

[16] *Moore v. JMK Golf* (Nov. 18, 2015, H039522) 2015 Cal.App.Unpub. LEXIS 8286.

[17] See *Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal.App.4th 686, 713.

The proposed change would make element 5 read:

> 5. That [*name of defendant*]'s [decision to [discharge/demote/[*specify other adverse employment action*] [*name of plaintiff*] was a substantial factor in causing [him/her] harm.

It is hoped that this change will focus the attention of the jury more properly on the ultimate harm from the adverse action.

CACI No. 2334: *Bad Faith (Third Party)—Refusal to Accept Reasonable Settlement Within Liability Policy Limits—Essential Factual Elements*

The committee's proposal to revise this instruction generated major controversy, resulting in receipt of over 170 comment letters. This instruction is the subject of a separate report and comment document.

CACI No. 3710: *Ratification*

A judge pointed out that in a 2012 employment harassment case,[18] the court did not give the first element of CACI No. 3710 on ratification. This element requires that the person whose prior acts were subsequently ratified intended to act on behalf of the principal. The judge asked for the committee's thoughts on the court's decision.

The committee concluded that the court was correct in not giving element 1. If in an employment case the claim is that the employer subsequently ratified the harassing conduct of a supervisor or coemployee (such as by refusing to discipline the harasser), the harasser's intent with regard to agency is irrelevant. This point is now made in the Directions for Use.

But the committee also concluded that intent was not actually required in a traditional principal-agent transaction either. According to case law, what is required is that the agent have purported to act on behalf of the principal in making the representation.[19] Element 1 has been revised accordingly.

Some additional changes to the instruction are also proposed. The initial representation must not have been authorized by the principal; otherwise there would be no need for subsequent ratification. While lack of initial authorization is implicit in ratification, the committee has decided to make it explicit in the instruction.

Finally, the principal must have learned all the material facts of the transaction and the agent's role in it before a ratification can be found.[20] This requirement has been added to element 2.

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[18] *Ventura v. ABM Industries Inc.* (2012) 212 Cal.App.4th 258.

[19] *Rakestraw v. Rodrigues* (1972) 8 Cal.3d 67, 73.

[20] *Bate v. Marsteller* (1959) 175 Cal.App.2d 573, 582.

CACI Nos. 4000, 4005, 4013: Lanterman-Petris-Short Act instructions

An Orange County deputy counsel requested changes to three Lanterman-Petris-Short Act instructions. For CACI No. 4000, *Conservatorship—Essential Factual Elements,* the attorney pointed out that there is a split of authority as to whether the third element—that the proposed conservatee is unwilling or unable voluntarily to accept meaningful treatment—must be shown. This element has been made optional and the split is explained in the Directions for Use.

With regard to CACI No. 4005, *Obligation to Prove—Reasonable Doubt,* the attorney argued that the presumption that the proposed conservatee is not gravely disabled (in the first sentence of the instruction) has been undermined by subsequent California Supreme Court decisions. The committee thought that the attorney made a very strong case in support of his position. However, no court has yet expressly stated that there is no presumption. The committee elected to leave the presumption in the instruction, but to present the attorney's argument briefly in the Directions for Use.

Finally, the attorney called the committee's attention to 2015 legislation that significantly changed the standards for disqualifying a conservatee from voting. Instead of "unable to complete an affidavit of voter registration per Elections Code section 2150," it is now "cannot communicate, with or without reasonable accommodations, a desire to participate in the voting process."[21] CACI No. 4013, renamed *Disqualification From Voting,* has been rewritten to reflect the new standards.

Uniform Voidable Transfers Act series (CACI No. 4200 et seq.)

Legislation in 2015 changed the name of the Uniform Fraudulent Transfer Act to the Uniform Voidable Transactions Act and made other changes throughout the act.[22] The primary substantive thrust of the legislation was to take the emphasis off of fraud in order to set aside a transfer that prejudiced creditors. Instead of "fraudulent," the transfer is now just "voidable."[23]

The legislation actually made few changes that affected jury instructions. The required changes to *CACI* are more cosmetic than substantive. Nevertheless, in response to the legislation, some changes have been made to all of the instructions and verdict forms in the series.

Comments, Alternatives Considered, and Policy Implications

The proposed additions and revisions to *CACI* circulated for comment from January 25 to March 4, 2016. Comments were received from 179 different commentators. Of these, 168 expressed opposition to the proposed changes to CACI No. 2334. Of these 168, 97 letters were

[21] See Sen. Bill 589, Stats. 2015, ch. 736.

[22] See Sen. Bill 161, Stats. 2015, ch. 44.

[23] Nevertheless, fraud remains as one of the grounds to void a transfer. See Civ. Code, § 3439.04(a)(1); CACI No. 4200, renamed *Actual Intent to Hinder, Delay, or Defraud a Creditor—Essential Factual Elements*.

identical except for the identity of the commentator;[24] 21 were almost identical, but contained slight variations; and 50 were different letters drafted by the commentators. There were three letters generally supporting the changes to CACI No. 2334. Only 12 commentators addressed instructions other than CACI No. 2334.

The committee evaluated all comments and, as a result, revised some of the instructions, including CACI No. 2334. Two instructions, proposed new CACI No. 2548, *Disability Discrimination—Refusal to Make Reasonable Accommodation in Housing*, and current CACI No. 3040, *Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Substantial Risk of Serious Harm*, were dropped from the release based on the comments. Two commentators on CACI No. 2548 raised numerous concerns and issues that the committee had not considered. With regard to CACI No. 3040, a commentator called the committee's attention to the fact that the Ninth Circuit had granted review en banc for the case that had caused the committee to revise the instruction. These instructions will be considered again in the next release cycle.

A chart summarizing all comments received on the instructions (except CACI No. 2334) and the committee's responses is attached at pages 10–46. A separate document summarizing the comments received on CACI No. 2334 and the committee's responses is attached to the committee's supplemental report on that instruction.

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

Implementation Requirements, Costs, and Operational Impacts

No implementation costs are associated with this proposal. To the contrary, under the publication agreement, the official publisher, LexisNexis, will publish a supplement to the 2016 edition and pay royalties to the Judicial Council. Other licensing agreements with other publishers provide additional royalties.

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

[24] This is a template letter that the Consumer Attorneys of California sent to their members with a request to forward it on to the committee.

Attachments

1. Chart of comments, at pages 10–46
2. Table of Contents and CACI instructions at pages 47-201

Instruction	Commentator	Comment	Committee Response
426, *Negligent Hiring, Supervision, or Retention of Employee*	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	Some of the brackets in the instruction appear to be misplaced. In element 2, we would delete one of the opening brackets before "was" and the closing bracket after "incompetent," so it reads: "That [*name of employee*] [was/became] [unfit/ [or] incompetent/*other particular risk*] to perform the work for which [he/she] was hired;	There is a bracketing error, which has been corrected. The "other particular risk" is an alternative to all of the words currently in the element, including "to perform the work for which s/he was hired.
		In element 3, we would delete one of the opening brackets before "was," the closing bracket after "incompetent," one of the opening brackets before "unfitness," and the closing bracket after "incompetence," so it reads: "That [*name of employer defendant*] knew or should have known that [*name of employee*] [was/became] [unfit/ [or] incompetent/*other particular risk*] and that this [unfitness/ [or]incompetence/*other particular risk*] created a particular risk to others;"	The bracketing depends on whether the "other particular risk" can be expressed in words that don't require "was/became." In the first instance in element 3, for the other risk, one could want "had a propensity for molesting students." That doesn't follow from was/became," so it is bracketed correctly. Because the second instance does not follow "was/became," the "other particular risk" would have to be expressed as a single noun. So the bracketing has been changes as suggested.

Instruction	Commentator	Comment	Committee Response
		In element 4, we would delete one of the opening brackets before "unfitness" and the closing bracket after "incompetence," so it reads: "That [*name of employee*]'s [unfitness/ [or] incompetence/*other particular risk*] harmed[*name of plaintiff*]; and" We believe that these modification are consistent with element 5 where there are no double brackets around "[hiring/ supervising/ [or] retaining].	The bracketing has been changed as suggested. There is no structural similarity between elements 2. 3, and 4 on the one hand, and element 5 on the other.
		We suggest adding authority to the Sources and Authority supporting the addition of the optional language "other particular risk."	The case that led the committee to propose this change was depublished. Nevertheless, the committee believes that other risks are possible besides unfitness and incompetence.
440, *Unreasonable Force by Law Enforcement Officer*	Misha D. Igra, Supervising Deputy Attorney General, California Department of Justice	As written, the Directions for Use explain that sections (a) through (c) of the proposed new jury instruction are referred to as the "*Graham* Factors." The proposed factor (d), relating to the officer's conduct leading up to the need for force, should also track *Graham v. Connor* (1989) 490 U.S. 386. Specifically, that case provides that "the 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the	The committtee declines to make this change because the proposed revised language is not balanced; it overly emphasizes the law enforcement position.

Instruction	Commentator	Comment	Committee Response
		scene, rather than with the 20/20 vision of hindsight." (*Graham*, 490 U.S. at 396.) The High Court instructed that "reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." (*Id.* at 396-397.) Proposed Alternative Language: factor (d) should be revised as follows: [(d) [Name of defendant]'s tactical conduct and decisions before using [deadly] force on [name of plaintiff], <u>allowing for the fact that peace officers are forced to make split-second judgments in uncertain situations about the amount of force that is necessary</u>] This revision is consistent with the sources and authority cited in support of the new instruction. "The most important of these [Graham factors, above] is whether the suspect posed an immediate threat to the officers or others, *as measured objectively under the circumstances*." (*Mendoza v. City of West Covina* (2012) 206 Cal.App.4th 702, 712 [emphasis added].)	

Instruction	Commentator	Comment	Committee Response
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	Agree, except we would delete the word "reasonably" in factor (a) as superfluous.	The committee sees the commentator's point. But "reasonably" is also used in *Graham* factor 1 in CACI Nos. 1305, *Battery by Peace Officer*, and 3020, *Excessive Use of Force—Unreasonable Arrest or Other Seizure—Essential Factual Elements*. The committee prefers that the three instructions be worded the same. The point is not sufficiently important to change all three instructions.
450C, *Negligent Undertaking*	Orange County Bar Association, by Todd G. Friedland, President	Elements should more closely track the language of the elements from *Paz v. State of California* (2000) 22 Cal.4th, 550, 553, 559 and Restatement 342A, especially elements one and two. The new instruction uses the terms "steps" but I only find the term "steps" one time in the *Paz* case. There is no use of the term "steps" in the Restatement Second of Torts, and none in the section of *Paz* case where the elements are stated. I think using the term "steps" is more confusing than using the terms actions or services. Suggested revised version:	The committee agrees that "took steps," while a better plain-English expression, is not quite accurate. "Rendered services" is a narrower concept. The committee has made this change.

Instruction	Commentator	Comment	Committee Response
		"[*Name of plaintiff*] claims that [*name of defendant*] is responsible for [*name of plaintiff]*'s harm because [*name of defendant*] failed to exercise reasonable care in taking action or rendering services to others. 1. That [*name of defendant*] voluntarily, or for a charge, took action or rendered services for another; 2. That [*name of defendant*]'s actions or services were of a kind that [*name of defendant*] should have recognized as needed for the protection of [*name of third person*] including [*name of plaintiff.*]; 3. That [*name of defendant*] failed to exercise reasonable care in the actions taken or services provided; (and) "5.[(b) That [*name of defendant*]'s actions or services were done to perform a duty that [*name of defendant*] owed to third persons including [*name of plaintiff*];] [(c) That [*name of plaintiff*] suffered harm because [*name of third person*] or [*name of plaintiff*] relied on [*name of defendant*]'s actions or services. Elements 4 and 5(a) unchanged.	

Instruction	Commentator	Comment	Committee Response
1123, *Affirmative Defense—Design Immunity*	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	We consider both the proposed new optional language "[its/specifically delegated]" in element 1 and the proposed new third paragraph in the Directions for Use confusing and unnecessary, so we would delete them. Current element 1 adequately states the requirement that the body or employee must have exercised discretionary authority. One cannot exercise discretionary authority that one does not have. The proposed optional language and the proposed new paragraph in the Directions for Use explaining how to select between "its" and "specifically delegated" seem to suggest that only a governing body can have its own discretionary authority, and any other body or employee can have only discretion specifically delegated, presumably by a governing body. The authorities cited in the Sources and Authority do not seem to support this proposition.	The committee does not find the language confusing. It is an effort to express "vested" and to explain that authority cannot be implied.
2020, *Public Nuisance*, and 2021, *Private Nuisance*	Orange County Bar Association, by Todd G. Friedland, President	The proposed revisions to Instructions 2020 and 2021 are being proposed based on two cases from the 1940s, and thus it is unclear why these changes now.	The proposed revisions are in response to a request from an attorney who had a case that involved a fire hazard, but no fire had happened yet.
		The proposed revisions are too limiting, and incorrectly condition the "fire hazard" or "potentially dangerous condition" on being hazardous or	The essence of a private nuisance (CACI No. 2021) is interference with the plaintiff's land.

Instruction	Commentator	Comment	Committee Response
		dangerous to "plaintiff's property." This is a misstatement of the law. Propose the following alternative language: "[was/is] a hazard or other dangerous or deleterious condition."	So removing that qualifier in 2021, would not be right. The essence of a public nuisance (CACI No. 2020) is a condition that is harmful (or potentially so) to a substantial number of people. But element 6 requires that the plaintiff suffer harm different from that suffered by the general public. So there has to be some particular danger to the plaintiff. Hence, no change should be made to 2020 either.
		Change the first option for element 2 in the existing instructions as follows: "was/is harmful to health, including but not limited to the illegal sale of controlled substances, so as not to interfere with the comfortable enjoyment of life or property [or]."	The committee does not find this more specific language to be appropriate.
		The second option should similarly be changed to read as follows: "was/is indecent or offensive to the senses, so as to interfere with the comfortable enjoyment of life or property."	Interference with the enjoyment of property is expressed in element 3 of both instructions.

Instruction	Commentator	Comment	Committee Response
		Last, the third condition should be modified by changing the word “was” an obstruction to “was/is” an obstruction.	The committee does not see a need for both “was” and “is.”
2332, *Bad Faith (First Party)—Failure to Properly Investigate Claim−Essential Factual Elements*	Montie S. Day, Attorney at Law, Williams	The words "prompt", "promptly," and "delaying," as used in several subsections of Insurance Code Section 790.03(h) describing deceptive insurance claims practices, have actual and significant meaning. I have been dealing with the fact that in the automobile insurance cases, the insurance company delays and refuses to "promptly" conduct the proper investigation and uses such deceptive claim tactic for the purpose of continuing to damage unless the claimant accepts the settlement offer and/or settles the case for a "lowball" figure. I suggest the following modification be made to add the words necessary to complete the instruction: A. In the first paragraph, add the word “promptly” so that it reads: “promptly conduct a proper investigation," or, in the alternative: "failing to conduct a prompt and proper investigation ... " B. In element "3," add the word “prompt” so that it reads: "unreasonable failed to promptly conduct a full, fair and through investigation ... "	The committee agrees that section 790.03(h) can be support for what a proper investigation requires. “Prompt” has been added to element 3. The committee does not believe any change is needed to the opening paragraph. The opening paragraph requires a “proper” investigation. Element 3 refines what is needed for “proper.”

Instruction	Commentator	Comment	Committee Response
	Professor Kenneth S. Klein, California Western School of Law	The jury instruction misstates the law. The change that the Advisory Committee is considering collapses "unreasonably" and "without proper cause" into a single inquiry. Decades of appellate decisions in California hold that an insurer is liable for "bad faith" if acts "unreasonably" or "without proper cause." (*See, e.g., Jordan v. Allstate Ins. Co.* {2007) 148 Cal.App.4th 1062, 1072.) An insurer need not "act without proper cause" and behave "unreasonably" in order to establish liability. Yet, the proposed instruction eliminates this meaningful distinction without any supporting authority.	See response to United Policyholders, below and *Rappaport-Scott v. Interinsurance Exch. of the Auto. Club* (2007) 146 Cal.App.4th 831, 837 [Croskey, J.].)
		I can verify the following from personal experience: Most insurance companies handle most insurance claims fairly and ethically. Some insurance companies, however, handle some insurance claims in bad faith. This is because doing so increases profits. The profit motive to handle insurance claims in bad faith increases with every incremental step eliminating bad faith exposure or increasing the threshold for a successful assertion of bad faith. These proposed revisions incentivize more bad faith claims handling.	Whether or not the commentator is correct in his description of how insurance companies operate, these are policy arguments, which are not considerations in drafting jury instructions.
	Orange County Bar Association, by Todd G.	Change first paragraph to "[*Name of plaintiff*] claims that [*name of defendant*] breached the obligation of good faith and fair dealing and acted unreasonably by	This language has been restored to the opening paragraph.

Instruction	Commentator	Comment	Committee Response
	Friedland, President	failing to conduct a proper investigation of [his/her/its] claim."	
		Change element 2 from "That [*name of plaintiff*] filed a claim" to "That [*name of plaintiff*] filed <u>or presented</u> a claim" to make it clearer.	The committee agreed with the comment and has changed "filed" to "presented a claim."
		Change element 3 to delete the word "unreasonably" because the unreasonable conduct IS failing to properly investigate the claim.	The committee also agreed with this comment and has removed "unreasonably" from element 3.
		Last paragraph, sentence: "To act or fail to act 'unreasonably' means that the insurer had no proper cause for its conduct." should be changed to "[*Name of defendant*] acted, or failed to act, "unreasonably" if [*name of defendant*]'s conduct was without proper cause.". This change is suggested to make the instruction more understandable and clear.	The committee does not find the proposed change to improve clarity.
		The proposed instruction fails to include as an element of the cause of action that the claim was timely filed and filed in compliance with claims procedures contained in the policy: (*See Shoppers Inc. v. Royal Globe Insurance Co.*) or that the insured made a good faith effort to comply with the claims procedures. (*Paulfrey v. Blue Chip Stamps*) [both included in the Sources and Authority to the instruction.]	The committee has added "properly" to element 2. The insured must "properly present" a claim to the insurer.
		This omission is also in 2331 on which we have not been asked to comment but	These instructions were revised (or in the case of

Instruction	Commentator	Comment	Committee Response
		which has been revised. [as have 2330, 2336, 2337 & 2351 (new) on which we have also not been asked to comment.] 2336 element 3 does contain the word "timely" in conjunction with providing notice of a lawsuit.	2351, added) in the last release. Element 2 of 2331 requires notice to the insurer.
		Element 3 parrots the words "full, fair and thorough investigation of all of the bases of" [the claim] from *Jordan v. Allstate*. Other courts have simply required a thorough or proper investigation into relevant facts. The concern is that this language could mislead the jury that all stones must be uncovered or the carrier faces liability for bad faith.	The committee believes that all of the "stones" "full," "fair," and "thorough" (and now "prompt" also) do need to be uncovered.
	United Policyholders, by David B. Goodwin	For the second year in a row, the proposed CACI revisions seek to obscure the distinction in California law that permits an insurer to be found liable on a "bad faith" claim for acting "unreasonably" or "without proper cause." CACI No. 2332—as amended in December 2015, over United Policyholder's objection—conflated these two separate and distinct standards by stating that an insurer can be found to have "acted unreasonably, that is, without proper cause" where it fails to conduct an adequate investigation of an insured's claim. That test has no appellate authority whatsoever supporting it, and is contrary to more than two dozen published California appellate decisions.	The commentator's argument that "unreasonably" and "without proper cause" are two separate tests was considered and rejected in the previous release. "[L]iability in tort arises only if the conduct was unreasonable, that is, without proper cause." (*Rappaport-Scott v. Interinsurance Exch. of the Auto. Club* (2007) 146 Cal.App.4th 831, 837 [Croskey, J.].)

Instruction	Commentator	Comment	Committee Response
		CACI No. 2332 as proposed to be revised inserts as essential factual elements of a bad faith claim for failure to properly investigate a claim that (1) the insured have "filed" a "claim to be compensated" and (2) that the insurer "unreasonably" failed to investigate this claim. The former is confusing—a policyholder "gives notice" of a claim or "tenders" it, but does not "file" a claim; a lay juror could easily decide to reject liability under the mistaken assumption that the policyholder failed to perfect the claim because no "filing" of a claim was involved.	As noted above, the committee agreed and has changed "filed" to "presented."
		Element 3: Delete "unreasonably." Final paragraph: Delete sentence stating "To act or fail to act 'unreasonably' means that the insurer had no proper cause for its conduct." The proposed revision to CACI No. 2332 further misstates California law by stating in element 3 that one of the essential factual elements of bad faith for failure to properly investigate an insured's claim is that the insurer "*unreasonably* failed to conduct a full, fair, and thorough investigation of all of the bases of" the insured's claim. California law does *not require that the insurer's failure to investigate the insured's claim be unreasonable* to	As noted above, the committee agreed and removed "unreasonably" from element 3 and the language from the last paragraph.

Instruction	Commentator	Comment	Committee Response
		maintain a claim for bad faith. None of the cases cited in the "Sources and Authority" section stands for such a requirement. These cases hold only that an insurer cannot reasonably and in good faith reject an insured's claim without conducting an investigation – with no mention made of the basis for failing to so investigate, or any additional requirement of unreasonableness. (See, e.g., *Egan v. Mutual of Omaha Insurance Co.* (1979) 24 Cal.3d 809, 819.) The only case cited that arguably supports the proposed language is *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 880, in which the Court of Appeal wrote in dictum that "[a]n unreasonable failure to investigate amounting to such unfair dealing *may* be found when an insurer fails to consider, or seek to discover, evidence relevant to the issues of liability and damages." This language describes one situation in which a court may conclude that an insurer unreasonably failed to investigate, but falls well short of imposing the burden set forth in the proposed amended jury instruction, that the failure to investigate be unreasonable in order to maintain a claim of bad faith in all instances. Indeed, in that case the court did not rest its ultimate finding of bad faith on any "unreasonable" motivation for the failure to investigate, but instead on the insurer's	

Instruction	Commentator	Comment	Committee Response
		mere failure to conduct a reasonable investigation. Id. at 882.	
2505, *Retaliation—Essential Factual Elements*	California Employment Lawyers Association, by David M. deRubertis	The proposed addition does not link the "reasonable belief' standard to the element it actually relates to (protected activity); rather, it makes it seem as if this concept of "reasonable belief' is not part of the protected activity element. More specifically, by stating "If [***name of plaintiff***] **establishes the elements above,** [he/she] does not have to prove [discrimination/ harassment/*specify other protected activity*] in order to be protected from retaliation," the bolded portion of the proposed instruction suggests to the jury that the "reasonable belief' concept is only considered if and after the jury determines all elements (including protected activity) are met. This is an incorrect analysis. The "reasonable belief standard is part of the protected activity requirement; that is, it is embedded within element one. To properly instruct the jury that "reasonable belief' is part of the protected-activity analysis, the proposed addition could be re-written as follows (with our proposed changes in bold): **To establish that [*name of plaintiff*] [*describe protected activity*],** [he/she] does not have to prove [discrimination/harassment/[*specify other protected activity*]] in order to be	The committee partially agrees with the comment. "If [*name of plaintiff*] establishes the elements above," has been deleted from the instruction**.** The committee does not find it necessary or helpful to include "**To establish that [*name of plaintiff*] [*describe protected activity*]**."

Instruction	Commentator	Comment	Committee Response
		protected from retaliation. If [he/she] [reasonably believed that [*name of defendant*]' s conduct was unlawful/requested a [disability/religious] accommodation, [he/she] may prevail on a retaliation claim even if [he/she] does not **present or prevail** on a separate claim for [discrimination/harassment/*other*].]	
		We suggest including the bold text of "present or prevail" to cover situations in which the plaintiff does not present the underlying harassment or discrimination claim to the jury, but only presents a retaliation claim. The language "prevail on a separate claim for [discrimination/harassment]" would be appropriate if such a claim were actually submitted to the jury. But, if no such claim is submitted to the jury (either because it was not pursued by the plaintiff, was dismissed voluntarily or was adjudicated pre-trial by the court), then only stating "prevail" suggests to the jury that the plaintiff did pursue (but lost) such a claim. That would be improper as an instruction.	The committee has added “present” to the instruction.
		The citation found in the "Sources and Authority" to *Nealy v. City of Santa Monica* (2015) 234 Cal.App.4th 359, 381 should be removed. The Legislative amendments to Government Code section 12940(m)(2) effectively overruled this part of *Nealy*.	The excerpt from *Nealy* has been removed.

Instruction	Commentator	Comment	Committee Response
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	The instruction is revised in accordance with subdivisions (*l*)(4) and (m)(2) of the statute, so we would add those two subdivisions to the citation in the title.	It is not necessary that the title include every relevant statute. The statute that creates the cause of action is sufficient.
		We believe that element 5 should refer to the actual discharge or demotion as a substantial factor rather than the decision as a substantial factor: "That [~~*name of defendant*~~]'s [~~decision to~~ the [discharge/demotion/[*specify other adverse employment action*]] [~~*name of plaintiff*~~] was a substantial factor in causing [*name of plaintiff*]'s [~~him/her~~] harm.	The committee does not find the suggested revision to be an improvement.
		We would change "*specify other protected activity*" within brackets in the second line of the final paragraph to "specify other unlawful activity" because the bracketed language should refer to the discrimination, harassment, or other unlawful activity rather than the plaintiff's protected activity	The committee believes that "unlawful" is a broader word that what is protected by the FEHA.
		The proposed new sentence in the first paragraph in the Directions for Use refers to retaliation or discrimination against a person for requesting "a reasonable accommodation," but subdivisions (*l*)(4) and (m)(2) prohibit retaliation against a person for "requesting accommodation." We would delete the word "reasonable." This is consistent with the final sentence in the instruction, which refers to	The committee has made the proposed change.

Instruction	Commentator	Comment	Committee Response
		requesting "a [disability/religious] accommodation" without the need to show that the requested accommodation was a reasonable accommodation.	
		We suggest adding to the Sources and Authority the following quotation from *Yanowitz v. L'Oreal, USA, Inc.* (2005) 36 Cal.4th 1028, 1043, which we find particularly clear and succinct: "It is well established that a retaliation claim may be brought by an employee who has complained of or opposed conduct that the employee reasonably believes to be discriminatory, even when a court later determines the conduct was not actually prohibited by the FEHA."	The Sources and Authority include an excerpt from *Miller v. Department of Corr.* (2005) 36 Cal.4th 446. 473–474 that makes this point.
		We believe that the quoted language from *Nealy v. City of Santa Monica* (2015) 235 Cal.App.4th 359, 381, is no longer good law in light of recent amendments to Government Code section 12940 prohibiting retaliation because of a request for a disability or religious accommodation, as reflected in the revised instruction.	The language has been deleted
2506, *Limitation on Remedies—After-Acquired Evidence*	California Employment Lawvers Association, by David M. deRubertis	CELA supports the proposed changes.	No response is necessary.
	State Bar of California, Litigation	The proposed revisions change this instruction from an affirmative defense to a limitation on remedies, according	It is not clear if the commentator wants the instruction revoked or

Instruction	Commentator	Comment	Committee Response
	Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	to the title, but the instruction itself is unchanged and does not inform the jury what to do if it finds the three elements are satisfied. The last sentence in the first paragraph in the Directions for Use seems to state that it is not clear how this instruction should be used. In our view, this instruction and the Directions for Use lack sufficient guidance for either the jury or counsel and the court, and should be withdrawn until the law is more certain.	just the changes deferred. An affirmative defense means a bar to liability. That is not the case with this instruction. After-acquired evidence limits the employee's possible recovery, but is not a complete defense to liability. The uncertainty is over whether it is the court or the jury that determines what damages are barred by after-acquired evidence. That does not impact the determination of whether the elements of the limitation have been established.
		The first sentence in the Directions for Use states that the doctrine of after-acquired evidence is an equitable defense. In light of the rule from *Salas v. Sierra Chemical Co.* (2014) 59 Cal.4th 407, 430-431, that the doctrine is not a defense to liability, we consider it more accurate to state that the doctrine can limit remedies. Accordingly, we suggest the following	It is not clear from the comment why a revision is requested. The proposed revision is not in plain English.

Instruction	Commentator	Comment	Committee Response
		modifications to the first sentence in the Directions for Use: "The doctrine of after-acquired evidence doctrine is an equitable defense that is determined by the court based on the facts of the case can limit available relief where, after a termination, the employer learns for the first time about employee wrongdoing that would have led to the discharge in any event. (*Thompson v. Tracor Flight Systems, Inc.* (2001) 86 Cal.App.4th 1156, 1172-1173.)"	
2512, *Limitation on Remedies—Same Decision*	California Employment Lawvers Association, by David M. deRubertis	CELA supports the proposed changes.	No response is necessary.
2548, *Disability Discrimination—Refusal to Make Reasonable Accommodation in Housing*	California Apartment Association, by Heidi Palutke, Research Counsel	Two Separate Instructions for Reasonable Modification and Reasonable Accommodation are Necessary. A reasonable accommodation is distinct from a reasonable modification in that a modification is a structural change's to a tenant's dwelling and an accommodation is an exception to the established policies, procedures or services of the housing provider.	The committee finds that the various comments on this instruction raise important points that have not been considered. Therefore, the committee is withdrawing this instruction from this release. It may be returned to the agenda for the next release cycle.

Instruction	Commentator	Comment	Committee Response
		Element #3 should refer to a "disability", not a "physical condition" since the law protects persons with disabilities, not "conditions" and also applies to mental disabilities.	See response above
		In the case of a "reasonable modification" element #8 should read "That [*defendant*] refused to allow this modification." The proposed text reads "refused to make this accommodation." This is correct in the case of reasonable accommodations, but not modifications.	See response above
	The Law Foundation of Silicon Valley the law firm of Brancart & Brancart, Pescadero the Los Angeles Housing Rights Center California Rural Legal Assistance the Legal Aid Foundation of Los Angeles National Housing Law Project	Courts Look To Cases Construing Federal Fair Housing Laws When Interpreting The Fair Employment And Housing Act. An excellent explication of the reasonable accommodation and reasonable modification provisions of the FHA are set forth in the Joint Statement of the Department of Housing and Urban Development And the Department of Justice on Reasonable Accommodations under the Fair Housing Act (May 17, 2004) ("Joint Statement on Reasonable Accommodations") and the Joint Statement of the Department of Housing and Urban Development And the Department of Justice on Reasonable Modifications under the Fair Housing Act (March 3, 2008), both of which are available on the Department of Justice's website, https://www.justice.gov/crt/us-department-housing-and-urban-	See response above

Instruction	Commentator	Comment	Committee Response
	Inner City Law Center Campbell & Farahani, Los Angeles The Law Office of Michelle Uzeta, Monrovia Western Center on Law and Poverty Neighborhood Legal Services of Los Angeles County Disability Rights California	development. Both would be helpful references in the Source and Authority section.	
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	This instruction should be appropriate for both rental housing and condominiums, so we would delete the word "rental" in element 1.	See response above
		We would make elements 6 and 7 optional by using brackets in the instruction and in the Directions for Use explain when to give those elements.	See response above
3020, *Excessive Use of Force—Unreasonabl*	Misha D. Igra, Supervising Deputy Attorney General, California	As written, the Directions for Use explain that factors (a) through (c) are referred to as the "*Graham* Factors." Factor (c) is constraining, applicable only to active resistance or attempted flight. The	Factors a-c are presented as stated in *Graham*. There is no reason to expand them

Instruction	Commentator	Comment	Committee Response
e Arrest or Other Seizure—Essential Factual Elements	Department of Justice	myriad of situations faced by peace officers that may give rise to an application of force is not so limited, and so the instruction should expressly allow for a wider range of circumstances.	beyond the current language.
		Factor (d) provides only [*specify other factors particular to the case*]. Before turning to this catch-all provision, the model instruction should track the directive from *Graham v. Connor* (1989) 490 U.S. 386, that the "the 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." (*Graham*, 490 U.S. at 396.) The High Court instructed that "reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." (*Id.* at 396-97.) Proposed Alternative Language Factors (c) and (d) should be revised and added as follows: (c) Whether [~~name of~~ plaintiff]'s conduct necessitated a use of force to [gain compliance or control of the plaintiff]/[to protect others from risk of harm] ~~was actively [resisting [arrest/detention]/ [or]~~	The proposed language overly emphasizes the law enforcement position.

Instruction	Commentator	Comment	Committee Response
		~~attempting to avoid [arrest/detention] by flight~~][./; and] [(d) [Name of defendant]'s efforts to temper the severity of a forceful response, allowing for the fact that peace officers are forced to make split-second judgments in uncertain situations about the amount of force that is necessary] [(e) [specify other factors particular to the case]. This revision is consistent with the sources and authority cited in support of the proposed instruction, including *Graham*. "If the officers' conduct required a reaction to fast-paced circumstances presenting competing public safety obligations, the plaintiff must prove intent to harm. (See *Green v. County of Riverside* (2015) 238 Cal.App.4th 1363, 1372.) And, "[plaintiff] was required to prove that the officers acted with a purpose to cause harm to her son." (*Green*, *supra*, 238 Cal.App.4th at p. 1372.)	
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	We would clarify the first sentence in the third paragraph in the Directions for Use as follows: "~~Additional considerations and verdict form questions will be needed~~ The instruction needs to be modified if there is a question of fact . . . ."	The committee now prefers not to simply suggest that an instruction "may need to be modified." Suggesting "additional considerations and verdict form questions"

Instruction	Commentator	Comment	Committee Response
			gives the user more specific information on the issue that may require some modifications.
		We believe that the proposed new fourth paragraph in the Directions for Use goes further than it should by identifying an issue and seeming to offer an answer by citing two statutes, while stating that the answer is unknown. We would delete this paragraph and wait for a case on point.	The committee believes that it is part of its charge to point out unresolved issues. If a case involves the issue, the committee believes that bench and bar would like the issue flagged.
		The proposed new bullet point in the Sources and Authorities quoting *Scott v. Harris* (2007) 550 U.S. 372, 381, footnote 8, relates exclusively to summary judgment and is not relevant to jury instructions given at trial, so we would delete this bullet point.	This language suggests that the US Supreme Court may view the ultimate issue of reasonableness as one of law. The committee believes that CACI users might want to know that.
3021, *Unlawful Arrest by Peace Officer Without a Warrant—Essential Factual Elements*	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	We believe that the jury should be instructed on the probable cause requirement only if the jury is also instructed that the court will decide that issue, so the jury does not decide for itself whether there was probable cause. We therefore would make the language "and without probable cause" in element 1 optional:	The committee agreed and has made this change.

Instruction	Commentator	Comment	Committee Response
		"That [*name of defendant*] arrested [*name of plaintiff*] without a warrant [and without probable cause]:"	
		We would explain in the Directions for Use that this optional language should be given only if the optional paragraph at the end of the instruction is given.	The committee agreed.
		We would modify the optional paragraph at the end of the instruction for clarity as follows: "~~[The law requires that the trial judge, rather than the jury, decide if [*name of plaintiff*] was arrested without probable cause.~~ The plaintiff must also prove that [*name of defendant*] arrested [name of plaintiff] without probable cause. The trial judge, rather than the jury, must decide if [name of defendant] arrested [name of plaintiff] without probable cause. But in order for me to do so, you must first decide:"	The committee sees no improvement with the suggested revised language.
3040, *Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Substantial Risk of Serious Harm*	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	We agree with the revision to this instruction. But note that The Ninth Circuit Court of Appeals granted an en banc hearing in *Castro v. County of Los Angeles* (9th Cir. 2015) 797 F.3d 654 on December 28, 2015, so the prior opinion should not be cited in the Directions for Use and Sources and Authority.	Based on the grant of hearing en banc in *Castro*, the committee has elected not to proceed with changes to this instruction at this time.

Instruction	Commentator	Comment	Committee Response
3051, *Unlawful Removal of Child From Parental Custody Without a Warrant—Essential Factual Elements*	Shawn A. McMillan, Attorney at Law, San Diego	In addition to the proposed new CACI Instruction 3051, you should also craft a new instruction covering circumstances in which government actors present false or misleading evidence to the courts. This is a common occurrence for which no current jury instruction exists. (See *Marshall v. Cty. of San Diego* (2015) 238 Cal.App.4th 1095, 1115.) My firm, and others in the state, regularly litigate and try these "judicial deception" cases. See, e.g., *Fogarty-Hardwick v.Cty. of Orange*, No. G039045, 2010 Cal. App. Unpub. LEXIS 4436, at *10 (Ct. App. June 14, 2010).	This suggestion will be considered in the next release cycle.
		Jury instruction 3051, should be paired with a "nominal" damages instruction. At a minimum, a due process violation gives rise to a constitutional injury. Thus, where the only harm is a technical violation of one's constitutional rights, the jury should be advised that it may award nominal damages.	The committee does not think it likely that a jury instruction will be needed if only nominal damages are available.
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	We would substitute "[*name of plaintiff*]" for "[his/her]" twice in the first line of the instruction for greater clarity.	The committee agreed with once but not twice. The first "[his/her]" follows "name of defendant" so that is technically ambiguous (though there could be no actual confusion given the context). Once the name of the plaintiff is entered for

Instruction	Commentator	Comment	Committee Response
			the first "[his/her]", there is no ambiguity about "[his/her]" in the second spot.
		We would substitute "[*name of defendant*]" for "[he/she] in the second line for the same reason.	The committee agreed and has made the change.
3060, *Unruh Civil Rights Act—Essential Factual Elements*	Inner City Law Center	ICLC strongly supports the addition of "citizenship/primary language/immigration status" to the list of enumerated characteristics in the Unruh Act instruction. This change will bring the instruction into line with the text of the Unruh Act itself (Civil Code section 51). It will also significantly clarify for jurors the range of characteristics that are actionable under the statute. Making this change will help ensure that factfinders fairly evaluate claims of discrimination on the basis of immigration status and primary language.	No response is necessary.
3710, *Ratification*	California Employment Lawvers Association, by David M. deRubertis	CELA supports the proposed changes.	No response is necessary.
	Orange County Bar Association, by Todd G. Friedland, President	In subpart 1, the words "although not authorized to do so" are confusing and unnecessary. We propose deleting that partial sentence.	Ratification comes into play if there was initially no express authority for the agent to do the act. So it is an essential part of the instruction.

Instruction	Commentator	Comment	Committee Response
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	The plaintiff may claim both that the defendant had authorized the agent to act on the defendant's behalf and, alternatively, that the defendant ratified the agent's conduct after the fact. The language "although not authorized to do so" in element 1 would contradict the first part of such a claim, and we believe this language is unnecessary in these instructions. We would delete this language.	This instruction is not for use if there was direct authorization.
		Element 3 largely repeats element 2. We could consolidate the two elements by deleting element 3 and modifying element 2 as follows: "That [*name of defendant*] learned of all the material facts involved in [*name of agent*]'s conduct after it occurred;"	The two elements address two different things. Element 2 means that the principal learned what the agent had done. Element 3 means that the principal learned all of the surrounding facts leading to why the agent did what s/he did. But the committee does see how the two elements might be confusing to the jury and has combined them in a similar, but slightly different way from that suggested.
		The second sentence in the final paragraph refers to the defendant's conduct, which occurred in the past, so	The committee thinks that the present tense is best. The paragraph is explaining what

Instruction	Commentator	Comment	Committee Response
		we would change "keeps" to "kept" and "learns" to "learned" as follows: "Approval can be inferred if [*name of defendant*] voluntarily ~~keeps~~ kept the benefits of [*name of agent*]'s unauthorized conduct after [he/she/it] ~~learns~~ learned of it."	constitutes approval, not referring to the particular events in the case.
3923, *Public Entities—Collateral Source Payments*	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	We would change "shall" to "must" in both the first line and the second line of the instruction. The word "may" in the second line could suggest some discretion, when the statement should be clearly mandatory.	"May" could suggest discretion. "May not" does not.
		We also suggest adding language to clarify the meaning of "speculate," which is not a common word for many jurors, and "benefit," and would modify the final sentence for clarity: "You must award damages in an amount that fully compensates [*name of plaintiff*] for [his/her/its] damages in accordance with instructions from the court. You ~~may~~ must not speculate, wonder, guess, or consider any other possible sources of money or benefit that [*name of plaintiff*] may have received for [his/her/its] harms. After you have returned your verdict the court will make whatever adjustments are necessary in this regard."	The language of this instruction is compelled by Government Code 985(j). The committee is comfortable with minor changes to replace "shall" with "must," and to change "plaintiff" to "[*name of plaintiff*]" per CACI standards. The committee is not comfortable with any further changes from the statute.

Instruction	Commentator	Comment	Committee Response
4005, *Obligation to Prove—Reasonable Doubt*	Orange County Bar Association, by Todd G. Friedland, President	The "Directions for Use" are confusing and not (*sic*) unhelpful. The first paragraph of CACI 4005 correctly states that in LPS proceeding, the LPS respondent is presumed to not be gravely disabled. (See *Conservatorship of Law* (1988) 202 Cal.App.3d 1336, 1340; *Conservatorship of Walker* (1988) 196 Cal.App.3d 1082, 1099.) However, the Directions for Use suggest that this principle "is perhaps open to question" and cite *Conservatorship of Ben C.* (2007) 40 Cal.4th 529, 538 for this proposition on a theory that "an LPS respondent is not entitled to all of the same protections as a criminal defendant." However, that case only held that the appellate review procedures under *Wende* and *Anders* are not applicable in LPS proceedings as they are in criminal cases. Because *Conservatorship of Ben C.* did not address the burden of proof, it is confusing and misleading for the "Directions for Use" to suggest that it undermined that principle as articulated in *Conservatorship of Walker* and *Conservatorship of Law*. "[C]ases are not authority for propositions not considered …." (*People v. Brown* (2012) 54 Cal.4th 314, 330.)	The committee received a very well-crafted argument that *Walker* and *Law* are no longer good law. This commentator disagrees with that argument. While jury instructions should not be revised based solely on well-crafted arguments, the committee does believe that it is worth of mention in the Directions for Use.
4200, *Actual Intent to*	Orange County Bar Association,	At the first Use Note paraphrasing Civil Code section 3439.04(a)(1), it is	The committee disagrees. "Any" is a

Instruction	Commentator	Comment	Committee Response
Hinder, Delay, or Defraud a Creditor—Essential Factual Elements	by Todd G. Friedland, President	suggested that "any" rather than "a" be used in the phrase ". . . with actual intent to hinder, delay, or defraud a creditor," to reflect the language and sense of the statute. Accordingly, the phrase would read, "… with actual intent to hinder, delay, or defraud <u>any</u> creditor."	very good statutory word. That does not make it a good jury instructions word.
4205, *"Insolvency" Explained*	Orange County Bar Association, by Todd G. Friedland, President	At the second paragraph of the Use Note, first sentence, to make it more accurate, it is suggested the sentence be redrafted as follows: "Property, <u>the transfer of which</u> is potentially voidable under the Uniform Voidable Transactions Act (formerly the Uniform Fraudulent Transfer Act), is to be excluded from the computation of the debtor's assets for purposes of determining insolvency."	The committee agreed and has made this change.
4560, *Recovery of Payments to Unlicensed Contractor*	Orange County Bar Association, by Todd G. Friedland, President	At line one of the introductory paragraph, add "applicable to the services being performed" after the term "valid contractor's license."	While the proposed addition may technically be more accurate, the committee finds it to be unnecessary words for an introductory paragraph.
		In the last sentence of the opening paragraph, substitute "each" instead of "both.	There are three elements, so "both" won't work. "All" is the standard word for use with more than two elements.

Instruction	Commentator	Comment	Committee Response
		In element 2, add "applicable to the services being performed" after "valid contractor's license."	The element states "That a valid contractor's license was required *to perform these services*." The committee trusts the jury to understand that if "these services" are for roofing, a plumbing license will not suffice.
		In element three, change to read: "That [*name of defendant*] was compensated for contractor services by the….".	The committee agreed that there is a language problem in element 3. It has to be "performed *for*" and "was compensated *by*."
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	We would change "both" in the second sentence to "all" because there are three (not two) required elements.	Agreed and changed
		We would insert "and" after element 2.	Also agreed
		We would modify element 3 as follows for clarity: "That ~~[name of defendant] performed and was compensated~~ [*name of plaintiff*] paid [*name of defendant*] for contractor services ~~for the [name of plaintiff] as required by~~ performed under the contract;"	The committee agreed that the proposed revised language is better.
		We would modify the final sentence as follows for clarity and because we think this instruction should expressly state that the plaintiff is entitled to recover damages (unless the defendant meets its	While finding that the proposed revised language is more words than necessary to get this point across, "at all times" has been moved

Instruction	Commentator	Comment	Committee Response
		burden of proof), and specifically all compensation paid to the defendant. The following instruction (CACI No. 4561) then would only clarify the meaning of "all compensation paid." "~~[Name of defendant] must then~~ If [*name of plaintiff*] proves these three things, [name of plaintiff] is entitled to recover all compensation [he/she/it] paid to [*name of defendant*]. However, plaintiff is not entitled to recover any compensation if [*name of defendant*] proves that while performing these services, [he/she/it] had a valid contractor's license at all times as required by law."	to modify "while performing."
4561, *Damages—All Payments Made to Unlicensed Contractor*	Orange County Bar Association, by Todd G. Friedland, President	At line one, change the language to read: "A person who pays money under a contract to a person or entity acting as a contractor who is not licensed at all times during performance of the particular services may recover all…"	The committee finds the proposed revised language to be more words than needed.
		In the second paragraph, change the language to read: "for services under the contract and that [*name of defendant*] was acting as an unlicensed contractor at any time during…"	The committee finds the proposed revised language to be more words than needed.
	State Bar of California, Litigation Section, Jury	Our proposed revisions to the prior instruction (CACI No. 4560) make the first sentence of this instruction unnecessary, so we would delete it.	The committee disagreed with the proposed revision to 4560.

Instruction	Commentator	Comment	Committee Response
	Instructions Committee, by Reuben Ginsberg, Chair	Language in the second paragraph in the instruction could be misconstrued to mean that the plaintiff has the burden to prove not only that the plaintiff paid money for services under the contract, but also that defendant was unlicensed. We would modify this paragraph to clarify the defendant's burden of proof: "If you decide that [*name of plaintiff*] has proved that [he/she/it] paid money to [*name of defendant*] for services under the contract and that [*name of defendant*] <u>has failed to prove that</u> [*name of defendant*] was ~~un~~licensed at ~~any~~ <u>all</u> times during performance, then [*name of plaintiff*] is entitled to the return of all amounts paid, not just the amounts paid while [name of defendant] was unlicensed. The fact that [*name of plaintiff*] may have received some or all of the benefits of [*name of defendant*]'s performance does not affect [his/her/its] right to the return of all amounts paid."	The committee agreed with the comment and has revised the language to make it abundantly clear that the contractor has the burden to prove the license.
4603, *Whistleblower Protection—Essential Factual Elements*	California Employment Lawvers Association, by David M. deRubertis	CELA supports the proposed changes.	No response is necessary.
	State Bar of California, Litigation	The proposed revision states that the instruction should be modified "if the retaliation is against a family member of	The committee agreed with the comment and

Instruction	Commentator	Comment	Committee Response
	Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	the person who engaged in the protected activity." Strictly speaking, this is correct, but using the words "family member" first to refer to the employee's family member and then to refer to the employee may be confusing. We would revise the final sentence in the first paragraph of the Directions for Use so that "family member" consistently refers not to the employee but to the employee's family member: "Modifications will also be required if the retaliation is against an employee whose family member ~~of the person who~~ engaged in the protected activity."	has made the proposed change.
4606, *Whistleblower Protection—Unsafe Patient Care and Conditions —Essential Factual Elements*	California Employment Lawvers Association, by David M. deRubertis	CELA's concern about the proposed instruction is that it fails to encompass cases in which the rebuttable presumption of discrimination/retaliation applies. In the experience of CELA members, many cases brought under section 1278.5 have facts that do trigger the rebuttable presumption of Health and Safety Code section 1278.5(d)(l) and, therefore, the standard instruction should incorporate it.	1278.5(e) specifies that the rebuttable presumptions (there is another one in subdivision (c)) affect only the burden of producing evidence. A presumption affecting only the burden of producing evidence ceases to exist when the defendant produces evidence rebutting the presumption, such as a reason for the action other than retaliation. (Evid. Code, § 604.) So juries should not be instructed on

Instruction	Commentator	Comment	Committee Response
			presumptions affecting only the burden of producing evidence. However, the committee has revised the Directions for Use to explain this point.
5018, *Audio or Video Recording and Transcription*	Hon. Alan S. Rosenfield, Judge, Los Angeles Superior Court	I support the proposed revised version of this instruction as I believe that the revision would be helpful to trial judges and juries. There are times when trial judges tell juries during trials about asking for read back of testimony and that the reporter's record (i.e. transcript) must prevail over a juror's notes, and that a deposition transcript may be read to the jury that has the same potential evidentiary value as sworn testimony given in open court. This modification better explains to jurors that there is a distinction between a transcription created by the parties of an audio or audio/visual trial exhibit played as evidence for the jury, and an official transcript or read back by a certified shorthand reporter.	No response is necessary.
Multiple	Orange County Bar Association, by Todd G. Friedland, President	Agree with all except as noted above.	No response is necessary.

Instruction	Commentator	Comment	Committee Response
Multiple	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	Agree with all except as noted above.	No response is necessary.

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426. Negligent Hiring, Supervision, or Retention of Employee

[*Name of plaintiff***] claims that [he/she] was harmed by [***name of employee***] and that [***name of employer defendant***] is responsible for that harm because [***name of employer defendant***] negligently [hired/ supervised/ [or] retained] [***name of employee***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **[That [***name of employer defendant***] hired [***name of employee***];]**

2. **That [***name of employee***] [[was/became] [unfit/ [or] incompetent] to perform the work for which [he/she] was hired/[*specify other particular risk*]];**

3. **That [***name of employer defendant***] knew or should have known that [***name of employee***] [[was/became] [unfit/ [or] incompetent]/[*other particular risk*]] and that this [unfitness/incompetence [or] [*other particular risk*]] created a particular risk to others;**

4. **That [***name of employee***]'s [unfitness/incompetence [or] [*other particular risk*]] harmed [***name of plaintiff***]; and**

5. **That [***name of employer defendant***]'s negligence in [hiring/ supervising/ [or] retaining] [***name of employee***] was a substantial factor in causing [***name of plaintiff***]'s harm.**

New December 2009; Revised December 2015, June 2016

Directions for Use

Give this instruction if the plaintiff alleges that the employer of an employee who caused harm was negligent in the hiring, supervision, or retention of the employee after actual or constructive notice ~~of~~ that the employee created a particular risk or hazard to others~~'s unfitness~~. For instructions holding the employer vicariously liable (without fault) for the acts of the employee, see the Vicarious Responsibility series, CACI No. 3700 et seq.

Include optional question 1 if the employment relationship between the defendant and the negligent person is contested. (See *Jackson v. AEG Live, LLC* (2015) 233 Cal.App.4th 1156, 1185−1189 [183 Cal.Rptr.3d 394].) It appears that liability may also be imposed on the hirer of an independent contractor for the negligent selection of the contractor. (See *Noble v. Sears, Roebuck & Co.* (1973) 33 Cal.App.3d 654, 662–663 [109 Cal.Rptr. 269].) Therefore, it would not seem to be necessary to instruct on the test to determine whether the relationship is one of employer-employee or hirer-independent contractor. (See CACI No. 3704, *Existence of "Employee" Status Disputed*.)

Choose "became" in elements 2 and 3 in a claim for negligent retention.

In most cases, "unfitness" or "incompetence" (or both) will adequately describe the particular risk that

the employee represents. However, there may be cases in which neither word adequately describes the risk that the employer should have known about.

Sources and Authority

- "California case law recognizes the theory that an employer can be liable to a third person for negligently hiring, supervising, or retaining an unfit employee." (*Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 1054 [58 Cal.Rptr.2d 122].)

- "Negligence liability will be imposed on an employer if it 'knew or should have known that hiring the employee created a particular risk or hazard and that particular harm materializes.' " (*Phillips v. TLC Plumbing, Inc.* (2009) 172 Cal.App.4th 1133, 1139 [91 Cal.Rptr.3d 864].)

- "Liability for negligent supervision and/or retention of an employee is one of direct liability for negligence, not vicarious liability." (*Delfino v. Agilent Technologies, Inc.* (2006) 145 Cal.App.4th 790, 815 [52 Cal.Rptr.3d 376].)

- "Liability for negligent hiring and supervision is based upon the reasoning that if an enterprise hires individuals with characteristics which might pose a danger to customers or other employees, the enterprise should bear the loss caused by the wrongdoing of its incompetent or unfit employees. The tort has developed in California in factual settings where the plaintiff's injury occurred in the workplace, or the contact between the plaintiff and the employee was generated by the employment relationship." (*Mendoza v. City of Los Angeles* (1998) 66 Cal.App.4th 1333, 1339–1340 [78 Cal.Rptr.2d 525].)

- "To establish negligent supervision, a plaintiff must show that a person in a supervisorial position over the actor had prior knowledge of the actor's propensity to do the bad act." (*Z.V. v. County of Riverside* (2015) 238 Cal.App.4th 889, 902 [189 Cal.Rptr.3d 570]~~We are cited to no authority, nor have we found any authority basing liability on lack of, or on inadequate, supervision, in the absence of knowledge by the principal that the agent or servant was a person who could not be trusted to act properly without being supervised." (*Noble*, *supra*, 33 Cal.App.3d at p. 664~~.)

- "Apparently, [defendant] had no actual knowledge of [the employee]'s past. But the evidence recounted above presents triable issues of material fact regarding whether the [defendant] had reason to believe [the employee] was unfit or whether the [defendant] failed to use reasonable care in investigating [the employee]." (*Evan F. v. Hughson United Methodist Church* (1992) 8 Cal.App.4th 828, 843 [10 Cal.Rptr.2d 748]; cf. *Flores v. AutoZone West Inc.* (2008) 161 Cal.App.4th 373, 384–386 [74 Cal.Rptr.3d 178] [employer had no duty to investigate and discover that job applicant had a juvenile delinquency record].)

- "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 citations omitted.)

- "[A] public school district may be vicariously liable under [Government Code] section 815.2 for the negligence of administrators or supervisors in hiring, supervising and retaining a school employee who sexually harasses and abuses a student." (*C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861, 879 [138 Cal.Rptr.3d 1, 270 P.3d 699].)

- "[P]laintiff premises her direct negligence claim on the hospital's alleged failure to properly screen [doctor] before engaging her and to properly supervise her after engaging her. Since hiring and supervising medical personnel, as well as safeguarding incapacitated patients, are clearly within the scope of services for which the hospital is licensed, its alleged failure to do so necessarily states a claim for professional negligence. Accordingly, plaintiff cannot pursue a claim of direct negligence against the hospital." (*So v. Shin* (2013) 212 Cal.App.4th 652, 668 [151 Cal.Rptr.3d 257].)

- "[Asking] whether [defendant] hired [employee] was necessary given the dispute over who hired [employee]—[defendant] or [decedent]. As the trial court noted, 'The employment was neither stipulated nor obvious on its face.' However, if the trial court began the jury instructions or special verdict form with, 'Was [employee] unfit or incompetent to perform the work for which he was hired,' confusion was likely to result as the question assumed a hiring. Therefore, the jury needed to answer the question of whether [defendant] hired [employee] before it could determine if [defendant] negligently hired, retained, or supervised him." (*Jackson, supra*, 233 Cal.App.4th at pp. 1187−1188.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1190

Chin et al., California Practice Guide: Employment Litigation, Ch. 5-H, *Negligence,* ¶ 5:615 et seq. (The Rutter Group)

3 California Torts, Ch. 40B, *Employment Discrimination and Harassment,* § 40B.21 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts*, § 248.12 (Matthew Bender)

10 California Points and Authorities, Ch. 100A, *Employer and Employee: Respondeat Superior*, § 100A.22 (Matthew Bender)

440. Unreasonable Force by Law Enforcement Officer in Arrest or Other Seizure—Essential Factual Elements

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A law enforcement officer may use reasonable force to [arrest/detain] a person when the officer has reasonable cause to believe that that person has committed or is committing a crime. However, the officer may use only that degree of force necessary to accomplish the [arrest/detention].

[*Name of plaintiff***] claims that [***name of defendant***] used unreasonable force in [arresting/detaining] [him/her]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. That [*name of defendant***] used force in [arresting/detaining] [***name of plaintiff***];**

2. That the amount of force used by [*name of defendant***] was unreasonable;**

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

5. That [*name of defendant***]'s use of unreasonable force was a substantial factor in causing [***name of plaintiff***]'s harm.**

In deciding whether [*name of defendant***] used unreasonable force, you must consider all of the circumstances of the [arrest/detention] and determine what force a reasonable [***insert type of peace officer***] in [***name of defendant***]'s position would have used under the same or similar circumstances. Among the factors to be considered are the following:**

(a) Whether [*name of plaintiff***] reasonably appeared to pose an immediate threat to the safety of [***name of defendant***] or others;**

(b) The seriousness of the crime at issue;

(c) Whether [*name of plaintiff***] was actively resisting [arrest/detention] or attempting to avoid [arrest/detention] by flight[; and/.]**

[(d) [*Name of defendant***]'s tactical conduct and decisions before using [deadly] force on [***name of plaintiff***].]**

New June 2016

Directions for Use

Use this instruction if the plaintiff makes a negligence claim under state law arising from the force used in effecting an arrest or detention. Such a claim is often combined with a claimed civil rights violation under 42 United States Code section 1983 (See CACI No. 3020, *Excessive Use of Force—Unreasonable Arrest or Other Seizure—Essential Factual Elements.* It might also be combined with a claim for battery. See CACI No. 1305, *Battery by Peace Officer*. For additional authorities on excessive force by a law

enforcement officer, see the Sources and Authority to these two CACI instructions.

Factors (a), (b), and (c) are often referred to as the "*Graham* factors." (See *Graham v. Connor* (1989) 490 U.S. 386, 396 [109 S.Ct. 1865, 104 L.Ed.2d 443].) The *Graham* factors are to be applied under California negligence law. (*Hernandez v. City of Pomona* (2009) 46 Cal.4th 501, 514 [94 Cal. Rptr. 3d 1, 207 P.3d 506].) They are not exclusive (see *Glenn v. Wash. County* (9th Cir. 2011) 661 F.3d 460, 467–468.); additional factors may be added if appropriate to the facts of the case. If negligence, civil rights, and battery claims are all involved, the instructions can be combined so as to give the *Graham* factors only once. A sentence may be added to advise the jury that the factors apply to all three claims.

Give optional factor (d) if the officer's conduct leading up to the need to use force is at issue. Liability can arise if the earlier tactical conduct and decisions show, as part of the totality of circumstances, that the ultimate use of force was unreasonable. In this respect, California negligence law differs from the federal standard under the Fourth Amendment. (*Hayes v. County of San Diego* (2014) 57 Cal. 4th 622, 639 [160 Cal.Rptr.3d 684, 305 P.3d 252].)

Sources and Authority

- Use of Reasonable Force to Arrest. California Penal Code section 835a.

- "Consistent with these principles and the factors the high court has identified, the federal court in this case did not instruct the jury to conduct some abstract or nebulous balancing of competing interests. Instead, as noted above, it instructed the jury to determine the reasonableness of the officers' actions in light of 'the totality of the circumstances at the time,' including 'the severity of the crime at issue, whether the plaintiff posed a reasonable threat to the safety of the officer or others, and whether the plaintiff was actively resisting detention or attempting to escape.' The same consideration of the totality of the circumstances is required in determining reasonableness under California negligence law. Moreover, California's civil jury instructions specifically direct the jury, in determining whether police officers used unreasonable force for purposes of tort liability, to consider the same factors that the high court has identified and that the federal court's instructions in this case set forth. (Judicial Council of Cal. Civ. Jury Instns. (2008) CACI No. 1305.) Thus, plaintiffs err in arguing that the federal and state standards of reasonableness differ in that the former involves a fact finder's balancing of competing interests." (*Hernandez, supra,* 46 Cal.4th at p. 514, internal citation omitted.)

- "Determining whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires a careful balancing of ' "the nature and quality of the intrusion on the individual's Fourth Amendment interests" ' against the countervailing governmental interests at stake. Our Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it. Because '[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application,' however, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." (*Graham, supra,* 490 U.S. at p. 396, internal citations omitted.)

- "The most important of these [*Graham* factors, above] is whether the suspect posed an immediate threat to the officers or others, as measured objectively under the circumstances." (*Mendoza v. City of West Covina* (2012) 206 Cal.App.4th 702, 712 [141 Cal.Rptr.3d 553].)

- "Plaintiff must prove unreasonable force as an element of the tort." (*Edson v. City of Anaheim* (1998) 63 Cal.App.4th 1269, 1272 [74 Cal.Rptr.2d 614].)

- " ' "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. … [T]he question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. …" ' In calculating whether the amount of force was excessive, a trier of fact must recognize that peace officers are often forced to make split-second judgments, in tense circumstances, concerning the amount of force required." (*Brown v. Ransweiler* (2009) 171 Cal.App.4th 516, 527–528 [89 Cal.Rptr.3d 801], internal citations omitted.)

- " '[A]s long as an officer's conduct falls within the range of conduct that is reasonable under the circumstances, there is no requirement that he or she choose the "most reasonable" action or the conduct that is the least likely to cause harm and at the same time the most likely to result in the successful apprehension of a violent suspect, in order to avoid liability for negligence.' " (*Hayes v. County of San Diego* (2014) 57 Cal. 4th 622, 632 [160 Cal. Rptr. 3d 684, 305 P.3d 252].)

- "A police officer's use of deadly force is reasonable if ' " 'the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.' …" …' " (*Brown, supra,* 171 Cal.App.4th at p. 528.)

- "Law enforcement personnel's tactical conduct and decisions preceding the use of deadly force are relevant considerations under California law in determining whether the use of deadly force gives rise to negligence liability. Such liability can arise, for example, if the tactical conduct and decisions show, as part of the totality of circumstances, that the use of deadly force was unreasonable." (*Hayes, supra,* 57 Cal.4th at p. 639.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2010) Torts, § 424

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

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

450C. Negligent Undertaking

[*Name of plaintiff***] claims that [***name of defendant***] is responsible for [***name of plaintiff***]'s harm because [***name of defendant***] failed to exercise reasonable care to protect [***name of third person***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. That [*name of defendant***], voluntarily or for a charge, rendered services for the protection of [***name of third person***];**

2. That these services were of a kind that [*name of defendant***] should have recognized as needed for the protection of [***name of plaintiff***];**

3. That [*name of defendant***] failed to exercise reasonable care in rendering these services;**

4. That [*name of defendant***]'s failure to exercise reasonable care was a substantial factor in causing harm to [***name of plaintiff***]; and**

5. [(a) That [*name of defendant***]'s failure to use reasonable care added to the risk of harm;]**

[or]

[(b) That [*name of defendant***]'s services were rendered to perform a duty that [***name of third person***] owed to third persons including [***name of plaintiff***];]**

[or]

[(c) That [*name of plaintiff***] suffered harm because [***name of third person/* **[or] [***name of plaintiff***] relied on [***name of defendant***]'s services.]**

New June 2016

Directions for Use

This instruction presents the theory of liability known as the "negligent undertaking" rule. (See Restatement Second of Torts, section 324A.) The elements are stated in *Paz v. State of California* (2000) 22 Cal.4th 550, 553 [93 Cal.Rptr.2d 703, 994 P.2d 975].

In *Paz,* the court said that negligent undertaking is "sometimes referred to as the 'Good Samaritan' rule," by which a person generally has no duty to come to the aid of another and cannot be liable for doing so unless the person aiding's acts increased the risk to the person aided or the person aided relied on the person aiding's acts. (*Paz, supra,* 22 Cal.4th at p. 553; see CACI No. 450A, *Good Samaritan—Nonemergency.*) It is perhaps more accurate to say that negligent undertaking is another application of the Good Samaritan rule. CACI No. 450A is for use in a case in which the person aided is

the injured plaintiff. (See Restatement 2d of Torts, § 323.) This instruction is for use in a case in which the defendant's failure to exercise reasonable care in acting to aid one person has resulted in harm to another person.

Select one or more of the three options for element 5 depending on the facts.

Sources and Authority

- Negligent Undertaking. Restatement Second of Torts section 324A.

- "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.)

- "[T]he [Restatement Second of Torts] section 324A theory of liability--sometimes referred to as the "Good Samaritan" rule--is a settled principle firmly rooted in the common law of negligence. Section 324A prescribes the conditions under which a person who undertakes to render services for another may be liable to third persons for physical harm resulting from a failure to act with reasonable care. Liability may exist *if* (a) the failure to exercise reasonable care increased the risk of harm, (b) the undertaking was to perform a duty the other person owed to the third persons, or (c) the harm was suffered because the other person or the third persons relied on the undertaking." (*Paz, supra,* 22 Cal.4th at p. 553, original italics.)

- "Thus, as the traditional theory is articulated in the Restatement, and as we have applied it in other contexts, a negligent undertaking claim of liability to third parties requires evidence that: (1) the actor undertook, gratuitously or for consideration, to render services to another; (2) the services rendered were of a kind the actor should have recognized as necessary for the protection of third persons; (3) the actor failed to exercise reasonable care in the performance of the undertaking; (4) the actor's failure to exercise reasonable care resulted in physical harm to the third persons; and (5) *either* (a) the actor's carelessness increased the risk of such harm, or (b) the actor undertook to perform a duty that the other owed to the third persons, or (c) the harm was suffered because either the other or the third persons relied on the actor's undertaking. [¶] Section 324A's negligent undertaking theory of liability subsumes the well-known elements of any negligence action, viz., duty, breach of duty, proximate cause, and damages." (*Paz, supra,* 22 Cal.4th at p. 559, original italics, internal citation omitted; see also *Scott v. C. R. Bard, Inc.* (2014) 231 Cal.App.4th 763, 775 [180 Cal.Rptr.3d 479] [jury properly instructed on elements as set forth above in *Paz*].)

- "The general rule is that a person who has not created a peril is not liable in tort for failing to take affirmative action to protect another unless they have some relationship that gives rise to a duty to act. However, one who undertakes to aid another is under a duty to exercise due care in acting and is liable if the failure to do so increases the risk of harm or if the harm is suffered because the other relied on the undertaking. Section 324A integrates these two basic principles in its rule." (*Paz. supra,* 22 Cal.4th at pp. 558−559.)

- "[T]he 'negligent undertaking' doctrine, like the special relationship doctrine, is an exception to the 'no duty to aid' rule." (*Conti v. Watchtower Bible & Tract Society of New York, Inc.* (2015) 235 Cal.App.4th 1214, 1231 [186 Cal.Rptr.3d 26].)

- "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.)

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[2][d], [5][c] (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence*, §§ 165.150, 165.241 (Matthew Bender)

461. Strict Liability for Injury Caused by Wild Animal—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***]'s [***insert type of animal***] harmed [him/her] and that [***name of defendant***] is responsible for that harm.**

People who own, keep, or control wild animals are responsible for the harm that these animals cause to others, no matter how carefully they guard or restrain their animals.

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

1. **That [***name of defendant***] owned, kept, or controlled [a/an] [***insert type of animal***];**

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

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

New September 2003; Revised December 2015, June 2016

Directions for Use

Give this instruction to impose strict liability on an animal owner for injuries caused by an animal of a type that is inherently dangerous without the need to show the owner's knowledge of dangerousness. (See *Baugh v. Beatty* (1949) 91 Cal.App.2d 786, 791–792 [205 P.2d 671].) For an instruction for use for a domestic animal if it is alleged that the owner knew or should have known that the animal had a dangerous propensity, see CACI No. 462, *Strict Liability for Injury Caused by Domestic Animal With Dangerous Propensity*. (See *Thomas v. Stenberg* (2012) 206 Cal.App.4th 654, 665 [142 Cal.Rptr.3d 24].) For an instruction on statutory strict liability under the dog-bite statute, see CACI No. 463, *Dog Bite Statute—Essential Factual Elements.*

Whether the determination that the animal that caused injury is a "wild animal" triggering this instruction is a matter of law for the court or can be a question of fact for the jury has apparently not been addressed by the courts.

Sources and Authority

- "The keeper of an animal of a species dangerous by nature … is liable, without wrongful intent or negligence, for damage to others resulting from such a propensity. The liability of the keeper is absolute, for '[the] gist of the action is not the manner of keeping the vicious animal, but the keeping him at all with knowledge of the vicious propensities. [Citation.] In such instances the owner is an insurer against the acts of the animal, to one who is injured without fault, and the question of the owner's negligence is not in the case.' " (*Hillman v. Garcia-Ruby* (1955) 44 Cal.2d 625, 626 [283 P.2d 1033].)

- "[I]f the animal which inflicted the injury is vicious and dangerous, known to the defendant to be such, an allegation of negligence on the part of defendant is unnecessary and the averment, if made, may be treated as surplusage." (*Baugh*, *supra*, ~~*v. Beatty* (1949)~~ 91 Cal.App.2d at p.~~786,~~ 791 ~~[205 P.2d 671]~~.)

- "[A] wild animal is presumed to be vicious and since the owner of such an animal … is an insurer against the acts of the animal to anyone who is injured, and unless such person voluntarily or consciously does something which brings the injury on himself, the question of the owner's negligence is not in the case." *Baugh, supra,* 91 Cal.App.2d at p. 791.)

- "The court instructed the jury with respect to the liability of the keeper of a vicious or dangerous animal, known to be such by its owner. Although plaintiff has not raised any objection to this instruction, it was not proper in the instant case since the animal was of the class of animals *ferae naturae,* of known savage and vicious nature, and hence an instruction on the owner's knowledge of its ferocity was unnecessary." (*Baugh, supra,* 91 Cal.App.2d at pp. 791–792.)

- "[Strict] liability has been imposed on 'keepers of lions and tigers, bears, elephants, wolves [and] monkeys.' " (*Rosenbloom v. Hanour Corp.* (1998) 66 Cal.App.4th 1477, 1479, fn. 1 [78 Cal.Rptr.2d 686].)

- "The owner of a naturally dangerous animal may be excused from the usual duty of care: 'In cases involving "primary assumption of risk"—where, by virtue of the nature of the activity and the parties' relationship to the activity, the defendant owes no legal duty to protect the plaintiff from the particular risk of harm that caused the injury—the doctrine ... operates as a complete bar to the plaintiff's recovery.' " (*Rosenbloom, supra,* 66 Cal.App.4th at p. 1479, internal citation omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1403

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 3.3-3.6

1 Levy et al., California Torts, Ch. 6, *Strict Liability for Injuries Caused by Animals,* §§ 6.01-6.10 (Matthew Bender)

3 California Forms of Pleading and Practice, Ch. 23, *Animals: Civil Liability,* § 23.23 (Matthew Bender)

1 California Civil Practice: Torts §§ 2:20–2:21 (Thomson Reuters)

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~~ injury 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, June 2016

Directions for Use

For element 4, choose either or both options depending on whether liability is alleged under Government Code section 835(a), 835(b), or both.

See also CACI No. 1102, *Definition of "Dangerous Condition,"* and CACI No. 1103, *Notice*.

Sources and Authority

- Liability of Public Entity for Dangerous Condition of Property. Government Code section 835.
- Actual Notice. Government Code section 835.2(a).
- Constructive Notice. Government Code section 835.2(b).
- Definitions. Government Code section 830.

- ‘The Government Claims Act (§ 810 et seq.; the Act) ‘is a comprehensive statutory scheme that sets forth the liabilities and immunities of public entities and public employees for torts.’ Section 835 … prescribes the conditions under which a public entity may be held liable for injuries caused by a dangerous condition of public property. Section 835 provides that a public entity may be held liable for such injuries ‘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, [and] that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred.’ In addition, the plaintiff must establish that 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) ‘[t]he public entity had . . . notice of the dangerous condition . . . a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.’ ” (*Cordova v. City of Los Angeles* (2015) 61 Cal.4th 1099, 1104 [190 Cal.Rptr.3d 850, 353 P.3d 773], internal citations omitted.)

- “[A] public entity may be liable for a dangerous condition of public property even when the immediate cause of a plaintiff's injury is a third party's negligent or illegal act (such as a motorist's negligent driving), if some physical characteristic of the property exposes its users to increased danger from third party negligence or criminality. Public entity liability lies under section 835 when some feature of the property increased or intensified the danger to users from third party conduct.” (*Castro v. City of Thousand Oaks* (2015) 239 Cal.App.4th 1451, 1457−1458 [192 Cal.Rptr.3d 376], internal citation omitted.)

- “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 v. Poway Unified School Dist.* (1993) 4 Cal.4th 820, 836 [15 Cal.Rptr.2d 679, 843 P.2d 624].)

- “[T]he res ipsa loquitur presumption does not satisfy the requirements for holding a public entity liable under section 835, subdivision (a). Res ipsa loquitur requires the plaintiff to show only (1) that the accident was of a kind which ordinarily does not occur in the absence of negligence, (2) that the instrumentality of harm was within the defendant's exclusive control, and (3) that the plaintiff did not voluntarily contribute to his or her own injuries. Subdivision (a), in contrast, requires the plaintiff to show that an employee of the public entity ‘created’ the dangerous condition; in view of the legislative history … ,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.)

- “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.)

- "In order to recover under Government Code section 835, it is not necessary for plaintiff to prove a negligent act *and* notice; either negligence *or* notice will suffice." (*Curtis v. State of California* (1982) 128 Cal.App.3d 668, 693 [180 Cal.Rptr. 843], original italics.)

- "A public entity may not be held liable under section 835 for a dangerous condition of property that it does not own or control." (*Goddard v. Department of Fish & Wildlife* (2015) 243 Cal.App.4th 350, 359 [196 Cal.Rptr.3d 625].)

- "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.)

- "[P]laintiffs in this case must show that a dangerous condition of property--that is, a condition that creates a substantial risk of injury to the public--proximately caused the fatal injuries their decedents suffered as a result of the collision with [third party]'s car. But nothing in the statute requires plaintiffs to show that the allegedly dangerous condition also caused the third party conduct that precipitated the accident." (*Cordova, supra,* 61 Cal. 4th at p. 1106.)

- "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 Government Claims Act*, § 464.81 (Matthew Bender)

19A California Points and Authorities, Ch. 196, *Public Entities*, § 196.11 (Matthew Bender)

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

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

1. **That the plan or design was [prepared in conformity with standards previously] approved before [construction/improvement] by the [[***legislative body of the public entity, e.g., city council***]/[***other body or employee, e.g., city civil engineer***]] exercising [its/specifically delegated] discretionary authority to approve the plan or design; and**

2. **That the plan or design of the [***e.g., highway***] was a substantial factor in causing harm to [***name of plaintiff***].**

New December 2014; Revised June 2016

Directions for Use

Give this instruction to present the affirmative defense of design immunity to a claim for liability caused by a dangerous condition on public property. (Gov. Code, § 830.6; see *Martinez v. County of Ventura* (2014) 225 Cal.App.4th 364, 369 [169 Cal.Rptr.3d 880] [design immunity is an affirmative defense that the public entity must plead and prove].)

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

In element 1, select "its" if it is the governing body that has exercised its discretionary authority. Select "specifically delegated" if it is some other body or employee.

The discretionary authority to approve the plan or design must be "vested," which means that the body or employee actually had the express authority to approve it. This authority cannot be implied from the circumstances. (*Castro v. City of Thousand Oaks* (2015) 239 Cal.App.4th 1451, 1457 [192 Cal.Rptr.3d 376].)

Sources and Authority

- Design Immunity. Government Code section 830.6.

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

- "Section 830.6 makes it quite clear that 'the trial or appellate court' is to determine whether 'there is any substantial evidence upon the basis of which (a) a reasonable public employee could have adopted the plan or design or the standards therefor or (b) a reasonable legislative body or other body or employee could have approved the plan or design or the standards therefor.' " (*Cornette, supra,* 26 Cal.4th at p. 66.)

- "To prove [the discretionary approval element of design immunity], the entity must show that the design was approved 'in advance' of the construction 'by the legislative body of the public entity or by some other body or employee exercising discretionary authority to give such approval or where such plan or design is prepared in conformity with standards previously so approved … .' 'Approval … is a vital precondition of the design immunity.' " (*Martinez, supra,* 225 Cal.App.4th at p. 369, internal citations omitted.)

- "In many cases, the evidence of discretionary authority to approve a design decision is clear, or even undisputed. For example, '[a] detailed plan, drawn up by a competent engineering firm, and approved by a city engineer in the exercise of his or her discretionary authority, is persuasive evidence of the element of prior approval. [Citation.]' When the discretionary approval issue is disputed, however, as it was here, we must determine whether the person who approved the construction had the discretionary authority to do so." (*Martinez, supra,* 225 Cal.App.4th at pp. 370−371, internal citations omitted.)

- "[T]he focus of discretional authority to approve a plan or design is fixed by law and will not be implied. '[T]he public entity claiming design immunity must prove that the person or entity who made the decision is vested with the authority to do so. Recognizing "implied" discretionary approval would vitiate this requirement and provide public entities with a blanket release from liability that finds no support in section 830.6.' " (*Castro, supra,* 239 Cal.App.4th at p. 1457~~[T]he public entity claiming design immunity must prove that the person or entity who made the decision is vested with the authority to do so. Recognizing 'implied' discretionary approval would vitiate this requirement and provide public entities with a blanket release from liability that finds no support in section 830.6." (*Martinez, supra,* 225 Cal.App.4th at p. 373~~.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 229, 280 et seq.

Haning et al., California Practice Guide: Personal Injury, Ch. 2(III)-D, Liability For "Dangerous Conditions" Of Public Property, ¶ 2:2855 et seq. (The Rutter Group)

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

40 California Forms of Pleading and Practice, Ch. 464, *Public Entities and Officers: California Government Claims Act*, § 464.85[2] (Matthew Bender)

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

1248. Affirmative Defense—Inherently Unsafe Consumer Product (Civ. Code, § 1714.45)

[*Name of defendant***] claims that it is not responsible for [***name of plaintiff***]'s claimed harm because [***specify product***] is an inherently unsafe consumer product. To succeed on this defense, [***name of defendant***] must prove all of the following:**

1. **That [***product***] is a common consumer product intended for personal consumption; and**

2. **That [***product***] is inherently unsafe;**

3. **But [***product***] is no more dangerous than what an ordinary consumer of the product with knowledge common to the community would expect.**

New June 2016

Directions for Use

This instruction sets forth an immunity defense to product liability for a product that is clearly recognizable as inherently dangerous. (See Civ. Code, § 1714.45(a).) The statute requires that the product be "a common consumer product intended for personal consumption, such as sugar, castor oil, alcohol, and butter, as identified in comment i to Section 402A of the Restatement (Second) of Torts." (Civ. Code, § 1714.45(a)(2).) This reference is perhaps somewhat confusing because the Restatement comment makes it clear that sugar, castor oil, alcohol, and butter are not *unreasonably* dangerous. The implication from the statutory references is that although they are not unreasonably dangerous, they are inherently unsafe and thus within the protection provided to the manufacturer by the statute.

Sources and Authority

- Nonliability for Inherently Unsafe Consumer Product. Civil Code section 1714.45

- Comment i to Section 402A of the Restatement (Second) of Torts provides: "*Unreasonably dangerous*. The rule stated in this Section applies only where the defective condition of the product makes it unreasonably dangerous to the user or consumer. Many products cannot possibly be made entirely safe for all consumption, and any food or drug necessarily involves some risk of harm, if only from over-consumption. Ordinary sugar is a deadly poison to diabetics, and castor oil found use under Mussolini as an instrument of torture. That is not what is meant by "unreasonably dangerous" in this Section. The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics. Good whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics; but bad whiskey, containing a dangerous amount of fusel oil, is unreasonably dangerous. Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably

dangerous. Good butter is not unreasonably dangerous merely because, if such be the case, it deposits cholesterol in the arteries and leads to heart attacks; but bad butter, contaminated with poisonous fish oil, is unreasonably dangerous."

- "Additional limitations on the scope of the immunity may be deduced from the history and purpose of the Immunity Statute … . The statute's express premise … was 'that suppliers of certain products which are "inherently unsafe," but which the public wishes to have available despite awareness of their dangers, should not be responsible in tort for resulting harm to those who voluntarily consumed the products despite such knowledge.' … [T]he Immunity Statute [is] based on the principle that 'if a product is pure and unadulterated, its inherent or unavoidable danger, commonly known to the community which consumes it anyway, does not expose the seller to liability for resulting harm to a voluntary user.' " (*Naegele v. R.J. Reynolds Tobacco Co.* (2002) 28 Cal.4th 856, 862 [123 Cal.Rptr.2d 61, 50 P.3d 769], internal citations omitted.)

- "The law should not ignore interactive effects that might render a product more dangerous than is contemplated by the ordinary consumer who purchases it and possesses the ordinary knowledge common to the community as to the product's characteristics. Therefore, when a court addresses whether a multi-ingredient product is a common consumer product for purposes of Civil Code section 1714.45 and the ingredients have an interactive effect, the product and its inherent dangers must be considered as a whole so that the interactive effects of its ingredients are not overlooked or trivialized." (*Fiorini v. City Brewing Co., LLC* (2014) 231 Cal.App.4th 306, 325 [179 Cal.Rptr.3d 827].)

- "The foregoing inferences preclude us from finding, as a matter of law, that [product] was a common consumer product for purposes of Civil Code section 1714.45, subdivision (a). As a result, that factual question should be presented to the trier of fact." (*Fiorini, supra,* 231 Cal.App.4th at p. 326, footnote omitted.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2010) Torts, § 1745 et seq.

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.11[5] (Matthew Bender)

5 Levy et al., California Torts, Ch. 74, *Resolving Multiparty Tort Litigation*, § 74.04 (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 460, *Products Liability*, §§ 460.11, 460.70 (Matthew Bender)

19 California Points and Authorities, Ch. 190, *Products Liability*, § 190.80A et seq. (Matthew Bender)

1700. Defamation per se—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 se defamatory statements***]. To establish this claim, [***name of plaintiff***] must prove that all of the following are more likely true than not true:**

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 [this person/these people] reasonably understood the statement(s) to mean that [***insert ground(s) for defamation per se, e.g., "[name of plaintiff] had committed a crime"***]]; and**

4. **That the statement(s) [was/were] false.**

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 [his/her] actual damages if [he/she] proves that [***name of defendant***]'s wrongful conduct was a substantial factor in causing any of the following:**

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.**

Assumed Damages

Even if [*name of plaintiff***] has not proved any actual damages for harm to reputation or shame, mortification, or hurt feelings, the law nonetheless assumes that [he/she] has suffered this harm. Without presenting evidence of damage, [***name of plaintiff***] is entitled to receive compensation for this assumed harm in whatever sum you believe is reasonable. You must award at least a nominal sum, such as one dollar.**

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, June 2016

Directions for Use

Special verdict form CACI No. VF-1700, *Defamation per se (Public Officer/Figure and Limited Public Figure)*, should be used in this type of case.

Use the bracketed element 3 only if the statement is not defamatory on its face (i.e., if the judge has not determined that the statement is defamatory as a matter of law). For statutory grounds of defamation per se, see Civil Code sections 45 (libel) and 46 (slander). Note that certain specific grounds of libel per se have been defined by case law.

An additional element of a defamation claim is that the alleged defamatory statement is "unprivileged." (*Hui v. Sturbaum* (2014) 222 Cal.App.4th 1109, 1118 [166 Cal.Rptr.3d 569].) If this element presents an issue for the jury, an instruction on the "unprivileged" element should be given.

Under the common-interest privilege of Civil Code section 47(c), the defendant bears the initial burden of showing facts to bring the communication within the privilege. The plaintiff then must prove that the statement was made with malice. (*Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1203 [31 Cal.Rptr.2d 776, 875 P.2d 1279].) If the common-interest privilege is at issue, give CACI No. 1723, *Common Interest Privilege—Malice*. The elements of CACI No. 1723 constitute the "unprivileged" element of this basic claim. If some other privilege is at issue, an additional element or instruction targeting that privilege will be required.

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.
- "Defamation is the intentional publication of a statement of fact that is false, unprivileged, and has a natural tendency to injure or that causes special damage." (*Grenier v. Taylor* (2015) 234 Cal.App.4th 471, 486 [183 Cal.Rptr.3d 867].)

- "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* (2010) 189 Cal.App.4th 1354, 1369 [117 Cal.Rptr.3d 747].)

- "[S]tatements cannot form the basis of a defamation action if they cannot be reasonably interpreted as stating actual facts about an individual. Thus, rhetorical hyperbole, vigorous epithets, lusty and imaginative expressions of contempt and language used in a loose, figurative sense will not support a defamation action." (*Grenier, supra,* 234 Cal.App.4th at p. 486.)

- " ' "If no reasonable reader would perceive in a false and unprivileged publication a meaning which tended to injure the subject's reputation in any of the enumerated respects, then there is no libel at all. If such a reader would perceive a defamatory meaning without extrinsic aid beyond his or her own intelligence and common sense, then … there is a libel per se. But if the reader would be able to recognize a defamatory meaning only by virtue of his or her knowledge of specific facts and circumstances, extrinsic to the publication, 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," requiring pleading and proof of special damages.' " (*Barker v. Fox & Associates* (2015) 240 Cal.App.4th 333, 351−352 [192 Cal.Rptr.3d 511].)

- ~~California does not follow the majority rule, which is that all libel is actionable per se. If the court determines that the statement is reasonably susceptible to a defamatory interpretation, it is for the jury to determine if a defamatory meaning was in fact conveyed to a listener or reader. (*Kahn v. Bower* (1991) 232 Cal.App.3d 1599, 1608 [284 Cal.Rptr. 244].)~~

- ~~A plaintiff is not required to allege special damages if the statement is libelous per se (either on its face or by jury finding). (*Selleck v. Globe Int'l, Inc.* (1985) 166 Cal.App.3d 1123, 1130 [212 Cal.Rptr. 838].)~~

- "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.)

- "With respect to slander per se, the trial court decides if the alleged statement falls within Civil Code section 46, subdivisions 1 through 4. It is then for the trier of fact to determine if the statement is defamatory. This allocation of responsibility may appear, at first glance, to result in an overlap of responsibilities because a trial court determination that the statement falls within those categories would seemingly suggest that the statement, if false, is necessarily defamatory. But a finder of fact might rely upon extraneous evidence to conclude that, under the circumstances, the statement was not defamatory." (*The Nethercutt Collection, supra,* 172 Cal.App.4th at pp. 368–369.)

- "[T]he jury was instructed that if it found that defendant published matter that was defamatory on its face and it found by clear and convincing evidence that defendant knew the statement was false or published it in reckless disregard of whether it was false, then the jury 'also may award plaintiff presumed general damages.' Presumed damages 'are those damages that necessarily result from the

publication of defamatory matter and are presumed to exist. They include reasonable compensation for loss of reputation, shame, mortification, and hurt feeling. No definite standard or method of calculation is prescribed by law by which to fix reasonable compensation for presumed damages, and no evidence of actual harm is required. Nor is the opinion of any witness required as to the amount of such reasonable compensation. In making an award for presumed damages, you shall exercise your authority with calm and reasonable judgment and the damages you fix shall be just and reasonable in the light of the evidence. You may in the exercise of your discretion award nominal damages only, namely an insignificant sum such as one dollar.' [¶] … [¶] … [T]he instant instruction, which limits damages to 'those damages that necessarily result from the publication of defamatory matter,' constitutes substantial compliance with [Civil Code] section 3283. Thus, the instant instructions, 'if obeyed, did not allow the jurors to "enter the realm of speculation" regarding future suffering.' " (*Sommer v. Gabor* (1995) 40 Cal.App.4th 1455, 1472–1473 [48 Cal.Rptr.2d 235], internal citations omitted.)

- "In defamation actions generally, factual truth is a defense which it is the defendant's burden to prove. In a defamation action against a newspaper by a private person suing over statements of public concern, however, the First Amendment places the burden of proving falsity on the plaintiff. As a matter of constitutional law, therefore, media statements on matters of public interest, including statements of opinion which reasonably imply a knowledge of facts, 'must be provable as false before there can be liability under state defamation law.' " (*Eisenberg v. Alameda Newspapers* (1999) 74 Cal.App.4th 1359, 1382 [88 Cal.Rptr.2d 802], internal citations omitted.)

- In matters involving public concern, the First Amendment protection applies to nonmedia defendants, putting the burden of proving falsity of the statement on the plaintiff. (*Nizam-Aldine v. City of Oakland* (1996) 47 Cal.App.4th 364, 375 [54 Cal.Rptr.2d 781].)

- "Publication means communication to some third person who understands the defamatory meaning of the statement and its application to the person to whom reference is made. Publication need not be to the 'public' at large; communication to a single individual is sufficient." (*Smith, supra,* 72 Cal.App.4th at p. 645, internal citations omitted.)

- "[W]hen a party repeats a slanderous charge, he is equally guilty of defamation, even though he states the source of the charge and indicates that he is merely repeating a rumor." (*Jackson v. Paramount Pictures Corp.* (1998) 68 Cal.App.4th 10, 26 [80 Cal.Rptr.2d 1], internal citation omitted.)

- "At common law, one who republishes a defamatory statement is deemed thereby to have adopted it and so may be held liable, together with the person who originated the statement, for resulting injury to the reputation of the defamation victim. California has adopted the common law in this regard, although by statute the republication of defamatory statements is privileged in certain defined situations." (*Khawar v. Globe Internat.* (1998) 19 Cal.4th 254, 268 [79 Cal.Rptr.2d 178, 965 P.2d 696], internal citations omitted.)

- The general rule is that "a plaintiff cannot manufacture a defamation cause of action by publishing the statements to third persons; the publication must be done by the defendant." There is an exception to this rule. [When it is foreseeable that the plaintiff] " 'will be under a strong compulsion to disclose the contents of the defamatory statement to a third person after he has read it or been informed of its

contents.' " (*Live Oak Publishing Co. v. Cohagan* (1991) 234 Cal.App.3d 1277, 1284 [286 Cal.Rptr. 198], internal citations omitted.)

- Whether a plaintiff in a defamation action is a public figure is a question of law for the trial court. (*Reader's Digest Assn. v. Superior Court* (1984) 37 Cal.3d 244, 252 [208 Cal.Rptr. 137, 690 P.2d 610].)

- "To qualify as a limited purpose public figure, a plaintiff 'must have undertaken some voluntary [affirmative] act[ion] through which he seeks to influence the resolution of the public issues involved.' " (*Rudnick v. McMillan* (1994) 25 Cal.App.4th 1183, 1190 [31 Cal.Rptr.2d 193]; see also *Mosesian v. McClatchy Newspapers* (1991) 233 Cal.App.3d 1685, 1689 [285 Cal.Rptr. 430].)

- "Characterizing a plaintiff as a limited purpose public figure requires the presence of certain elements. First, there must be a public controversy about a topic that concerns a substantial number of people. In other words, the issue was publicly debated. Second, the plaintiff must have voluntarily acted to influence resolution of the issue of public interest. To satisfy this element, the plaintiff need only attempt to thrust himself or herself into the public eye. Once the plaintiff places himself or herself in the spotlight on a topic of public interest, his or her private words and acts relating to that topic become fair game. However, the alleged defamation must be germane to the plaintiff's participation in the public controversy." (*Grenier, supra,* 234 Cal.App.4th at p. 484, internal citations omitted.)

- "The First Amendment limits California's libel law in various respects. When, as here, the plaintiff is a public figure, he cannot recover unless he proves by clear and convincing evidence that the defendant published the defamatory statement with actual malice, i.e., with 'knowledge that it was false or with reckless disregard of whether it was false or not.' Mere negligence does not suffice. Rather, the plaintiff must demonstrate that the author 'in fact entertained serious doubts as to the truth of his publication,' or acted with a 'high degree of awareness of ... probable falsity.' " (*Masson v. New Yorker Magazine* (1991) 501 U.S. 496, 510 [111 S.Ct. 2419, 115 L.Ed.2d 447], internal citations omitted; see *St. Amant v. Thompson* (1968) 390 U.S. 727, 731 [88 S.Ct. 1323, 20 L.Ed.2d 262]; *New York Times v. Sullivan* (1964) 376 U.S. 254, 279–280 [84 S.Ct. 710, 11 L.Ed.2d 686].)

- The *New York Times v. Sullivan* standard applies to private individuals with respect to presumed or punitive damages if the statement involves a matter of public concern. (*Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 349 [94 S.Ct. 2997, 41 L.Ed.2d 789].)

- "California ... permits defamation liability so long as it is consistent with the requirements of the United States Constitution." (*Melaleuca, Inc. v. Clark* (1998) 66 Cal.App.4th 1344, 1359 [78 Cal.Rptr.2d 627], citing *Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 740–742 [257 Cal.Rptr. 708, 771 P.2d 406].)

- "Actual malice under the *New York Times* standard should not be confused with the concept of malice as an evil intent or a motive arising from spite or ill will. ... In place of the term actual malice, it is better practice that jury instructions refer to publication of a statement with knowledge of falsity or reckless disregard as to truth or falsity." (*Masson, supra,* 501 U.S. at pp. 510–511, internal citations omitted.)

- Actual malice "does not require that the reporter hold a devout belief in the truth of the story being reported, only that he or she refrain from either reporting a story he or she knows to be false or acting in reckless disregard of the truth." (*Jackson, supra,* 68 Cal.App.4th at p. 35.)

- "The law is clear [that] the recklessness or doubt which gives rise to actual or constitutional malice is subjective recklessness or doubt." (*Melaleuca, Inc., supra,* 66 Cal.App.4th at p. 1365.)

- To show reckless disregard, "[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice." (*St. Amant, supra,* 390 U.S. at p. 731.)

- " 'A defamation plaintiff may rely on inferences drawn from circumstantial evidence to show actual malice. [Citation.] "A failure to investigate [fn. omitted] [citation], anger and hostility toward the plaintiff [citation], reliance upon sources known to be unreliable [citations], or known to be biased against the plaintiff [citations]—such factors may, in an appropriate case, indicate that the publisher himself had serious doubts regarding the truth of his publication." ' " (*Sanders v. Walsh* (2013) 219 Cal.App.4th 855, 873 [162 Cal.Rptr.3d 188].)

- " ' "[Evidence] of negligence, of motive and of intent may be adduced for the purpose of establishing, by cumulation and by appropriate inferences, the fact of a defendant's recklessness or of his knowledge of falsity." [Citations.] A failure to investigate [citation], anger and hostility toward the plaintiff [citation], reliance upon sources known to be unreliable [citations], or known to be biased against the plaintiff [citations]—such factors may, in an appropriate case, indicate that the publisher himself had serious doubts regarding the truth of his publication. [¶] We emphasize that such evidence is relevant only to the extent that it reflects on the subjective attitude of the publisher. [Citations.] The failure to conduct a thorough and objective investigation, standing alone, does not prove actual malice, nor even necessarily raise a triable issue of fact on that controversy. [Citations.] Similarly, mere proof of ill will on the part of the publisher may likewise be insufficient. [Citation.]' " (*Young v. CBS Broadcasting, Inc.* (2012) 212 Cal.App.4th 551, 563 [151 Cal.Rptr.3d 237], quoting *Reader's Digest Assn., supra,* 37 Cal.3d at pp. 257–258, footnote omitted.)

- "An entity other than a natural person may be libeled." (*Live Oak Publishing Co., supra,* 234 Cal.App.3d at p. 1283.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 529–555, 601–612

Chin, et al., California Practice Guide: Employment Litigation, Ch. 5-D, *Employment Torts And Related Claims—Defamation,* ¶ 5:372 (The Rutter Group)

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 et seq. (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)

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, June 2016

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.

An additional element of a defamation claim is that the alleged defamatory statement is "unprivileged." (*Hui v. Sturbaum* (2014) 222 Cal.App.4th 1109, 1118 [166 Cal.Rptr.3d 569].) If this element presents an issue for the jury, an instruction on the "unprivileged" element should be given.

Under the common-interest privilege of Civil Code section 47(c), the defendant bears the initial burden of showing facts to bring the communication within the privilege. The plaintiff then must prove that the statement was made with malice. (*Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1203 [31 Cal.Rptr.2d 776, 875 P.2d 1279].) If the common-interest privilege is at issue, give CACI No. 1723, *Common Interest Privilege—Malice*. The elements of CACI No. 1723 constitute the "unprivileged" element of this basic claim. If some other privilege is at issue, an additional element or instruction targeting that privilege will be required.

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.
- Special Damages. Civil Code section 48a(4)(b).

- "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 no reasonable reader would perceive in a false and unprivileged publication a meaning which tended to injure the subject's reputation in any of the enumerated respects, then there is no libel at all. If such a reader would perceive a defamatory meaning without extrinsic aid beyond his or her own intelligence and common sense, then … there is a libel per se. But if the reader would be able to recognize a defamatory meaning only by virtue of his or her knowledge of specific facts and circumstances, extrinsic to the publication, 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," requiring pleading and proof of special damages.' " (*Barker v. Fox & Associates* (2015) 240 Cal.App.4th 333, 351−352 [192 Cal.Rptr.3d 511].)

- "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.)

- "The question whether challenged statements convey the requisite factual imputation is ordinarily a question of law for the court. However, … , some statements are ambiguous and cannot be characterized as factual or nonfactual as a matter of law. 'In these circumstances, it is for the jury to determine whether an ordinary reader would have understood the article as a factual assertion . . . .' " (*Kahn v. Bower* (1991) 232 Cal.App.3d 1599, 1608 [284 Cal.Rptr. 244].)

- "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)

1702. Defamation per se—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): [***list all claimed per se defamatory statement(s)***]. 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 [this person/these people] reasonably understood the statement(s) to mean that [*insert ground(s) for defamation per se, e.g., "[name of plaintiff] had committed a crime"***];]**

4. **That the statement(s) [was/were] false; and**

5. **That [***name of defendant***] failed to use reasonable care to determine the truth or falsity of the statement(s).**

Actual Damages

If [*name of plaintiff***] has proved all of the above, then [he/she] is entitled to recover [his/her] actual damages if [he/she] proves that [***name of defendant***]'s wrongful conduct was a substantial factor in causing any of the following:**

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.**

Assumed Damages

If [*name of plaintiff***] has not proved any actual damages for harm to reputation or shame, mortification, or hurt feelings but proves by clear and convincing evidence that [***name of defendant***] knew the statement(s) [was/were] false or that [he/she] had serious doubts about the truth of the statement(s), then the law assumes that [***name of plaintiff***]'s reputation has been harmed and that [he/she] has suffered shame, mortification, or hurt feelings. Without presenting evidence of damage, [***name of plaintiff***] is entitled to receive compensation for this assumed harm in whatever sum you believe is reasonable. You must award at least a nominal sum, such as one dollar.**

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, October 2008, December 2009, June 2016

Directions for Use

Special verdict form CACI No. VF-1702, *Defamation per se (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. 1700, *Defamation per se—Essential Factual Elements (Public Officer/Figure and Limited Public Figure).*

Use the bracketed element 3 only if the statement is not defamatory on its face (i.e., if the judge has not determined that the statement is defamatory as a matter of law). For statutory grounds of defamation per se, see Civil Code sections 45 (libel) and 46 (slander). Note that certain specific grounds of libel per se have been defined by case law.

An additional element of a defamation claim is that the alleged defamatory statement is "unprivileged." (*Hui v. Sturbaum* (2014) 222 Cal.App.4th 1109, 1118 [166 Cal.Rptr.3d 569].) If this element presents an issue for the jury, an instruction on the "unprivileged" element should be given.

Under the common-interest privilege of Civil Code section 47(c), the defendant bears the initial burden of showing facts to bring the communication within the privilege. The plaintiff then must prove that the statement was made with malice. (*Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1203 [31 Cal.Rptr.2d 776, 875 P.2d 1279].) If the common-interest privilege is at issue, give CACI No. 1723, *Common Interest Privilege—Malice*. The elements of CACI No. 1723 constitute the "unprivileged" element of this basic claim. If some other privilege is at issue, an additional element or instruction targeting that privilege will be required.

Sources and Authority

- "Defamation is an invasion of the interest in reputation. The tort involves the intentional publication of a statement of fact that is false, unprivileged, and has a natural tendency to injure or which causes special damage." (*Smith v. Maldonado* (1999) 72 Cal.App.4th 637, 645 [85 Cal.Rptr.2d 397].)

- "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.)

- A private plaintiff is not required to prove malice to recover actual damages. (*Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 347-348 [94 S.Ct. 2997, 41 L.Ed.2d 789]; *Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 742 [257 Cal.Rptr. 708, 771 P.2d 406].)

- " '[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~~.)

- "[T]he jury was instructed that if it found that defendant published matter that was defamatory on its face and it found by clear and convincing evidence that defendant knew the statement was false or published it in reckless disregard of whether it was false, then the jury 'also may award plaintiff presumed general damages.' Presumed damages 'are those damages that necessarily result from the publication of defamatory matter and are presumed to exist. They include reasonable compensation for loss of reputation, shame, mortification, and hurt feeling. No definite standard or method of calculation is prescribed by law by which to fix reasonable compensation for presumed damages, and no evidence of actual harm is required. Nor is the opinion of any witness required as to the amount of such reasonable compensation. In making an award for presumed damages, you shall exercise your authority with calm and reasonable judgment and the damages you fix shall be just and reasonable in the light of the evidence. You may in the exercise of your discretion award nominal damages only, namely an insignificant sum such as one dollar.' [¶¶] … [T]he instant instruction, which limits damages to 'those damages that necessarily result from the publication of defamatory matter,' constitutes substantial compliance with [Civil Code] section 3283. Thus, the instant instructions, 'if obeyed, did not allow the jurors to "enter the realm of speculation" regarding future suffering.' " (*Sommer v. Gabor* (1995) 40 Cal.App.4th 1455, 1472–1473 [48 Cal.Rptr.2d 235], internal citations omitted.)

- The jury should be instructed that the defendant's negligence is an element of libel if the plaintiff is a private figure. (*Carney v. Santa Cruz Women Against Rape* (1990) 221 Cal.App.3d 1009, 1016 [271 Cal.Rptr. 30].)

- "When the speech involves a matter of public concern, a private-figure plaintiff has the burden of proving the falsity of the defamation." (*Brown, supra,* 48 Cal.3d at p. 747.)

- "Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. Of course, juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury." (*Gertz, supra,* 418 U.S. at p. 350.)

- 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].)

- "A private-figure plaintiff must prove at least negligence to recover any damages and, when the speech involves a matter of public concern, he must also prove *New York Times* malice ... to recover presumed or punitive damages. This malice must be established by 'clear and convincing proof.' " (*Brown, supra,* 48 Cal.3d at p. 747, internal citations omitted.)

- When the court is instructing on punitive damages, it is error to fail to instruct that *New York Times* malice is required when the statements at issue involve matters of public concern. (*Carney, supra,* 221 Cal.App.3d at p. 1022.)

- "To prove actual malice ... a plaintiff must 'demonstrate with clear and convincing evidence that the defendant realized that his statement was false or that he subjectively entertained serious doubts as to the truth of his statement.' " (*Khawar, supra,* 19 Cal.4th at p. 275, internal citation omitted.)

- "Because actual malice is a higher fault standard than negligence, a finding of actual malice generally includes a finding of negligence ...." (*Khawar, supra,* 19 Cal.4th at p. 279.)

- "The inquiry into the protected status of speech is one of law, not fact." (*Nizam-Aldine v. City of Oakland* (1996) 47 Cal.App.4th 364, 375 [54 Cal.Rptr.2d 781], quoting *Connick v. Myers* (1983) 461 U.S. 138, 148, fn. 7 [103 S.Ct. 1684, 75 L.Ed.2d 708].)

- "For the *New York Times* standard to be met, 'the publisher must come close to willfully blinding itself to the falsity of its utterance.' " (*Brown, supra,* 48 Cal.3d at p. 747, internal citation omitted.)

- " 'While such speech is not totally unprotected by the First Amendment, its protections are less stringent' [than that applying to speech on matters of public concern]." (*Savage v. Pacific Gas & Electric Co.* (1993) 21 Cal.App.4th 434, 445 [26 Cal.Rptr.2d 305], 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,* §§ 340.12–340.13, 340.18 (Matthew Bender)

14 California Points and Authorities, Ch. 142, *Libel and Slander (Defamation),* §§ 142.30–142.40, 142.87 et seq. (Matthew Bender)

1 California Civil Practice: Torts (Thomson Reuters~~West~~) §§ 21:1–21:2, 21:22–21:25, 21:51

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, June 2016

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.

Presumed damages either are not available or will likely not be sought in a per quod case.

An additional element of a defamation claim is that the alleged defamatory statement is "unprivileged." (*Hui v. Sturbaum* (2014) 222 Cal.App.4th 1109, 1118 [166 Cal.Rptr.3d 569].) If this element presents an issue for the jury, an instruction on the "unprivileged" element should be given.

Under the common-interest privilege of Civil Code section 47(c), the defendant bears the initial burden of showing facts to bring the communication within the privilege. The plaintiff then must prove that the statement was made with malice. (*Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1203 [31 Cal.Rptr.2d 776, 875 P.2d 1279].) If the common-interest privilege is at issue, give CACI No. 1723, *Common Interest Privilege—Malice*. The elements of CACI No. 1723 constitute the "unprivileged" element of this basic claim. If some other privilege is at issue, an additional element or instruction targeting that privilege will be required.

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.
- Special Damages. Civil Code section 48a(4)(b).
- "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 §§ 21:1–21:2, 21:22–21:25, 21:51 (Thomson Reuters)

1704. Defamation per se—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): [***list all claimed per se defamatory statement(s)***]. 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 [this person/these people] reasonably understood the statement(s) to mean that [***insert ground(s) for defamation per se, e.g., "[name of plaintiff] had committed a crime"***]];**

4. **That [***name of defendant***] failed to use reasonable care to determine the truth or falsity of the statement(s).**

Actual Damages

If [*name of plaintiff***] has proved all of the above, then [he/she] is entitled to recover [his/her] actual damages if [he/she] proves that [***name of defendant***]'s wrongful conduct was a substantial factor in causing any of the following:**

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.**

Assumed Damages

Even if [*name of plaintiff***] has not proved any actual damages for harm to reputation or shame, mortification, or hurt feelings, the law assumes that [he/she] has suffered this harm. Without presenting evidence of damage, [***name of plaintiff***] is entitled to receive compensation for this assumed harm in whatever sum you believe is reasonable. You must award at least a nominal sum, such as one dollar.**

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, June 2016

Directions for Use

Special verdict form VF-1704, *Defamation per se—Affirmative Defense—Truth (Private Figure—Matter of Private Concern)*, may 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. 1700, *Defamation per se—Essential Factual Elements (Public Officer/Figure and Limited Public Figure).*~~

Use the bracketed element 3 only if the statement is not defamatory on its face (i.e., if the judge has not determined that the statement is defamatory as a matter of law). For statutory grounds of defamation per se, see Civil Code sections 45 (libel) and 46 (slander). Note that certain specific grounds of libel per se have been defined by case law.

An additional element of a defamation claim is that the alleged defamatory statement is "unprivileged." (*Hui v. Sturbaum* (2014) 222 Cal.App.4th 1109, 1118 [166 Cal.Rptr.3d 569].) If this element presents an issue for the jury, an instruction on the "unprivileged" element should be given.

Under the common-interest privilege of Civil Code section 47(c), the defendant bears the initial burden of showing facts to bring the communication within the privilege. The plaintiff then must prove that the statement was made with malice. (*Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1203 [31 Cal.Rptr.2d 776, 875 P.2d 1279].) If the common-interest privilege is at issue, give CACI No. 1723, *Common Interest Privilege—Malice*. The elements of CACI No. 1723 constitute the "unprivileged" element of this basic claim. If some other privilege is at issue, an additional element or instruction targeting that privilege will be required.

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. 1700, *Defamation per se—Essential Factual Elements (Public Officer/Figure and Limited Public Figure).*

Sources and Authority

- "Defamation is an invasion of the interest in reputation. The tort involves the intentional publication of a statement of fact that is false, unprivileged, and has a natural tendency to injure or which causes special damage." (*Smith v. Maldonado* (1999) 72 Cal.App.4th 637, 645 [85 Cal.Rptr.2d 397].)

- "The question whether a plaintiff is a public figure [or not] 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.)

- The jury should be instructed that the defendant's negligence is an element of libel if the plaintiff is a private figure. (*Carney v. Santa Cruz Women Against Rape* (1990) 221 Cal.App.3d 1009, 1016 [271 Cal.Rptr. 30].)

- "A private-figure plaintiff must prove at least negligence to recover any damages and, when the speech involves a matter of public concern, he must also prove *New York Times* malice ... to recover presumed or punitive damages." (*Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 747 [257 Cal.Rptr. 708, 771 P.2d 406].)

- "The First Amendment trumps the common law presumption of falsity in defamation cases involving private-figure plaintiffs when the allegedly defamatory statements pertain to a matter of public interest." (*Nizam-Aldine v. City of Oakland* (1996) 47 Cal.App.4th 364, 375 [54 Cal.Rptr.2d 781].)

- "Thus, in a defamation action the burden is normally on the defendant to prove the truth of the allegedly defamatory communications. However, in accommodation of First Amendment considerations (which are implicated by state defamation laws), where the plaintiff is a public figure, the 'public-figure plaintiff must show the falsity of the statements at issue in order to prevail in a suit for defamation.' " (*Stolz, supra*, 30 Cal.App.4th at p. 202, internal citations omitted.)

- "Since the statements at issue here involved a matter of purely private concern communicated between private individuals, we do not regard them as raising a First Amendment issue. 'While such speech is not totally unprotected by the First Amendment, its protections are less stringent' [than that applying to speech on matters of public concern]." (*Savage v. Pacific Gas & Electric Co.* (1993) 21 Cal.App.4th 434, 445 [26 Cal.Rptr.2d 305], quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.* (1985) 472 U.S. 749, 760 [105 S.Ct. 2939, 86 L.Ed.2d 593], internal citation omitted.)

- "We conclude that permitting recovery of presumed and punitive damages in defamation cases absent a showing of 'actual malice' does not violate the First Amendment when the defamatory statements do not involve matters of public concern." (*Dun & Bradstreet, Inc., supra*, 472 U.S. at p. 763.)

- "When the speech is of exclusively private concern and the plaintiff is a private figure, as in *Dun & Bradstreet*, the constitutional requirements do not necessarily force any change in at least some of the features of the common-law landscape." (*Philadelphia Newspapers, Inc. v. Hepps* (1986) 475 U.S. 767, 775 [106 S.Ct. 1558, 89 L.Ed.2d 783].)

- "[T]he jury was instructed that if it found that defendant published matter that was defamatory on its face and it found by clear and convincing evidence that defendant knew the statement was false or published it in reckless disregard of whether it was false, then the jury 'also may award plaintiff presumed general damages.' Presumed damages 'are those damages that necessarily result from the publication of defamatory matter and are presumed to exist. They include reasonable compensation for loss of reputation, shame, mortification, and hurt feeling. No definite standard or method of calculation is prescribed by law by which to fix reasonable compensation for presumed damages, and no evidence of actual harm is required. Nor is the opinion of any witness required as to the amount of

such reasonable compensation. In making an award for presumed damages, you shall exercise your authority with calm and reasonable judgment and the damages you fix shall be just and reasonable in the light of the evidence. You may in the exercise of your discretion award nominal damages only, namely an insignificant sum such as one dollar.' [¶¶] … [T]he instant instruction, which limits damages to 'those damages that necessarily result from the publication of defamatory matter,' constitutes substantial compliance with [Civil Code] section 3283. Thus, the instant instructions, 'if obeyed, did not allow the jurors to "enter the realm of speculation" regarding future suffering.' " (*Sommer v. Gabor* (1995) 40 Cal.App.4th 1455, 1472–1473 [48 Cal.Rptr.2d 235], internal citations omitted.)

- "In defamation actions generally, factual truth is a defense which it is the defendant's burden to prove. In a defamation action against a newspaper by a private person suing over statements of public concern, however, the First Amendment places the burden of proving falsity on the plaintiff." (*Eisenberg v. Alameda Newspapers* (1999) 74 Cal.App.4th 1359, 1382 [88 Cal.Rptr.2d 802].)

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*, § 340.18 (Matthew Bender)

14 California Points and Authorities, Ch. 142, *Libel and Slander (Defamation)*, § 142.87 (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, June 2016

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.

An additional element of a defamation claim is that the alleged defamatory statement is "unprivileged." (*Hui v. Sturbaum* (2014) 222 Cal.App.4th 1109, 1118 [166 Cal.Rptr.3d 569].) If this element presents an issue for the jury, an instruction on the "unprivileged" element should be given.

Under the common-interest privilege of Civil Code section 47(c), the defendant bears the initial burden of showing facts to bring the communication within the privilege. The plaintiff then must prove that the statement was made with malice. (*Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1203 [31 Cal.Rptr.2d 776, 875 P.2d 1279].) If the common-interest privilege is at issue, give CACI No. 1723, *Common Interest Privilege—Malice*. The elements of CACI No. 1723 constitute the "unprivileged" element of this basic claim. If some other privilege is at issue, an additional element or instruction targeting that privilege will be required.

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.
- Special Damages. Civil Code section 48a(4)(b).
- "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 §§ 21:1–21:2, 21:22–21:25, 21:51 (Thomson Reuters)

1722. Retraction: News Publication~~paper~~ or Broadcast (Civ. Code, § 48a)

Because [*name of defendant***] is a [news ~~paper~~publication/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; Revised June 2016

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.
- "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 §§ 21:55–21:57 (Thomson Reuters)

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;] [or]

   _____[was [a/an] [fire hazard/*specify other potentially dangerous condition***] to [***name of plaintiff***]'s property;**

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, June 2016

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.
- Public Nuisance. Civil Code section 3480.
- Action by Private Person for Public Nuisance. Civil Code section 3493.
- Act Done Under Express Authority of Statute. Civil Code section 3482.
- Property Used for Dogfighting and Cockfighting. Civil Code section 3482.8.
- "[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.)

- "Nuisance liability is not necessarily based on negligence, thus, 'one may be liable for a nuisance even in the absence of negligence. [Citations.]' However, ' "where liability for the nuisance is predicated on the omission of the owner of the premises to abate it, rather than on his having created it, then negligence is said to be involved. …" [Citations.]' " (*City of Pasadena v. Superior Court* (2014) 228 Cal.App.4th 1228, 1236 [176 Cal.Rptr.3d 422], internal citations 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].)

- "[M]ere apprehension of injury from a dangerous condition may constitute a nuisance where it interferes with the comfortable enjoyment of property… ." (*McIvor v. Mercer-Fraser Co.* (1946) 76 Cal.App.2d 247, 254 [172 P.2d 758].)

- "A fire hazard, at least when coupled with other conditions, can be found to be a public nuisance and abated." (*People v. Oliver* (1948) 86 Cal.App.2d 885, 889 [195 P.2d 926].)

- "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)

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;] [or]

   _____[was [a/an] [fire hazard/*specify other potentially dangerous condition***] to [***name of plaintiff***]'s property;**

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, December 2015, June 2016

Directions for Use

Element 8 must be supplemented with CACI No. 2022, *Private Nuisance—Balancing-Test Factors—Seriousness of Harm and Public Benefit*. (See *Wilson v. Southern California Edison Co.* (2015) 234 Cal.App. 4th 123, 160−165 [184 Cal.Rptr.3d 26].) 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.
- Acts Done Under Express Authority of Statute. Civil Code section 3482.
- "[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.)

- "Nuisance liability is not necessarily based on negligence, thus, 'one may be liable for a nuisance even in the absence of negligence. [Citations.]' However, ' " 'where liability for the

nuisance is predicated on the omission of the owner of the premises to abate it, rather than on his having created it, then negligence is said to be involved. …" [Citations.]' " (*City of Pasadena v. Superior Court* (2014) 228 Cal.App.4th 1228, 1236 [176 Cal.Rptr.3d 422, internal citations omitted.)

- "We acknowledge that to recover on a nuisance claim the harm the plaintiff suffers need not be a physical injury. Thus, the absence of evidence in this case to establish that [plaintiff] 's physical injuries were caused by the stray voltage would not preclude recovery on her nuisance claim." (*Wilson, supra,* 234 Cal.App.4th at p. 159, internal citations omitted.)

- "[M]ere apprehension of injury from a dangerous condition may constitute a nuisance where it interferes with the comfortable enjoyment of property… ." (*McIvor v. Mercer-Fraser Co.* (1946) 76 Cal.App.2d 247, 254 [172 P.2d 758].)

- "A fire hazard, at least when coupled with other conditions, can be found to be a public nuisance and abated." (*People v. Oliver* (1948) 86 Cal.App.2d 885, 889 [195 P.2d 926].)

- 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.

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)

2210. Affirmative Defense—Privilege to Protect Own Financial Interest

[*Name of defendant***] claims that there was no intentional interference with contractual relations because [he/she/it] acted only to protect [his/her/its] legitimate financial interests. To succeed, [***name of defendant***] must prove all of the following:**

1. **That [***name of defendant***] had a [legitimate] financial interest in the contractual relations because [***specify financial interest***];**

2. **That [***name of defendant***] acted only to protect [his/her/its] own financial interest;**

3. **That [***name of defendant***] acted reasonably and in good faith to protect it; and**

4. **That [***name of defendant***] used appropriate means to protect it.**

New June 2016

Directions for Use

Give this instruction as an affirmative defense to a claim for intentional interference with contractual relations. (See CACI No. 2201.) The defense presents a justification based on the defendant's right to protect its own financial interest.

In element 1, the jury should be told the specific financial interest that the defendant was acting to protect. Include "legitimate" if the jury will be asked to determine whether that financial interest was legitimate, as opposed perhaps to pretextual or fraudulent.

Sources and Authority

- "In harmony with the general guidelines of the test for justification is the narrow protection afforded to a party where (1) he has a legally protected interest, (2) in good faith threatens to protect it, and (3) the threat is to protect it by appropriate means. Prosser adds: 'Where the defendant acts to further his own advantage, other distinctions have been made. If he has a present, existing economic interest to protect, such as the ownership or condition of property, or a prior contract of his own, or a financial interest in the affairs of the person persuaded, he is privileged to prevent performance of the contract of another which threatens it; and for obvious reasons of policy he is likewise privileged to assert an honest claim, or bring or threaten a suit in good faith.' " (*Richardson v. La Rancherita* (1979) 98 Cal.App.3d 73, 81 [159 Cal.Rptr. 285], internal citation omitted.)

- "Justification for the interference is an affirmative defense and not an element of plaintiff's cause of action." (*Richardson, supra,* 98 Cal.App.3d at p. 80.)

- "Something other than sincerity and an honest conviction by a party in his position is required before justification for his conduct on the grounds of 'good faith' can be established. There must be an objective basis for the belief which requires more than reliance on counsel." (*Richardson, supra*, 98 Cal.App.3d at pp. 82−83.)

- "A thoroughly bad motive, that is, a *purpose solely to harm the plaintiff,* of course, is sufficient to exclude any apparent privilege which the interests of the parties might otherwise create, just as such a motive will defeat the immunity of any other conditional privilege. If the defendant does not act in a bona fide attempt to protect his own interest or the interest of others involved in the situation, he forfeits the immunity of the privilege. . . . *Conduct is actionable, when it is indulged solely to harm another, since the legitimate interest of the defendant is practically eliminated from consideration*. The defendant's interest, although of such a character as to justify an invasion of another's similar interest, is not to be taken into account when the defendant acts, not for the purpose of protecting that interest, but *solely* to damage the plaintiff." (*Bridges v. Cal-Pacific Leasing Co.* (1971) 16 Cal.App.3d 118, 132 [93 Cal.Rptr. 796], original italics.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, § 760

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts,* § 40.119 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition,* § 565.137 (Matthew Bender)

12 California Points and Authorities, Ch. 122, *Interference,* § 122.42 et seq. (Matthew Bender)

2332. Bad Faith (First Party)—Failure to Properly Investigate Claim–Essential Factual Elements

[*Name of plaintiff*] claims that [*name of defendant*] acted unreasonably, that is, without proper cause, by failing to conduct a proper investigation of [his/her/its] claim. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of plaintiff*] suffered a loss covered under an insurance policy issued by [*name of defendant*];**

2. **That [*name of plaintiff*] properly presented a claim to [*name of defendant*] to be compensated for the loss;**

3. **That [*name of defendant*], failed to conduct a full, fair, prompt, and thorough investigation of all of the bases of [*name of plaintiff*]'s claim.**

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

5. **That [*name of defendant*]'s failure to properly investigate the claim was a substantial factor in causing [*name of plaintiff*]'s harm.**

~~**[*Name of defendant*] acted unreasonably, that is, without proper cause, if it failed to conduct a full, fair, and thorough investigation of all of the bases of the claim.**~~ **When investigating [*name of plaintiff*]'s claim, [*name of defendant*] had a duty to diligently search for and consider evidence that supported coverage of the claimed loss.**

New September 2003; Revised December 2005, December 2007, April 2008, December 2015, June 2016

Directions for Use

This instruction sets forth a claim for breach of the implied covenant of good faith and fair dealing based on the insurer's failure or refusal to conduct a proper investigation of the plaintiff's claim.~~must be used with CACI No. 2331, *Breach of the Implied Obligation of Good Faith and Fair Dealing—Failure or Delay in Payment (First Party)—Essential Factual Elements*, if it is alleged~~. The claim alleges that the insurer acted unreasonably, that is ~~or~~ without proper cause, by failing to properly investigate the claim. (See *Rappaport-Scott v. Interinsurance Exch. of the Auto. Club* (2007) 146 Cal.App.4th 831, 837 [53 Cal.Rptr.3d 245].)

The instructions in this series assume that 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.

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

Sources and Authority

- "[A]n insurer may breach the covenant of good faith and fair dealing when it fails to properly investigate its insured's claim." (*Egan v. Mutual of Omaha Insurance Co.* (1979) 24 Cal.3d 809, 817 [169 Cal.Rptr. 691, 620 P.2d 141].)

- "To fulfill its implied obligation, an insurer must give at least as much consideration to the interests of the insured as it gives to its own interests. When the insurer unreasonably and in bad faith withholds payment of the claim of its insured, it is subject to liability in tort. And an insurer cannot reasonably and in good faith deny payments to its insured without fully investigating the grounds for its denial." (*Frommoethelydo v. Fire Insurance Exchange* (1986) 42 Cal.3d 208, 214–215 [228 Cal.Rptr. 160, 721 P.2d 41], internal citation omitted.)

- "To protect [an insured's] interests it is essential that an insurer fully inquire into possible bases that might support the insured's claim. Although we recognize that distinguishing fraudulent from legitimate claims may occasionally be difficult for insurers, ... an insurer cannot reasonably and in good faith deny payments to its insured without thoroughly investigating the foundation for its denial." (*Egan, supra*, 24 Cal.3d at p. 819.)

- "When investigating a claim, an insurance company has a duty to diligently search for evidence which supports its insured's claim. If it seeks to discover only the evidence that defeats the claim it holds its own interest above that of the insured." (*Mariscal v. Old Republic Ins. Co.* (1996) 42 Cal.App.4th 1617, 1620 [50 Cal.Rptr.2d 224].)

- "While we agree with the trial court … that the insurer's interpretation of the language of its policy which led to its original denial of [the insured]'s claim was reasonable, it does not follow that [the insurer]'s resulting claim denial can be justified in the absence of a full, fair and thorough investigation of *all* of the bases of the claim that was presented." (*Jordan v. Allstate Ins. Co.* (2007) 148 Cal.App.4th 1062, 1066 [56 Cal.Rptr.3d 312], original italics.)

- "An unreasonable failure to investigate amounting to ... unfair dealing may be found when an insurer fails to consider, or seek to discover, evidence relevant to the issues of liability and damages. ... [¶] The insurer's willingness to reconsider its denial of coverage and to continue an investigation into a claim has been held to weigh in favor of its good faith." (*Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 880 [93 Cal.Rptr.2d 364], internal citation omitted.)

- "[The insurer], of course, was not obliged to accept [the doctor]'s opinion without scrutiny or investigation. To the extent it had good faith doubts, the insurer would have been within its rights to investigate the basis for [plaintiff]'s claim by asking [the doctor] to reexamine or further explain his findings, having a physician review all the submitted medical records and offer an opinion, or, if necessary, having its insured examined by other physicians (as it later did). What it could not do, consistent with the implied covenant of good faith and fair dealing, was *ignore* [the doctor]'s conclusions without any attempt at adequate investigation, and reach contrary conclusions lacking any discernable medical foundation." (*Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 722 [68 Cal.Rptr.3d 746, 171 P.3d 1082], original italics.)

- "[W]hether an insurer breached its duty to investigate [is] a question of fact to be determined by the particular circumstances of each case." (*Paulfrey v. Blue Chip Stamps* (1983) 150 Cal.App.3d 187, 196 [197 Cal.Rptr. 501].)

- "[L]iability in tort arises only if the conduct was unreasonable, that is, without proper cause." (*Rappaport-Scott, supra*, 146 Cal.App.4th at p. 837.)

- "[W]ithout actual presentation of a claim by the insured in compliance with claims procedures contained in the policy, there is no duty imposed on the insurer to investigate the claim." (*California Shoppers, Inc. v. Royal Globe Insurance Co.* (1985) 175 Cal.App.3d 1, 57 [221 Cal.Rptr. 171].)

- "It would seem reasonable that any responsibility to investigate on an insurer's part would not arise unless and until the threshold issue as to whether a claim was filed, or a good faith effort to comply with claims procedure was made, has been determined. In no event could an insured fail to keep his/her part of the bargain in the first instance, and thereafter seek recovery for breach of a duty to pay seeking punitive damages based on an insurer's failure to investigate a nonclaim." (*Paulfrey, supra*, 150 Cal.App.3d at pp. 199–200.)

Secondary Sources

2 Witkin, Summary of California Law (10th ed. 2005) Insurance, § 245

Croskey et al., California Practice Guide: Insurance Litigation, Chapter 12C-D, *Bad Faith—First Party Cases--Application—Matters Held "Unreasonable"* ~~(The Rutter Group)~~ ¶¶ 12:848–12:904 (The Rutter Group)

1 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar) Investigating the Claim, §§ 9.2-9.3, 9.14–9.22A

2 California Insurance Law & Practice, Ch. 13, *Claims Handling and the Duty of Good Faith*, § 13.04[1]–[3] (Matthew Bender)

2 California Uninsured Motorist Law, Ch. 24, *Bad Faith in Uninsured Motorist Law*, § 24.11 (Matthew Bender)

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

12 California Points and Authorities, Ch. 120, *Insurance*, §§ 120.153, 120.184 (Matthew Bender)

2334. Bad Faith (Third Party)—Refusal to Accept Reasonable Settlement Within Liability Policy Limits—Essential Factual Elements

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

1. **That [***name of plaintiff in underlying case***] brought a lawsuit against [***name of plaintiff***] for a claim that was covered by [***name of defendant***]'s insurance policy;**

2. **That [***name of defendant***] failed to accept a reasonable settlement demand for an amount within policy limits; and**

3. **That a monetary judgment was entered against [***name of plaintiff***] for a sum greater than the policy limits.**

"Policy limits" means the highest amount available under the policy for the claim against [*name of plaintiff***].**

A settlement demand for an amount within policy limits is reasonable if [*name of defendant***] knew or should have known at the time the ~~settlement~~ demand was rejected that the potential judgment was likely to exceed the amount of the ~~settlement~~ demand based on [***name of plaintiff in underlying case***]'s injuries or loss and [***name of plaintiff***]'s probable liability. However, the demand may be unreasonable for reasons other than the amount demanded.**

New September 2003; Revised December 2007, June 2012, December 2012, June 2016

Directions for Use

This instruction is for use in an "excess judgment" case; that is one in which judgment was against the insured for an amount over the policy limits, after the insurer rejected a settlement demand within policy limits.

The instructions in this series assume that 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 use if the insurer assumed the duty to defend the insured, but failed to accept a reasonable settlement offer. It may also be used if the insurer rejects the defense, but did in fact owe its insured a duty to indemnify (i.e., coverage can be established). (See *Dewitt v. Monterey Ins. Co.* (2012) 204 Cal.App.4th 233, 244 [138 Cal.Rptr.3d 705].)~~ For instructions regarding general breach of contract issues, refer to the Contracts series (CACI No. 300 et seq.).

If it is alleged that a demand was made in excess of limits and there is a claim that the defendant should

have contributed the policy limits, then this instruction will need to be modified.

This instruction should also be modified if the insurer did not accept the policy-limits demand because of potential remaining exposure to the insured, such as a contractual indemnity claim or exposure to other claimants.

Under this instruction, if the jury finds that the policy-limits demand was reasonable, then the insurer is automatically liable for the entire excess judgment. Language from the California Supreme Court supports this view of what might be called insurer "strict liability" if the demand is reasonable. (See *Johansen v. California State Auto. Assn. Inter-Insurance Bureau* (1975) 15 Cal.3d 9, 16 [123 Cal.Rptr. 288, 538 P.2d 744] ["[W]henever it is likely that the judgment against the insured will exceed policy limits 'so that the most reasonable manner of disposing of the claim is a settlement which can be made within those limits, a consideration in good faith of the insured's interest *requires the insurer to settle* the claim,' " italics added].)

However, there is language in numerous cases, including several from the California Supreme Court, that would require the plaintiff to also prove that the insurer's rejection of the demand was "unreasonable." (See, e.g., *Hamilton v. Maryland Cas. Co.* (2002) 27 Cal.4th 718, 724-725 [117 Cal.Rptr.2d 318, 41 P.3d 128] ["An *unreasonable* refusal to settle may subject the insurer to liability for the entire amount of the judgment rendered against the insured, including any portion in excess of the policy limits," italics added]; *Graciano v. Mercury General Corp.* (2014) 231 Cal.App.4th 414, 425 [179 Cal.Rptr.3d 717] [claim for bad faith based on an alleged wrongful refusal to settle *also* requires proof the insurer *unreasonably* failed to accept an otherwise reasonable offer within the time specified by the third party for acceptance, italics added].) Under this view, even if the policy-limits demand was reasonable, the insurer may assert that it had a legitimate reason for rejecting it. However, this option, if it exists, is not available in a denial of coverage case. (*Johansen*, *supra*, 15 Cal.3d at pp. 15−16.)

None of these cases, however, neither those seemingly creating strict liability nor those seemingly providing an opportunity for the insurer to assert that its rejection was reasonable, actually discuss, analyze, and apply this standard to reach a result. All are determined on other issues, leaving the pertinent language as arguably dicta.

For this reason, the committee has elected not to change the elements of the instruction at this time. Hopefully, some day there will be a definitive resolution from the courts. Until then, the need for an additional element requiring the insurer's rejection of the demand to have been unreasonable is a plausible, but unsettled, requirement. For a thorough analysis of the issue, see the committee's report to the Judicial Council for its June 2016 meeting, found at (link).

Sources and Authority

- "[T]he implied obligation of good faith and fair dealing requires the insurer to settle in an appropriate case although the express terms of the policy do not impose such a duty. [¶] The insurer, in deciding whether a claim should be compromised, must take into account the interest of the insured and give it at least as much consideration as it does to its own interest. When there is great risk of a recovery beyond the policy limits so that the most reasonable manner of disposing of the claim is a settlement which can be made within those limits, a consideration in good faith of the insured's interest requires

the insurer to settle the claim." (*Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 659 [328 P.2d 198], citation omitted.)

- "Liability is imposed not for a bad faith breach of the contract but for failure to meet the duty to accept reasonable settlements, a duty included within the implied covenant of good faith and fair dealing." (*Crisci v. Security Insurance Co. of New Haven, Connecticut* (1967) 66 Cal.2d 425, 430 [58 Cal.Rptr. 13, 426 P.2d 173].)

- "In determining whether an insurer has given consideration to the interests of the insured, the test is whether a prudent insurer without policy limits would have accepted the settlement offer." (*Crisci*, *supra*, 66 Cal.2d at p. 429.)

- "[I]n deciding whether or not to compromise the claim, the insurer must conduct itself as though it alone were liable for the entire amount of the judgment. ... [T]he only permissible consideration in evaluating the reasonableness of the settlement offer becomes whether, in light of the victim's injuries and the probable liability of the insured, the ultimate judgment is likely to exceed the amount of the settlement offer." (*Johansen*, *supra*, ~~*v. California State Auto. Asso. Inter-Insurance Bureau* (1975)~~ 15 Cal.3d ~~9,~~ at p. 16 ~~[123 Cal.Rptr. 288, 538 P.2d 744]~~, internal citation omitted.)

- "[A]n insurer is required to act in good faith in dealing with its insured. Thus, in deciding whether or not to settle a claim, the insurer must take into account the interests of the insured, and when there is a great risk of recovery beyond the policy limits, a good faith consideration of the insured's interests may require the insurer to settle the claim within the policy limits. An unreasonable refusal to settle may subject the insurer to liability for the entire amount of the judgment rendered against the insured, including any portion in excess of the policy limits." (*Hamilton*, *supra*, 27 Cal.4th at pp. 724–725.)

- "The size of the judgment recovered in the personal injury action when it exceeds the policy limits, although not conclusive, furnishes an inference that the value of the claim is the equivalent of the amount of the judgment and that acceptance of an offer within those limits was the most reasonable method of dealing with the claim." (*Crisci*, *supra*, 66 Cal.2d at p. 431.)

- "The covenant of good faith and fair dealing implied in every insurance policy obligates the insurer, among other things, to accept a reasonable offer to settle a lawsuit by a third party against the insured within policy limits whenever there is a substantial likelihood of a recovery in excess of those limits. The insurer must evaluate the reasonableness of an offer to settle a lawsuit against the insured by considering the probable liability of the insured and the amount of that liability, without regard to any coverage defenses. An insurer that fails to accept a reasonable settlement offer within policy limits will be held liable in tort for the entire judgment against the insured, even if that amount exceeds the policy limits. An insurer's duty to accept a reasonable settlement offer in these circumstances is implied in law to protect the insured from exposure to liability in excess of coverage as a result of the insurer's gamble—on which only the insured might lose." (*Rappaport-Scott v. Interinsurance Exch. of the Auto. Club* (2007) 146 Cal.App.4th 831, 836 [53 Cal.Rptr.3d 245], internal citations omitted.)

- "An insured's claim for bad faith based on an alleged wrongful refusal to settle first requires proof the third party made a reasonable offer to settle the claims against the insured for an amount within the policy limits. The offer satisfies this first element if (1) its terms are clear enough to have created an

enforceable contract resolving all claims had it been accepted by the insurer, (2) all of the third party claimants have joined in the demand, (3) it provides for a complete release of all insureds, and (4) the time provided for acceptance did not deprive the insurer of an adequate opportunity to investigate and evaluate its insured's exposure." (*Graciano, supra, ~~v. Mercury General Corp.~~ (2014)* 231 Cal.App.4th ~~414,~~ at p. 425 ~~[179 Cal.Rptr.3d 717]~~, internal citations omitted.)

- "A bad faith claim requires 'something beyond breach of the contractual duty itself, and that something more is ' "refusing, *without proper cause*, to compensate its insured for a loss covered by the policy … ." [Citation.] Of course, the converse of "without proper cause" is that declining to perform a contractual duty under the policy *with proper cause* is not a breach of the implied covenant.' " (*Graciano, supra*, 231 Cal.App.4th at p. 433, original italics.)

- "Determination of the reasonableness of a settlement offer for purposes of a reimbursement action is based on the information available to [the insurer] at the time of the proposed settlement." (*Isaacson v. California Ins. Guarantee Assn.* (1988) 44 Cal.3d 775, 793 [244 Cal.Rptr. 655, 750 P.2d 297].)

- ~~"A claim for bad faith based on an alleged wrongful refusal to settle also requires proof the insurer unreasonably failed to accept an otherwise reasonable offer within the time specified by the third party for acceptance." (*Graciano, supra*, 231 Cal.App.4th at p. 425.)~~

- "The third party is entitled to set a reasonable time limit within which the insurer must accept the settlement proposal … ." (*Graciano, supra,* 231 Cal.App.4th at p. 434.)

- "Whether [the insurer] 'refused' the 'offer,' and whether it could reasonably have acted otherwise in light of the 11-day deadline imposed by the offer's terms, were questions for the jury." (*Coe v. State Farm Mut. Auto. Ins. Co.* (1977) 66 Cal.App.3d 981, 994 [136 Cal.Rptr. 331].)

- "A cause of action for bad faith refusal to settle arises only after a judgment has been rendered in excess of the policy limits. ... Until judgment is actually entered, the mere possibility or probability of an excess judgment does not render the refusal to settle actionable." (*Safeco Ins. Co. of Am. v. Superior Court* (1999) 71 Cal.App.4th 782, 788 [84 Cal.Rptr.2d 43], internal citations omitted.)

- "An insurer's wrongful failure to settle may be actionable even without rendition of an excess judgment. An insured may recover for bad faith failure to settle, despite the lack of an excess judgment, where the insurer's misconduct goes beyond a simple failure to settle within policy limits or the insured suffers consequential damages apart from an excess judgment." (*Howard v. American National Fire Ins. Co.* (2010) 187 Cal.App.4th 498, 527 [115 Cal.Rptr.3d 42], internal citations omitted.)

- " 'An insurer who denies coverage *does so at its own risk and although its position may not have been entirely groundless*, if the denial is found to be wrongful it is liable for the full amount which will compensate the insured for all the detriment caused by the insurer's breach of the express and implied obligations of the contract.' Accordingly, contrary to the defendant's suggestion, an insurer's 'good faith,' though erroneous, belief in noncoverage affords no defense to liability flowing from the insurer's refusal to accept a reasonable settlement offer." (*Johansen, supra,* 15 Cal.3d at pp. 15−16, original italics, footnotes and internal citation omitted.)

- "~~[A]n insurer who refused a reasonable settlement offer, on the ground of no coverage, does so at its own risk, so that the insurer has no defense that its refusal was in good faith if coverage is, in fact, found. However, w~~[W]here the *kind* of claim asserted is not covered by the insurance contract (and not simply the *amount* of the claim), an insurer has no obligation to pay money in settlement of a noncovered claim, because 'The insurer does not … insure the entire range of an insured's well-being, outside the scope of and unrelated to the insurance policy, with respect to paying third party claims.…' " (*Dewitt v. Monterey Ins. Co.* (2012) 204 Cal.App.4th 233, 244 [138 Cal.Rptr.3d 705]~~*DeWitt, supra,* 204 Cal.App.4th at p. 244~~, original italics.)

- "A good faith belief in noncoverage is not relevant to a determination of the reasonableness of a settlement offer." (*Samson v. Transamerica Insurance Co.* (1981) 30 Cal.3d 220, 243 [178 Cal.Rptr. 343, 636 P.2d 32], internal citation omitted.)

- "An insurer that breaches its duty of reasonable settlement is liable for all the insured's damages proximately caused by the breach, regardless of policy limits. Where the underlying action has proceeded to trial and a judgment in excess of the policy limits has been entered against the insured, the insurer is ordinarily liable to its insured for the entire amount of that judgment, excluding any punitive damages awarded." (*Hamilton, supra, ~~v. Maryland Casualty Co.~~* ~~(2002)~~ 27 Cal.4th at p.~~718,~~ 725~~ [117 Cal.Rptr.2d 318, 41 P.3d 128]~~, internal citations omitted.)

- "[I]nsurers do have a 'selfish' interest (that is, one that is peculiar to themselves) in imposing a blanket rule which effectively precludes disclosure of policy limits, and that interest can adversely affect the possibility that an excess claim against a policyholder might be settled within policy limits. Thus, a palpable conflict of interest exists in at least one context where there is no formal settlement offer. We therefore conclude that a formal settlement offer is not an absolute prerequisite to a bad faith action in the wake of an excess verdict when the claimant makes a request for policy limits and the insurer refuses to contact the policyholder about the request." (*Boicourt v. Amex Assurance Co.* (2000) 78 Cal.App.4th 1390, 1398−1399 [93 Cal.Rptr.3d 763].)

- "For bad faith liability to attach to an insurer's failure to pursue settlement discussions, in a case where the insured is exposed to a judgment beyond policy limits, there must be, at a minimum, some evidence either that the injured party has communicated to the insurer an interest in settlement, or some other circumstance demonstrating the insurer knew that settlement within policy limits could feasibly be negotiated. In the absence of such evidence, or evidence the insurer by its conduct has actively foreclosed the possibility of settlement, there is no "opportunity to settle" that an insurer may be taxed with ignoring." (*Reid v. Mercury Ins. Co.* (2013) 220 Cal.App.4th 262, 272 [162 Cal.Rptr.3d 894].)

- **"(4) [12:245] Insurer culpability required? A number of cases suggest that some degree of insurer 'culpability' is required before an insurer's refusal to settle a third party claim can be found to constitute 'bad faith.' [*Howard v. American Nat'l Fire Ins. Co.* (2010) 187 CA4th 498, 529, 115 CR3d 42, 69 (quoting text)]**

  (a) [12:246] **Good faith or mistake as excuse:** 'If the insurer has exercised good faith in all of its dealings … and if the settlement which it has rejected has been fully and fairly considered and has been based upon an *honest belief* that the insurer could defeat the action or keep any possible

judgment within the limits of the policy, and its judgments are based on a fair review of the evidence after reasonable diligence in ascertaining the facts, and upon sound legal advice, a court should not subject the insurer to further liability if it ultimately turns out that its judgment is a mistaken judgment.' [See *Brown v. Guarantee Ins. Co.* (1957) 155 CA2d 679, 684, 319 P2d 69, 72 (emphasis added); *Howard v. American Nat'l Fire Ins. Co.*, supra, 187 CA4th at 529, 115 CR3d at 69—'an insurer may reasonably underestimate the value of a case, and thus refuse settlement' on this basis (acknowledging but not applying rule)]

'In short, so long as insurers are not subject to a strict liability standard, there is still room for an honest, innocent mistake.' [*Walbrook Ins. Co. Ltd. v. Liberty Mut. Ins. Co.* (1992) 5 CA4th 1445, 1460, 7 CR2d 513, 521]

1) [12:246.1] **Comment: These cases are difficult to reconcile with the 'only permissible consideration' standard of a 'reasonable settlement demand' set out in *Johansen* and CACI 2334 (see ¶12:235.1). A possible explanation is that these cases address the 'reasonableness' of the insurer's refusal to settle based on a dispute as to the value of the case (or other matters unrelated to coverage), whereas *Johansen* addressed 'reasonableness' in the context of a coverage dispute (see ¶12:235). [See *Howard v. American Nat'l Fire Ins. Co.*, supra, 187 CA4th at 529, 115 CR3d at 69 (quoting text)]" (**Croskey et al., California Practice Guide: Insurance Litigation, Ch. 12B-B, *Bad Faith Refusal To Settle*, ¶¶ 12:245–12:246.1 (The Rutter Group), bold in original.)

Secondary Sources

2 Witkin, Summary of California Law (10th ed. 2005) Insurance, §§ 257–258

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 12B-A, *Implied Covenant Liability—Introduction*, ¶¶ 12:202–12:224 (The Rutter Group)

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 12B-B, *Bad Faith Refusal To Settle*, ¶¶ 12:226–12:548 (The Rutter Group)

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 12B-C, *Bad Faith Liability Despite Settlement Of Third Party Claims*, ¶¶ 12:575–12:581.12 (The Rutter Group)

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 12B-D, *Refusal To Defend Cases*, ¶¶ 12:582–12:686, (The Rutter Group)

2 California Liability Insurance Practice: Claims and Litigation (Cont.Ed.Bar) Actions for Failure to Settle, §§ 26.1–26.35

2 California Insurance Law and Practice, Ch. 13, *Claims Handling and the Duty of Good Faith*, § 13.07[1]–[3] (Matthew Bender)

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

12 California Points and Authorities, Ch. 120, *Insurance*, §§ 120.195, 120.199, 120.205, 120.207 (Matthew Bender)

2505. Retaliation—Essential Factual Elements (Gov. Code, § 12940(h))

[*Name of plaintiff***] claims that [***name of defendant***] retaliated against [him/her] for [***describe activity protected by the FEHA***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [***describe protected activity***];**

2. **[That [***name of defendant***] [discharged/demoted/[***specify 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;]**

3. **That [***name of plaintiff***]'s [***describe protected activity***] was a substantial motivating reason for [***name of defendant***]'s [decision to [discharge/demote/[***specify other adverse employment action***]] [***name of plaintiff***]/conduct];**

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

5. **That [***name of defendant***]'s [decision to [discharge/demote/[***specify other adverse employment action***] [***name of plaintiff***]~~conduct~~ was a substantial factor in causing ~~[***name of plaintiff***]'s~~ [him/her] harm.**

[[*Name of plaintiff***] does not have to prove [discrimination/harassment] in order to be protected from retaliation. If [he/she] [reasonably believed that [***name of defendant***]'s conduct was unlawful/requested a [disability/religious] accommodation], [he/she] may prevail on a retaliation claim even if [he/she] does not present, or prevail on, a separate claim for [discrimination/harassment/[***other***]].]**

New September 2003; Revised August 2007, April 2008, October 2008, April 2009, June 2010, June 2012, December 2012, June 2013, June 2014, June 2016

Directions for Use

In elements 1 and 3, describe the protected activity in question. Government Code section 12940(h) provides that it is unlawful to retaliate against a person "because the person has opposed any practices forbidden under [Government Code sections 12900 through 12966] or because the person has filed a complaint, testified, or assisted in any proceeding under [the FEHA]." It is also unlawful to retaliate or

otherwise discriminate against a person for requesting an accommodation for religious practice or disability, regardless of whether the request was granted. (Gov. Code, § 12940(*l*)(4) [religious practice], (m)(2) [disability].)

Read the first option for element 2 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. For example, the case may involve a pattern of employer harassment consisting of acts that might not individually be sufficient to constitute retaliation, but taken as a whole establish prohibited conduct. (See *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1052–1056 [32 Cal.Rptr.3d 436, 116 P.3d 1123].) Give both the first and second options if the employee presents evidence supporting liability under both a sufficient-single-act theory or a pattern-of-harassment theory. (See, e.g., *Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 423–424 [69 Cal.Rptr.3d 1].) Also select "conduct" in element 3 if the second option or both the first and second options are included for element 2.

Retaliation in violation of the FEHA may be established by constructive discharge; that is, that the employer intentionally created or knowingly permitted working conditions to exist that were so intolerable that a reasonable person in the employee's position would have had no reasonable alternative other than to resign. (See *Steele v. Youthful Offender Parole Bd.* (2008) 162 Cal.App.4th 1241, 1253 [76 Cal.Rptr.3d 632].) If constructive discharge is alleged, give the third option for element 2 and also give CACI No. 2510, *"Constructive Discharge" Explained*. Also select "conduct" in element 3 if the third option is included for element 2.

Element 3 requires that the protected activity be a substantial motivating reason for the retaliatory acts. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; *Alamo v. Practice Management Information Corp.* (2013) 219 Cal.App.4th 466, 479 [161 Cal.Rptr.3d 758]; see also CACI No. 2507, *"Substantial Motivating Reason" Explained*.)

Note that there are two causation elements. There must be a causal link between the retaliatory animus and the adverse action (see element 3), and there must be a causal link between the adverse action and damages (see element 5). (See *Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal.App.4th 686, 713 [81 Cal.Rptr.3d 406].)

This instruction has been criticized in dictum because it is alleged that there is no element requiring retaliatory intent. (See *Joaquin v. City of Los Angeles* (2012) 202 Cal.App.4th 1207, 1229–1231 [136 Cal.Rptr.3d 472].) The court urged the Judicial Council to redraft the instruction and the corresponding special verdict form so as to clearly state that retaliatory intent is a necessary element of a retaliation claim under FEHA. The jury in the case was instructed per element 3 "that Richard Joaquin's reporting that he had been sexually harassed was a motivating reason for the City of Los Angeles' decision to terminate Richard Joaquin's employment or deny Richard Joaquin promotion to the rank of sergeant." The committee believes that the instruction as given is correct for the intent element in a retaliation case. However, in cases such as *Joaquin* that involve allegations of a prohibited motivating reason (based on a report of sexual harassment) and a permitted motivating reason (based on a good faith belief that the report was falsified), the instruction may need to be modified to make it clear that plaintiff must prove that defendant acted based on the *prohibited* motivating reason and not the *permitted* motivating reason.

Sources and Authority

- Retaliation Prohibited Under Fair Employment and Housing Act. Government Code section 12940(h).
- Retaliation for Requesting Reasonable Accommodation for Religious Practice and Disability Prohibited. Government Code section 12940(*l*)(4), (m)(2).
- "Person" Defined Under Fair Employment and Housing Act. Government Code section 12925(d).
- Prohibited Retaliation. Title 2 California Code of Regulations section 11021.
- "[I]n order to establish a prima facie case of retaliation under the FEHA, a plaintiff must show (1) he or she engaged in a 'protected activity,' (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer's action. Once an employee establishes a prima facie case, the employer is required to offer a legitimate, nonretaliatory reason for the adverse employment action. If the employer produces a legitimate reason for the adverse employment action, the presumption of retaliation ' " 'drops out of the picture,' " ' and the burden shifts back to the employee to prove intentional retaliation." (*Yanowitz, supra*, 36 Cal.4th at p. 1042, internal citations omitted.)
- "Actions for retaliation are 'inherently fact-driven'; it is the jury, not the court, that is charged with determining the facts." (*McCoy v. Pacific Maritime Assn.* (2013) 216 Cal.App.4th 283, 299 [156 Cal.Rptr.3d 851].)
- "It is well established that a plaintiff in a retaliation case need only prove that a retaliatory animus was at least a substantial or motivating factor in the adverse employment decision." (*George v. California Unemployment Ins. Appeals Bd.* (2009) 179 Cal.App.4th 1475, 1492 [102 Cal.Rptr.3d 431].)
- "Retaliation claims are inherently fact-specific, and the impact of an employer's action in a particular case must be evaluated in context. Accordingly, although an adverse employment action must materially affect the terms, conditions, or privileges of employment to be actionable, the determination of whether a particular action or course of conduct rises to the level of actionable conduct should take into account the unique circumstances of the affected employee as well as the workplace context of the claim." (*Yanowitz, supra,* 36 Cal.4th at p. 1052.)
- "Contrary to [defendant]'s assertion that it is improper to consider collectively the alleged retaliatory acts, there is no requirement that an employer's retaliatory acts constitute one swift blow, rather than a series of subtle, yet damaging, injuries. Enforcing a requirement that each act separately constitute an adverse employment action would subvert the purpose and intent of the statute." (*Yanowitz, supra*, 36 Cal.4th at pp. 1055–1056, internal citations omitted.)
- "Clearly, section 12940, subdivision (h) encompasses a broad range of protected activity. An employee need not use specific legal terms or buzzwords in opposing discrimination. Nor is it

necessary for an employee to file a formal charge. The protected activity element may be established by evidence that the plaintiff threatened to file a discrimination charge, by a showing that the plaintiff mistakenly, but reasonably and sincerely believed he was opposing discrimination, or by evidence an employer believed the plaintiff was a potential witness in another employee's FEHA action." (*Rope v. Auto-Chlor System of Washington, Inc.* (2013) 220 Cal.App.4th 635, 652 [163 Cal.Rptr.3d 392], internal citations and footnote omitted.)

- ~~"But protected activity does not include a mere request for reasonable accommodation. Without more, exercising one's rights under FEHA to request reasonable accommodation or engage in the interactive process does not demonstrate some degree of opposition to or protest of unlawful conduct by the employer." (*Nealy v. City of Santa Monica* (2015) 234 Cal.App.4th 359, 381 [184 Cal.Rptr.3d 9], internal citation omitted.)~~

- "Moreover, [defendant]'s actions had a substantial and material impact on the conditions of employment. The refusal to promote [plaintiff] is an adverse employment action under FEHA. There was also a pattern of conduct, the totality of which constitutes an adverse employment action. This includes undeserved negative job reviews, reductions in his staff, ignoring his health concerns and acts which caused him substantial psychological harm." (*Wysinger, supra,* 157 Cal.App.4th at p. 424, internal citations omitted.)

- "A long period between an employer's adverse employment action and the employee's earlier protected activity may lead to the inference that the two events are not causally connected. But if between these events the employer engages in a pattern of conduct consistent with a retaliatory intent, there may be a causal connection." (*Wysinger, supra,* 157 Cal.App.4th at p. 421, internal citation omitted.)

- "Both direct and circumstantial evidence can be used to show an employer's intent to retaliate. 'Direct evidence of retaliation may consist of remarks made by decisionmakers displaying a retaliatory motive.' Circumstantial evidence typically relates to such factors as the plaintiff's job performance, the timing of events, and how the plaintiff was treated in comparison to other workers." (*Colarossi v. Coty US Inc.* (2002) 97 Cal.App.4th 1142, 1153 [119 Cal.Rptr.2d 131], internal citations omitted.)

- "The retaliatory motive is 'proved by showing that plaintiff engaged in protected activities, that his employer was aware of the protected activities, and that the adverse action followed within a relatively short time thereafter.' 'The causal link may be established by an inference derived from circumstantial evidence, "such as the employer's knowledge that the [employee] engaged in protected activities and the proximity in time between the protected action and allegedly retaliatory employment decision." ' " (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 615 [262 Cal.Rptr. 842], internal citations omitted.)

- "[A]n employer generally can be held liable for the retaliatory actions of its supervisors." (*Wysinger, supra,* 157 Cal.App.4th at p. 420.)

- "Plaintiff, although a partner, is a person whom section 12940, subdivision (h) protects from retaliation for opposing the partnership-employer's harassment against those employees." (*Fitzsimons*

v. California Emergency Physicians Medical Group (2012) 205 Cal.App.4th 1423, 1429 [141 Cal.Rptr.3d 265].)

- "[A]n employer may be found to have engaged in an adverse employment action, and thus liable for retaliation under section 12940(h), 'by permitting … fellow employees to punish [him] for invoking [his] rights.' We therefore hold that an employer may be held liable for coworker retaliatory conduct if the employer knew or should have known of coworker retaliatory conduct and either participated and encouraged the conduct, or failed to take reasonable actions to end the retaliatory conduct." (*Kelley v. The Conco Cos.* (2011) 196 Cal.App.4th 191, 213 [126 Cal.Rptr.3d 651], internal citation omitted.)

- "[T]he employer is liable for retaliation under section 12940, subdivision (h), but nonemployer individuals are not personally liable for their role in that retaliation." (*Jones v. The Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1173 [72 Cal.Rptr.3d 624, 177 P.3d 232].)

- "[U]nder certain circumstances, a retaliation claim may be brought by an employee who has complained of or opposed conduct, even when a court or jury subsequently determines the conduct actually was not prohibited by the FEHA. Indeed, this precept is well settled. An employee is protected against retaliation if the employee reasonably and in good faith believed that what he or she was opposing constituted unlawful employer conduct such as sexual harassment or sexual discrimination." (*Miller v. Department of Corr.* (2005) 36 Cal.4th 446,. 473–474 [30 Cal.Rptr.3d 797, 115 P.3d 77], internal citations omitted.)

- " 'The legislative purpose underlying FEHA's prohibition against retaliation is to prevent employers from deterring employees from asserting good faith discrimination complaints … .' Employer retaliation against employees who are believed to be prospective complainants or witnesses for complainants undermines this legislative purpose just as effectively as retaliation after the filing of a complaint. To limit FEHA in such a way would be to condone 'an absurd result' that is contrary to legislative intent. We agree with the trial court that FEHA protects employees against preemptive retaliation by the employer." (*Steele, supra,* 162 Cal.App.4th at p. 1255, internal citations omitted.)

- " 'The plaintiff's burden is to prove, by competent evidence, that the employer's proffered justification is mere pretext; i.e., that the presumptively valid reason for the employer's action was in fact a coverup. … In responding to the employer's showing of a legitimate reason for the complained-of action, the plaintiff cannot " 'simply show the employer's decision was wrong, mistaken, or unwise. Rather, the employee '"must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them "unworthy of credence," … and hence infer "that the employer did not act for the [asserted] non-discriminatory reasons." ' " ' " (*Jumaane v. City of Los Angeles* (2015) 241 Cal.App.4th 1390, 1409 [194 Cal.Rptr.3d 689].)

- "Government Code section 12940, subdivision (h), does not shield an employee against termination or lesser discipline for either lying or withholding information during an employer's internal investigation of a discrimination claim. In other words, public policy does not protect deceptive activity during an internal investigation. Such conduct is a legitimate reason to terminate an at-will employee." (*McGrory v. Applied Signal Technology, Inc.* (2013) 212 Cal.App.4th 1510, 1528 [152

Cal.Rptr.3d 154], footnotes omitted.)

- "Although appellant does not argue she was constructively discharged, such a claim is not necessary to find unlawful retaliation." (*McCoy, supra,* 216 Cal.App.4th at p. 301.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 922, 940, 941

Chin et al., California Practice Guide: Employment Litigation, Ch. 7-A, *Title VII And The California Fair Employment And Housing Act,* ¶¶ 7:680–7:841 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.83–2.88

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws,* § 41.131 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination,* §§ 115.37, 115.94 (Matthew Bender)

California Civil Practice: Employment Litigation, §§ 2:74–2:75 (Thomson Reuters)

2506. Limitation on Remedies~~Affirmative Defense~~—After-Acquired Evidence

[*Name of defendant***] claims that [he/she/it] would have discharged [***name of plaintiff***] anyway if [he/she/it] had known that [***name of plaintiff***] [***describe misconduct***]. You must decide whether [***name of defendant***] has proved all of the following:**

1. **That [***name of plaintiff***] [***describe misconduct***];**

2. **That [***name of plaintiff***]'s misconduct was sufficiently severe that [***name of defendant***] would have discharged [him/her] because of that misconduct alone had [***name of defendant***] known of it; and**

3. **That [***name of defendant***] would have discharged [***name of plaintiff***] for [his/her] misconduct as a matter of settled company policy.**

New September 2003; Revised June 2016

Directions for Use

The after-acquired-evidence doctrine is an equitable defense that is determined by the court based on the facts of the case. This instruction assists the judge ~~where~~ if the facts are in dispute. (See, e.g., *Thompson v. Tracor Flight Systems, Inc.* (2001) 86 Cal.App.4th 1156, 1173 [104 Cal.Rptr.2d 95].) After-acquired evidence is not a complete defense to liability, but may foreclose otherwise available remedies. (*Salas v. Sierra Chemical Co.* (2014) 59 Cal.4th 407, 430−431 [173 Cal.Rptr.3d 689, 327 P.3d 797].) It is not clear if there is a role for the jury in deciding what remedies are available.

After-acquired evidence cases must be distinguished from mixed motive cases in which the employer at the time of the employment action has two or more motives, at least one of which is unlawful. (See *Salas supra*, 59 Cal.4th at p. 430; CACI No. 2512, *Limitation on Remedies—Same Decision*.)

Sources and Authority

- "In general, the after-acquired-evidence doctrine shields an employer from liability or limits available relief where, after a termination, the employer learns for the first time about employee wrongdoing that would have led to the discharge in any event. Employee wrongdoing in after-acquired-evidence cases generally falls into one of two categories: (1) misrepresentations on a resume or job application; or (2) posthire, on-the-job misconduct." (*Camp v. Jeffer, Mangels, Butler & Marmaro* (1995) 35 Cal.App.4th 620, 632 [41 Cal.Rptr.2d 329].)

- "The after-acquired-evidence doctrine serves as a complete or partial defense to an employee's claim of wrongful discharge ... To invoke this doctrine, '... the employer must establish "that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it" ... [T]he employer ... must show that such a firing would have taken place as a matter of "settled" company policy.' " (*Murillo v. Rite Stuff Foods, Inc.*

(1998) 65 Cal.App.4th 833, 842, 845-846 [77 Cal.Rptr.2d 12], internal citations omitted.)

- "Where an employer seeks to rely upon after-acquired evidence of wrongdoing, it must first establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge." (*McKennon v. Nashville Banner Publishing Co.* (1995) 513 U.S. 352, 362-363 [115 S.Ct. 879, 130 L.Ed.2d 852].)

- "Courts must tread carefully in applying the after-acquired-evidence doctrine to discrimination claims ... . Where, as here, the discriminatory conduct was pervasive during the term of employment, therefore, it would not be sound public policy to bar recovery for injuries suffered while employed. In applying the after-acquired-evidence doctrine, the equities between employer and employee can be balanced by barring all portions of the employment discrimination claim tied to the employee's discharge." (*Murillo*, *supra*, 65 Cal.App.4th at pp. 849–850.)

- "As the Supreme Court recognized in *McKennon*, the use of after-acquired evidence must 'take due account of the lawful prerogatives of the employer in the usual course of its business and the corresponding equities that it has arising from the employee's wrongdoing.' We appreciate that the facts in *McKennon* ... presented a situation where balancing the equities should permit a finding of employer liability-to reinforce the importance of antidiscrimination laws-while limiting an employee's damages-to take account of an employer's business prerogatives. However, the equities compel a different result where an employee who is disqualified from employment by government-imposed requirements nevertheless obtains a job by misrepresenting the pertinent qualifications. In such a situation, the employee should have no recourse for an alleged wrongful termination of employment." (*Camp*, *supra*, 35 Cal.App.4th at pp. 637-638, internal citation omitted.)

- "We decline to adopt a blanket rule that material falsification of an employment application is a complete defense to a claim that the employer, while still unaware of the falsification, terminated the employment in violation of the employee's legal rights." (*Cooper v. Rykoff-Sexton, Inc.* (1994) 24 Cal.App.4th 614, 617 [29 Cal.Rptr.2d 642].)

- "The doctrine [of after-acquired evidence] is the basis for an equitable defense related to the traditional defense of 'unclean hands' ... [¶] In the present case, there were conflicts in the evidence concerning respondent's actions, her motivations, and the possible consequences of her actions within appellant's disciplinary system. The trial court submitted those factual questions to the jury for resolution and then used the resulting special verdict as the basis for concluding appellant was not entitled to equitable reduction of the damages award." (*Thompson, supra,* 86 Cal.App.4th at p. 1173.)

- "By definition, after-acquired evidence is not known to the employer at the time of the allegedly unlawful termination or refusal to hire. In after-acquired evidence cases, the employer's alleged wrongful act in violation of the FEHA's strong public policy precedes the employer's discovery of information that would have justified the employer's decision. To allow such after-acquired evidence to be a complete defense would eviscerate the public policies embodied in the FEHA by allowing an employer to engage in invidious employment discrimination with total impunity." (*Salas*, *supra*, 59 Cal.4th at p. 430.)

- "In after-acquired evidence cases, therefore, both the employee's rights and the employer's

prerogatives deserve recognition. The relative equities will vary from case to case, depending on the nature and consequences of any wrongdoing on either side, a circumstance that counsels against rigidity in fashioning appropriate remedies in those actions where an employer relies on after-acquired evidence to defeat an employee's FEHA claims." (*Salas*, *supra*, 59 Cal.4th at p. 430.)

- "Generally, the employee's remedies should not afford compensation for loss of employment during the period after the employer's discovery of the evidence relating to the employee's wrongdoing. When the employer shows that information acquired after the employee's claim has been made would have led to a lawful discharge or other employment action, remedies such as reinstatement, promotion, and pay for periods after the employer learned of such information would be 'inequitable and pointless,' as they grant remedial relief for a period during which the plaintiff employee was no longer in the defendant's employment and had no right to such employment." (*Salas*, *supra*, 59 Cal.4th at pp. 430−431.)

- The remedial relief generally should compensate the employee for loss of employment from the date of wrongful discharge or refusal to hire to the date on which the employer acquired information of the employee's wrongdoing or ineligibility for employment. Fashioning remedies based on the relative equities of the parties prevents the employer from violating California's FEHA with impunity while also preventing an employee or job applicant from obtaining lost wages compensation for a period during which the employee or applicant would not in any event have been employed by the employer. In an appropriate case, it would also prevent an employee from recovering any lost wages when the employee's wrongdoing is particularly egregious." (*Salas*, *supra*, 59 Cal.4th at p. 431, footnote omitted.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, § 211

Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group) ¶¶ 7:930–7:932, 16:615–16:616, 16:625, 16:635–16:637, 16:647

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, § 2.107

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.92 (Matthew Bender)

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

California Civil Practice: Employment Litigation ~~(Thomson West)~~ § 2:88 (Thomson Reuters)

2512. Limitation on Remedies—Same Decision

[*Name of plaintiff***] claims that [he/she] was [discharged/[***other adverse employment action***]] because of [his/her] [***protected status or action, e.g., race, gender, or age***], which is an unlawful [discriminatory/retaliatory] reason. [***Name of defendant***] claims that [***name of plaintiff***] [was discharged/[***other adverse employment action***]] because of [***specify reason, e.g., plaintiff's poor job performance***], which is a lawful reason.**

If you find that [discrimination/retaliation] was a substantial motivating reason for [*name of plaintiff***]'s [discharge/[***other adverse employment action***]], you must then consider [***name of defendant***]'s stated reason for the [discharge/[***other adverse employment action***]].**

If you find that [*e.g., plaintiff's poor job performance***] was also a substantial motivating reason, then you must determine whether the defendant has proven that [he/she/it] would have [discharged/[***other adverse employment action***]] [***name of plaintiff***] anyway at that time based on [***e.g., plaintiff's poor job performance***] even if [he/she/it] had not also been substantially motivated by [discrimination/retaliation].**

In determining whether [*e.g., plaintiff's poor job performance***] was a substantial motivating reason, determine what actually motivated [***name of defendant***], not what [he/she/it] might have been justified in doing.**

If you find that [*name of defendant***] [discharged/[***other adverse employment action***]] [***name of plaintiff***] ~~only~~ for a [discriminatory/retaliatory] reason, you will be asked to determine the amount of damages that [he/she] is entitled to recover. If, however, you find that [***name of defendant***] would have [discharged/[***other adverse employment action***]] [***name of plaintiff***] anyway at that time for [***specify defendant's nondiscriminatory/nonretaliatory reason***], then [***name of plaintiff***] will not be entitled to reinstatement, back pay, or damages.**

New December 2013; Revised June 2015, June 2016

Directions for Use

Give this instruction along with CACI No. 2507, *"Substantial Motivating Reason" Explained*, if the employee has presented sufficient evidence for the jury to find that the employer took adverse action against him or her for a prohibited reason, but the employer has presented sufficient evidence for the jury to find that it had a legitimate reason for the action. In such a "mixed-motive" case, the employer is relieved from an award of damages, but may still be liable for attorney fees and costs and injunctive relief. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 211 [152 Cal.Rptr.3d 392, 294 P.3d 49].)

Mixed-motive must be distinguished from pretext though both require evaluation of the same evidence, i.e., the employer's purported legitimate reason for the adverse action. In a pretext case, the only actual motive is the discriminatory one and the purported legitimate reasons are fabricated in order to disguise

the true motive. (See *City and County of San Francisco v. Fair Employment and Housing Com.* (1987) 191 Cal.App.3d 976, 985 [236 Cal.Rptr. 716].) The employee has the burden of proving pretext. (*Harris, supra,* 56 Cal.4th at pp. 214−215.) If the employee proves discrimination or retaliation and also pretext, the employer is liable for all potential remedies including damages. But if the employee proves discrimination or retaliation but fails to prove pretext, then a mixed-motive case is presented. To avoid an award of damages, the employer then has the burden of proving that it would have made the same decision anyway solely for the legitimate reason, even though it may have also discriminated or retaliated.

Sources and Authority

- "[U]nder the FEHA, when a jury finds that unlawful discrimination was a substantial factor motivating a termination of employment, and when the employer proves it would have made the same decision absent such discrimination, a court may not award damages, backpay, or an order of reinstatement. But the employer does not escape liability. In light of the FEHA's express purpose of not only redressing but also preventing and deterring unlawful discrimination in the workplace, the plaintiff in this circumstance could still be awarded, where appropriate, declaratory relief or injunctive relief to stop discriminatory practices. In addition, the plaintiff may be eligible for reasonable attorney's fees and costs." (*Harris, supra,* 56 Cal.4th at p. 211.)

- "Because employment discrimination litigation does not resemble the kind of cases in which we have applied the clear and convincing standard, we hold that preponderance of the evidence is the standard of proof applicable to an employer's same-decision showing" (*Harris, supra,* 53 Cal.4th at p. 239.)

- "[W]hen we refer to a same-decision showing, we mean proof that the employer, in the absence of any discrimination, would have made the same decision *at the time it made its actual decision*." (*Harris, supra,* 56 Cal.4th at p. 224, original italics.)

- "In light of today's decision, a jury in a mixed-motive case alleging unlawful termination should be instructed that it must find the employer's action was substantially motivated by discrimination before the burden shifts to the employer to make a same-decision showing, and that a same-decision showing precludes an award of reinstatement, backpay, or damages." (*Harris, supra,* 56 Cal.4th at p. 241.)

- "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.)

- "[A] plaintiff has the initial burden to make a prima facie case of discrimination by showing that it is more likely than not that the employer has taken an adverse employment action based on a prohibited criterion. A prima facie case establishes a presumption of discrimination. The employer may rebut the presumption by producing evidence that its action was taken for a legitimate, nondiscriminatory reason. If the employer discharges this burden, the presumption of

discrimination disappears. The plaintiff must then show that the employer's proffered nondiscriminatory reason was actually a pretext for discrimination, and the plaintiff may offer any other evidence of discriminatory motive. The ultimate burden of persuasion on the issue of discrimination remains with the plaintiff." (*Harris, supra,* 56 Cal.4th at pp. 214−215.)

- " '[Plaintiff] further argues that for equitable reasons, an employer that wishes to make a same-decision showing must concede that it had mixed motives for taking the adverse employment action instead of denying a discriminatory motive altogether. But there is no inconsistency when an employer argues that its motive for discharging an employee was legitimate, while also arguing, contingently, that if the trier of fact finds a mixture of lawful and unlawful motives, then its lawful motive alone would have led to the discharge.' " (*Thornbrough v. Western Placer Unified School Dist.* (2013) 223 Cal.App.4th 169, 199 [167 Cal.Rptr.3d 24] [quoting *Harris, supra,* 56 Cal.App.4th at p. 240].)

- "As a preliminary matter, we reject [defendant]'s claim that the jury could have found no liability on the part of [defendant] had it been properly instructed on the mixed-motive defense at trial. As discussed, the Supreme Court in *Harris* held that the mixed-motive defense is available under the FEHA, but only as a limitation on remedies and not as a complete defense to liability. Consequently, when the plaintiff proves by a preponderance of the evidence that discrimination was a substantial motivating factor in the adverse employment decision, the employer is liable under the FEHA. When the employer proves by a preponderance of the evidence that it would have made the same decision even in the absence of such discrimination, the employer is still liable under the FEHA, but the plaintiff's remedies are then limited to declaratory or injunctive relief, and where appropriate, attorney's fees and costs. As presently drafted, BAJI No. 12.26 does not accurately set forth the parameters of the defense as articulated by the Supreme Court, but rather states that, in a mixed-motive case, 'the employer is not liable if it can establish by a preponderance of the evidence that its legitimate reason, standing alone, would have induced it to make the same decision.' By providing that the mixed-motive defense, if proven, is a complete defense to liability, [defendant]'s requested instruction directly conflicts with the holding in *Harris*. (*Alamo v. Practice Management Information Corp.* (2013) 219 Cal.App.4th 466, 481 [161 Cal.Rptr.3d 758], internal citations omitted.)

- "Pretext may … be inferred from the timing of the company's termination decision, by the identity of the person making the decision, and by the terminated employee's job performance before termination." (*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 272 [100 Cal.Rptr.3d 296].)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 928, 950

7 Witkin, California Procedure (5th ed. 2008), Judgment § 217

3 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws,* § 41.11 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.23 (Matthew Bender)

3020. Excessive Use of Force—Unreasonable Arrest or Other Seizure—Essential Factual Elements (42 U.S.C. § 1983)

[*Name of plaintiff***] claims that [***name of defendant***] used excessive force in [arresting/detaining] [him/her]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] used force in [arresting/detaining] [***name of plaintiff***];**

2. **That the force used by [***name of defendant***] 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 not excessive if it is reasonably necessary under the circumstances. In deciding whether force is reasonably necessary or excessive, you should determine, based on all of the facts and circumstances, what force a reasonable law enforcement officer on the scene would have used under the same or similar circumstances. You should consider the following:

(a) Whether [*name of plaintiff***] reasonably appeared to pose an immediate threat to the safety of [***name of defendant***] or others;**

(b) The seriousness of the crime at issue; [and]

(c) Whether [*name of plaintiff***] was actively [resisting [arrest/detention]/ [or] attempting to avoid [arrest/detention] by flight][./; and]**

(d) [*specify other factors particular to the case***].**

New September 2003; Revised June 2012; Renumbered from CACI No. 3001 December 2012; Revised June 2015, June 2016

Directions for Use

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

The three factors (a), (b), and (c) listed are often referred to as the "*Graham* factors." (See *Graham v.*

Connor (1989) 490 U.S. 386, 396 [109 S.Ct. 1865, 104 L.Ed.2d 443].) The *Graham* factors are not exclusive. (See *Glenn v. Wash. County* (9th Cir. 2011) 661 F.3d 460, 467–468.) Additional factors may be added if appropriate to the facts of the case.

Additional considerations and verdict form questions will be needed if there is a question of fact as to whether the defendant law enforcement officer had time for reflective decision-making before applying force. If the officers' conduct required a reaction to fast-paced circumstances presenting competing public safety obligations, the plaintiff must prove intent to harm. (See *Green v. County of Riverside* (2015) 238 Cal.App.4th 1363, 1372 [190 Cal.Rptr.3d 693].)

No case has yet determined, and therefore it is unclear, whether the defense has either the burden of proof or the burden of producing evidence on reaction to fast-paced circumstances. (See Evid. Code, §§ 500 [party has burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense asserted], 550 [burden of producing evidence as to particular fact is on party against whom a finding on the fact would be required in absence of further evidence].)

For an ~~This~~ instruction ~~may be modified~~ for use in a negligence claim under California common law based on the same event and facts, see CACI No. 440, *Unreasonable Force by Law Enforcement Officer in Arrest or Other Seizure—Essential Factual Elements*. For an instruction for use alleging excessive force as a battery, see CACI No. 1305, *Battery by Police Officer*. ~~The *Graham* factors apply under California negligence law. (*Hernandez v. City of Pomona* (2009) 46 Cal.4th 501, 514 [94 Cal. Rptr. 3d 1, 207 P.3d 506].) Liability under California negligence law can arise if tactical conduct and decisions preceding the use of force, as part of the totality of circumstances, make the ultimate use of force unreasonable. In this respect, California negligence law differs from the federal standard under the Fourth Amendment, which focuses more narrowly on the moment when force is used. (*Hayes v. County of San Diego* (2014) 57 Cal.4th 622, 639 [160 Cal.Rptr.3d 684, 305 P.3d 252].) If the negligence claim is based in part on tactical conduct and decisions made before the use of force, this instruction may be modified to specifically instruct the jury to consider the officers' pre-force decisions and conduct.~~

Sources and Authority

- "In addressing an excessive force claim brought under § 1983, analysis begins by identifying the specific constitutional right allegedly infringed by the challenged application of force. In most instances, that will be either the Fourth Amendment's prohibition against unreasonable seizures of the person, or the Eighth Amendment's ban on cruel and unusual punishments, which are the two primary sources of constitutional protection against physically abusive governmental conduct." (*Graham, supra,* 490 U.S. at p. 395, internal citations and footnote omitted.)

- "Where, as here, the excessive force claim arises in the context of an arrest or investigatory stop of a free citizen, it is most properly characterized as one invoking the protections of the Fourth Amendment, which guarantees citizens the right 'to be secure in their persons ... against unreasonable ... seizures' of the person." (*Graham, supra,* 490 U.S. at p. 394.)

- "[A]ll claims that law enforcement officers have used excessive force-deadly or not-in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process'

approach." (*Graham, supra,* 490 U.S. at p. 395.)

- "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." (*Graham, supra,* 490 U.S. at p. 396.)

- "Because '[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application,' ... its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." (*Graham, supra,* 490 U.S. at p. 396, internal citation omitted.)

- "The most important of these [factors from *Graham,* above] is whether the suspect posed an immediate threat to the officers or others, as measured objectively under the circumstances." (*Mendoza v. City of West Covina* (2012) 206 Cal.App.4th 702, 712 [141 Cal.Rptr.3d 553] .)

- "[The *Graham*] factors, however, are not exclusive. We 'examine the totality of the circumstances and consider "whatever specific factors may be appropriate in a particular case, whether or not listed in *Graham*." ' Other relevant factors include the availability of less intrusive alternatives to the force employed, whether proper warnings were given and whether it should have been apparent to officers that the person they used force against was emotionally disturbed." (*Glenn, supra*, 661 F.3d at p. 467, internal citations omitted.)

- "Because the reasonableness standard 'nearly always requires a jury to sift through disputed factual contentions, and to draw inferences therefrom, we have held on many occasions that summary judgment or judgment as a matter of law in excessive force cases should be granted sparingly.' " (*Torres v. City of Madera* (9th Cir. 2011) 648 F.3d 1119, 1125.)

- "Justice Stevens incorrectly declares [the 'objective reasonableness' standard under *Graham*] to be 'a question of fact best reserved for a jury,' and complains we are 'usurp[ing] the jury's factfinding function.'. At the summary judgment stage, however, once we have determined the relevant set of facts and drawn all inferences in favor of the nonmoving party *to the extent supportable by the record*, the reasonableness of [defendant]'s actions--or, in Justice Stevens' parlance, '[w]hether [respondent's] actions have risen to a level warranting deadly force,' is a pure question of law." (*Scott v. Harris* (2007) 550 U.S. 372, 381, fn. 8 [127 S. Ct. 1769; 167 L. Ed. 2d 686], original italics, internal citations omitted.)

- "To be sure, the reasonableness inquiry in the context of excessive force balances 'intrusion[s] on the individual's Fourth Amendment interests' against the government's interests. But in weighing the evidence in favor of the officers, rather than the [plaintiffs], the district court unfairly tipped the reasonableness inquiry in the officers' favor." (*Sandoval v. Las Vegas Metro. Police Dep't* (9th Cir. 2014) 756 F.3d 1154, 1167, internal citation omitted.)

- "The Fourth Amendment's 'reasonableness' standard is not the same as the standard of 'reasonable care' under tort law, and negligent acts do not incur constitutional liability." (*Hayes, supra,* 57

Cal.4th at p. 639.)

- "[S]tate negligence law, which considers the totality of the circumstances surrounding any use of deadly force, is broader than federal Fourth Amendment law, which tends to focus more narrowly on the moment when deadly force is used." (*Hayes, supra,* 57 Cal.4th at p. 639, internal citations omitted.)

- "We are cognizant of the Supreme Court's command to evaluate an officer's actions 'from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.' We also recognize the reality that 'police officers are often forced to make split-second judgments--in circumstances that are tense, uncertain, and rapidly evolving--about the amount of force that is necessary in a particular situation.' This does not mean, however, that a Fourth Amendment violation will be found only in those rare instances where an officer and his attorney are unable to find a sufficient number of compelling adjectives to describe the victim's conduct. Nor does it mean that we can base our analysis on what officers actually felt or believed during an incident. Rather, we must ask if the officers' conduct is ' "objectively reasonable" in light of the facts and circumstances confronting them' without regard for an officer's subjective intentions." (*Bryan v. MacPherson* (9th Cir. 2010) 630 F.3d 805, 831, internal citations omitted.)

- "[A]n officer may not use deadly force to apprehend a suspect where the suspect poses no immediate threat to the officer or others. On the other hand, it is not constitutionally unreasonable to prevent escape using deadly force '[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others.' " (*Wilkinson v. Torres* (9th Cir. 2010) 610 F.3d 546, 550, internal citations omitted.)

- "Resistance, or the reasonable perception of resistance, does not entitle police officers to use any amount of force to restrain a suspect. Rather, police officers who confront actual (or perceived) resistance are only permitted to use an amount of force that is reasonable to overcome that resistance." (*Barnard v. Theobald* (9th Cir. 2013) 721 F.3d 1069, 1076, internal citations omitted.)

- " In any event, the court correctly instructed the jury on the mental state required in a Fourteenth Amendment excessive use of force case under section 1983 because this case did not involve reflective decisionmaking by the officers, but instead their reaction to fast-paced circumstances presenting competing public safety obligations. Given these circumstances, [plaintiff] was required to prove that the officers acted with a purpose to cause harm to her son." (*Green v. County of Riverside* (2015) 238 Cal.App.4th 1363, 1372 [190 Cal.Rptr.3d 693].)

- "[T]he fact that the 'suspect was armed with a deadly weapon' does *not* render the officers' response per se reasonable under the Fourth Amendment. [¶] This is not to say that the Fourth Amendment always requires officers to delay their fire until a suspect turns his weapon on them. If the person is armed—or reasonably suspected of being armed—a furtive movement, harrowing gesture, or serious verbal threat might create an immediate threat." (*George v. Morris* (9th Cir. 2013) 724 F.3d 1191, 1200, original italics, internal citations omitted.)

- " '[A] simple statement by an officer that he fears for his safety or the safety of others is not enough; there must be objective factors to justify such a concern.' Here, whether objective factors supported

[defendant]'s supposed subjective fear is not a question that can be answered as a matter of law based upon the limited evidence in the record, especially given that on summary judgment that evidence must be construed in the light most favorable to [plaintiff], the non-moving party. Rather, whether [defendant]'s claim that he feared a broccoli-based assault is credible and reasonable presents a genuine question of material fact that must be resolved not by a court ruling on a motion for summary judgment but by a jury in its capacity as the trier of fact." (*Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156, 1163–1164.)

- "Although *Graham* does not specifically identify as a relevant factor whether the suspect poses a threat to *himself*, we assume that the officers could have used some reasonable level of force to try to prevent [decedent] from taking a suicidal act. But we are aware of no published cases holding it reasonable to use a *significant* amount of force to try to stop someone from attempting suicide. Indeed, it would be odd to permit officers to use force capable of causing serious injury or death in an effort to prevent the possibility that an individual might attempt to harm only himself. We do not rule out that in some circumstances some force might be warranted to prevent suicide, but in cases like this one the 'solution' could be worse than the problem." (*Glenn, supra,* 661 F.3d at p. 468.)

- "[W]e have stated that if the police were summoned to the scene to protect a mentally ill offender from himself, the government has less interest in using force. By contrast, if the officer warned the offender that he would employ force, but the suspect refused to comply, the government has an increased interest in the use of force." (*Marquez v. City of Phoenix* (9th Cir. 2012) 693 F.3d 1167, 1175, internal citation omitted.)

- "[P]reshooting conduct is included in the totality of circumstances surrounding an officer's use of deadly force, and therefore the officer's duty to act reasonably when using deadly force extends to preshooting conduct. But in a case like this one, where the preshooting conduct did not cause the plaintiff any injury independent of the injury resulting from the shooting, the reasonableness of the officers' preshooting conduct should not be considered in isolation. Rather, it should be considered in relation to the question whether the officers' ultimate use of deadly force was reasonable." (*Hayes, supra,* 57 Cal.4th at p. 632, internal citation omitted.)

- "A person is seized by the police and thus entitled to challenge the government's action under the Fourth Amendment when the officer by means of physical force or show of authority terminates or restrains his freedom of movement through means intentionally applied." (*Nelson v. City of Davis* (9th Cir. 2012) 685 F.3d 867, 875.)

- "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.)

- "We hold that, in order to recover damages for allegedly unconstitutional conviction or imprisonment,

or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus. A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under § 1983. Thus, when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. But if the district court determines that the plaintiff's action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit." (*Heck v. Humphrey* (1994) 512 U.S. 477, 486–487 [114 S.Ct. 2364, 129 L.Ed.2d 383], footnotes and internal citation omitted.)

- "[Plaintiff]'s section 1983 claim *is* barred to the extent it alleges that [the arresting officer] lacked justification to arrest him or to respond with reasonable force to his resistance. The use of deadly force in this situation, though, requires a separate analysis. 'For example, a defendant might resist a lawful arrest, to which the arresting officers might respond with excessive force to subdue him. The subsequent use of excessive force would not negate the lawfulness of the initial arrest attempt, or negate the unlawfulness of the criminal defendant's attempt to resist it. Though occurring in one continuous chain of events, two isolated factual contexts would exist, the first giving rise to criminal liability on the part of the criminal defendant, and the second giving rise to civil liability on the part of the arresting officer.' " (*Yount v. City of Sacramento* (2008) 43 Cal.4th 885, 899 [76 Cal.Rptr.3d 787, 183 P.3d 471], original italics.)

- "[T]he district court effectively required the jury to presume that the arrest *was* constitutionally lawful, and so not to consider facts concerning the basis for the arrest. Doing so removed critical factual questions that were within the jury's province to decide. For instance, by taking from the jury the question whether [officer]'s arrest of [plaintiff] for resisting or obstructing a police officer was lawful, the district judge implied simultaneously that [plaintiff] was in fact resisting or failing to obey the police officer's lawful instructions. Presuming such resistance could certainly have influenced the jury's assessment of 'the need for force,' as well as its consideration of the other *Graham* factors, including 'whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight. By erroneously granting judgment as a matter of law on [plaintiff]'s unlawful arrest claim, the district court impermissibly truncated the jury's consideration of [plaintiff]'s excessive force claim." (*Velazquez v. City of Long Beach* (9th Cir. 2015) 793 F.3d 1010, --, original italics.)

- "[P]rivate parties ordinarily are not subject to suit under section 1983, unless, sifting the circumstances of the particular case, the state has so significantly involved itself in the private conduct that the private parties may fairly be termed state actors. Among the factors considered are whether the state subsidized or heavily regulated the conduct, or compelled or encouraged the particular conduct, whether the private actor was performing a function which normally is performed exclusively by the state, and whether there was a symbiotic relationship rendering the conduct joint state action." (*Robbins v. Hamburger Home for Girls* (1995) 32 Cal.App.4th 671, 683 [38 Cal.Rptr.2d 534], internal citations omitted.)

- "Private parties act under color of state law if they willfully participate in joint action with state officials to deprive others of constitutional rights. Private parties involved in such a conspiracy may be liable under section 1983." (*United Steelworkers of America v. Phelps Dodge Corp.* (9th Cir.1989) 865 F.2d 1539, 1540, internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 816, 819 et seq.

Chin et al., California Practice Guide: Employment Litigation, Ch.7-G, *Unruh Civil Rights Act*, ¶ 7:1526 et seq. (The Rutter Group)

3 Civil Rights Actions, Ch. 10, *Deprivation of Rights Under Color of State Law—Law Enforcement and Prosecution*, ¶¶ 10.00–10.03 (Matthew Bender)

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

3021. Unlawful Arrest by Peace Officer Without a Warrant—Essential Factual Elements (42 U.S.C. § 1983)

[*Name of plaintiff***] claims that [***name of defendant***] wrongfully arrested [him/her] because [he/she] did not have a warrant. 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[and without probable cause];**

2. **That [***name of defendant***] was acting or purporting to act in the performance of [his/her] official duties;**

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.**

[The law requires that the trial judge, rather than the jury, decide if [*name of plaintiff***] was arrested without probable cause. But in order for me to do so, you must first decide:**

[*List all factual disputes that must be resolved by the jury.***]]**

New April 2009; Revised December 2009; Renumbered from CACI No. 3014 December 2012, June 2016

Directions for Use

Give this instruction in a false arrest case brought under title 42 United States Code section 1983. For an instruction for false arrest under California law, see CACI No. 1401, ~~*Essential Factual Elements—*~~*False Arrest Without Warrant by Peace Officer—Essential Factual Elements*.

The ultimate determination of whether the arresting officer had probable cause (element 1) is to be made by the court as a matter of law. (*Hunter v. Bryant* (1991) 502 U.S. 224, 227−228 [112 S.Ct. 534, 116 L.Ed.2d 589].) However, in exercising this role, the court does not sit as the trier of fact. It is still the province of the jury to determine the facts on conflicting evidence as to what the arresting officer knew at the time. (See *Velazquez v. City of Long Beach* (9th Cir. 2015) 793 F.3d 1010, 1018−1023; see also *King v. State of California* (2015) 242 Cal.App.4th 265, 289 [195 Cal.Rptr.3d 286].) Include "without probable cause" and the last optional paragraph if the jury will be asked to find facts with regard to probable cause.

The "official duties" referred to in element 2 must be duties created by a state, county, or municipal law, ordinance, or regulation. This aspect of color of law most likely will not be an issue for the jury, so it has been omitted to shorten the wording of element 2.

Sources and Authority

- "The Fourth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, provides: 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.' " (*Conway v. Pasadena Humane Society* (1996) 45 Cal.App.4th 163, 171 [52 Cal.Rptr.2d 777], internal citation omitted.)

- " 'A claim for unlawful arrest is cognizable under § 1983 as a violation of the Fourth Amendment, provided the arrest was without probable cause or other justification.'. 'Probable cause exists if the arresting officers "had knowledge and reasonably trustworthy information of facts and circumstances sufficient to lead a prudent person to believe that [the arrestee] had committed or was committing a crime." ' " (*Gravelet-Blondin v. Shelton* (9th Cir. 2013) 728 F.3d 1086, 1097−1098.)

- "The Court of Appeals' confusion is evident from its statement that 'whether a reasonable officer could have believed he had probable cause is a question for the trier of fact, and summary judgment . . . based on lack of probable cause is proper only if there is only one reasonable conclusion a jury could reach.' This statement of law is wrong for two reasons. First, it routinely places the question of immunity in the hands of the jury. Immunity ordinarily should be decided by the court long before trial. Second, the court should ask whether the agents acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed five years after the fact." (*Hunter*, *supra*, 502 U.S. at pp. 227−228, internal citations omitted.)

- "The mere existence of some evidence that could suggest self-defense does not negate probable cause. [Plaintiff]'s claim of self-defense apparently created doubt in the minds of the jurors, but probable cause can well exist (and often does) even though ultimately, a jury is not persuaded that there is proof beyond a reasonable doubt." (*Yousefian v. City of Glendale* (9th Cir. 2015) 779 F.3d 1010, 1014.)

- "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.)

- "Although the plaintiff bears the burden of proof on the issue of unlawful arrest, she can make a prima facie case simply by showing that the arrest was conducted without a valid warrant. At that point, the burden shifts to the defendant to provide some evidence that the arresting officers had probable cause for a warrantless arrest. The plaintiff still has the ultimate burden of proof, but the burden of production falls on the defendant." (*Dubner v. City & County of San Francisco* (9th Cir. 2001) 266 F.3d 959, 965.)

- “There is no bright-line rule to establish whether an investigatory stop has risen to the level of an arrest. Instead, this difference is ascertained in light of the ‘ “totality of the circumstances.” ’ This is a highly fact-specific inquiry that considers the intrusiveness of the methods used in light of whether these methods were ‘reasonable *given the specific circumstances*.’ ” (*Green v. City & County of San Francisco* (9th Cir. 2014) 751 F.3d 1039, 1047, original italics, internal citations omitted.)

- “Because stopping an automobile and detaining its occupants, ‘even if only for a brief period and for a limited purpose,’ constitutes a ‘seizure’ under the Fourth Amendment, an official must have individualized ‘reasonable suspicion’ of unlawful conduct to carry out such a stop.” (*Tarabochia v. Adkins* (9th Cir. 2014) 766 F.3d 1115, 1121, internal citation omitted.)

- “ ‘[Q]ualified immunity is a question of law, not a question of fact. [Citation.] But Defendants are only entitled to qualified immunity as a matter of law if, taking the facts in the light most favorable to [the plaintiff], they violated no clearly established constitutional right. The court must deny the motion for judgment as a matter of law if reasonable jurors could believe that Defendants violated [the plaintiff's] constitutional right, and the right at issue was clearly established.’ ‘The availability of qualified immunity after a trial is a legal question informed by the jury's findings of fact, but ultimately committed to the court's judgment.’ ‘‘ ‘[D]eference to the jury's view of the facts persists throughout each prong of the qualified immunity inquiry.’ ” ‘[T]he jury's view of the facts must govern our analysis once litigation has ended with a jury's verdict.’ ‘Where, as here, the legal question of qualified immunity turns upon which version of the facts one accepts, the jury, not the judge, must determine liability.’ ” (*King, supra*, 242 Cal.App.4th at p. 289, internal citations omitted.)

- “[I]f what the policeman knew prior to the arrest is genuinely in dispute, and if a reasonable officer's perception of probable cause would differ depending on the correct version, that factual dispute must be resolved by a fact finder. [Citations.] [¶] … [W]e do not find the facts relative to probable cause to arrest, and the alleged related conspiracy, so plain as to lead us to only a single conclusion, i.e., a conclusion in defendants' favor. The facts are complex, intricate and in key areas contested. Even more important, the inferences to be drawn from the web of facts are disputed and unclear—and are likely to depend on credibility judgments.” (*King, supra*, 242 Cal.App.4th at p. 291, internal citations omitted.)

Secondary Sources

Witkin, Summary of California Law (10th ed. 2005) Torts, § 181

5 Levy et al., California Torts, Ch. 60, *Principles of Liability and Immunity of Public Entities and Employees*, § 60.06 (Matthew Bender)

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

2 California Points and Authorities, Ch. 21, *Assault and Battery*, § 21.36A (Matthew Bender)

1 Civil Rights Actions, Ch. 2, *Institutional and Individual Immunity*, § 2.03 (Matthew Bender)

3051. Unlawful Removal of Child From Parental Custody Without a Warrant—Essential Factual Elements (42 U.S.C., § 1983)

[*Name of plaintiff***] claims that [***name of defendant***] wrongfully removed [***name of plaintiff***]'s child from [his/her] parental custody because [***name of defendant***] did not have a warrant. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] removed [***name of plaintiff***]'s child from [his/her] parental custody without a warrant;**

2. **That [***name of defendant***] was performing or purporting to perform [his/her] official duties;**

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 June 2016

Directions for Use

This instruction is a variation on CACI No. 3021, *Unlawful Arrest by Peace Officer Without a Warrant—Essential Factual Elements*, and CACI No. 3023, *Unreasonable Search—Search Without a Warrant—Essential Factual Elements*, in which the warrantless act is the removal of a child from parental custody rather than an arrest or search. This instruction asserts a parent's due process right to familial association under the Fourteenth Amendment. It may be modified to assert or include the child's right under the Fourth Amendment to be free of a warrantless seizure. (See *Arce v. Childrens Hospital Los Angeles* (2012) 211 Cal.App.4th 1455, 1473−1474 [150 Cal.Rptr.3d 735].)

Warrantless removal is a constitutional violation unless the authorities possess information at the time of the seizure that establishes reasonable cause to believe that the child is in imminent danger of serious bodily injury and that the scope of the intrusion is reasonably necessary to avert that specific injury. (*Arce, supra,* 211 Cal.App.4th at p. 1473.) The committee believes that the defendant bears the burden of proving imminent danger. (See Evid. Code, § 500 ["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."]; cf. *Welsh v. Wisconsin* (1984) 466 U.S. 740, 750 [104 S.Ct. 2091, 80 L.Ed.2d 732] ["Before agents of the government may invade the sanctity of the home, the burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries."].) CACI No. 3026, *Affirmative Defense─Exigent Circumstances* (to a warrantless search), may be modified to respond to this claim.

If the removal of the child was without a warrant and without exigent circumstances, but later found to be justified by the court, damages are limited to those caused by the procedural defect, not the removal. (See

Watson v. City of San Jose (9th Cir. 2015) 800 F.3d 1135, 1139.)

Sources and Authority

- " ' "Parents and children have a well-elaborated constitutional right to live together without governmental interference.' [Citation.] 'The Fourteenth Amendment guarantees that parents will not be separated from their children without due process of law except in emergencies." This 'right to family association' requires '[g]overnment officials … to obtain prior judicial authorization before intruding on a parent's custody of her child unless they possess information at the time of the seizure that establishes "reasonable cause to believe that the child is in imminent danger of serious bodily injury and that the scope of the intrusion is reasonably necessary to avert that specific injury." [Citation.]' " (*Arce, supra*, 211 Cal.App.4th at p. 1473, internal citations omitted.)

- " 'The Fourth Amendment also protects children from removal from their homes [without prior judicial authorization] absent such a showing. [Citation.] Officials, including social workers, who remove a child from its home without a warrant must have reasonable cause to believe that the child is likely to experience serious bodily harm in the time that would be required to obtain a warrant.' Because 'the same legal standard applies in evaluating Fourth and Fourteenth Amendment claims for the removal of children," we may "analyze [the claims] together.' " (*Arce, supra*, 211 Cal.App.4th at pp. 1473−1474.)

- "While the constitutional source of the parent's and the child's rights differ, the tests under the Fourteenth Amendment and the Fourth Amendment for when a child may be seized without a warrant are the same. The Constitution requires an official separating a child from its parents to obtain a court order unless the official has reasonable cause to believe the child is in 'imminent danger of serious bodily injury.' Seizure of a child is reasonable also where the official obtains parental consent." (*Jones v. County of L.A.* (9th Cir. 2015) 802 F.3d 990, 1000, internal citations omitted.)

- "[W]hether an official had 'reasonable cause to believe exigent circumstances existed in a given situation … [is a] "question[] of fact to be determined by a jury." [Citation.]' " (*Arce, supra*, 211 Cal.App.4th at p. 1475.)

- "Importantly, 'social workers who remove a child from its home without a warrant must have reasonable cause to believe that the child is likely to experience serious bodily harm *in the time that would be required to obtain a warrant*.' " (*Kirkpatrick v. County of Washoe* (9th Cir. 2015) 792 F.3d 1184, 1194, original italics.)

- "[A] child is seized for purposes of the Fourth and Fourteenth Amendments when a representative of the state takes action causing a child to be detained at a hospital as part of a child abuse investigation, such that a reasonable person in the same position as the child's parent would believe that she cannot take her child home." (*Jones, supra*, 802 F.3d at p. 1001.)

- "[A] jury is needed to determine what a reasonable parent in the [plaintiffs'] position would have believed and whether [defendant]'s conduct amounted to a seizure. (*Jones, supra*, 802 F.3d at p.

1002.)

- "In sum, although we do not dispute that Shaken Baby Syndrome is a serious, life-threatening injury, we disagree with the County defendants' assertion that a child may be detained without prior judicial authorization based solely on the fact that he or she has suffered a serious injury. Rather, the case law demonstrates that the warrantless detention of a child is improper unless there is "specific, articulable evidence" that the child would be placed at imminent risk of serious harm absent an immediate interference with parental custodial rights." (*Arce, supra,* 211 Cal.App.4th at p. 1481.)

- "[I]n cases where 'a deprivation is justified but procedures are deficient, whatever distress a person feels may be attributable to the justified deprivation rather than to deficiencies in procedure.' In such cases, … a plaintiff must 'convince the trier of fact that he actually suffered distress because of the denial of procedural due process itself.' " (*Watson, supra,* 800 F.3d at p. 1139, internal citation omitted; see *Carey v. Piphus* (1978) 435 U.S. 247, 263 [98 S.Ct. 1042, 55 L.Ed.2d 252].)

Secondary Sources

3 Civil Rights Actions, Ch. 12B, *Deprivation of Rights Under Color of State Law--Family Relations*, ¶ 12B.03 (Matthew Bender)

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

3 California Points and Authorities, Ch. 35A, *Civil Rights: Equal Protection*, § 35A.29 et seq. (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/citizenship/primary language/immigration status/[***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/ citizenship/primary language/immigration status/[***insert other actionable characteristic***]];]**

   [That the [sex/race/color/religion/ancestry/national origin/medical condition/genetic information/marital status/sexual orientation/ citizenship/primary language/immigration status/[*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, June 2016

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.
- Remedies Under Unruh Act. Civil Code section 52.
- "The Unruh Act was enacted to 'create and preserve a nondiscriminatory environment in California business establishments by "banishing" or "eradicating" arbitrary, invidious discrimination by such establishments.' " (*Flowers v. Prasad* (2015) 238 Cal.App.4th 930, 937 [190 Cal.Rptr.3d 33].)

- "Invidious discrimination is the treatment of individuals in a manner that is malicious, hostile, or damaging." (*Javorsky v. Western Athletic Clubs, Inc.* (2015) 242 Cal.App.4th 1386, 1404 [195 Cal.Rptr.3d 706]

- " '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.)

- "Here, the City was not acting as a business establishment. It was amending an already existing municipal code section to increase the minimum age of a responsible person from the age of 21 years to 30. The City was not directly discriminating against anyone and nothing in the plain language of the Unruh Civil Rights Act makes its provisions applicable to the actions taken by the City." (*Harrison v. City of Rancho Mirage* (2015) 243 Cal.App.4th 162, 175 [196 Cal.Rptr.3d 267].)

- "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]here is no dispute that California courts have applied the Act to discrimination based on age. Furthermore, the Act targets not just the practice of outright exclusion, but pricing differentials as well." (*Javorsky, supra*, 242 Cal.App.4th at p. 1394, 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.)

- "Discrimination may be reasonable, and not arbitrary, in light of the nature of the enterprise or its facilities, legitimate business interests (maintaining order, complying with legal requirements, and protecting business reputation or investment), and public policy supporting the disparate treatment." (*Javorsky, supra,* 242 Cal.App.4th at p. 1395.)

- "[T]he Act's objective of prohibiting 'unreasonable, arbitrary or invidious discrimination' is fulfilled by examining whether a price differential reflects an 'arbitrary, class-based generalization.' … [A] policy treating age groups differently in this respect may be upheld, at least if the pricing policy (1) ostensibly provides a social benefit to the recipient group; (2) the recipient group is disadvantaged economically when compared to other groups paying full price; and (3) there is no invidious discrimination." (*Javorsky, supra,* 242 Cal.App.4th at p. 1399.)

- "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)

3710. Ratification

[*Name of plaintiff***] claims that [***name of defendant***] is responsible for the harm caused by [***name of agent***]'s conduct because [***name of defendant*~~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***], although not authorized to do so, purported ~~intended~~ to act on behalf of [***name of defendant***];**

2. **That [***name of defendant***] learned of [***name of agent***]'s unauthorized conduct, and all of the material facts involved in the unauthorized transaction, after it occurred; and**

3. **That [***name of defendant***] then 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 [*name of defendant***]~~a person~~ voluntarily keeps the benefits of [***name of agent*~~his/her/its~~]'s ~~[representative/employee]'s~~ unauthorized conduct after [he/she/it] learns of it~~the unauthorized conduct~~.]**

New September 2003; Revised June 2016

Directions for Use

This instruction is for use in a traditional principal-agent relationship. The last bracketed sentence should be read only if it is appropriate to the facts of the case.

This instruction should not be given without modifications in an employment law case, in which an employee seeks to hold the employer liable for the tortious conduct of a supervisor or other employee. Ratification involves different considerations in employment law. For example, element 1 should not be given because it is not necessary for the culpable employee to purport to act on behalf of the employer. (See *Ventura v. ABM Industries Inc.* (2012) 212 Cal.App.4th 258, 271−272 [150 Cal.Rptr.3d 861] [CACI 3710 given without element 1].)

For an instruction for use for governmental entity liability in a civil rights case under Title 42 United States Code section 1983, see CACI No. 3004, *Local Government Liability—Act or Ratification by Official With Final Policymaking Authority—Essential Factual Elements*.

Sources and Authority

- Agency Created by Ratification. Civil Code section 2307.
- Ratification by Acceptance of Benefits. Civil Code section 2310.

- Partial Ratification. Civil Code section 2311.

- Vicarious Liability for Ratified Acts. Civil Code section 2339.

- "Ratification is the subsequent adoption by one person of an act which another without authority assumed to do as his agent." (*Anderson v. Fay Improv. Co.* (1955) 134 Cal.App.2d 738, 748 [286 P.2d 513].)

- " '[S]ince ratification contemplates an act by one person in behalf of another, there must exist at the time the unauthorized act was done a relationship, either actual or assumed, of principal and agent, between the person alleged to have ratified and the person by whom the unauthorized act was done.' " (*Anderson*, *supra*, 134 Cal.App.2d at p. 748, citing 2 California Jurisprudence 2d 741, section 83.)

- " 'Furthermore, the prevailing view is that there can be no ratification if the person who performed the unauthorized act did not at the time profess to be an agent.' " (*Anderson*, *supra*, 134 Cal.App.2d at p. 748, citing 2 California Jurisprudence 2d 741, section 83.)~~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].)

- "Ratification is essentially a matter of assent. Consequently, a principal is not bound by ratification unless he acts with knowledge of all the material facts involved in the unauthorized transaction, particularly with knowledge of the acts of the person who assumed to act as his agent. This knowledge is equally necessary whether the ratification be express or implied." (*Bate v. Marsteller* (1959) 175 Cal.App.2d 573, 582 [346 P.2d 903].)

- "Ratification is the subsequent adoption by one claiming the benefits of an act, which without authority, another has voluntarily done while ostensibly acting as the agent of him who affirms the act and who had the power to confer authority. A principal cannot split an agency transaction and accept the benefits thereof without the burdens." (*Reusche v. California Pacific Title Ins. Co.* (1965) 231 Cal.App.2d 731, 737 [42 Cal.Rptr. 262], internal citation omitted.)

- "[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, supra, ~~v. ABM Industries Inc.~~ (2012)* 212 Cal.App.4th at p.~~258,~~ 272 ~~[150 Cal.Rptr.3d 861]~~.)

- "On this issue, the jury was instructed that in order to establish her claim that defendants were responsible for [supervisor]'s conduct, [plaintiff] 'must prove … that [defendants] learned of [supervisor]'s conduct after it occurred,' and that 'defendants approved [supervisor]'s conduct.' The instruction concluded, 'Approval can be shown through words, or it can be inferred from a person's conduct.' " [¶] Defendants contend that the instruction was erroneous because it did not tell the jury that there is ratification only if the employee intended to act on behalf of the employer, the employer actually knows that the wrongful conduct occurred, and the employer benefitted from the conduct, and that a disputed allegation is not actual knowledge. …We can see no error." (*Ventura*, *supra*, 212 Cal.App.4th at pp. 271−272.)

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)

3923. Public Entities—Collateral Source Payments (Gov. Code, § 985)

You ~~shall~~ must award damages in an amount that fully compensates [*name of plaintiff*] for [his/her/its] damages in accordance with instructions from the court. You ~~shall~~ may not speculate or consider any other possible sources of benefit ~~the~~ that [*name of plaintiff*] may have received. After you have returned your verdict the court will make whatever adjustments are necessary in this regard.

New September 2003; Revised June 2016

Directions for Use

Per Government Code section 985(j), this language is mandatory.

Sources and Authority

- Collateral Source Evidence Inadmissible in Action Against Public Entity. Government Code section 985(b).
- Mandatory Instruction. Government Code section 985(j).
- "[T]he [collateral source rule] also covers payments *such as pensions* paid to a plaintiff who, as a result of his injuries, can no longer work. Like insurance benefits, such payments are considered to have been secured by the plaintiff's efforts as part of his employment contract, and the tortfeasor is entitled to no credit for them. 'With respect to pension benefits, the justification for the rule is that the plaintiff secured the benefits by his labors, and the fact that he may obtain a double recovery is not relevant.' Pension benefits are a commonly cited example of a collateral source that may not be used to decrease a plaintiff's recovery." (*Mize-Kurzman v. Marin Community College Dist.* (2012) 202 Cal.App.4th 832, 872−873 [136 Cal.Rptr.3d 259], original italics, internal citations omitted.)

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*, § 177.50 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Torts*, § 64.190 et seq. (Matthew Bender)

2 California Civil Practice: Torts, § 31:47 (Thomson Reuters)

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]; [and]**

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; Revised June 2016

Directions for Use

~~Element 3 may not be necessary in every case~~ There is a split of authority as to whether element 3 is required. (Compare~~see~~ *Conservatorship of Symington* (1989) 209 Cal.App.3d 1464, 1467 [257 Cal.Rptr. 860] ["[M]any gravely disabled individuals are simply beyond treatment."] with *Conservatorship of Davis* (1981) 124 Cal.App.3d 313, 328 [177 Cal.Rptr. 369] [jury should be allowed to consider all factors that bear on whether person should be on LPS conservatorship, including willingness to accept treatment].)~~.~~

Sources and Authority

- Right to Jury Trial. Welfare and Institutions Code section 5350(d).
- "Gravely Disabled" Defined. Welfare and Institutions Code section 5008(h).
- "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.)

- "[T]he trial court erred in accepting counsel's waiver of [conservatee]'s right to a jury trial … . (*Estate of Kevin A.* (2015) 240 Cal.App.4th 1241, 1253 [193 Cal.Rptr.3d 237].)

- "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*, *supra*, ~~(1981)~~ 124 Cal.App.3d at p.~~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)

4005. Obligation to Prove—Reasonable Doubt

[*Name of respondent*] is presumed not to be gravely disabled. [*Name of petitioner*] has the burden of proving beyond a reasonable doubt that [*name of respondent*] is gravely disabled. The fact that a petition has been filed claiming [*name of respondent*] is gravely disabled is not evidence that this claim is true.

Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that [*name of respondent*] is gravely disabled as a result of [a mental disorder/impairment by chronic alcoholism]. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt.

In deciding whether [*name of respondent*] is gravely disabled, you must impartially compare and consider all the evidence that was received throughout the entire trial.

Unless the evidence proves that [*name of respondent*] is gravely disabled because of [a mental disorder/impairment by chronic alcoholism] beyond a reasonable doubt, you must find that [he/she] is not gravely disabled.

Although a conservatorship is a civil proceeding, the burden of proof is the same as in criminal trials.

New June 2005; Revised June 2016

Directions for Use

The presumption in the first sentence of the instruction is perhaps open to question. Two older cases have held that there is such a presumption. (See *Conservatorship of Law* (1988) 202 Cal.App.3d 1336, 1340 [249 Cal.Rptr. 415]; *Conservatorship of Walker* (1987) 196 Cal.App.3d 1082, 1099 [242 Cal.Rptr. 289].) However, these holdings may have been based on the assumption that the California Supreme Court had incorporated all protections for criminal defendants into LPS proceedings. (See *Conservatorship of Roulet* (1979) 23 Cal.3d 219, 235 [152 Cal.Rptr. 425, 590 P.2d 1] [proof beyond reasonable doubt and unanimous jury verdict required].) Subsequent cases have made it clear that an LPS respondent is not entitled to all of the same protections as a criminal defendant. (See *Conservatorship of Ben C.* (2007) 40 Cal.4th 529, 538 [53 Cal.Rptr.3d 856, 150 P.3d 738] [exclusionary rule and *Wende* review do not apply in LPS].)

Sources and Authority

- ~~"The due process clause of the California Constitution requires that proof beyond a reasonable doubt and a unanimous jury verdict be applied to conservatorship proceedings under the LPS Act." (*Conservatorship of Roulet* (1979) 23 Cal.3d 219, 235 [152 Cal.Rptr. 425, 590 P.2d 1].)~~

- "A proposed conservatee has a constitutional right to a finding based on proof beyond a reasonable

doubt. Without deciding whether the court has a sua sponte duty to so instruct, we are satisfied that, on request, a court is required to instruct in language emphasizing a proposed conservatee is presumed to not be gravely disabled until the state carries its burden of proof." (*Conservatorship of Walker*, *supra*, ~~(1987)~~ 196 Cal.App.3d at p.~~1082,~~ 1099 ~~[242 Cal.Rptr. 289]~~, internal citation omitted.)

- "[I]f requested, a court is required to instruct that a proposed conservatee is presumed not to be gravely disabled until the state carries its burden of proof." (*Conservatorship of Law*, *supra*, ~~(1988)~~ 202 Cal.App.3d at p.~~1336,~~ 1340 ~~[249 Cal.Rptr. 415]~~.)

- But see *People v. Beeson* (2002) 99 Cal.App.4th 1393, 1409 [122 Cal.Rptr.2d 384]: "Even if we view the presumption in a more general sense as a warning against the consideration of extraneous factors, we cannot conclude that the federal and state Constitutions require a presumption-of-innocence-like instruction outside the context of a criminal case. Particularly, we conclude that, based on the civil and nonpunitive nature of involuntary commitment proceedings, a mentally ill or disordered person would not be deprived of a fair trial without such an instruction."

- "Neither mental disorder nor grave disability is a crime." (*Conservatorship of Davis* (1981) 124 Cal.App.3d 313, 330 [177 Cal.Rptr. 369].)

- "More recently this court has recognized, however, that the analogy between criminal proceedings and proceedings under the LPS Act is imperfect at best and that not all of the safeguards required in the former are appropriate to the latter." (See *Conservatorship of Ben C. supra*, 40 Cal.4th at p. 538.)

- "In *Roulet*, the California Supreme Court held that due process requires proof beyond a reasonable doubt and jury unanimity in conservatorship proceedings. However, subsequent appellate court decisions have not extended the application of criminal law concepts in this area." (*Conservatorship of Maldonado* (1985) 173 Cal.App.3d 144, 147 [218 Cal.Rptr. 796].)

Secondary Sources

3 Witkin, California Procedure (5th ed. 2008) Actions, §§ 97, 104

2 California Conservatorship Practice (Cont.Ed.Bar) § 23.81

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~~Disqualification From Voting

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~~should also be disqualified from voting. To ~~reach a verdict~~disqualify [***name of respondent***] from voting, all 12 jurors must find, by clear and convincing evidence, that [he/she~~*~~name of respondent~~*~~] cannot communicate, with or without reasonable accommodations, a desire to participate in the voting process~~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; Revised June 2016

Directions for Use

This instruction should be given if the petition prays for this relief.

In addition to the required jury finding, one of the following must apply (See Elec. Code, § 2208(a)):

(1) A conservator for the person or the person and estate is appointed under Division 4 (commencing with Section 1400) of the Probate Code;

(2) A conservator for the person or the person and estate is appointed under Chapter 3 (commencing with Section 5350) of Part 1 of Division 5 of the Welfare and Institutions Code.

(3) A conservator is appointed for the person under proceedings initiated under Section 5352.5 of the Welfare and Institutions Code, the person has been found not competent to stand trial, and the person's trial or judgment has been suspended pursuant to Section 1370 of the Penal Code.

(4) A person has pleaded not guilty by reason of insanity, has been found to be not guilty under Section 1026 of the Penal Code, and is deemed to be gravely disabled at the time of judgment as defined in paragraph (2) of subdivision (h) of Section 5008 of the Welfare and Institutions Code.

The court should determine if one of the above requirements has been met.

Sources and Authority

- ~~Jury Finding on Completion of Affidavit of Voter Registration~~Disqualification from Voting. Elections Code section 2208~~(b)~~.

- Affidavit of Voter Registration. Elections Code section 2150.

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)

4200. Actual Intent to Hinder, Delay, or Defraud a Creditor—Essential Factual Elements (Civ. Code, § 3439.04(a)(1))

[*Name of plaintiff***] claims [he/she/it] was harmed because [***name of debtor***] ~~fraudulently~~ [transferred property/incurred an obligation] to [***name of defendant***] in order to avoid paying a debt to [***name of plaintiff***]. [This is called "actual 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***] [transferred the property/incurred the obligation] with the intent to hinder, delay, or defraud one or more of [his/her/its] creditors;**

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

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

To prove intent to hinder, delay, or defraud creditors, it is not necessary to show that [*name of debtor***] had a desire to harm [his/her/its] creditors. [***Name of plaintiff***] need only show that [***name of debtor***] intended to remove or conceal assets to make it more difficult for [his/her/its] creditors to collect payment.**

[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; Revised June 2013, June 2016

Directions for Use

Under the Uniform Voidable Transactions Act (formerly the Uniform Fraudulent Transfer Act), a transfer made or obligation incurred by a debtor is voidable 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 with actual intent to hinder, delay, or defraud a creditor. (Civ. Code, § 3439.04(a)(1).)

This instruction assumes the defendant is a transferee of the original debtor. Read the bracketed second sentence ~~in cases in which~~if the plaintiff is asserting ~~causes of action~~claims for both actual and constructive fraud. Read the last bracketed sentence ~~in cases in which~~if the plaintiff's alleged claim arose after the defendant's property was transferred or the obligation was incurred.

Note that in element 3, only the debtor-transferor's ~~fraudulent~~ intent is required. (See Civ. Code, §

3439.04(a)(1).) The intent of the transferee is irrelevant. However, a transferee who receives the property both in good faith and for a reasonably equivalent value has an affirmative defense. (See Civ. Code, § 3439.08(a); CACI No. 4207, *Affirmative Defense—Good Faith*.)

If the case concerns an ~~fraudulently~~ incurred obligation, users may wish to insert a brief description of the obligation in this instruction, e.g., "a lien on the property."

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~~ if 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)(A)) necessarily would seek monetary relief and give rise to a right to a jury trial.

Note that there may be a split of authority regarding the appropriate standard of proof of ~~fraudulent~~ intent. The Sixth District Court of Appeal has stated: "Actual intent to defraud must be shown by clear and convincing evidence. (*Hansford v. Lassar* (1975) 53 Cal.App.3d 364, 377 [125 Cal.Rptr. 804].)" (*Reddy v. Gonzalez* (1992) 8 Cal.App.4th 118, 123 [10 Cal.Rptr.2d 58].) Note that the case relied on by the *Hansford* court (*Aggregates Assoc., Inc. v. Packwood* (1962) 58 Cal.2d 580 [25 Cal.Rptr. 545, 375 P.2d 425]) was disapproved by the Supreme Court in *Liodas v. Sahadi* (1977) 19 Cal.3d 278, 291–292 [137 Cal.Rptr. 635, 562 P.2d 316]. The Fourth District Court of Appeal, Division Two, disagreed with *Reddy*: "In determining whether transfers occurred with fraudulent intent, we apply the preponderance of the evidence test, even though we recognize that some courts believe that the test requires clear and convincing evidence." (*Gagan v. Gouyd* (1999) 73 Cal.App.4th 835, 839 [86 Cal.Rptr.2d 733], internal citations omitted, disapproved on other grounds in *Mejia v. Reed* (2003) 31 Cal.4th 657, 669, fn. 2 [3 Cal.Rptr.3d 390, 74 P.3d 166].)

Sources and Authority

- Uniform ~~Fraudulent Transfer~~Voidable Transactions Act. Civil Code section 3439~~.04~~ et seq.
- "Claim" Defined for ~~UFTA~~UVTA. Civil Code section 3439.01(b).
- Creditor Remedies Under ~~UFTA~~UVTA. Civil Code section 3439.07.
- "The UFTA permits defrauded creditors to reach property in the hands of a transferee." (*Mejia, supra*, 31 Cal.4th at p. 663.)
- "A fraudulent conveyance under the UFTA involves 'a transfer by the debtor of property to a third person undertaken with the intent to prevent a creditor from reaching that interest to satisfy its claim.'" (*Filip v. Bucurenciu* (2005) 129 Cal.App.4th 825, 829 [28 Cal.Rptr.3d 884].)
- "Under the UFTA, 'a transfer of assets made by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer, if the debtor made the transfer (1) with an actual intent to hinder, delay or defraud any creditor, or (2) without receiving reasonably equivalent value in

return, and either (a) was engaged in or about to engage in a business or transaction for which the debtor's assets were unreasonably small, or (b) intended to, or reasonably believed, or reasonably should have believed, that he or she would incur debts beyond his or her ability to pay as they became due.' " (*Hasso v. Hapke* (2014) 227 Cal.App.4th 107, 121−122 [173 Cal.Rptr.3d 356], internal citations omitted.)

- "[A] conveyance will not be considered fraudulent if the debtor merely transfers property which is otherwise exempt from liability for debts. That is, because the theory of the law is that it is fraudulent for a judgment debtor to divest himself of assets against which the creditor could execute, if execution by the creditor would be barred while the property is in the possession of the debtor, then the debtor's conveyance of that exempt property to a third person is not fraudulent." (*Yaesu Electronics Corp. v. Tamura* (1994) 28 Cal.App.4th 8, 13 [33 Cal.Rptr.2d 283].)

- "A transfer is not voidable against a person 'who took in good faith and for a reasonably equivalent value or against any subsequent transferee.' " (*Filip, supra,* 129 Cal.App.4th at p. 830, internal citations omitted.)

- " '[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.' " (*Wisden, supra,* 124 Cal.App.4th at p. 758, internal citation omitted.)

- "[E]ven if the Legislature intended that all fraudulent conveyance claims be brought under the UFTA, the Legislature could not thereby dispense with a right to jury trial that existed at common law when the California Constitution was adopted." (*Wisden, supra,* 124 Cal.App.4th at p. 758, 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 citations omitted.)

- "In order to constitute intent to defraud, it is not necessary that the transferor act maliciously with the desire of causing harm to one or more creditors." (*Economy Refining & Service Co. v. Royal Nat'l Bank* (1971) 20 Cal.App.3d 434, 441 [97 Cal.Rptr. 706].)

- "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.)

- "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.)

- "[G]ranting [plaintiff judgment creditor] an additional judgment against [defendant judgment debtor] under the UFTA for … 'the amount transferred here to avoid paying part of his underlying judgment, *would in effect allow [him] to recover more than the underlying judgment*, which the [UFTA] does not allow.' (Italics added.) We thus conclude that because [plaintiff] obtained a judgment in the prior action for the damages [defendant] caused him, the principle against double recovery for the same harm bars him from obtaining a second judgment against her under the UFTA for a portion of those same damages." (*Renda v. Nevarez* (2014) 223 Cal.App.4th 1231, 1238 [167 Cal.Rptr.3d 874], original italics.)

Secondary Sources

8 Witkin, California Procedure (5th ed. 2008) Enforcement of Judgment~~s~~, § 495 et seq.

Ahart, California Practice Guide: Enforcing Judgments & Debts, Ch. 4~~3~~-C, *Prejudgment Collection—Prelawsuit Considerations*, ¶ 3:~~320~~ 291 et seq. (The Rutter Group)

Wiseman & Reese, California Practice Guide: Civil Procedure Before Trial Claims & Defenses, Ch. 5(III)-B, *Fraud--Fraudulent Transfers--Elements of Claim*, ¶ 5:528 (The Rutter Group)

23 California Forms of Pleading and Practice, Ch. 270, *Fraudulent Conveyances*, § 270.40 (Matthew Bender)

1 Goldsmith et al., Matthew Bender Practice Guide: California Debt Collection and Enforcement of Judgments, Ch. 4, *Fraudulent Transfers*, 4.05

4201. Factors to Consider in Determining Actual Intent to Hinder, Delay, or 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; Revised June 2016

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).

- "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

Ahart, California Practice Guide: Enforcing Judgments & Debts, Ch. 3-C, *Prejudgment Collection—Prelawsuit Considerations*, ¶ 3:291 et seq. (The Rutter Group)

Wiseman & Reese, California Practice Guide: Civil Procedure Before Trial Claims & Defenses, Ch. 5(III)-B, *Fraud--Fraudulent Transfers--Elements of Claim*, ¶ 5:528 (The Rutter Group)

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—No Reasonably Equivalent Value Received—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; Revised June 2016

Directions for Use

Under the Uniform Voidable Transactions Act (formerly the Uniform Fraudulent Transfer Act), a transfer made or obligation incurred by a debtor is voidable 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 without receiving a reasonably equivalent value in exchange for the transfer or

obligation, and the debtor either: (1) 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; or (2) intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due. (Civ. Code, § 3439.04(a)(2).)

This instruction assumes the defendant is a transferee of the original debtor. Read the bracketed second sentence ~~in cases in which~~if the plaintiff is asserting ~~causes of action~~claims for both actual and constructive fraud. Read the last bracketed sentence ~~in cases where~~if 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~~ if 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)(A)) necessarily would seek monetary relief and give rise to a right to a jury trial.

Sources and Authority

- ~~When Transfer Is Fraudulent~~Transfer Without Reasonably Equivalent Value in Exchange. Civil Code section 3439.04(a)(2).

- When Value Is Given. Civil Code section 3439.03.

- "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

Ahart, California Practice Guide: Enforcing Judgments & Debts, Ch. 3-C, *Prejudgment Collection—Prelawsuit Considerations*, ¶ 3:291 et seq. (The Rutter Group)

Wiseman & Reese, California Practice Guide: Civil Procedure Before Trial Claims & Defenses, Ch. 5(III)-B, *Fraud--Fraudulent Transfers--Elements of Claim*, ¶ 5:528 (The Rutter Group)

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; Revised June 2016

Directions for Use

Under the Uniform Voidable Transactions Act (formerly the Uniform Fraudulent Transfer Act), a transfer made or obligation incurred by a debtor is voidable 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. (Civ. Code, § 3439.05.)

This instruction assumes the defendant is a transferee of the debtor. This instruction may be used along with CACI No. 4202, *Constructive Fraudulent Transfer—No Reasonably Equivalent Value Received—Essential Factual Elements*, in cases whereif 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~~if the plaintiff is asserting causes of action for both actual and constructive fraud. Also give CACI No~~s~~. 4205, *"Insolvency" Explained*, and CACI No. 4206, *Presumption of Insolvency*.

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~~ if 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)(A)) necessarily would seek monetary relief and give rise to a right to a jury trial.

Sources and Authority

- ~~When Transfer Is Fraudulent~~Voidable Transaction Involving Insolvency. Civil Code section 3439.05.
- When Value Is Given. Civil Code section 3439.03.
- "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

Wiseman & Reese, California Practice Guide: Civil Procedure Before Trial Claims & Defenses, Ch. 5(III)-B, *Fraud--Fraudulent Transfers--Elements of Claim*, ¶ 5:545 et seq. (The Rutter Group)

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 [the payment of money/a release/a lease/a license/ [and] the creation of a lien or other encumbrance].]

[In this case, [*describe transaction***] is a transfer.]**

New June 2006; Revised June 2016

Directions for Use

This instruction sets forth the statutory definition of a "transfer" within the Uniform Voidable Transactions Act (formerly the Uniform Fraudulent Transfers Act). (See Civ. Code, § 3439.01(m).) ~~Include only the bracketed terms at the end of the third sentence that are at issue in the case.~~ Read the second bracketed ~~sentence~~ option for the second sentence if the transaction has been stipulated to or determined as a matter of law. Otherwise, read the first bracketed option. Include only the bracketed terms at the end of the ~~third sentence~~first option that are at issue in the case.

Sources and Authority

- "Transfer" Defined. Civil Code section 3439.01(~~i~~m).

- ~~Nonvoidable Transfers. Civil Code section 3439.08(c).~~

- "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

Ahart, California Practice Guide: Enforcing Judgments & Debts, Ch. 3-C, *Prejudgment Collection—Prelawsuit Considerations*, ¶ 3:319 et seq. (The Rutter Group)

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/ [or] transferred [***specify grounds for voidable transfer based on constructive fraud***]]. [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; Revised June 2016

Directions for Use

Give this instruction with CACI No. 4203, *Constructive Fraudulent Transfer—Insolvency—Essential Factual Elements*. Give also CACI No. 4206, *Presumption of Insolvency.*

Property the transfer of which is potentially voidable under the Uniform Voidable Transactions Act (formerly the Uniform Fraudulent Transfer Act) is to be excluded from the computation of the debtor's assets for purposes of determining insolvency. (Civ. Code, § 3439.02(c).) In the first sentence of the second paragraph select the first option if there is property transferred and alleged to be voidable for actual fraud (see Civ. Code, § 3439.04(a)(1).), and specify the grounds in the second option if there is property transferred and alleged to be voidable for constructive fraud. (See Civ. Code, §§ 3439.04(a)(2), 3904.05.)~~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. (See Civ. Code, § 3439.02(d).)

Sources and Authority

- When Debtor Is Insolvent. Civil Code section 3439.02.
- "Asset" Defined. Civil Code section 3439.01(a).
- "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

Ahart, California Practice Guide: Enforcing Judgments & Debts, Ch. 3-C, *Prejudgment Collection—Prelawsuit Considerations*, ¶ 3:327 et seq. (The Rutter Group)

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*, § 307.32 (Matthew Bender)

4206. Presumption of Insolvency

A debtor who is generally not paying [his/her/its] debts as they become due, other than because of a legitimate dispute, 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 must~~should~~ find that [***name of debtor***] was insolvent unless [***name of defendant***] proves that [***name of debtor***] was solvent.**

New June 2006; Revised June 2016

Directions for Use

This instruction should be read in conjunction with CACI No. 4203, *Constructive Fraudulent Transfer—Insolvency—Essential Factual Elements*, and CACI No. 4205, *Insolvency Explained*.

Sources and Authority

- Presumption of Insolvency. Civil Code section 3439.02(~~c~~b).
- ~~The Legislative Committee Comment to Civil Code section 3439.02 states:~~ "Subdivision (c) [now subdivision (b)] 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." (Legislative Committee Comment to Civil Code section 3439.02.)
- ~~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." (Legislative Committee Comment to Civil Code section 3439.02.)

Secondary Sources

Ahart, California Practice Guide: Enforcing Judgments & Debts, Ch. 3-C, *Prejudgment Collection—Prelawsuit Considerations*, ¶ 3:328 (The Rutter Group)

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*, § 307.20 (Matthew Bender)

4207. Affirmative Defense—Good Faith (Civ. Code, § 3439.08(a), (f)(1))

[*Name of defendant***] ~~claims [he/she/it]~~ is not liable to [***name of plaintiff***] [on the claim for actual fraud] if ~~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~~ proves 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; Revised June 2016

Directions for Use

This instruction ~~is appropriate~~presents a defense that is available to a good-faith transferee for value in cases involving allegations of actual fraud under the Uniform ~~Fraudulent Transfer~~Voidable Transactions Act (formerly the Uniform Fraudulent Transfer Act). (See Civ. Code, § 3439.08(a), (f)(1).) Include t~~T~~he bracketed language in the first sentence ~~is not necessary~~ if the plaintiff is bringing ~~a~~ claims for both actual fraud and constructive fraud~~only~~.

Sources and Authority

- Transaction Not Voidable as to Good-Faith Transferee for Reasonable Value~~; Remedies~~. Civil Code section 3439.08(a).

- Transferee's Burden of Proving Good Faith and Reasonable Value. Civil Code section 3439.08(f)(1).

- When Value is Given. Civil Code section 3439.03.

- "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

Ahart, California Practice Guide: Enforcing Judgments & Debts, Ch. 3-C, *Prejudgment Collection—Prelawsuit Considerations*, ¶ 3:324. (The Rutter Group)

Wiseman & Reese, California Practice Guide: Civil Procedure Before Trial Claims & Defenses, Ch. 5(III)-C, *Fraud--Fraudulent Transfers—Particular Defenses*, ¶ 5:580 et seq. (The Rutter Group)

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 intent to hinder, delay, or defraud,] [To/to] succeed on this defense, [*name of defendant*] must prove that [*name of plaintiff*] ~~did not file~~filed [his/her/its] lawsuit ~~within~~ later than four years after the [transfer was made/obligation was incurred] [or, if later than four years, ~~within~~ no later than 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~~filed [his/her/its] lawsuit ~~within~~ later than four years after the [transfer was made/obligation was incurred].]

New June 2006; Revised December 2007, June 2016

Directions for Use

This instruction provides an affirmative defense for failure to file within the statute of limitations. (See Civ. Code, § 3439.09.) Read the first bracketed paragraph regarding delayed discovery in cases involving actual ~~fraud~~intent to hinder, delay or defraud. (See Civ. Code, § 3439.04(a)(1); CACI No. 4200.) ~~,~~ ~~and~~Read the second in cases involving constructive fraud. (See Civ. Code, §§ 3439.04(a)(2), 3439.05; CACI Nos. 4202, 4203.) ~~Do not r~~Read the first bracketed phrases in those paragraphs ~~unless~~ if 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.

- "[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

Ahart, California Practice Guide: Enforcing Judgments & Debts, Ch. 3-C, *Prejudgment Collection—Prelawsuit Considerations*, ¶ 3:351 et seq. (The Rutter Group)

23 California Forms of Pleading and Practice, Ch. 270, *Fraudulent Conveyances*, §§ 270.49, 270.50 (Matthew Bender)

VF-4200. Actual Intent to Hinder, Delay, or Defraud Creditor—Affirmative Defense—Good Faith

We answer the questions submitted to us as follows:

1. **Did [***name of plaintiff***] have a right to payment from [***name of debtor***]?**
   ____ Yes ____ No

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

2. **Did [***name of debtor***] [transfer property/incur an obligation] to [***name of defendant***]?**
   ____ Yes ____ No

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

3. **Did [***name of debtor***] [transfer the property/incur the obligation] with the intent to hinder, delay, or defraud one or more of [his/her/its] creditors?**
   ____ Yes ____ No

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

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

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

5. **Did [[***name of defendant***]/[***name of third party***]] receive the property from [***name of debtor***] in good faith?**
   ____ Yes ____ No

   If your answer to question 5 is yes, then answer question 6. If you answered no, skip question 6 and answer question 7.

6. **Did [[***name of defendant***]/[***name of third party***]] receive the property for a reasonably equivalent value?**
   ____ Yes ____ No

   If your answer to question 6 is yes, stop here, answer no further questions, and have

the presiding juror sign and date this form. If you answered no, then answer question 7.

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

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

New December 2011; Revised June 2016

Directions for Use

This verdict form is based on CACI No. 4200, *Actual Intent to Hinder, Delay, or Defraud a Creditor—Essential Factual Elements*, and CACI No. 4207, *Affirmative Defense—Good Faith*. The defendant is the transferee of the property. The transferee may have received the property in good faith even though the debtor had a fraudulent intent. (See *Annod Corp. v. Hamilton & Samuels* (2002) 100 Cal.App.4th 1286, 1299 [123 Cal.Rptr.2d 924].)

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

~~This verdict form is based on CACI No. 4200, *Actual Intent to Defraud a Creditor—Essential Factual Elements*, and CACI No. 4207, *Affirmative Defense—Good Faith*. The defendant is the transferee of the property. The transferee may have received the property in good faith even though the debtor had a fraudulent intent. (See *Annod Corp. v. Hamilton & Samuels* (2002) 100 Cal.App.4th 1286, 1299 [123 Cal.Rptr.2d 924].)~~

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

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

VF-4201. Constructive Fraudulent Transfer—No Reasonably Equivalent Value Received

We answer the questions submitted to us as follows:

1. **Did [*name of plaintiff*] have a right to payment from [*name of debtor*]?**
   ____ Yes ____ No

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

2. **Did [*name of debtor*] [transfer property/incur an obligation] to [*name of defendant*]?**
   ____ Yes ____ No

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

3. **Did [*name of debtor*] fail to receive a reasonably equivalent value in exchange for the [transfer/obligation]?**
   ____ Yes ____ No

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

4. **[[Was [*name of debtor*] [in business/about to start a business]/Did [*name of debtor*] enter into a transaction] when [his/her/its] remaining assets were unreasonably small for the [business/transaction]?]**

   [*or*]

   [Did [*name of debtor*] intend to incur debts beyond [his/her/its] ability to pay as they became due?]

   [*or*]

   [Did [*name of debtor*] believe or should [he/she/it] reasonably have believed that [he/she/it] would incur debts beyond [his/her/its] ability to pay as they became due?]
   ____ Yes ____ No

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

5. **Was [*name of debtor*]'s conduct a substantial factor in causing [*name of plaintiff*]'s harm?**

____ Yes ____ No

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

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

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

New December 2011; Revised June 2016

Directions for Use

This verdict form is based on CACI No. 4202, *Constructive Fraudulent Transfer—No Reasonably Equivalent Value Received—Essential Factual Elements.*

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

~~This verdict form is based on CACI No. 4202, *Constructive Fraudulent Transfer—Essential Factual Elements.*~~

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

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

VF-4202. Constructive Fraudulent Transfer—Insolvency

We answer the questions submitted to us as follows:

1. **Did [***name of plaintiff***] have a right to payment from [***name of debtor***]?**
   ____ Yes ____ No

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

2. **Did [***name of debtor***] [transfer property/incur an obligation] to [***name of defendant***]?**
   ____ Yes ____ No

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

3. **Did [***name of debtor***] fail to receive a reasonably equivalent value in exchange for the [transfer/obligation]?**
   ____ Yes ____ No

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

4. **Did [***name of plaintiff***]'s right to payment from [***name of debtor***] arise before [***name of debtor***] [transferred property/incurred an obligation]?**
   ____ Yes ____ No

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

5. **Was [***name of debtor***] insolvent at that time or did [***name of debtor***] become insolvent as a result of the [transfer/ obligation]?**
   ____ Yes ____ No

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

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

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

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

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

New December 2011; Revised June 2016

Directions for Use

This verdict form is based on CACI No. 4203, *Constructive Fraudulent Transfer—~~(Insolvency)—~~ Essential Factual Elements.*

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

~~This verdict form is based on CACI No. 4203, *Constructive Fraudulent Transfer (Insolvency)—Essential Factual Elements.*~~

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

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

4560. Recovery of Payments to Unlicensed Contractor (Bus. & Prof. Code, § 7031(b))

[*Name of plaintiff***] claims that [***name of defendant***] did not have a valid contractor's license during all times when [***name of defendant***] was performing services for [***name of plaintiff***] under their contract. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That there was a contract between [***name of plaintiff***] and [***name of defendant***] under which [***name of defendant***] was required to perform services for [***name of plaintiff***];**

2. **That a valid contractor's license was required to perform these services; and**

3. **That [***name of plaintiff***] paid [***name of defendant***] for contractor services that [***name of defendant***] performed as required by the contract;**

[*Name of defendant***] must then prove that at all times while performing these services, [he/she/it] had a valid contractor's license as required by law.**

New June 2016

Directions for Use

Give this instruction in a case in which the plaintiff seeks to recover money paid to an unlicensed contractor for service performed for which a license is required. (Bus. & Prof. Code, § 7031(b).) It may be modified for use if an allegedly unlicensed contractor brings a claim for payment for services performed. (See Bus. & Prof. Code, § 7031(a).)

The burden of proof to establish licensure or proper licensure is on the licensee. Proof must be made by producing a verified certificate of licensure from the Contractors' State License Board. When licensure or proper licensure is controverted, the burden of proof to establish licensure or proper licensure is on the contractor. (Bus. & Prof. Code, § 7031(d).)

A corporation qualifies for a contractor's license through a responsible managing officer (RMO) or responsible managing employee (RME) who is qualified for the same license classification as the classification being applied for. (Bus & Prof. Code § 7068(b)(3).) The plaintiff may attack a contractor's license by going behind the face of the license and proving that a required RMO or RME is a sham. The burden of proof remains with the contractor to prove a bona fide RMO or RME. (*Buzgheia v. Leasco Sierra Grove* (1997) 60 Cal.App.4th 374, 385−387 [70 Cal. Rptr. 2d 427].) Whether an RMO or RME is a sham can be a question of fact. (*Jeff Tracy, Inc. v. City of Pico Rivera* (2015) 240 Cal.App.4th 510, 518 [192 Cal.Rptr.3d 600].)

Sources and Authority

- Action to Recover Compensation Paid to Unlicensed Contractor. Business and Professions Code section 7031(b).

- Proof of Licensure. Business and Professions Code section 7031(d).

- "Contractor" Defined. Business and Professions Code section 7026.

- "The purpose of the licensing law is to protect the public from incompetence and dishonesty in those who provide building and construction services. The licensing requirements provide minimal assurance that all persons offering such services in California have the requisite skill and character, understand applicable local laws and codes, and know the rudiments of administering a contracting business." (*Hydrotech Systems, Ltd. v. Oasis Waterpark* (1991) 52 Cal.3d 988, 995 [277 Cal. Rptr. 517, 803 P.2d 370], internal citations omitted.)

- "Because of the strength and clarity of this policy, it is well settled that section 7031 applies despite injustice to the unlicensed contractor. 'Section 7031 represents a legislative determination that the importance of deterring unlicensed persons from engaging in the contracting business *outweighs any harshness between the parties*, and that such deterrence can best be realized by denying violators the right to maintain any action for compensation in the courts of this state. [Citation.] . . .' " (*Hydrotech Systems, Ltd., supra*, 52 Cal.3d at p. 995, original italics.)

- "The current legislative requirement that a contractor plaintiff must, in addition to proving the traditional elements of a contract claim, also prove that it was duly licensed at all times during the performance of the contract does not change this historical right to a jury trial." (*Jeff Tracy, Inc., supra*, 240 Cal.App.4th at p. 518, fn. 2.)

- "[T]he courts may not resort to equitable considerations in defiance of section 7031." (*Lewis & Queen v. N. M. Ball Sons* (1957) 48 Cal.2d 141, 152 [308 P.2d 713].)

- "In 2001, the Legislature complemented the shield created by subdivision (a) of section 7031 by adding a sword that allows persons who utilize unlicensed contractors to recover compensation paid to the contractor for performing unlicensed work. Section 7031(b) provides that 'a person who utilizes the services of an unlicensed contractor may bring an action in any court of competent jurisdiction in this state to recover all compensation paid to the unlicensed contractor for performance of any act or contract' unless the substantial compliance doctrine applies." (*White v. Cridlebaugh* (2009) 178 Cal.App.4th 506, 519 [100 Cal.Rptr.3d 434], internal citation omitted.)

- "It appears section 7031(b) was designed to treat persons who have utilized unlicensed contractors consistently, regardless of whether they have paid the contractor for the unlicensed work. In short, those who have not paid are protected from being sued for payment and those who have paid may recover all compensation delivered. Thus, unlicensed contractors are not able to avoid the full measure of the CSLL's civil penalties by (1) requiring prepayment before undertaking the next increment of unlicensed work or (2) retaining progress payments relating to completed phases of the construction." (*White, supra*, 178 Cal.App.4th at p. 520.)

- "In most cases, a contractor can establish valid licensure by simply producing 'a verified

certificate of licensure from the Contractors' State License Board which establishes that the individual or entity bringing the action was duly licensed in the proper classification of contractors at all times during the performance of any act or contract covered by the action.' [Contractor] concedes that if this was the only evidence at issue, 'then—perhaps—the issue could be decided by the court without a jury.' But as [contractor] points out, the City was challenging [contractor]'s license by going behind the face of the license to prove that [license holder] was a sham RME or RMO. (*Jeff Tracy, Inc., supra,* 240 Cal.App.4th at p. 518.)

- "[T]he determination of whether [contractor] held a valid class A license involved questions of fact. '[W]here there is a conflict in the evidence from which either conclusion could be reached as to the status of the parties, the question must be submitted to the jury. [Citations.] This rule is clearly applicable to cases revolving around the disputed right of a party to bring suit under the provisions of Business and Professions Code section 7031.' " (*Jeff Tracy, Inc., supra,* 240 Cal.App.4th at p. 518.)

- "We conclude the authorization of recovery of '*all* compensation paid to the unlicensed contractor for performance of any act or contract' means that unlicensed contractors are required to return all compensation received without reductions or offsets for the value of material or services provided." (*White, supra,* 178 Cal.App.4th at pp. 520−521, original italics, internal citation omitted.)

- "[A]n unlicensed contractor is subject to forfeiture even if the other contracting party was aware of the contractor's lack of a license, and the other party's bad faith or unjust enrichment cannot be asserted by the contractor as a defense to forfeiture." (*Judicial Council of California v. Jacobs Facilities, Inc.* (2015) 239 Cal.App.4th 882, 896 [191 Cal.Rptr.3d 714].)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2010) Contracts, § 489 et seq.

12 California Real Estate Law and Practice, Ch. 430, *Licensing of Contractors,* § 430.70 (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts,* § 104.83 (Matthew Bender)

5 California Points and Authorities, Ch. 50A, *Contracts: Performance, Breach, and Defenses,* § 50A.52 et seq. (Matthew Bender)

29 California Legal Forms, Ch. 88, *Licensing of Contractors,* § 88.18 (Matthew Bender)

4561. Damages—All Payments Made to Unlicensed Contractor

A person who pays money under a contract to an unlicensed contractor may recover all compensation paid to the unlicensed contractor under the contract.

If you decide that [*name of plaintiff***] has proved that [he/she/it] paid money to [***name of defendant***] for services under the contract and that [***name of defendant***] has failed to prove that [he/she/it] was licensed at all times during performance, then [***name of plaintiff***] is entitled to the return of all amounts paid, not just the amounts paid while [***name of defendant***] was unlicensed. The fact that [***name of plaintiff***] may have received some or all of the benefits of [***name of defendant***]'s performance does not affect [his/her/its] right to the return of all amounts paid.**

New June 2016

Directions for Use

Give this instruction to clarify that the plaintiff is entitled to recover all compensation paid to the unlicensed defendant regardless of any seeming injustice to the contractor. (See *Hydrotech Systems, Ltd. v. Oasis Waterpark* (1991) 52 Cal.3d 988, 995 [277 Cal. Rptr. 517, 803 P.2d 370].) It may be modified for use if an allegedly unlicensed contractor brings a claim for payment for services performed. (See Bus. & Prof. Code, § 7031(a).)

Sources and Authority

- "Because of the strength and clarity of this policy, it is well settled that section 7031 applies despite injustice to the unlicensed contractor. 'Section 7031 represents a legislative determination that the importance of deterring unlicensed persons from engaging in the contracting business *outweighs any harshness between the parties*, and that such deterrence can best be realized by denying violators the right to maintain any action for compensation in the courts of this state. [Citation.] . . .' " (*Hydrotech Systems, Ltd., supra*, 52 Cal.3d at p. 995, original italics.)

- "[T]he courts may not resort to equitable considerations in defiance of section 7031." (*Lewis & Queen v. N. M. Ball Sons* (1957) 48 Cal.2d 141, 152 [308 P.2d 713].)

- "[I]f a contractor is unlicensed for any period of time while delivering construction services, the contractor forfeits all compensation for the work, not merely compensation for the period when the contractor was unlicensed." (*Judicial Council of California v. Jacobs Facilities, Inc.* (2015) 239 Cal.App.4th 882, 896 [191 Cal.Rptr.3d 714].)

- "We conclude the authorization of recovery of '*all* compensation paid to the unlicensed contractor for performance of any act or contract' means that unlicensed contractors are required to return all compensation received without reductions or offsets for the value of material or services provided." (*White v. Cridlebaugh* (2009) 178 Cal.App.4th 506, 520−521 [100 Cal.Rptr.3d 434], original italics, internal citation omitted.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2010) Contracts, § 489 et seq.

12 California Real Estate Law and Practice, Ch. 430, *Licensing of Contractors*, § 430.70 (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, § 104.83 (Matthew Bender)

5 California Points and Authorities, Ch. 50A, *Contracts: Performance, Breach, and Defenses*, § 50A.52 et seq. (Matthew Bender)

29 California Legal Forms, Ch. 88, *Licensing of Contractors*, § 88.18 (Matthew Bender)

4603. Whistleblower Protection—Essential Factual Elements (Lab. Code, § 1102.5)

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

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

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

   [*or***]**

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

   [*or***]**

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

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

   [*or***]**

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

   [*or***]**

   [That [*name of plaintiff***]'s participation in [***specify activity***] would result in [a violation of a [state/federal] statute/[a violation of/noncompliance with] a [local/state/federal] rule or regulation];]**

4. **That [***name of defendant***] [discharged/[***other adverse employment action***]] [***name of plaintiff***];**

5. **That [***name of plaintiff***]'s [disclosure of information/refusal to [***specify***]] was a contributing factor in [***name of defendant***]'s decision to [discharge/[***other adverse employment action***]] [***name of plaintiff***];**

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

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

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

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

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

New December 2012; Revised June 2013, December 2013, Revoked June 2014; Restored and Revised December 2014; Renumbered from CACI No. 2730 and Revised June 2015; Revised June 2016

Directions for Use

The whistleblower protection statute of the Labor Code prohibits retaliation against an employee who, or whose family member, discloses information about, or refuses to participate in, an illegal activity. (Lab. Code, § 1102.5(b), (c), (h).) Liability may be predicated on retaliation by "any person acting on behalf of the employer." (Lab. Code, § 1102.5(a)−(d).) Modifications to the instruction may be required if liability is predicated on an agency theory and the agent is also a defendant. Modifications will also be required if the retaliation is against an employee whose family member engaged in the protected activity.

Select the first option for elements 2 and 3 for disclosure of information; select the second options for providing information to or testifying before a public body conducting an investigation, hearing, or inquiry. Select the third options for refusal to participate in an unlawful activity. In the first option for element 2, choose "might disclose" if the allegation is that the employer believed that the employee might disclose the information in the future. (Cf. *Rope v. Auto-Chlor System of Washington, Inc.* (2013) 220 Cal.App.4th 635, 648−649 [163 Cal.Rptr.3d 392] [under prior version of statute, no liability for anticipatory or preemptive retaliation based on fear that plaintiff might file a complaint in the future].)

Select any of the optional paragraphs explaining what disclosures are and are not protected as appropriate to the facts of the case. It has been held that a report of publicly known facts is not a protected disclosure. (*Mize-Kurzman v. Marin Community College Dist.* (2012) 202 Cal.App.4th 832, 858 [136 Cal.Rptr.3d 259].) Another court, however, has cast doubt on this limitation and held that protection is not limited to the first public employee to report unlawful acts to the employer. (*Hager v. County of Los Angeles* (2014) 228 Cal.App.4th 1538, 1548−1553 [176 Cal.Rptr.3d 268]; see Lab. Code, § 1102.5(e).)

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

instructions that may be adapted for use with this instruction.

The employee must demonstrate by a preponderance of evidence that a protected activity was a contributing factor in the adverse action against the employee. The employer may then attempt to prove by clear and convincing evidence that the action would have been taken anyway for legitimate, independent reasons even if the employee had not engaged in the protected activities. (See Lab. Code, § 1102.6; CACI No. 4604, *Affirmative Defense—Same Decision*.)

Sources and Authority

- Retaliation Against Whistleblower Prohibited. Labor Code section 1102.5.
- Affirmative Defense: Same Decision. Labor Code section 1102.6.
- "The elements of a section 1102.5(b) retaliation cause of action require that (1) the plaintiff establish a prima facie case of retaliation, (2) the defendant provide a legitimate, nonretaliatory explanation for its acts, and (3) the plaintiff show this explanation is merely a pretext for the retaliation. [¶] We are concerned here with the first element of a section 1102.5(b) retaliation claim, establishing a prima facie case of retaliation. To do that, a plaintiff must show (1) she engaged in a protected activity, (2) her employer subjected her to an adverse employment action, and (3) there is a causal link between the two." (*Patten, supra,* 134 Cal.App.4th at p. 1384, internal citations omitted.)
- "In 1984, our Legislature provided 'whistle-blower' protection in section 1102.5, subdivision (b), stating that an employer may not retaliate against an employee for disclosing a violation of state or federal regulation to a governmental or law enforcement agency. This provision reflects the broad public policy interest in encouraging workplace whistle-blowers to report unlawful acts without fearing retaliation. Section 1102.5, subdivision (b), concerns employees who report to public agencies. It does not protect plaintiff, who reported his suspicions directly to his employer. Nonetheless, it does show the Legislature's interest in encouraging employees to report workplace activity that may violate important public policies that the Legislature has stated. The state's whistle-blower statute includes administrative regulations as a policy source for reporting an employer's wrongful acts and grants employees protection against retaliatory termination. Thus, our Legislature believes that fundamental public policies embodied in regulations are sufficiently important to justify encouraging employees to challenge employers who ignore those policies." (*Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 76–77 [78 Cal.Rptr.2d 16, 960 P.2d 1046].)
- "[T]he purpose of … section 1102.5(b) 'is to 'encourag[e] workplace whistle-blowers to report unlawful acts without fearing retaliation.' " (*Diego v. Pilgrim United Church of Christ* (2014) 231 Cal.App.4th 913, 923 [180 Cal.Rptr.3d 359].)
- "As a general proposition, we conclude the court could properly craft instructions in conformity with law developed in federal cases interpreting the federal whistleblower statute. As the court acknowledged, it was not bound by such federal interpretations. Nevertheless, the court could properly conclude that the jury required guidance as to what did and did not constitute 'disclosing

information' or a 'protected disclosure' under the California statutes." (*Mize-Kurzman, supra,* 202 Cal.App.4th at p. 847.)

- "The court erred in failing to distinguish between the disclosure of policies that plaintiff believed to be unwise, wasteful, gross misconduct or the like, which are subject to the [debatable differences of opinion concerning policy matters] limitation, and the disclosure of policies that plaintiff reasonably believed violated federal or state statutes, rules, or regulations, which are not subject to this limitation, even if these policies were also claimed to be unwise, wasteful or to constitute gross misconduct." (*Mize-Kurzman, supra,* 202 Cal.App.4th at pp. 852–853.)

- "[I]t is not the *motive* of the asserted whistleblower, but the nature of the communication that determines whether it is covered." (*Mize-Kurzman, supra,* 202 Cal.App.4th at p. 852, original italics.)

- "[I]f we interpret section 1102.5 to require an employee to go to a different public agency or directly to a law enforcement agency before he or she can be assured of protection from retaliation, we would be encouraging public employees who suspected wrongdoing to do nothing at all. Under the scenario envisioned by the [defendant], if the employee reports his or her suspicions to the agency, … , he or she will *have to suffer any retaliatory* conduct with no legal recourse. If the employee reports suspicions to an outside agency or law enforcement personnel, he or she risks subjecting the agency to negative publicity and loss of public support which could ensue without regard to whether the charges prove to be true. At the same time, a serious rift in the employment relationship will have occurred because the employee did not go through official channels within the agency which was prepared to investigate the charges. We see no reason to interpret the statute to create such anomalous results." (*Gardenhire v. Housing Authority* (2000) 85 Cal.App.4th 236, 243 [101 Cal.Rptr.2d 893].)

- "Labor Code section 1102.5, subdivision (b) protects employee reports of unlawful activity by third parties such as contractors and employees, as well unlawful activity by an employer. In support of our conclusion, we note that an employer may have a financial motive to suppress reports of illegal conduct by employees and contractors that reflect poorly on that employer." (*McVeigh v. Recology San Francisco* (2013) 213 Cal.App.4th 443, 471 [152 Cal.Rptr.3d 595], internal citation omitted.)

- "We are persuaded that [instructing the jury that reporting publicly known facts is not a protected disclosure] was a proper limitation on what constitutes disclosure protected by California law." (*Mize-Kurzman, supra,* 202 Cal.App.4th at p. 858.)

- "The report of 'publicly known' information or 'already known' information is distinct from a rule in which only the first employee to report or disclose unlawful conduct is entitled to protection from whistleblower retaliation." (*Hager, supra,* 228 Cal.App.4th at p. 1552.)

- "Protection only to the first employee to disclose unlawful acts would defeat the legislative purpose of protecting workplace whistleblowers, as employees would not come forward to report unlawful conduct for fear that someone else already had done so. The 'first report' rule would discourage whistleblowing. Thus, the [defendant]'s interpretation is a disincentive to report

unlawful conduct. We see no such reason to interpret the statute in a manner that would contradict the purpose of the statute." (*Hager, supra*, 228 Cal.App.4th at p. 1550.)

- "Matters such as transferring employees, writing up employees, and counseling employees are personnel matters. 'To exalt these exclusively internal personnel disclosures with whistleblower status would create all sorts of mischief. Most damagingly, it would thrust the judiciary into micromanaging employment practices and create a legion of undeserving protected 'whistleblowers' arising from the routine workings and communications of the job site. … ' " (*Mueller v. County of Los Angeles* (2009) 176 Cal.App.4th 809, 822 [98 Cal.Rptr.3d 281].)

Secondary Sources

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

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

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

11 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249~~50~~.12, 249.15 (Matthew Bender)

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

4606. Whistleblower Protection—Unsafe Patient Care and Conditions ─Essential Factual Elements (Health & Saf. Code, § 1278.5)

[*Name of plaintiff***] claims that [***name of defendant***] discriminated against [him/her] in retaliation for [his/her] [***briefly specify protected conduct***] regarding unsafe patient care, services, or conditions at [***specify hospital or other health care facility***], [***name of defendant***]'s health care facility. In order to establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was [a/an] [patient/employee/member of the medical staff/***specify other health care worker***] of [***name of defendant***];**

2. **[That [***name of plaintiff***] [***select one or both of the following options:***]**

   a. **[presented a grievance, complaint, or report to [[***name of defendant***]/an entity or agency responsible for accrediting or evaluating [***name of defendant***]/[***name of defendant***]'s medical staff/ [or] a governmental entity]] related to, the quality of care, services, or conditions at [***name of defendant***]'s health care facility;]**

   [or]

   b. **[initiated, participated, or cooperated in an [investigation [or] administrative proceeding] related to, the quality of care, services, or conditions at [***name of defendant***]'s health care facility that was carried out by [an entity or agency responsible for accrediting or evaluating the facility/its medical staff/a governmental entity];]**

3. **That [***name of defendant***] [mistreated/discharged/[***other adverse action***]] [***name of plaintiff***];**

4. **That [***name of plaintiff***]'s [***specify***] was a substantial motivating reason for [***name of defendant***]'s [mistreatment/discharge/[***other adverse action***]] of [***name of plaintiff***];**

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 2016

Directions for Use

A patient, employee, member of the medical staff, or any other health care worker of a health facility is protected from discrimination or retaliation if he or she, or his or her family member, takes specified acts regarding suspected unsafe patient care and conditions at a health care facility. (Health & Saf. Code, § 1278.5.) A person alleging discrimination or retaliation by the facility has a private right of action against the facility. (*Fahlen v. Sutter Central Valley Hospitals* (2014) 58 Cal.4th 655, 676 [168 Cal.Rptr.3d 165,

318 P.3d 833].)

For elements 3 and 4, choose "mistreated" and "mistreatment" if the plaintiff was a patient. Choose "discharge" or specify another adverse action if the plaintiff is or was an employee, member of the medical staff, or other health care worker of the defendant's facility. Other adverse actions include, but are not limited to, demotion, suspension, or any unfavorable changes in, or breach of, the terms or conditions of the plaintiff's contract, employment, or privileges, or the threat of any of these actions. (Health & Saf. Code, § 1278.5(d)(2).)

There are rebuttable presumptions of retaliation and discrimination if acts are taken within a certain time after the filing of a grievance. (See Health & Saf. Code § 1278.5(c), (d).) However, these presumptions affect only the burden of producing evidence. (Health & Saf. Code § 1278.5(e).) A presumption affecting only the burden of producing evidence drops out if evidence is introduced that would support a finding of its nonexistence. (Evid. Code § 604.) Therefore, unless there is no such evidence, the jury should not be instructed on the presumptions.

Sources and Authority

- Whistleblower Protection for Patients and Health Care Personnel. Health and Safety Code section 1278.5.

- "Section 1278.5 declares a policy of encouraging workers in a health care facility, including members of a hospital's medical staff, to report unsafe patient care. The statute implements this policy by forbidding a health care facility to retaliate or discriminate 'in any manner' against such a worker 'because' he or she engaged in such whistleblower action. It entitles the worker to prove a statutory violation, and to obtain appropriate relief, in a civil suit before a judicial fact finder." (*Fahlen, supra,* 58 Cal.4th at pp. 660−661; internal citation omitted.)

- "A medical staff member who has suffered retaliatory discrimination 'shall be entitled' to redress, including, as appropriate, reinstatement and reimbursement of resulting lost income. Section 1278.5 does not affirmatively state that these remedies may be pursued by means of a civil action, but it necessarily assumes as much when it explains certain procedures that may apply when 'the member of the medical staff … has filed *an action pursuant to this section … ' .*" (*Fahlen, supra,* 58 Cal.4th at p. 676, original italics, internal citation omitted.)

- "[Defendant] also appears to contend that it was entitled to judgment as a matter of law on [plaintiff]'s claim for violation of Health and Safety Code section 1278.5 because the undisputed evidence established that [defendant] terminated [plaintiff] for *refusing to perform* nurse-led stress testing, rather than for making complaints concerning [defendant]'s nurse-led stress testing. We are not persuaded. In light of the evidence of [plaintiff]'s complaints pertaining to the legality of nurse-led stress testing and the disciplinary actions discussed above, a jury could reasonably find that [defendant] retaliated against her for making these complaints. This is particularly so given that many of the complaints and disciplinary actions occurred within 120 days of each other, thereby triggering the rebuttable presumption of discrimination established in Health and Safety Code section 1278.5, subdivision (d)(1)." (*Nosal-Tabor v. Sharp Chula Vista Medical Center* (2015) 239 Cal.App.4th 1224, 1246 [191 Cal.Rptr.3d 651], original italics.)

Secondary Sources

1 Witkin & Epstein, California Criminal Law (4th ed. 2014) Crimes Against Public Peace and Welfare, § 393

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

25 California Forms of Pleading and Practice, Ch. 295, *Hospitals*, § 295.13[14] (Matthew Bender)

5018. Audio or Video Recording and Transcription

A [sound/video] recording has been admitted into evidence, and a transcription of the recording has been provided to you. The recording itself, not the transcription, is the evidence. The transcription is not an official court reporter's transcript. The transcription was prepared by a party only for the purpose of assisting the jury in following the video-audio recording. The transcription may not be completely accurate. It may contain errors, omissions, or notations of inaudible portions of the recording. Therefore, you should use the transcription 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 transcription, your understanding of the recording must prevail.

[[Portions of the recording have been deleted.] [The transcription [also] contains strikeouts or other deletions.] You must disregard any deleted portions of the recording or transcription 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 of the court reporter is the official record that you should consider as evidence.]**

New December 2010; Revised June 2016

Directions for Use

Give this instruction if an audio or a video recording was played at trial and accepted into evidence. A transcription is created by a party or parties in the case to assist the jury in following the video/audio recording. Include the second paragraph if only a portion of the recording was received into evidence or if parts of the transcription 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].)

Secondary Sources

3 Witkin, California Evidence (5th ed. 2012) Presentation at Trial, § 162

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)

California Judges Benchbook: Civil Proceedings—Trial (2d ed.) § 7.23 (Cal CJER 2010)

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REPORT TO THE JUDICIAL COUNCIL

For business meeting on: June 24, 2016

Title
Jury Instructions: Revised Civil Jury Instruction No. 2334—Supplemental Report

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

Recommended by
Advisory Committee on Civil Jury Instructions
Hon. Martin J. Tangeman, Chair

Agenda Item Type
Action Required

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Executive Summary

This is a supplementary report covering only the Advisory Committee on Civil Jury Instructions' proposed revisions to CACI No. 2334, *Bad Faith (Third Party)—Refusal to Accept Reasonable Settlement Within Liability Policy Limits—Essential Factual Elements*. Because of the extensive controversy generated by the committee's proposed changes to this instruction, the committee believes that it is appropriate to set forth its decision and decisionmaking process about this instruction in a separate report.

Recommendation

The Advisory Committee on Civil Jury Instructions recommends that the Judicial Council, effective June 24, 2016, approve for publication under rules 2.1050 and 10.58 of the California Rules of Court revisions to CACI No. 2334. The proposed revised instruction is attached at pages 15–20. It is also included in the complete file of instructions proposed for adoption in this release that is attached to the committee's report to the council for this release.

Rationale for Recommendation

At its January 2016 meeting, the committee approved for posting a revised version of CACI No. 2334, which addresses a claim for bad-faith insurance practice if the insurer has rejected a policy-limits settlement demand, and there is a subsequent judgment against the insured in excess of the policy limits. The proposed revisions involved four significant changes to the instruction.

First, an additional element was proposed to be added:

> [3. That [*name of defendant*]'s failure to accept this settlement demand was unreasonable;][1]

Second, the following sentence was proposed to be added after the elements:

> To act or fail to act "unreasonably" means that the insurer had no proper cause for its conduct.

Third, the current last paragraph would be revised as follows:

> A settlement demand <u>for an amount within policy limits</u> is reasonable<u>, and [*name of defendant*]'s rejection of the demand is unreasonable,</u> if [*name of defendant*] knew or should have known at the time the ~~settlement~~ demand was rejected that the potential judgment was likely to exceed the amount of the ~~settlement~~ demand based on [*name of plaintiff in underlying case*]'s injuries or loss and [*name of plaintiff*]'s probable liability.

Fourth, the following sentence would be added to the end of the instruction:

> However, the demand may be unreasonable for reasons other than the amount demanded.

The committee majority[2] approved these changes in response to a 2015 case, *Graciano v. Mercury General Corp.*[3] *Graciano,* as discussed in more detail below, contained language directly supporting the first two proposed changes. The committee decided, however, that the "unreasonable failure" inquiry was limited to the insurer's evaluation of the case; i.e., liability

[1] The element was made optional because it would not apply if the insurer denied that there was coverage for the loss. See *Johansen v. California State Auto. Assn. Inter-Insurance Bureau* (1975) 15 Cal.3d 9, 15−16.

[2] The vote was 13 to 8.

[3] *Graciano v. Mercury General Corp.* (2014) 231 Cal.App.4th 414.

and damages.[4] The fourth proposed change, which proved to be noncontroversial, was to direct the jury's attention to any nonmonetary conditions in the settlement demand that may have been unreasonable.

As noted below under Comments, Alternatives, and Policy Considerations, the proposed revisions produced a barrage of comments from attorneys who represent plaintiffs in suits against insurers, all objecting to the proposed revisions to the instruction.

The opposition focused around two main arguments. First, no court has specifically stated that 2334 is wrong or incomplete, so there is no reason to change it. Second, it was claimed that the language from *Graciano* is dicta, is not the law, and should be ignored.

History: 2003−2014

The original 2003 version of CACI No. 2334, as drafted by the CACI task force and approved by the Judicial Council, included the following element:

> 2. That [*name of defendant*] unreasonably failed to accept a reasonable settlement demand for an amount within policy limits.

This element requires two separate inquiries. First, the settlement demand must be reasonable; second, the insurer's failure to accept the demand must be unreasonable.

The cases originally excerpted in the Sources and Authority perhaps did not provide solid support for this element. The closest is the following:

> An insurer's decision to contest or settle a claim " 'should be an honest and intelligent one. It must be honest and intelligent if it be a good-faith conclusion. In order that it be honest and intelligent it must be based upon a knowledge of the facts and circumstances upon which liability is predicated, and upon a knowledge of the nature and extent of the injuries so far as they reasonably can be ascertained.' "[5]

If one substitutes "reasonable" for "honest and intelligent," then there is arguably support for element 2 as originally written by the task force.

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[4] See *Johansen, supra,* 15 Cal.3d at p. 16. "[[T]he only permissible consideration in evaluating the reasonableness of the settlement offer becomes whether, in light of the victim's injuries and the probable liability of the insured, the ultimate judgment is likely to exceed the amount of the settlement offer."

[5] *Brown v. Guarantee Insurance Co.* (1957) 155 Cal.App.2d 679, 685−686.

In contrast, there is this 1975 language from the California Supreme Court in *Johansen v. California State Auto. Assn. Inter-Insurance Bureau*: [6]

> [W]henever it is likely that the judgment against the insured will exceed policy limits "so that the most reasonable manner of disposing of the claim is a settlement which can be made within those limits, a consideration in good faith of the insured's interest *requires the insurer to settle* the claim." (Italics added.)

Johansen was a denial-of-coverage case. The court's holding was that if the insurer denied coverage, it did so "at its peril." If coverage is later established, then the insurer must pay the entire judgment, not just the policy limits.

The language "requires the insurer to settle" would seem to impose the same "peril" on the insurer even if there is no coverage dispute. If the insurer refuses to accept a reasonable demand for the policy limits, it is automatically on the hook for the entire judgment if its insured is found liable for a judgment in excess of the policy limits. This is the position of the authors of the many letters received in opposition to the proposed changes.

In December 2006, Justice H. Walter Croskey,[7] then the committee chair, proposed that all of the insurance bad-faith instructions be revised to clarify what it meant that the insurer's decision was "unreasonable." Justice Croskey was concerned that without any qualification, juries would construe "unreasonable" as indicating a lack of due care; that is, negligence. The law is clear that mere negligence is not bad faith.[8]

For 2334, he proposed deleting "unreasonable" from element 2, but adding explanatory words so that the element would read:

> 2. That [*name of defendant*] ~~unreasonably~~ failed to accept a reasonable settlement demand for an amount within policy limits <u>without proper cause or with no reasonable basis for such action</u>.

The committee majority, however, rejected Justice Croskey's proposal for 2334. Instead, it agreed to remove "unreasonably" from element 2, but did not add his proposed replacement language. The result was the current instruction, which extends the "at its peril" holding of *Johansen* to all cases, not just to denial of coverage. It focuses solely on the reasonableness of the demand. If the demand is reasonable, the insurer pays the entire judgment if it guessed wrong in refusing to pay the policy limits. This result may be seen as a version of "strict liability."

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[6] *Johansen, supra,* 15 Cal.3d at p. 16.

[7] The late Justice Croskey was the lead-named author of The Rutter Group treatise on insurance law, *California Practice Guide: Insurance Litigation*.

[8] See, e.g., *Brown, supra,* 155 Cal.App.2d at p. 689. "Bad faith may involve negligence, or negligence may be indicative of bad faith, but negligence alone is insufficient to render the insurer liable."

It should be noted that this 2007 change was not done in response to any holding in any particular case finding CACI No. 2334 as originally drafted to be an incorrect statement of the law. Instead, the committee reevaluated the instruction and came to a different conclusion about the state of the law in 2007 than the one made by the original CACI task force in 2003.

Like its predecessor, the instruction as revised in 2007 has not been directly addressed by the courts since then, as noted by numerous commentators. Nevertheless, it did not escape criticism. In 2014, the committee received a proposal from an insurance defense attorney asking the committee to restore 2334 to its original language by returning "unreasonably failed" to element 2. The attorney argued as follows, citing authority from the California Supreme Court:

> Breach of the implied covenant of good faith and fair dealing is dubbed "bad faith" for a reason. In order for an insurer to be liable for a judgment above its policy limits, its failure to accept a settlement demand within the limits must be unreasonable—i.e., in bad faith. *Kransco v. International Ins. Co.*, 23 Cal. 4th 390, 401, 97 Cal. Rptr. 2d 151 (2000) ("An insurer that breaches its implied duty of good faith and fair dealing by *unreasonably refusing* to accept a settlement offer within policy limits may be held liable for the full amount of the judgment against the insured in excess of its policy limits") (italics added); *Commercial Union Assurance Companies v. Safeway Stores, Inc.*, 26 Cal. 3d 912, 916-17, 610 P.2d 1038 (1980) ("an insurer may be held liable for a judgment against the insured in excess of its policy limits where it has breached its implied covenant of good faith and fair dealing by *unreasonably refusing* to accept a settlement offer within the policy limits") (italics added).

But the Supreme Court cases cited did not turn on the reasonableness of the insurer's rejection of the policy limits demand, and there is no analysis of the issue in any of them.[9]

In resolving this proposal, a working group recommended deferring any changes while closely monitoring the issue. One factor was the lack of any clear Supreme Court authority rejecting the strict liability position seemingly adopted in *Johansen*. Still, the cases cited in support of the defense position caused many members to postulate that 2334 element 2 might indeed be insufficient by not including a requirement that the insurer's rejection of the offer be unreasonable. Nevertheless, the recommendation was to wait for a clearer signal from the courts.

At its July 2014 meeting, the full committee agreed with the Working Group recommendation to defer action.

[9] See also *Hamilton v. Maryland Cas. Co.* (2012) 27 Cal.4th 718, 724–725. ("An *unreasonable* refusal to settle may subject the insurer to liability for the entire amount of the judgment rendered against the insured, including any portion in excess of the policy limits.") (italics added)

2015: *Graciano v. Mercury General*

The committee did not have long to wait. On October 17, 2014, the Fourth Appellate District, Division One, published *Graciano v. Mercury General*, in which the court stated:[10]

> An insured's claim for bad faith based on an alleged wrongful refusal to settle first requires proof the third party made a reasonable offer to settle the claims against the insured for an amount within the policy limits. … ¶ A claim for bad faith based on an alleged wrongful refusal to settle *also* requires proof the insurer *unreasonably* failed to accept an otherwise reasonable offer within the time specified by the third party for acceptance. (*Critz, supra*, 230 Cal.App.2d at p. 798.) (italics added)

At its July 2015 meeting, the committee agreed that *Graciano* now compelled restoring the "unreasonably rejected" language to 2334. A revised 2334 was drafted containing a new element requiring:

> [3. That [*name of defendant*]'s failure to accept this settlement demand was unreasonable or without proper cause;][11]

The proposed revised instruction was posted for public comment. Many comments were received, both opposing and supporting the proposed change. After reviewing the comments, the chair decided to pull the instruction from the release for further deliberation, based on three concerns.

First, the instruction did not address nonmonetary aspects of the policy-limits demand. As written, the instruction suggested to the jury that its only task was to evaluate the financial aspects of the offer. In fact, an offer may be unreasonable for any number of nonmonetary reasons, such as an unduly short window in which to accept it.[12]

Second, commentators opposed to the change claimed that the language from *Graciano* was dicta. The committee had not considered this possibility in its discussions of the case and the instruction.

Third, there was concern with the lack of any discussion about possible parameters of what insurer conduct the jury could evaluate for reasonableness. While cases say that the insurer's rejection of the offer must be "unreasonable" or "unwarranted," the committee had not looked at any cases that addressed whether there are limitations on the scope of insurer conduct that are

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[10] *Graciano, supra*, 231 Cal.App.4th at p. 426.

[11] The element was bracketed to make it optional because it should not be given in denial-of-coverage cases.

[12] See, e.g., *Coe v. State Farm Mut. Auto. Ins. Co.* (1977) 66 Cal.App.3d 981, 992–993. Failure to include provisions for relief by the workers' compensation carrier made the settlement offer ineffective.

subject to this reasonableness inquiry. The chair was uncomfortable with leaving this inquiry open-ended without further consideration by the committee.

2016: the current proposal

On reconsideration for the current release cycle, the committee focused on the three issues above that had caused it not to proceed to recommend the revised instruction in 2015. The nonmonetary issue was noncontroversial and easily addressed. Language was added to the instruction: "However, the demand may be unreasonable for reasons other than the amount demanded." The other two issues remain without any clear resolution after another round of deliberations.

For the reasons set forth below, the committee now proposes that only the above substantive change to the instruction itself, regarding nonmonetary conditions in the demand, be made. [13] But the committee believes that bench and bar should be informed that there is a highly controversial potential additional element for the instruction. Therefore, the committee proposes adding substantial discussion of the issue in the Directions for Use.

Reasons for current proposal: no case clearly holds that the additional element is required.

The many commentators opposed to adding the element would ignore *Graciano* entirely. They claim that all of the language that supports adding the additional element is dicta, and that it is wrong anyway.

The issue of whether the crucial language in *Graciano* is or is not dicta is not so easily answered. There are several ways of identifying the actual holding of *Graciano*. The facts of the case involved a mix-up over policies covering two different insureds. The plaintiff made the demand on the wrong policy and never corrected the error. The insurer rejected the demand on the wrong policy, but eventually discovered another policy that did provide coverage. On this discovery, the insurer offered the policy limits, but the plaintiff rejected the offer as untimely.

The position of those opposed to adding the element is that the holding of *Graciano* was that there was never a valid settlement offer. Therefore, the plaintiff's bad-faith claim fails on the lack of a reasonable demand; everything that follows is dicta.

But another possible holding is in this sentence:[14]

> [A]lthough there was some delay by CAIC in locating and connecting Graciano's claim with Saul's policy, resulting in a mistaken "withholding" of policy benefits

[13] The committee proposes several nonsubstantive language changes to the last paragraph as follows: "A settlement demand <u>for an amount within policy limits</u> is reasonable if [*name of defendant*] knew or should have known at the time the ~~settlement~~ demand was rejected that the potential judgment was likely to exceed the amount of the ~~settlement~~ demand based on [*name of plaintiff in underlying case*]'s injuries or loss and [*name of plaintiff*]'s probable liability."

[14] *Graciano, supra,* 231 Cal.App.4th at p. 433.

> for a 24-hour period, such mistake was "contributed to by the very party claiming those policy benefits" and "supplies the 'proper cause'" (*ibid.*), fatal to Graciano's bad faith claim.

One may argue that "supplies the proper cause" is a holding that "proper cause" negates bad faith. But whether the *Graciano* language is a holding or dicta is not dispositive of the correct rule.[15] Whether or not the language in *Graciano* is dicta, it has its origins in language from the California Supreme Court.

As noted in the proposed addition to the Directions for Use, none of these cases—neither those seemingly creating strict liability nor those seemingly providing an opportunity for the insurer to assert that its rejection was reasonable—actually discuss, analyze, and apply this standard to reach a result. All are determined on other issues.

Reasons for current proposal: it is not clear that the reasonable-rejection inquiry can be limited to evaluation of liability and damages. The third reason that 2334 was returned for further consideration in 2015 is what has ultimately led us to the revisions now proposed for this release. Does the law place any limitations on the scope of insurer conduct that the jury must evaluate for reasonableness?

In *Johansen*, the California Supreme Court stated:[16]

> [T]he *only* permissible consideration in evaluating the reasonableness of the settlement offer becomes whether, in light of the victim's injuries and the probable liability of the insured, the ultimate judgment is likely to exceed the amount of the settlement offer.

Application of this language would limit the scope of the reasonable-rejection inquiry. Apart from denial of coverage cases and nonmonetary provisions in the demand, there would be only one ground on which an insurer may assert that its rejection of the demand was reasonable, and that is reasonable misevaluation of liability and damages. At the January meeting, the committee majority voted in favor of this position.

Those committee members asserting the minority position argued that misevaluation is encompassed within the first step, the evaluation of whether the demand was reasonable. But the majority countered that it is possible for the demand to be reasonable, and for the insurer's rejection of the demand to also be reasonable. One member gave the example of an accident

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[15] It should be noted that the language from *Johansen* quoted above—for the proposition that failure to accept a reasonable policy limits demand creates strict liability for an excess judgment—was also dicta. *Johansen* was a denial-of-coverage case. Any language that might be applied to a case in which coverage was conceded was therefore dicta.

[16] *Johansen, supra*, 15 Cal.3d at p. 16, italics added.

causing catastrophic injuries, but after a full and fair investigation, the insurer's counsel puts the likelihood of liability at less than 5 percent. The likely damage award will indisputably greatly exceed the policy limits. In such a case, one could hardly say that a policy-limits demand would be unreasonable. But can it be said that given the doubts as to liability, it was unreasonable for the insurer to reject paying the policy limits? That is exactly the issue that the jury must determine with the help of CACI No. 2334.

Thus, the committee's proposed revisions to the last paragraph would provide:

> A settlement demand for an amount within policy limits is reasonable, and [*name of defendant*]'s rejection of the demand is unreasonable, if [*name of defendant*] knew or should have known at the time the demand was rejected that the potential judgment was likely to exceed the amount of the demand based on [*name of plaintiff in underlying case*]'s injuries or loss and [*name of plaintiff*]'s probable liability.

The intent of the instruction as revised was to create a two-step reasonableness evaluation, but to tie both to the evaluation of liability and damages. First the jury looks at the plaintiff's evaluation in making the demand. Then the jury is to look at the insurer's evaluation in rejecting it. The intent was to significantly narrow the scope of the grounds that the insurer can allege to constitute a reasonable rejection.

But after considering some analysis from former chair Justice Croskey in a December 27, 2006 memorandum to a working group, and one comment in particular, the committee majority is no longer convinced that the reasonableness inquiry can be narrowed to evaluation of liability and damages.

A commentator presented the following:

> I am unaware of any cases where a jury relying upon CACI 2334 has found an insurer liable for bad faith because its adjuster was hit by a bus while in the process of mailing a letter accepting a settlement demand.

Under the originally proposed revisions, the insurer must pay in the example noted above because the reason for failing to accept was not related to its evaluation of liability and damages. Strict liability remains for bus accidents (and everything else that is not related to evaluation). But are there reasonable failures to accept that don't involve evaluation? A bus accident would seem to be one.

Justice Croskey in a 2006 memo to the committee presented the following factors that should guide the jury's determination in the prudent-insurer inquiry:[17]

> [The prudent-insurer inquiry] will always raise a jury question and will depend on the consideration of a number of factors, for example:
>
> (1) the strength of the injured claimant's case on the issues of liability and damages;
>
> (2) the nature and extent of the claimant's injuries;
>
> (3) the extent of the financial risk to which the insured would be exposed in the event of a refusal to settle;
>
> (4) whether the insurer has properly investigated the circumstances so as to ascertain the evidence against the insured as well as the evidence of the claimant's injuries;
>
> (5) whether the insurer followed advice received from its own lawyer or claims investigator;
>
> (6) whether the insurer fairly and objectively evaluated the claim;
>
> (7) whether the insurer kept the insured fully informed of any settlement offers, to enable the insured to consider adding to the "pot" to effect settlement;
>
> (8) any attempt by the insurer to induce or coerce the insured to contribute to the settlement (e.g., "if you want to avoid excess liability, you'll have to pay for it");
>
> (9) the fault of the insured, if any, in inducing the insurer's rejection of the compromise offer by misleading it as to the facts; and
>
> (10) any other facts tending to show bad faith (i.e., action without a reasonable basis or proper cause) on the part of the insurer.

[17] This list is a slight variation on a list of eight factors in *Brown, supra*, 155 Cal.App.2d at p. 689. Justice Croskey added: (2) the nature and extent of the claimant's injuries; and (6) whether the insurer fairly and objectively evaluated the claim. His factor (2) is really subsumed within factor (1). His factor (6) would be the only relevant factor under the committee's original proposed revision.

Some of these factors are clearly relevant only to case evaluation. But others, particularly (9), suggest that the prudent-insurer inquiry is not limited to evaluation.

Another scenario that caused the committee hesitation about limiting the inquiry to evaluation issues is as follows: Assume that the adjuster was supposed to contact the claimant's counsel to accept or refuse the demand. The insurer decides to accept on the last day before the offer to settle expires. But the adjuster gets called away from the office for a family emergency and neglects to accept the demand. The demand expires. This situation sounds like negligence at most, and negligence is not bad faith.[18] So should the insurer be liable for the entire judgment under "unreasonably failed?" Yes, if the reasonableness inquiry is limited to evaluation issues.

Reasons for current proposal: subjective v. objective standards and the "prudent insurer" test. Numerous commentators allege that "the posted proposed change requiring the aggrieved party to show that the insurer's conduct was unreasonable, is a subjective standard that is much harder to meet and for which no true measure even exists." The committee does not agree that the proposed new element 3 is a subjective standard. A subjective standard would allow the defendant to avoid liability as long as it actually believed that it had a good reason to reject the demand. That is not what the element said. The jury is to determine whether the insurer's rejection was justified or not justified. The jury is to put itself in the insurer's shoes and decide what the insurer should have done. This is an objective standard based on a "reasonable insurer."

Still, there is possibly a different way to phrase the element to make it totally clear that it is an objective standard. According to Justice Croskey in his 2006 memo to the committee:

> When an insurer refuses to settle on some other ground (e.g., a disagreement over the nature and extent of the claimant's injuries or the insured's liability—"damage refusal"), then it will be judged by a different standard: the so called "*prudent insurer*" standard. Here, the test is whether a prudent insurer would have settled if there were no policy limits and the insurer alone was on the risk: "The governing standard is whether a prudent insurer would have accepted the settlement offer if it alone were liable for the entire judgment." (*Betts v. Allstate Ins. Co.* (1984) 154 Cal.App.3d 688, 706; *Crisci v. Security Ins. Co. of New Haven, Conn.* (1967) 66 Cal.2d 425, 430 436), original italics.

It could be argued that the proposed new element 3 is just a different way of expressing the prudent-insurer standard. That is perhaps true, but element 3 might also be expressed as:

> 3. That a prudent insurer would have accepted the settlement offer if it alone were liable for the entire judgment.

[18] *Brown, supra,* 155 Cal.App.2d at p. 689.

The possibility that element 3 might be better expressed differently is another factor counseling caution in making a change to the instruction itself at this time.

Reasons for current proposal: the explanation of "unreasonable" as meaning "without proper cause" is not firmly established in the third-party context. Numerous commentators point out that "without proper cause" is vague and undefined.

Two cases support defining "unreasonable" as meaning "without proper cause." One is Justice Croskey's opinion *Rappaport-Scott v. The Interinsurance Exchange of the Automobile Club*, in which he wrote: [19]

> The withholding of benefits due under the policy may constitute a breach of contract even if the conduct was reasonable, but liability in tort arises only if the conduct was unreasonable, that is, without proper cause.

But *Rappaport-Scott* was a first-party case over uninsured motorist coverage. So this language arguably (as numerous commentators did argue) does not apply in a third-party excess judgment case.

The other case is *Graciano,* in which the court said:[20]

> A bad faith claim requires "something beyond breach of the contractual duty itself" (*California Shoppers, Inc. v. Royal Globe Ins. Co., supra,* 175 Cal.App.3d at p. 54 (*California Shoppers*)), and that something more is "'refusing, *without proper cause,* to compensate its insured for a loss covered by the policy … .' [Citation.] Of course, the converse of 'without proper cause' is that declining to perform a contractual duty under the policy *with proper cause* is not a breach of the implied covenant." (*Ibid.,* italics added by *California Shoppers.*) The *California Shoppers* court then noted that "[t]o refine further the nature and extent of the duty here under analysis, in terms of a particular application of 'with proper cause,' it is our view that a *mistaken withholding* of policy benefits, at least where, as here, such mistake (as to the insured's identity and not as to the matter of coverage) has been contributed to by the very party claiming those policy benefits, is consistent with observance of the implied covenant of good faith and fair dealing because the mistake supplies the 'proper cause.'" (*Id.* at p. 55.) Applying *California Shoppers* here, although there was some delay by CAIC in locating and connecting Graciano's claim with Saul's policy, resulting in a mistaken "withholding" of policy benefits for a 24-hour period, such mistake was

[19] *Rappaport-Scott v. The Interinsurance Exchange of the Automobile Club* (2007) 146 Cal.App.4th 831, 837.

[20] *Graciano, supra,* 231 Cal.App.4th at pp. 433−434.

> "contributed to by the very party claiming those policy benefits" and "supplies the 'proper cause'" (*ibid.*), fatal to Graciano's bad faith claim. (original italics)

Graciano is a third-party case, so if it is authority, then the definition is supported. But, as pointed out extensively above, it may not be authority.

For all of the above reasons, the committee decided that some restraint would be best in actually revising the words of the instruction at this time. But the committee believes that it owes it to bench and bar to point out that CACI No. 2334 could be insufficient as currently written. The need for an additional element requiring the insurer's rejection of the demand to have been unreasonable is a plausible, but unsettled, requirement.

Comments, Alternatives Considered, and Policy Implications

The proposed additions and revisions to *CACI* circulated for comment from January 25 to March 4, 2016. Comments were received from 171 different commentators. Of these, 168 expressed opposition to the proposed changes to CACI No. 2334. Of these 168, 97 letters were identical except for the identity of the commentator;[21] A list of the attorneys submitting this letter is attached as Appendix A. 21 were almost identical, but contained slight variations. A list of the attorneys submitting these letters is attached as Appendix B. 50 of the comments were different letters drafted by the commentators. A list of the attorneys submitting these comments is attached as Appendix C. There were three comments generally supporting the changes to CACI No. 2334.

The comments received on CACI No. 2334 resulted in the committee's change in recommendation as outlined above.

A document summarizing all comments received on CACI No. 2334 and the committee's responses is attached at pages 21–58.

The committee considered and voted on three options:

1. Leave the instruction unchanged in any way, which was the position of the many commentators who opposed the proposed changes; this option received only one vote;

2. Proceed with the revision approved in January and posted for comment, which included the additional element in the instruction itself; this option received only six votes;

3. Add language on the nonmonetary aspects of the offer, but defer adding the new element and the language in the last paragraph that tries to restrict the scope of that element; but address the possible existence of the additional element in the Directions for Use. This

[21] This is a template letter that the Consumer Attorneys of California sent to their members with a request to forward it on to the committee.

option received a unanimous 23-0 vote, including the votes of the seven members who had voted for one of the first two options.

Attachments

1. CACI No. 2334 as proposed to be revised at page 15.
2. Document of comments on CACI No. 2334, at pages 21−58
3. Attorney List Appendix A at pages 59-65
4. Attorney List Appendix B at pages 66-67
5. Attorney List Appendix C at pages 68-70

2334. Bad Faith (Third Party)—Refusal to Accept Reasonable Settlement Within Liability Policy Limits—Essential Factual Elements

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

1. **That [***name of plaintiff in underlying case***] brought a lawsuit against [***name of plaintiff***] for a claim that was covered by [***name of defendant***]'s insurance policy;**

2. **That [***name of defendant***] failed to accept a reasonable settlement demand for an amount within policy limits; and**

3. **That a monetary judgment was entered against [***name of plaintiff***] for a sum greater than the policy limits.**

"Policy limits" means the highest amount available under the policy for the claim against [*name of plaintiff***].**

A settlement demand for an amount within policy limits is reasonable if [*name of defendant***] knew or should have known at the time the ~~settlement~~ demand was rejected that the potential judgment was likely to exceed the amount of the ~~settlement~~ demand based on [***name of plaintiff in underlying case***]'s injuries or loss and [***name of plaintiff***]'s probable liability. However, the demand may be unreasonable for reasons other than the amount demanded.**

New September 2003; Revised December 2007, June 2012, December 2012, June 2016

Directions for Use

This instruction is for use in an "excess judgment" case; that is one in which judgment was against the insured for an amount over the policy limits, after the insurer rejected a settlement demand within policy limits.

The instructions in this series assume that 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 use if the insurer assumed the duty to defend the insured, but failed to accept a reasonable settlement offer. It may also be used if the insurer rejects the defense, but did in fact owe its insured a duty to indemnify (i.e., coverage can be established). (See *Dewitt v. Monterey Ins. Co.* (2012) 204 Cal.App.4th 233, 244 [138 Cal.Rptr.3d 705].)~~ For instructions regarding general breach of contract issues, refer to the Contracts series (CACI No. 300 et seq.).

If it is alleged that a demand was made in excess of limits and there is a claim that the defendant should

have contributed the policy limits, then this instruction will need to be modified.

This instruction should also be modified if the insurer did not accept the policy-limits demand because of potential remaining exposure to the insured, such as a contractual indemnity claim or exposure to other claimants.

Under this instruction, if the jury finds that the policy-limits demand was reasonable, then the insurer is automatically liable for the entire excess judgment. Language from the California Supreme Court supports this view of what might be called insurer "strict liability" if the demand is reasonable. (See *Johansen v. California State Auto. Assn. Inter-Insurance Bureau* (1975) 15 Cal.3d 9, 16 [123 Cal.Rptr. 288, 538 P.2d 744] ["[W]henever it is likely that the judgment against the insured will exceed policy limits 'so that the most reasonable manner of disposing of the claim is a settlement which can be made within those limits, a consideration in good faith of the insured's interest *requires the insurer to settle* the claim,' " italics added].)

However, there is language in numerous cases, including several from the California Supreme Court, that would require the plaintiff to also prove that the insurer's rejection of the demand was "unreasonable." (See, e.g., *Hamilton v. Maryland Cas. Co.* (2002) 27 Cal.4th 718, 724-725 [117 Cal.Rptr.2d 318, 41 P.3d 128] ["An *unreasonable* refusal to settle may subject the insurer to liability for the entire amount of the judgment rendered against the insured, including any portion in excess of the policy limits," italics added]; *Graciano v. Mercury General Corp.* (2014) 231 Cal.App.4th 414, 425 [179 Cal.Rptr.3d 717] [claim for bad faith based on an alleged wrongful refusal to settle *also* requires proof the insurer *unreasonably* failed to accept an otherwise reasonable offer within the time specified by the third party for acceptance, italics added].) Under this view, even if the policy-limits demand was reasonable, the insurer may assert that it had a legitimate reason for rejecting it. However, this option, if it exists, is not available in a denial of coverage case. (*Johansen*, *supra*, 15 Cal.3d at pp. 15−16.)

None of these cases, however, neither those seemingly creating strict liability nor those seemingly providing an opportunity for the insurer to assert that its rejection was reasonable, actually discuss, analyze, and apply this standard to reach a result. All are determined on other issues, leaving the pertinent language as arguably dicta.

For this reason, the committee has elected not to change the elements of the instruction at this time. Hopefully, some day there will be a definitive resolution from the courts. Until then, the need for an additional element requiring the insurer's rejection of the demand to have been unreasonable is a plausible, but unsettled, requirement. For a thorough analysis of the issue, see the committee's report to the Judicial Council for its June 2016 meeting, found at (link).

Sources and Authority

- "[T]he implied obligation of good faith and fair dealing requires the insurer to settle in an appropriate case although the express terms of the policy do not impose such a duty. [¶] The insurer, in deciding whether a claim should be compromised, must take into account the interest of the insured and give it at least as much consideration as it does to its own interest. When there is great risk of a recovery beyond the policy limits so that the most reasonable manner of disposing of the claim is a settlement which can be made within those limits, a consideration in good faith of the insured's interest requires

the insurer to settle the claim." (*Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 659 [328 P.2d 198], citation omitted.)

- "Liability is imposed not for a bad faith breach of the contract but for failure to meet the duty to accept reasonable settlements, a duty included within the implied covenant of good faith and fair dealing." (*Crisci v. Security Insurance Co. of New Haven, Connecticut* (1967) 66 Cal.2d 425, 430 [58 Cal.Rptr. 13, 426 P.2d 173].)

- "In determining whether an insurer has given consideration to the interests of the insured, the test is whether a prudent insurer without policy limits would have accepted the settlement offer." (*Crisci*, *supra*, 66 Cal.2d at p. 429.)

- "[I]n deciding whether or not to compromise the claim, the insurer must conduct itself as though it alone were liable for the entire amount of the judgment. ... [T]he only permissible consideration in evaluating the reasonableness of the settlement offer becomes whether, in light of the victim's injuries and the probable liability of the insured, the ultimate judgment is likely to exceed the amount of the settlement offer." (*Johansen*, *supra*, ~~*v. California State Auto. Asso. Inter-Insurance Bureau* (1975)~~ 15 Cal.3d ~~9,~~ at p. 16 ~~[123 Cal.Rptr. 288, 538 P.2d 744]~~, internal citation omitted.)

- "[A]n insurer is required to act in good faith in dealing with its insured. Thus, in deciding whether or not to settle a claim, the insurer must take into account the interests of the insured, and when there is a great risk of recovery beyond the policy limits, a good faith consideration of the insured's interests may require the insurer to settle the claim within the policy limits. An unreasonable refusal to settle may subject the insurer to liability for the entire amount of the judgment rendered against the insured, including any portion in excess of the policy limits." (*Hamilton*, *supra*, 27 Cal.4th at pp. 724–725.)

- "The size of the judgment recovered in the personal injury action when it exceeds the policy limits, although not conclusive, furnishes an inference that the value of the claim is the equivalent of the amount of the judgment and that acceptance of an offer within those limits was the most reasonable method of dealing with the claim." (*Crisci*, *supra*, 66 Cal.2d at p. 431.)

- "The covenant of good faith and fair dealing implied in every insurance policy obligates the insurer, among other things, to accept a reasonable offer to settle a lawsuit by a third party against the insured within policy limits whenever there is a substantial likelihood of a recovery in excess of those limits. The insurer must evaluate the reasonableness of an offer to settle a lawsuit against the insured by considering the probable liability of the insured and the amount of that liability, without regard to any coverage defenses. An insurer that fails to accept a reasonable settlement offer within policy limits will be held liable in tort for the entire judgment against the insured, even if that amount exceeds the policy limits. An insurer's duty to accept a reasonable settlement offer in these circumstances is implied in law to protect the insured from exposure to liability in excess of coverage as a result of the insurer's gamble—on which only the insured might lose." (*Rappaport-Scott v. Interinsurance Exch. of the Auto. Club* (2007) 146 Cal.App.4th 831, 836 [53 Cal.Rptr.3d 245], internal citations omitted.)

- "An insured's claim for bad faith based on an alleged wrongful refusal to settle first requires proof the third party made a reasonable offer to settle the claims against the insured for an amount within the policy limits. The offer satisfies this first element if (1) its terms are clear enough to have created an

enforceable contract resolving all claims had it been accepted by the insurer, (2) all of the third party claimants have joined in the demand, (3) it provides for a complete release of all insureds, and (4) the time provided for acceptance did not deprive the insurer of an adequate opportunity to investigate and evaluate its insured's exposure." (*Graciano, supra, ~~v. Mercury General Corp.~~ (2014)* 231 Cal.App.4th ~~414,~~ at p. 425 ~~[179 Cal.Rptr.3d 717]~~, internal citations omitted.)

- "A bad faith claim requires 'something beyond breach of the contractual duty itself, and that something more is ' "refusing, *without proper cause*, to compensate its insured for a loss covered by the policy … ." [Citation.] Of course, the converse of "without proper cause" is that declining to perform a contractual duty under the policy *with proper cause* is not a breach of the implied covenant.' " (*Graciano, supra*, 231 Cal.App.4th at p. 433, original italics.)

- "Determination of the reasonableness of a settlement offer for purposes of a reimbursement action is based on the information available to [the insurer] at the time of the proposed settlement." (*Isaacson v. California Ins. Guarantee Assn.* (1988) 44 Cal.3d 775, 793 [244 Cal.Rptr. 655, 750 P.2d 297].)

- ~~"A claim for bad faith based on an alleged wrongful refusal to settle also requires proof the insurer unreasonably failed to accept an otherwise reasonable offer within the time specified by the third party for acceptance." (*Graciano, supra*, 231 Cal.App.4th at p. 425.)~~

- "The third party is entitled to set a reasonable time limit within which the insurer must accept the settlement proposal … ." (*Graciano, supra,* 231 Cal.App.4th at p. 434.)

- "Whether [the insurer] 'refused' the 'offer,' and whether it could reasonably have acted otherwise in light of the 11-day deadline imposed by the offer's terms, were questions for the jury." (*Coe v. State Farm Mut. Auto. Ins. Co.* (1977) 66 Cal.App.3d 981, 994 [136 Cal.Rptr. 331].)

- "A cause of action for bad faith refusal to settle arises only after a judgment has been rendered in excess of the policy limits. ... Until judgment is actually entered, the mere possibility or probability of an excess judgment does not render the refusal to settle actionable." (*Safeco Ins. Co. of Am. v. Superior Court* (1999) 71 Cal.App.4th 782, 788 [84 Cal.Rptr.2d 43], internal citations omitted.)

- "An insurer's wrongful failure to settle may be actionable even without rendition of an excess judgment. An insured may recover for bad faith failure to settle, despite the lack of an excess judgment, where the insurer's misconduct goes beyond a simple failure to settle within policy limits or the insured suffers consequential damages apart from an excess judgment." (*Howard v. American National Fire Ins. Co.* (2010) 187 Cal.App.4th 498, 527 [115 Cal.Rptr.3d 42], internal citations omitted.)

- " 'An insurer who denies coverage *does so at its own risk and although its position may not have been entirely groundless*, if the denial is found to be wrongful it is liable for the full amount which will compensate the insured for all the detriment caused by the insurer's breach of the express and implied obligations of the contract.' Accordingly, contrary to the defendant's suggestion, an insurer's 'good faith,' though erroneous, belief in noncoverage affords no defense to liability flowing from the insurer's refusal to accept a reasonable settlement offer." (*Johansen, supra,* 15 Cal.3d at pp. 15−16, original italics, footnotes and internal citation omitted.)

- "~~[A]n insurer who refused a reasonable settlement offer, on the ground of no coverage, does so at its own risk, so that the insurer has no defense that its refusal was in good faith if coverage is, in fact, found. However, w~~[W]here the *kind* of claim asserted is not covered by the insurance contract (and not simply the *amount* of the claim), an insurer has no obligation to pay money in settlement of a noncovered claim, because 'The insurer does not … insure the entire range of an insured's well-being, outside the scope of and unrelated to the insurance policy, with respect to paying third party claims.…' " (*Dewitt v. Monterey Ins. Co.* (2012) 204 Cal.App.4th 233, 244 [138 Cal.Rptr.3d 705]~~*DeWitt, supra,* 204 Cal.App.4th at p. 244~~, original italics.)

- "A good faith belief in noncoverage is not relevant to a determination of the reasonableness of a settlement offer." (*Samson v. Transamerica Insurance Co.* (1981) 30 Cal.3d 220, 243 [178 Cal.Rptr. 343, 636 P.2d 32], internal citation omitted.)

- "An insurer that breaches its duty of reasonable settlement is liable for all the insured's damages proximately caused by the breach, regardless of policy limits. Where the underlying action has proceeded to trial and a judgment in excess of the policy limits has been entered against the insured, the insurer is ordinarily liable to its insured for the entire amount of that judgment, excluding any punitive damages awarded." (*Hamilton, supra, ~~v. Maryland Casualty Co.~~* (2002) 27 Cal.4th at p.~~718,~~ 725~~ [117 Cal.Rptr.2d 318, 41 P.3d 128]~~, internal citations omitted.)

- "[I]nsurers do have a 'selfish' interest (that is, one that is peculiar to themselves) in imposing a blanket rule which effectively precludes disclosure of policy limits, and that interest can adversely affect the possibility that an excess claim against a policyholder might be settled within policy limits. Thus, a palpable conflict of interest exists in at least one context where there is no formal settlement offer. We therefore conclude that a formal settlement offer is not an absolute prerequisite to a bad faith action in the wake of an excess verdict when the claimant makes a request for policy limits and the insurer refuses to contact the policyholder about the request." (*Boicourt v. Amex Assurance Co.* (2000) 78 Cal.App.4th 1390, 1398−1399 [93 Cal.Rptr.3d 763].)

- "For bad faith liability to attach to an insurer's failure to pursue settlement discussions, in a case where the insured is exposed to a judgment beyond policy limits, there must be, at a minimum, some evidence either that the injured party has communicated to the insurer an interest in settlement, or some other circumstance demonstrating the insurer knew that settlement within policy limits could feasibly be negotiated. In the absence of such evidence, or evidence the insurer by its conduct has actively foreclosed the possibility of settlement, there is no "opportunity to settle" that an insurer may be taxed with ignoring." (*Reid v. Mercury Ins. Co.* (2013) 220 Cal.App.4th 262, 272 [162 Cal.Rptr.3d 894].)

- **"(4) [12:245] Insurer culpability required? A number of cases suggest that some degree of insurer 'culpability' is required before an insurer's refusal to settle a third party claim can be found to constitute 'bad faith.' [*Howard v. American Nat'l Fire Ins. Co.* (2010) 187 CA4th 498, 529, 115 CR3d 42, 69 (quoting text)]**

  (a) [12:246] **Good faith or mistake as excuse:** 'If the insurer has exercised good faith in all of its dealings … and if the settlement which it has rejected has been fully and fairly considered and has been based upon an *honest belief* that the insurer could defeat the action or keep any possible

judgment within the limits of the policy, and its judgments are based on a fair review of the evidence after reasonable diligence in ascertaining the facts, and upon sound legal advice, a court should not subject the insurer to further liability if it ultimately turns out that its judgment is a mistaken judgment.' [See *Brown v. Guarantee Ins. Co.* (1957) 155 CA2d 679, 684, 319 P2d 69, 72 (emphasis added); *Howard v. American Nat'l Fire Ins. Co.*, supra, 187 CA4th at 529, 115 CR3d at 69—'an insurer may reasonably underestimate the value of a case, and thus refuse settlement' on this basis (acknowledging but not applying rule)]

'In short, so long as insurers are not subject to a strict liability standard, there is still room for an honest, innocent mistake.' [*Walbrook Ins. Co. Ltd. v. Liberty Mut. Ins. Co.* (1992) 5 CA4th 1445, 1460, 7 CR2d 513, 521]

1) [12:246.1] **Comment: These cases are difficult to reconcile with the 'only permissible consideration' standard of a 'reasonable settlement demand' set out in *Johansen* and CACI 2334 (see ¶12:235.1). A possible explanation is that these cases address the 'reasonableness' of the insurer's refusal to settle based on a dispute as to the value of the case (or other matters unrelated to coverage), whereas *Johansen* addressed 'reasonableness' in the context of a coverage dispute (see ¶12:235). [See *Howard v. American Nat'l Fire Ins. Co.*, supra, 187 CA4th at 529, 115 CR3d at 69 (quoting text)]" (**Croskey et al., California Practice Guide: Insurance Litigation, Ch. 12B-B, *Bad Faith Refusal To Settle*, ¶¶ 12:245–12:246.1 (The Rutter Group), bold in original.)

Secondary Sources

2 Witkin, Summary of California Law (10th ed. 2005) Insurance, §§ 257–258

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 12B-A, *Implied Covenant Liability—Introduction*, ¶¶ 12:202–12:224 (The Rutter Group)

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 12B-B, *Bad Faith Refusal To Settle*, ¶¶ 12:226–12:548 (The Rutter Group)

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 12B-C, *Bad Faith Liability Despite Settlement Of Third Party Claims*, ¶¶ 12:575–12:581.12 (The Rutter Group)

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 12B-D, *Refusal To Defend Cases*, ¶¶ 12:582–12:686, (The Rutter Group)

2 California Liability Insurance Practice: Claims and Litigation (Cont.Ed.Bar) Actions for Failure to Settle, §§ 26.1–26.35

2 California Insurance Law and Practice, Ch. 13, *Claims Handling and the Duty of Good Faith*, § 13.07[1]–[3] (Matthew Bender)

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

12 California Points and Authorities, Ch. 120, *Insurance*, §§ 120.195, 120.199, 120.205, 120.207 (Matthew Bender)

Comments Generally Supporting Proposed Revisions

Civil Justice Association, by Hal Dasinger, Legislative Director
In general we support the proposed changes as an improved reflection of the current state of the law. The instruction that the plaintiff must prove that the defendant's failure to accept a settlement demand was unreasonable, in particular, represents an important element of bad faith litigation.

Committee Response:
No response is necessary. However, this element will not be added at this time, but will be suggested in the Directions for Use.

We remain concerned with the included definition of "unreasonably." The standard for unreasonableness—"no proper cause"—is itself not clearly defined, and may cause a jury to struggle with what constitutes unreasonableness. We suggest instead "the insurer's conduct was not justified" or something similar. We recognize that "unreasonable" and "without proper cause" have been used interchangeably in cases including *Dalrymple v. United Services Auto Assn.*, 40 Cal.App.4th 497, *Chateau Chamberay Homeowners Assn. v. Associated Internat. Ins. Co.*, 90 Cal.App.4th 335, and *Rappaport-Scott v. Interinsurance Exchange of Auto. Club*, 146 Cal.App.4th 831; however, whether conduct is proper appears at least conceptually to be more imprecise to establish than whether it is justified.

Committee Response:
The committee believes that it is best to use language from the cases unless it is absolutely clear that there is a better plan-language alternative. That is not the case here.

We are troubled by wording that says that a settlement demand within policy demands is reasonable. We think the instruction would be clearer if the last sentence were reworded to read "However, [*name of defendant*] does not act unreasonably in refusing to accept a settlement demand that may be unreasonable for reasons other than the amount demanded.

Committee Response:
The committee believes that these are more words than are needed to make the point that there can be nonmonetary provisions that make a demand unreasonable.

The jury should evaluate the defendant's conduct according to the information the defendant possessed at the time. We suggest adding the following sentence at the end:

> The reasonableness of the demand is based on the information the defendant has at the time of the offer and should not include information (or treatment) that is provided to the defendant after the demand.

Committee Response:
The committee assumes that the comment actually is meant to address the reasonableness of the insurer's rejection of the demand, not the reasonableness of the demand, which would be based on information known to the plaintiff, not the defendant. As stated in the instruction, the reasonableness of the rejection (should such an element be included) is based on what the insurer knew or should have known.

Interinsurance Exchange of the Automobile Club, by Mitchell C. Tilner, Horvitz & Levy
The Exchange commends the Committee for its work and supports the proposed revisions to CACI No. 2334, particularly the addition of the third numbered element.

Committee Response:
No response is necessary. However, this element will not be added at this time, but will be suggested in the Directions for Use.

The instruction should use the terms “refusal” and “refused,” rather than “failure” and “failed.” “Refusal” and “refusing” are the words the Supreme Court has consistently used to describe the conduct that can support tort liability. (citing cases.)

The committee has previously recognized “the clearly understood limitation that mere negligence is not bad faith” and that instructions on bad faith should communicate to jurors that “more than negligence” is required. (Judicial Council of Cal., Advisory Com. on Civil Jury Instructions, Rep. to the Judicial Council (Dec. 11, 2015) p. 5.) The words “failure” and “failed,” however, connote mere negligence. An insurer might “fail” to accept a reasonable settlement offer because its mail clerk failed to deliver the offer to the responsible adjuster; or because the adjuster overlooked or misinterpreted a condition of the demand; or because the adjuster erroneously calendared the deadline for responding to the offer. Indeed, as in Grayson, an insurer might “fail” to accept the offer despite repeated efforts to accept it.

The problem is not ameliorated by requiring proof that the insurer’s failure was “unreasonable,” the language used in the Committee’s proposed third numbered element in CACI No. 2334. That language would still leave the jury free to find, for example, that it was “unreasonable” for the adjuster to misinterpret the demand or to erroneously calendar the deadline for responding, or for an insurer to request that the policyholder sign a release. The insurer’s liability would rest on “mere negligence,” not on the required “refusal” to accept a settlement offer.

If the committee decides not to accept this change of language, then the Exchange supports adoption of the proposed revisions in their current form.

Committee Response:
The committee has decided not to change the title at this time.

We agree with the committee’s proposal to add the following sentence to the instruction to explain that, in the bad faith context, “unreasonably” means having “no proper cause”: “To act or fail to act ‘unreasonably’ means that the insurer had no proper cause for its conduct.”

Committee Response:
No response is necessary. However, this language will not be added at this time.

Neil Selman, Attorney at Law, Los Angeles
I am fully in support of these proposed changes as they are in line with current California law on the subject and would reduce the need to supplement jury instructions during trial to make up for the failure of the current language to properly focus on the need for the carrier to have acted unreasonably in order to be found liable for bad faith.

The current language only uses the term "reasonable" to describe the offer made by the plaintiff but it does not appear to use the standard of "reasonable" or "unreasonable" in reference to the carrier's conduct. This omission needs correction because a carrier's refusal to accept a reasonable demand, if such refusal was reasonable, allows the carrier to fully defend a claim of bad faith. Even if the decision to not accept a reasonable offer is found to be wrong, if the jury finds the carrier acted reasonably, the carrier can be found liable for breach of the contract, but not for the breach of the covenant of good faith and fair dealing.

There really cannot be any dispute on this legal standard and the CACI instructions in this area should, indeed, better reflect the law now governing this area.

Committee Response:
While no response is necessary, the committee does not concur that "[t]here really cannot be any dispute on this legal standard."

Comments Raised in Consumer Attorneys of California Standard Letter
(97 letters were received with the only difference being information on the commentator)
See Appendix 1 for names of those submitting this letter.

The proposed revision would improperly add an additional element-· that in addition to failing to accept a reasonable settlement offer within policy limits, the defendant insurer's conduct must be otherwise "unreasonable" which means vvithout "proper cause." The proposed revision puts the focus on the insurance company's conduct and would constitute a major departure from the existing established standard of liability.

Committee Response:
The committee does not believe that it is proposing a major departure. There is authority, including language from the California Supreme Court, supporting both the current version of CACI No. 2334 and the proposed revision adding that an insurer's rejection of a policy-limits offer must be "unreasonable" before the insurer is liable for the entire judgment. See report.

Nevertheless, the committee has decided not to proceed with adding the disputed element at this time. Instead, the case supporting the additional element will be summarized in the Directions for Use.

If the instruction is truly incorrect, an appellate court should issue a decision saying it is wrong. The current CACI 2334 instruction has been in use since 2007 without the additional "unreasonable" requirement. It has been used in countless trials over the past nine years giving defendants multiple opportunities to challenge the instruction as currently approved and take their complaint to a court of appeal. By not seeking an appellate court review of the actual instruction, and instead arguing for its change before the CACI committee, defendants, have demonstrated an inability or fear of judicial review. They are choosing to do an end run around the jury instruction approval process. This revision sets a dangerous precedent and sends the message that future legal changes should be made at the CACI committee level, rather than at the Legislature or the courts.

Committee Response:
There is no evidentiary support for the view that the insurance industry is "arguing for … change before the CACI committee" rather than seeking judicial review. The impetus for the committee's proposed changes is *Graciano v. Mercury General Corp.* (2014) 231 Cal.App.4th 414, 425, not advocacy by the insurance industry. The unresolved issue is whether *Graciano,* and the authority that supports it, is sufficient to change the instruction. See report.

The basis for the committee decision to add this element is the *Graciano* case, which does not directly deal with whether CACI 2334 as written is incorrect. In *Graciano,* the court held that there was no substantial evidence that the insurer had *unreasonably* rejected an offer to settle because the evidence showed that the insurer was prejudiced by the third party's identification of the applicable policy. (231 Cal.App.4th at p. 418.) The court then concluded "there is no substantial evidence Graciano [plaintiff] ever offered to settle her claims against Saul [insured] for an amount within Saul's policy limits. (231 Cal.App.4th at p. 427.) The *Graciano* case did not hold that CACI 2334 was wrong. The decision held that there was no breach of the covenant where there was not a reasonable offer to settle for the policy limits with the actual insured. Id. at 427. This is the same result that would have been reached applying the existing CACI 2334 instruction. (color emphasis added by committee)

Committee Response:

The fact that no court has directly said that CACI 2334 is wrong is not dispositive. If a court holds that the elements of a claim are a, b, and c, the CACI instruction omits c, then the court has held that the instruction is wrong. It does not have to expressly state that the instruction is wrong.

The crucial language from *Graciano* is:

> A claim for bad faith based on an alleged wrongful refusal to settle *also* requires proof the insurer *unreasonably failed* to accept an otherwise reasonable offer within the time specified by the third party for acceptance." (*Graciano, supra*, 231 Cal.App.4th at p. 425, italics added.)

The commentator is correct in noting that the court found that there had been no valid demand. Whether or not that makes the above language dicta, the committee does not believe that it can be ignored.

It is true that there is no analysis or development of the "unreasonably failed" element in the opinion. But as the comment itself notes in the language emphasized above, throughout the opinion, the court says that the insurer must have unreasonably rejected the offer. The court did not invent this element; there are several California Supreme Court cases that say that speak of the insurer's "unreasonable" or 'unwarranted" rejection of the demand. (See *Hamilton v. Maryland Cas. Co.* (2012) 27 Cal.4th 718, 724-725 ("An *unreasonable refusal* to settle may subject the insurer to liability for the entire amount of the judgment rendered against the insured, including any portion in excess of the policy limits.") *Kransco v. International Ins. Co.* (2009) 23 Cal.4th 390, 401 ("An insurer that breaches its implied duty of good faith and fair dealing by *unreasonably refusing* to accept a settlement offer within policy limits may be held liable for the full amount of the judgment against the insured in excess of its policy limits") *Commercial Union Assurance Companies v. Safeway Stores, Inc.* (1980) 26 Cal.3d 912, 916-917 ("an insurer may be held liable for a judgment against the insured in excess of its policy limits where it has breached its implied covenant of good faith and fair dealing by *unreasonably refusing* to accept a settlement offer within the policy limits"), italics added

However, uncertainty over whether the critical language in *Graciano* is or is not dicta, is one of the reasons why the committee has elected not to add the element to the instruction at this time. See report.

Additional Comments Raised in Other Letters Objecting to Proposed Revisions
See Appendix 2 for names of those submitting additional comments.

Thomas G. Adams, Attorney at Law, Ventura
Nothing justifies this departure from present standards, which already reflect existing law placing responsibility upon carriers for their breaches of their duty of good faith and fair dealing, defined as rejection of reasonable offers, presumptively for their own benefit, to the detriment of their insured. The added language implies that rejecting a reasonable offer to settle a claim against their insured is not unreasonable enough to hold the carrier liable. This is contrary to law. Instead, the Committee should adhere to the longstanding notion that not accepting a reasonable offer is per se unreasonable—and leave the instruction alone.

Committee Response:
The added language does more than imply that rejecting a reasonable offer to settle a claim against their insured is not unreasonable enough to hold the carrier liable. That is in fact the purpose of the proposed change. It is not contrary to law; instead, the law is unsettled.

Indeed, the seminal cases, *Johansen v. California State Auto Assoc.* (1975) 15 Cal.3d. 9, *Crisci v. Security Insurance Co. of New Haven* (1967) 66 Cal.2d 425, and *Communale v. Traders & General Insurance Co.* (1958) 50 Cal.2d 654, clearly identify the requirements, which have been properly stated in the current jury instruction:

> Liability is imposed not for a bad faith breach of the contract but for failure to meet the duty to accept reasonable settlements, a duty included within the implied covenant of good faith and fair dealing." (*Crisci, supra,* 66 Cal.2d at 430)

Committee Response:
The committee agrees that this excerpt is a correct statement of the law.

> "[I]n deciding whether or not to compromise the claim, the insurer must conduct itself as though it alone were liable for the entire amount of the judgment… [T]he only permissible consideration in evaluating the reasonableness of the settlement offer becomes whether, in light of the victim's injuries and the probable liability of the insured, the ultimate judgment is likely to exceed the amount of the settlement offer." (*Johansen, supra,* 15 Cal.3d at 16)

Committee Response:
The committee originally concluded that this language from *Johansen* supported the conclusion that there is a reasonable-rejection element, but that the inquiry is limited to evaluation ("the *only* permissible consideration"). The committee is no longer confident that *Johansen* so limits the inquiry. This is among the reasons that the committee has decided not to include language to this effect in the last paragraph at this time. See report.

> The insurer, in deciding whether a claim should be compromised, must take into account the interest of the insured and give it at least as much consideration as it does to its own interest. When there is great risk of a recovery beyond the policy limits so that the most reasonable manner of disposing of the claim is a settlement which can be made within those limits, a consideration in good faith of the insured's interest requires the insurer to settle the claim. Its unwarranted refusal to do so constitutes a breach of the implied covenant of good faith and fair dealing." (*Comunale, supra,* 50 Cal.2d at 659) (color emphasis added by committee)

Committee Response:
The committee believes that this excerpt from *Communale* actually supports adding the additional element. The committee sees no difference between "unreasonable" and "unwarranted." If a refusal must be "unwarranted" to constitute a breach of the implied covenant, then by implication, if it is not unwarranted (i.e., "warranted"), then there is no breach. But, as with all the cases from the Supreme Court, this is only this single word that supports that result. There is no development of what is, and what is not "unwarranted."

> A breach which prevents the making of an advantageous settlement when there is a great risk of liability in excess of the policy limits will, in the ordinary course of things, result in a judgment against the insured in excess of those limits. (*Id.* at 660-661)

Committee Response:
The significance of this excerpt is not immediately clear. Yes, a breach, that is, compelling the insured to go to trial, will usually (in the ordinary course of things) result in a judgment against the insured. And if there in fact was a breach, then the insurer must pay the entire judgment. But nothing in this language addresses what constitutes a breach.

A review of the case law lays out 5 criteria to support a bad faith finding in rejecting a demand, none of which are that the insurer engaged in "unreasonable conduct" "without proper cause." Rather, the requirements are:

- The terms of the demand must be clear. (*Coe v. State Farm Mutual Automobile Insurance Co.* (1977) 66 Cal.App.3d 981, 991).

- All [bad faith] claimants must join in the settlement demand. (*Coe, supra,* 66 Cal.App.3d at 992-93).

- All insureds must be released. (*Strauss v. Farmers Insurance Exchange* (1994) 26 Cal.App.4th 1017, 1021).

- The settlement amount demanded must be both within policy limits and "reasonable". (*Heredia v. Farmers Insurance Exchange* (1991) 228 Cal.App.3d 1345, 1357; see also, *Comunale, supra,* 50 Cal.2d at 661.)

- The demand must be timed to afford the insurer adequate opportunity to investigate "whether, in light of the victim's injuries and the probable liability of the insured, the ultimate judgment is likely to exceed the amount of the settlement offer." (*Crisci v. Security Insurance Co. of New Haven, Conn.* (1967) 66 Cal.2d 425, 430);

Committee Response:
These are nonmonetary considerations in evaluating the reasonableness of the demand. But their existence proves nothing about whether or not there is also a reasonable-rejection element.

A reading of the above cases shows that those in favor of the plaintiff likely would have turned out differently if this additional requirement were placed on them. For example, in *Johanson, supra,* the insurance company did not believe that the injury fell within coverage. In *Crisci,* the insurance company's adjusters determined that the plaintiff in the underlying matter could not win on the mental suffering issue. Both of these cases would have resulted in verdicts for the insurance company under the new jury instruction. That alone should make it clear that this instruction is contrary to the law.

Committee Response:
The committee does not agree. In *Crisci*: "[insurer] was unwilling to pay one cent for the possibility of a plaintiff's verdict on the mental illness issue. This conclusion was based on the assumption that the jury would believe all of the defendant's psychiatric evidence and none of the plaintiff's." If the jury in the bad-faith action decides whether the insurer's stonewall position was or was not reasonable, the case could have come out either way under proposed revised 2334. *Johansen* could not have turned out differently because the court held that there is no reasonable-rejection inquiry in a denial-of-coverage case.

Adamson Ahdoot, Attorneys at Law, Los Angeles, by Christopher B. Adamson
Any reliance on the *Graziano* matter is misplaced and disingenuous. … Most importantly, the emphasis of the *Graziano* matter - and all relevant California case law - is on the reasonableness of the demand, not whether the insurer's failure to accept the demand was unreasonable.

Committee Response:
The comment misstates the emphasis of *Graciano*. There are eight different places in the opinion in which the court used "unreasonably" to qualify the insurer's rejection of a reasonable settlement offer.

Adleson Hess & Kelly, Attorneys at Law, Camp, by Randy M. Hess and Nicole S. Adams-Hess
Last summer we obtained a $2,280,000 jury verdict on behalf of our client against Navigators Specialty Insurance Company in the Northern District of California, in front of Judge Alsup, in a bad faith breach of the duty to settle case entitled Doublevision Entertainment LLC v. Navigators Specialty Insurance Company, Case No. 3:14-cv-02848-WHA. In this case, Judge Alsup required extensive argument and supplemental briefing on the proper standard to determine when an insurer has breached the duty to settle under California law. Judge Alsup was determined to get the law right in drafting his jury instructions. We urged the Court to utilize CACI 2334, asserting that it stated the essential elements of an insurer's duty to settle. Counsel for Navigators insisted on adding additional requirements, similar to the proposed changes at issue here. In fact, Navigators' counsel specifically requested that there should be an additional prong added to the test, requiring the jury to determine if the insurer had acted unreasonably in rejecting the settlement offer, and cited *Graciano* in support of their arguments. After hearing argument and reviewing our briefs, Judge Alsup agreed with us and refused to instruct the jury that they should look to the reasonableness of the insurer's conduct in evaluating a breach of the duty to settle.

Committee Response:
A trial judge's views are not dispositive of the law. If in fact Judge Alsup's decision was incorrect, that would be a strong argument to revise the instruction so that other judges are not led astray.

Agnew Brusavich, Attorneys at Law, Torrance, by Bruce M. Brusavich
Having been involved for many years in the political process in Sacramento on behalf of CAOC and as a member of the Civil Small Claims Advisory Committee where I worked through the deliberative process of drafting proposals to enact Rules of Court or propose changes in the law to deal with new court decisions or legislative enactments requiring such changes, I have a thorough understanding of the differences in the two processes. Given the fact that there has been no appellate decision critical of CACI 2334 which would justify the Committee's proposal to change the instruction, making such a proposal gives the appearance that the Committee is acquiescing to special-interest pressure for a change, something more common in the legislative process.

Committee Response:
The committee may recommend updates and revisions to a jury instruction without a case that expressly says that an instruction is wrong before there is a clear need to revise it. If the case says that the elements

of the claim are a, b, c, and d, and the instruction omits c, then c must be added, whether or not the court expressly says that the instruction is wrong.

Finally, I believe the proposed change to CACI 2334 would create jury confusion since essentially it asks them to answer the question as to whether or not the failure to accept the policy limit demand was unreasonable after already having to have made a determination as to whether or not the policy limit demand itself was reasonable. The proposed change is also likely to create years of appellate litigation which is not existing with the current instruction.

Committee Response:
Whether or not two different elements involving reasonableness are confusing, if it is the law, then the committee must present the elements in a way that attempts to lessen the confusion. Originally, the instruction read that the insurer "unreasonably failed to accept a reasonable [policy limits] settlement demand." Arguably, the elements would be less confusing if separated into two, as was proposed in the draft posted for public comment. What would be most useful would be one case from the California Supreme Court resolving the issue.

Aitken Aitken Cohn, Attorneys at Law, Santa Ana—Six identical letters from different attorneys
Thus, the dicta relied upon by the committee (as confirmed by its own reporting) comes from a case that 1) did not challenge the language of CACI 2334, and 2) did not involve a refusal to accept a settlement within the liability policy limits. Simply put, there is no legal holding that supports the change to CACI 2334 currently being considered by the committee.

Committee Response:
The question of whether the critical language in *Graziano* is or is not dicta is addressed in the committee's report.

Alpers Law Group, Aptos, by Thomas Aldrich
In my 15 years of practice, I have represented plaintiffs and defendants and insurance companies on both sides of cases. I have utilized the current version of CACI 2334 on a number of occasions to instruct insurance companies on the ramifications of accepting or denying a settlement proposal. I believe it provides the right incentive for insurance companies to resolve cases short of trial. Adding additional burdens to the plaintiff will likely only increase litigation costs for both sides due to insurance companies' perceived strength in negotiating position created by the new requirement.

Committee Response:
The committee does not consider legal policy, such as the importance of balancing bargain power, in drafting and revising instructions consistent with the law. The law should reflect best policies; jury instructions should then reflect the law.

Additionally, I have chaired 11 jury trials and participated in a number of others. It is my belief, based on this experience, that adding a second reasonableness requirement for the jury to consider in the same instruction will unnecessarily increase jury confusion on this issue.

Committee Response:
Addressed above

Alpers Law Group, Aptos, by Richard C. Alpers
When people purchase insurance, they are buying peace of mind that any inadvertent mistakes they may make will be protected against. They buy the insurance to help fix the problems they may have accidentally caused, and for the peace of mind that dealing with these problems will not overtake their

life. Including a reasonableness standard in this jury instruction will defeat this underlying purpose of insurance.

The bad-faith laws exist in order to keep insurance companies honest and deal in a fair manner with their insureds. The laws, as they exist today, even the playing field between the insured and their insurance company, allowing an insured to bring an action against their insurance company if the insurance company fails to live up to their obligations.

If the jury instructions, as they presently exist, are changed as proposed, these bad-faith cases will be more difficult to win, thereby un-leveling the playing field. It will be more difficult to keep the insurance companies honest, and therefore the potential for mistreatment of the insurance buying public will grow.

Committee Response:
These are all policy arguments and therefore not considered by the committee in revising the instruction consistent with the law.

Chet R. Bhavsar, Attorney at Law, Los Angeles
Maurizio A. Mangini, Attorney at Law, Oceanside
Russell & Lazerus, Attorneys at Law, Newport Beach, by Christopher E. Russell
(All three included this paragraph in their comments.)
It has become progressively more difficult to resolve claims for their fair value short of trial. The insurance industry has made the determination that if fair value is to be provided to a personal injury victim it must be by way of verdict or by way of an 11th hour offer after hundreds of hours and tens of thousands of dollars have been spent. The ONLY fear the insurance industry has is a verdict in excess of the insured's policy limits as a result of the unreasonable handling of a claim, which would then expose it to having to pay on a claim in excess of the limits purchased by the insured. (color emphasis added by committee)

The current CACI 2334 instruction properly puts the focus on the reasonableness of the settlement demand, and in doing so provides premium-paying policy holders with objectively verifiable rights that cannot be manipulated by an insurer, and the existing CACI 2334 is therefore the instruction that should remain in use.

Committee Response:
This is one of a number of comments that actually support adding a reasonable-rejection element. According to the commentator, the handling of the claim must have been *unreasonable*. If all that matters is if the demand is reasonable, it would make no difference whether the insurer's claims handling was reasonable or unreasonable; meticulous or outrageous. Everything that the insurer does would be irrelevant once the demand is determined to be reasonable.

Biren Law Group, Attorneys at Law, Los Angeles, by Sarina M. Jarchi and John A. Roberts
Existing law is that if the insurer makes a reasonable business decision to gamble and not accept a reasonable settlement offer within policy limits, it has got to gamble with its own money, not the insured's. In many cases, a jury could very well find that if there was a liability dispute and the insurer decided to take the case to trial rather than settling, that the decision to try the case was a reasonable business decision. Thus, under the proposed instruction, the jury could conclude that even though the insurer refused to accept a reasonable offer within policy limits, the refusal was nevertheless not unreasonable, because the decision to gamble at trial was a reasonable business decision.

Committee Response:

The committee agrees that under the proposed revisions posted for comment, this would be the result. If one replaces "business" decision in the last sentence of the comment with "evaluation" decision, then this comment says exactly what the proposed revised 2334 was trying to accomplish.

Campagnoli Abelson & Campagnoli, Attorneys at Law, San Francisco, by Mark B. Abelson
Unfortunately, special interest groups will devise new strategies to buy their desired result. CACI 2334 has been used by our trial courts for a decade and has been considered by appellate courts. It is not the job of this Advisory Committee to change jury instructions as requested by the insurance industry. Let the Insurance industry seek to have the courts of our state make the determination about the jury instructions. (color emphasis added by committee)

Committee Response:
CACI 2334 has not been considered by appellate courts. There are no published opinions that say that 2334 is correct or incorrect. The committee has received no requests from the insurance industry. It has received proposals from counsel who represent insurance companies to change the instruction. This is perfectly appropriate, as it also is appropriate for attorneys who represent insureds to make proposals for CACI instructions. The committee deeply resents any implication in the comment that it has taken money to aid special interest groups. Hopefully, "buy" is just a poor choice of words.

Central Coast Trial Lawyers Association (CCTLA) – Mission Law Center, San Luis Obispo, by Louis Koory, President
The proposed revision allows the defendant insurance company to simply argue that they had some "proper" basis to reject the demand and as such, there can be no bad faith. This revision not only misstates the law, but would result in substantially undercutting the consumer's ability to prove that the refusal to accept a reasonable settlement demand within the policy limits amounted to bad faith.

Committee Response:
The proposed revision posted for comment did allow the insurer to argue that it had a proper basis to reject the demand. And yes, it would make it more difficult to prove bad faith. But whether it misstates the law is not resolved.

Gordon Churchill, Attorney at Law (inactive), San Diego
The word which bounced off the page when I saw it was "proper". There is no precedent for using "proper" to define the duty of good faith and fairness owed by the insurance company. It leaves the juror with a defining a word, "proper" by using a word which itself needs to be defined. This, of course, makes things worse instead of better.

Committee Response:
The committee agrees that "without proper cause" is language without a clear meaning. But it is used in many cases. In *Rappaport-Scott v. Insurance Exchange*, a first-party case, the court said the following:

> The withholding of benefits due under the policy may constitute a breach of contract even if the conduct was reasonable, but liability in tort arises only if the conduct was unreasonable, that is, without proper cause. (146 Cal.App.4th at p. 837.)

It is also used in *Graciano*. A third-party case.

But because there is no clear authority for defining "unreasonable" as meaning "without proper cause" in a third-party case, the committee has decided not to propose this language at this time. See Report.

Consider defining “unreasonable” with “1.) The failure to settle was done without clear evidence of a benefit to the insured person or 2) that the insurance company placed its own interests ahead of the financial interests of the insured person when declining the opportunity to settle.”

Committee Response:
Implicit in this suggestion is that the commentator agrees that the conduct of the insurer in rejecting the demand must be considered. The first suggested definition seems unhelpful. It will always be to the benefit of the insured to settle, and there are cases that point that out. The second could be helpful as many cases say that the insurer must place the insured’s interest equal to its own. That could be an added sentence on how to determine proper cause, but it is not a definition.

Stephen N. Cole, Attorney at Law, West Sacramento
Carolin K. Shining, Attorney at Law, Sherman Oaks
(Both included this paragraph in their comment letters.)
Instead of improving CACI 2334 by using "plain English", the proposed changes are nothing short of blasphemous to written clarity:

1. The proposed changes add the word "unreasonable" when key parts of the instruction already use the word "reasonable" in several different places. Strunk and White advise clear writing should omit needless words". Asking a juror to find certain conduct "reasonable", then asking him or her also to find that other similar or identical conduct was "unreasonable" frustrates and overcomplicates their task.
2. The English words "reasonable" and "unreasonable" are undisputedly opposites. Yet in the proposed instruction they are given definitions that are not opposite. Reasonable conduct is defined one way, but unreasonable conduct is defined as a something that had no "proper cause." Giving regular words different legal definitions is precisely the type of confusion that the Advisory Committee should be seeking to avoid.
3. Adding a completely new element (turning a 3-prong test into a 4-prong test) to an already confusing and complex instruction should only be done with clear instruction from the California Supreme Court or the Legislature.
4. Finally, a new jargonistic phrase "proper cause" is given no definition at all, leaving the jury at sea and without even common sense direction.

Committee Response:
The committee finds points 1 and 2 to be off point. The proposed revisions to the instruction did not use “reasonable conduct” anywhere. “Reasonable” was only used as an adjective to modify “settlement.” The committee sees no great confusion in requiring a reasonable demand and an unreasonable rejection of the demand. Points 3 and 4 are addressed in response to other comments
Robert D. Conaway, Attorney at Law, Victorville
Adding the subjective "unreasonableness" standard becomes a way to undermine a finder of fact's conclusion that the offer was unreasonable. How? It collateralizes the finder of fact's review in violation of Evidence Code 352 to consider as examples staffing and workload problems a carrier may have had at the time, personalities, changes in management teams and oversight philosophies. It could introduce a tier of "expert" testimony on something that is within the province of the jury and by that cause confusion, delays and additional expense.

Committee Response:
The committee is not sure what a collateralized review is. None of the postulated evidence would be relevant if the determination of whether the rejection was reasonable was limited to case evaluation, as was proposed in the draft posted for comment. Because the committee is no longer convinced that the determination is so limited, some of the postulated evidence could become relevant in distinguishing

between negligence and bad faith. The fact that the scope of the determination is unresolved is one of the reasons that the committee is no longer recommending the posted version. See report.

DeWitt Algorri & Algorri, Attorneys at Law, Pasadena, by Mark S. Algorri
Let's not forget or ignore the basics, especially in third party situations. The gravamen of the claim, to be brief, is when the carrier, with vastly superior power, puts their interest over that of their insured and consequently causes great harm to their insured. The insurer, generally after dragging the insured through a traumatic jury trial, forces the insured to assign their claims to the third party. Carriers now, subtly or not so subtly, have misframed the issues as a fight between them and a third party plaintiff, forgetting that it was their breach of contract, and their covenants that caused the problem. In short, the proposed instruction now provides an unacceptable excuse, not found in the law, to the carrier even if it just breached the contract and "botched" the claim. Something they are paid NOT to do. This ignore years of long standing law.

Committee Response:
The comment mostly presents policy arguments.

Dreyer Babich Buccola Wood Campora, Attorneys at Law, Sacramento, by Robert B. Bale
The proposed revision injects a subjective element into the quantum of proof by focusing on the insurance company's conduct in light of what that company considered "unreasonable." This constitutes a major departure from the existing established standard of liability.

The additional element stands the meaning and impetus of the current instruction on its head. The current instruction is grounded in a failure of the insurer to accept a "reasonable" demand that is within the policy limits. The "reasonable person" standard is one of long standing and common usage. It is, in fact, a cornerstone of tort law. For generations it has been used to measure the standard of care that litigants must comply with, and serves as bedrock for hundreds of judicial interpretations of the law. Conversely, the proposed change requires the aggrieved party to show that the insurer's conduct was unreasonable, a subjective standard that is much harder to meet and for which no true measure even exists.

Committee Response:
The committee does not believe that the additional element included in the draft posted for comment presents a subjective standard. The element does not tell the jury that as long as the insurer thought that it had a good reason to reject the demand, that's all that is required. The reasonableness of the insurer's rejection would be evaluated according to a "reasonable insurer" standard, which the comment notes is one of long standing and common usage.

But this comment caused the committee to reconsider whether the element is presented in the clearest possible way. Cases state that the standard is the objective, whether a prudent insurer would have accepted the offer if there were no policy limits and the insurer alone was on the risk: (*Betts v. Allstate Ins. Co.* (1984) 154 Cal.App.3d 688, 706]; *Crisci v. Security Ins. Co. of New Haven, Conn.* (1967) 66 Cal.2d 425, 430 436). Whether or not the element should be phrased along these lines is among the reasons that the committee has elected not to recommend the posted version at this time.

There has been no showing that the current version of CACI 2334 creates an unfair burden for defendant insurance companies, or unfairly benefits plaintiffs seeking recourse.

Committee Response:
These are policy considerations.

Dreyer Babich Buccola Wood Campora, Attorneys at Law, Sacramento, by Steven M. Campora

The correct statement of the law in California is that an insurer, who is aware that the plaintiff has expressed an interest in settling the case, within the policy limit, must take affirmative steps to settle the case.

> In summary, when a claimant offers to settle an excess claim within policy limits, an opportunity to settle exists and a conflict of interest arises, because a divergence exists between the insurer's interest in paying less than the policy limits and the insured's interest in avoiding liability beyond the policy limit. (*Merritt, supra*, 34 Cal.App.3d at p. 873.) And a conflict may also arise, without a formal settlement offer, when a claimant clearly conveys to the insurer an interest In discussing settlement but the insurer ignores the opportunity to explore settlement possibilities to the insured's detriment, or when an insurer has an arbitrary rule or engages in other conduct that prevents settlement opportunities from arising. (*Boicourt, supra,* 78 Cal.App.4th at p. 1399.) (*Reid v. Mercury Ins. Co.*, 220 Cal.App.4th 262, 278 (Cal.App.2d Dist. 2013).)

Committee Response:
Whether or not "expressed an interest" is the correct statement of the law is not relevant. This language is about what constitutes an offer that the insurer must respond to. It has nothing to do with whether the insurer may reject an offer and argue that its rejection was reasonable.

Dreyer Babich Buccola Wood Campora, Attorneys at Law, Sacramento, by Andrew G. Minney
The proposed revision would add an element which is solely intended to create an unduly difficult burden at trial that would only embolden carriers to act unreasonably. The present language of CACI 2334 establishes a suitable burden which protects consumers and carriers alike and promotes timely settlement. As for plaintiffs, he or she must engage in a difficult, painstaking assessment before concluding that a demand for settlement within the policy limits is a reasonable course of action. This is often done with the full knowledge that the value of his or her damages far exceeds the demand. (color emphasis added by committee)

Committee Response:
The committee sees at least two contradictions in this comment. First, if the insurer has been emboldened to act unreasonably, then under proposed revised 2334 it is liable for the entire excess judgment. If there is any emboldening being encouraged, it is to act reasonably in order to avoid liability. But more significantly, if the law is as under current CACI 2334, how the insurer acts is completely irrelevant. There's a reasonable demand; there's a rejection; there's an excess judgment; there's insurer liability with no inquiry into how it acted.

If the victim of the policy holder's negligence is able to timely develop a measured and reasonable demand, there is no reason why a carrier should not be expected to perform a similar assessment and act accordingly. The existing language of CACI 2334 properly focusses upon the value of the damages. However, the proposed amendment will require the jury to shift its focus away from the key issue of damages and into an esoteric analysis of insurance industry standards and practices. The result of this distraction is the establishment of a shield to protect bad faith conduct.

Committee Response:
The committee agrees with the first sentence of the comment. The carrier should be expected to perform a measured and reasonable assessment of the case and to act accordingly. Whether it did or did not do that would be what the jury would determine if the proposed element is added to the instruction. The committee does not fear any esoteric analysis of insurance industry standards and practices. The sole issue would be whether this insurer in this case can advance a good reason for having rejected the demand.

Dunk Law Firm, Attorneys at Law, San Diego, by Andrew P. Dunk, III
There are plenty of cases addressing the issue of an insurer's duty to accept a reasonable settlement offer and none of them have the additional proposed burden of proof. For example, "determination of the reasonableness of a settlement offer for purposes of a reimbursement action is based on the information available to [the insurer] at the time of the proposed settlement." (*Isaacson v. California Ins. Guarantee Assn.* (1988) 44 Cal.3d 775, 793); "Whether [the insurer] 'refused' the 'offer,' and whether it could reasonably have acted otherwise in light of the 11-day deadline imposed by the offer's terms, were questions for the jury." (*Coe v. State Farm Mut. Auto. Ins. Co.* (1977) 66 Cal.App.3d 981, 994.) (color emphasis added by committee)

Committee Response:
Many cases have language stating the proposed additional burden of proof. The comment contradicts the commentator's position. Whether the insurer could "reasonably have acted otherwise" is what the proposed added element would ask the jury to find. If all that is required is a reasonable demand, what the insurer could have done, reasonable or unreasonable, would be irrelevant.

Scott Dunning, Attorney at Law, San Francisco
All failures to settle within policy limits are viewed as "reasonable" by insurance companies. Their bottom line is profits, not the interests of their insureds. The purpose of bad faith law is to compel insurance companies to additionally act from the vantage point of their insureds rather than their own personal interests. For the jury to focus on whether the insurance company acted with "proper cause" is simply too vague a standard.

Committee Response:
The comment mostly presents policy arguments. The vagueness of "proper cause" is addressed in response to prior comments.

Jeffrey I. Erlich
I am a co-author of the Rutter Insurance Litigation treatise, and was fortunate enough to work with the late Justice Walter Croskey on that treatise for several years. I know that Justice Croskey had a major role in the development of the CACI instructions on insurance bad faith, and that it was his view that the current version of CACI 2334 correctly stated the law. (color emphasis added by committee)

Committee Response:
The committee records contain documents from its former chair the late Justice Croskey indicating that the commentator is not correct about Justice Croskey's views, at least in 2006 and 2007. There is an undated memo from him in a file noted as last modified on December 7, 2006. In this memo, he says:

> The damage refusal cases [as opposed to coverage denial case], on the other hand, rely on a different standard. Whether an insurer's refusal to settle constitutes "bad faith" will be measured by the "prudent insurer" standard. This is obviously a jury issue and is the case to which No. 2334 clearly applies. This standard requires a showing that the insurer's refusal to settle was "unreasonable" under all the circumstances. (See *Comunale v. Traders & Gen. Ins. Co.* (1958) 50 Cal.2d 654, 659 [implied covenant requires insurer to settle "in an appropriate case"]; *Crisci v. Security Ins. Co. of New Haven, Conn.* (1967) 66 Cal.2d 425, 430 [insurer must settle "where the most reasonable manner of disposing of the claim is by accepting settlement"].) The test of "good faith" under this standard is whether a prudent insurer would have settled if there were no policy limits and the insurer alone was at risk: "The governing standard is whether a prudent insurer would have accepted the settlement offer if it alone were liable for the entire judgment." (*Betts v. Allstate Ins. Co.* (1984) 154 Cal.App.3d 688, 706 (italics added). By unreasonably refusing to settle within policy limits, the insurer assumes the full liability, even in excess of its

policy limits: "When defendant refused to pay the policy limits demand, it . . . in essence wrote a new policy without limits . . . " (*Hulett v. Farmers Ins. Exchange* (1992) 10 Cal.App.4th 1051, 1060.) Under this standard, however, an insurer that had a reasonable basis for rejecting a settlement offer would not be held liable in bad faith.

The result, with respect to exposing the insurer to full liability for any excess judgment, is the same in both the "coverage refusal" and the "damage refusal" cases. But the "bad faith" basis for such recovery in the coverage refusal cases seems questionable where the insurer has acted reasonably and with proper cause. If the insurer's actions were found to be reasonable and with proper cause in a damage refusal case, there would be no bad faith recovery, so why should there be one in a coverage refusal case. It would seem to be enough simply to expose the coverage refusal insurer to full liability regardless of policy limits, but do so on a non tort theory. The full liability result is justified on public policy grounds, but it need not and should not rest on the theory of a tortious breach of the implied covenant of good faith and fair dealing.

It is true that in 2014, when an insurance defense attorney asked the committee to restore the "unreasonable rejection" requirement, Justice Croskey was not in favor. But his view then, which was adopted by the committee, was to wait and see if a case came down.

The law in this area was accurately and comprehensively explained by Justice Croskey in his opinion in *Archdale v. American Intern. Specialty Lines Ins. Co.* (2007) 154 Cal.App.4th 449, 464. He explained that:

(1) "The implied covenant of good faith and fair dealing imposes a duty on an insurer to accept a reasonable offer to settle a claim against its insured." (*Id.*, citing *Crisci v. Security Ins. Co. of New Haven) Conn.* (1967) 66 Cal.2d 425, 430.)

(2) [W]hether a liability insurer's failure to accept a settlement offer constituted a breach of the implied covenant depends on whether that settlement offer was "reasonable." (*Archdale, supra,* 154 Cal.App.4th at p. 464.)

In other words, under the proposed change, a carrier could receive an offer that was within policy limits and represented a fair value for the case in light of the insured's potential liability and policy limits, was clearly phrased to release all insureds; and which contained no extraneous demands that made it "unreasonable," and yet the insurer could nevertheless still be found to have acted "reasonably" in declining to accept it.

Committee Response:
The committee agrees that the two sentences from *Archdale* correctly state the law. But they do not address the issue. Under the proposed additional element, the committee agrees that the result postulated in the comment is possible if the insurer properly investigated, and based on what it knew or should have known at the time, reasonably concluded that the insured had no potential liability.

Similarly, the *Johansen* opinion explains that, "We have held that whenever it is likely that the judgment against the insured will exceed policy limits so that the most reasonable manner of disposing of the claim is a settlement which can be made within those limits, a consideration in good faith of the insured's interest requires the insurer to settle the claim." (*Id.*, 15 Cal.3d at p. 16, emphasis added and internal quotation marks omitted for clarity.)

Johansen plainly states that if the insurer receives a reasonable settlement offer, that it is obligated to accept it. As the Court framed its holding, "we conclude the insurer breached its duty to its insured when

it failed to accept the reasonable settlement offer." (*Id.* at p. 19.) Note that the Court did not say, "we conclude the insurer breached its duty to its insured when it unreasonably failed to accept the reasonable settlement offer." Yet the proposed revision to CACI 2334 proceeds as if that is what the Court held.

Committee Response:
Yes, this language from *Johansen* is the source of the strict-liability rule set forth in current CACI No.2334. And if that were the only case in which the California Supreme Court had ever spoken about excess judgment cases, then the current instruction would clearly be correct. But there are a number of California Supreme Court cases that include the exact language that the comment notes was *not* stated in *Johansen.* Further, this language from *Johansen* is dicta with regard to cases in which the insurer has accepted coverage. *Johansen* was a denial of coverage case. See report.

The proposed change to the instruction is expressly at odds with the Court's opinion in *Samson v. Transamerica Ins. Co.* (1981) 30 Cal.3d 220, 243. In *Samson,* three month after the insured had been held liable for an excess judgment, the plaintiffs offered the insurer a chance to settle the case within the policy limit. (*Id.*, 30 Cal.3d at p. 229.) The carrier declined. The Supreme Court held that the rejection was a breach of the implied covenant as a matter of law. (Id. at p. 243.)

Specifically, the Court rejected the insurer's argument that "the issue as to whether it wrongfully rejected a reasonable settlement offer must be decided by a jury." (Id. at pp. 242-243.) The Court noted that, ordinarily, the reasonableness of a rejected settlement offer presents a factual question for the jury. But the Court noted that "reasonableness in this context was narrowly defined by this court in *Johansen*. 'The only permissible consideration in evaluating the reasonableness of the settlement offer becomes whether, in light of the victim's injuries and the probable liability of the insured, the ultimate judgment is likely to exceed the amount of the settlement offer.'" (*Id.* at p. 243, citation omitted.) The Court held that, because the judgment against the insured had already been entered, and exceeded the amount of the offer, "as a matter of law, the settlement offer was reasonable and was wrongfully rejected by Transamerica. [fn 14.]" (*Id.*)

Committee Response:
Samson was a denial-of-coverage case. The issue was whether the policy covered the claim. All of the language cited in the comment was in recognition that if there was in fact coverage, *Johansen* dictated liability for the entire judgment.

The Supreme Court has also described bad-faith conduct as a refusal to pay policy benefits "without proper cause." But each time it has used that formulation, it has done so in the context of a first-party claim for policy benefits) not in a third-party failure to settle context. (See *Gruenberg v. Aetna Ins. Co.* (1973) 9 Cal.3d 566, 574 [first-party claim for insurer's failure to pay fire-loss claim].) I have not located a Supreme Court decision that has framed the bad-faith inquiry in the third party failure-to-settle context in terms of the insurer refusing to accept a reasonable settlement offer "without proper cause." Accordingly, I question whether the proposed change to the instruction to put the inquiry in those terms is accurate.

Committee Response:
The committee found this to be a valid point. It is among the reasons why the committee has elected not to propose the draft of CACI No. 2334 at this time, but to instead, frame the unresolved issues in the Directions for Use.

The proposed change to CACI 2334 would tell juries that an insurer acts or fails to act "unreasonably" when it "had no proper cause for its conduct." But the instruction fails to provide any corresponding explanation of what "proper cause" might be. In addition, the instruction requires the jury to decide

whether a settlement demand is "reasonable," as well as whether the insurer's refusal to accept the offer was "unreasonable."

The proposed change is therefore likely to confuse juries in two ways. First, jurors are far more likely to have an understanding of what is "reasonable" or "unreasonable" than to have any conception of the legalism "proper cause." And second, if jurors are instructed that "unreasonable" means "without proper cause," they are likely to try to use the same formulation when deciding whether the [demand] is "reasonable." But that endeavor will be hopelessly confusing, because defining "reasonable" to mean "with proper cause" simply does not translate to the inquiry of whether a settlement offer is reasonable.

Committee Response:
These points have mostly been addressed in response to prior comments. The committee doubts that there will be an issue with the jury's attempting to apply "with proper cause" to the reasonableness of the demand. To do so would have the element come out "the demand was reasonable, which means with proper cause." Jurors will soon recognize that it doesn't work. "Without proper cause" as it applies to the reasonableness of the insurer's rejection modifies "acts or fails to act." Thus, it's used as an adverbial phrase. With regard to the demand, "reasonable" is used as an adjective.

Evans Law Firm, Attorneys at Law, San Francisco, by Michael Levy
A jury can readily evaluate whether a settlement demand was "reasonable." For a jury to evaluate whether the refusal to accept a settlement demand was "reasonable," that suggests it would be necessary to evaluate the insurer's internal process. Insurers are not known for openness or honesty about their internal processes. This change will increase the amount and scope of discovery that must be done in bad faith cases. It will invite insurance companies to "paper their file" to create a record to support that every denial was supposedly "reasonable" (instead of spending their time and effort to look out for the interests of the insured). It is contrary to binding Supreme Court precedent, which requires the jury to consider whether "a prudent insurer without limits" would make the decision, not whether this particular insurer was reasonable in making the decision. (*Crisci v. Security Insurance Co. of New Haven, Connecticut* (1967) 66 Cal.2d 425.)

Committee Response:
The "paper their file" argument appears in several comments. The assumption of the comment is that the "papering" will involve falsification. But if the phrase is changed to "build their files" and the assumption of falsification is set aside, then isn't the building a good thing? Documenting the facts on which the rejection was based is actually what the insurer should be doing. So yes, inquiring into the reasonableness of the insurer's rejection gives the insurer the incentive to have a good file in support of its decision. But it also gives the insurer the incentive to open up its internal process to the light of day rather than hiding it. And it may increase the discovery needed as the plaintiff will have to attack the insurer's purported good reason to reject. But whether or not a legal rule makes discovery harder or easier is not a consideration in determining whether there is such an element to the claim.

The proposed new instruction is not only incorrect and unwieldy in practice, it will also promote a result that is bad and contrary to law. This change would incentivize insurance carriers to reject reasonable settlement demands, as long as the insurer believes it could get away, at a later date, with claiming that its decision-making process was "reasonable." This is exactly the type of behavior that the bad faith cause of action was created to dis-incent. (*Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 659.) Insurance carriers' rational willingness to "roll the dice" by rejecting reasonable settlement offers, at the expense of their policyholders, is exactly why California's Supreme Court recognized the bad faith cause of action in the first instance. (*Id.*) If this proposed new instruction significantly weakens the bad faith cause of action, it would bring about all of the negative outcomes that the bad faith cause of action was

intended to suppress: more individual and small business bankruptcies, more uncompensated victims, more litigation, and it would make litigation more protracted and expensive.

Committee Response:
These are essentially policy arguments.

Felahy Trial Lawyers, Los Angeles, by Andrew P. Menotti
Contrary to some comments the Committee has received, the current version of CACI 2334 does not impose "strict liability" on insurers. Rather, CACI 2334 states that the insurer must have "failed to accept a reasonable settlement demand for an amount within policy limits" and further defines a "reasonable" settlement demand. Therefore, as currently worded, the instruction properly focuses on the reasonableness of the settlement demand, which is the proper standard for a bad faith claim based on rejecting a third party's settlement offer. (See, e.g., *Johansen v. Cal. State Auto. Assn.Inter-Ins. Bureau* (1975) 15 Cal.3d 9, 16 ("We have held that whenever it is likely that the judgment against the insured will exceed policy limits so that the most reasonable manner of disposing of the claim is a settlement which can be made within those limits, a consideration in good faith of the insured's interest requires the insurer to settle the claim." (quotation marks omitted.))

Committee Response:
The committee finds that the term "strict liability" is helpful to the debate, while recognizing that it may be technically inaccurate. According to the commentators, if the demand is reasonable, then the insurer is liable for the entire judgment. There is no evaluation of how the insurer arrived at the decision to reject the demand, valid or invalid. The committee finds that "strict liability" is a reasonable label even though there is the qualification that there first must be a reasonable demand.

I am unaware of any cases where a jury relying upon CACI 2334 has found an insurer liable for bad faith because its adjuster was hit by a bus while in the process of mailing a letter accepting a settlement demand.

Committee Response:
This simple point on the surface makes little or no sense. Under current CACI 2334, nothing else is relevant if the demand is reasonable. So no jury could find bad faith based on a bus accident. The more pertinent inquiry would be whether a jury could find the insurer NOT liable for bad faith based on a bus accident.

But this comment is one that has caused the committee to elect not to recommend adoption of the version of the instruction posted for public comment at this time. The premise of the posted draft with the additional element requiring an unreasonable insurer rejection is that the only consideration for the jury is the reasonableness of the insurer's evaluation of liability and damages. A bus accident would not be a reason for avoiding liability. The committee is not convinced that it should not be. See report.

Christopher J. Fry, Attorney at Law, Sacramento
Scott H.Z. Sumner, Attorney at Law, Walnut Creek
The proposed revision would improperly add a new element of proof that would effectively immunize insurers from bad faith liability to their insureds, and thereby leave Californians at the mercy of liability insurers when their insurer's failure to accept a reasonable offer of settlement within the limits of coverage ends up leaving the insured defendant left to deal with a judgment in excess of their policy limits. This situation will be financially catastrophic to policy holders who find themselves in such circumstances, and lead to bankruptcies and financial disruption to the lives of policyholders and their families despite their prudence in purchasing insurance coverage. As such, this proposed change is against public policy and I urge the committee to reject the proposed change.

Committee Response:
These are policy arguments. But the committee fails to see how scrutiny of insurers' basis for rejecting a policy limits offer would immunize them from liability. An unwarranted rejection would still be bad faith.

Garmo & Garmo, Attorneys at Law, El Cajon, by Bill Epstein
The comment adds these two sentences to the CAOC template letter: Plaintiffs already have a substantial burden in such cases, typically meeting this challenge with limited funds. Sufficient statutory and real-world limitations are already in place.

Committee Response:
These are policy arguments.

Greene, Broillet & Wheeler, Attorneys at Law, Santa Monica, by Mark T. Quigley
While the CACI committee has the benefit of many members of the judiciary and legal community, its review of instructions is necessarily limited and is not based on the full record that a court of appeal would have before it when reviewing whether instructional error has occurred. By revising the instruction in such a significant way, without a Court of Appeal decision finding that the current instruction is wrong, the CACI committee is conveying to the legal community that future legal changes to instructions should be made at the committee level, rather than before the trial and appellate courts or the legislature.

Committee Response:
This is a slight variation on the argument that the committee should not act until a court or the legislature expressly says that an instruction is wrong. As addressed in response to previous comments, the committee disagrees.

The new element is unnecessary since it is, in effect, asking the same question as the first element but using different words. This will undoubtedly create confusion and uncertainty in the minds of jurors.

Committee Response:
A committee member made this argument at the January 2016 full committee meeting. Another member responded with the following example, which the majority found persuasive.

Say there is an accident with catastrophic damages and questionable liability on the insured. On those facts, it would be hard to say that a policy-limits demand would be unreasonable. But the insurer properly investigates and has solid evidence pointing a 90 or 95 percent likelihood of a defense verdict. It rejects the demand. Whether that conclusion was reasonable is the different evaluation that the jury must undertake under the proposed new element.

Inner City Law Office – LA
ICLC supports the change in this instruction's title from "Refusal" to "Failure."

Committee Response:
The committee has elected to recommend a change to the title at this time. It proposes making only noncontroversial changes to the instruction itself.

ICLC disagrees with the proposed addition of a third element and subsequent statement indicating that settlement demands may be unreasonable for reasons other than the amount demanded. The added language is vague and is likely to confuse jurors.

Committee Response:
This is the only comment received that addresses the additional language on nonmonetary provisions of the demand. The committee does not really see it as vague and likely to confuse. The attorneys will argue the nonmonetary aspects of the offer that are not reasonable, usually an unduly short acceptance window.

In addition, the proposed definition of "unreasonably" does not make clear what would constitute a "proper" cause for an insurer's denial of coverage, and taken together, the additions tend to suggest that denial of coverage is broadly appropriate.

Committee Response:
This instruction does not apply in a denial-of-coverage case, as is made clear in the Directions for Use.

These concerns are particularly acute from the perspective of tenants facing off against landlords, when the landlords' theory of the case is often rooted in an overt or implied argument that tenants' requests for repairs to their homes are unreasonable. Landlords' defenses in habitability cases often revolve around a suggestion that low-income tenants, particularly those who have disabilities, do not speak English, and/or are undocumented immigrants, should simply lower their expectations for safety and dignity in their homes. Jury instructions that suggest settlement demands could be "unreasonable" for a range of unspecified reasons beyond the amount could significantly disadvantage tenants in this type of case.

Committee Response:
The comment does not address the proposed changes to the instruction.

Jacobs & Jacobs – Jacobs and Girard
The proposed instruction can misleadingly result in error in those cases where the failure to accept is due to the denial of coverage if the new nonbracketed definition clause is given in such cases. Although the new proposed use note indicates that the new element 3 is to be omitted if the insurer denied coverage, but coverage is in fact established, it says nothing about deleting the nonbracketed phrase "To act or fail to act 'unreasonably' means that the insurer has no proper cause for its conduct" in such cases, which would clearly violate the holding of the Supreme Court in *Johansen v. California State Auto. Asso. Inter-Insurance Bureau* (1975) 15 Cal. 3d 9, 15-16.

Committee Response:
The committee agrees with the comment. Were it to recommend going forward with the draft posted for public comment, the suggested bracketing would have to be added. But since that is no longer the recommendation, the point is moot.

Under current law, an insurance company *cannot avoid its duty to accept a reasonable policy limits demand based upon its "subjective intent or motivations"* (e.g. claiming that they intended to settle when their purported acceptance was in fact a counter-offer i.e. rejection of a reasonable offer that was capable of acceptance) *or based upon its so called "good faith belief" due to a "genuine dispute"* over coverage, liability, the amount of damages, or some claimed technical defect in the offer, *if a prudent insurance company* faced with such a demand under similar circumstances *would have accepted the offer* because the potential judgment was likely to exceed the demand and the terms of the offer provided reasonable protection against potential remaining exposure to any insured covered under the same limits.

Committee Response:
This is the principal argument in favor of keeping the current instruction as is based on *Johansen*. It is addressed in response to other comments above.

"**Clearly, the rules for determining an insurer's liability under the implied covenant based on the failure to pay a first party claim differ from the rules for determining the obligations of a liability insurer based on the rejection of a reasonable settlement offer by a third party**." (*Rappaport-Scott v. Interinsurance Exchange of the Automobile Club* (2007) 146 Cal.App.4th 831, 836-837. (Underinsured motorist case) (bold added).

Committee Response:
The fact that first-party and third-party cases may have some different rules does not foreclose the possibility that the "without proper cause" definition of "unreasonable" applies to both. But the committee is concerned about making this leap with questionable authority (*Graciano*). As noted in response to a similar comment above, this is one of the reasons that the committee is not recommending the draft posted for public comment at this time.

The key inquiry is not necessarily how the insurer weighed the insured's interests, rather the governing standard is "whether a prudent insurer would have accepted the settlement offer if it alone were to be liable for the entire judgment." (*Egan, supra,* 24 Cal.3d at p. 818.) This is an objective standard. The test is not dependent upon the motivations or intent of the insurer.

Committee Response:
The committee agrees with the comment. But the fact that the test is not dependent on the motivations or intent of the insurer does not mean that it does not involve the conduct of the insurer.

"A key factual question put to the jury was: Were the repeated offers made by the Trotter firm reasonable in the light of all of the circumstances of this case? If reasonable, their rejection by Allstate became unreasonable, therefore imposing on Allstate responsibility for the excess judgment." (*Betts v. Allstate Ins. Co.* (1984) 154 Cal.App.3d 688, 707.)

Committee Response:
The opinion in *Betts* also says: "There is more than substantial evidence to support the jury's conclusion Allstate *unreasonably* rejected the policy limits offer made on several occasions by Gallucci's attorney." (154 Cal.App.3d at p.708, italics added) *Betts* is a misevaluation case in which the insurer ignored the results of its investigation. It is a prime example of how both sides of the debate can find language to support their position.

The terms "rejection" and "refusal" in the third party context seem to be used synonymously in the reported cases. Moreover, "the failure to timely act while the reasonable offer remained open breaches the duty just as much as an express rejection of the offer that considered the insured's interests." (See, e.g., *McDaniel v. GEICO Gen. Ins. Co.* (E.D. Cal. 2014) 55 F. Supp. 3d 1244, 1264 (applying California law). Under existing law, failure to accept the demand may be shown by proof that the insurer either refused, rejected, counter-offered (which operates as a rejection as a matter of law) or ignored the offer before the expiration of its deadline.

Committee Response:
The committee found this comment helpful in considering the use of "failure," "refusal," and "rejection" in the title and elsewhere in the instruction. As noted in response to a similar comment above, the committee has elected not to propose any changes to this language at this time. The comment suggests that there is no real significance to which word is used.

While some cases may contain language indicating that a breach of the covenant "may be" based on an "unwarranted or unreasonable rejection or refusal" of a reasonable settlement demand, or "refusal to accept" a reasonable settlement demand, most of these same cases describe the duty as one to accept a

reasonable settlement demand within policy limits. What is clear is that the prevailing view of California law in this third party context, is that it is the failure to timely accept a reasonable settlement demand within policy limits that is objectively unreasonable and a breach of the covenant.

Committee Response:
The comment acknowledges that there is authority for adding the additional reasonable-rejection element, including cases from the California Supreme Court. But the commentator does not say why these cases should be ignored; only that the "prevailing view" is to ignore them. The committee does not believe that these cases should be ignored, even if they might not compel a change to the instruction at this time.

While it is true that there are issues of reasonableness involved in both third party failure to accept policy limits offer cases and in first party cases, the focus between the two is quite different. In the third party context at issue in the CACI 2334 instruction, the focus of the analysis is upon the "reasonableness of the offer". As explained previously, under the duty to accept a reasonable settlement offer within policy limits, there is no requirement to show "bad faith" conduct in order to breach the implied covenant. The insurer's conduct, subjective beliefs or motivations, however well intended or in good faith, are not dispositive of this type of third party cause of action. Rather, the critical issue is the reasonableness of the settlement demand within policy limits. Under California law as explained above, the jury must determine the reasonableness of the offer on an objective basis, determining whether the insurer knew or should have known at the time the offer was not accepted that the potential judgment was likely to exceed the amount of the offer based upon the claimant's injuries or loss and the insured's probable liability. (color emphasis added by committee)

Committee Response:
While the comment purports to involve evaluation of the reasonableness of the offer, it transitions in the language in red to the reasonableness of the insurer's *evaluation* of the offer. Did the insurer reasonably evaluate the offer? If it did based on what it knew or should have known at that time, then it met the prudent insurer standard. That was exactly the intent of the draft posted for public comment.

Kerr & Wagstaffe, Attorneys at Law, San Francisco, by Daniel J. Veroff
There is good reason for imposing bad faith liability on an insurance company that refuses a reasonable settlement offer within the policy limits. Namely, it discourages the insurance company from gambling with the insured's money. An insurance company may feel that although a settlement offer is reasonable, there is a possibility it will save money by taking the case to trial. And the insurance company doesn't have a lot to lose if the gamble goes awry. If the judgment or verdict exceeds the policy limits, the insured pays the rest, not the insurer.

Committee Response:
These are essentially policy arguments. But under the proposed additional element, the insurer must have a good reason for rejecting the demand. That requirement should discourage gambling.

But, when bad faith liability is imposed on the insurer for refusing to accept a reasonable settlement within the policy limits, the insurer is on the hook for the excess amount, not the insured. As it stands under the current version of CACI 2334 and California case law, such bad faith liability can only be imposed if the jury finds that the refused settlement offer was reasonable at the time it was refused. Events occurring after the offer is refused – such as an excess judgment in favor of the insured, or newly discovered evidence – does not play into the jury's reasonableness analysis. Neither does any other evidence the insurer did not consider when making its refusal, unless its failure to consider it was a result of its own wrongful conduct, such as an unreasonable failure to investigate. Clearly, the jury instructions are sufficient as they now exist. (color emphasis added by committee)

Committee Response:
The instruction, both as it currently reads and as proposed to be revised, states that the determination of reasonableness must be based on what the insurer knew or should have known *at the time the demand was rejected*. The language in red introduces improper insurer conduct, i.e., failure to properly investigate. Under the *Johansen* strict liability position of those supporting the current instruction, whether the insurer did or did not conduct a proper investigation would be irrelevant. If the jury finds the demand to be reasonable, the insurer is liable for the whole judgment.

Kenneth S. Klein, Professor, California Western School of Law, San Diego
These revisions read like the work of someone who has not ever tried a case to a jury, or defended a verdict on appeal.

The proposed language defines "unreasonable" conduct as being "without proper cause." But in California unreasonable conduct in claims handling and claims denial without proper cause are two distinct forms of bad faith. Consider, for example, a claim that has been denied - and has a possibly proper cause for the denial – but the insurer is not confident of the propriety of the cause and so acts entirely unreasonably in its denial.

Committee Response:
This argument was made and rejected in release 27 with regard to all bad-faith insurance instructions. "Without proper cause" qualifies "unreasonable" to clarify that it does not mean "negligent." They are not two separate tests. (See *Rappaport Scott*, *supra*.)

Most insurance companies handle most insurance claims fairly and ethically. Some insurance companies, however, handle some insurance claims in bad faith. This is because doing so increases profits. The profit motive to handle insurance claims in bad faith increases with every incremental step eliminating bad faith exposure or increasing the threshold for a successful assertion of bad faith. These proposed revisions incentivize more bad faith claims handling.

Committee Response:
These are policy arguments. But the committee doubts that giving the insurer the possibility of showing a good reason for rejecting the offer (which requires that the insurer be acting in good faith) will sanction bad faith.

Kornblum, Cochran, Erickson & Harbison, Attorneys at Law, San Francisco, by Guy O. Kornblum
This change is clearly orchestrated by insurance interests who are trying to change the basic legal principles which apply to their claims handling which have governed such for years. I urge the Committee to reject this effort.

Committee Response:
The proposed revisions to the instruction were not improperly "orchestrated" by anyone. They were proposed in response to *Graciano*. Anyone may advocate for changes in instructions based on reasonable interpretations of the law, including attorneys who represent insurance companies.

Peter M. Kunstler, Attorney at Law, Encino
Nothing justifies this departure from present standards, which already reflect existing law placing responsibility upon carriers for their breaches of their duty of good faith and fair dealing, defined as rejection of reasonable offers, presumptively for their own benefit, to the detriment of their insured. The added language implies that rejecting a reasonable offer to settle a claim against their insured is not unreasonable enough to hold the carrier liable. Instead, the committee should adhere to the longstanding notion that not accepting a reasonable offer is per se unreasonable-and leave the instruction alone.

Committee Response:
All points made in this comment have been addressed previously.

Alexander O. Lichtner, Attorney at Law, West Sacramento
The landscape was changed (and not for the better) by the *Moradi-Shalal* decision eliminating third-party liability exposure as an incentive for the insurers to comply with the provisions of the insurance code in dealing with third party claims. Insurers have increasingly changed their conduct so that what in "my day" would have clearly been considered to be in bad faith has now become the norm. Cases which should be evaluated and settled early, are not. Many are forced through trial. What in my day would have been bad faith has now become part of the business model. Recent limitations on punitive damages have aggravated this problem. In my view it would be against the public interest and bad public policy to further amplify this problem by use of the proposed revision without legislative or judicial action, or both, and I would respectfully request that the committee not do so.

Committee Response:
These are all policy arguments.

The "no proper cause" standard is confusing to me and would be confusing to jurors, something I think would be contrary to the committee's intent. Is the "no proper cause" standard one of substance or one of form? Does "no proper cause" mean did the insurer have "proper cause" to put its own interests ahead of that of its insured and to gamble with the insured's money and the insured's future rather than its own? Or, does "no proper cause" mean did the insurance company claims file "document" defenses which could be used in the underlying third-party claim (which they always do), whether valid or not? Or, does it mean something else?

Committee Response:
The committee agrees that the meaning of “without proper cause” is subject to further interpretation, which may need to be addressed by the courts in the future. But in light of the committee’s decision to not go forward with including this language in the instruction at this time, the comment is moot.

Losh & Khoshlesan, Attorneys at Law, Beverly Hills, author signature illegible
I do not have a dog in this fight as I do not bring these types of suits, but I have an intellectual interest in this issue. I began practicing in California in 1987 after practicing in Michigan for 23 years. I was intrigued by two things as I had been hired by Detroit area insurance companies to enforce California judgments in excess of policy limits primarily where the insured vehicle had $20,000 worth of damage and the third party only had $10,000 in coverage. These companies do not settle within policy limits. I immediately learned that the third party carrier would approach me and try to work out something on the overage. I also learned that in California the duty of an insurance company to defend its insured was greater than the duty to pay for a loss. The other issue to me was the amount of underinsurance that many people in California carry in respect to policy limits.

On these types of property damage cases, the third party's insurance carrier is not taking a big risk by its actions. Where this becomes a problem is in the very cases that have brought this issue to your attention. Who is in the best position to understand the value of a case? That is the insurance company that is defending the third party defendant. Who is at the greatest risk of loss if their insurance company deliberately makes the wrong decision when presented with a policy limits demand? That is the third party defendant. He or she is putting their future in the hands of their insurance company. The Plaintiff is willing to take the loss in damages by submitting an offer to settle within policy limits. The only party gambling is the insurance company and there is no valid reason to support its efforts in that regard. The current jury instruction is fine.

Committee Response:
These are essentially policy arguments.

Maurice Mandel II, Attorney at Law, Newport Beach
The recent case of *Wallace v. County of Stanislaus* (2016) 245 Cal.App.4th 109, is also instructive, because the Court of Appeal invalidated an unduly burdensome and restrictive jury instruction that improperly prejudiced the Plaintiff by imposing additional burdens of proof. This issue is best left to the Legislature or Courts of Appeal to determine, not this committee.

Committee Response:
The committee sees no relevance between *Wallace*, a disability discrimination case, and CACI No. 2334.

Maurizio A. Mangini, Attorney at Law, Oceanside
Russell & Lazerus, Attorneys at Law, Newport Beach, by Christopher E. Russell

The ONLY fear the insurance industry has is if the verdict returned is a verdict in excess of the insured's policy limits as a result of the unreasonable handling of a claim, which would then expose it to having to pay on a claim in excess of the limits purchased by the insured. Without that, there is nothing that will prevent almost all claims from either being resolved for pennies on the dollar or those same claims having to be tried. (color emphasis added by committee)

Committee Response:
The "unreasonable handling of a claim" would constitute bad faith under the proposed revisions to 2334 as the insurer's rejection of the demand would be found to be unreasonable, that is, without proper cause.

How is having more cases tried in the best interests of the taxpayer? As it is, there should be a surtax on the insurance industry to pay for our court system since a significant majority of the cases that must be filed are as a result of no offer or low ball offers from an uncaring industry more interested in quarterly profits than doing right by California consumers. You are a consumer, as am I. Would you really want to be in a position of having to file bankruptcy because your insurance company refused to handle a claim in a reasonable manner and as a result, a large, excess of your limits, verdict was returned against you? Of course not, but that is exactly what will be taking place here in California if the bar was lowered as to what is and is not the unreasonable handling of a claim. (color emphasis added by committee)

Committee Response:
These policy arguments culminate with language that would support adding the additional element of "unreasonable rejection." Under current CACI No. 2334, whether the handling of the claim was reasonable or unreasonable is irrelevant.

What front line insurance adjuster desires to get fired for the mishandling of a claim when that firing can be stopped by manipulating what actually was done in the handling of a given personal injury claim? The pressure on that front line adjuster is already enormous and gone is the day when that same adjuster actually has authority to resolve a claim without having to use software that is set up to spit out a low ball offer.

Committee Response:
These are policy arguments.

Apparently, the basis for the committee decision to change CACI 2334 is the case of *Graciano v. Mercury General Corp.* (2014) 231 Cal.App.4th 414. Mercury usually leads the carriers on an annual

basis for most complaints filed with the DOI, so it does not surprise me it is involved with the *Graciano* case.

Committee Response:
No response necessary.

Mannion & Lowe, Attorneys at Law, San Francisco, by Derrian Oksenendler
Submitted the template letter with this additional sentence:
"In other words, all the Court of Appeal did in *Graciano* was *apply second prong of CACI 2334 as written*. The court found that the defect was in the plaintiffs demand."

Committee Response:
This is one plausible construction of the holding of *Graciano*. See report.

Myers, Widders, Gibson, Jones & Feingold, Attorneys at Law, Ventura, by Dennis Neil Jones
"In each policy of liability insurance, California law implies a covenant of good faith and fair dealing. This implied covenant obligates the insurance company, among other things, to make reasonable efforts to settle a third party's lawsuit against the insured. If the insurer breaches the implied covenant by unreasonably refusing to settle the third party suit, the insured may sue the insurer in tort to recover damages proximately caused by the insurer's breach." (*PPG Industries, Inc. v. Transamerica Ins. Co.* (1999) 20 Cal.4th 310, 312, 84 Cal.Rptr.2d 455, 457.) (color emphasis added by committee)

Committee Response:
Like some others, this comment supports adding the proposed additional element.

Insured's reasonable expectations: A duty to accept reasonable settlement demands is implied in order to protect the insureds' reasonable expectations in purchasing the insurance: "(I)n light of the common knowledge that settlement is one of the usual methods by which an insured receives protection under a liability policy, it may not be unreasonable for an insured ... to believe that a sum of money equal to the limits is available and will be used so as to avoid liability on his part ... " (*Crisci v. Security Ins. Co. of New Haven, Conn.* (1967) 66 Cal.2d 425, 431 [58 Cal.Rptr. 13].)

Committee Response:
The committee agrees with the language from *Crisci;* it is reasonable for the insured to believe that the policy limits will be used to avoid personal liability. But this reality is not helpful in resolving the issues presented.

The duty to accept reasonable settlement demands is also implied in order to cope with the conflict of interests that inevitably arises when the injured party offers to settle within the policy limits.

Settlement within policy limits is almost always in the insureds' financial interest, because it costs the insureds nothing and eliminates the risk of unlimited personal liability.

By contrast, settlement is not always in the insurer's financial interest. An insurer's contract liability is subject to the policy limits. Therefore, it might have "nothing to lose" (except defense costs) in rejecting a policy limits demand and gambling on the outcome at trial. After all, a jury *might* return a defense verdict, and any plaintiff's verdict *might* be less than the settlement demand.

Committee Response:
The committee agrees with this language also but also finds it off point.

Nelson & Fraenkel, Attorneys at Law, Los Angeles, by Stuart R. Fraenkel
There is no California case which I am aware of which supports the language change proposition.

Committee Response:
There are many cases with language supporting this point, most recently *Graciano*. See report.

The duty to settle is an implied promise to settle a case, in certain situations, within policy limits. "The implied covenant of good faith and fair dealing requires the insured to settle in an appropriate case although the express terms of the policy do not impose such a duty." (*Comunale v. Traders Gen. Ins.* (1958) 50 Cal.2d 654, 659.) Triggering the duty to settle requires: (1) a clear and unequivocal opportunity to settle within policy limits, (2) reasonably clear liability, and (3) a substantial likelihood of a recovery in excess of the policy limits. A settlement offer must be construed as reasonable and whether it exposes the insurer to an excess policy limits exposure will depend upon the information the insurer knows, or should have known, at the time of the demand. (See *KPFF, Inc. v. California Union Ins. Co.* (1997) 56 Cal.App.4th 963, 973; *Isaacson v. Cal. Ins. Guarantee Assn.* (1988) 44 Cal.3d 775, 793.) "Liability is imposed not for bad faith breach of the contract, but for failure to meet the duty to accept reasonable settlements, a duty included within the implied covenant of good faith and fair dealing." (*Crisci v. Security Ins. Co.* (1967) 66 Cal.2d 425, 430.) An insurer has an obligation to accept a settlement demand within policy limits where there is "a substantial likelihood of a recovery in excess of those limits." (*Johansen v. California State Auto Inter-Ins. Bureau* (1975) 15 Cal.3d 9, 14. "[T]he only permissible consideration in evaluating the reasonableness of the settlement offer becomes whether, in light of the victim's injuries and the probable liability of the insured, the ultimate judgment is likely to exceed the amount of the settlement offer." (Emphasis added) (*Id.* at 16.)

Committee Response:
If the duty to settle requires reasonably clear liability and substantial likelihood of damages greater than the policy limits, then the committee believes that the insurer must evaluate whether those two conditions exist. The insurer should be able to conclude that either there is no reasonably clear liability or that there is no substantial likelihood of an excess judgment (or both). Under the proposed draft posted for comment, the jury would decide whether the insurer's conclusion is "reasonable" in light of what it knew or should have known at the time.

Minh T. Nguyen, Attorney at Law, Long Beach
(Added this sentence to the CAOC template letter)
The law in this area is settled and should not be disturbed. The principle of *stare decisis* is critical to the administration of justice.

Committee Response:
The committee agrees that *stare decisis* is critical to the administration of justice. But it finds the law far from settled.

Orange County Bar Association, by Todd G. Friedland, President
The change from "Refusal" to "Failure" is unnecessary. Further, case law regularly refers to an insurers' duty to accept a reasonable settlement offer within policy limits by using the word "refusal." (See *Safeco Ins. Co. of Am. v. Superior Court* (1999) 71 Cal.App.4th 782, 788 (Bad Faith Refusal to Settle); *Hamilton v. Maryland Cas. Co.* (2002) 27 Cal.4th 718 (Until judgment is actually entered following trial, the mere possibility or even probability of an excess judgment does not render the insurer's refusal to settle actionable); *Johansen v. California State Auto. Asso. Inter-Insurance Bureau* (1975) 15 Cal.3d 9; *Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654; etc.)

Committee Response:

As noted in responses to previous comments, the committee has decided not to propose this change.

The inclusion of Element 3 would cause the litigant confusion as to which facts apply to each element. As it stands, Element 2 has adequately addressed all factors that might apply in this context.

The general factors to be considered in determining whether or not an insurer has breached its duty of good faith and fair dealing in failing to settle a third-party action are well established in California. The court of appeal has listed the following as the factors to be considered: (1) the strength of the injured claimant's case on the issues of liability and damages; (2) attempts by the insurer to induce the insured to contribute to a settlement (or lack of such attempts); (3) failure of the insurer to properly investigate the circumstances so as to ascertain the evidence against the insured; (4) the insurer's rejection of advice of its own attorney or agent; (5) failure of the insurer to inform the insured of a compromise offer; (6) the amount of financial risk to which each party is exposed in the event of a refusal to settle; (7) the fault of the insured in inducing the insurer's rejection of the compromise offer by misleading it as to the facts; and (8) any other factors tending to establish or negate bad faith on the part of the insurer. (*Brown v. Guarantee Ins. Co.* (1957) 155 Cal.App.2d 679, 689, 319 P.2d 69. The factors cited above are under the umbrella of factors used to determine the reasonableness of settlement offers, not whether the defendant's failure was unreasonable.

Committee Response:
Except for factor (1) (liability and damages), the other factors do not evaluate the demand, they evaluate the insurer's conduct. If all that is required is a reasonable demand, then none of these factors would have any relevance. What the insurer did or did not do in the course of deciding to reject the demand would be of no import.

The final paragraph of the instruction should also remain unchanged.

Committee Response:
The only substantive change proposed to the final paragraph was to narrow the inquiry on the proposed new element of reasonable rejection to the insurer's evaluation of the case. The committee has elected not to propose the new element at this time; therefore, it will not propose this language either.

No objection to the additional case law and authorities.

Committee Response:
No response is necessary.

An insurer may reject the demand if there are non-monetary conditions in the demand or if the carrier has not had an adequate opportunity to thoroughly investigate the claim before the demand expires. Again, there should be some requirement that the plaintiff timely notified the insurer of the lawsuit in accord with the terms of the policy.

Committee Response:
Notice will not be an issue because the injured party will have given the insurer notice via the demand.

The word "settlement" should remain in the last paragraph.

Committee Response:
The committee disagrees. Once "settlement demand" is used in the first sentence, "settlement" is just an unneeded extra word in the rest of the paragraph.

The last sentence "However, the demand may be unreasonable for reasons other than the amount demanded," could be explained such as an unreasonable time given for the carrier to investigate and respond to the demand.

Committee Response:
The committee considered this suggestion. But it decided that an example might be misleading if the provision in the demand was something other than the example.

Bruce Palumbo, Attorney at Law, Pasadena
Clearly, the very damages caused by an insurer's failure to accept a reasonable settlement offer within policy limits when the insured is facing liability for damages above those limits are those very damages above the policy themselves. The insurer retains by its terms the exclusive right and duty to make all settlement decisions regarding payment of policy limits. Requiring a new and additional element for an insurer's breach would be unfair and unwarranted and would violate basic contract damages under Civil Code 3300.

Committee Response:
The committee does not understand this comment. The committee agrees that the damages in a policy limits case are the amount of a judgment against the insured in excess of the policy limits. But the instruction does not address what damages are recoverable. The committee does not see how the proposed additional element could possibly violate basic contract damages under Civil Code section 3300.

R. Rex Parris Law Firm, Attorneys at Law, Lancaster, by Daniel Eli
The *Graciano* court's dicta confuses these two aspects of the Covenant. Because the insurer's failure to accept a "reasonable" settlement demand is a violation of an implied "contractual" term, it is irrelevant whether the insurer acted reasonably or with proper cause. The reasonableness of the insurer's conduct is only relevant where the insured seeks enhanced "tort" damages. However, where the only damages at issue are "contract" damages for failure to accept a "reasonable" settlement demand, no further showing of "unreasonable" conduct by the insurer is necessary.

The California Supreme Court made this clear in *Crisci v. Security Ins. Co. of New Haven, Conn.* (1967) 66 Cal.2d 425, 430:

> As we have seen, the duty of the insurer to consider the insured's interest in settlement offers within the policy limits arises from an implied covenant in the contract, and ordinarily contract duties are strictly enforced and not subject to a standard of reasonableness.

Committee Response:
The previous paragraph from *Crisci* to the one excerpted says:

> Obviously a showing that the insurer has been guilty of actual dishonesty, fraud, or concealment is relevant to the determination whether it has given consideration to the insured's interest in considering a settlement offer within the policy limits. The language used in the cases, however, should not be understood as meaning that in the absence of evidence establishing actual dishonesty, fraud, or concealment no recovery may be had for a judgment in excess of the policy limits. *Comunale v. Traders & General Ins. Co., supra,* 50 Cal.2d 654, 658-659, makes it clear that liability based on an implied covenant exists whenever the insurer refuses to settle in an appropriate case and that liability may exist when the insurer unwarrantedly refuses an offered settlement where the most reasonable manner of disposing of the claim is by accepting the settlement. Liability is imposed not for a bad faith breach of the contract but for failure to meet

> the duty to accept reasonable settlements, a duty included within the implied covenant of good faith and fair dealing. Moreover, examination of the balance of the *Palmer*, *Critz*, and *Davy* opinions makes it abundantly clear that recovery may be based on unwarranted rejection of a reasonable settlement offer and that the absence of evidence, circumstantial or direct, showing actual dishonesty, fraud, or concealment is not fatal to the cause of action.

Crisci demonstrates that there is often language supporting either position in the same case.

Law Offices of Frank D. Penney, Roseville, by James R. Lewis
The *Graciano* case did not create the proposed new element of "without proper cause" and factually does not support the creation of the new burden to be placed upon plaintiffs.

Committee Response:
Graciano says:

> A bad faith claim requires "something beyond breach of the contractual duty itself" (*California Shoppers, Inc. v. Royal Globe Ins. Co.*, *supra*, 175 Cal.App.3d at p. 54 (*California Shoppers*)), and that something more is "'refusing, *without proper cause*, to compensate its insured for a loss covered by the policy … .' [Citation.] Of course, the converse of 'without proper cause' is that declining to perform a contractual duty under the policy *with proper cause* is not a breach of the implied covenant." (231 Cal.App.4th at p. 433, original italics.)

So if *Graciano* is authority, then there is authority for "without proper cause." As to whether *Graciano* is authority, see report.

Existing case law, contained within the citations to CACI 2334, sufficiently address the burden of proof of bad faith against an insurer. The authorities specifically require that a plaintiff must prove that the terms were clear, all claimants were including the policy limit demand, all insureds would be released if the policy limit was tendered, the demand was within the policy limits, the demand was reasonable (in light of the victim's injuries and the probable liability of the insured that ultimate judgment is likely to exceed the amount of the settlement offer), and that the policy limit demand afforded the insured adequate time to investigate the demand.

Committee Response:
These are the factors for the jury to consider in determining whether the demand was reasonable. But the fact that there are factors to evaluate the reasonableness of the demand does not mean that there are not factors to evaluate the reasonableness of the insurer's rejection of the demand.

Reiner & Slaughter, Attorneys at Law, Redding, by April K. Gesberg and Todd E. Slaughter
The change in the law that you are proposing will remove any pressure on the insurance carriers to make reasonable settlement offers and settle the cases for the limits when there is danger that the case could exceed the policy limits. Adjustors will simply document reasons in their file why they feel that their refusal to accept the demand is justified, in hopes that a later jury will conclude that they "seemed to be acting reasonably." Adjustors are already doing this now, as we are receiving an increasing number of letters from adjustors stating that the demands cannot be "accepted or rejected" at this time, citing some reason or claimed need for documentation, no matter how specious. In essence, you are providing a wall for the insurance industry to hide behind, removing them from their good faith obligation to protect the insured's financial wellbeing on a parity with their own. The inevitable net result of your proposed changes is that insureds are going to have their own assets put in peril when clever adjustors and carriers start justifying why they "just didn't think it was a good idea" to accept the demand at the time.

Committee Response:
These are essentially policy arguments. But the committee does not believe that a jury will accept "just didn't think that it was a good idea" as a reasonable rejection.

Rice & Bloomfield, Attorneys at Law, Encino, and Consumer Attorneys Association of Los Angeles, by Linda Fermoyle Rice
(Added this paragraph to the CAOC template letter)
Plaintiffs face significant obstacles to attaining justice in our civil justice system. Many of those obstacles have been designed and "sold" by the insurance industry to "fix" problems that do not exist - witness MICRA, now more than 40 years old. The "unintended consequences" of changing established law at the behest of insurers and their attorneys must be carefully considered and should mitigate heavily against not making this change to CACI 2334.

Committee Response:
These are policy arguments

Ara Saroian, Attorney at Law, Sherman Oaks
Although the term "unreasonable" has been defined, how does the committee intend to provide a definition to jurors as to what "proper cause" means. In essence, the definition the committee has provided to an ambiguous term itself requires further defining. Furthermore, what "conduct" is the committee discussing in the definition? Shouldn't the conduct that the insurer engaged in be absolutely clear (i.e. " failing to accept this settlement demand was unreasonable")?

Committee Response:
This point has been addressed in the committee's response to previous comments.

Alex B. Scheingross, Attorney at Law, San Diego
As our society is currently constituted, the insurance industry has tremendous advantage in any dispute with its policy holders. They have the time, money and resources to fight any thing they don't like, regardless of what the law is. Very few of my clients have ever had the resources to fight back on the scale the insurance industry has. The insurance industry has the ability (which they frequently exercise through their lobbying efforts) to influence legislation and give the table even more tilt in their favor. Therefore I cannot begin to comprehend how the committee arrived at its decision to change CACI 2334 without the holding of an appellate decision critical of the instruction. If allowed to stand, this revision to the instruction will work a grave injustice on the public.

Committee Response:
These are policy arguments

Shernoff Bidart Echeverria Bentley, Attorneys at Law, Claremont, by William M. Shernoff, Michael J. Bidart, Ricardo Echeverria, and Gregory L. Bentley
Graciano has not been cited by a reported decision for the proposition embodied in the proposed change to CACI 2334. Instead, the current CACI 2334 has repeatedly been cited as a correct statement of the law. (See, e.g., *Bosetti v. U.S. Life Ins. Co. in City of New York* (2009) 175 Cal.App.4th 1208, 1236 ("In other words, an insured plaintiff need only show, for example, that the insurer ... failed to accept a reasonable settlement offer") (citing the current CACI 2334); *Yan Fang Du v. Allstate Ins. Co.* (9th Cir. 2012) 697 F.3d 753, 757 ("At trial, the district court gave modified forms of CACI 2334 and 2337. Both of these instructions made clear that breach of the covenant of good faith and fair dealing could be found only if Deerbrook had failed to accept a reasonable settlement demand"); *McDaniel v. GEICO General Ins. Co.* (E.D. Cal. 2014) 55 F.Supp.3d 1244, 1263 ("CACI 2334, *Hamilton, Johansen, Egan,* and *Crisci* recognize that there is a particular duty imposed on an insurance company to accept reasonable settlement

offers within policy limits. When the insurance company fails to accept a reasonable offer, the duty has been violated"); and *RSUI Indem. Co. v. Discover P & C Ins. Co.* (E.D. Cal., Apr. 16, 2014, 2:13-CV-00960-TLN-EF) 2014 WL 1513973, at *4 (citing the current CACI 2334 as a correct statement of the law) (color emphasis on the ellipsis in the *Bosetti* quote added by committee).

Committee Response:
The only case cited in this comment that might be controlling authority is *Bosetti*; the rest are federal court cases. *Bosetti* was a first-party case. Here is the full paragraph, including the text within the ellipsis above:

> Subsequent case law has confirmed that "the covenant of good faith can be breached for objectively unreasonable conduct, regardless of the actor's motive." (*Carma Developers (Cal.), Inc. v. Marathon Development California, Inc., supra,* 2 Cal.4th at p. 373.) Indeed, "'[t]he ultimate test of [bad faith] liability in … first party [insurance] cases is whether the refusal to pay policy benefits was unreasonable.'" (*Opsal v. United Services Auto. Assn.* (1991) 2 Cal.App.4th 1197, 1205 [10 Cal. Rptr. 2d 352], original italics.) In other words, an insured plaintiff need only show, for example, that the insurer unreasonably refused to pay benefits or failed to accept a reasonable settlement offer; there is no requirement to establish subjective bad faith. (See CACI No. 2331 [first party bad faith]; CACI No. 2334 [third party bad faith]; see also *McCoy v. Progressive West Ins. Co.* (2009) 171 Cal.App.4th 785, 794 [90 Cal. Rptr. 3d 74].)

The language is dicta. Further, the word "unreasonably" could be read above to modify both "refused to pay benefits" and also "failed to accept a reasonable settlement offer." Thus *Bosetti* adds nothing but additional uncertainty to the discussion.

State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair
We believe that an insurer's failure to accept a settlement demand that is reasonable in all respects, including amount, is necessarily unreasonable. A reasonable settlement demand and an unreasonable refusal are different sides of the same coin. To instruct the jury on both the reasonableness of the demand and the unreasonableness of the refusal may suggest that there is some distinction, which the authorities do not support. Accordingly, we would delete proposed new element 3 and the proposed new penultimate paragraph in the instruction defining "unreasonably."

Committee Response:
This committee's rejection of this argument is set forth in a response to a previous comment.

We would simplify and clarify the final paragraph in the instruction by limiting it to cases in which the insurer claims the demand was unreasonable because of the amount, which we believe are the great majority of cases. We suggest the following:

> "A settlement demand for an amount within policy limits is reasonable~~, and [name of defendant]'s rejection of the demand is unreasonable,~~ if [*name of defendant*] knew or should have known at the time the demand was rejected that the potential judgment was likely to exceed the amount of the demand based on [*name of plaintiff in underlying case*]'s injuries or loss and [*name of plaintiff*]'s probably liability.~~ However, the demand may be unreasonable for reasons other than the amount demanded.~~"

We would modify the Directions for Use to state that the instruction should be modified if the insurer claims that the demand was unreasonable for a reason other than the amount, and delete the proposed new language explaining when to give element 3.

Committee Response:
The first deletion is a reiteration of the point above, that there is no difference in the analysis of reasonable demand and reasonable rejection. Assuming arguendo that it is true that in the "great majority of cases" the only issue is the monetary amount, the committee does not think that the instruction should ignore the need to look at the nonmonetary aspects, particularly the amount of time given to investigate.

Jonathan G. Stein, Attorney at Law, Elk Grove
He submitted the CAOC template letter with an expansion of the discussion of *Graciano* as shown in red. Second, the apparent basis changing CACI 2334 add this element is the *Graciano* case, but that decision does not say that CACI 2334 is incorrect or anything else that might require a change in the instruction. In *Graciano*, the court of Appeal actually applied the same law that underlies the existing CACI 2334. It held was that there was no bad faith because the insurer did not have a reasonable opportunity to settle the claim. When the third party claimant made a demand, she identified the wrong insurance policy number and the wrong insured, so the insurer could not accept the claim. 231 Cal.App.4th at 418-19. The court concluded "there is no substantial evidence Graciano [plaintiff] ever offered to settle her claims against Saul [insured] for an amount within Saul's policy limits." 231 Cal.App.4th at 427. The decision held that there was no breach of the covenant where there was not a reasonable offer to settle for the policy limits with the actual insured. Id. at 427. In other words, all the Court of Appeal did in *Graciano* was apply the second prong of CACI 2334 as written. The court found that the defect was in the plaintiff's demand. The *Graciano* court did not hold that CACI 2334 is wrong or that there is any problem with the instruction. Indeed, the words "instruct", "instructed", and "instruction" do not even appear in the opinion.

Committee Response:
This language expands on the view that the pertinent language in *Graciano* that would support the proposed additional element of unreasonable rejection is dicta. See report.

Robert H. Tourtelot, Attorney at Law, Santa Monica
He submitted the CAOC template letter with the additional language shown in red.
The current CACI 2334 instruction properly focuses on the reasonableness of the settlement demand and acknowledges that rejection of a reasonable demand, in and of itself, causes harm to an insured faced thereafter with an excess judgment. There is no reason to add consideration of extraneous conduct by insurers to the instruction.

Committee Response:
It cannot be denied that an excess judgment causes harm to the insured. But that does not foreclose the possibility that there are other elements other than a reasonable demand.

United Policyholders, by David B. Goodwin, Covington and Burling, Attorneys at Law, San Francisco
Draft amended instruction No. 2334 incorrectly describes the essential factual elements of an insurer's refusal to accept a reasonable settlement within policy limits. Liability for that tort arises from one of two distinct claims. Although the draft amended instruction attempts to reconcile the two situations in its "Directions for Use" section by removing certain elements when not applicable, crafting one instruction for two different categories of tortious behavior risks needless confusion.

First, an insurer can breach the implied covenant of good faith and fair dealing when it fails to accept a settlement of a covered claim within policy limits and (a) the likelihood of liability (b) multiplied by the likely damages if the insured is found liable is (c) greater than the settlement offer. (See *Johansen v. California State Auto. Ass'n Inter-Ins. Bureau* (1975) 15 Cal.3d 9, 16.) In such cases, other factors such as policy limits or concerns about future settlements are irrelevant – so long as the likely liability exceeds

the settlement offer, the offer is a reasonable one and the insurer's failure to accept it can support a finding of bad faith. (See *id.*; see also *Howard v. American Nat'l Fire Ins. Co.* (2010) 187 Cal.App.4th 498, 524-25. The standard is, moreover, closer to strict liability than it is to negligence. (See, e.g., *Johansen*, 15 Cal.3d at 16; *Crisci v. Security Ins. Co. of New Haven, Conn.* (1967) 66 Cal.2d 425, 429.)

Committee Response:
The comment points (a), (b), and (c) would seem to indicate that the insurer is to evaluate the demand in light of its conclusion on liability and damages. The proposed draft posted for public comment would have the jury evaluate the insurer's conclusion and decide it was reasonable for it to have been wrong. If there is to be no consideration as to whether the insurer's conclusion was a reasonable one, then its evaluation would be irrelevant. Only the third party's evaluation as expressed in the demand would be relevant.

Second and distinctly, an insurer's failure to accept a settlement offer can constitute bad faith when it failed to adequately and objectively consider the offer. Under *Davy v. Public Nat'l Ins. Co.* (1960) 181 Cal.App.2d 387 and its progeny, "[t]he exercise of good faith … requires that the consideration given to an offer of settlement should be an intelligent one; and should be based on a reasonable investigation; and should be made by persons reasonably qualified to make a decision respecting the risks involved." Id. at 396. A wide variety of different actions by the insurer can suggest insufficient consideration of the offer, including the following:

- failing to make an "honest, intelligent and knowledgeable" evaluation of the offer on the merits, (see *Merritt v. Reserve Ins. Co.* (1973) 34 Cal.App.2d 858, 875-76);

- improperly delegating its duty to evaluate the claim, (see *Garner v. American Mut. Liab. Ins. Co.* (1973) 31 Cal.App.3d 843, 850-51);

- unreasonably relying on an insured's statements when evidence undermined that perspective, (see *Betts v. Allstate Ins. Co.* (1984) 154 Cal.App.3d 688, 707);

- failing to seek competent legal advice, (see *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 906);

- disregarding competent legal advice, (see *Kinder v. Western Pioneer Ins. Co.* (1965) 231 Cal.App.2d 894, 901);

- concealing an unwillingness to settle for an unreasonable period of time, (see *Shade Foods*, 78 Cal.App.4th at 906);

- failing to properly inform the insured of settlement negotiations, (see *Martin v. Hartford Acc. & Indem. Co.* (1964) 228 Cal.App.2d 178, 184, see also *Anguiano v. Allstate Ins. Co.* (9th Cir. 2000) 209 F.2d 1167, 1169); and

- failing to ask an insured to contribute to a settlement offer above policy limits (see *Merritt, supra,* 34 Cal.App.2d 875-876).

These cases present distinct factual situations in which an insurer may be found to have refused a settlement offer in bad faith, all of which are distinct from a simple valuation of the offer against likely liability, as in *Johansen* and its progeny.

Committee Response:

All of these factors point to the insurer's bad conduct in how it investigates and determines whether to pay the policy limits. If the only question to be decided is whether the demand was reasonable, then none of these factors would be relevant.

While *Hamilton v. Maryland Cas. Co* (2002) 27 Cal.4th 718, 724-25 does describe such a situation as an "unreasonable refusal" to settle, it does so by way of direct citation to *Comunale*, and says only that an unreasonable refusal to settle "may subject the insurer to liability," not that it is the only way by which an insurer may face such liability. (*Id.*)

Committee Response:
The committee does not understand this comment. It acknowledges that *Hamilton*, a California Supreme Court case, includes language supporting an additional "unreasonable rejection" element. But the comment fails to explain why the instruction need not reflect this language.

Scott H.Z. Sumner, Attorney at Law, Walnut Creek
Sent the CAOC template letter with this addition.
The proposed change would encourage liability insurers to build their files to immunize themselves against bad faith liability, as opposed to the current instruction, which looks to the externally-verifiable objective reasonableness of the settlement offer.

Committee Response:
An insurer can "immunize" itself against bad-faith liability by properly investigating the claim and reaching a reasonable decision to accept or reject the demand. Hopefully, the files would show that they met this obligation.

William Swearinger, Attorney at Law, West Hollywood
Sent the CAOC template letter with this addition.
If the committee feels that its job is to make it easier for insurers to triumph over the ordinary person, then, y'all will have done someone's bidding in changing the instruction. If the committee wishes to remain apparently neutral, as it should be, then, leave interpretation of the law to the appellate court.

Committee Response:
The committee will leave interpretation of the law to the appellate courts.

Valentine Law Group, Attorneys at Law, Irvine, by Kimberly A. Valentine
There is no persuasive reasoning for this change to CACI 2334. CACI 2334 already provides that the settlement offer by the Plaintiff has to be reasonable and within the policy limits and this requirement of "reasonableness" already takes into consideration the circumstances surrounding the offer. There is no need to now provide the Defendant insurer with the ability to refuse an otherwise reasonable offers merely because Defendant believed they had a "proper cause" to do so.

Committee Response:
Under the proposed reasonable-rejection element, whether the insurer believed that it had proper cause would be irrelevant. It would be whether the jury concluded that the insurer had proper cause.

This revision would take the focus off the reasonableness of the settlement demand and instead focus it on defendant insurer's conduct. Given the vagueness of the revision, Defendants will have the ability to assert various and irrelevant factors to avoid a finding of bad faith on behalf of the Defendants.

Committee Response:

The proposed draft posted for public comment would put the focus on both the demand and the insurer's conduct.

Young & Nichols, Attorneys at Law, Bakersfield, by Steve W. Nichols
First, insurance companies get away with failing to pay claims within policy limits. On most all the claims made, insurance companies can deny a legitimate claim and the monetary differences make it impossible to sue over a claim, since economically, it is not enough to fight over. Those cases make up the vast majority of claims. The insurance company wins simply because it is not worth the effort to go after a few thousand dollars. For the insurance companies, you add up all those little wins and it becomes billions.

Second, when an insurance company is presented with a claim that is legitimate and deserves to be paid, the carrier refuses to pay it as well. Now the industry wants citizens to prove those actions were "unreasonable". This is just another way to defeat claims by people who have been hurt physically and financially. The insurance companies want our state to take away more rights by putting up road blocks.

The request to require proving something that can easily be fabricated only protects an industry that has already been over protected.

Committee Response:
These are policy arguments

The current jury instruction is adequate and simply tells jurors, judges and attorneys that when an insurance company fails to pay claims [that] are already deemed legitimate, they have violated the law.

Committee Response:
The committee agrees that is what the current instruction does. The question is whether it really is adequate or whether it needs to require more.

Innocent people are the victims if any further requirements are put up as road blocks to justice. The current law protects insurance companies if those requirements are not met. If those requirements are not met, insurance companies must be held accountable for their failure to act in good faith.

Remember, insurance companies already win 95% of all cases that they have failed to pay, simply because injured parties cannot afford to fight. Now, insurers want protection on the other 5% when these acts cause considerable damage and an attorney has decided to take the case and pursue the rights allowed by law.

Committee Response:
These are also policy arguments

Young & Nichols, Attorneys at Law, Bakersfield, by Thomas Sheets, Office Administrator
As a civil and criminal investigator, retired deputy sheriff, and law office administrator for 46 years, I must comment on CACI 2334 and its chilling effect on the ability to prove bad faith judgments in civil cases.

I know you will receive many emails and correspondence on this issue which will brief the fine legal points. I write this as a worker in the system who, in my investigations, sees almost daily abuses and incidents of bad faith.

Insurance companies in California have controlled and directed legislation for some time and this proposed revision to CACI 2334 is simply a further attempt to insulate insurance companies from paying claims when a reasonable offer for settlement has been made.

Committee Response:
The proposed revisions to CACI No. 2334 are an attempt to correctly express the law.

The law has worked well after changes were made to CACl 2334 in 2007. Now the insurance lobby is seeking the addition of vague and ambiguous language in the jury instruction to allow more loopholes and argument.

Committee Response:
The committee is not sure what language is challenged as "vague and ambiguous." "Without proper cause" is addressed in responses to prior comments.

Appendix A Attorneys Submitting Identical Letter

1. Agnew Brusavich, Attorneys at Law, Torrance, by Terry S. Schneier
2. Law Offices of Joseph R. Baer, Attorney at Law, Pollock Pines, by Joseph R. Baer
3. Kelly Balamuth, Attorney at Law, Moraga
4. Larry L. Baumbach, Attorney at Law, Chico, by Larry L. Baumbach
5. Garland O. Bell, Attorney at Law, Sacramento
6. Arthur Paul Berg, Attorney at Law, Dillsboro, Indiana
7. Bennett & Johnson, Attorneys at Law, Oakland, by Richard C. Bennett
8. Bohn & Fletcher, Attorneys at Law, San Jose, by Robert H. Bohn, Jr.
9. John Christian Bohren, Attonrey at Law, San Diego
10. Robert A. Brenner, Attorney at Law, Woodland Hills
11. Steven M. Bronson, Attorney at Law, San Diego
12. James Matthew Brown, Attorney at Law, San Diego
13. Bruno | Nalu, Attorneys at Law, Newport Beach, by Keith J. Bruno
14. Boucher LLP, Attorneys at Law, Woodland Hills, by Shehnaz M. Bhujwala
15. Brent W. Caldwell, Attorney at Law, Huntington Beach
16. Richard P. Caputo, Attorney at Law, San Jose
17. Choulos, Choulos & Wyle, Attorneys at Law, San Francisco, by Claude A. Wyle
18. Corrales Law Group, Attorneys at Law, Orange, by Peter Corrales
19. Costanzo Law Firm, Attorneys at Law, San Jose, by Lori J. Costanzo
20. Frank J. Crum, Attorney at Law, Woodland
21. Seth Davidson, Attorney at Law, Torrance

22. Demián Oksenendler, Mannion & Lowe, Attorneys at Law, San Francisco

23. Thomas M. Dempsey, Attorney at Law, Beverly Hills

24. The Dolan Law Firm, Attorneys at Law, San Francisco, separate letters from
    Aimee E. Kirby
    Megan Irish

25. Dreyer Babich Buccola Wood Campora, Attorneys at Law, Sacramento, separate letters from
    Robert A. Buccola
    Ryan L. Dostart
    Joshua T. Edlow
    Kelsey J. Fischer
    Justin M. Gingery
    Thomas J. Gray
    Hank G. Greenblatt
    Jonathan R. Hayes
    Larry Q. Phan
    Catia G. Saraiva
    Daniel G. Schneiderman
    Craig C. Sheffer
    Jason J. Siegel
    Sean D. Wisman
    Joseph R. Yates

26. Brent Duque, Attorney at Law, Newport Beach

27. Richard L. Duquette, Attorney at Law, Oceanside

28. Scott Bradley Dormer, Attorney at Law, Los Angeles

29. Emison Hullverson, Attorneys at Law, San Francisco, by Miles B. Cooper

30. Britany M. Engelman, Attorney at Law, Beverly Hills

31. Ernst Law Group, Attorneys at Law, San Luis Obispo, separate letters from
    Don Ernst
    Taylor Ernst
    Terry Kilpatrick
    Nigel Whitehead

32. Ingrid Evans, Attorney at Law, San Francisco

33. Mayra M. Fornos, Attorney at Law, Los Angeles

34. Freeman & Freeman, Attorneys at Law, Woodland Hills, separate letters from
    Stan Freeman
    Steven M. Freeman

35. Garmo & Garmo, Attorneys at Law, El Cajon, by Bill Epstein

36. Richard H. Geringer, Attorney at Law, Aliso Viejo
37. Michael F. Ghozland, Attorney at Law, Los Angeles

38. Gibson & Hughes, Attorneys at Law, Santa Ana, by Robert B. Gibson, Jeffrey S. Hughes, and Cynthia A. Craig

39. Goldstein, Gellman, Melbostad, Harris & McSparran, Attorneys at Law, San Francisco, by Lee S. Harris

40. Gwilliam, Ivary Chiosso, Cavalli & Brewer, Attorneys at Law, Oakland, by Jayme L. Walker

41. Loren B. Halpern, Attorney at Law, Calabasas

42. Genie Harrison, Attorney at Law, Los Angeles

43. Hassell Law Group, Attorneys at Law, San Francisco, separate letters from
    Dawn L. Hassell
    Sophia Cohn
    Sean Crandall
    Andrew Haling
    Christina Sun
    Lisa Villasenor

44. Rolando Hidalgo, Attorney at Law, Sonoma

45. Sanford I. Horowitz, Attorney at Law, Sonoma

46. Vincent D. Howard, Attorney at Law, Anaheim

47. Jachimowicz, Pointer & Emanuel, Attorneys at Law, San Jose, by Braid Pezzaglia

48. Jackson & Parkinson, Attorneys at Law, Fallbrook, by Brett R. Parkinson

49. Johnson Attorneys Group, Attorneys at Law, Newport Beach , by James Johnson

50. Robin Johnson, Attorney at Law, Folsom

51. Aghavni Kasparian, Attorney at Law, Los Angeles

52. Susan Cameron Kelley, Attorney at Law, Huntington Beach

53. Alain Kinaly, Attorney at Law, Irvine

54. James W. Kirby, Attorneys at Law, Redondo Beach

55. Lawrence Knapp, Attorney at Law, Stockton

56. Kornblum, Cochran, Erickson & Harbison, Attorneys at Law, San Francisco |Santa Rosa, separate letters from
    Charles D. Cochran
    Nicholas J. Peterson
    Amy Winters

57. Koshkaryan Law Group, Attorneys at Law, Sherman Oaks, by Vahagn Koshkaryan

58. Kottler & Kottler, Attorneys at Law, Los Angeles, separate letters from
    Shari S. Daneshrad
    Douglas E. Kottler
    Rochelle Rodriguez

59. M. Lawrence Lallande, Attorney at Law, Long Beach

60. Jeffrey R. Lamb, Attorney at Law, Los Angeles

61. Lamb & Frischer, Attorneys at Law, San Francisco, by Richard L. Frischer

62. Lavelle Law Group, Attorneys at Law, San Diego, by Joseph C. Lavelle

63. Timothy V. Magill, Attorney at Law, Fresno

64. Mancini & Associates, Attorneys at Law, Sherman Oaks, by Marcus A. Mancini

65. Jerod A. Marsalli, Attorney at Law, Pleasant Hill

66. McTernan, Stender & Weingus, Attorneys at Law, San Francisco, by Cliff Weingus

67. Mark Millen, Attorney at Law, Los Gatos

68. Mulligan, Banham & Findley, Attorneys at Law, San Diego, by Elizabeth A. Banham

69. Newmeyer & Dillion, Attorneys at Law, Newport Beach, by Robert K. Scott,

70. R. Rex Parris, Attorney at Law, Lancaster

71. Nikolaus W. Reed, Attorney at Law, San Francisco

72. Shawn Steel Law Firm, Attorneys at Law, Seal Beach, by Arun Dayalan

73. Kenneth M. Sigelman, Attorney at Law, San Diego

74. Edward A. Smith, Attorney at Law, Sacramento

75. Swanson O'Dell, Attorneys at Law, Bakersfield, separate letters from
    Peggy Vargas
    Seth N. O'Dell
    Jeremy D. Swanson

76. Jonathan G. Stein, Attorney at Law, Elk Grove

77. Stoll, Nussbaum & Polakov, Attorneys at Law, Los Angeles, by Mark J. Bringardner

78. Robert W. Thompson, Attorney at Law, Burlingame

79. Thorsnes Bartolotta McGuire, Attorneys at Law, San Diego, by Brett J. Schreiber

80. Joseph E. Tomasik, Attorney at Law, Berkeley

81. Kathryn M. Trepinski, Attorney at Law, Beverly Hills

82. Treyzon & Associates, Attorneys at Law, Los Angeles, by Boris Treyzon

83. The Veen Firm, Attorneys at Law, San Francisco, separate letters from
    Alexandra A. Hamilton
    Elinor Leary
    Andje M. Medina
    Kimberly Wong

84. Michael D. Waks, Attorney at Law, Long Beach

85. Walker, Hamilton & Koenig, Attorneys at Law San Francisco, by
    Walter H. Walker, III
    Timothy M. Hamilton
    Peter J. Koenig
    Beau R. Burbidge

86. Walkup, Melodia, Kelly & Schoenberger, Attorneys at Law, San Francisco, separate letters from
    Matthew D. Davis
    Conor M. Kelly

87. Bradley S. Wallace, Attorney at Law, Encino

88. Ward & Hagen, Attorneys at Law, Solana Beach, by Steven M. Nuñez

89. Wickman & Wickman, Attorneys at Law, Escondido, by Christina E. Wickman

90. Wilcoxen Callaham, Attorneys at Law, Sacramento, separate letters from
    Brian W. Plummer
    Daniel E. Wilcoxen
    William C. Callaham

91. Andrew L. Wright, Attorney at Law, Los Angeles

92. Alaa A. Yasin, Attorney at Law, Santa Ana

93. Yuhl Carr, Attorneys at Law, Marina del Rey, by Tyler J. Barnett

Appemdix B. Attorneys Submitting Almost Identical Letter, But With Slight Variations

1. Aitken * Aitken * Cohn, Attorneys at Law, Santa Ana, separate letters from
   Ashleigh E. Aitken
   Christopher R. Aitken
   Darren O. Aitken
   Megan Demshki
   Casey R. Johnson
   Michael A. Penn

2. Baradat & Paboojian, Attorneys at Law, Fresno, by
   Daniel R. Baradat
   Warren R. Paboojian
   Jason S. Bell
   Adam B. Stirrup
   Kevin B. Kalajian
   Lynne Thaxter Brown

3. Chet R. Bhavsar, Attorney at Law, Los Angeles

4. Campagnoli Abelson & Campagnoli, Attorneys at Law, San Francisco, by Mark B. Abelson

5. Dreyer Babich Buccola Wood Campora, Attorneys at Law, Sacramento, by Roger A. Dreyer

6. Garmo & Garmo, Attorneys at Law, El Cajon, by Bill Epstein

7. Howarth & Smith, Attorneys at Law, Los Angeles, by Suzelle Smith

8. Maurice Mandel II, Attorney at Law, Newport Beach

9. Manion & Lowe, Attorneys at Law, San Francisco, by Derrian Oksenendler

10. Minh T. Nguyen, Attorney at Law, Long Beach

11. Law Offices of Frank D. Penney, Roseville , by James R. Lewis

12. Reiner & Slaughter, Attorneys at Law, Redding, by April K. Gesberg
    Todd E. Slaughter

13. Rice & Bloomfield, Attorneys at Law, Encino, and Consumer Attorneys Association of Los Angeles, by Linda Fermoyle Rice

14. Rizio & Nelson, Attorneys at Law, Santa Ana, by Eric Ryanen

15. William Swearinger, Attorney at Law, West Hollywood

16. Robert H. Tourtelot, Attorney at law, Santa Monica

17. Valentine Law Group, Attorneys at Law, Irvine, by Kimberly A. Valentine

Appendix C. Attorneys Submitting Other Letters

1. Thomas G. Adams, Attorney at Law, Ventura

2. Adamson Ahdoot, Attorneys at Law, Los Angeles, by Christopher B. Adamson

3. Adleson Hess & Kelly, Attorneys at Law, Campbell, by Randy M. Hess and Nicole S. Adams-Hess

4. Agnew Brusavich, Attorneys at Law, Torrance, by Bruce M. Brusavich

5. Alpers Law Group, Aptos, by J. Thomas Aldrich and Richard C. Alpers

6. Biren Law Group, Los Angeles, by
   Sarina M. Jarchi
   John A. Roberts

7. Central Coast Trial Lawyers Association (CCTLA) – Mission Law Center, San Luis Obispo, by Louis Koory, President

8. Gordon Churchill, Attorney at Law (inactive), San Diego

9. Stephen N. Cole, Attorney at Law, West Sacramento

10. Robert D. Conaway, Attorney at Law, Victorville SLaw Office of Robert D. Conaway, Victorville

11. Danko Meredith, Attorneys at Law, Redwood Shores, by Kristine K. Meredith

12. DeWitt Algorri & Algorri, Attorneys at Law, Pasadena, by Mark S. Algorri

13. Dreyer Babich Buccola Wood Campora, Attorneys at Law, Sacramento, by
    Robert B. Bale
    Steven M. Campora
    Andrew G. Minney

14. Dunk Law Firm, Attorneys at Law, San Diego, by Andrew P.P. Dunk III

15. Scott Dunning, Attorney at Law, San Francisco

16. Jeffrey I. Ehrlich, Attorney at Law, Encino

17. Evans Law Firm, Attorneys at Law, San Francisco, by Michael Levy

18. Christopher J. Fry, Attorney at Law, Sacramento

19. Greene, Broillet & Wheeler, Attorneys at Law, Santa Monica, by Mark T. Quigley

20. Heiting & Irwin, Attorneys at Law, Riverside, by
    James O. Heiting

Dennis R. Stout
Jean-Simon Serrano
Sara B. Morgan

21. Inner City Law Center (ICLC), Los Angeles

22. Jacobs & Jacobs, Attorneys at Law, Los Angeles, by
Stanley K. Jacobs
John F. Gerard

23. Kerr & Wagstaffe, Attorneys at Law, San Francisco, by Daniel J. Veroff

24. Kenneth S. Klein, Professor, California Western School of Law, San Diego

25. Kornblum, Cochran, Erickson & Harbison, Attorneys at Law, San Francisco, by Guy O. Kornblum

26. Peter M. Kunstler, Attorney at Law, Encino

27. Alexander O. Lichtner, Attorney at Law, West Sacramento

28. Losh & Khoshlesan, Attorneys at Law, Beverly Hills, author signature illegible

29. Maurizio A. Mangini, Attorney at Law, Oceanside

30. Felahy Trial Lawyers, Los Angeles, by Andrew P. Menotti

31. Myers, Widders, Gibson, Jones & Feingold, Attorneys at Law, Ventura, by Dennis Neil Jones

32. Nelson & Fraenkel, Attorneys at Law, Los Angeles, by Stuart R. Fraenkel,

33. Orange County Bar Association, by Todd G. Friedland, President

34. Bruce Palumbo, Attorney at Law, Pasadena

35. R. Rex Parris Law Firm, Lancaster, by Daniel Eli

36. Reiner & Slaughter, Attorneys at Law, Redding, by Todd E. Slaughter

37. Russell & Lazerus, Attorneys at Law, Newport Beach, by Christopher E. Russell

38. Ara Saroian, Attorney at Law, Sherman Oaks

39. Alex B. Scheingross, Attorney at Law, San Diego

40. Shernoff Bidart Echeverria Bentley, Attorneys at Law, Claremont, by
William M. Shernoff
Michael J. Bidart
Ricardo Echeverria

Gregory L. Bentley

41. Carolin K. Shining, Attorney at Law, Sherman Oaks

42. State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair

43. Jonathan G. Stein, Attorney at Law, Elk Grove

44. Scott H.Z. Sumner, Attorney at Law, Walnut Creek

45. United Policyholders, by David B. Goodwin, Covington & Burling, Attorneys at Law, San Francisco

46. Young & Nichols, Attorneys at Law, Bakersfield, separate letters from'
    Steve W. Nichols
    Thomas Sheets, Office Administrator

Item number: 02b

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Approve**

RUPRO Meeting: May 18, 2016

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Civil Jury Instructions: Approve Publication of Minor Revisions (Action Required)

Committee or other entity submitting the proposal:
Advisory Commitee on Civil Jury Instructions

Staff contact (name, phone and e-mail): Bruce Greenlee, Attorney, Legal Services 415-865-7698 bruce.greenlee@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: Maintaining and expanding CACI (the committee's ongoing project)
Project description from annual agenda:

If requesting July 1 or out of cycle, explain:
Rules 2.1050(d) and 10.58(a) of the California Rules of Court require the advisory committee to update, amend, and add topics to CACI on a regular basis and to submit its recommendations to the council for approval. Jury instructions are currently revised twice a year, and more often if necessary. Release 28 is the first CACI release for 2016. Release 27 was approved on December 13, 2015.

Additional Information: (To facilitate RUPRO's review of your proposal, please include any relevant information not contained in the attached summary.)
In addition to recommending approval of 49 revised CACI instructions under the provisions of the guidelines adopted on December 19, 2006 regarding Jury Instructions Corrections and Technical and Minor Substantive Changes, the advisory committee also requests that RUPRO approve and submit to the Judicial Council 48 new and revised CACI instructions and verdict forms.

JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue • San Francisco, California 94102-3688
Telephone 415-865-4200 • Fax 415-865-4205 • TDD 415-865-4272

MEMORANDUM

Date
April 11, 2016

To
Members of the Rules and Projects Committee

From
Advisory Committee on Civil Jury Instructions
Hon. Martin J. Tangeman, Chair

Subject
Civil Jury Instructions: Instructions With Minor Revisions

Action Requested
Review and Approve Publication of Instructions With Minor Revisions, Effective June 24, 2016

Deadline
N/A

Contact
Bruce Greenlee, Attorney
415-865-7698 phone
415-865-4319 fax
bruce.greenlee@jud.ca.gov

Executive Summary

The Advisory Committee on Civil Jury Instructions has completed revisions and additions to the *Judicial Council of California Civil Jury Instructions (CACI).* This report addresses 49 instructions that have only the types of revisions that the Judicial Council has given the Rules and Projects Committee (RUPRO) final authority to approve—primarily instructions with changes only to the Directions for Use or to the Sources and Authority.

Recommendation

The Advisory Committee on Civil Jury Instructions recommends that RUPRO, effective June 24, 2016, approve for publication 49 revised civil jury instructions, prepared by the advisory committee, that contain changes that do not require Judicial Council approval. On RUPRO's approval, these instructions will be officially published in the June supplement to the 2016 edition of the *Judicial Council of California Civil Jury Instructions*.

The 49 instructions presented for final RUPRO approval are attached at pages 5–192. The committee in a separate report requests that RUPRO recommend to the Judicial Council for adoption 48 new and revised instructions and verdict forms.

Previous Council Action

At the October 20, 2006, Judicial Council meeting, the Judicial Council approved authority for RUPRO to:[1]

> Review and approve nonsubstantive technical changes and corrections and minor substantive changes unlikely to create controversy to Judicial Council of California Civil Jury Instructions (CACI) and Criminal Jury Instructions (CALCRIM).

Under the implementing guidelines that RUPRO adopted on December 19, 2006, titled *Jury Instructions Corrections and Technical and Minor Substantive Changes*, RUPRO has final approval authority over the following:

(a) Additions of cases and statutes to the Sources and Authority;
(b) Changes to statutory language quoted in Sources and Authority that are required by legislative amendments, provided that the amendment does not affect the text of the instruction itself;[2]
(c) Additions or changes to the Directions for Use;
(d) Changes to instruction text that are nonsubstantive and unlikely to create controversy. A nonsubstantive change is one that does not affect or alter any fundamental legal basis of the instruction;
(e) Changes to instruction text required by subsequent developments (such as new cases or legislative amendments), provided that the change, though substantive, is both necessary and unlikely to create controversy; and
(f) Revocation of instructions for which any fundamental legal basis of the instruction is no longer valid because of statutory amendment or case law.

Rationale for Recommendation

The Task Force on Jury Instructions was appointed in 1997 on the recommendation of the Blue Ribbon Commission on Jury System Improvement. The mission of the task force was to draft comprehensive, legally accurate jury instructions that are readily understood by the average juror. In July 2003, the council approved its civil jury instructions for initial publication in September 2003. The Advisory Committee on Civil Jury Instructions is charged with maintaining and updating those instructions.[3]

Overview of updates

Of the 49 revised instructions that are presented for final RUPRO approval:

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[1] Judicial Council of Cal., Rules and Projects Committee, *Jury Instructions: Approve New Procedure for RUPRO Review and Approval of Changes in the Jury Instructions* (Sep. 12, 2006), p. 1.

[2] In light of the committee's 2014 decision to remove verbatim quotes of statutes, rules, and regulations, this category (b) is now mostly moot. It might still apply if a statute, rule, or regulation is revoked, or if subdivisions are renumbered.

[3] See Cal. Rules of Court, rules 2.1050(d), 10.58(a).

- All have revisions under category (a) above only (additional cases added to Sources and Authority);
- Five (CACI Nos. 222, 1230, 2322, 2502, and 2508) fall under both categories (a) and (c) (additions or changes to Sources and Authority and Directions for Use)

Standards for adding case excerpts to Sources and Authority

The standards approved by the advisory committee for adding case excerpts to the Sources and Authority are as follows:

1. *CACI* Sources and Authority are in the nature of a digest. Entries should be direct quotes from cases. However, all cases that may be relevant to the subject area of an instruction need not be included, particularly if they do not involve a jury matter.
2. Each legal component of the instruction should be supported by authority, either statutory or case law.
3. Authority addressing the burden of proof should be included.
4. Authority addressing the respective roles of judge and jury (questions of law and questions of fact) should be included.
5. Only one case excerpt should be included for each legal point.
6. California Supreme Court authority should always be included, if available.
7. If no Supreme Court authority is available, the most recent California appellate court authority for a point should be included.
8. A United States Supreme Court case should be included on any point for which it is the controlling authority.
9. A Ninth Circuit Court of Appeals case may be included if the case construes California law or federal law that is the subject of the *CACI* instruction.
10. Other cases may be included if deemed particularly useful to the users.
11. The fact that the committee chooses to include a case excerpt in the Sources and Authority does not mean that the committee necessarily believes that the language is binding precedent. The standard is simply whether the language would be useful or of interest to users.

The advisory committee has deleted material from the Sources and Authority that duplicates other material that is already included or is to be added.

Nonfinal cases and incomplete citations

All of the cases added to instructions covered by this report are final.

Except for U.S. Supreme Court reports, all incomplete citations will be resolved before publication. Any temporary LEXIS citations will be replaced once the official citation is available.

Sources and Authority format cleanup

CACI format for case entries to the Sources and Authority requires that they be in the form of directly quoted material from the case. In some of the series, this format was not uniformly observed initially, and some excerpts are in the form of a legal statement with a citation rather

than a direct quotation. Many of these out-of-format excerpts have been converted to direct quotations.

CACI format also orders statutes, rules, and regulations first; then case excerpts; and then any other authorities, such as a Restatement excerpt. Excerpts that were out of order have been moved to the proper location.

Comments, Alternatives Considered, and Policy Implications

Because the changes to these instructions do not change the legal effect of the instructions in any way, they were not circulated for public comment.

Rules 2.1050 and 10.58 of the California Rules of Court specifically charge the advisory committee to regularly review case law and statutes; to make recommendations to the Judicial Council for updating, amending, and adding topics to *CACI*; and to submit its recommendations to the council for approval. The proposed revisions and additions are necessary to ensure that the instructions remain clear, accurate, and complete.

Implementation Requirements, Costs, and Operational Impacts

There are no implementation costs. To the contrary, under its publication agreement with the Judicial Council, the official publisher, LexisNexis, will print the June supplement to the 2016 edition and pay royalties to the council. The official publisher will also make the new edition available free of charge to all judicial officers in both print and HotDocs document assembly software. With respect to commercial publishers, the council will register the copyright in this work and will continue to license its publication of the instructions under provisions that govern accuracy, completeness, attribution, copyright, fees and royalties, and other publication matters. To continue to make the instructions freely available for use and reproduction by parties, attorneys, and the public, the council will provide a broad public license for their noncommercial use and reproduction.

Attachments

1. Full text of 49 instructions for final RUPRO approval, at pages 5–192

CIVIL JURY INSTRUCTIONS
TABLE OF CONTENTS

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).
- "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.)
- "[E]vidence of a plaintiff's settlement with one or more defendants is admissible at trial to prove witness bias and to prevent collusion." (*Diamond v. Reshko* (2015) 239 Cal.App.4th 828, 843 [191 Cal.Rptr.3d 438].)
- "[A] term in a settlement agreement requiring the settling defendant to stay in the case during trial is not per se improper, but the settling defendant's position should be revealed to the court and jury to avoid committing a fraud on the court, and to permit the trier of fact to properly weigh the settling defendant's testimony." (*Diamond*, *supra*, 239 Cal.App.4th at p. 844.)
- "[T]he good faith settlement determination did not limit the trial court's authority to admit evidence of that settlement at trial. To the contrary, … the decision whether to admit evidence of the settlement was for the trial court to make." (*Diamond*, *supra*, 239 Cal.App.4th at p. 846.)
- "The bias inherent in a settling defendant's realignment with the plaintiff's interest may or may not affect the conduct of the plaintiff or settling defendant at trial, but that is a question for the jury to decide." (*Diamond*, *supra*, 239 Cal.App.4th at p. 848.)

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)

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).
- "Under Evidence Code section 720, subdivision (a), a person is qualified to testify as an expert if he or she 'has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates.' '[T]he determinative issue in each case must be

whether the witness has sufficient skill or experience in the field so that his testimony would be likely to assist the jury in the search for the truth … . [Citation.] Where a witness has disclosed sufficient knowledge, the question of the degree of knowledge goes more to the weight of the evidence than its admissibility. [Citation.]' " (*Lattimore v. Dickey* (2015) 239 Cal.App.4th 959, 969 [191 Cal.Rptr.3d 766].)

- 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].)

- 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; Revised June 2016

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. A 'Mary Carter' agreement calls for the settling defendant to participate in the trial on the plaintiff's behalf, and provides for a settling defendant to be credited for amounts the plaintiff recovers from nonsettling defendants. It is secret and raises concerns of collusion and the potential for fraud. The interests of the parties are realigned in a manner not apparent to the trier of fact. (*Diamond v. Reshko* (2015) 239 Cal.App.4th 828, 843, fn. 7 [191 Cal.Rptr.3d 438].)
~~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).)

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.

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).

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

- 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)

314. Interpretation—Disputed Words

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

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

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

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

New September 2003; Revised December 2014

Directions for Use

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

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

Sources and Authority

- Contract Interpretation: Intent. Civil Code section 1636.
- Contracts Explained by Circumstances. Civil Code section 1647.
- "Juries are not prohibited from interpreting contracts. Interpretation of a written instrument becomes solely a judicial function only when it is based on the words of the instrument alone, when there is no conflict in the extrinsic evidence, or a determination was made based on incompetent evidence. But when, as here, ascertaining the intent of the parties at the time the contract was executed depends on the credibility of extrinsic evidence, that credibility determination and the interpretation of the contract are questions of fact that may properly be resolved by the jury." (*City of Hope National Medical Center, supra,* 43 Cal.4th at p. 395, footnote and internal citations omitted.)
- "This rule—that the jury may interpret an agreement when construction turns on the credibility of

extrinsic evidence—is well established in our case law. California's jury instructions reflect this (Judicial Council of Cal. Civ. Jury Instns. (2008) CACI No. 314) … , as do authoritative secondary sources." (*City of Hope National Medical Center, supra,* 43 Cal.4th at pp. 395−396, internal citations omitted.)

- "The trial court's determination of whether an ambiguity exists is a question of law, subject to independent review on appeal. The trial court's resolution of an ambiguity is also a question of law if no parol evidence is admitted or if the parol evidence is not in conflict. However, where the parol evidence is in conflict, the trial court's resolution of that conflict is a question of fact and must be upheld if supported by substantial evidence. Furthermore, '[w]hen two equally plausible interpretations of the language of a contract may be made . . . parol evidence is admissible to aid in interpreting the agreement, thereby presenting a question of fact which precludes summary judgment if the evidence is contradictory.' " (*WYDA Associates v. Merner* (1996) 42 Cal.App.4th 1702, 1710 [50 Cal.Rptr.2d 323].)

- "In interpreting a contract, the objective intent, as evidenced by the words of the contract is controlling. We interpret the intent and scope of the agreement by focusing on the usual and ordinary meaning of the language used and the circumstances under which the agreement was made." (*Lloyd's Underwriters v. Craig & Rush, Inc.* (1994) 26 Cal.App.4th 1194, 1197-1198 [32 Cal.Rptr.2d 144], internal citations omitted.)

- "Ordinarily, even in an integrated contract, extrinsic evidence can be admitted to explain the meaning of the contractual language at issue, although it cannot be used to contradict it or offer an inconsistent meaning. The language, in such a case, must be ' "reasonably susceptible" ' to the proposed meaning." (*Hot Rods, LLC v. Northrop Grumman Systems Corp.* (2015) 242 Cal.App.4th 1166, 1175–1176 [196 Cal.Rptr.3d 53].)

Secondary Sources

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

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

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

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

409. Primary Assumption of Risk—Liability of Instructors, Trainers, or Coaches

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[*Name of plaintiff***] claims [he/she] was harmed by [***name of defendant***]'s [coaching/training/instruction]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was [***name of plaintiff***]'s [coach/trainer/instructor];**

2. **[That [***name of defendant***] intended to cause [***name of plaintiff***] injury or acted recklessly in that [his/her] conduct was entirely outside the range of ordinary activity involved in teaching or coaching [***sport or other recreational activity, e.g., horseback riding***] in which [***name of plaintiff***] was participating;]**

   [or]

   [That [*name of defendant***] unreasonably increased the risks to [***name of plaintiff***] over and above those inherent in [***e.g., horseback riding***];]**

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 April 2004, June 2012, December 2013

Directions for Use

This instruction sets forth a plaintiff's response to a defendant's assertion of the affirmative defense of primary assumption of risk. Primary assumption of risk generally absolves the defendant of a duty of care toward the plaintiff with regard to injury incurred in the course of a sporting or other recreational activity covered by the doctrine. (See *Knight v. Jewett* (1992) 3 Cal.4th 296, 320 [11 Cal.Rptr.2d 2, 834 P.2d 696].)

There are exceptions, however, in which there is a duty of care. Use the first option for element 2 if it is alleged that the coach or trainer intended to cause the student's injury or engaged in conduct totally outside the range of the ordinary activity involved in teaching or coaching the sport or activity. Use the second option if it is alleged that the coach's or trainer's failure to use ordinary care increased the risk of injury to the plaintiff, for example, by encouraging or allowing him or her to participate in the sport or activity when he or she was physically unfit to participate or by allowing the plaintiff to use unsafe equipment or instruments. (See *Eriksson v. Nunnink* (2011) 191 Cal.App.4th 826, 845 [120 Cal.Rptr.3d 90].) If the second option is selected, also give CACI No. 400, *Negligence—Essential Factual Elements.*

While duty is a question of law, courts have held that whether the defendant has unreasonably increased the risk is a question of fact for the jury. (See *Luna v. Vela* (2008) 169 Cal.App.4th 102, 112–113 [86

Cal.Rptr.3d 588] [and cases cited therein].) There may also be disputed facts that must be resolved by a jury before it can be determined if the doctrine applies. (See *Shin v. Ahn* (2007) 42 Cal.4th 482, 486 [64 Cal.Rptr.3d 803, 165 P.3d 581].)

For an instruction on primary assumption of risk applicable to coparticipants, see CACI No. 408, *Primary Assumption of Risk—Liability of Coparticipant in Sport or Other Recreational Activity.* For an instruction on primary assumption of risk applicable to facilities owners and operators and to event sponsors, see CACI No. 410, *Primary Assumption of Risk—Liability of Facilities Owners and Operators and Event Sponsors.*

Sources and Authority

- "In order to support a cause of action in cases in which it is alleged that a sports instructor has required a student to perform beyond the student's capacity or without providing adequate instruction, it must be alleged and proved that the instructor acted with intent to cause a student's injury or that the instructor acted recklessly in the sense that the instructor's conduct was 'totally outside the range of the ordinary activity' involved in teaching or coaching the sport." (*Kahn v. East Side Union High School District* (2003) 31 Cal.4th 990, 1011 [4 Cal.Rptr.3d 103, 75 P.3d 30], internal citation omitted.)

- "[T]he primary assumption of risk doctrine is not limited to activities classified as sports, but applies as well to other recreational activities 'involving an inherent risk of injury to voluntary participants … where the risk cannot be eliminated without altering the fundamental nature of the activity.' " (*Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148, 1156 [150 Cal.Rptr.3d 551, 290 P.3d 1158].)

- "Here, we do not deal with the relationship between coparticipants in a sport, or with the duty that an operator may or may not owe to a spectator. Instead, we deal with the duty of a coach or trainer to a student who has entrusted himself to the former's tutelage. There are precedents reaching back for most of this century that find an absence of duty to coparticipants and, often, to spectators, but the law is otherwise as applied to coaches and instructors. For them, the general rule is that coaches and instructors owe a duty of due care to persons in their charge. The coach or instructor is not, of course, an insurer, and a student may be held to notice that which is obvious and to ask appropriate questions. But all of the authorities that comment on the issue have recognized the existence of a duty of care." (*Tan v. Goddard* (1993) 13 Cal.App.4th 1528, 1535–1536 [17 Cal.Rptr.2d 89, internal citations omitted.)

- "[D]ecisions have clarified that the risks associated with learning a sport may themselves be inherent risks of the sport, and that an instructor or coach generally does not increase the risk of harm inherent in learning the sport simply by urging the student to strive to excel or to reach a new level of competence." (*Kahn, supra,* 31 Cal.4th at p. 1006.)

- "To the extent a duty is alleged against a coach for 'pushing' and/or 'challenging' a student to improve and advance, the plaintiff must show that the coach intended to cause the student's injury or engaged in reckless conduct—that is, conduct totally outside the range of the ordinary activity involved in teaching or coaching the sport. Furthermore, a coach has a duty of ordinary care not to increase the risk of injury to a student by encouraging or allowing the student to participate in the

sport when he or she is physically unfit to participate or by allowing the student to use unsafe equipment or instruments." (*Eriksson, supra,* 191 Cal.App.4th at p. 845, internal citation omitted.)

- "That an instructor might ask a student to do more than the student can manage is an inherent risk of the activity. Absent evidence of recklessness, or other risk-increasing conduct, liability should not be imposed simply because an instructor asked the student to take action beyond what, with hindsight, is found to have been the student's abilities. To hold otherwise would discourage instructors from requiring students to stretch, and thus to learn, and would have a generally deleterious effect on the sport as a whole." (*Honeycutt v. Meridian Sports Club, LLC* (2014) 231 Cal.App.4th 251, 258 [179 Cal.Rptr.3d 473].)

- Coaches and sports instructors "owe students a duty 'not to increase the risks inherent in the learning process undertaken by the student.' But this does not require them to 'fundamentally alter the nature of the sport and, in some instances, effectively preclude participation altogether ... .' Instead, '[b]y choosing to participate in a sport that poses the obvious possibility of injury, the student athlete must learn to accept an adverse result of the risks inherent in the sport.' " (*Lupash v. City of Seal Beach* (1999) 75 Cal.App.4th 1428, 1436−1437 [89 Cal.Rptr.2d 920], internal citations omitted.)

- "The determinant of duty, 'inherent risk,' is to be decided solely as a question of law and based on the general characteristics of the sport activity and the parties' relationship to it." ((*Griffin v. The Haunted Hotel, Inc.* (2015) 242 Cal.App.4th 490, 501 [194 Cal.Rptr.3d 830].)

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

pp. 112–113.)

- "The existence of a duty of care is a separate issue from the question whether (on the basis of forseeability among other factors) a particular defendant breached that duty of care, which is an essentially factual matter." (*Kockelman v. Segal* (1998) 61 Cal.App.4th 491, 498 [71 Cal.Rptr.2d 552].)

Secondary Sources

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

Haning et al., California Practice Guide: Personal Injury, Ch. 3-D, *Mitigating Factors In Reduction Of Damages*, ¶¶ 3:234–3:254.30 (The Rutter Group)

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

23 California Forms of Pleading and Practice, Ch. 273, *Games, Sports, and Athletics*, § 273.31 (Matthew Bender)

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

410. Primary Assumption of Risk—Liability of Facilities Owners and Operators and Event Sponsors

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[*Name of plaintiff***] claims [he/she] was harmed while [participating in/watching] [***sport or other recreational activity e.g., snowboarding***] at [***name of defendant***]'s [***specify facility or event where plaintiff was injured, e.g., ski resort***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was the [owner/operator/sponsor/***other***] of [***e.g., a ski resort***];**

2. **That [***name of defendant***] unreasonably increased the risks to [***name of plaintiff***] over and above those inherent in [***e.g., snowboarding***];**

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 December 2013

Directions for Use

This instruction sets forth a plaintiff's response to a defendant's assertion of the affirmative defense of primary assumption of risk. Primary assumption of risk generally absolves the defendant of a duty of care toward the plaintiff with regard to injury incurred in the course of a sporting or other recreational activity covered by the doctrine. (See *Knight v. Jewett* (1992) 3 Cal.4th 296, 320 [11 Cal.Rptr.2d 2, 834 P.2d 696].) There is, however, a duty applicable to facilities owners and operators and to event sponsors not to unreasonably increase the risks of injury to participants and spectators beyond those inherent in the activity. (See *Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148, 1162 [150 Cal.Rptr.3d 551, 290 P.3d 1158] [participants]; *Lowe v. California League of Prof. Baseball* (1997) 56 Cal.App.4th 112, 123 [65 Cal.Rptr.2d 105] [spectators].)

While duty is a question of law, courts have held that whether the defendant has increased the risk is a question of fact for the jury. (See *Luna v. Vela* (2008) 169 Cal.App.4th 102, 112–113 [86 Cal.Rptr.3d 588] [and cases cited therein].) There may also be disputed facts that must be resolved by a jury before it can be determined if the doctrine applies. (See *Shin v. Ahn* (2007) 42 Cal.4th 482, 486 [64 Cal.Rptr.3d 803, 165 P.3d 581].)

For an instruction on primary assumption of risk applicable to coparticipants, see CACI No. 408, *Primary Assumption of Risk—Liability of Coparticipant in Sport or Other Recreational Activity.* For an instruction on primary assumption of risk applicable to instructors, trainers, and coaches, see CACI No. 409, *Primary Assumption of Risk—Liability of Instructors, Trainers, or Coaches*.

Sources and Authority

- "[U]nder the primary assumption of risk doctrine, operators, sponsors and instructors in recreational activities posing inherent risks of injury have no duty to eliminate those risks, but do owe participants the duty not to unreasonably increase the risks of injury beyond those inherent in the activity." (*Nalwa, supra,* 55 Cal.4th at p. 1162.)

- "The doctrine applies to recreational activities ' "involving an inherent risk of injury to voluntary participants … where the risk cannot be eliminated without altering the fundamental nature of the activity." ' " (*Griffin v. The Haunted Hotel, Inc.* (2015) 242 Cal.App.4th 490, 500 [194 Cal.Rptr.3d 830].)

- "The determinant of duty, 'inherent risk,' is to be decided solely as a question of law and based on the general characteristics of the sport activity and the parties' relationship to it." (*Griffin, supra,* 242 Cal.App.4th at p. 501.)

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

- "Although defendants generally have no legal duty to eliminate (or protect a plaintiff against) risks inherent in the sport itself, it is well established that defendants generally do have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport. Thus, although a ski resort has no duty to remove moguls from a ski run, it clearly does have a duty to use due care to maintain its towropes in a safe, working condition so as not to expose skiers to an

increased risk of harm. The cases establish that the latter type of risk, posed by a ski resort's negligence, clearly is not a risk (inherent in the sport) that is assumed by a participant." (*Knight, supra,* 3 Cal.4th at pp. 315−316.)

- "Under *Knight,* defendants had a duty *not to increase* the inherent risks to which spectators at professional baseball games are regularly exposed and which they assume. As a result, a triable issue of fact remained, namely whether the [defendants]' mascot cavorting in the stands and distracting plaintiff's attention, *while the game was in progress,* constituted a breach of that duty, i.e., constituted negligence in the form of increasing the inherent risk to plaintiff of being struck by a foul ball." (*Lowe, supra,* 56 Cal.App.4th at p. 114, original italics.)

- "[T]hose responsible for maintaining athletic facilities have a … duty not to increase the inherent risks, albeit in the context of businesses selling recreational opportunities." (*Avila v. Citrus Community College Dist.* (2006) 38 Cal.4th 148, 162 [41 Cal.Rptr.3d 299, 131 P.3d 383], internal citation omitted.)

- "*Knight,* consistently with established case law, simply requires courts in each instance to examine the question of duty in light of the nature of the defendant's activities and the relationship of the parties to that activity." (*Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 482 [63 Cal.Rptr.2d 291, 936 P.2d 70].)

- "Because primary assumption of risk focuses on the question of duty, it is not dependent on either the plaintiff's implied consent to, or subjective appreciation of, the potential risk.' (*Griffin, supra,* 242 Cal.App.4th at p. 502.)

- "Defendants' obligation not to increase the risks inherent in the activity included a duty to provide safe equipment for the trip, such as a safe and sound craft." (*Ferrari v. Grand Canyon Dories* (1995) 32 Cal.App.4th 248, 255 [38 Cal.Rptr.2d 65].)

Secondary Sources

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

Haning et al., California Practice Guide: Personal Injury, Ch. 3-D, *Mitigating Factors In Reduction Of Damages,* ¶¶ 3:234–3:254.30 (The Rutter Group)

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

23 California Forms of Pleading and Practice, Ch. 273, *Games, Sports, and Athletics,* § 273.31 (Matthew Bender)

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

423. Public Entity Liability for Failure to Perform Mandatory Duty

[*Name of plaintiff***] claims that [he/she] was harmed because [***name of defendant***] violated [***insert reference to statute, regulation, or ordinance***] which states: _____ [***insert relevant language***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] violated [***insert reference to statute, regulation, or ordinance***];**

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

3. **That [***name of defendant***]'s failure to perform its duty was a substantial factor in causing [***name of plaintiff***]'s harm.**

[*Name of defendant***], however, is not responsible for [***name of plaintiff***]'s harm if [***name of defendant***] proves that it made reasonable efforts to perform its duties under the [statute/regulation/ordinance].**

New September 2003

Directions for Use

The judge decides the issues of whether the statute imposes a mandatory duty and whether it was designed to protect against the type of harm suffered. (*Haggis v. City of Los Angeles* (2000) 22 Cal.4th 490, 499 [93 Cal.Rptr.2d 327, 993 P.2d 983].)

Sources and Authority

- Government Liability for Failure to Perform Mandatory Duty. Government Code section 815.6.

- " 'Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty.' (Gov. Code, § 815.6.) Thus, the government may be liable when (1) a mandatory duty is imposed by enactment, (2) the duty was designed to protect against the kind of injury allegedly suffered, and (3) breach of the duty proximately caused injury." (*State Dept. of State Hospitals v. Superior Court* (2015) 61 Cal.4th 339, 348 [188 Cal.Rptr.3d 308, 349 P.3d 1013].)

- "In order to recover plaintiffs have to show that there is some specific statutory mandate that was violated by the County, which violation was a proximate cause of the accident." (*Washington v. County of Contra Costa* (1995) 38 Cal.App.4th 890, 896-897 [45 Cal.Rptr.2d 646], internal citations omitted.)

- "[T]he term 'enactment' refers to 'a constitutional provision, statute, charter provision, ordinance or

regulation.' … A 'contract cannot give rise to "a mandatory duty imposed by an enactment … ." ' " (*Tuthill v. City of San Buenaventura* (2014) 223 Cal.App.4th 1081, 1091−1092 [167 Cal.Rptr.3d 820].)

- "The first element of liability under Government Code section 815.6 requires that ' "the enactment at issue be *obligatory*, rather than merely discretionary or permissive, in its directions to the public entity; it must *require*, rather than merely authorize or permit, that a particular action be taken or not taken. [Citation.] It is not enough, moreover, that the public entity or officer have been under an obligation to perform a function if the function itself involves the exercise of discretion. [Citation.]' [Citation.] Courts have construed this first prong rather strictly, finding a mandatory duty only if the enactment 'affirmatively imposes the duty and provides implementing guidelines." ' " (*B.H. v. County of San Bernardino* (2015) 62 Cal.4th 168, 180 [195 Cal.Rptr.3d 220, 361 P.3d 319], original italics.) ~~'[A]pplication of section 815.6 requires that the enactment at issue be *obligatory*, rather than merely discretionary or permissive, in its directions to the public entity; it must *require*, rather than merely authorize or permit, that a particular action be taken or not taken.'~~
- ~~Even where an enactment imposes an obligation, it does not necessarily follow that the obligation gives rise to a mandatory duty. The key question is whether the obligation involves an exercise of discretion." (*County of Los Angeles v. Superior Court* (2012) 209 Cal.App.4th 543, 549 [147 Cal.Rptr.3d 33], original italics, internal citation omitted.)~~

- " 'It is not enough, moreover, that the public entity or officer have been under an obligation to perform a function *if the function itself involves the exercise of discretion*.' Moreover, '[c]ourts have … [found] a mandatory duty only if the enactment "affirmatively imposes the duty and provides implementing guidelines." ' ' " '[T]he mandatory nature of the duty must be phrased in explicit and forceful language.' [Citation.] 'It is not enough that some statute contains mandatory language. In order to recover plaintiffs have to show that there is some specific statutory mandate that was violated by the [public entity].' " [Citations.]' " (*State Dept. of State Hospitals ~~v. Superior Court~~, supra,* ~~—~~61 Cal. ~~App.~~4th at pp. 348−349, internal citations omitted.)

- "Courts have recognized that as a practical matter the standard for determining whether a mandatory duty exists is 'virtually identical' to the test for an implied statutory duty of care under Evidence Code section 669." (*Alejo v. City of Alhambra* (1999) 75 Cal.App.4th 1180, 1185, fn. 3 [89 Cal.Rptr.2d 768], disapproved on other grounds in *B.H, supra*, -- Cal.4th at p. --, fn. 6, internal citations omitted.)

- "The injury must be ' " 'one of the consequences which the [enacting body] sought to prevent through imposing the alleged mandatory duty.' " ' … 'That the enactment "confers some benefit" on the class to which plaintiff belongs is not enough; if the benefit is "incidental" to the enactment's protective purpose, the enactment cannot serve as a predicate for liability under section 815.6." (*Tuthill, supra,* 223 Cal.App.4th at p. 1092, internal citation omitted.)

- "Financial limitations of governments have never been, and cannot be, deemed an excuse for a public employee's failure to comply with mandatory duties imposed by law." (*Scott v. County of Los Angeles* (1994) 27 Cal.App.4th 125, 146 [32 Cal.Rptr.2d 643], internal citations omitted.)

- "Questions of statutory immunity do not become relevant until it has been determined that the defendant otherwise owes a duty of care to the plaintiff and thus would be liable in the absence of

such immunity. However, a defendant may not be held liable for the breach of a duty if such an immunity in fact exists." (*Washington, supra,* 38 Cal.App.4th at p. 896, internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 245–248

5 Levy et al., California Torts, Ch. 60, *General Principles of Liability and Immunity of Public Entities and Employees*, § 60.22 (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 464, *Public Entities and Officers: California Government Claims Act*, § 464.61 (Matthew Bender)

45 California Forms of Pleading and Practice, Ch. 514, *Schools: Injuries to Students*, § 514.17 (Matthew Bender)

19 California Points and Authorities, Ch. 196, *Public Entities*, § 196.182 (Matthew Bender)

430. Causation: Substantial Factor

A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm.

[Conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct.]

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

Directions for Use

As phrased, this definition of "substantial factor" subsumes the "but for" test of causation, that is, "but for" the defendant's conduct, the plaintiff's harm would not have occurred. (*Mitchell v. Gonzales* (1991) 54 Cal.3d 1041, 1052 [1 Cal.Rptr.2d 913, 819 P.2d 872]; see Rest.2d Torts, § 431.) The optional last sentence makes this explicit, and in some cases it may be error not to give this sentence. (See *Soule v. GM Corp.* (1994) 8 Cal.4th 548, 572–573 [34 Cal.Rptr.2d 607, 882 P.2d 298]; Rest.2d Torts, § 432(1).)

"Conduct," in this context, refers to the culpable acts or omissions on which a claim of legal fault is based, e.g., negligence, product defect, breach of contract, or dangerous condition of public property. This is in contrast to an event that is not a culpable act but that happens to occur in the chain of causation, e.g., that the plaintiff's alarm clock failed to go off, causing her to be at the location of the accident at a time when she otherwise would not have been there. The reference to "conduct" may be changed as appropriate to the facts of the case.

The "but for" test of the last optional sentence does not apply to concurrent independent causes, which are multiple forces operating at the same time and independently, each of which would have been sufficient by itself to bring about the same harm. (*Viner v. Sweet* (2003) 30 Cal.4th 1232, 1240 [135 Cal.Rptr.2d 629, 70 P.3d 1046]; *Barton v. Owen* (1977) 71 Cal.App.3d 484, 503–504 [139 Cal.Rptr. 494]; see Rest.2d Torts, § 432(2).) Accordingly, do not include the last sentence in a case involving concurrent independent causes.

In cases of multiple (concurrent dependent) causes, CACI No. 431, *Causation: Multiple Causes,* should also be given.

In asbestos-related cancer cases, *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 977 [67 Cal.Rptr.2d 16, 941 P.2d 1203] requires a different instruction regarding exposure to a particular product. Give CACI No. 435, *Causation for Asbestos-Related Cancer Claims,* and do not give this instruction.

Sources and Authority

- "The test for joint tort liability is set forth in section 431 of the Restatement of Torts 2d, which provides: 'The actor's negligent conduct is a legal cause of harm to another if (a) his conduct is a

substantial factor in bringing about the harm, and, (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm.' Section 431 correctly states California law as to the issue of causation in tort cases." (*Wilson v. Blue Cross of So. Cal.* (1990) 222 Cal.App.3d 660, 671–672 [271 Cal.Rptr. 876].)

- "California has definitively adopted the substantial factor test of the Restatement Second of Torts for cause-in-fact determinations. Under that standard, a cause in fact is something that is a substantial factor in bringing about the injury. The substantial factor standard generally produces the same results as does the 'but for' rule of causation which states that a defendant's conduct is a cause of the injury if the injury would not have occurred 'but for' that conduct. The substantial factor standard, however, has been embraced as a clearer rule of causation—one which subsumes the 'but for' test while reaching beyond it to satisfactorily address other situations, such as those involving independent or concurrent causes in fact." (*Rutherford, supra,* 16 Cal.4th at pp. 968–969, internal citations omitted.)

- "The term 'substantial factor' has not been judicially defined with specificity, and indeed it has been observed that it is 'neither possible nor desirable to reduce it to any lower terms.' This court has suggested that a force which plays only an 'infinitesimal' or 'theoretical' part in bringing about injury, damage, or loss is not a substantial factor. Undue emphasis should not be placed on the term 'substantial.' For example, the substantial factor standard, formulated to aid plaintiffs as a broader rule of causality than the 'but for' test, has been invoked by defendants whose conduct is clearly a 'but for' cause of plaintiff's injury but is nevertheless urged as an insubstantial contribution to the injury. Misused in this way, the substantial factor test 'undermines the principles of comparative negligence, under which a party is responsible for his or her share of negligence and the harm caused thereby.' " (*Rutherford, supra,* 16 Cal.4th at pp. 968–969, internal citations omitted.)

- "The substantial factor standard is a relatively broad one, requiring only that the contribution of the individual cause be more than negligible or theoretical. Thus, 'a force which plays only an "infinitesimal" or "theoretical" part in bringing about injury, damage, or loss is not a substantial factor', but a very minor force that does cause harm is a substantial factor. This rule honors the principle of comparative fault." (*Bockrath v. Aldrich Chemical Co.* (1999) 21 Cal.4th 71, 79 [86 Cal.Rptr.2d 846, 980 P.2d 398], internal citations omitted.)

- "The text of Restatement Torts second section 432 demonstrates how the 'substantial factor' test subsumes the traditional 'but for' test of causation. Subsection (1) of section 432 provides: 'Except as stated in Subsection (2), the actor's negligent conduct *is not a substantial factor* in bringing about harm to another *if the harm would have been sustained even if the actor had not been negligent*.' … Subsection (2) states that if 'two forces are actively operating … and each of itself is sufficient to bring about harm to another, the actor's negligence may be found to be a substantial factor in bringing it about.' " (*Viner, supra,* 30 Cal.4th at p. 1240, original italics.)

- "Because the 'substantial factor' test of causation subsumes the 'but for' test, the 'but for' test has been phrased in terms of 'substantial factor,' as follows, in the context, as here, of a combination of causes dependent on one another: A defendant's negligent conduct may combine with another factor to cause harm; if a defendant's negligence was a substantial factor in causing the plaintiff's harm, then the defendant is responsible for the harm; a defendant cannot avoid responsibility just because some other person, condition, or event was also a substantial factor in causing the plaintiff's harm; but

conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct." (*Yanez v. Plummer* (2013) 221 Cal.App.4th 180, 187 [164 Cal.Rptr.3d 309].)

- "A tort is a legal cause of injury only when it is a substantial factor in producing the injury. If the external force of a vehicle accident was so severe that it would have caused identical injuries notwithstanding an abstract 'defect' in the vehicle's collision safety, the defect cannot be considered a substantial factor in bringing them about. [¶] The general causation instruction given by the trial court correctly advised that plaintiff could not recover for a design defect unless it was a 'substantial factor' in producing plaintiff's 'enhanced' injuries. However, this instruction dealt only by 'negative implication' with [defendant]'s theory that any such defect was *not* a 'substantial factor' in this case because this particular accident would have broken plaintiff's ankles in any event. As we have seen, [defendant] presented substantial evidence to that effect. [Defendant] was therefore entitled to its special instruction, and the trial court's refusal to give it was error." (*Soule, supra,* 8 Cal.4th at p. 572–573, original italics, footnote and internal citations omitted.)

- "The first element of legal cause is cause in fact ... . The 'but for' rule has traditionally been applied to determine cause in fact. The Restatement formula uses the term *substantial factor* 'to denote the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause.' " (*Mayes v. Bryan* (2006) 139 Cal.App.4th 1075, 1095 [44 Cal.Rptr.3d 14], internal citations omitted.)

- "We have recognized that proximate cause has two aspects. ' "One is *cause in fact*. An act is a cause in fact if it is a necessary antecedent of an event." ' This is sometimes referred to as 'but-for' causation. ~~n12~~ In cases where concurrent independent causes contribute to an injury, we apply the 'substantial factor' test of the Restatement Second of Torts, section 423, which subsumes traditional 'but for' causation. This case does not involve concurrent independent causes, so the 'but for' test governs questions of factual causation." (*State Dept. of State Hospitals v. Superior Court* (2015) 61 Cal.4th 339, 354 [188 Cal.Rptr.3d 308, 349 P.3d 1013], footnote omitted.)

- "The substantial factor standard generally produces the same results as does the 'but for' rule of causation which states that a defendant's conduct is a cause of the injury if the injury would not have occurred 'but for' that conduct. The substantial factor standard, however, has been embraced as a clearer rule of causation—one which subsumes the 'but for' test while reaching beyond it to satisfactorily address other situations, such as those involving independent or concurrent causes in fact." (*People v. Foalima* (2015) 239 Cal.App.4th 1376, 1396 [192 Cal.Rptr.3d 136], internal citations omitted.)

- " 'Whether a defendant's conduct actually caused an injury is a question of fact … that is ordinarily for the jury … .' '[C]ausation in fact is ultimately a matter of probability and common sense: "[A plaintiff] is not required to eliminate entirely all possibility that the defendant's conduct was not a cause. It is enough that he introduces evidence from which reasonable [persons] may conclude that it is more probable that the event was caused by the defendant than that it was not. The fact of causation is incapable of mathematical proof, since no [person] can say with absolute certainty what would have occurred if the defendant had acted otherwise. If, as a matter of ordinary experience, a particular act or omission might be expected to produce a particular result, and if that result has in fact followed, the conclusion may be justified that the causal relation exists. In drawing that conclusion, the triers of

fact are permitted to draw upon ordinary human experience as to the probabilities of the case." ' … ' "A mere possibility of … causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant." ' " (*Raven H. v. Gamette* (2007) 157 Cal.App.4th 1017, 1029–1030 [68 Cal.Rptr.3d 897], internal citations omitted.)

- "[E]vidence of causation 'must rise to the level of a reasonable probability based upon competent testimony. [Citations.] "A possible cause only becomes 'probable' when, in the absence of other reasonable causal explanations, it becomes more likely than not that the injury was a result of its action." [Citation.] The defendant's conduct is not the cause in fact of harm " 'where the evidence indicates that there is less than a probability, i.e., a 50–50 possibility or a mere chance,' " that the harm would have ensued.' " (*Bowman v. Wyatt* (2010) 186 Cal.App.4th 286, 312 [111 Cal.Rptr.3d 787].)

- "However the test is phrased, causation in fact is ultimately a matter of probability and common sense." (*Osborn v. Irwin Memorial Blood Bank* (1992) 5 Cal.App.4th 234, 253 [7 Cal.Rptr.2d 101], relying on Rest.2d Torts, § 433B, com. b.)

- "The Supreme Court … set forth explicit guidelines for plaintiffs attempting to allege injury resulting from exposure to toxic materials: A plaintiff must 'allege that he was exposed to each of the toxic materials claimed to have caused a specific illness'; 'identify each product that allegedly caused the injury'; allege 'the toxins entered his body' 'as a result of the exposure'; allege that 'he suffers from a specific illness, and that each toxin that entered his body was a substantial factor in bringing about, prolonging, or aggravating that illness'; and, finally, allege that 'each toxin he absorbed was manufactured or supplied by a named defendant.' " (*Jones v. ConocoPhillips Co.* (2011) 198 Cal.App.4th 1187, 1194 [130 Cal.Rptr.3d 571], quoting *Bockrath, supra,* 21 Cal.4th at p. 80, footnote omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1185–1189, 1191

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 1.13–1.15

1 Levy et al., California Torts, Ch. 2, *Causation,* § 2.02 (Matthew Bender)

4 California Trial Guide, Unit 90, *Closing Argument,* § 90.89 (Matthew Bender)

California Products Liability Actions, Ch. 2, *Liability for Defective Products,* § 2.22, Ch. 7, *Proof,* § 7.06 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence,* § 380.71 (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence,* §§ 165.260–165.263 (Matthew Bender)

435. Causation for Asbestos-Related Cancer Claims

A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It does not have to be the only cause of the harm.

[*Name of plaintiff***] may prove that exposure to asbestos from [***name of defendant***]'s product was a substantial factor causing [his/her/[***name of decedent***]'s] illness by showing, through expert testimony, that there is a reasonable medical probability that the exposure was a substantial factor contributing to [his/her] risk of developing cancer.**

New September 2003; Revised December 2007

Directions for Use

If the issue of medical causation is tried separately, revise this instruction to focus on that issue.

If necessary, CACI No. 431, *Causation: Multiple Causes,* may also be given. Unless there are other defendants who are not asbestos manufacturers or suppliers, do not give CACI No. 430, *Causation: Substantial Factor*.

Sources and Authority

- "In the context of a cause of action for asbestos-related latent injuries, the plaintiff must first establish some threshold *exposure* to the defendant's defective asbestos-containing products, and must further establish in reasonable medical probability that a particular exposure or series of exposures was a 'legal cause' of his injury, i.e., a *substantial factor* in bringing about the injury. In an asbestos-related cancer case, the plaintiff need *not* prove that fibers from the defendant's product were the ones, or among the ones, that actually began the process of malignant cellular growth. Instead, the plaintiff may meet the burden of proving that exposure to defendant's product was a substantial factor causing the illness by showing that in reasonable medical probability it was a substantial factor contributing to the plaintiff's or decedent's *risk* of developing cancer. The jury should be so instructed. The standard instructions on substantial factor and concurrent causation remain correct in this context and should also be given." (*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 982–983 [67 Cal.Rptr.2d 16, 941 P.2d 1203], original italics, internal citation and footnotes omitted.)

- "The term 'substantial factor' has not been judicially defined with specificity, and indeed it has been observed that it is 'neither possible nor desirable to reduce it to any lower terms.' This court has suggested that a force which plays only an 'infinitesimal' or 'theoretical' part in bringing about injury, damage, or loss is not a substantial factor. Undue emphasis should not be placed on the term 'substantial.' For example, the substantial factor standard, formulated to aid plaintiffs as a broader rule of causality than the 'but for' test, has been invoked by defendants whose conduct is clearly a 'but for' cause of plaintiff's injury but is nevertheless urged as an insubstantial contribution to the injury. Misused in this way, the substantial factor test 'undermines the principles of comparative negligence, under which a party is responsible for his or her share of negligence and the harm caused

thereby.' " (*Rutherford, supra*, 16 Cal.4th at p. 969, internal citations omitted.)

- "[A] very minor force that does cause harm is a substantial factor. This rule honors the principle of comparative fault." (*Bockrath v. Aldrich Chem. Co.* (1999) 21 Cal.4th 71, 79 [86 Cal.Rptr.2d 846, 980 P.2d 398], internal citation omitted.)

- "Contrary to defendant's assertion, the California Supreme Court's decision in *Viner v. Sweet* (2003) 30 Cal.4th 1232 [135 Cal. Rptr. 2d 629, 70 P.3d 1046] (*Viner*) did not alter the causation requirement in asbestos-related cases. In *Viner*, the court noted that subsection (1) of section 432 of the Restatement Second of Torts, which provides that 'the actor's negligent conduct is not a substantial factor in bringing about harm to another if the harm would have been sustained even if the actor had not been negligent,' 'demonstrates how the "substantial factor" test subsumes the traditional "but for" test of causation.' Defendant argues that *Viner* required plaintiffs to show that defendant's product 'independently caused [plaintiff's] injury or that, but for that exposure, [plaintiff] would not have contracted lung cancer.' *Viner*, however, is a legal malpractice case. It does not address the explicit holding in *Rutherford* that 'plaintiffs may prove causation in asbestos-related cancer cases by demonstrating that the plaintiff's exposure to defendant's asbestos-containing product in reasonable medical probability was a substantial factor in contributing to the aggregate dose of asbestos the plaintiff or decedent inhaled or ingested, and hence to the risk of developing asbestos-related cancer, without the need to demonstrate that fibers from the defendant's particular product were the ones, or among the ones, that actually produced the malignant growth.' " *Viner* is consistent with *Rutherford* insofar as *Rutherford* requires proof that an individual asbestos-containing product is a substantial factor contributing to the plaintiff's risk or probability of developing cancer." (*Jones v. John Crane, Inc.* (2005) 132 Cal.App.4th 990, 998, fn. 3 [35 Cal.Rptr.3d 144], internal citations omitted.)

- " 'A threshold issue in asbestos litigation is exposure to the defendant's product. … If there has been no exposure, there is no causation.' Plaintiffs bear the burden of 'demonstrating that exposure to [defendant's] asbestos products was, in reasonable medical probability, a substantial factor in causing or contributing to [plaintiff's] risk of developing cancer.' 'Factors relevant to assessing whether such a medical probability exists include frequency of exposure, regularity of exposure and proximity of the asbestos product to [plaintiff].' Therefore, '[plaintiffs] cannot prevail against [defendant] without evidence that [plaintiff] was exposed to asbestos-containing materials manufactured or furnished by [defendant] with enough frequency and regularity as to show a reasonable medical probability that this exposure was a factor in causing the plaintiff's injuries.' " (*Whitmire v. Ingersoll-Rand Co.* (2010) 184 Cal.App.4th 1078, 1084 [109 Cal.Rptr.3d 371], internal citations omitted.)

- "Further, '[t]he mere "possibility" of exposure' is insufficient to establish causation. '[P]roof that raises mere speculation, suspicion, surmise, guess or conjecture is not enough to sustain [the plaintiff's] burden' of persuasion." (*Izell v. Union Carbide Corp.* (2014) 231 Cal.App.4th 962, 969 [180 Cal.Rptr.3d 382], internal citations omitted.)

- "To support an allocation of liability to another party in an asbestos case, a defendant must 'present evidence that the aggregate dose of asbestos particles arising from' exposure to that party's asbestos 'constituted a substantial factor in the causation of [the decedent's] cancer.' " (*Soto v. BorgWarner Morse TEC Inc.* (2015) 239 Cal.App.4th 165, 205 [191 Cal.Rptr.3d 263] ~~Plaintiffs may prove causation in an asbestos case by demonstrating that the plaintiff's or decedent's exposure to~~

~~defendant's asbestos-containing product in reasonable medical probability was a substantial factor in contributing to the aggregate dose of asbestos the plaintiff or decedent inhaled or ingested, and hence to the risk of developing asbestos-related cancer." (*McGonnell v. Kaiser Gypsum Co., Inc.* (2002) 98 Cal.App.4th 1098, 1103 [120 Cal.Rptr.2d 23], internal citations omitted~~.)

- " '[G]iven the long latency period of asbestos-related disease, and the occupational settings that commonly exposed the worker to multiple forms and brands of asbestos products with varying degrees of toxicity,' our Supreme Court has held that a plaintiff 'need *not* prove with medical exactitude that fibers from a particular defendant's asbestos-containing products were those, or among those, that actually began the cellular process of malignancy.' Rather, a 'plaintiff may meet the burden of proving that exposure to defendant's product was a substantial factor causing the illness by showing that in reasonable medical probability it was a substantial factor contributing to the plaintiff's or decedent's *risk* of developing cancer.' " (*Izell, supra,* 231 Cal.App.4th at p. 975, original italics, internal citation omitted.)

- "Many factors are relevant in assessing the medical probability that an exposure contributed to plaintiff's asbestos disease. Frequency of exposure, regularity of exposure, and proximity of the asbestos product to plaintiff are certainly relevant, although these considerations should not be determinative in every case. [Citation.] Additional factors may also be significant in individual cases, such as the type of asbestos product to which plaintiff was exposed, the type of injury suffered by plaintiff, and other possible sources of plaintiff's injury. [Citations.] 'Ultimately, the sufficiency of the evidence of causation will depend on the unique circumstances of each case.' [Citation.] " (*Paulus v. Crane Co.* (2014) 224 Cal.App.4th 1357, 1363−1364 [169 Cal.Rptr.3d 373].)

- "Mere presence at a site where asbestos was present is insufficient to establish legally significant asbestos exposure." (*Shiffer v. CBS Corp.* (2015) 240 Cal.App.4th 246, 252 [192 Cal.Rptr.3d 346].)

- "We disagree with the trial court's view that *Rutherford* mandates that a medical doctor must expressly link together the evidence of substantial factor causation. The *Rutherford* court did not create a requirement that specific words must be recited by appellant's expert. Nor did the *Rutherford* court specify that the testifying expert in asbestos cases must always be 'somebody with an M.D. after his name.' The *Rutherford* court agreed with the *Lineaweaver* court that 'the reference to "medical probability" in the standard "is no more than a recognition that asbestos injury cases (like medical malpractice cases) involve the use of medical evidence." [Citation.]' The Supreme Court has since clarified that medical evidence does not necessarily have to be provided by a medical doctor." (*Hernandez v. Amcord, Inc.* (2013) 215 Cal.App.4th 659, 675 [156 Cal.Rptr.3d 90], internal citations omitted.)

- "Nothing in *Rutherford* precludes a plaintiff from establishing legal causation through opinion testimony by a competent medical expert to the effect that every exposure to respirable asbestos contributes to the risk of developing mesothelioma. On the contrary, *Rutherford* acknowledges the scientific debate between the 'every exposure' and 'insignificant exposure' camps, and recognizes that the conflict is one for the jury to resolve." (*Izell, supra,* 231 Cal.App.4th at p. 977.)

- "Nor is there a requirement that 'specific words must be recited by [plaintiffs'] expert.' [¶] The connection, however, must be made between the defendant's asbestos products and the risk of

developing mesothelioma suffered by the decedent." (*Paulus, supra,* 224 Cal.App.4th at p. 1364.)

Secondary Sources

3 Witkin, California Procedure (5th ed. 2008) Actions, § 570

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-D, Theories of Recovery—Strict Liability For Defective Products, ¶ 2:1259 (The Rutter Group)

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-O, Theories of Recovery—Causation Issues, ¶ 2:2409 (The Rutter Group)

1 Levy et al., California Torts, Ch. 2, *Causation*, § 2.03 (Matthew Bender)

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.22, Ch. 7, *Proof*, § 7.06 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.72 (Matthew Bender)

500. Medical Negligence—Essential Factual Elements

Please see CACI No. 400, *Negligence—Essential Factual Elements*

New September 2003; Revised December 2011, December 2015

Directions for Use

In medical malpractice or professional negligence cases, the word "medical" or "professional" should be added before the word "negligence" in the first paragraph of CACI No. 400. From a theoretical standpoint, medical negligence is still considered negligence. (See *Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 997–998 [35 Cal.Rptr.2d 685, 884 P.2d 142].)

Also give the appropriate standard-of-care instruction for the defendant's category of medical professional. (See CACI No. 501, *Standard of Care for Health Care Professionals,* CACI No. 502, *Standard of Care for Medical Specialists,* CACI No. 504, *Standard of Care for Nurses,* CACI No. 514, *Duty of Hospital*.)

It is not necessary to instruct that causation must be proven within a reasonable medical probability based upon competent expert testimony. The reference to "medical probability" in medical malpractice cases is no more than a recognition that the case involves the use of medical evidence. (*Uriell v. Regents of University of California* (2015) 234 Cal.App.4th 735, 746 [184 Cal.Rptr.3d 79].)

Sources and Authority

- "Professional Negligence" of Health Care Provider Defined. Code of Civil Procedure section 340.5, Civil Code sections 3333.1 and 3333.2.

- "The elements of a cause of action for medical malpractice are: (1) a duty to use such skill, prudence, and diligence as other members of the profession commonly possess and exercise; (2) a breach of the duty; (3) a proximate causal connection between the negligent conduct and the injury; and (4) resulting loss or damage." (*Lattimore v. Dickey* (2015) 239 Cal.App.4th 959, 968 [191 Cal.Rptr.3d 766].)

- "The court's use of standard jury instructions for the essential elements of negligence, including causation, was appropriate because medical negligence is fundamentally negligence." (*Uriell, supra,* 234 Cal.App.4th at p. 744 [citing Directions for Use to this instruction].)

- "Section 340.5 defines 'professional negligence' as 'a negligent act or omission by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that such services are *within the scope of services for which the provider is licensed* and which are not within any restriction imposed by the licensing agency or licensed hospital.' The term 'professional negligence' encompasses actions in which 'the injury for which damages are sought is directly related to the professional services provided by the

health care provider' or directly related to 'a matter that is an ordinary and usual part of medical professional services.' '[C]ourts have broadly construed "professional negligence" to mean negligence occurring during the rendering of services for which the health care provider is licensed.' " (*Arroyo v. Plosay* (2014) 225 Cal.App.4th 279, 297 [170 Cal.Rptr.3d 125], original italics, internal citations omitted.)

- "With respect to professionals, their specialized education and training do not serve to impose an increased duty of care but rather are considered additional 'circumstances' relevant to an overall assessment of what constitutes 'ordinary prudence' in a particular situation." (*Flowers, supra,* 8 Cal.4th at pp. 997-998.)

- "Since the standard of care remains constant in terms of 'ordinary prudence,' it is clear that denominating a cause of action as one for 'professional negligence' does not transmute its underlying character. For substantive purposes, it merely serves to establish the basis by which 'ordinary prudence' will be calculated and the defendant's conduct evaluated." (*Flowers, supra,* 8 Cal.4th at p. 998.)

- "The Medical Injury Compensation Reform Act (MICRA) contains numerous provisions effecting substantial changes in negligence actions against health care providers, including a limitation on noneconomic damages, elimination of the collateral source rule as well as preclusion of subrogation in most instances, and authorization for periodic payments of future damages in excess of $ 50,000. While in each instance the statutory scheme has altered a significant aspect of claims for medical malpractice, such as the measure of the defendant's liability for damages or the admissibility of evidence, the fundamental substance of such actions on the issues of duty, standard of care, breach, and causation remains unaffected." (*Flowers, supra,* 8 Cal.4th at p. 999.)

- "[I]n a personal injury action causation must be proven within a reasonable medical probability based upon competent expert testimony. Mere possibility alone is insufficient to establish a prima facie case." (*Lattimore, supra*, 239 Cal.App.4th at p. 970.)

- "~~The law is well settled that in a personal injury action causation must be proven within a reasonable medical probability based upon competent expert testimony. Mere possibility alone is insufficient to establish a prima facie case. …~~ That there is a distinction between a reasonable medical 'probability' and a medical 'possibility' needs little discussion. There can be many possible 'causes,' indeed, an infinite number of circumstances which can produce an injury or disease. A possible cause only becomes 'probable' when, in the absence of other reasonable causal explanations, *it becomes more likely than not that the injury was a result of its action*. This is the outer limit of inference upon which an issue may be submitted to the jury." (*Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1118 [8 Cal.Rptr.3d 363], original italics, internal citations omitted.)

- "The rationale advanced by the hospital is that … if the need for restraint is 'obvious to all,' the failure to restrain is ordinary negligence. … [T]his standard is incompatible with the subsequently enacted statutory definition of professional negligence, which focuses on whether the negligence occurs in the rendering of professional services, rather than whether a high or low level of skill is required. [Citation.]" (*Bellamy v. Appellate Dep't of the Superior Court* (1996) 50 Cal.App.4th 797, 806-807 [57 Cal.Rptr.2d 894].)

- "[E]ven in the absence of a physician-patient relationship, a physician has liability to an examinee for negligence or professional malpractice for injuries incurred during the examination itself." (*Mero v. Sadoff* (1995) 31 Cal.App.4th 1466, 1478 [37 Cal.Rptr.2d 769].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 933–936, 938, 939

California Tort Guide (Cont.Ed.Bar 3d ed.) § 9.65

3 Levy et al., California Torts, Ch. 30, *General Principles of Liability of Professionals*, § 30.11, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.01 (Matthew Bender)

17 California Forms of Pleading and Practice, Ch. 209, *Dentists*, § 209.15 (Matthew Bender)

27 California Forms of Pleading and Practice, Ch. 295, *Hospitals*, §§ 295.13, 295.43 (Matthew Bender)

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

17 California Points and Authorities, Ch. 175, *Physicians and Surgeons*, § 175.20 et seq. (Matthew Bender)

502. Standard of Care for Medical Specialists

[A/An] [*insert type of medical specialist***] is negligent if [he/she] fails to use the level of skill, knowledge, and care in diagnosis and treatment that other reasonably careful [***insert type of medical specialists***] would use 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, knowledge, and care that other reasonably careful [*insert type of medical specialists***] 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

Directions for Use

This instruction is intended to apply to physicians, surgeons, and dentists who are specialists in a particular practice area.

The second paragraph should be used except in cases where the court determines that expert testimony is not necessary to establish the standard of care.

See CACI Nos. 219–221 on evaluating the credibility of expert witnesses.

Sources and Authority

- "In those cases where a medical specialist is alleged to have acted negligently, the 'specialist must possess and use the learning, care and skill normally possessed and exercised by practitioners of that specialty under the same or similar circumstances.' " (*Lattimore v. Dickey* (2015) 239 Cal.App.4th 959, 968 [191 Cal.Rptr.3d 766~~Specialists, such as anesthesiologists and ophthalmologists, are "held to that standard of learning and skill normally possessed by such specialists in the same or similar locality under the same or similar circumstances." (*Quintal v. Laurel Grove Hospital* (1964) 62 Cal.2d 154, 159–160 [41 Cal.Rptr. 577, 397 P.2d 161~~].)

- ~~This standard adds a further level to the general standard of care for medical professionals: ~~"In the first place, the special obligation of the professional is exemplified by his duty not merely to perform his work with ordinary care but to use the skill, prudence, and diligence commonly exercised by practitioners of his profession. If he further specializes within the profession, he must meet the standards of knowledge and skill of such specialists." (*Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 188 [98 Cal.Rptr. 837, 491 P.2d 421].)

- "The difference between the duty owed by a specialist and that owed by a general practitioner lies not in the degree of care required but in the amount of skill required."~~California imposes a "higher standard of care upon physicians with a specialized practice." (*Neel, supra*, 6 Cal.3d 176 at p. 188, fn. 22.) This higher standard refers to the level of skill that must be exercised, not to the standard of care.~~

(*Valentine v. Kaiser Foundation Hospitals* (1961) 194 Cal.App.2d 282, 294 [15 Cal.Rptr. 26] (disapproved on other grounds by *Siverson v. Weber* (1962) 57 Cal.2d 834, 839 [22 Cal.Rptr. 337, 372 P.2d 97]).)

- "The role of the psychiatrist, who is indeed a practitioner of medicine, and that of the psychologist who performs an allied function, are like that of the physician who must conform to the standards of the profession and who must often make diagnoses and predictions based upon such evaluations. Thus the judgment of the therapist in diagnosing emotional disorders and in predicting whether a patient presents a serious danger of violence is comparable to the judgment which doctors and professionals must regularly render under accepted rules of responsibility."~~Psychotherapists are considered specialists in their field.~~ (*Tarasoff v. Regents of Univ. of Cal.* (1976) 17 Cal.3d 425, 438 [131 Cal.Rptr. 14, 551 P.2d 334].)

- "[A] psychotherapist or other mental health care provider has a duty to use a reasonable degree of skill, knowledge and care in treating a patient, commensurate with that possessed and exercised by others practicing within that specialty in the professional community."~~;~~ (*Kockelman v. Segal* (1998) 61 Cal.App.4th 491, 505 [71 Cal.Rptr.2d 552].)

- "[T]he standard of care for physicians is the reasonable degree of skill, knowledge and care ordinarily possessed and exercised by members of the medical profession *under similar circumstances*. The test for determining familiarity with the standard of care is knowledge of similar conditions. Geographical location may be a factor considered in making that determination, but, by itself, does not provide a practical basis for measuring similar circumstances. Over 30 years ago, our Supreme Court observed that '[t]he unmistakable general trend … has been toward liberalizing the rules relating to the testimonial qualifications of medical experts.' " (*Avivi v. Centro Medico Urgente Medical Center* (2008) 159 Cal.App.4th 463, 470–471 [71 Cal.Rptr.3d 707], original italics, internal citations omitted.)

Secondary Sources

California Tort Guide (Cont.Ed.Bar 3d ed.) § 9.2

3 Levy et al., California Torts, Ch. 30, *General Principles of Liability of Professionals*, § 30.12, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.85 (Matthew Bender)

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

17 California Points and Authorities, Ch. 175, *Physicians and Surgeons: Medical Malpractice*, § 175.20 et seq. (Matthew Bender)

504. Standard of Care for Nurses

[A/An] [*insert type of nurse***] is negligent if [he/she] fails to use the level of skill, knowledge, and care in diagnosis and treatment that other reasonably careful [***insert type of nurses***] would use 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, knowledge, and care that other reasonably careful [*insert type of nurses***] 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, June 2010

Directions for Use

The appropriate level of nurse should be inserted where indicated—i.e., registered nurse, licensed vocational nurse, nurse practitioner.

The second paragraph should be included unless the court determines that expert testimony is not necessary to establish the standard of care.

Sources and Authority

- "[A] nurse is negligent if he or she fails to meet the standard of care—that is, fails to use the level of skill, knowledge, and care that a reasonably careful nurse would use in similar circumstances." (*Massey v. Mercy Med. Ctr. Redding* (2009) 180 Cal.App.4th 690, 694 [103 Cal.Rptr.3d 209] [citing this instruction].)

- " '[T]oday's nurses are held to strict professional standards of knowledge and performance.' But '[s]ome difficulties are presented [in the nursing malpractice context] by the fact that a nurse's traditional role has involved "both routine, nontechnical tasks as well as specialized nursing tasks. If, in considering the case law in this area, the dispute is analyzed in terms of what action by the nurse is being complained about, it is possible to make some sense out of the relevant decisions." ' " (*Massey, supra,* 180 Cal.App.4th at p. 697, internal citation omitted.)

- "[A] nurse's conduct must not be measured by the standard of care required of a physician or surgeon, but by that of other nurses in the same or similar locality and under similar circumstances." (*Lattimore v. Dickey* (2015) 239 Cal.App.4th 959, 969 [191 Cal.Rptr.3d 766~~Courts have held that "a nurse's conduct must not be measured by the standard of care required of a physician or surgeon, but by that of other nurses in the same or similar locality and under similar circumstances." (*Alef v. Alta Bates Hospital* (1992) 5 Cal.App.4th 208, 215 [6 Cal.Rptr.2d 900~~].)

- The jury should not be instructed that the standard of care for a nurse practitioner must be measured by the standard of care for a physician or surgeon when the nurse is examining a patient or making a

diagnosis. (*Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137, 150 [211 Cal.Rptr. 368, 695 P.2d 665].) Courts have observed that nurses are trained, "but to a lesser degree than a physician, in the recognition of the symptoms of diseases and injuries." (*Cooper v. National Motor Bearing Co.* (1955) 136 Cal.App.2d 229, 238 [288 P.2d 581].)

- "[E]xpert opinion testimony is required to prove that a defendant nurse did not meet the standard of care and therefore was negligent, 'except in cases where the negligence is obvious to laymen.' " (*Massey*, *supra*, 180 Cal.App.4th at pp. 694–695.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 995–997

California Tort Guide (Cont.Ed.Bar 3d ed.) § 9.52

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.84 (Matthew Bender)

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

17 California Points and Authorities, Ch. 175, *Physicians and Surgeons*, § 175.20 et seq. (Matthew Bender)

610. Affirmative Defense—Statute of Limitations—Attorney Malpractice—One-Year Limit (Code Civ. Proc., § 340.6)

[*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 before [***insert date one year before date of filing***] [***name of plaintiff***] knew, or with reasonable diligence should have discovered, the facts of [***name of defendant***]'s alleged wrongful act or omission.**

[If, however, [*name of plaintiff***] proves**

[*Choose one or more of the following three options:***]**

[that [he/she/it] did not sustain actual injury until on or after [*insert date one year before date of filing***][,/; or]]**

[that on or after [*insert date one year before date of filing***] [***name of defendant***] continued to represent [***name of plaintiff***] regarding the specific subject matter in which the wrongful act or omission occurred[,/; or]]**

[that on or after [*insert date one year before date of filing***] [he/she/it] was under a legal or physical disability that restricted [his/her/its] ability to file a lawsuit[,/;]]**

the period within which [*name of plaintiff***] had to file the lawsuit is extended for the amount of time that [***insert tolling provision, e.g., [name of defendant] continued to represent [name of plaintiff]***].]**

New April 2007; Revised April 2009

Directions for Use

Use CACI No. 611, *Affirmative Defense—Statute of Limitations—Attorney Malpractice—Four-Year Limit,* if the four-year limitation provision is at issue.

The court may need to define the term "actual injury" depending on the facts and circumstances of the particular case.

If no tolling provision from Code of Civil Procedure section 340.6 is at issue, read only through the end of the first paragraph. Read the rest of the instruction if there is a question of fact concerning a tolling provision. If so, the verdict form should ask the jury to find (1) the "discovery" date (the date on which the plaintiff discovered or knew of facts that would have caused a reasonable person to suspect that he or she had suffered harm that was caused by someone's wrongful conduct); (2) whether the tolling provision applies; and (3) if so, for what period of time. The court can then add the additional time to the discovery date and determine whether the action is timely.

Sources and Authority

- Statute of Limitation for Attorney Malpractice. Code of Civil Procedure section 340.6.

- Persons Under Disabilities. Code of Civil Procedure section 352.

- "Under section 340.6, the one-year limitations period commences when the plaintiff actually or constructively discovers the facts of the wrongful act or omission, but the period is tolled until the plaintiff sustains actual injury. That is to say, the statute of limitations will not run during the time the plaintiff cannot bring a cause of action for damages from professional negligence." (*Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 751 [76 Cal.Rptr.2d 749, 958 P.2d 1062].)

- "Actual injury refers only to the legally cognizable damage necessary to assert the cause of action. There is no requirement that an adjudication or settlement must first confirm a causal nexus between the attorney's error and the asserted injury. The determination of actual injury requires only a factual analysis of the claimed error and its consequences. The inquiry necessarily is more qualitative than quantitative because the fact of damage, rather than the amount, is the critical factor." (*Truong v. Glasser* (2009) 181 Cal.App.4th 102, 113 [103 Cal.Rptr.3d 811].)

- " '[S]ection 340.6, subdivision (a)(1), will not toll the limitations period once the client can plead damages that could establish a cause of action for legal malpractice.' '[T]he limitations period is not tolled after the plaintiff sustains actual injury [even] if the injury is, in some sense, remediable. [Citation.] Furthermore, the statutory scheme does not depend on the plaintiff's recognizing actual injury. Actual injury must be noticeable, but the language of the tolling provision does not require that it be noticed.' On the other hand, 'the statute of limitations will not run during the time the plaintiff cannot bring a cause of action for damages from professional negligence' because the plaintiff cannot allege actual injury resulted from an attorney's malpractice." (*Croucier v. Chavos* (2012) 207 Cal.App.4th 1138, 1148 [144 Cal.Rptr.3d 180], internal citations omitted.)

- "[A]ctual injury exists even if the client has yet to 'sustain[] all, or even the greater part, of the damages occasioned by his attorney's negligence'; even if the client will encounter 'difficulty in proving damages'; and even if that damage might be mitigated or entirely eliminated in the future. [¶] However, 'actual injury' does not include 'speculative and contingent injuries … that do not yet exist … .' " (*Shaoxing City Maolong Wuzhong Down Products, Ltd. v. Keehn & Associates, APC* (2015) 238 Cal.App.4th 1031, 1036 [190 Cal.Rptr.3d 90], internal citations omitted.)

- "[B]ecause 'determining actual injury is predominately a factual inquiry' to the extent a question remains on this point, the matter is properly resolved by the trier of fact … ." (*Callahan v. Gibson, Dunn & Crutcher LLP* (2011) 194 Cal.App.4th 557, 576 [125 Cal.Rptr.3d 120].)

- "[W]here, as here, the 'material facts are undisputed, the trial court can resolve the matter [of actual injury] as a question of law in conformity with summary judgment principles.' " (*Shaoxing City Maolong Wuzhong Down Products, Ltd., supra*, 238 Cal.App.4th at pp. 1037−1038.)

- "[P]rior to the enactment of section 340.6 the running of the statute of limitations coincided with accrual of the plaintiff's malpractice cause of action, including damages. By contrast, under the provisions of section 340.6, discovery of the negligent act or omission initiates the statutory period,

and the absence of injury or damages serves as a tolling factor." (*Adams v. Paul* (1995) 11 Cal.4th 583, 589, fn. 2 [46 Cal.Rptr.2d 594, 904 P.2d 1205], internal citations omitted.)

- "[A] defendant must prove the facts necessary to enjoy the benefit of a statute of limitations." (*Samuels v. Mix* (1999) 22 Cal.4th 1, 10 [91 Cal.Rptr.2d 273, 989 P.2d 701], internal citations omitted.)

- "[D]efendant, if he is to avail himself of the statute's one-year-from-discovery limitation defense, has the burden of proving, under the 'traditional allocation of the burden of proof' that plaintiff discovered or should have discovered the facts alleged to constitute defendant's wrongdoing more than one year prior to filing this action." (*Samuels, supra,* 22 Cal.4th at pp. 8–9, internal citations omitted.)

- "In ordinary tort and contract actions, the statute of limitations, it is true, begins to run upon the occurrence of the last element essential to the cause of action. The plaintiff's ignorance of the cause of action, or of the identity of the wrongdoer, does not toll the statute. In cases of professional malpractice, however, postponement of the period of limitations until discovery finds justification in the special nature of the relationship between the professional man and his client." (*Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 187–188 [98 Cal.Rptr. 837, 491 P.2d 421], footnote omitted.)

- "We hold that a cause of action for legal malpractice does not accrue until the client discovers, or should discover, the facts establishing the elements of his cause of action." (*Neel, supra,* 6 Cal.3d at p. 194.)

- " '[W]here there is a professional relationship, the degree of diligence in ferreting out the negligence for the purpose of the statute of limitations is diminished. [Citation.]' " (*Stueve Bros. Farms, LLC v. Berger Kahn* (2013) 222 Cal.App.4th 303, 315 [166 Cal.Rptr.3d 116].)

- "If the allegedly negligent conduct does not cause damage, it generates no cause of action in tort. The mere breach of a professional duty, causing only nominal damages, speculative harm, or the threat of future harm—not yet realized—does not suffice to create a cause of action for negligence. Hence, until the client suffers appreciable harm as a consequence of his attorney's negligence, the client cannot establish a cause of action for malpractice." (*Budd v. Nixen* (1971) 6 Cal.3d 195, 200 [98 Cal.Rptr. 849, 491 P.2d 433], internal citations omitted.)

- "A plaintiff who is aware of, and has been actually injured by, attorney malpractice in a matter need not file suit for malpractice while that attorney is still representing him on the same 'specific subject matter.' " (*Shaoxing City Maolong Wuzhong Down Products, Ltd., supra,* 238 Cal.App.4th at p. 1038.)

- "The mere existence of an attorney-client relationship does not trigger the continuous representation rule: 'Instead, the statute's tolling language addresses a particular phase of such a relationship-representation regarding a *specific subject matter*. Moreover, the limitations period is not tolled when an attorney's subsequent role is only tangentially related to the legal representation the attorney provided to the plaintiff. Therefore, "[t]he *inquiry is not whether an attorney-client relationship still*

exists but when the representation of the specific matter terminated." ' Tolling does not apply where there is a continuing relationship between the attorney and client 'involving only unrelated matters.' " (*Lockton v. O'Rourke* (2010) 184 Cal.App.4th 1051, 1064 [109 Cal.Rptr.3d 392], original italics, internal citations omitted.)

- "[W]here a client hires a law firm to represent it, the provisions of section 340.6 apply to that firm; the term 'attorney' in section 340.6 may embrace the entire partnership, law corporation, or other legal entity the client retains. [¶] That either an attorney or a firm may be the subject of an action does not support a reading under which representation by one attorney or firm might toll the limitations period as to another no longer affiliated attorney or firm. Rather, the text implies an action against a law firm is tolled so long as *that firm* continues representation, just as an action against an attorney is tolled so long as *that attorney* continues representation, but representation by one attorney or firm does not toll claims that may exist against a different, unaffiliated attorney or firm." (*Beal Bank, SSB v. Arter & Hadden, LLP* (2007) 42 Cal.4th 503, 509 [66 Cal.Rptr.3d 52, 167 P.3d 666], original italics.)

- " '[W]hen an attorney leaves a firm and takes a client with him or her, … the tolling in ongoing matters [does not] continue for claims against the former firm and partners.' " (*Stueve Bros. Farms, LLC, supra*, 222 Cal.App.4th at p. 314.)

- " 'Ordinarily, an attorney's representation is not completed until the agreed tasks or events have occurred, the client consents to termination or a court grants an application by counsel for withdrawal.' 'The rule is that, for purposes of the statute of limitations, the attorney's representation is concluded when the parties so agree, and that result does not depend upon formal termination, such as withdrawing as counsel of record.' 'Continuity of representation ultimately depends, not on the client's subjective beliefs, but rather on evidence of an ongoing mutual relationship and of activities in furtherance of the relationship.' " (*Nielsen v. Beck* (2007) 157 Cal.App.4th 1041, 1049 [69 Cal.Rptr.3d 435], internal citations omitted.)

- "[A]bsent a statutory standard to determine when an attorney's representation of a client regarding a specific subject matter ends, and consistent with the purposes of the continuing representation rule, we conclude that for purposes of … section 340.6, subdivision (a)(2), in the event of an attorney's unilateral withdrawal or abandonment of the client, the representation ends *when the client actually has or reasonably should have no expectation that the attorney will provide further legal services.* … That may occur upon the attorney's express notification to the client that the attorney will perform no further services, or, if the attorney remains silent, may be inferred from the circumstances. *Absent actual notice to the client that the attorney will perform no further legal services or circumstances that reasonably should cause the client to so conclude*, a client should be entitled to rely on an attorney to perform the agreed services and should not be required to interrupt the attorney-client relationship by filing a malpractice complaint. *After a client has no reasonable expectation that the attorney will provide further legal services*, however, the client is no longer hindered by a potential disruption of the attorney-client relationship and no longer relies on the attorney's continuing representation, so the tolling should end. To this extent and for these reasons, *we conclude that continuous representation should be viewed objectively from the client's perspective … .*" (*Laclette v. Galindo* (2010) 184 Cal.App.4th 919, 928 [109 Cal.Rptr.3d 660], original italics.)

- "Section 340.6, subdivision (a), states that 'in no event' shall the prescriptive period be tolled except under those circumstances specified in the statute. Thus, the Legislature expressly intended to disallow tolling under any circumstances not enumerated in the statute." (*Laird v. Blacker* (1992) 2 Cal.4th 606, 618 [7 Cal.Rptr.2d 550, 828 P.2d 691] [applying rule to one-year limitation period]; cf. *Belton v. Bowers Ambulance Serv.* (1999) 20 Cal.4th 928, 934 [86 Cal.Rptr.2d 107, 978 P.2d 591] [substantially similar language in Code Civ. Proc., § 340.5, applicable to medical malpractice, construed to apply only to three-year limitation period].)

- "[T]he fourth tolling provision of section 340.6, subdivision (a)—that is, the provision applicable to legal and physical disabilities—encompasses the circumstances set forth in section 351 [exception, where defendant is out of the state]." (*Jocer Enterprises, Inc. v. Price* (2010) 183 Cal.App.4th 559, 569 [107 Cal.Rptr.3d 539].)

- "In light of the Legislature's intent that section 340.6(a) cover more than claims for legal malpractice, the term 'professional services' is best understood to include nonlegal services governed by an attorney's professional obligations." (*Lee v. Hanley* (2015) 61 Cal.4th 1225, 1237 [191 Cal.Rptr.3d 536, 354 P.3d 334].)

- "For purposes of section 340.6(a), the question is not simply whether a claim alleges misconduct that entails the violation of a professional obligation. Rather, the question is whether the claim, in order to succeed, necessarily depends on proof that an attorney violated a professional obligation as opposed to some generally applicable nonprofessional obligation." (*Lee*, *supra*, 61 Cal.4th at p. 1238.)

Secondary Sources

3 Witkin, California Procedure (5th ed. 2008) Actions, §§ 573, 626–655

3 Levy et al., California Torts, Ch. 32, *Liability of Attorneys*, § 32.60 (Matthew Bender)

1 Matthew Bender Practice Guide: California Pretrial Civil Procedure, Ch. 4, *Limitation of Actions*, 4.05

7 California Forms of Pleading and Practice, Ch. 76, *Attorney Professional Liability*, §§ 76.170, 76.430 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.150 (Matthew Bender)

611. Affirmative Defense—Statute of Limitations—Attorney Malpractice—Four-Year Limit (Code Civ. Proc., § 340.6)

[*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 [his/her/its] alleged wrongful act or omission occurred before [***insert date four years before date of filing***].**

[If, however, [*name of plaintiff***] proves**

[*Choose one or more of the following four options:***]**

[that [he/she/it] did not sustain actual injury until on or after [*insert date four years before date of filing***]][,/; or]]**

[that on or after [*insert date four years before date of filing***] [***name of defendant***] continued to represent [***name of plaintiff***] regarding the specific subject matter in which the wrongful act or omission occurred[,/; or]]**

[that on or after [*insert date four years before date of filing***] [***name of defendant***] knowingly concealed the facts constituting the wrongful act or omission[,/; or]]**

[that on or after [*insert date four years before date of filing***] [he/she/it] was under a legal or physical disability that restricted [his/her/its] ability to file a lawsuit[,/;]]**

the period within which [*name of plaintiff***] had to file the lawsuit is extended for the amount of time that [***insert tolling provision, e.g., [name of defendant] knowingly concealed the facts***].]**

New April 2007; Revised April 2009

Directions for Use

Use CACI No. 610, *Affirmative Defense—Statute of Limitations—Attorney Malpractice—One-Year Limit*, if the one-year limitation provision is at issue.

If no tolling provision from Code of Civil Procedure section 340.6 is at issue, read only through the end of the first paragraph. Read the rest of the instruction if there is a question of fact concerning a tolling provision. If so, the verdict form should ask the jury to find (1) the date on which the alleged wrongful act or omission occurred; (2) whether the tolling provision applies; and (3) if so, for what period of time. The court can then add the additional time to the date on which the alleged wrongful act or omission occurred and determine whether the action is timely.

The court may need to define the term "actual injury" depending on the facts and circumstances of the particular case.

Sources and Authority

- Statute of Limitation for Attorney Malpractice. Code of Civil Procedure section 340.6.

- Persons Under Disabilities. Code of Civil Procedure section 352.

- "Under section 340.6, the one-year limitations period commences when the plaintiff actually or constructively discovers the facts of the wrongful act or omission, but the period is tolled until the plaintiff sustains actual injury. That is to say, the statute of limitations will not run during the time the plaintiff cannot bring a cause of action for damages from professional negligence." (*Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 751 [76 Cal.Rptr.2d 749, 958 P.2d 1062].)

- "Actual injury refers only to the legally cognizable damage necessary to assert the cause of action. There is no requirement that an adjudication or settlement must first confirm a causal nexus between the attorney's error and the asserted injury. The determination of actual injury requires only a factual analysis of the claimed error and its consequences. The inquiry necessarily is more qualitative than quantitative because the fact of damage, rather than the amount, is the critical factor." (*Truong v. Glasser* (2009) 181 Cal.App.4th 102, 113 [103 Cal.Rptr.3d 811].)

- " '[S]ection 340.6, subdivision (a)(1), will not toll the limitations period once the client can plead damages that could establish a cause of action for legal malpractice.' '[T]he limitations period is not tolled after the plaintiff sustains actual injury [even] if the injury is, in some sense, remediable. [Citation.] Furthermore, the statutory scheme does not depend on the plaintiff's recognizing actual injury. Actual injury must be noticeable, but the language of the tolling provision does not require that it be noticed.' On the other hand, 'the statute of limitations will not run during the time the plaintiff cannot bring a cause of action for damages from professional negligence' because the plaintiff cannot allege actual injury resulted from an attorney's malpractice." (*Croucier v. Chavos* (2012) 207 Cal.App.4th 1138, 1148 [144 Cal.Rptr.3d 180], internal citations omitted.)

- "[A]ctual injury exists even if the client has yet to 'sustain[] all, or even the greater part, of the damages occasioned by his attorney's negligence'; even if the client will encounter 'difficulty in proving damages'; and even if that damage might be mitigated or entirely eliminated in the future. [¶] However, 'actual injury' does not include 'speculative and contingent injuries … that do not yet exist … .' " (*Shaoxing City Maolong Wuzhong Down Products, Ltd. v. Keehn & Associates, APC* (2015) 238 Cal.App.4th 1031, 1036 [190 Cal.Rptr.3d 90], internal citations omitted.)

- "[B]ecause 'determining actual injury is predominately a factual inquiry' to the extent a question remains on this point, the matter is properly resolved by the trier of fact … ." (*Callahan v. Gibson, Dunn & Crutcher LLP* (2011) 194 Cal.App.4th 557, 576 [125 Cal.Rptr.3d 120].)

- "[W]here, as here, the 'material facts are undisputed, the trial court can resolve the matter [of actual injury] as a question of law in conformity with summary judgment principles.' " (*Shaoxing City Maolong Wuzhong Down Products, Ltd., supra*, 238 Cal.App.4th at pp. 1037−1038.)

- "[P]rior to the enactment of section 340.6 the running of the statute of limitations coincided with accrual of the plaintiff's malpractice cause of action, including damages. By contrast, under the provisions of section 340.6, discovery of the negligent act or omission initiates the statutory period, and the absence of injury or damages serves as a tolling factor." (*Adams v. Paul* (1995) 11 Cal.4th 583, 598 fn. 2 [46 Cal.Rptr.2d 594, 904 P.2d 1205], internal citations omitted.)

- "[A] defendant must prove the facts necessary to enjoy the benefit of a statute of limitations." (*Samuels v. Mix* (1999) 22 Cal.4th 1, 10 [91 Cal.Rptr.2d 273, 989 P.2d 701], internal citations omitted.)

- "In ordinary tort and contract actions, the statute of limitations, it is true, begins to run upon the occurrence of the last element essential to the cause of action. The plaintiff's ignorance of the cause of action, or of the identity of the wrongdoer, does not toll the statute. In cases of professional malpractice, however, postponement of the period of limitations until discovery finds justification in the special nature of the relationship between the professional man and his client." (*Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 187–188 [98 Cal.Rptr. 837, 491 P.2d 421], footnote omitted.)

- "If the allegedly negligent conduct does not cause damage, it generates no cause of action in tort. The mere breach of a professional duty, causing only nominal damages, speculative harm, or the threat of future harm—not yet realized—does not suffice to create a cause of action for negligence. Hence, until the client suffers appreciable harm as a consequence of his attorney's negligence, the client cannot establish a cause of action for malpractice." (*Budd v. Nixen* (1971) 6 Cal.3d 195, 200 [98 Cal.Rptr. 849, 491 P.2d 433], internal citations omitted.)

- "A plaintiff who is aware of, and has been actually injured by, attorney malpractice in a matter need not file suit for malpractice while that attorney is still representing him on the same 'specific subject matter.' " (*Shaoxing City Maolong Wuzhong Down Products, Ltd., supra*, 238 Cal.App.4th at p. 1038.)

- "The mere existence of an attorney-client relationship does not trigger the continuous representation rule: 'Instead, the statute's tolling language addresses a particular phase of such a relationship-representation regarding a *specific subject matter*. Moreover, the limitations period is not tolled when an attorney's subsequent role is only tangentially related to the legal representation the attorney provided to the plaintiff. Therefore, "[t]he *inquiry is not whether an attorney-client relationship still exists but when the representation of the specific matter terminated*." ' Tolling does not apply where there is a continuing relationship between the attorney and client 'involving only unrelated matters.' " (*Lockton v. O'Rourke* (2010) 184 Cal.App.4th 1051, 1064 [109 Cal.Rptr.3d 392], original italics, internal citations omitted.)

- "[W]here a client hires a law firm to represent it, the provisions of section 340.6 apply to that firm; the term 'attorney' in section 340.6 may embrace the entire partnership, law corporation, or other legal entity the client retains. [¶] That either an attorney or a firm may be the subject of an action does not support a reading under which representation by one attorney or firm might toll the limitations period as to another no longer affiliated attorney or firm. Rather, the text implies an action against a law firm is tolled so long as *that firm* continues representation, just as an action against an attorney is

tolled so long as *that attorney* continues representation, but representation by one attorney or firm does not toll claims that may exist against a different, unaffiliated attorney or firm." (*Beal Bank, SSB v. Arter & Hadden, LLP* (2007) 42 Cal.4th 503, 509 [66 Cal.Rptr.3d 52, 167 P.3d 666], original italics.)

- " '[W]hen an attorney leaves a firm and takes a client with him or her, … the tolling in ongoing matters [does not] continue for claims against the former firm and partners.' " (*Stueve Bros. Farms, LLC v. Berger Kahn* (2013) 222 Cal.App.4th 303, 314 [166 Cal.Rptr.3d 116].)

- " 'Ordinarily, an attorney's representation is not completed until the agreed tasks or events have occurred, the client consents to termination or a court grants an application by counsel for withdrawal.' 'The rule is that, for purposes of the statute of limitations, the attorney's representation is concluded when the parties so agree, and that result does not depend upon formal termination, such as withdrawing as counsel of record.' 'Continuity of representation ultimately depends, not on the client's subjective beliefs, but rather on evidence of an ongoing mutual relationship and of activities in furtherance of the relationship.' " (*Nielsen v. Beck* (2007) 157 Cal.App.4th 1041, 1049 [69 Cal.Rptr.3d 435], internal citations omitted.)

- "[A]bsent a statutory standard to determine when an attorney's representation of a client regarding a specific subject matter ends, and consistent with the purposes of the continuing representation rule, we conclude that for purposes of … section 340.6, subdivision (a)(2), in the event of an attorney's unilateral withdrawal or abandonment of the client, the representation ends *when the client actually has or reasonably should have no expectation that the attorney will provide further legal services.* … That may occur upon the attorney's express notification to the client that the attorney will perform no further services, or, if the attorney remains silent, may be inferred from the circumstances. *Absent actual notice to the client that the attorney will perform no further legal services or circumstances that reasonably should cause the client to so conclude,* a client should be entitled to rely on an attorney to perform the agreed services and should not be required to interrupt the attorney-client relationship by filing a malpractice complaint. *After a client has no reasonable expectation that the attorney will provide further legal services,* however, the client is no longer hindered by a potential disruption of the attorney-client relationship and no longer relies on the attorney's continuing representation, so the tolling should end. To this extent and for these reasons, *we conclude that continuous representation should be viewed objectively from the client's perspective* … ." (*Laclette v. Galindo* (2010) 184 Cal.App.4th 919, 928 [109 Cal.Rptr.3d 660], original italics.)

- "In light of the Legislature's intent that section 340.6(a) cover more than claims for legal malpractice, the term 'professional services' is best understood to include nonlegal services governed by an attorney's professional obligations." (*Lee v. Hanley* (2015) 61 Cal.4th 1225, 1237 [191 Cal.Rptr.3d 536, 354 P.3d 334].)

- "For purposes of section 340.6(a), the question is not simply whether a claim alleges misconduct that entails the violation of a professional obligation. Rather, the question is whether the claim, in order to succeed, necessarily depends on proof that an attorney violated a professional obligation as opposed to some generally applicable nonprofessional obligation." (*Lee, supra,* 61 Cal.4th at p. 1238.)

Secondary Sources

3 Witkin, California Procedure (5th ed. 2008) Actions, §§ 573, 626–655

3 Levy et al., California Torts, Ch. 32, *Liability of Attorneys*, § 32.60 (Matthew Bender)

1 Matthew Bender Practice Guide: California Pretrial Civil Procedure, Ch. 4, *Limitation of Actions*, 4.05

7 California Forms of Pleading and Practice, Ch. 76, *Attorney Professional Liability*, §§ 76.170, 76.430 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.150 (Matthew Bender)

1006. Landlord's Duty

A landlord must conduct reasonable periodic inspections of rental property whenever the landlord has the legal right of possession. Before giving possession of leased property to a tenant [or on renewal of a lease] [or after retaking possession from a tenant], a landlord must conduct a reasonable inspection of the property for unsafe conditions and must take reasonable precautions to prevent injury due to the conditions that were or reasonably should have been discovered in the process. The inspection must include common areas under the landlord's control.

After a tenant has taken possession, a landlord must take reasonable precautions to prevent injury due to any unsafe condition in an area of the premises under the landlord's control if the landlord knows or reasonably should have known about it.

[After a tenant has taken possession, a landlord must take reasonable precautions to prevent injury due to any unsafe condition in an area of the premises under the tenant's control if the landlord has actual knowledge of the condition and the right and ability to correct it.]

New September 2003; Revised April 2008, April 2009, December 2009, June 2010

Directions for Use

Give this instruction with CACI No. 1000, *Premises Liability—Essential Factual Elements,* CACI No. 1001, *Basic Duty of Care,* and CACI No. 1003, *Unsafe Conditions,* if the injury occurred on rental property and the landlord is alleged to be liable. Include the last paragraph if the property is not within the landlord's immediate control.

Include "or on renewal of a lease" for commercial tenancies. (See *Mora v. Baker Commodities, Inc.* (1989) 210 Cal.App.3d 771, 781 [258 Cal.Rptr. 669].) While no case appears to have specifically addressed a landlord's duty to inspect on renewal of a residential lease, it would seem impossible to impose such a duty with regard to a month-to-month tenancy. Whether there might be a duty to inspect on renewal of a long-term residential lease appears to be unresolved.

Under the doctrine of nondelegable duty, a landlord cannot escape liability for failure to maintain property in a safe condition by delegating the duty to an independent contractor. (*Srithong v. Total Investment Co.* (1994) 23 Cal.App.4th 721, 726 [28 Cal.Rptr.2d 672].) For an instruction for use with regard to a landlord's liability for the acts of an independent contractor, see CACI No. 3713, *Nondelegable Duty*.

Sources and Authority

- "A landlord owes a duty of care to a tenant to provide and maintain safe conditions on the leased premises. This duty of care also extends to the general public. 'A lessor who leases property for a purpose involving the admission of the public is under a duty to see that it is safe for the purposes intended, and to exercise reasonable care to inspect and repair the premises before possession is

transferred so as to prevent any unreasonable risk of harm to the public who may enter. An agreement to renew a lease or relet the premises ... cannot relieve the lessor of his duty to see that the premises are reasonably safe at that time.' [¶] Where there is a duty to exercise reasonable care in the inspection of premises for dangerous conditions, the lack of awareness of the dangerous condition does not generally preclude liability. 'Although liability might easily be found where the landowner has actual knowledge of the dangerous condition "[t]he landowner's lack of knowledge of the dangerous condition is not a defense. He has an affirmative duty to exercise ordinary care to keep the premises in a reasonably safe condition, and therefore must inspect them or take other proper means to ascertain their condition. And if, by the exercise of reasonable care, he would have discovered the dangerous condition, he is liable." ' " (*Portillo v. Aiassa* (1994) 27 Cal.App.4th 1128, 1134 [32 Cal.Rptr.2d 755], internal citations omitted.)

- "Public policy precludes landlord liability for a dangerous condition on the premises which came into existence after possession has passed to a tenant. This is based on the principle that the landlord has surrendered possession and control of the land to the tenant and has no right even to enter without permission. It would not be reasonable to hold a lessor liable if the lessor did not have the power, opportunity, and ability to eliminate the dangerous condition." (*Garcia v. Holt* (2015) 242 Cal.App.4th 600, 604 [195 Cal.Rptr.3d 47], internal citations omitted.)

- "~~Historically, the public policy of this state generally has precluded a landlord's liability for injuries to his tenant or his tenant's invitees from a dangerous condition on the premises which comes into existence after the tenant has taken possession. This is true even though by the exercise of reasonable diligence the landlord might have discovered the condition. [¶]~~ The rationale for this rule has been that property law regards a lease as equivalent to a sale of the land for the term of the lease. As stated by Prosser: 'In the absence of agreement to the contrary, the lessor surrenders both possession and control of the land to the lessee, retaining only a reversionary interest; and he has no right even to enter without the permission of the lessee. Consequently, it is the general rule that he is under no obligation to anyone to look after the premises or keep them in repair, and is not responsible, either to persons injured on the land or to those outside of it, for conditions which develop or are created by the tenant after possession has been transferred. Neither is he responsible, in general, for the activities which the tenant carries on upon the land after such transfer, even when they create a nuisance.' " (*Uccello v. Laudenslayer* (1975) 44 Cal.App.3d 504, 510–511 [118 Cal.Rptr. 741], internal citations omitted.)

- "To this general rule of nonliability, the law has developed a number of exceptions, such as where the landlord covenants or volunteers to repair a defective condition on the premises, where the landlord has actual knowledge of defects which are unknown and not apparent to the tenant and he fails to disclose them to the tenant, where there is a nuisance existing on the property at the time the lease is made or renewed, when a safety law has been violated, or where the injury occurs on a part of the premises over which the landlord retains control, such as common hallways, stairs, elevators, or roof. [¶] A common element in these exceptions is that either at or after the time possession is given to the tenant the landlord retains or acquires a recognizable degree of control over the dangerous condition with a concomitant right and power to obviate the condition and prevent the injury. In these situations, the law imposes on the landlord a duty to use ordinary care to eliminate the condition with resulting liability for injuries caused by his failure so to act." (*Uccello, supra,* 44 Cal.App.3d at p. 511, internal citations omitted.)

- “[W]here a landlord has relinquished control of property to a tenant, a ‘bright line’ rule has developed to moderate the landlord's duty of care owed to a third party injured on the property as compared with the tenant who enjoys possession and control. ‘ “Because a landlord has relinquished possessory interest in the land, his or her duty of care to third parties injured on the land is attenuated as compared with the tenant who enjoys possession and control. Thus, before liability may be thrust on a landlord for a third party's injury due to a dangerous condition on the land, the plaintiff must show that the landlord had actual knowledge of the dangerous condition in question, plus the right and ability to cure the condition.” [¶] Limiting a landlord's obligations releases it from needing to engage in potentially intrusive oversight of the property, thus permitting the tenant to enjoy its tenancy unmolested.’ ” (*Salinas v. Martin* (2008) 166 Cal.App.4th 404, 412 [82 Cal.Rptr.3d 735], internal citations omitted.)

- “[A] commercial landowner cannot totally abrogate its landowner responsibilities merely by signing a lease. As the owner of property, a lessor out of possession must exercise due care and must act reasonably toward the tenant as well as to unknown third persons. At the time the lease is executed and upon renewal a landlord has a right to reenter the property, has control of the property, and must inspect the premises to make the premises reasonably safe from dangerous conditions. Even if the commercial landlord executes a contract which requires the tenant to maintain the property in a certain condition, the landlord is obligated at the time the lease is executed to take reasonable precautions to avoid unnecessary danger.” (*Mora, supra,* 210 Cal.App.3d at p. 781, internal citations omitted.)

- “[T]he landlord’s responsibility to inspect is limited. Like a residential landlord, the duty to inspect charges the lessor ‘only with those matters which would have been disclosed by a reasonable inspection.’ The burden of reducing or avoiding the risk and the likelihood of injury will affect the determination of what constitutes a reasonable inspection. The landlord’s obligation is only to do what is reasonable under the circumstances. The landlord need not take extraordinary measures or make unreasonable expenditures of time and money in trying to discover hazards unless the circumstances so warrant. When there is a potential serious danger, which is foreseeable, a landlord should anticipate the danger and conduct a reasonable inspection before passing possession to the tenant. However, if no such inspection is warranted, the landlord has no such obligation.” (*Mora, supra,* 210 Cal.App.3d at p. 782, internal citations and footnote omitted.)

- “It is one thing for a landlord to leave a tenant alone who is complying with its lease. It is entirely different, however, for a landlord to ignore a defaulting tenant's possible neglect of property. Neglected property endangers the public, and a landlord's detachment frustrates the public policy of keeping property in good repair and safe. To strike the right balance between safety and disfavored self-help, we hold that [the landlord]’s duty to inspect attached upon entry of the judgment of possession in the unlawful detainer action and included reasonable periodic inspections thereafter.” (*Stone v. Center Trust Retail Properties, Inc.* (2008) 163 Cal.App.4th 608, 613 [77 Cal.Rptr.3d 556].)

- “[I]t is established that a landlord owes a duty of care to its tenants to take reasonable steps to secure the common areas under its control.” (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 675 [25 Cal.Rptr.2d 137, 863 P.2d 207].)

- "The existence of the landlord's duty to others to maintain the property in a reasonably safe condition is a question of law for the court." (*Johnson v. Prasad* (2014) 224 Cal.App.4th 74, 79 [168 Cal.Rptr.3d 196].)

- "The reasonableness of a landlord's conduct under all the circumstances is for the jury. A triable issue of fact exists as to whether the defendants' maintenance of a low, open, unguarded window in a common hallway where they knew young children were likely to play constituted a breach of their duty to take reasonable precautions to prevent children falling out of the window." (*Amos v. Alpha Prop. Mgmt.* (1999) 73 Cal.App.4th 895, 904 [87 Cal.Rptr.2d 34], internal citation omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1142, 1143

1 Levy et al., California Torts, Ch. 15, *General Premises Liability*, § 15.02 (Matthew Bender)

6 California Real Estate Law and Practice, Ch. 170, *The Premises: Duties and Liabilities*, § 170.03 (Matthew Bender)

29 California Forms of Pleading and Practice, Ch. 334, *Landlord and Tenant: Claims for Damages*, §§ 334.10, 334.53 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 421, *Premises Liability*, §§ 421.01–421.121 (Matthew Bender)

17 California Points and Authorities, Ch. 178, *Premises Liability*, § 178.23 (Matthew Bender)

1 California Civil Practice: Torts §§ 16:12–16:16 (Thomson Reuters)

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).

- " '[C]ontrol exists if the public entity has the "power to prevent, remedy or guard against the dangerous condition." ' " (*Goddard v. Department of Fish & Wildlife* (2015) 243 Cal.App.4th 350, 364 [196 Cal.Rptr.3d 625].)

- "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 Government Claims 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).
- No Liability for Minor Risk. Government Code section 830.2.
- "The Act defines a' "[d]angerous condition" 'as '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.' Public property is in a dangerous condition within the meaning of section 835 if it 'is physically damaged, deteriorated, or defective in such a way as to foreseeably endanger those using the property itself.' " (*Cordova v. City of L.A.* (2015) 61 Cal.4th 1099, 1105 [190 Cal.Rptr.3d 850, 353 P.3d 773], internal citations omitted.)
- "A public entity is not, without more, liable under section 835 for the harmful conduct of third parties on its property. But if a condition of public property 'creates a substantial risk of injury even when the property is used with due care', a public entity 'gains no immunity from liability simply because, in a particular case, the dangerous condition of its property combines with a third party's negligent conduct to inflict injury.' " (*Cordova, supra,* 61 Cal.4th at p. 1105, internal citations omitted.)
- "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.)

- "[T]he fact the particular plaintiff may not have used due care is relevant only to his [or her] comparative fault and not to the issue of the presence of a dangerous condition." (*Castro v. City of Thousand Oaks* (2015) 239 Cal.App.4th 1451, 1459 [192 Cal.Rptr.3d 376].)

- "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.)

- "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 Government Claims Act*, § 464.81 (Matthew Bender)

19A California Points and Authorities, Ch. 196, *Public Entities*, § 196.11 (Matthew Bender)

1110. Affirmative Defense—Natural Conditions (Gov. Code, § 831.2)

A public entity is not responsible for harm caused by a natural condition of an unimproved public property. If [*name of defendant***] proves that [***name of plaintiff***]'s injury was caused by such a condition, then it is not responsible for the injury.**

New September 2003

Sources and Authority

- Natural Condition of Unimproved Public Property. Government Code section 831.2.
- Public Beaches. Government Code section 831.21.
- "The immunity provided by section 831.2 is absolute and applies regardless of whether the public entity had knowledge of the dangerous condition or failed to give warning. The legislative purpose in enacting section 831.2 was to ensure that public entities will not prohibit public access to recreational areas due to the burden and expense of defending against personal injury suits and of placing such land in a safe condition." (*Goddard v. Department of Fish & Wildlife* (2015) 243 Cal.App.4th 350, 360 [196 Cal.Rptr.3d 625 ~~[Government Code section 831.2] provides absolute immunity for public entities against claims for injuries caused by natural conditions of unimproved public property. Section 831.2 was enacted to ensure that public entities will not prohibit public access to recreational areas caused by the burden and expense of defending against personal injury suits and of placing such land in a safe condition. Immunity provisions of the tort claims act generally prevail over all sections imposing liability." (*Arroyo v. State of California* (1995) 34 Cal.App.4th 755, 761 [40 Cal.Rptr.2d 627~~], internal citations omitted.)
- "The statutory immunity extends to 'an injury *caused* by a natural condition of any unimproved public property.' The use of the term 'caused' is significant. Here, although the injury *occurred* on improved property, that is, the paved parking lot, it was *caused* by the trees, native flora located near—and perhaps superadjacent to—the improved parking lot, but themselves on unimproved property." (*Meddock v. County of Yolo* (2013) 220 Cal.App.4th 170, 177 [162 Cal.Rptr.3d 796], original italics, footnote and internal citations omitted.)
- "[T]o qualify public property as *improved* so as to take it outside the immunity statute 'some form of physical change in the condition of the property *at the location of the injury*, which justifies the conclusion that the public entity is responsible for reasonable risk management in that area, [is] required to preclude application of the immunity.' " (*Meddock, supra*, 220 Cal.App.4th at p. 178 [162 Cal.Rptr.3d 796], original italics.)
- "[I]mprovement of a portion of a park does not remove the immunity from the unimproved areas." (*Meddock, supra*, 220 Cal.App.4th at p. 178.)
- "It is now generally settled that human-altered conditions, especially those that have existed for some

years, which merely duplicate models common to nature are still 'natural conditions' as a matter of law for the purposes of Government Code section 831.2." (*Tessier v. City of Newport Beach* (1990) 219 Cal.App.3d 310, 314 [268 Cal.Rptr. 233].)

- "Immunity under section 831.2 exists even where the public entity's nearby improvements together with natural forces add to the buildup of sand on a public beach." (*Morin v. County of Los Angeles* (1989) 215 Cal.App.3d 184, 188 [263 Cal.Rptr. 479].)

- "The statutory immunity is fully applicable to manmade lakes and reservoirs. Moreover, section 831.2 has been broadly construed to provide immunity even where a natural condition has been affected in some manner by human activity or nearby improvements." (*Goddard, supra,* 243 Cal.App.4th at p. 361, internal citations omitted.)

- "The mere attachment of a rope on defendant's undeveloped land by an unknown third party did not change the 'natural condition' of the land." (*Kuykendall v. State of California* (1986) 178 Cal.App.3d 563, 566 [223 Cal.Rptr. 763].)

- ~~Man-made lakes are covered by the Government Code section 831.2 immunity. (*Osgood v. County of Shasta* (1975) 50 Cal.App.3d 586, 590 [123 Cal.Rptr. 442]; see also *Knight, supra*, 4 Cal.App.4th at p. 926 [artificially rebuilt beach].)~~

- "Given the intent of the Legislature in enacting section 831.2, we hold that wild animals are a natural part of the condition of unimproved public property within the meaning of the statute." (*Arroyo, supra,* 34 Cal.App.4th at p. 762.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 250, 256

Haning, et al., California Practice Guide: Personal Injury, Ch. 2(III)-D, *Liability For "Dangerous Conditions" Of Public Property*, ¶ 2:2825 et seq. (The Rutter Group)

2 California Government Tort Liability Practice (Cont.Ed.Bar 4th ed.) §§ 12.82–12.87

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

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

19A California Points and Authorities, Ch. 196, *Public Entities*, §§ 196.12, 196.214 (Matthew Bender)

1200. Strict Liability—Essential Factual Elements

[*Name of plaintiff***] claims that [he/she] was harmed by a product [distributed/manufactured/sold] by [***name of defendant***] that:**

[contained a manufacturing defect;] [or]

[was defectively designed;] [or]

[did not include sufficient [instructions] [or] [warning of potential safety hazards].]

New September 2003

Sources and Authority

- "Products liability is the name currently given to the area of the law involving the liability of those who supply goods or products for the use of others to purchasers, users, and bystanders for losses of various kinds resulting from so-called defects in those products." (*Johnson v. United States Steel Corp.* (2015) 240 Cal.App.4th 22, 30 [192 Cal.Rptr.3d 158].)

- "A manufacturer, distributor, or retailer is liable in tort if a defect in the manufacture or design of its product causes injury while the product is being used in a reasonably foreseeable way." (*Soule v. GM Corp.* (1994) 8 Cal.4th 548, 560 [34 Cal.Rptr.2d 607, 882 P.2d 298], internal citations omitted.)

- "Strict liability has been invoked for three types of defects—manufacturing defects, design defects, and 'warning defects,' i.e., inadequate warnings or failures to warn." (*Anderson v. Owens-Corning Fiberglas Corp.* (1991) 53 Cal.3d 987, 995 [281 Cal.Rptr. 528, 810 P.2d 549].)

- "Under the Restatement [Rest.3d Torts, Products Liability, § 2], a product is defective if it: '(a) contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product; [¶] (b) is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe; [¶] (c) is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.' " (*Brady v. Calsol, Inc.* (2015) 241 Cal.App.4th 1212, 1218–1219 [194 Cal.Rptr.3d 243].)

- "A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being. ... The purpose of such liability is to insure that the costs of injuries resulting from defective products

are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves." (*Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, 62-63 [27 Cal.Rptr. 697, 377 P.2d 897].)

- "[S]trict products liability causes of action need not be pled in terms of classic negligence elements (duty, breach, causation and damages)." (*Elsheref v. Applied Materials, Inc.* (2014) 223 Cal.App.4th 451, 464 [167 Cal.Rptr.3d 257].)

- "[S]trict liability has never been, and is not now, absolute liability. As has been repeatedly expressed, under strict liability the manufacturer does not thereby become the insurer of the safety of the product's user." (*Sanchez v. Hitachi Koki, Co.* (2013) 217 Cal.App.4th 948, 956 [158 Cal.Rptr.3d 907].)

- "Beyond manufacturers, anyone identifiable as 'an integral part of the overall producing and marketing enterprise' is subject to strict liability." (*Arriaga v. CitiCapital Commercial Corp.* (2008) 167 Cal.App.4th 1527, 1534 [85 Cal.Rptr.3d 143].)

- "Generally, the imposition of strict liability hinges on the extent to which a party was 'responsible for placing products in the stream of commerce.' When the purchase of a product 'is the primary objective or essence of the transaction, strict liability applies even to those who are mere conduits in distributing the product to the consumer.' In contrast, the doctrine of strict liability is ordinarily inapplicable to transactions 'whose primary objective is obtaining services,' and to transactions in which the 'service aspect predominates and any product sale is merely incidental to the provision of the service.' Thus, '[i]n a given transaction involving both products and services, liability will often depend upon the defendant's role.' " (*Hernandezcueva v. E.F. Brady Co., Inc.* (2015) 243 Cal.App.4th 249, 258 [196 Cal.Rptr.3d 594], internal citations omitted.)

- "[U]nder the stream-of-commerce approach to strict liability[,] no precise legal relationship to the member of the enterprise causing the defect to be manufactured or to the member most closely connected with the customer is required before the courts will impose strict liability. It is the defendant's participatory connection, for his personal profit or other benefit, with the injury-producing product and with the enterprise that created consumer demand for and reliance upon the product (and not the defendant's legal relationship (such as agency) with the manufacturer or other entities involved in the manufacturing-marketing system) which calls for imposition of strict liability." (*Hernandezcueva, supra*, 243 Cal.App.4th at pp. 257–258.)

- " '[S]trict liability is not imposed even if the defendant is technically a "link in the chain" in getting the product to the consumer market if the judicially perceived policy considerations are not satisfied. Thus, a defendant will not be held strictly liable unless doing so will enhance product safety, maximize protection to the injured plaintiff, and apportion costs among the defendants. [Citations.]' " (*Hernandezcueva, supra*, 234 Cal.App.4th at p. 258.)

- "The component parts doctrine provides that the manufacturer of a component part is not liable for injuries caused by the finished product into which the component has been incorporated unless the component itself was defective and caused harm." (*O'Neil v. Crane Co.* (2012) 53 Cal.4th 335, 355 [135 Cal.Rptr.3d 288, 266 P.3d 987].)

- "The only exceptions to this rule [that a product manufacturer generally may not be held strictly liable for harm caused by another manufacturer's product] arise when the defendant bears some direct responsibility for the harm, either because the defendant's own product contributed substantially to the harm, or because the defendant participated substantially in creating a harmful combined use of the products." (*O'Neil, supra,* 53 Cal.4th at p. 362, internal citation omitted.)

- "[T]o hold a defendant strictly liable under a marketing/distribution theory, the plaintiff must demonstrate that: '(1) the defendant received a direct financial benefit from its activities and from the sale of the product; (2) the defendant's role was integral to the business enterprise such that the defendant's conduct was a necessary factor in bringing the product to the initial consumer market; and (3) the defendant had control over, or a substantial ability to influence, the manufacturing or distribution process.' " (*Arriaga, supra,* 167 Cal.App.4th at p. 1535.)

- "[T]he doctrine of strict liability may not be restricted on a theory of privity of contract. Since the doctrine applies even where the manufacturer has attempted to limit liability, they further make it clear that the doctrine may not be limited on the theory that no representation of safety is made to the bystander. [¶¶] If anything, bystanders should be entitled to greater protection than the consumer or user where injury to bystanders from the defect is reasonably foreseeable. Consumers and users, at least, have the opportunity to inspect for defects and to limit their purchases to articles manufactured by reputable manufacturers and sold by reputable retailers, whereas the bystander ordinarily has no such opportunities. In short, the bystander is in greater need of protection from defective products which are dangerous, and if any distinction should be made between bystanders and users, it should be made, contrary to the position of defendants, to extend greater liability in favor of the bystanders." (*Elmore v. American Motors Corp.* (1969) 70 Cal.2d 578, 586 [75 Cal.Rptr. 652, 451 P.2d 84].)

- "Engineers who do not participate in bringing a product to market and simply design a product are not subject to strict products liability." (*Romine v. Johnson Controls, Inc.* (2014) 224 Cal.App.4th 990, 1008 [169 Cal.Rptr.3d 208].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1428–1437

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-D, *Strict Liability For Defective Products*, ¶¶ 2:1207, 2:1215 (The Rutter Group)

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.10 (Matthew Bender)

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

19 California Points and Authorities, Ch. 190, *Products Liability,* § 190.20 et seq. (Matthew Bender)

1201. Strict Liability—Manufacturing Defect—Essential Factual Elements

[*Name of plaintiff***] claims that the [***product***] contained a manufacturing defect. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] [manufactured/distributed/sold] the [***product***];**
2. **That the [***product***] contained a manufacturing defect when it left [***name of defendant***]'s possession;**
3. **That [***name of plaintiff***] was harmed; and**
4. **That the [***product***]'s defect was a substantial factor in causing [***name of plaintiff***]'s harm.**

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

Directions for Use

To make a prima facie case, the plaintiff has the initial burden of producing evidence that he or she was injured while the product was being used in an intended or reasonably foreseeable manner. If this prima facie burden is met, the burden of proof shifts to the defendant to prove that the plaintiff's injury resulted from a misuse of the product. (See *Perez v. VAS S.p.A.* (2010) 188 Cal.App.4th 658, 678 [115 Cal.Rptr.3d 590] [risk-benefit design defect case]; *Cronin v. J.B.E. Olson Corp.* (1972) 8 Cal.3d 121, 125–126 [104 Cal.Rptr. 433, 501 P.2d 1153 [product misuse asserted as a defense to manufacturing defect]; see also CACI No. 1245, *Affirmative Defense—Product Misuse or Modification*.) Product misuse is a complete defense to strict products liability if the defendant proves that an unforeseeable abuse or alteration of the product after it left the manufacturer's hands was the sole cause of the plaintiff's injury. (*Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 56 [148 Cal.Rptr. 596, 583 P.2d 121]; see CACI No. 1245.) Misuse or modification that was a substantial factor in, but not the sole cause of, plaintiff's harm may also be considered in determining the comparative fault of the plaintiff or of third persons. See CACI No. 1207A, *Strict Liability—Comparative Fault of Plaintiff,* and CACI No. 1207B, *Strict Liability—Comparative Fault of Third Person*.

Sources and Authority

- "[T]he term defect as utilized in the strict liability context is neither self-defining nor susceptible to a single definition applicable in all contexts." (*Johnson v. United States Steel Corp.* (2015) 240 Cal.App.4th 22, 31 [192 Cal.Rptr.2d 158].)
- "A manufacturing defect occurs when an item is manufactured in a substandard condition." (*Gonzalez v. Autoliv ASP, Inc.* (2007) 154 Cal.App.4th 780, 792 [64 Cal.Rptr.3d 908].)

- "A product has a manufacturing defect if it differs from the manufacturer's intended result or from other ostensibly identical units of the same product line. In other words, a product has a manufacturing defect if the product as manufactured does not conform to the manufacturer's design." (*Garrett v. Howmedica Osteonics Corp.* (2013) 214 Cal.App.4th 173, 190 [153 Cal.Rptr.3d 693].)

- " 'Regardless of the theory which liability is predicated upon ... it is obvious that to hold a producer, manufacturer, or seller liable for injury caused by a particular product, there must first be proof that the defendant produced, manufactured, sold, or was in some way responsible for the product ... .' " (*Garcia v. Joseph Vince Co.* (1978) 84 Cal.App.3d 868, 874 [148 Cal.Rptr. 843], internal citation omitted.)

- "[W]here a plaintiff alleges a product is defective, proof that the product has malfunctioned is essential to establish liability for an injury *caused by the defect*." (*Khan v. Shiley Inc.* (1990) 217 Cal.App.3d 848, 855 [266 Cal.Rptr. 106], original italics.)

- "We think that a requirement that a plaintiff also prove that the defect made the product 'unreasonably dangerous' places upon him a significantly increased burden and represents a step backward in the area pioneered by this court." (*Cronin, supra,* 8 Cal.3d at pp. 134-135.)

- "[T]he policy underlying the doctrine of strict liability compels the conclusion that recovery should not be limited to cases involving latent defects." (*Luque v. McLean* (1972) 8 Cal.3d 136, 145 [104 Cal.Rptr. 443, 501 P.2d 1163].)

- "A manufacturer is liable only when a defect in its product was a legal cause of injury. A tort is a legal cause of injury only when it is a substantial factor in producing the injury." (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572 [34 Cal.Rptr.2d 607, 882 P.2d 298], internal citations omitted.)

- "[S]trict liability should not be imposed upon a manufacturer when injury results from a use of its product that is not reasonably foreseeable." (*Cronin, supra,* 8 Cal.3d at p. 126.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1428–1437

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-D, *Strict Liability For Defective Products*, ¶¶ 2:1215, 2:1216 (The Rutter Group)

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.11, Ch. 7, *Proof*, § 7.06 (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 460, *Products Liability*, §§ 460.11, 460.30 (Matthew Bender)

19 California Points and Authorities, Ch. 190, *Products Liability*, § 190.140 (Matthew Bender)

1203. Strict Liability—Design Defect—Consumer Expectation Test—Essential Factual Elements

[*Name of plaintiff***] claims the [***product***]'s design was defective because the [***product***] did not perform as safely as an ordinary consumer would have expected it to perform. To establish this claim, [***name of plaintiff***] must prove all of the following:**

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

2. **That the [***product***] did not perform as safely as an ordinary consumer would have expected it to perform when used or misused in an intended or reasonably foreseeable way;**

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

4. **That the [***product***]'s failure to perform safely was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003; Revised December 2005, April 2009, December 2009, June 2011

Directions for Use

If both tests (the consumer expectation test and the risk-benefit test) for design defect are asserted by the plaintiff, the burden-of-proof instructions must make it clear that the two tests are alternatives. (*Bracisco v. Beech Aircraft Corp.* (1984) 159 Cal.App.3d 1101, 1106–1107 [206 Cal.Rptr. 431].)

The court must make an initial determination as to whether the consumer expectation test applies to the product. In some cases, the court may determine that the product is one to which the test may, but not necessarily does, apply, leaving the determination to the jury. (See *Saller v. Crown Cork & Seal Co., Inc.* (2010) 187 Cal.App.4th 1220, 1233–1234 [115 Cal.Rptr.3d 151].) In such a case, modify the instruction to advise the jury that it must first determine whether the product is one about which an ordinary consumer can form reasonable minimum safety expectations.

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

Sources and Authority

- "A manufacturer, distributor, or retailer is liable in tort if a defect in the manufacture or design of its product causes injury while the product is being used in a reasonably foreseeable way." (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 560 [34 Cal.Rptr.2d 607, 882 P.2d 298].)

- "[T]he term defect as utilized in the strict liability context is neither self-defining nor susceptible to a single definition applicable in all contexts." (*Johnson v. United States Steel Corp.* (2015) 240 Cal.App.4th 22, 31 [192 Cal.Rptr.2d 158].)

- "[A] product is defective in design either (1) if the product has failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, or (2) if, in light of the relevant factors … , the benefits of the challenged design do not outweigh the risk of danger inherent in such design." (*Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413, 418 [143 Cal.Rptr. 225, 573 P.2d 443].)

- "The [consumer-expectation and risk-benefit] tests provide alternative means for a plaintiff to prove design defect and do not serve as defenses to one another. A product may be defective under the consumer expectation test even if the benefits of the design outweigh the risks. [Citation.] On the other hand, a product may be defective if it satisfies consumer expectations but contains an excessively preventable danger in that the risks of the design outweigh its benefits." (*Chavez v. Glock, Inc.* (2012) 207 Cal.App.4th 1283, 1303 [144 Cal.Rptr.3d 326].)

- "The rationale of the consumer expectations test is that '[t]he purposes, behaviors, and dangers of certain products are commonly understood by those who ordinarily use them.' Therefore, in some cases, ordinary knowledge of the product's characteristics may permit an inference that the product did not perform as safely as it should. '*If* the facts permit such a conclusion, and *if* the failure resulted from the product's design, a finding of defect is warranted without any further proof,' and the manufacturer may not defend by presenting expert evidence of a risk/benefit analysis. … Nonetheless, the inherent complexity of the product itself is not controlling on the issue of whether the consumer expectations test applies; a complex product 'may perform so unsafely that the defect is apparent to the common reason, experience, and understanding of its ordinary consumers.' " (*Saller, supra,* 187 Cal.App.4th at p. 1232, original italics, internal citations omitted.)

- "The critical question, in assessing the applicability of the consumer expectation test, is not whether the product, when considered in isolation, is beyond the ordinary knowledge of the consumer, but whether the product, *in the context of the facts and circumstances of its failure,* is one about which the ordinary consumers can form minimum safety expectations." (*Pannu v. Land Rover North America, Inc.* (2011) 191 Cal.App.4th 1298, 1311–1312 [120 Cal.Rptr.3d 605].)

- "Whether the jury should be instructed on either the consumer expectations test or the risk/benefit test depends upon the particular facts of the case. In a jury case, the trial court must initially determine as a question of foundation, within the context of the facts and circumstances of the particular case, whether the product is one about which the ordinary consumer can form reasonable minimum safety expectations. 'If the court concludes it is not, no consumer expectation instruction should be given. …

If, on the other hand, the trial court finds there is sufficient evidence to support a finding that the ordinary consumer can form reasonable minimum safety expectations, the court should instruct the jury, consistent with Evidence Code section 403, subdivision (c), to determine whether the consumer expectation test applies to the product at issue in the circumstances of the case [or] to disregard the evidence about consumer expectations unless the jury finds that the test is applicable. If it finds the test applicable, the jury then must decide whether the product failed to perform as safely as an ordinary consumer would expect when the product is used in an intended or reasonably foreseeable manner.' " (*Saller, supra,* 187 Cal.App.4th at pp. 1233–1234, internal citations omitted.)

- "[The] dual standard for design defect assures an injured plaintiff protection from products that either fall below ordinary consumer expectations as to safety or that, on balance, are not as safely designed as they should be." (*Barker, supra,* 20 Cal.3d at p. 418.)

- "The consumer expectation test "acknowledges the relationship between strict tort liability for a defective product and the common law doctrine of warranty, which holds that a product's presence on the market includes an implied representation 'that it [will] safely do the jobs for which it was built.' " (*Soule, supra,* 8 Cal.4th at p. 562, internal citations omitted.)

- "[T]he jury may not be left free to find a violation of ordinary consumer expectations whenever it chooses. Unless the facts actually permit an inference that the product's performance did not meet the minimum safety expectations of its ordinary users, the jury must engage in the balancing of risks and benefits required by the second prong of *Barker*. Accordingly, as *Barker* indicated, instructions are misleading and incorrect if they allow a jury to avoid this risk-benefit analysis in a case where it is required." (*Soule, supra,* 8 Cal.4th at p. 568.)

- "[T]he consumer expectation test is reserved for cases in which the *everyday experience* of the product's users permits a conclusion that the product's design violated *minimum* safety assumptions, and is thus defective *regardless of expert opinion about the merits of the design*." (*Soule, supra,* 8 Cal.4th at p. 567, original italics.)

- "If the facts permit an inference that the product at issue is one about which consumers may form minimum safety assumptions in the context of a particular accident, then it is enough for a plaintiff, proceeding under the consumer expectation test, to show the circumstances of the accident and 'the objective features of the product which are relevant to an evaluation of its safety' [citation], leaving it to the fact finder to 'employ "[its] own sense of whether the product meets ordinary expectations as to its safety under the circumstances presented by the evidence." ' [Citations.] Expert testimony as to what consumers ordinarily 'expect' is generally improper." (*Chavez, supra*, 207 Cal.App.4th at p. 1303.)

- "That causation for a plaintiff's injuries was proved through expert testimony does not mean that an ordinary consumer would be unable to form assumptions about the product's safety. Accordingly, the trial court properly instructed the jury on the consumer expectations test." (*Romine v. Johnson Controls, Inc.* (2014) 224 Cal.App.4th 990, 1004 [169 Cal.Rptr.3d 208], internal citations omitted.)

- " An exception [to the rule that expert testimony is generally improper] exists where the product is in specialized use with a limited group of consumers. In such cases, 'if the expectations of the product's

limited group of ordinary consumers are beyond the lay experience common to all jurors, expert testimony on the limited subject of what the product's actual consumers do expect may be proper.' " (*McCabe v. American Honda Motor Co.* (2002) 100 Cal.App.4th 1111, 1120 fn. 3 [123 Cal.Rptr.2d 303], internal citations omitted.)

- "In determining whether a product's safety satisfies [the consumer expectation test], the jury considers the expectations of a hypothetical reasonable consumer, rather than those of the particular plaintiff in the case." (*Campbell v. General Motors Corp.* (1982) 32 Cal.3d 112, 126, fn. 6 [184 Cal.Rptr. 891, 649 P.2d 224].)

- "[E]vidence as to what the scientific community knew about the dangers … and when they knew it is not relevant to show what the ordinary consumer of [defendant]'s product reasonably expected in terms of safety at the time of [plaintiff]' s exposure. It is the knowledge and reasonable expectations of the consumer, not the scientific community, that is relevant under the consumer expectations test." (*Morton v. Owens-Corning Fiberglas Corp.* (1995) 33 Cal.App.4th 1529, 1536 [40 Cal.Rptr.2d 22].)

- "Where liability depends on the proof of a design defect, no practical difference exists between negligence and strict liability; the claims merge." (*Lambert v. General Motors* (1998) 67 Cal.App.4th 1179, 1185 [76 Cal.Rptr.2d 657].)

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

- "[T]he plaintiff bears an initial burden of making 'a prima facie showing that the injury was proximately caused by the product's design.' This showing requires evidence that the plaintiff was injured *while using the product in an intended or reasonably foreseeable manner* and that the plaintiff's ability to avoid injury was frustrated by the absence of a safety device, or by the nature of the product's design. If this prima facie burden is met, the burden of proof shifts to the defendant to prove, in light of the relevant factors, that the product is not defective. Importantly, the plaintiff's prima facie burden of producing evidence that injury occurred while the product was being used in an intended or reasonably foreseeable manner must be distinguished from the ultimate burden of proof that rests with the defendant to establish that its product was not defective because the plaintiff's injury resulted from a misuse of the product." (*Perez, supra*, 188 Cal.App.4th at p. 678, original italics, internal citations omitted.)

- "The use of asbestos insulation is a product that is within the understanding of ordinary lay consumers." (*Saller, supra*, 187 Cal.App.4th at p. 1236.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1449–1467

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-D, *Strict Liability For Defective*

Products, ¶¶ 2:1220–2:1222 (The Rutter Group)

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.11, Ch. 7, *Proof*, § 7.02 (Matthew Bender)

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

19 California Points and Authorities, Ch. 190, *Products Liability*, § 190.116 (Matthew Bender)

1204. Strict Liability—Design Defect—Risk-Benefit Test—Essential Factual Elements—Shifting Burden of Proof

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[*Name of plaintiff***] claims that the [***product***]'s design caused harm to [***name of plaintiff***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

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

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

3. **That the [***product***]'s design was a substantial factor in causing harm to [***name of plaintiff***].**

If [*name of plaintiff***] has proved these three facts, then your decision on this claim must be for [***name of plaintiff***] unless [***name of defendant***] proves that the benefits of the [***product***]'s design outweigh the risks of the design. In deciding whether the benefits outweigh the risks, you should consider the following:**

(a) The gravity of the potential harm resulting from the use of the [*product***];**

(b) The likelihood that this harm would occur;

(c) The feasibility of an alternative safer design at the time of manufacture;

(d) The cost of an alternative design; [and]

(e) The disadvantages of an alternative design; [and]

[(f) [*Other relevant factor(s)***].]**

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

Directions for Use

If the plaintiff asserts both tests for design defect (the consumer expectation test and the risk-benefit test), the instructions must make it clear that the two tests are alternatives. (*Bracisco v. Beech Aircraft Corp.* (1984) 159 Cal.App.3d 1101, 1106–1107 [206 Cal.Rptr. 431].) Risk-benefit weighing is not a formal part of, nor may it serve as a defense to, the consumer expectations test. (*Chavez v. Glock, Inc.* (2012) 207 Cal.App.4th 1283, 1303 [144 Cal.Rptr.3d 326].)

To make a prima facie case, the plaintiff has the initial burden of producing evidence that he or she was injured while the product was being used in an intended or reasonably foreseeable manner. If this prima facie burden is met, the burden of proof shifts to the defendant to prove

that the plaintiff's injury resulted from a misuse of the product. (See *Perez v. VAS S.p.A.* (2010) 188 Cal.App.4th 658, 678 [115 Cal.Rptr.3d 590]; see also CACI No. 1245, *Affirmative Defense—Product Misuse or Modification*.) Product misuse is a complete defense to strict products liability if the defendant proves that an unforeseeable abuse or alteration of the product after it left the manufacturer's hands was the sole cause of the plaintiff's injury. (*Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 56 [148 Cal.Rptr. 596, 583 P.2d 121]; see CACI No. 1245.) Misuse or modification that was a substantial factor in, but not the sole cause of, plaintiff's harm may also be considered in determining the comparative fault of the plaintiff or of third persons. See CACI No. 1207A, *Strict Liability—Comparative Fault of Plaintiff*, and CACI No. 1207B, *Strict Liability—Comparative Fault of Third Person*.

Aesthetics might be an additional factor to be considered in an appropriate case in which there is evidence that appearance is important in the marketability of the product. (See *Bell v. Bayerische Motoren Werke Aktiengesellschaft* (2010) 181 Cal.App.4th 1108, 1131 [105 Cal.Rptr.3d 485].)

Sources and Authority

"A manufacturer, distributor, or retailer is liable in tort if a defect in the manufacture or design of its product causes injury while the product is being used in a reasonably foreseeable way." (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 560 [34 Cal.Rptr.2d 607, 882 P.2d 298].)

- "[T]he term defect as utilized in the strict liability context is neither self-defining nor susceptible to a single definition applicable in all contexts." (*Johnson v. United States Steel Corp.* (2015) 240 Cal.App.4th 22, 31 [192 Cal.Rptr.2d 158].)

- " '[O]nce the plaintiff makes a prima facie showing that the injury was proximately caused by the product's design, the burden should appropriately shift to the defendant to prove, in light of the relevant factors, that the product is not defective.' Appellants are therefore correct in asserting that it was not their burden to show that the risks involved in the loader's design—the lack of mechanical safety devices, or of a warning—outweighed the benefits of these aspects of its designs. The trial court's instruction to the jury, which quite likely would have been understood to place this burden on appellants, was therefore an error." (*Lunghi v. Clark Equipment Co., Inc.* (1984) 153 Cal.App.3d 485, 497–498 [200 Cal.Rptr. 387], internal citations omitted.)

- "[U]nder the risk/benefit test, the plaintiff may establish the product is defective by showing that its design proximately caused his injury and the defendant then fails to establish that on balance the benefits of the challenged design outweigh the risk of danger inherent in such design. In such case, the jury must evaluate the product's design by considering the gravity of the danger posed by the design, the likelihood such danger would occur, the feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the consumer resulting from an alternative design. 'In such cases, the jury must consider the manufacturer's evidence of competing design considerations … , and the issue of design defect cannot fairly be resolved by standardless reference to the "expectations" of an "ordinary consumer." '" (*Saller v. Crown Cork & Seal Co., Inc.* (2010)

187 Cal.App.4th 1220, 1233 [115 Cal.Rptr.3d 151], internal citations omitted.)

- "[T]he defendant's burden is one 'affecting the burden of proof, rather than simply the burden of producing evidence.' " (*Moreno v. Fey Manufacturing Corp.* (1983) 149 Cal.App.3d 23, 27 [196 Cal.Rptr. 487].)

- "The [consumer-expectation and risk-benefit] tests provide alternative means for a plaintiff to prove design defect and do not serve as defenses to one another. A product may be defective under the consumer expectation test even if the benefits of the design outweigh the risks. [Citation.] On the other hand, a product may be defective if it satisfies consumer expectations but contains an excessively preventable danger in that the risks of the design outweigh its benefits." (*Chavez, supra,* 207 Cal.App.4th at p. 1303.)

- "Under *Barker,* in short, the plaintiff bears an initial burden of making 'a prima facie showing that the injury was proximately caused by the product's design.' This showing requires evidence that the plaintiff was injured *while using the product in an intended or reasonably foreseeable manner* and that the plaintiff's ability to avoid injury was frustrated by the absence of a safety device, or by the nature of the product's design. If this prima facie burden is met, the burden of proof shifts to the defendant to prove, in light of the relevant factors, that the product is not defective. Importantly, the plaintiff's prima facie burden of producing evidence that injury occurred while the product was being used in an intended or reasonably foreseeable manner must be distinguished from the ultimate burden of proof that rests with the defendant to establish that its product was not defective because the plaintiff's injury resulted from a misuse of the product." (*Perez, supra,* 188 Cal.App.4th at p. 678, original italics, internal citations omitted.)

- " '[I]n evaluating the adequacy of a product's design pursuant to [the risk-benefit] standard, a jury may consider, among other relevant factors, the gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design.'" (*Gonzalez v. Autoliv ASP, Inc.* (2007) 154 Cal.App.4th 780, 786–787 [64 Cal.Rptr.3d 908], internal citations omitted.)

- "[E]xpert evidence about compliance with industry standards can be considered on the issue of defective design, in light of all other relevant circumstances, even if such compliance is not a complete defense. An action on a design defect theory can be prosecuted and defended through expert testimony that is addressed to the elements of such a claim, including risk-benefit considerations." (*Howard v. Omni Hotels Management Corp.* (2012) 203 Cal.App.4th 403, 426 [136 Cal.Rptr.3d 739].)

- "Plaintiffs contend aesthetics is not a proper consideration in the risk-benefit analysis, and the trial court's ruling to the contrary was an '[e]rror in law.' We disagree. In our view, much of the perceived benefit of a car lies in its appearance. A car is not a strictly utilitarian product. We believe that a jury properly may consider aesthetics in balancing the benefits of a challenged design against the risk of danger inherent in the design. Although consideration

of the disadvantages of an alternative design (CACI No. 1204, factor (e)) would encompass any impact on aesthetics, we conclude that there was no error in the trial court's approval of the modification listing aesthetics as a relevant factor." (*Bell, supra,* 181 Cal.App.4th at p. 1131, internal citations omitted.)

- "Taken together, section 2, subdivision (b), and section 5 of the Restatement indicate that a component part manufacturer may be held liable for a defect in the component. When viewed in its entirety, the Restatement does not support [defendant]'s argument that '[o]nly if the component part analysis establishes sufficient control over the design of the alleged defect should the component manufacturer be held to the standard of the risk-benefit test.' Instead, the test considering foreseeable risks of harm and alternative designs is applied to the component part manufacturer when the alleged defect is in the component." (*Gonzalez, supra,* 154 Cal.App.4th at pp. 789–790.)

- "Where liability depends on the proof of a design defect, no practical difference exists between negligence and strict liability; the claims merge." (*Lambert v. General Motors* (1998) 67 Cal.App.4th 1179, 1185 [76 Cal.Rptr.2d 657].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1449–1467

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-D, *Strict Liability For Defective Products*, ¶¶ 2:1223–2:1224 (The Rutter Group)

California Products Liability Actions, Ch. 7, *Proof*, § 7.02 (Matthew Bender)

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

19 California Points and Authorities, Ch. 190, *Products Liability*, §§ 190.110, 190.118–190.122 (Matthew Bender)

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:***]**

[gave [*name of plaintiff***] a written warranty that the [***product***] [***insert description of written warranty***];] [or]**

[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 defendant***] failed to [repair/***specify other remedy provided by warranty***] the [***product***] as required by the warranty;**

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

6. **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, June 2015

Directions for Use

~~The second option for element 1 was inadvertently omitted in the June 2015 supplement. It has been restored. The Judicial Council and LexisNexis regret this error.~~

This instruction is for use if breach of an express warranty is alleged under the California Commercial Code. (See *Orichian v. BMW of North America, LLC* (2014) 226 Cal.App.4th 1322, 1333−1334 [172 Cal.Rptr.3d 876]; Comm. Code, § 2313.) If a breach of written warranty under the federal Magnuson-Moss Warranty Act (see 15 U.S. Code, § 2301 et seq.) is alleged, give the first option for element 1. (See 15 U.S.C. §§ 2310(d)(1), 2301(6).)

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. California Uniform Commercial Code section 2313.
- Applicable to "Transactions in Goods." California Uniform Commercial Code section 2102.
- "Goods" Defined. California Uniform Commercial Code section 2105.
- Damages Under Commercial Code. California Uniform Commercial Code section 2714.
- "An express warranty 'is a contractual promise from the seller that the goods conform to the promise. If they do not, the buyer is entitled to recover the difference between the value of the goods accepted by the buyer and the value of the goods had they been as warranted.' " (*Dagher v. Ford Motor Co.* (2015) 238 Cal.App.4th 905, 928 [190 Cal.Rptr.3d 261].)
- "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.)
- "The essential elements of a cause of action under the California Uniform Commercial Code for breach of an express warranty to repair defects are (1) an express warranty to repair defects given in connection with the sale of goods; (2) the existence of a defect covered by the warranty; (3) the buyer's notice to the seller of such a defect within a reasonable time after its discovery; (4) the seller's failure to repair the defect in compliance with the warranty; and (5) resulting damages." (*Orichian, supra,* 226 Cal.App.4th at pp. 1333−1334, internal citations omitted.)
- "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].)

- "Used car owners that obtain their vehicles via private sales and who comply with the warranty terms may seek to enforce the express warranty against the manufacturer by bringing an action under the Commercial Code based on breach of express warranty. Such an action does not require that the plaintiff purchase the vehicle from a retail seller." (*Dagher, supra*, 238 Cal.App.4th at p. 928.)

- " '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 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.)

- "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.)

- "Neither Magnuson-Moss nor the California Uniform Commercial Code requires proof that a defect substantially impairs the use, value, or safety of a vehicle in order to establish a breach of an express or written warranty, as required under Song-Beverly." (*Orichian, supra,* 226 Cal.App.4th at p. 1331; fn. 9, see CACI No. 3204, *"Substantially Impaired" Explained*.)

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*, § 206.60 et seq. (Matthew Bender)

1501. Wrongful Use of Civil Proceedings

[*Name of plaintiff***] claims that [***name of defendant***] wrongfully brought a lawsuit 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 lawsuit;**

[2. That the lawsuit ended in [*name of plaintiff***]'s favor;]**

[3. That no reasonable person in [*name of defendant***]'s circumstances would have believed that there were reasonable grounds to bring the lawsuit against [***name of plaintiff***];]**

4. **That [***name of defendant***] acted primarily for a purpose other than succeeding on the merits of the claim;**

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 earlier lawsuit 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 [***name of defendant***] had reasonable grounds for bringing the earlier lawsuit against [him/her/it]. 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 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, the jury may be required 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 to decide.

Element 4 expresses the malice requirement.

Sources and Authority

- Public Employee Immunity. Government Code section 821.6.

- "Although the tort is usually called 'malicious prosecution,' the word 'prosecution' is not a particularly apt description of the underlying civil action. The Restatement uses the term 'wrongful use of civil proceedings' to refer to the tort." (5 Witkin, Summary of California Law (10th ed. 2005) Torts, § 486, internal citations omitted.)

- "To establish a cause of action for the malicious prosecution of a civil proceeding, a plaintiff must plead and prove that the prior action (1) was commenced by or at the direction of the defendant and was pursued to a legal termination in his, plaintiff's, favor; (2) was brought without probable cause; and (3) was initiated with malice." (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 50 [118 Cal.Rptr. 184, 529 P.2d 608], internal citations 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.)

- "The malicious commencement of a civil proceeding is actionable because it harms the individual against whom the claim is made, and also because it threatens the efficient administration of justice. The individual is harmed because he is compelled to defend against a fabricated claim which not only subjects him to the panoply of psychological pressures most civil defendants suffer, but also the additional stress of attempting to resist a suit commenced out of spite or ill will, often magnified by

slanderous allegations in the pleadings." (*Merlet v. Rizzo* (1998) 64 Cal.App.4th 53, 59 [75 Cal.Rptr.2d 83], internal citation omitted.)

- "[The litigation privilege of Civil Code section 47] has been interpreted to apply to virtually all torts except malicious prosecution." (*Kimmel v. Goland* (1990) 51 Cal.3d 202, 209 [271 Cal.Rptr. 191, 793 P.2d 524].)

- "Liability for malicious prosecution is not limited to one who initiates an action. A person who did not file a complaint may be liable for malicious prosecution if he or she 'instigated' the suit or 'participated in it at a later time.' " (*Nunez v. Pennisi* (2015) 241 Cal.App.4th 861, 873 [193 Cal.Rptr.3d 912~~There does not appear to be any good reason not to impose liability upon a person who inflicts harm by aiding or abetting a malicious prosecution which someone else has instituted." (*Lujan v. Gordon* (1977) 70 Cal.App.3d. 260, 264 [138 Cal.Rptr. 654~~].)

- "[A] cause of action for malicious prosecution lies when predicated on a claim for affirmative relief asserted in a cross-pleading even though intimately related to a cause asserted in the complaint." (*Bertero, supra,* 13 Cal.3d at p. 53.)

- "A claim for malicious prosecution need not be addressed to an entire lawsuit; it may … be based upon only some of the causes of action alleged in the underlying lawsuit." (*Franklin Mint Co. v. Manatt, Phelps & Phillips, LLP* (2010) 184 Cal.App.4th 313, 333 [109 Cal.Rptr.3d 143].)

- "[A] lawyer is not immune from liability for malicious prosecution simply because the general area of law at issue is complex and there is no case law with the same facts that establishes that the underlying claim was untenable. Lawyers are charged with the responsibility of acquiring a reasonable understanding of the law governing the claim to be alleged. That achieving such an understanding may be more difficult in a specialized field is no defense to alleging an objectively untenable claim." (*Franklin Mint Co., supra,* 184 Cal.App.4th at p. 346.)

- "Our repeated references in *Bertero* to the types of harm suffered by an 'individual' who is forced to defend against a baseline suit do not indicate … that a malicious prosecution action can be brought only by an individual. On the contrary, there are valid policies which would be furthered by allowing nonindividuals to sue for malicious prosecution." (*City of Long Beach v. Bozek* (1982), 31 Cal.3d 527, 531 [183 Cal.Rptr. 86, 645 P.2d 137], reiterated on remand from United States Supreme Court at 33 Cal.3d 727 [but holding that public entity cannot sue for malicious prosecution].)

- "[T]he courts have refused to permit malicious prosecution claims when they are based on a prior proceeding that is (1) less formal or unlike the process in the superior court (i.e., a small claims hearing, an investigation or application not resulting in a formal proceeding), (2) purely defensive in nature, or (3) a continuation of an existing proceeding." (*Merlet, supra,* 64 Cal.App.4th at p. 60.)

- "[I]t is not enough that the present plaintiff (former defendant) prevailed in the action. The termination must ' "reflect on the merits," ' and be such that it 'tended to indicate [the former defendant's] innocence of or lack of responsibility for the alleged misconduct.' " (*Drummond v. Desmarais* (2009) 176 Cal.App.4th 439, 450 [98 Cal.Rptr.3d 183], internal citations omitted.)

- " '[A] voluntary dismissal on technical grounds, such as lack of jurisdiction, laches, the statute of limitations or prematurity, does not constitute a favorable termination because it does not reflect on the substantive merits of the underlying claim. … ' " (*Drummond, supra,* 176 Cal.App.4th at p. 456.)

- "[Code of Civil Procedure] Section 581c, subdivision (c) provides that where a motion for judgment of nonsuit is granted, 'unless the court in its order for judgment otherwise specifies, the judgment of nonsuit operates as an adjudication upon the merits.' … [¶] We acknowledge that not every judgment of nonsuit should be grounds for a subsequent malicious prosecution action. Some will be purely technical or procedural and will not reflect the merits of the action. In such cases, trial courts should exercise their discretion to specify that the judgment of nonsuit shall not operate as an adjudication upon the merits." (*Nunez, supra,* 241 Cal.App.4th at p. 874.)

- "[A] malicious prosecution plaintiff is not precluded from establishing favorable termination where severable claims are adjudicated in his or her favor." (*Sierra Club Found., supra,* 72 Cal.App.4th at p. 1153, internal citation omitted.)

- " ' "A voluntary dismissal may be an implicit concession that the dismissing party cannot maintain the action and may constitute a decision on the merits. [Citations.] 'It is not enough, however, merely to show that the proceeding was dismissed.' [Citation.] The reasons for the dismissal of the action must be examined to determine whether the termination reflected on the merits." [Citations.]' Whether that dismissal is a favorable termination for purposes of a malicious prosecution claim depends on whether the dismissal of the [earlier] Lawsuit is considered to be on the merits reflecting [plaintiff's 'innocence' of the misconduct alleged." (*JSJ Limited Partnership v. Mehrban* (2012) 205 Cal.App.4th 1512, 1524 [141 Cal.Rptr.3d 338], internal citations omitted.)

- "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.)

- "[W]hen a dismissal results from negotiation, settlement, or consent, a favorable termination is normally not recognized. Under these latter circumstances, the dismissal reflects ambiguously on the merits of the action." (*Weaver v. Superior Court* (1979) 95 Cal.App.3d 166, 184–185 [156 Cal.Rptr. 745], internal citations omitted, disapproved on other grounds in *Sheldon Appel Co., supra,* 47 Cal.3d at p. 882.)

- "Not every case in which a terminating sanctions motion is granted necessarily results in a 'favorable termination.' But where the record from the underlying action is devoid of any attempt during discovery to substantiate allegations in the complaint, and the court's dismissal is justified by the plaintiff's lack of evidence to submit the case to a jury at trial, a prima facie showing of facts sufficient to satisfy the 'favorable termination' element of a malicious prosecution claim is established … ." (*Daniels v. Robbins* (2010) 182 Cal.App.4th 204, 219 [105 Cal.Rptr.3d 683].)

- "[T]he existence or absence of probable cause has traditionally been viewed as a question of law to be determined by the court, rather than a question of fact for the jury …. [¶] [It] requires a sensitive evaluation of legal principles and precedents, a task generally beyond the ken of lay jurors ... ." (*Sheldon Appel Co., supra,* 47 Cal.3d at p. 875.)

- "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.)

- "Whereas the malice element is directly concerned with the *subjective* mental state of the defendant in instituting the prior action, the probable cause element calls on the trial court to make an objective determination of the 'reasonableness' of the defendant's conduct, i.e., to determine whether, on the basis of the facts known to the defendant, the institution of the prior action was legally tenable." (*Sheldon Appel Co., supra,* 47 Cal.3d at p. 878, original italics.)

- " 'The benchmark for legal tenability is whether any reasonable attorney would have thought the claim was tenable. [Citation.] ~~Good faith reliance on the advice of counsel, after truthful disclosure of all the relevant facts, is a complete defense to a malicious prosecution claim. [Citation.]' 'However, if the initiator acts in bad faith or withholds from counsel facts he knew or should have known would defeat a cause of action otherwise appearing from the information supplied, that defense fails. [Citations.]~~' " (*Oviedo v. Windsor Twelve Properties, LLC* (2012) 212 Cal.App.4th 97, 114 [151 Cal.Rptr.3d 117], internal citation omitted.)

- " 'The facts to be analyzed for probable cause are those known to the defendant [in the malicious prosecution action] at the time the underlying action was filed.' " (*Walsh v. Bronson* (1988) 200 Cal.App.3d 259, 264 [245 Cal.Rptr. 888], internal citations omitted.)

- "A litigant will lack probable cause for his action either if he relies upon facts which he has no reasonable cause to believe to be true, or if he seeks recovery upon a legal theory which is untenable under the facts known to him." (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 292 [46 Cal.Rptr.3d 638, 139 P.3d 30].)

- "[W]e reject their contention that unpled hidden theories of liability are sufficient to create probable cause." (*Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1542 [161 Cal.Rptr.3d 700].)

- "Certain nonfinal rulings on the merits may serve as the basis for concluding that there was probable cause for prosecuting the underlying case on which a subsequent malicious prosecution action is based. This is based on the notion that '[c]laims that have succeeded at a hearing on the merits, even if that result is subsequently reversed by the trial or appellate court, are not so lacking in potential merit that a reasonable attorney or litigant would necessarily have recognized their frivolousness.' Thus, for instance, the denial of a nonsuit motion and a subsequent plaintiff's jury verdict has been found sufficient to constitute probable cause, even though the trial court or appellate court later reverses that verdict. Similarly, the denial of a defense summary judgment motion 'normally establishes there was probable cause to sue, thus barring a later malicious prosecution suit.' " (*Yee v. Cheung* (2013) 220 Cal.App.4th 184, 200−201 [162 Cal.Rptr.3d 851], internal citations omitted.)

- "California courts have held that victory at *trial*, though reversed on appeal, conclusively establishes probable cause." (*Roberts v. Sentry Life Insurance* (1999) 76 Cal.App.4th 375, 383 [90 Cal.Rptr.2d 408], original italics.)

- " '[T]here may be situations where denial of summary judgment should not irrefutably establish probable cause. For example, if denial of summary judgment was induced by materially false facts submitted in opposition, equating denial with probable cause might be wrong. Summary judgment might have been granted but for the false evidence.' " (*Antounian v. Louis Vuitton Malletier* (2010) 189 Cal.App.4th 438, 451 [117 Cal.Rptr.3d 3].)

- "[T]he fraud exception requires ' "knowing use of false and perjured testimony." ' " (*Antounian, supra,* 189 Cal.App.4th at p. 452.)

- "Probable cause may be present even where a suit lacks merit. ... Suits which all reasonable lawyers agree totally lack merit—that is, those which lack probable cause—are the least meritorious of all meritless suits. Only this subgroup of meritless suits present[s] no probable cause." (*Roberts, supra,* 76 Cal.App.4th at p. 382.)

- "[A]n attorney may be held liable for malicious prosecution for continuing to prosecute a lawsuit discovered to lack probable cause." (*Zamos v. Stroud* (2004) 32 Cal.4th 958, 970 [12 Cal.Rptr.3d 54, 87 P.3d 802].)

- "[W]here several claims are advanced in the underlying action, each must be based on probable cause." (*Lanz v. Goldstone* (2015) 243 Cal.App.4th 441, 459 [197 Cal.Rptr.3d 227].)

- "As an element of the tort of malicious prosecution, malice at its core refers to an improper *motive* for bringing the prior action. As an element of liability it reflects the core function of the tort, which is to secure compensation for harm inflicted by *misusing* the judicial system, i.e., using it for something other than to enforce legitimate rights and secure remedies to which the claimant may tenably claim an entitlement. Thus the cases speak of malice as being present when a suit is actuated by hostility or ill will, or for some purpose other than to secure relief. It is also said that a plaintiff acts with malice when he asserts a claim with knowledge of its falsity, because one who seeks to establish such a claim 'can only be motivated by an improper purpose.' A lack of probable cause will therefore support an inference of malice." (*Drummond, supra,* 176 Cal.App.4th at pp. 451–452, original italics, internal citations omitted.)

- "A lack of probable cause is a factor that may be considered in determining if the claim was prosecuted with malice [citation], but the lack of probable cause must be supplemented by other, additional evidence." (*Silas v. Arden* (2013) 213 Cal.App.4th 75, 90 [152 Cal.Rptr.3d 255].)

- "Because malice concerns the former plaintiff's actual mental state, it necessarily presents a question of fact." (*Drummond, supra,* 176 Cal.App.4th at p. 452.)

- "Negligence does not equate with malice. Nor does the negligent filing of a case necessarily constitute the malicious prosecution of that case." (*Grindle v. Lorbeer* (1987) 196 Cal.App.3d 1461, 1468 [242 Cal.Rptr. 562].)

- "The motive of the defendant must have been something other than that of bringing a perceived guilty person to justice or the satisfaction in a civil action of some personal or financial purpose." (*Downey Venture v. LMI Insurance Co.* (1998) 66 Cal.App.4th 478, 494 [78 Cal.Rptr.2d 142], internal citations omitted.)

- "Malice does not require that the defendants harbor actual ill will toward the plaintiff in the malicious prosecution case, and liability attaches to attitudes that range ' "from open hostility to indifference. [Citations.]" ' " (*Cole v. Patricia A. Meyer & Associates, APC* (2012) 206 Cal.App.4th 1095, 1113–1114 [142 Cal.Rptr.3d 646], internal citations omitted.)

- " 'Suits with the hallmark of an improper purpose' include, but are not necessarily limited to, 'those in which: " '… (1) the person initiating them does not believe that his claim may be held valid; (2) the proceedings are begun primarily because of hostility or ill will; (3) the proceedings are initiated solely for the purpose of depriving the person against whom they are initiated of a beneficial use of his property; (4) the proceedings are initiated for the purpose of forcing a settlement which has no relation to the merits of the claim.' " ' [Citation.] [¶] Evidence tending to show that the defendants did not subjectively believe that the action was tenable is relevant to whether an action was instituted or maintained with malice. [Citation.]' " (*Oviedo, supra*, 212 Cal.App.4th at pp. 113-114..)

- "Although *Zamos* [*supra*] did not explicitly address the malice element of a malicious prosecution case, its holding and reasoning compel us to conclude that malice formed after the filing of a complaint is actionable." (*Daniels, supra*, 182 Cal.App.4th at p. 226.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 471, 474, 477–484, 486–512

Ahart, California Practice Guide: Enforcing Judgments & Debts, Ch. 2-C, *Liability For Unfair Collection Practices—Tort Liability*, ¶ 2:455 (The Rutter Group)

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)

1510. Affirmative Defense—Reliance on Counsel

[*Name of defendant***] claims that [he/she] had reasonable grounds for [causing or continuing the criminal proceeding/bringing or continuing a [lawsuit/administrative proceeding]] because [he/she] was relying on the advice of an attorney. To succeed, [***name of defendant***] must prove both of the following:**

1. **That [***name of defendant***] made a full and honest disclosure of all the important facts known to [him/her] to the [district attorney/attorney]; and**

2. **That [**he/she**] reasonably relied on the [district attorney/attorney]'s advice.**

New September 2003; Renumbered from CACI No. 1505 June 2013

Sources and Authority

- " 'Good faith reliance on the advice of counsel, after truthful disclosure of all the relevant facts, is a complete defense to a malicious prosecution claim.' The burden of proving the advice of counsel defense is on [defendant]." (*Nunez v. Pennisi* (2015) 241 Cal.App.4th 861, 876-877 [193 Cal.Rptr.3d 912(Cal. App. 6th Dist. 2015)~~Probable cause may be established by the defendants in a malicious institution proceeding when they prove that they have in good faith consulted a lawyer, have stated all the facts to him, have been advised by the lawyer that they have a good cause of action and have honestly acted upon the advice of the lawyer.' " (*Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548, 1556 [8 Cal.Rptr.2d 552~~], internal citation omitted.)

- "[I]f the initiator acts in bad faith or withholds from counsel facts he knew or should have known would defeat a cause of action otherwise appearing from the information supplied, [the] defense fails." (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 53-54 [118 Cal.Rptr. 184, 529 P.2d 608].)

- "[T]he defense that a criminal prosecution was commenced upon the advice of counsel is unavailing in an action for malicious prosecution if it appears ... that the defendant did not believe that the accused was guilty of the crime charged." (*Singleton v. Singleton* (1945) 68 Cal.App.2d 681, 695 [157 P.2d 886].)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, § 509

4 Levy et al., California Torts, Ch. 43, *Malicious Prosecution and Abuse of Process*, § 43.07 (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,* §§ 147.37, 147.46 (Matthew Bender)

1723. Common Interest Privilege—Malice (Civ. Code, § 47(c))

[*Name of plaintiff***] cannot recover damages from [***name of defendant***], even if the statement(s) [was/were] false, unless [***name of plaintiff***] also proves either:**

1. **That in making the statement(s), [***name of defendant***] acted with hatred or ill will toward [him/her], showing [***name of defendant***]'s willingness to vex, annoy, or injure [him/her]; or**

2. **That [***name of defendant***] had no reasonable grounds for believing the truth of the statement(s) .**

New September 2003; Revised June 2014

Directions for Use

This instruction involves what is referred to as the "common interest" privilege of Civil Code section 47(c). This statute grants a privilege against defamation to communications made without malice on subjects of mutual interest. The defendant bears the initial burden of showing facts to bring the communication within the privilege. The plaintiff then must prove malice. (*Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1203 [31 Cal.Rptr.2d 776, 875 P.2d 1279].)

Sources and Authority

- Common-Interest Privilege: Civil Code section 47(c).
- Malice Not Inferred: Civil Code section 48.
- "So, defendants contended, any publication was protected by the common interest privilege in Civil Code section 47, subdivision (c), which extends a privilege to statements made 'without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information.' " (*Barker v. Fox & Associates* (2015) 240 Cal.App.4th 333, 353 [192 Cal.Rptr.3d 511.)
- "Civil Code section 47 'extends a conditional privilege against defamation to statements made without malice on subjects of mutual interests. [Citation.] This privilege is "recognized where the communicator and the recipient have a common interest and the communication is of a kind reasonably calculated to protect or further that interest." [Citation.] The "interest" must be something other than mere general or idle curiosity, such as where the parties to the communication share a contractual, business or similar relationship or the defendant is protecting his own pecuniary interest. [Citation.] Rather, it is restricted to 'proprietary or narrow private interests." [Citations.]' " (*Hui v. Sturbaum* (2014) 222 Cal.App.4th 1109, 1118−1119 [166 Cal.Rptr.3d 569].)
- "The malice necessary to defeat a qualified privilege is 'actual malice' which is established by a showing that the publication was motivated by hatred or ill will towards the plaintiff *or* by a showing

that the defendant lacked reasonable grounds for belief in the truth of the publication and therefore acted in reckless disregard of the plaintiff's rights." (*Taus v. Loftus* (2007) 40 Cal.4th 683, 721 [54 Cal.Rptr.3d 775, 151 P.3d 1185], original italics.)

- "[M]alice [as used in Civil Code section 47(c)] has been defined as 'a state of mind arising from hatred or ill will, evidencing a willingness to vex, annoy or injure another person.' " (*Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 723 [257 Cal.Rptr. 708, 771 P.2d 406], internal citation omitted.)

- "[M]alice may not be inferred from the mere fact of the communication." (*Barker, supra*, 240 Cal.App.4th at p. 354.)

- "For purposes of establishing a triable issue of malice, 'the issue is not the truth or falsity of the statements but whether they were made recklessly without reasonable belief in their truth.' A triable issue of malice would exist if [defendant] made a statement in reckless disregard of Employee's rights that [defendant] either did not believe to be true (i.e., he actually knew better) or unreasonably believed to be true (i.e., he should have known better). In either case, a fact finder would have to ascertain what [defendant] subjectively knew and believed about the topic at the time he spoke." (*McGrory v. Applied Signal Technology, Inc.* (2013) 212 Cal.App.4th 1510, 1540 [152 Cal.Rptr.3d 154], internal citation omitted.)

- "[M]aliciousness cannot be derived from negligence. Malice entails more than sloppiness or, as in this case, an easily explained typo." (*Bierbower v. FHP, Inc.* (1999) 70 Cal.App.4th 1, 9 [82 Cal.Rptr.2d 393].)

- "[I]f malice is shown, the privilege is not merely overcome; it never arises in the first instance. ... [T]he characterization of the privilege as qualified or conditional is incorrect to the extent that it suggests the privilege is defeasible." (*Brown, supra,* 48 Cal.3d at p. 723, fn. 7.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 163, 556, 585–600

Chin, et al., California Practice Guide: Employment Litigation, Ch. 5-D, *Defamation,* ¶ 5:435 et seq. (The Rutter Group)

4 Levy et al., California Torts, Ch. 45, *Defamation,* § 45.12 (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 340, *Libel and Slander,* § 340.66 (Matthew Bender)

14 California Points and Authorities, Ch. 142, *Libel and Slander (Defamation),* § 142.53 (Matthew Bender)

1 California Civil Practice: Torts §§ 21:40–21:41 (Thomson Reuters)

2100. Conversion—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] wrongfully exercised control over [his/her/its] personal property. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [owned/possessed/had a right to possess] [a/an] [***insert item of personal property***];**

2. **That [***name of defendant***] intentionally and substantially interfered with [***name of plaintiff***]'s property by [***insert one or more of the following:***]**

   [taking possession of the [*insert item of personal property***];] [or]**

   [preventing [*name of plaintiff***] from having access to the [***insert item of personal property***];] [or]**

   [destroying the [*insert item of personal property***];] [or]**

   [refusing to return the [*insert item of personal property***] after [***name of plaintiff***] demanded its return.]**

3. **That [***name of plaintiff***] did not consent;**

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

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

New September 2003; Revised December 2009, December 2010

Directions for Use

The last option for element 2 may be used if the defendant's original possession of the property was not tortious. (See *Atwood v. S. Cal. Ice Co.* (1923) 63 Cal.App. 343, 345 [218 P. 283].)

Sources and Authority

- "Conversion is the wrongful exercise of dominion over the property of another. The elements of a conversion claim are: (1) the plaintiff's ownership or right to possession of the property; (2) the defendant's conversion by a wrongful act or disposition of property rights; and (3) damages." (*Lee v. Hanley* (2015) 61 Cal.4th 1225, 1240 [191 Cal.Rptr.3d 536, 354 P.3d 334~~Conversion is generally described as the wrongful exercise of dominion over the personal property of another. … The basic~~

~~elements of the tort are (1) the plaintiff's ownership or right to possession of personal property; (2) the defendant's disposition of the property in a manner that is inconsistent with the plaintiff's property rights; and (3) resulting damages." (*Regent Alliance Ltd. v. Rabizadeh* (2014) 231 Cal.App.4th 1177, 1181 [180 Cal.Rptr.3d 610~~].)

- "It is not necessary that there be a manual taking of the property; it is only necessary to show an assumption of control or ownership over the property, or that the alleged converter has applied the property to his own use." …' " (*Shopoff & Cavallo LLP v. Hyon* (2008) 167 Cal.App.4th 1489, 1507 [85 Cal.Rptr.3d 268].)

- "[A]ny act of dominion wrongfully exerted over the personal property of another inconsistent with the owner's rights thereto constitutes conversion." (*Plummer v. Day/Eisenberg, LLP* (2010) 184 Cal.App.4th 38, 50 [108 Cal.Rptr.3d 455].)

- "Conversion is a strict liability tort. The foundation of the action rests neither in the knowledge nor the intent of the defendant. Instead, the tort consists in the breach of an absolute duty; the act of conversion itself is tortious. Therefore, questions of the defendant's good faith, lack of knowledge, and motive are ordinarily immaterial." (*Los Angeles Federal Credit Union v. Madatyan* (2012) 209 Cal.App.4th 1383, 1387 [147 Cal.Rptr.3d 768].)

- "The rule of strict liability applies equally to purchasers of converted goods, or more generally to purchasers from sellers who lack the power to transfer ownership of the goods sold. That is, there is no general exception for bona fide purchasers." (*Regent Alliance Ltd., supra,* 231 Cal.App.4th at p. 1181, internal citations omitted.)

- "There are recognized exceptions to the general rule of strict liability. Some exceptions are based on circumstances in which 'the person transferring possession may have the legal power to convey to a bona fide transferee a good title,' as, for example, when 'a principal has clothed an agent in apparent authority exceeding that which was intended.' Another exception concerns goods obtained by means of a fraudulent misrepresentation. If the party who committed the fraud then sells the goods to 'a bona fide purchaser' who 'takes for value and without notice of the fraud, then such purchaser gets good title to the chattel and may not be held for conversion (though the original converter may be).' " (*Regent Alliance Ltd., supra,* 231 Cal.App.4th at p. 1183, internal citation omitted.)

- "[I]t is generally acknowledged that conversion is a tort that may be committed only with relation to personal property and not real property." (*Munger v. Moore* (1970) 11 Cal.App.3d 1, 7 [89 Cal.Rptr. 323], disagreeing with *Katz v. Enos* (1945) 68 Cal.App.2d 266, 269 [156 P.2d 461].)

- "The first element of that cause of action is his ownership or right to possession of the property at the time of the conversion. Once it is determined that [plaintiff] has a right to reinstate the contract, he has a right to possession of the vehicle and standing to bring conversion. Unjustified refusal to turn over possession on demand constitutes conversion even where possession by the withholder was originally obtained lawfully and of course so does an unauthorized sale." (*Cerra v. Blackstone* (1985) 172 Cal.App.3d 604, 609 [218 Cal.Rptr. 15], internal citations omitted.)

- " 'To establish a conversion, plaintiff must establish an actual interference with his ownership or right

of possession. … Where plaintiff neither has title to the property alleged to have been converted, nor possession thereof, he cannot maintain an action for conversion.' " (*Moore v. Regents of the Univ. of Cal.* (1990) 51 Cal.3d 120, 136 [271 Cal.Rptr. 146, 793 P.2d 479], internal citations omitted.)

- "In a conversion action the plaintiff need show only that he was entitled to possession at the time of conversion; the fact that plaintiff regained possession of the converted property does not prevent him from suing for damages for the conversion." (*Enterprise Leasing Corp. v. Shugart Corp*. (1991) 231 Cal.App.3d 737, 748 [282 Cal.Rptr. 620], internal citation omitted.)

- "Neither legal title nor absolute ownership of the property is necessary. … A party need only allege it is 'entitled to immediate possession at the time of conversion. … ' … However, a mere contractual right of payment, without more, will not suffice." (*Plummer, supra,* 184 Cal.App.4th at p. 45, internal citation omitted.)

- "The existence of a lien … can establish the immediate right to possess needed for conversion. 'One who holds property by virtue of a lien upon it may maintain an action for conversion if the property was wrongfully disposed of by the owner and without authority … .' Thus, attorneys may maintain conversion actions against those who wrongfully withhold or disburse funds subject to their attorney's liens." (*Plummer, supra,* 184 Cal.App.4th at p. 45, internal citation omitted.)

- "Where the conduct complained of does not amount to a substantial interference with possession or the right thereto, but consists of intermeddling with or use of or damages to the personal property, the owner has a cause of action for trespass or case, and may recover only the actual damages suffered by reason of the impairment of the property or the loss of its use. As [plaintiff] was a cotenant and had the right of possession of the realty, which included the right to keep his personal property thereon, [defendant]'s act of placing the goods in storage, although not constituting the assertion of ownership and a substantial interference with possession to the extent of a conversion, amounted to an intermeddling. Therefore, [plaintiff] is entitled to actual damages in an amount sufficient to compensate him for any impairment of the property or loss of its use." (*Zaslow v. Kroenert* (1946) 29 Cal.2d 541, 551–552 [176 P.2d 1], internal citation omitted.)

- "[T]he law is well settled that there can be no conversion where an owner either expressly or impliedly assents to or ratifies the taking, use or disposition of his property." (*Farrington v. A. Teichert & Son, Inc.* (1943) 59 Cal.App.2d 468, 474 [139 P.2d 80], internal citations omitted.)

- "As to intentional invasions of the plaintiff's interests, his consent negatives the wrongful element of the defendant's act, and prevents the existence of a tort. 'The absence of lawful consent,' said Mr. Justice Holmes, 'is part of the definition of an assault.' The same is true of false imprisonment, conversion, and trespass." (*Tavernier v. Maes* (1966) 242 Cal.App.2d 532, 552 [51 Cal.Rptr. 575], internal citations omitted.)

- " 'Money cannot be the subject of a cause of action for conversion unless there is a specific, identifiable sum involved, such as where an agent accepts a sum of money to be paid to another and fails to make the payment.' A 'generalized claim for money [is] not actionable as conversion.' " (*PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLP* (2007) 150 Cal.App.4th 384, 395 [58 Cal.Rptr.3d 516], internal citations omitted.)

- "Generally, conversion has been held to apply to the taking of intangible property rights when 'represented by documents, such as bonds, notes, bills of exchange, stock certificates, and warehouse receipts.' As one authority has written, 'courts have permitted a recovery for conversion of assets reflected in such documents as accounts showing amounts owed, life insurance policies, and other evidentiary documents. These cases are far removed from the paradigm case of physical conversion; they are essentially financial or economic tort cases, not physical interference cases.' " (*Welco Electronics, Inc. v. Mora* (2014) 223 Cal.App.4th 202, 209 [166 Cal.Rptr.3d 877], internal citation omitted.)

- "Credit card, debit card, or PayPal information may be the subject of a conversion." (*Welco Electronics, Inc., supra,* 223 Cal.App.4th at p. 212, footnote omitted.)

- "One who buys property in good faith from a party lacking title and the right to sell may be liable for conversion. The remedies for conversion include specific recovery of the property, damages, and a quieting of title." (*State Farm Mut. Auto. Ins. Co. v. Department of Motor Vehicles* (1997) 53 Cal.App.4th 1076, 1081–1082 [62 Cal.Rptr.2d 178], internal citations omitted.)

- "[Conversion] must be knowingly or intentionally done, but a wrongful intent is not necessary. Because the act must be knowingly done, 'neither negligence, active or passive, nor a breach of contract, even though it result in injury to, or loss of, specific property, constitutes a conversion.' It follows therefore that mistake, good faith, and due care are ordinarily immaterial, and cannot be set up as defenses in an action for conversion." (*Taylor v. Forte Hotels International* (1991) 235 Cal.App.3d 1119, 1124 [1 Cal.Rptr.2d 189], internal citations omitted.)

- "In order to establish a conversion, the plaintiff 'must show an intention or purpose to convert the goods and to exercise ownership over them, or to prevent the owner from taking possession of his property.' Thus, a necessary element of the tort is an intent to exercise ownership over property which belongs to another. For this reason, conversion is considered an intentional tort." (*Collin v. American Empire Insurance Co.* (1994) 21 Cal.App.4th 787, 812 [26 Cal.Rptr.2d 391], internal citations omitted.)

- "A conversion can occur when a willful failure to return property deprives the owner of possession." (*Fearon v. Department of Corrections* (1984) 162 Cal.App.3d 1254, 1257 [209 Cal.Rptr. 309], internal citation omitted.)

- "A demand for return of the property is not a condition precedent to institution of the action when possession was originally acquired by a tort as it was in this case." (*Igauye v. Howard* (1952) 114 Cal.App.2d 122, 127 [249 P.2d 558].)

- " 'Negligence in caring for the goods is not an act of dominion over them such as is necessary to make the bailee liable as a converter.' Thus a warehouseman's negligence in causing a fire which destroyed the plaintiffs' goods will not support a conversion claim." (*Gonzales v. Pers. Storage* (1997) 56 Cal.App.4th 464, 477 [65 Cal.Rptr.2d 473], internal citations omitted.)

- "Although damages for conversion are frequently the equivalent to the damages for negligence, i.e.,

specific recovery of the property or damages based on the value of the property, negligence is no part of an action for conversion." (*Taylor, supra*, 235 Cal.App.3d at p. 1123, internal citation omitted.)

- "A person without legal title to property may recover from a converter if the plaintiff is responsible to the true owner, such as in the case of a bailee or pledgee of the property." (*Department of Industrial Relations v. UI Video Stores, Inc.* (1997) 55 Cal.App.4th 1084, 1096 [64 Cal.Rptr.2d 457], internal citation omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 699–719

Ahart, California Practice Guide: Enforcing Judgments & Debts, Ch. 2-C, *Tort Liability*, ¶ 2:427.4 et seq. (The Rutter Group)

Rylaarsdam & Turner, California Practice Guide: Civil Procedure Before Trial--Statutes of Limitations, Ch. 4-D, *Actions Involving Personal Property (Including Intangibles)*, ¶ 4:1101 et seq. (The Rutter Group)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.40 (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*, § 51.21[3][b] (Matthew Bender)

2322. Affirmative Defense—Insured's Voluntary Payment

[*Name of defendant***] claims that it does not have to pay [***specify, e.g., the amount of the settlement***] because [***name of plaintiff***] made a voluntary payment. To succeed on this defense, [***name of defendant***] must prove the following:**

1. [*Select either or both of the following:*]

[That [*name of plaintiff***] made a payment to [***name of third party claimant***] in [partial/full] settlement of [***name of third party claimant***]'s claim against [***name of plaintiff***]; [or]]**

[That [*name of plaintiff***] [made a payment/ [or] assumed an obligation/ [or] incurred an expense] to [***name***] with regard to [***name of third party claimant***]'s claim against [***name of plaintiff***]];**

AND

2. **That [***name of defendant***] did not give its consent or approval for the [payment/ [or] obligation/ [or] expense].**

New April 2007

Directions for Use

The instructions in this series assume that 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 use by an insurer as a defense to a breach of contract action based on a third party liability policy. This instruction also may be modified for use as a defense to a judgment creditor's action to recover on a liability policy. This defense is not available if the insurer refused to defend before the voluntary payment was made. (See *21st Century Ins. Co. v. Superior Court (Tapia)* (2015) 240 Cal.App.4th 322, 328 [192 Cal.Rptr.3d 530].)

A voluntary-payments clause in an insurance policy typically provides that the insured may not voluntarily make a payment, assume an obligation, or incur an expense without the insurer's consent. (See, e.g., *Truck Ins. Exchange v. Unigard Ins. Co.* (2000) 79 Cal.App.4th 966, 976 [94 Cal.Rptr.2d 516].) In element 1, select the appropriate options depending on the acts alleged. Modify, as necessary, depending on the actual language of the policy. Use the first option if the insured has made a payment in settlement of the claim. Use the second option if the insured has made a payment, assumed an obligation, or incurred an expense for other reasons, such as to an attorney for legal services, or to a creditor of the claimant, such as a provider of medical or repair services.

Sources and Authority

- "The general validity of no-voluntary-payment provisions in liability insurance policies is well established. … [S]uch clauses are common 'to prevent collusion as well as to invest the insurer with the complete control and direction of the defense or compromise of suits or claims.' " (*Insua v. Scottsdale Ins. Co.* (2002) 104 Cal.App.4th 737, 742 [129 Cal.Rptr.2d 138], internal citations omitted.)

- "California law enforces ... no-voluntary-payments provisions in the absence of economic necessity, insurer breach, or other extraordinary circumstances. They are designed to ensure that responsible insurers that promptly accept a defense tendered by their insureds thereby gain control over the defense and settlement of the claim. That means insureds cannot unilaterally settle a claim before the establishment of the claim against them and the insurer's refusal to defend in a lawsuit to establish liability. … [T]he decision to pay any remediation costs outside the civil action context raises a 'judgment call left solely to the insurer.' In short, the provision protects against coverage by fait accompli." *Low v. Golden Eagle Ins. Co.* (2003) 110 Cal.App.4th 1532, 1544 [2 Cal.Rptr.3d 761], internal citations omitted.)

- " 'Typically, a breach of that provision occurs, if at all, before the insured has tendered the defense to the insurer.' … [A voluntary-payments] provision *is* [also] enforceable posttender until the insurer wrongfully denies tender. '[I]t is only when the insured has requested *and been denied a defense by the insurer* that the insured may ignore the policy's provisions forbidding the incurring of defense costs without the insurer's prior consent and under the compulsion of that refusal undertake his own defense at the insurer's expense.' " (*Low, supra,* 110 Cal.App.4th at pp. 1546–1547, original italics, internal citations omitted.)

- " '[T]he existence or absence of prejudice to [the insurer] is simply irrelevant to [its] duty to indemnify costs incurred *before* notice. The policy plainly provides that notice is a *condition precedent* to the insured's right to be indemnified; a fortiori the right to be indemnified cannot relate back to payments made or obligations incurred before notice. … The prejudice requirement … applies only to the insurer's attempt to assert lack of notice as a *policy defense* against payment even of losses and costs incurred *after* belated notice. ' " (*Jamestown Builders, Inc. v. General Star Indemnity Co.* (1999) 77 Cal.App.4th 341, 350 [91 Cal.Rptr.2d 514], original italics, internal citations omitted.)

- " 'There may be exceptions to the prohibition on voluntary payments, as where the insured is unaware of the identity of the insurer, the payment is necessary for reasons beyond the insured's control, or the insured faces a situation requiring an immediate response to protect its legal interests.' In a circumstance of that nature, the insured's payment is considered *involuntary*." (*Belz v. Clarendon America Ins. Co.* (2007) 158 Cal.App.4th 615, 628 [69 Cal.Rptr.3d 864], internal citation omitted.)

- "If an insurer *refuses* to defend, the insured is free to enter into a non-collusive settlement and then maintain *or* assign an action against the insurer for breach of the duty to defend. In the subsequent action the amount of the settlement *will* be presumptive evidence of the amount of the insured's liability." (*21st Century Ins. Co., supra,* 240 Cal.App.4th at p. 328, original italics.)

Secondary Sources

2 Witkin, Summary of California Law (10th ed. 2005) Insurance, § 320

Croskey et al., California Practice Guide: Insurance Litigation ~~(The Rutter Group)~~ ¶¶ 7:439.5–7:439.10 (The Rutter Group)

California Liability Insurance Practice: Claims and Litigation (Cont.Ed.Bar) §§ 2.7, 3.27, 8.32, 11.14, 23.38

25 California Forms of Pleading and Practice, Ch. 300, *Indemnity and Contribution*, § 300.73[6] (Matthew Bender)

26 California Forms of Pleading and Practice, Ch. 308, *Insurance*, §§ 308.500, 308.502 (Matthew Bender)

2430. Wrongful Discharge in Violation of Public Policy—Essential Factual Elements

[*Name of plaintiff***] claims [he/she] was discharged from employment for reasons that violate a public policy. It is a violation of public policy [***specify claim in case, e.g., to discharge someone from employment for refusing to engage in price fixing***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was employed by [***name of defendant***];**

2. **That [***name of defendant***] discharged [***name of plaintiff***];**

3. **That [***insert alleged violation of public policy, e.g., "***[***name of plaintiff***]***'s refusal to engage in price fixing"***] was a substantial motivating reason for [***name of plaintiff***]'s discharge; and**

4. **That the discharge caused [***name of plaintiff***] harm.**

New September 2003; Revised June 2013, June 2014, December 2014

Directions for Use

The judge should determine whether the purported reason for firing the plaintiff would amount to a violation of public policy. (See *Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1092 [4 Cal.Rptr.2d 874, 824 P.2d 680]; overruled on other grounds in *Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 80 fn. 6 [78 Cal. Rptr.2d 16, 960 P.2d 1046].) The jury should then be instructed that the alleged conduct would constitute a public-policy violation if proved.

Note that this instruction uses the term "substantial motivating reason" to express causation between the public policy and the discharge (see element 3). "Substantial motivating reason" has been held to be the appropriate standard for cases alleging termination in violation of public policy. (*Alamo v. Practice Management Information Corp.* (2013) 219 Cal.App.4th 466, 479 [161 Cal.Rptr.3d 758]; 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*.)

This instruction must be supplemented with CACI No. 2433, *Wrongful Discharge in Violation of Public Policy—Damages.* If plaintiff alleges he or she was forced or coerced to resign, then CACI No. 2431, *Constructive Discharge in Violation of Public Policy—Plaintiff Required to Violate Public Policy*, or CACI No. 2432, *Constructive Discharge in Violation of Public Policy—Plaintiff Required to Endure Intolerable Conditions That Violate Public Policy*, should be given instead. See also CACI No. 2510, *"Constructive Discharge" Explained.*

This instruction may be modified for adverse employment actions other than discharge, for example demotion, if done in violation of public policy. (See *Garcia v. Rockwell Internat. Corp.* (1986) 187 Cal.App.3d 1556, 1561 [232 Cal.Rptr. 490], disapproved on other grounds in *Gantt v. Sentry Ins.* (1992)

1 Cal.4th 1083, 1093 [4 Cal. Rptr. 2d 874, 824 P.2d 680] [public policy forbids retaliatory action taken by employer against employee who discloses information regarding employer's violation of law to government agency].) See also CACI No. 2509, *"Adverse Employment Action" Explained*.

Sources and Authority

- " '[W]hile an at-will employee may be terminated for no reason, or for an arbitrary or irrational reason, there can be no right to terminate for an unlawful reason or a purpose that contravenes fundamental public policy. Any other conclusion would sanction lawlessness, which courts by their very nature are bound to oppose.' " (*Casella v. SouthWest Dealer Services, Inc.* (2007) 157 Cal.App.4th 1127, 1138–1139 [69 Cal.Rptr.3d 445], internal citations omitted.)

- "[W]hen an employer's discharge of an employee violates fundamental principles of public policy, the discharged employee may maintain a tort action and recover damages traditionally available in such actions." (*Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 170 [164 Cal.Rptr. 839, 610 P.2d 1330].)

- "The elements of a claim for wrongful discharge in violation of public policy are (1) an employer-employee relationship, (2) the employer terminated the plaintiff's employment, (3) the termination was substantially motivated by a violation of public policy, and (4) the discharge caused the plaintiff harm." (*Yau v. Allen* (2014) 229 Cal.App.4th 144, 154 [176 Cal.Rptr.3d 824].)

- "[T]his court established a set of requirements that a policy must satisfy to support a tortious discharge claim. First, the policy must be supported by either constitutional or statutory provisions. Second, the policy must be 'public' in the sense that it 'inures to the benefit of the public' rather than serving merely the interests of the individual. Third, the policy must have been articulated at the time of the discharge. Fourth, the policy must be 'fundamental' and 'substantial.' " (*Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 889-890 [66 Cal.Rptr.2d 888, 941 P.2d 1157], footnote omitted.)

- "Policies are not 'public' (and thus do not give rise to a common law tort claim) when they are derived from statutes that 'simply regulate conduct between private individuals, or impose requirements whose fulfillment does not implicate fundamental public policy concerns.' " (*Diego v. Pilgrim United Church of Christ* (2014) 231 Cal.App.4th 913, 926 [180 Cal.Rptr.3d 359].)

- "[T]he cases in which violations of public policy are found generally fall into four categories: (1) refusing to violate a statute; (2) performing a statutory obligation (3) exercising a statutory right or privilege; and (4) reporting an alleged violation of a statute of public importance." (*Gantt, supra,* 1 Cal.4th at pp. 1090-1091, internal citations and footnote omitted, overruled on other grounds in *Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 80, fn. 6 [78 Cal.Rptr.2d 16, 960 P.2d 1046]; accord *Stevenson, supra,* 16 Cal.4th at p. 889.)

- " [T]ermination of an employee most clearly violates public policy when it contravenes the provision of a statute forbidding termination for a specified reason … ." (*Diego, supra,* 231 Cal.App.4th at p. 926)

- "[Discharge because of employee's] [r]efusal to violate a governmental regulation may also be the

basis for a tort cause of action where the administrative regulation enunciates a fundamental public policy and is authorized by statute." (*Scott v. Phoenix Schools, Inc.* (2009) 175 Cal.App.4th 702, 708–709 [96 Cal.Rptr.3d 159].)

- "In the context of a tort claim for wrongful discharge, tethering public policy to specific constitutional or statutory provisions serves not only to avoid judicial interference with the legislative domain, but also to ensure that employers have adequate notice of the conduct that will subject them to tort liability to the employees they discharge ... ." (*Stevenson, supra,* 16 Cal.4th at p. 889.)

- "[A]n employee need not prove an actual violation of law; it suffices if the employer fired him for reporting his 'reasonably based suspicions' of illegal activity." (*Green, supra,* 19 Cal.4th at p. 87, internal citation omitted.)

- "[A]n employer's authority over its employee does not include the right to demand that the employee commit a criminal act to further its interests, and an employer may not coerce compliance with such unlawful directions by discharging an employee who refuses to follow such an order ... ." (*Tameny, supra,* 27 Cal.3d at p. 178.)

- " [T]here is a 'fundamental public interest in a workplace free from illegal practices … .' '[T]he public interest is in a lawful, not criminal, business operation. Attainment of this objective requires that an employee be free to call his or her employer's attention to illegal practices, so that the employer may prevent crimes from being committed by misuse of its products by its employees.' " (*Yau, supra,* 229 Cal.App.4th at p. 157.)

- "An action for wrongful termination in violation of public policy 'can only be asserted against *an employer*. An individual who is not an employer cannot commit the tort of wrongful discharge in violation of public policy; rather, he or she can only be the agent by which *an employer* commits that tort.' " (*Kim v. Konad USA Distribution, Inc.* (2014) 226 Cal.App.4th 1336, 1351 [172 Cal.Rptr.3d 686], original italics.)

- Employees in both the private and public sector may assert this claim. (*See Shoemaker v. Myers* (1992) 2 Cal.App.4th 1407 [4 Cal.Rptr.2d 203].)

- "Sex discrimination in employment may support a claim of tortious discharge in violation of public policy." (*Kelley v. The Conco Cos.* (2011) 196 Cal.App.4th 191, 214 [126 Cal.Rptr.3d 651].)

- "In sum, a wrongful termination against public policy common law tort based on sexual harassment can be brought against an employer of any size." (*Kim, supra,* 226 Cal.App.4th at p. 1351.)

- "To establish a claim for wrongful termination in violation of public policy, an employee must prove causation. (See CACI No. 2430 [using phrase 'substantial motivating reason' to express causation].) Claims of whistleblower harassment and retaliatory termination may not succeed where a plaintiff 'cannot demonstrate the required nexus between his reporting of alleged statutory violations and his allegedly adverse treatment by [the employer].' " (*Ferrick v. Santa Clara University* (2014) 231 Cal.App.4th 1337, 1357 [181 Cal.Rptr.3d 68].)

- "It would be nonsensical to provide a different standard of causation in FEHA cases and common law tort cases based on public policies encompassed by FEHA." (*Mendoza v. Western Medical Center Santa Ana* (2014) 222 Cal.App.4th 1334, 1341 [166 Cal.Rptr.3d 720].)

- "FEHA's policy prohibiting disability discrimination in employment is sufficiently substantial and fundamental to support a claim for wrongful termination in violation of public policy." (*Rope v. Auto-Chlor System of Washington, Inc.* (2013) 220 Cal. App. 4th 635, 660 [163 Cal.Rptr.3d 392].)

- "Although the fourth cause of action references FEHA as one source of the public policy at issue, this is not a statutory FEHA cause of action. FEHA does not displace or supplant common law tort claims for wrongful discharge." (*Kim, supra,* 226 Cal.App.4th at p. 1349.)

- "[T]o the extent the trial court concluded Labor Code section 132a is the exclusive remedy for work-related injury discrimination, it erred. The California Supreme Court held '[Labor Code] section 132a does not provide an exclusive remedy and does not preclude an employee from pursuing FEHA and common law wrongful discharge remedies.' " (*Prue v. Brady Co./San Diego, Inc.* (2015) 242 Cal.App.4th 1367, 1381 [196 Cal.Rptr.3d 68].)

- "California's minimum wage law represents a fundamental policy for purposes of a claim for wrongful termination or constructive discharge in violation of public policy." (*Vasquez v. Franklin Management Real Estate Fund, Inc.* (2013) 222 Cal.App.4th 819, 831−832 [166 Cal.Rptr.3d 242].)

- " 'Labor Code section 1102.5, subdivision (b), which prohibits employer retaliation against an employee who reports a reasonably suspected violation of the law to a government or law enforcement agency, reflects the broad public policy interest in encouraging workplace "whistleblowers," who may without fear of retaliation report concerns regarding an employer's illegal conduct. This public policy is the modern day equivalent of the long-established duty of the citizenry to bring to public attention the doings of a lawbreaker. [Citation.] …' " (*Ferrick, supra,* 231 Cal.App.4th at p. 1355.)

- "That [defendant]'s decision not to renew her contract for an additional season *might* have been influenced by her complaints about an unsafe working condition … does not change our conclusion in light of the principle that a decision not to renew a contract set to expire is not actionable in tort." (*Touchstone Television Productions v. Superior Court* (2012) 208 Cal.App.4th 676, 682 [145 Cal.Rptr.3d 766], original italics.)

- " ' "[P]ublic policy' as a concept is notoriously resistant to precise definition, and … courts should venture into this area, if at all, with great care … ." [Citation.] Therefore, *when the constitutional provision or statute articulating a public policy also includes certain substantive limitations in scope or remedy, these limitations also circumscribe the common law wrongful discharge cause of action.* Stated another way, the common law cause of action cannot be broader than the constitutional provision or statute on which it depends, and therefore it 'presents no impediment to employers that operate within the bounds of law." [Citation.]' " (*Dutra v. Mercy Medical Center Mt. Shasta* (2012) 209 Cal.App.4th 750, 756 [146 Cal.Rptr.3d 922], original italics.)

Secondary Sources

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

Chin et al., California Practice Guide: Employment Litigation, Ch. 5-A, *Wrongful Discharge In Violation Of Public Policy (Tameny Claims),* ¶¶ 5:2, 5:47, 5:50, 5:70, 5:105, 5:115, 5:150, 5:151, 5:170, 5:195, 5:220, 5:235 (The Rutter Group)

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

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

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline,* §§ 249.12, 249.50–249.52 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline,* §§ 100.52–100.58 (Matthew Bender)

California Civil Practice: Employment Litigation §§ 6:23–6:25 (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. (*Jumaane v. City of Los Angeles* (2015) 241 Cal.App.4th 1390, 1405 [194 Cal.Rptr.3d 689].)

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).

- Disparate Impact May Prove Age Discrimination. Government Code section 12941.1.

- Justification for Disparate Impact. Cal. Code Regs., tit. 2, §§ 11010(b), 11017(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.)

- "It is well settled that valid statistical evidence is required to prove disparate impact discrimination, that is, that a facially neutral policy has caused a protected group to suffer adverse effects. ' "Once the employment practice at issue has been identified, causation must be proved; that is, the plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group. … [S]tatistical disparities must be sufficiently substantial that they raise such an inference of causation." ' " (*Jumaane, supra,* 241 Cal.App.4th at p. 1405.)

- 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)

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

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

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

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

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

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

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

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

New June 2010; Revised December 2011, June 2015

Directions for Use

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

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

In the second paragraph, insert the date on which the administrative complaint was filed and the dates on which both sides allege that the complaint requirement was triggered. The verdict form should ask the

jury to specify the date that it finds that the requirement accrued. If there are multiple claims with different continuing-violation dates, repeat this paragraph for each claim.

The plaintiff has the burden to plead and prove timely exhaustion of administrative remedies, such as filing a sufficient complaint with the DFEH. (*Kim v. Konad USA Distribution, Inc.* (2014) 226 Cal.App.4th 1336, 1345 [172 Cal.Rptr.3d 686].) This burden of proof ~~would appear to extend~~extends to any excuse or justification for the failure to timely file, such as the continuing violation exception. (*Jumaane v. City of Los Angeles* (2015) 241 Cal.App.4th 1390, 1402 [194 Cal.Rptr.3d 689].~~See *Holland v. Union Pacific Railroad Co.* (2007) 154 Cal.App.4th 940, 945 [65 Cal.Rptr.3d 145] [plaintiff's burden to establish an exception that would deem the administrative complaint to be timely].~~)

Sources and Authority

- Administrative Complaint for FEHA Violation. Government Code section 12960.

- "At a jury trial, the facts are presented and the jury must decide whether there was a continuing course of unlawful conduct based on the law as stated in CACI No. 2508." (*Jumaane, supra*, 241 Cal.App.4th at p. 1401.)

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

- "[I]t is 'plaintiff's burden to plead and prove timely exhaustion of administrative remedies, such as filing a sufficient complaint with [DFEH] and obtaining a right-to-sue letter.' " (*Kim, supra,* 226 Cal.App.4th at p. 1345.)

- "[W]hen defendant has asserted the statute of limitation defense, plaintiff has the burden of proof to show his or her claims are timely under the continuing violation doctrine." (*Jumaane, supra*, 241 Cal.App.4th at p. 1402.)

- ~~"Before maintaining a legal action, a plaintiff must exhaust the administrative remedy of filing a timely complaint with the DFEH and obtaining permission to pursue legal remedies. The one-year period specified in the statute begins to run when the administrative remedy accrues, which is the occurrence of the unlawful practice. In the present case, the allegedly unlawful suspension occurred on July 2, 2002, and therefore the one-year period began to run on that date. As a result, plaintiff's July 2003 administrative complaint was not timely on its face, his allegations to the contrary notwithstanding. This made it his burden to establish an exception that would deem the administrative complaint to be timely." (*Holland, supra*, 154 Cal.App.4th at p. 945, internal citations omitted.)~~

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

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

- "[T]he *Richards* court interpreted section 12960 to mean that when a continuing pattern of wrongful conduct occurs partly in the statutory period and partly outside the statutory period, the limitations period begins to accrue once an employee is on notice of the violation of his or her rights and on notice that 'litigation, not informal conciliation, is the only alternative for the vindication of his or her rights.' " (*Acuna v. San Diego Gas & Electric Co.* (2013) 217 Cal.App.4th 1402, 1412 [159 Cal.Rptr.3d 749].)

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

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

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

Secondary Sources

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

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

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

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

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

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

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

2701. Nonpayment of Minimum Wage—Essential Factual Elements (Lab. Code, § 1194)

[*Name of plaintiff***] claims that [***name of defendant***] owes [him/her] the difference between the wages paid by [***name of defendant***] and the wages [***name of plaintiff***] should have been paid according to the minimum wage rate required by state law. 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 plaintiff***] was paid less than the minimum wage by [***name of defendant***] for some or all hours worked; and**

3. **The amount of wages owed.**

The minimum wage for labor performed from [*beginning date***] to [***ending date***] was [***minimum wage rate***] per hour.**

An employee is entitled to be paid the legal minimum wage rate even if he or she agrees to work for a lower wage.

New September 2003; Revised June 2005, June 2014, June 2015

Directions for Use

The court must determine the prevailing minimum wage rate from applicable state or federal law. (See, e.g., Cal. Code Regs., tit. 8, § 11000.) The jury must be instructed accordingly.

Both liquidated damages (See Lab. Code, § 1194.2) and civil penalties (See Lab. Code, § 1197.1) may be awarded on a claim for nonpayment of minimum wage.

Wage and hour claims are governed by two sources of authority: the provisions of the Labor Code and a series of 18 wage orders, adopted by the Industrial Welfare Commission. (See *Mendiola v. CPS Security Solutions, Inc.* (2015) 60 Cal.4th 833, 838 [182 Cal.Rptr.3d 124, 340 P.3d 355].) The California Labor Code and the IWC's wage orders provide that certain employees are exempt from minimum wage requirements (for example, outside salespersons; see Lab. Code, § 1171), and that under certain circumstances employers may claim credits for meals and lodging against minimum wage pay (see Cal. Code Regs., tit. 8, § 11000, subd. 3, § 11010, subd. 10, and § 11150, subd. 10(B)). The assertion of an exemption from wage and hour laws is an affirmative defense. (See generally *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 794 [85 Cal.Rptr.2d 844, 978 P.2d 2].) The advisory committee has chosen not to write model instructions for the numerous fact-specific affirmative defenses to minimum wage claims. (Cf. CACI No. 2720, *Affirmative Defense—Nonpayment of Overtime—Executive Exemption,* and CACI No. 2721, *Affirmative Defense—Nonpayment of Overtime—Administrative Exemption*.)

Sources and Authority

- Employee Right to Recover Minimum Wage or Overtime Compensation. Labor Code section 1194(a).
- Recovery of Liquidated Damages. Labor Code section 1194.2.
- Civil Penalties, Restitution and Liquidated Damages. Labor Code section 1197.1(a).
- "Wages" Defined. Labor Code section 200.
- Payment of Uncontested Wages Required. Labor Code section 206(a).
- Action by Department to Recover Unpaid Minimum Wage or Overtime Compensation. Labor Code section 1193.6(a).
- Duties of Industrial Welfare Commission. Labor Code section 1173.
- "Labor Code section 1194 accords an employee a statutory right to recover unpaid wages from an employer who fails to pay the minimum wage." (*Flowers v. Los Angeles County Metropolitan Transportation Authority* (2015) 243 Cal.App.4th 66, 74 [196 Cal.Rptr.3d 352].)
- "Labor Code section 1194 does not define the employment relationship nor does it specify who may be liable for unpaid wages. Specific employers and employees become subject to the minimum wage requirements only through and under the terms of wage orders promulgated by the IWC, the agency formerly authorized to regulate working conditions in California." (*Flowers*, *supra*, 243 Cal.App.4th at p. 74.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 382–384, 398, 399

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, 11:499, 11:513, 11:545, 11:547 (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*, ¶¶ 11:1342, 11:1478.5 (The Rutter Group)

1 Wilcox, California Employment Law, Ch. 2, *Minimum Wages*, §§ 2.02[1], 2.03[1], 2.04[1], 2.05[1]; Ch. 5, *Administrative and Judicial Remedies Under Wage and Hour Laws*, § 5.72 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 250, *Employment Law: Wage and Hour Disputes*, §§ 250.13[1][a], 250.14[d] (Matthew Bender)

California Civil Practice: Employment Litigation §§ 4:67, 4:76 (Thomson Reuters)

2702. Nonpayment of Overtime Compensation—Essential Factual Elements (Lab. Code, § 1194)

[*Name of plaintiff***] claims that [***name of defendant***] owes [him/her] overtime pay as required by state law. 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 plaintiff***] worked overtime hours;**

3. **That [***name of defendant***] knew or should have known that [***name of plaintiff***] had worked overtime hours;**

4. **That [***name of plaintiff***] was [not paid/paid less than the overtime rate] for some or all of the overtime hours worked; and**

5. **The amount of overtime pay owed.**

Overtime hours are the hours worked longer than [*insert applicable definition(s) of overtime hours***].**

Overtime pay is [*insert applicable formula***].**

An employee is entitled to be paid the legal overtime pay rate even if he or she agrees to work for a lower rate.

New September 2003; Revised June 2005, June 2014, June 2015

Directions for Use

The court must determine the overtime compensation rate under applicable state or federal law. (See, e.g., Lab. Code, §§ 1173, 1182; Cal. Code Regs., tit. 8, § 11000, subd. 2, § 11010, subd. 4(A), and § 11150, subd. 4(A).) The jury must be instructed accordingly. It is possible that the overtime rate will be different over different periods of time.

Wage and hour claims are governed by two sources of authority: the provisions of the Labor Code, and a series of 18 wage orders adopted by the Industrial Welfare Commission. (See *Mendiola v. CPS Security Solutions, Inc.* (2014) 60 Cal.4th 833, 838 [182 Cal.Rptr.3d 124, 340 P.3d 355].) Both the Labor Code and the IWC wage orders provide for certain exemptions from overtime laws. (See, e.g., Lab. Code, § 1171 [outside salespersons are exempt from overtime requirements]).The assertion of an employee's exemption is an affirmative defense, which presents a mixed question of law and fact. (*Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 794 [85 Cal.Rptr.2d 844, 978 P.2d 2].) For instructions on exemptions, see CACI No. 2720, *Affirmative Defense—Nonpayment of Overtime—Executive Exemption,* and CACI No. 2721, *Affirmative Defense—Nonpayment of Overtime—Administrative Exemption*.

Sources and Authority

- Employee Right to Recover Minimum Wage or Overtime Compensation. Labor Code section 1194(a).
- Recovery of Liquidated Damages. Labor Code section 1194.2.
- "Wages" Defined. Labor Code section 200.
- Payment of Uncontested Wages Required. Labor Code section 206(a).
- What Hours Worked Are Overtime. Labor Code section 510.
- Rate of Compensation. Labor Code section 515(d).
- Action by Department to Recover Unpaid Minimum Wage or Overtime Compensation. Labor Code section 1193.6(a).
- "[T]he assertion of an exemption from the overtime laws is considered to be an affirmative defense, and therefore the employer bears the burden of proving the employee's exemption." (*Ramirez, supra,* 20 Cal.4th at pp. 794–795.)
- "[W]here an employer has no knowledge that an employee is engaging in overtime work and that employee fails to notify the employer or deliberately prevents the employer from acquiring knowledge of the overtime work, the employer's failure to pay for the overtime hours is not a violation … ." (*Jong v. Kaiser Foundation Health Plan, Inc.* (2014) 226 Cal.App.4th 391, 395 [171 Cal.Rptr.3d 874] [applying rule under federal Fair Labor Standards Act to claims under California Labor Code].)
- "[A]n employer's actual or constructive knowledge of the hours its employees work is an issue of fact … ." (*Jong, supra,* 226 Cal.App.4th at p. 399.)
- "The question whether [plaintiff] was an outside salesperson within the meaning of applicable statutes and regulations is … a mixed question of law and fact." (*Ramirez, supra,* 20 Cal.4th at p. 794.)
- "The FLSA [federal Fair Labor Standards Act] requires overtime pay only if an employee works more than 40 hours per week, regardless of the number of hours worked during any one day. California law, codified at Labor Code section 510, is more stringent and requires overtime compensation for '[a]ny work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek.' " (*Flowers v. Los Angeles County Metropolitan Transportation Authority* (2015) 243 Cal.App.4th 66, 83 [196 Cal.Rptr.3d 352], internal citation omitted.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 382–384, 398, 399

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-D, *Payment Of Wages*, ¶¶ 11:456, 11:470.1, 11:499 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-F, *Payment Of Overtime Compensation*, ¶¶ 11:730, 11:955.2 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-J, *Enforcing California Laws Regulating Employee Compensation*, ¶¶ 11:1342, 11:1478.5 (The Rutter Group)

1 Wilcox, California Employment Law, Ch. 3, *Overtime Compensation and Regulation of Hours Worked*, §§ 3.03[1], 3.04[1], 3.07[1], 3.08[1], 3.09[1]; Ch. 5, *Administrative and Judicial Remedies Under Wage and Hour Laws*, § 5.72 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 250, *Employment Law: Wage and Hour Disputes*, § 250.40 (Matthew Bender)

California Civil Practice: Employment Litigation, §§ 4:67, 4:76 (Thomson Reuters)

3000. Violation of Federal Civil Rights—In General—Essential Factual Elements (42 U.S.C. § 1983)

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

1. **That [***name of defendant***] [intentionally/[***other applicable state of mind***]] [***insert wrongful act***];**

2. **That [***name of defendant***] was acting or purporting to act in the performance of [his/her] official duties;**

3. **That [***name of defendant***]'s conduct violated [***name of plaintiff***]'s right [***insert right, e.g., "of privacy"***];**

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

5. **That [***name of defendant***]'s [***insert wrongful act***] was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003

Directions for Use

In element 1, the standard is not always based on intentional conduct. Insert the appropriate level of scienter. For example, Eighth Amendment cases involve conduct carried out with "deliberate indifference," and Fourth Amendment claims do not necessarily involve intentional conduct. The "official duties" referred to in element 2 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 a jury issue, so it has been omitted to shorten the wording of element 2. This instruction is intended for claims not covered by any of the following more specific instructions regarding the elements that the plaintiff must prove.

Sources and Authority

- Civil Action for Deprivation of Rights. Title 42 United States Code section 1983.

- "As we have said many times, § 1983 'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.' " (*Graham v. Connor* (1989) 490 U.S. 386, 393-394 [109 S.Ct. 1865, 104 L.Ed.2d 443], internal citation omitted.)

- "42 U.S.C. § 1983 creates a cause of action against a person who, acting under color of state law, deprives another of rights guaranteed under the Constitution. Section 1983 does not create any substantive rights; rather it is the vehicle whereby plaintiffs can challenge actions by governmental

officials." (*Jones v. Williams* (9th Cir. 2002) 297 F.3d 930, 934.)

- "By the plain terms of § 1983, two—and only two—allegations are required in order to state a cause of action under that statute. First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law." (*Catsouras v. Department of California Highway Patrol* (2010) 181 Cal.App.4th 856, 890 [104 Cal.Rptr.3d 352].)

- "Section 1983 can also be used to enforce federal statutes. For a statutory provision to be privately enforceable, however, it must create an individual right." (*Henry A. v. Willden* (9th Cir. 2012) 678 F.3d 991, 1005, internal citation omitted.)

- "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 jury was properly instructed on [plaintiff]'s burden of proof and the particular elements of the section 1983 claim. (CACI No. 3000.)" (*King v. State of California* (2015) 242 Cal.App.4th 265, 280 [195 Cal.Rptr.3d 286].)

- " 'State courts look to federal law to determine what conduct will support an action under section 1983. The first inquiry in any section 1983 suit is to identify the precise constitutional violation with which the defendant is charged.' " (*Weaver v. State of California* (1998) 63 Cal.App.4th 188, 203 [73 Cal.Rptr.2d 571], internal citations omitted.)

- " 'Qualified immunity is an affirmative defense against section 1983 claims. Its purpose is to shield public officials "from undue interference with their duties and from potentially disabling threats of liability." The defense provides immunity from suit, not merely from liability. Its purpose is to spare defendants the burden of going forward with trial.' Because it is an immunity from suit, not just a mere defense to liability, it is important to resolve immunity questions at the earliest possible stage in litigation. Immunity should ordinarily be resolved by the court, not a jury." (*Martinez v. County of Los Angeles* (1996) 47 Cal.App.4th 334, 342 [54 Cal.Rptr.2d 772], internal citations omitted.)

- "Constitutional torts employ the same measure of damages as common law torts and are not augmented 'based on the abstract "value" or "importance" of constitutional rights ... .' Plaintiffs have the burden of proving compensatory damages in section 1983 cases, and the amount of damages depends 'largely upon the credibility of the plaintiffs' testimony concerning their injuries.' " (*Choate v. County of Orange* (2000) 86 Cal.App.4th 312, 321 [103 Cal.Rptr.2d 339], internal citations omitted.)

- "[E]ntitlement to compensatory damages in a civil rights action is not a matter of discretion: 'Compensatory damages . . . are mandatory; once liability is found, the jury is required to award compensatory damages in an amount appropriate to compensate the plaintiff for his loss.' " (*Hazle v. Crofoot* (9th Cir. 2013) 727 F.3d 983, 992.)

- "[T]he state defendants' explanation of the jury's zero-damages award as allocating all of [plaintiff]'s injury to absent persons reflects the erroneous view that not only could zero damages be awarded to

[plaintiff], but that [plaintiff]'s damages were capable of apportionment. [Plaintiff] independently challenges the jury instruction and verdict form that allowed the jury to decide this question, contending that the district judge should have concluded, as a matter of law, that [plaintiff] was entitled to compensatory damages and that defendants were jointly and severally liable for his injuries. He is correct. The district judge erred in putting the question of apportionment to the jury in the first place, because the question of whether an injury is capable of apportionment is a legal one to be decided by the judge, not the jury." (*Hazle, supra,* 727 F.3d at pp. 994−995.)

- "An individual acts under color of state law when he or she exercises power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.' " (*Naffe v. Frey* (9th Cir. 2015) 789 F.3d 1030, 1036.)

- "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.)

- "A state employee who is off duty nevertheless acts under color of state law when (1) the employee 'purport[s] to or pretend[s] to act under color of law,' (2) his 'pretense of acting in the performance of his duties . . . had the purpose and effect of influencing the behavior of others,' and (3) the harm inflicted on plaintiff 'related in some meaningful way either to the officer's governmental status or to the performance of his duties,' " (*Naffe, supra,* 789 F.3d at p. 1037, internal citations omitted.)

- "[P]rivate parties ordinarily are not subject to suit under section 1983, unless, sifting the circumstances of the particular case, the state has so significantly involved itself in the private conduct that the private parties may fairly be termed state actors. Among the factors considered are whether the state subsidized or heavily regulated the conduct, or compelled or encouraged the particular conduct, whether the private actor was performing a function which normally is performed exclusively by the state, and whether there was a symbiotic relationship rendering the conduct joint state action." (*Robbins v. Hamburger Home for Girls* (1995) 32 Cal.App.4th 671, 683 [38 Cal.Rptr.2d 534], internal citations omitted.)

- "Private parties act under color of state law if they willfully participate in joint action with state officials to deprive others of constitutional rights. Private parties involved in such a conspiracy may be liable under section 1983." (*United Steelworkers of America v. Phelps Dodge Corp.* (9th Cir. 1989) 865 F.2d 1539, 1540, internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 816, 819 et seq.

2 Civil Rights Actions, Ch. 7, *Deprivation of Rights Under Color of State Law-General Principles (Civil*

Rights Act of 1871, 42 U.S.C. § 1983), ¶¶ 7.05–7.07, Ch. 17, *Deprivation of Rights Under Color of State Law-General Principles (Civil Rights Act of 1871, 42 U.S.C. § 1983)*, ¶ 17.02 (Matthew Bender)

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

1 Matthew Bender Practice Guide: Federal Pretrial Civil Procedure in California, Ch. 8, *Answers and Responsive Motions Under Rule 12*, 8.40

3001. Local Government Liability—Policy or Custom—Essential Factual Elements (42 U.S.C. § 1983)

[*Name of plaintiff***] claims that [he/she] was deprived of [his/her] civil rights as a result of an official [policy/custom] of the [***name of local governmental entity***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That the [***name of local governmental entity***] had an official [policy/custom] [***specify policy or custom***];**

2. **That [***name of officer or employee***] was an [officer/employee/[***other***]] of [***name of local governmental entity***];**

3. **That [***name of officer or employee***] [intentionally/[***insert other applicable state of mind***]] [***insert conduct allegedly violating plaintiff's civil rights***];**

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

5. **That [***name of officer or employee***] acted because of this official [policy/custom].**

New September 2003; Revised December 2010; Renumbered from CACI No. 3007 and Revised December 2012

Directions for Use

Give this instruction and CACI No. 3002, *"Official Policy or Custom" Explained,* if the plaintiff seeks to hold a local governmental entity liable for a civil rights violation based on the entity's official policy or custom. First give CACI No. 3000, *Violation of Federal Civil Rights—In General—Essential Factual Elements,* and the instructions on the particular constitutional violation alleged.

In element 3, a constitutional violation is not always based on intentional conduct. Insert the appropriate level of scienter. For example, Eighth Amendment cases involving failure to provide a prisoner with proper medical care require "deliberate indifference." (See *Hudson v. McMillian* (1992) 503 U.S. 1, 5 [112 S.Ct. 995, 117 L.Ed.2d 156].) And Fourth Amendment claims require an "unreasonable" search or seizure. (See *Sacramento County Deputy Sheriffs' Assn. v. County of Sacramento* (1996) 51 Cal.App.4th 1468, 1477 [59 Cal.Rptr.2d 834.)

For other theories of liability against a local governmental entity, see CACI No. 3003, *Local Government Liability—Failure to Train—Essential Factual Elements,* and CACI No. 3004, *Local Government Liability—Act or Ratification by Official With Final Policymaking Authority—Essential Factual Elements*.

Sources and Authority

- "[I]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." (*Monell v. Dept. of Social Services of New York* (1978) 436 U.S. 658, 694 [98 S.Ct. 2018, 56 L.Ed.2d 611].)

- Local governmental entities " 'can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where ... the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted. ...' " Local governmental entities also can be sued " 'for constitutional deprivations visited pursuant to governmental "custom." ' " In addition, " '[t]he plaintiff must ... demonstrate that, through its *deliberate* conduct, the municipality was the "moving force" behind the injury alleged. That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights.' " (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1147 [119 Cal.Rptr.2d 709, 45 P.3d 1171], internal citations omitted.)

- "Entity liability may arise in one of two forms. The municipality may itself have directed the deprivation of federal rights through an express government policy. This was the situation in *Monell*, where there was an explicit policy requiring pregnant government employees to take unpaid leaves of absence before such leaves were medically required. ... Alternatively, the municipality may have in place a custom or practice so widespread in usage as to constitute the functional equivalent of an express policy." (*Choate v. County of Orange* (2000) 86 Cal.App.4th 312, 328 [103 Cal.Rptr.2d 339].)

- " '[I]n order to successfully maintain an action under 42 United States Code section 1983 against governmental defendants for the tortious conduct of employees under federal law, it is necessary to establish that the conduct occurred in execution of a government's policy or custom promulgated either by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy.' " (*Newton v. County of Napa* (1990) 217 Cal.App.3d 1551, 1564 [266 Cal.Rptr. 682], internal citations omitted.)

- "Under *Monell*, a local government body can be held liable under § 1983 for policies of inaction as well as policies of action. A policy of action is one in which the government body itself violates someone's constitutional rights, or instructs its employees to do so; a policy of inaction is based on a government body's 'failure to implement procedural safeguards to prevent constitutional violations.' " (*Jackson v. Barnes* (9th Cir. 2014) 749 F.3d 755, 763], internal citations omitted.)

- "Normally, the question of whether a policy or custom exists would be a jury question. However, when there are no genuine issues of material fact and the plaintiff has failed to establish a prima facie case, disposition by summary judgment is appropriate." (*Trevino v. Gates* (9th Cir. 1996) 99 F.3d 911, 920.)

- "A triable issue exists as to whether the root of the unconstitutional behavior exhibited in [plaintiff]'s case lies in the unofficial operating procedure of [defendant] County or in the errant acts of individual social workers, and this question should go to a jury." (*Kirkpatrick v. County of Washoe* (9th Cir.

2015) 792 F.3d 1184, 11xx.)

- "At most, *Monell* liability adds an additional defendant, a municipality, to the universe of actors who will be jointly and severally liable for the award." (*Choate, supra,* 86 Cal.App.4th at p. 328.)

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

- "Local governmental bodies such as cities and counties are considered 'persons' subject to suit under section 1983. States and their instrumentalities, on the other hand, are not." (*Kirchmann v. Lake Elsinore Unified School Dist.* (2000) 83 Cal.App.4th 1098, 1101 [100 Cal.Rptr.2d 289], internal citations omitted.)

- "A municipality can be sued under section 1983 for 'constitutional deprivations visited pursuant to governmental "custom." ' However, 'Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort. In particular, … a municipality cannot be held liable solely because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory.' " (*Marshall v. County of San Diego* (2015) 238 Cal.App.4th 1095, 1118 [190 Cal.Rptr.3d 97], original italics, internal citation omitted.)

- "~~A local governmental unit cannot be liable under this section for acts of its employees based solely on a respondeat superior theory.~~ A local governmental unit is liable only if the alleged deprivation of rights 'implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers,' or when the injury is in 'execution of a [local] government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy.' " (*County of Los Angeles v. Superior Court* (1998) 68 Cal.App.4th 1166, 1171 [80 Cal.Rptr.2d 860], internal citations omitted.)

- "A municipality's policy or custom resulting in constitutional injury may be actionable even though the individual public servants are shielded by good faith immunity." (*Bach v. County of Butte* (1983) 147 Cal.App.3d 554, 568 [195 Cal.Rptr. 268], internal citations omitted.)

- "No punitive damages can be awarded against a public entity." (*Choate, supra,* 86 Cal.App.4th at p. 328, internal citation omitted.)

- "[T]he requirements of *Monell* do apply to suits against private entities under § 1983. … [W]e see no basis in the reasoning underlying *Monell* to distinguish between municipalities and private entities acting under color of state law." (*Tsao v. Desert Palace, Inc.* (9th Cir. 2012) 698 F.3d 1128, 1139, internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 816, 819 et seq.

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

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

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

3023. Unreasonable Search—Search Without a Warrant—Essential Factual Elements (42 U.S.C. § 1983)

[*Name of plaintiff***] claims that [***name of defendant***] carried out an unreasonable search of [his/her] [person/home/automobile/office/[***insert other***]] because [he/she] did not have a warrant. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] searched [***name of plaintiff***]'s [person/home/automobile/office/[***insert other***]];**

2. **That [***name of defendant***] did not have a warrant;**

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 search was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003; Renumbered from CACI No. 3003 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.

Sources and Authority

- "The Fourth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, provides: 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.' " (*Conway v. Pasadena Humane Society* (1996) 45 Cal.App.4th 163, 171 [52 Cal.Rptr.2d 777], internal citation omitted.)

- " 'The Fourth Amendment prohibits only unreasonable searches ... . [¶] The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.'" (*Sacramento County Deputy Sheriffs' Assn. v. County of Sacramento* (1996) 51 Cal.App.4th 1468, 1477 [59 Cal.Rptr.2d 834], internal citation omitted.)

- " '[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.' 'And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search "warrant a man of reasonable caution in the belief" that the action taken was appropriate?' An officer's good faith is not enough." (*King v. State of California* (2015) 242 Cal.App.4th 265, 283 [195 Cal.Rptr.3d 286], internal citations omitted.)

- "Thus, the fact that the officers' reasonable suspicion of wrongdoing is not particularized to each member of a group of individuals present at the same location does not automatically mean that a search of the people in the group is unlawful. Rather, the trier of fact must decide whether the search was reasonable in light of the circumstances." (*Lyall v. City of Los Angeles* (9th Cir. 2015) 807 F.3d 1178, 1194.)

- " 'It is settled doctrine that probable cause for belief that certain articles subject to seizure are in a dwelling cannot of itself justify a search without a warrant.' Thus, a warrantless entry into a residence is presumptively unreasonable and therefore unlawful. Government officials 'bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests.' " (*Conway, supra,* 45 Cal.App.4th at p. 172, internal citations omitted.)

- "The Fourth Amendment shields not only actual owners, but also anyone with sufficient possessory rights over the property searched. … To be shielded by the Fourth Amendment, a person needs 'some joint control and supervision of the place searched,' not merely permission to be there." (*Lyall, supra,* 807 F.3d at pp. 1186–1187.)

- "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.)

- "[P]rivate parties ordinarily are not subject to suit under section 1983, unless, sifting the circumstances of the particular case, the state has so significantly involved itself in the private conduct that the private parties may fairly be termed state actors. Among the factors considered are whether the state subsidized or heavily regulated the conduct, or compelled or encouraged the particular conduct, whether the private actor was performing a function which normally is performed exclusively by the state, and whether there was a symbiotic relationship rendering the conduct joint state action." (*Robbins v. Hamburger Home for Girls* (1995) 32 Cal.App.4th 671, 683 [38 Cal.Rptr.2d 534], internal citations omitted.)

- "Private parties act under color of state law if they willfully participate in joint action with state officials to deprive others of constitutional rights. Private parties involved in such a conspiracy may

be liable under section 1983." (*United Steelworkers of America v. Phelps Dodge Corp.* (9th Cir. 1989) 865 F.2d 1539, 1540, internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 816, 819 et seq.

3 Civil Rights Actions, Ch. 10, *Deprivation of Rights Under Color of State Law—Law Enforcement and Prosecution*, ¶ 10.04 (Matthew Bender)

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

3026. Affirmative Defense—Exigent Circumstances

[*Name of defendant***] claims that a search warrant was not required. To succeed, [***name of defendant***] must prove both of the following:**

1. **That a reasonable officer would have believed that, under the circumstances, there was not enough time to get a search warrant because entry or search was necessary to prevent [***insert one of the following:***]**

   [physical harm to the officer or other persons;]

   [the destruction or concealment of evidence;]

   [the escape of a suspect;] and

2. **That the search was reasonable under the circumstances.**

In deciding whether the search was reasonable, you should consider, among other factors, the following:

(a) The extent of the particular intrusion;

(b) The place in which the search was conducted; [and]

(c) The manner in which the search was conducted; [and]

(d) [*Insert other applicable factor***].**

New September 2003; Renumbered from CACI No. 3006 December 2012

Sources and Authority

- "Absent consent, exigent circumstances must exist for a warrantless entry into a home, despite probable cause to believe that a crime has been committed or that incriminating evidence may be found inside. Such circumstances are 'few in number and carefully delineated.' 'Exigent circumstances' means 'an emergency situation requiring swift action to prevent imminent danger to life or serious damage to property, or to forestall the imminent escape of a suspect or destruction of evidence.' " (*Conway v. Pasadena Humane Society* (1996) 45 Cal.App.4th 163, 172 [52 Cal.Rptr.2d 777], internal citation omitted.)

- "Before agents of the government may invade the sanctity of the home, the burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries." (*Welsh v. Wisconsin* (1984) 466 U.S. 740, 750 [104 S.Ct. 2091, 80 L.Ed.2d 732].)

- " 'There are two general exceptions to the warrant requirement for home searches: exigency and emergency.' These exceptions are 'narrow' and their boundaries are 'rigorously guarded' to prevent any expansion that would unduly interfere with the sanctity of the home. In general, the difference between the two exceptions is this: The 'emergency' exception stems from the police officers' 'community caretaking function' and allows them 'to respond to emergency situations' that threaten life or limb; this exception does '*not* [derive from] police officers' function as criminal investigators.' By contrast, the 'exigency' exception does derive from the police officers' investigatory function; it allows them to enter a home without a warrant if they have both probable cause to believe that a crime has been or is being committed and a reasonable belief that their entry is 'necessary to prevent . . . the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts.' (*Hopkins v. Bonvicino* (9th Cir. 2009) 573 F.3d 752, 763, original italics, internal citations omitted.)

- "[D]etermining whether an official had 'reasonable cause to believe exigent circumstances existed in a given situation … [is a] "question[] of fact to be determined by a jury." [Citation.]' " (*Arce v. Childrens Hospital Los Angeles* (2012) 211 Cal.App.4th 1455, 1475 [150 Cal.Rptr.3d 735].)

- "There is no litmus test for determining whether exigent circumstances exist, and each case must be decided on the facts known to the officers at the time of the search or seizure. However, two primary considerations in making this determination are the gravity of the underlying offense and whether the delay in seeking a warrant would pose a threat to police or public safety." (*Conway, supra,* 45 Cal.App.4th at p. 172.)

- " '[W]hile the commission of a misdemeanor offense,' such as the petty theft that [defendants] were investigating, 'is not to be taken lightly, it militates against a finding of exigent circumstances where the offense . . . is not inherently dangerous.' " (*Lyall v. City of Los Angeles* (9th Cir. 2015) 807 F.3d 1178, 1189.)

- "Finally, even where exigent circumstances exist, '[t]he search must be "strictly circumscribed by the exigencies which justify its initiation".' 'An exigent circumstance may justify a search without a warrant. However, after the emergency has passed, the [homeowner] regains his right to privacy, and ... a second entry [is unlawful].' " (*Conway, supra,* 45 Cal.App.4th at p. 173, internal citation omitted.)

- " 'Exigent circumstances are those in which a substantial risk of harm to the persons involved or to the law enforcement process would arise if the police were to delay a search [] until a warrant could be obtained.' Mere speculation is not sufficient to show exigent circumstances. Rather, 'the government bears the burden of showing the existence of exigent circumstances by particularized evidence.' This is a heavy burden and can be satisfied 'only by demonstrating specific and articulable facts to justify the finding of exigent circumstances.' Furthermore, 'the presence of exigent circumstances necessarily implies that there is insufficient time to obtain a warrant; therefore, the government must show that a warrant could not have been obtained in time.' " (*U.S. v. Reid* (9th Cir. 2000) 226 F.3d 1020, 1027−1028, internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 816, 819 et seq.

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

- Remedies Under Bane Act. Civil Code section 52.

- "The Bane Act permits an individual to pursue a civil action for damages where another person 'interferes by threat, intimidation, or coercion, or attempts to interfere by threat, 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 essence of a Bane Act claim is that the defendant, by the specified improper means (i.e., "threat[], intimidation or coercion"), tried to or did prevent the plaintiff from doing something he or she had the right to do under the law or to force the plaintiff to do something that he or she was not required to do under the law.' " (*King v. State of California* (2015) 242 Cal.App.4th 265, 294 [195 Cal.Rptr.3d 286], internal citation omitted.)

- "[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].)

- "Numerous California decisions make clear that a plaintiff in a search-and-seizure case must allege threats or coercion beyond the coercion inherent in a detention or search in order to recover under the Bane Act." (*Lyall v. City of Los Angeles* (9th Cir. 2015) 807 F.3d 1178, 1196.)

- "[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)

3704. Existence of "Employee" Status Disputed

[*Name of plaintiff***] must prove that [***name of agent***] was [***name of defendant***]'s employee.**

In deciding whether [*name of agent***] was [***name of defendant***]'s employee, the most important factor is whether [***name of defendant***] had the right to control how [***name of agent***] performed the work, rather than just the right to specify the result. One indication of the right to control is that the hirer can discharge the worker [without cause]. It does not matter whether [***name of defendant***] exercised the right to control.**

In deciding whether [*name of defendant***] was [***name of agent***]'s employer, in addition to the right of control, you must consider the full nature of their relationship. You should take into account the following additional factors, which, if true, may show that [***name of defendant***] was the employer of [***name of agent***]. No one factor is necessarily decisive. Do not simply count the number of applicable factors and use the larger number to make your decision. It is for you to determine the weight and importance to give to each of these additional factors based on all of the evidence.**

(a) **[***Name of defendant***] supplied the equipment, tools, and place of work;**

(b) **[***Name of agent***] was paid by the hour rather than by the job;**

(c) **[***Name of defendant***] was in business;**

(d) **The work being done by [***name of agent***] was part of the regular business of [***name of defendant***];**

(e) **[***Name of agent***] was not engaged in a distinct occupation or business;**

(f) **The kind of work performed by [***name of agent***] is usually done under the direction of a supervisor rather than by a specialist working without supervision;**

(g) **The kind of work performed by [***name of agent***] does not require specialized or professional skill;**

(h) **The services performed by [***name of agent***] were to be performed over a long period of time; [and]**

(i) **[***Name of defendant***] and [***name of agent***] believed that they had an employer-employee relationship[./; and]**

(j) **[***Specify other factor***].**

New September 2003; Revised December 2010, June 2015, December 2015

Directions for Use

This instruction is primarily intended for employer-employee relationships. Most of the factors are less appropriate for analyzing other types of agency relationships, such as franchisor/franchisee. For an instruction more appropriate to these kinds of relationships, see CACI No. 3705, *Existence of "Agency" Relationship Disputed.*

Secondary factors (a)–(i) come from the Restatement Second of Agency, section 220. (See also *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 532 [173 Cal.Rptr.3d 332, 327 P.3d 165]; Rest.3d Agency, § 7.07, com. f,) They have been phrased so that a yes answer points toward an employment relationship. Omit any that are not relevant. Additional factors have been endorsed by the California Supreme Court and may be included if applicable. (See *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 354–355 [256 Cal.Rptr. 543, 769 P.2d 399].) Therefore, an "other" option (j) has been included.

Sources and Authority

- Principal-Agent Relationship. Civil Code section 2295.

- "Whether a common law employer-employee relationship exists turns foremost on the degree of a hirer's right to control how the end result is achieved." (*Ayala, supra,* 59 Cal.4th at p. 528.)

- "However, the courts have long recognized that the 'control' test, applied rigidly and in isolation, is often of little use in evaluating the infinite variety of service arrangements. While conceding that the right to control work details is the 'most important' or 'most significant' consideration, the authorities also endorse several 'secondary' indicia of the nature of a service relationship." (*S. G. Borello & Sons, Inc., supra,* 48 Cal.3d at p. 350, internal citations omitted.)

- "While the extent of the hirer's right to control the work is the foremost consideration in assessing whether a common law employer-employee relationship exists, our precedents also recognize a range of secondary indicia drawn from the Second and Third Restatements of Agency that may in a given case evince an employment relationship. Courts may consider '(a) whether the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee.' " (*Ayala, supra,* 59 Cal.4th at p. 532.)

- " 'Generally, . . . the individual factors cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations.' " (*S. G. Borello & Sons, Inc., supra,* 48 Cal.3d at p. 351, internal citations omitted.)

- "[T]he Restatement guidelines heretofore approved in our state remain a useful reference." (*S. G.*

Borello & Sons, Inc., supra, 48 Cal.3d at p. 354.)

- "We also note the six-factor test developed by other jurisdictions which determine independent contractorship in light of the remedial purposes of the legislation. Besides the 'right to control the work,' the factors include (1) the alleged employee's opportunity for profit or loss depending on his managerial skill; (2) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; (3) whether the service rendered requires a special skill; (4) the degree of permanence of the working relationship; and (5) whether the service rendered is an integral part of the alleged employer's business. [¶] As can be seen, there are many points of individual similarity between these guidelines and our own traditional Restatement tests. We find that all are logically pertinent to the inherently difficult determination whether a provider of service is an employee or an excluded independent contractor for purposes of workers' compensation law." (*S. G. Borello & Sons, Inc., supra,* 48 Cal.3d at pp. 354–355, internal cross-reference omitted.)

- "Whether a person is an independent contractor or an employee is a question of fact if dependent upon the resolution of disputed evidence or inferences." (*Bowman v. Wyatt* (2010) 186 Cal.App.4th 286, 297, fn. 4 [111 Cal.Rptr.3d 787].)

- 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].)

- "The label placed by the parties on their relationship is not dispositive, and subterfuges are not countenanced." (*S. G. Borello & Sons, Inc., supra,* 48 Cal.3d at p. 342.)

- "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.)

- "Perhaps the strongest evidence of the right to control is whether the hirer can discharge the worker without cause, because '[t]he power of the principal to terminate the services of the agent gives him the means of controlling the agent's activities.' " (*Ayala, supra,* 59 Cal.4th at p. 531.)

- "The worker's corresponding right to leave is similarly relevant: ' "An employee may quit, but an independent contractor is legally obligated to complete his contract." ' " (*Ayala, supra,* 59 Cal.4th at p. 531 fn. 2.)

- "A finding of employment is supported where the workers are 'a regular and integrated portion of [the] business operation.' " (*Garcia v. Seacon Logix Inc.* (2015) 238 Cal.App.4th 1476, 1487 [190 Cal.Rptr.3d 400].)

- "Where workers are paid weekly or by the hour, rather than by the job, it suggests an employment relationship." (*Garcia, supra,* 238 Cal.App.4th at p. 1488.)

- "In cases where there is a written contract, to answer that question [the right of control] without full examination of the contract will be virtually impossible. … [¶] … [T]he rights spelled out in a

contract may not be conclusive if other evidence demonstrates a practical allocation of rights at odds with the written terms." (*Ayala, supra,* 59 Cal.4th at p. 535.)

- "[T]he right to exercise complete or authoritative control must be shown, rather than mere suggestion as to detail. A worker is an independent contractor when he or she follows the employer's desires only in the result of the work, and not the means by which it is achieved." (*Jackson v. AEG Live, LLC* (2015) 233 Cal.App.4th 1156, 1179 [183 Cal.Rptr.3d 394].)

- " '[T]he owner may retain a broad general power of supervision and control as to the results of the work so as to insure satisfactory performance of the independent contract—including the right to inspect [citation], … the right to make suggestions or recommendations as to details of the work [citation], the right to prescribe alterations or deviations in the work [citation]—without changing the relationship from that of owner and independent contractor … .' " (*Beaumont-Jacques v. Farmers Group, Inc.* (2013) 217 Cal.App.4th 1138, 1143 [159 Cal.Rptr.3d 102], quoting *McDonald v. Shell Oil Co.* (1955) 44 Cal.2d 785, 790 [285 P.2d 902].)

- "Agency and independent contractorship are not *necessarily* mutually exclusive legal categories as independent contractor and servant or employee are. In other words, an agent may also be an independent contractor. 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." (*Jackson, supra,* 233 Cal.App.4th at p. 1184, original italics, internal citations omitted].)

- "[W]hen a statute refers to an 'employee' without defining the term, courts have generally applied the common law test of employment to that statute." (*Arnold v. Mutual of Omaha Ins. Co.* (2011) 202 Cal.App.4th 580, 586 [135 Cal.Rptr.3d 213].)

- "[A] termination at-will clause for both parties may properly be included in an independent contractor agreement, and is not by itself a basis for changing that relationship to one of an employee." (*Arnold, supra,* 202 Cal.App.4th at p. 589.)

- Restatement Second of Agency, section 220, provides:
  (1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.
  (2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:
    (a) the extent of control which, by the agreement, the master may exercise over the details of the work;

    (b) whether or not the one employed is engaged in a distinct occupation or business;

    (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

    (d) the skill required in the particular occupation;

(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

(f) the length of time for which the person is employed;

(g) the method of payment, whether by the time or by the job;

(h) whether or not the work is a part of the regular business of the employer;

(i) whether or not the parties believe they are creating the relation of master and servant; and

(j) whether the principal is or is not in business.

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 2–42

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, § 8.03[2] (Matthew Bender)

2 Wilcox, 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*, §§ 248.15, 248.22, 248.51 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent*, § 427.13 (Matthew Bender)

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

1 California Civil Practice: Torts §§ 3:5–3:6 (Thomson Reuters)

3721. Scope of Employment—Peace Officer's Misuse of Authority

[*Name of plaintiff*] must prove that [*name of agent*] was acting within the scope of [his/her] [employment/authorization] when [*name of plaintiff*] was harmed.

The conduct of a peace officer is within the scope of [his/her] employment as a peace officer if all of the following are true:

(a) The conduct occurs while the peace officer is on duty as a peace officer;

(b) The conduct occurs while the peace officer is exercising [his/her] authority as a peace officer; and

(c) The conduct results from the use of [his/her] authority as a peace officer.

New September 2003

Sources and Authority

- "[W]e hold that when, as in this case, a police officer on duty misuses his official authority by raping a woman whom he has detained, the public entity that employs him can be held vicariously liable. This does not mean that, as a matter of law, the public employer is vicariously liable whenever an on-duty officer commits a sexual assault. Rather, this is a question of fact for the jury." (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 221 [285 Cal.Rptr. 99, 814 P.2d 1341].)

- "The use of authority is incidental to the duties of a police officer. The County enjoys tremendous benefits from the public's respect for that authority. Therefore, it must suffer the consequences when the authority is abused." (*White v. County of Orange* (1985) 166 Cal.App.3d 566, 572 [212 Cal.Rptr. 493].)

- "It is questionable whether the holding in *Mary M.* is still viable. Indeed, the Chief Justice of California has described it as an 'aberrant holding' that was 'wrongly decided' and should be 'overrule[d].' Nonetheless, it remains the rule of law unless a majority of the California Supreme Court decides otherwise." (*M.P. v. City of Sacramento* (2009) 177 Cal.App.4th 121, 124 [98 Cal.Rptr.3d 812], internal citations omitted.)

- "We reject plaintiff's effort to apply *Mary M.* to the facts of this case. For reasons that follow, we conclude the *Mary M.* holding that a public employer of a police officer may be vicariously liable for a sex crime committed by the officer against a person detained by the officer while on duty is, at best, limited to such acts by an on-duty police officer and does not extend to any other form of employment, including firefighting. Thus, as a matter of law, the alleged sexual assault by firefighters in this case was not conduct within in the scope of their employment and cannot support a finding that their employer … is vicariously liable for the harm." (*M.P.*, *supra*, 177 Cal.App.4th at p. 124; see also *Z.V. v. County of Riverside* (2015) 238 Cal.App.4th 889, 893–902 [189 Cal.Rptr.3d 570] [*Mary M.*

not applicable to sexual assault by social worker on foster child].)

- "Appellants argue they fall within *Mary M*. because [employee]'s misconduct arose from the abuse of his authority as a law enforcement officer. The County counters that [employee] was a correctional officer, not a law enforcement officer. However, whether [employee] is classified as a law enforcement officer or not is immaterial. The power or privilege that [employee] abused, i.e., his access to the correctional management computer system, is totally different from the unique and formidable power and authority police officers have over members of the public or people under their control. [Employee] had no authority or control over appellants. As courts have noted, ' "police officers [exercise] the most awesome and dangerous power that a democratic state possesses with respect to its residents—the power to use lawful force to arrest and detain them." ' This is not the case with a correctional officer who processes paperwork and has access to a jail computer system. Rather in this context, the criminal conduct underlying appellants' action, namely the illegal act of writing the letters using the information gathered from the jail computer system for totally non-work-related purposes, must be considered unusual or startling." (*Perry v. County of Fresno* (2013) 215 Cal.App.4th 94, 103−104 [155 Cal.Rptr.3d 219], internal citation omitted.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 170, 180, 185, 190

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, § 8.03[3][f][ii] (Matthew Bender)

10 California Points and Authorities, Ch. 100A, *Employer and Employee: Respondeat Superior*, § 100A.26 et seq. (Matthew Bender)

1 California Civil Practice: Torts § 3:8 (Thomson Reuters)

3903A. Medical Expenses—Past and Future (Economic Damage)

[*Insert number, e.g.,* "1."**] [Past] [and] [future] medical expenses.**

[To recover damages for past medical expenses, [*name of plaintiff***] must prove the reasonable cost of reasonably necessary medical care that [he/she] has received.]**

[To recover damages for future medical expenses, [*name of plaintiff***] must prove the reasonable cost of reasonably necessary medical care that [he/she] is reasonably certain to need in the future.]**

New September 2003

Sources and Authority

- "[A] person injured by another's tortious conduct is entitled to recover the reasonable value of medical care and services reasonably required and attributable to the tort." (*Hanif v. Housing Authority of Yolo County* (1988) 200 Cal.App.3d 635, 640 [246 Cal.Rptr. 192], internal citations omitted; see also *Helfend v. Southern Cal Rapid Transit Dist.* (1970) 2 Cal.3d 1, 6 [84 Cal.Rptr. 173, 465 P.2d 61 [collateral source rule].)

- "An injured plaintiff is entitled to recover the reasonable value of medical services that are reasonably certain to be necessary in the future." (*J.P. v. Carlsbad Unified School Dist.* (2014) 232 Cal.App.4th 323, 341 [181 Cal.Rptr.3d 286].)

- "The jury was properly instructed in this case to determine 'the reasonable cost of reasonably necessary medical care that [plaintiff] has received' and 'the reasonable cost of reasonably necessary medical care that [plaintiff] is reasonably certain to need in the future.' But as a consequence of the discrepancy in recent decades between the amount patients are typically billed by health care providers and the lower amounts usually paid in satisfaction of the charges (whether by a health insurer or otherwise), controversy has arisen as to how to measure the reasonable costs of medical care in a variety of factual scenarios." (*Bermudez v. Ciolek* (2015) 237 Cal.App.4th 1311, 1328 [188 Cal.Rptr.3d 820].)

- "[A] plaintiff may recover as economic damages *no more* than the reasonable value of the medical services received and is not entitled to recover the reasonable value if his or her actual loss was less. California decisions have focused on 'reasonable value' in the context of *limiting* recovery to reasonable expenditures, not expanding recovery beyond the plaintiff's actual loss or liability. To be recoverable, a medical expense must be both incurred *and* reasonable." (*Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541, 555 [129 Cal.Rptr.3d 325, 257 P.3d 1130], original italics, internal citations omitted.)

- "[A]n injured plaintiff whose medical expenses are paid through private insurance may recover as economic damages no more than the amounts paid by the plaintiff or his or her insurer for the medical services received or still owing at the time of trial. In so holding, we in no way abrogate or modify the

collateral source rule as it has been recognized in California; we merely conclude the negotiated rate differential—the discount medical providers offer the insurer—is not a benefit provided to the plaintiff in compensation for his or her injuries and therefore does not come within the rule." (*Howell, supra,* 52 Cal.4th at p. 566.)

- "[W]hen a medical care provider has, by agreement with the plaintiff's private health insurer, accepted as full payment for the plaintiff's care an amount less than the provider's full bill, evidence of that amount is relevant to prove the plaintiff's damages for past medical expenses and, assuming it satisfies other rules of evidence, is admissible at trial. Evidence that such payments were made in whole or in part by an insurer remains, however, generally inadmissible under the evidentiary aspect of the collateral source rule. Where the provider has, by prior agreement, accepted less than a billed amount as full payment, evidence of the full billed amount is not itself relevant on the issue of past medical expenses." (*Howell, supra,* 52 Cal.4th at p. 567, internal citation omitted.)

- "*Howell* offered no bright-line rule on how to determine 'reasonable value' when uninsured plaintiffs have incurred (but not paid) medical bills. [Defendant] is correct that the concept of market or exchange value was endorsed by *Howell* as the proper way to think about the 'reasonable value' of medical services. But she is incorrect to the extent she suggests (1) [Plaintiff] is necessarily in the same market as insured health care recipients or wealthy health care recipients who can pay cash; or (2) *Howell* prescribes a particular method for determining the 'reasonable value' of medical services." (*Bermudez, supra,* 237 Cal.App.4th at p. 1330.)

- "In sum, the measure of medical damages is the lesser of (1) the amount paid or incurred, and (2) the reasonable value of the medical services provided. In practical terms, the measure of damages in insured plaintiff cases will likely be the amount paid to settle the claim in full. It is theoretically possible to prove the reasonable value of services is lower than the rate negotiated by an insurer. But nothing in the available case law suggests this will be a particularly fruitful avenue for tort defendants. Conversely, the measure of damages for uninsured plaintiffs who have not paid their medical bills will usually turn on a wide-ranging inquiry into the reasonable value of medical services provided, because uninsured plaintiffs will typically incur standard, nondiscounted charges that will be challenged as unreasonable by defendants." (*Bermudez, supra,* 237 Cal.App.4th at pp. 1330−1331.)

- "[T]he inquiry into reasonable value for the medical services provided to an uninsured plaintiff is not necessarily limited to the billed amounts where a defendant seeks to introduce evidence that a lesser payment has been made to the provider by a factor … . In such cases, the inquiry requires some additional evidence showing a nexus between the amount paid by the factor and the reasonable value of the medical services." (*Uspenskaya v. Meline* (2015) 241 Cal.App.4th 996, 1007 [194 Cal.Rptr.3d 364].)

- "Where a medical provider has (1) rendered medical services to a plaintiff, (2) issued a bill for those services, and (3) subsequently written off a portion of the bill gratuitously, the amount written off constitutes a benefit that may be recovered by the plaintiff under the collateral source rule." (*Sanchez v. Strickland* (2011) 200 Cal.App.4th 758, 769 [133 Cal.Rptr.3d 342].)

- "It is established that 'the reasonable value of nursing services required by the defendant's tortious

conduct may be recovered from the defendant even though the services were rendered by members of the injured person's family and without an agreement or expectation of payment. Where services in the way of attendance and nursing are rendered by a member of the plaintiff's family, the amount for which the defendant is liable is the amount for which reasonably competent nursing and attendance by others could have been obtained. The fact that the injured party had a legal right to the nursing services (as in the case of a spouse) does not, as a general rule, prevent recovery of their value … .' " (*Hanif, supra,* 200 Cal.App.3d at pp. 644–645, internal citations omitted.)

- "Two points about the sufficiency of evidence to support a judgment can fairly be taken from *Howell*. First, the amount paid to settle in full an insured plaintiff's medical bills is likely substantial evidence on its own of the reasonable value of the services provided. Second, consistent with pre-*Howell* law, initial medical bills are generally insufficient on their own as a basis for determining the reasonable value of medical services. Ensuing cases have held that a plaintiff who relies solely on evidence of unpaid medical charges will not meet his burden of proving the reasonable value of medical damages with substantial evidence." (*Bermudez, supra,* 237 Cal.App.4th at p. 1335, internal citations omitted.)

- Nor is it necessary that the amount of the award equal the alleged medical expenses for it has long been the rule that the costs alone of medical treatment and hospitalization do not govern the recovery of such expenses. It must be shown additionally that the services were attributable to the accident, that they were necessary, and that the charges for such services were reasonable." (*Dimmick v. Alvarez* (1961) 196 Cal.App.2d 211, 216 [16 Cal.Rptr. 308].)

- "The intervention of a third party in purchasing a medical lien does not prevent a plaintiff from recovering the amounts billed by the medical provider for care and treatment, as long as the plaintiff legitimately incurs those expenses and remains liable for their payment. Nor does the rule [that a plaintiff in a tort action cannot recover more than the amount of medical expenses he or she paid or incurred, even if the reasonable value of those services might be a greater sum] forbid the jury from considering the amounts billed by the provider as evidence of the reasonable value of the services." (*Katiuzhinsky v. Perry* (2007) 152 Cal.App.4th 1288, 1291 [62 Cal.Rptr.3d 309].)

- "The fact that a hospital or doctor, for administrative or economic convenience, decides to sell a debt to a third party at a discount does not reduce the value of the services provided in the first place." (*Uspenskaya, supra,* 241 Cal.App.4th at p. 1003.)

- "Because the provider may no longer assert a lien for the full cost of its services, the Medicaid beneficiary may only recover the amount payable under Medicaid as his or her medical expenses in an action against a third party tortfeasor." (*Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, 827 [135 Cal.Rptr.2d 1, 69 P.3d 927], internal citation omitted.)

- " '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.)

- "It is for the jury to determine the probabilities as to whether future detriment is reasonably certain to occur in any particular case. [Citation.] It is 'not required' for a doctor to 'testify that he [is]

reasonably certain that the plaintiff would be disabled in the future. All that is required to establish future disability is that from all the evidence, including the expert testimony, if there be any, it satisfactorily appears that such disability will occur with reasonable certainty. [Citations.]' [Citation.] The fact that the amount of future damages may be difficult to measure or subject to various possible contingencies does not bar recovery." (*J.P., supra,* 232 Cal.App.4th at pp. 341−342.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1670

Hanning et al., California Practice Guide: Personal Injury, Ch. 3-A, *Damages: Introduction*, ¶¶ 3:1–3:19.4 (The Rutter Group)

Hanning et al., California Practice Guide: Personal Injury, Ch. 3-C, *Specific Items Of Compensatory Damages*, ¶¶ 3:33–3:233 (The Rutter Group)

California Tort Damages (Cont.Ed.Bar) Bodily Injury, §§ 1.19–1.31

4 Levy et al., California Torts, Ch. 52, *Medical Expenses and Economic Loss*, §§ 52.01, 52.03 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.45 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort*, § 64.192 (Matthew Bender)

1 California Civil Practice: Torts § 5:12 (Thomson Reuters)

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.
- Damages for Wrongful Death. Code of Civil Procedure section 377.61.
- "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.)
- "The elements of the cause of action for wrongful death are the tort (negligence or other wrongful act), the resulting death, and the damages, consisting of the pecuniary loss suffered by the heirs." (*Lattimore v. Dickey* (2015) 239 Cal.App.4th 959, 968 [191 Cal.Rptr.3d 766].)

- "~~We therefore conclude, on this basis as well, that~~ '[W]~~w~~rongful 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.)

- " 'The pecuniary value of the society, comfort, and protection that is lost through the wrongful death of a spouse, parent, or child may be considerable in cases where, for instance, the decedent had demonstrated a "kindly demeanor" toward the statutory beneficiary and rendered assistance or "kindly offices" to that person. [Citation.]' " (*Soto v. BorgWarner Morse TEC Inc.* (2015) 239 Cal.App.4th 165, 198−199 [191 Cal.Rptr.3d 263].)

- "Factors such as the closeness of a family unit, the depth of their love and affection, and the character of the decedent as kind, attentive, and loving are proper considerations for a jury assessing noneconomic damages … ." (*Soto, supra,* 239 Cal.App.4th at p. 201.)

- "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)

3940. Punitive Damages—Individual Defendant—Trial Not Bifurcated

If you decide that [*name of defendant***]'s conduct 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 the plaintiff and to discourage similar conduct in the future.**

You may award punitive damages only if [*name of plaintiff***] proves by clear and convincing evidence that [***name of defendant***] engaged in that conduct with malice, oppression, or fraud.**

"Malice" means that [*name of defendant***] acted with intent to cause injury or that [***name of defendant***]'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 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 [*name of defendant***] intentionally misrepresented or concealed a material fact and did so intending to harm [***name of plaintiff***].**

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, December 2005, June 2006, April 2007, August 2007, October 2008

Directions for Use

This instruction is intended to apply to individual persons only. When the plaintiff is seeking punitive damages against corporate defendants, use CACI No. 3943, *Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee—Trial Not Bifurcated*, or CACI No. 3945, *Punitive Damages—Entity Defendant—Trial Not Bifurcated*. When plaintiff is seeking punitive damages against both an individual person and a corporate defendant, use CACI No. 3947, *Punitive Damages—Individual and Entity Defendants—Trial Not Bifurcated*.

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

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 where 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.

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."

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.

- "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.)

- "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].)

- "Though due process does not permit courts or juries, 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, this does not mean that the defendant's similar wrongful conduct toward others should not be considered in determining the amount of punitive damages. … '[T]o consider the defendant's entire course of conduct in setting or reviewing a punitive damages award, even in an individual plaintiff's lawsuit, is not to punish the defendant for its conduct toward others. An enhanced punishment for recidivism does not directly punish the earlier offense; it is, rather, " ' "a stiffened penalty for the last crime, which is considered to be an aggravated offense because a repetitive one." ' " … By placing the defendant's conduct on one occasion into the context of a business practice or policy, an individual plaintiff can demonstrate that the conduct toward him or her was more blameworthy and warrants a stronger penalty to deter continued or repeated conduct of the same nature.' " (*Izell v. Union Carbide Corp.* (2014) 231 Cal.App.4th 962, 986, fn. 10 [180 Cal.Rptr.3d 382], internal citations omitted.)

- "[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].)

- "Evidence of the defendant's net worth is the most commonly used, but that metric is too susceptible to manipulation to be the sole standard for measuring a defendant's ability to pay. Yet the 'net' concept of the net worth metric remains critical. 'In most cases, evidence of earnings or profit alone are not sufficient "without examining the liabilities side of the balance sheet" [Citations.]' " (*Soto v. BorgWarner Morse TEC Inc.* (2015) 239 Cal.App.4th 165, 194 [191 Cal.Rptr.2d 263], internal citations omitted.)

- "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.)

- "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., supra,* 8 Cal.4th at p. 725, internal citations omitted.)

- "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, 14.39

4 Levy et al., California Torts, Ch. 54, *Punitive Damages*, §§ 54.01–54.06, 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)

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.

- Evidence of Profits or Financial Condition. Civil Code section 3295(d).

- "[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].)

- "Though due process does not permit courts or juries, 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, this does not mean that the defendant's similar wrongful conduct toward others should not be considered in determining the amount of punitive damages. … '[T]o consider the defendant's entire course of conduct in setting or reviewing a punitive damages award, even in an individual plaintiff's lawsuit, is not to punish the defendant for its conduct toward others. An enhanced punishment for recidivism does not directly punish the earlier offense; it is, rather, " ' "a

stiffened penalty for the last crime, which is considered to be an aggravated offense because a repetitive one." ' " … By placing the defendant's conduct on one occasion into the context of a business practice or policy, an individual plaintiff can demonstrate that the conduct toward him or her was more blameworthy and warrants a stronger penalty to deter continued or repeated conduct of the same nature.' " (*Izell v. Union Carbide Corp.* (2014) 231 Cal.App.4th 962, 986, fn. 10 [180 Cal.Rptr.3d 382], internal citations omitted.)

- "[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].)

- "Evidence of the defendant's net worth is the most commonly used, but that metric is too susceptible to manipulation to be the sole standard for measuring a defendant's ability to pay. Yet the 'net' concept of the net worth metric remains critical. 'In most cases, evidence of earnings or profit alone are not sufficient "without examining the liabilities side of the balance sheet" [Citations.]' " (*Soto v. BorgWarner Morse TEC Inc.* (2015) 239 Cal.App.4th 165, 194 [191 Cal.Rptr.2d 263], internal citations omitted.)

- "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)

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.
- Evidence of Profits or Financial Condition. Civil Code section 3295(d).
- "[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].)

- "Though due process does not permit courts or juries, 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, this does not mean that the defendant's similar wrongful conduct toward others should not be considered in determining the amount of punitive damages. … '[T]o consider the defendant's entire course of conduct in setting or reviewing a punitive damages award, even in an

individual plaintiff's lawsuit, is not to punish the defendant for its conduct toward others. An enhanced punishment for recidivism does not directly punish the earlier offense; it is, rather, " ' "a stiffened penalty for the last crime, which is considered to be an aggravated offense because a repetitive one." ' " … By placing the defendant's conduct on one occasion into the context of a business practice or policy, an individual plaintiff can demonstrate that the conduct toward him or her was more blameworthy and warrants a stronger penalty to deter continued or repeated conduct of the same nature.' " (*Izell v. Union Carbide Corp.* (2014) 231 Cal.App.4th 962, 986, fn. 10 [180 Cal.Rptr.3d 382], internal citations omitted.)

- "[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].)

- “Evidence of the defendant's net worth is the most commonly used, but that metric is too susceptible to manipulation to be the sole standard for measuring a defendant's ability to pay. Yet the ‘net’ concept of the net worth metric remains critical. ‘In most cases, evidence of earnings or profit alone are not sufficient “without examining the liabilities side of the balance sheet” [Citations.]’ ” (*Soto v. BorgWarner Morse TEC Inc.* (2015) 239 Cal.App.4th 165, 194 [191 Cal.Rptr.2d 263], internal citations omitted.)

- “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)

4100. "Fiduciary Duty" Explained

[A/An] [agent/stockbroker/real estate agent/real estate broker/corporate officer/partner/[*insert other fiduciary relationship***]] owes what is known as a fiduciary duty to [his/her/its] [principal/client/corporation/partner/[***insert other fiduciary relationship***]]. A fiduciary duty imposes on [a/an] [agent/stockbroker/real estate agent/real estate broker/corporate officer/partner/[***insert other fiduciary relationship***]] a duty to act with the utmost good faith in the best interests of [his/her/its] [principal/client/corporation/partner/[***insert other fiduciary relationship***]].**

New June 2006; Revised December 2010

Directions for Use

This instruction may be modified if other concepts involving fiduciary duty are relevant to the jury's understanding of the case. For instructions on damages resulting from misrepresentation by a fiduciary, see CACI No. 1923, *Damages—"Out of Pocket" Rule*, and CACI No. 1924, *Damages—"Benefit of the Bargain" Rule*.

Sources and Authority

- "A fiduciary relationship is ' " 'any relation existing between parties to a transaction wherein one of the parties is in duty bound to act with the utmost good faith for the benefit of the other party. Such a relation ordinarily arises where a confidence is reposed by one person in the integrity of another, and in such a relation the party in whom the confidence is reposed, if he voluntarily accepts or assumes to accept the confidence, can take no advantage from his acts relating to the interest of the other party without the latter's knowledge or consent. …' " ' " (*Wolf v. Superior Court* (2003) 107 Cal.App.4th 25, 29 [130 Cal.Rptr.2d 860], internal citations omitted.)

- "The elements of a cause of action for breach of fiduciary duty are the existence of a fiduciary relationship, its breach, and damage proximately caused by that breach." (*Knox v. Dean* (2012) 205 Cal.App.4th 417, 432-433 [140 Cal.Rptr.3d 569].)

- "The breach of fiduciary duty can be based upon either negligence or fraud, depending on the circumstances." (*Tribeca Companies, LLC v. First American Title Ins. Co.* (2015) 239 Cal.App.4th 1088, 1114 [192 Cal.Rptr.3d 354].)

- "Whether a fiduciary duty exists is generally a question of law. Whether the defendant breached that duty towards the plaintiff is a question of fact." (*Marzec v. Public Employees' Retirement System* (2015) 236 Cal.App.4th 889, 915 [187 Cal.Rptr.3d 452], internal citation omitted.)

- " ' "[B]efore a person can be charged with a fiduciary obligation, he must either knowingly undertake to act on behalf and for the benefit of another, or must enter into a relationship which imposes that undertaking as a matter of law." [Citation.]' " (*Cleveland v. Johnson* (2012) 209 Cal.App.4th 1315, 1338 [147 Cal.Rptr.3d 772].)

- "[E]xamples of relationships that impose a fiduciary obligation to act on behalf of and for the benefit of another are 'a joint venture, a partnership, or an agency.' But, '[t]hose categories are merely illustrative of fiduciary relationships in which fiduciary duties are imposed by law.' " (*Cleveland, supra,* 209 Cal.App.4th at p. 1339, internal citation omitted.)

- "The investment adviser/client relationship is one such relationship, giving rise to a fiduciary duty as a matter of law." (*Hasso v. Hapke* (2014) 227 Cal.App.4th 107, 140 [173 Cal.Rptr.3d 356].)

- "There is a 'strong public interest in assuring that corporate officers, directors, majority shareholders and others are faithful to their fiduciary obligations to minority shareholders.' " (*Meister v. Mensinger* (2014) 230 Cal.App.4th 381, 395 [178 Cal.Rptr.3d 604].)

- "Any persons who subscribe for stock have a right to do so upon the assumption that the promoters are using their knowledge, skill, and ability for the benefit of the company. It is, therefore, clear on principle that promoters, under the circumstances just stated, do occupy a position of trust and confidence, and it devolves upon them to make full disclosure." (*Cleveland, supra,* 209 Cal.App.4th at p. 1339.)

- "[I]t is unclear whether a fiduciary relationship exists between an insurance broker and an insured." (*Mark Tanner Constr. v. Hub Internat. Ins. Servs.* (2014) 224 Cal.App.4th 574, 585 [169 Cal.Rptr.3d 39].)

- "It is a question of fact whether one is either an investment adviser or a party to a confidential relationship that gives rise to a fiduciary duty under common law." (*Hasso, supra,* 227 Cal.App.4th at p. 140, internal citations omitted.)

- "[A] third party who knowingly assists a trustee in breaching his or her fiduciary duty may, dependent upon the circumstances, be held liable along with that trustee for participating in the breach of trust." (*Stueve Bros. Farms, LLC v. Berger Kahn* (2013) 222 Cal.App.4th 303, 325 [166 Cal.Rptr.3d 116].)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, § 58

Greenwald et al., California Practice Guide: Real Property Transactions, Ch. 2-C, *Broker's Relationship And Obligations To Principal And Third Parties*, ¶ 2:158 et seq. (The Rutter Group)

Vapnek et al., California Practice Guide: Professional Responsibility, Ch. 6-D, *Professional Liability*, ¶ 6:425 et seq. (The Rutter Group)

10 California Forms of Pleading and Practice, Ch. 103, *Brokers*, § 103.31[1] (Matthew Bender)

14 California Forms of Pleading and Practice, Ch. 167, *Corporations*: *Directors and Management*, § 167.53 et seq. (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent*, §§ 427.12, 427.23 (Matthew Bender)

5 California Points and Authorities, Ch. 52, *Corporations*, § 52.112 et seq. (Matthew Bender)

6 California Legal Forms, Ch. 12C, *Limited Liability Companies*, § 12C.24[6] (Matthew Bender)

4120. 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 four years before complaint was filed***] unless [***name of plaintiff***] proves that before [***insert date four years before complaint was filed***], [he/she/it] did not discover, and did not know of facts that would have caused a reasonable person to suspect, [***name of defendant***]'s wrongful act or omission.**

New April 2007; Renumbered from CACI No. 4106 December 2007; Revised December 2012

Directions for Use

Read this instruction only for a cause of action for breach of fiduciary duty. For a statute-of-limitations defense to a cause of action for personal injury or wrongful death due to wrongful or negligent conduct, see CACI No. 454, *Affirmative Defense—Statute of Limitations*, and CACI No. 455, *Statute of Limitations—Delayed Discovery*.

This instruction assumes that the four-year "catch-all" statute of limitations of Code of Civil Procedure section 343 applies to claims for breach of fiduciary duty. (See *Stalberg v. Western Title Ins. Co.* (1991) 230 Cal.App.3d 1223, 1230 [282 Cal.Rptr. 43].) There is, however, language in several cases supporting the proposition that if the breach can be characterized as constructive fraud, the three-year limitation period of Code of Civil Procedure section 338(d) applies. (See *William L. Lyon & Associates, Inc. v. Superior Court* (2012) 204 Cal.App.4th 1294, 1312 [139 Cal.Rptr.3d 670].) If the court determines that the claim is actually for constructive fraud, a date three years before the complaint was filed may be used instead of a four-year date. It is not clear, however, when a breach of fiduciary duty might constitute constructive fraud for purposes of the applicable statute of limitations. (Compare *Thomson v. Canyon* (2011) 198 Cal.App.4th 594, 607 [129 Cal.Rptr.3d 525] [suggesting that breach of fiduciary duty founded on concealment of facts would be subject to three-year statute] with *Stalberg, supra*, 230 Cal.App.3d at p. 1230 [applying four-year statute to breach of fiduciary duty based on concealment of facts].)

Do not use this instruction in an action against an attorney. For a statute-of-limitations defense to a cause of action, other than actual fraud, against an attorney acting in the capacity of an attorney, 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*. One cannot avoid a shorter limitation period for attorney malpractice (see Code Civ. Proc., § 340.6) by pleading the facts as a breach of fiduciary duty. (*Stoll v. Superior Court* (1992) 9 Cal.App.4th 1362, 1368 [12 Cal.Rptr.2d 354].)

Sources and Authority

- Four-Year Statute of Limitations. Code of Civil Procedure section 343.

- “The statute of limitations for breach of fiduciary duty is four years. (§ 343.)” (*Stalberg, supra,* 230 Cal.App.3d at p. 1230, internal citation omitted.)

- “ ‘[W]here the gravamen of the complaint is that defendant's acts constituted actual or constructive fraud, the applicable statute of limitations is the [Code of Civil Procedure section 338, subdivision (d) three-year] limitations period,’ governing fraud even though the cause of action is designated by the plaintiff as a claim for breach of fiduciary duty.” (*Thomson, supra,* 198 Cal.App.4th at p. 607.)

- “Defendants argue on appeal that the gravamen of plaintiff’s complaint is that defendants’ acts constituted actual or constructive fraud, and thus should be governed by the fraud statute of limitations. We disagree. Plaintiff’s claim is not founded upon the concealment of facts but upon defendants’ alleged failure to draft documents necessary to the real estate transaction in which they represented plaintiff. The allegation is an allegation of breach of fiduciary duty, not fraud.” (*Thomson, supra,* 198 Cal.App.4th at p. 607.)

- “Breach of fiduciary duty not amounting to fraud or constructive fraud is subject to the four-year ‘catch-all statute’ of Code of Civil Procedure section 343 … . Fraud is subject to the three-year statute of limitations under Code of Civil Procedure section 338. … [¶][¶] However, a breach of a fiduciary duty usually constitutes constructive fraud.” (*William L. Lyon & Associates, Inc., supra,* 204 Cal.App.4th at pp. 1312, 1313.)

- “The statute of limitations for breach of fiduciary duty is three years or four years, depending on whether the breach is fraudulent or nonfraudulent.” (*American Master Lease LLC v. Idanta Partners, Ltd.* (2014) 225 Cal.App.4th 1451, 1479 [171 Cal.Rptr.3d 548].)

- “A breach of fiduciary duty claim is based on concealment of facts, and the statute begins to run when plaintiffs discovered, or in the exercise of reasonable diligence could have discovered, that facts had been concealed.” (*Stalberg, supra,* 230 Cal.App.3d at p. 1230, internal citation omitted.)

- “We also are not persuaded by [defendant]’s contention breach of fiduciary duty can only be characterized as constructive fraud (which does not include fraudulent intent as an element). This simply is not true: ‘A misrepresentation that constitutes a breach of a fiduciary or confidential a [*sic*] relationship may, depending on whether an intent to deceive is present, constitute either actual or constructive fraud. However, the issue is usually discussed in terms of whether the misrepresentation constitutes constructive fraud, because actual fraud can exist independently of a fiduciary or confidential relationship, while the existence of such a relationship is usually crucial to a finding of constructive fraud.’ ” (*Worthington v. Davi* (2012) 208 Cal.App.4th 263, 283 [145 Cal.Rptr.3d 389].)

- “ ‘Where a fiduciary obligation is present, the courts have recognized a postponement of the accrual of the cause of action until the beneficiary has knowledge or notice of the act constituting a breach of fidelity. [Citations.] The existence of a trust relationship limits the duty of inquiry. “Thus, when a potential plaintiff is in a fiduciary relationship with another individual, that plantiff's burden of discovery is reduced and he is entitled to rely on the statements and advice provided by the fiduciary.” ’ ” (*WA Southwest 2, LLC v. First American Title Ins. Co.* (2015) 240 Cal.App.4th 148, 157 [192 Cal.Rptr.3d 423].)~~Where a fiduciary relationship exists, facts which ordinarily require investigation may not incite suspicion and do not give rise to a duty of inquiry. Where there is a~~

~~fiduciary relationship, the usual duty of diligence to discover facts does not exist." (*Hobbs v. Bateman Eichler, Hill Richards, Inc.* (1985) 164 Cal.App.3d 174, 202 [210 Cal.Rptr. 387], internal citations omitted.)~~

- ~~"[A] plaintiff need not establish that she exercised due diligence to discover the facts within the limitations period unless she is under a duty to inquire and the circumstances are such that failure to inquire would be negligent. Where the plaintiff is not under such duty to inquire, the limitations period does not begin to run until she *actually* discovers the facts constituting the cause of action, even though the means for obtaining the information are available." (*Hobbs, supra*, 164 Cal.App.3d at p. 202, original italics, internal citations omitted.)~~

- "The distinction between the rules excusing a late discovery of fraud and those allowing late discovery in cases in the confidential relationship category is that in the latter situation, the duty to investigate may arise later because the plaintiff is entitled to rely upon the assumption that his fiduciary is acting on his behalf. However, once a plaintiff becomes *aware* of facts which would make a reasonably prudent person suspicious, the duty to investigate arises and the plaintiff may then be charged with knowledge of the facts which would have been discovered by such an investigation." (*Hobbs v. Bateman Eichler, Hill Richards, Inc.* (1985) 164 Cal.App.3d 174, 202 [210 Cal.Rptr. 387]~~*Hobbs, supra*, 164 Cal.App.3d at p. 202~~, original italics, internal citations omitted.)

- " '[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].)\

- "[T]he statute of limitations for aiding and abetting a breach of fiduciary duty is the same as the statute of limitations for breach of fiduciary duty." (*American Master Lease LLC, supra,* 225 Cal.App.4th at p. 1479].)

- " 'Constructive fraud is a unique species of fraud applicable only to a fiduciary or confidential relationship.' [Citation.] [¶] '[A]s a general principle constructive fraud comprises any act, omission or concealment involving a breach of legal or equitable duty, trust or confidence which results in damage to another even though the conduct is not otherwise fraudulent. Most acts by an agent in breach of his fiduciary duties constitute constructive fraud. The failure of the fiduciary to disclose a material fact to his principal which might affect the fiduciary's motives or the principal's decision, which is known (or should be known) to the fiduciary, may constitute constructive fraud. …' " (*Mark Tanner Constr. v. Hub Internat. Ins. Servs.* (2014) 224 Cal.App.4th 574, 588 [169 Cal.Rptr.3d 39].)

Secondary Sources

3 Witkin, California Procedure (5th ed. 2008) Actions, §§ 677–679

Vapnek et al., California Practice Guide: Professional Responsibility, Ch. 6-D, *Professional Liability*, ¶ 6:425.4 (The Rutter Group)

3 Levy et al., California Torts, Ch. 32, *Liability of Attorneys*, § 32.60 (Matthew Bender)

7 California Forms of Pleading and Practice, Ch. 76, *Attorney Professional Liability*, § 76.170 (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions*, § 345.19[4] (Matthew Bender)

2A California Points and Authorities, Ch. 24A, *Attorneys at Law: Malpractice*, § 24A.29 (Matthew Bender)

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 Receipt of Rent Sent to Address Provided in Notice. Code of Civil Procedure section 1161(2).
- Commercial Tenancy: Estimate of Rent Due in Notice. Code of Civil Procedure 1161.1.
- Manner of Service of Notice. Code of Civil Procedure section 1162.
- " '[P]roper 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. [Citations.]' [Citation.] 'A lessor must allege and prove proper service of the requisite notice. [Citations.] Absent evidence the requisite notice was properly served

pursuant to section 1162, no judgment for possession can be obtained. [Citations.]'" (*Borsuk v. Appellate Division of Superior Court* (2015) 242 Cal.App.4th 607, 611 [195 Cal.Rptr.3d 581].)~~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.)

- "As compared to service of summons, by which the court acquires personal jurisdiction, service of the three-day notice is merely an element of an unlawful detainer cause of action that must be alleged and proven for the landlord to acquire possession." (*Borsuk, supra*, 242 Cal.App.4th at pp. 612–613.)

- "[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)

4605. Whistleblower Protection—Health or Safety Complaint—Essential Factual Elements (Lab. Code, § 6310)

[*Name of plaintiff***] claims that [***name of defendant***] [discharged/[***other adverse employment action***]] [him/her] in retaliation for [his/her] [***specify, e.g., complaint to the Division of Occupational Safety and Health regarding unsafe working conditions***]. In order 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***];**

2. **[That [***name of plaintiff***], on [his/her] own behalf or on behalf of others, [***select one or more of the following options:***]**

   [made [an oral/a written] complaint to [*specify to whom complaint was directed, e.g., the Division of Occupational Safety and Health***] regarding [unsafe/unhealthy] working conditions;]**

   [*or***]**

   [[initiated a proceeding/caused a proceeding to be initiated] relating to [his/her [or] another person's] rights to workplace health or safety;]

   [*or***]**

   [[testified/was about to testify] in a proceeding related to [his/her [or] another person's] rights to workplace health or safety;]

   [*or***]**

   [exercised [his/her [or] another person's] rights to workplace health or safety;]

   [*or***]**

   [participated in a workplace health and safety committee;]

3. **That [***name of defendant***] [discharged/[***other adverse employment action***]] [***name of plaintiff***];**

4. **That [***name of plaintiff***]'s [***specify***] was a substantial motivating reason for [***name of defendant***]'s decision to [discharge/[***other adverse employment action***]] [***name of plaintiff***];**

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 December 2015

Directions for Use

Use this instruction for a whistleblower claim under Labor Code section 6310 for employer retaliation for an employee's complaint or other protected activity about health or safety conditions. Select the appropriate statutorily protected activity in element 2 and summarize it in the introductory paragraph. (See Lab. Code, § 6310(a).)

With regard to the first option in element 2, the complaint must have been made to (1) the Division of Occupational Safety and Health, (2) to another governmental agencies having statutory responsibility for or assisting the division with reference to employee safety or health, (3) to the employer, or (4) to the employee's representative. (Lab. Code, § 6310(a)(1).)

The statute requires that the employee's complaint be "bona fide." (See Lab. Code, 6310(b).) There appears to be a split of authority as to whether "bona fide" means that there must be an actual health or safety violation or only that the employee have a good-faith belief that there are violations. (See *Touchstone Television Productions v. Superior Court* (2012) 208 Cal.App.4th 676, 682, fn. 5 [145 Cal.Rptr.3d 766].) The instruction should be modified if the court decides to instruct one way or the other on the meaning of "bona fide."

Note that element 4 uses the term "substantial motivating reason" to express both intent and causation between the employee's protected conduct and the defendant's adverse action. "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 Labor Code section 6310 has not been addressed by the courts. There is authority for a "but for" causation standard instead of "substantial motivating reason." (See *Touchstone Television Productions, supra,* 208 Cal.App.4th at pp. 681−682.)

Sources and Authority

- Whistleblower Protection for Report of Health or Safety Violation. Labor Code section 6310.
- "Division" Defined. Labor Code section 6302(d).
- "[Plaintiff]'s action is brought under section 6310, subdivision (a)(1), which prohibits an employer from discriminating against an employee who makes 'any oral or written complaint.' Subdivision (b) provides that '[a]ny employee who is discharged, threatened with discharge, demoted, suspended, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because the employee has made a bona fide oral or written complaint to … his or her employer … of unsafe working conditions, or work practices … shall be entitled to reinstatement and reimbursement for lost wages and work benefits caused by the acts of the employer.' " (*Sheridan v. Touchstone Television Productions, LLC* (2015) 241

Cal.App.4th 508, 512 [193 Cal.Rptr.3d 811].)

- "[T]he plaintiff did not lack a remedy: she could sue under section 6310, subdivision (b) which permits 'an action for damages if the employee is discharged, threatened with discharge, or discriminated against by his or her employer because of the employee's complaints about unsafe work conditions. Here, it is alleged that [the defendant] discriminated against [the plaintiff] by not renewing her employment contract. *To prevail on the claim, she must prove that, but for her complaints about unsafe work conditions, [the defendant] would have renewed the employment contract. Damages, however, are limited to "lost wages and work benefits caused by the acts of the employer." ' "* (*Touchstone Television Productions, supra,* 208 Cal.App.4th at pp. 681−682, original italics.)

- "The voicing of a fear about one's safety in the workplace does not necessarily constitute a complaint about unsafe working conditions under Labor Code section 6310. [Plaintiff]'s declaration shows only that she became frightened for her safety as a result of her unfortunate experience … and expressed her fear to [defendant]; it is not evidence that the … office where she worked was actually unsafe within the meaning of Labor Code sections 6310 and 6402. Hence, [plaintiff]'s declaration fails to raise a triable issue of fact as to whether she was terminated for complaining to [defendant] about unsafe working conditions in violation of Labor Code section 6310." (*Muller v. Auto. Club of So. Cal.* (1998) 61 Cal.App.4th 431, 452 [71 Cal.Rptr.2d 573], disapproved on other grounds in *Colmenares v. Braemar Country Club, Inc.* (2003) 29 Cal.4th 1019, 1031, fn. 6 [130 Cal.Rptr.2d 662, 63 P.3d 220].)

- "Citing *Muller v. Automobile Club of So. California* (1998) 61 Cal. App. 4th 431, 452 [71 Cal. Rptr. 2d 573], defendants assert plaintiff's causes of action based on section 6310 must fail because an essential element of a section 6310 violation is that the workplace must actually be unsafe. We first note that the *Muller* court cites no authority for this assertion. It appears to contradict Justice Grodin's pronouncement that '. . . an employee is protected against discharge or discrimination for complaining in good faith about working conditions or practices which he reasonably believes to be unsafe, whether or not there exists at the time of the complaint an OSHA standard or order which is being violated.' We agree that an employee must be protected against discharge for a good faith complaint about working conditions which he believes to be unsafe." (*Cabesuela v. Browning-Ferris Indus.* (1998) 68 Cal.App.4th 101, 109 [80 Cal.Rptr.2d 60], internal citation omitted.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2010) Agency, § 370

2 Wilcox, California Employment Law, Ch. 21, *Occupational Health and Safety Regulation*, § 21.20 (Matthew Bender)

3 California Torts, Ch. 40A, *Wrongful Termination*, § 40A.30 (Matthew Bender)

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

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline,* § 100.42 et seq. (Matthew Bender)