JUDICIAL COUNCIL
OF CALIFORNIA

RULES AND PROJECTS
COMMITTEE

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Notice of Action by E-mail Between Meetings for Rules and Projects Committee

The Chair of the Rules and Projects Committee having concluded that prompt action is needed, public notice is hereby given that the Rules and Projects Committee proposes to act by email between meetings on Wednesday, July 25, 2018, in accordance with California Rules of Court, rule 10.75(o)(1)(B). A copy of the proposed action is available on the advisory body web page on the California Courts website listed above.

Written Comment

In accordance with California Rules of Court, rule 10.75(o)(2), written comments pertaining to the proposed action may be submitted before the Rules and Projects Committee acts on the proposal. For this specific meeting, comments should be e-mailed to rupromeetings@jud.ca.gov or delivered to Judicial Council of California, 455 Golden Gate Avenue, San Francisco, CA 94102, attention: RUPRO. Only written comments received by 4:00 p.m. on Tuesday, July 24, 2018, will be provided to advisory body members.

Posted on: July 24, 2018

JUDICIAL COUNCIL OF CALIFORNIA

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MEMORANDUM

Date
July 20, 2018

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 Online Posting of Instructions With Minor Revisions

Deadline
July 25, 2018

Contact
Bruce Greenlee, Attorney
415-865-7698 phone
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Executive Summary

The Advisory Committee on Civil Jury Instructions recommends that the Rules and Projects Committee (RUPRO) approve revisions to the *Judicial Council of California Civil Jury Instructions (CACI)* to maintain and update those instructions. The 43 instructions in this release, prepared by the advisory committee, contain only the types of revisions that the Judicial Council has given RUPRO final authority to approve—primarily instructions with only changes to the Directions for Use or additions to the Sources and Authority.

Recommendation

The Advisory Committee on Civil Jury Instructions recommends that RUPRO approve for posting online revisions to the 43 civil jury instructions, prepared by the advisory committee, that contain changes that do not require posting for public comment or Judicial Council approval. Effective with RUPRO's approval, these instructions will be posted online on the California Courts website and on Lexis and Westlaw.

The revised instructions are attached at pages 6–183.

Relevant Previous Council Action

The Task Force on Jury Instructions was appointed by the Judicial Council 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.[1]

At the October 20, 2006, Judicial Council meeting, the council approved authority for RUPRO to "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)."[2]

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;[3]
(c) Additions or changes to the Directions for Use;[4]
(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.

Analysis/Rationale

Online-only process

This is the committee's second proposed online-only release, which has been designated as Release 32A.[5] On October 24, 2017, RUPRO approved adding four additional annual *CACI*

[1] See Cal. Rules of Court, rules 2.1050(d), 10.58(a).

[2] Judicial Council of Cal., Rules and Projects Committee, *Jury Instructions: Approve New Procedure for RUPRO Review and Approval of Changes in the Jury Instructions* (Sept. 12, 2006), p. 1.

[3] In light of the committee's 2014 decision to remove verbatim quotes of statutes, rules, and regulations from *CACI*, this category is now mostly moot. It still applies if a statute, rule, or regulation is revoked, or if subdivisions are renumbered.

[4] The committee only presents nonsubstantive changes to the Directions for Use for RUPRO's final approval. Substantive changes are posted for public comment and presented to the council for approval.

[5] The 2018 midyear supplement, approved May 24, 2018, was Release 32.

releases in January, March, July, and September.[6] However, it was not possible for the official publisher LexisNexis to process both an online-only release in March and a print release for May and an online-only release in September and a print release in November.[7] Thus, there will only be two online-only releases annually (January and July).

LexisNexis will process the manuscript for electronic delivery. The release will be posted online on Lexis Advance. *CACI* licensees Thomson Reuters and AmericanLegalNet will also post the release on Westlaw and FormsWorkFlow, respectively. The publishers may, but are not required to, also issue print editions of the release. The instructions will also be posted on the California Courts website at *www.courts.ca.gov/partners/317.htm*.

The online-only instructions that RUPRO approved in January (Release 31A[8]) were included in the May 2018 *CACI* print supplement. The instructions in this online-only release will be included in the 2019 print edition of *CACI*.

Overview of revisions

Of the 43 revised instructions in this release that are presented for final RUPRO approval:

- 39 have revisions under only category (a) above (additional cases added to Sources and Authority);
- 1 (CACI No. 4510) has revisions under only category (c) above (additions or changes to the Directions for Use); and
- 3 (CACI Nos. 3060, 3062, and 4700) fall under both categories (a) and (c).

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.

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[6] Full substantive releases will continue to be presented to RUPRO for recommendation for Judicial Council approval. The next substantive release, Release 33, will be presented in November. These releases will continue to be posted for public comment.

[7] Lexis's legal editor for *CACI* explained their issues: "The document repository system that Lexis maintains its coded master files in, which generate print proof and online files for Lexis Advance, cannot accommodate more than one active release of any type at one time. That is, Lexis cannot have two releases in progress in the system at once. Lexis must finish one before the system will allow the next one to start. The planned four online releases plus two print releases (supplement and edition) meant there was not enough time to finish one release, check it back in the system and update and 'date stamp' all the files, before the next release had to be in progress. The document repository and production system simply could not accommodate such a frequent back-to-back schedule; its production cycle is longer than that."

[8] The online-only releases are labeled with the number of the preceding print release and the letter A.

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 U.S. 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 cases included in this release are final. There are no incomplete citations.

Sources and Authority format cleanup

CACI format requires that case excerpts in the Sources and Authority be 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. Where found in instructions otherwise included, 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.

Policy implications

There are no policy implications.

Alternatives considered

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 meet this responsibility. There are no alternatives to be considered.

Comments

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.

Fiscal and Operational Impacts

There are no implementation costs. To the contrary, under its publication agreement with the Judicial Council, the official publisher, LexisNexis, will pay royalties to the council. With respect to other 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 instructions, at pages 6–183

CIVIL JURY INSTRUCTIONS
TABLE OF CONTENTS

INSURANCE LITIGATION SERIES

WRONGFUL TERMINATION SERIES

FAIR EMPLOYMENT AND HOUSING ACT SERIES

CIVIL RIGHTS SERIES

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

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

New September 2003; Revised December 2012

Directions for Use

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

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

Sources and Authority

- No Presumption From Exercise of Fifth Amendment Privilege. Evidence Code section 913.
- Privilege to Refuse to Disclose Incriminating Information. Evidence Code section 940.
- "[I]n any proceeding, civil or criminal, a witness has the right to decline to answer questions which may tend to incriminate him in criminal activity." (*Cramer v. Tyars* (1979) 23 Cal.3d 131, 137 [151 Cal.Rptr. 653, 588 P.2d 793], internal citation omitted.)
- "A defendant may not bring a civil action to a halt simply by invoking the privilege against self-incrimination." (*Oiye v. Fox* (2012) 211 Cal.App.4th 1036, 1055 [151 Cal.Rptr.3d 65].)
- "[T]he privilege may not be asserted by merely declaring that an answer will incriminate; it must be 'evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.' " (*Troy v. Superior Court* (1986) 186 Cal.App.3d 1006, 1010–1011 [231 Cal.Rptr. 108], internal citations omitted.)
- "The Fifth Amendment of the United States Constitution includes a provision that '[no] person ... shall be compelled in any criminal case to be a witness against himself, ...' Although the specific

reference is to criminal cases, the Fifth Amendment protection 'has been broadly extended to a point where now it is available even to a person appearing only as a *witness* in *any* kind of proceeding where testimony can be compelled.' " (*Brown v. Superior Court* (1986) 180 Cal.App.3d 701, 708 [226 Cal.Rptr. 10], citation and footnote omitted.)

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

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

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

- "The jury may not draw any inference from a witness's invocation of a privilege. Upon request, the trial court must so instruct jurors. 'To avoid the potentially prejudicial impact of having a witness assert the privilege against self-incrimination before the jury, we have in the past recommended that, in determining the *propriety* of the witness's invocation of the privilege, the trial court hold a pretestimonial hearing outside the jury's presence.' Such a procedure makes sense under the appropriate circumstances. If there is a dispute about whether a witness may legitimately rely on the Fifth Amendment privilege against self-incrimination to avoid testifying, that legal question should be resolved by the court. Given the court's ruling and the nature of the potential testimony, the witness may not be privileged to testify at all, or counsel may elect not to call the witness as a matter of tactics." (*People v. Doolin, supra,* 45 Cal.4th at pp. 441-442, original italics, internal citations omitted.)

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

Secondary Sources

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

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

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

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

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

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

California Judges Benchbook: Civil Proceedings—Trial (2d ed.) § 8.74 (Cal CJER 2010)

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].)

- "[U]nder Evidence Code sections 801, subdivision (b), and 802, the trial court acts as a gatekeeper to exclude expert opinion testimony that is (1) based on matter of a type on which an expert may not reasonably rely, (2) based on reasons unsupported by the material on which the expert relies, or (3) speculative. Other provisions of law, including decisional law, may also provide reasons for excluding expert opinion testimony. [¶] But courts must also be cautious in excluding expert testimony. The trial court's gatekeeping role does not involve choosing between competing expert opinions." (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 771−772 [149 Cal.Rptr.3d 614, 288 P.3d 1237], footnote omitted.)

- " '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.)

- "When any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay. It

cannot logically be maintained that the statements are not being admitted for their truth." (*People v. Sanchez* (2016) 63 Cal.4th 665, 686 [204 Cal.Rptr.3d 102, 374 P.3d 320].)

- "Any expert may still *rely* on hearsay in forming an opinion, and may tell the jury *in general terms* that he did so. Because the jury must independently evaluate the probative value of an expert's testimony, Evidence Code section 802 properly allows an expert to relate generally the kind and source of the 'matter' upon which his opinion rests. A jury may repose greater confidence in an expert who relies upon well-established scientific principles. It may accord less weight to the views of an expert who relies on a single article from an obscure journal or on a lone experiment whose results cannot be replicated. There is a distinction to be made between allowing an expert to describe the type or source of the matter relied upon as opposed to presenting, as fact, case-specific hearsay that does not otherwise fall under a statutory exception." (*People v. Sanchez*, *supra*, 63 Cal.4th at pp. 685–686, original italics.)

Secondary Sources

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

220. Experts—Questions Containing Assumed Facts

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

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

New September 2003

Directions for Use

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

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

Sources and Authority

- The value of an expert's opinion depends on the truth of the facts assumed. (*Richard v. Scott* (1978) 79 Cal.App.3d 57, 63 [144 Cal.Rptr. 672].)

- "Generally, an expert may render opinion testimony on the basis of facts given 'in a hypothetical question that asks the expert to assume their truth.' " (*People v. Vang* (2011) 52 Cal.4th 1038, 1045 [132 Cal.Rptr.3d 373, 262 P.3d 581].)

- Hypothetical questions must be based on facts that are supported by the evidence: "It was decided early in this state that a hypothetical question to an expert must be based upon facts shown by the evidence and that the appellate court will place great reliance in the trial court's exercise of its discretion in passing upon a sufficiency of the facts as narrated." (*Hyatt v. Sierra Boat Co.* (1978) 79 Cal.App.3d 325, 339 [145 Cal.Rptr. 47].)

- "A hypothetical question need not encompass all of the evidence. 'It is true that "it is not necessary that the question include a statement of all the evidence in the case. The statement may assume facts within the limits of the evidence, not unfairly assembled, upon which the opinion of the expert is required, and considerable latitude must be allowed in the choice of facts as to the basis upon which to frame a hypothetical question." On the other hand, the expert's opinion may not be based "on assumptions of fact without evidentiary support [citation], or on speculative or conjectural factors … ." ' " (*People v. Vang, supra,* 52 Cal.4th at p. 1046, internal citation omitted.)

- Hypothetical questions should not omit essential material facts. (*Coe v. State Farm Mutual Automobile Insurance Co.* (1977) 66 Cal.App.3d 981, 995 [136 Cal.Rptr. 331].)

- The jury should not be instructed that they are entitled to reject the entirety of an expert's opinion if a hypothetical assumption has not been proven. Rather, the jury should be instructed "to determine the effect of that failure of proof on the value and weight of the expert opinion based on that assumption." (*Lysick v. Walcom* (1968) 258 Cal.App.2d 136, 156 [65 Cal.Rptr. 406].)

- "The jury still plays a critical role in two respects. First, it must decide whether to credit the expert's opinion at all. Second, it must determine whether the facts stated in the hypothetical questions are the actual facts, and the significance of any difference between the actual facts and the facts stated in the questions." (*People v. Vang*, *supra*, 52 Cal.4th at pp. 1049-1050.)

- "[Experts] … can rely on background information accepted in their field of expertise under the traditional latitude given by the Evidence Code. They can rely on information within their personal knowledge, and they can give an opinion based on a hypothetical including case-specific facts that are properly proven. They may also rely on nontestimonial hearsay properly admitted under a statutory hearsay exception." (*People v. Sanchez* (2016) 63 Cal.4th 665, 685 [204 Cal.Rptr.3d 102, 374 P.3d 320].)

Secondary Sources

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

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

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

California Judges Benchbook: Civil Proceedings—Trial (2d ed.) § 8.92 (Cal CJER 2010)

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 [or] incompetence/ [***other particular risk***]] created a particular risk to others;**

4. **That [***name of employee***]'s [unfitness [or] incompetence/ [***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 that the employee created a particular risk or hazard to others. 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].)

- "[Plaintiff] brought several claims against [defendant employer], including negligent hiring, supervising, and retaining [employee], and failure to warn. To prevail on his negligent hiring/retention claim, [plaintiff] will be required to prove [employee] was [defendant employer]'s agent and [defendant employer] knew or had reason to believe [employee] was likely to engage in sexual abuse. On the negligent supervision and failure to warn claims, [plaintiff] will be required to show [defendant employer] knew or should have known of [employee]'s alleged misconduct and did not act in a reasonable manner when it allegedly recommended him to serve as [plaintiff]'s Bible instructor." (*Lopez v. Watchtower Bible & Tract Society of New York, Inc.* (2016) 246 Cal.App.4th 566, 591 [–[201 Cal.Rptr.3d –], 156], internal citations omitted.)

- "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].)

- "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].)

- "We note that the jury instructions issued by our Judicial Council include 'substantial factor' causation as an element of the tort of negligent hiring, retention, or supervision. The fifth element listed in CACI No. 426 is '[t]hat [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.*' [¶] CACI No. 426 is consistent with California case law on the causation element of [plaintiff]'s claim against [employer]." (*Liberty Surplus Ins. Corp. v. Ledesma & Meyer Construction Co., Inc.* (2018) -- Cal.5th --, --, fn.5 [-- Cal.Rptr.3d --], original italics.) [2018 Cal. LEXIS 4063].)

- "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.)

- "[W]hen an employer … admits vicarious liability, neither the complaint's allegations of employer misconduct relating to the recovery of punitive damages nor the evidence supporting those allegations are superfluous. Nothing in *Diaz* or *Armenta* suggests otherwise." (*CRST, Inc. v. Superior Court* (2017) 11 Cal.App.5th 1255, 1264 [218 Cal.Rptr.3d 664].)

- "[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.)

- "Any claim alleging negligent hiring by an employer will be based in part on events predating the employee's tortious conduct. Plainly, that sequence of events does not itself preclude liability." (*Liberty Surplus Ins. Corp., supra*, -- Cal.5th at p. --, fn. 7.)

Secondary Sources

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

Chin et al., California Practice Guide: Employment Litigation, Ch. 5-H, *Employment Torts and Related Claims—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)

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, May 2018

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. (See also *Major v. R.J. Reynolds Tobacco Co.* (2017) 14 Cal.App.5th 1179, 1198 [222 Cal.Rptr.3d 563] [court did not err in refusing to give last sentence of instruction in case involving exposure to carcinogens in cigarettes].)

In cases of multiple (concurrent dependent) causes, CACI No. 431, *Causation: Multiple Causes,* should also be given.

In a case in which the plaintiff's claim is that he or she contracted cancer from exposure to the defendant's asbestos-containing product, *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. (Cf. *Petitpas v. Ford Motor Co.* (2017) 13 Cal.App.5th 261, 298–299 [220 Cal.Rptr.3d 185] [not error to give both CACI Nos. 430 and 435 in case with both product liability and premises liability

defendants].)

Under this instruction, a remote or trivial factor is not a substantial factor. This sentence could cause confusion in an asbestos case. "Remote" often connotes a time limitation. Nothing in *Rutherford* suggests such a limitation; indeed asbestos cases are brought long after exposure due to the long-term latent nature of asbestos-related diseases. (See *City of Pasadena v. Superior Court (Jauregui)* (2017) 12 Cal.App.5th 1340, 1343–1344 [220 Cal.Rptr.3d 99] [cause of action for a latent injury or disease generally accrues when the plaintiff discovers or should reasonably have discovered he or she has suffered a compensable injury].)

Although the court in *Rutherford* did not use the word "trivial," it did state that "a force [that] plays only an 'infinitesimal' or 'theoretical' part in bringing about injury, damage, or loss is not a substantial factor." (*Rutherford, supra,* 16 Cal.4th at p. 969.) While it may be argued that "trivial" and "infinitesimal" are synonyms, 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].) In *Rutherford,* the jury allocated the defendant only 1.2 percent of comparative fault, and the court upheld this allocation. (See *Rutherford, supra,* 16 Cal.4th at p. 985.) Instructing the jury that a *de minimis* force (whether trivial or infinitesimal) is not a substantial factor could confuse the jury in allocating comparative fault at the lower end of the exposure spectrum.

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, supra,* 21 Cal.4th at p. 79, 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.)

- "If the accident would have happened anyway, whether the defendant was negligent or not, then his or her negligence was not a cause in fact, and of course cannot be the legal or responsible cause."

(*Toste v. CalPortland Construction* (2016) 245 Cal.App.4th 362, 370 [199 Cal.Rptr.3d 522].)

- "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. 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], original italics, footnote omitted.)

- "On the issue … of causation, as on other issues essential to the cause of action for negligence, the plaintiff, in general, has the burden of proof. The plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. A mere possibility of such 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." (*Leyva v. Garcia* (2018) 20 Cal.App.5th 1095, 1104 [231 Cal.Rptr.3d 814].)

- " '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.)

- "[M]ultiple sufficient causes exist not only when there are two causes each of which is sufficient to cause the harm, but also when there are more than two causes, partial combinations of which are sufficient to cause the harm. As such, the trial court did not err in refusing to instruct the jury with the but-for test." (*Major, supra,* 14 Cal.App.5th at p. 1200.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1334–1341

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, May 2018

Directions for Use

This instruction is to be given in a case in which the plaintiff's claim is that he or she contracted an asbestos-related disease from exposure to the defendant's asbestos-containing product. See the discussion in the Directions for Use to CACI No. 430, *Causation: Substantial Factor*, with regard to whether CACI No. 430 may also be given.

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.

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.)

- "[T]here is no requirement that plaintiffs show that [defendant] was the exclusive, or even the primary, supplier of asbestos-containing gaskets to PG&E." (*Turley v. Familian Corp.* (2017) 18

Cal.App.5th 969, 981 [227 Cal.Rptr.3d 321].)

- "[T]o establish exposure in an asbestos case a plaintiff has no obligation to prove a specific exposure to a specific product on a specific date or time. Rather, it is sufficient to establish 'that defendant's product was definitely at his work site and that it was sufficiently prevalent to warrant an inference that plaintiff was exposed to it' during his work there." (*Turley, supra*, 18 Cal.App.5th at p. 985.)

- "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].)

- " '[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].)

- "In this case, [defendant] argues the trial court's refusal to give its proposed instruction was error because the instruction set forth 'the requirement in *Rutherford* that causation be decided by taking into account "the length, frequency, proximity and intensity of exposure, the peculiar properties of the individual product, [and] any other potential causes to which the disease could be attributed." ' But *Rutherford* does not require the jury to take these factors into account when deciding whether a plaintiff's exposure to an asbestos-containing product was a substantial factor in causing mesothelioma. Instead, those factors are ones that a medical expert may rely upon in forming his or her expert medical opinion." (*Davis v. Honeywell Internat. Inc.* (2016) 245 Cal.App.4th 477, 495 [199 Cal.Rptr.3d 583], internal citation omitted.)

- "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.)

- "[T]he identified-exposure theory is a more rigorous standard of causation than the every-exposure theory. As a single example of the difference, we note [expert]'s statement that it 'takes significant exposures' to increase the risk of disease. This statement uses the plural 'exposures' and also requires that those exposures be 'significant.' The use of 'significant' as a limiting modifier appears to be connected to [expert]'s earlier testimony about the concentrations of airborne asbestos created by particular activities done by [plaintiff], such as filing, sanding and using an airhose to clean a brake drum." (*Phillips v. Honeywell Internat. Inc.* (2017) 9 Cal.App.5th 1061, 1088 [217 Cal.Rptr.3d 147].)

- "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.)

- "We hold that the duty of employers and premises owners to exercise ordinary care in their use of asbestos includes preventing exposure to asbestos carried by the bodies and clothing of on-site workers. Where it is reasonably foreseeable that workers, their clothing, or personal effects will act as vectors carrying asbestos from the premises to household members, employers have a duty to take reasonable care to prevent this means of transmission. This duty also applies to premises owners who use asbestos on their property, subject to any exceptions and affirmative defenses generally applicable to premises owners, such as the rules of contractor liability. Importantly, we hold that this duty extends only to members of a worker's household. Because the duty is premised on the foreseeability of both the regularity and intensity of contact that occurs in a worker's home, it does not extend beyond this circumscribed category of potential plaintiffs." (*Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1140 [210 Cal.Rptr.3d 283, 384 P.3d 283].)

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)

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;**

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

4. **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; [and]

(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, supra, ~~v. County of San Diego~~ (2014) ~~57~~* Cal.~~4~~th at p.~~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.)

- "The California Supreme Court did not address whether decisions before non-deadly force can be actionable negligence, but addressed this issue only in the context of 'deadly force.' " (*Mulligan v. Nichols* (9th Cir. 2016) 835 F.3d 983, 991, fn. 7.)

Secondary Sources

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

- "[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*].)

- "Section 324A is applied to determine the 'duty element' in a negligence action where the defendant has ' "specifically … undertaken to perform the task that he is charged with having performed negligently, for without the actual assumption of the undertaking there can be no correlative duty to perform that undertaking carefully." ' The negligent undertaking theory of liability applies to personal injury and property damage claims, but not to claims seeking only economic loss." (*Lichtman v. Siemens Industry Inc.* (2017) 16 Cal.App.5th 914, 922 [224 Cal.Rptr.3d 725], internal citations omitted.)

- "[U]nder a negligent undertaking theory of liability, the scope of a defendant's duty presents a jury issue when there is a factual dispute as to the nature of the undertaking. The issue of 'whether [a defendant's] alleged actions, if proven, would constitute an "undertaking" sufficient … to give rise to an actionable duty of care is a legal question for the court.' However, 'there may be fact questions "about precisely what it was that the defendant undertook to do." That is, while "[t]he 'precise nature

and extent' of [an alleged negligent undertaking] duty 'is a question of law … "it depends on the nature and extent of the act undertaken, a question of fact." ' " [Citation.] Thus, if the record can support competing inferences [citation], or if the facts are not yet sufficiently developed [citation], " 'an ultimate finding on the existence of a duty cannot be made prior to a hearing on the merits' " [citation], and summary judgment is precluded. [Citations.]' " (*O'Malley v. Hospitality Staffing Solutions* (2018) 20 Cal.App.5th 21, 27-28 [228 Cal.Rptr.3d 731] [citing this instruction], internal citations omitted.)

- "To establish as a matter of law that defendant does not owe plaintiffs a duty under a negligent undertaking theory, defendant must negate all three alternative predicates of the fifth factor: '(a) the actor's carelessness increased the risk of such harm, or (b) the undertaking was to perform a duty owed by the other to the third persons, or (c) the harm was suffered because of the reliance of the other or the third persons upon the undertaking.' " (*Lichtman, supra,* 16 Cal.App.5th at p. 926.)

- "The undisputed facts here present a classic scenario for consideration of the negligent undertaking theory. This theory of liability is typically applied where the defendant has contractually agreed to provide services for the protection of others, but has negligently done so." (*Lichtman, supra,* 16 Cal.App.5th at p. 927.)

- "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.)

- "A operates a grocery store. An electric light hanging over one of the aisles of the store becomes defective, and A calls B Electric Company to repair it. B Company sends a workman, who repairs the light, but leaves the fixture so insecurely attached that it falls upon and injures C, a customer in the

store who is walking down the aisle. B Company is subject to liability to C." (Restat. 2d of Torts, § 324A, Illustration 1.)

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)

455. Statute of Limitations—Delayed Discovery

If [*name of defendant***] proves that [***name of plaintiff***]'s claimed harm occurred before [***insert date from applicable statute of limitations***], [***name of plaintiff***]'s lawsuit was still filed on time if [***name of plaintiff***] proves that before that date,**

[[*name of plaintiff***] did not discover, and did not know of facts that would have caused a reasonable person to suspect, that [he/she/it] had suffered harm that was caused by someone's wrongful conduct.]**

[*or***]**

[[*name of plaintiff***] did not discover, and a reasonable and diligent investigation would not have disclosed, that [***specify factual basis for cause of action, e.g., "a medical device" or "inadequate medical treatment"***] contributed to [***name of plaintiff***]'s harm.]**

New April 2007; Revised December 2007, April 2009, December 2009

Directions for Use

Read this instruction with the first option after CACI No. 454, *Affirmative Defense—Statute of Limitations*, if the plaintiff seeks to overcome the statute-of-limitations defense by asserting the "delayed-discovery rule" or "discovery rule." The discovery rule provides that the accrual date of a cause of action is delayed until the plaintiff is aware of his or her injury and its negligent cause. (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1109 [245 Cal.Rptr. 658, 751 P.2d 923].) The date to be inserted is the applicable limitation period before the filing date. For example, if the limitation period is two years and the filing date is August 31, 2009, the date is August 31, 2007.

If the facts suggest that even if the plaintiff had conducted a timely and reasonable investigation, it would not have disclosed the limitation-triggering information, read the second option. (See *Fox v. Ethicon Endo-Surgery* (2005) 35 Cal.4th 797 [27 Cal.Rptr.3d 661, 110 P.3d 914] [fact that plaintiff suspected her injury was caused by surgeon's negligence and timely filed action for medical negligence against health care provider did not preclude "discovery rule" from delaying accrual of limitations period on products liability cause of action against medical staple manufacturer whose role in causing injury was not known and could not have been reasonably discovered within the applicable limitations period commencing from date of injury].)

See also verdict form CACI No. VF-410, *Statute of Limitations—Delayed Discovery—Reasonable Investigation Would Not Have Disclosed Pertinent Facts.*

Do not use this instruction for medical malpractice (see CACI No. 555, *Affirmative Defense—Statute of Limitations—Medical Malpractice—One-Year Limit*, and CACI No. 556, *Affirmative Defense—Statute of Limitations—Medical Malpractice—Three-Year Limit*) or attorney malpractice (see CACI No. 610, *Affirmative Defense—Statute of Limitations—Attorney Malpractice—One-Year Limit*, and CACI No. 611, *Affirmative Defense—Statute of Limitations—*

Attorney Malpractice—Four-Year Limit). Also, do not use this instruction if the case was timely but a fictitiously named defendant was identified and substituted in after the limitation period expired. (See *McOwen v. Grossman* (2007) 153 Cal.App.4th 937, 942 [63 Cal.Rptr.3d 615] [if lawsuit is initiated within the applicable period of limitations against one party and the plaintiff has complied with Code of Civil Procedure section 474 by alleging the existence of unknown additional defendants, the relevant inquiry when the plaintiff seeks to substitute a real defendant for one sued fictitiously is what facts the plaintiff actually knew at the time the original complaint was filed].)

"Claimed harm" refers to all of the elements of the cause of action, which must have occurred before the cause of action accrues and the limitation period begins. (*Glue-Fold, Inc. v. Slautterback Corp.* (2000) 82 Cal.App.4th 1018, 1029 [98 Cal.Rptr.2d 661].) In some cases, it may be necessary to modify this term to refer to specific facts that give rise to the cause of action.

Sources and Authority

- "An exception to the general rule for defining the accrual of a cause of action—indeed, the 'most important' one—is the discovery rule. … It postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action. [¶] … [T]he plaintiff discovers the cause of action when he at least suspects a factual basis, as opposed to a legal theory, for its elements, even if he lacks knowledge thereof—when, simply put, he at least 'suspects … that someone has done something wrong' to him, 'wrong' being used, not in any technical sense, but rather in accordance with its 'lay understanding.' He has reason to discover the cause of action when he has reason at least to suspect a factual basis for its elements. He has reason to suspect when he has 'notice or information of circumstances to put a reasonable person on *inquiry*'; he need not know the 'specific "facts" necessary to establish' the cause of action; rather, he may seek to learn such facts through the 'process contemplated by pretrial discovery'; but, within the applicable limitations period, he must indeed seek to learn the facts necessary to bring the cause of action in the first place—he 'cannot wait for' them to 'find him' and 'sit on' his 'rights'; he 'must go find' them himself if he can and 'file suit' if he does." (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 397–398 [87 Cal.Rptr.2d 453, 981 P.2d 79], original italics, internal citations and footnote omitted.)

- ~~"The policy reason behind the discovery rule is to ameliorate a harsh rule that would allow the limitations period for filing suit to expire before a plaintiff has or should have learned of the latent injury and its cause." (*Applied Medical Corp. v. Thomas* (2017) 10 Cal.App.5th 927, 939 [217 Cal.Rptr.3d 169].)~~

- "[I]t is the discovery of facts, not their legal significance, that starts the statute." (*Jolly, supra,* 44 Cal.3d at p. 1113.)

- "*Jolly* 'sets forth two alternate tests for triggering the limitations period: (1) a subjective test requiring actual suspicion by the plaintiff that the injury was caused by wrongdoing; and (2) an objective test requiring a showing that a reasonable person would have suspected the injury was caused by wrongdoing. [Citation.] The first to occur under these two tests begins

the limitations period.' " (*Nguyen v. Western Digital Corp.* (2014) 229 Cal.App.4th 1522, 1552 [178 Cal.Rptr.3d 897].)

- "While ignorance of the existence of an injury or cause of action may delay the running of the statute of limitations until the date of discovery, the general rule in California has been that ignorance of the identity of the defendant is not essential to a claim and therefore will not toll the statute." (*Bernson v. Browning-Ferris Industries* (1994) 7 Cal.4th 926, 932 [30 Cal.Rptr.2d 440, 873 P.2d 613].)

- "[U]nder the delayed discovery rule, a cause of action accrues and the statute of limitations begins to run when the plaintiff has reason to suspect an injury and some wrongful cause, unless the plaintiff pleads and proves that a reasonable investigation at that time would not have revealed a factual basis for that particular cause of action. In that case, the statute of limitations for that cause of action will be tolled until such time as a reasonable investigation would have revealed its factual basis." (*Fox, supra,* 35 Cal.4th at p. 803.)

- "[A]s *Fox* teaches, claims based on two independent legal theories against two separate defendants can accrue at different times." (*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1323 [64 Cal.Rptr.3d 9].)

- "A limitation period does not begin until a cause of action accrues, i.e., all essential elements are present and a claim becomes legally actionable. Developed to mitigate the harsh results produced by strict definitions of accrual, the common law discovery rule postpones accrual until a plaintiff discovers or has reason to discover the cause of action." (*Glue-Fold, Inc., supra,* 82 Cal.App.4th at p. 1029, internal citations omitted.)

- "A plaintiff's inability to discover a cause of action may occur 'when it is particularly difficult for the plaintiff to observe or understand the breach of duty, or when the injury itself (or its cause) is hidden or beyond what the ordinary person could be expected to understand.' " (*NBCUniversal Media, LLC v. Superior Court* (2014) 225 Cal.App.4th 1222, 1232 [171 Cal.Rptr.3d 1].)

- "[T]he plaintiff may discover, or have reason to discover, the cause of action even if he does not suspect, or have reason to suspect, the identity of the defendant. That is because the identity of the defendant is not an element of any cause of action. It follows that failure to discover, or have reason to discover, the identity of the defendant does not postpone the accrual of a cause of action, whereas a like failure concerning the cause of action itself does. 'Although never fully articulated, the rationale for distinguishing between ignorance' of the defendant and 'ignorance' of the cause of action itself 'appears to be premised on the commonsense assumption that once the plaintiff is aware of' the latter, he 'normally' has 'sufficient opportunity,' within the 'applicable limitations period,' 'to discover the identity' of the former. He may 'often effectively extend[]' the limitations period in question 'by the filing' and amendment 'of a Doe complaint' and invocation of the relation-back doctrine. 'Where' he knows the 'identity of at least one defendant … , [he] must' proceed thus." (*Norgart, supra,* 21 Cal.4th at p. 399, internal citations and footnote omitted.)

- “The discovery rule only delays accrual until the plaintiff has, or should have, inquiry notice of the cause of action. The discovery rule does not encourage dilatory tactics because plaintiffs are charged with presumptive knowledge of an injury if they have ‘ “ ‘information of circumstances to put [them] on inquiry’ ” ’ or if they have ‘ “ ‘the opportunity to obtain knowledge from sources open to [their] investigation.’ ” ’ In other words, plaintiffs are required to conduct a reasonable investigation after becoming aware of an injury, and are charged with knowledge of the information that would have been revealed by such an investigation.” (*Fox, supra*, 35 Cal.4th at pp. 807–808, internal citations omitted.)

- “Thus, a two-part analysis is used to assess when a claim has accrued under the discovery rule. The initial step focuses on whether the plaintiff possessed information that would cause a reasonable person to inquire into the cause of his injuries. Under California law, this inquiry duty arises when the plaintiff becomes aware of facts that would cause a reasonably prudent person to suspect his injuries were the result of wrongdoing. If the plaintiff was in possession of such facts, thereby triggering his duty to investigate, it must next be determined whether ‘such an investigation would have disclosed a factual basis for a cause of action[.] [T]he statute of limitations begins to run on that cause of action when the investigation would have brought such information to light.’ ” (*Alexander v. Exxon Mobil* (2013) 219 Cal.App.4th 1236, 1251 [162 Cal.Rptr.3d 617], internal citation omitted.)

- “ [I]f continuing injury from a completed act generally extended the limitations periods, those periods would lack meaning. Parties could file suit at any time, as long as their injuries persisted. This is not the law. The time bar starts running when the plaintiff first learns of actionable injury, even if the injury will linger or compound. ‘ “ ‘[W]here an injury, although slight, is sustained in consequence of the wrongful act of another, and the law affords a remedy therefor, the statute of limitations attaches at once. *It is not material that all the damages resulting from the act shall have been sustained at that time, and the running of the statute is not postponed by the fact that the actual or substantial damages do not occur until a later date … .*’ ” ’ ” (*Vaca v. Wachovia Mortgage Corp.* (2011) 198 Cal.App.4th 737, 745 [129 Cal.Rptr.3d 354], original italics, internal citation omitted.)

- “[T]he discovery rule ‘may be applied to breaches [of contract] which can be, and are, committed in secret and, moreover, where the harm flowing from those breaches will not be reasonably discoverable by plaintiffs until a future time.’ ” (*Wind Dancer Production Group v. Walt Disney Pictures* (2017) 10 Cal.App.5th 56, 73 [215 Cal.Rptr.3d 835].)

- There is no doctrine of constructive or imputed suspicion arising from media coverage. “[Defendant]’s argument amounts to a contention that, having taken a prescription drug, [plaintiff] had an obligation to read newspapers and watch television news and otherwise seek out news of dangerous side effects not disclosed by the prescribing doctor, or indeed by the drug manufacturer, and that if she failed in this obligation, she could lose her right to sue. We see no such obligation.” (*Nelson v. Indevus Pharmaceuticals, Inc.* (2006) 142 Cal.App.4th 1202, 1206 [48 Cal.Rptr.3d 668].)

- “The statute of limitations does not begin to run when some members of the public have a suspicion of wrongdoing, but only ‘[o]nce the plaintiff *has* a suspicion of wrongdoing.’ ”

(*Unruh-Haxton v. Regents of University of California* (2008) 162 Cal.App.4th 343, 364 [76 Cal.Rptr.3d 146], original italics.)

- "Generally, the bar of the statute of limitations is raised as an affirmative defense, subject to proof by the defendant. [¶] However, when a plaintiff relies on the discovery rule or allegations of fraudulent concealment as excuses for an apparently belated filing of a complaint, 'the burden of pleading and proving belated discovery of a cause of action falls on the plaintiff.' " (*Czajkowski v. Haskell & White, LLP* (2012) 208 Cal.App.4th 166, 174 [144 Cal.Rptr.3d 522].)

- ~~"[I]t was [plaintiff]'s burden in claiming delayed discovery to set forth facts showing ' " '(1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence.' " ' " (*Applied Medical Corp., supra*, 10 Cal.App.5th at p. 942.)~~

- " '[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].)

- "More specifically, as to accrual, 'once properly pleaded, belated discovery is a question of fact.' " (*Nguyen, supra,* 229 Cal.App.4th at p. 1552.)

Secondary Sources

3 Witkin, California Procedure (5th ed. 2008) Actions, §§ 493–507, 553–592, 673

Haning et al., California Practice Guide: Personal Injury, Ch. 5-B, *When To Sue—Statute Of Limitations*, ¶¶ 5:108–5:111.6 (The Rutter Group)

5 Levy et al., California Torts, Ch. 71, *Commencement, Prosecution, and Dismissal of Tort Actions*, § 71.03[3] (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions*, § 345.19[3] (Matthew Bender)

14 California Points and Authorities, Ch. 143, *Limitation of Actions*, §§ 143.47, 143.52 et seq. (Matthew Bender)

1 Matthew Bender Practice Guide: California Pretrial Civil Procedure, Ch. 4, *Limitation of Actions*, 4.15

McDonald, California Medical Malpractice: Law and Practice §§ 7:1-7:7 (Thomson Reuters)

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

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

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

2. **That [***name of defendant***] retained control over safety conditions at the worksite;**

3. **That [***name of defendant***] negligently exercised [his/her/its] retained control over safety conditions by [***specify alleged negligent acts or omissions***];**

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

5. **That [***name of defendant***]'s negligent exercise of [his/her/its] retained control over safety conditions was a substantial factor in causing [***name of plaintiff***]'s harm.**

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

Directions for Use

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

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

The hirer's retained control must have "affirmatively contributed" to the plaintiff's injury. (*Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, 202 [115 Cal.Rptr.2d 853, 38 P.3d 1081].) However, the affirmative contribution need not be active conduct but may be a failure to act. (*Id.* at p. 212, fn. 3.) "Affirmative contribution" means that there must be causation between the hirer's retained control and the plaintiff's injury. But "affirmative contribution" might be construed by a jury to require active conduct rather than a failure to act. Element 5, the standard "substantial factor" element, expresses the "affirmative contribution." requirement. (See *Regalado v. Callaghan* (2016) 3 Cal.App.5th 582, 594−595 [207 Cal.Rptr.3d 712] [agreeing with committee's position that "affirmatively contributed" need

not be specifically stated in instruction].)

Sources and Authority

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

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

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

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

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

- "Although drawn directly from case law, [plaintiff]'s proposed Special Instructions Nos. 2 and 8 are somewhat misleading in that they suggest that in order for the hirer to 'affirmatively contribute' to the plaintiff's injuries, the hirer must have engaged in some form of active direction or conduct. However, 'affirmative contribution need not always be in the form of actively directing a contractor or contractor's employee. There will be times when a hirer will be liable for its omissions.' The Advisory Committee on Civil Jury Instructions recognized the potential to confuse the jury by including 'affirmative contribution' language in CACI No. 1009B. The committee's Directions for Use states: 'The hirer's retained control must have "affirmatively contributed" to the plaintiff's injury. [Citation.] However, the affirmative contribution need not be active conduct but may be in the form of an omission to act. [Citation.] The advisory committee believes that the "affirmative contribution" requirement simply means that there must be

causation between the hirer's conduct and the plaintiff's injury. Because "affirmative contribution" might be construed by a jury to require active conduct rather than a failure to act, the committee believes that its standard "substantial factor" element adequately expresses the "affirmative contribution" requirement.' (Directions for Use for CACI No. 1009B.) [¶] We agree with the Advisory Committee on Civil Jury Instructions that CACI No. 1009B adequately covers the 'affirmative contribution' requirement set forth in *Hooker*." (*Regalado v. Callaghan* (2016) 3 Cal.App.5th 582, 594−595 [207 Cal.Rptr.3d 712].)

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

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

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

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

Secondary Sources

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

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

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

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

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

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

- "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." (*Rodriguez v. Department of Transportation* (2018) 21 Cal.App.5th 947, 955 [230 Cal.Rptr.3d 852].)

- "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.)

- "Discretionary approval need not be established with testimony of the individual who approved the project. A former employee may testify to the entity's 'discretionary approval custom and practice' even if the employee was not involved in the approval process at the time the challenged plan was approved." (*Gonzales v. City of Atwater* (2016) 6 Cal.App.5th 929, 947 [212 Cal.Rptr.3d 137], internal citation 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.)

- "We conclude that the discretionary approval element of section 830.6 does not implicate the question whether the employee who approved the plans was aware of design standards or was aware that the design deviated from those standards. The issue of the adequacy of the deliberative process with respect to design standards may be considered in connection with the court's determination whether there is substantial evidence that the design was reasonable. In addition, the discretionary approval element does not require the entity to demonstrate in its prima facie case that the employee who had authority to and did approve the plans also had authority to disregard applicable standards." (*Hampton v. County of San Diego* (2015) 62 Cal.4th 340, 343 [195 Cal.Rptr.3d 773, 362 P.3d 417].)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 234 et seq., 273.

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)

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].)

- "[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.)

- " ' "[T]hat a malicious prosecution suit may be maintained where only one of several claims in the prior action lacked probable cause [citation] does not alter the rule there must first be a favorable termination of the *entire* action." ' Thus, if the defendant in the underlying action prevails on *all* of the plaintiff's claims, he or she may successfully sue for malicious prosecution if any one of those claims was subjectively malicious and objectively unreasonable. But if the underlying plaintiff succeeds on any of his or her claims, the favorable termination requirement is unsatisfied and the malicious prosecution action cannot be maintained." (*Lane v. Bell* (2018) 20 Cal.App.5th 61, 64 [228 Cal.Rptr.3d 605], original italics~~[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.]' " (*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].)

- "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.)

- "California courts have long embraced the so-called interim adverse judgment rule, under which 'a trial court judgment or verdict in favor of the plaintiff or prosecutor in the underlying case, unless obtained by means of fraud or perjury, establishes probable cause to bring the underlying action, even though the judgment or verdict is overturned on appeal or by later ruling of the trial court.' This rule reflects a recognition 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.' That is to say, if a claim succeeds at a hearing on the merits, then, unless that success has been procured by certain improper means, the claim cannot be 'totally and completely without merit.' Although the rule arose from cases that had been resolved after trial, the rule has also been applied to the 'denial of defense summary judgment motions, directed verdict motions, and similar efforts at pretrial termination of the underlying case.' " (*Parrish v. Latham & Watkins* (2017) 3 Cal.5th 767, 776–777 [---[221 Cal.Rptr.3d ---, 432, ---400 P.3d ---], 1], internal citations omitted.)

- .)

- "[T]he fraud exception requires ' "knowing use of false and perjured testimony." ' " (*Antounian v. Louis Vuitton Malletier* (2010) 189 Cal.App.4th 438, 452 [117 Cal.Rptr.3d 3].)

- "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 (11th ed. 2017) Torts, §§ 554, 557, 562–569, 571–606

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 (Matthew Bender)

31 California Forms of Pleading and Practice, Ch. 357, *Malicious Prosecution and Abuse of Process*, § 357.10 et seq. (Matthew Bender)

14 California Points and Authorities, Ch. 147, *Malicious Prosecution and Abuse of Process,* § 147.20 (Matthew Bender)

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 [[***name of defendant***]'s conduct in acting or failing to act was [intentional and unreasonable/unintentional, but negligent or reckless]/[the condition that [***name of defendant***] created or permitted to exist was the result of an abnormally dangerous activity]];**

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

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

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

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

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

9. **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, May 2017, May 2018

Directions for Use

Private nuisance liability depends on some sort of conduct by the defendant that either directly and unreasonably interferes with the plaintiff's property or creates a condition that does so. (*Lussier v. San Lorenzo Valley Water Dist.* (1988) 206 Cal.App.3d 92, 100 [253 Cal.Rptr. 470].) Element 2 requires that the defendant have acted to create a condition or allowed a condition to exist by failing to act.

The act that causes the interference may be intentional and unreasonable. Or it may be unintentional but caused by negligent or reckless conduct. Or it may result from an abnormally dangerous activity for which there is strict liability. However, if the act is intentional but reasonable, or if it is entirely accidental, there is generally no liability. (*Lussier, supra,* 206 Cal.App.3d at p. 100.)

The intent required is only to do the act that interferes, not an intent to cause harm. (*Lussier, supra,* 206 Cal.App.3d at pp. 100, 106; see Rest.2d Torts, § 822.) For example, it is sufficient that one intend to chop down a tree; it is not necessary to intend that it fall on a neighbor's property.

If the condition results from an abnormally dangerous activity, it must be one for which there is strict liability. (*Lussier, supra,* 206 Cal.App.3d at p. 100; see Rest.2d Torts, § 822).

There may be an exception to the scienter requirement of element 3 for at least some harm caused by trees. There are cases holding that a property owner is strictly liable for damage caused by tree branches and roots that encroach on neighboring property. (See *Lussier, supra,* 206 Cal.App.3d at p.106, fn. 5; see also *Mattos v. Mattos* (1958) 162 Cal.App.2d 41, 43 [328 P.2d 269] [absolute liability of an owner to remove portions of his fallen trees that extend over and upon another's land]; cf. *City of Pasadena v. Superior Court* (2014) 228 Cal.App.4th 1228, 1236 [176 Cal.Rptr.3d 422] [plaintiff must prove negligent maintenance of trees that fell onto plaintiff's property in a windstorm].) Do not give element 3 if the court decides that there is strict liability for damage caused by encroaching or falling trees.

If the claim is that the defendant failed to abate a nuisance, negligence must be proved. (*City of Pasadena, supra,* 228 Cal.App.4th at p. 1236.)

Element 9 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.

- "A nuisance is considered a 'public nuisance' when it 'affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.' A 'private nuisance' is defined to include any nuisance not covered by the definition of a public nuisance, and also includes some public nuisances. 'In other words, it is possible for a nuisance to be public and, from the perspective of individuals who suffer an interference with their use and enjoyment of land, to be private as well.' " (*Mendez v. Rancho Valencia Resort Partners, LLC* (2016) 3 Cal.App.5th 248, 261-262 [207 Cal.Rptr.3d 532], internal citations 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.)

- "A nuisance is an interference with the interest in the private use and enjoyment of the land and does not require interference with the possession." (*McBride v. Smith* (2018) 18 Cal.App.5th 1160, 1178 [227 Cal.Rptr.3d 390].)

- "[T]o 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.)

- "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; … ." (*Mendez, supra*, 3 Cal.App.5th at p. 262.)

- "The requirements of *substantial damage* and *unreasonableness* are not inconsequential. These requirements stem from the law's recognition that: ' "Life in organized society and especially in populous communities involves an unavoidable clash of individual interests. Practically all human activities unless carried on in a wilderness interfere to some extent with others or involve some risk of interference, and these interferences range from mere trifling annoyances to serious harms. It is an obvious truth that each individual in a community must

put up with a certain amount of annoyance, inconvenience and interference and must take a certain amount of risk in order that all may get on together. The very existence of organized society depends upon the principle of 'give and take, live and let live,' and *therefore the law of torts does not attempt to impose liability or shift the loss in every case in which one person's conduct has some detrimental effect on another*. Liability … is imposed in those cases in which the harm or risk to one is greater than he ought to be required to bear under the circumstances, at least without compensation." ' " (*Mendez, supra,* 3 Cal.App.5th at p. 263, original italics.)

- "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, supra,* 162 Cal.App.2d at p. 42.)

- "Although the central idea of nuisance is the unreasonable invasion of this interest and not the particular type of conduct subjecting the actor to liability, liability nevertheless depends

on some sort of conduct that either directly and unreasonably interferes with it or creates a condition that does so. 'The invasion may be intentional and unreasonable. It may be unintentional but caused by negligent or reckless conduct; or it may result from an abnormally dangerous activity for which there is strict liability. On any of these bases the defendant may be liable. On the other hand, the invasion may be intentional but reasonable; or it may be entirely accidental and not fall within any of the categories mentioned above. In these cases there is no liability.' " (*Lussier, supra,* 206 Cal.App.3d at p. 100, internal citations omitted.)

- "A finding of an actionable nuisance does not require a showing that the defendant acted unreasonably. As one treatise noted, '[c]onfusion has resulted from the fact that the intentional interference with the plaintiff's use of his property can be unreasonable even when the defendant's conduct is reasonable. This is simply because a reasonable person could conclude that the plaintiff's loss resulting from the intentional interference ought to be allocated to the defendant.' " (*Wilson v. Southern California Edison Co.* (2018) 21 Cal.App.5th 786, 804 [230 Cal.Rptr.3d 595], quoting Prosser & Keeton (5th ed. 1984) Torts § 88.)

- "We do not intend to suggest, however, that one is strictly liable for damages that arise when a natural condition of one's land interferes with another's free use and enjoyment of his property. Such a rule would, quite anomalously, equate natural conditions with dangerous animals, ultrahazardous activities, or defective products, for which strict liability is reserved." (*Lussier, supra,* 206 Cal.App.3d at pp. 101–102.)

- "Clearly, a claim of nuisance based on our example is easier to prove than one based on negligent conduct, for in the former, a plaintiff need only show that the defendant committed the acts that caused injury, whereas in the latter, a plaintiff must establish a duty to act and prove that the defendant's failure to act reasonably in the face of a known danger breached that duty and caused damages." (*Lussier, supra,* 206 Cal.App.3d at p. 106.)

- "We note, however, a unique line of cases, starting with *Grandona v. Lovdal* (1886) 70 Cal. 161 [11 P. 623], which holds that to the extent that the branches and roots of trees encroach upon another's land and cause or threaten damage, they may constitute a nuisance. Superficially, these cases appear to impose nuisance liability in the absence of wrongful conduct." (*Lussier, supra,* 206 Cal.App.3d at p. 102, fn. 5 [but questioning validity of such a rule], internal citations omitted.)

- "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, supra,* 228 Cal.App.4th at p. 1236, 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].)

- "It is the general rule that the unreasonable, unwarrantable or unlawful use by a person of his own property so as to interfere with the rights of others is a nuisance [citation]. In fact, any unwarranted activity which causes substantial injury to the property of another or obstructs its reasonable use and enjoyment is a nuisance which may be abated. And, even a lawful use of one's property may constitute a nuisance if it is part of a general scheme to annoy a neighbor and if the main purpose of the use is to prevent the neighbor from reasonable enjoyment of his own property [citation]." (*McBride, supra,* 18 Cal.App.5th at p. 1180.)

- "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].)

- "[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.)

Secondary Sources

13 Witkin, Summary of California Law (11th ed. 2017) Equity, § 174

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)

2201. Intentional Interference With Contractual Relations—Essential Factual Elements

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[*Name of plaintiff***] claims that [***name of defendant***] intentionally interfered with the contract between [him/her/it] and [***name of third party***]. 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 third party***];**

2. **That [***name of defendant***] knew of the contract;**

3. **That [***name of defendant***]'s conduct prevented performance or made performance more expensive or difficult;**

4. **That [***name of defendant***] [intended to disrupt the performance of this contract/ [or] knew that disruption of performance was certain or substantially certain to occur];**

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

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

New September 2003; Revised June 2012, December 2013

Directions for Use

This tort is sometimes called intentional interference with performance of a contract. (See *Little v. Amber Hotel Co.* (2011) 202 Cal.App.4th 280, 291 [136 Cal.Rptr.3d 97].) If the validity of a contract is an issue, see the series of contracts instructions (CACI No. 300 et seq.).

Sources and Authority

- "California recognizes a cause of action against *noncontracting parties* who interfere with the performance of a contract. 'It has long been held that *a stranger to a contract* may be liable in tort for intentionally interfering with the performance of the contract.' " (*Redfearn v. Trader Joe's Co.* (2018) 20 Cal.App.5th 989, 997 [230 Cal.Rptr.3d 98], original italics.)

- "[C]ases have pointed out that while the tort of inducing breach of contract requires proof of a breach, the cause of action for interference with contractual relations is distinct and requires only proof of interference." (*Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1129 [270 Cal.Rptr. 1, 791 P.2d 587], internal citations omitted.)

- "The elements which a plaintiff must plead to state the cause of action for intentional interference with contractual relations are (1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5)

resulting damage." (*Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1126 [270 Cal.Rptr. 1, 791 P.2d 587], internal citations omitted.)

- "[A] cause of action for intentional interference with contract requires an underlying enforceable contract. Where there is no existing, enforceable contract, only a claim for interference with prospective advantage may be pleaded." (*PMC, Inc. v. Saban Entertainment, Inc.* (1996) 45 Cal.App.4th 579, 601 [52 Cal.Rptr.2d 877].)

- "Because interference with an existing contract receives greater solicitude than does interference with prospective economic advantage, it is not necessary that the defendant's conduct be wrongful apart from the interference with the contract itself." (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 55 [77 Cal.Rptr.2d 709, 960 P.2d 513], internal citations omitted.)

- "The question is whether a plaintiff must plead and prove that the defendant engaged in wrongful acts *with the specific intent* of interfering with the plaintiff's business expectancy. We conclude that specific intent is not a required element of the tort of interference with prospective economic advantage. While a plaintiff may satisfy the intent requirement by pleading specific intent, i.e., that the defendant desired to interfere with the plaintiff's prospective economic advantage, a plaintiff may alternately plead that the defendant knew that the interference was certain or substantially certain to occur as a result of its action." (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1154 [131 Cal.Rptr.2d 29, 63 P.3d 937], original italics.)

- "We caution that although we find the intent requirement to be the same for the torts of intentional interference with contract and intentional interference with prospective economic advantage, these torts remain distinct." (*Korea Supply Co., supra,* 29 Cal.4th at p. 1157.)

- "Plaintiff need not allege an actual or inevitable breach of contract in order to state a claim for disruption of contractual relations. We have recognized that interference with the plaintiff's performance may give rise to a claim for interference with contractual relations if plaintiff's performance is made more costly or more burdensome. Other cases have pointed out that while the tort of inducing breach of contract requires proof of a breach, the cause of action for interference with contractual relations is distinct and requires only proof of interference." (*Pacific Gas & Electric Co., supra,* 50 Cal.3d at p. 1129, internal citations omitted.)

- "*[A] contracting party* cannot be held liable in tort for conspiracy to interfere with its own contract." (*Asahi Kasei Pharma Corp. v. Actelion Ltd.* (2013) 222 Cal.App.4th 945, 961 [166 Cal.Rptr.3d 134], original italics.)

- "[O]ne, like [defendant] here, who is not a party to the contract or an agent of a party to the contract is a 'stranger' for purpose of the tort of intentional interference with contract. A nonparty to a contract that contemplates the nonparty's performance, by that fact alone, is not immune from liability for contract interference. Liability is properly imposed if each of the elements of the tort are otherwise satisfied." (*Redfearn, supra,* 20 Cal.App.5th at p. 1003.)

- "[I]nterference with an at-will contract is actionable interference with the contractual relationship, on the theory that a contract 'at the will of the parties, respectively, does not make it one at the will of

others.' " (*Pacific Gas & Electric Co., supra,* 50 Cal.3d at p. 1127, internal citations and quotations omitted.)

- "We conclude that a plaintiff seeking to state a claim for intentional interference with contract or prospective economic advantage because defendant induced another to undertake litigation, must allege that the litigation was brought without probable cause and that the litigation concluded in plaintiff's favor." (*Pacific Gas & Electric Co., supra,* 50 Cal.3d at p. 1137.)

- "[A]n actor with ' "a financial interest in the business of another is privileged purposely to cause him not to enter into or continue a relation with a third person in that business if the actor [¶] (a) does not employ improper means, and [¶] (b) acts to protect his interest from being prejudiced by the relation[.]" ' " (*Asahi Kasei Pharma Corp, supra,* 222 Cal.App. 4th at p. 962.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 741, 742, 759

Chin et al., California Practice Guide: Employment Litigation, Ch. 5-E, *Intentional Interference With Contract Or Prospective Economic Advantage,* ¶ 5:461 et seq. (The Rutter Group)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts,* §§ 40.110–40.117 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition,* § 565.133 (Matthew Bender)

12 California Points and Authorities, Ch. 122, *Interference,* § 122.20 et seq. (Matthew Bender)

2202. Intentional Interference With Prospective Economic Relations—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] intentionally interfered with an economic relationship between [him/her/it] and [***name of third party***] that probably would have resulted in an economic benefit to [***name of plaintiff***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] and [***name of third party***] were in an economic relationship that probably would have resulted in an economic benefit to [***name of plaintiff***];**

2. **That [***name of defendant***] knew of the relationship;**

3. **That [***name of defendant***] engaged in [***specify conduct determined by the court to be wrongful***];**

4. **That by engaging in this conduct, [***name of defendant***] [intended to disrupt the relationship/ [or] knew that disruption of the relationship was certain or substantially certain to occur];**

5. **That the relationship was disrupted;**

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

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

New September 2003; Revised June 2013, December 2013

Directions for Use

Regarding element 3, the interfering conduct must be wrongful by some legal measure other than the fact of the interference itself. (*Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 393 [45 Cal.Rptr.2d 436, 902 P.2d 740].) This conduct must fall outside the privilege of fair competition. (*PMC, Inc. v. Saban Entertainment, Inc.* (1996) 45 Cal.App.4th 579, 603 [52 Cal.Rptr.2d 877], disapproved on other grounds in *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1159 fn. 11 [131 Cal.Rptr.2d 29, 63 P.3d 937].) Whether the conduct alleged qualifies as wrongful if proven or falls within the privilege of fair competition is resolved by the court as a matter of law. If the court lets the case go to trial, the jury's role is not to determine wrongfulness, but simply to find whether or not the defendant engaged in the conduct. If the conduct is tortious, the judge should instruct on the elements of the tort.

Sources and Authority

- "The tort of intentional or negligent interference with prospective economic advantage imposes liability for improper methods of disrupting or diverting the business relationship of another which

fall outside the boundaries of fair competition." (*Settimo Associates v. Environ Systems, Inc.* (1993) 14 Cal.App.4th 842, 845 [17 Cal.Rptr.2d 757], internal citation omitted.)

- "The tort of interference with prospective economic advantage protects the same interest in stable economic relationships as does the tort of interference with contract, though interference with prospective advantage does not require proof of a legally binding contract. The chief practical distinction between interference with contract and interference with prospective economic advantage is that a broader range of privilege to interfere is recognized when the relationship or economic advantage interfered with is only prospective." (*Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1126 [270 Cal.Rptr. 1, 791 P.2d 587], internal citations omitted.)

- "Intentional interference with prospective economic advantage has five elements: (1) the existence, between the plaintiff and some third party, of an economic relationship that contains the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentionally wrongful acts designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm proximately caused by the defendant's action." (*Roy Allan Slurry Seal, Inc. v. American Asphalt South, Inc.* (2017) 2 Cal.5th 505, 512 [213 Cal.Rptr.3d 568, 388 P.3d 800]].)

- "The tort's requirements 'presuppose the relationship existed at the time of the defendant's allegedly tortious acts lest liability be imposed for actually and intentionally disrupting a relationship which has yet to arise.' " (*Roy Allan Slurry Seal, Inc., supra,* 2 Cal.5th at p. 518.)

- "The question is whether a plaintiff must plead and prove that the defendant engaged in wrongful acts *with the specific intent* of interfering with the plaintiff's business expectancy. We conclude that specific intent is not a required element of the tort of interference with prospective economic advantage. While a plaintiff may satisfy the intent requirement by pleading specific intent, i.e., that the defendant desired to interfere with the plaintiff's prospective economic advantage, a plaintiff may alternately plead that the defendant knew that the interference was certain or substantially certain to occur as a result of its action." (*Korea Supply Co., supra,* 29 Cal.4th at p. 1154, original italics.)

- "[A] plaintiff seeking to recover for an alleged interference with prospective contractual or economic relations must plead and prove as part of its case-in-chief that the defendant not only knowingly interfered with the plaintiff's expectancy, but engaged in conduct that was wrongful by some legal measure other than the fact of interference itself." (*Della Penna, supra,* 11 Cal.4th at p. 393.)

- "With respect to the third element, a plaintiff must show that the defendant engaged in an independently wrongful act. It is not necessary to prove that the defendant acted with the specific intent, or purpose, of disrupting the plaintiff's prospective economic advantage. Instead, 'it is sufficient for the plaintiff to plead that the defendant "[knew] that the interference is certain or substantially certain to occur as a result of his action." ' '[A]n act is independently wrongful if it is unlawful, that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard.' '[A]n act must be wrongful by some legal measure, rather than merely a product of an improper, but lawful, purpose or motive.' " (*San Jose Construction, Inc. v. S.B.C.C., Inc.* (2007) 155 Cal.App.4th 1528, 1544–1545 [67 Cal.Rptr.3d 54], internal citations omitted.)

- "*Della Penna* did not specify what sort of conduct would qualify as 'wrongful' apart from the interference itself." (*LiMandri v. Judkins* (1997) 52 Cal.App.4th 326, 340 [60 Cal.Rptr.2d 539].)

- "Justice Mosk's concurring opinion in *Della Penna* advocates that proscribed conduct be limited to means that are independently tortious or a restraint of trade. The Oregon Supreme Court suggests that conduct may be wrongful if it violates 'a statute or other regulation, or a recognized rule of common law, or perhaps an established standard of a trade or profession.' ... Our Supreme Court may later have occasion to clarify the meaning of 'wrongful conduct' or 'wrongfulness,' or it may be that a precise definition proves impossible." (*Arntz Contracting Co. v. St. Paul Fire and Marine Insurance Co.* (1996) 47 Cal.App.4th 464, 477−478 [54 Cal.Rptr.2d 888], internal citations omitted.)

- "Commonly included among improper means are actions which are independently actionable, violations of federal or state law or unethical business practices, e.g., violence, misrepresentation, unfounded litigation, defamation, trade libel or trade mark infringement." (*PMC, Inc., supra,* 45 Cal.App.4th at p. 603, internal citation omitted.)

- "[A] plaintiff need not allege the interference and a second act independent of the interference. Instead, a plaintiff must plead and prove that the conduct alleged to constitute the interference was independently wrongful, i.e., unlawful for reasons other than that it interfered with a prospective economic advantage. [Citations.]" (*Crown Imports, LLC v. Superior Court* (2014) 223 Cal.App.4th 1395, 1404 [168 Cal.Rptr.3d 228].)

- "The question has arisen as to whether, in order to be actionable as interference with prospective economic advantage, the interfering act must be independently wrongful *as to the plaintiff*. It need not be. There is 'no sound reason for requiring that a defendant's wrongful actions must be directed towards the plaintiff seeking to recover for this tort. The interfering party is liable to the interfered-with party [even] "when the independently tortious means the interfering party uses are independently tortious *only as to a third party*." ' " (*Crown Imports LLC, supra,* 223 Cal.App.4th at p. 1405, original italics.)

- "[T]o state a cause of action for intentional or negligent interference with prospective economic advantage, it is not necessary to also plead a separate, stand-alone tort cause of action." (*Redfearn v. Trader Joe's Co.* (2018) 20 Cal.App.5th 989, 1006 [230 Cal.Rptr.3d 98], internal citations omitted.)

- "[O]ur focus for determining the wrongfulness of those intentional acts should be on the defendant's objective conduct, and evidence of motive or other subjective states of mind is relevant only to illuminating the nature of that conduct." (*Arntz Contracting Co., supra,* 47 Cal.App.4th at p. 477.)

- "[A]n essential element of the tort of intentional interference with prospective business advantage is the existence of a business relationship with which the tortfeasor interfered. Although this need not be a contractual relationship, an existing relationship is required." (*Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 546 [30 Cal.Rptr.2d 706], internal citations omitted.)

- "If a party has no liability in tort for refusing to perform an existing contract, no matter what the reason, he or she certainly should not have to bear a burden in tort for refusing to *enter into* a contract

where he or she has no obligation to do so. If that same party cannot conspire with a third party to breach or interfere with his or her own contract then certainly the result should be no different where the 'conspiracy' is to disrupt a relationship which has not even risen to the dignity of an existing contract and the party to that relationship was entirely free to 'disrupt' it on his or her own without legal restraint or penalty." (*Kasparian v. County of Los Angeles* (1995) 38 Cal.App.4th 242, 266 [45 Cal.Rptr.2d 90], original italics.)

- "Although varying language has been used to express this threshold requirement, the cases generally agree it must be reasonably probable that the prospective economic advantage would have been realized but for defendant's interference." (*Youst v. Longo* (1987) 43 Cal.3d 64, 71 [233 Cal.Rptr. 294, 729 P.2d 728], internal citations omitted.)

- "Under [the competition] privilege, ' "a competitor is free to divert business to himself as long as he uses fair and reasonable means.' [Citation.]' " (*I-CA Enterprises, Inc. v. Palram Americas, Inc.* (2015) 235 Cal.App.4th 257, 292−293 [185 Cal.Rptr.3d 24].)

- "Since the crux of the competition privilege is that one can interfere with a competitor's prospective contractual relationship with a third party as long as the interfering conduct is not independently wrongful (i.e., wrongful apart from the fact of the interference itself), *Della Penna*'s requirement that a plaintiff plead and prove such wrongful conduct in order to recover for intentional interference with prospective economic advantage has resulted in a shift of burden of proof. It is now the plaintiff's burden to prove, as an element of the cause of action itself, that the defendant's conduct was independently wrongful and, therefore, was not privileged rather than the defendant's burden to prove, as an affirmative defense, that it's [*sic*] conduct was not independently wrongful and therefore was privileged." (*Bed, Bath & Beyond of La Jolla, Inc. v. La Jolla Village Square Venture Partners* (1997) 52 Cal.App.4th 867, 881 [60 Cal.Rptr.2d 830].)

- "[I]n the absence of other evidence, timing alone *may be sufficient* to prove causation … . Thus, … the real issue is whether, in the circumstances of the case, the proximity of the alleged cause and effect tends to demonstrate some relevant connection. If it does, then the issue is one for the fact finder to decide." (*Overhill Farms, Inc. v. Lopez* (2010) 190 Cal.App.4th 1248, 1267 [119 Cal.Rptr.3d 127], original italics.)

- "There are three formulations of the manager's privilege: (1) absolute, (2) mixed motive, and (3) predominant motive.." (*Halvorsen v. Aramark Uniform Services, Inc.* (1998) 65 Cal.App.4th 1383, 1391 [77 Cal.Rptr.2d 383].)

- "We conclude that a plaintiff seeking to state a claim for intentional interference with contract or prospective economic advantage because defendant induced another to undertake litigation, must allege that the litigation was brought without probable cause and that the litigation concluded in plaintiff's favor." (*Pacific Gas & Electric Co., supra,* 50 Cal.3d at p. 1137.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 741–754, 759

Chin et al., California Practice Guide: Employment Litigation, Ch. 5-E, *Intentional Interference With Contract Or Prospective Economic Advantage*, ¶¶ 5:463, 5:470 (The Rutter Group)

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 11-G, *Intentional Interference With Contract Or Economic Advantage*, ¶ 11:138.5 (The Rutter Group)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, §§ 40.100–40.105 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.133 (Matthew Bender)

12 California Points and Authorities, Ch. 122, *Interference*, §§ 122.23, 122.32 (Matthew Bender)

2204. Negligent Interference With Prospective Economic Relations

[*Name of plaintiff***] claims that [***name of defendant***] negligently interfered with a relationship between [him/her/it] and [***name of third party***] that probably would have resulted in an economic benefit to [***name of plaintiff***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] and [***name of third party***] were in an economic relationship that probably would have resulted in a future economic benefit to [***name of plaintiff***];**

2. **That [***name of defendant***] knew or should have known of this relationship;**

3. **That [***name of defendant***] knew or should have known that this relationship would be disrupted if [he/she/it] failed to act with reasonable care;**

4. **That [***name of defendant***] failed to act with reasonable care;**

5. **That [***name of defendant***] engaged in wrongful conduct through [***insert grounds for wrongfulness, e.g., breach of contract with another, misrepresentation, fraud, violation of statute***];**

6. **That the relationship was disrupted;**

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

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

New September 2003

Directions for Use

Regarding the fifth element, the judge must specifically state for the jury the conduct that the judge has determined as a matter of law would satisfy the "wrongful conduct" standard. This conduct must fall outside the privilege of fair competition. (*PMC, Inc. v. Saban Entertainment, Inc.* (1996) 45 Cal.App.4th 579, 603 [52 Cal.Rptr.2d 877]; *Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 393 [45 Cal.Rptr.2d 436, 902 P.2d 740].) The jury must then decide whether the defendant engaged in the conduct as defined by the judge. If the conduct is tortious, judge should instruct on the elements of the tort.

Sources and Authority

- "The tort of intentional or negligent interference with prospective economic advantage imposes liability for improper methods of disrupting or diverting the business relationship of another which fall outside the boundaries of fair competition." (*Settimo Associates v. Environ Systems, Inc.* (1993) 14 Cal.App.4th 842, 845 [17 Cal.Rptr.2d 757], internal citation omitted.)

- "The elements of negligent interference with prospective economic advantage are (1) the existence of an economic relationship between the plaintiff and a third party containing the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) the defendant's knowledge (actual or construed) that the relationship would be disrupted if the defendant failed to act with reasonable care; (4) the defendant's failure to act with reasonable care; (5) actual disruption of the relationship; (6) and economic harm proximately caused by the defendant's negligence." (*Redfearn v. Trader Joe's Co.* (2018) 20 Cal.App.5th 989, 1005 [230 Cal.Rptr.3d 98].)

- "The tort of negligent interference with prospective economic advantage is established where a plaintiff demonstrates that (1) an economic relationship existed between the plaintiff and a third party which contained a reasonably probable future economic benefit or advantage to plaintiff; (2) the defendant knew of the existence of the relationship and was aware or should have been aware that if it did not act with due care its actions would interfere with this relationship and cause plaintiff to lose in whole or in part the probable future economic benefit or advantage of the relationship; (3) the defendant was negligent; and (4) such negligence caused damage to plaintiff in that the relationship was actually interfered with or disrupted and plaintiff lost in whole or in part the economic benefits or advantage reasonably expected from the relationship." (*North American Chemical Co. v. Superior Court* (1997) 59 Cal.App.4th 764, 786 [69 Cal.Rptr.2d 466].)

- "'The tort of negligent interference with economic relationship arises only when the defendant owes the plaintiff a duty of care.'" (*Limandri v. Judkins* (1997) 52 Cal.App.4th 326, 348 [60 Cal.Rptr.2d 539], internal citation omitted.)

- "Where a special relationship exists between the parties, a plaintiff may recover for loss of expected economic advantage through the negligent performance of a contract although the parties were not in contractual privity." (*J'Aire Corp. v. Gregory* (1979) 24 Cal.3d 799, 804 [157 Cal.Rptr. 407, 598 P.2d 60].)

- The trial court should instruct the jury on the "independently wrongful" element of the tort of negligent interference with prospective economic advantage. (*National Medical Transportation Network v. Deloitte & Touche* (1998) 62 Cal.App.4th 412, 440 [72 Cal.Rptr.2d 720].)

- "Commonly included among improper means are actions which are independently actionable, violations of federal or state law or unethical business practices, e.g., violence, misrepresentation, unfounded litigation, defamation, trade libel or trade mark infringement." (*PMC, Inc., supra,* 45 Cal.App.4th at p. 603, internal citation omitted.)

- "While the trial court and [defendant] are correct that a defendant incurs liability for interfering with another's prospective economic advantage only if the defendant's conduct was independently wrongful, we have been directed to no California authority, and have found none, for the trial court's conclusion that the wrongful conduct must be intentional or willful. The defendant's conduct must 'fall outside the boundaries of fair competition' … , but negligent misconduct or the violation of a statutory obligation suffice. The approved CACI No. 2204 does not indicate otherwise and, in fact, indicates that either a misrepresentation or 'violation of statute' is sufficient." (*Venhaus v. Shultz* (2007) 155 Cal.App.4th 1072, 1079–1080 [66 Cal.Rptr.3d 432], internal citations omitted.)

- "The fact that the defendant's conduct was independently wrongful is an element of the interference cause of action itself. In addition, the wrongful interfering act can be independently tortious only as to a third party; it need not be independently wrongful as to the plaintiff. Accordingly, … to state a cause of action for intentional or negligent interference with prospective economic advantage, it is not necessary to also plead a separate, stand-alone tort cause of action." (*Redfearn, supra,* 20 Cal.App.5th at p. 1006, internal citations omitted.)

- Notably, one of "[t]he criteria for establishing [the existence of] a duty of care is the 'blameworthiness' of the defendant's conduct." (*Lange v. TIG Insurance Co.* (1999) 68 Cal.App.4th 1179, 1187 [81 Cal.Rptr.2d 39].) The *Lange* court stated that in a negligent interference case "a defendant's conduct is blameworthy only if it was independently wrongful apart from the interference itself." (*Ibid*.) Thus, the "independently wrongful" element may, in effect, be decided by the judge in the course of determining whether a duty of care was owed.

- There is currently no cause of action for negligent interference with contractual relations (see *Fifield Manor v. Finston* (1960) 54 Cal.2d 632, 636-637 [7 Cal.Rptr. 377, 354 P.2d 1073]): "Although the continuing validity of the so-called '*Fifield* rule' is questionable in light of the California Supreme Court's recognition in *J'Aire* of a cause of action for negligent interference with prospective economic advantage, the Supreme Court has yet to disapprove *Fifield*." (*LiMandri, supra,* 52 Cal.App.4th at p. 349.)

- "Under the privilege of free competition, a competitor is free to divert business to himself as long as he uses fair and reasonable means. Thus, the plaintiff must present facts indicating the defendant's interference is somehow wrongful—i.e., based on facts that take the defendant's actions out of the realm of legitimate business transactions." (*Tri-Growth Centre City, Ltd. v. Silldorf, Burdman, Duignan & Eisenberg* (1989) 216 Cal.App.3d 1139, 1153–1154 [265 Cal.Rptr. 330], internal citations omitted.)

- "Since the crux of the competition privilege is that one can interfere with a competitor's prospective contractual relationship with a third party as long as the interfering conduct is not independently wrongful (i.e., wrongful apart from the fact of the interference itself), *Della Penna*'s requirement that a plaintiff plead and prove such wrongful conduct in order to recover for intentional interference with prospective economic advantage has resulted in a shift of burden of proof. It is now the plaintiff's burden to prove, as an element of the cause of action itself, that the defendant's conduct was independently wrongful and, therefore, was not privileged rather than the defendant's burden to prove, as an affirmative defense, that it's [*sic*] conduct was not independently wrongful and therefore was privileged." (*Bed, Bath & Beyond of La Jolla, Inc. v. La Jolla Village Square Venture Partners* (1997) 52 Cal.App.4th 867, 881 [60 Cal.Rptr.2d 830].)

- There are other privileges that a defendant could assert in appropriate cases, such as the "manager's privilege." (See *Halvorsen v. Aramark Uniform Services, Inc.* (1998) 65 Cal.App.4th 1383, 1391–1392 [77 Cal.Rptr.2d 383].)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 751–754

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts,* § 40.104 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition,* § 565.133 (Matthew Bender)

12 California Points and Authorities, Ch. 122, *Interference,* § 122.36 (Matthew Bender)

2361. Negligent Failure to Obtain Insurance Coverage—Essential Factual Elements

[*Name of plaintiff***] claims that [he/she/it] was harmed by [***name of defendant***]'s negligent failure to obtain insurance requested by [him/her/it]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] requested [***name of defendant***] to obtain [***describe requested insurance***] and [***name of defendant***] promised to obtain that insurance for [him/her/it];**

2. **That [***name of defendant***] was negligent in failing to obtain the promised insurance;**

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

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

New September 2003

Directions for Use

The instructions in this series assume the plaintiff is the insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case.

For general tort instructions, including the definition of "substantial factor," see the Negligence series (CACI No. 400 et seq.).

Sources and Authority

- "California recognizes the general rule that an agent or broker who intentionally or negligently fails to procure insurance as requested by a client—either an insured or an applicant for insurance—will be liable to the client in tort for the resulting damages." (*AMCO Ins. Co. v. All Solutions Ins. Agency, LLC* (2016) 244 Cal.App.4th 883, 890 [198 Cal.Rptr.3d 687].)

- A 'failure to deliver the agreed-upon coverage' case is actionable ... . An insurance agent has an 'obligation to use reasonable care, diligence, and judgment in procuring insurance requested by an insured.' A broker's failure to obtain the type of insurance requested by an insured may constitute actionable negligence and the proximate cause of injury." (*Desai v. Farmers Insurance Exchange* (1996) 47 Cal.App.4th 1110, 1119–1120 [55 Cal.Rptr.2d 276], internal citations omitted.)

- "Absent some notice or warning, an insured should be able to rely on an agent's representations of coverage without independently verifying the accuracy of those representations by examining the relevant policy provisions." (*Clement v. Smith* (1993) 16 Cal.App.4th 39, 45 [19 Cal.Rptr.2d 676].)

- "[W]hile an insurance agent who promises to procure insurance will indeed be liable for his negligent

failure to do so, it does not follow that he can avoid liability for foreseeable harm caused by his silence or inaction merely because he has not expressly promised to assume responsibility." (*Westrick v. State Farm Insurance* (1982) 137 Cal.App.3d 685, 691 [187 Cal.Rptr. 214], internal citations omitted.)

Secondary Sources

Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group) ¶¶ 2:50–2:64.2, 11:246–11:249

2 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar) Actions Against Agents and Brokers, §§ 29.7–29.8

5 California Insurance Law & Practice, Ch. 61, *Operating Requirements of Agents and Brokers*, § 61.04[3][a] (Matthew Bender)

12 California Points and Authorities, Ch. 120, *Insurance*, § 120.402 (Matthew Bender)

2402. Breach of Employment Contract—Unspecified Term—Constructive Discharge—Essential Factual Elements

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[*Name of plaintiff***] claims that [***name of defendant***] breached their employment contract by forcing [***name of plaintiff***] to resign. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] and [***name of defendant***] entered into an employment relationship. [An employment contract or a provision in an employment contract may be [written or oral/partly written and partly oral/created by the conduct of the parties]];**

2. **That [***name of defendant***] promised, by words or conduct, to discharge [***name of plaintiff***] only for good cause;**

3. **That [***name of plaintiff***] substantially performed [his/her] job duties [unless [***name of plaintiff***]'s performance was excused [or prevented]];**

4. **That [***name of defendant***] intentionally created or knowingly permitted working conditions to exist that were so intolerable that a reasonable person in [***name of plaintiff***]'s position would have had no reasonable alternative except to resign;**

5. **That [***name of plaintiff***] resigned because of the intolerable conditions; and**

6. **That [***name of plaintiff***] was harmed by the loss of employment.**

To be intolerable, the adverse working conditions must be unusually or repeatedly offensive to a reasonable person in [*name of plaintiff***]'s position.**

New September 2003

Directions for Use

The element of substantial performance should not be confused with the "good cause" defense: "The action is primarily for breach of contract. It was therefore incumbent upon plaintiff to prove that he was able and offered to fulfill all obligations imposed upon him by the contract. Plaintiff failed to meet this requirement; by voluntarily withdrawing from the contract he excused further performance by defendant." (*Kane v. Sklar* (1954) 122 Cal.App.2d 480, 482 [265 P.2d 29], internal citation omitted.) Element 3 may be deleted if substantial performance is not a disputed issue.

Sources and Authority

- At-Will Employment. Labor Code section 2922.

- Contractual Conditions Precedent. Civil Code section 1439.

- "Where there is no express agreement, the issue is whether other evidence of the parties' conduct has a 'tendency in reason' to demonstrate the existence of an actual mutual understanding on particular terms and conditions of employment. If such evidence logically permits conflicting inferences, a question of fact is presented. But where the undisputed facts negate the existence or the breach of the contract claimed, summary judgment is proper." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 337 [100 Cal.Rptr.2d 352, 8 P.3d 1089], internal citations omitted.)

- The employee bears the ultimate burden of proving that he or she was wrongfully terminated. (*Pugh v. See's Candies, Inc.* (*Pugh I*) (1981) 116 Cal.App.3d 311, 330 [171 Cal.Rptr. 917].)

- "Standing alone, constructive discharge is neither a tort nor a breach of contract, but a doctrine that transforms what is ostensibly a resignation into a firing. Even after establishing constructive discharge, an employee must independently prove a breach of contract or tort in connection with employment termination in order to obtain damages for wrongful discharge." (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1251 [32 Cal.Rptr.2d 223, 876 P.2d 1022], internal citation omitted.)

- "The presumption that an employment relationship of indefinite duration is intended to be terminable at will is therefore 'subject, like any presumption, to contrary evidence. This may take the form of an agreement, express or implied, that ... the employment relationship will continue indefinitely, pending the occurrence of some event such as the employer's dissatisfaction with the employee's services or the existence of some "cause" for termination.' " (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 680 [254 Cal.Rptr. 211, 765 P.2d 373], internal citation omitted.)

- "In *Foley*, we identified several factors, apart from express terms, that may bear upon 'the existence and content of an ... [implied-in-fact] agreement' placing limits on the employer's right to discharge an employee. These factors might include "'the personnel policies or practices of the employer, the employee's longevity of service, actions or communications by the employer reflecting assurances of continued employment, and the practices of the industry in which the employee is engaged." ' " (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 336-337 [100 Cal.Rptr.2d 352, 8 P.3d 1089], internal citations omitted.)

- Civil Code sections 1619–1621 together provide as follows: "A contract is either express or implied. An express contract is one, the terms of which are stated in words. An implied contract is one, the existence and terms of which are manifested by conduct."

- " 'Good cause' or 'just cause' for termination connotes ' "a fair and honest cause or reason," ' regulated by the good faith of the employer. The term is relative. Whether good cause exists is dependent upon the particular circumstances of each case. In deciding whether good cause exists, there must be a balance between the employer's interest in operating its business efficiently and profitably and the employee's interest in continued employment. Care must be exercised so as not to interfere with the employer's legitimate exercise of managerial discretion. While the scope of such discretion is substantial, it is not unrestricted. Good cause is not properly found where the asserted reasons for discharge are 'trivial, capricious, unrelated to business needs or goals, or pretextual.'

Where there is a contract to terminate only for good cause, the employer has no right to terminate for an arbitrary or unreasonable decision." (*Walker v. Blue Cross of California* (1992) 4 Cal.App.4th 985, 994 [6 Cal.Rptr.2d 184], internal citations omitted, abrogated on another ground in *Guz, supra,* 24 Cal.4th at p. 351.)

- "Constructive discharge occurs when the employer's conduct effectively forces an employee to resign. Although the employee may say, 'I quit,' the employment relationship is actually severed involuntarily by the employer's acts, against the employee's will. As a result, a constructive discharge is legally regarded as a firing rather than a resignation." (*Turner, supra,* 7 Cal.4th at pp. 1245-1246, internal citation omitted.)

- "In order to amount to constructive discharge, adverse working conditions must be unusually 'aggravated' or amount to a 'continuous pattern' before the situation will be deemed intolerable. In general, '[s]ingle, trivial, or isolated acts of [misconduct] are insufficient' to support a constructive discharge claim. Moreover, a poor performance rating or a demotion, even when accompanied by reduction in pay, does not by itself trigger a constructive discharge." (*Turner, supra*, 7 Cal.4th at p. 1247, internal citation and fns. omitted.)

- "Whether conditions were so intolerable as to justify a reasonable employee's decision to resign is normally a question of fact." (*Valdez v. City of Los* Angeles (1991) 231 Cal.App.3d 1043, 1056 [282 Cal.Rptr. 726].)

- "In some circumstances, a single intolerable incident, such as a crime of violence against an employee by an employer, or an employer's ultimatum that an employee commit a crime, may constitute a constructive discharge. Such misconduct potentially could be found 'aggravated.' " (*Turner, supra,* 7 Cal.4th at p. 1247, fn. 3.)

- "[T]he standard by which a constructive discharge is determined is an objective one-the question is 'whether a reasonable person faced with the allegedly intolerable employer actions or conditions of employment would have no reasonable alternative except to quit.' " (*Turner, supra,* 7 Cal.4th at p. 1248, internal citations omitted.)

- "[U]nder *Turner*, the proper focus is on the working conditions themselves, not on the plaintiff's *subjective* reaction to those conditions." (*Simers v. Los Angeles Times Communications, LLC* (2018) 18 Cal.App.5th 1248, 1272 [227 Cal.Rptr.3d 695], original italics.)

- "In order to establish a constructive discharge, an employee must plead and prove, by the usual preponderance of the evidence standard, that the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign. [¶] For purposes of this standard, the requisite knowledge or intent must exist on the part of either the employer or those persons who effectively represent the employer, i.e., its officers, directors, managing agents, or supervisory employees." (*Turner, supra,* 7 Cal.4th at p. 1251.)

- "The length of time the plaintiff remained on the job may be one relevant factor in determining the

intolerability of employment conditions from the standpoint of a reasonable person. Neither logic nor precedent suggests it should always be dispositive." (*Turner, supra*, 7 Cal.4th at p. 1254.)

- "[T]here was, as the trial court found, substantial evidence that plaintiff's age and disability were 'substantial motivating reason[s]' for the adverse employment action or actions to which plaintiff was subjected. But the discriminatory motive for plaintiff's working conditions has no bearing on whether the evidence was sufficient to establish constructive discharge." (*Simers, supra*, 18 Cal.App.5th at p. 1271.)

- "The general rule is that the measure of recovery by a wrongfully discharged employee is the amount of salary agreed upon for the period of service, less the amount which the employer affirmatively proves the employee has earned or with reasonable effort might have earned from other employment." (*Parker v. Twentieth Century-Fox Film Corp.* (1970) 3 Cal.3d 176, 181 [89 Cal.Rptr. 737, 474 P.2d 689], internal citations omitted.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§223–227

Chin et al., Cal. Practice Guide: Employment Litigation ¶¶ 4:2, 4:65, 4:81, 4:105, 4:405–4:407, 4:409–4:410, 4:270–4:273, 4:420, 4:422, 4:440 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Contract Actions, §§ 8.1–8.21

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, §§ 60.05, 60.07 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, § 249.15 (Matthew Bender)

California Civil Practice: Employment Litigation §§ 6:9–6:11 (Thomson Reuters)

2431. Constructive Discharge in Violation of Public Policy—Plaintiff Required to Violate Public Policy

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[*Name of plaintiff***] claims that [he/she] was forced to resign rather than commit a violation of public policy. It is a violation of public policy [***specify claim in case, e.g. , for an employer to require that an employee 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***] required [***name of plaintiff***] to [***specify alleged conduct in violation of public policy, e.g., "engage in price fixing"***];**

3. **That this requirement was so intolerable that a reasonable person in [***name of plaintiff***]'s position would have had no reasonable alternative except to resign;**

4. **That [***name of plaintiff***] resigned because of this requirement;**

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

6. **That the requirement was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003; Revised June 2014, December 2014

Directions for Use

This instruction should be given if a plaintiff claims that his or her constructive termination was wrongful because the defendant required the plaintiff to commit an act in violation of public policy. If the plaintiff alleges he or she was subjected to intolerable working conditions that violate public policy, see CACI No. 2432, *Constructive Discharge in Violation of Public Policy—Plaintiff Required to Endure Intolerable Conditions for Improper Purpose That Violates Public Policy*.

This instruction must be supplemented with CACI No. 2433, *Wrongful Discharge in Violation of Public Policy—Damages.* See also CACI No. 2510, *"Constructive Discharge" Explained*.

The judge should determine whether the purported reason for plaintiff's resignation 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.

Sources and Authority

- "[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].)

- "[A]n employer's authority over its employees 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. An employer engaging in such conduct violates a basic duty imposed by law upon all employers, and thus an employee who has suffered damages as a result of such discharge may maintain a tort action for wrongful discharge against the employer." (*Tameny, supra,* 27 Cal.3d at p. 178.)

- "[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.)

- "[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 v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1090–1091 [4 Cal.Rptr.2d 874, 824 P.2d 680], internal citations and fn. 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.)

- "In addition to statutes and constitutional provisions, valid administrative regulations may also serve as a source of fundamental public policy that impacts on an employer's right to discharge employees when such regulations implement fundamental public policy found in their enabling statutes." (*D'sa v. Playhut, Inc.* (2000) 85 Cal.App.4th 927, 933 [102 Cal.Rptr.2d 495], internal citation omitted.)

- "Constructive discharge occurs when the employer's conduct effectively forces an employee to resign. Although the employee may say, 'I quit,' the employment relationship is actually severed involuntarily by the employer's acts, against the employee's will. As a result, a constructive discharge is legally regarded as a firing rather than a resignation." (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1244-1245 [32 Cal.Rptr.2d 223, 876 P.2d 1022], internal citation omitted.)

- "Although situations may exist where the employee's decision to resign is unreasonable as a matter of law, '[w]hether conditions were so intolerable as to justify a reasonable employee's decision to resign is normally a question of fact. [Citation.]' " (*Vasquez v. Franklin Management Real Estate Fund, Inc.* (2013) 222 Cal.App.4th 819, 827 [166 Cal.Rptr.3d 242].)

- "In order to establish a constructive discharge, an employee must plead and prove ... that the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign." (*Turner, supra,* 7 Cal.4th at p. 1251.)

- "The conditions giving rise to the resignation must be sufficiently extraordinary and egregious to overcome the normal motivation of a competent, diligent, and reasonable employee to remain on the job to earn a livelihood and to serve his or her employer. The proper focus is on whether the resignation was coerced, not whether it was simply one rational option for the employee." (*Turner, supra,* 7 Cal.4th at p. 1246.)

- "In some circumstances, a single intolerable incident, such as a crime of violence against an employee by an employer, or an employer's ultimatum that an employee commit a crime, may constitute a constructive discharge. Such misconduct potentially could be found 'aggravated.' " (*Turner, supra,* 7 Cal.4th at p. 1247, fn. 3.)

- "The mere existence of illegal conduct in a workplace does not, without more, render employment conditions intolerable to a reasonable employee." (*Turner, supra,* 7 Cal.4th at p. 1254.)

- "[T]he standard by which a constructive discharge is determined is an objective one-the question is 'whether a reasonable person faced with the allegedly intolerable employer actions or conditions of employment would have no reasonable alternative except to quit.' " (*Turner, supra,* 7 Cal.4th at p. 1248, internal citations omitted.)

- "[U]nder *Turner*, the proper focus is on the working conditions themselves, not on the plaintiff's subjective reaction to those conditions." (*Simers v. Los Angeles Times Communications, LLC* (2018) 18 Cal.App.5th 1248, 1272 [227 Cal.Rptr.3d 695].)

- "The length of time the plaintiff remained on the job may be one relevant factor in determining the intolerability of employment conditions from the standpoint of a reasonable person." (*Turner, supra,* 7 Cal.4th at p. 1254.)

- "[T]here was, as the trial court found, substantial evidence that plaintiff's age and disability were 'substantial motivating reason[s]' for the adverse employment action or actions to which plaintiff was subjected. But the discriminatory motive for plaintiff's working conditions has no bearing on whether the evidence was sufficient to establish constructive discharge." (*Simers, supra,* 18 Cal.App.5th at p. 1271.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, § 222

Chin et al., California Practice Guide: Employment Litigation, Ch. 4-G, Constructive Discharge, ¶¶ 4:405–4:406, 4:409–4:410, 4:421–4:422 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 5-A, Wrongful Discharge In Violation Of Public Policy (Tameny Claims), ¶¶ 5:2, 5:45–5:47, 5:50, 5:70, 5:105, 5:115, 5:150, 5:151, 5:170, 5:195, 5:220 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Public Policy Violations, §§ 5.45–

5.46

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, 249.15 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, §§ 100.31, 100.35–100.38 (Matthew Bender)

California Civil Practice: Employment Litigation §§ 6:23–6:25 (Thomson Reuters)

2432. Constructive Discharge in Violation of Public Policy—Plaintiff Required to Endure Intolerable Conditions That Violate Public Policy

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[*Name of plaintiff***] claims that [***name of defendant***] forced [him/her] to resign for reasons that violate public policy. It is a violation of public policy [***specify claim in case, e.g., for an employer to require an employee to work more than forty hours a week for less than minimum wage***]. 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 plaintiff***] was subjected to working conditions that violated public policy, in that [***describe conditions imposed on the employee that constitute the violation, e.g., "[name of plaintiff] was treated required to work more than forty hours a week for less than minimum wage"***];**

3. **That [***name of defendant***] intentionally created or knowingly permitted these working conditions;**

4. **That these working conditions were so intolerable that a reasonable person in [***name of plaintiff***]'s position would have had no reasonable alternative except to resign;**

5. **That [***name of plaintiff***] resigned because of these working conditions;**

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

7. **That the working conditions were a substantial factor in causing [***name of plaintiff***]'s harm.**

To be intolerable, the adverse working conditions must be unusually aggravated or involve a continuous pattern of mistreatment. Trivial acts are insufficient.

New September 2003; Revised December 2014, June 2015

Directions for Use

This instruction should be given if plaintiff claims that his or her constructive termination was wrongful because defendant subjected plaintiff to intolerable working conditions in violation of public policy. The instruction must be supplemented with CACI No. 2433, *Wrongful Discharge in Violation of Public Policy—Damages.* See also CACI No. 2510, *"Constructive Discharge" Explained.*

The judge should determine whether the purported reason for plaintiff's resignation 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.

Whether conditions are so intolerable as to justify the employee's decision to quit rather than endure them is to be judged by an objective reasonable-employee standard. (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1247 [32 Cal.Rptr.2d 223, 876 P.2d 1022].) This standard is captured in element 4. The paragraph at the end of the instruction gives the jury additional guidance as to what makes conditions intolerable. (See *id.* at p. 1247.) Note that in some circumstances, a single intolerable incident, such as a crime of violence against an employee by an employer, or an employer's ultimatum that an employee commit a crime, may constitute a constructive discharge. (*Id.* at p. 1247, fn.3.)

Sources and Authority

- "[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].)

- "[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], fn. omitted.)

- "In addition to statutes and constitutional provisions, valid administrative regulations may also serve as a source of fundamental public policy that impacts on an employer's right to discharge employees when such regulations implement fundamental public policy found in their enabling statutes." (*D'sa v. Playhut, Inc.* (2000) 85 Cal.App.4th 927, 933 [102 Cal.Rptr.2d 495], internal citation omitted.)

- "Plaintiffs assert, in essence, that they were terminated for refusing to engage in conduct that violated fundamental public policy, to wit, nonconsensual sexual acts. They also assert, in effect, that they were discharged in retaliation for attempting to exercise a fundamental right -- the right to be free from sexual assault and harassment. Under either theory, plaintiffs, in short, should have been granted leave to amend to plead a cause of action for wrongful discharge in violation of public policy." (*Rojo v. Kliger* (1990) 52 Cal.3d 65, 91 [276 Cal.Rptr. 130, 801 P.2d 373].)

- "Constructive discharge occurs when the employer's conduct effectively forces an employee to resign. Although the employee may say, 'I quit,' the employment relationship is actually severed involuntarily by the employer's acts, against the employee's will. As a result, a constructive discharge is legally regarded as a firing rather than a resignation." (*Turner,supra,* 7 Cal.4th at pp. 1244-1245, internal citation omitted.)

- "Although situations may exist where the employee's decision to resign is unreasonable as a matter of law, '[w]hether conditions were so intolerable as to justify a reasonable employee's decision to resign is normally a question of fact. [Citation.]' " (*Vasquez v. Franklin Management Real Estate Fund, Inc.* (2013) 222 Cal.App.4th 819, 827 [166 Cal.Rptr.3d 242].)

- "In order to establish a constructive discharge, an employee must plead and prove ... that the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign." (*Turner, supra,* 7 Cal.4th at p. 1251.)

- "The conditions giving rise to the resignation must be sufficiently extraordinary and egregious to overcome the normal motivation of a competent, diligent, and reasonable employee to remain on the job to earn a livelihood and to serve his or her employer. The proper focus is on whether the resignation was coerced, not whether it was simply one rational option for the employee." (*Turner, supra,* 7 Cal.4th at p. 1246.)

- "In order to amount to a constructive discharge, adverse working conditions must be unusually 'aggravated' or amount to a 'continuous pattern' before the situation will be deemed intolerable. In general, '[s]ingle, trivial, or isolated acts of [misconduct] are insufficient' to support a constructive discharge claim. Moreover, a poor performance rating or a demotion, even when accompanied by reduction in pay, does not by itself trigger a constructive discharge" (*Turner, supra,* 7 Cal.4th at p. 1247, footnote and internal citation omitted.)

- "The mere existence of illegal conduct in a workplace does not, without more, render employment conditions intolerable to a reasonable employee." (*Turner, supra,* 7 Cal.4th at p. 1254.)

- "[T]he standard by which a constructive discharge is determined is an objective one-the question is 'whether a reasonable person faced with the allegedly intolerable employer actions or conditions of employment would have no reasonable alternative except to quit.' " (*Turner, supra,* 7 Cal.4th at p. 1248, internal citations omitted.)

- "[U]nder *Turner,* the proper focus is on the working conditions themselves, not on the plaintiff's subjective reaction to those conditions." (*Simers v. Los Angeles Times Communications, LLC* (2018) 18 Cal.App.5th 1248, 1272 [227 Cal.Rptr.3d 695].)

- "The length of time the plaintiff remained on the job may be one relevant factor in determining the intolerability of employment conditions from the standpoint of a reasonable person." (*Turner, supra,* 7 Cal.4th at p. 1254.)

- "[T]here was, as the trial court found, substantial evidence that plaintiff's age and disability were 'substantial motivating reason[s]' for the adverse employment action or actions to which plaintiff was subjected. But the discriminatory motive for plaintiff's working conditions has no bearing on whether the evidence was sufficient to establish constructive discharge." (*Simers, supra,* 18 Cal.App.5th at p. 1271.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, § 222

Chin et al., California Practice Guide: Employment Litigation, Ch. 4-G, Constructive Discharge, ¶¶ 4:405–4:406, 4:409–4:411, 4:421–4:422 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 5-A, Wrongful Discharge In Violation Of Public Policy (Tameny Claims), ¶¶ 5:2, 5:45–5:47, 5:50, 5:70, 5:105, 5:115, 5:150, 5:151, 5:170, 5:195, 5:220 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Public Policy Violations, §§ 5.45–5.46

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*, §§ 249.15, 249.50 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, §§ 100.31, 100.32, 100.36–100.38 (Matthew Bender)

California Civil Practice: Employment Litigation §§ 6:23–6:25 (Thomson Reuters)

2509. "Adverse Employment Action" Explained

[*Name of plaintiff***] must prove that [he/she] was subjected to an adverse employment action.**

Adverse employment actions are not limited to ultimate actions such as termination or demotion. There is an adverse employment action if [*name of defendant***] has taken an action or engaged in a course or pattern of conduct that, taken as a whole, materially and adversely affected the terms, conditions, or privileges of [***name of plaintiff***]'s employment. An adverse employment action includes conduct that is reasonably likely to impair a reasonable employee's job performance or prospects for advancement or promotion. However, minor or trivial actions or conduct that is not reasonably likely to do more than anger or upset an employee cannot constitute an adverse employment action.**

New June 2012

Directions for Use

Give this instruction with CACI No. 2500, *Disparate Treatment—Essential Factual Elements,* CACI No. 2505, *Retaliation,* CACI No. 2540, *Disability Discrimination—Disparate Treatment—Essential Factual Elements,* CACI No. 2560, *Religious Creed Discrimination—Failure to Accommodate—Essential Factual Elements,* or CACI No. 2570, *Age Discrimination—Disparate Treatment—Essential Factual Elements,* if there is an issue as to whether the employee was the victim of an adverse employment action.

For example, the case may involve a pattern of employer harassment consisting of acts that might not individually be sufficient to constitute discrimination or 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].) Or the case may involve acts that, considered alone, would not appear to be adverse, but could be adverse under the particular circumstances of the case. (See *Patten v. Grant Joint Union High School Dist.* (2005) 134 Cal.App.4th 1378, 1389–1390 [37 Cal.Rptr.3d 113] [lateral transfer can be adverse employment action even if wages, benefits, and duties remain the same].)

Sources and Authority

- "Appropriately viewed, [section 12940(a)] protects an employee against unlawful discrimination with respect not only to so-called ultimate employment actions such as termination or demotion, but also the entire spectrum of employment actions that are reasonably likely to adversely and materially affect an employee's job performance or opportunity for advancement in his or her career. Although a mere offensive utterance or even a pattern of social slights by either the employer or coemployees cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment for purposes of section 12940(a) (or give rise to a claim under section 12940(h)), the phrase 'terms, conditions, or privileges' of employment must be interpreted liberally and with a reasonable appreciation of the realities of the workplace in order to afford employees the appropriate and generous protection against employment discrimination that the FEHA was intended to provide." (*Yanowitz, supra,* 36 Cal.4th at pp. 1053–1054, footnotes omitted.)

- "[T]he determination of what type of adverse treatment properly should be considered discrimination in the terms, conditions, or privileges of employment is not, by its nature, susceptible to a mathematically precise test, and the significance of particular types of adverse actions must be evaluated by taking into account the legitimate interests of both the employer and the employee. Minor or relatively trivial adverse actions or conduct by employers or fellow employees that, from an objective perspective, are reasonably likely to do no more than anger or upset an employee cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment and are not actionable, but adverse treatment that is reasonably likely to impair a reasonable employee's job performance or prospects for advancement or promotion falls within the reach of the antidiscrimination provisions of sections 12940(a) and 12940(h)." (*Yanowitz, supra,* 36 Cal.4th at pp. 1054–1055.)

- "An ' "adverse employment action," ' … , requires a 'substantial adverse change in the terms and conditions of the plaintiff's employment'. " (*Holmes v. Petrovich Development Co., LLC* (2011) 191 Cal.App.4th 1047, 1063 [119 Cal.Rptr.3d 878, internal citations omitted.)

- "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.)

- "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 v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 424 [69 Cal.Rptr.3d 1], internal citations omitted.)

- "The employment action must be both detrimental and substantial ... [¶]. We must analyze [plaintiff's] complaints of adverse employment actions to determine if they result in a material change in the terms of her employment, impair her employment in some cognizable manner, or show some other employment injury ... . [W]e do not find that [plaintiff's] complaint alleges the necessary material changes in the terms of her employment to cause employment injury. Most of the actions upon which she relies were one time events ... . The other allegations ... are not accompanied by facts which evidence both a substantial and detrimental effect on her employment." (*Thomas v. Department of Corrections* (2000) 77 Cal.App.4th 507, 511–512 [91 Cal.Rptr.2d 770], internal citations omitted.)

- "The 'materiality' test of adverse employment action … looks to 'the entire spectrum of employment actions that are reasonably likely to adversely and materially affect an employee's job performance or opportunity for advancement in his or her career,' and the test 'must be interpreted liberally … with a reasonable appreciation of the realities of the workplace … .' " (*Patten, supra,* 134 Cal.App.4th at p. 1389.)

- "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." (*Whitehall v. County of San Bernardino* (2017) 17 Cal.App.5th 352, 366-367 [225 Cal.Rptr.3d 321].)

- "[A] mere oral or written criticism of an employee … does not meet the definition of an adverse employment action under [the] FEHA." (*Light v. Department of Parks & Recreation* (2017) 14 Cal.App.5th 75, 92 [221 Cal.Rptr.3d 668].)

- "Mere ostracism in the workplace is insufficient to establish an adverse employment decision. However, ' "[W]orkplace harassment, if sufficiently severe or pervasive, may in and of itself constitute an adverse employment action sufficient to satisfy the second prong of the prima facie case for … retaliation cases." [Citation].' " (*Kelley v. The Conco Companies* (2011) 196 Cal.App.4th 191, 212 [126 Cal.Rptr.3d 651], internal citations omitted.)

- "Not every change in the conditions of employment, however, constitutes an adverse employment action. ' "A change that is merely contrary to the employee's interests or not to the employee's liking is insufficient." … ' '[W]orkplaces are rarely idyllic retreats, and the mere fact that an employee is displeased by an employer's act or omission does not elevate that act or omission to the level of a materially adverse employment action.' " (*Malais v. Los Angeles City Fire Dept.* (2007) 150 Cal.App.4th 350, 357 [58 Cal.Rptr.3d 444].)

- "[R]efusing to allow a former employee to rescind a voluntary discharge—that is, a resignation free of employer coercion or misconduct—is not an adverse employment action." (*Featherstone v. Southern California Permanente Medical Group* (2017) 10 Cal.App.5th 1150, 1161 [217 Cal.Rptr.3d 258].)

- "[T]he reduction of [plaintiff]'s hours alone could constitute a material and adverse employment action by the [defendant]." (*Light, supra,* 14 Cal.App.5th at p. 93.)

- "[A] job reassignment may be an adverse employment action when it entails materially adverse consequences." (*Simers v. Los Angeles Times Communications, LLC* (2018) 18 Cal.App.5th 1248, 1279 [227 Cal.Rptr.3d 695].)

- "[T]he denial of previously promised training and the failure to promote may constitute adverse employment actions." (*Light, supra,* 14 Cal.App.5th at p. 93.)

- "The trial court correctly found that the act of placing plaintiff on administrative leave [involuntarily] was an adverse employment action." (*Whitehall, supra,* 17 Cal.App.5th at p. 367.)

Secondary Sources

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

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 1052–1055

Chin et al., California Practice Guide: Employment Litigation, Ch. 7-A, *Title VII And The California Fair Employment And Housing Act*, ¶¶ 7:203, 7:731, 7:785 (The Rutter Group)

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

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.36 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, § 249.12 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, § 100.42 (Matthew Bender)

2510. "Constructive Discharge" Explained

[*Name of plaintiff***] must prove that [he/she] was constructively discharged. To establish constructive discharge, [***name of plaintiff***] must prove the following:**

1. **That [***name of defendant***] [through** [*name of defendant*]**'s officers, directors, managing agents, or supervisory employees] intentionally created or knowingly permitted working conditions to exist that were so intolerable that a reasonable person in [***name of plaintiff***]'s position would have had no reasonable alternative except to resign; and**

2. **That [***name of plaintiff***] resigned because of these working conditions.**

New June 2012

Directions for Use

Give this instruction with CACI No. 2500, *Disparate Treatment—Essential Factual Elements,* CACI No. 2505, *Retaliation,* CACI No. 2540, *Disability Discrimination—Disparate Treatment—Essential Factual Elements,* CACI No. 2560, *Religious Creed Discrimination—Failure to Accommodate—Essential Factual Elements,* or CACI No. 2570, *Age Discrimination—Disparate Treatment—Essential Factual Elements,* if the employee alleges that because of the employer's actions, he or she had no reasonable alternative other than to leave the employment. Constructive discharge can constitute the adverse employment action required to establish a FEHA violation for discrimination or retaliation. (See *Steele v. Youthful Offender Parole Bd.* (2008) 162 Cal.App.4th 1241, 1253 [76 Cal.Rptr.3d 632].)

Sources and Authority

- "[C]onstructive discharge occurs only when an employer terminates employment by forcing the employee to resign. A constructive discharge is equivalent to a dismissal, although it is accomplished indirectly. Constructive discharge occurs only when the employer coerces the employee's resignation, either by creating working conditions that are intolerable under an objective standard, or by failing to remedy objectively intolerable working conditions that actually are known to the employer. We have said 'a constructive discharge is legally regarded as a firing rather than a resignation.' " (*Mullins v. Rockwell Internat. Corp.* (1997) 15 Cal.4th 731, 737 [63 Cal.Rptr.2d 636, 936 P.2d 1246], internal citations omitted.)

- "Actual discharge carries significant legal consequences for employers, including possible liability for wrongful discharge. In an attempt to avoid liability, an employer may refrain from actually firing an employee, preferring instead to engage in conduct causing him or her to quit. The doctrine of constructive discharge addresses such employer-attempted 'end runs' around wrongful discharge and other claims requiring employer-initiated terminations of employment." (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1244 [32 Cal.Rptr.2d 223, 876 P.2d 1022].)

- "Standing alone, constructive discharge is neither a tort nor a breach of contract, but a doctrine that transforms what is ostensibly a resignation into a firing." (*Turner, supra,* 7 Cal.4th at p. 1251.)

- "In order to amount to constructive discharge, adverse working conditions must be unusually 'aggravated' or amount to a 'continuous pattern' before the situation will be deemed intolerable. In general, '[s]ingle, trivial, or isolated acts of [misconduct] are insufficient' to support a constructive discharge claim. Moreover, a poor performance rating or a demotion, even when accompanied by reduction in pay, does not by itself trigger a constructive discharge." (*Turner, supra,* 7 Cal.4th at p. 1247, internal citation and footnotes omitted.)

- "In some circumstances, a single intolerable incident, such as a crime of violence against an employee by an employer, or an employer's ultimatum that an employee commit a crime, may constitute a constructive discharge. Such misconduct potentially could be found 'aggravated.' " (*Turner, supra,* 7 Cal.4th at p. 1247, fn. 3.)

- "Although situations may exist where the employee's decision to resign is unreasonable as a matter of law, '[w]hether conditions were so intolerable as to justify a reasonable employee's decision to resign is normally a question of fact. [Citation.]' " (*Vasquez v. Franklin Management Real Estate Fund, Inc.* (2013) 222 Cal.App.4th 819, 827 [166 Cal.Rptr.3d 242].)

- "[T]he standard by which a constructive discharge is determined is an objective one—the question is 'whether a reasonable person faced with the allegedly intolerable employer actions or conditions of employment would have no reasonable alternative except to quit.' " (*Turner, supra,* 7 Cal.4th at p. 1248, internal citations omitted.)

- "[U]nder *Turner*, the proper focus is on the working conditions themselves, not on the plaintiff's subjective reaction to those conditions." (*Simers v. Los Angeles Times Communications, LLC* (2018) 18 Cal.App.5th 1248, 1272 [227 Cal.Rptr.3d 695].)

- "The length of time the plaintiff remained on the job may be *one* relevant factor in determining the intolerability of employment conditions from the standpoint of a reasonable person." (*Turner, supra,* 7 Cal.4th at p. 1254, original italics.)

- "[T]here was, as the trial court found, substantial evidence that plaintiff's age and disability were 'substantial motivating reason[s]' for the adverse employment action or actions to which plaintiff was subjected. But the discriminatory motive for plaintiff's working conditions has no bearing on whether the evidence was sufficient to establish constructive discharge." (*Simers, supra,* 18 Cal.App.5th at p. 1271.)

- "In order to establish a constructive discharge, an employee must plead and prove, by the usual preponderance of the evidence standard, that the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign. [¶] For purposes of this standard, the requisite knowledge or intent must exist on the part of either the employer or those persons who effectively represent the employer, i.e., its officers, directors, managing agents, or supervisory employees." (*Turner, supra,* 7 Cal.4th at p. 1251.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, § 225

Chin et al., California Practice Guide: Employment Litigation, Ch. 4-G, *Constructive Discharge*, ¶ 4:405 et seq. (The Rutter Group)

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

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.34 (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*, § 100.31 et seq. (Matthew Bender)

2540. Disability Discrimination—Disparate Treatment—Essential Factual Elements

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[*Name of plaintiff***] claims that [***name of defendant***] wrongfully discriminated against [him/her] based on [his/her] [history of [a]] [***select term to describe basis of limitations, e.g., physical condition***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was [an employer/[***other covered entity***]];**

2. **That [***name of plaintiff***] [was an employee of [***name of defendant***]/applied to [***name of defendant***] for a job/[***describe other covered relationship to defendant***]];**

3. **That [***name of defendant***] knew that [***name of plaintiff***] had [a history of having] [a] [***e.g., physical condition***] [that limited [***insert major life activity***]];**

4. **That [***name of plaintiff***] was able to perform the essential job duties [with reasonable accommodation for [his/her] [***e.g., physical condition***]];**

5. **[That [***name of defendant***] [discharged/refused to hire/[***other adverse employment action***]] [***name of plaintiff***];]**

   [or]

   [That [*name of defendant***] subjected [***name of plaintiff***] to an adverse employment action;]**

   [or]

   [That [*name of plaintiff***] was constructively discharged;]**

6. **That [***name of plaintiff***]'s [history of [a]] [***e.g., physical condition***] was a substantial motivating reason for [***name of defendant***]'s [decision to [discharge/refuse to hire/[***other adverse employment action***]] [***name of plaintiff***]/conduct];**

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

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

[*Name of plaintiff***] does not need to prove that [***name of defendant***] held any ill will or animosity toward [him/her] personally because [he/she] was [perceived to be] disabled. [On the other hand, if you find that [***name of defendant***] did hold ill will or animosity toward [***name of plaintiff***] because [he/she] was [perceived to be] disabled, you may consider this fact, along with all the other evidence, in determining whether [***name of plaintiff***]'s [history of [a]] [***e.g., physical condition***] was a substantial motivating reason for [***name of defendant***]'s [decision to [discharge/refuse to hire/[***other adverse employment action***]] [***name of plaintiff***]/conduct].]**

New September 2003; Revised June 2006, December 2007, April 2009, December 2009, June 2010, June 2012, June 2013, December 2014, December 2016

Directions for Use

Select a term to use throughout to describe the source of the plaintiff's limitations. It may be a statutory term such as "physical disability," "mental disability," or "medical condition." (See Gov. Code, § 12940(a).) Or it may be a general term such as "condition," "disease," or "disorder." Or it may be a specific health condition such as "diabetes."

In the introductory paragraph and in elements 3 and 6, select the bracketed language on "history" of disability if the claim of discrimination is based on a history of disability rather than a current actual disability.

For element 1, 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).)

Modify elements 3 and 6 if plaintiff was not actually disabled or had a history of disability, but alleges discrimination because he or she was perceived to be disabled. (See Gov. Code, § 12926(o); see also Gov. Code, § 12926(j)(4), (m)(4) [mental and physical disability include being regarded or treated as disabled by the employer].) This can be done with language in element 3 that the employer "treated [*name of plaintiff*] as if [he/she] ..." and with language in element 6 "That [*name of employer*]'s belief that … ."

If the plaintiff alleges discrimination on the basis of his or her association with someone who was or was perceived to be disabled, give CACI No. 2547, *Disability-Based Associational Discrimination—Essential Factual Elements.* (See *Rope v. Auto-Chlor System of Washington, Inc.* (2013) 220 Cal.App.4th 635, 655−660 [163 Cal.Rptr.3d 392] [claim for "disability based associational discrimination" adequately pled].)

If medical-condition discrimination as defined by statute (see Gov. Code, § 12926(i)) is alleged, omit "that limited [*insert major life activity*]" in element 3. (Compare Gov. Code, § 12926(i) with Gov. Code, § 12926(j), (m) [no requirement that medical condition limit major life activity].)

Regarding element 4, it is now settled that the ability to perform the essential duties of the job is an element of the plaintiff's burden of proof. (See *Green v. State of California* (2007) 42 Cal.4th 254, 257–258 [64 Cal.Rptr.3d 390, 165 P.3d 118].)

Read the first option for element 5 if there is no dispute as to whether the employer's acts constituted an adverse employment action. Read the second option and also give CACI No. 2509, *"Adverse Employment Action" Explained,* if whether there was an adverse employment action is a question of fact for the jury. If constructive discharge is alleged, give the third option for element 5 and also give CACI No. 2510, *"Constructive Discharge" Explained.* Select "conduct" in element 6 if either the second or third option is included for element 5.

Element 6 requires that the disability be a substantial motivating reason for the adverse action. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; see also CACI No. 2507, *"Substantial Motivating Reason" Explained*.)

Give the optional sentence in the last paragraph if there is evidence that the defendant harbored personal animus against the plaintiff because of his or her disability.

If the existence of a qualifying disability is disputed, additional instructions defining "physical disability," "mental disability," and "medical condition" may be required. (See Gov. Code, § 12926(i), (j), (m).)

Sources and Authority

- Disability Discrimination Prohibited Under Fair Employment and Housing Act. Government Code section 12940(a).
- Inability to Perform Essential Job Duties. Government Code section 12940(a)(1).
- "Medical Condition" Defined. Government Code section 12926(i).
- "Mental Disability" Defined. Government Code section 12926(j).
- "Physical Disability" Defined. Government Code section 12926(m).
- Perception of Disability and Association With Disabled Person Protected. Government Code section 12926(o).
- "Substantial" Limitation Not Required. Government Code section 12926.1(c).
- "[T]he plaintiff initially has the burden to establish a prima facie case of discrimination. The plaintiff can meet this burden by presenting evidence that demonstrates, even circumstantially or by inference, that he or she (1) suffered from a disability, or was regarded as suffering from a disability; (2) could perform the essential duties of the job with or without reasonable accommodations, and (3) was subjected to an adverse employment action because of the disability or perceived disability. To establish a prima facie case, a plaintiff must show ' " ' "actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were based on a [prohibited] discriminatory criterion … ." ' " …' The prima facie burden is light; the evidence necessary to sustain the burden is minimal. As noted above, while the elements of a plaintiff's prima facie case can vary considerably, generally an employee need only offer sufficient circumstantial evidence to give rise to a reasonable *inference* of discrimination." (*Sandell v. Taylor-Listug, Inc.* (2010) 188 Cal.App.4th 297, 310 [115 Cal.Rptr.3d 453], original italics, internal citations omitted.)
- "The distinction between cases involving *direct evidence* of the employer's motive for the adverse employment action and cases where there is only *circumstantial evidence* of the employer's

discriminatory motive is critical to the outcome of this appeal. There is a vast body of case law that addresses proving discriminatory intent in cases where there was no direct evidence that the adverse employment action taken by the employer was motivated by race, religion, national origin, age or sex. In such cases, proof of discriminatory motive is governed by the three-stage burden-shifting test established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green* [(1973) 411 U.S. 792 [93 S. Ct. 1817, 36 L. Ed. 2d 668]. (*Wallace v. County of Stanislaus* (2016) 245 Cal.App.4th 109, 123 [199 Cal.Rptr.3d 462], original italics, footnote and internal citations omitted.)

- "The three-stage framework and the many principles adopted to guide its application do not apply in discrimination cases where, like here, the plaintiff presents direct evidence of the employer's motivation for the adverse employment action. In many types of discrimination cases, courts state that direct evidence of intentional discrimination is rare, but disability discrimination cases often involve direct evidence of the role of the employee's actual or perceived *disability* in the employer's decision to implement an adverse employment action. Instead of litigating the employer's reasons for the action, the parties' disputes in disability cases focus on whether the employee was able to perform essential job functions, whether there were reasonable accommodations that would have allowed the employee to perform those functions, and whether a reasonable accommodation would have imposed an undue hardship on the employer. To summarize, courts and practitioners should not automatically apply principles related to the *McDonnell Douglas* test to disability discrimination cases. Rather, they should examine the critical threshold issue and determine whether there is direct evidence that the motive for the employer's conduct was related to the employee's physical or mental condition." (*Wallace, supra,* 245 Cal.App.4th at p. 123, original italics, footnote and internal citations omitted; cf. *Moore v. Regents of University of California* (2016) 248 Cal.App.4th 216, 234 fn. 3 [206 Cal.Rptr.3d 841] [case did not present so-called "typical" disability discrimination case, as described in *Wallace,* in that the parties disputed the employer's reasons for terminating plaintiff's employment].)

- "If the employee meets this [prima facie] burden, it is then incumbent on the employer to show that it had a legitimate, nondiscriminatory reason for its employment decision. When this showing is made, the burden shifts back to the employee to produce substantial evidence that employer's given reason was either 'untrue or pretextual,' or that the employer acted with discriminatory animus, in order to raise an inference of discrimination." (*Furtado v. State Personnel Bd.* (2013) 212 Cal.App.4th 729, 744 [151 Cal.Rptr.3d 292], internal citations omitted.)

- "Although the same statutory language that prohibits disability discrimination also prohibits discrimination based on race, age, sex, and other factors, we conclude that disability discrimination claims are fundamentally different from the discrimination claims based on the other factors listed in section 12940, subdivision (a). These differences arise because (1) additional statutory provisions apply to disability discrimination claims, (2) the Legislature made separate findings and declarations about protections given to disabled persons, and (3) discrimination cases involving race, religion, national origin, age and sex, often involve pretexts for the adverse employment action—an issue about motivation that appears less frequently in disability discrimination cases." (*Wallace, supra,* 245 Cal.App.4th at p. 122.)

- "Summary adjudication of the section 12940(a) claim … turns on … whether [plaintiff] could perform the essential functions of the relevant job with or without accommodation. [Plaintiff] does not dispute that she was unable to perform the essential functions of her *former* position as a clothes

fitter with or without accommodation. Under federal law, however, when an employee seeks accommodation by being reassigned to a vacant position in the company, the employee satisfies the 'qualified individual with a disability' requirement by showing he or she can perform the essential functions of the *vacant position* with or without accommodation. The position must exist and be vacant, and the employer need not promote the disabled employee. We apply the same rule here. To prevail on summary adjudication of the section 12940(a) claim, [defendant] must show there is no triable issue of fact about [plaintiff]'s ability, with or without accommodation, to perform the essential functions of an available vacant position that would not be a promotion." (*Nadaf-Rahrov v. The Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 965 [83 Cal.Rptr.3d 190], original italics, internal citations omitted.)

- "To establish a prima facie case of mental disability discrimination under FEHA, a plaintiff must show the following elements: (1) She suffers from a mental disability; (2) she is otherwise qualified to do the job with or without reasonable accommodation; and (3) she was subjected to an adverse employment action because of the disability." (*Higgins-Williams v. Sutter Medical Foundation* (2015) 237 Cal.App.4th 78, 84 [187 Cal.Rptr.3d 745].)

- "At most, [plaintiff] alleges only that he anticipated becoming disabled for some time after the organ donation. This is insufficient. [Plaintiff] cannot pursue a cause of action for discrimination under FEHA on the basis of his 'actual' physical disability in the absence of factual allegations that he was in fact, physically disabled." (*Rope, supra,* 220 Cal.App.4th at p. 659.)

- "[Defendant] asserts the statute's 'regarded as' protection is limited to persons who are denied or who lose jobs based on an employer's reliance on the 'myths, fears or stereotypes' frequently associated with disabilities. … However, the statutory language does not expressly restrict FEHA's protections to the narrow class to whom [defendant] would limit its coverage. To impose such a restriction would exclude from protection a large group of individuals, like [plaintiff], with more mundane long-term medical conditions, the significance of which is exacerbated by an employer's failure to reasonably accommodate. 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. We agree most individuals who sue exclusively under this definitional prong likely are and will continue to be victims of an employer's 'mistaken' perception, based on an unfounded fear or stereotypical assumption. Nevertheless, FEHA's protection is nowhere expressly premised on such a factual showing, and we decline the invitation to import such a requirement." (*Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 53 [43 Cal.Rptr.3d 874], original italics, internal citations omitted.)

- "[T]he purpose of the 'regarded-as' prong is to protect individuals rejected from a job because of the 'myths, fears and stereotypes' associated with disabilities. In other words, to find a perceived disability, the perception must stem from a false idea about the existence of or the limiting effect of a disability." (*Diffey v. Riverside County Sheriff's Dept.* (2000) 84 Cal.App.4th 1031, 1037 [101 Cal.Rptr.2d 353], internal citation omitted.)

- "We say on this record that [defendant] took action against [plaintiff] based on concerns or fear about

his possible future disability. The relevant FEHA definition of an individual regarded as disabled applies only to those who suffer certain specified physical disabilities or those who have a condition with 'no present disabling effect' but which 'may become a physical disability … .' According to the pleadings, [defendant] fired [plaintiff] to avoid accommodating him because of his association with his physically disabled sister. That is not a basis for liability under the 'regarded as' disabled standard." (*Rope, supra,* 220 Cal.App.4th at p. 659, internal citations omitted.)

- " '[A]n employer "knows an employee has a disability when the employee tells the employer about his condition, or when the employer otherwise becomes aware of the condition, such as through a third party or by observation. The employer need only know the underlying facts, not the legal significance of those facts." ' " (*Soria v. Univision Radio Los Angeles, Inc.* (2016) 5 Cal.App.5th 570, 592 [210 Cal.Rptr.3d 59].)

- " 'An adverse employment decision cannot be made "because of" a disability, when the disability is not known to the employer. Thus, in order to prove [a discrimination] claim, a plaintiff must prove the employer had knowledge of the employee's disability when the adverse employment decision was made. … While knowledge of the disability can be inferred from the circumstances, knowledge will only be imputed to the employer when the fact of disability is the only reasonable interpretation of the known facts. "Vague or conclusory statements revealing an unspecified incapacity are not sufficient to put an employer on notice of its obligations … ." … ' " (*Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1008 [93 Cal.Rptr.2d 338].)

- "[W]e interpret FEHA as authorizing an employer to distinguish between disability-caused misconduct and the disability itself in the narrow context of threats or violence against coworkers. If employers are not permitted to make this distinction, they are caught on the horns of a dilemma. They may not discriminate against an employee based on a disability but, at the same time, must provide all employees with a safe work environment free from threats and violence." (*Wills v. Superior Court* (2011) 195 Cal.App.4th 143, 166 [125 Cal.Rptr.3d 1], internal citations omitted.)

- "Requiring the plaintiff to show that discrimination was a *substantial* motivating factor, rather than simply *a* motivating factor, more effectively ensures that liability will not be imposed based on evidence of mere thoughts or passing statements unrelated to the disputed employment decision. At the same time, … proof that discrimination was a *substantial* factor in an employment decision triggers the deterrent purpose of the FEHA and thus exposes the employer to liability, even if other factors would have led the employer to make the same decision at the time." (*Harris, supra,* 56 Cal.4th at p. 232, original italics.)

- "We do not suggest that discrimination must be alone sufficient to bring about an employment decision in order to constitute a substantial motivating factor. But it is important to recognize that discrimination can be serious, consequential, and even by itself determinative of an employment decision without also being a "but for" cause." (*Harris, supra,* 56 Cal.4th at p. 229.)

- "We note that the court in *Harris* discussed the employer's motivation and the link between the employer's consideration of the plaintiff's physical condition and the adverse employment action without using the terms "animus," "animosity," or "ill will." The absence of a discussion of these terms necessarily implies an employer can violate section 12940, subdivision (a) by taking an adverse

employment action against an employee "because of" the employee's physical disability even if the employer harbored no animosity or ill will against the employee or the class of persons with that disability." (*Wallace, supra,* 245 Cal.App.4th at p. 128.)

- Based on *Harris,* we conclude that an employer has treated an employee differently 'because of' a disability when the disability is a substantial motivating reason for the employer's decision to subject the [employee] to an adverse employment action. This conclusion resolves how the jury should have been instructed on [defendant]'s motivation or intent in connection with the disability discrimination claim." (*Wallace, supra,* 245 Cal.App.4th at p. 128.)

- "We conclude that where, as here, an employee is found to be able to safely perform the essential duties of the job, a plaintiff alleging disability discrimination can establish the requisite employer intent to discriminate by proving (1) the employer knew that plaintiff had a physical condition that limited a major life activity, or perceived him to have such a condition, and (2) the plaintiff's actual or perceived physical condition was a substantial motivating reason for the defendant's decision to subject the plaintiff to an adverse employment action. … [T]his conclusion is based on (1) the interpretation of section 12940's term 'because of' adopted in *Harris*; (2) our discussion of the meaning of the statutory phrase 'to discriminate against'; and (3) the guidance provided by the current versions of CACI Nos. 2540 and 2507. [¶] Therefore, the jury instruction that [plaintiff] was required to prove that [defendant] 'regarded or treated [him] as having a disability in order to discriminate' was erroneous." (*Wallace, supra,* 245 Cal.App.4th at p. 129.)

- "The word 'animus' is ambiguous because it can be interpreted narrowly to mean 'ill will' or 'animosity' or can be interpreted broadly to mean 'intention.' In this case, it appears [defendant] uses 'animus' to mean something more than the intent described by the substantial-motivating-reason test adopted in *Harris*." (*Wallace, supra,* 245 Cal.App.4th at p. 130, fn. 14, internal citation omitted.)

- " '[W]eight may qualify as a protected "handicap" or "disability" within the meaning of the FEHA if medical evidence demonstrates that it results from a physiological condition affecting one or more of the basic bodily systems and limits a major life activity.'… '[A]n individual who asserts a violation of the FEHA on the basis of his or her weight must adduce evidence of a physiological, systemic basis for the condition.' " (*Cornell v. Berkeley Tennis Club* (2017) 18 Cal.App.5th 908, 928 [227 Cal.Rptr.3d 286].)

- "Being unable to work during pregnancy is a disability for the purposes of section 12940." (*Sanchez v. Swissport, Inc.* (2013) 213 Cal.App.4th 1331, 1340 [153 Cal.Rptr.3d 367].)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 1045–1049

Chin et al., California Practice Guide: Employment Litigation, Ch. 9-C, *California Fair Employment And Housing Act (FEHA),* ¶¶ 9:2160–9:2241 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.78–2.80

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws,* § 41.32[2][c] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination,* §§ 115.14, 115.23, 115.34, 115.77[3][a] (Matthew Bender)

California Civil Practice: Employment Litigation § 2:46 (Thomson Reuters)

2541. Disability Discrimination—Reasonable Accommodation—Essential Factual Elements (Gov. Code, § 12940(m))

[*Name of plaintiff***] claims that [***name of defendant***] failed to reasonably accommodate [his/her] [***select term to describe basis of limitations, e.g., physical condition***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was [an employer/[***other covered entity***]];**

2. **That [***name of plaintiff***] [was an employee of [***name of defendant***]/applied to [***name of defendant***] for a job/[***describe other covered relationship to defendant***]];**

3. **That [[***name of plaintiff***] had/[***name of defendant***] treated [***name of plaintiff***] as if [he/she] had] [a] [***e.g., physical condition***] [that limited [***insert major life activity***]];**

[4. That [*name of defendant***] knew of [***name of plaintiff***]'s [***e.g., physical condition***] [that limited [***insert major life activity***]];]**

5. **That [***name of plaintiff***] was able to perform the essential job duties with reasonable accommodation for [his/her] [***e.g., physical condition***];**

6. **That [***name of defendant***] failed to provide reasonable accommodation for [***name of plaintiff***]'s [***e.g., physical condition***];**

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

8. **That [***name of defendant***]'s failure to provide reasonable accommodation was a substantial factor in causing [***name of plaintiff***]'s harm.**

[In determining whether [*name of plaintiff***]'s [***e.g., physical condition***] limits [***insert major life activity***], you must consider the [***e.g., physical condition***] [in its unmedicated state/without assistive devices/[***describe mitigating measures***]].]**

New September 2003; Revised April 2007, December 2007, April 2009, December 2009, June 2010, December 2011, June 2012, June 2013

Directions for Use

Select a term to use throughout to describe the source of the plaintiff's limitations. It may be a statutory term such as "physical disability," "mental disability," or "medical condition." (See Gov. Code, § 12940(a).) Or it may be a general term such as "condition," "disease," or "disorder." Or it may be a specific health condition such as "diabetes."

For element 1, 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).)

If medical-condition discrimination as defined by statute (see Gov. Code, § 12926(i)) is alleged, omit "that limited [*insert major life activity*]" in elements 3 and 4 and do not include the last paragraph. (Compare Gov. Code, § 12926(i) with Gov. Code, § 12926(j), (m) [no requirement that medical condition limit major life activity].)

In a case of perceived disability, include "[*name of defendant*] treated [*name of plaintiff*] as if [he/she] had" in element 3, and delete optional element 4. (See Gov. Code, § 12926(j)(4), (m)(4) [mental and physical disability include being regarded or treated as disabled by the employer].) In a case of actual disability, include "**[***name of plaintiff*] had" in element 3, and give element 4.

If the existence of a qualifying disability is disputed, additional instructions defining "physical disability," "mental disability," and "medical condition" may be required. (See Gov. Code, § 12926(i), (j), (m).)

The California Supreme Court has held that under Government Code section 12940(a), the plaintiff is required to prove that he or she has the ability to perform the essential duties of the job with or without reasonable accommodation. (See *Green v. State of California* (2007) 42 Cal.4th 254, 260 [64 Cal.Rptr.3d 390, 165 P.3d 118].) While the court left open the question of whether the same rule should apply to cases under Government Code section 12940(m) (see *id.* at p. 265), appellate courts have subsequently placed the burden on the employee to prove that he or she would be able to perform the job duties with reasonable accommodation (see element 5). (See *Cuiellette v. City of Los Angeles* (2011) 194 Cal.App.4th 757, 766 [123 Cal.Rptr.3d 562]; *Nadaf-Rahrov v. The Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 973–979 [83 Cal.Rptr.3d 190].)

There may still be an unresolved issue if the employee claims that the employer failed to provide him or her with other suitable job positions that he or she might be able to perform with reasonable accommodation. The rule has been that the employer has an affirmative duty to make known to the employee other suitable job opportunities and to determine whether the employee is interested in, and qualified for, those positions, if the employer can do so without undue hardship or if the employer offers similar assistance or benefit to other disabled or nondisabled employees or has a policy of offering such assistance or benefit to any other employees. (*Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 950–951 [62 Cal.Rptr.2d 142]; see also *Furtado v. State Personnel Bd.* (2013) 212 Cal.App.4th 729, 745 [151 Cal.Rptr.3d 292]; *Claudio v. Regents of the University of California* (2005) 134 Cal.App.4th 224, 243 [35 Cal.Rptr.3d 837]; *Hanson v. Lucky Stores* (1999) 74 Cal.App.4th 215, 226 [87 Cal.Rptr.2d 487].) In contrast, other courts have said that it is the employee's burden to prove that a reasonable accommodation could have been made, i.e., that he or she was qualified for a position in light of the potential accommodation. (See *Nadaf-Rahrov, supra,* 166 Cal.App.4th at p. 978; see also *Cuiellette, supra,* 194 Cal.App.4th at p. 767 [plaintiff proves he or she is a qualified individual by establishing that he or she can perform the essential functions of the position to which reassignment is sought].) The question of whether the employee has to present evidence of other suitable job descriptions and prove that a vacancy existed for a position that the employee could do with reasonable accommodation may not be fully resolved.

No element has been included that requires the plaintiff to specifically request reasonable accommodation. Unlike Government Code section 12940(n) on the interactive process (see CACI No. 2546, *Disability Discrimination—Reasonable Accommodation—Failure to Engage in Interactive Process*), section 12940(m) does not specifically require that the employee request reasonable accommodation; it requires only that the employer know of the disability. (See *Prilliman, supra,* 53 Cal.App.4th at pp. 950–951.)

Sources and Authority

- Reasonable Accommodation Required. Government Code section 12940(m).
- "Reasonable Accommodation" Explained. Government Code section 12926(p).
- "Medical Condition" Defined. Government Code section 12926(i).
- "Mental Disability" Defined. Government Code section 12926(j).
- "Physical Disability" Defined. Government Code section 12926(m).
- "Substantial" Limitation Not Required. Government Code section 12926.1(c).
- "The essential elements of a failure to accommodate claim are: (1) the plaintiff has a disability covered by the FEHA; (2) the plaintiff is a qualified individual (i.e., he or she can perform the essential functions of the position); and (3) the employer failed to reasonably accommodate the plaintiff's disability." (*Cuiellette, supra,* 194 Cal.App.4th at p. 766.)
- "Under the FEHA, 'reasonable accommodation' means 'a modification or adjustment to the workplace that enables the employee to perform the essential functions of the job held or desired.' " (*Cuiellette, supra,* 194 Cal.App.4th at p. 766.)
- "Reasonable accommodations include '[j]ob restructuring, part-time or modified work schedules, *reassignment to a vacant position,* … and other similar accommodations for individuals with disabilities.' " (*Swanson v. Morongo Unified School Dist.* (2014) 232 Cal.App.4th 954, 968 [181 Cal.Rptr.3d 553], original italics.)
- "The examples of reasonable accommodations in the relevant statutes and regulations include reallocating nonessential functions or modifying how or when an employee performs an essential function, but not eliminating essential functions altogether. FEHA does not obligate the employer to accommodate the employee by excusing him or her from the performance of essential functions." (*Nealy v. City of Santa Monica* (2015) 234 Cal.App.4th 359, 375 [184 Cal.Rptr.3d 9].)
- "A term of leave from work can be a reasonable accommodation under FEHA, and, therefore, a request for leave can be considered to be a request for accommodation under FEHA." (*Moore v. Regents of University of California* (2016) 248 Cal.App.4th 216, 243 [206 Cal.Rptr.3d 841], internal citation omitted.)

- "Failure to accommodate claims are not subject to the *McDonnell Douglas* burden-shifting framework." (*Cornell v. Berkeley Tennis Club* (2017) 18 Cal.App.5th 908, 926 [227 Cal.Rptr.3d 286].)

- "The question now arises whether it is the employees' burden to prove that a reasonable accommodation could have been made, i.e., that they were qualified for a position in light of the potential accommodation, or the employers' burden to prove that no reasonable accommodation was available, i.e., that the employees were not qualified for any position because no reasonable accommodation was available. [¶¶] Applying *Green's* burden of proof analysis to section 12940(m), we conclude that the burden of proving ability to perform the essential functions of a job with accommodation should be placed on the plaintiff under this statute as well. First, … an employee's ability to perform the essential functions of a job is a prerequisite to liability under section 12940(m). Second, the Legislature modeled section 12940(m) on the federal reasonable accommodation requirement (adopting almost verbatim the federal statutory definition of 'reasonable accommodation' by way of example). Had the Legislature intended the employer to bear the burden of proving ability to perform the essential functions of the job, contrary to the federal allocation of the burden of proof, … it could have expressly provided for that result, but it did not. Finally, general evidentiary principles support allocating the burden of proof on this issue to the plaintiff." (*Nadaf-Rahrov, supra,* 166 Cal.App.4th at pp. 977–978, internal citations omitted.)

- " 'If the employee cannot be accommodated in his or her existing position and the requested accommodation is reassignment, an employer must make affirmative efforts to determine whether a position is available. [Citation.] A reassignment, however, is not required if "there is no vacant position for which the employee is qualified." [Citations.] "The responsibility to reassign a disabled employee who cannot otherwise be accommodated does 'not require creating a new job, moving another employee, promoting the disabled employee or violating another employee's rights … .' " [Citations.] "What is required is the 'duty to reassign a disabled employee if an already funded, vacant position at the same level exists.' [Citations.]" [Citations.]' " (*Furtado, supra,* 212 Cal.App.4th at p. 745.)

- "[A]n employee's probationary status does not, in and of itself, deprive an employee of the protections of FEHA, including a reasonable reassignment. The statute does not distinguish between the types of reasonable accommodations an employer may have to provide to employees on probation or in training and those an employer may have to provide to other employees. We decline to read into FEHA a limitation on an employee's eligibility for reassignment based on an employee's training or probationary status. Instead, the trier of fact should consider whether an employee is on probation or in training in determining whether a particular reassignment is comparable in pay and status to the employee's original position." (*Atkins v. City of Los Angeles* (2017) 8 Cal.App.5th 696, 724 [214 Cal.Rptr.3d 113], internal citations omitted.)

- "[A] disabled employee seeking reassignment to a vacant position 'is entitled to preferential consideration.' " (*Swanson, supra,* 232 Cal.App.4th at p. 970.)

- " 'Generally, " '[t]he employee bears the burden of giving the employer notice of the disability.' " ' An employer, in other words, has no affirmative duty to investigate whether an employee's illness might qualify as a disability. ' " '[T]he employee can't expect the employer to read his mind and

know he secretly wanted a particular accommodation and sue the employer for not providing it. Nor is an employer ordinarily liable for failing to accommodate a disability of which it had no knowledge.' " ' " (*Featherstone v. Southern California Permanente Medical Group* (2017) 10 Cal.App.5th 1150, 1167 [217 Cal.Rptr.3d 258], internal citations omitted.)

- " '[A]n employer "knows an employee has a disability when the employee tells the employer about his condition, or when the employer otherwise becomes aware of the condition, such as through a third party or by observation." ' … [¶] 'While knowledge of the disability can be inferred from the circumstances, knowledge will only be imputed to the employer when the fact of disability is the *only* reasonable interpretation of the known facts. "Vague or conclusory statements revealing an unspecified incapacity are not sufficient to put an employer on notice of its obligations under the [FEHA]." ' " (*Featherstone, supra,* 10 Cal.App.5th at p. 1167, internal citations omitted.)

- "In other words, so long as the employer is aware of the employee's condition, there is no requirement that the employer be aware that the condition is considered a disability under the FEHA. By the same token, it is insufficient to tell the employer merely that one is disabled or requires an accommodation." (*Cornell, supra,* 18 Cal.App.5th at p. 938, internal citation omitted.)

- " ' " 'This notice then triggers the employer's burden to take "positive steps" to accommodate the employee's limitations. … [¶] … The employee, of course, retains a duty to cooperate with the employer's efforts by explaining [his or her] disability and qualifications. [Citation.] Reasonable accommodation thus envisions an exchange between employer and employee where each seeks and shares information to achieve the best match between the [employee's] capabilities and available positions.' " ' " (*Soria v. Univision Radio Los Angeles, Inc.* (2016) 5 Cal.App.5th 570, 598 [210 Cal.Rptr.3d 59].)

- "Employers must make reasonable accommodations to the disability of an individual unless the employer can demonstrate that doing so would impose an 'undue hardship.' " (*Prilliman, supra,* 53 Cal.App.4th at p. 947.)

- " 'Ordinarily the reasonableness of an accommodation is an issue for the jury.' " (*Prilliman, supra,* 53 Cal.App.4th at p. 954, internal citation omitted.)

- "[T]he duty of an employer to provide reasonable accommodation for an employee with a disability is broader under the FEHA than under the ADA." (*Bagatti, supra,* 97 Cal.App.4th at p. 362.)

- "[A]n employer is relieved of the duty to reassign a disabled employee whose limitations cannot be reasonably accommodated in his or her current job only if reassignment would impose an 'undue hardship' on its operations … ." (*Atkins, supra,* 8 Cal.App.5th at p. 721.)

- "On these issues, which are novel to California and on which the federal courts are divided, we conclude that employers must reasonably accommodate individuals falling within any of FEHA's statutorily defined 'disabilities,' including those 'regarded as' disabled, and must engage in an informal, interactive process to determine any effective accommodations." (*Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 55 [43 Cal.Rptr.3d 874].)

- "While a claim of failure to accommodate is independent of a cause of action for failure to engage in an interactive dialogue, each necessarily implicates the other." (*Moore, supra,* 248 Cal.App.4th at p. 242.)

- "[A] pretextual termination of a perceived-as-disabled employee's employment in lieu of providing reasonable accommodation or engaging in the interactive process does not provide an employer a reprieve from claims for failure to accommodate and failure to engage in the interactive process." (*Moore, supra,* 248 Cal.App.4th at p. 244.)

- "Appellant also stated a viable claim under section 12940, subdivision (m), which mandates that an employer provide reasonable accommodations for the known physical disability of an employee. She alleged that she was unable to work during her pregnancy, that she was denied reasonable accommodations for her pregnancy-related disability and terminated, and that the requested accommodations would not have imposed an undue hardship on [defendant]. A finite leave of greater than four months may be a reasonable accommodation for a known disability under the FEHA." (*Sanchez v. Swissport, Inc.* (2013) 213 Cal.App.4th 1331, 1341 [153 Cal.Rptr.3d 367].)

- "To the extent [plaintiff] claims the [defendant] had a duty to await a vacant position to arise, he is incorrect. A finite leave of absence may be a reasonable accommodation to allow an employee time to recover, but FEHA does not require the employer to provide an indefinite leave of absence to await possible future vacancies." (*Nealy, supra,* 234 Cal.App.4th at pp. 377−378.)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, § 833

Chin et al., California Practice Guide: Employment Litigation, Ch. 9-C, *California Fair Employment And Housing Act (FEHA),* ¶¶ 9:2250–9:2285, 9:2345–9:2347 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, § 2.79

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws,* §§ 41.32[2][c], 41.51[3] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination,* §§ 115.22, 115.35, 115.92 (Matthew Bender)

California Civil Practice: Employment Litigation § 2:50 (Thomson Reuters)

2570. Age Discrimination—Disparate Treatment—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] wrongfully discriminated against [him/her] because of [his/her] age. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was [an employer/[***other covered entity***]];**

2. **That [***name of plaintiff***] [was an employee of [***name of defendant***]/applied to [***name of defendant***] for a job/[***describe other covered relationship to defendant***]];**

3. **[That [***name of defendant***] [discharged/refused to hire/[***other adverse employment action***]] [***name of plaintiff***];]**

   [or]

   [That [*name of defendant***] subjected [***name of plaintiff***] to an adverse employment action;]**

   [or]

   [That [*name of plaintiff***] was constructively discharged;]**

4. **That [***name of plaintiff***] was age 40 or older at the time of the [discharge/[***other adverse employment action***]];**

5. **That [***name of plaintiff***]'s age was a substantial motivating reason for [***name of defendant***]'s [decision to [discharge/refuse to hire/[***other adverse employment action***]] [***name of plaintiff***]/conduct];**

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

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

New June 2011; Revised June 2012, June 2013

Directions for Use

Read the first option for element 3 if there is no dispute as to whether the employer's acts constituted an adverse employment action. Read the second option and also give CACI No. 2509, *"Adverse Employment Action" Explained,* if whether there was an adverse employment action is a question of fact for the jury. If constructive discharge is alleged, give the third option for element 3 and also give CACI

No. 2510, *"Constructive Discharge" Explained*. Select "conduct" in element 5 if the either the second or third option is included for element 3.

Note that there are two causation elements. There must be a causal link between the discriminatory animus based on age and the adverse action (see element 5), and there must be a causal link between the adverse action and the damage (see element 7). (See *Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal.App.4th 686, 713 [81 Cal.Rptr.3d 406].)

Element 5 requires that age discrimination be a substantial motivating reason for the adverse action. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; see also CACI No. 2507, *"Substantial Motivating Reason" Explained*.)

Under the *McDonnell Douglas* (*McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 [93 S.Ct. 1817, 36 L.Ed.2d 668]) process for allocating burdens of proof and producing evidence, which is used in California for disparate-treatment cases under FEHA, the employee must first present a prima facie case of discrimination. The burden then shifts to the employer to produce evidence of a nondiscriminatory reason for the adverse action. At that point, the burden shifts back to the employee to show that the employer's stated reason was in fact a pretext for a discriminatory act.

Whether or not the employee has met his or her prima facie burden, and whether or not the employer has rebutted the employee's prima facie showing, are questions of law for the trial court, not questions of fact for the jury. (See *Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 201 [48 Cal.Rptr.2d 448].) In other words, by the time that the case is submitted to the jury, the plaintiff has already established his or her prima facie case, and the employer has already proffered a legitimate, nondiscriminatory reason for the adverse employment decision. The *McDonnell Douglas* shifting burden drops from the case. The jury is left to decide which evidence it finds more convincing, that of the employer's discriminatory intent or that of the employer's age-neutral reasons for the employment decision. (See *Muzquiz v. City of Emeryville* (2000) 79 Cal.App.4th 1106, 1118, fn. 5 [94 Cal.Rptr.2d 579]).

Under FEHA, age-discrimination cases require the employee to show that his or her job performance was satisfactory at the time of the adverse employment action as a part of his or her prima facie case (see *Sandell v. Taylor-Listug, Inc.* (2010) 188 Cal.App.4th 297, 321 [115 Cal.Rptr.3d 453]), even though it is the employer's burden to produce evidence of a nondiscriminatory reason for the action. Poor job performance is the most common nondiscriminatory reason that an employer advances for the action. Even though satisfactory job performance may be an element of the employee's prima facie case, it is not an element that the employee must prove to the trier of fact. Under element 5 and CACI No. 2507, the burden remains with the employee to ultimately prove that age discrimination was a substantial motivating reason for the action. (See *Muzquiz, supra*, 79 Cal.App.4th at p. 1119.)

See also the Sources and Authority to CACI No. 2500, *Disparate Treatment—Essential Factual Elements.*

Sources and Authority

- Age Discrimination Prohibited Under Fair Employment and Housing Act. Government Code

section 12940(a).

- "Age" Defined. Government Code section 12926(b).

- Disparate Treatment; Layoffs Based on Salary. Government Code section 12941.

- "In order to make out a prima facie case of age discrimination under FEHA, a plaintiff must present evidence that the plaintiff (1) is over the age of 40; (2) suffered an adverse employment action; (3) was performing satisfactorily at the time of the adverse action; and (4) suffered the adverse action under circumstances that give rise to an inference of unlawful discrimination, i.e., evidence that the plaintiff was replaced by someone significantly younger than the plaintiff." (*Sandell, supra,* 188 Cal.App.4th at p. 321.)

- "In other words, '[b]y the time that the case is submitted to the jury, . . . the plaintiff has already established his or her prima facie case, and the employer has already proffered a legitimate, nondiscriminatory reason for the adverse employment decision, leaving only the issue of the employer's discriminatory intent for resolution by the trier of fact. Otherwise, the case would have been disposed of as a matter of law for the trial court. That is to say, if the plaintiff cannot make out a prima facie case, the employer wins as a matter of law. If the employer cannot articulate a nondiscriminatory reason for the adverse employment decision, the plaintiff wins as a matter of law. In those instances, no fact-finding is required, and the case will never reach a jury. [¶] In short, if and when the case is submitted to the jury, the construct of the shifting burden "drops from the case," and the jury is left to decide which evidence it finds more convincing, that of the employer's discriminatory intent, or that of the employer's race or age-neutral reasons for the employment decision.' " (*Muzquiz, supra,* 79 Cal.App.4th at p. 1118, fn. 5.)

- "Because the only issue properly before the trier of fact was whether the [defendant]'s adverse employment decision was motivated by discrimination on the basis of age, the shifting burdens of proof regarding appellant's prima facie case and the issue of legitimate nondiscriminatory grounds were actually irrelevant." (*Muzquiz, supra,* 79 Cal.App.4th at p. 1119.)

- "An employee alleging age discrimination must ultimately prove that the adverse employment action taken was based on his or her age. Since direct evidence of such motivation is seldom available, the courts use a system of shifting burdens as an aid to the presentation and resolution of age discrimination cases. That system necessarily establishes the basic framework for reviewing motions for summary judgment in such cases." (*Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1002 [67 Cal.Rptr.2d 483], internal citations omitted.)

- "Requiring the plaintiff to show that discrimination was a *substantial* motivating factor, rather than simply *a* motivating factor, more effectively ensures that liability will not be imposed based on evidence of mere thoughts or passing statements unrelated to the disputed employment decision. At the same time, … proof that discrimination was a *substantial* factor in an employment decision triggers the deterrent purpose of the FEHA and thus exposes the employer to liability, even if other factors would have led the employer to make the same decision at the time." (*Harris, supra,* 56 Cal.4th at p. 232, original italics.)

- "We do not suggest that discrimination must be alone sufficient to bring about an employment decision in order to constitute a substantial motivating factor. But it is important to recognize that discrimination can be serious, consequential, and even by itself determinative of an employment decision without also being a "but for" cause." (*Harris, supra,* 56 Cal.4th at p. 229.)

- "While we agree that a plaintiff must demonstrate some basic level of competence at his or her job in order to meet the requirements of a prima facie showing, the burden-shifting framework established in *McDonnell Douglas* compels the conclusion that any measurement of such competency should, to the extent possible, be based on objective, rather than subjective, criteria. A plaintiff's burden in making a prima facie case of discrimination is not intended to be 'onerous.' Rather, the prima facie burden exists in order to weed out patently unmeritorious claims." (*Sandell, supra,* 188 Cal.App.4th at p. 322, internal citations omitted.)

- "A discharge is not 'on the ground of age' within the meaning of this prohibition unless age is a 'motivating factor' in the decision. Thus, ' "an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision." ' '[A]n employee claiming discrimination must offer substantial evidence that the employer's stated nondiscriminatory reason for the adverse action was untrue or pretextual, or evidence the employer acted with a discriminatory animus, or a combination of the two, such that a reasonable trier of fact could conclude the employer engaged in intentional discrimination.' " (*West v. Bechtel Corp.* (2002) 96 Cal.App.4th 966, 978 [117 Cal.Rptr.2d 647].)

- "[D]ownsizing alone is not necessarily a sufficient explanation, under the FEHA, for the consequent dismissal of an age-protected worker. An employer's freedom to consolidate or reduce its work force, and to eliminate positions in the process, does not mean it may 'use the occasion as a convenient opportunity to get rid of its [older] workers.' " (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 358 [100 Cal.Rptr.2d 352, 8 P.3d 1089].)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 932–935

Chin et al., California Practice Guide: Employment Litigation, Ch. 8-B, *California Fair Employment and Housing Act*, ¶¶ 8:740, 8:800 et seq. (The Rutter Group)

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws,* § 41.31 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.22 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline,* § 100.43 (Matthew Bender)

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.)

- "[D]efendants cannot be held liable for a constitutional violation under 42 U.S.C. § 1983 unless they were integral participants in the unlawful conduct. We have held that defendants can be liable for 'integral participation' even if the actions of each defendant do not 'rise to the level of a constitutional violation.' " (*Keates v. Koile* (9th Cir. 2018) 883 F.3d 1228, 1241, internal citation 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.)

- " 'While generally not applicable to private parties, a § 1983 action can lie against a private party when "he is a willful participant in joint action with the State or its agents." ' " (*Julian v. Mission Community Hospital* (2017) 11 Cal.App.5th 360, 396 [218 Cal.Rptr.3d 38]".)

- "The Ninth Circuit has articulated four tests for determining whether a private person acted under

color of law: (1) the public function test, (2) the joint action test, (3) the government nexus test, and (4) the government coercion or compulsion test. 'Satisfaction of any one test is sufficient to find state action, so long as no countervailing factor exists.' ' "[N]o one fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient, for there may be some countervailing reason against attributing activity to the government." ' " (*Julian, supra,* 11 Cal.App.5th at p. 396.)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 888, 892 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

3005. Supervisor Liability for Acts of Subordinates (42 U.S.C. § 1983)

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

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

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

3. **That [***name of supervisor defendant***] disregarded that risk by [expressly approving/impliedly approving/ [or] failing to take adequate action to prevent] the wrongful conduct; and**

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

New April 2007; Renumbered from CACI No. 3013 December 2010; Revised December 2011; Renumbered from CACI No. 3017 December 2012; Revised June 2013

Directions for Use

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

For certain constitutional violations, deliberate indifference based on knowledge and acquiescence is insufficient to establish the supervisor's liability. The supervisor must act with the purpose necessary to establish the underlying violation. (*Ashcroft v. Iqbal* (2009) 556 U.S. 662, 676–677 [129 S.Ct. 1937, 173 L.Ed.2d 868] [for claim of invidious discrimination in violation of the First and Fifth Amendments, plaintiff must plead and prove that defendant acted with discriminatory purpose].) In such a case, element 3 requires not only express approval, but also discriminatory purpose. The United States Supreme Court has found constitutional torts to require specific intent in three situations: (1) due process claims for injuries caused by a high-speed chase (See *Cnty. of Sacramento v. Lewis* (1998) 523 U.S. 833, 836 [118 S.Ct. 1708, 140 L.Ed.2d 1043].); (2) Eighth Amendment claims for injuries suffered during the response to a prison disturbance (See *Whitley v. Albers* (1986) 475 U.S. 312, 320−321 [106 S.Ct. 1078, 89 L.Ed.2d 251].); and (3) invidious discrimination under the equal protection clause and the First Amendment free exercise clause. (See *Ashcroft v. Iqbal*, *supra*, 556 U.S. at pp. 676−677.)

The Ninth Circuit has held that deliberate indifference based on knowledge and acquiescence is still sufficient to support supervisor liability if the underlying constitutional violation does not require purposeful discrimination. (*OSU Student Alliance v. Ray* (9th Cir. 2012) 699 F.3d 1053, 1070−1075 [knowing acquiescence is sufficient to establish supervisor liability for free-speech violations because intent to discriminate is not required]; see also *Starr v. Baca* (9th Cir. 2011) 652 F.3d 1202, 1207 [same for 8th Amendment violation for cruel and unusual punishment].)

Sources and Authority

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

- "[W]hen a supervisor is found liable based on deliberate indifference, the supervisor is being held liable for his or her own culpable action or inaction, not held vicariously liable for the culpable action or inaction of his or her subordinates." (*Starr, supra,* 652 F.3d at p. 1207.)

- ~~"[A] plaintiff may state a claim against a supervisor for deliberate indifference based upon the supervisor's knowledge of and acquiescence in unconstitutional conduct by his or her subordinates." (*Starr, supra*, 652 F.3d at p. 1207.)~~

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

- "A supervisor is liable under § 1983 for a subordinate's constitutional violations 'if the supervisor participated in or directed the violations, or knew of the violations and failed to act to prevent them.' [Defendants] testified that they were mere observers who stayed at the end of the [plaintiffs'] driveway. But based on the [plaintiffs'] version of the facts, which we must accept as true in this appeal, we draw the inference that [defendants] tacitly endorsed the other Sheriff's officers' actions by failing to intervene. … On this appeal we do not weigh the evidence to determine whether [defendants'] stated reasons for not intervening are plausible." (*Maxwell v. County of San Diego* (9th Cir. 2013) 708 F.3d 1075, 1086, internal citation omitted.)

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

- "[T]he claim that a supervisory official knew of unconstitutional conditions and 'culpable actions of his subordinates' but failed to act amounts to 'acquiescence in the unconstitutional conduct of his subordinates' and is 'sufficient to state a claim of supervisory liability.' " (*Keates v. Koile* (9th Cir. 2018) 883 F.3d 1228, 1243.)

- " '[A] plaintiff must show the supervisor breached a duty to plaintiff which was the proximate cause of the injury. The law clearly allows actions against supervisors under section 1983 as long as a sufficient causal connection is present and the plaintiff was deprived under color of law of a federally secured right.' " (*Starr, supra,* 652 F.3d at p. 1207, internal citation omitted.)

- "Respondent … argues that, under a theory of 'supervisory liability,' petitioners can be liable for 'knowledge and acquiescence in their subordinates' use of discriminatory criteria to make classification decisions among detainees.' That is to say, respondent believes a supervisor's mere knowledge of his subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution. We reject this argument. Respondent's conception of 'supervisory liability' is inconsistent with his accurate stipulation that petitioners may not be held accountable for the misdeeds of their agents. In a § 1983 suit or a *Bivens* action—where masters do not answer for the torts of their servants—the term 'supervisory liability' is a misnomer. Absent vicarious liability, each Government official, his or her title notwithstanding, is only liable for his or her own misconduct. In the context of determining whether there is a violation of a clearly established right to overcome qualified immunity, purpose rather than knowledge is required to impose *Bivens* liability on the subordinate for unconstitutional discrimination; the same holds true for an official charged with violations arising from his or her superintendent responsibilities." (*Ashcroft v. Iqbal, supra,* 556 U.S. at p. 677, internal citations omitted.)

- "The factors necessary to establish a *Bivens* violation will vary with the constitutional provision at issue. Where the claim is invidious discrimination in contravention of the First and Fifth Amendments, our decisions make clear that the plaintiff must plead and prove that the defendant acted with discriminatory purpose. Under extant precedent purposeful discrimination requires more than 'intent as volition or intent as awareness of consequences.' It instead involves a decisionmaker's undertaking a course of action ''because of," not merely "in spite of," [the action's] adverse effects upon an identifiable group.' " (*Ashcroft v. Iqbal, supra,* 556 U.S. at pp. 676–677, internal citations omitted.)

- "*Iqbal* … holds that a plaintiff does not state invidious racial discrimination claims against supervisory defendants by pleading that the supervisors knowingly acquiesced in discrimination perpetrated by subordinates, but this holding was based on the elements of invidious discrimination in particular, not on some blanket requirement that applies equally to all constitutional tort claims. *Iqbal* makes crystal clear that constitutional tort claims against supervisory defendants turn on the requirements of the particular claim—and, more specifically, on the state of mind required by the particular claim—not on a generally applicable concept of supervisory liability. 'The factors necessary to establish a *Bivens* violation will vary with the constitutional provision at issue.' Allegations that the [defendants] knowingly acquiesced in their subordinates' discrimination did not suffice to state invidious racial discrimination claims against them, because such claims require specific intent—something that knowing acquiescence does not establish. On the other hand, because Eighth Amendment claims for cruel and unusual punishment generally require only deliberate indifference (not specific intent), a Sheriff is liable for prisoner abuse perpetrated by his subordinates if he knowingly turns a blind eye to the abuse. The Sheriff need not act with the purpose that the prisoner be abused. Put simply, constitutional tort liability after *Iqbal* depends primarily on the requisite mental state for the violation alleged."

(*OSU Student Alliance, supra*, 699 F.3d at p. 1071, internal citations omitted.)

- " '[S]upervisory liability exists even without overt personal participation in the offensive act if supervisory officials implement a policy so deficient that the policy "itself is a repudiation of constitutional rights" and is the "moving force of a constitutional violation." ' " (*Crowley v. Bannister* (9th Cir. 2013) 734 F.3d 967, 977.)

- "When a supervisory official advances or manages a policy that instructs its adherents to violate constitutional rights, then the official specifically intends for such violations to occur. Claims against such supervisory officials, therefore, do not fail on the state of mind requirement, be it intent, knowledge, or deliberate indifference. *Iqbal* itself supports this holding. There, the Court rejected the invidious discrimination claims against [supervisory defendants] because the complaint failed to show that those defendants advanced a policy of purposeful discrimination (as opposed to a policy geared simply toward detaining individuals with a 'suspected link to the [terrorist] attacks'), not because it found that the complaint had to allege that the supervisors intended to discriminate against [plaintiff] in particular. Advancing a policy that requires subordinates to commit constitutional violations is always enough for § 1983 liability, no matter what the required mental state, so long as the policy proximately causes the harm—that is, so long as the plaintiff's constitutional injury in fact occurs pursuant to the policy." (*OSU Student Alliance, supra*, 699 F.3d at p. 1076.)

Secondary Sources

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

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

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

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

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

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 instruction 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.*

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.)

- "With respect to the possibility of less intrusive force, officers need not employ the least intrusive means available[,] so long as they act within a range of reasonable conduct." (*Estate of Lopez v. Gelhaus* (9th Cir. 2017) 871 F.3d 998, 1006.)

- "Courts 'also consider, under the totality of the circumstances, the quantum of force used to arrest the plaintiff, the availability of alternative methods of capturing or detaining the suspect, and the plaintiff's mental and emotional state.' " (*Brooks v. Clark Cnty.* (9th Cir. 2016) 828 F.3d 910, 920.)

- "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.)

- "Because there are no genuine issues of material fact and 'the relevant set of facts' has been determined, the reasonableness of the use of force is 'a pure question of law.' " (*Lowry v. City of San Diego* (9th Cir. 2017) 858 F.3d 1248, 1256 (en banc).)

- "In assessing the objective reasonableness of a particular use of force, we consider: (1) 'the severity of the intrusion on the individual's Fourth Amendment rights by evaluating the type and amount of force inflicted,' (2) 'the government's interest in the use of force,' and (3) the balance between 'the gravity of the intrusion on the individual' and 'the government's need for that intrusion.' " (*Lowry,*

supra, 858 F.3d at p. 1256.)

- "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 district court found that [plaintiff] stated a claim for excessive use of force, but that governmental interests in officer safety, investigating a possible crime, and controlling an interaction with a potential domestic abuser outweighed the intrusion upon [plaintiff]'s rights. In reaching this conclusion, the court improperly 'weigh[ed] conflicting evidence with respect to . . . disputed material fact[s].' " (*Bonivert v. City of Clarkston* (9th Cir. 2018) 883 F.3d 865, 880.)

- "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.)

- "Deadly force is permissible only 'if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm.' " (*A. K. H. v. City of Tustin* (9th Cir. 2016) 837 F.3d 1005, 1011.)

- "[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.)

- " '[I]f police officers are justified in firing at a suspect in order to end a severe threat to public safety,

the officers need not stop shooting until the threat has ended.' But terminating a threat doesn't necessarily mean terminating the suspect. If the suspect is on the ground and appears wounded, he may no longer pose a threat; a reasonable officer would reassess the situation rather than continue shooting." (*Zion v. Cty. of Orange* (9th Cir. 2017) 874 F.3d 1072, 1076, internal citation 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.)

- "An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional." (*Fetters v. County of Los Angeles* (2016) 243 Cal.App.4th 825, 838 [196 Cal.Rptr.3d 848].)

- "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.)

- “This Court has ‘refused to create two tracks of excessive force analysis, one for the mentally ill and one for serious criminals.’ The Court has, however, ‘found that even when an emotionally disturbed individual is acting out and inviting officers to use deadly force to subdue him, the governmental interest in using such force is diminished by the fact that the officers are confronted . . . with a mentally ill individual.’ A reasonable jury could conclude, based upon the information available to [defendant officer] at the time, that there were sufficient indications of mental illness to diminish the governmental interest in using deadly force.” (*Hughes v. Kisela* (9th Cir. 2016) 841 F.3d 1081, 1086.)

- “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.)

- "*Heck* requires the reviewing court to answer three questions: (1) Was there an underlying conviction or sentence relating to the section 1983 claim? (2) Would a 'judgment in favor of the plaintiff [in the section 1983 action] "necessarily imply" … the invalidity of the prior conviction or sentence?' (3) 'If so, was the prior conviction or sentence already invalidated or otherwise favorably terminated?' " (*Fetters, supra*, 243 Cal.App.4th at p. 834.)

- "The *Heck* inquiry does not require a court to consider whether the section 1983 claim would establish beyond all doubt the invalidity of the criminal outcome; rather, a court need only 'consider whether a judgment in favor of the plaintiff would necessarily *imply* the invalidity of his conviction or sentence.' " (*Fetters, supra,* 243 Cal.App.4th at p. 841, original italics.)

- "[A] dismissal under section 1203.4 does not invalidate a conviction for purposes of removing the *Heck* bar preventing a plaintiff from bringing a civil action." (*Baranchik v. Fizulich* (2017) 10 Cal.App.5th 1210, 1224 [217 Cal.Rptr.3d 423].)

- "[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.)

- "Plaintiffs contend that the use of force is unlawful because the arrest itself is unlawful. But that is not so. We have expressly held that claims for false arrest and excessive force are analytically distinct." (*Sharp v. Cty. of Orange* (9th Cir. 2017) 871 F.3d 901, 916.)

- "[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, 1027, original italics.)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 888, 892 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)

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.)

- "[T]here is no talismanic distinction, for Fourth Amendment purposes, between a warrantless 'entry' and a warrantless 'search.' 'The two intrusions share this fundamental characteristic: the breach of the entrance to an individual's home.' " (*Bonivert v. City of Clarkston* (9th Cir. 2018) 883 F.3d 865, 874.)

- " '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.)

- " '[I]t is a "basic principle of Fourth Amendment law" ' that warrantless searches of the home or the curtilage surrounding the home 'are presumptively unreasonable.' " (*Bonivert, supra*, 883 F.3d at p. 873.)

- "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)

3025. Affirmative Defense—Consent to Search

[*Name of defendant***] claims that the search was reasonable and that a search warrant was not required because [***name of plaintiff/third person***] consented to the search. To succeed, [***name of defendant***] must prove both of the following:**

1. **That [[***name of plaintiff***]/[***name of third person***], who controlled or reasonably appeared to have control of the area,] knowingly and voluntarily consented to the search; and**

2. **That the search was reasonable under all of the circumstances.**

[[*Name of third person***]'s consent is insufficient if [***name of plaintiff***] was physically present and expressly refused to consent to the search.]**

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(s)***].**

New September 2003; Revised April 2009; Renumbered from CACI No. 3005 December 2012

Directions for Use

Give the optional paragraph after element 2 if the defendant relied on the consent of someone other than the plaintiff to initiate the search. (See *Georgia v. Randolph* (2006) 547 U.S. 103, 106 [126 S.Ct. 1515, 164 L.Ed.2d 208].)

Sources and Authority

- "The Fourth Amendment generally prohibits the warrantless entry of a person's home, whether to make an arrest or to search for specific objects. The prohibition does not apply, however, to situations in which voluntary consent has been obtained, either from the individual whose property is searched or from a third party who possesses common authority over the premises." (*Illinois v. Rodriguez* (1990) 497 U.S. 177, 181 [110 S.Ct. 2793, 111 L.Ed.2d 148], internal citations omitted.)

- " '[C]ommon authority' rests 'on mutual use of the property by persons generally having joint access or control for most purposes ... .' The burden of establishing that common authority rests upon the

State." (*Illinois v. Rodriguez, supra,* 497 U.S. at p. 181, internal citation omitted.)

- "The Fourth Amendment recognizes a valid warrantless entry and search of premises when police obtain the voluntary consent of an occupant who shares, or is reasonably believed to share, authority over the area in common with a co-occupant who later objects to the use of evidence so obtained. The question here is whether such an evidentiary seizure is likewise lawful with the permission of one occupant when the other, who later seeks to suppress the evidence, is present at the scene and expressly refuses to consent. We hold that, in the circumstances here at issue, a physically present co-occupant's stated refusal to permit entry prevails, rendering the warrantless search unreasonable and invalid as to him." (*Georgia, supra,* 547 U.S. at p. 106, internal citations omitted.)

- "Where consent is relied upon to justify the lawfulness of a search, the government 'has the burden of proving that the consent was, in fact, freely and voluntarily given.' 'The issue of whether or not consent to search was freely and voluntarily given is one of fact to be determined on the basis of the totality of the circumstances.' " (*U.S. v. Henry* (9th Cir. 1980) 615 F.2d 1223, 1230, internal citations omitted.)

- "Whether consent was voluntarily given 'is to be determined from the totality of all the circumstances.' We consider the following factors to assess whether the consent was voluntary: (1) whether the person was in custody; (2) whether the officers had their guns drawn; (3) whether a Miranda warning had been given; (4) whether the person was told that he had the right not to consent; and (5) whether the person was told that a search warrant could be obtained. Although no one factor is determinative in the equation, 'many of this court's decisions upholding consent as voluntary are supported by at least several of the factors.' " (*U.S. v. Reid* (9th Cir. 2000) 226 F.3d 1020, 1026–1027, internal citations omitted.)

- "According to [defendant], 'express refusal means verbal refusal.' We disagree, as this interpretation finds no support in either common sense or the case law." (*Bonivert v. City of Clarkston* (9th Cir. 2018) 883 F.3d 865, 875.)

- ~~" '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.)~~

- ~~"The Fourth Amendment proscribes only 'unreasonable' searches and seizures. However, the reasonableness of a search or a seizure depends 'not only on *when* it is made, but also on *how* it is carried out.' In other words, even when supported by probable cause, a search or seizure may be invalid if carried out in an *unreasonable* fashion. [¶] Whether an otherwise valid search or seizure was carried out in an unreasonable manner is determined under an objective test, on the basis of the facts and circumstances confronting the officers." (*Franklin v. Foxworth* (9th Cir. 1994) 31 F.3d 873, 875, original italics, internal citation 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)

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.)

- "When the domestic violence victim is still in the home, circumstances may justify an entry pursuant

to the exigency doctrine." (*Bonivert v. City of Clarkston* (9th Cir. 2018) 883 F.3d 865, 878.)

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)

3027. Affirmative Defense—Emergency

[*Name of defendant***] claims that a search warrant was not required. To succeed on this defense, [***name of defendant***] must prove that a peace officer, under the circumstances, would have reasonably believed that violence was imminent and that there was an immediate need to protect [[himself/herself]/ [or] another person] from serious harm.**

New December 2013

Directions for Use

The emergency defense is similar to the exigent circumstances defense. (See CACI No. 3026, *Affirmative Defense—Exigent Circumstances*.) Emergency requires imminent violence and a need to protect from harm. In contrast, exigent circumstances is broader, reaching such things as a need to prevent escape or the destruction of evidence. (See *Hopkins v. Bonvicino* (9th Cir. 2009) 573 F.3d 752, 763.)

Sources and Authority

- " '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, supra,* 573 F.3d at p. 763, original italics, internal citations omitted.)

- "We previously have recognized that officers acting in their community caretaking capacities and responding to a perceived emergency may conduct certain searches without a warrant or probable cause. To determine whether the emergency exception applies to a particular warrantless search, we examine whether: '(1) considering the totality of the circumstances, law enforcement had an objectively reasonable basis for concluding that there was an immediate need to protect others or themselves from serious harm; and (2) the search's scope and manner were reasonable to meet the need.' " (*Ames v. King Cnty.* (9th Cir. 2017) 846 F.3d 340, 350.)

- "The testimony that a reasonable officer would have perceived an immediate threat to his safety is, at a minimum, contradicted by certain portions of the record. The facts matter, and here, there are triable issues of fact as to whether 'violence was imminent,' and whether [defendant]'s warrantless entry was justified under the emergency exception." (*Sandoval v. Las Vegas Metro. Police Dep't* (9th Cir. 2014) 756 F.3d 1154, 1165, internal citation omitted.)

- "In sum, reasonable police officers in petitioners' position could have come to the conclusion that the Fourth Amendment permitted them to enter the … residence if there was an objectively reasonable basis for fearing that violence was imminent." (*Ryburn v. Huff* (2012) 565 U.S. 469, 477 [132 S.Ct. 987, 181 L.Ed.2d 966].)

- "[W]e have refused to hold that 'domestic abuse cases create a per se' emergency justifying warrantless entry. [¶] Indeed, all of our decisions involving a police response to reports of domestic violence have required an objectively reasonable basis for believing that an *actual or imminent injury* was unfolding in the place to be entered." (*Bonivert v. City of Clarkston* (9th Cir. 2018) 883 F.3d 865, 877, original italics, internal citations omitted.)

- "[O]fficer safety may also fall under the emergency rubric." (*Sandoval, supra*, 756 F.3d at p. 1163.)

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)

3041. Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Medical Care (42 U.S.C. § 1983)

[*Name of plaintiff***] claims that [***name of defendant***] provided [him/her] with inadequate medical care in violation of [his/her] constitutional rights. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] had a serious medical need;**

2. **That [***name of defendant***] knew that [***name of plaintiff***] faced a substantial risk of serious harm if [his/her] medical need went untreated;**

3. **That [***name of defendant***] consciously disregarded that risk by not taking reasonable steps to treat [***name of plaintiff***]'s medical need;**

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

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.**

A serious medical need exists if the failure to treat a prisoner's condition could result in further significant injury or the unnecessary and pointless infliction of pain.

Neither medical negligence alone, nor a difference of opinion between medical personnel or between doctor and patient, is enough to establish a violation of [*name of plaintiff***]'s constitutional rights.**
[In determining whether [*name of defendant***] consciously disregarded a substantial risk, you should consider the personnel, financial, and other resources available to [him/her] or those that [he/she] could reasonably have obtained. [***Name of defendant***] is not responsible for services that [he/she] could not provide or cause to be provided because the necessary personnel, financial, and other resources were not available or could not be reasonably obtained.]**

New September 2003; Revised December 2010; Renumbered from CACI No. 3012 December 2012; Revised June 2014, December 2014, June 2015

Directions for Use

Give this instruction in a case involving the deprivation of medical care to a prisoner. For an instruction on the creation of a substantial risk of serious harm, see CACI No. 3040, *Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Substantial Risk of Serious Harm*. For an instruction involving the deprivation of necessities, see CACI No. 3043, *Violation of Prisoner's Federal Civil Rights—Eighth*

Amendment—Deprivation of Necessities.

In prison-conditions cases, the inmate must show that the defendant was deliberately indifferent to his or her health or safety. In a medical-needs case, deliberate indifference requires that the prison officials have known of and disregarded an excessive risk to the inmate's health or safety. Negligence is not enough. (*Farmer v. Brennan* (1994) 511 U.S. 825, 834−837 [114 S.Ct. 1970, 128 L.Ed.2d 811].) Elements 2 and 3 express deliberate indifference.

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 Ninth Circuit has held that in considering whether an individual prison medical provider was deliberately indifferent, the jury should be instructed to consider the economic resources made available to the prison health care system. (See *Peralta v. Dillard* (9th Cir. 2014) 744 F.3d 1076, 1084 [*en banc*].) Although this holding is not binding on California courts, the last optional paragraph may be given if the defendant has presented evidence of lack of economic resources and the court decides that this defense should be presented to the jury.

Sources and Authority

- Deprivation of Civil Rights. Title 42 United States Code section 1983.

- "[D]eliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain,' proscribed by the Eighth Amendment. This is true whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed. Regardless of how evidenced, deliberate indifference to a prisoner's serious illness or injury states a cause of action under section 1983." (*Estelle v. Gamble* (1976) 429 U.S. 97, 104-105 [97 S.Ct. 285, 50 L.Ed.2d 251], internal citation and footnotes omitted.)

- "Our cases have held that a prison official violates the Eighth Amendment only when two requirements are met. First, the deprivation alleged must be, objectively, 'sufficiently serious.' For a claim ... based on a failure to prevent harm, the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm. The second requirement follows from the principle that 'only the unnecessary and wanton infliction of pain implicates the Eighth Amendment.' To violate the Cruel and Unusual Punishments Clause, a prison official must have a 'sufficiently culpable state of mind.' In prison-conditions cases that state of mind is one of 'deliberate indifference' to inmate health or safety ... ." (*Farmer, supra*, 511 U.S. at p. 834, internal citations omitted.)

- " 'To set forth a constitutional claim under the Eighth Amendment predicated upon the failure to provide medical treatment, first the plaintiff must show a serious medical need by demonstrating that failure to treat a prisoner's condition could result in further significant injury or the unnecessary and wanton infliction of pain. Second, a plaintiff must show the defendant's response to the need was deliberately indifferent.' The 'deliberate indifference' prong requires '(a) a purposeful act or failure to

respond to a prisoner's pain or possible medical need, and (b) harm caused by the indifference.' 'Indifference may appear when prison officials deny, delay or intentionally interfere with medical treatment, or it may be shown in the way in which prison [officials] provide medical care.' '[T]he indifference to [a prisoner's] medical needs must be substantial. Mere "indifference," "negligence," or "medical malpractice" will not support this [claim].' Even gross negligence is insufficient to establish deliberate indifference to serious medical needs." (*Lemire v. Cal. Dep't of Corr. & Rehab.* (9th Cir. 2013) 726 F.3d 1062, 1081−1082, internal citations omitted.)

- "Indications that a plaintiff has a serious medical need include '[t]he existence of an injury that a reasonable doctor or patient would find important and worthy of comment or treatment; the presence of a medical condition that significantly affects an individual's daily activities; or the existence of chronic and substantial pain.' " (*Colwell v. Bannister* (9th Cir. 2014) 763 F.3d 1060, 1066.)

- "We hold ... that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." (*Farmer, supra,* 511 U.S. at p. 837.)

- "The subjective standard of deliberate indifference requires 'more than ordinary lack of due care for the prisoner's interests or safety.' The state of mind for deliberate indifference is subjective recklessness. But the standard is 'less stringent in cases involving a prisoner's medical needs . . . because "the State's responsibility to provide inmates with medical care ordinarily does not conflict with competing administrative concerns." ' " (*Snow v. McDaniel* (9th Cir. 2012) 681 F.3d 978, 985, internal citations omitted.)

- "[D]eliberate indifference 'may appear when prison officials deny, delay or intentionally interfere with medical treatment, or it may be shown by the way in which prison physicians provide medical care.'. … '[A] prisoner need not show his harm was substantial.' " (*Wilhelm v. Rotman* (9th Cir. 2012) 680 F.3d 1113, 1122, internal citation omitted.)

- "[A]llegations that a prison official has ignored the instructions of a prisoner's treating physician are sufficient to state a claim for deliberate indifference." (*Wakefield v. Thompson* (9th Cir. 1999) 177 F.3d 1160, 1165.)

- "[A] complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner." (*Estelle, supra,* 429 U.S. at p. 106.)

- " 'A difference of opinion between a physician and the prisoner—or between medical professionals—concerning what medical care is appropriate does not amount to deliberate indifference.' Rather, '[t]o show deliberate indifference, the plaintiff "must show that the course of treatment the doctors chose was medically unacceptable under the circumstances" and that the defendants "chose this course in conscious disregard of an excessive risk to plaintiff's health." ' " (*Colwell, supra,* 763 F.3d at p. 1068.)

- “It has been recognized ... that inadequate medical treatment may, in some instances, constitute a violation of 42 United States Code section 1983. In *Sturts v. City of Philadelphia,* for example, the plaintiff alleged that defendants acted ‘carelessly, recklessly and negligently’ when they failed to remove sutures from his eye, neck and face. The court concluded that although plaintiff was alleging inadequate medical treatment, he had stated a cause of action under section 1983: ‘... where a prisoner has received some medical attention and the dispute is over the adequacy of the treatment, federal courts are generally reluctant to second guess medical judgments. In some cases, however, the medical attention rendered may be so woefully inadequate as to amount to no treatment at all, thereby rising to the level of a § 1983 claim. ...’” (*Ochoa v. Superior Court* (1985) 39 Cal.3d 159, 176-177 [216 Cal.Rptr. 661, 703 P.2d 1], internal citations omitted.)

- “Because society does not expect that prisoners will have unqualified access to health care, deliberate indifference to medical needs amounts to an Eighth Amendment violation only if those needs are ‘serious.’ ” (*Hudson v. McMillian* (1992) 503 U.S. 1, 9 [112 S.Ct. 995, 117 L.Ed.2d 156], internal citation omitted.)

- “[T]here is a two-pronged test for evaluating a claim for deliberate indifference to a serious medical need: First, the plaintiff must show a serious medical need by demonstrating that failure to treat a prisoner's condition could result in further significant injury or the unnecessary and wanton infliction of pain. Second, the plaintiff must show the defendant's response to the need was deliberately indifferent. This second prong . . . is satisfied by showing (a) a purposeful act or failure to respond to a prisoner's pain or possible medical need and (b) harm caused by the indifference.” (*Akhtar v. Mesa* (9th Cir. 2012) 698 F.3d 1202, 1213.)

- “A prison medical official who fails to provide needed treatment because he lacks the necessary resources can hardly be said to have intended to punish the inmate. The challenged instruction properly advised the jury to consider the resources [defendant] had available in determining whether he was deliberately indifferent.” (*Peralta, supra,* 744 F.3d at p. 1084.)

- “We recognize that prison officials have a ‘better grasp’ of the policies required to operate a correctional facility than either judges or juries. For this reason, in excessive force and conditions of confinement cases, we instruct juries to defer to prison officials' judgments in adopting and executing policies needed to preserve discipline and maintain security. [¶] Such deference is generally absent from serious medical needs cases, however, where deliberate indifference ‘can typically be established or disproved without the necessity of balancing competing institutional concerns for the safety of prison staff or other inmates.’ ” (*Mendiola-Martinez v. Arpaio* (9th Cir. 2016) 836 F.3d 1239, 1254, internal citations omitted.)

- “[T]rial judges in prison medical care cases should not instruct jurors to defer to the adoption and implementation of security-based prison policies, unless a party's presentation of the case draws a plausible connection between a security-based policy or practice and the challenged medical care decision.” (*Chess v. Dovey* (9th Cir. 2015) 790 F.3d 961, 962.)

- “We now turn to the second prong of the inquiry, whether the defendants were deliberately indifferent. This is not a case in which there is a difference of medical opinion about which treatment

is best for a particular patient. Nor is this a case of ordinary medical mistake or negligence. Rather, the evidence is undisputed that [plaintiff] was denied treatment for his monocular blindness solely because of an administrative policy, even in the face of medical recommendations to the contrary. A reasonable jury could find that [plaintiff] was denied surgery, not because it wasn't medically indicated, not because his condition was misdiagnosed, not because the surgery wouldn't have helped him, but because the policy of the [defendant] is to require an inmate to endure reversible blindness in one eye if he can still see out of the other. This is the very definition of deliberate indifference." (*Colwell, supra,* 763 F.3d at p. 1068.)

- "[C]laims for violations of the right to adequate medical care 'brought by pretrial detainees against individual defendants under the Fourteenth Amendment' must be evaluated under an objective deliberate indifference standard. Based thereon, the elements of a pretrial detainee's medical care claim against an individual defendant under the due process clause of the Fourteenth Amendment are: (i) the defendant made an intentional decision with respect to the conditions under which the plaintiff was confined; (ii) those conditions put the plaintiff at substantial risk of suffering serious harm; (iii) the defendant did not take reasonable available measures to abate that risk, even though a reasonable official in the circumstances would have appreciated the high degree of risk involved—making the consequences of the defendant's conduct obvious; and (iv) by not taking such measures, the defendant caused the plaintiff's injuries. 'With respect to the third element, the defendant's conduct must be objectively unreasonable, a test that will necessarily "turn[ ] on the facts and circumstances of each particular case." ' The ' "mere lack of due care by a state official" does not deprive an individual of life, liberty, or property under the Fourteenth Amendment.' Thus, the plaintiff must 'prove more than negligence but less than subjective intent—something akin to reckless disregard.' " (*Gordon v. Cty. of Orange* (9th Cir. 2018) 888 F.3d 1118, 1124–1125, internal citations omitted.)

- "A 'serious' medical need exists if the failure to treat a prisoner's condition could result in further significant injury or the 'unnecessary and wanton infliction of pain.' The 'routine discomfort' that results from incarceration and which is 'part of the penalty that criminal offenders pay for their offenses against society' does not constitute a 'serious' medical need." (*Doty v. County of Lassen* (9th Cir. 1994) 37 F.3d 540, 546, internal citations and footnote omitted.)

- "The Supreme Court has interpreted the phrase 'under "color" of law' to mean 'under "pretense" of law.' A police officer's actions are under pretense of law only if they are 'in some way "related to the performance of his official duties." ' By contrast, an officer who is "'pursuing his own goals and is not in any way subject to control by [his public employer]," ' does not act under color of law, unless he 'purports or pretends' to do so. Officers who engage in confrontations for personal reasons unrelated to law enforcement, and do not 'purport[] or pretend[]' to be officers, do not act under color of law." (*Huffman v. County of Los Angeles* (9th Cir. 1998) 147 F.3d 1054, 1058, internal citations omitted.)

Secondary Sources

3 Witkin & Epstein, California Criminal Law (4th ed. 2012) Punishment, § 244

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 826

Schwarzer, et al., California Practice Guide: Federal Civil Procedure Before Trial, Ch. 2E-10, *Special Jurisdictional Limitations--Eleventh Amendment As Limitation On Actions Against States*, ¶ 2:4923 (The Rutter Group)

3 Civil Rights Actions, Ch. 11, *Deprivation of Rights Under Color of State Law-Prisons*, ¶ 11.09 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 114, *Civil Rights: Prisoners' Rights*, § 114.15 (Matthew Bender)

19A California Points and Authorities, Ch. 196, *Public Entities*, § 196.183 (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.)

- "This requirement 'balance[s], on the one hand, the need to protect children from abuse and neglect and, on the other, the preservation of the essential privacy and liberty interests that families are guaranteed under both the Fourth and Fourteenth Amendments of our Constitution.' " (*Demaree v. Pederson* (9th Cir. 2018) 880 F.3d 1066, 1074.)

- "[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.)

- "Under the Fourth Amendment, government officials are ordinarily required to obtain prior judicial authorization before removing a child from the custody of her parent. However, officials may seize a child without a warrant 'if the information they possess at the time of the seizure is such as provides 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.' " (*Kirkpatrick v. Cnty. of Washoe* (9th Cir. 2016) 843 F.3d 784, 790 (en banc) .)

- "[I]t does not matter whether the warrant could be obtained in hours or days. What matters is whether there is an identifiable risk of serious harm or abuse *during whatever the delay period is*." (*Demaree, supra,* 880 F.3d at p. 1079, original italics.)

- "The parental right secured by the Fourteenth Amendment 'is not reserved for parents with full legal and physical custody.' At the same time, however, '[p]arental rights do not spring full-blown from the biological connection between parent and child.' Judicially enforceable interests arising under the Fourteenth Amendment 'require relationships more enduring,' which reflect some assumption 'of parental responsibility.' It is '[w]hen an unwed father demonstrates a full commitment to the responsibilities of parenthood by coming forward to participate in the rearing of his child,' that 'his interest in personal contact with his child acquires substantial protection under the due process clause.' Until then, a person with only potential parental rights enjoys a liberty interest in the companionship, care, and custody of his children that is 'unambiguously lesser in magnitude.' " (*Kirkpatrick, supra,* 843 F.3d at p. 789.)

- "[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.)

- "An official 'cannot seize children suspected of being abused or neglected unless reasonable avenues of investigation are first pursued.' Further, because the 'scope of the intrusion' must be 'reasonably necessary to avert' a specific injury, the intrusion cannot be longer than necessary to avert the injury." (*Keates v. Koile* (9th Cir. 2018) 883 F.3d 1228, 1237, internal citations omitted.)

- "[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].)

- "Lack of health insurance … does not provide a reasonable cause to believe a child is in imminent danger." (*Keates, supra,* 883 F.3d at p. 1237.)

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)

3052. Use of Fabricated Evidence—Essential Factual Elements (42 U.S.C. § 1983)

[*Name of plaintiff***] claims that [***name of defendant***] deliberately fabricated evidence against [him/her], and that as a result of this evidence being used against [him/her], [he/she] was deprived of [his/her] [***specify right, privilege, or immunity secured by the Constitution, e.g., liberty***] without due process of law. In order to establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] [***specify fabricated evidence, e.g., informed the district attorney that plaintiff's DNA was found at the scene of the crime***];**

2. **That this [***e.g., statement***] was not true;**

3. **That [***name of defendant***] knew that the [***e.g., statement***] was not true; and**

4. **That because of [***name of defendant***]'s conduct, [***name of plaintiff***] was deprived of [his/her] [***e.g., liberty***].**

To decide whether there was a deprivation of rights because of the fabrication, you must determine what would have happened if the [*e.g., statement***] had not been used against [***name of plaintiff***].**

[Deprivation of liberty does not require that [*name of plaintiff***] have been put in jail. Nor is it necessary that [he/she] prove that [he/she] was wrongly convicted of a crime.]**

New May 2017

Directions for Use

This instruction is for use if the plaintiff claims to have been deprived of a constitutional or legal right based on false evidence. Give also CACI No. 3000, *Violation of Federal Civil Rights—In General—Essential Factual Elements*.

What would have happened had the fabricated evidence not been presented (i.e., causation) is a question of fact. (*Kerkeles v. City of San Jose* (2011) 199 Cal.App.4th 1001, 1013 [132 Cal.Rptr.3d 143].)

Give the last optional paragraph if the alleged fabrication occurred in a criminal case. It would appear that the use of fabricated evidence for prosecution may be a constitutional violation even if the arrest was lawful or objectively reasonable. (See *Kerkeles, supra,* 199 Cal.App.4th at pp. 1010–1012, quoting favorably *Ricciuti v. New York City Transit Authority* (2d Cir. 1997) 124 F.3d 123, 130.)

Sources and Authority

- "Substantive due process protects individuals from arbitrary deprivation of their liberty by government." (*Costanich v. Dep't of Soc. & Health Servs.* (9th Cir. 2010) 627 F.3d 1101, 1110.)

- "[T]here is a clearly established constitutional due process right not to be subjected to criminal

charges on the basis of false evidence that was deliberately fabricated by the government." (*Devereaux v. Abbey* (9th Cir. 2001) 263 F.3d 1070, 1074–1075.)

- "In order to prevail on a judicial deception claim, a plaintiff must prove that '(1) the defendant official deliberately fabricated evidence and (2) the deliberate fabrication caused the plaintiff's deprivation of liberty.' " (*Keates v. Koile* (9th Cir. 2018) 883 F.3d 1228, 1240.)

- " 'No arrest, no matter how lawful or objectively reasonable, gives an arresting officer or his fellow officers license to deliberately manufacture false evidence against an arrestee. To hold that police officers, having lawfully arrested a suspect, are then free to fabricate false confessions at will, would make a mockery of the notion that Americans enjoy the protection of due process of the law and fundamental justice. Like a prosecutor's knowing use of false evidence to obtain a tainted conviction, a police officer's fabrication and forwarding to prosecutors of known false evidence works an unacceptable "corruption of the truth-seeking function of the trial process." [Citations.]' " (*Ricciuti, supra,* 124 F.3d at p. 130.)

- "Even if there was probable cause to arrest plaintiff, we cannot say as a matter of law on the record before us that he would have been subjected to continued prosecution and an unfavorable preliminary hearing without the use of the false lab report and testimony derived from it. These are questions of fact which defendants appear to concede are material to the issue of causation, and which cannot be determined without weighing the evidence presented and conclusions reached at the preliminary hearing. Defendants' statement of undisputed facts does not establish lack of causation as a matter of law." (*Kerkeles, supra,* 199 Cal.App.4th at p. 1013.)

- "There is no authority for defendants' argument that a due process claim cannot be established unless the false evidence is used to *convict* the plaintiff. … [T]he right to be free from criminal *charges*, not necessarily the right to be free from conviction, is a clearly established constitutional right supporting a section 1983 claim." (*Kerkeles, supra,* 199 Cal.App.4th at p. 1010.)

- "There is no sound reason to impose a narrow restriction on a plaintiff's case by requiring incarceration as a sine qua non of a deprivation of a liberty interest." (*Kerkeles, supra,* 199 Cal.App.4th at p. 1011.)

- "[T]here is no such thing as a minor amount of actionable perjury or of false evidence that is somehow permissible. Why? Because government perjury and the knowing use of false evidence are absolutely and obviously irreconcilable with the Fourteenth Amendment's guarantee of Due Process in our courts. Furthermore, the social workers' alleged transgressions were not made under pressing circumstances requiring prompt action, or those providing ambiguous or conflicting guidance. There are no circumstances in a dependency proceeding that would permit government officials to bear false witness against a parent." (*Hardwick v. Cnty. of Orange* (9th Cir. 2017) 844 F.3d 1112, 1119.)

- "[T]o the extent that [plaintiff] has raised a deliberate-fabrication-of-evidence claim, he has not adduced or pointed to any evidence in the record that supports it. For purposes of our analysis, we assume that, in order to support such a claim, [plaintiff] must, at a minimum, point to evidence that supports at least one of the following two propositions: (1) Defendants continued their

investigation of [plaintiff] despite the fact that they knew or should have known that he was innocent; or (2) Defendants used investigative techniques that were so coercive and abusive that they knew or should have known that those techniques would yield false information." (*Devereaux, supra,* 263 F.3d at p. 1076.)

- "[T]he Constitution prohibits the deliberate fabrication of evidence whether or not the officer knows that the person is innocent. The district court erred by granting judgment as a matter of law to Defendants because, in this case involving direct evidence of fabrication, Plaintiff was not required to show that [defendant] actually or constructively knew that he was innocent." (*Spencer v. Peters* (9th Cir. 2017) 857 F.3d 789, 800, internal citations omitted.)

- "The *Devereaux* test envisions an investigator whose unlawful motivation is illustrated by her state of mind regarding the alleged perpetrator's innocence, or one who surreptitiously fabricates evidence by using coercive investigative methods. These are circumstantial methods of proving deliberate falsification. Here, [plaintiff] argues that the record directly reflects [defendant]'s false statements. If, under *Devereaux*, an interviewer who uses coercive interviewing techniques that are known to yield false evidence commits a constitutional violation, then an interviewer who deliberately mischaracterizes witness statements in her investigative report also commits a constitutional violation. Similarly, an investigator who purposefully reports that she has interviewed witnesses, when she has actually only attempted to make contact with them, deliberately fabricates evidence." (*Costanich, supra,* 627 F.3d at p. 1111.)

- "[N]ot all inaccuracies in an investigative report give rise to a constitutional claim. Mere 'careless[ness]' is insufficient, as are mistakes of 'tone.' Errors concerning trivial matters cannot establish causation, a necessary element of any § 1983 claim. And fabricated evidence does not give rise to a claim if the plaintiff cannot 'show the fabrication actually injured her in some way.' " (*Spencer, supra,* 857 F.3d at p. 798, internal citations omitted.)

- "In light of long-standing criminal prohibitions on making deliberately false statements under oath, no social worker could reasonably believe that she was acting lawfully in making deliberately false statements to the juvenile court in connection with the removal of a dependent child from a caregiver." (*Marshall v. County of San Diego* (2015) 238 Cal.App.4th 1095, 1113 [190 Cal.Rptr.3d 97], footnotes omitted.)

- "[P]retrial detention can violate the Fourth Amendment not only when it precedes, but also when it follows, the start of legal process in a criminal case. The Fourth Amendment prohibits government officials from detaining a person in the absence of probable cause. That can happen when the police hold someone without any reason before the formal onset of a criminal proceeding. But it also can occur when legal process itself goes wrong—when, for example, a judge's probable-cause determination is predicated solely on a police officer's false statements. Then, too, a person is confined without constitutionally adequate justification." (*Manuel v. City of Joliet* (2017) __ U.S. __ [137 S.Ct. 911, 918, 197 L.Ed.2d 312], internal citation omitted.)
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Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, § 901 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)

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 Disabilities 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. (*Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 736 [180 Cal.Rptr. 496, 640 P.2d 115]~~*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].)

- "[T]he protection against discrimination afforded by the Unruh Act applies to 'all persons,' and is not reserved for restricted categories of prohibited discrimination." (*Marina Point, Ltd., supra,* 30 Cal.3d at p. 736.)

- "Nevertheless, the enumerated categories, bearing the 'common element' of being 'personal' characteristics of an individual, necessarily confine the Act's reach to forms of discrimination based on characteristics similar to the statutory classifications—such as 'a person's geographical origin, physical attributes, and personal beliefs.' The 'personal characteristics' protected by the Act are not defined by 'immutability, since some are, while others are not [immutable], but that they represent traits, conditions, decisions, or choices fundamental to a person's identity, beliefs and self-definition.' " (*Candelore v. Tinder, Inc.* (2018) 19 Cal.App.5th 1138, 1145 [228 Cal.Rptr.3d 336].)

- "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.)

- "The Act applies not merely in situations where businesses exclude individuals altogether, but also

‘where unequal treatment is the result of a business practice.’ ‘Unequal treatment includes offering price discounts on an arbitrary basis to certain classes of individuals.’ ~~[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~~*Candelore*, *supra*, 19 Cal.App.5th at pp. 1145–1146, 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.)

- "[T]he Unruh Civil Rights Act prohibits arbitrary discrimination in public accommodations with respect to trained service dogs, but not to service-animals-in-training." (*Miller v. Fortune Commercial Corp.* (2017) 15 Cal.App.5th 214, 224 [223 Cal.Rptr.3d 133].)

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)

3062. Gender Price Discrimination—Essential Factual Elements (Civ. Code, § 51.6)

[*Name of plaintiff*] claims that [*name of defendant*] charged [him/her] a higher price for services because of [his/her] gender. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] charged [*name of plaintiff*] more for services of similar or like kind because of [his/her] gender;**

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

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

It is not improper to charge a higher price for services if the price difference is based on the amount of time, difficulty, or cost of providing the services.

New September 2003; Renumbered from CACI No. 3022 December 2012; Revised June 2013, July 2018

Directions for Use

For an instruction on damages under Civil Code section 51.6, see CACI No. 3067, *Unruh Civil Rights Act—Damages*. Note that the jury may award a successful plaintiff up to three times actual damages but not less than $4,000. (Civ. Code, § 52(a)); see also Civ. Code, § 52(h) ["actual damages" means special and general damages].)

It is possible that elements 2 and 3 are not needed if only the statutory minimum $4000 award is sought. With regard to the Unruh Act (Civ. Code, § 51), which is also governed by Civil Code section 52(a), the California Supreme Court has held that a violation is per se injurious, and that section 52 provides for minimum statutory damages for every violation regardless of the plaintiff's actual damages. (See *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 33 [219 Cal.Rptr. 133, 707 P.2d 195].)

The judge may decide the issue of whether the defendant is a business establishment as a matter of law. (*Rotary Club of Duarte v. Bd. of Directors* (1986) 178 Cal.App.3d 1035, 1050 [224 Cal.Rptr. 213].) Special interrogatories may be needed if there are factual issues. This element has been omitted from the instruction because it is unlikely to go to a jury.

Price discrimination based on age has been held to violate the Unruh Act, at least if there is no statute-based policy supporting the differential. (See *Candelore v. Tinder, Inc.* (2018) 19 Cal.App.5th 1138, 1146–1155 [228 Cal.Rptr.3d 336]; but see *Javorsky v. Western Athletic Clubs, Inc.* (2015) 242 Cal.App.4th 1386, 1402–1403 [195 Cal. Rptr. 3d 706].)

Sources and Authority

- Gender Price Discrimination. Civil Code section 51.6.

- "Section 51 by its express language applies only within California. It cannot (with its companion penalty provisions in § 52) be extended into the Hawaiian jurisdiction. A state cannot regulate or proscribe activities conducted in another state or supervise the internal affairs of another state in any way, even though the welfare or health of its citizens may be affected when they travel to that state." (*Archibald v. Cinerama Hawaiian Hotels, Inc.* (1977) 73 Cal.App.3d 152, 159 [140 Cal.Rptr. 599], internal citations omitted, disapproved on other grounds in *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24 [219 Cal.Rptr. 133, 707 P.2d 195].)

- " '[D]iscounts must be "applicable alike to persons of every sex, color, race, [and age, etc.]", instead of being contingent on some arbitrary, class-based generalization.' " (*Candelore, supra*, 19 Cal.App.5th at p. 1154.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 905

11 California Forms of Pleading and Practice, Ch. 116, *Civil Rights: Discrimination in Business Establishments*, § 116.15 (Matthew Bender)

3 California Points and Authorities, Ch. 35, *Civil Rights: Unruh Civil Rights Act*, § 35.44 (Matthew Bender)

3103. Neglect—Essential Factual Elements (Welf. & Inst. Code, § 15610.57)

[*Name of plaintiff***] claims that [he/she/[***name of decedent***]] was neglected by [[***name of individual defendant***]/ [and] [***name of employer defendant***]] in violation of the Elder Abuse and Dependent Adult Civil Protection Act. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [[***name of individual defendant***]/[***name of employer defendant***]'s employee] had a substantial caretaking or custodial relationship with [***name of plaintiff/decedent***], involving ongoing responsibility for [his/her] basic needs, which an able-bodied and fully competent adult would ordinarily be capable of managing without assistance;**

2. **That [***name of plaintiff/decedent***] was [65 years of age or older/a dependent adult] while [he/she] was in [[***name of individual defendant***]'s/[***name of employer defendant***]'s employee's] care or custody;**

3. **That [[***name of individual defendant***]/[***name of employer defendant***]'s employee] failed to use the degree of care that a reasonable person in the same situation would have used in providing for [***name of plaintiff/decedent***]'s basic needs, including [***insert one or more of the following:***]**

   [assisting in personal hygiene or in the provision of food, clothing, or shelter;]

   [providing medical care for physical and mental health needs;]

   [protecting [*name of plaintiff/decedent***] from health and safety hazards;]**

   [preventing malnutrition or dehydration;]

   [*insert other grounds for neglect;***]**

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

5. **That [[***name of individual defendant***]'s/[***name of employer defendant***]'s employee's] conduct was a substantial factor in causing [***name of plaintiff/decedent***]'s harm.**

New September 2003; Revised December 2005, June 2006, October 2008, January 2017

Directions for Use

This instruction may be given in cases brought under the Elder Abuse and Dependent Adult Civil Protection Act (the Act) by the victim of elder neglect, or by the survivors of the victim. If the victim is the plaintiff and is seeking damages for pain and suffering, see CACI No. 3905A, *Physical Pain, Mental Suffering, and Emotional Distress (Noneconomic Damage),* in the Damages series.

If the plaintiff seeks the enhanced remedies of attorney fees and costs, and in the case of a wrongful

death, the decedent's pain and suffering, give CACI No. 3104, *Neglect—Enhanced Remedies Sought,* in addition to this instruction. (See Welf. & Inst. Code, § 15657.)

If the individual responsible for the neglect is a defendant in the case, use "[*name of individual defendant*]" throughout. If only the individual's employer is a defendant, use "[*name of employer defendant*]'s employee" throughout.

If the plaintiff is seeking enhanced remedies against the individual's employer, also give either CACI No. 3102A, *Employer Liability for Enhanced Remedies—Both Individual and Employer Defendants,* or CACI No. 3102B, *Employer Liability for Enhanced Remedies—Employer Defendant Only.* To recover damages against the employer under a theory of vicarious liability, see instructions in the Vicarious Responsibility series (CACI No. 3700 et seq.).

The Act does not extend to cases involving professional negligence against health-care providers as defined by the California Medical Injury Compensation Reform Act of 1975 (MICRA) unless the professional had a substantial caretaking or custodial relationship with the elder or dependent adult patient, involving ongoing responsibility for one or more basic needs. (*Winn v. Pioneer Medical Group, Inc.* (2016) 63 Cal.4th 148, 152 [202 Cal.Rptr.3d 447, 370 P.3d 1011]; see Welf. & Inst. Code, § 15657.2; Civ. Code, § 3333.2(c)(2).)

The instructions in this series are not intended to cover every circumstance in which a plaintiff may bring a cause of action under the Elder Abuse and Dependent Adult Civil Protection Act.

Sources and Authority

- "Elder Abuse" Defined. Welfare and Institutions Code section 15610.07.
- "Dependent Adult" Defined. Welfare and Institutions Code section 15610.23.
- "Elder" Defined. Welfare and Institutions Code section 15610.27.
- "Neglect" Defined. Welfare and Institutions Code section 15610.57.
- Claims for Professional Negligence Excluded. Welfare and Institutions Code section 15657.2.
- "It is true that statutory elder abuse includes 'neglect as defined in Section 15610.57,' which in turn includes negligent failure of an elder custodian 'to provide medical care for [the elder's] physical and mental health needs.' … '[N]eglect' within the meaning of Welfare and Institutions Code section 15610.57 covers an area of misconduct distinct from 'professional negligence.' As used in the Act, neglect refers not to the substandard performance of medical services but, rather, to the 'failure of those responsible for attending to the basic needs and comforts of elderly or dependent adults, regardless of their professional standing, to carry out their custodial obligations.' Thus, the statutory definition of 'neglect' speaks not of the *undertaking* of medical services, but of the failure to *provide* medical care." (*Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 783 [11 Cal.Rptr.3d 222, 86 P.3d 290], original italics, internal citations omitted.)

- "We granted review to consider whether a claim of neglect under the Elder Abuse Act requires a caretaking or custodial relationship—where a person has assumed significant responsibility for attending to one or more of those basic needs of the elder or dependent adult that an able-bodied and fully competent adult would ordinarily be capable of managing without assistance. Taking account of the statutory text, structure, and legislative history of the Elder Abuse Act, we conclude that it does." (*Winn, supra,* 63 Cal.4th at p. 155.)

- "[T]he Act does not apply unless the defendant health care provider had a substantial caretaking or custodial relationship, involving ongoing responsibility for one or more basic needs, with the elder patient. It is the nature of the elder or dependent adult's relationship with the defendant—not the defendant's professional standing—that makes the defendant potentially liable for neglect." (*Winn, supra,* 63 Cal.4th at p. 152.)

- "The Act seems premised on the idea that certain situations place elders and dependent adults at heightened risk of harm, and heightened remedies relative to conventional tort remedies are appropriate as a consequence. Blurring the distinction between neglect under the Act and conduct actionable under ordinary tort remedies—even in the absence of a care or custody relationship—risks undermining the Act's central premise. Accordingly, plaintiffs alleging professional negligence may seek certain tort remedies, though not the heightened remedies available under the Elder Abuse Act." (*Winn, supra,* 63 Cal.4th at p. 159, internal citation omitted.)

- " '[I]t is the defendant's relationship with an elder or a dependent adult—not the defendant's professional standing or expertise—that makes the defendant potentially liable for neglect.' For these reasons, *Winn* better supports the conclusion that the majority of [defendant]'s interactions with decedent were custodial. [Defendant] has cited no authority allowing or even encouraging a court to assess care and custody status on a task-by-task basis, and the *Winn* court's focus on the extent of dependence by a patient on a health care provider rather than on the nature of the particular activities that comprised the patient-provider relationship counsels against adopting such an approach." (*Stewart v. Superior Court* (2017) 16 Cal.App.5th 87, 103-104 [224 Cal.Rptr.3d 219].)

- "The purpose of the [Elder Abuse Act] is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect." (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33 [82 Cal.Rptr.2d 610, 971 P.2d 986].)

- "Neglect includes the failure to assist in personal hygiene, or in the provision of food, clothing, or shelter; the failure to provide medical care for physical and mental health needs; the failure to protect from health and safety hazards; and the failure to prevent malnutrition or dehydration." (*Avila v. Southern California Specialty Care, Inc.* (2018) 20 Cal.App.5th 835, 843 [230 Cal.Rptr.3d 42].)

- "[T]he statutory definition of neglect set forth in the first sentence of Welfare and Institutions Code section 15610.57 is substantially the same as the ordinary definition of neglect." (*Conservatorship of Gregory v. Beverly Enterprises, Inc.* (2000) 80 Cal.App.4th 514, 521 [95 Cal.Rptr.2d 336].)

- "[N]eglect as a form of abuse under the Elder Abuse Act refers 'to the failure of those responsible for attending to the basic needs and comforts of elderly or dependent adults, regardless of their professional standing, to carry out their custodial obligations.' " (*Carter v. Prime Healthcare*

Paradise Valley LLC (2011) 198 Cal.App.4th 396, 404 [129 Cal.Rptr.3d 895].)

- "It seems to us, then, that respecting the patient's right to consent or object to surgery is a necessary component of 'provid[ing] medical care for physical and mental health needs.' Conversely, depriving a patient of the right to consent to surgery could constitute a failure to provide a necessary component of what we think of as 'medical care.' " (*Stewart, supra,* 16 Cal.App.5th at p. 107, internal citation omitted.)

- "[A] violation of staffing regulations here may provide a basis for finding neglect. Such a violation might constitute a negligent failure to exercise the care that a similarly situated reasonable person would exercise, or it might constitute a failure to protect from health and safety hazards … . The former is the definition of neglect under the Act, and the latter is just one nonexclusive example of neglect under the Act." (*Fenimore v. Regents of University of California* (2016) 245 Cal.App.4th 1339, 1348−1349 [200 Cal.Rptr.3d 345].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1686–1688

California Elder Law Litigation (Cont.Ed.Bar 2003) §§ 2.70–2.71

3 Levy et al., California Torts, Ch. 31 *Liability of Physicians and Other Medical Practitioners,* § 31.50[4][d] (Matthew Bender)

1 California Forms of Pleading and Practice, Ch. 5, *Abuse of Minors and Elderly,* § 5.33[3] (Matthew Bender)

3210. Breach of Implied Warranty of Merchantability—Essential Factual Elements

[*Name of plaintiff***] claims that the [***consumer good***] did not have the quality that a buyer would reasonably expect. This is known as "breach of an implied warranty." To establish this claim, [***name of plaintiff***] must prove all of the following:**

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

2. **That at the time of purchase [***name of defendant***] was in the business of [selling [***consumer goods***] to retail buyers/manufacturing [***consumer goods***]]; and**

3. **That the [***consumer good***] [***insert one or more of the following:***]**

   [was not of the same quality as those generally acceptable in the trade;] [or]

   [was not fit for the ordinary purposes for which the goods are used;] [or]

   [was not adequately contained, packaged, and labeled;] [or]

   [did not measure up to the promises or facts stated on the container or label.]

New September 2003; Revised December 2005, December 2014

Directions for Use

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

> That [*name of plaintiff*] took reasonable steps to notify [*name of defendant*] within a reasonable time that the [*consumer good*] did not have the quality that a buyer would reasonably expect;

See also CACI No. 1243, *Notification/Reasonable Time.* Instructions on damages and causation may be necessary in actions brought under the California Uniform Commercial Code.

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

Sources and Authority

- Buyer's Action for Breach of Implied Warranties. Civil Code section 1794(a).

- Damages. Civil Code section 1794(b).
- Implied Warranties. Civil Code section 1791.1(a).
- Duration of Implied Warranties. Civil Code section 1791.1(c).
- Remedies. Civil Code section 1791.1(d).
- Implied Warranty of Merchantability. Civil Code section 1792.
- Damages for Breach; Accepted Goods. California Uniform Commercial Code section 2714.
- "As defined in the Song-Beverly Consumer Warranty Act, 'an implied warranty of merchantability guarantees that 'consumer goods meet each of the following: [¶] (1) Pass without objection in the trade under the contract description. [¶] (2) Are fit for the ordinary purposes for which such goods are used. [¶] (3) Are adequately contained, packaged, and labeled. [¶] (4) Conform to the promises or affirmations of fact made on the container or label.' Unlike an express warranty, 'the implied warranty of merchantability arises by operation of law' and 'provides for a minimum level of quality.' 'The California Uniform Commercial Code separates implied warranties into two categories. An implied warranty that the goods "shall be merchantable" and "fit for the ordinary purpose" is contained in California Uniform Commercial Code section 2314. Whereas an implied warranty that the goods shall be fit for a particular purpose is contained in section 2315. [¶] Thus, there exists in every contract for the sale of goods by a merchant a warranty that the goods shall be merchantable. The core test of merchantability is fitness for the ordinary purpose for which such goods are used. (§ 2314.)' " (*Isip v. Mercedes-Benz USA, LLC* (2007) 155 Cal.App.4th 19, 26–27 [65 Cal.Rptr.3d 695], internal citations omitted.)
- "Here the alleged wrongdoing is a breach of the implied warranty of merchantability imposed by the Song-Beverly Consumer Warranty Act. Under the circumstances of this case, which involves the sale of a used automobile, the element of wrongdoing is established by pleading and proving (1) the plaintiff bought a used automobile from the defendant, (2) at the time of purchase, the defendant was in the business of selling automobiles to retail buyers, (3) the defendant made express warranties with respect to the used automobile, and (4) the automobile was not fit for ordinary purposes for which the goods are used. Generally, '[t]he core test of merchantability is fitness for the ordinary purpose for which such goods are used.' " (*Gutierrez v. Carmax Auto Superstores California* (2018) 19 Cal.App.5th 1234, 1246 [228 Cal.Rptr.3d 699] [citing this instruction], internal citations omitted.)
- "[T]he buyer of consumer goods must plead he or she was injured or damaged by the alleged breach of the implied warranty of merchantability." (*Gutierrez, supra,* 19 Cal.App.5th at p. 1247.)
- "Unless specific disclaimer methods are followed, an implied warranty of merchantability accompanies every retail sale of consumer goods in the state." (*Music Acceptance Corp. v. Lofing* (1995) 32 Cal.App.4th 610, 619 [39 Cal.Rptr.2d 159].)
- The implied warranty of merchantability "does not 'impose a general requirement that goods

precisely fulfill the expectation of the buyer. Instead, it provides for a minimum level of quality.' " (*American Suzuki Motor Corp. v. Superior Court* (1995) 37 Cal.App.4th 1291, 1295–1296 [44 Cal.Rptr.2d 526], internal citation omitted.)

- "The [Song Beverly] act provides for both express and implied warranties, and while under a manufacturer's express warranty the buyer must allow for a reasonable number of repair attempts within 30 days before seeking rescission, that is not the case for the implied warranty of merchantability's bulwark against fundamental defects." (*Brand v. Hyundai Motor America* (2014) 226 Cal.App.4th 1538, 1545 [173 Cal.Rptr.3d 454].)

- "The Song-Beverly Act incorporates the provisions of [California Uniform Commercial Code] sections 2314 and 2315. It 'supplements, rather than supersedes, the provisions of the California Uniform Commercial Code' by broadening a consumer's remedies to include costs, attorney's fees, and civil penalties." (*American Suzuki Motor Corp., supra*, 37 Cal.App.4th at p. 1295, fn. 2, internal citation omitted.)

- "The implied warranty of merchantability may be breached by a latent defect undiscoverable at the time of sale. Indeed, '[u]ndisclosed latent defects … are the very evil that the implied warranty of merchantability was designed to remedy.' In the case of a latent defect, a product is rendered unmerchantable, and the warranty of merchantability is breached, by the existence of the unseen defect, not by its subsequent discovery." (*Mexia v. Rinker Boat Co., Inc.* (2009) 174 Cal.App.4th 1297, 1304–1305 [95 Cal.Rptr.3d 285], internal citations omitted.)

- "[Defendant] suggests 'the implied warranty of merchantability can be breached only if the vehicle manifests a defect that is so basic it renders the vehicle unfit for its ordinary purpose of providing transportation.' As the trial court correctly recognized, however, a merchantable vehicle under the statute requires more than the mere capability of 'just getting from point "A" to point "B." ' " (*Brand, supra*, 226 Cal.App.4th at p. 1546.)

- "[A]llegations showing an alleged defect that created a substantial safety hazard would sufficiently allege the vehicle was not 'fit for the ordinary purposes for which such goods are used' and, thus, breached the implied warranty of merchantability." (*Gutierrez, supra*, 19 Cal.App.5th at pp. 1247–1248.)

- "The notice requirement of [former Civil Code] section 1769 ... is not an appropriate one for the court to adopt in actions by injured consumers against manufacturers with whom they have not dealt. 'As between the immediate parties to the sale [the notice requirement] is a sound commercial rule, designed to protect the seller against unduly delayed claims for damages. As applied to personal injuries, and notice to a remote seller, it becomes a booby-trap for the unwary.' " (*Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, 61 [27 Cal.Rptr. 697, 377 P.2d 897], internal citations omitted.)

Secondary Sources

4 Witkin, Summary of California Law (10th ed. 2005) Sales, §§ 70, 71

1 California UCC Sales & Leases (Cont.Ed.Bar) Warranties, §§ 3.21–3.23, 3.25–3.26

2 California UCC Sales & Leases (Cont.Ed.Bar) Leasing of Goods, §§ 19.31–19.32

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.31[2][a] (Matthew Bender)

44 California Forms of Pleading and Practice, Ch. 502, Sales: *Warranties*, § 502.51 (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales*, § 206.42 (Matthew Bender)

5 California Civil Practice Business Litigation, §§ 53:5–53:7 (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

There is a split of authority as to whether element 3 is required. (Compare *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].)
- "LPS Act commitment proceedings are subject to the due process clause because significant liberty

interests are at stake. But an LPS Act proceeding is civil. '[T]he stated purposes of the LPS Act foreclose any argument that an LPS commitment is equivalent to criminal punishment in its design or purpose.' Thus, not all safeguards required in criminal proceedings are required in LPS Act proceedings." (*Conservatorship of P.D.* (2018) 21 Cal.App.5th 1163, 1167 [231 Cal.Rptr.3d 79], internal citations omitted.)

- "The clear import of the LPS Act is to use the involuntary commitment power of the state sparingly and only for those truly necessary cases where a 'gravely disabled' person is incapable of providing for his basic needs either alone or with help from others." (*Conservatorship of K.W.* (2017) 13 Cal.App.5th 1274, 1280 [221 Cal.Rptr.3d 622].)

- "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].)

- " '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.' An LPS commitment order involves a loss of liberty by the conservatee. Consequently, it follows that a trial court must obtain a waiver of the right to a jury trial from the person who is subject to an LPS commitment." (*Conservatorship of Heather W.* (2016) 245 Cal.App.4th 378, 382−383 [199 Cal.Rptr.3d 689].)

- "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,* 124 Cal.App.3d at p. 328.)

- "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)

4004. Issues Not to Be Considered

In determining whether [*name of respondent*] is gravely disabled, you must not consider or discuss the type of treatment, care, or supervision that may be ordered if a conservatorship is established.

New June 2005

Sources and Authority

- "Petitioner's proposed jury instruction reads as follows: 'You are instructed that the matter of what kind or type of treatment, care or supervision shall be rendered is not a part of your deliberation, and shall not be considered in determining whether or not [proposed conservatee] is or is not gravely disabled. The problem of treatment, care and supervision of a gravely disabled person and whether or not he shall be detained in a sanitarium, private hospital, or state institution, is not within the province of the jury, but is a matter to be considered by the conservator in the event that the jury finds that [proposed conservatee] is gravely disabled.' [¶] [T]he instruction should be given." ~~An instruction on this point "should be given."~~ (*Conservatorship of Baber* (1984) 153 Cal.App.3d 542, 553 & fn. 7 [200 Cal.Rptr. 262].)

- "[I]nformation about the consequences of conservatorship for [proposed conservatee] was irrelevant to the only question before [the] jury: whether, as a result of a mental disorder, he is unable to provide for his basic personal needs for food, clothing, or shelter." (*Conservatorship of P.D.* (2018) 21 Cal.App.5th 1163, 1168 [231 Cal.Rptr.3d 79].)

Secondary Sources

3 Witkin, California Procedure (5th ed. 2008) Actions, § 97

2 California Conservatorship Practice (Cont.Ed.Bar) § 23.89

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)

4510. Breach of Implied Covenant to Perform Work in a Good and Competent Manner—Essential Factual Elements

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[*Name of plaintiff***] claims that [***name of defendant***] failed to [perform the work for the [project/***describe construction project, e.g., kitchen remodeling***] competently/ [or] use the proper materials for the [project/** *e.g., kitchen remodeling***]]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] failed to [perform [his/her/its] work competently/ [or] provide the proper materials] by [***describe alleged breach, e.g., failing to apply sufficient coats of paint or failing to complete the project in substantial conformity with the plans and specifications***]; and**

2. **That [***name of plaintiff***] was harmed by [***name of defendant***]'s failure.**

New December 2010; Revised June 2011, December 2014

Directions for Use

This instruction is for use if an owner claims that the contractor breached the contract by failing to perform the work on the project competently so that the result did not meet what was expected under the contract. This is sometimes referred to as the implied covenant that the work performed will be fit and proper for its intended use. (See *Kuitems v. Covell* (1951) 104 Cal.App.2d 482, 485 [231 P.2d 552].) The implied covenant encompasses the quality of both the work and materials. (See *Aced v. Hobbs-Sesack Plumbing Co.* (1961) 55 Cal.2d 573, 582–583 [12 Cal.Rptr. 257, 360 P.2d 897].)

Also give CACI No. 303, *Breach of Contract—Essential Factual Elements*.

The word "project" may be used if the meaning will be clear to the jury. Alternatively, describe the project in the first paragraph, and then select a shorter term for use thereafter.

This instruction is based on CACI No. 325, *Breach of Covenant of Good Faith and Fair Dealing—Essential Factual Elements*. It should be given in conjunction with CACI No. 4530, *Owner's Damages for Breach of Construction Contract—Work Does Not Conform to Contract*, which provides the proper measure of damages recoverable for a breach of the implied covenant to perform work fit for its intended use.

This instruction may be adapted for use with a claim by a homeowner who purchased the property from the developer-owner against the contractor for construction defects. The claim would be based on the homeowner's status as a third-party beneficiary of the builder-developer contract. (See *Burch v. Superior Court* (2014) 223 Cal.App.4th 1411, 1422−1423 [168 Cal.Rptr.3d 81], disapproved on other grounds in *McMillin Albany LLC v. Superior Court* (2018) 4 Cal.5th 241, 258 [227 Cal.Rptr.3d 191, 408 P.3d 797]; see also *Gilbert Financial Corp. v. Steelform Contracting Co.* (1978) 82 Cal.App.3d 65, 69-70, 145 Cal.Rptr. 448 [homeowner can be beneficiary of contractor-subcontractor contract].)

Sources and Authority

- "[A]lthough [general contractor] … had a contractual relationship with the City, it also had a duty of care to perform in a competent manner." (*Willdan v. Sialic Contractors Corp.* (2007) 158 Cal.App.4th 47, 57 [69 Cal.Rptr.3d 633].)

- "The defect complained of and the alleged breach of the warranty relate solely to fabrication and workmanship—the seams opened and the edges raveled. The failure of the carpet to last for the period warranted was occasioned by the defective sewing of the seams and binding of the edges, constituting a breach of the warranty as it related to good workmanship in assembling and installing it, but not as to the quality of the carpet itself." (*Southern California Enterprises, Inc. v. D. N. & E. Walter & Co.* (1947) 78 Cal.App.2d 750, 753–754 [178 P.2d 785], superseded by statute as stated in *Cardinal Health 301, Inc. v. Tyco Electronics Corp.* (2008) 169 Cal.App.4th 116, 132 [87 Cal. Rptr. 3d 5].)

- "[Subcontractor] agreed to perform the waterproofing and drainage work on the retaining walls built by [contractor] and had the duty to perform those tasks in a good and workmanlike manner." (*Stonegate Homeowners Assn. v. Staben* (2006) 144 Cal.App.4th 740, 749 [50 Cal.Rptr.3d 709].)

- " 'Accompanying every contract is a common-law duty to perform with care, skill, reasonable expedience, and faithfulness the thing agreed to be done, and a negligent failure to observe any of these conditions is a tort as well as a breach of the contract.' The rule which imposes this duty is of universal application as to all persons who by contract undertake professional or other business engagements requiring the exercise of care, skill and knowledge; the obligation is implied by law and need not be stated in the agreement." (*Kuitems, supra,* 104 Cal.App.2d at p. 485.)

- "Obviously, the statement in the written contract that it contains the entire agreement of the parties cannot furnish the appellants an avenue of escape from the entirely reasonable obligation implied in all contracts to the effect that the work performed 'shall be fit and proper for its said intended use' … ." (*Kuitems, supra,* 104 Cal.App.2d at p. 485.)

- "[N]o warranty other than that of good workmanship can be implied where the contractor faithfully complies with plans and specifications supplied by the owner … ." (*Sunbeam Constr. Co. v. Fisci* (1969) 2 Cal.App.3d 181, 186 [82 Cal.Rptr. 446], internal citations omitted.)

- "[T]here is implied in a sales contract for newly constructed real property a warranty of quality and fitness. … '[T]he builder or seller of new construction—not unlike the manufacturer or merchandiser of personalty—makes implied representations, ordinarily indispensable to the sale, that the builder has used reasonable skill and judgment in constructing the building.' … '[W]e conclude builders and sellers of new construction should be held to what is impliedly represented—that the completed structure was designed and constructed in a reasonably workmanlike manner.' " (*Burch, supra,* 223 Cal.App.4th at p. 1422, disapproved on other grounds in *McMillin Albany LLC, supra,* 4 Cal.5th at p. 258, internal citations omitted.)

- "[A] contract to build an entire building is essentially a contract for material and labor, and there is an implied warranty protecting the owner from defective construction. Clearly, it would be anomalous to imply a warranty of quality when construction is pursuant to a contract with the owner—but fail to recognize a similar warranty when the sale follows completion of construction." (*Pollard v. Saxe & Yolles Dev. Co.* (1974) 12 Cal.3d 374, 378–379 [115 Cal.Rptr. 648, 525 P.2d 88], internal citations omitted.)

- "Several cases dealing with construction contracts and other contracts for labor and material show that ordinarily such contracts give rise to an implied warranty that the product will be fit for its intended use both as to workmanship and materials. These cases support the proposition that although the provisions of the Uniform Sales Act with respect to implied warranty (Civ. Code, §§ 1734–1736) apply only to sales, similar warranties may be implied in other contracts not governed by such statutory provisions when the contracts are of such a nature that the implication is justified. … [¶] The reference in the stipulation to merchantability, a term generally used in connection with sales, does not preclude reliance on breach of warranty although the contract is one for labor and material. With respect to sales, merchantability requires among other things that the substance sold be reasonably suitable for the ordinary uses it was manufactured to meet. The defect of which [plaintiff] complains is that the tubing was not reasonably suitable for its ordinary use, and his cause of action may properly be considered as one for breach of a warranty of merchantability. There is no justification for refusing to imply a warranty of suitability for ordinary uses merely because an article is furnished in connection with a construction contract rather than one of sale. The evidence, if taken in the light most favorable to [plaintiff], would support a determination that there was an implied warranty of merchantability." (*Aced, supra,* 55 Cal.2d at p. 583, internal citations omitted.)

- "[P]ublic policy imposes on contractors in various circumstances the duty to finish a project with diligence and to avoid injury to the person or property of third parties." (*Ott v. Alfa-Laval Agri, Inc.* (1995) 31 Cal.App.4th 1439, 1450 [37 Cal.Rptr.2d 790].)

Secondary Sources

2 California Construction Contracts, Defects, and Litigation (Cont.Ed.Bar) Ch. 9, *Handling Disputes During Construction,* § 9.93

2 Stein, Construction Law, Ch. 5B, *Contractor's and Construction Manager's Rights and Duties,* ¶ 5B.01[2][b] (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, § 104.42 (Matthew Bender)

29 California Legal Forms, Ch. 89, *Home Improvement and Specialty Contracts*, § 89.14 (Matthew Bender)

11 Miller & Starr, California Real Estate, § 29:5 (Ch. 29, Defective Construction) (3d ed. 2008) (Thomson Reuters)

Acret, California Construction Law Manual § 5:39 (Ch. 5, Construction Defects) (6th ed. 2005) (Thomson Reuters)

3 Bruner & O'Connor on Construction Law, §§ 9:67–9:70 (Ch. 9, Warranties) (Thomson Reuters)

Gibbs & Hunt, California Construction Law (Aspen Pub. 16th ed. 1999) Ch. 5, *Breach of Contract by Contractor,* § 5.01

4700. Consumers Legal Remedies Act—Essential Factual Elements (Civ. Code, § 1770)

[*Name of plaintiff***] claims that [***name of defendant***] engaged in unfair methods of competition and unfair or deceptive acts or practices in a transaction that resulted, or was intended to result, in the sale or lease of goods or services to a consumer, and that [***name of plaintiff***] was harmed by [***name of defendant***]'s violation. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] acquired, or sought to acquire, by purchase or lease, [***specify product or service***] for personal, family, or household purposes;**

2. **That [***name of defendant***] [***specify one or more prohibited practices from Civ. Code, § 1770(a), e.g., represented that [product or service] had characteristics, uses, or benefits that it did not have***];**

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

4. **That [***name of plaintiff***]'s harm resulted from [***name of defendant***]'s conduct.**

[[*Name of plaintiff***]'s harm resulted from [***name of defendant***]'s conduct if [***name of plaintiff***] relied on [***name of defendant***]'s representation. To prove reliance, [***name of plaintiff***] need only prove that the representation was a substantial factor in [his/her] decision. [He/She] does not need to prove that it was the primary factor or the only factor in the decision.**

If [*name of defendant***]'s representation of fact was material, reliance may be inferred. A fact is material if a reasonable consumer would consider it important in deciding whether to buy or lease the [goods/services].]**

New November 2017

Directions for Use

Give this instruction for a claim under the Consumers Legal Remedies Act (CLRA).

The CLRA prohibits 27 distinct unfair methods of competition and unfair or deceptive acts or practices with regard to consumer transactions. (See Civ. Code, § 1770(a).) In element 2, insert the prohibited practice or practices at issue in the case.

The last two optional paragraphs address the plaintiff's reliance on the defendant's conduct. Give these paragraphs in a case sounding in fraud. CLRA claims not sounding in fraud do not require reliance. (See, e.g., Civ. Code, § 1770(a)(19) [inserting an unconscionable provision in a contract].)

Many of the prohibited practices involve a misrepresentation made by the defendant. (See, e.g., Civ. Code, § 1770(a)(4) [using deceptive representations or designations of geographic origin in connection with goods or services].) In a misrepresentation claim, the plaintiff must have relied on the information given. (*Nelson v. Pearson Ford Co.* (2010) 186 Cal.App.4th 983, 1022 [112 Cal.Rptr.3d 607],

disapproved of on other grounds in *Raceway Ford Cases* (2016) 2 Cal.5th 161, 180 [211 Cal.Rptr.3d 244, 385 P.3d 397].) An element of reliance is that the information must have been material (or important). (*Collins v. eMachines, Inc.* (2011) 202 Cal.App.4th 249, 256 [134 Cal.Rptr.3d 588].)

Other prohibited practices involve a failure to disclose information. (See *Gutierrez v. Carmax Auto Superstores California* (2018) 19 Cal.App.5th 1234, 1258 [228 Cal.Rptr.3d 699]; see, e.g., Civ. Code, § 1770(a)(9) [advertising goods or services with intent not to sell them as advertised]~~; see *Jones v. Credit Auto Center, Inc.* (2015) 237 Cal.App.4th Supp. 1, 11 [188 Cal.Rptr.3d 578]~~.) Reliance in concealment cases is best expressed in terms that the plaintiff would have behaved differently had the true facts been known. (See *Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1093 [23 Cal.Rptr.2d 101, 858 P.2d 568].) The next-to-last paragraph may be modified to express reliance in this manner. (See CACI No. 1907, *Reliance*.)

The CLRA provides for class actions. (See Civ. Code, § 1781.) In a class action, this instruction should be modified to state that only the named plaintiff's reliance on the defendant's representation must be proved. Class-wide reliance does not require a showing of actual reliance on the part of every class member. Rather, if all class members have been exposed to the same material misrepresentations, class-wide reliance will be inferred, unless rebutted by the defendant. (*Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 814–815 [94 Cal.Rptr. 796, 484 P.2d 964]; *Occidental Land, Inc. v. Superior Court* (1976) 18 Cal.3d 355, 362–363 [134 Cal.Rptr. 388, 556 P.2d 750]; *Massachusetts Mut. Life Ins. Co. v. Superior Court* (2002) 97 Cal.App.4th 1282, 1293 [119 Cal.Rptr.2d 190].) In class cases then, exposure and materiality are the only facts that need to be established to justify class-wide relief. Those determinations are a part of the class certification analysis and will, therefore, be within the purview of the court.

Sources and Authority

- Consumers Legal Remedies Act: Prohibited Practices. Civil Code section 1770(a).
- Consumers Legal Remedies Act: Private Cause of Action. Civil Code section 1780(a).
- " 'The CLRA makes unlawful, in Civil Code section 1770, subdivision (a) … various "unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer." ' The CLRA proscribes 27 specific acts or practices." (*Rubenstein v. The Gap, Inc.* (2017) 14 Cal.App.5th 870, 880–881 [222 Cal.Rptr.3d 397], internal citation omitted.)
- "The CLRA is set forth in Civil Code section 1750 et seq. … [U]nder the CLRA a consumer may recover actual damages, punitive damages and attorney fees. However, relief under the CLRA is limited to '[a]ny consumer who suffers any damage *as a result* of the use or employment by any person of a method, act, or practice' unlawful under the act. As [defendant] argues, this limitation on relief requires that plaintiffs in a CLRA action show not only that a defendant's conduct was deceptive but that the deception caused them harm." (*Massachusetts Mutual Life Ins. Co., supra*, 97 Cal.App.4th at p. 1292, original italics, internal citations omitted.)
- "[T]he CLRA does not require lost injury or property, but does require damage and causation.

‘Under Civil Code section 1780, subdivision (a), CLRA actions may be brought “only by a consumer ‘who suffers any damage as a result of the use or employment’ of a proscribed method, act, or practice. … Accordingly, ‘plaintiffs in a CLRA action [must] show not only that a defendant's conduct was deceptive but that the deception caused them harm.” ’ ” (*Veera v. Banana Republic, LLC* (2016) 6 Cal.App.5th 907, 916, fn. 3 [211 Cal.Rptr.3d 769].)

- “This language does not create an automatic award of statutory damages upon proof of an unlawful act.” (*Moran v. Prime Healthcare Management, Inc.* (2016) 3 Cal.App.5th 1131, 1152 [208 Cal.Rptr.3d 303].)

- “[Civil Code section 1761(e)] provides a broad definition of ‘transaction’ as ‘an agreement between a consumer and any other person, whether or not the agreement is a contract enforceable by action, and includes the making of, and the performance pursuant to, that agreement.’ ” (*Wang v. Massey Chevrolet* (2002) 97 Cal.App.4th 856, 869 [118 Cal.Rptr.2d 770].)

- “ ‘While a plaintiff must show that the misrepresentation was an immediate cause of the injury-producing conduct, the plaintiff need not demonstrate it was the only cause. “ ‘It is not … necessary that [the plaintiff's] reliance upon the truth of the fraudulent misrepresentation be the sole or even the predominant or decisive factor in influencing his conduct. … It is enough that the representation has played a substantial part, and so has been a substantial factor, in influencing his decision.’ [Citation.]” ’ In other words, it is enough if a plaintiff shows that ‘ “in [the] absence [of the misrepresentation] the plaintiff ‘in all reasonable probability’ would not have engaged in the injury-producing conduct.’ [Citation.]’ ” (*Veera, supra,* 6 Cal.App.5th at p. 919, internal citations omitted.)

- “Under the CLRA, plaintiffs must show actual reliance on the misrepresentation and harm.” (*Nelson, supra,* 186 Cal.App.4th at p. 1022.)

- “A ‘ “misrepresentation is material for a plaintiff only if there is reliance—that is, ‘ “ ‘without the misrepresentation, the plaintiff would not have acted as he did’ ” ’ … .” [Citation.]’ ” (*Moran, supra,* 3 Cal.App.5th at p. 1152.)

- “[M]ateriality usually is a question of fact. In certain cases, a court can determine the factual misrepresentation or omission is so obviously unimportant that the jury could not reasonably find that a reasonable person would have been influence (*sic*) by it.” (*Gutierrez, supra,* 19 Cal.App.5th at p. 1262, internal citations omitted.)

- “In the CLRA context, a fact is deemed ‘material,’ and obligates an exclusively knowledgeable defendant to disclose it, if a ‘ “reasonable [consumer]” ’ would deem it important in determining how to act in the transaction at issue.” (*Collins, supra,* 202 Cal.App.4th at p. 256.)

- “If the undisclosed assessment was material, an inference of reliance as to the entire class would arise, subject to any rebuttal evidence [defendant] might offer.” (*Massachusetts Mutual Life Ins. Co., supra,* 97 Cal.App.4th at p. 1295.)

- “[U]nless the advertisement targets a particular disadvantaged or vulnerable group, it is judged by

the effect it would have on a reasonable consumer." (*Consumer Advocates v. Echostar Satellite Corp.* (2003) 113 Cal.App.4th 1351, 1360 [8 Cal.Rptr.3d 22].)

- "Not every omission or nondisclosure of fact is actionable. Consequently, we must adopt a test identifying which omissions or nondisclosures fall within the scope of the CLRA. Stating that test in general terms, we conclude an omission is actionable under the CLRA if the omitted fact is (1) 'contrary to a [material] representation actually made by the defendant' or (2) is 'a fact the defendant was obliged to disclose.' " (*Gutierrez, supra,* 19 Cal.App.5th at p. 1258~~[A]lthough a claim may be stated under the CLRA in terms constituting fraudulent omissions, to be actionable the omission must be contrary to a representation actually made by the defendant, or an omission of a fact the defendant was obliged to disclose." (*Daugherty v. American Honda Motor Co., Inc.* (2006) 144 Cal.App.4th 824, 835 [51 Cal.Rptr.3d 118].~~)

- "[T]here is no independent duty to disclose [safety] concerns. Rather, a duty to disclose material safety concerns 'can be actionable in four situations: (1) when the defendant is in a fiduciary relationship with the plaintiff; (2) when the defendant had exclusive knowledge of material facts not known to the plaintiff; (3) when the defendant actively conceals a material fact from the plaintiff; or (4) when the defendant makes partial representations but also suppresses some material fact.' " (*Gutierrez, supra*, 19 Cal.App.5th at p. 1260.)

- "Under the CLRA, even if representations and advertisements are true, they may still be deceptive because ' "[a] perfectly true statement couched in such a manner that it is likely to mislead or deceive the consumer, such as by failure to disclose other relevant information, is actionable." [Citation.]' " (*Jones, supra,* 237 Cal.App.4th Supp. at p. 11.)

- "Defendants next allege that plaintiffs cannot sue them for violating the CLRA because their debt collection efforts do not involve 'goods or services.' The CLRA prohibits 'unfair methods of competition and unfair or deceptive acts or practices.' This includes the inaccurate 'represent[ation] that a transaction confers or involves rights, remedies, or obligations which it does not have or involve … .' However, this proscription only applies with respect to 'transaction[s] intended to result or which result[] in the sale or lease of goods or services to [a] consumer … .' The CLRA defines 'goods' as 'tangible chattels bought or leased for use primarily for personal, family, or household purposes', and 'services' as 'work, labor, and services for other than a commercial or business use, including services furnished in connection with the sale or repair of goods.' " (*Alborzian v. JPMorgan Chase Bank, N.A.* (2015) 235 Cal.App.4th 29, 39−40 [185 Cal.Rptr.3d 84], internal citations omitted [mortgage loan is neither a good nor a service].)

Secondary Sources

4 Witkin, Summary of California Law (11th ed. 2017) Sales, § 298 et seq.

Wiseman & Reese, California Practice Guide: Civil Procedure Before Trial Claims & Defenses, Ch.1 4(II)-B, *Consumers Legal Remedies Act—Elements of Claim*, ¶ 14:315 et seq. (The Rutter Group)

Cabraser, California Class Actions and Coordinated Proceedings, Ch. 4, California's Consumer Legal Remedies Act, § 4.01 et seq. (Matthew Bender)

44 California Forms of Pleading and Practice, Ch. 504, *Sales: Consumers Legal Remedies Act*, § 504.12 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 1, *Determining the Applicable Law*, 1.33