JUDICIAL COUNCIL OF CALIFORNIA
RULES AND PROJECTS COMMITTEE

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RULES AND PROJECTS COMMITTEE

MINUTES OF OPEN MEETING

January 24, 2019
12:10 PM
Teleconference Call

Advisory Body Members Present:	Hon. Harry E. Hull (chair), Hon. Dalila C. Lyons, (vice-chair), Hon. Paul A. Bacigalupo, Ms. Kimberly Flener, Hon. Scott M. Gordon, Ms. Rachel W. Hill, Hon. Ann Moorman, and Hon. Rebecca L. Wightman.
Advisory Body Members Absent:	None
Others Present:	Ms. Benita Downs, Ms. Sarah Fleischer-Ihn, Mr. Bruce Greenlee, Ms. Susan McMullan, and Ms. Kara Portnow.

OPEN MEETING

Call to Order and Roll Call

The chair called the meeting to order at 12:10 pm, and took roll call.

DISCUSSION AND ACTION ITEMS (ITEMS 1–3)

Item 1

California Civil Jury Instructions: Instructions with minor revisions (Review and approve online publication of instructions with minor revisions data *(Action required – RUPRO action only)*

***Action**:* *The Rules and Projects Committee approved the online publication of instructions.*

Item 2

California Criminal Jury Instructions: Proposed revisions to the California Criminal Jury Instructions (CALCRIM) (Action required – recommend Judicial Council action)

***Action**:* *The Rules and Projects Committee recommended approval on the Judicial Council's March 15, 2019, consent agenda.*

Item 03

Criminal Procedure: Multicounty Incarceration and Supervision (amend rule 4.452) (Action required – recommend Judicial Council action)

Staff identified an error in draft rule 4.452. Rule 4.452(a)(6)(G) should be amended to delete references to rule 4.530(g) and (h), so that it now reads: "The factors listed in rule 4.530(f); and . . .". Rule 4.452(a)(8) should be amended to so that the reference to rule 4.530 includes subdivisions (f), (g), and (h), so that it now reads: "If after the court's determination in accordance with paragraph (5) the defendant is 39 ordered to serve a period of supervision in another county, whether with or without 40 a term of custody, the matter shall be transferred for the period of supervision in accordance with provisions of rule 4.530(f), (g), and (h)."

***Action**:* *With the non-substantive revision mentioned by staff, the Rules and Projects Committee recommended approval on the Judicial Council's March 15, 2019, consent agenda.*

ADJOURNMENT

There being no further business, the meeting was adjourned at 12:25 pm.

Approved by the advisory body on enter date.

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RULES AND PROJECTS COMMITTEE

MINUTES OF OPEN MEETING

February 06, 2019
12:10 p.m. - 1:10 p.m.
Conference Call

Advisory Body Members Present:	Hon. Harry E. Hull, Jr. (Chair), Ms. Kimberly Flener, Hon. Scott M. Gordon, Hon. Ann Moorman, and Hon. Rebecca L. Wightman
Advisory Body Members Absent:	Hon. Dalila C. Lyons (Vice-chair), Hon. Paul A. Bacigalupo, and Ms. Rachel W. Hill
Others Present:	Lisa Chavez, Benita Downs, Michael I. Giden, Tracy Kenny, Seung Lee, Susan R. McMullan, and Anne Ronan

OPEN MEETING

Call to Order and Roll Call

The chair called the meeting to order at 12:12 p.m., and took roll call.

DISCUSSION AND ACTION ITEMS (ITEMS 01–04)

Item 01

Appointment Request of Violence Against Women Education Project (VAWEP) Sub-Committee Members. (Action required– RUPRO approval of appointment)

Action: *The Rules and Projects Committee approved appointment of one additional non-advisory committee member to the Violence Against Women Education Project (VAWEP) subcommittee of the Family and Juvenile Law Advisory Committee*

Item 02

Rules and Forms: Technical Form Changes to Reflect Federal Poverty Guidelines (revise forms FW-001, FW-001-GC, APP-015/FW-015-INFO, and JV-132) (Action required– recommend Judicial Council action)

Action*: The Rules and Projects Committee recommended approval on the Judicial Council's March 15, 2019, consent agenda.*

Item 03

Criminal Procedure: Superior Court Procedures for Death Penalty–Related Habeas Corpus Proceedings (adopt rules 4.571, 4.572, 4.573, 4.574, 4.575, 4.576, and 4.577)

Action: *The Rules and Projects Committee recommended approval on the Judicial Council's March 15, 2019, discussion agenda.*

Item 04

Criminal and Appellate Procedure: Appeals from Superior Court Decisions in Death Penalty–Related Habeas Corpus Proceedings (adopt rules 8.390–8.398; amend rule 8.388; and adopt form HC-200)

Action: *The Rules and Projects Committee recommended approval on the Judicial Council's March 15, 2019, discussion agenda.*

ADJOURNMENT

There being no further business, the meeting was adjourned at 12:25 p.m.

Minutes approved by the advisory body on enter date.

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RULES AND PROJECTS COMMITTEE (RUPRO)

MINUTES OF ACTION BY E-MAIL

Tuesday, February 26, 2019

9:42 a.m.

Advisory Body Members Present:	Hon. Harry E. Hull, Jr. (Chair), Hon. Dalila C. Lyons (Vice-chair), Hon. Paul A. Bacigalupo, Ms. Kimberly Flener, Hon. Scott M. Gordon, Ms. Rachel W. Hill, Hon. Ann Moorman, and Hon. Rebecca L. Wightman
Advisory Body Members Absent:	None
Others Present:	Susan R. McMullen and Benita Downs

ACTION BY E-MAIL

The chair concluded that prompt action was required; therefore, in accordance with rule 10.75(o)(1) of the California Rules of Court, written public comment was not accepted on the proposed action.

DISCUSSION AND ACTION ITEM

Item 01

Civil Practice and Procedure: Adjustments to Dollar Amounts of Exemptions and Civil Penalty (adopt Appendix H of Cal. Rules of Court; revise form EJ-156) (Action required– recommend Judicial Council action)

***Action**: The Rules and Projects Committee recommended approval on the Judicial Council's March 15, 2019, consent agenda.*

CLOSURE OF ACTION

The action by e-mail concluded on Wednesday, February 27, 2019, at 5:00 p.m.

Minutes approved by the advisory body on enter date.

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RULES AND PROJECTS COMMITTEE (RUPRO)

MINUTES OF ACTION BY E-MAIL

Monday, March 4, 2019

2:04 p.m.

Advisory Body Members Present:	Hon. Harry E. Hull, Jr. (Chair), Hon. Dalila C. Lyons (Vice-chair), Hon. Paul A. Bacigalupo, , Hon. Scott M. Gordon, Ms. Rachel W. Hill, Hon. Ann Moorman, and Hon. Rebecca L. Wightman
Advisory Body Members Absent:	Ms. Kimberly Flener
Others Present:	Susan R. McMullen and Benita Downs

ACTION BY E-MAIL

The chair concluded that prompt action was required; therefore, in accordance with rule 10.75(o)(1) of the California Rules of Court, written public comment was not accepted on the proposed action.

DISCUSSION AND ACTION ITEM

Item 01

Rules and Forms: Technical Form Changes to Correct Inadvertent Errors (revise forms CR-600; CR-601, CR-602, CR-603, CR-604, and CR-605) (Action required– recommend Judicial Council action)

***Action**: The Rules and Projects Committee recommended approval on the Judicial Council's March 15, 2019, consent agenda.*

CLOSURE OF ACTION

The action by e-mail concluded on Tuesday, March 5, 2019, at 5:00 p.m.

Minutes approved by the advisory body on enter date.

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RULES AND PROJECTS COMMITTEE (RUPRO)

MINUTES OF ACTION BY E-MAIL

Wednesday, March 6, 2019

12:37 p.m.

Advisory Body Members Present:	Hon. Harry E. Hull, Jr. (Chair), Ms. Kimberly Flener, Hon. Scott M. Gordon, Ms. Rachel W. Hill, Hon. Ann Moorman, and Hon. Rebecca L. Wightman
Advisory Body Members Absent:	Hon. Dalila C. Lyons (Vice-chair) and Hon. Paul A. Bacigalupo
Others Present:	Susan R. McMullen and Benita Downs

ACTION BY E-MAIL

The chair concluded that prompt action was required; therefore, in accordance with rule 10.75(o)(1) of the California Rules of Court, written public comment was not accepted on the proposed action.

DISCUSSION AND ACTION ITEM

Item 01

The Family and Juvenile Law Advisory Committee asked to amend its annual agenda to add an item to revise certain restraining order forms to ensure that these orders are properly entered into the California Law Enforcement Telecommunications System (CLETS).

***Action**: The Rules and Projects Committee approved the Family and Juvenile Law Advisory Committee's request to amend its annual agenda to add an item to revise certain restraining orders forms to ensure that these orders are properly entered into the California Law Enforcement Telecommunications System (CLETS).*

CLOSURE OF ACTION

The action by e-mail concluded on Thursday, March 7, 2019, at 5:00 p.m.

Minutes approved by the advisory body on enter date.

Item number: 01

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Approve**

RUPRO Meeting: May 6, 2019

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Civil Jury Instructions: Approve Publication of Minor Revisions (Action Required)

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

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

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

If requesting July 1 or out of cycle, explain:
Rules 2.1050(d) and 10.58(a) of the California Rules of Court require the advisory committee to update, amend, and add topics to CACI on a regular basis and to submit its recommendations to the council for approval. Jury instructions are currently revised four times a year, and more often if necessary. Release 34 is the first full CACI release for 2019. Release 33 was approved in November 2018. Release 33A , an online only release, was approved in January 2019.

Additional Information: (To facilitate RUPRO's review of your proposal, please include any relevant information not contained in the attached summary.)
In addition to recommending approval of 25 revised CACI instructions under the provisions of the guidelines adopted on December 19, 2006 regarding Jury Instructions Corrections and Technical and Minor Substantive Changes, the advisory committee also requests that RUPRO approve and submit to the Judicial Council for adoption 35 new and revised CACI instructions and one revision to the CACI User Guide.

JUDICIAL COUNCIL OF CALIFORNIA

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MEMORANDUM

Date
April 5, 2019

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 (Release 34)

Action Requested
Review and Approve Publication of Instructions With Minor Revisions

Deadline
May #, 2019

Contact
Bruce Greenlee, Attorney
415-865-7698 phone
415-865-4319 fax
bruce.greenlee@jud.ca.gov

Executive Summary

The Advisory Committee on Civil Jury Instructions 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 25 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 changes only 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 publication *CACI* release 34, which contains revisions to 25 civil jury instructions prepared by the advisory committee that contain changes that do not require posting for public comment or Judicial Council approval. These instructions will be published in the midyear supplement to the 2019 edition of *CACI* and posted online on the California Courts website, and on Lexis and Westlaw.

The revised instructions are attached at pages 5–114.

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

Overview of revisions

Of the 25 revised instructions in this release that are presented for final RUPRO approval, all have revisions under category (a) above (additional cases added to Sources and Authority). Two

[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.

instructions also have additions under category (c) above (additions or changes to the Directions for Use). CACI No. 3700 has two citations added to the Directions for Use. CACI No. 3704 has a "cf." citation added.

Standards for adding case excerpts to Sources and Authority

The standards approved by the advisory committee for adding case excerpts to the Sources and Authority are as follows:

1. *CACI* Sources and Authority are in the nature of a digest. Entries should be direct quotes from cases. However, all cases that may be relevant to the subject area of an instruction need not be included, particularly if they do not involve a jury matter.
2. Each legal component of the instruction should be supported by authority—either statutory or case law.
3. Authority addressing the burden of proof should be included.
4. Authority addressing the respective roles of judge and jury (questions of law and questions of fact) should be included.
5. Only one case excerpt should be included for each legal point.
6. California Supreme Court authority should always be included, if available.
7. If no Supreme Court authority is available, the most recent California appellate court authority for a point should be included.
8. A 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

Rule 2.1050 of the California Rules of Court requires the committee to regularly update, revise, and add topics to *CACI* and to submit its recommendations to the council for approval. This proposal fulfills that requirement.

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.

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.

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 *CACI* instructions, at pages 5–114

CIVIL JURY INSTRUCTIONS
TABLE OF CONTENTS

301. Third-Party Beneficiary

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

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

New September 2003

Directions for Use

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

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

Sources and Authority

- Contract for Benefit of Third Person. Civil Code section 1559.

- "While it is not necessary that a third party be specifically named, the contracting parties must clearly manifest their intent to benefit the third party. 'The fact that [a third party] is incidentally named in the contract, or that the contract, if carried out according to its terms, would inure to his benefit, is not sufficient to entitle him to demand its fulfillment. It must appear to have been the intention of *the parties* to secure to him personally the benefit of its provisions.' " (*Kalmanovitz, supra,* 43 Cal.App.4th at p. 314, original italics, internal citation omitted.)

- " 'It is sufficient if the claimant belongs to a class of persons for whose benefit it was made. [Citation.] A third party may qualify as a contract beneficiary where the contracting parties must have intended to benefit that individual, an intent which must appear in the terms of the agreement. [Citation.]' " ~~A third party may qualify as a beneficiary under a contract where the contracting parties must have intended to benefit that individual and such intent appears from the terms of the agreement.~~ (*Brinton v. Bankers Pension Services, Inc.* (1999) 76 Cal.App.4th 550, 558 [90 Cal.Rptr.2d 469].)

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

- "[A] review of this court's third party beneficiary decisions reveals that our court has carefully examined the express provisions of the contract at issue, as well as all of the relevant circumstances under which the contract was agreed to, in order to determine not only (1) whether the third party would in fact benefit from the contract, but also (2) whether a motivating purpose of the contracting parties was to provide a benefit to the third party, and (3) whether permitting a third party to bring its own breach of contract action against a contracting party is consistent with the objectives of the contract and the reasonable expectations of the contracting parties. All three elements must be satisfied to permit the third party action to go forward." (*Goonewardene v. ADP, LLC* (2019) 6 Cal.5th 817, 829–830 [-- Cal.Rptr.3d --, -- P.3d --].)

- "Because of the ambiguous and potentially confusing nature of the term 'intent', this opinion uses the term 'motivating purpose' in its iteration of this element to clarify that the contracting parties must have a motivating purpose to benefit the third party, and not simply knowledge that a benefit to the third party may follow from the contract." (*Goonewardene, supra,* 6 Cal.5th at p. 830, internal citation omitted.)

- "[The third] element calls for a judgment regarding the potential effect that permitting third party enforcement would have on the parties' contracting goals, rather than a determination whether the parties actually anticipated third party enforcement at the time the contract was entered into." (*Goonewardene, supra,* 6 Cal.5th at p. 831.)

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

- "Section 1559 of the Civil Code, which provides for enforcement by a third person of a contract made 'expressly' for his benefit, does not preclude this result. The effect of the section is to exclude enforcement by persons who are only incidentally or remotely benefited."~~Civil Code section 1559 excludes enforcement of a contract by persons who are only incidentally or remotely benefited by the agreement.~~ (*Lucas, supra,* 56 Cal.2d at p. 590.)

- "Whether a third party is an intended beneficiary or merely an incidental beneficiary to the contract involves construction of the parties' intent, gleaned from reading the contract as a whole in light of the circumstances under which it was entered. [Citation.]" (*Jones v. Aetna Casualty & Surety Co.* (1994) 26 Cal.App.4th 1717, 1725 [33 Cal.Rptr.2d 291].)

- "[A] third party's rights under the third party beneficiary doctrine may arise under an oral as well as a written contract … ." (*Goonewardene, supra,* 6 Cal.5th at p. 833.)

- "In place of former section 133, the Second Restatement inserted section 302: '(1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either [para.] (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or [para.] (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance. [para.] (2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.' " (~~Restatement Second of Contracts, section 302,~~

~~provides:~~

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

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

- "[T]he burden is upon [plaintiff] to prove that the performance he seeks was actually promised. This is largely a question of interpretation of the written contract." ~~The burden is on the third party "to prove that the performance [it] seeks was actually promised."~~ (*Garcia v. Truck Ins.~~urance~~ Exchange* (1984) 36 Cal.3d 426, 436 [204 Cal.Rptr. 435, 682 P.2d 1100]~~; *Neverkovec v. Fredericks* (1999) 74 Cal.App.4th 337, 348-349 [87 Cal.Rptr.2d 856]~~.)

Secondary Sources

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

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

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

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

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

350. Introduction to Contract Damages

If you decide that [*name of plaintiff*] has proved [his/her/its] claim against [*name of defendant*] for breach of contract, you also must decide how much money will reasonably compensate [*name of plaintiff*] for the harm caused by the breach. This compensation is called "damages." The purpose of such damages is to put [*name of plaintiff*] in as good a position as [he/she/it] would have been if [*name of defendant*] had performed as promised.

To recover damages for any harm, [*name of plaintiff*] must prove that when the contract was made, both parties knew or could reasonably have foreseen that the harm was likely to occur in the ordinary course of events as result of the breach of the contract.

[*Name of plaintiff*] also must prove the amount of [his/her/its] damages according to the following instructions. [He/She/It] does not have to prove the exact amount of damages. You must not speculate or guess in awarding damages.

[*Name of plaintiff*] claims damages for [*identify general damages claimed*].

New September 2003; Revised October 2004, December 2010

Directions for Use

This instruction should always be read before any of the following specific damages instructions. (See CACI Nos. 351–360.)

Sources and Authority

- Contract Damages. Civil Code section 3300.
- Damages Must Be Clearly Ascertainable. Civil Code section 3301.
- Damages No Greater Than Benefit of Full Performance. Civil Code section 3358.
- Damages Must Be Reasonable. Civil Code section 3359.
- "An element of a breach of contract cause of action is damages proximately caused by the defendant's breach. The statutory measure of damages for breach of contract is 'the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom.' 'Contract damages seek to approximate the agreed-upon performance. "[I]n the law of contracts the theory is that the party injured by breach should receive as nearly as possible the equivalent of the benefits of performance." ' " (*Copenbarger v. Morris Cerullo World Evangelism, Inc.* (2018) 29 Cal.App.5th 1, 9 [239 Cal.Rptr.3d 838], internal citations omitted.)

- ~~The basic object of damages is compensation, and in the law of contracts the theory is that the party injured by a breach should receive as nearly as possible the equivalent of the benefits of performance. The aim is to put the injured party in as good a position as he would have been had performance been rendered as promised. "~~This aim can never be exactly attained yet that is the problem the trial court is required to resolve." (*Brandon & Tibbs v. George Kevorkian Accountancy Corp.* (1990) 226 Cal.App.3d 442, 455 [277 Cal.Rptr. 40], internal citations omitted.)

- "~~The damages awarded should, insofar as possible, place the injured party in the same position it would have held had the contract properly been performed, but such~~ [D]~~d~~amages may not exceed the benefit which it would have received had the promisor performed." (*Brandon & Tibbs, supra,* 226 Cal.App.3d at p. 468, internal citations omitted.)

- " 'The rules of law governing the recovery of damages for breach of contract are very flexible. Their application in the infinite number of situations that arise is beyond question variable and uncertain. Even more than in the case of other rules of law, they must be regarded merely as guides to the court, leaving much to the individual feeling of the court created by the special circumstances of the particular case.' " (*Brandon & Tibbs, supra,* 226 Cal.App.3d at p. 455, internal citation omitted.)

- "Contractual damages are of two types—general damages (sometimes called direct damages) and special damages (sometimes called consequential damages)." (*Lewis Jorge Construction Management, Inc. v. Pomona Unified School Dist.* (2004) 34 Cal.4th 960, 968 [22 Cal.Rptr.3d 340, 102 P.3d 257].)

- "General damages are often characterized as those that flow directly and necessarily from a breach of contract, or that are a natural result of a breach. Because general damages are a natural and necessary consequence of a contract breach, they are often said to be within the contemplation of the parties, meaning that because their occurrence is sufficiently predictable the parties at the time of contracting are 'deemed' to have contemplated them." (*Lewis Jorge Construction Management, Inc., supra,* 34 Cal.4th at p. 968, internal citations omitted.)

- " 'Contract damages are generally limited to those within the contemplation of the parties when the contract was entered into or at least reasonably foreseeable by them at that time; consequential damages beyond the expectation of the parties are not recoverable. This limitation on available damages serves to encourage contractual relations and commercial activity by enabling parties to estimate in advance the financial risks of their enterprise.' 'In contrast, tort damages are awarded to [fully] compensate the victim for [all] injury suffered.' " (*Erlich v. Menezes* (1999) 21 Cal.4th 543, 550 [87 Cal.Rptr.2d 886, 981 P.2d 978], internal citations omitted.)

- " [I]f special circumstances caused some unusual injury, special damages are not recoverable therefor unless the circumstances were known or should have been known to the breaching party at the time he entered into the contract.' " (*Resort Video, Ltd. v. Laser Video, Inc.* (1995) 35 Cal.App.4th 1679, 1697 [42 Cal.Rptr.2d 136], internal citations omitted.)

- "The detriment that is 'likely to result therefrom' is that which is foreseeable to the breaching party at the time the contract is entered into." (*Wallis v. Farmers Group, Inc.* (1990) 220 Cal.App.3d 718, 737 [269 Cal.Rptr. 299], internal citation omitted.)

- "Where the fact of damages is certain, as here, the amount of damages need not be calculated with absolute certainty. The law requires only that some reasonable basis of computation be used, and the result reached can be a reasonable approximation." (*Acree v. General Motors Acceptance Corp.* (2001) 92 Cal.App.4th 385, 398 [112 Cal.Rptr.2d 99], footnotes and internal citations omitted.)

- "Under contract principles, the nonbreaching party is entitled to recover only those damages, including lost future profits, which are 'proximately caused' by the specific breach. Or, to put it another way, the breaching party is only liable to place the nonbreaching party in the same position as if the specific breach had not occurred. Or, to phrase it still a third way, the breaching party is only responsible to give the nonbreaching party the benefit of the bargain to the extent the specific breach deprived that party of its bargain." (*Postal Instant Press v. Sealy* (1996) 43 Cal.App.4th 1704, 1709 [51 Cal.Rptr.2d 365], internal citations omitted.)

- "[D]amages for mental suffering and emotional distress are generally not recoverable in an action for breach of an ordinary commercial contract in California." (*Erlich, supra,* 21 Cal.4th 543 at p. 558, internal citations omitted.)

- "Cases permitting recovery for emotional distress typically involve mental anguish stemming from more personal undertakings the traumatic results of which were unavoidable. Thus, when the express object of the contract is the mental and emotional well-being of one of the contracting parties, the breach of the contract may give rise to damages for mental suffering or emotional distress." (*Erlich, supra,* 21 Cal.4th at p. 559, internal citations omitted.)

- "The right to recover damages for emotional distress for breach of mortuary and crematorium contracts has been well established in California for many years." (*Saari v. Jongordon Corp*. (1992) 5 Cal.App.4th 797, 803 [7 Cal.Rptr.2d 82], internal citation omitted.)

- "[T]he principle that attorney fees *qua* damages are recoverable as damages, and not as costs of suit, applies equally to breach of contract." (*Copenbarger, supra,* 29 Cal.App.5th at p. 10, original italics.)

- "Numerous other cases decided both before and after *Brandt* have likewise recognized that '[a]lthough fee issues are usually addressed to the trial court in the form of a posttrial motion, fees as damages are pleaded and proved by the party claiming them and are decided by the jury unless the parties stipulate to a posttrial procedure.' " (*Monster, LLC v. Superior Court* (2017) 12 Cal.App.5th 1214, 1229 [219 Cal.Rptr.3d 814].)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 894–903

California Breach of Contract Remedies (Cont.Ed.Bar 1980; 2001 supp.) Recovery of Money Damages, §§ 4.1–4.9

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, §§ 140.55–140.56, 140.100–140.106 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.70 et seq. (Matthew Bender)

5 California Points and Authorities, Ch. 50, *Contracts*, §§ 50.10–50.11 (Matthew Bender)

6 California Points and Authorities, Ch. 65, *Damages: Contract,* § 65.20 et seq. (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 7, *Seeking or Opposing Damages in Contract Actions,* 7.03 et seq.

418. Presumption of Negligence per se

[*Insert citation to statute, regulation, or ordinance***] states:**

_____

If you decide

1. **That [***name of plaintiff/defendant***] violated this law and**

2. **That the violation was a substantial factor in bringing about the harm,**

then you must find that [*name of plaintiff/defendant***] was negligent [unless you also find that the violation was excused].**

If you find that [*name of plaintiff/defendant***] did not violate this law or that the violation was not a substantial factor in bringing about the harm [or if you find the violation was excused], then you must still decide whether [***name of plaintiff/defendant***] was negligent in light of the other instructions.**

New September 2003; Revised December 2005, June 2011

Directions for Use

This jury instruction addresses the establishment of the two factual elements underlying the presumption of negligence. If they are not established, then a finding of negligence cannot be based on the alleged statutory violation. However, negligence can still be proven by other means. (See *Nunneley v. Edgar Hotel* (1950) 36 Cal.2d 493, 500–501 [225 P.2d 497].)

If a rebuttal is offered on the ground that the violation was excused, then the bracketed portion in the second and last paragraphs should be read. For an instruction on excuse, see CACI No. 420, *Negligence per se: Rebuttal of the Presumption of Negligence (Violation Excused).*

If the statute is lengthy, the judge may want to read it at the end of this instruction instead of at the beginning. The instruction would then need to be revised, to tell the jury that they will be hearing the statute at the end.

Rebuttal of the presumption of negligence is addressed in the instructions that follow (see CACI Nos. 420 and 421).

Sources and Authority

- Negligence per se. Evidence Code section 669.

- "Although compliance with the law does not prove the absence of negligence, violation of the law does raise a presumption that the violator was negligent. This is called negligence per se. The

presumption of negligence arises if (1) the defendant violated a statute; (2) the violation proximately caused the plaintiff's injury; (3) the injury resulted from the kind of occurrence the statute was designed to prevent; and (4) the plaintiff was one of the class of persons the statute was intended to protect. The first two elements are normally questions for the trier of fact and the last two are determined by the trial court as a matter of law. That is, the trial court decides whether a statute or regulation defines the standard of care in a particular case." (*Jacobs Farm/Del Cabo, Inc. v. Western Farm Service, Inc.* (2010) 190 Cal.App.4th 1502, 1526 [119 Cal.Rptr.3d 529], internal citations omitted; see also Cal. Law Revision Com. to Evid. Code, § 669.)

- "[T]he doctrine of negligence per se is not a separate cause of action, but creates an evidentiary presumption that affects the standard of care in a cause of action for negligence." (*Turner v. Seterus, Inc.* (2018) 27 Cal.App.5th 516, 534 [238 Cal.Rptr.3d 528].)

- "Under the doctrine of negligence per se, the plaintiff 'borrows' statutes to prove duty of care and standard of care. [Citation.] The plaintiff still has the burden of proving causation." (*David v. Hernandez* (2014) 226 Cal.App.4th 578, 584 [172 Cal.Rptr.3d 204].)

- "Where a statute establishes a party's duty, ' "proof of the [party's] violation of a statutory standard of conduct raises a presumption of negligence that may be rebutted only by evidence establishing a justification or excuse for the statutory violation." This rule, generally known as the doctrine of negligence per se, means that where the court has adopted the conduct prescribed by statute as the standard of care for a reasonable person, a violation of the statute is presumed to be negligence." (*Spriesterbach v. Holland* (2013) 215 Cal.App.4th 255, 263 [155 Cal.Rptr.3d 306], internal citation omitted.)

- "[I]n negligence per se actions, the plaintiff must produce evidence of a violation of a statute and a substantial probability that the plaintiff's injury was caused by the violation of the statute before the burden of proof shifts to the defendant to prove the violation of the statute did not cause the plaintiff's injury." (*Toste v. CalPortland Construction* (2016) 245 Cal.App.4th 362, 371 [199 Cal.Rptr.3d 522].)

- " 'The significance of a statute in a civil suit for negligence lies in its formulation of a standard of conduct that the court adopts in the determination of such liability. The decision as to what the civil standard should be still rests with the court, and the standard formulated by a legislative body in a police regulation or criminal statute becomes the standard to determine civil liability only because the court accepts it. In the absence of such a standard the case goes to the jury, which must determine whether the defendant has acted as a reasonably prudent man would act in similar circumstances. The jury then has the burden of deciding not only what the facts are but what the unformulated standard is of reasonable conduct. When a legislative body has generalized a standard from the experience of the community and prohibits conduct that is likely to cause harm, the court accepts the formulated standards and applies them [citations], except where they would serve to impose liability without fault.' " (*Ramirez v. Plough, Inc.* (1993) 6 Cal.4th 539, 547 [25 Cal.Rptr.2d 97, 863 P.2d 167], internal citations omitted.)

- "There is no doubt in this state that a federal statute or regulation may be adopted as a standard of care." (*DiRosa v. Showa Denko K. K.* (1996) 44 Cal.App.4th 799, 808 [52 Cal.Rptr.2d 128].)

- "[T]he courts and the Legislature may create a negligence duty of care, but an administrative agency cannot independently impose a duty of care if that authority has not been properly delegated to the agency by the Legislature." (*Cal. Serv. Station Etc. Ass'n v. Am. Home Assur. Co.* (1998) 62 Cal.App.4th 1166, 1175 [73 Cal.Rptr.2d 182].)

- "In combination, the [1999] language and the deletion [to Lab. Code, § 6304.5] indicate that henceforth, Cal-OSHA provisions are to be treated like any other statute or regulation and may be admitted to establish a standard or duty of care in all negligence and wrongful death actions, including third party actions." (*Elsner v. Uveges* (2004) 34 Cal.4th 915, 928 [22 Cal.Rptr.3d 530, 102 P.3d 915].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 871–896

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-H, *Negligence Predicated On Statutory Violation ("Negligence Per Se")*, ¶ 2:1845 (The Rutter Group)

Wegner et al., California Practice Guide: Civil Trials & Evidence, Ch. 8G-C, *Procedural Considerations--Presumptions*, ¶ 8:3604 (The Rutter Group)

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 1.28-1.31

1 Levy et al., California Torts, Ch. 3, *Proof of Negligence,* §§ 3.10, 3.13 (Matthew Bender)

4 California Trial Guide, Unit 90, *Closing Argument,* §§ 90.88, 90.89 (Matthew Bender)

California Products Liability Actions, Ch. 7, *Proof,* § 7.04 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence,* § 380.50 (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence,* §§ 165.70, 165.80, 165.81 (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 309, 349 P.3d 1013], original italics, footnote omitted.)

- "The second aspect of proximate cause 'focuses on public policy considerations. Because the purported [factual] causes of an event may be traced back to the dawn of humanity, the law has imposed additional "limitations on liability other than simple causality." [Citation.] "These additional limitations are related not only to the degree of connection between the conduct and the injury, but also with public policy." [Citation.] Thus, "proximate cause 'is ordinarily concerned, not with the fact of causation, but with the various considerations of policy that limit an actor's responsibility for the consequences of his conduct.' " [Citation.]' " (*State Dept. of State Hospitals, supra,* 61 Cal.4th at p. 353, internal citation 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.)

- "Ordinarily, proximate cause is a question of fact which cannot be decided as a matter of law from the allegations of a complaint. … Nevertheless, where the facts are such that the only reasonable conclusion is an absence of causation, the question is one of law, not of fact." (*Modisette v. Apple Inc.* (2018) 30 Cal.App.5th 136, 152 [241 Cal.Rptr.3d 209].)

- "[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.)

- "As a general matter, juries may decide issues of causation without hearing expert testimony. But '[w]here the complexity of the causation issue is beyond common experience, expert testimony is required to establish causation.' " (*Webster v. Claremont Yoga* (2018) 26 Cal.App.5th 284, 290 [236 Cal.Rptr.3d 802], internal citation omitted.)

- "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)

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 in rendering services to [***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 to [***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; Revised November 2018

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 performing services to 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*].)

- "Under this formulation, a duty of care exists when the first, second and fifth elements are established. The third element addresses the breach of that duty of care and the fourth element covers both causation and damages." (*Peredia v. HR Mobile Services, Inc.* (2018) 25 Cal.App.5th 680, 691 [236 Cal.Rptr.3d 157].)

- "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.)

- "The foundation for considering whether an actor … should be exposed to liability on this theory is whether the actor made a specific undertaking ' "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." ' " (*Jabo v. YMCA of San Diego County* (2018) 27 Cal.App.5th 853, 878 [238 Cal.Rptr.3d 588].)

- "[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.]' (see CACI No. 450C [each element of the negligent undertaking theory of liability is resolved by the trier of fact].)" (*O'Malley v. Hospitality Staffing Solutions* (2018) 20 Cal.App.5th 21, 27–28 [228 Cal.Rptr.3d 731], 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

5 Witkin, California Procedure (5th ed. 2018) Pleadings, § 594

9 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1205–1210

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)

610. Affirmative Defense—Statute of Limitations—Attorney Malpractice—One-Year Limit (Code Civ. Proc., § 340.6)

[*Name of defendant***] contends that [***name of plaintiff***]'s lawsuit was not filed within the time set by law. To succeed on this defense, [***name of defendant***] must prove that before [***insert date one year before date of filing***] [***name of plaintiff***] knew, or with reasonable diligence should have discovered, the facts of [***name of defendant***]'s alleged wrongful act or omission.**

[If, however, [*name of plaintiff***] proves**

[*Choose one or more of the following three options:***]**

[that [he/she/it] did not sustain actual injury until on or after [*insert date one year before date of filing***][,/; or]]**

[that on or after [*insert date one year before date of filing***] [***name of defendant***] continued to represent [***name of plaintiff***] regarding the specific subject matter in which the wrongful act or omission occurred[,/; or]]**

[that on or after [*insert date one year before date of filing***] [he/she/it] was under a legal or physical disability that restricted [his/her/its] ability to file a lawsuit[,/;]]**

the period within which [*name of plaintiff***] had to file the lawsuit is extended for the amount of time that [***insert tolling provision, e.g., [name of defendant] continued to represent [name of plaintiff]***].]**

New April 2007; Revised April 2009

Directions for Use

Use CACI No. 611, *Affirmative Defense—Statute of Limitations—Attorney Malpractice—Four-Year Limit,* if the four-year limitation provision is at issue.

The court may need to define the term "actual injury" depending on the facts and circumstances of the particular case.

If no tolling provision from Code of Civil Procedure section 340.6 is at issue, read only through the end of the first paragraph. Read the rest of the instruction if there is a question of fact concerning a tolling provision. If so, the verdict form should ask the jury to find (1) the "discovery" date (the date on which the plaintiff discovered or knew of facts that would have caused a reasonable person to suspect that he or she had suffered harm that was caused by someone's wrongful conduct); (2) whether the tolling provision applies; and (3) if so, for what period of time. The court can then add the additional time to the discovery date and determine whether the action is timely.

Sources and Authority

- Statute of Limitation for Attorney Malpractice. Code of Civil Procedure section 340.6.

- Persons Under Disabilities. Code of Civil Procedure section 352.

- "Under section 340.6, the one-year limitations period commences when the plaintiff actually or constructively discovers the facts of the wrongful act or omission, but the period is tolled until the plaintiff sustains actual injury. That is to say, the statute of limitations will not run during the time the plaintiff cannot bring a cause of action for damages from professional negligence." (*Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 751 [76 Cal.Rptr.2d 749, 958 P.2d 1062].)

- "Summary judgment was proper under section 340.6, subdivision (a)'s one-year limitations period only if the undisputed facts compel the conclusion that [plaintiff] was on inquiry notice of his claim more than one year before the complaint was filed. Inquiry notice exist where 'the plaintiffs have reason to at least suspect that a type of wrongdoing has injured them.' ' "A plaintiff need not be aware of the specific 'facts' necessary to establish the claim; that is a process contemplated by pretrial discovery. Once the plaintiff has a suspicion of wrongdoing, and therefore an incentive to sue, she must decide whether to file suit or sit on her rights. So long as a suspicion exists, it is clear that the plaintiff must go find the facts; she cannot wait for the facts to find her." [Citation.]' " (*Genisman v. Carley* (2018) 29 Cal.App.5th 45, 50–51 [239 Cal.Rptr.3d 780], internal citation omitted.)

- " ' "[S]ubjective suspicion is not required. If a person becomes aware of facts which would make a reasonably prudent person suspicious, he or she has a duty to investigate further and is charged with knowledge of matters which would have been revealed by such an investigation." [Citation.]' " (*Genisman, supra,* 29 Cal.App.5th at p. 51.)

- "For purposes of section 340.6, 'actual injury occurs when the plaintiff sustains any loss or injury legally cognizable as damages in a legal malpractice action based on the acts or omissions that the plaintiff alleged.' While 'nominal damages will not end the tolling of section 340.6's limitations period,' it is 'the fact of damage, rather than the amount, [that] is the critical factor.' " (*Genisman, supra,* 29 Cal.App.5th at p. 52, internal citation omitted.)

- "Actual injury refers only to the legally cognizable damage necessary to assert the cause of action. There is no requirement that an adjudication or settlement must first confirm a causal nexus between the attorney's error and the asserted injury. The determination of actual injury requires only a factual analysis of the claimed error and its consequences. ~~The inquiry necessarily is more qualitative than quantitative because the fact of damage, rather than the amount, is the critical factor.~~" (*Truong v. Glasser* (2009) 181 Cal.App.4th 102, 113 [103 Cal.Rptr.3d 811].)

- " '[S]ection 340.6, subdivision (a)(1), will not toll the limitations period once the client can plead damages that could establish a cause of action for legal malpractice.' '[T]he limitations period is not tolled after the plaintiff sustains actual injury [even] if the injury is, in some sense, remediable. [Citation.] Furthermore, the statutory scheme does not depend on the plaintiff's recognizing actual injury. Actual injury must be noticeable, but the language of the tolling provision does not require that it be noticed.' On the other hand, 'the statute of limitations will not run during the time the plaintiff cannot bring a cause of action for damages from professional negligence' because the

plaintiff cannot allege actual injury resulted from an attorney's malpractice." (*Croucier v. Chavos* (2012) 207 Cal.App.4th 1138, 1148 [144 Cal.Rptr.3d 180], internal citations omitted.)

- "[A]ctual injury exists even if the client has yet to 'sustain[] all, or even the greater part, of the damages occasioned by his attorney's negligence'; even if the client will encounter 'difficulty in proving damages'; and even if that damage might be mitigated or entirely eliminated in the future. [¶] However, 'actual injury' does not include 'speculative and contingent injuries … that do not yet exist … .' " (*Shaoxing City Maolong Wuzhong Down Products, Ltd. v. Keehn & Associates, APC* (2015) 238 Cal.App.4th 1031, 1036 [190 Cal.Rptr.3d 90], internal citations omitted.)

- "[B]ecause 'determining actual injury is predominately a factual inquiry' to the extent a question remains on this point, the matter is properly resolved by the trier of fact … ." (*Callahan v. Gibson, Dunn & Crutcher LLP* (2011) 194 Cal.App.4th 557, 576 [125 Cal.Rptr.3d 120].)

- "[W]here, as here, the 'material facts are undisputed, the trial court can resolve the matter [of actual injury] as a question of law in conformity with summary judgment principles.' " (*Shaoxing City Maolong Wuzhong Down Products, Ltd., supra,* 238 Cal.App.4th at pp. 1037−1038.)

- "[P]rior to the enactment of section 340.6 the running of the statute of limitations coincided with accrual of the plaintiff's malpractice cause of action, including damages. By contrast, under the provisions of section 340.6, discovery of the negligent act or omission initiates the statutory period, and the absence of injury or damages serves as a tolling factor." (*Adams v. Paul* (1995) 11 Cal.4th 583, 589, fn. 2 [46 Cal.Rptr.2d 594, 904 P.2d 1205], internal citations omitted.)

- "[A] defendant must prove the facts necessary to enjoy the benefit of a statute of limitations." (*Samuels v. Mix* (1999) 22 Cal.4th 1, 10 [91 Cal.Rptr.2d 273, 989 P.2d 701], internal citations omitted.)

- "[D]efendant, if he is to avail himself of the statute's one-year-from-discovery limitation defense, has the burden of proving, under the 'traditional allocation of the burden of proof' that plaintiff discovered or should have discovered the facts alleged to constitute defendant's wrongdoing more than one year prior to filing this action." (*Samuels, supra,* 22 Cal.4th at pp. 8–9, internal citations omitted.)

- "In ordinary tort and contract actions, the statute of limitations, it is true, begins to run upon the occurrence of the last element essential to the cause of action. The plaintiff's ignorance of the cause of action, or of the identity of the wrongdoer, does not toll the statute. In cases of professional malpractice, however, postponement of the period of limitations until discovery finds justification in the special nature of the relationship between the professional man and his client." (*Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 187–188 [98 Cal.Rptr. 837, 491 P.2d 421], footnote omitted.)

- "We hold that a cause of action for legal malpractice does not accrue until the client discovers, or should discover, the facts establishing the elements of his cause of action." (*Neel, supra,* 6 Cal.3d at p. 194.)

- " '[W]here there is a professional relationship, the degree of diligence in ferreting out the negligence for the purpose of the statute of limitations is diminished. [Citation.]' " (*Stueve Bros. Farms, LLC v. Berger Kahn* (2013) 222 Cal.App.4th 303, 315 [166 Cal.Rptr.3d 116].)

- "If the allegedly negligent conduct does not cause damage, it generates no cause of action in tort. The mere breach of a professional duty, causing only nominal damages, speculative harm, or the threat of future harm—not yet realized—does not suffice to create a cause of action for negligence. Hence, until the client suffers appreciable harm as a consequence of his attorney's negligence, the client cannot establish a cause of action for malpractice." (*Budd v. Nixen* (1971) 6 Cal.3d 195, 200 [98 Cal.Rptr. 849, 491 P.2d 433], internal citations omitted.)

- "A plaintiff who is aware of, and has been actually injured by, attorney malpractice in a matter need not file suit for malpractice while that attorney is still representing him on the same 'specific subject matter.' " (*Shaoxing City Maolong Wuzhong Down Products, Ltd., supra,* 238 Cal.App.4th at p. 1038.)

- "The continuous representation tolling provision in section 340.6, subdivision (a)(2) 'was adopted in order to "avoid the disruption of an attorney-client relationship by a lawsuit while enabling the attorney to correct or minimize an apparent error, and to prevent an attorney from defeating a malpractice cause of action by continuing to represent the client until the statutory period has expired." ' " (*Kelly v. Orr* (2016) 243 Cal.App.4th 940, 950 [196 Cal.Rptr.3d 901].)

- "The mere existence of an attorney-client relationship does not trigger the continuous representation rule: 'Instead, the statute's tolling language addresses a particular phase of such a relationship-representation regarding a *specific subject matter*. Moreover, the limitations period is not tolled when an attorney's subsequent role is only tangentially related to the legal representation the attorney provided to the plaintiff. Therefore, "[t]he *inquiry is not whether an attorney-client relationship still exists but when the representation of the specific matter terminated.*" ' Tolling does not apply where there is a continuing relationship between the attorney and client 'involving only unrelated matters.' " (*Lockton v. O'Rourke* (2010) 184 Cal.App.4th 1051, 1064 [109 Cal.Rptr.3d 392], original italics, internal citations omitted.)

- "[W]here a client hires a law firm to represent it, the provisions of section 340.6 apply to that firm; the term 'attorney' in section 340.6 may embrace the entire partnership, law corporation, or other legal entity the client retains. [¶] That either an attorney or a firm may be the subject of an action does not support a reading under which representation by one attorney or firm might toll the limitations period as to another no longer affiliated attorney or firm. Rather, the text implies an action against a law firm is tolled so long as *that firm* continues representation, just as an action against an attorney is tolled so long as *that attorney* continues representation, but representation by one attorney or firm does not toll claims that may exist against a different, unaffiliated attorney or firm." (*Beal Bank, SSB v. Arter & Hadden, LLP* (2007) 42 Cal.4th 503, 509 [66 Cal.Rptr.3d 52, 167 P.3d 666], original italics.)

- " '[W]hen an attorney leaves a firm and takes a client with him or her, … the tolling in ongoing matters [does not] continue for claims against the former firm and partners.' " (*Stueve Bros. Farms, LLC, supra,* 222 Cal.App.4th at p. 314.)

- " 'Ordinarily, an attorney's representation is not completed until the agreed tasks or events have occurred, the client consents to termination or a court grants an application by counsel for withdrawal.' 'The rule is that, for purposes of the statute of limitations, the attorney's representation is concluded when the parties so agree, and that result does not depend upon formal termination, such as withdrawing as counsel of record.' 'Continuity of representation ultimately depends, not on the client's subjective beliefs, but rather on evidence of an ongoing mutual relationship and of activities in furtherance of the relationship.' " (*Nielsen v. Beck* (2007) 157 Cal.App.4th 1041, 1049 [69 Cal.Rptr.3d 435], internal citations omitted.)

- "[T]he continuous representation tolling provision in section 340.6, subdivision (a)(2), applies to toll legal malpractice claims brought by successor trustees against attorneys who represented the predecessor trustee." (*Kelly, supra,* 243 Cal.App.4th at p. 951.)

- "[A]bsent a statutory standard to determine when an attorney's representation of a client regarding a specific subject matter ends, and consistent with the purposes of the continuing representation rule, we conclude that for purposes of … section 340.6, subdivision (a)(2), in the event of an attorney's unilateral withdrawal or abandonment of the client, the representation ends *when the client actually has or reasonably should have no expectation that the attorney will provide further legal services.* … That may occur upon the attorney's express notification to the client that the attorney will perform no further services, or, if the attorney remains silent, may be inferred from the circumstances. *Absent actual notice to the client that the attorney will perform no further legal services or circumstances that reasonably should cause the client to so conclude,* a client should be entitled to rely on an attorney to perform the agreed services and should not be required to interrupt the attorney-client relationship by filing a malpractice complaint. *After a client has no reasonable expectation that the attorney will provide further legal services,* however, the client is no longer hindered by a potential disruption of the attorney-client relationship and no longer relies on the attorney's continuing representation, so the tolling should end. To this extent and for these reasons, *we conclude that continuous representation should be viewed objectively from the client's perspective* … ." (*Laclette v. Galindo* (2010) 184 Cal.App.4th 919, 928 [109 Cal.Rptr.3d 660], original italics.)

- "Continuity of representation ultimately depends, not on the client's subjective beliefs, but rather on evidence of an ongoing *mutual* relationship and of activities in furtherance of the relationship." (*GoTek Energy, Inc. v. SoCal IP Law Group, LLP* (2016) 3 Cal.App.5th 1240, 1248 [208 Cal.Rptr.3d 428], original italics.)

- "Section 340.6, subdivision (a), states that 'in no event' shall the prescriptive period be tolled except under those circumstances specified in the statute. Thus, the Legislature expressly intended to disallow tolling under any circumstances not enumerated in the statute." (*Laird v. Blacker* (1992) 2 Cal.4th 606, 618 [7 Cal.Rptr.2d 550, 828 P.2d 691] [applying rule to one-year limitation period]; cf. *Belton v. Bowers Ambulance Serv.* (1999) 20 Cal.4th 928, 934 [86 Cal.Rptr.2d 107, 978 P.2d 591] [substantially similar language in Code Civ. Proc., § 340.5, applicable to medical malpractice, construed to apply only to three-year limitation period].)

- "[T]he fourth tolling provision of section 340.6, subdivision (a)—that is, the provision applicable to legal and physical disabilities—encompasses the circumstances set forth in section 351 [exception,

where defendant is out of the state].” (*Jocer Enterprises, Inc. v. Price* (2010) 183 Cal.App.4th 559, 569 [107 Cal.Rptr.3d 539].)

- “[A] would-be plaintiff is ‘imprisoned on a criminal charge’ within the meaning of section 352.1 if he or she is serving a term of imprisonment in the state prison.” (*Austin v. Medicis* (2018) 21 Cal.App.5th 577, 597 [230 Cal.Rptr.3d 528].)

- “In light of the Legislature's intent that section 340.6(a) cover more than claims for legal malpractice, the term ‘professional services’ is best understood to include nonlegal services governed by an attorney's professional obligations.” (*Lee v. Hanley* (2015) 61 Cal.4th 1225, 1237 [191 Cal.Rptr.3d 536, 354 P.3d 334].)

- “For purposes of section 340.6(a), the question is not simply whether a claim alleges misconduct that entails the violation of a professional obligation. Rather, the question is whether the claim, in order to succeed, necessarily depends on proof that an attorney violated a professional obligation as opposed to some generally applicable nonprofessional obligation.” (*Lee, supra,* 61 Cal.4th at p. 1238.)

- “*Lee* held that ‘section 340.6(a)'s time bar applies to claims whose merits necessarily depend on proof that an attorney violated a professional obligation in the course of providing professional services. In this context, a “professional obligation” is an obligation that an attorney has by virtue of being an attorney, such as fiduciary obligations, the obligation to perform competently, the obligation to perform the services contemplated in a legal services contract into which an attorney has entered, and the obligations embodied in the State Bar Rules of Professional Conduct.’ ” (*Foxen v. Carpenter* (2016) 6 Cal.App.5th 284, 292 [211 Cal.Rptr.3d 372].)

Secondary Sources

3 Witkin, California Procedure (5th ed. 2008) Actions, §§ 573, 626–655

3 Levy et al., California Torts, Ch. 32, *Liability of Attorneys*, § 32.60 (Matthew Bender)

1 Matthew Bender Practice Guide: California Pretrial Civil Procedure, Ch. 4, *Limitation of Actions*, 4.05

7 California Forms of Pleading and Practice, Ch. 76, *Attorney Professional Liability*, §§ 76.170, 76.430 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.150 (Matthew Bender)

901. Status of Common Carrier Disputed

To prove that [*name of defendant*] was a common carrier, [*name of plaintiff*] must prove that it was in the business of transporting [the property of] the general public.

In deciding this issue, you may consider whether any of the following factors apply. These factors suggest that a carrier is a common carrier:

(a) The carrier maintains a regular place of business for the purpose of transporting passengers [or property].

(b) The carrier advertises its services to the general public.

(c) The carrier charges standard fees for its services.

(d) [*Insert other applicable factor(s)*.]

A carrier can be a common carrier even if it does not have a regular schedule of departures, a fixed route, or a transportation license.

If you find that [*name of defendant*] was not a common carrier, then [*name of defendant*] did not have the duty of a common carrier, only a duty of ordinary care.

New September 2003

Directions for Use

The court should give the ordinary negligence instructions in conjunction with this one. Ordinary negligence is the standard applicable to private carriers.

Sources and Authority

- "Common Carrier" Defined. Civil Code section 2168.
- Contract of Carriage. Civil Code section 2085.
- "[A] common carrier within the meaning of Civil Code section 2168 is any entity which holds itself out to the public generally and indifferently to transport goods or persons from place to place for profit." (*Squaw Valley Ski Corp. v. Superior Court* (1992) 2 Cal.App.4th 1499, 1508 [3 Cal.Rptr.2d 897], internal citations omitted.)
- "Whether a party is a common carrier for reward may be decided as a matter of law when the material facts are not in dispute. When the material facts are disputed, it is a question of fact for the jury." (*Huang v. The Bicycle Casino, Inc.* (2016) 4 Cal.App.5th 329, 339 [208 Cal.Rptr.3d 591 [citing this

instruction].)

- "Factors bearing on a party's common carrier status include (1) whether the party maintained an established place of business for the purpose of transporting passengers; (2) whether the party engaged in transportation as a regular business and not as a casual or occasional undertaking; (3) whether the party advertised its transportation services to the general public; and (4) whether the party charged standard rates for its service. The party need not have a regular schedule or a fixed route to be a common carrier, nor need the party have a transportation license. [¶] Not all these factors need be present for the party to be a common carrier subject to the heightened duty of care." (*Huang, supra,* 4 Cal.App.5th at p. 339, internal citations omitted; see also *Gradus v. Hanson Aviation, Inc.* (1984) 158 Cal.App.3d 1038, 1047–1048 [205 Cal.Rptr. 211] [approving jury instruction].)

- "In deciding whether [defendant] is a common carrier, a court may properly consider whether (1) the defendant maintains a regular place of business for the purpose of transportation; (2) the defendant advertises its services to the general public; and (3) the defendant charges standard fees for its services." (*Martine v. Heavenly Valley Limited Partnership* (2018) 27 Cal.App.5th 715, 725 [238 Cal.Rptr.3d 237, citing this instruction].)

- "Common carrier status emerged in California in the mid-19th century as a narrow concept involving stagecoaches hired purely for transportation. Over time, however, the concept expanded to include a wide array of recreational transport like scenic airplane and railway tours, ski lifts, and roller coasters. This expansion reflects the policy determination that a passenger's purpose, be it recreation, thrill-seeking, or simply conveyance from point A to B, should not control whether the operator should bear a higher duty to protect the passenger." (*Grotheer v. Escape Adventures, Inc.* (2017) 14 Cal.App.5th 1283, 1294 [222 Cal.Rptr.3d 633], internal citations omitted.)

- "[T]he key inquiry in the common carrier analysis is whether passengers expect the transportation to be safe because the operator is reasonably capable of controlling the risk of injury." (*Grotheer, supra,* 14 Cal.App.5th at p. 1295 [hot air balloon is not a common carrier].)

- "A private carrier ... is bound only to accept carriage pursuant to special agreement." (*Webster v. Ebright* (1992) 3 Cal.App.4th 784, 787 [4 Cal.Rptr.2d 714].) Private carriers " 'make no public profession that they will carry for all who apply, but ... occasionally or upon the particular occasion undertake for compensation to carry the goods of others upon such terms as may be agreed upon.' " (*Id*. at p. 788, internal citations omitted.)

- " '[T]he law applicable to common carriers is peculiarly rigorous, and it ought not to be extended to persons who have not expressly assumed that character, or by their conduct and from the nature of their business justified the belief on the part of the public that they intended to assume it.' " (*Samuelson v. Public Utilities Com.* (1951) 36 Cal.2d 722, 730 [227 P.2d 256], internal citation omitted.)

- "To be a common carrier, the entity merely must be of the character that members of the general public may, if they choose, avail themselves of it." (*Squaw Valley Ski Corp., supra,* 2 Cal.App.4th at pp. 1509–1510, internal citation omitted.)

- "Given the fact [defendant] indiscriminately offers its Shirley Lake chair lift to the public to carry skiers at a fixed rate from the bottom to the top of the Shirley Lake run, it logically comes within the Civil Code section 2168 definition of a common carrier." (*Squaw Valley Ski Corp., supra,* 2 Cal.App.4th at p. 1508.)

- "[T]he 'reward' contemplated by the statutory scheme need not be a fee charged for the transportation service. The reward may be the profit generated indirectly by easing customers' way through the carriers' premises." (*Huang, supra,* 4 Cal.App.5th at p. 339, internal citation omitted.)

- " '[T]he "public" does not mean everyone all of the time; naturally, passengers are restricted by the type of transportation the carrier affords. [Citations.] "One may be a common carrier though the nature of the service rendered is sufficiently specialized as to be of possible use to only a fraction of the total population." … To be a common carrier, the entity merely must be of the character that members of the general public may, if they choose, avail themselves of it.' " (*Huang, supra,* 4 Cal.App.5th at p. 339, internal citation omitted.)

- "Plaintiff also argues the public policy of protecting passengers of a common carrier for reward, as expressed in Civil Code section 2100, precludes limiting defendant's duty to riders on [bumper cars]. In *Gomez v. Superior Court* [(2005) 35 Cal.4th 1125, 1136, fn. 5 [29 Cal. Rptr. 3d 352, 113 P.3d 41]], we held that an operator of a 'roller coaster or similar amusement park ride can be a carrier of persons for reward' for purposes of Civil Code section 2100. At the same time, however, we expressed no opinion 'whether other, dissimilar, amusement rides or attractions can be carriers of persons for reward.' " (*Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148, 1160 [150 Cal.Rptr.3d 551, 290 P.3d 1158] [bumper car ride is not common carrier].)

- "In the situation at bar, [defendant]'s motor cars were customarily and daily cruising the streets for patronage or awaiting calls of the public. It was a common carrier in transporting such patrons. But when it agreed to act as carrier of handicapped school children under agreement for its operators to escort the pupils to and from their schools and homes to the cab and to render such service exclusively for them at designated hours, the company ceased to be a common carrier while transporting the specified children during such hours." (*Hopkins v. Yellow Cab Co.* (1952) 114 Cal.App.2d 394, 398 [250 P.2d 330].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 924

2 Levy et al., California Torts, Ch. 23, *Carriers*, § 23.01 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 109, *Carriers,* § 109.14 (Matthew Bender)

3 California Points and Authorities, Ch. 33, *Carriers,* § 33.29 (Matthew Bender)

2 California Civil Practice: Torts §§ 28:1–28:2 (Thomson Reuters)

1903. Negligent Misrepresentation

[*Name of plaintiff*] claims [he/she/it] was harmed because [*name of defendant*] negligently misrepresented a fact. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] represented to [*name of plaintiff*] that a fact was true;**

2. **That [*name of defendant*]'s representation was not true;**

3. **That [although [*name of defendant*] may have honestly believed that the representation was true,] [[*name of defendant*]/he/she] had no reasonable grounds for believing the representation was true when [he/she] made it;**

4. **That [*name of defendant*] intended that [*name of plaintiff*] rely on this representation;**

5. **That [*name of plaintiff*] reasonably relied on [*name of defendant*]'s representation;**

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

7. **That [*name of plaintiff*]'s reliance on [*name of defendant*]'s representation was a substantial factor in causing [his/her/its] harm.**

New September 2003; Revised December 2009, December 2013

Directions for Use

Give this instruction in a case in which it is alleged that the defendant made certain representations with no reason to believe that they were true. (See Civ. Code, § 1710(2).) If element 5 is contested, give CACI No. 1907, *Reliance,* and CACI No. 1908, *Reasonable Reliance*.

If both negligent misrepresentation and intentional misrepresentation are alleged in the alternative, give both this instruction and CACI No.1900, *Intentional Misrepresentation*. If only negligent misrepresentation is alleged, the bracketed reference to the defendant's honest belief in the truth of the representation in element 3 may be omitted. (See *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 407–408 [11 Cal.Rptr.2d 51, 834 P.2d 745].)

Sources and Authority

- Negligent Misrepresentation. Civil Code section 1710.

- "Negligent misrepresentation is a separate and distinct tort, a species of the tort of deceit. 'Where the defendant makes false statements, honestly believing that they are true, but without reasonable ground for such belief, he may be liable for negligent misrepresentation, a form of deceit.' " (*Bily, supra,* 3 Cal.4th at p~~p~~. 407, internal citations omitted.)

- "This is not merely a case where the defendants made false representations of matters within their personal knowledge which they had *no reasonable grounds for believing to be true*. Such acts clearly would constitute actual fraud under California law. In such situations the defendant *believes* the representations to be true but is without reasonable grounds for such belief. His liability is based on negligent misrepresentation which has been made a form of actionable deceit. On the contrary, in the instant case, the court found that the defendants *did not believe* in the truth of the statements. Where a person makes statements which he does not believe to be true, in a reckless manner without knowing whether they are true or false, the element of scienter is satisfied and he is liable for intentional misrepresentation." (*Yellow Creek Logging Corp. v. Dare* (1963) 216 Cal.App.2d 50, 57 [30 Cal.Rptr. 629], original italics, internal citations omitted.)

- "Negligent misrepresentation requires an assertion of fact, falsity of that assertion, and the tortfeasor's lack of reasonable grounds for believing the assertion to be true. It also requires the tortfeasor's intent to induce reliance, justifiable reliance by the person to whom the false assertion of fact was made, and damages to that person. An implied assertion of fact is 'not enough' to support liability." *(SI 59 LLC v. Variel Warner Ventures, LLC* (2018) 29 Cal.App.5th 146, 154 [239 Cal.Rptr.3d 788], internal citation omitted.~~The elements of negligent misrepresentation are (1) a misrepresentation of a past or existing material fact, (2) made without reasonable ground for believing it to be true, (3) made with the intent to induce another's reliance on the fact misrepresented, (4) justifiable reliance on the misrepresentation, and (5) resulting damage." (*Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182, 196 [147 Cal.Rptr.3d 41].~~)

- " 'To be actionable deceit, the representation need not be made with knowledge of actual falsity, but need only be an "assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true" and made "with intent to induce [the recipient] to alter his position to his injury or his risk. ..." ' The elements of negligent misrepresentation also include justifiable reliance on the representation, and resulting damage." (*B.L.M. v. Sabo & Deitsch* (1997) 55 Cal.App.4th 823, 834 [64 Cal.Rptr.2d 335], internal citations omitted.)

- "[Plaintiffs] do not allege negligence. They allege negligent misrepresentation. They are different torts, as the Supreme Court expressly observed in [*Bily, supra,* 3 Cal.4th at p. 407]: '[N]either the courts (ourselves included), the commentators, nor the authors of the Restatement Second of Torts have made clear or careful distinctions between the tort of negligence and the separate tort of negligent misrepresentation. The distinction is important not only because of the different statutory bases of the two torts, but also because it has practical implications for the trial of cases in complex areas … . [¶] Negligent misrepresentation is a separate and distinct tort, a species of the tort of deceit.' In short, the elements of each tort are different. Perhaps more importantly, the policies behind each tort sometimes call for different results even when applied to the same conduct." (*Bock v. Hansen* (2014) 225 Cal.App.4th 215, 227−228 [170 Cal.Rptr.3d 293].)

- "As is true of negligence, responsibility for negligent misrepresentation rests upon the existence of a legal duty, imposed by contract, statute or otherwise, owed by a defendant to the injured person. The determination of whether a duty exists is primarily a question of law." (*Eddy v. Sharp* (1988) 199 Cal.App.3d 858, 864 [245 Cal.Rptr. 211], internal citations omitted.)

- "The tort of negligent misrepresentation is similar to fraud, except that it does not require scienter or

an intent to defraud. … [T]he same elements of intentional fraud also comprise a cause of action for negligent misrepresentation, with the exception that there is no requirement of intent to induce reliance … .” (*Tenet Healthsystem Desert, Inc. v. Blue Cross of California* (2016) 245 Cal.App.4th 821, 845 [199 Cal.Rptr.3d 901], internal citation omitted.)

- “ ‘ “Where the defendant makes false statements, honestly believing that they are true, but without reasonable ground for such belief, he may be liable for negligent misrepresentation, a form of deceit.” ’ If defendant’s belief ‘is both honest and reasonable, the misrepresentation is innocent and there is no tort liability.’ ” (*Diediker v. Peelle Financial Corp.* (1997) 60 Cal.App.4th 288, 297 [70 Cal.Rptr.2d 442], internal citations omitted.)

- “[A] cause of action for misrepresentation requires an affirmative statement, not an implied assertion.” (*RSB Vineyards, LLC v. Orsi* (2017) 15 Cal.App.5th 1089, 1102 [223 Cal.Rptr.3d 458].)

- “Whether a defendant had reasonable ground for believing his or her false statement to be true is ordinarily a question of fact.” (*Quality Wash Group V, Ltd. v. Hallak* (1996) 50 Cal.App.4th 1687, 1696 [58 Cal.Rptr.2d 592], internal citations omitted.)

- “[T]here are two causation elements in a fraud cause of action. First, the plaintiff's actual and justifiable reliance on the defendant's misrepresentation must have caused him to take a detrimental course of action. Second, the detrimental action taken by the plaintiff must have caused his alleged damage.” (*Beckwith v. Dahl* (2012) 205 Cal.App.4th 1039, 1062 [141 Cal.Rptr.3d 142].)

- “The law is well established that actionable misrepresentations must pertain to past or existing material facts. Statements or predictions regarding future events are deemed to be mere opinions which are not actionable.” (*Cansino v. Bank of America* (2014) 224 Cal.App.4th 1462, 1469 [169 Cal.Rptr.3d 619], internal citation omitted.)

- “Where, as here, a negligent misrepresentation claim is brought against the provider of a professional opinion based on special knowledge, information or expertise regarding a company's value, the California Supreme Court requires the following: ‘The representation must have been made with the intent to induce plaintiff, or a particular class of persons to which plaintiff belongs, to act in reliance upon the representation in a specific transaction, or a specific type of transaction, that defendant intended to influence. Defendant is deemed to have intended to influence [its client's] transaction with plaintiff whenever defendant knows with substantial certainty that plaintiff, or the particular class of persons to which plaintiff belongs, will rely on the representation in the course of the transaction. [However,] [i]f others become aware of the representation and act upon it, there is no liability even though defendant should reasonably have foreseen such a possibility.’ ” (*Public Employees’ Retirement System v. Moody's Investors Service, Inc.* (2014) 226 Cal.App.4th 643, 667−668 [172 Cal.Rptr.3d 238].)

- “[P]laintiffs rely on section 311 of the Restatement Second of Torts (section 311), which addresses negligent misrepresentation involving physical harm. Under section 311(1), ‘[o]ne who negligently gives false information to another is subject to liability for physical harm caused by action taken by the other in reasonable reliance upon such information, where such harm results [¶] … [¶] to such third persons as the actor should expect to be put in peril by the action taken.’ [¶] Section 311's theory

of liability is intended to be 'somewhat broader' than that for mere pecuniary loss. It 'finds particular application where it is a part of the actor's business or profession to give information upon which the safety of the recipient or a third person depends.' This court applied and followed section 311 … " (*T.H. v. Novartis Pharmaceuticals Corp.* (2017) 4 Cal.5th 145, 162–163 [226 Cal.Rptr.3d 336, 407 P.3d 18], internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 818–820, 823–826

Chin et al., California Practice Guide: Employment Litigation, Ch. 5(I)-H,, *Negligent Misrepresentation*, ¶ 5:781 et seq. (The Rutter Group)

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 11-D, *Negligent Misrepresentation*, ¶ 11:41 et seq. (The Rutter Group)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.10 (Matthew Bender)

23 California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit,* § 269.14 (Matthew Bender)

10 California Points and Authorities, Ch. 105, *Fraud and Deceit,* § 105.270 et seq. (Matthew Bender)

2 California Civil Practice: Torts, §§ 22:13–22:15 (Thomson Reuters)

2320. Affirmative Defense—Failure to Provide Timely Notice

[*Name of defendant*] claims that it does not have to pay the [judgment against/settlement by] [*name of plaintiff*] because it did not receive timely notice of the [lawsuit/[*insert other*]]. To succeed, [*name of defendant*] must prove both of the following:

1. **That [*name of plaintiff*] did not give [*name of defendant*] notice [or that [*name of defendant*] did not receive notice by some other means] [within the time specified in the policy/within a reasonable time] of the [lawsuit/[*insert other*]]; and**

2. **That [*name of defendant*] was prejudiced by [*name of plaintiff*]'s failure to give timely notice.**

To establish prejudice, [*name of defendant*] must show a substantial likelihood that, with timely notice, it would have [taken steps that would have substantially reduced or eliminated [*name of plaintiff*]'s liability] [or] [settled for a substantially smaller amount].

New September 2003

Directions for Use

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

This instruction is intended for use by an insurer as a defense to a breach of contract action based on a third party liability policy. The defense does not apply to "claims made" policies (see *Pacific Employers Insurance Co. v. Superior Court* (1990) 221 Cal.App.3d 1348, 1357–1360 [270 Cal.Rptr. 779]). This instruction also may be modified for use as a defense to a judgment creditor's action to recover on a liability policy.

Sources and Authority

- "The right of an injured party to sue an insurer on the policy after obtaining judgment against the insured is established by statute. An insurer may assert defenses based upon a breach by the insured of a condition of the policy such as a cooperation clause, but the breach cannot be a valid defense unless the insurer was substantially prejudiced thereby. Similarly, it has been held that prejudice must be shown with respect to breach of a notice clause." (*Campbell v. Allstate Insurance Co.* (1963) 60 Cal.2d 303, 305-306 [32 Cal.Rptr. 827, 384 P.2d 155], internal citations omitted.)

- "The burden of establishing prejudice is on the insurance company, and prejudice is not presumed by delay alone. To establish prejudice, the ' "insurer must show it lost something that would have changed the handling of the underlying claim." ' "(*Lat v. Farmers New World Life Ins. Co.* (2018) 29 Cal.App.5th 191, 196–197 [239 Cal.Rptr.3d 796], internal citations omitted.)

- "[P]rejudice is not shown simply by displaying end results; the probability that such result could or would have been avoided absent the claimed default or error must also be explored." (*Clemmer v. Hartford Insurance Co.* (1978) 22 Cal.3d 865, 883, fn. 12 [151 Cal.Rptr. 285, 587 P.2d 1098].)

- "If the insurer asserts that the underlying claim is not a covered occurrence or is excluded from basic coverage, then earlier notice would only result in earlier denial of coverage. To establish actual prejudice, the insurer must show a substantial likelihood that, with timely notice, and notwithstanding a denial of coverage or reservation of rights, it would have settled the claim for less or taken steps that would have reduced or eliminated the insured's liability." (*Safeco Ins. Co. of America v. Parks* (2009) 170 Cal.App.4th 992, 1004 [88 Cal.Rptr.3d 730].)

- "Under the notice prejudice rule, an insurance company may not deny an insured's claim under an occurrence policy based on lack of timely notice or proof of claim unless it can show actual prejudice from the delay. The rule is based on the rationale that ' "[t]he primary and essential part of the contract [is] insurance coverage, not the procedure for determining liability …" [citations], and that "the notice requirement serves to protect insurers from prejudice, … not … to shield them from their contractual obligations" through "a technical escape-hatch." ' " (*Lat, supra,* 29 Cal.App.5th at p. 196, internal citations omitted~~California's 'notice-prejudice' rule operates to bar insurance companies from disavowing coverage on the basis of lack of timely notice unless the insurance company can show actual prejudice from the delay. The rule was developed in the context of 'occurrence' policies." (*Pacific Employers Insurance Co., supra,* 221 Cal.App.3d at p. 1357~~.)

- "[The notice-prejudice rule] does not apply to every time limit on any insurance policy. [¶] Where the policy provides that special coverage for a particular type of claim is conditioned on express compliance with a reporting requirement, the time limit is enforceable without proof of prejudice. Such reporting time limits often are found in provisions for expanded liability coverage that the insurer usually does not cover. The insurer makes an exception and extends special coverage conditioned on compliance with a reporting requirement and other conditions. The reporting requirement becomes 'the written notice necessary to trigger the expanded coverage afforded' by the special policy provision." (*Venoco, Inc. v. Gulf Underwriters Ins. Co.* (2009) 175 Cal.App.4th 750, 760 [96 Cal.Rptr.3d 409], internal citations omitted.)

- "With respect to notice provisions, one Court of Appeal has explained: '[A]n "occurrence" policy provides coverage for any acts or omissions that arise during the policy period even though the claim is made after the policy has expired.' … [¶] … [¶] Occurrence policies were developed to provide coverage for damage caused by collision, fire, war, and other identifiable events. … Because the occurrence of these events was relatively easy to ascertain, the insurer was able to 'conduct a prompt investigation of the incident … .' … Notice provisions contained in such occurrence policies were 'included to aid the insurer in investigating, settling, and defending claims[.]' … If an insured breaches a notice provision, resulting in substantial prejudice to the defense, the insurer is relieved of liability." (*Belz v. Clarendon America Ins. Co.* (2007) 158 Cal.App.4th 615, 626 [69 Cal.Rptr.3d 864], internal citation omitted.)

- "The 'general rule' is that an insurer is not bound by a judgment unless it had notice of the pendency of the action. ... However, if an insurer denies coverage to the insured, the insured's contractual

obligation to notify the insurer ceases." (*Samson v. Transamerica Insurance Co.* (1981) 30 Cal.3d 220, 238 [178 Cal.Rptr. 343, 636 P.2d 32], internal citations omitted.)

Secondary Sources

Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group) ¶¶ 15:917–15:920

1 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar) Identifying Sources of Coverage, §§ 8.24–8.26

4 California Insurance Law & Practice, Ch. 41, *Liability Insurance in General*, § 41.65[1]–[9] (Matthew Bender)

26 California Forms of Pleading and Practice, Ch. 308, *Insurance*, § 308.500 (Matthew Bender)

2330. Implied Obligation of Good Faith and Fair Dealing Explained

In every insurance policy there is an implied obligation of good faith and fair dealing that neither the insurance company nor the insured will do anything to injure the right of the other party to receive the benefits of the agreement.

To fulfill its implied obligation of good faith and fair dealing, an insurance company must give at least as much consideration to the interests of the insured as it gives to its own interests.

To breach the implied obligation of good faith and fair dealing, an insurance company must unreasonably act or fail to act in a manner that deprives the insured of the benefits of the policy. To act unreasonably is not a mere failure to exercise reasonable care. It means that the insurer must act or fail to act without proper cause. However, it is not necessary for the insurer to intend to deprive the insured of the benefits of the policy.

New September 2003; Revised December 2007, December 2015

Directions for Use

This instruction may be used to introduce a "bad-faith" claim arising from an alleged breach of the implied covenant of good faith and fair dealing.

Sources and Authority

- "There is an implied covenant of good faith and fair dealing in every contract that neither party will do anything which will injure the right of the other to receive the benefits of the agreement." (*Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 658 [328 P.2d 198].)

- "It is important to recognize the reason for the possibility of tort, and perhaps even punitive damages on top of regular tort damages, for an insurance company's unreasonable breach of an insurance contract. Insurance contracts are unique in that, if the insurance company breaches them, the policyholder suffers a loss (often a catastrophic loss) that cannot, by definition, be compensated by obtaining another contract. [Citations.] [¶] Thus, without the possibility of tort damages hanging over its head when it makes a claims decision, an insurance company may choose not to deal in good faith when a policyholder makes a claim. The insurance company could arbitrarily deny a claim, thus gambling with the policyholder's 'benefits of the agreement.' [Citation.] If the insurance company gambled wrong, it would be no worse off than it would have been if it had honored the claim in the first place. In effect, if the law confined the exposure of the insurance company under such circumstances to only contract damages, it would be pardoned and still retain the fruits of its offense." (*Pulte Home Corp. v. American Safety Indemnity Co.* (2017) 14 Cal.App.5th 1086, 1125 [223 Cal.Rptr.3d 47].)

- "For the insurer to fulfill its obligation not to impair the right of the insured to receive the benefits of the agreement, it again must give at least as much consideration to the latter's interests as it does to its

own." (*Egan v. Mutual of Omaha Insurance Co.* (1979) 24 Cal.3d 809, 818–819 [169 Cal.Rptr. 691, 620 P.2d 141].)

- "[T]o establish the insurer's 'bad faith' liability, the insured must show that the insurer has (1) withheld benefits due under the policy, and (2) that such withholding was 'unreasonable' or 'without proper cause.' The actionable withholding of benefits may consist of the denial of benefits due; paying less than due; and/or unreasonably delaying payments due." (*Major v. Western Home Ins. Co.* (2009) 169 Cal.App.4th 1197, 1209 [87 Cal.Rptr.3d 556], internal citations omitted.)

- " '[T]he covenant of good faith can be breached for objectively unreasonable conduct, regardless of the actor's motive.' … [A]n insured plaintiff need only show, for example, that the insurer unreasonably refused to pay benefits or failed to accept a reasonable settlement offer; there is no requirement to establish *subjective* bad faith." (*Bosetti v. United States Life Ins. Co. in the City of New York* (2009) 175 Cal.App.4th 1208, 1236 [96 Cal.Rptr.3d 744], original italics, internal citations omitted.)

- "To establish bad faith, a policy holder must demonstrate misconduct by the insurer more egregious than an incorrect denial of policy benefits." (*Case v. State Farm Mutual Automobile Ins. Co., Inc.* (2018) 30 Cal.App.5th 397, 402 [241 Cal.Rptr.3d 458].)

- "Bad faith may involve negligence, or negligence may be indicative of bad faith, but negligence alone is insufficient to render the insurer liable." (*Brown v. Guarantee Ins. Co.* (1957) 155 Cal.App.2d 679, 689 [319 P.2d 69].)

- "Thus, a breach of the implied covenant of good faith and fair dealing involves something more than a breach of the contract or mistaken judgment. There must be proof the insurer failed or refused to discharge its contractual duties not because of an honest mistake, bad judgment, or negligence, 'but rather by a conscious and deliberate act, which unfairly frustrates the agreed common purposes and disappoints the reasonable expectations of the other party thereby depriving that party of the benefits of the agreement.' " (*Century Surety Co. v. Polisso* (2006) 139 Cal.App.4th 922, 949 [43 Cal.Rptr.3d 468], internal citations omitted.)

- "[I]f the insurer denies benefits unreasonably (i.e., without any reasonable basis for such denial), it may be exposed to the full array of tort remedies, including possible punitive damages." (*Jordan v. Allstate Ins. Co.* (2007) 148 Cal.App.4th 1062, 1073 [56 Cal.Rptr.3d 312].)

- "Subterfuges and evasions violate the obligation of good faith in performance even though the actor believes his conduct to be justified. But the obligation goes further: bad faith may be overt or may consist of inaction, and fair dealing may require more than honesty. A complete catalogue of types of bad faith is impossible, but the following types are among those which have been recognized in judicial decisions: evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance." (*R. J. Kuhl Corp. v. Sullivan* (1993) 13 Cal.App.4th 1589, 1602 [17 Cal.Rptr.2d 425].)

- "[A]n insurer is not required to pay every claim presented to it. Besides the duty to deal fairly with

the insured, the insurer also has a duty to its other policyholders and to the stockholders (if it is such a company) not to dissipate its reserves through the payment of meritless claims. Such a practice inevitably would prejudice the insurance seeking public because of the necessity to increase rates, and would finally drive the insurer out of business." (*Austero v. National Cas. Co.* (1978) 84 Cal.App.3d 1, 30 [148 Cal.Rptr. 653], overruled on other grounds in *Egan, supra,* 24 Cal.3d at p. 824 fn. 7.)

- "Unique obligations are imposed upon true fiduciaries which are not found in the insurance relationship. For example, a true fiduciary must first consider and always act in the best interests of its trust and not allow self-interest to overpower its duty to act in the trust's best interests. An insurer, however, may give its own interests consideration equal to that it gives the interests of its insured; it is not required to disregard the interests of its shareholders and other policyholders when evaluating claims; and it is not required to pay noncovered claims, even though payment would be in the best interests of its insured." (*Love v. Fire Ins. Exchange* (1990) 221 Cal.App.3d 1136, 1148–1149 [271 Cal.Rptr. 246], internal citations omitted.)

- "[I]n California, an insurer has the same duty to act in good faith in the uninsured motorist context as it does in any other insurance context." (*Maslo v. Ameriprise Auto & Home Ins.* (2014) 227 Cal.App.4th 626, 636 [173 Cal.Rptr.3d 854].)

- " '[P]erformance of an act specifically authorized by the policy cannot, as a matter of law, constitute bad faith.' [¶] [I]n the insurance context, … ' "courts are not at liberty to imply a covenant directly at odds with a contract's express grant of discretionary power." ' The possible exception would be ' "those relatively rare instances when reading the provision literally would, contrary to the parties' clear intention, result in an unenforceable, illusory agreement." ' " (*Baldwin v. AAA Northern California, Nevada & Utah Ins. Exchange* (2016) 1 Cal.App.5th 545, 557−558 [204 Cal.Rptr.3d 433], internal citations omitted.)
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Secondary Sources

2 Witkin, Summary of California Law (11th ed. 2017) Insurance, § 340

Croskey, et al., California Practice Guide: Insurance Litigation, Ch. 11-B, *Theories For Extracontractual Liability—In General*, ¶¶ 11:7–11:8.1 (The Rutter Group)

Croskey, et al., California Practice Guide: Insurance Litigation, Ch. 12A-A, *Definition of Terms*, ¶¶ 12:1–12:10 (The Rutter Group)

Croskey, et al., California Practice Guide: Insurance Litigation, Ch. 12A-B, *Capsule History Of Insurance "Bad Faith" Cases*, ¶¶ 12:13–12:23 (The Rutter Group)

Croskey, et al., California Practice Guide: Insurance Litigation, Ch. 12A-C, *Theory Of Recovery—Breach Of Implied Covenant Of Good Faith And Fair Dealing ("Bad Faith")*, ¶¶ 12:27–12:54 (The Rutter Group)

Croskey, et al., California Practice Guide: Insurance Litigation, Ch. 12A-D, *Who May Sue For Tortious Breach Of Implied Covenant (Proper Plaintiffs)*, ¶¶ 12:56–12:90.17 (The Rutter Group)

Croskey, et al., California Practice Guide: Insurance Litigation, Ch. 12A-E, *Persons Who May Be Sued For Tortious Breach Of Implied Covenant (Proper Defendants)*, ¶¶ 12:92–12:118 (The Rutter Group)

Croskey, et al., California Practice Guide: Insurance Litigation, Ch. 12A-F, *Compare—Breach Of Implied Covenant By Insured*, ¶¶ 12:119–12:121 (The Rutter Group)

1 California Liability Insurance Practice: Claims and Litigation (Cont.Ed.Bar) Overview of Rights and Obligations of Policy, §§ 2.9–2.15

2 California Insurance Law & Practice, Ch. 13, *Claims Handling and the Duty of Good Faith*, § 13.01 (Matthew Bender)

1 California Uninsured Motorist Law, Ch. 13, *Rights, Duties, and Obligations of the Parties*, § 13.23 (Matthew Bender)

2 California Uninsured Motorist Law, Ch. 24, *Bad Faith in Uninsured Motorist Law*, §§ 24.10, 24.20–24.21, 24.40 (Matthew Bender)

26 California Forms of Pleading and Practice, Ch. 308, *Insurance*, § 308.24[1] (Matthew Bender)

11 California Legal Forms, Ch. 26A, *Title Insurance*, § 26A.17[9] (Matthew Bender)

2331. Breach of the Implied Obligation of Good Faith and Fair Dealing—Failure or Delay in Payment (First Party)—Essential Factual Elements

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[*Name of plaintiff***] claims that [***name of defendant***] breached the obligation of good faith and fair dealing by [failing to pay/delaying payment of] benefits due under the insurance policy. To establish this claim, [***name of plaintiff***] must prove all of the following:**

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

2. **That [***name of defendant***] was notified of the loss;**

3. **That [***name of defendant***], unreasonably [failed to pay/delayed payment of] policy benefits;**

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

5. **That [***name of defendant***]'s [failure to pay/delay in payment of] policy benefits was a substantial factor in causing [***name of plaintiff***]'s harm.**

To act or fail to act "unreasonably" means that the insurer had no proper cause for its conduct. In determining whether [*name of defendant***] acted unreasonably, you should consider only the information that [***name of defendant***] knew or reasonably should have known at the time when it [failed to pay/delayed payment of] policy benefits.**

New September 2003; Revised December 2007, April 2008, December 2009, December 2015

Directions for Use

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

If there is a genuine issue as to the insurer's liability under the policy for the claim asserted by the insured, there can be no bad-faith liability imposed on the insurer for advancing its side of that dispute. This is known as the "genuine dispute" doctrine. The genuine-dispute doctrine is subsumed within the test of reasonableness or proper cause (element 3). No specific instruction on the doctrine need be given. (See *McCoy v. Progressive West Ins. Co.* (2009) 171 Cal.App.4th 785, 792–794 [90 Cal.Rptr.3d 74].)

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

Sources and Authority

- If an insurer "fails to deal *fairly and in good faith* with its insured by refusing, without proper cause,

to compensate its insured for a loss covered by the policy, such conduct may give rise to a cause of action in tort for breach of an implied covenant of good faith and fair dealing. ... [¶] ... [W]hen the insurer unreasonably and in bad faith withholds payment of the claim of its insured, it is subject to liability in tort." (*Gruenberg v. Aetna Insurance Co.* (1973) 9 Cal.3d 566, 574–575 [108 Cal.Rptr. 480, 510 P.2d 1032], original italics.)

- "An insurer's obligations under the implied covenant of good faith and fair dealing with respect to first party coverage include a duty not to unreasonably withhold benefits due under the policy. An insurer that unreasonably delays, or fails to pay, benefits due under the policy may be held liable in tort for breach of the implied covenant. The withholding of benefits due under the policy may constitute a breach of contract even if the conduct was reasonable, but liability in tort arises only if the conduct was unreasonable, that is, without proper cause. In a first party case, as we have here, the withholding of benefits due under the policy is not unreasonable if there was a genuine dispute between the insurer and the insured as to coverage or the amount of payment due." (*Rappaport-Scott v. Interinsurance Exch. of the Auto. Club* (2007) 146 Cal.App.4th 831, 837 [53 Cal.Rptr.3d 245], internal citations omitted.)

- "[T]here are at least two separate requirements to establish breach of the implied covenant: (1) benefits due under the policy must have been withheld; and (2) the reason for withholding benefits must have been unreasonable or without proper cause." (*Love v. Fire Insurance Exchange* (1990) 221 Cal.App.3d 1136, 1151 [271 Cal.Rptr. 246], internal citations omitted.)

- "The standard of good faith and fairness examines the reasonableness of the insurer's conduct, and mere errors by an insurer in discharging its obligations to its insured ' "does not necessarily make the insurer liable in tort for violating the covenant of good faith and fair dealing; to be liable in tort, the insurer's conduct must also have been *unreasonable*. [Citations.]" ' " (*Graciano v. Mercury General Corp*. (2014) 231 Cal.App.4th 414, 425 [179 Cal.Rptr.3d 717], original italics.)

- " 'Although an insurer's bad faith is ordinarily a question of fact to be determined by a jury by considering the evidence of motive, intent and state of mind, "[t]he question becomes one of law … when, because there are no conflicting inferences, reasonable minds could not differ." ' " (*Pulte Home Corp. v. American Safety Indemnity Co.* (2017) 14 Cal.App.5th 1086, 1119 [223 Cal.Rptr.3d 47].)

- "Generally, the reasonableness of an insurer's conduct 'must be evaluated in light of the totality of the circumstances surrounding its actions.' " (*Paslay v. State Farm General Ins. Co.* (2016) 248 Cal.App.4th 639, 654 [203 Cal.Rptr.3d 785].)

- "[T]he adequacy of the insurer's claims handling is properly assessed in light of conduct by the insured delaying resolution of a claim." (*Case v. State Farm Mutual Automobile Ins. Co., Inc.* (2018) 30 Cal.App.5th 397, 413 [241 Cal.Rptr.3d 458].)

- " '[A]n insurer denying or delaying the payment of policy benefits due to the existence of a genuine dispute with its insured as to the existence of coverage liability or the amount of the insured's coverage claim is not liable in bad faith[,] even though it might be liable for breach of contract.' That is because 'whe[n] there is a genuine issue as to the insurer's liability under the policy for the claim

asserted by the insured, there can be no bad faith liability imposed on the insurer for advancing its side of that dispute.' " (*Case, supra,* 30 Cal.App.5th at p. 402, internal citation omitted~~[A]n insurer denying or delaying the payment of policy benefits due to the existence of a genuine dispute with its insured as to the existence of coverage liability or the amount of the insured's coverage claim is not liable in bad faith even though it might be liable for breach of contract." (*Chateau Chamberay Homeowners Assn. v. Associated International Insurance Co.* (2001) 90 Cal.App.4th 335, 347 [108 Cal.Rptr.2d 776]~~.)

- "The genuine dispute rule does not relieve an insurer from its obligation to thoroughly and fairly investigate, process and evaluate the insured's claim. A *genuine* dispute exists only where the insurer's position is maintained in good faith and on reasonable grounds. … 'The genuine issue rule in the context of bad faith claims allows a [trial] court to grant summary judgment when it is undisputed or indisputable that the basis for the insurer's denial of benefits was reasonable—for example, where even under the plaintiff's version of the facts there is a genuine issue as to the insurer's liability under California law. … On the other hand, an insurer is not entitled to judgment as a matter of law where, viewing the facts in the light most favorable to the plaintiff, a jury could conclude that the insurer acted unreasonably.' " (*Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 724 [68 Cal.Rptr.3d 746, 171 P.3d 1082], original italics, internal citations omitted.)

- "[T]he reasonableness of the insurer's decisions and actions must be evaluated as of the time that they were made; the evaluation cannot fairly be made in the light of subsequent events that may provide evidence of the insurer's errors. [Citation.]" (*Zubillaga v. Allstate Indemnity Co.* (2017) 12 Cal.App.5th 1017, 1028 [219 Cal.Rptr.3d 620].)

- "[I]f the insurer denies benefits unreasonably (i.e., without any reasonable basis for such denial), it may be exposed to the full array of tort remedies, including possible punitive damages." (*Jordan v. Allstate Ins. Co.* (2007) 148 Cal.App.4th 1062, 1073 [56 Cal.Rptr.3d 312].)

- "While many, if not most, of the cases finding a genuine dispute over an insurer's coverage liability have involved *legal* rather than *factual* disputes, we see no reason why the genuine dispute doctrine should be limited to legal issues. That does not mean, however, that the genuine dispute doctrine may properly be applied in every case involving purely a factual dispute between an insurer and its insured. This is an issue which should be decided on a case-by-case basis." (*Chateau Chamberay Homeowners Assn., supra,* 90 Cal.App.4th at p. 348, original italics, footnote and internal citations omitted.)

- "[I]f the conduct of [the insurer] in defending this case was objectively reasonable, its subjective intent is irrelevant." (*Bosetti v. United States Life Ins. Co. in the City of New York* (2009) 175 Cal.App.4th 1208, 1236 [96 Cal.Rptr.3d 744]; cf. *Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 372 [6 Cal.Rptr.2d 467, 826 P.2d 710] ["[I]t has been suggested the covenant has both a subjective and objective aspect—subjective good faith and objective fair dealing. A party violates the covenant if it subjectively lacks belief in the validity of its act or if its conduct is objectively unreasonable."].)

- "[W]hile an insurer's subjective bad intentions are not a sufficient basis on which to establish a bad faith cause of action, an insurer's subjective mental state may nonetheless be a circumstance to be

considered in the evaluation of the *objective* reasonableness of the insurer's actions." (*Bosetti, supra,* 175 Cal.App.4th at p. 1239, original italics.)

- "[A]n insured cannot maintain a claim for tortious breach of the implied covenant of good faith and fair dealing absent a covered loss. If the insurer's investigation—adequate or not—results in a correct conclusion of no coverage, no tort liability arises for breach of the implied convenant." (*Benavides v. State Farm General Ins. Co.* (2006) 136 Cal.App.4th 1241, 1250 [39 Cal.Rptr.3d 650], internal citations omitted; cf. *Brehm v. 21st Century Ins. Co.* (2008) 166 Cal.App.4th 1225, 1236 [83 Cal.Rptr.3d 410] ["[B]reach of a specific provision of the contract is not a necessary prerequisite to a claim for breach of the implied covenant of good faith and fair dealing. … [E]ven an insurer that pays the full limits of its policy may be liable for breach of the implied covenant, if improper claims handling causes detriment to the insured"].)

- " '[D]enial of a claim on a basis unfounded in the facts known to the insurer, or contradicted by those facts, may be deemed unreasonable. "A trier of fact may find that an insurer acted unreasonably if the insurer ignores evidence available to it which supports the claim. The insurer may not just focus on those facts which justify denial of the claim." ' " (*Maslo v. Ameriprise Auto & Home Ins.* (2014) 227 Cal.App.4th 626, 634 [173 Cal.Rptr.3d 854].)

- "We conclude ... that the duty of good faith and fair dealing on the part of defendant insurance companies is an absolute one. ... [T]he nonperformance by one party of its contractual duties cannot excuse a breach of the duty of good faith and fair dealing by the other party while the contract between them is in effect and not rescinded." (*Gruenberg, supra,* 9 Cal.3d at p. 578.)

- "Thus, an insurer may be liable for bad faith in failing to attempt to effectuate a prompt and fair settlement (1) where it unreasonably demands arbitration, or (2) where it commits other wrongful conduct, such as failing to investigate a claim. An insurer's statutory duty to attempt to effectuate a prompt and fair settlement is not abrogated simply because the insured's damages do not plainly exceed the policy limits. Nor is the insurer's duty to investigate a claim excused by the arbitrator's finding that the amount of damages was lower than the insured's initial demand. Even where the amount of damages is lower than the policy limits, an insurer may act unreasonably by failing to pay damages that are certain and demanding arbitration on those damages." (*Maslo, supra,* 227 Cal.App.4th at pp. 638−639 [uninsured motorist coverage case].)

- "[T]he insurer's duty to process claims fairly and in good faith [is] a nondelegable duty." (*Hughes v. Blue Cross of Northern California* (1989) 215 Cal.App.3d 832, 848 [263 Cal.Rptr. 850].)

- "[I]n [a bad–faith action] 'damages for emotional distress are compensable as *incidental damages flowing from the initial breach,* not as a separate cause of action.' Such claims of emotional distress must be incidental to 'a substantial invasion of property interests.' " (*Major v. Western Home Ins. Co.* (2009) 169 Cal.App.4th 1197, 1214 [87 Cal.Rptr.3d 556], original italics, internal citations omitted.)

Secondary Sources

2 Witkin, Summary of California Law (11th ed. 2017) Insurance, §§ 341–343

Croskey et al., California Practice Guide: Insurance Litigation. Ch. 12C-C, *Bad Faith—Requirements for First Party Bad Faith Action,* ¶¶ 12:822–12:1016 (The Rutter Group)

2 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar) General Principles of Contract and Bad Faith Actions, §§ 24.25–24.45A

2 California Insurance Law & Practice, Ch. 13, *Claims Handling and the Duty of Good Faith*, §§ 13.03[2][a]–[c], 13.06 (Matthew Bender)

1 California Uninsured Motorist Law, Ch. 13, *Rights, Duties, and Obligations of the Parties*, § 13.23 (Matthew Bender)

2 California Uninsured Motorist Law, Ch. 24, *Bad Faith in Uninsured Motorist Law*, §§ 24.10, 24.20–24.21, 24.40 (Matthew Bender)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.140 (Matthew Bender)

6 Levy et al., California Torts, Ch. 82, *Claims and Disputes Under Insurance Policies*, §§ 82.21, 82.50 (Matthew Bender)

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

11 California Legal Forms, Ch. 26A, *Title Insurance*, § 26A.17 (Matthew Bender)

12 California Points and Authorities, Ch. 120, *Insurance*, § 120.208 (Matthew Bender)

2700. Nonpayment of Wages—Essential Factual Elements (Lab. Code, §§ 201, 202, 218)

[*Name of plaintiff*] claims that [*name of defendant*] owes [him/her] unpaid wages. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of plaintiff*] performed work for [*name of defendant*];**

2. **That [*name of defendant*] owes [*name of plaintiff*] wages under the terms of the employment; and**

3. **The amount of unpaid wages.**

"Wages" includes all amounts for labor performed by an employee, whether the amount is calculated by time, task, piece, commission, or some other method.

New September 2003; Revised December 2005, December 2013, June 2015

Directions for Use

This instruction is for use in a civil action for payment of wages. Depending on the allegations in the case, the definition of "wages" may be modified to include additional compensation, such as earned vacation, nondiscretionary bonuses, or severance pay.

Wage and hour claims are governed by two sources of authority: the provisions of the Labor Code and a series of ~~18~~ 15 wage orders, adopted by the Industrial Welfare Commission. All of the wage orders define hours worked as "the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so." (*Hernandez v. Pacific Bell Telephone Co.* (2018) 29 Cal.App.5th 131, 137 [239 Cal.Rptr.3d 852]; ~~S~~see, e.g., Wage Order 4-2001, subd. 2(K).) The two parts of the definition are independent factors, each of which defines whether certain time spent is compensable as "hours worked." Thus, an employee who is subject to an employer's control does not have to be working during that time to be compensated. (*Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 582–584 [94 Cal.Rptr.2d 3, 995 P.2d 139].) Courts have identified various factors bearing on an employer's control during on-call time. However, what qualifies as hours worked is a question of law. (*Mendiola v. CPS Security Solutions, Inc.* (2015) 60 Cal.4th 833, 838−840 [182 Cal.Rptr.3d 124, 340 P.3d 355].) Therefore, the jury should not be instructed on the factors to consider in determining whether the employer has exercised sufficient control over the employee during the contested period to require compensation.

However, the jury should be instructed to find any disputed facts regarding the factors. For example, one factor is whether a fixed time limit for the employee to respond to a call was unduly restrictive. Whether there was a fixed time limit would be a disputed fact for the jury. Whether it was unduly restrictive would be a matter of law for the court.

The court may modify this instruction or write an appropriate instruction if the defendant employer

claims a permissible setoff from the plaintiff employee's unpaid wages. Under California Wage Orders, an employer may deduct from an employee's wages for cash shortage, breakage, or loss of equipment if the employer proves that this was caused by a dishonest or willful act or by the gross negligence of the employee. (See, e.g., Cal. Code Regs., tit. 8, § 11010, subd. 8.)

Sources and Authority

- Right of Action for Wage Claim. Labor Code section 218.
- Wages Due on Discharge. Labor Code section 201.
- Wages Due on Quitting. Labor Code section 202.
- "Wages" Defined, Labor Code section 200.
- Wages Partially in Dispute. Labor Code section 206(a).
- Deductions From Pay. Labor Code section 221, California Code of Regulations, Title 8, section 11010, subdivision 8.
- Nonapplicability to Government Employers. Labor Code section 220.
- Employer Not Entitled to Release. Labor Code section 206.5.
- Private Agreements Prohibited. Labor Code section 219(a).
- "As an employee, appellant was entitled to the benefit of wage laws requiring an employer to promptly pay all wages due, and prohibiting the employer from deducting unauthorized expenses from the employee's wages, deducting for debts due the employer, or recouping advances absent the parties' express agreement." (*Davis v. Farmers Ins. Exchange* (2016) 245 Cal.App.4th 1302, 1330 [200 Cal.Rptr.3d 315].)
- "The Labor Code's protections are 'designed to ensure that employees receive their full wages at specified intervals while employed, as well as when they are fired or quit,' and are applicable not only to hourly employees, but to highly compensated executives and salespeople." (*Davis, supra,* 245 Cal.App.4th at p. 1331, internal citation omitted.)
- "[W]ages include not just salaries earned hourly, but also bonuses, profit-sharing plans, and commissions." (*Davis, supra,* 245 Cal.App.4th at p. 1332, fn. 20.)
- "The two phrases of the definition—'time during which an employee is subject to the control of an employer' and 'time the employee is suffered or permitted to work, whether or not required to do so'—establish independent factors that each define 'hours worked.' 'Thus, an employee who is subject to an employer's control does not have to be working during that time to be compensated under [the applicable wage order].' The time an employee is ' "suffered or permitted to work, whether or not required to do so," ' includes time the employee is working but not under the

employer's control, such as unauthorized overtime, provided the employer has knowledge of it." (*Hernandez, supra,* 29 Cal.App.5th at p. 137, internal citations omitted.)

- "[A]n employee's on-call or standby time may require compensation." (*Mendiola, supra,* 60 Cal.4th at p. 840.)

- " '[T]he standard of "suffered or permitted to work" is met when an employee is engaged in certain tasks or exertion that a manager would recognize as work. Mere transportation of tools, which does not add time or exertion to a commute, does not meet this standard.' We agree with this construction of the 'suffer or permit to work' test." (*Hernandez, supra,* 29 Cal.App.5th at p. 142, internal citation omitted.)

- "[Labor Code] section 221 has long been held to prohibit deductions from an employee's wages for cash shortages, breakage, loss of equipment, and other business losses that may result from the employee's simple negligence." (*Hudgins v. Neiman Marcus Group, Inc.* (1995) 34 Cal.App.4th 1109, 1118 [41 Cal.Rptr.2d 46].)

- "[A]n employer is not entitled to a setoff of debts owing it by an employee against any wages due that employee." (*Barnhill v. Robert Saunders & Co.* (1981) 125 Cal.App.3d 1, 6 [177 Cal.Rptr. 803].)

- "In light of the wage order's remedial purpose requiring a liberal construction, its directive to compensate employees for all time worked, the evident priority it accorded that mandate notwithstanding customary employment arrangements, and its concern with small amounts of time, we conclude that the de minimis doctrine has no application under the circumstances presented here. An employer that requires its employees to work minutes off the clock on a regular basis or as a regular feature of the job may not evade the obligation to compensate the employee for that time by invoking the de minimis doctrine." (*Troester v. Starbucks Corp.* 5 Cal.5th 829, 847 [235 Cal.Rptr.3d 820, 421 P.3d 1114].)

Secondary Sources

4 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 437-439

Chin et al., California Practice Guide: Employment Litigation, Ch.1-A, *Background*, ¶ 1:22 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-B, *Coverage And Exemptions—In General*, ¶ 11:121 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch.11-D, *Payment Of Wages,* ¶¶ 11:456, 11:470, 11:470.1, 11:512−11.514 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch.11-J, *Enforcing California Laws Regulating Employee Compensation*, ¶ 11:1459 (The Rutter Group)

1 Wilcox, California Employment Law, Ch. 5, *Administrative and Judicial Remedies Under Wage and*

Hour Laws, § 5.40 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 250, *Employment Law: Wage and Hour Disputes,* §§ 250.13[1][a], 250.40[3][a], 250.65 (Matthew Bender)

California Civil Practice: Employment Litigation §§ 4:67, 4:75 (Thomson Reuters)

2705. Affirmative Defense to Wage Order Violations—Plaintiff Was Not Defendant's Employee

[*Name of defendant***] claims that [he/she/it] is not liable for [***specify wage order violations, e.g., failure to pay minimum wage***] because [***name of plaintiff***] was not [his/her/its] employee, but rather an independent contractor. To establish this defense, [***name of defendant***] must prove all of the following:**

a. That [*name of plaintiff***] is [under the terms of the contract and in fact] free from the control and direction of [***name of defendant***] in connection with the performance of the work that [***name of plaintiff***] was hired to do;**

b. That [*name of plaintiff***] performs work for [***name of defendant***] that is outside the usual course of [***name of defendant***]'s business; and**

c. That [*name of plaintiff***] is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed for [***name of defendant***].**

New November 2018

Directions for Use

This instruction may be needed if there is a dispute as to whether the defendant was the plaintiff's employer for purposes of a claim covered by a California wage order. The wage orders, which are constitutionally-authorized, quasi-legislative regulations that have the force of law, impose obligations relating to the minimum wages, maximum hours, and a limited number of very basic working conditions (such as minimally required meal and rest breaks) of California employees. (See *Dynamex Operations W. v. Superior Court* (2018) 4 Cal.5th 903, 913–914, & fn. 3 [232 Cal.Rptr.3d 1, 416 P.3d 1].) The defendant has the burden to prove independent contractor status. (*Id., supra,* 4 Cal.5th at p. 916.)

Under the wage orders, "to employ" has three alternative definitions. It means: (a) to exercise control over the wages, hours or working conditions, or (b) to suffer or permit to work, or (c) to engage, thereby creating a common law employment relationship. (*Martinez v. Combs* (2010) 49 Cal.4th 35, 64 [109 Cal.Rptr.3d 514, 231 P.3d 259].) In *Dynamex*, the Supreme Court found no need to address definition (a) on exercising control. It acknowledged that definition (c), the common law test, could be used, but held that the controlling test was definition (b), "to suffer or permit to work." It then defined this test, known as the ABC test, as involving the three factors of the instruction. (*Dynamex Operations W., supra,* 4 Cal.5th at pp. 916–917.)

The rule on employment status has been that if there are disputed facts, it's for the jury to decide whether one is an employee or an independent contractor. (*Espejo v. The Copley Press, Inc.* (2017) 13 Cal.App.5th 329, 342 [221 Cal.Rptr.3d 1].) However, on undisputed facts, the court may decide that the relationship is employment as a matter of law. (*Dynamex Operations W., supra,* 4 Cal.5th at p. 963.) The

court may address the three factors in any order when making this determination, and if the defendant's undisputed facts fail to prove any one of them, the inquiry ends; the plaintiff is an employee as a matter of law and the question does not reach the jury.

If, however, there is no failure of proof as to any of the three factors without resolution of disputed facts, the determination of whether the plaintiff was defendant's employee should be resolved by the jury using this instruction. If the court concludes based on undisputed facts that the defendant *has* proved one or more of the three factors, that factor (or factors) should be removed from the jury's consideration and the jury should only consider whether the employer has proven those factors that cannot be determined without further factfinding.

Include the bracketed language in element 1 if there is a contract between the parties covering the work at issue.

Sources and Authority

- "The ABC test presumptively considers all workers to be employees, and permits workers to be classified as independent contractors only if the hiring business demonstrates that the worker in question satisfies each of three conditions: (a) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of the work and in fact; and (b) that the worker performs work that is outside the usual course of the hiring entity's business; and (c) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed." (*Dynamex Operations W., supra,* 4 Cal.5th at pp. 955–956.)

- "[W]e conclude that there is no need in this case to determine whether the exercise control over wages, hours or working conditions definition is intended to apply outside the joint employer context, because we conclude that the suffer or permit to work standard properly applies to the question whether a worker should be considered an employee or, instead, an independent contractor, and that under the suffer or permit to work standard, the trial court class certification order at issue here should be upheld. (*Dynamex Operations W., supra,* 4 Cal.5th at p. 943.)

- "A business that hires any individual to provide services to it can always be said to knowingly 'suffer or permit' such an individual to work for the business. A literal application of the suffer or permit to work standard, therefore, would bring within its reach even those individuals hired by a business--including unquestionably independent plumbers, electricians, architects, sole practitioner attorneys, and the like--who provide only occasional services unrelated to a company's primary line of business and who have traditionally been viewed as working in their own independent business." (*Dynamex Operations W., supra,* 4 Cal.5th at pp. 948–949.)

- "A multifactor standard--like the economic reality standard or the *Borello* standard--that calls for consideration of all potentially relevant factual distinctions in different employment arrangements on a case-by-case, totality-of-the-circumstances basis has its advantages. A number of state courts, administrative agencies and academic commentators have observed, however, that such a wide-ranging and flexible test for evaluating whether a worker should be considered an employee or an independent contractor has significant disadvantages, particularly when applied in the wage

and hour context." (*Dynamex Operations W., supra,* 4 Cal.5th at p. 954.)

- "Thus, on the one hand, when a retail store hires an outside plumber to repair a leak in a bathroom on its premises or hires an outside electrician to install a new electrical line, the services of the plumber or electrician are not part of the store's usual course of business and the store would not reasonably be seen as having suffered or permitted the plumber or electrician to provide services to it as an employee. On the other hand, when a clothing manufacturing company hires work-at-home seamstresses to make dresses from cloth and patterns supplied by the company that will thereafter be sold by the company, or when a bakery hires cake decorators to work on a regular basis on its custom-designed cakes, the workers are part of the hiring entity's usual business operation and the hiring business can reasonably be viewed as having suffered or permitted the workers to provide services as employees. In the latter settings, the workers' role within the hiring entity's usual business operations is more like that of an employee than that of an independent contractor." (*Dynamex Operations W., supra,* 4 Cal.5th at pp. 959–960, internal citations omitted.)

- "A company that labels as independent contractors a class of workers who are not engaged in an independently established business in order to enable the company to obtain the economic advantages that flow from avoiding the financial obligations that a wage order imposes on employers unquestionably violates the fundamental purposes of the wage order. The fact that a company has not prohibited or prevented a worker from engaging in such a business is not sufficient to establish that the worker has independently made the decision to go into business for himself or herself." (*Dynamex Operations W., supra,* 4 Cal.5th at p. 962.)

- "The trial court's determination of employee or independent contractor status is one of fact if it depends upon the resolution of disputed evidence or inferences and, as such, must be affirmed on appeal if supported by substantial evidence. The question is one of law only if the evidence is undisputed. 'The label placed by the parties on their relationship is not dispositive, and subterfuges are not countenanced.' " (*Espejo, supra, ~~v. The Copley Press, Inc.~~* (~~2017~~) 13 Cal.App.5th at pp.~~329,~~ 342-~~_~~343 ~~[221 Cal.Rptr.3d 1]~~.)

- "It bears emphasis that in order to establish that a worker is an independent contractor under the ABC standard, the hiring entity is required to establish the existence of each of the three parts of the ABC standard. Furthermore, inasmuch as a hiring entity's failure to satisfy any one of the three parts itself establishes that the worker should be treated as an employee for purposes of the wage order, *a court* is free to consider the separate parts of the ABC standard in whatever order it chooses. Because in many cases it may be easier and clearer for *a court* to determine whether or not part B or part C of the ABC standard has been satisfied than for *the court* to resolve questions regarding the nature or degree of a worker's freedom from the hiring entity's control for purposes of part A of the standard, the significant advantages of the ABC standard--in terms of increased clarity and consistency--will often be best served by first considering one or both of the latter two parts of the standard in resolving the employee or independent contractor question." (*Dynamex Operations W., supra,* 4 Cal.5th at p. 963, italics added.)

- "An entity that controls the business enterprise may be an employer even if it did not 'directly hire, fire or supervise' the employees. Multiple entities may be employers where they 'control

different aspects of the employment relationship.' 'This occurs, for example, when one entity (such as a temporary employment agency) hires and pays a worker, and another entity supervises the work.' 'Supervision of the work, in the specific sense of exercising control over how services are performed, is properly viewed as one of the "working conditions" … .' " (*Castaneda v. Ensign Group, Inc.* (2014) 229 Cal.App.4th 1015, 1019 [177 Cal.Rptr.3d 581].)

- "[T]he Supreme Court's policy reasons for selecting the 'ABC' test are uniquely relevant to the issue of allegedly misclassified independent contractors. In the joint employment context, the alleged employee is already considered an employee of the primary employer; the issue is whether the employee is also an employee of the alleged secondary employer. Therefore, the primary employer is presumably paying taxes and the employee is afforded legal protections due to being an employee of the primary employer. As a result, the policy purpose for presuming the worker to be an employee and requiring the secondary employer to disprove the worker's status as an employee is unnecessary in that taxes are being paid and the worker has employment protections. [¶] In conclusion, the 'ABC' test set forth in *Dynamex* is directed toward the issue of whether employees were misclassified as independent contractors. Placing the burden on the alleged employer to prove that the worker is not an employee is meant to serve policy goals that are not relevant in the joint employment context. Therefore, it does not appear that the Supreme Court intended for the 'ABC' test to be applied in joint employment cases." (*Curry v. Equilon Enterprises, LLC* (2018) 23 Cal.App.5th 289, 314 [233 Cal.Rptr.3d 295], internal citation omitted.)

- " '*Dynamex* did not purport to replace the *Borello* standard in every instance where a worker must be classified as either an independent contractor or an employee for purposes of enforcing California's labor protections.' To the contrary, the Supreme Court recognized that different standards could apply to different statutory claims: '[B]ecause the *Borello* standard itself emphasizes the primacy of statutory purpose in resolving the employee or independent contractor question, when different statutory schemes have been enacted for different purposes, it is possible under *Borello* that a worker may properly be considered an employee with reference to one statute but not another.' " (*Garcia v. Border Transportation Group, LLC* (2018) 28 Cal.App.5th 558, 570 [239 Cal.Rptr.3d 360], internal citations omitted.)

- "Key for our purposes, *Dynamex* makes clear that the question in part C is *not* whether [defendant] *prohibited or prevented* [plaintiff] from engaging in an independently established business. Instead, the inquiry is whether [plaintiff] fits the common conception of an independent contractor—'an individual who *independently* has made the decision to go into business for himself or herself' and 'generally takes the usual steps to establish and promote his or her independent business—for example, through incorporation, licensure, advertisements, routine offerings to provide services of the independent business to the public or to a number of potential customers, and the like.' " (*Garcia, supra,* 28 Cal.App.5th at p. 573, original italics, internal citation omitted.)

Secondary Sources

Chin, et al., California Practice Guide: Employment Litigation, Ch. 11-B, Compensation—Coverage and Exemptions—In General, ¶ 11:115 et seq. (The Rutter Group)

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 intrusiveness of a seizure by means of deadly force is unmatched.' 'The use of deadly force implicates the highest level of Fourth Amendment interests both because the suspect has a "fundamental interest in his own life" and because such force "frustrates the interest of the individual, and of society, in judicial determination of guilt and punishment." ' " (*Vos v. City of Newport Beach* (9th Cir. 2018) 892 F.3d 1024, 1031.)

- "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.)

- "Although officers are not required to use the least intrusive degree of force available, 'the availability of alternative methods of capturing or subduing a suspect may be a factor to consider,' " (*Vos, supra,* 892 F.3d at p. 1033, internal citation omitted.)

- "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 v. County of San Diego~~, supra,~~* 57 Cal.4th 622,~~at p.~~ 639 [160 Cal.Rptr.3d 684, 305 P.3d 252].)

- "[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.)

- "It is clearly established law that shooting a fleeing suspect in the back violates the suspect's Fourth Amendment rights. 'Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. . . . A police officer may not seize an unarmed, nondangerous suspect by shooting him dead.' " (*Foster v. City of Indio* (9th Cir. 2018) 908 F.3d 1204, 1211.)

- " '[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, supra, ~~v. County of Riverside~~ ~~(2015)~~* 238 Cal.App.4th at p.~~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

10 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, *Employment Discrimination—In General—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)

3040. Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Substantial Risk of Serious Harm (42 U.S.C. § 1983)

[*Name of plaintiff***] claims that [***name of defendant***] subjected [him/her] to prison conditions that violated [his/her] constitutional rights. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That while imprisoned, [***describe violation that created risk, e.g., [name of plaintiff] was placed in a cell block with rival gang members***];**

2. **That [***name of defendant***]'s [conduct/failure to act] created a substantial risk of serious harm to [***name of plaintiff***]'s health or safety;**

3. **That [***name of defendant***] knew that [his/her] [conduct/failure to act] created a substantial risk of serious harm to [***name of plaintiff***]'s health or safety;**

4. **That [***name of defendant***] disregarded the risk by failing to take reasonable measures to address it;**

5. **That there was no reasonable justification for the [conduct/failure to act];**

6. **That [***name of defendant***] was performing [his/her] official duties when [he/she] [acted/purported to act/failed to act];**

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

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

Whether the risk was obvious is a factor that you may consider in determining whether [*name of defendant***] knew of the risk.**

New September 2003; Revised December 2010, June 2011; Renumbered from CACI No. 3011 December 2012; Revised December 2014, June 2015, May 2017

Directions for Use

Give this instruction in a case involving conduct that allegedly created a substantial risk of serious harm to an inmate. (See *Farmer v. Brennan* (1994) 511 U.S. 825 [114 S.Ct. 1970, 128 L.Ed.2d 811].) For an instruction on deprivation of medical care, see CACI No. 3041, *Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Medical Care*. For an instruction involving the deprivation of necessities, see CACI No. 3043, *Violation of Prisoner's Federal Civil Rights—Eight Amendment—Deprivation of Necessities*.

In element 1, describe the act or omission that created the risk. In elements 2 and 3, choose "conduct" if the risk was created by affirmative action. Choose "failure to act" if the risk was created by an omission.

In prison-conditions cases, the inmate must show that the defendant was deliberately indifferent to his or her health or safety. (*Farmer, supra,* 511 U.S. at p. 834.) "Deliberate indifference" involves a two part inquiry. First, the inmate must show that the prison officials were aware of a "substantial risk of serious harm" to the inmate's health or safety, but failed to act to address the danger. (See *Castro v. Cnty. of L.A.* (9th Cir. 2016) 833 F.3d 1060, 1073.) Second, the inmate must show that the prison officials had no "reasonable" justification for the conduct, in spite of that risk. (*Thomas v. Ponder* (9th Cir. 2010) 611 F.3d 1144, 1150.) Elements 3, 4, and 5 express the deliberate-indifference components.

The "official duties" referred to in element 6 must be duties created by 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 6.

Sources and Authority

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

- "It is undisputed that the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment." (*Helling v. McKinney* (1993) 509 U.S. 25, 31 [113 S.Ct. 2475, 125 L.Ed.2d 22].)

- "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.)

- "[D]irect causation by affirmative action is not necessary: 'a prison official may be held liable under the Eighth Amendment if he knows that inmates face a substantial risk of serious harm and disregards that risk *by failing to take reasonable measures to abate it*.' " (*Castro, supra,* 833 F.3d at p. 1067, original italics.)

- "Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence, and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." (*Farmer, supra,* 511 U.S. at p. 842, internal citation omitted.)

- "When instructing juries in deliberate indifference cases with such issues of proof, courts should be careful to ensure that the requirement of subjective culpability is not lost. It is not enough merely to find that a reasonable person would have known, or that the defendant should have known, and juries should be instructed accordingly." (*Farmer, supra,* 511 U.S. at p. 843 fn. 8.)

- "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 precise role of legitimate penological interests is not entirely clear in the context of an Eighth Amendment challenge to conditions of confinement. The Supreme Court has written that the test of *Turner v. Safley,* 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987), which requires only a reasonable relationship to a legitimate penological interest to justify prison regulations, does not apply to Eighth Amendment claims. … The existence of a legitimate penological justification has, however, been used in considering whether adverse treatment is sufficiently gratuitous to constitute punishment for Eighth Amendment purposes." (*Grenning v. Miller-Stout* (9th Cir. 2014) 739 F.3d 1235, 1240.)

- "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 … 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." (*Mendiola-Martinez v. Arpaio* (9th Cir. 2016) 836 F.3d 1239, 1254, internal citation omitted.)

- "However, our precedent should not be misread to suggest that jail officials are automatically entitled to deference instructions in conditions of confinement or excessive force cases brought by prisoners, or § 1983 actions brought by former inmates. We have long recognized that a jury need not defer to prison officials where the plaintiff produces substantial evidence showing that the jail's policy or practice is an unnecessary, unjustified, or exaggerated response to the need for prison security." (*Shorter v. Baca* (9th Cir. 2018) 895 F.3d 1176, 1183, internal citations omitted.)

- "Although claims by pretrial detainees arise under the Fourteenth Amendment and claims by convicted prisoners arise under the Eighth Amendment, our cases do not distinguish among pretrial and postconviction detainees for purposes of the excessive force, conditions of confinement, and medical care deference instructions." (*Shorter, supra,* 895 F.3d at p. 1182, fn. 4.)

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

Secondary Sources

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

3 Civil Rights Actions, Ch. 11, *Deprivation of Rights Under Color of State Law—Prisons*, ¶¶ 11.02–11.03 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 114, *Civil Rights: Prisoners' Rights*, § 114.28 (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.)

- "Although claims by pretrial detainees arise under the Fourteenth Amendment and claims by convicted prisoners arise under the Eighth Amendment, our cases do not distinguish among pretrial

and postconviction detainees for purposes of the excessive force, conditions of confinement, and medical care deference instructions." (*Shorter v. Baca* (9th Cir. 2018) 895 F.3d 1176, 1182, fn. 4.)

- "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)

3042. Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Excessive Force (42 U.S.C. § 1983)

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

1. **That [***name of defendant***] used force against [***name of plaintiff***];**

2. **That the force used was excessive;**

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

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

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

Force is excessive if it is used maliciously and sadistically to cause harm. In deciding whether excessive force was used, you should consider, among other factors, the following:

(a) The need for the use of force;

(b) The relationship between the need and the amount of force that was used;

(c) The extent of injury inflicted;

(d) The extent of the threat to the safety of staff and inmates, as reasonably perceived by the responsible officials on the basis of the facts known to them; [and]

(e) Any efforts made to temper the severity of a forceful response; [and]

(f) [*Insert other relevant factor.***]**

Force is not excessive if it is used in a good-faith effort to protect the safety of inmates, staff, or others, or to maintain or restore discipline.

New September 2003; Revised June 2010; Renumbered from CACI No. 3010 December 2010; Renumbered from CACI No. 3013 December 2012

Directions for Use

The "official duties" referred to in element 3 must be duties created pursuant to any state, county, or municipal law, ordinance, or regulation. This aspect of color of law most likely will not be an issue for

the jury, so it has been omitted to shorten the wording of element 3.

There is law suggesting that the jury should give deference to prison officials in the adoption and execution of policies and practices that in their judgment are needed to preserve discipline and to maintain internal security in a prison. This principle is covered in the final sentence by the term "good faith."

Sources and Authority

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

- "Section 1983 claims may be brought in either state or federal court." (*Pitts v. County of Kern* (1998) 17 Cal.4th 340, 348 [70 Cal.Rptr.2d 823, 949 P.2d 920].)

- "The Constitution 'does not mandate comfortable prisons,' but neither does it permit inhumane ones, and it is now settled that 'the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment.' In its prohibition of 'cruel and unusual punishments,' the Eighth Amendment places restraints on prison officials, who may not, for example, use excessive physical force against prisoners. The Amendment also imposes duties on these officials, who must provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must 'take reasonable measures to guarantee the safety of the inmates.' " (*Farmer v. Brennan* (1994) 511 U.S. 825, 832 [114 S.Ct. 1970, 128 L.Ed.2d 811], internal citations omitted.)

- "[A]pplication of the deliberate indifference standard is inappropriate when authorities use force to put down a prison disturbance. Instead, 'the question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." ' " (*Hudson v. McMillian* (1992) 503 U.S. 1, 6 [112 S.Ct. 995, 117 L.Ed.2d 156], internal citations omitted.)

- "[W]e hold that whenever prison officials stand accused of using excessive physical force in violation of the Cruel and Unusual Punishments Clause, the core judicial inquiry is that set out in *Whitley:* whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." (*Hudson, supra,* 503 U.S. at pp. 6–7, internal citations omitted.)

- "[E]xcessive force under the Eighth Amendment does not require proof that an officer enjoyed or otherwise derived pleasure from his or her use of force." (*Hoard v. Hartman* (9th Cir. 2018) 904 F.3d 780, 782.)

- "[T]here is ample evidence here that the Supreme Court did not intend its use of 'maliciously and sadistically' … to work a substantive change in the law on excessive force beyond requiring intent to cause harm. Chief among this evidence is the fact that the Supreme Court has never addressed 'maliciously and sadistically' separately from the specific intent to cause harm. It has even, on one occasion, omitted any mention of 'maliciously and sadistically' altogether and simply explained that 'a purpose to cause harm is needed for Eighth Amendment liability in a [prison] riot case.' " (*Hoard,*

supra, 904 F.3d at p. 789.)

- "Whether the prison disturbance is a riot or a lesser disruption, corrections officers must balance the need 'to maintain or restore discipline' through force against the risk of injury to inmates. Both situations may require prison officials to act quickly and decisively. Likewise, both implicate the principle that 'prison administrators ... should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.' " (*Hudson, supra,* 503 U.S. at p. 6, internal citations omitted.)

- "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 … cases, we instruct juries to defer to prison officials' judgments in adopting and executing policies needed to preserve discipline and maintain security." (*Mendiola-Martinez v. Arpaio* (9th Cir. 2016) 836 F.3d 1239, 1254, internal citations omitted.)

- "[T]his Court rejected the notion that 'significant injury' is a threshold requirement for stating an excessive force claim. … 'When prison officials maliciously and sadistically use force to cause harm,' … 'contemporary standards of decency always are violated . . . whether or not significant injury is evident. Otherwise, the Eighth Amendment would permit any physical punishment, no matter how diabolic or inhuman, inflicting less than some arbitrary quantity of injury.' " (*Wilkins v. Gaddy* (2010) 559 U.S. 34, 37 [130 S.Ct. 1175, 175 L.Ed.2d 995].)

- "This is not to say that the 'absence of serious injury' is irrelevant to the Eighth Amendment inquiry. '[T]he extent of injury suffered by an inmate is one factor that may suggest "whether the use of force could plausibly have been thought necessary" in a particular situation.' The extent of injury may also provide some indication of the amount of force applied. … [N]ot 'every malevolent touch by a prison guard gives rise to a federal cause of action.' 'The Eighth Amendment's prohibition of "cruel and unusual" punishments necessarily excludes from constitutional recognition *de minimis* uses of physical force, provided that the use of force is not of a sort repugnant to the conscience of mankind.' An inmate who complains of a 'push or shove' that causes no discernible injury almost certainly fails to state a valid excessive force claim. … [¶] Injury and force, however, are only imperfectly correlated, and it is the latter that ultimately counts." (*Wilkins, supra,* 559 U.S. at pp. 37–38, original italics, internal citations omitted.)

- " '[S]uch factors as the need for the application of force, the relationship between the need and the amount of force that was used, [and] the extent of injury inflicted,' are relevant to that ultimate determination. From such considerations inferences may be drawn as to whether the use of force could plausibly have been thought necessary, or instead evinced such wantonness with respect to the unjustified infliction of harm as is tantamount to a knowing willingness that it occur. But equally relevant are such factors as the extent of the threat to the safety of staff and inmates, as reasonably perceived by the responsible officials on the basis of the facts known to them, and any efforts made to temper the severity of a forceful response." (*Whitley v. Albers* (1986) 475 U.S. 312, 321 [106 S.Ct. 1078, 89 L.Ed.2d 251], internal citations omitted.)

- " '[T]he appropriate standard for a pretrial detainee's excessive force claim [under the Fourteenth

Amendment] is solely an objective one.' In contrast, a convicted prisoner's excessive force claim under the Eighth Amendment requires a subjective inquiry into 'whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.' " (*Rodriguez v. Cty. of L.A.* (9th Cir. 2018) 891 F.3d 776, 788, internal citation omitted.)

- "Although claims by pretrial detainees arise under the Fourteenth Amendment and claims by convicted prisoners arise under the Eighth Amendment, our cases do not distinguish among pretrial and postconviction detainees for purposes of the excessive force, conditions of confinement, and medical care deference instructions." (*Shorter v. Baca* (9th Cir. 2018) 895 F.3d 1176, 1182, fn. 4.)

- "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

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

3 Civil Rights Actions, Ch. 10, *Deprivation of Rights Under Color of State Law—Law Enforcement and Prosecution*, ¶ 10.01 (Matthew Bender)

3 Civil Rights Actions, Ch. 11, *Deprivation of Rights Under Color of State Law—Prisons*, ¶ 11.03 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 114, *Civil Rights: Prisoners' Rights*, § 114.70 (Matthew Bender)

3043. Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Deprivation of Necessities (42 U.S.C. § 1983)

[*Name of plaintiff***] claims that [***name of defendant***] subjected [him/her] to prison conditions that deprived [him/her] of basic rights. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was imprisoned under conditions that deprived [him/her] of [***describe deprivation, e.g., clothing***];**

2. **That this deprivation was sufficiently serious in that it denied [***name of plaintiff***] a minimal necessity of life;**

3. **That [***name of defendant***]'s conduct created a substantial risk of serious harm to [***name of plaintiff***]'s health or safety;**

4. **That [***name of defendant***] knew that [his/her] conduct created a substantial risk of serious harm to [***name of plaintiff***]'s health or safety;**

5. **That there was no reasonable justification for the deprivation;**

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

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.**

Whether the risk was obvious is a factor that you may consider in determining whether [*name of defendant***] knew of the risk.**

New June 2015

Directions for Use

Give this instruction in a prisoner case involving deprivation of something serious. (See *Thomas v. Ponder* (9th Cir. 2010) 611 F.3d 1144, 1150-1151.) For an instruction involving the creation of a risk, see CACI No. 3040, *Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Substantial Risk of Serious Harm*. For an instruction on deprivation of medical care, see CACI No. 3041, *Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Medical Care.*

In prison-conditions cases, the inmate must show that the defendant was deliberately indifferent to his or her health or safety. (*Farmer v. Brennan* (1994) 511 U.S. 825, 834 [114 S.Ct. 1970, 128 L.Ed.2d 811].) "Deliberate indifference" involves a two-part inquiry. First, the inmate must show that the prison officials

were aware of a substantial risk of serious harm to the inmate's health or safety. Second, the inmate must show that the prison officials had no reasonable justification for the conduct, in spite of that risk. (*Thomas, supra,* 611 F.3d at p. 1150.) Elements 4 and 5 express the deliberate-indifference components.

The "official duties" referred to in element 6 must be duties created by 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 6.

Sources and Authority

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

- "It is undisputed that the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment." (*Helling v. McKinney* (1993) 509 U.S. 25, 31 [113 S.Ct. 2475, 125 L.Ed.2d 22].)

- "Prison officials have a duty to ensure that prisoners are provided adequate shelter, food, clothing, sanitation, medical care, and personal safety." (*Johnson v. Lewis* (9th Cir. 2000) 217 F.3d 726, 731, internal citations omitted.)

- "[E]xtreme deprivations are required to make out a conditions-of-confinement claim. Because routine discomfort is 'part of the penalty that criminal offenders pay for their offenses against society,' 'only those deprivations denying "the minimal civilized measure of life's necessities" are sufficiently grave to form the basis of an Eighth Amendment violation.' " (*Hudson v. McMillian* (1992) 503 U.S. 1, 9 [112 S.Ct. 995, 117 L.Ed.2d 156], internal citations omitted.)

- "[A] prison official violates the Eighth Amendment only when two requirements are met. First, the deprivation alleged must be, objectively, 'sufficiently serious,' a prison official's act or omission must result in the denial of 'the minimal civilized measure of life's necessities,'… ." (*Farmer, supra,* 511 U.S. at p. 834, internal citations omitted.)

- "'[O]nly 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.)

- "[A]n inmate seeking to prove an Eighth Amendment violation must 'objectively show that he was deprived of something "sufficiently serious," ' and 'make a subjective showing that the deprivation occurred with deliberate indifference to the inmate's health or safety.' The second step, showing 'deliberate indifference,' involves a two part inquiry. First, the inmate must show that the prison officials were aware of a 'substantial risk of serious harm' to an inmate's health or safety. This part of our inquiry may be satisfied if the inmate shows that the risk posed by the deprivation is obvious. Second, the inmate must show that the prison officials had no 'reasonable' justification for the deprivation, in spite of that risk." (*Thomas, supra,* 611 F.3d at p. 1150, footnote and internal citations omitted.)

- "Next, the inmate must 'make a subjective showing that the deprivation occurred with deliberate indifference to the inmate's health or safety.' To satisfy this subjective component of deliberate indifference, the inmate must show that prison officials 'kn[e]w[] of and disregard[ed]' the substantial risk of harm, but the officials need not have intended any harm to befall the inmate; 'it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm.' " (*Lemire v. Cal. Dep't of Corr. & Rehab.* (9th Cir. 2013) 726 F.3d 1062, 1074, internal citations omitted.)

- "Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence, and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." (*Farmer, supra,* 511 U.S. at p. 842, internal citation omitted.)

- "When instructing juries in deliberate indifference cases with such issues of proof, courts should be careful to ensure that the requirement of subjective culpability is not lost. It is not enough merely to find that a reasonable person would have known, or that the defendant should have known, and juries should be instructed accordingly." (*Farmer, supra,* 511 U.S. at p. 843 fn. 8.)

- "The precise role of legitimate penological interests is not entirely clear in the context of an Eighth Amendment challenge to conditions of confinement. The Supreme Court has written that the test of *Turner v. Safley,* 482 U.S. 78, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987), which requires only a reasonable relationship to a legitimate penological interest to justify prison regulations, does not apply to Eighth Amendment claims. The existence of a legitimate penological justification has, however, been used in considering whether adverse treatment is sufficiently gratuitous to constitute punishment for Eighth Amendment purposes." (*Grenning v. Miller-Stout* (9th Cir. 2014) 739 F.3d 1235, 1240.)

- "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 … 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." (*Mendiola-Martinez v. Arpaio* (9th Cir. 2016) 836 F.3d 1239, 1254, internal citation omitted.)

- "However, our precedent should not be misread to suggest that jail officials are automatically entitled to deference instructions in conditions of confinement or excessive force cases brought by prisoners, or § 1983 actions brought by former inmates. We have long recognized that a jury need not defer to prison officials where the plaintiff produces substantial evidence showing that the jail's policy or practice is an unnecessary, unjustified, or exaggerated response to the need for prison security." (*Shorter v. Baca* (9th Cir. 2018) 895 F.3d 1176, 1183, internal citations omitted.)

- "Although claims by pretrial detainees arise under the Fourteenth Amendment and claims by convicted prisoners arise under the Eighth Amendment, our cases do not distinguish among pretrial and postconviction detainees for purposes of the excessive force, conditions of confinement, and medical care deference instructions." (*Shorter, supra,* 895 F.3d at p. 1182, fn. 4.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2010) Constitutional Law, § 816

3 Civil Rights Actions, Ch. 11, *Deprivation of Rights Under Color of State Law—Prisons*, ¶ 11.02 (Matthew Bender)

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

18 California Points and Authorities, Ch. 196, *Public Entities*, § 196.183 (Matthew Bender)

3070. Disability Discrimination—Access Barriers to Public Facility—Construction-Related Accessibility Standards Act—Essential Factual Elements (Civ. Code, §§ 54.3, 55.56)

[*Name of defendant***] is the owner of [a/an] [***e.g., restaurant***] named [***name of business***] that is open to the public. [***Name of plaintiff***] is a disabled person who [***specify disability that creates accessibility problems***].**

[*Name of plaintiff***] claims that [he/she] was denied full and equal access to [***name of defendant***]'s business on a particular occasion because of physical barriers. To establish this claim, [***name of plaintiff***] must prove both of the following:**

1. **That [***name of defendant***]'s business had barriers that violated construction-related accessibility standards in that [***specify barriers***]; and [either]**

2. **[That [***name of plaintiff***] personally encountered the violation on a particular occasion.]**

   [or]

   [That [*name of plaintiff***] was deterred from accessing [***name of defendant***]'s business on a particular occasion.]**

[A violation that [*name of plaintiff***] personally encountered may be sufficient to cause a denial of full and equal access if [he/she] experienced difficulty, discomfort, or embarrassment because of the violation.]**

[To prove that [*name of plaintiff***] was deterred from accessing [***name of defendant***]'s business on a particular occasion, [he/she] must prove both of the following:**

1. **That [***name of plaintiff***] had actual knowledge of one or more violations that prevented or reasonably dissuaded [him/her] from accessing [***name of defendant***]'s business, which [***name of plaintiff***] intended to patronize on a particular occasion.**

2. **That the violation(s) would have actually denied [***name of plaintiff***] full and equal access if [he/she] had tried to patronize [***name of defendant***]'s business on that particular occasion.]**

New December 2014; Revised December 2016

Directions for Use

Use this instruction if a plaintiff seeks statutory damages based on a construction-related accessibility claim under the Disabled Persons Act (DPA) or the Unruh Civil Rights Act. (See Civ. Code, § 55.56(a).) Do not give this instruction if actual damages are sought. CACI No. 3067, *Unruh Civil Rights Act—Damages,* may be given for claims for actual damages under the Unruh Act and adapted for use under the

DPA.

The DPA provides disabled persons with rights of access to public facilities. (See Civ. Code, §§ 54, 54.1.) Under the DPA, a disabled person who encounters barriers to access at a public accommodation may recover minimum statutory damages for each particular occasion on which he or she was denied access. (Civ. Code, §§ 54.3, 55.56(f).) However, the Construction Related Accessibility Standard Act (CRASA) requires that before statutory damages may be recovered, the disabled person either have personally encountered the violation on a particular occasion or have been deterred from accessing the facility on a particular occasion. (See Civ. Code, § 55.56(b).) Also, specified violations are deemed to be merely technical and are presumed to not cause a person difficulty, discomfort, or embarrassment for the purpose of an award of minimum statutory damages. (See Civ. Code, § 55.56(e).)

Give either or both options for element 2 depending on whether the plaintiff personally encountered the barrier or was deterred from patronizing the business because of awareness of the barrier. The next-to-last paragraph is explanatory of the first option, and the last paragraph is explanatory of the second option.

Sources and Authority

- Disabled Persons Act: Right of Access to Public Facilities. Civil Code sections 54, 54.1.

- Action for Interference With Admittance to or Enjoyment of Public Facilities. Civil Code section 54.3.

- Construction-Related Accessibility Standard Act. Civil Code section 55.56.

- "Part 2.5 of division 1 of the Civil Code, currently consisting of sections 54 to 55.3, is commonly referred to as the "Disabled Persons Act," although it has no official title. Sections 54 and 54.1 generally guarantee individuals with disabilities equal access to public places, buildings, facilities and services, as well as common carriers, housing and places of public accommodation, while section 54.3 specifies remedies for violations of these guarantees, including a private action for damages." (*Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 661, 674 fn. 8 [94 Cal.Rptr.3d 685, 208 P.3d 623].)

- "[L]egislation (applicable to claims filed on or after Jan. 1, 2009 ([Civ. Code,] § 55.57)) restricts the availability of statutory damages under sections 52 and 54.3, permitting their recovery only if an accessibility violation actually denied the plaintiff full and equal access, that is, only if 'the plaintiff personally encountered the violation on a particular occasion, or the plaintiff was deterred from accessing a place of public accommodation on a particular occasion' (§ 55.56, subd. (b)). It also limits statutory damages to one assessment per occasion of access denial, rather than being based on the number of accessibility standards violated. (*Id.,* subd. (e).)" (*Munson, supra,* 46 Cal.4th at pp. 677−678.)

- " '[S]ection 54.3 imposes the standing requirement that the plaintiff have suffered an actual denial of equal access before any suit for damages can be brought. … [A] plaintiff cannot recover damages under section 54.3 unless the violation actually denied him or her access to some public

facility. [¶] Plaintiff's attempt to equate a denial of equal access with the presence of a violation of federal or state regulations would nullify the standing requirement of section 54.3, since any disabled person could sue for statutory damages whenever he or she encountered noncompliant facilities, regardless of whether that lack of compliance actually impaired the plaintiff's access to those facilities. Plaintiff's argument would thereby eliminate any distinction between a cause of action for equitable relief under section 55 and a cause of action for damages under section 54.3.' " (*Reycraft v. Lee* (2009) 177 Cal.App.4th 1211, 1223 [99 Cal.Rptr.3d 746].)

- "We do not read *Reycraft* and *Urhausen* for the proposition that plaintiffs may not sue someone other than the owner or operator of the public facility described in section 54, for violating a plaintiff's rights under the DPA. A defendant's ability to control a particular location may ultimately be relevant to the question of liability, that is, whether the defendant interfered with the plaintiff's admission to or enjoyment of a public facility. But nothing in the language of section 54.3 suggests that damages may not be recovered against nonowners or operators. To the contrary, section 54.3 broadly and plainly provides: '[a]ny person or persons, firm or corporation who denies or interferes with admittance to or enjoyment of the public facilities as specified in [s]ections 54 and 54.1 or otherwise interferes with the rights of an individual with a disability under [s]ections 54, 54.1 and 54.2 is liable for … actual damages … .' " (*Ruiz v. Musclewood Investment Properties, LLC* (2018) 28 Cal.App.5th 15, 24 [238 Cal.Rptr.3d 835].)

- "In our view, *Reycraft* does not require that a plaintiff who sues for interference of his rights must present himself to *defendant's* business, with the intent to utilize *defendant's* services. Instead, a plaintiff who seeks damages for a violation of section 54.3 must establish that he 'presented himself' to a 'public place' with the intent of 'utilizing its services in the manner in which those … services are typically offered to the public and was actually denied' admission or enjoyment (or had his admission or enjoyment interfered with) on a particular occasion. Here, as alleged, plaintiff presented himself at a public place (the sidewalk) with the intent of using it in the manner it is typically offered to the public (walking on it for travel), and actually had his enjoyment interfered with on six occasions. Plaintiff therefore has standing to sue for damages." (*Ruiz, supra,* 28 Cal.App.5th at p. 24, original italics, internal citation omitted.)

- "Like the Unruh Civil Rights Act, the DPA incorporates the ADA to the extent that 'A violation of the right of an individual under the Americans with Disabilities Act of 1990 (Public Law 101-336) also constitutes a violation of this section.' (Civ. Code, § 54, subd. (c)." (*Baughman v. Walt Disney World Co.* (2013) 217 Cal.App.4th 1438, 1446 [159 Cal.Rptr.3d 825].)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 957 et seq.

11 California Forms of Pleading and Practice, Ch. 116, *Civil Rights: Discrimination in Business Establishments*, § 116.36 (Matthew Bender)

3 California Points and Authorities, Ch. 35, *Civil Rights: Unruh Civil Rights Act*, § 35.20 (Matthew Bender)

3704. Existence of "Employee" Status Disputed

[*Name of plaintiff***] must prove that [***name of agent***] was [***name of defendant***]'s employee.**

In deciding whether [*name of agent***] was [***name of defendant***]'s employee, the most important factor is whether [***name of defendant***] had the right to control how [***name of agent***] performed the work, rather than just the right to specify the result. One indication of the right to control is that the hirer can discharge the worker [without cause]. It does not matter whether [***name of defendant***] exercised the right to control.**

In deciding whether [*name of defendant***] was [***name of agent***]'s employer, in addition to the right of control, you must consider the full nature of their relationship. You should take into account the following additional factors, which, if true, may show that [***name of defendant***] was the employer of [***name of agent***]. No one factor is necessarily decisive. Do not simply count the number of applicable factors and use the larger number to make your decision. It is for you to determine the weight and importance to give to each of these additional factors based on all of the evidence.**

(a) **[***Name of defendant***] supplied the equipment, tools, and place of work;**

(b) **[***Name of agent***] was paid by the hour rather than by the job;**

(c) **[***Name of defendant***] was in business;**

(d) **The work being done by [***name of agent***] was part of the regular business of [***name of defendant***];**

(e) **[***Name of agent***] was not engaged in a distinct occupation or business;**

(f) **The kind of work performed by [***name of agent***] is usually done under the direction of a supervisor rather than by a specialist working without supervision;**

(g) **The kind of work performed by [***name of agent***] does not require specialized or professional skill;**

(h) **The services performed by [***name of agent***] were to be performed over a long period of time; [and]**

(i) **[***Name of defendant***] and [***name of agent***] believed that they had an employer-employee relationship[./; and]**

(j) **[***Specify other factor***].**

New September 2003; Revised December 2010, June 2015, December 2015, November 2018

Directions for Use

This instruction is based on *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 354–355 [256 Cal.Rptr. 543, 769 P.2d 399] and the Restatement Second of Agency, section 220. It is sometimes referred to as the *Borello* test or the common law test. (See *Dynamex Operations W. v. Superior Court* (2018) 4 Cal.5th 903, 934 [232 Cal.Rprt.3d 1, 416 P.3d 1].) It is intended to address the employer-employee relationship for purposes of assessing vicarious responsibility on the employer for the employee's acts. Most of the factors are less appropriate for analyzing other types of agency relationships, such as franchisor/franchisee. For an instruction more appropriate to these kinds of relationships, see CACI No. 3705, *Existence of "Agency" Relationship Disputed.*

Secondary factors (a)–(i) come from the Restatement section 220. (See also *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 532 [173 Cal.Rptr.3d 332, 327 P.3d 165]; Rest.3d Agency, § 7.07, com. f,) They have been phrased so that a yes answer points toward an employment relationship. Omit any that are not relevant. Additional factors have been endorsed by the California Supreme Court and may be included if applicable. (See *S. G. Borello & Sons, Inc., supra,* 48 Cal.3d at pp. 354–355.) Therefore, an "other" option (j) has been included.

Borello was a workers' compensation case. In *Dynamex, supra,* the court, in holding that *Borello* did not control the specific wage order dispute at issue, noted that "it appears more precise to describe *Borello* as calling for resolution of the employee or independent contractor question by focusing on the intended scope and purposes of the particular statutory provision or provisions at issue." (*Dynamex Operations W.*, *supra*, 4 Cal.5th at p. 934.) The court also said that "[t]he *Borello* decision repeatedly emphasizes statutory purpose as the touchstone for deciding whether a particular category of workers should be considered employees rather than independent contractors for purposes of social welfare legislation." (*Id.* at p. 935.) With respondeat superior, there is no statutory provision or social welfare legislation to be considered. (Cf. *Garcia v. Border Transportation Group, LLC* (2018) 28 Cal.App.5th 558, 571 [239 Cal.Rptr.3d 360] [no reason to apply *Dynamex* categorically to every working relationship].)

Sources and Authority

- Principal-Agent Relationship. Civil Code section 2295.
- Rebuttable Presumption that Contractor Is Employee Rather Than Independent Contractor; Proof of Independent Contractor Status. Labor Code section 2750.5.
- "[S]ubject to certain policy considerations, a hirer … cannot be held vicariously liable for the negligence of his independent contractors." (*Blackwell v. Vasilas* (2016) 244 Cal.App.4th 160, 168 [197 Cal.Rptr.3d 753].)
- "Whether a common law employer-employee relationship exists turns foremost on the degree of a hirer's right to control how the end result is achieved." (*Ayala, supra,* 59 Cal.4th at p. 528.)
- "However, the courts have long recognized that the 'control' test, applied rigidly and in isolation, is often of little use in evaluating the infinite variety of service arrangements. While conceding that the right to control work details is the 'most important' or 'most significant' consideration, the authorities

also endorse several ‘secondary’ indicia of the nature of a service relationship.” (*S. G. Borello & Sons, Inc., supra,* 48 Cal.3d at p. 350, internal citations omitted.)

- “While the extent of the hirer's right to control the work is the foremost consideration in assessing whether a common law employer-employee relationship exists, our precedents also recognize a range of secondary indicia drawn from the Second and Third Restatements of Agency that may in a given case evince an employment relationship. Courts may consider ‘(a) whether the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee.’ ” (*Ayala, supra,* 59 Cal.4th at p. 532.)

- “ ‘Generally, . . . the individual factors cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations.’ ” (*S. G. Borello & Sons, Inc., supra,* 48 Cal.3d at p. 351, internal citations omitted.)

- “[T]he Restatement guidelines heretofore approved in our state remain a useful reference.” (*S. G. Borello & Sons, Inc., supra,* 48 Cal.3d at p. 354.)

- “We also note the six-factor test developed by other jurisdictions which determine independent contractorship in light of the remedial purposes of the legislation. Besides the ‘right to control the work,’ the factors include (1) the alleged employee's opportunity for profit or loss depending on his managerial skill; (2) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; (3) whether the service rendered requires a special skill; (4) the degree of permanence of the working relationship; and (5) whether the service rendered is an integral part of the alleged employer's business. [¶] As can be seen, there are many points of individual similarity between these guidelines and our own traditional Restatement tests. We find that all are logically pertinent to the inherently difficult determination whether a provider of service is an employee or an excluded independent contractor for purposes of workers' compensation law.” (*S. G. Borello & Sons, Inc., supra,* 48 Cal.3d at pp. 354–355, internal cross-reference omitted.)

- “[A]t common law the problem of determining whether a worker should be classified as an employee or an independent contractor initially arose in the tort context--in deciding whether the hirer of the worker should be held vicariously liable for an injury that resulted from the worker's actions. In the vicarious liability context, the hirer's right to supervise and control the details of the worker's actions was reasonably viewed as crucial, because ‘ “[t]he extent to which the employer had a right to control [the details of the service] activities was . . . highly relevant to the question whether the employer ought to be legally liable for them . . . .” ’ For this reason, the question whether the hirer controlled the details of the worker's activities became the primary common law standard for determining whether a worker was considered to be an employee or an independent contractor.” (*Dynamex Operations W., supra,* 4 Cal.5th at p. 927, internal citations omitted.)

- "[A]lthough we have sometimes characterized *Borello* as embodying the common law test or standard for distinguishing employees and independent contractors, it appears more precise to describe *Borello* as calling for resolution of the employee or independent contractor question by focusing on the intended scope and purposes of the particular statutory provision or provisions at issue. In other words, *Borello* calls for application of a *statutory purpose* standard that considers the control of details and other potentially relevant factors identified in prior California and out-of-state cases in order to determine which classification (employee or independent contractor) best effectuates the underlying legislative intent and objective of the statutory scheme at issue." (*Dynamex Operations W., supra,* 4 Cal.5th at p. 934, original italics, internal citation omitted.)

- " '*Dynamex* did not purport to replace the *Borello* standard in every instance where a worker must be classified as either an independent contractor or an employee for purposes of enforcing California's labor protections.' To the contrary, the Supreme Court recognized that different standards could apply to different statutory claims: … ." (*Garcia, supra,* 28 Cal.App.5th at p. 570, internal citation omitted.)

- "In the absence of an argument that the statutory purposes underlying those claims compel application of a different standard, we conclude *Borello* furnishes the proper standard as to non-wage-order claims." (*Garcia, supra,* 28 Cal.App.5th at p. 571.)

- "The trial court's determination of employee or independent contractor status is one of fact if it depends upon the resolution of disputed evidence or inferences. ' "Even in cases where the evidence is undisputed or uncontradicted, if two or more different inferences can reasonably be drawn from the evidence this court is without power to substitute its own inferences or deductions for those of the trier of fact … ." ' The question is one of law only if the evidence is undisputed." (*Linton v. DeSoto Cab Co., Inc.* (2017) 15 Cal.App.5th 1208, 1225 [223 Cal.Rptr.3d 761.)

- The burden of proving the existence of an agency rests on the one affirming its existence. (*Burbank v. National Casualty Co.* (1941) 43 Cal.App.2d 773, 781 [111 P.2d 740].)

- "The label placed by the parties on their relationship is not dispositive, and subterfuges are not countenanced." (*S. G. Borello & Sons, Inc., supra,* 48 Cal.3d at p. 349.)

- "It is not essential that the right of control be exercised or that there be actual supervision of the work of the agent. The existence of the right of control and supervision establishes the existence of an agency relationship." (*Malloy v. Fong* (1951) 37 Cal.2d 356, 370 [232 P.2d 241], internal citations omitted.)

- "Perhaps the strongest evidence of the right to control is whether the hirer can discharge the worker without cause, because '[t]he power of the principal to terminate the services of the agent gives him the means of controlling the agent's activities.' " (*Ayala, supra,* 59 Cal.4th at p. 531.)

- "The worker's corresponding right to leave is similarly relevant: ' "An employee may quit, but an independent contractor is legally obligated to complete his contract." ' " (*Ayala, supra,* 59 Cal.4th at p. 531 fn. 2.)

- "A finding of employment is supported where the workers are 'a regular and integrated portion of [the] business operation.' " (*Garcia v. Seacon Logix Inc.* (2015) 238 Cal.App.4th 1476, 1487 [190 Cal.Rptr.3d 400].)

- "Where workers are paid weekly or by the hour, rather than by the job, it suggests an employment relationship." (*Garcia, supra,* 238 Cal.App.4th at p. 1488.)

- "In cases where there is a written contract, to answer that question [the right of control] without full examination of the contract will be virtually impossible. … [¶] … [T]he rights spelled out in a contract may not be conclusive if other evidence demonstrates a practical allocation of rights at odds with the written terms." (*Ayala, supra,* 59 Cal.4th at p. 535.)

- "[T]he right to exercise complete or authoritative control must be shown, rather than mere suggestion as to detail. A worker is an independent contractor when he or she follows the employer's desires only in the result of the work, and not the means by which it is achieved." (*Jackson v. AEG Live, LLC* (2015) 233 Cal.App.4th 1156, 1179 [183 Cal.Rptr.3d 394].)

- " '[T]he owner may retain a broad general power of supervision and control as to the results of the work so as to insure satisfactory performance of the independent contract—including the right to inspect [citation], … the right to make suggestions or recommendations as to details of the work [citation], the right to prescribe alterations or deviations in the work [citation]—without changing the relationship from that of owner and independent contractor … .' " (*Beaumont-Jacques v. Farmers Group, Inc.* (2013) 217 Cal.App.4th 1138, 1143 [159 Cal.Rptr.3d 102], quoting *McDonald v. Shell Oil Co.* (1955) 44 Cal.2d 785, 790 [285 P.2d 902].)

- "Agency and independent contractorship are not *necessarily* mutually exclusive legal categories as independent contractor and servant or employee are. In other words, an agent may also be an independent contractor. One who contracts to act on behalf of another and subject to the other's control, except with respect to his physical conduct, is both an agent and an independent contractor." (*Jackson, supra,* 233 Cal.App.4th at p. 1184, original italics, internal citations omitted].)

- "[W]hen a statute refers to an 'employee' without defining the term, courts have generally applied the common law test of employment to that statute." (*Arnold v. Mutual of Omaha Ins. Co.* (2011) 202 Cal.App.4th 580, 586 [135 Cal.Rptr.3d 213].)

- "[A] termination at-will clause for both parties may properly be included in an independent contractor agreement, and is not by itself a basis for changing that relationship to one of an employee." (*Arnold, supra,* 202 Cal.App.4th at p. 589.)

- Restatement Second of Agency, section 220, provides:
    (1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.
    (2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

(a) the extent of control which, by the agreement, the master may exercise over the details of the work;

(b) whether or not the one employed is engaged in a distinct occupation or business;

(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

(d) the skill required in the particular occupation;

(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

(f) the length of time for which the person is employed;

(g) the method of payment, whether by the time or by the job;

(h) whether or not the work is a part of the regular business of the employer;

(i) whether or not the parties believe they are creating the relation of master and servant; and

(j) whether the principal is or is not in business.

Secondary Sources

4 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 2–45

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, § 8.03[2] (Matthew Bender)

2 Wilcox, California Employment Law, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, § 30.04 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts*, §§ 248.15, 248.22, 248.51 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent,* § 427.13 (Matthew Bender)

10 California Points and Authorities, Ch. 100A, *Employer and Employee: Respondeat Superior,* §§ 100A.25, 100A.34 (Matthew Bender)

1 California Civil Practice: Torts §§ 3:5–3:6 (Thomson Reuters)

3720. Scope of Employment

[*Name of plaintiff*] must prove that [*name of agent*] was acting within the scope of [his/her] [employment/authorization] when [*name of plaintiff*] was harmed.

Conduct is within the scope of [employment/authorization] if:

(a) It is reasonably related to the kinds of tasks that the [employee/agent] was employed to perform; or

(b) It is reasonably foreseeable in light of the employer's business or the [agent's/employee's job] responsibilities.

New September 2003

Directions for Use

For an instruction on the scope of employment in cases involving on-duty peace officers, see CACI No. 3721, *Scope of Employment—Peace Officer's Misuse of Authority*.

This instruction is closely related to CACI No. 3723, *Substantial Deviation*, which focuses on when an act is not within the scope of employment.

Sources and Authority

- "The question of scope of employment is ordinarily one of fact for the jury to determine." (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 221 [285 Cal.Rptr. 99, 814 P.2d 1341].)
- "The facts relating to the applicability of the doctrine of *respondeat superior* are undisputed in the instant case, and we conclude that as a matter of law the doctrine is applicable and that the trial court erred in its instructions in leaving the issue as one of fact to the jury." (*Hinman v. Westinghouse Electric Co.* (1970) 2 Cal.3d 956, 963 [88 Cal.Rptr. 188, 471 P.2d 988], original italics.)
- "The burden of proof is on the plaintiff to demonstrate that the negligent act was committed within the scope of his employment." (*Ducey v. Argo Sales Co.* (1979) 25 Cal.3d 707, 721 [159 Cal.Rptr. 835, 602 P.2d 755].)
- "That the employment brought the tortfeasor and victim together in time and place is not enough.... [T]he incident leading to injury must be an 'outgrowth' of the employment [or] the risk of tortious injury must be 'inherent in the working environment' or 'typical of or broadly incidental to the enterprise [the employer] has undertaken.' " (*Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal.4th 291, 298 [48 Cal.Rptr.2d 510, 907 P.2d 358], internal citations omitted.)
- "In California, the scope of employment has been interpreted broadly under the respondeat superior

doctrine." (*Farmers Insurance Group v. County of Santa Clara* (1995) 11 Cal.4th 992, 1004 [47 Cal.Rptr.2d 478, 906 P.2d 440].)

- "[R]espondeat superior liability attaches if the activities 'that cause[d] the employee to become an instrumentality of danger to others' were undertaken with the employer's permission and were of some benefit to the employer or, in the absence of proof of benefit, the activities constituted a customary incident of employment." (*Purton v. Marriott Internat., Inc.* (2013) 218 Cal.App.4th 499, 509 [159 Cal.Rptr.3d 912].)

- "Tortious conduct that violates an employee's official duties or disregards the employer's express orders may nonetheless be within the scope of employment. So may acts that do not benefit the employer, or are willful or malicious in nature." (*Mary M., supra*, 54 Cal.3d at p. 209, internal citations omitted.)

- "A risk arises out of the employment when 'in the context of the particular enterprise an employee's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business. In other words, where the question is one of vicarious liability, the inquiry should be whether the risk was one "that may fairly be regarded as typical of or broadly incidental" to the enterprise undertaken by the employer.' Accordingly, the employer's liability extends beyond his actual or possible control of the employee to include risks inherent in or created by the enterprise." (*Perez v. Van Groningen & Sons, Inc*. (1986) 41 Cal.3d 962, 968 [227 Cal.Rptr. 106, 719 P.2d 676].)

- "California no longer follows the traditional rule that an employee's actions are within the scope of employment only if motivated, in whole or part, by a desire to serve the employer's interests." (*Lisa M., supra,* 12 Cal.4th at p. 297.)

- "*One way to determine* whether a risk is inherent in, or created by, an enterprise is to ask whether the actual occurrence was a generally foreseeable consequence of the activity. However, 'foreseeability' in this context must be distinguished from 'foreseeability' as a test for negligence. In the latter sense 'foreseeable' means a level of probability which would lead a prudent person to take effective precautions whereas 'foreseeability' as a test for respondeat superior merely means that *in the context of the particular enterprise an employee's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business*." (*Farmers Ins. Group, supra,* 11 Cal.4th at pp. 1003−1004, original italics.)

- "The employment ... must be such as predictably to create the risk employees will commit [torts] of the type for which liability is sought." (*Lisa M., supra,* 12 Cal.4th at p. 299.)

- "Some courts employ a two-prong test to determine whether an employee's conduct was within the scope of his employment for purposes of respondeat superior liability, asking whether ' "1) the act performed was either required or 'incident to his duties' [citation], or 2) the employee's misconduct could be reasonably foreseen by the employer in any event [citation]." [Citation.]' " (*Halliburton Energy Services, Inc. v. Department of Transportation* (2013) 220 Cal.App.4th 87, 94 [162 Cal.Rptr.3d 752].)

- "[I]n some cases, a cell phone call clearly would give rise to respondeat superior liability: 'We envision the link between respondeat superior and most work-related cell phone calls while driving as falling along a continuum. Sometimes the link between the job and the accident will be clear, *as when an employee is on the phone for work at the moment of the accident*.' " (*Ayon v. Esquire Deposition Solutions, LLC* (2018) 27 Cal.App.5th 487, 495 [238 Cal.Rptr.3d 185], original italics.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 176–194

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, § 8.03[3] (Matthew Bender)

2 California Employment Law, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, § 30.05 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts*, § 248.16 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent* (Matthew Bender)

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

1 California Civil Practice: Torts § 3:8 (Thomson Reuters)

3921. Wrongful Death (Death of an Adult)

If you decide that [*name of plaintiff*] has proved [his/her] claim against [*name of defendant*] for the death of [*name of decedent*], you also must decide how much money will reasonably compensate [*name of plaintiff*] for the death of [*name of decedent*]. This compensation is called "damages."

[*Name of plaintiff*] does not have to prove the exact amount of these damages. However, you must not speculate or guess in awarding damages.

The damages claimed by [*name of plaintiff*] fall into two categories called economic damages and noneconomic damages. You will be asked to state the two categories of damages separately on the verdict form.

[*Name of plaintiff*] claims the following economic damages:

1. **The financial support, if any, that [*name of decedent*] would have contributed to the family during either the life expectancy that [*name of decedent*] had before [his/her] death or the life expectancy of [*name of plaintiff*], whichever is shorter;**

2. **The loss of gifts or benefits that [*name of plaintiff*] would have expected to receive from [*name of decedent*];**

3. **Funeral and burial expenses; and**

4. **The reasonable value of household services that [*name of decedent*] would have provided.**

Your award of any future economic damages must be reduced to present cash value.

[*Name of plaintiff*] also claims the following noneconomic damages:

1. **The loss of [*name of decedent*]'s love, companionship, comfort, care, assistance, protection, affection, society, moral support[; [and]/.]**

[2. The loss of the enjoyment of sexual relations[; [and]/.]]

[3. The loss of [*name of decedent*]'s training and guidance.]

No fixed standard exists for deciding the amount of noneconomic damages. You must use your judgment to decide a reasonable amount based on the evidence and your common sense.

[For these noneconomic damages, determine the amount in current dollars paid at the time of judgment that will compensate [*name of plaintiff***] for those damages. This amount of noneconomic damages should not be further reduced to present cash value because that reduction should only be performed with respect to future economic damages.]**

In determining [*name of plaintiff***]'s loss, do not consider:**

1. **[***Name of plaintiff***]'s grief, sorrow, or mental anguish;**

2. **[***Name of decedent***]'s pain and suffering; or**

3. **The poverty or wealth of [***name of plaintiff***].**

In deciding a person's life expectancy, you may consider, among other factors, the average life expectancy of a person of that age, as well as that person's health, habits, activities, lifestyle, and occupation. According to [*insert source of information***], the average life expectancy of a [***insert number***]-year-old [male/female] is [***insert number***] years, and the average life expectancy of a [***insert number***]-year-old [male/female] is [***insert number***] years. This published information is evidence of how long a person is likely to live but is not conclusive. Some people live longer and others die sooner.**

[In computing these damages, consider the losses suffered by all plaintiffs and return a verdict of a single amount for all plaintiffs. I will divide the amount [among/between] the plaintiffs.]

New September 2003; Revised December 2005, February 2007, April 2008, December 2009, June 2011, December 2013

Directions for Use

If the decedent recovered damages for lost earning capacity in his or her lifetime, an heir's recovery for lost financial support (economic damages item 1) is to be measured by the decedent's physical condition at the time of death. There is no similar limitation on recovery for loss of consortium (noneconomic damages item 1). (*Boeken v. Philip Morris USA Inc.* (2013) 217 Cal.App.4th 992, 997−1000 [159 Cal.Rptr.3d 195]; see *Blackwell v. American Film Co.* (1922) 189 Cal. 689, 694 [209 P. 999].)

One of the life-expectancy subjects in the second sentence of the second-to-last paragraph should be the decedent, and the other should be the plaintiff. This definition is intended to apply to the element of damages pertaining to the financial support that the decedent would have provided to the plaintiff.

Use of the life tables in *Vital Statistics of the United States*, published by the National Center for Health Statistics, is recommended. (See Life Expectancy Table—Male and Life Expectancy Table—Female, following the Damages series.) The first column shows the age interval

between the two exact ages indicated. For example, 50–51 means the one-year interval between the fiftieth and fifty-first birthdays.

For an instruction, worksheets, and tables for use in reducing future economic damages to present value, see CACI No. 3904B, *Use of Present-Value Tables*.

The paragraph concerning not reducing noneconomic damages to present cash value is bracketed because the law is not completely clear. It has been held that all damages, pecuniary and nonpecuniary, must be reduced to present value. (See *Fox v. Pacific Southwest Airlines* (1982) 133 Cal.App.3d 565, 569 [184 Cal.Rptr. 87]; cf. Restat 2d of Torts, § 913A [future *pecuniary* losses must be reduced to present value].) The view of the court in *Fox* was that damages for lost value of society, comfort, care, protection and companionship must be monetarily quantified, and thus become pecuniary and subject to reduction to present value. However, the California Supreme Court subsequently held that with regard to future pain and suffering, the amount that the jury is to award should already encompass the idea of today's dollars for tomorrow's loss (See *Salgado v. County of L.A.* (1998) 19 Cal.4th 629, 646–647 [80 Cal.Rptr.2d 46, 967 P.2d 585]), so there is no further reduction to present value. (See CACI No. 3904A, *Present Cash Value,* and CACI No. 3904B, *Use of Present-Value Tables*.) While it seems probable that *Salgado* should apply to wrongful death actions, no court has expressly so held.

Assuming that *Salgado* applies to wrongful death, this paragraph is important to ensure that the jury does not apply any tables and worksheets provided to reduce future economic damages to present value (see CACI No. 3904B) to the noneconomic damages also. Note that because only future economic damages are to be reduced to present value, the jury must find separate amounts for economic and noneconomic damages and for past and present economic damages. (See CACI No. VF-3905, *Damages for Wrongful Death (Death of an Adult)*.)

Sources and Authority

- Cause of Action for Wrongful Death. Code of Civil Procedure section 377.60.

- Damages for Wrongful Death. Code of Civil Procedure section 377.61.

- "Generally, wrongful death claims are legally distinct from claims for personal injury and loss of consortium. 'A cause of action for wrongful death is a statutory claim that compensates specified heirs of the decedent for losses suffered as a result of a decedent's death.' Although each heir has a 'personal and separate' claim, the wrongful death statutes ordinarily require joint litigation of the heirs' claims in order to prevent a series of suits against the tortfeasor. However, that requirement does not deprive a court of subject matter jurisdiction to try a wrongful death action when an heir fails to participate in the action." (*LAOSD Asbestos Cases* (2018) 28 Cal.App.5th 862, 872 [240 Cal.Rptr.3d 1], internal citations omitted.)

- "A cause of action for wrongful death is purely statutory in nature, and therefore 'exists only so far and in favor of such person as the legislative power may declare.' " (*Barrett v. Superior Court* (1990) 222 Cal.App.3d 1176, 1184 [272 Cal.Rptr. 304], internal citations

omitted.)

- "There are three distinct public policy considerations involved in the legislative creation of a cause of action for wrongful death: '(1) compensation for survivors, (2) deterrence of conduct and (3) limitation, or lack thereof, upon the damages recoverable.' " (*Barrett, supra,* 222 Cal.App.3d at p. 1185, internal citation omitted.)

- "The elements of the cause of action for wrongful death are the tort (negligence or other wrongful act), the resulting death, and the damages, consisting of the *pecuniary loss* suffered by the *heirs*." (*Lattimore v. Dickey* (2015) 239 Cal.App.4th 959, 968 [191 Cal.Rptr.3d 766], original italics.)

- "'[W]rongful act' as used in section 377 means any kind of tortious act, including the tortious act of placing defective products into the stream of commerce." (*Barrett, supra,* 222 Cal.App.3d at p. 1191.)

- "In any action for wrongful death resulting from negligence, the complaint must contain allegations as to all the elements of actionable negligence." (*Novak v. Continental Tire North America* (2018) 22 Cal.App.5th 189, 195 [231 Cal.Rptr.3d 324].)

- "Under Code of Civil Procedure section 377.61, damages for wrongful death "are measured by the financial benefits the heirs were receiving at the time of death, those reasonably to be expected in the future, and the monetary equivalent of loss of comfort, society, and protection." (*Boeken, supra,* 217 Cal.App.4th at p. 997.)

- "These benefits include the personal services, advice, and training the heirs would have received from the deceased, and the value of her society and companionship. 'The services of children, elderly parents, or nonworking spouses often do not result in measurable net income to the family unit, yet unquestionably the death of such a person represents a substantial "injury" to the family for which just compensation should be paid.' " (*Allen v. Toledo* (1980) 109 Cal.App.3d 415, 423 [167 Cal.Rptr. 270], internal citations omitted.)

- " 'The pecuniary value of the society, comfort, and protection that is lost through the wrongful death of a spouse, parent, or child may be considerable in cases where, for instance, the decedent had demonstrated a "kindly demeanor" toward the statutory beneficiary and rendered assistance or "kindly offices" to that person. [Citation.]' " (*Soto v. BorgWarner Morse TEC Inc.* (2015) 239 Cal.App.4th 165, 198−199 [191 Cal.Rptr.3d 263].)

- "Factors such as the closeness of a family unit, the depth of their love and affection, and the character of the decedent as kind, attentive, and loving are proper considerations for a jury assessing noneconomic damages … ." (*Soto, supra,* 239 Cal.App.4th at p. 201.)

- "California permits recovery in a child's wrongful death action for loss of a parent's consortium." (*Boeken, supra,* 217 Cal.App.4th at pp. 997−998.)

- "Code of Civil Procedure section 377 ~~The wrongful death statute "~~has long allowed the

recovery of funeral expenses in California wrongful death actions." (*Vander Lind v. Superior Court* (1983) 146 Cal.App.3d 358, 364 [194 Cal.Rptr. 209].)

- "Where, as here, decedent was a husband and father, a significant element of damages is the loss of financial benefits he was contributing to his family by way of support at the time of his death and that support reasonably expected in the future. The total future lost support must be reduced by appropriate formula to a present lump sum which, when invested to yield the highest rate of return consistent with reasonable security, will pay the equivalent of lost future benefits at the times, in the amounts and for the period such future benefits would have been received." (*Canavin v. Pacific Southwest Airlines* (1983) 148 Cal.App.3d 512, 520–521 [196 Cal.Rptr. 82], internal citations omitted.)

- "To avoid confusion regarding the jury's task in future cases, we conclude that when future noneconomic damages are sought, the jury should be instructed expressly that they are to assume that an award of future damages is a present value sum, i.e., they are to determine the amount *in current dollars paid at the time of judgment* that will compensate a plaintiff for future pain and suffering. In the absence of such instruction, unless the record clearly establishes otherwise, awards of future damages will be considered to be stated in terms of their present or current value." (*Salgado, supra,* 19 Cal.4th at pp. 646–647, original italics.)

- "The California statutes and decisions ... have been interpreted to bar the recovery of punitive damages in a wrongful death action." (*Tarasoff v. Regents of the University of California* (1976) 17 Cal.3d 425, 450 [131 Cal.Rptr. 14, 551 P.2d 334], internal citation omitted.) There is an exception to this rule for death by felony homicide for which the defendant has been convicted. (Civ. Code, § 3294(d).)

- ~~"Punitive damages are awardable to the decedent's estate in an action by the estate representative based on the cause of action the decedent would have had if he or she had survived." (*Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 616 [103 Cal.Rptr.2d 492], internal citation omitted.)~~

- "California cases have uniformly held that damages for mental and emotional distress, including grief and sorrow, are not recoverable in a wrongful death action." (*Krouse v. Graham* (1977) 19 Cal.3d 59, 72 [137 Cal.Rptr. 863, 562 P.2d 1022], internal citations omitted.)

- "[A] simple instruction excluding considerations of grief and sorrow in wrongful death actions will normally suffice." (*Krouse, supra,* 19 Cal.3d at p. 69.)

- "[T]he competing and conflicting interests of the respective heirs, the difficulty in ascertaining individual shares of lost economic support when dealing with minors, the lack of any reason under most circumstances to apportion the lump-sum award attributable to loss of monetary support where minors are involved, the irrelevance of the heirs' respective interests in that portion of the award pertaining to lost economic support in determining the aggregate award, and the more efficient nature of court proceedings without a jury, cumulatively establish apportionment by the court, rather than the jury, is consistent with the efficient

administration of justice." (*Canavin, supra,* 148 Cal.App.3d at pp. 535–536.)

- "[W]here all statutory plaintiffs, properly represented by legal counsel waive judicial apportionment, the trial court should instruct the jury to return separate verdicts unless the remaining considerations enumerated above mandate refusal." (*Canavin, supra,* 148 Cal.App.3d at p. 536.)

- "We note that the court instructed the jury that in determining pecuniary loss they should consider inter alia the age, state of health and respective life expectancies of the deceased and each plaintiff but should be concerned only with 'the shorter of the life expectancies, that of one of the plaintiffs or that of the deceased. ...' This was a correct statement of the law." (*Francis v. Sauve* (1963) 222 Cal.App.2d 102, 120–121 [34 Cal.Rptr. 754], internal citation omitted.)

- "It is the shorter expectancy of life that is to be taken into consideration; for example; if, as in the case here, the expectancy of life of the parents is shorter than that of the son, the benefits to be considered are those only which might accrue during the life of the surviving parents." (*Parsons v. Easton* (1921) 184 Cal. 764, 770–771 [195 P. 419], internal citation omitted.)

- "The life expectancy of the deceased is a question of fact for the jury to decide, considering all relevant factors including the deceased's health, lifestyle and occupation. Life expectancy figures from mortality tables are admissible but are not conclusive." (*Allen, supra,* 109 Cal.App.3d at p. 424, internal citations omitted.)

- "Accordingly, the trial court in this case did not err in refusing [defendant]'s two proposed jury instructions, and in denying its request to modify CACI No. 3921, its motion for a directed verdict, its motion for a judgment notwithstanding the verdict, and its motion for a new trial, all of which were based on the erroneous ground that [plaintiff]'s loss of consortium damages were to be measured from [decedent]'s physical condition at the time of his death." (*Boeken, supra,* 217 Cal.App.4th at p. 1000.)

Secondary Sources

9 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1873–1880

California Tort Damages (Cont.Ed.Bar 2d ed.) Wrongful Death, §§ 3.1–3.58

4 Levy et al., California Torts, Ch. 55, *Death and Survival Actions*, §§ 55.10–55.13 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, §§ 177.163–177.167 (Matthew Bender)

6 California Points and Authorities, Ch. 64*, Damages: Tort*, § 64.25 (Matthew Bender)

California Civil Practice: Torts, §§ 23:8–23:8.2 (Thomson Reuters)

3922. Wrongful Death (Parents' Recovery for Death of a Minor Child)

If you decide that [*name of plaintiff***] has proved [his/her] claim against [***name of defendant***] for the death of [***name of minor***], you also must decide how much money will reasonably compensate [***name of plaintiff***] for the death of [***name of minor***]. This compensation is called "damages."**

[*Name of plaintiff***] does not have to prove the exact amount of these damages. However, you must not speculate or guess in awarding damages.**

The damages claimed by [*name of plaintiff***] fall into two categories called economic damages and noneconomic damages. You will be asked to state the two categories of damages separately on the verdict form.**

[*Name of plaintiff***] claims the following economic damages:**

1. **The value of the financial support, if any, that [***name of minor***] would have contributed to the family during either the life expectancy that [***name of minor***] had before [his/her] death or the life expectancy of [***name of plaintiff***], whichever is shorter;**

2. **The loss of gifts or benefits that [***name of plaintiff***] could have expected to receive from [***name of minor***];**

3. **Funeral and burial expenses; and**

4. **The reasonable value of household services that [***name of minor***] would have provided.**

Your award of any future economic damages must be reduced to present cash value.

[*Name of plaintiff***] also claims the following noneconomic damages: The loss of [***name of minor***]'s love, companionship, comfort, care, assistance, protection, affection, society, and moral support.**

No fixed standard exists for deciding the amount of noneconomic damages. You must use your judgment to decide a reasonable amount based on the evidence and your common sense.

[For these noneconomic damages, determine the amount in current dollars paid at the time of judgment that will compensate [*name of plaintiff***] for those damages. This amount of noneconomic damages should not be further reduced to present cash value because that reduction should only be performed with respect to future economic damages.]**

Do not include in your award any compensation for the following:

1. **[***Name of plaintiff***]'s grief, sorrow, or mental anguish; or**

2. [*Name of minor*]'s pain and suffering.

In computing these damages, you should deduct the present cash value of the probable costs of [*name of minor*]'s support and education.

In deciding a person's life expectancy, consider, among other factors, that person's health, habits, activities, lifestyle, and occupation. Life expectancy tables are evidence of a person's life expectancy but are not conclusive.

[In computing these damages, consider the losses suffered by all plaintiffs and return a verdict of a single amount for all plaintiffs. I will divide the amount [among/between] the plaintiffs.]

New September 2003; Revised December 2005, April 2008, December 2009, June 2011

Directions for Use

Use of the life tables in *Vital Statistics of the United States*, published by the National Center for Health Statistics, is recommended. (See Life Expectancy Table—Male and Life Expectancy Table—Female, following the Damages series.) The first column shows the age interval between the two exact ages indicated. For example, 50–51 means the one-year interval between the fiftieth and fifty-first birthdays.

For an instruction, worksheets, and tables for use in reducing future economic damages to present value, see CACI No. 3904B, *Use of Present-Value Tables*.

The paragraph concerning not reducing noneconomic damages to present cash value is bracketed because the law is not completely clear. It has been held that all damages, pecuniary and nonpecuniary, must be reduced to present value. (See *Fox v. Pacific Southwest Airlines* (1982) 133 Cal.App.3d 565, 569 [184 Cal.Rptr. 87]; cf. Restat 2d of Torts, § 913A [future *pecuniary* losses must be reduced to present value].) The view of the court in *Fox* was that damages for lost value of society, comfort, care, protection and companionship must be monetarily quantified, and thus become pecuniary and subject to reduction to present value. However, the California Supreme Court subsequently held that with regard to future pain and suffering, the amount that the jury is to award should already encompass the idea of today's dollars for tomorrow's loss (See *Salgado v. County of L.A.* (1998) 19 Cal.4th 629, 646–647 [80 Cal.Rptr.2d 46, 967 P.2d 585]), so there is no further reduction to present value. (See CACI No. 3904A, *Present Cash Value,* and CACI No. 3904B, *Use of Present-Value Tables*.) While it seems probable that *Salgado* should apply to wrongful death actions, no court has expressly so held.

Assuming that *Salgado* applies to wrongful death, this paragraph is important to ensure that the jury does not apply any tables and worksheets provided to reduce future economic damages to present value (see CACI No. 3904B) to the noneconomic damages also. Note thatbecause only future economic damages are to be reduced to present value, the jury must find separate amounts for economic and noneconomic damages and for past and present economic damages. (See CACI No. VF-3906, *Damages for Wrongful Death (Parents' Recovery for Death of a Minor Child)*.)

Sources and Authority

- Cause of Action for Wrongful Death. Code of Civil Procedure section 377.60.

- Damages for Wrongful Death. Code of Civil Procedure section 377.61.

- "Generally, wrongful death claims are legally distinct from claims for personal injury and loss of consortium. 'A cause of action for wrongful death is a statutory claim that compensates specified heirs of the decedent for losses suffered as a result of a decedent's death.' Although each heir has a 'personal and separate' claim, the wrongful death statutes ordinarily require joint litigation of the heirs' claims in order to prevent a series of suits against the tortfeasor. However, that requirement does not deprive a court of subject matter jurisdiction to try a wrongful death action when an heir fails to participate in the action." (*LAOSD Asbestos Cases* (2018) 28 Cal.App.5th 862, 872 [240 Cal.Rptr.3d 1], internal citations omitted.)

- "A cause of action for wrongful death is purely statutory in nature, and therefore 'exists only so far and in favor of such person as the legislative power may declare.' " (*Barrett v. Superior Court* (1990) 222 Cal.App.3d 1176, 1184 [272 Cal.Rptr. 304], internal citations omitted.)

- "Where the deceased was a minor child, recovery is based on the present value of reasonably probable future services and contributions, deducting the probable cost of rearing the child." (6 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 1695.)

- "There is authority in such cases for deducting from the loss factors-including the pecuniary loss a parent suffers by being deprived of the comfort, protection and society of a child-the prospective cost to the parent of the child's support and education. [¶] Although neither the loss factors nor such offsets are readily measurable in a particular case—nor need they be measured in precise terms of dollars and cents—in the case at bench the jury had before it for consideration a court order subject to mathematical computation which required plaintiff to pay support for his child in the sum of $125 monthly. The jury was entitled and required to take into consideration the prospective cost to plaintiff of the boy's maintenance and rearing, and they may well have offset their reasonable appraisal of such costs, under the general verdict, against any pecuniary loss which they found that plaintiff suffered." (*Fields v. Riley* (1969) 1 Cal.App.3d 308, 315 [81 Cal.Rptr. 671], internal citations omitted.)

- "There are three distinct public policy considerations involved in the legislative creation of a cause of action for wrongful death: '(1) compensation for survivors, (2) deterrence of conduct and (3) limitation, or lack thereof, upon the damages recoverable.' " (*Barrett, supra,* 222 Cal.App.3d at p. 1185, internal citation omitted.)

- "We therefore conclude, on this basis as well, that 'wrongful act' as used in section 377 means any kind of tortious act, including the tortious act of placing defective products into the stream of commerce." (*Barrett, supra,* 222 Cal.App.3d at p. 1191.)

- "In any action for wrongful death resulting from negligence, the complaint must contain allegations as to all the elements of actionable negligence." (*Jacoves v. United Merchandising Corp.* (1992) 9 Cal.App.4th 88, 105 [11 Cal.Rptr.2d 468], internal citation omitted.)

- "Damages for wrongful death are not limited to compensation for losses with 'ascertainable economic value.' Rather, the measure of damages is the value of the benefits the heirs could reasonably expect to receive from the deceased if she had lived." (*Allen v. Toledo* (1980) 109 Cal.App.3d 415, 423 [167 Cal.Rptr. 270], internal citations omitted.)

- ~~The wrongful death statute~~ "Code of Civil Procedure section 377 has long allowed the recovery of funeral expenses in California wrongful death actions." (*Vander Lind v. Superior Court* (1983) 146 Cal.App.3d 358, 364 [194 Cal.Rptr. 209].)

- "The California statutes and decisions ... have been interpreted to bar the recovery of punitive damages in a wrongful death action." (*Tarasoff v. Regents of Univ. of Cal.* (1976) 17 Cal.3d 425, 450 [131 Cal.Rptr. 14, 551 P.2d 334], internal citation omitted.) There is an exception to this rule for death by felony homicide for which the defendant has been convicted. (Civ. Code, § 3294(d).)

- ~~"Punitive damages are awardable to the decedent's estate in an action by the estate representative based on the cause of action the decedent would have had if he or she had survived." (*Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 616 [103 Cal.Rptr.2d 492], internal citation omitted.)~~

- "California cases have uniformly held that damages for mental and emotional distress, including grief and sorrow, are not recoverable in a wrongful death action." (*Krouse v. Graham* (1977) 19 Cal.3d 59, 72 [137 Cal.Rptr. 863, 562 P.2d 1022], internal citations omitted.)

- "[A] simple instruction excluding considerations of grief and sorrow in wrongful death actions will normally suffice." (*Krouse, supra,* 19 Cal.3d at p. 69.)

- "To avoid confusion regarding the jury's task in future cases, we conclude that when future noneconomic damages are sought, the jury should be instructed expressly that they are to assume that an award of future damages is a present value sum, i.e., they are to determine the amount *in current dollars paid at the time of judgment* that will compensate a plaintiff for future pain and suffering. In the absence of such instruction, unless the record clearly establishes otherwise, awards of future damages will be considered to be stated in terms of their present or current value." (*Salgado, supra,* 19 Cal.4th at pp. 646–647, original italics.)

- "[T]he competing and conflicting interests of the respective heirs, the difficulty in ascertaining individual shares of lost economic support when dealing with minors, the lack of any reason under most circumstances to apportion the lump-sum award attributable to loss of monetary support where minors are involved, the irrelevance of the heirs' respective interests in that portion of the award pertaining to lost economic support in determining the aggregate award, and the more efficient nature of court proceedings without a jury, cumulatively establish [that] apportionment by the court, rather than the jury, is consistent with the efficient administration of justice." (*Canavin v. Pacific Southwest Airlines* (1983) 148 Cal.App.3d 512, 535–536 [196 Cal.Rptr. 82].)

- "[W]here all statutory plaintiffs properly represented by legal counsel waive judicial apportionment, the trial court should instruct the jury to return separate verdicts unless the remaining considerations enumerated above mandate refusal." (*Canavin, supra,* 148 Cal.App.3d at p. 536.)

- "We note that the court instructed the jury that in determining pecuniary loss they should consider inter alia the age, state of health and respective life expectancies of the deceased and each plaintiff but should be concerned only with 'the shorter of the life expectancies, that of one of the plaintiffs or that of the deceased. …' This was a correct statement of the law." (*Francis v. Sauve* (1963) 222 Cal.App.2d 102, 120–121 [34 Cal.Rptr. 754], internal citation omitted.)

- "It is the shorter expectancy of life that is to be taken into consideration; for example, if, as in the case here, the expectancy of life of the parents is shorter than that of the son, the benefits to be considered are those only which might accrue during the life of the surviving parents." (*Parsons v. Easton* (1921) 184 Cal. 764, 770–771 [195 P. 419], internal citation omitted.)

- "The life expectancy of the deceased is a question of fact for the jury to decide, considering all relevant factors including the deceased's health, lifestyle and occupation. Life expectancy figures from mortality tables are admissible but are not conclusive." (*Allen, supra,* 109 Cal.App.3d at p. 424, internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1695

California Tort Damages (Cont.Ed.Bar) Wrongful Death, §§ 3.1–3.52

4 Levy et al., California Torts, Ch. 55, *Death and Survival Actions*, §§ 55.10–55.13 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, §§ 177.162–177.167 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort*, § 64.25 (Matthew Bender)

2 California Civil Practice: Torts, §§ 23:8–23:8.2 (Thomson Reuters)

4401. Misappropriation of Trade Secrets—Essential Factual Elements

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[*Name of plaintiff***] claims that [***name of defendant***] has misappropriated a trade secret. To succeed on this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [owned/was a licensee of] [the following:][***describe each item claimed to be a trade secret that is subject to the misappropriation claim***];**

2. **That [this/these] [***select short term to describe, e.g., information***] [was/were] [a] trade secret[s] at the time of the misappropriation;**

3. **That [***name of defendant***] improperly [acquired/used/ [or] disclosed] the trade secret[s];**

4. **That [[***name of plaintiff***] was harmed/ [or] [***name of defendant***] was unjustly enriched]; and**

5. **That [***name of defendant***]'s [acquisition/use/ [or] disclosure] was a substantial factor in causing [[***name of plaintiff***]'s harm/ [or] [***name of defendant***] to be unjustly enriched].**

New December 2007; Revised December 2010, December 2014

Directions for Use

In element 1, specifically describe all items that are alleged to be the trade secrets that were misappropriated. (See *Altavion, Inc. v. Konica Minolta Systems Laboratory, Inc.* (2014) 226 Cal.App.4th 26, 43 [171 Cal.Rptr.3d 714].) If more than one item is alleged, include "the following" and present the items as a list. Then in element 2, select a short term to identify the items, such as "information," "customer lists," or "computer code."

In element 1, select the appropriate term, "owned" or "was a licensee of," to indicate the plaintiff's interest in the alleged trade secrets. No reported California state court decision has addressed whether a licensee has a sufficient interest to assert a claim of trade secret misappropriation. These instructions take no position on this issue. The court should make a determination whether the plaintiff has the right as a matter of substantive law to maintain a cause of action for misappropriation of trade secrets if that issue is disputed.

Read also CACI No. 4402, *"Trade Secret" Defined,* to give the jury guidance on element 2.

Civil Code section 3426.1(b)(1) defines "misappropriation" as improper "[a]cquisition" of a trade secret, and subsection (b)(2) defines it as improper "[d]isclosure or use" of a trade secret. In some cases, the mere acquisition of a trade secret, as distinguished from a related disclosure or use, will not result in damages and will only be relevant to injunctive relief. Because generally the jury should be instructed only on matters relevant to damage claims, do not select "acquired" in element 3 or "acquisition" in element 5 unless there is evidence that the acquisition resulted in damages, other than damages from related disclosure or use.

To avoid confusion, instruct the jury only on the particular theory of misappropriation applicable under the facts of the case. For example, the jury should not be instructed on misappropriation through "use" if the plaintiff does not assert that the defendant improperly used the trade secrets. Nor should the jury be instructed on a particular type of "use" if that type of "use" is not asserted and supported by the evidence.

Give also CACI No. 4409, *Remedies for Misappropriation of Trade Secret*.

Sources and Authority

- Uniform Trade Secrets Act: Definitions. Civil Code section 3426.1.
- Trade Secrets Must Be Identified With Reasonable Particularity. Code of Civil Procedure section 2019.210.
- "A trade secret is misappropriated if a person (1) acquires a trade secret knowing or having reason to know that the trade secret has been acquired by 'improper means,' (2) discloses or uses a trade secret the person has acquired by 'improper means' or in violation of a nondisclosure obligation, (3) discloses or uses a trade secret the person knew or should have known was derived from another who had acquired it by improper means or who had a nondisclosure obligation or (4) discloses or uses a trade secret after learning that it is a trade secret but before a material change of position." (*Ajaxo Inc. v. E*Trade Group Inc.* (2005) 135 Cal.App.4th 21, 66 [37 Cal.Rptr.3d 221].)
- "A cause of action for monetary relief under CUTSA may be said to consist of the following elements: (1) possession by the plaintiff of a trade secret; (2) the defendant's misappropriation of the trade secret, meaning its wrongful acquisition, disclosure, or use; and (3) resulting or threatened injury to the plaintiff. The first of these elements is typically the most important, in the sense that until the content and nature of the claimed secret is ascertained, it will likely be impossible to intelligibly analyze the remaining issues." (*Silvaco Data Systems v. Intel Corp*. (2010) 184 Cal.App.4th 210, 220 [109 Cal.Rptr.3d 27], internal citations omitted.)
- "A cause of action for misappropriation of trade secrets requires a plaintiff to show the plaintiff owned the trade secret; at the time of misappropriation, the information was a trade secret; the defendant improperly acquired, used, or disclosed the trade secret; the plaintiff was harmed; and the defendant's acquisition, use, or disclosure of the trade secret was a substantial factor in causing the plaintiff harm." (*AMN Healthcare, Inc. v. Aya Healthcare Services, Inc.* (2018) 28 Cal.App.5th 923, 942 [239 Cal.Rptr.3d 577] [citing CACI].)
- "It is critical to any [UTSA] cause of action—and any defense—that the information claimed to have been misappropriated be clearly identified. Accordingly, a California trade secrets plaintiff must, prior to commencing discovery, 'identify the trade secret with reasonable particularity.' " (*Altavion, Inc., supra,* 226 Cal.App.4th at p. 43.)
- "We find the trade secret situation more analogous to employment discrimination cases. In those cases, as we have seen, information of the employer's intent is in the hands of the employer, but discovery affords the employee the means to present sufficient evidence to raise an inference of discriminatory intent. The burden of proof remains with the plaintiff, but the defendant must then bear the burden of producing evidence once a prima facie case for the plaintiff is made. [¶] We conclude that the trial court correctly refused the proposed instruction that would have shifted the burden of proof." (*Sargent Fletcher, Inc. v. Able Corp.* (2003) 110 Cal.App.4th 1658, 1674 [3 Cal.Rptr.3d 279], internal citation omitted.)
- "[W]e find no support for [a current-ownership] rule in the text of the CUTSA, cases applying it, or

legislative history. Nor do we find any evidence of such a rule in patent or copyright law, which defendants have cited by analogy. Defendants have offered no persuasive argument from policy for our adoption of such a rule." (*Jasmine Networks, Inc. v. Superior Court* (2009) 180 Cal.App.4th 980, 986 [103 Cal.Rptr.3d 426].)

- "[T]he only California authority [defendant] cited for the asserted requirement [that a trade-secrets plaintiff must own the trade secret when the action is filed] was the official California pattern jury instructions—whose 'first element,' [defendant] asserted, 'requires the plaintiff to be either the owner or the licensee of the trade secret. See CACI Nos. 4400, 4401.' [Defendant] did not quote the cited instructions—for good reason. The most that can be said in favor of its reading is that the broader and less specific of the two instructions uses the present tense to refer to the requirement of ownership. That instruction, whose avowed purpose is 'to introduce the jury to the issues involved' in a trade secrets case (Directions for Use for CACI No. 4400), describes the plaintiff as claiming that he 'is' the owner/licensee of the trade secrets underlying the suit. (CACI No. 4400.) The second instruction, which enumerates the actual *elements* of the plaintiff's cause of action, dispels whatever weak whiff of relevance this use of the present tense might have. It requires the plaintiff to prove that he 'own*ed*' or '*was* a licensee of' the trade secrets at issue. (CACI No. 4401, italics added.) Given only these instructions to go on, one would suppose that *past* ownership—i.e., ownership at the time of the alleged misappropriation—is sufficient to establish this element." (*Jasmine Networks, Inc., supra,* 180 Cal.App.4th at p. 997, original italics.)

Secondary Sources

1 Milgrim on Trade Secrets, Ch. 1, *Definitional Aspects*, § 1.01 (Matthew Bender)

Zamore, Business Torts, Ch. 17, *Trade Secrets*, § 17.05 et seq. (Matthew Bender)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.51 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.103[4] (Matthew Bender)

Edelson & Kay, eds., Trade Secret Litigation and Protection in California (State Bar of California 2009) Chs. 1, 2, 6, 10, 11, 12

4402. "Trade Secret" Defined

To prove that the [*select short term to describe, e.g., information***] [was/were] [a] trade secret[s], [***name of plaintiff***] must prove all of the following:**

1. **That the [***e.g., information***] [was/were] secret;**

2. **That the [***e.g., information***] had actual or potential independent economic value because [it was/they were] secret; and**

3. **That [***name of plaintiff***] made reasonable efforts to keep the [***e.g., information***] secret.**

New December 2007; Revised April 2008

Directions for Use

Give also CACI No. 4403, *Secrecy Requirement,* if more explanation of element 1 is needed. Give CACI No. 4412, *"Independent Economic Value" Explained,* if more explanation of element 2 is needed. Give CACI No. 4404, *Reasonable Efforts to Protect Secrecy*, if more explanation of element 3 is needed.

Sources and Authority

- "Trade Secret" Defined. Civil Code section 3426.1(d).

- " 'Trade secrets are a peculiar kind of property. Their only value consists in their being kept private.' Thus, 'the right to exclude others is central to the very definition of the property interest. Once the data that constitute a trade secret are disclosed to others, or others are allowed to use those data, the holder of the trade secret has lost his property interest in the data.' " (*DVD Copy Control Assn., Inc. v. Bunner* (2003) 31 Cal.4th 864, 881 [4 Cal.Rptr.3d 69, 75 P.3d 1], internal citations omitted.)

- "The 'test for a trade secret is whether the matter sought to be protected is information (1) that is valuable because it is unknown to others and (2) that the owner has attempted to keep secret. [Citation.] … [I]n order to qualify as a trade secret, the information "must be secret, and must not be of public knowledge or of a general knowledge in the trade or business." ' " (*AMN Healthcare, Inc. v. Aya Healthcare Services, Inc.* (2018) 28 Cal.App.5th 923, 943 [239 Cal.Rptr.3d 577]~~[T]he test for a trade secret is whether the matter sought to be protected is information (1) that is valuable because it is unknown to others and (2) that the owner has attempted to keep secret. … [I]n order to qualify as a trade secret, the information 'must be secret, and must not be of public knowledge or of a general knowledge in the trade or business.' " (*DVD Copy Control Assn., Inc. v. Bunner* (2004) 116 Cal.App.4th 241, 251 [10 Cal.Rptr.3d 185], internal citations omitted~~.)

- "[A]ny information (such as price concessions, trade discounts and rebate incentives) disclosed to [cross-complainant's] customers cannot be considered trade secret or confidential." (*Whyte v. Schlage Lock Co.* (2002) 101 Cal.App.4th 1443, 1455 [125 Cal.Rptr.2d 277].)

- " '[A] trade secret … has an intrinsic value which is based upon, or at least preserved by, being safeguarded from disclosure.' Public disclosure, that is the absence of secrecy, is fatal to the existence of a trade secret. 'If an individual discloses his trade secret to others who are under no obligation to protect the confidentiality of the information, or otherwise publicly discloses the secret, his property right is extinguished.' A person or entity claiming a trade secret is also required to make 'efforts that are reasonable under the circumstances to maintain its secrecy.' " (*In re Providian Credit Card Cases* (2002) 96 Cal.App.4th 292, 304 [116 Cal.Rptr.2d 8330, internal citations omitted.)

- "The requirement that a customer list must have economic value to qualify as a trade secret has been interpreted to mean that the secrecy of this information provides a business with a 'substantial business advantage.' In this respect, a customer list can be found to have economic value because its disclosure would allow a competitor to direct its sales efforts to those customers who have already shown a willingness to use a unique type of service or product as opposed to a list of people who only might be interested." (*Morlife, Inc. v. Perry* (1997) 56 Cal.App.4th 1514, 1522 [66 Cal.Rptr.2d 731], internal citations omitted.)

- "The sine qua non of a trade secret, then, is the plaintiff's possession of information of a type that can, at the possessor's option, be made known to others, or withheld from them, i.e., kept secret. This is the fundamental difference between a trade secret and a patent. A patent protects an *idea*, i.e., an invention, against appropriation by others. Trade secret law does not protect ideas as such. Indeed a trade secret may consist of something we would not ordinarily consider an *idea* (a conceptual datum) at all, but more a *fact* (an empirical datum), such as a customer's preferences, or the location of a mineral deposit. In either case, the trade secret is not the idea or fact itself, but *information* tending to communicate (disclose) the idea or fact to another. Trade secret law, in short, protects only *the right to control the dissemination of information*." (*Silvaco Data Systems v. Intel Corp.* (2010) 184 Cal.App.4th 210, 220–221 [109 Cal.Rptr.3d 27], original italics.)

- "[I]f a patentable idea is kept secret, the idea itself can constitute information protectable by trade secret law. In that situation, trade secret law protects the inventor's '*right to control the dissemination of information*'—the information being the idea itself—rather than the subsequent use of the novel technology, which is protected by patent law. In other words, trade secret law may be used to sanction the misappropriation of an idea the plaintiff kept secret." (*Altavion, Inc. v. Konica Minolta Systems Laboratory, Inc.* (2014) 226 Cal.App.4th 26, 55−56 [171 Cal.Rptr.3d 714], original italics, internal citations omitted.)

- "[T]he doctrine has been established that a trade secret can include a system where the elements are in the public domain, but there has been accomplished an effective, successful and valuable integration of the public domain elements and the trade secret gave the claimant a competitive advantage which is protected from misappropriation." (*Altavion, Inc., supra,* 226 Cal.App.4th at p. 48.)

Secondary Sources

13 Witkin, Summary of California Law (10th ed. 2005) Equity, § 87(4)

Trade Secrets Practice in California (Cont.Ed.Bar 2d ed.) §§ 4.8–4.10

1 Milgrim on Trade Secrets, Ch. 1, *Definitional Aspects*, § 1.01 (Matthew Bender)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.52 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.103[4][a] (Matthew Bender)

Edelson & Kay, eds., Trade Secret Litigation and Protection in California (State Bar of California 2009) Ch. 1

Item number: 02

RUPRO ACTION REQUEST FORM

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

RUPRO Meeting: May 6, 2019

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

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

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

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

If requesting July 1 or out of cycle, explain:
Rules 2.1050(d) and 10.58(a) of the California Rules of Court require the advisory committee to update, amend, and add topics to CACI on a regular basis and to submit its recommendations to the council for approval. Jury instructions are currently revised twice a year, and more often if necessary. Release 34 is the first CACI release for 2019. Release 33 was approved by the Judicial Council November 2018.

Additional Information: (To facilitate RUPRO's review of your proposal, please include any relevant information not contained in the attached summary.)
In addition to recommending approval of 35 new, revised, and revoked CACI instructions and one addition to the CACI User Guide to the council, the advisory committee also requests that RUPRO give final approval to 25 revised CACI instructions under the provisions of the guidelines adopted on December 19, 2006 regarding Jury Instructions Corrections and Technical and Minor Substantive Changes.

JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue · San Francisco, California 94102-3688
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REPORT TO THE JUDICIAL COUNCIL

For business meeting on May 16–17, 2019

Title
Jury Instructions: Civil Jury Instructions (Release 34)

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

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

Agenda Item Type
Action Required

Effective Date
May 17, 2019

Date of Report
April 11, 2019

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

Executive Summary

The Advisory Committee on Civil Jury Instructions recommends approving for publication the new, revised, and revoked civil jury instructions prepared by the committee. These revisions bring the instructions up to date with developments in the law over the previous six months. On Judicial Council approval, the instructions will be published in the official midyear supplement to the 2019 edition of the *Judicial Council of California Civil Jury Instructions* (*CACI*).

Recommendation

The Advisory Committee on Civil Jury Instructions recommends that the Judicial Council, effective May 17, 2019, approve for publication the following civil jury instructions prepared by the committee:

1. Revisions to 21 instructions: CACI Nos. 101, 105, 472, 1204, 2020, 2021, 2506, 2508, 2510, 2540, 2541, 2544, 2704, 3725, 4002, 4106, 5001, 5009, 5012, 5017, and 5022;
2. The addition of 6 new instructions: CACI Nos. 3903Q, 4570, 4571, 4572, 4573, and 4574;
3. Revocation of CACI No. 4003;

4. The addition of a note to 7 instructions—CACI Nos. 2521A, 2521B, 2521C, 2522A, 2522B, 2522C, and 2524—indicating that proposed revisions are currently under consideration; and
5. One addition to the User Guide.

A table of contents and the proposed new, revised, and revoked civil jury instructions are attached at pages 8–138.

Relevant Previous Council Action

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

This is release 34 of *CACI*. The council approved release 33 at its November 2018 meeting.[2]

Analysis/Rationale

A total of 35 instructions and one addition to the User Guide are presented in this release. The Judicial Council's Rules and Projects Committee (RUPRO) has also approved changes to 25 additional instructions under a delegation of authority from the council to RUPRO.[3]

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

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

[2] The committee now also issues two releases annually in January and July for online only delivery. These online-only releases—Numbers 33A and 34A for 2019—are limited to nonsubstantive technical changes and the like (as described in note 3 below).

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

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

New instructions

CACI No. 3903Q, *Survival Damages (Economic Damage).* There is currently no CACI instruction on survival damages (the damages that a decedent incurs before death as a result of a fatal event).[4] A recent case[5] called the committee's attention to this omission. A trial judge member noted that survival damages are always at issue in asbestos cases, and that a new instruction would be of value to bench and bar. The committee therefore proposes this new instruction to address this subject.

CACI Nos. 4570–4574, *Right to Repair Act.* The Right to Repair Act (the Act)[6] supplants the common law with regard to construction defect claims based on negligence and strict liability.[7] It allows for a statutory cause of action for construction defects causing property damage or purely economic loss (but not personal injury).[8] There are limitations on damages[9] and eight affirmative defenses.[10] The Act seemed to be a good candidate for expansion of *CACI*'s Construction Law series into a new subject area. The committee now proposes the following new instructions based on the Act:

4570. *Right to Repair Act—Construction Defects—Essential Factual Elements*

4571. *Right to Repair Act—Damages*

4572. *Right to Repair Act—Affirmative Defense—Act of Nature*

4573. *Right to Repair Act—Affirmative Defense—Unreasonable Failure to Minimize or Prevent Damage*

4574. *Right to Repair Act—Affirmative Defense—Plaintiff's Subsequent Acts or Omissions*

CACI No. 4570 is the basic claim for specific construction defects as enumerated in Civil Code section 896. But the problem for jury instructions drafting is that the statute contains approximately 50 different possible construction standards the violation of which may give rise to a claim under the Act. It is not possible for a jury instruction to present all of the possible claims that might form the basis for the action.

The committee has addressed this problem by leaving the actual elements of the claim unspecified. Instead, the user is told to "[*Specify all defects from Civil Code section 896,*

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[4] See Code Civ. Proc., § 377.34.

[5] *Williams v. The Pep Boys Manny Moe & Jack of California* (2018) 26 Cal.App.5th 672, 682–687.

[6] Civ. Code, § 895 et seq.

[7] *McMillin Albany LLC v. Superior Court* (2018) 4 Cal.5th 241.

[8] Civ. Code, § 896.

[9] Civ. Code, § 944.

[10] Civ. Code, § 945.5.

e.g., that a defectively constructed door allowed unintended water to pass beyond, around, or through it.]"

Revised instructions

CACI No. 472, *Primary Assumption of Risk—Exception to Nonliability—Facilities Owners and Operators and Event Sponsors*. In a recent case,[11] the court addressed the duty of event sponsors and operators with regard to a risk that was not an inherent risk in the sport of long-distance running. The court held that event operators and organizers have two distinct duties: (1) the limited duty not to increase the inherent risks of an activity under the primary assumption of the risk doctrine and (2) the duty of due care with respect to the extrinsic risks of the activity, which should reasonably be minimized to the extent possible without altering the nature of the activity.[12] The committee proposes adding a second option to element 2 to address the duty with regard to extrinsic risks.

CACI No. 1204, *Strict Liability—Design Defect—Risk-Benefit Test—Essential Factual Elements—Shifting Burden of Proof*. Evidence of industry custom and practice is a controversial issue in product liability design defect cases under the risk-benefit test. In a recent case, the California Supreme Court held that if evidence of industry custom and practice has been admitted for a limited purpose, on the request of a party the jury must be given a limiting instruction on how this evidence may and may not be considered under the risk-benefit test.[13] The court offered no specifics as to what the limiting instruction should say. The committee proposes adding a brief mention of the court's holding to the Directions for Use to alert the bench and bar of a possible need for a limiting instruction. The committee has rejected comments calling for a more comprehensive treatment of the admissibility of custom and practice evidence as that is not the purpose of this instruction, nor an appropriate subject for any jury instruction. Juries do not decide the admissibility of evidence.

CACI No. 2020, *Public Nuisance—Essential Factual Elements*; CACI No. 2021, *Private Nuisance—Essential Factual Elements*. A committee member questioned whether these two nuisance instructions were correct in making lack of consent an element of the plaintiff's claim. There are cases that clearly list lack of consent with the elements.[14] However, other cases have referred to consent as a defense, albeit in the context of a nuisance action involving parties with interests in the same property.[15] The committee proposes bracketing the lack-of-consent elements and then explaining the apparent conflict in the Directions for Use.

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[11] *Hass v. RhodyCo Productions* (2018) 26 Cal.App.5th 11, 38.

[12] *Hass, supra*, 26 Cal.App.5th at p. 38.

[13] See *Kim v. Toyota Motor Corp.* (2018) 6 Cal.5th 21, 30, 38.

[14] *See Department of Fish & Game v. Superior Court* (2011) 197 Cal.App.4th 1323, 1352; *Birke v. Oakwood Worldwide* (2009) 169 Cal.App.4th 1540, 1548.

[15] See *Newhall Land & Farming Co. v. Superior Court* (1993) 19 Cal.App.4th 334, 341–345; *Mangini v. Aerojet-General Corp.* (1991) 230 Cal.App.3d 1125, 1138–1140.

CACI Nos. 2506, 2508, 2540, 2541, 2544 (Fair Employment and Housing Act series). An attorney from a law firm labor and employment group presented a number of proposals for revisions to instructions in the Fair Employment and Housing Act series. His proposals addressed things like improved language with no substantive difference, additional explanation, and inconsistencies in the series. The committee proposes that many of his proposals be adopted.

CACI No. 2506, *Limitation on Remedies—After-Acquired Evidence.* The attorney proposed adding an optional paragraph to the instruction to advise the jury that if it finds discrimination, it may only award damages up to the date of discovery of the after-acquired evidence. The committee agreed with the suggestion and now proposes adding a paragraph similar to the one proposed by the attorney.

CACI No. 2508, *Failure to File Timely Administrative Complaint—Plaintiff Alleges Continuing Violation*. The attorney found this instruction difficult to understand and proposed a number of revisions to improve clarity. One proposal was to shift the language of the instruction to focus on acts that occurred before the one-year limitation period, which would be barred unless saved by the continuing-violation rule of the instruction. Currently, the instruction refers to "triggering the filing requirement," which the attorney found potentially confusing to a jury. The committee agreed that much of the attorney's approach was better and proposes revising the instruction along the lines suggested.

CACI No. 2540, *Disability Discrimination—Disparate Treatment—Essential Factual Elements*; CACI No. 2541, *Disability Discrimination—Reasonable Accommodation—Essential Factual Elements.* The attorney noted that the elements of these two instructions that address the ability to perform essential job duties were incomplete in several regards. The element in both instructions is limited to employees, while the instructions also apply to disability discrimination against job applicants. Also, CACI No. 2541 does not address an employee's possible reassignment to a vacant position, which is one possible accommodation. The committee proposes revising element 4 of CACI No. 2540 and element 5 of CACI No. 2541 to address these concerns.

CACI No. 2544, *Disability Discrimination—Affirmative Defense—Health or Safety Risk*. The attorney noted that the last part of this instruction, defining essential job duties, duplicates CACI No. 2543, *Disability Discrimination—"Essential Job Duties" Explained.* The committee proposes removing this part of the instruction and cross referring to CACI No. 2543.[16]

Revoked instruction

CACI No. 4003, *"Gravely Disabled" Minor Explained.* CACI No. 4003 is for use in Lanterman-Petris-Short (LPS) Act conservatorship proceedings. It is based on the definition of

[16] The California Employment Lawyers Association submitted a comment noting that the regulation on which CACI No. 2544 is based has been revised and that the instruction no longer accurately replicates the regulation. Revisions to conform the instruction to the regulation will be considered in the next release cycle.

"gravely disabled minor" in Welfare and Institutions Code section 5585.25, which is part of the Children's Civil Commitment and Mental Health Treatment Act of 1988. In a recent case,[17] the court held that the definition in section 5585.25 does not apply under LPS, and instead, the general definition of "gravely disabled" in the LPS[18] applies to minors as well as to adults. The committee therefore proposes revoking CACI No. 4003 and noting in the Directions for Use to CACI No. 4002, *"Gravely Disabled" Explained,* that this instruction applies to both adults and minors.

Note: Revisions under consideration

CACI Nos. 2521A, 2521B, 2521C, 2522A, 2522B, 2522C, 2524, *Hostile Work Environment Harassment.* A new statute, Government Code section 12923,[19] declares legislative intent with regard to the laws about harassment.[20] The statute raises some challenges for drafters of jury instructions. The committee continues to address these challenges and expects to have proposed revisions to the affected instructions ready for posting for public comments on or before May 1, 2019.

User Guide

An attorney reported that in response to his request for non-*CACI* instructions, the judge stated "if CACI hasn't provided it, my assumption is CACI rejected it." An addition has been made to the User Guide to clarify that this is not the case.

Policy implications

Jury instructions express the law; there are no policy implications.

Comments

The proposed additions and revisions to *CACI* circulated for comment from January 21 through March 1, 2019. Comments were received from 13 different commenters. Some submitted comments on multiple instructions, and some commented on only a single instruction. No single instruction generated a particularly large number of comments.

The committee evaluated all comments and revised some of the instructions in light of the comments received. A chart summarizing the comments received on all instructions and the committee's responses is attached at pages 8–138.

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[17] *Conservatorship of M.B.* (2018) 27 Cal.App.5th 98, 106–107.

[18] Welf. & Inst. Code, § 5008(h)(1)(A).

[19] See Stats. 2018, ch. 955 (Sen. Bill 1300).

[20] Gov. Code, § 12923 (introductory language preceding subdivisions).

Alternatives considered

Rule 2.1050 of the California Rules of Court requires the committee to update, amend, and add topics to *CACI* on a regular basis and to submit its recommendations to the council for approval; therefore, the advisory committee did not consider any alternative actions.

Fiscal and Operational Impacts

No implementation costs are associated with this proposal. To the contrary, under the publication agreement, the official publisher, LexisNexis, will publish the midyear supplement to the 2019 edition of *CACI* and pay royalties to the Judicial Council. Other licensing agreements with other publishers provide additional royalties.

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

Attachments

1. *CACI* instructions, at pages 8–138
2. Chart of comments and the committee's responses, at pages 139–177

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Release 34: May 2019

101. Overview of Trial

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

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

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

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

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

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

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

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

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

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

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

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

Directions for Use

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

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

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

Sources and Authority

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

Secondary Sources

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

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

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

California Judges Benchbook: Civil Proceedings—Trial (2d ed.) § 4.100 (Cal CJER 2010)

105. Insurance

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

New September 2003; Revised May 2019

Directions for Use

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

By statute, evidence of a defendant's insurance coverage is inadmissible to prove liability. (Evid. Code, § 1155.) If evidence of insurance has been admitted for some other reason, a limiting instruction should be given advising the jury to consider the evidence only for the purpose for which it was admitted.

Sources and Authority

- Evidence of Insurance Inadmissible to Prove Liability. Evidence Code section 1155.

- " 'The evidence [of liability insurance] is regarded as both irrelevant and prejudicial to the defendant. Hence, not only is it subject to objection and exclusion, but any attempt to inject it by question, suggestion or argument is considered misconduct of counsel, and is often held reversible error. [Citations.]' " ~~As a rule, evidence that the defendant has insurance is both irrelevant and prejudicial to the defendant.~~ (*Neumann v. Bishop* (1976) 59 Cal.App.3d 451, 469 [130 Cal.Rptr. 786].)

- "Evidence of a *defendant's* insurance coverage ordinarily is not admissible to prove the defendant's negligence or other wrongdoing." (*Blake v. E. Thompson Petroleum Repair Co.* (1985) 170 Cal.App.3d 823, 830 [216 Cal.Rptr. 568], original italics.)

- "[E]vidence of a *plaintiff's* insurance coverage is not admissible for the purpose of mitigating the damages the plaintiff would otherwise recover from the tortfeasor. This is the ~~Generally, evidence that the plaintiff was insured is not admissible under the "~~ 'collateral source rule~~."~~.' (*Blake, supra,* 170 Cal.App.3d at p. 830, original italics; see *Helfend v. Southern California Rapid Transit Dist.* (1970) 2 Cal.3d 1, 16-18 [84 Cal.Rptr. 173, 465 P.2d 61]~~; *Acosta v. Southern California Rapid Transit Dist.* (1970) 2 Cal.3d 19, 25-26 [84 Cal.Rptr. 184, 465 P.2d 72]~~.)

- "Both of the foregoing principles are subject to the qualification that where the topic of insurance coverage is coupled with other relevant evidence, that topic may be admitted along with such other evidence. '[para.] It has always been the rule that the existence of insurance may properly be referred to in a case if the evidence is otherwise admissible.' The trial court must then determine, pursuant to Evidence Code section 352, whether the probative value of the other evidence outweighs the prejudicial effect of the mention of insurance."~~Evidence of insurance coverage may be admissible~~

~~where it is coupled with other relevant evidence, provided that the probative value of the other evidence outweighs the prejudicial effect of the mention of insurance.~~ (*Blake*, *supra*, ~~*v. E. Thompson Petroleum Repair Co., Inc.* (1985)~~ 170 Cal.App.3d at p. ~~823,~~ 831, internal citation omitted ~~[216 Cal.Rptr. 568]~~.)

- "[T]he trial court did not abuse its discretion by excluding evidence of [plaintiff]'s insured [health care coverage] under Evidence Code section 352. [Plaintiff] had the right to treat outside his plan. Evidence of his insurance would have confused the issues or misled and prejudiced the jury." (*Pebley v. Santa Clara Organics, LLC* (2018) 22 Cal.App.5th 1266, 1278 [232 Cal.Rptr.3d 404].)

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

Secondary Sources

8 Witkin, California Procedure (5th ed. 2018) Trial, § 217 et seq.
~~7 Witkin, California Procedure (4th ed. 1997) Trial, §§ 230-233~~

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

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

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

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

1 Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 16, *Jury Instructions*, 16.06

1 Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 17, *Dealing With the Jury*, 17.26

472. Primary Assumption of Risk—Exception to Nonliability— Facilities Owners and Operators and Event Sponsors

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[*Name of plaintiff***] claims [he/she] was harmed while [participating in/watching] [***sport or other recreational activity e.g., snowboarding***] at [***name of defendant***]'s [***specify facility or event where plaintiff was injured, e.g., ski resort***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was the [owner/operator/sponsor/***other***] of [***e.g., a ski resort***];**

2. [**That [***name of defendant***] unreasonably increased the risks to [***name of plaintiff***] over and above those inherent in [***e.g., snowboarding***];**]

   [or]

   [That [*name of defendant***] unreasonably failed to minimize a risk that is not inherent in [***e.g., snowboarding***] and unreasonably exposed [***name of plaintiff***] to an increased risk of harm;]**

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

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

New December 2013; Revised and Renumbered From CACI No. 410 May 2017; Revised May 2019

Directions for Use

This instruction sets forth a plaintiff's response to a defendant's assertion of the affirmative defense of primary assumption of risk. Primary assumption of risk generally absolves the defendant of a duty of care toward the plaintiff with regard to injury incurred in the course of a sporting or other recreational activity covered by the doctrine. (See *Knight v. Jewett* (1992) 3 Cal.4th 296, 320 [11 Cal.Rptr.2d 2, 834 P.2d 696].) There is, however, a duty applicable to facilities owners and operators and to event sponsors not to unreasonably increase the risks of injury to participants and spectators beyond those inherent in the activity. (See *Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148, 1162 [150 Cal.Rptr.3d 551, 290 P.3d 1158] [participants]; *Lowe v. California League of Prof. Baseball* (1997) 56 Cal.App.4th 112, 123 [65 Cal.Rptr.2d 105] [spectators].)

There is also a duty to minimize risks that are extrinsic to the nature of the sport; that is, those that can be addressed without altering the essential nature of the activity. (*Hass v. RhodyCo Productions* (2018) 26 Cal.App.5th 11, 38 [236 Cal.Rptr.3d 682].) Choose either or both options for element 2 depending on which duty is alleged to have been breached.

While duty is a question of law, courts have held that whether the defendant has increased the risk is a

question of fact for the jury. (See *Luna v. Vela* (2008) 169 Cal.App.4th 102, 112–113 [86 Cal.Rptr.3d 588] [and cases cited therein]; cf. *Willhide-Michiulis v. Mammoth Mountain Ski Area, LLC* (2018) 25 Cal.App.5th 344, 354 [235 Cal.Rptr.3d 716] [court to decide whether an activity is an active sport, the inherent risks of that sport, and whether the defendant has increased the risks of the activity beyond the risks inherent in the sport].) There may also be disputed facts that must be resolved by a jury before it can be determined if the doctrine applies. (See *Shin v. Ahn* (2007) 42 Cal.4th 482, 486 [64 Cal.Rptr.3d 803, 165 P.3d 581].)

For an instruction on primary assumption of risk applicable to coparticipants, see CACI No. 470, *Primary Assumption of Risk—Exception to Nonliability—Coparticipant in Sport or Other Recreational Activity.* For an instruction on primary assumption of risk applicable to instructors, trainers, and coaches, see CACI No. 471, *Primary Assumption of Risk—Exception to Nonliability—Instructors, Trainers, or Coaches*. For an instruction applicable to occupations with inherent risk, see CACI No. 473, *Primary Assumption of Risk—Exception to Nonliability—Occupation With Inherent Risk.*

Sources and Authority

- "[U]nder the primary assumption of risk doctrine, operators, sponsors and instructors in recreational activities posing inherent risks of injury have no duty to eliminate those risks, but do owe participants the duty not to unreasonably increase the risks of injury beyond those inherent in the activity." (*Nalwa, supra,* 55 Cal.4th at p. 1162.)

- "The doctrine applies to recreational activities ' "involving an inherent risk of injury to voluntary participants … where the risk cannot be eliminated without altering the fundamental nature of the activity." ' " (*Griffin v. The Haunted Hotel, Inc.* (2015) 242 Cal.App.4th 490, 500 [194 Cal.Rptr.3d 830].)

- "Although the doctrine is often applied as between sports coparticipants, it defines the duty owed as between persons engaged in any activity involving inherent risks. The doctrine applies to activity 'done for enjoyment or thrill, requires physical exertion as well as elements of skill, and involves a challenge containing a potential risk of injury' … ." (*Jimenez v. Roseville City School Dist.* (2016) 247 Cal.App.4th 594, 601 [202 Cal.Rptr.3d 536], internal citations omitted; see also *Bertsch v. Mammoth Community Water Dist.* (2016) 247 Cal.App.4th 1201, 1208 [202 Cal.Rptr.3d 757] ["These factors certainly apply to skateboarding"], internal citations omitted.)

- "What the primary assumption of risk doctrine does not do, however, is absolve operators of *any obligation* to protect the safety of their customers. As a general rule, where an operator can take a measure that would increase safety and minimize the risks of the activity *without also altering the nature of the activity,* the operator is required to do so. As the court explained in *Knight,* 'in the sports setting, as elsewhere, the nature of the applicable duty or standard of care frequently varies with the role of the defendant whose conduct is at issue in a given case.' When the defendant is the operator of an inherently risky sport or activity (as opposed to a coparticipant), there are 'steps the sponsoring business entity reasonably should be obligated to take in order to minimize the risks without altering the nature of the sport [or activity].' " (*Grotheer v. Escape Adventures, Inc.* (2017) 14 Cal.App.5th 1283, 1300 [222 Cal.Rptr.3d 633], original italics, internal citations omitted.)

- "Thus, *Nalwa* actually reaffirms *Knight's* conclusions regarding the duties owed to participants by operators/organizers of recreational activities. In short, such operators and organizers have two distinct duties: the limited duty not to increase the *inherent* risks of an activity under the primary assumption of the risk doctrine and the ordinary duty of due care with respect to the *extrinsic* risks of the activity, which should reasonably be minimized to the extent possible without altering the nature of the activity." (*Hass, supra,* 26 Cal.App.5th at p. 38.)

- "The determinant of duty, 'inherent risk,' is to be decided solely as a question of law and based on the general characteristics of the sport activity and the parties' relationship to it." (*Griffin, supra,* 242 Cal.App.4th at p. 501.)

- "Admittedly, it is sometimes said that '[t]he existence and scope of a defendant's duty of care in the primary assumption of risk context "is a *legal* question which depends on the nature of the sport or activity … and on the parties' general relationship to the activity, and is an issue to be decided by the court, rather than the jury." ' This statement of the rule is correct where there is no dispute about the inherent risks, and such cases may be resolved on summary judgment. [¶] However this statement is overly broad. Although the risks inherent in *many* activities are not subject to reasonable dispute (e.g., being hit with a baseball during a game), the risks inherent in *some* activities are not commonly known. In such cases, expert testimony may be required ' "for purposes of weighing whether the inherent risks of the activity were increased by the defendant's conduct." ' … Thus, it is not entirely accurate to say inherent risks of an activity always present purely legal questions, because sometimes the nature of an activity and its risks must be gleaned from the evidence." (*Jimenez, supra,* 247 Cal.App.4th at p. 608, original italics, internal citations omitted.)

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

assumption of the risk decision, *Shin v. Ahn, supra,* 42 Cal.4th 482, a case that postdates the appellate court decisions suggesting the issue is one for the court to resolve." (*Luna, supra,* 169 Cal.App.4th at pp. 112–113.)

- "Although defendants generally have no legal duty to eliminate (or protect a plaintiff against) risks inherent in the sport itself, it is well established that defendants generally do have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport. Thus, although a ski resort has no duty to remove moguls from a ski run, it clearly does have a duty to use due care to maintain its towropes in a safe, working condition so as not to expose skiers to an increased risk of harm. The cases establish that the latter type of risk, posed by a ski resort's negligence, clearly is not a risk (inherent in the sport) that is assumed by a participant." (*Knight, supra,* 3 Cal.4th at pp. 315−316.)

- "Under *Knight,* defendants had a duty *not to increase* the inherent risks to which spectators at professional baseball games are regularly exposed and which they assume. As a result, a triable issue of fact remained, namely whether the [defendants]' mascot cavorting in the stands and distracting plaintiff's attention, *while the game was in progress,* constituted a breach of that duty, i.e., constituted negligence in the form of increasing the inherent risk to plaintiff of being struck by a foul ball." (*Lowe, supra,* 56 Cal.App.4th at p. 114, original italics.)

- "[T]hose responsible for maintaining athletic facilities have a … duty not to increase the inherent risks, albeit in the context of businesses selling recreational opportunities." (*Avila v. Citrus Community College Dist.* (2006) 38 Cal.4th 148, 162 [41 Cal.Rptr.3d 299, 131 P.3d 383], internal citation omitted.)

- "*Knight,* consistently with established case law, simply requires courts in each instance to examine the question of duty in light of the nature of the defendant's activities and the relationship of the parties to that activity." (*Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 482 [63 Cal.Rptr.2d 291, 936 P.2d 70].)

- "Because primary assumption of risk focuses on the question of duty, it is *not* dependent on either the plaintiff's implied consent to, or subjective appreciation of, the potential risk." (*Griffin, supra,* 242 Cal.App.4th at p. 502, original italics.)

- "Defendants' obligation not to increase the risks inherent in the activity included a duty to provide safe equipment for the trip, such as a safe and sound craft." (*Ferrari v. Grand Canyon Dories* (1995) 32 Cal.App.4th 248, 255 [38 Cal.Rptr.2d 65].)

- "[A duty not to increase the risk] arises only if there is an ' "organized relationship" ' between the defendants and the participant in relation to the sporting activity, such as exists between a recreational business operator and its patrons … . [I]mposing such a duty in the context of these types of relationships is justified because the defendants are 'responsible for, or in control of, the conditions under which the [participant] engaged in the sport.' " However, '[t]his policy justification does not extend to a defendant wholly uninvolved with and unconnected to the sport,' … who neither 'held out their driveway as an appropriate place to skateboard or in any other way represented that the driveway was a safe place for skateboarding.' " (*Bertsch, supra,* 247 Cal.App.4th at pp. 1208−1209,

internal citations omitted.)

Secondary Sources

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

Haning et al., California Practice Guide: Personal Injury, Ch. 3-D, *Mitigating Factors In Reduction Of Damages*, ¶¶ 3:234–3:254.30 (The Rutter Group)

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

23 California Forms of Pleading and Practice, Ch. 273, *Games, Sports, and Athletics,* § 273.31 (Matthew Bender)

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

1204. Strict Liability—Design Defect—Risk-Benefit Test—Essential Factual Elements—Shifting Burden of Proof

[*Name of plaintiff***] claims that the [***product***]'s design caused harm to [***name of plaintiff***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

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

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

3. **That the [***product***]'s design was a substantial factor in causing harm to [***name of plaintiff***].**

If [*name of plaintiff***] has proved these three facts, then your decision on this claim must be for [***name of plaintiff***] unless [***name of defendant***] proves that the benefits of the [***product***]'s design outweigh the risks of the design. In deciding whether the benefits outweigh the risks, you should consider the following:**

(a) The gravity of the potential harm resulting from the use of the [*product***];**

(b) The likelihood that this harm would occur;

(c) The feasibility of an alternative safer design at the time of manufacture;

(d) The cost of an alternative design; [and]

(e) The disadvantages of an alternative design; [and]

[(f) [*Other relevant factor(s)***].]**

New September 2003; Revised February 2007, April 2009, December 2009, December 2010, June 2011, January 2018, May 2019

Directions for Use

–The consumer expectation test and the risk-benefit test for design defect are not mutually exclusive, and depending on the facts and circumstances of the case, both may be presented to the trier of fact in the same case. (*Demara v. The Raymond Corp.* (2017) 13 Cal.App.5th 545, 554 [221 Cal.Rptr.3d 102].) If the plaintiff asserts both tests, the instructions must make it clear that the two tests are alternatives. (*Bracisco v. Beech Aircraft Corp.* (1984) 159 Cal.App.3d 1101, 1106–1107 [206 Cal.Rptr. 431].) Risk-benefit weighing is not a formal part of, nor may it serve as a defense to, the consumer expectations test. (*Chavez v. Glock, Inc.* (2012) 207 Cal.App.4th 1283, 1303 [144 Cal.Rptr.3d 326].)

To make a prima facie case, the plaintiff has the initial burden of producing evidence that he or

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

If evidence of industry custom and practice has been admitted for a limited purpose, at the timely request of a party opposing this evidence, the jury must be given a limiting instruction on how this evidence may and may not be considered under the risk-benefit test. (See *Kim v. Toyota Motor Corp.* (2018) 6 Cal.5th 21, 30, 38 [237 Cal.Rptr.3d 205, 424 P.3d 290].)

Aesthetics might be an additional factor to be considered in an appropriate case in which there is evidence that appearance is important in the marketability of the product. (See *Bell v. Bayerische Motoren Werke Aktiengesellschaft* (2010) 181 Cal.App.4th 1108, 1131 [105 Cal.Rptr.3d 485].)

Sources and Authority

"A manufacturer, distributor, or retailer is liable in tort if a defect in the manufacture or design of its product causes injury while the product is being used in a reasonably foreseeable way." (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 560 [34 Cal.Rptr.2d 607, 882 P.2d 298].)

- "[T]he term defect as utilized in the strict liability context is neither self-defining nor susceptible to a single definition applicable in all contexts." (*Johnson v. United States Steel Corp.* (2015) 240 Cal.App.4th 22, 31 [192 Cal.Rptr.2d 158].)

  "The risk-benefit test requires the plaintiff to first 'demonstrate[] that the product's design proximately caused his injury.' If the plaintiff makes this initial showing, the defendant must then 'establish, in light of the relevant factors, that, on balance, the benefits of the challenged design outweigh the risk of danger inherent in such design.' " (*Kim, supra, ~~v. Toyota Motor Corp.~~* 6 Cal.5th at p.~~21,~~ 30 ~~[237 Cal.Rptr.3d 205, 424 P.3d]~~, internal citation omitted.)

- "Appellants are therefore correct in asserting that it was not their burden to show that the risks involved in the loader's design—the lack of mechanical safety devices, or of a warning—outweighed the benefits of these aspects of its designs. The trial court's instruction to the jury, which quite likely would have been understood to place this burden on appellants, was therefore an error." (*Lunghi v. Clark Equipment Co., Inc.* (1984) 153 Cal.App.3d 485, 497–498 [200 Cal.Rptr. 387], internal citations omitted.)

- "[U]nder the risk/benefit test, the plaintiff may establish the product is defective by showing that its design proximately caused his injury and the defendant then fails to establish that on balance the benefits of the challenged design outweigh the risk of danger inherent in such design. In such case, the jury must evaluate the product's design by considering the gravity of the danger posed by the design, the likelihood such danger would occur, the feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the consumer resulting from an alternative design. 'In such cases, the jury must consider the manufacturer's evidence of competing design considerations … , and the issue of design defect cannot fairly be resolved by standardless reference to the "expectations" of an "ordinary consumer." '" (*Saller v. Crown Cork & Seal Co., Inc.* (2010) 187 Cal.App.4th 1220, 1233 [115 Cal.Rptr.3d 151], internal citations omitted.)

- "[T]he defendant's burden is one 'affecting the burden of proof, rather than simply the burden of producing evidence.' " (*Moreno v. Fey Manufacturing Corp.* (1983) 149 Cal.App.3d 23, 27 [196 Cal.Rptr. 487].)

- "The [consumer-expectation and risk-benefit] tests provide alternative means for a plaintiff to prove design defect and do not serve as defenses to one another. A product may be defective under the consumer expectation test even if the benefits of the design outweigh the risks. [Citation.] On the other hand, a product may be defective if it satisfies consumer expectations but contains an excessively preventable danger in that the risks of the design outweigh its benefits." (*Chavez, supra,* 207 Cal.App.4th at p. 1303.)

- "Under *Barker,* in short, the plaintiff bears an initial burden of making 'a prima facie showing that the injury was proximately caused by the product's design.' This showing requires evidence that the plaintiff was injured *while using the product in an intended or reasonably foreseeable manner* and that the plaintiff's ability to avoid injury was frustrated by the absence of a safety device, or by the nature of the product's design. If this prima facie burden is met, the burden of proof shifts to the defendant to prove, in light of the relevant factors, that the product is not defective. Importantly, the plaintiff's prima facie burden of producing evidence that injury occurred while the product was being used in an intended or reasonably foreseeable manner must be distinguished from the ultimate burden of proof that rests with the defendant to establish that its product was not defective because the plaintiff's injury resulted from a misuse of the product." (*Perez, supra,* 188 Cal.App.4th at p. 678, original italics, internal citations omitted.)

- " '[I]n evaluating the adequacy of a product's design pursuant to [the risk-benefit] standard, a jury may consider, among other relevant factors, the gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design.'" (*Gonzalez v. Autoliv ASP, Inc.* (2007) 154 Cal.App.4th 780, 786–787 [64 Cal.Rptr.3d 908], internal citations omitted.)

- "[E]xpert evidence about compliance with industry standards can be considered on the issue of defective design, in light of all other relevant circumstances, even if such compliance is

not a complete defense. An action on a design defect theory can be prosecuted and defended through expert testimony that is addressed to the elements of such a claim, including risk-benefit considerations." (*Howard v. Omni Hotels Management Corp.* (2012) 203 Cal.App.4th 403, 426 [136 Cal.Rptr.3d 739].)

- "We stress that while industry custom and practice evidence is not categorically inadmissible, neither is it categorically admissible; its admissibility will depend on application of the ordinary rules of evidence in the circumstances of the case. … First, the party seeking admission of such evidence must establish its relevance to at least one of the elements of the risk-benefit test, either causation or the *Barker* factors. The evidence is relevant to the *Barker* inquiry if it sheds light on whether, objectively speaking, the product was designed as safely as it should have been, given 'the complexity of, and trade-offs implicit in, the design process.' Whether the evidence serves this purpose depends on whether, under the circumstances of the case, it is reasonable to conclude that other manufacturers' choices do, as the Court of Appeal put it, 'reflect legitimate, independent research and practical experience regarding the appropriate balance of product safety, cost, and functionality.' If the proponent of the evidence establishes a sufficient basis for drawing such a conclusion, the evidence is admissible, even though one side or the other may argue it is entitled to little weight because industry participants have weighed the relevant considerations incorrectly. The evidence may not, however, be introduced simply for the purpose of showing the manufacturer was acting no worse than its competitors." (*Kim, supra,* 6 Cal.5th at p. 37, internal citations omitted.)

- "[I]f the party opposing admission of this evidence makes a timely request, the trial court must issue a jury instruction that explains how this evidence may and may not be considered under the risk-benefit test." (*Kim, supra,* 6 Cal.5th at p. 38.)

- "Plaintiffs contend aesthetics is not a proper consideration in the risk-benefit analysis, and the trial court's ruling to the contrary was an '[e]rror in law.' We disagree. In our view, much of the perceived benefit of a car lies in its appearance. A car is not a strictly utilitarian product. We believe that a jury properly may consider aesthetics in balancing the benefits of a challenged design against the risk of danger inherent in the design. Although consideration of the disadvantages of an alternative design (CACI No. 1204, factor (e)) would encompass any impact on aesthetics, we conclude that there was no error in the trial court's approval of the modification listing aesthetics as a relevant factor." (*Bell, supra,* 181 Cal.App.4th at p. 1131, internal citations omitted.)

- "Taken together, section 2, subdivision (b), and section 5 of the Restatement indicate that a component part manufacturer may be held liable for a defect in the component. When viewed in its entirety, the Restatement does not support [defendant]'s argument that '[o]nly if the component part analysis establishes sufficient control over the design of the alleged defect should the component manufacturer be held to the standard of the risk-benefit test.' Instead, the test considering foreseeable risks of harm and alternative designs is applied to the component part manufacturer when the alleged defect is in the component." (*Gonzalez, supra,* 154 Cal.App.4th at pp. 789–790.)

- "Where liability depends on the proof of a design defect, no practical difference exists between negligence and strict liability; the claims merge." (*Lambert v. General Motors* (1998) 67 Cal.App.4th 1179, 1185 [76 Cal.Rptr.2d 657].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1615–1631

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-D, *Strict Liability For Defective Products*, ¶¶ 2:1223–2:1224 (The Rutter Group)

California Products Liability Actions, Ch. 7, *Proof*, § 7.02 (Matthew Bender)

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

19 California Points and Authorities, Ch. 190, *Products Liability*, §§ 190.110, 190.118–190.122 (Matthew Bender)

2020. Public Nuisance—Essential Factual Elements

[*Name of plaintiff***] claims that [he/she] suffered harm because [***name of defendant***] created a nuisance. To establish this claim, [***name of plaintiff***] must prove all of the following:**

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

   [was harmful to health;] [or]

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

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

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

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

2. **That the condition affected a substantial number of people at the same time;**

3. **That an ordinary person would be reasonably annoyed or disturbed by the condition;**

4. **That the seriousness of the harm outweighs the social utility of [***name of defendant***]'s conduct;**

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

6. **That [***name of plaintiff***] suffered harm that was different from the type of harm suffered by the general public; and**

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

New September 2003; Revised December 2007, June 2016, November 2017, May 2019

Directions for Use

Give this instruction for a claim for public nuisance. For an instruction on private nuisance, give CACI No. 2021, *Private Nuisance—Essential Factual Elements.* While a private nuisance is designed to vindicate individual land ownership interests, a public nuisance is not dependent on an interference with

any particular rights of land: The public nuisance doctrine aims at the protection and redress of community interests. (*Citizens for Odor Nuisance Abatement v. City of San Diego* (2017) 8 Cal.App.5th 350, 358 [213 Cal.Rptr.3d 538].)

There is some uncertainty as to whether lack of consent is an element (element 5) or consent is a defense. Cases clearly list lack of consent with the elements. (See *Department of Fish & Game v. Superior Court* (2011) 197 Cal.App.4th 1323, 1352 [129 Cal.Rptr.3d 719]; *Birke v. Oakwood Worldwide* (2009) 169 Cal.App.4th 1540, 1548 [87 Cal.Rptr.3d 602].) However, other cases have referred to consent as a defense, albeit in the context of a nuisance action involving parties with interests in the same property. (See *Newhall Land & Farming Co. v. Superior Court* (1993) 19 Cal.App.4th 334, 341–345, 23 Cal.Rptr. 2d 377; *Mangini v. Aerojet-General Corp.* (1991) 230 Cal.App.3d 1125, 1138–1140 [281 Cal.Rptr. 827].)

Sources and Authority

- "Nuisance" Defined. Civil Code section 3479.
- Public Nuisance. Civil Code section 3480.
- Action by Private Person for Public Nuisance. Civil Code section 3493.
- Act Done Under Express Authority of Statute. Civil Code section 3482.
- Property Used for Dogfighting and Cockfighting. Civil Code section 3482.8.
- "[T]he exculpatory effect of Civil Code section 3482 has been circumscribed by decisions of this court. ...' "A statutory sanction cannot be pleaded in justification of acts which by the general rules of law constitute a nuisance, unless the acts complained of are authorized by the express terms of the statute under which the justification is made, or by the plainest and most necessary implication from the powers expressly conferred, so that it can be fairly stated that the Legislature contemplated the doing of the very act which occasions the injury." ' " (*Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, 291 [142 Cal.Rptr. 429, 572 P.2d 43], internal citation omitted.)
- "Public nuisance and private nuisance 'have almost nothing in common except the word "nuisance" itself.' Whereas private nuisance is designed to vindicate individual land ownership interests, the public nuisance doctrine has historically distinct origins and aims at 'the protection and redress of *community interests*.' With its roots tracing to the beginning of the 16th century as a criminal offense against the crown, public nuisances at common law are 'offenses against, or interferences with, the exercise of *rights common to the public,*' such as public health, safety, peace, comfort, or convenience." (*Citizens for Odor Nuisance Abatement, supra,* 8 Cal.App.5th at p. 358, original italics, internal citation omitted.)
- "The elements of a public nuisance, under the circumstances of this case, are as follows: (1) the 2007 poisoning obstructed the free use of property, so as to interfere with the comfortable enjoyment of life or property; (2) the 2007 poisoning affected a substantial number of people; (3) an ordinary person would be unreasonably annoyed or disturbed by the 2007 poisoning; (4) the seriousness of the harm occasioned by the 2007 poisoning outweighed its social utility; (5) plaintiffs did not consent to the

2007 poisoning; (6) plaintiffs suffered harm as a result of the 2007 poisoning that was different from the type of harm suffered by the general public; and (7) the 2007 poisoning was a substantial factor in causing plaintiffs' harm." (*Department of Fish & Game, supra,* 197 Cal.App.4th at p. 1352 [citing this instruction].)

- "Where the nuisance alleged is not also a private nuisance as to a private individual he does not have a cause of action on account of a public nuisance unless he alleges facts showing special injury to himself in person or property of a character different in kind from that suffered by the general public." (*Venuto, supra,* 22 Cal.App.3d at p. 124, internal citations omitted; but see *Birke, supra, ~~v. Oakwood Worldwide (2009)~~* 169 Cal.App.4th at p.~~1540,~~ 1550 ~~[87 Cal.Rptr.3d 602]~~ ["to the extent *Venuto* … can be read as precluding an action to abate a public nuisance by a private individual who has suffered personal injuries as a result of the challenged condition, we believe it is an incorrect statement of the law"].)

- "Unlike the private nuisance-tied to and designed to vindicate individual ownership interests in land-the 'common' or public nuisance emerged from distinctly different historical origins. The public nuisance doctrine is aimed at the protection and redress of community interests and, at least in theory, embodies a kind of collective ideal of civil life which the courts have vindicated by equitable remedies since the beginning of the 16th century." (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1103 [60 Cal.Rptr.2d 277, 929 P.2d 596].)

- "[W]hen the nuisance is a private as well as a public one, there is no requirement the plaintiff suffer damage different in kind from that suffered by the general public. That is, the plaintiff ' "does not lose his rights as a landowner merely because others suffer damage of the same kind, or even of the same degree … ." ' " (*Birke, supra,* 169 Cal.App.4th at p. 1551, internal citations omitted.)

- "A public nuisance cause of action is established by proof that a defendant knowingly created or assisted in the creation of a substantial and unreasonable interference with a public right." (*People v. ConAgra Grocery Products Co.* (2017) 17 Cal.App.5th 51, 79~~112~~ [227 Cal.Rptr.3d 499].)

- "Of course, not every interference with collective social interests constitutes a public nuisance. To qualify ... the interference must be both substantial and unreasonable." (*People ex rel. Gallo, supra*, 14 Cal.4th at p. 1105.)

- "It is substantial if it causes significant harm and unreasonable if its social utility is outweighed by the gravity of the harm inflicted." *People v. ConAgra Grocery Products Co., supra,* ~~(2017)~~ 17 Cal.App.5th at p.~~51,~~ 112 ~~[227 Cal.Rptr.3d 499]~~.)

- "The fact that the defendants' alleged misconduct consists of omission rather than affirmative actions does not preclude nuisance liability." (*Birke, supra,* 169 Cal.App.4th at p. 1552 [citing this instruction], internal citation omitted.)

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

- "Nuisance liability is not necessarily based on negligence, thus, 'one may be liable for a nuisance

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

- "An essential element of a cause of action for nuisance is damage or injury." (*Helix Land Co., Inc. v. City of San Diego* (1978) 82 Cal.App.3d 932, 950 [147 Cal.Rptr. 683].)

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

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

- "By analogy to the rules governing tort liability, courts apply the same elements to determine liability for a public nuisance." (*People ex rel. Gallo, supra,* 14 Cal.4th at p. 1105, fn. 3, internal citation omitted.)

- "The elements 'of a cause of action for public nuisance include the existence of a duty and causation.'' " (*Melton v. Boustred* (2010) 183 Cal.App.4th 521, 542 [107 Cal.Rptr.3d 481], internal citations omitted.)

- "[L]iability for nuisance does not hinge on whether the defendant owns, possesses or controls the property, nor on whether he is in a position to abate the nuisance; the critical question is whether the defendant *created or assisted in the creation of the nuisance*." (*People v. ConAgra Grocery Products Co., supra,* 17 Cal.App.5th at p. 109, original italics.)

- "Causation is an essential element of a public nuisance claim. A plaintiff must establish a 'connecting element' or a 'causative link' between the defendant's conduct and the threatened harm." (*Citizens for Odor Nuisance Abatement, supra,* 8 Cal.App.5th at p. 359 [citing this instruction], internal citation omitted.)

- "Causation may consist of either '(a) an act; or [¶] (b) a failure to act under circumstances in which the actor is under a duty to take positive action to prevent or abate the interference with the public interest or the invasion of the public interest.' A plaintiff must show the defendant's conduct was a 'substantial factor' in causing the alleged harm." (*Citizens for Odor Nuisance Abatement, supra,* 8 Cal.App.5th at p. 359 [citing this instruction], internal citation omitted.)

- " 'Where negligence and nuisance causes of action rely on the same facts about lack of due care, the nuisance claim is a negligence claim.' The nuisance claim 'stands or falls with the determination of the negligence cause of action' in such cases." (*Melton, supra,* 183 Cal.App.4th at p. 542, internal citations omitted.)

- "[W]here, as here, an owner of property seeks damages for creation of a nuisance by a prior lessee, the lessee has a defense that his use of the property was lawful and was authorized by the lease; i.e.,

his use of the property was undertaken with the consent of the owner." (*Mangini, supra,* 230 Cal.App.3d at p. 1138, original italics.)

- "Nor is a defense of consent vitiated simply because plaintiffs seek damages based on special injury from public nuisance. 'Where special injury to a private person or persons entitles such person or persons to sue on account of a public nuisance, both a public and private nuisance, in a sense, are in existence.' " (*Mangini, supra. ~~v. Aerojet-General Corp.~~* ~~(1991)~~ 230 Cal.App.3d at p.~~1125,~~ 1139 ~~[281 Cal.Rptr. 827]~~.)

"[W]here the law expressly declares something to be a nuisance, then no inquiry beyond its existence need be made and in this sense its mere existence is said to be a nuisance per se. [Citation.] But, to rephrase the rule, to be considered a nuisance per se the object, substance, activity or circumstance at issue must be expressly declared to be a nuisance by its very existence by some applicable law." (*People v. ConAgra Grocery Products Co., supra,* 17 Cal.App.5th at p. 114.)

Secondary Sources

13 Witkin, Summary of California Law (11th ed. 2017) Equity, § 152

Greenwald & Asimow, California Practice Guide: Real Property Transactions, Ch. 5-D, *Common Law Environmental Hazards Liability*, ¶¶ 5:140-5:179 (The Rutter Group)

California Real Property Remedies and Damages (Cont.Ed.Bar 2d ed.) Ch. 11, Remedies for Nuisance and Trespass, § 11.7

2 Levy et al., California Torts, Ch. 17, *Nuisance and Trespass*, §§ 17.01–17.04, 17.06 (Matthew Bender)

34 California Forms of Pleading and Practice, Ch. 391, *Nuisance*, § 391.12 (Matthew Bender)

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

1 California Civil Practice: Torts §§ 17:1–17:3 (Thomson Reuters)

2021. Private Nuisance—Essential Factual Elements

[*Name of plaintiff***] claims that [he/she] suffered harm because [***name of defendant***] created a nuisance.~~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, May 2019

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.

There is some uncertainty as to whether lack of consent is an element (element 6) or consent is a defense. Cases clearly list lack of consent with the elements. (See *Department of Fish & Game v. Superior Court* (2011) 197 Cal.App.4th 1323, 1352 [129 Cal.Rptr.3d 719]; *Birke v. Oakwood Worldwide* (2009) 169 Cal.App.4th 1540, 1548 [87 Cal.Rptr.3d 602].) However, other cases have referred to consent as a defense, albeit in the context of a nuisance action involving parties with interests in the same property. (See *Newhall Land & Farming Co. v. Superior Court* (1993) 19 Cal.App.4th 334, 341–345, 23 Cal. Rptr. 2d 377; *Mangini v. Aerojet-General Corp.* (1991) 230 Cal.App.3d 1125, 1138–1140 [281 Cal.Rptr. 827].)

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.)
- "The elements of a public nuisance, under the circumstances of this case, are as follows: (1) the 2007 poisoning obstructed the free use of property, so as to interfere with the comfortable enjoyment of life or property; (2) the 2007 poisoning affected a substantial number of people; (3) an ordinary person would be unreasonably annoyed or disturbed by the 2007 poisoning; (4) the seriousness of the harm occasioned by the 2007 poisoning outweighed its social utility; (5) plaintiffs did not consent to the 2007 poisoning; (6) plaintiffs suffered harm as a result of the 2007 poisoning that was different from the type of harm suffered by the general public; and (7) the 2007 poisoning was a substantial factor in causing plaintiffs' harm.[¶] The elements of a private nuisance are the same except there is no requirement that plaintiffs prove a substantial number of people were harmed and plaintiffs suffered harm that was different from that suffered by the general public, but there are additional elements that plaintiffs owned, leased, occupied or controlled real property, that the 2007 poisoning interfered with plaintiffs' use of their property, and that plaintiffs were harmed thereby" (*Department of Fish & Game, supra,* 197 Cal.App.4th at p. 1352 [citing this instruction].)
- "In their first cause of action, plaintiffs allege the 2007 poisoning adversely affected tourism for a substantial period of time, caused plaintiffs to suffer serious losses, obstructed the free use of plaintiffs' property, and interfered with plaintiffs' comfortable enjoyment of their property or their businesses. Strictly speaking, this does not state a claim for either public or private nuisance. There is no allegation that plaintiffs did not consent to the 2007 poisoning, that an ordinary person would have been annoyed or disturbed by the 2007 poisoning, or that

the seriousness of the harm caused by the 2007 poisoning outweighed its public benefit." (*Department of Fish & Game, supra,* 197 Cal.App.4th at p. 1352.)

- "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, supra, ~~v. Oakwood Worldwide~~ (2009)* 169 Cal.App.4th at p.~~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.)

- "[W]here, as here, an owner of property seeks damages for creation of a nuisance by a prior lessee, the lessee has a defense that his use of the property was lawful and was authorized by the lease; i.e., his use of the property was undertaken with the *consent* of the owner." (*Mangini*, *supra*, ~~*v. Aerojet-General Corp.* (1991)~~ 230 Cal.App.3d at p.~~1125,~~ 1138 ~~[281 Cal.Rptr. 827]~~, original italics.)

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)

2506. Limitation on Remedies—After-Acquired Evidence

[*Name of defendant***] claims that after [he/she/it] [discharged/refused to hire] [***name of plaintiff***], [he/she/it] discovered that [***name of plaintiff***] [***describe misconduct, e.g., had provided a false Social Security number***]. [***Name of defendant***] claims that [he/she/it] would have [discharged/refused to hire] [***name of plaintiff***] anyway if [he/she/it] had known that [***name of plaintiff***] [***describe misconduct***]. You must decide whether [***name of defendant***] has proved all of the following:**

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

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

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

[If you find that [*name of defendant***] has proved that [***name of plaintiff***] [***describe misconduct***] and that had [***name of defendant***] known of the misconduct earlier, [he/she/it] would have [discharged/refused to hire] [***name of plaintiff***] as required by the elements above, then [***name of plaintiff***] may recover damages only for any time before the date on which [***name of defendant***] discovered the misconduct. [[***Name of defendant***] must prove the date of discovery if it is contested.]]**

New September 2003; Revised June 2016, December 2016, May 2019

Directions for Use

The doctrine of after-acquired evidence refers to an employer's discovery, after an allegedly wrongful termination of employment or refusal to hire, of information that would have justified a lawful termination or refusal to hire. (*Salas v. Sierra Chemical Co.* (2014) 59 Cal.4th 407, 428 [173 Cal.Rptr.3d 689, 327 P.3d 797].)

There is some uncertainty as to whether or not it is an equitable doctrine. (Compare *Thompson v. Tracor Flight Systems, Inc.* (2001) 86 Cal.App.4th 1156, 1173 [104 Cal.Rptr.2d 95] [doctrine is the basis for an *equitable defense* related to the traditional defense of "unclean hands," italics added] with *Salas, supra,* 59 Cal.4th at p. 428 [omitting "equitable"].) If it is an equitable doctrine, then the fact-finding in the elements of the instruction would be only advisory to the court, or the elements could be found by the court itself as the trier of fact. (See *Thompson, supra,* 86 Cal.App.4th at p. 1173; see also *Hoopes v. Dolan* (2008) 168 Cal.App.4th 146, 156 [85 Cal.Rptr.3d 337] [jury's factual findings are purely advisory because, on equitable causes of action, the judge is the proper fact finder].)

After-acquired evidence is not a complete defense to liability, but may foreclose otherwise available remedies. (*Salas, supra,* 59 Cal.4th at pp. 430−431.) Give the optional last paragraph if the court decides to allow the jury to award damages or to make a finding on damages. Add the last sentence of the

paragraph if the date on which the defendant discovered the after-acquired evidence is contested.

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

Sources and Authority

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

- "The after-acquired-evidence doctrine serves as a complete or partial defense to an employee's claim of wrongful discharge ... To invoke this doctrine, '... the employer must establish "that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it" ... [T]he employer ... must show that such a firing would have taken place as a matter of "settled" company policy.' " (*Murillo v. Rite Stuff Foods, Inc.* (1998) 65 Cal.App.4th 833, 842, 845-846 [77 Cal.Rptr.2d 12], internal citations omitted.)

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

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

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

- "We decline to adopt a blanket rule that material falsification of an employment application is a

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

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

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

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

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

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

- The remedial relief generally should compensate the employee for loss of employment from the date of wrongful discharge or refusal to hire to the date on which the employer acquired information of the employee's wrongdoing or ineligibility for employment. Fashioning remedies based on the relative equities of the parties prevents the employer from violating California's FEHA with impunity while also preventing an employee or job applicant from obtaining lost wages compensation for a period during which the employee or applicant would not in any event have been employed by the employer.

In an appropriate case, it would also prevent an employee from recovering any lost wages when the employee's wrongdoing is particularly egregious." (*Salas, supra,* 59 Cal.4th at p. 431, footnote omitted.)

Secondary Sources

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

Chin et al., Cal. Practice Guide: Employment Litigation Ch. 7-A, *Employment Discrimination—Title VII and the California Fair Employment and Housing Act*, ¶¶ 7:930–7:932 (The Rutter Group)
Chin et al., Cal. Practice Guide: Employment Litigation Ch. 16-H, *Other Defenses--After-Acquired Evidence of Employee Misconduct*, ¶¶ 16:615–16:616, 16:625, 16:635–16:637, 16:647 (The Rutter Group)

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

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

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

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

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

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

[*Name of plaintiff***] filed a complaint with the DFEH on [***date***]. [***Name of plaintiff***] may recover for acts of alleged [***specify the unlawful practice, e.g., harassment***] that occurred before [***insert date one year before the DFEH complaint was filed***], only if [he/she] proves all of the following: ~~[***Name of defendant***] claims that its alleged unlawful practice that triggered the requirement to file a complaint occurred no later than [***date more than one year before DFEH complaint was filed***]. [***Name of plaintiff***] claims that [***name of defendant***]'s unlawful practice was a continuing violation so that the requirement to file a complaint was triggered no earlier than [***date less than one year before DFEH complaint was filed***].~~**

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

1. **That [***name of defendant***]'s [***e.g., harassment***] that occurred before [***insert date one year before the DFEH complaint was filed***]~~Conduct occurring within a year of the date on which [***name of plaintiff***] filed [his/her] complaint with the DFEH~~ was similar or related to the conduct that occurred on or after that date~~earlier~~;**

2. **That the conduct was reasonably frequent; and**

3. **That the conduct had not yet become permanent before that date.**

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

New June 2010; Revised December 2011, June 2015, May 2019

Directions for Use

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

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

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

The plaintiff has the burden to plead and prove timely exhaustion of administrative remedies, such as filing a sufficient complaint with the DFEH. (*Kim v. Konad USA Distribution, Inc.* (2014) 226 Cal.App.4th 1336, 1345 [172 Cal.Rptr.3d 686].) This burden of proof extends to any excuse or justification for the failure to timely file, such as the continuing violation exception. (*Jumaane v. City of Los Angeles* (2015) 241 Cal.App.4th 1390, 1402 [194 Cal.Rptr.3d 689].)

Sources and Authority

- Administrative Complaint for FEHA Violation. Government Code section 12960.

- "At a jury trial, the facts are presented and the jury must decide whether there was a continuing course of unlawful conduct based on the law as stated in CACI No. 2508." (*Jumaane, supra,* 241 Cal.App.4th at p. 1401.)

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

- "[I]t is 'plaintiff's burden to plead and prove timely exhaustion of administrative remedies, such as filing a sufficient complaint with [DFEH] and obtaining a right-to-sue letter.' " (*Kim, supra,* 226 Cal.App.4th at p. 1345.)

- "[W]hen defendant has asserted the statute of limitation defense, plaintiff has the burden of proof to show his or her claims are timely under the continuing violation doctrine." (*Jumaane, supra,* 241 Cal.App.4th at p. 1402.)

- "Under the continuing violation doctrine, a plaintiff may recover for unlawful acts occurring outside the limitations period if they continued into that period. The continuing violation doctrine requires proof that (1) the defendant's actions inside and outside the limitations period are sufficiently similar in kind; (2) those actions occurred with sufficient frequency; and (3) those actions have not acquired a

degree of permanence." (*Wassmann v. South Orange County Community College Dist.* (2018) 24 Cal.App.5th 825, 850-851 [234 Cal.Rptr.3d 712] , internal citations omitted.)

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

- "[T]he *Richards* court interpreted section 12960 to mean that when a continuing pattern of wrongful conduct occurs partly in the statutory period and partly outside the statutory period, the limitations period begins to accrue once an employee is on notice of the violation of his or her rights and on notice that 'litigation, not informal conciliation, is the only alternative for the vindication of his or her rights.' " (*Acuna v. San Diego Gas & Electric Co.* (2013) 217 Cal.App.4th 1402, 1412 [159 Cal.Rptr.3d 749].)

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

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

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

Secondary Sources

7 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, § 1065

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

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

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

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

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

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

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.**

In order to be sufficiently intolerable, adverse working conditions must be unusually aggravated or amount to a continuous pattern. In general, single, trivial, or isolated acts of misconduct are insufficient to support a constructive discharge claim. But in some circumstances, a single intolerable incident may constitute a constructive discharge.

New June 2012; Revised May 2019

Directions for Use

Give this instruction with CACI No. 2401, *Breach of Employment Contract—Unspecified Term—Actual or Constructive Discharge—Essential Factual Elements,* 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~~ 11th ed. ~~2005~~2017) Agency and Employment, § ~~225~~238

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)

2521A. Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant (Gov. Code, § 12940(j))

The advisory committee is currently considering revisions to this instruction in light of newly enacted Government Code section 12923. (See SB 1300, Stats. 2018, ch. 955.)

[*Name of plaintiff***] claims that [he/she] was subjected to harassment based on [his/her] [***describe protected status, e.g., race, gender, or age***] at [***name of defendant***], causing a hostile or abusive work environment. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was [an employee of/a person providing services under a contract with/an unpaid intern with/a volunteer with] [***name of defendant***];**

2. **That [***name of plaintiff***] was subjected to unwanted harassing conduct because [he/she] was [***protected status, e.g., a woman***];**

3. **That the harassing conduct was severe or pervasive;**

4. **That a reasonable [***e.g., woman***] in [***name of plaintiff***]'s circumstances would have considered the work environment to be hostile or abusive;**

5. **That [***name of plaintiff***] considered the work environment to be hostile or abusive;**

6. **[***Select applicable basis of defendant's liability:***]**

   [That a supervisor engaged in the conduct;]

   [That [*name of defendant***] [or [his/her/its] supervisors or agents] knew or should have known of the conduct and failed to take immediate and appropriate corrective action;]**

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

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

Derived from former CACI No. 2521 December 2007; Revised June 2013, December 2015, May 2018

Directions for Use

This instruction is for use in a hostile work environment case when the defendant is an employer or other entity covered by the FEHA. For an individual defendant, such as the alleged harasser or plaintiff's coworker, see CACI No. 2522A, *Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant.* For a case in which the plaintiff is not the target of the harassment, see CACI No. 2521B, *Hostile Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Employer or Entity Defendant.* For an instruction for

use if the hostile environment is due to sexual favoritism, see CACI No. 2521C, *Hostile Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Employer or Entity Defendant.* Also read CACI No. 2523, *"Harassing Conduct" Explained*, and CACI No. 2524, *"Severe or Pervasive" Explained*.

Modify element 2 if plaintiff was not actually a member of the protected class, but alleges harassment because he or she was perceived to be a member, or associated with someone who was or was perceived to be a member, of the protected class. (See Gov. Code, § 12926(o).)

In element 6, select the applicable basis of employer liability: (a) strict liability for a supervisor's harassing conduct, or (b) the employer's ratification of the conduct. For a definition of "supervisor," see CACI No. 2525, *Harassment—"Supervisor" Defined*. If there are both employer and individual supervisor defendants (see CACI No. 2522A, *Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant*) and both are found liable, they are both jointly and severally liable for any damages. Comparative fault and Proposition 51 do not apply to the employer's strict liability for supervisor harassment. (*State Dep't of Health Servs. v. Superior Court* (2003) 31 Cal.4th 1026, 1041–1042 [6 Cal.Rptr.3d 441, 79 P.3d 556]; see *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 1000 [16 Cal.Rptr.2d 787], disapproved on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664 [25 Cal.Rptr.2d 109, 863 P.2d 179]; see also *Rashtian v. BRAC-BH, Inc.* (1992) 9 Cal.App.4th 1847, 1851 [12 Cal.Rptr.2d 411] [Proposition 51 cannot be applied to those who are without fault and only have vicarious liability by virtue of some statutory fiat].)

Sources and Authority

- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- "Employer" Defined for Harassment. Government Code section 12940(j)(4)(A).
- Person Providing Services Under Contract. Government Code section 12940(j)(5).
- Harassment Because of Sex. Government Code section 12940(j)(4)(C).
- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).
- Perception and Association. Government Code section 12926(o).
- "The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)

- "[A]n employer is strictly liable for all acts of sexual harassment by a supervisor." (*State Dep't of Health Servs., supra,* 31 Cal.4th at p. 1042.)

- "The applicable language of the FEHA does not suggest that an employer's liability for sexual harassment by a supervisor is constrained by principles of agency law. Had the Legislature so intended, it would have used language in the FEHA imposing the negligence standard of liability on acts of harassment by an employee 'other than an agent,' 'not acting as the employer's agent,' or 'not acting within the scope of an agency for the employer.' By providing instead in section 12940, subdivision (j)(1), that the negligence standard applies to acts of harassment 'by an employee other than an agent *or supervisor*' (italics added), the Legislature has indicated that all acts of harassment by a supervisor are to be exempted from the negligence standard, whether or not the supervisor was then acting as the employer's agent, and that agency principles come into play only when the harasser is not a supervisor. (*State Dept. of Health Services, supra,* 31 Cal.4th at p. 1041, original italics.)

- "When the harasser is a nonsupervisory employee, employer liability turns on a showing of negligence (that is, the employer knew or should have known of the harassment and failed to take appropriate corrective action)." (*Rehmani v. Superior Court* (2012) 204 Cal.App.4th 945, 952 [139 Cal.Rptr.3d 464].)

- "If an employee other than an agent or supervisor commits the harassment, and the employer takes immediate and appropriate corrective action when it becomes or reasonably should become aware of the conduct—for example, when the victim or someone else informs the employer—there simply is no 'unlawful employment practice' that the FEHA governs." (*Carrisales v. Dept. of Corrections* (1999) 21 Cal.4th 1132, 1136 [90 Cal.Rptr.2d 804, 988 P.2d 1083], called into doubt on other grounds by statute.)

- "[I]n order for the employer to avoid strict liability for the supervisor's actions under the FEHA, the harassment must result from a completely private relationship unconnected with the employment. Otherwise, the employer is strictly liable for the supervisor's actions regardless of whether the supervisor was acting as the employer's agent." (*Myers v. Trendwest Resorts, Inc.* (2007) 148 Cal.App.4th 1403, 1421 [56 Cal.Rptr.3d 501].)

- Employers may be liable for the conduct of certain agents. (See Gov. Code, §§ 12925(d), 12926(d), and 12940(j)(1) and *Reno v. Baird* (1998) 18 Cal.4th 640, 658 [76 Cal.Rptr.2d 499, 957 P.2d 1333] [California Supreme Court declined to express opinion whether "agent" language in the FEHA merely incorporates respondeat superior principles or has some other meaning].)

- "Here, [defendant] was jointly liable with its employees on a respondeat superior or vicarious liability theory on every cause of action in which it was named as a defendant." (*Bihun, supra,* 13 Cal.App.4th at p. 1000.)

- "The *McDonnell Douglas* burden-shifting framework does not apply to [plaintiff]'s harassment claim either. Since 'there is no possible justification for harassment in the workplace,' an employer cannot offer a legitimate nondiscriminatory reason for it." (*Cornell v. Berkeley Tennis Club* (2017) 18 Cal.App.5th 908, 927 [227 Cal.Rptr.3d 286].)

- "[A]lthough no California cases have directly addressed racial harassment in the workplace, the California courts have applied the federal threshold standard to claims of sexual harassment and held that FEHA is violated when the harassment was 'sufficiently severe or pervasive to alter the conditions of the victim's employment.' " (*Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 464–465 [79 Cal.Rptr.2d 33], internal citations and footnote omitted.)

- "When the workplace is permeated with discriminatory intimidation, ridicule and insult that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,' the law is violated." (*Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 Cal.App.4th 397, 409 [27 Cal.Rptr.2d 457], internal citation omitted.)

- "[N]ot every utterance of a racial slur in the workplace violates the FEHA or Title VII. As the United States Supreme Court has recognized in the context of sexual harassment: '[N]ot all workplace conduct that may be described as "harassment" affects a "term, condition, or privilege" of employment within the meaning of Title VII. For sexual harassment to be actionable, it must be sufficiently severe or pervasive "to alter the conditions of [the victim's] employment and create an abusive working environment." ' . . . 'Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.' . . . California courts have adopted the same standard in evaluating claims under the FEHA." (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 129–130 [87 Cal.Rptr.2d 132, 980 P.2d 846], internal citations omitted.)

- "To be actionable, 'a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.' That means a plaintiff who subjectively perceives the workplace as hostile or abusive will not prevail under the FEHA, if a reasonable person in the plaintiff's position, considering all the circumstances, would not share the same perception. Likewise, a plaintiff who does not perceive the workplace as hostile or abusive will not prevail, even if it objectively is so." (*Lyle v. Warner Brothers. Television Productions* (2006) 38 Cal.4th 264, 284 [42 Cal.Rptr.3d 2, 132 P.3d 211], internal citations omitted.)

- "In contending that the 'subjectively offensive' element was not proven, a defendant 'will assert that a plaintiff consented to the conduct through active participation in it, or was not injured because the plaintiff did not subjectively find it abusive.' [¶] [Evidence Code] Section 1106 limits the evidence the defendant may use to support this assertion. It provides that '[i]n any civil action alleging conduct which constitutes sexual harassment, sexual assault, or sexual battery, opinion evidence, reputation evidence, and evidence of specific instances of the plaintiff's sexual conduct, or any of that evidence, is not admissible by the defendant in order to prove consent by the plaintiff or the absence of injury to the plaintiff … .' This general rule is, however, subject to the exception that it 'does not apply to evidence of the plaintiff's sexual conduct with the alleged perpetrator.' The term 'sexual conduct' within the meaning of section 1106 has been broadly construed to include 'all active or passive behavior (whether statements or actions), that either directly or through reasonable inference establishes a plaintiff's willingness to engage in sexual activity,' including 'racy banter, sexual

horseplay, and statements concerning prior, proposed, or planned sexual exploits.' " (*Meeks v. AutoZone, Inc.* (2018) 24 Cal.App.5th 855, 874 [235 Cal.Rptr.3d 161], internal citations omitted.)

- "[A]llegations of a racially hostile work-place must be assessed from the perspective of a reasonable person belonging to the racial or ethnic group of the plaintiff." (*McGinest v. GTE Serv. Corp.* (9th Cir. 2004) 360 F.3d 1103, 1115.)

- "Under … FEHA, sexual harassment can occur between members of the same gender as long as the plaintiff can establish the harassment amounted to discrimination *because of sex*." (*Lewis v. City of Benicia* (2014) 224 Cal.App.4th 1519, 1525 [169 Cal.Rptr.3d 794], original italics.)

- "[T]here is no requirement that the *motive* behind the sexual harassment must be sexual in nature. '[H]arassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex.' Sexual harassment occurs when, as is alleged in this case, sex is used as a weapon to create a hostile work environment." (*Singleton v. United States Gypsum Co.* (2006) 140 Cal.App.4th 1547, 1564 [45 Cal.Rptr.3d 597], original italics, internal citation omitted.)

- "The plaintiff must show that the harassing conduct took place because of the plaintiff's sex, but need not show that the conduct was motivated by sexual desire. For example, a female plaintiff can prevail by showing that the harassment was because of the defendant's bias against women; she need not show that it was because of the defendant's sexual interest in women. In every case, however, the plaintiff must show a discriminatory intent or motivation based on gender." (*Pantoja v. Anton* (2011) 198 Cal.App.4th 87, 114 [129 Cal.Rptr.3d 384], internal citations omitted.)

- "[A] heterosexual male is subjected to harassment because of sex under the FEHA when attacks on his heterosexual identity are used as a tool of harassment in the workplace, irrespective of whether the attacks are motivated by sexual desire or interest." (*Taylor v. Nabors Drilling USA, LP* (2014) 222 Cal.App.4th 1228, 1239-1240 [166 Cal.Rptr.3d 676].)

- "A recent legislative amendment modifies section 12940, subdivision (j)(4)(C) (a provision of FEHA specifying types of conduct that constitute harassment because of sex) to read: 'For purposes of this subdivision, "harassment" because of sex includes sexual harassment, gender harassment, and harassment based on pregnancy, childbirth, or related medical conditions. *Sexually harassing conduct need not be motivated by sexual desire*.' " (*Lewis, supra,* 224 Cal.App.4th at p. 1527 fn. 8, original italics.)

- "California courts have held so-called 'me too' evidence, that is, evidence of gender bias against employees other than the plaintiff, may be admissible evidence in discrimination and harassment cases." (*Meeks, supra,* 24 Cal.App.5th at p. 871.)

Secondary Sources

4 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 363, 370

Chin et al., California Practice Guide: Employment Litigation, Ch. 10-A, *Sources Of Law Prohibiting Harassment,* ¶¶ 10:18–10:19, 10:22, 10:31 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 10-B, *Sexual Harassment,* ¶¶ 10:40, 10:110–10:260 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75, Sexual and Other Harassment, §§ 3.1, 3.14, 3.17, 3.21, 3.36, 3.45

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws,* §§ 41.80[1][a], 41.81[1][b] (Matthew Bender)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws,* § 43.01[10][g][i] (Matthew Bender)

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

California Civil Practice: Employment Litigation § 2:56 (Thomson Reuters)

2521B. Hostile Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Employer or Entity Defendant (Gov. Code, § 12940(j))

The advisory committee is currently considering revisions to this instruction in light of newly enacted Government Code section 12923. (See SB 1300, Stats. 2018, ch. 955.)

[*Name of plaintiff***] claims that [he/she] was subjected to a hostile or abusive work environment because coworkers at [***name of defendant***] were subjected to harassment based on [***describe protected status, e.g., race, gender, or age***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was [an employee of/a person providing services under a contract with/an unpaid intern with/a volunteer with] [***name of defendant***];**

2. **That [***name of plaintiff***], although not personally subjected to unwanted harassing conduct, personally witnessed harassing conduct that took place in [his/her] immediate work environment;**

3. **That the harassing conduct was severe or pervasive;**

4. **That a reasonable [***describe member of protected group, e.g., woman***] in [***name of plaintiff***]'s circumstances would have considered the work environment to be hostile or abusive;**

5. **That [***name of plaintiff***] considered the work environment to be hostile or abusive toward [***e.g., women***];**

6. **[***Select applicable basis of defendant's liability:***]**

   [That a supervisor engaged in the conduct;]

   [*or***]**

   [That [*name of defendant***] [or [his/her/its] supervisors or agents] knew or should have known of the conduct and failed to take immediate and appropriate corrective action;]**

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

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

Derived from former CACI No. 2521 December 2007; Revised June 2013, December 2015, May 2018

Directions for Use

This instruction is for use in a hostile work environment case if the plaintiff was not the target of the harassing conduct and the defendant is an employer or other entity covered by the FEHA. For an

individual defendant, such as the alleged harasser or plaintiff's coworker, see CACI No. 2522B, *Hostile Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual Defendant.* For a case in which the plaintiff is the target of the harassment, see CACI No. 2521A, *Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant.* For an instruction for use if the hostile environment is due to widespread sexual favoritism, see CACI No. 2521C, *Hostile Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Employer or Entity Defendant*. Also read CACI No. 2523, *"Harassing Conduct" Explained*, and CACI No. 2524, *"Severe or Pervasive" Explained*.

In element 6, select the applicable basis of employer liability: (a) strict liability for a supervisor's harassing conduct, or (b) the employer's ratification of the conduct. For a definition of "supervisor," see CACI No. 2525, *Harassment—"Supervisor" Defined.* If there are both employer and individual supervisor defendants (see CACI No. 2522B, *Hostile Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual Defendant*) and both are found liable, they are both jointly and severally liable for any damages. Comparative fault and Proposition 51 do not apply to the employer's strict liability for supervisor harassment. (*State Dep't of Health Servs. v. Superior Court* (2003) 31 Cal.4th 1026, 1041–1042 [6 Cal.Rptr.3d 441, 79 P.3d 556]; see *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 1000 [16 Cal.Rptr.2d 787], disapproved on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664 [25 Cal.Rptr.2d 109, 863 P.2d 179]; see also *Rashtian v. BRAC-BH, Inc.* (1992) 9 Cal.App.4th 1847, 1851 [12 Cal.Rptr.2d 411] [Proposition 51 cannot be applied to those who are without fault and only have vicarious liability by virtue of some statutory fiat].)

See also the Sources and Authority to CACI No. 2521A, *Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant.*

Sources and Authority

- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- "Employer" Defined for Harassment. Government Code section 12940(j)(4)(A).
- Person Providing Services Under Contract. Government Code section 12940(j)(5).
- Harassment Because of Sex. Government Code section 12940(j)(4)(C),
- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).
- Perception and Association. Government Code section 12926(o).
- "The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment;

and (5) respondeat superior." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)

- "The plaintiff's work environment is affected not only by conduct directed at herself but also by the treatment of others. A woman's perception that her work environment is hostile to women will obviously be reinforced if she witnesses the harassment of other female workers." (*Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 519 [76 Cal.Rptr.2d 547], internal citations omitted.)

- "Harassment against others in the workplace is only relevant to the plaintiff's case if she has personal knowledge of it. Unless plaintiff witnesses the conduct against others, or is otherwise aware of it, that conduct cannot alter the conditions of her employment and create an abusive working environment. Stated another way, a reasonable person in plaintiff's position would not find the environment hostile or abusive unless that person had knowledge of the objectionable conduct toward others." (*Beyda, supra,* 65 Cal.App.4th at p. 520.)

- "To state that an employee must be the direct victim of the sexually harassing conduct is somewhat misleading as an employee who is subjected to a hostile work environment is a victim of sexual harassment even though no offensive remarks or touchings are directed to or perpetrated upon that employee. Generally, however, sexual conduct that involves or is aimed at persons other than the plaintiff is considered less offensive and severe than conduct that is directed at the plaintiff. A hostile work environment sexual harassment claim by a plaintiff who was not personally subjected to offensive remarks and touchings requires 'an even higher showing' than a claim by one who had been sexually harassed without suffering tangible job detriment: such a plaintiff must 'establish that the sexually harassing conduct permeated [her] direct work environment**.**' [¶] To meet this burden, the plaintiff generally must show that the harassment directed at others was in her immediate work environment, and that she personally witnessed it. The reason for this is obvious: if the plaintiff does not witness the incidents involving others, 'those incidents cannot affect ... her perception of the hostility of the work environment**.**' " (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 284-285 [42 Cal.Rptr.3d 2, 132 P.3d 211], internal citations omitted.)

- "[U]nder the FEHA, an employer is strictly liable for *all* acts of sexual harassment by a supervisor. (*State Dep't of Health Servs., supra,* 31 Cal.4th at p. 1041, original italics.)

- "The applicable language of the FEHA does not suggest that an employer's liability for sexual harassment by a supervisor is constrained by principles of agency law. Had the Legislature so intended, it would have used language in the FEHA imposing the negligence standard of liability on acts of harassment by an employee 'other than an agent,' 'not acting as the employer's agent,' or 'not acting within the scope of an agency for the employer.' By providing instead in section 12940, subdivision (j)(1), that the negligence standard applies to acts of harassment 'by an employee other than an agent *or supervisor*' (italics added), the Legislature has indicated that all acts of harassment by a supervisor are to be exempted from the negligence standard, whether or not the supervisor was then acting as the employer's agent, and that agency principles come into play only when the harasser is not a supervisor. (*State Dept. of Health Services, supra,* 31 Cal.4th at p. 1041, original italics.)

- "[I]n order for the employer to avoid strict liability for the supervisor's actions under the FEHA, the harassment must result from a completely private relationship unconnected with the employment.

Otherwise, the employer is strictly liable for the supervisor's actions regardless of whether the supervisor was acting as the employer's agent." (*Myers v. Trendwest Resorts, Inc.* (2007) 148 Cal.App.4th 1403, 1421 [56 Cal.Rptr.3d 501].)

- "In order to be actionable, it must be shown that respondents knew, or should have known, of the alleged harassment and failed to take appropriate action." (*McCoy v. Pacific Maritime Assn.* (2013) 216 Cal.App.4th 283, 294 [156 Cal.Rptr.3d 851].)

- "If an employee other than an agent or supervisor commits the harassment, and the employer takes immediate and appropriate corrective action when it becomes or reasonably should become aware of the conduct—for example, when the victim or someone else informs the employer—there simply is no 'unlawful employment practice' that the FEHA governs." (*Carrisales v. Dept. of Corrections* (1999) 21 Cal.4th 1132, 1136 [90 Cal.Rptr.2d 804, 988 P.2d 1083], called into doubt on other grounds by statute.)

Secondary Sources

4 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 363, 370

Chin et al., Cal. Practice Guide: Employment Litigation, Ch. 10-B, *Sexual Harassment,* ¶¶ 10:40, 10:110–10:260 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75, Sexual and Other Harassment, §§ 3.1, 3.14, 3.17, 3.21, 3.36, 3.45

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws,* §§ 41.80[1][a], 41.81[1][b] (Matthew Bender)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws,* § 43.01[10][g][i] (Matthew Bender)

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

California Civil Practice: Employment Litigation § 2:56 (Thomson Reuters)

2521C. Hostile Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Employer or Entity Defendant (Gov. Code, § 12940(j))

The advisory committee is currently considering revisions to this instruction in light of newly enacted Government Code section 12923. (See SB 1300, Stats. 2018, ch. 955.)

[*Name of plaintiff***] claims that widespread sexual favoritism at [***name of defendant***] created a hostile or abusive work environment. "Sexual favoritism" means that another employee has received preferential treatment with regard to promotion, work hours, assignments, or other significant employment benefits or opportunities because of a sexual relationship with an individual representative of the employer who was in a position to grant those preferences. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was [an employee of/a person providing services under a contract with/an unpaid intern with/a volunteer with] [***name of defendant***];**

2. **That there was sexual favoritism in the work environment;**

3. **That the sexual favoritism was widespread and also severe or pervasive;**

4. **That a reasonable [***describe member of protected group, e.g., woman***] in [***name of plaintiff***]'s circumstances would have considered the work environment to be hostile or abusive;**

5. **That [***name of plaintiff***] considered the work environment to be hostile or abusive because of the widespread sexual favoritism;**

6. **[***Select applicable basis of defendant's liability:***]**

   [That a supervisor [engaged in the conduct/created the widespread sexual favoritism];]

   [That [*name of defendant***] [or [his/her/its] supervisors or agents] knew or should have known of the widespread sexual favoritism and failed to take immediate and appropriate corrective action;]**

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

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

Derived from former CACI No. 2521 December 2007; Revised December 2015, May 2018

Directions for Use

This instruction is for use in a hostile work environment case involving widespread sexual favoritism when the defendant is an employer or other entity covered by the FEHA. For an individual defendant,

such as the alleged harasser or plaintiff's coworker, see CACI No. 2522C, *Hostile Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Individual Defendant.* For a case in which the plaintiff is the target of harassment based on a protected status such as gender, race, or sexual orientation, see CACI No. 2521A, *Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant.* For an instruction for use if the plaintiff is not the target of the harassment, see CACI No. 2521B, *Hostile Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Employer or Entity Defendant.* Also read CACI No. 2523, *"Harassing Conduct" Explained*, and CACI No. 2524, *"Severe or Pervasive" Explained*.

In element 6, select the applicable basis of employer liability: (a) strict liability for a supervisor's harassing conduct, or (b) the employer's ratification of the conduct. For a definition of "supervisor," see CACI No. 2525, *Harassment—"Supervisor" Defined.* If there are both employer and individual supervisor defendants (see CACI No. 2522C, *Hostile Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Individual Defendant*) and both are found liable, they are both jointly and severally liable for any damages. Comparative fault and Proposition 51 do not apply to the employer's strict liability for supervisor harassment. (*State Dep't of Health Servs. v. Superior Court* (2003) 31 Cal.4th 1026, 1041–1042 [6 Cal.Rptr.3d 441, 79 P.3d 556]; see *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 1000 [16 Cal.Rptr.2d 787], disapproved on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664 [25 Cal.Rptr.2d 109, 863 P.2d 179]; see also *Rashtian v. BRAC-BH, Inc.* (1992) 9 Cal.App.4th 1847, 1851 [12 Cal.Rptr.2d 411] [Proposition 51 cannot be applied to those who are without fault and only have vicarious liability by virtue of some statutory fiat].)

See also the Sources and Authority to CACI No. 2521A, *Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant.*

Sources and Authority

- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- "Employer" Defined for Harassment. Government Code section 12940(j)(4)(A).
- Person Providing Services Under Contract. Government Code section 12940(j)(5).
- Harassment Because of Sex. Government Code section 12940(j)(4)(C).
- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).
- Perception and Association. Government Code section 12926(o).
- "The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently

pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)

- "Following the guidance of the EEOC, and also employing standards adopted in our prior cases, we believe that an employee may establish an actionable claim of sexual harassment under the FEHA by demonstrating that widespread sexual favoritism was severe or pervasive enough to alter his or her working conditions and create a hostile work environment." (*Miller v. Dept. of Corrections* (2005) 36 Cal.4th 446, 466 [30 Cal.Rptr.3d 797, 115 P.3d 77], internal citations omitted.)

- "[S]exual favoritism by a manager may be actionable when it leads employees to believe that 'they [can] obtain favorable treatment from [the manager] if they became romantically involved with him', the affair is conducted in a manner 'so indiscreet as to create a hostile work environment,' or the manager has engaged in 'other pervasive conduct … which created a hostile work environment.' " (*Miller, supra,* 36 Cal.4th at p. 465, internal citations omitted.)

- "[A] romantic relationship between a supervisor and an employee does not, without more, give rise to a sexual discrimination or sexual harassment claim either under the FEHA or the public policy of the state." (*Proksel v. Gattis* (1996) 41 Cal.App.4th 1626, 1631 [49 Cal.Rptr.2d 322].)

- "The FEHA imposes two standards of employer liability for sexual harassment, depending on whether the person engaging in the harassment is the victim's supervisor or a nonsupervisory coemployee. The employer is liable for harassment by a nonsupervisory employee only if the employer (a) knew or should have known of the harassing conduct and (b) failed to take immediate and appropriate corrective action. This is a negligence standard. Because the FEHA imposes this negligence standard only for harassment 'by an employee other than an agent or supervisor', by implication the FEHA makes the employer strictly liable for harassment by a supervisor." (*State Dep't of Health Servs., supra,* 31 Cal.4th at pp. 1040-1041, original italics.)

- "The applicable language of the FEHA does not suggest that an employer's liability for sexual harassment by a supervisor is constrained by principles of agency law. Had the Legislature so intended, it would have used language in the FEHA imposing the negligence standard of liability on acts of harassment by an employee 'other than an agent,' 'not acting as the employer's agent,' or 'not acting within the scope of an agency for the employer.' By providing instead in section 12940, subdivision (j)(1), that the negligence standard applies to acts of harassment 'by an employee other than an agent *or supervisor*' (italics added), the Legislature has indicated that all acts of harassment by a supervisor are to be exempted from the negligence standard, whether or not the supervisor was then acting as the employer's agent, and that agency principles come into play only when the harasser is not a supervisor. (*State Dept. of Health Services, supra,* 31 Cal.4th at p. 1041, original italics.)

- "[I]n order for the employer to avoid strict liability for the supervisor's actions under the FEHA, the harassment must result from a completely private relationship unconnected with the employment. Otherwise, the employer is strictly liable for the supervisor's actions regardless of whether the supervisor was acting as the employer's agent." (*Myers v. Trendwest Resorts, Inc.* (2007) 148 Cal.App.4th 1403, 1421 [56 Cal.Rptr.3d 501].)

- "In order to be actionable, it must be shown that respondents knew, or should have known, of the alleged harassment and failed to take appropriate action." (*McCoy v. Pacific Maritime Assn.* (2013) 216 Cal.App.4th 283, 294 [156 Cal.Rptr.3d 851].)

- "If an employee other than an agent or supervisor commits the harassment, and the employer takes immediate and appropriate corrective action when it becomes or reasonably should become aware of the conduct—for example, when the victim or someone else informs the employer—there simply is no 'unlawful employment practice' that the FEHA governs." (*Carrisales v. Dept. of Corrections* (1999) 21 Cal.4th 1132, 1136 [90 Cal.Rptr.2d 804, 988 P.2d 1083], called into doubt on other grounds by statute.)

Secondary Sources

4 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 363, 370

Chin et al., Cal. Practice Guide: Employment Litigation, Ch. 10-B, *Sexual Harassment,* ¶¶ 10:40, 10:110–10:260 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75, Sexual and Other Harassment, §§ 3.1, 3.14, 3.17, 3.21, 3.36, 3.45

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws,* §§ 41.80[1][a], 41.81[1][b] (Matthew Bender)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws,* § 43.01[10][g][i] (Matthew Bender)

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

California Civil Practice: Employment Litigation § 2:56 (Thomson Reuters)

2522A. Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant (Gov. Code, § 12940(j))

The advisory committee is currently considering revisions to this instruction in light of newly enacted Government Code section 12923. (See SB 1300, Stats. 2018, ch. 955.)

[*Name of plaintiff***] claims that [***name of defendant***] subjected [him/her] to harassment based on [***describe protected status, e.g., race, gender, or age***], causing a hostile or abusive work environment. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was [an employee of/a person providing services under a contract with/an unpaid intern with/a volunteer with] [***name of employer***];**

2. **That [***name of plaintiff***] was subjected to unwanted harassing conduct because [he/she] was [***protected status, e.g., a woman***];**

3. **That the harassing conduct was severe or pervasive;**

4. **That a reasonable [***e.g., woman***] in [***name of plaintiff***]'s circumstances would have considered the work environment to be hostile or abusive;**

5. **That [***name of plaintiff***] considered the work environment to be hostile or abusive;**

6. **That [***name of defendant***] [participated in/assisted/ [or] encouraged] the harassing conduct;**

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

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

Derived from Former CACI No. 2522 December 2007; Revised June 2013, December 2015, May 2018

Directions for Use

This instruction is for use in a hostile work environment case if the plaintiff was the target of the harassing conduct and the defendant is an individual such as the alleged harasser or plaintiff's coworker. For an employer defendant, see CACI No. 2521A, *Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant.* For a case in which the plaintiff is not the target of the harassment, see CACI No. 2522B, *Hostile Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual Defendant.* For an instruction for use if the hostile environment is due to sexual favoritism, see CACI No. 2522C, *Hostile Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Individual Defendant.* Also read CACI No. 2523, *"Harassing Conduct" Explained*, and CACI No. 2524, *"Severe or Pervasive" Explained*.

Modify element 2 if plaintiff was not actually a member of the protected class, but alleges harassment because he or she was perceived to be a member, or associated with someone who was or was perceived to be a member, of the protected class. (See Gov. Code, § 12926(o).)

If there are both employer and individual supervisor defendants (see CACI No. 2521A, *Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant*) and both are found liable, they are both jointly and severally liable for any damages. Comparative fault and Proposition 51 do not apply to the employer's strict liability for supervisor harassment. (*State Dep't of Health Servs. v. Superior Court* (2003) 31 Cal.4th 1026, 1041–1042 [6 Cal.Rptr.3d 441, 79 P.3d 556]; see *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 1000 [16 Cal.Rptr.2d 787], disapproved on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664 [25 Cal.Rptr.2d 109, 863 P.2d 179]; see also *Rashtian v. BRAC-BH, Inc.* (1992) 9 Cal.App.4th 1847, 1851 [12 Cal.Rptr.2d 411] [Proposition 51 cannot be applied to those who are without fault and only have vicarious liability by virtue of some statutory fiat].)

See also the Sources and Authority to CACI No. 2521A, *Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant.*

Sources and Authority

- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- Personal Liability for Harassment. Government Code section 12940(j)(3).
- "Employer" Defined for Harassment. Government Code section 12940(j)(4)(A).
- Harassment Because of Sex. Government Code section 12940(j)(4)(C).
- Person Providing Services Under Contract. Government Code section 12940(j)(5).
- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).
- Perception and Association. Government Code section 12926(o).
- "The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)
- "Under FEHA, an employee who harasses another employee may be held personally liable." (*Lewis v. City of Benicia* (2014) 224 Cal.App.4th 1519, 1524 [169 Cal.Rptr.3d 794].)

- "A supervisor who, without more, fails to take action to prevent sexual harassment of an employee is not personally liable as an aider and abettor of the harasser, an aider and abettor of the employer or an agent of the employer." (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1331 [58 Cal.Rptr.2d 308].)

Secondary Sources

4 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 363, 370

Chin et al., California Practice Guide: Employment Litigation, Ch. 10-B, *Sexual Harassment,* ¶¶ 10:40, 10:110–10:260 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75, Sexual and Other Harassment, §§ 3.1, 3.14, 3.17, 3.36–3.45

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.80[1][a], 41.81[1][b] (Matthew Bender)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01[10][g][i] (Matthew Bender)

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

California Civil Practice: Employment Litigation §§ 2:56–2:56.1 (Thomson Reuters)

2522B. Hostile Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual Defendant (Gov. Code, § 12940(j))

The advisory committee is currently considering revisions to this instruction in light of newly enacted Government Code section 12923. (See SB 1300, Stats. 2018, ch. 955.)

[*Name of plaintiff***] claims that [he/she] was subjected to a hostile or abusive work environment because coworkers at [***name of employer***] were subjected to harassment based on [***describe protected status, e.g., race, gender, or age***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was [an employee of/a person providing services under a contract with/an unpaid intern with/a volunteer with] [***name of employer***];**

2. **That [***name of plaintiff***] although not personally subjected to unwanted harassing conduct, personally witnessed harassing conduct that took place in [his/her] immediate work environment;**

3. **That the harassing conduct was severe or pervasive;**

4. **That a reasonable [***describe member of protected group, e.g., woman***] in [***name of plaintiff***]'s circumstances would have considered the work environment to be hostile or abusive;**

5. **That [***name of plaintiff***] considered the work environment to be hostile or abusive toward [***e.g., women***];**

6. **That [***name of defendant***] [participated in/assisted/ [or] encouraged] the harassing conduct;**

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

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

Derived from former CACI No. 2522 December 2007; Revised June 2013, December 2015, May 2018

Directions for Use

This instruction is for use in a hostile work environment case if the plaintiff was not the target of the harassing conduct and the defendant is an individual such as the alleged harasser or plaintiff's coworker. For an employer defendant, see CACI No. 2521B, *Hostile Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Employer or Entity Defendant.* For a case in which the plaintiff is the target of the harassment, see CACI No. 2522A, *Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant.* For an instruction for

use if the hostile environment is due to sexual favoritism, see CACI No. 2522C, *Hostile Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Individual Defendant.* Also read CACI No. 2523, *"Harassing Conduct" Explained*, and CACI No. 2524, *"Severe or Pervasive" Explained*.

If there are both employer and individual supervisor defendants (see CACI No. 2521B, *Hostile Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Employer or Entity Defendant*) and both are found liable, they are both jointly and severally liable for any damages. Comparative fault and Proposition 51 do not apply to the employer's strict liability for supervisor harassment. (*State Dep't of Health Servs. v. Superior Court* (2003) 31 Cal.4th 1026, 1041–1042 [6 Cal.Rptr.3d 441, 79 P.3d 556]; see *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 1000 [16 Cal.Rptr.2d 787], disapproved on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664 [25 Cal.Rptr.2d 109, 863 P.2d 179]; see also *Rashtian v. BRAC-BH, Inc.* (1992) 9 Cal.App.4th 1847, 1851 [12 Cal.Rptr.2d 411] [Proposition 51 cannot be applied to those who are without fault and only have vicarious liability by virtue of some statutory fiat].)

See also the Sources and Authority to CACI No. 2521A, *Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant.*

Sources and Authority

- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- Personal Liability for Harassment. Government Code section 12940(j)(3).
- "Employer" Defined for Harassment. Government Code section 12940(j)(4)(A).
- Harassment Because of Sex. Government Code section 12940(j)(4)(C).
- Person Providing Services Under Contract. Government Code section 12940(j)(5).
- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).
- Perception and Association. Government Code section 12926(o).
- "The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)
- "The plaintiff's work environment is affected not only by conduct directed at herself but also by the treatment of others. A woman's perception that her work environment is hostile to women will

obviously be reinforced if she witnesses the harassment of other female workers." (*Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 519 [76 Cal.Rptr.2d 547], internal citations omitted.)

- "Harassment against others in the workplace is only relevant to the plaintiff's case if she has personal knowledge of it. Unless plaintiff witnesses the conduct against others, or is otherwise aware of it, that conduct cannot alter the conditions of her employment and create an abusive working environment. Stated another way, a reasonable person in plaintiff's position would not find the environment hostile or abusive unless that person had knowledge of the objectionable conduct toward others." (*Beyda, supra,* 65 Cal.App.4th at p. 520.)

- "To state that an employee must be the direct victim of the sexually harassing conduct is somewhat misleading as an employee who is subjected to a hostile work environment is a victim of sexual harassment even though no offensive remarks or touchings are directed to or perpetrated upon that employee. Generally, however, sexual conduct that involves or is aimed at persons other than the plaintiff is considered less offensive and severe than conduct that is directed at the plaintiff. A hostile work environment sexual harassment claim by a plaintiff who was not personally subjected to offensive remarks and touchings requires 'an even higher showing' than a claim by one who had been sexually harassed without suffering tangible job detriment: such a plaintiff must 'establish that the sexually harassing conduct permeated [her] direct work environment.' [¶] To meet this burden, the plaintiff generally must show that the harassment directed at others was in her immediate work environment, and that she personally witnessed it. The reason for this is obvious: if the plaintiff does not witness the incidents involving others, 'those incidents cannot affect ... her perception of the hostility of the work environment.' " (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 284–285 [42 Cal.Rptr.3d 2, 132 P.3d 211], internal citations omitted.)

- "[W]e conclude a nonharassing supervisor, who fails to take action to prevent sexual harassment, is not personally liable for sexual harassment under the Fair Employment and Housing Act (FEHA)." (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1322 [58 Cal.Rptr.2d 308].)

- "A supervisor who, without more, fails to take action to prevent sexual harassment of an employee is not personally liable as an aider and abettor of the harasser, an aider and abettor of the employer or an agent of the employer." (*Fiol*, *supra*, 50 Cal.App.4th at p. 1331.)

Secondary Sources

4 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 363, 370

Chin et al., California Practice Guide: Employment Litigation, Ch. 10-B, *Sexual Harassment,* ¶¶ 10:40, 10:110–10:260 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75, Sexual and Other Harassment, §§ 3.1, 3.14, 3.17, 3.36–3.45

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.80[1][a], 41.81[1][b] (Matthew Bender)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01[10][g][i] (Matthew Bender)

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

California Civil Practice: Employment Litigation §§ 2:56, 2:56.50 (Thomson Reuters)

2522C. Hostile Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Individual Defendant (Gov. Code, § 12940(j))

The advisory committee is currently considering revisions to this instruction in light of newly enacted Government Code section 12923. (See SB 1300, Stats. 2018, ch. 955.)

[*Name of plaintiff***] claims that widespread sexual favoritism by [***name of defendant***] created a hostile or abusive work environment. "Sexual favoritism" means that another employee has received preferential treatment with regard to promotion, work hours, assignments, or other significant employment benefits or opportunities because of a sexual relationship with an individual representative of the employer who was in a position to grant these preferences. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was [an employee of/a person providing services under a contract with/an unpaid intern with/a volunteer with] [***name of employer***];**

2. **That there was sexual favoritism in the work environment;**

3. **That the sexual favoritism was widespread and also severe or pervasive;**

4. **That a reasonable [***describe member of protected group, e.g., woman***] in [***name of plaintiff***]'s circumstances would have considered the work environment to be hostile or abusive because of the widespread sexual favoritism;**

5. **That [***name of plaintiff***] considered the work environment to be hostile or abusive because of the widespread sexual favoritism;**

6. **That [***name of defendant***] [participated in/assisted/ [or] encouraged] the sexual favoritism;**

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

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

Derived from former CACI No. 2522 December 2007; Revised December 2015, May 2018

Directions for Use

This instruction is for use in a hostile work environment case involving widespread sexual favoritism when the defendant is an individual such as the alleged harasser or plaintiff's coworker. For an employer defendant, see CACI No. 2521C, *Hostile Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Employer or Entity Defendant.* For a case in which the plaintiff is the target of harassment based on a protected status such as gender, race, or sexual orientation, see CACI No. 2522A, *Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant.* For an instruction for use if the plaintiff is not the target of the

harassment, see CACI No. 2522B, *Hostile Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual Defendant.* Also read CACI No. 2523, *"Harassing Conduct" Explained*, and CACI No. 2524, *"Severe or Pervasive" Explained*.

If there are both employer and individual supervisor defendants (see CACI No. 2521C, *Hostile Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Employer or Entity Defendant*) and both are found liable, they are both jointly and severally liable for any damages. Comparative fault and Proposition 51 do not apply to the employer's strict liability for supervisor harassment. (*State Dep't of Health Servs. v. Superior Court* (2003) 31 Cal.4th 1026, 1041–1042 [6 Cal.Rptr.3d 441, 79 P.3d 556]; see *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 1000 [16 Cal.Rptr.2d 787], disapproved on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664 [25 Cal.Rptr.2d 109, 863 P.2d 179]; see also *Rashtian v. BRAC-BH, Inc.* (1992) 9 Cal.App.4th 1847, 1851 [12 Cal.Rptr.2d 411] [Proposition 51 cannot be applied to those who are without fault and only have vicarious liability by virtue of some statutory fiat].)

See also the Sources and Authority to CACI No. 2521A, *Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant.*

Sources and Authority

- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- Personal Liability for Harassment. Government Code section 12940(j)(3).
- "Employer" Defined for Harassment. Government Code section 12940(j)(4)(A).
- Harassment Because of Sex. Government Code section 12940(j)(4)(C).
- Person Providing Services Under Contract. Government Code section 12940(j)(5).
- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).
- Perception and Association. Government Code section 12926(o).
- "The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)
- "Following the guidance of the EEOC, and also employing standards adopted in our prior cases, we believe that an employee may establish an actionable claim of sexual harassment under the FEHA by demonstrating that widespread sexual favoritism was severe or pervasive enough to alter his or her

working conditions and create a hostile work environment." (*Miller v. Dept. of Corrections* (2005) 36 Cal.4th 446, 466 [30 Cal.Rptr.3d 797, 115 P.3d 77], internal citations omitted.)

- "[S]exual favoritism by a manager may be actionable when it leads employees to believe that 'they [can] obtain favorable treatment from [the manager] if they became romantically involved with him', the affair is conducted in a manner 'so indiscreet as to create a hostile work environment,' or the manager has engaged in 'other pervasive conduct … which created a hostile work environment.' " (*Miller, supra,* 36 Cal.4th at p. 465, internal citations omitted.)

- "[A] romantic relationship between a supervisor and an employee does not, without more, give rise to a sexual discrimination or sexual harassment claim either under the FEHA or the public policy of the state." (*Proksel v. Gattis* (1996) 41 Cal.App.4th 1626, 1631 [49 Cal.Rptr.2d 322].)
- "[W]e conclude a nonharassing supervisor, who fails to take action to prevent sexual harassment, is not personally liable for sexual harassment under the Fair Employment and Housing Act (FEHA)." (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1322 [58 Cal.Rptr.2d 308].)

- "A supervisor who, without more, fails to take action to prevent sexual harassment of an employee is not personally liable as an aider and abettor of the harasser, an aider and abettor of the employer or an agent of the employer." (*Fiol*, *supra*, 50 Cal.App.4th at p. 1331.)

Secondary Sources

4 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 363, 370

Chin et al., California Practice Guide: Employment Litigation, Ch. 10-B, *Sexual Harassment,* ¶¶ 10:40, 10:110–10:260 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75, Sexual and Other Harassment, §§ 3.1, 3.14, 3.17, 3.36–3.45

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.80[1][a], 41.81[1][b] (Matthew Bender)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01[10][g][i] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.36[5] (Matthew Bender)

California Civil Practice: Employment Litigation §§ 2:56, 2:56.50 (Thomson Reuters)

2524. "Severe or Pervasive" Explained

The advisory committee is currently considering revisions to this instruction in light of newly enacted Government Code section 12923. (See SB 1300, Stats. 2018, ch. 955.)

"Severe or pervasive" means conduct that alters the conditions of employment and creates a hostile or abusive work environment.

In determining whether the conduct was severe or pervasive, you should consider all the circumstances. You may consider any or all of the following:

(a) The nature of the conduct;

(b) How often, and over what period of time, the conduct occurred;

(c) The circumstances under which the conduct occurred;

(d) Whether the conduct was physically threatening or humiliating;

(e) The extent to which the conduct unreasonably interfered with an employee's work performance.

New September 2003; Revised December 2007

Directions for Use

Read this instruction with any of the Hostile Work Environment Harassment instructions (CACI Nos. 2521A, 2521B, 2521C, 2522A, 2522B, and 2522C). Read also CACI No. 2523, *"Harassing Conduct" Explained*.

Sources and Authority

- "We have agreed with the United States Supreme Court that, to prevail, an employee claiming harassment based upon a hostile work environment must demonstrate that the conduct complained of was severe enough or sufficiently pervasive to alter the conditions of employment and create a work environment that qualifies as hostile or abusive to employees because of their sex. The working environment must be evaluated in light of the totality of the circumstances: '[W]hether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.' " (*Miller v. Dept. of Corrections* (2005) 36 Cal.4th 446, 462 [30 Cal.Rptr.3d 797, 115 P.3d 77], internal citations omitted.)

- "For sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the

conditions of [the victim's] employment and create an abusive working environment.' ... [¶] 'Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment--an environment that a reasonable person would find hostile or abusive--is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.' ... California courts have adopted the same standard in evaluating claims under the FEHA." (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 129–130 [87 Cal.Rptr.2d 132, 980 P.2d 846], internal citations omitted.)

- "Whether the sexual conduct complained of is sufficiently pervasive to create a hostile or offensive work environment must be determined from the totality of the circumstances. The plaintiff must prove that the defendant's conduct would have interfered with a reasonable employee's work performance … and that she was actually offended ... . The factors that can be considered in evaluating the totality of the circumstances are: (1) the nature of the unwelcome sexual acts or works (generally, physical touching is more offensive than unwelcome verbal abuse); (2) the frequency of the offensive encounters; (3) the total number of days over which all of the offensive conduct occurs; and (4) the context in which the sexually harassing conduct occurred." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 609–610 [262 Cal.Rptr. 842], internal citation omitted.)

- "In determining what constitutes 'sufficiently pervasive' harassment, the courts have held that acts of harassment cannot be occasional, isolated, sporadic, or trivial, rather the plaintiff must show a concerted pattern of harassment of a repeated, routine or a generalized nature." (*Fisher*, *supra*, 214 Cal.App.3d at p. 610.)

- "The United States Supreme Court ... has clarified that conduct need not seriously affect an employee's psychological well-being to be actionable as abusive work environment harassment. So long as the environment reasonably would be perceived, and is perceived, as hostile or abusive, there is no need for it also to be psychologically injurious." (*Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 Cal.App.4th 397, 412 [27 Cal.Rptr.2d 457], internal citations omitted.)

- "As the Supreme Court recently reiterated, in order to be actionable, '... a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.' The work environment must be viewed from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.' This determination requires judges and juries to exercise '[c]ommon sense, and an appropriate sensitivity to social context' in order to evaluate whether a reasonable person in the plaintiff's position would find the conduct severely hostile or abusive." (*Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 518–519 [76 Cal.Rptr.2d 547], internal citations omitted.)

- "The requirement that the conduct be sufficiently severe or pervasive to create a working environment a reasonable person would find hostile or abusive is a crucial limitation that prevents sexual harassment law from being expanded into a 'general civility code.' The conduct must be extreme: ' "simple teasing," … offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the "terms and conditions of employment." ' " (*Jones v. Department of Corrections* (2007) 152 Cal. App. 4th 1367, 1377 [62 Cal.Rptr. 3d 200], internal

citations omitted.)

- "[E]mployment law acknowledges that an isolated incident of harassing conduct may qualify as 'severe' when it consists of 'a *physical* assault or the threat thereof.' " (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1049 [95 Cal.Rptr.3d 636, 209 P.3d 963], original italics.)

- "In the present case, the jury was instructed as follows: 'In order to find in favor of Plaintiff on his claim of race harassment, you must find that Plaintiff has proved by a preponderance of the evidence that the racial conduct complained of was sufficiently severe or pervasive to alter the conditions of employment. In order to find that racial harassment is "sufficiently severe or pervasive," the acts of racial harassment cannot be occasional, isolated, sporadic, or trivial.' ... [W]e find no error in the jury instruction given here ... . [T]he law requires the plaintiff to meet a threshold standard of severity or pervasiveness. We hold that the statement within the instruction that severe or pervasive conduct requires more than 'occasional, isolated, sporadic, or trivial' acts was an accurate statement of that threshold standard." (*Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 465–467 [79 Cal.Rptr.2d 33].)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 340, 346

Chin, et al., California Practice Guide: Employment Litigation (The Rutter Group) ¶¶ 10:160–10:249

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75, Sexual and Other Harassment, §§ 3.1, 3.17, 3.36–3.41

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.80[1][a], 41.81[1][b] (Matthew Bender)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01[10][g][i] (Matthew Bender)

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

California Civil Practice: Employment Litigation (Thomson West) § 2:56

2540. Disability Discrimination—Disparate Treatment—Essential Factual Elements

[*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 of [his/her current position/the position for which [he/she] applied] [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, May 2019

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).)

This instruction is for use by both an employee and a job applicant. Select the appropriate options in elements 2, 4, and 5 depending on the plaintiff's status.

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.)

- "[Defendant] argues that, because [it] hired plaintiffs as recruit officers, they must show they were able to perform the essential functions of a police recruit in order to be qualified individuals entitled to protection under FEHA. [Defendant] argues that plaintiffs cannot satisfy their burden of proof under FEHA because they failed to show that they could perform those essential functions. [¶] Plaintiffs do not directly respond to [defendant]'s argument. Instead, they contend that the relevant question is whether they could perform the essential functions of the positions to which they sought reassignment. Plaintiffs' argument improperly conflates the legal standards for their claim under section 12940, subdivision (a), for discrimination, and their claim under section 12940, subdivision (m), for failure to make reasonable accommodation, including reassignment. In connection with a discrimination claim under section 12940, subdivision (a), the court considers whether a plaintiff could perform the essential functions of the job held—or for job applicants, the job desired—with or without reasonable accommodation." (*Atkins v. City of Los Angeles* (2017) 8 Cal.App.5th 696, 716–717 [214 Cal.Rptr.3d 113].)

- "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.3d 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 of [[his/her] current position or a vacant alternative position to which [he/she] could have been reassigned/the position for which [he/she] applied] 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, May 2019

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).)

This instruction is for use by both an employee and a job applicant. Select the appropriate options in elements 2 and 5 depending on the plaintiff's status.

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).
- "There are three elements to a failure to accommodate action: '(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. [Citation.]' " (*Hernandez v. Rancho Santiago Cmty. College Dist.* (2018) 22 Cal.App.5th 1187, 1193-1194 [232 Cal.Rptr.3d 349].)
- "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.)

- "The question whether plaintiffs could perform the essential functions of a position to which they sought reassignment is relevant to a claim for failure to accommodate under section 12940, subdivision (m) … ." (*Atkins, supra,* 8 Cal.App.5th at p. 717.)

- "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.)

- "While 'a finite leave can be a reasonable accommodation under FEHA, provided it is likely that at the end of the leave, the employee would be able to perform … her duties', a finite leave is not a reasonable accommodation when the leave leads directly to termination of employment because the employee's performance could not be evaluated while she was on the leave." (*Hernandez, supra,* 22 Cal.App.5th at p. 1194.)

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)

2544. Disability Discrimination—Affirmative Defense—Health or Safety Risk

[*Name of defendant*] claims that [his/her/its] conduct was lawful because, even with reasonable accommodations, [*name of plaintiff*] was unable to perform an essential job duty without endangering [[his/her] health or safety] [or] [the health or safety of others]. To succeed, [*name of defendant*] must prove both of the following:

1. **That [*describe job duty*] was an essential job duty; and**

2. **That even with reasonable accommodations, [*name of plaintiff*] could not [*describe job duty*] without endangering [[his/her] health or safety] [or] [the health or safety of others] more than if an individual without a disability performed the job duty.**

[In determining whether [*name of plaintiff*]'s performance of the job duty would endanger [his/her] health or safety, you must decide whether the performance of the job duty presents an immediate and substantial degree of risk to [him/her].]

~~**In deciding whether a job duty is essential, you may consider, among other factors, the following:**~~

~~**a. Whether the reason the job exists is to perform that duty;**~~

~~**b. The number of employees available who can perform that duty; and**~~

~~**c. Whether the job duty is highly specialized.**~~

New September 2003; Revised May 2019

Directions for Use

Give CACI No. 2543, *Disability Discrimination—"Essential Job Duties" Explained*, to instruct on when a job duty is essential.

Sources and Authority

- Risk to Health or Safety. Government Code section 12940(a)(1).
- Risk to Health or Safety. Cal. Code Regs., tit. 2, § 11067(c)-(e).
- "FEHA's 'danger to self' defense has a narrow scope; an employer must offer more than mere conclusions or speculation in order to prevail on the defense ... . As one court said, '[t]he defense requires that the employee face an "imminent and substantial degree of risk" in performing the essential functions of the job.' An employer may not terminate an employee for harm that is merely potential ... . In addition, in cases in which the employer is able to establish the 'danger to self' defense, it must also show that there are 'no "available reasonable means of accommodation which

could, without undue hardship to [the employer], have allowed [the plaintiff] to perform the essential job functions ... without danger to himself." ' " (*Wittkopf v. County of Los Angeles* (2001) 90 Cal.App.4th 1205, 1218-1219 [109 Cal.Rptr.2d 543], internal citations omitted.)

- "An employer may refuse to hire persons whose physical handicap prevents them from performing their duties in a manner which does not endanger their health. Unlike the BFOQ defense, this exception must be tailored to the individual characteristics of each applicant ... in relation to specific, legitimate job requirements ... . [Defendant's] evidence, at best, shows a possibility [plaintiff] might endanger his health sometime in the future. In the light of the strong policy for providing equal employment opportunity, such conjecture will not justify a refusal to employ a handicapped person." (*Sterling Transit Co. v. Fair Employment Practice Com.* (1981) 121 Cal.App.3d 791, 798, 799 [175 Cal.Rptr. 548], internal citations and footnote omitted.)

- "FEHA does not expressly address whether the act protects an employee whose disability causes him or her to make threats against coworkers. FEHA, however, does authorize an employer to terminate or refuse to hire an employee who poses an actual threat of harm to others due to a disability … ." (*Wills v. Superior Court* (2011) 195 Cal.App.4th 143, 169 [125 Cal.Rptr.3d 1] [idle threats against coworkers do not disqualify employee from job, but rather may provide legitimate, nondiscriminatory reason for discharging employee].)

- "The employer has the burden of proving the defense of the threat to the health and safety of other workers by a preponderance of the evidence." (*Raytheon Co. v. Fair Employment & Housing Com.* (1989) 212 Cal.App.3d 1242, 1252 [261 Cal.Rptr. 197].)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 936, 937

Chin et al., Cal. Practice Guide: Employment Litigation, Ch. 9-C, *California Fair Employment And Housing Act (FEHA)*, ¶¶ 9:2298, 9:2402–9:2403, 9:2405, 9:2420 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, § 2.111

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.97[1] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.54, 115.104 (Matthew Bender)

California Civil Practice: Employment Litigation § 2:86 (Thomson Reuters)

2704. Damages—Waiting-Time Penalty for Nonpayment of Wages (Lab. Code, §§ 203, 218)

If you decide that [*name of plaintiff***] has proved [his/her] claim against [***name of defendant***] for [unpaid wages/[***insert other claim***]], then [***name of plaintiff***] may be entitled to receive an award of an ~~civil~~ additional penalty based on the number of days [***name of defendant***] failed to pay [his/her] [wages/***other***] when due.**

To recover ~~the civil~~this penalty, [*name of plaintiff***] must prove all of the following:**

1. **That ~~The date on which~~ [***name of plaintiff***]'s employment with [***name of defendant***] ended;**

2. **~~[~~That [***name of defendant***] failed to pay [***name of plaintiff***] all wages when due ~~by [***insert date***]~~; and~~]~~**

3. **That [***name of defendant***] willfully failed to pay these wages.**

The term "willfully" means only that the employer intentionally failed or refused to pay the wages. It does not imply a need for any additional bad motive.

~~*[or]*~~

~~**[The date on which [***name of defendant***] paid [***name of plaintiff***] all wages due;]**~~

[*Name of plaintiff***] must also prove the following:**

1. **The date on which [***name of plaintiff***]'s wages were due;**

2. **[***Name of plaintiff***]'s daily wage rate at the time [his/her] employment with [***name of defendant***] ended[; and/.]**

[3. The date on which [*name of defendant***] finally paid [***name of plaintiff***] all wages due.]**

~~**4. That [***name of defendant***] willfully failed to pay these wages.**~~

[The term "wages" includes all amounts for labor performed by an employee, whether the amount is calculated by time, task, piece, commission, or some other method.]

~~**The term "willfully" means that the employer intentionally failed or refused to pay the wages.**~~

New September 2003; Revised June 2005, May 2019

Directions for Use

The first part of this instruction sets forth the elements required to obtain a waiting time penalty under Labor Code section 203. The second part ~~This instruction~~ is intended to instruct the jury on the factsual

~~determinations~~ required to assist the court in calculating the amount of waiting time penalties ~~under Labor Code section 203~~. Some or all of these facts may be stipulated, in which case they may be omitted from the instruction. Give the third optional fact if the employer eventually paid all wages due, but after their due date.

The court must determine when final wages are due based on the circumstances of the case and applicable law. (See Lab. ~~or~~ Code, ~~§§ sections~~ 201, ~~and~~ 202.) Final wages are generally due on the day an employee is discharged by the employer (Lab. Code, § 201(a)), but are not due for 72 hours if an employee quits without notice. (Lab. Code, § 202(a).) ~~see Lab. Code, §§ 201, 201.5, 201.7, 202, 205.5).~~

If there is a factual dispute, for example, whether plaintiff gave advance notice of his or her intention to quit, or whether payment of final wages by mail was authorized by plaintiff, the court may be required to give further instruction to the jury. ~~Final wages generally are due on the day an employee is discharged by the employer, but are not due for 72 hours if an employee quits without notice (see Lab. Code, §§ 201, 201.5, 201.7, 202, 205.5).~~

The definition of "wages" may be deleted ~~as redundant if it is redundant with~~ if it is included in other instructions.

Sources and Authority

- Wages of Discharged Employee Due Immediately. Labor Code section 201.
- Wages of ~~Contract~~ Employee on Quitting. Labor Code section 202.
- Willful Failure to Pay Wages of Discharged Employee. Labor Code section 203.
- Right of Action for Unpaid Wages. Labor Code section 218.
- ~~Wages of Contract Employee on Quitting. Labor Code section 202.~~
- "Wages" Defined. Labor Code section 200.
- Payment for Accrued Vacation of Terminated Employee. Labor Code section 227.3.
- Wages Partially in Dispute. Labor Code section 206(a).
- Exemption for Certain Governmental Employers. Labor Code section 220(b).
- "Labor Code section 203 empowers a court to award 'an employee who is discharged or who quits' a penalty equal to up to 30 days' worth of the employee's wages '[i]f an employer *willfully* fails to pay' the employee his full wages immediately (if discharged) or within 72 hours (if he or she quits). It is called a waiting time penalty because it is awarded for effectively making the employee wait for his or her final paycheck. A waiting time penalty may be awarded when the final paycheck is for less than the applicable wage—whether it be the minimum wage, a prevailing wage, or a living wage." (*Diaz v. Grill Concepts Services, Inc.* (2018) 23 Cal.App.5th 859, 867 [233 Cal.Rptr.3d 524], original

italics, internal citations omitted.)

- " '[T]he public policy in favor of full and prompt payment of an employee's earned wages is fundamental and well established …' and the failure to timely pay wages injures not only the employee, but the public at large as well. We have also recognized that sections 201, 202, and 203 play an important role in vindicating this public policy. To that end, the Legislature adopted the penalty provision as a disincentive for employers to pay final wages late. It goes without saying that a longer statute of limitations for section 203 penalties provides additional incentive to encourage employers to pay final wages in a prompt manner, thus furthering the public policy." (*Pineda v. Bank of America, N.A.* (2010) 50 Cal.4th 1389, 1400 [117 Cal.Rptr.3d 377, 241 P.3d 870], internal citations omitted.)

- " 'The plain purpose of [Labor Code] sections 201 and 203 is to compel the immediate payment of earned wages upon a discharge.' The prompt payment of an employee's earned wages is a fundamental public policy of this state." (*Kao v. Holiday* (2017) 12 Cal.App.5th 947, 962 [219 Cal.Rptr.3d 580], internal citation omitted.)

- "The statutory policy favoring prompt payment of wages applies to employees who retire, as well as those who quit for other reasons." (*McLean v. State* (2016) 1 Cal.5th 615, 626 [206 Cal.Rptr.3d 545, 377 P.3d 796].)

- "[A]n employer may not delay payment for several days until the next regular pay period. Unpaid wages are due *immediately* upon discharge. This requirement is strictly applied and may not be 'undercut' by company payroll practices or 'any industry habit or custom to the contrary.' " (*Kao, supra,* 12 Cal.App.5th at p. 962, original italics, internal citation omitted.)

- " ' "[T]o be at fault within the meaning of [section 203], the employer's refusal to pay need not be based on a deliberate evil purpose to defraud workmen of wages which the employer knows to be due. As used in section 203, 'willful' merely means that the employer intentionally failed or refused to perform an act which was required to be done." …' " (*Gonzalez v. Downtown LA Motors, LP* (2013) 215 Cal.App.4th 36, 54 [155 Cal.Rptr.3d 18].)

- "In civil cases the word 'willful' as ordinarily used in courts of law, does not necessarily imply anything blameable, or any malice or wrong toward the other party, or perverseness or moral delinquency, but merely that the thing done or omitted to be done, was done or omitted intentionally. It amounts to nothing more than this: That the person knows what he is doing, intends to do what he is doing, and is a free agent." (*Nishiki v. Danko Meredith, P.C.* (2018) 25 Cal.App.5th 883, 891 [236 Cal.Rptr.3d 626].)

- "[A]n employer's reasonable, good faith belief that wages are not owed may negate a finding of willfulness." (*Choate v. Celite Corp.* (2013) 215 Cal.App.4th 1460, 1468 [155 Cal.Rptr.3d 915].)

- "A 'good faith dispute' that any wages are due occurs when an employer presents a defense, based in law or fact which, if successful, would preclude any recover[y] on the part of the employee. The fact that a defense is ultimately unsuccessful will not preclude a finding that a good faith dispute did exist." (*Kao, supra,* 12 Cal.App.5th at p. 963.)

- "A 'good faith dispute' excludes defenses that 'are unsupported by any evidence, are unreasonable, *or* are presented in bad faith.' Any of the three precludes a defense from being a good faith dispute. Thus, [defendant]'s good faith does not cure the objective unreasonableness of its challenge or the lack of evidence to support it." (*Diaz, supra,* 23 Cal.App.5th at pp. 873–874, original italics, internal citations omitted.)

- "A proper reading of section 203 mandates a penalty equivalent to the employee's daily wages for each day he or she remained unpaid up to a total of 30 days. … [¶] [T]he critical computation required by section 203 is the calculation of a daily wage rate, which can then be multiplied by the number of days of nonpayment, up to 30 days." (*Mamika v. Barca* (1998) 68 Cal.App.4th 487, 493 [80 Cal.Rptr.2d 175].)

- " 'A tender of the wages due at the time of the discharge, if properly made and in the proper amount, terminates the further accumulation of penalty, but it does not preclude the employee from recovering the penalty already accrued.' " (*Oppenheimer v. Sunkist Growers, Inc.* (1957) 153 Cal.App.2d Supp. 897, 899 [315 P.2d 116], citation omitted.)

- "[Plaintiff] fails to distinguish between a request for statutory penalties provided by the Labor Code for employer wage-and-hour violations, which were recoverable directly by employees well before the Act became part of the Labor Code, and a demand for 'civil penalties,' previously enforceable only by the state's labor law enforcement agencies. An example of the former is section 203, which obligates an employer that willfully fails to pay wages due an employee who is discharged or quits to pay the employee, in addition to the unpaid wages, a penalty equal to the employee's daily wages for each day, not exceeding 30 days, that the wages are unpaid." (*Caliber Bodyworks, Inc. v. Superior Court* (2005) 134 Cal.App.4th 365, 377-378 [36 Cal.Rptr.3d 31].)

- "In light of the unambiguous statutory language, as well as the practical difficulties that would arise under defendant's interpretation, we conclude there is but one reasonable construction: section 203(b) contains a single, three-year limitations period governing all actions for section 203 penalties irrespective of whether an employee's claim for penalties is accompanied by a claim for unpaid final wages." (*Pineda, supra,* 50 Cal.4th at p. 1398.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 437–439

Chin et al., California Practice Guide: Employment Litigation, Ch. 1-A, *Introduction—Background*, ¶ 1:22 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-B, *Compensation—Coverage and Exemptions—In General*, ¶ 11:121 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-D, *Compensation—Payment of Wages*, ¶¶ 11:456, 11:470.1, 11:510, 11:513–11:515 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-J, *Compensation—Enforcing California Laws Regulating Employee Compensation*, ¶¶ 11:1458–11:1459, 11:1461–11:1461.1 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 17-B, *Remedies—Contract Damages*, ¶ 17:148 (The Rutter Group)

1 Wilcox, California Employment Law, Ch. 5, *Administrative and Judicial Remedies Under Wage and Hour Laws*, § 5.40 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 250, *Employment Law: Wage and Hour Disputes*, § 250.16[2][d] (Matthew Bender)

California Civil Practice: Employment Litigation, §§ 4:67, 4:74 (Thomson Reuters)

3725. Going-and-Coming Rule—Vehicle-Use Exception

In general, an employee is not acting within the scope of employment while traveling to and from the workplace. But if an employer requires an employee to drive to and from the workplace so that the vehicle is available for the employer's business, then the drive to and from work is within the scope of employment. The employer's requirement may be either express or implied.

The drive to and from work may also be within the scope of employment if the use of the employee's vehicle provides some direct or incidental benefit to the employer. There may be a benefit to the employer if (1) the employee has agreed to make the vehicle available as an accommodation to the employer, and (2) the employer has reasonably come to rely on the vehicle's use and expects the employee to make it available regularly. The employee's agreement may be either express or implied.

New September 2003; Revised June 2014, May 2017

Directions for Use

This instruction sets forth the vehicle use exception to the going-and-coming rule, sometimes called the required-vehicle exception. (See (*Jorge v. Culinary Institute of America* (2016) 3 Cal.App.5th 382, 398, fn. 6 [207 Cal.Rptr.3d 586]; see also *Pierson v. Helmerich & Payne International Drilling Co.* (2016) 4 Cal.App.5th 608, 624–630 [209 Cal.Rptr.3d 222 [vehicle-use exception encompasses two categories; required-vehicle and incidental-use, both of which are expressed within CACI No. 3725].) It may be given with CACI No. 3720, *Scope of Employment*.

Under the going-and-coming rule, commute time is not within the scope of employment. However, commute time is within the scope of employment if the use of a personally owned vehicle is either an express or implied condition of employment, or if the employee has agreed, expressly or implicitly, to make the vehicle available as an accommodation to the employer and the employer has reasonably come to rely on its use and to expect the employee to make the vehicle available on a regular basis while still not requiring it as a condition of employment. (See *Lobo v. Tamco* (2010) 182 Cal.App.4th 297, 301 [105 Cal.Rptr.3d 718].) Whether there is such a requirement or agreement can be a question of fact for the jury. (See *Ducey v. Argo Sales Co.* (1979) 25 Cal.3d 707, 723 [159 Cal. Rptr. 835, 602 P.2d 755].)

Under this exception, the commute itself is considered the employer's business. However, scope of employment may end if the employee substantially deviates from the commute route for personal reasons. (See *Moradi v. Marsh USA, Inc.* (2013) 219 Cal.App.4th 886, 899, 907–908 [162 Cal.Rptr.3d 280].) If substantial deviation is alleged, give CACI No. 3723, *Substantial Deviation*.

One court has stated that the employee must have been using the vehicle to do the employer's business or provide a benefit for the employer *at the time of the accident*. (*Newland v. County of L.A.* (2018) 24 Cal.App.5th 676, 693 [234 Cal.App.3d 374], emphasis added.) However, many cases have applied the vehicle use exception without imposing this time -of-the-accident requirement. (See, e.g., *Moradi, supra,* 219 Cal.App.4th at p. 892 (employee was just going home at the time of the accident); *Lobo, supra,* 182

Cal.App.4th at p. 302 (same); *Huntsinger v. Glass Containers Corp.* (1972) 22 Cal.App.3d 803, 806-807 [99 Cal.Rptr. 666] (same); see also *Smith v. Workers' Comp. Appeals Bd.* (1968) 69 Cal.2d 814, 815 [73 Cal.Rptr. 253, 447 P.2d 365] (workers compensation case: accident happened on the way to work).) *Newland* could be read as requiring the employee to need the vehicle for the employer's business on the *day* of the accident, even if he or she was not engaged in the employer's business at the *time* of the accident. (See *Newland supra,* 24 Cal.App.5th at p. 696 ["no evidence that [employee] required a vehicle for work on the day of the accident, and no evidence that the [employer] received any direct or incidental benefit from [employee] driving to and from work that day].)

Sources and Authority

- " 'An offshoot of the doctrine of respondeat superior is the so-called "going and coming rule." Under this rule, an employee is not regarded as acting within the scope of employment while going to or coming from the workplace. … This is based on the concept that the employment relationship is suspended from the time the employee leaves work until he or she returns, since the employee is not ordinarily rendering services to the employer while traveling. …' " (*Jeewarat v. Warner Brothers Entertainment, Inc.* (2009) 177 Cal.App.4th 427, 435 [98 Cal.Rptr.3d 837].)

- "The 'required-vehicle' exception to the going and coming rule and its variants have been given many labels. In *Halliburton, supra,* 220 Cal.App.4th 87, we used the phrase 'incidental benefit exception' as the equivalent of the required-vehicle exception. In *Felix v. Asai* (1987) 192 Cal.App.3d 926 [237 Cal. Rptr. 718] (*Felix*), we used the phrase 'vehicle-use exception.' The phrase 'required-use doctrine' also has been used. The 'vehicle-use' variant appears in the title to California Civil Jury Instruction (CACI) No. 3725, 'Going-and-Coming Rule—Vehicle-Use Exception.' The various labels and the wide range of circumstances they cover have the potential to create uncertainty about the factual elements of the exception—a topic of particular importance when reviewing a motion for summary judgment for triable issues of *material* fact. [¶] To structure our analysis of this exception, and assist the clear statement of the factual elements of its variants, we adopt the phrase 'vehicle-use exception' from *Felix* and CACI No. 3725 to describe the exception in its broadest form. Next, under the umbrella of the vehicle-use exception, we recognize two identifiable categories with different factual elements. We label those two categories as the 'required-vehicle exception' and 'incidental benefit exception' because those labels emphasize the factual difference between the two categories." (*Pierson, supra,* 4 Cal.App.5th at pp. 624–625, original italics, internal citations omitted.)

- "Our division of the vehicle-use exception for purposes of this summary judgment motion should not be read as implying that this division is required, or even helpful, when presenting the scope of employment issue to a jury. The broad formulation of the vehicle-use exception in CACI No. 3725 correctly informs the jury that the issue of ultimate fact—namely, the scope of employment—may be proven in different ways." (*Pierson, supra,* 4 Cal.App.5th at p. 625, fn. 4.)

- "The portion of CACI No. 3725 addressing an employer requirement states: '[I]f an employer requires an employee to drive to and from the workplace so that the vehicle is available for the employer's business, then the drive to and from work is within the scope of employment. The employer's requirement may be either express or implied.' " (*Pierson, supra,* 4 Cal.App.5th at p. 625.)

"Our formulation of the incidental benefit exception is based on the part of CACI No. 3725 that states: 'The drive to and from work may … be within the scope of employment if the use of the employee's vehicle provides some direct or incidental benefit to the employer. There may be a benefit to the employer if (1) the employee has agreed to make the vehicle available as an accommodation to the employer, and (2) the employer has reasonably come to rely on the vehicle's use and expects the employee to make it available regularly.' The 'agreement may be either express or implied.' The existence of an express or implied agreement can be a question of fact for the jury." (*Pierson, supra,* 4 Cal.App.5th at p. 629.)

- " '[W]hen a business enterprise requires an employee to drive to and from its office in order to have his vehicle available for company business during the day, accidents on the way to or from the office are statistically certain to occur eventually, and, the business enterprise having required the driving to and from work, the risk of such accidents are risks incident to the business enterprise.' [¶] These holdings are the bases for the CACI instruction, the first paragraph of which tells the jury that the drive to and from work is within the scope of employment if the "employer requires [the] employee to drive to and from the workplace so that the vehicle is available for the employer's business," and the second paragraph, that the drive may be if 'the use of the employee's vehicle provides some direct or incidental benefit to the employer' and 'there may be a benefit to the employer if, one, the employee has [agreed] to make the vehicle available as an accommodation to the employer, and two, the employer has reasonably come to rely on the vehicle's use and expect the employee to make it available regularly.' (CACI No. 3725.)" (*Jorge, supra,* 3 Cal.App.5th at pp. 401–402, internal citation omitted.)

- " 'A well-known exception to the going-and-coming rule arises *where the use of the car gives some incidental benefit to the employer*. Thus, the key inquiry is whether there is an incidental benefit derived by the employer. [Citation.]' … The exception can apply if the use of a personally owned vehicle is either an express or implied condition of employment, or if the employee has agreed, expressly or implicitly, to make the vehicle available as an accommodation to the employer and the employer has 'reasonably come to rely upon its use and [to] expect the employee to make the vehicle available on a regular basis while still not requiring it as a condition of employment.' " (*Lobo, supra,* 182 Cal.App.4th at p. 297, original italics, internal citations omitted.)

- " 'To be sure, ordinary commuting is beyond the scope of employment … . Driving a required vehicle, however, is a horse of another color because it satisfies the control and benefit elements of respondeat superior. An employee who is required to use his or her own vehicle provides an "essential instrumentality" for the performance of the employer's work. … When a vehicle must be provided by an employee, the employer benefits by not having to have available an office car and yet possessing a means by which off-site visits can be performed by its employees.' " (*Moradi, supra,* 219 Cal.App.4th at p. 899.)

- "When an employer requires an employee to use a personal vehicle, it exercises meaningful control over the method of the commute by compelling the employee to foreswear the use of carpooling, walking, public transportation, or just being dropped off at work." (*Moradi, supra,* 219 Cal.App.4th at p. 899.)

- "The cases invoking the required-vehicle exception all involve employees whose jobs entail the

regular use of a vehicle to accomplish the job in contrast to employees who use a vehicle to commute to a definite place of business." (*Tryer v. Ojai Valley School Dist.* (1992) 9 Cal.App.4th 1476, 1481 [12 Cal.Rptr.2d 114].)

- "[N]ot all benefits to the employer are of the type that satisfy the incidental benefits exception. The requisite benefit must be one that is 'not common to commute trips by ordinary members of the work force.' Thus, employers benefit when employees arrive at work on time, but this benefit is insufficient to satisfy the incidental benefits exception. An example of a sufficient benefit is where an employer enlarges the available labor market by providing travel expenses and paying for travel time." (*Pierson, supra,* 4 Cal.App.5th at p. 630.)

- "Where the incidental benefit exception applies, the employee's commute directly between work and home is considered to be within the scope of employment for respondeat superior purposes. Minor deviations from a direct commute are also included, but there is no respondeat superior liability if the employee substantially departs from the employer's business or is engaged in a purely personal activity at the time of the tortious injury." (*Halliburton Energy Services, Inc. v. Department of Transportation* (2013) 220 Cal.App.4th 87, 97 [162 Cal.Rptr.3d 752].)

- "Here, the required vehicle exception to the going and coming rule, not the special errand exception, governs our analysis. Accordingly, we have not applied the six factors used in special errand cases to determine whether [employee] was acting within the scope of her employment at the time of the accident. [¶] Rather, we have applied the relevant principles under the required vehicle exception. Those principles differ from the six factors used to determine whether the special errand exception applies. In the present case, [employer] required [employee] to use her personal vehicle to travel to and from the office and other destinations. She also had to use her personal vehicle before, during, and after regular work hours to develop new business. We have properly examined whether [employee]'s use of her personal vehicle conferred an incidental benefit on [employer]—it did; whether her planned stops at the frozen yogurt shop and the yoga studio were an unforeseeable, substantial departure from her commute—they were not; whether they were a foreseeable, minor deviation from her regular commute—they were; whether they were not so unusual or startling that it would be unfair to include the resulting loss among the other costs of the employer's business—they were not; and whether they were necessary for [employee]'s comfort, convenience, health, and welfare—they were." (*Moradi, supra,* 219 Cal.App.4th at pp. 907−908.)

- "One exception to the going and coming rule has been recognized when the commute involves ' "an incidental benefit to the employer, not common to commute trips by ordinary members of the work force." [Citation.]' When the employer incidentally benefits from the employee's commute, that commute may become part of the employee's workday for the purposes of respondeat superior liability. [¶] The incidental benefit exception has been applied when the employer furnishes, or requires the employee to furnish, a vehicle for transportation on the job, and the negligence occurs while the employee is traveling to or from work in that vehicle." (*Halliburton Energy Services, Inc., supra,* 220 Cal.App.4th at p. 96, internal citation omitted.)

- "Public policy would be ill-served by a rule establishing 24-hour employer liability for on-call employees, regardless of the nature of the employee's activities at the time of an accident." (*Le Elder v. Rice* (1994) 21 Cal.App.4th 1604, 1610 [26 Cal.Rptr.2d 749].)

- "[T]he trier of fact remains free to determine in a particular case that the employee's use of his or her vehicle was too infrequent to confer a sufficient benefit to the employer so as to make it reasonable to require the employer to bear the cost of the employee's negligence in operating the vehicle. This is particularly true in the absence of an express requirement that the employee make his or her vehicle available for the employer's benefit or evidence that the employer actually relied on the availability of the employee's car to further the employer's purposes." (*Lobo v. Tamco* (2014) 230 Cal.App.4th 438, 447 [178 Cal.Rptr.3d 515].)

- "Whether the transit is part of the employment relationship tends to be a more subtle issue than whether the transit was between home and work. … 'These are the extraordinary transits that vary from the norm because the employer requires a special, different transit, means of transit, or use of a car, for some particular reason of his own. When the employer gains that kind of a particular advantage, the job does more than call for routine transport to it; it plays a different role, bestowing a special benefit upon the employer by reason of the extraordinary circumstances. The employer's special request, his imposition of an unusual condition, removes the transit from the employee's choice or convenience and places it within the ambit of the employer's choice or convenience, restoring the employer-employee relationship.' " (*Zhu v. Workers' Comp. Appeals Bd.* (2017) 12 Cal.App.5th 1031, 1038-1039 [219 Cal.Rptr.3d 630].)

- "Liability may be imposed on an employer for an employee's tortious conduct while driving to or from work, if at the time of the accident, the employee's use of a personal vehicle was required by the employer or otherwise provided a benefit to the employer." (*Newland, supra,* 24 Cal.App.5th at p. 679.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, § 195

Haning, et al., California Practice Guide: Personal Injury, Ch. 2(II)-A, Part II *Theories Of Recovery—Vicarious Liability,* ¶ 2:803 (The Rutter Group)

2 Levy et al., California Torts, Ch. 20, *Motor Vehicles*, § 20.42[3][d] (Matthew Bender)

2 California Employment Law, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, § 30.05 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts*, § 248.16 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent*, § 427.22 (Matthew Bender)

10 California Points and Authorities, Ch. 100A, *Employer and Employee: Respondeat Superior,* § 100A.26 et seq. (Matthew Bender)

1 California Civil Practice: Torts § 3:10 (Thomson Reuters)

3903Q. Survival Damages (Economic Damage) (Code Civ. Proc, § 377.34)

If you decide that [*name of plaintiff***] has proved [his/her] claim against [***name of defendant***] for the death of [***name of decedent***], you must also decide the amount of damages that [***name of decedent***] sustained before death and that [he/she] would have been entitled to recover because of [***name of defendant***]'s conduct[, including any [penalties/ [or] punitive damages] as explained in the other instructions that I will give you].**

[*Name of plaintiff***] may recover the following damages:**

[1. The reasonable cost of reasonably necessary medical care that [*name of decedent***] received;]**

[2. The amount of [income/earnings/salary/wages] that [he/she] lost before death;]

[3. The reasonable cost of health care services that [*name of decedent***] would have provided to [***name of family member***] before [***name of decedent***]'s death;]**

[3. [*Specify other recoverable economic damage.***]]**

You may not award damages for any loss for [*name of decedent***]'s shortened life span attributable to [his/her] death.**

New May 2019

Directions for Use

Give this instruction if a deceased person's estate claims survival damages for harm that the decedent incurred in his or her lifetime. Survival damages can include punitive damages and penalties. (See Code Civ. Proc., § 377.34.) Include the bracketed language in the last sentence of the opening paragraph if either or both are sought. If punitive damages are claimed, give the appropriate instruction from CACI Nos. 3940–3949.

If items 1 and 2 are given, do not also give CACI No. 3903A, *Medical Expenses—Past and Future (Economic Damages)*, and CACI No. 3903C, *Past and Future Lost Earnings (Economic Damages),* as the future damages parts of those instructions are not applicable. Other 3903 group instructions may be omitted if their items of damages are included under item 3 and must not be given if they include future damages.

Damages for pain, suffering, or disfigurement are not recoverable in a survival action except at times in an elder abuse case. (Code Civ. Proc, § 377.34; see *Quiroz v. Seventh Ave. Center* (2006) 140 Cal.App.4th 1256, 1265 [45 Cal.Rptr.3d 222]; see also instructions in the 3100 Series, Elder Abuse and Dependent Adult Civil Protection Act.)

Sources and Authority

- Survival Damages. Code of Civil Procedure section 377.34.

- "In California, 'a cause of action for or against a person is not lost by reason of the person's death' and no 'pending action . . . abate[s] by the death of a party . . .' In a survival action by the deceased plaintiff's estate, the damages recoverable expressly exclude 'damages for pain, suffering, or disfigurement.' They do, however, include all 'loss or damage that the decedent sustained or incurred before death, including any penalties or punitive or exemplary damages.' Thus, under California's survival law, an estate can recover not only the deceased plaintiff's lost wages, medical expenses, and any other pecuniary losses incurred before death, but also punitive or exemplary damages." (*County of L.A. v. Superior Court* (1999) 21 Cal.4th 292, 303-304 [87 Cal.Rptr.2d 441, 981 P.2d 68], internal citations omitted.)

- "The first category consists of the reasonable value of nursing and other services that Decedent would have provided to his wife prior to his death, but was unable to provide due to his illness (replacement care). Again, [defendant] does not contest the recoverability of such damages here. Nor did it below. Such damages are recoverable. (See … CACI No. 3903E ["Loss of Ability to Provide Household Services (Economic Damage)"].)" (*Williams v. The Pep Boys Manny Moe & Jack of California* (2018) 27 Cal.App.5th 225, 238 [238 Cal.Rptr.3d 809], internal citations omitted.)

- "By expressly authorizing recovery of only penalties or punitive damages that the decedent would have been entitled to recover had the decedent lived, the Legislature necessarily implied that *other* categories of damages that the decedent would have been entitled to recover had the decedent lived would not be recoverable in a survival action." (*Williams, supra,* 27 Cal.App.5th at p. 239, original italics.)

- "In survival actions, … damages are narrowly limited to 'the loss or damage that the decedent sustained or incurred before death", which by definition excludes future damages. For a trial court to award ' "lost years" damages' in a survival action—that is, damages for 'loss of future economic benefits that [a decedent] would have earned during the period by which his life expectancy was shortened'—would collapse this fundamental distinction and render the plain language of 377.34 meaningless." (*Williams, supra,* 27 Cal.App.5th at p. 240, internal citations omitted.)

- "The same conclusion [that they are not recoverable in a survival action] would seem to follow as to the trial court's award of damages for the value of Decedent's lost pension benefits and Social Security benefits." (*Williams, supra,* 27 Cal.App.5th at p. 240, fn. 21.)

- "[T]here is at least one exception to the rule that damages for the decedent's predeath pain and suffering are not recoverable in a survivor action. Such damages are expressly recoverable in a survivor action under the Elder Abuse Act if certain conditions are met." (*Quiroz, supra,* 140 Cal.App.4th at p. 1265.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, § 27

4 Levy et al., California Torts, Ch. 55, *Death and Survival Actions*, § 55.21 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 181, *Death and Survival Actions*, § 181.45 (Matthew Bender)

6 California Points and Authorities, Ch. 66, *Death and Survival Actions*, § 66.63 et seq. (Matthew Bender)

4002. "Gravely Disabled" Explained

The term "gravely disabled" means that a person is presently unable to provide for his or her basic needs for food, clothing, or shelter because of [a mental health disorder/impairment by chronic alcoholism]. [The term "gravely disabled" does not include persons with intellectual disabilities by reason of the disability alone.]

[[*Insert one or more of the following*:**] [psychosis/bizarre or eccentric behavior/delusions/hallucinations/[***insert other***]] [is/are] not enough, by [itself/themselves], to find that [***name of respondent***] is gravely disabled. [He/She] must be unable to provide for the basic needs of food, clothing, or shelter because of [a mental disorder/impairment by chronic alcoholism].]**

[If you find [*name of respondent***] will not take [his/her] prescribed medication without supervision and that a mental disorder makes [him/her] unable to provide for [his/her] basic needs for food, clothing, or shelter without such medication, then you may conclude [***name of respondent***] is presently gravely disabled.**

In determining whether [*name of respondent***] is presently gravely disabled, you may consider evidence that [he/she] did not take prescribed medication in the past. You may also consider evidence of [his/her] lack of insight into [his/her] mental condition.]**

In considering whether [*name of respondent***] is presently gravely disabled, you may not consider the likelihood of future deterioration or relapse of a condition.**

New June 2005; Revised January 2018, May 2019

Directions for Use

This instruction provides the definition of "gravely disabled" from Welfare and Institutions Code section 5008(h)(1)(A), which will be the applicable standard in most cases. The instruction applies to both adults and minors. (*Conservatorship of M.B.* (2018) 27 Cal.App.5th 98, 107 [237 Cal.Rptr.3d 775].)

Read the bracketed sentence at the end of the first paragraph if appropriate to the facts of the case. There is a second standard in Welfare and Institutions Code section 5008(h)(1)(B) involving a finding of mental incompetence under Penal Code section 1370. A different instruction will be required if this standard is alleged.

The last paragraph regarding the likelihood of future deterioration may not apply if the respondent has no insight into his or her mental disorder. (*Conservatorship of Walker* (1989) 206 Cal.App.3d 1572, 1576–1577 [254 Cal.Rptr. 552].)

If there is evidence concerning the availability of third parties that are willing to provide assistance to the proposed conservatee, see CACI No. 4007, *Third Party Assistance*.

Sources and Authority

- "Gravely Disabled" Defined. Welfare and Institutions Code section 5008(h).

- "The enactment of the LPS and with it the substitution of 'gravely disabled' for 'in need of treatment' as the basis for commitment of individuals not dangerous to themselves or others reflects a legislative determination to meet the constitutional requirements of precision. The term 'gravely disabled' is sufficiently precise to exclude unusual or nonconformist lifestyles. It connotes an inability or refusal on the part of the proposed conservatee to care for basic personal needs of food, clothing and shelter." (*Conservatorship of Chambers* (1977) 71 Cal.App.3d 277, 284 [139 Cal.Rptr. 357], footnotes omitted.)

- "[T]he public guardian must prove beyond a reasonable doubt that the proposed conservatee is gravely disabled." (*Conservatorship of Jesse G.* (2016) 248 Cal.App.4th 453, 461 [203 Cal.Rptr.3d 667].)

- "The stricter criminal standard is used because the threat to the conservatee's individual liberty and personal reputation is no different than the burdens associated with criminal prosecutions." (*Conservatorship of Smith* (1986) 187 Cal.App.3d 903, 909 [232 Cal.Rptr. 277] internal citations omitted.)

- "Bizarre or eccentric behavior, even if it interferes with a person's normal intercourse with society, does not rise to a level warranting conservatorship except where such behavior renders the individual helpless to fend for herself or destroys her ability to meet those basic needs for survival." (*Conservatorship of Smith, supra,* 187 Cal.App.3d at p. 909.)

- "Under [Welfare and Institutions Code] section 5350, subdivision (e)(1), 'a person is not "gravely disabled" if that person can survive safely without involuntary detention with the help of responsible family, friends, or others who are both willing and able to help provide for the person's basic personal needs for food, clothing, or shelter.' " (*Conservatorship of Jesse G., supra,* 248 Cal.App.4th at p. 460.)

- "While [third person] may not have shown that he could manage appellant's mental health symptoms as adeptly as would a person professionally trained to care for someone with a mental disorder, that is not the standard. As appellant states, '[t]he question in a LPS conservatorship case where the proposed conservatee asserts a third party assistance claim is not whether the third party will be able to manage the person's mental health symptoms completely. Rather, the dispositive question is whether the person is able to provide the proposed conservatee with food, clothing, and shelter on a regular basis." (*Conservatorship of Jesse G., supra,* 248 Cal.App.4th at p. 463 fn. 4.)

- "We ... hold that a person sought to be made an LPS conservatee subject to involuntary confinement in a mental institution, is entitled to have a unanimous jury determination of all of the questions involved in the imposition of such a conservatorship, and not just on the issue of grave disability in the narrow sense of whether he or she can safely survive in freedom and provide food, clothing or shelter unaided by willing, responsible relatives, friends or appropriate third persons." (*Conservatorship of Davis* (1981) 124 Cal.App.3d 313, 328 [177 Cal.Rptr. 369].)

- "[A]n individual who will not voluntarily accept mental health treatment is not for that reason alone gravely disabled." (*Conservatorship of Symington* (1989) 209 Cal.App.3d 1464, 1468 [257 Cal.Rptr. 860].)

- "[T]he pivotal issue is whether [respondent] was 'presently' gravely disabled and the evidence demonstrates that he was not. Accordingly, the order granting the petition must be overturned." (*Conservatorship of Benvenuto* (1986) 180 Cal.App.3d. 1030, 1034 [226 Cal.Rptr. 33], fn. omitted, citing to *Conservatorship of Murphy* (1982) 134 Cal.App.3d 15, 18 [184 Cal.Rptr. 363].)

- "[A] conservatorship cannot be established because of a perceived likelihood of future relapse. To do so could deprive the liberty of persons who will not suffer such a relapse solely because of the pessimistic statistical odds. Because of the promptness with which a conservatorship proceeding can be invoked the cost in economic and liberty terms is unwarranted." (*Conservatorship of Neal* (1987) 190 Cal.App.3d 685, 689 [235 Cal.Rptr. 577].)

- "A perceived likelihood of future relapse, without more, is not enough to justify establishing a conservatorship. Neither can such a likelihood justify keeping a conservatorship in place if its subject is not presently gravely disabled, in light of the statutory provisions allowing rehearings to evaluate a conservatee's current status." (*Conservatorship of Jones* (1989) 208 Cal.App.3d 292, 302 [256 Cal.Rptr. 415], internal citation omitted.)

- "[T]he definition of ' "[g]ravely disabled minor" ' from section 5585.25 is not part of the LPS Act, but is found in the Children's Civil Commitment and Mental Health Treatment Act of 1988. (§ 5585.) This definition applies 'only to the initial 72 hours of mental health evaluation and treatment provided to a minor. … Evaluation and treatment of a minor beyond the initial 72 hours shall be pursuant to the … [LPS Act].' (§ 5585.20.) Accordingly, we must apply the definition found in the LPS Act, and determine whether there was substantial evidence Minor suffered from a mental disorder as a result of which she 'would be unable to provide for [her] basic personal needs' if she had to so provide." (*Conservatorship of M.B., supra,* 27 Cal.App.5th at p. 107.)

Secondary Sources

3 Witkin, California Procedure (5th ed. 2008) Actions, § 97

2 California Conservatorship Practice (Cont.Ed.Bar) §§ 23.3, 23.5

32 California Forms of Pleading and Practice, Ch. 361A, *Mental Health and Mental Disabilities: Judicial Commitment, Health Services, and Civil Rights*, §§ 361A.33, 361A.42 (Matthew Bender)

4003. "Gravely Disabled" Minor Explained

Revoked May 2019. See *Conservatorship of M.B.* (2018) 27 Cal.App.5th 98, 107 [237 Cal.Rptr.3d 775].)

~~**The term "gravely disabled" means that a minor is presently unable to use those things that are essential to health, safety, and development, including food, clothing, and shelter, even if they are provided to the minor by others, because of a mental disorder. [The term "gravely disabled" does not include mentally retarded persons by reason of being mentally retarded alone.]**~~

~~**[[***Insert one or more of the following:***] [physical or mental immaturity/developmental disabilities/epilepsy/alcoholism/drug abuse/repeated antisocial behavior/psychosis/bizarre or eccentric behavior/delusions/hallucinations/[***insert other***]] [is/are] not enough, by [itself/themselves], to find that [***name of respondent***] is gravely disabled. [He/She] must be unable to use those things that are essential to health, safety, or development because of a mental disorder.]**~~

~~**[If you find [***name of respondent***] will not take [his/her] medication without supervision and that a mental disorder makes [him/her] unable to use those things that are essential to health, safety, or development without such medication, then you may conclude [***name of respondent***] is presently gravely disabled.**~~

~~**In determining whether [***name of respondent***] is presently gravely disabled, you may consider evidence that [he/she] did not take prescribed medication in the past. You may consider evidence of [his/her] lack of insight into [his/her] mental condition.]**~~

~~**In considering whether [***name of respondent***] is presently gravely disabled, you may not consider the likelihood of future deterioration relapse of a condition.**~~

~~*New June 2005*~~

~~Directions for Use~~

~~Read the bracketed sentence at the end of the first paragraph if appropriate to the facts of the case.~~

~~The principle regarding the likelihood of future deterioration may not apply in cases where the respondent has no insight into his or her mental disorder. (*Conservatorship of Walker* (1989) 206 Cal.App.3d 1572, 1576–1577 [254 Cal.Rptr. 552].)~~

~~If there is evidence concerning the availability of third parties that are willing to provide assistance to the proposed conservatee, see CACI No. 4008, *Third Party Assistance to Minor*.~~

~~Sources and Authority~~

- ~~"Gravely Disabled Minor" Defined. Welfare and Institutions Code section 5585.25.~~

- "[T]he actual commitment of a mentally disordered minor who is also a ward of the juvenile court can be accomplished *only* in accordance with the LPS Act." (*In re Michael E.* (1975) 15 Cal.3d 183, 189 [123 Cal.Rptr. 103, 538 P.2d 231].)

- "The actual commitment of a minor ward of a juvenile court to a state hospital can be lawfully accomplished only through the appointment of a conservator who is vested with authority to place the minor in such a hospital. Such conservator may be appointed only for a 'gravely disabled' minor who is entitled to a jury trial on the issue whether he is in fact 'gravely disabled.' Conservatorship shall be recommended to the court only if, on investigation, no suitable alternatives are available. The conservator's proposed powers and duties are to be recommended to the court. A conservator may commit the minor to a medical facility, including a state hospital, only when specifically authorized by the court. Conservatorships automatically terminate at the end of one year, and every six months a conservatee may petition for a rehearing as to his status. Finally, the entertainment of a petition for conservatorship is a function of the superior and not the juvenile court." (*In re Michael E., supra,* 15 Cal.3d at pp. 192–193, internal citations and footnotes omitted.)

- "Although a minor may not be legally responsible to provide for his basic personal needs, or may suffer disabilities other than a mental disorder which preclude him from so providing, the [statutory] definition is nevertheless applicable. A minor is 'gravely disabled' within the meaning of section 5008, subdivision (h)(1), when the trier of fact, on expert and other testimony, finds that disregarding other disabilities, if any, the minor, because of the further disability of a mental disorder, would be unable to provide for his basic personal needs. Immaturity, either physical or mental when not brought about by a mental disorder, is not a disability which would render a minor 'gravely disabled' within the meaning of section 5008." (*In re Michael E., supra,* 15 Cal.3d at p. 192, fn. 12.)

Secondary Sources

3 Witkin, California Procedure (5th ed. 2008) Actions, §§ 90, 97

Ross, California Practice Guide: Probate, Ch. 1-B, *Premortem Planning*, ¶ 1:112 et seq. (The Rutter Group)

2 California Conservatorship Practice (Cont.Ed.Bar) § 23.16

28 California Forms of Pleading and Practice, Ch. 329, *Juvenile Courts: Delinquency Proceedings*, § 329.73 (Matthew Bender)

32 California Forms of Pleading and Practice, Ch. 361A, *Mental Health and Mental Disabilities: Judicial Commitment, Health Services, and Civil Rights*, §§ 361A.42, 361A.45 (Matthew Bender)

4106. Breach of Fiduciary Duty by Attorney—Essential Factual Elements

[*Name of plaintiff*] claims that [he/she/it] was harmed because [*name of defendant*] breached an attorney's duty [*describe duty, e.g., "not to represent clients with conflicting interests"*]. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] breached the duty of an attorney [*describe duty*];**

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

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

New September 2003; Revised April 2004; Renumbered from CACI No. 605 December 2007; Revised May 2019

Directions for Use

The existence of a fiduciary relationship is a question of law. Whether an attorney has breached that fiduciary duty is a question of fact. (*David Welch Co. v. Erskine & Tulley* (1988) 203 Cal.App.3d 884, 890 [250 Cal.Rptr. 339], disapproved on other grounds in *Lee v. Hanley* (2015) 61 Cal.4th 1225, 1239 [191 Cal.Rptr.3d 536, 354 P.3d 334].)

If the attorney's breach of duty is negligent rather than intentional or fraudulent, the "but for" ("would have happened anyway") causation standard applicable to legal malpractice (see *Viner v. Sweet* (2003) 30 Cal.4th 1232 [135 Cal.Rptr.2d 629, 70 P.3d 1046]) applies. (*Knutson v. Foster* (2018) 25 Cal.App.5th 1075, 1093–1094 [236 Cal.Rptr.3d 473].) If so, the optional last sentence of CACI No. 430, *Causation: Substantial Factor,* should be given: "Conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct."

Sources and Authority

- ~~"To establish a cause of action for breach of fiduciary duty, a plaintiff must demonstrate the existence of a fiduciary relationship, breach of that duty and damages." (*Shopoff & Cavallo LLP v. Hyon* (2008) 167 Cal.App.4th 1489, 1509 [85 Cal.Rptr.3d 268].)~~

- " 'The relation between attorney and client is a fiduciary relation of the very highest character.' " (*Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 189 [98 Cal.Rptr. 837, 491 P.2d 421].)

- ~~"[A] breach of fiduciary duty is a species of tort distinct from a cause of action for professional negligence." (*Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1086 [41 Cal.Rptr.2d 768].)~~

- " 'The breach of fiduciary duty can be based upon either negligence or fraud depending on the

circumstances. It has been referred to as a species of tort distinct from causes of action for professional negligence [citation] and from fraud [citation].' 'The elements of a cause of action for breach of fiduciary duty are the existence of a fiduciary relationship, breach of fiduciary duty, and damages.' " (*Knutson, supra,* 25 Cal.App.5th at pp. 1093–1094, internal citation omitted.)

- "Substantial factor causation is the correct causation standard for an intentional breach of fiduciary duty." (*Knutson, supra,* 25 Cal.App.5th at p. 1094.)

- "The trial court applied the legal malpractice standard of causation to [plaintiff]'s intentional breach of fiduciary duty cause of action. The court cited The Rutter Group's treatise on professional responsibility to equate causation for legal malpractice with causation for all breaches of fiduciary duty: ' "The rules concerning causation, damages, and defenses that apply to lawyer negligence actions … also govern actions for breach of fiduciary duty." ' This statement of the law is correct, however, only as to claims of breach of fiduciary duty arising from negligent conduct." (*Knutson, supra,* 25 Cal.App.5th at p. 1094, internal citations omitted.)

- "Expert testimony is not required, but is admissible to establish the duty and breach elements of a cause of action for breach of fiduciary duty where the attorney conduct is a matter beyond common knowledge." (*Stanley, supra,* 35 Cal.App.4th at p. 1087, internal citations omitted.)

- "The scope of an attorney's fiduciary duty may be determined as a matter of law based on the Rules of Professional Conduct which, 'together with statutes and general principles relating to other fiduciary relationships, all help define the duty component of the fiduciary duty which an attorney owes to his [or her] client.' " (*Stanley, supra,* 35 Cal.App.4th at p. 1087.)

Secondary Sources

1 Witkin, California Procedure (4th ed. 1996) Attorneys, § 118

Vapnek et al., California Practice Guide: Professional Responsibility (The Rutter Group) ¶ 6:425

3 Levy et al., California Torts, Ch. 32, *Liability of Attorneys*, § 32.02 (Matthew Bender)

7 California Forms of Pleading and Practice, Ch. 76, *Attorney Professional Liability*, § 76.150 (Matthew Bender)

2A California Points and Authorities, Ch. 24A, *Attorneys at Law: Malpractice*, §§ 24A.27[3][d], 24A.29[3][j] (Matthew Bender)

4570. Right to Repair Act—Construction Defects—Essential Factual Elements (Civ. Code, § 896)

[*Name of plaintiff***] claims that [he/she] has been harmed because of defects in [***name of defendant***]'s original construction of [***name of plaintiff***]'s home. To establish this claim, [***name of plaintiff***] must prove [one or more of the following:]**

> **[***Specify all defects from Civil Code section 896, e.g., that a defectively constructed door allowed unintended water to pass beyond, around, or through it.***]**

New May 2019

Directions for Use

Give this instruction for a claim under the Right to Repair Act (the Act). (Civ. Code, § 895 et seq.) The Act applies to original construction intended to be sold as an individual dwelling unit. (Civ. Code, § 896.) Section 896 lists all of the construction standards covered by the Act. List all defects within the coverage of section 896.

In order to make a claim for violation of the Act, a homeowner need only show that the home's original construction does not meet the applicable standard. No further showing of causation or damages is required to meet the burden of proof regarding a violation of the Act. (Civ. Code, § 942; see also Civ. Code, § 936 [negligence or breach of contract required in claim against general contractors, subcontractors, material suppliers, individual product manufacturers, and design professionals].)

For an instruction on the limited damages recoverable under Civil Code, section 944, see CACI No. 4571, *Right to Repair Act—Damages*. For instructions on various affirmative defenses available to the contractor under Civil Code section 945.5, see CACI Nos. 4572–4574

Sources and Authority

- Definitions. Civil Code section 895.
- Construction Standards Under the Right to Repair Act. Civil Code section 896.
- Intent of Standards. Civil Code section 897.
- Applicability of Act to Other Entities Involved in Construction. Civil Code section 936.
- Damages and Causation Not Required. Civil Code section 942.
- Exclusive Remedy for Certain Damages. Civil Code section 943.
- Damages Recoverable. Civil Code section 944.
- Affirmative Defenses. Civil Code section 945.5.

- "[T]he Right to Repair Act (the Act) was enacted in 2002. As recently explained by the Supreme Court, '[t]he Act sets forth detailed statewide standards that the components of a dwelling must satisfy. It also establishes a prelitigation dispute resolution process that affords builders notice of alleged construction defects and the opportunity to cure such defects, while granting homeowners the right to sue for deficiencies even in the absence of property damage or personal injury.' " (*Kohler Co. v. Superior Court* (2018) 29 Cal.App.5th 55, 59 [240 Cal.Rptr.3d 426], internal citation omitted.)

- "To sum up this portion of the statutory scheme: For economic losses, the Legislature intended to supersede *Aas* [*Aas v. Superior Court* (2000) 24 Cal.4th 627, 632] and provide a statutory basis for recovery. For personal injuries, the Legislature preserved the status quo, retaining the common law as an avenue for recovery. And for property damage, the Legislature replaced the common law methods of recovery with the new statutory scheme. The Act, in effect, provides that construction defect claims not involving personal injury will be treated the same procedurally going forward whether or not the underlying defects gave rise to any property damage." (*McMillin Albany LLC v. Superior Court* (2018) 4 Cal.5th 241, 253 [227 Cal.Rptr.3d 191, 408 P.3d 797].)

- "[A] homeowner alleging that a manufactured product—such as a plumbing fixture—installed in her home is defective may bring a claim under the Act only if the allegedly defective product caused a violation of one of the standards set forth in section 896; otherwise she must bring a common law claim outside of the Act against the manufacturer, and would be limited to the damages allowed under the common law." (*Kohler Co., supra,* 29 Cal.App.5th at p. 63.)

- "Insofar as section 944 allows recovery only for damages resulting from failure 'of the home,' it is clear that 'home' is not limited to the structure where people reside, because section 942 states that, '[i]n order to make a claim for violation of the standards set forth in Chapter 2 (commencing with Section 896), a homeowner need only demonstrate … that *the home* does not meet the applicable standard … .' As we have seen section 896 covers a multitude of defects not only in the residence but also in improvements such as driveways, landscaping, and damage to the lot, etc." (*Gillotti v. Stewart* (2017) 11 Cal.App.5th 875, 897 [217 Cal.Rptr.3d 860], original italics.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1307

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, § 104.43 (Matthew Bender)

19 California Points and Authorities, Ch. 66, *Products Liability*, § 190.224 (Matthew Bender)

12 California Real Estate Law and Practice, Ch. 441, *Consumers' Remedies*, § 441.60 et seq. (Matthew Bender)

4571. Right to Repair Act—Damages (Civ. Code, § 944)

If [*name of plaintiff*] proves any construction defects, [he/she] is entitled to recover only for the following:

a. The reasonable value of repairing the defect(s);

b. The reasonable cost of repairing any damage caused by the repair efforts;

c. The reasonable cost of repairing and correcting any damage resulting from the failure of the home to meet the standards;

d. The reasonable cost of removing and replacing any improper repair made by [*name of defendant*];

e. Reasonable relocation and storage expenses;

f. Lost business income if the home was used as a principal place of a business licensed to be operated from the home;

g. Reasonable investigative costs for each defect proved;

h. (*Specify any other costs or fees recoverable by contract or statute.*)

[[*Name of plaintiff*]'s right to the reasonable value of repairing any defect is limited to the lesser of the cost of repair or the diminution in current value of the home caused by the defect.]

New May 2019

Directions for Use

This instruction sets forth the damages recoverable in an action for construction defects under the Right to Repair Act. (Civ. Code, § 944.) Delete those that the plaintiff is not claiming.

Give the optional last paragraph for any claims involving a detached single-family home. The common-law personal use exception is preserved. (Civ. Code, § 943(b).)

Sources and Authority

- Damages Recoverable Under the Right to Repair Act. Civil Code section 944.
- "The provisions of chapter 5 make explicit the intended avenues for recouping economic losses, property damages, and personal injury damages. Section 944 defines the universe of damages that are recoverable in an action under the Act. (§ 944 ['If a claim for damages is made under this title, the homeowner is only entitled to damages for' a series of specified types of losses].) In turn,

section 943 makes an action under the Act the exclusive means of recovery for damages identified in section 944 absent an express exception: 'Except as provided in this title, no other cause of action for a claim covered by this title or for damages recoverable under Section 944 is allowed.' (§ 943, subd. (a).) In other words, section 944 identifies what damages may be recovered in an action under the Act, and section 943 establishes that such damages may only be recovered in an action under the Act, absent an express exception." (*McMillin Albany LLC v. Superior Court* (2018) 4 Cal.5th 241, 251 [227 Cal.Rptr.3d 191, 408 P.3d 797].)

- "Insofar as section 944 allows recovery only for damages resulting from failure 'of the home,' it is clear that 'home' is not limited to the structure where people reside, because section 942 states that, '[i]n order to make a claim for violation of the standards set forth in Chapter 2 (commencing with Section 896), a homeowner need only demonstrate … that *the home* does not meet the applicable standard … .' As we have seen section 896 covers a multitude of defects not only in the residence but also in improvements such as driveways, landscaping, and damage to the lot, etc." (*Gillotti v. Stewart* (2017) 11 Cal.App.5th 875, 897 [217 Cal.Rptr.3d 860], original italics.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1312

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, § 104.43 (Matthew Bender)

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

12 California Real Estate Law and Practice, Ch. 441, *Consumers' Remedies*, § 441.69 (Matthew Bender)

4572. Right to Repair Act—Affirmative Defense—Act of Nature (Civ. Code, § 945.5(a))

[*Name of defendant*] claims that [he/she/it] is not responsible for [*name of plaintiff*]'s harm because it was caused by an unforeseen event. To establish this defense, [*name of defendant*] must prove that the [*specify defect, e.g., door that allowed unintended water to pass through it*] was caused by [*specify, e.g., a landslide*], which was an unforeseen [act of nature/manmade event] that caused the home not to meet the otherwise required standard.

New May 2019

Directions for Use

This instruction sets forth a builder's affirmative defense to a homeowner's construction defect claim under the Right to Repair Act, asserting the construction defect was caused by an unforeseen act of nature. An "unforeseen act of nature" includes unforeseen manmade events such as war, terrorism, or vandalism, in addition to weather conditions and earthquakes. (See Civ. Code, § 945.5(a).)

The unforeseen event must be "in excess of the design criteria expressed by the applicable building codes, regulations, and ordinances in effect at the time of original construction." (Civ. Code, § 945.5(a).) If there is a question of fact with regard to such a situation, modify the instruction accordingly.

Sources and Authority

- Right to Repair Act Affirmative Defense of Unforeseen Act of Nature. Civil Code section 945.5(a).

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1312

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, § 104.43 (Matthew Bender)

12 California Real Estate Law and Practice, Ch. 441, *Consumers' Remedies*, § 441.70 (Matthew Bender)

4573. Right to Repair Act—Affirmative Defense—Unreasonable Failure to Minimize or Prevent Damage (Civ. Code, § 945.5(b))

[*Name of defendant***] claims that [he/she/it] is not responsible for [***name of plaintiff***]'s harm because [***name of plaintiff***] unreasonably failed to minimize or prevent [his/her] damages in a timely manner. To establish this defense, [***name of defendant***] must prove [***select one or more of the following***:]**

> **[a. [***Name of plaintiff***] failed to allow [***name of defendant***] reasonable and timely access to the home for inspections and repairs.]**
>
> **[b. [***Name of plaintiff***] failed to give [***name of defendant***] timely notice after discovery of a construction defect.]**
>
> **[c. [***Specify other act or omission of plaintiff that is alleged to constitute failure to minimize or prevent damage.***]**

[*Name of defendant***] cannot avoid responsibility for damages due to an untimely or inadequate response to [***name of plaintiff***]'s claim.**

New May 2019

Directions for Use

This instruction sets forth a builder's affirmative defense to a homeowner's construction defect claim under the Right to Repair Act, asserting the homeowner's failure to minimize or prevent damages. (See Civ. Code, § 945.5(b).) Select the particular failure to mitigate alleged from a or b, or specify a different failure in c. CACI No. 3931, *Mitigation of Damages (Property Damage)*, may also be given for the general principle of the plaintiff's duty to mitigate damages.

Sources and Authority

- Right to Repair Act Affirmative Defense of Homeowner's Failure to Mitigate. Civil Code section 945.5(b).

- "Although the Act establishes various maximum time periods in which the builder may respond, inspect, offer to repair, and commence repairs, the builder avails itself of the full time allowed by the Act at its peril. The builder is liable for the damages its construction defects cause, and even when a homeowner has acted unreasonably in failing to limit losses, the builder remains liable for 'damages due to the untimely or inadequate response of a builder to the homeowner's claim.' (§ 945.5, subd. (b).) What constitutes a timely response will vary according to the circumstances, and the maximum response periods set forth by the Act do not necessarily insulate a builder from damages when the builder has failed to take remedial action as promptly as is reasonable under the circumstances. The Act's liability provisions thus supply builders and homeowners clear incentives to move quickly to minimize damages when alerted to emergencies." (*McMillin Albany LLC v. Superior Court* (2018) 4 Cal.5th 241, 257-258 [227 Cal.Rptr.3d 191, 408 P.3d 797].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1312

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, § 104.43 (Matthew Bender)

12 California Real Estate Law and Practice, Ch. 441, *Consumers' Remedies*, § 441.70 (Matthew Bender)

4574. Right to Repair Act—Affirmative Defense—Plaintiff's Subsequent Acts or Omissions (Civ. Code, § 945.5(d))

[*Name of defendant*] claims that [he/she/it] is not responsible for [*name of plaintiff*]'s harm because it was caused by [*name of plaintiff*]'s later [acts/ [or] omissions]. To establish this defense [*name of defendant*] must prove that the harm was caused by [[*name of plaintiff*]'s later [alterations/ordinary wear and tear/misuse/abuse/[or] neglect]/ [or] the structure's use for something other than its intended purpose].

New May 2019

Directions for Use

This instruction sets forth a builder's affirmative defense to a homeowner's construction defect claim under the Right to Repair Act, asserting that the harm was caused by the homeowner's alterations, ordinary wear and tear, misuse, abuse, or neglect, or by the structure's use for something other than its intended purpose. (Civ.Code, § 945.5(d).)

The homeowner is responsible for any acts or omissions by any of his or her agents or independent third parties. (Civ.Code, § 945.5(d).) Modify the instruction as needed if the harm is alleged to have been caused by the subsequent acts of an agent or third party.

Sources and Authority

- Right to Repair Act Affirmative Defense of Alterations, Ordinary Wear and Tear, Misuse, Abuse, Neglect, or Use for Something Other Than Intended. Civil Code section 945.5(d).

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1312

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, § 104.43 (Matthew Bender)

12 California Real Estate Law and Practice, Ch. 441, *Consumers' Remedies*, § 441.70 (Matthew Bender)

5001. Insurance

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

New September 2003; Revised April 2004, May 2019

Directions for Use

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

By statute, evidence of a defendant's insurance coverage is inadmissible to prove liability. (Evid. Code, § 1155.) If evidence of insurance has been admitted for some other reason, a limiting instruction should be given advising the jury to consider the evidence only for the purpose for which it was admitted.

Sources and Authority

- Evidence of Insurance Inadmissible to Prove Liability. Evidence Code section 1155.
- " 'The evidence [of liability insurance] is regarded as both irrelevant and prejudicial to the defendant. Hence, not only is it subject to objection and exclusion, but any attempt to inject it by question, suggestion or argument is considered misconduct of counsel, and is often held reversible error. [Citations.]' " (*Neumann v. Bishop* (1976) 59 Cal.App.3d 451, 469 [130 Cal.Rptr. 786].)
- "Evidence of a *defendant's* insurance coverage ordinarily is not admissible to prove the defendant's negligence or other wrongdoing." (*Blake v. E. Thompson Petroleum Repair Co.* (1985) 170 Cal.App.3d 823, 830 [216 Cal.Rptr. 568], original italics.)
- "[E]vidence of a plaintiff's insurance coverage is not admissible for the purpose of mitigating the damages the plaintiff would otherwise recover from the tortfeasor. This is the 'collateral source rule.' (*Blake, supra,* 170 Cal.App.3d at p. 830; see *Helfend v. Southern California Rapid Transit Dist.* (1970) 2 Cal.3d 1, 16-18 [84 Cal.Rptr. 173, 465 P.2d 61].)
- "Both of the foregoing principles are subject to the qualification that where the topic of insurance coverage is coupled with other relevant evidence, that topic may be admitted along with such other evidence. '[para.] It has always been the rule that the existence of insurance may properly be referred to in a case if the evidence is otherwise admissible.' The trial court must then determine, pursuant to Evidence Code section 352, whether the probative value of the other evidence outweighs the prejudicial effect of the mention of insurance." (*Blake, supra,* 170 Cal.App.3d at p. 831, internal citation omitted.)
- "[T]he trial court did not abuse its discretion by excluding evidence of [plaintiff]'s insured [health

care coverage] under Evidence Code section 352. [Plaintiff] had the right to treat outside his plan. Evidence of his insurance would have confused the issues or misled and prejudiced the jury." (*Pebley v. Santa Clara Organics, LLC* (2018) 22 Cal.App.5th 1266, 1278 [232 Cal.Rptr.3d 404].)

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

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

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

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

Secondary Sources

8 Witkin, California Procedure (5th ed. 2018) Trial, § 217 et seq.
~~7 Witkin, California Procedure (4th ed. 1997) Trial, §§ 230–233~~

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

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

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

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

1 Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 16, *Jury Instructions*, 16.06

1 Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 17, *Dealing With the Jury*, 17.26

5009. Predeliberation Instructions

When you go to the jury room, the first thing you should do is choose a presiding juror. The presiding juror should see to it that your discussions are orderly and that everyone has a fair chance to be heard.

It is your duty to talk with one another in the jury room and to consider the views of all the jurors. Each of you must decide the case for yourself, but only after you have considered the evidence with the other members of the jury. Feel free to change your mind if you are convinced that your position should be different. You should all try to agree. But do not give up your honest beliefs just because the others think differently.

Please do not state your opinions too strongly at the beginning of your deliberations or immediately announce how you plan to vote as it may interfere with an open discussion. Keep an open mind so that you and your fellow jurors can easily share ideas about the case.

You should use your common sense and experience in deciding whether testimony is true and accurate. However, during your deliberations, do not make any statements or provide any information to other jurors based on any special training or unique personal experiences that you may have had related to matters involved in this case. What you may know or have learned through your training or experience is not a part of the evidence received in this case.

Sometimes jurors disagree or have questions about the evidence or about what the witnesses said in their testimony. If that happens, you may ask to have testimony read back to you [or ask to see any exhibits admitted into evidence that have not already been provided to you]. Also, jurors may need further explanation about the laws that apply to the case. If this happens during your discussions, write down your questions and give them to the [clerk/bailiff/court attendant]. I will talk with the attorneys before I answer so it may take some time. You should continue your deliberations while you wait for my answer. I will do my best to answer them. When you write me a note, do not tell me how you voted on an issue until I ask for this information in open court.

~~**[At least nine jurors must agree on a verdict. When you have finished filling out the form, your presiding juror must write the date and sign it at the bottom and then notify the [bailiff/clerk/court attendant] that you are ready to present your verdict in the courtroom.]**~~

Your decision must be based on your personal evaluation of the evidence presented in the case. Each of you may be asked in open court how you voted on each question.

While I know you would not do this, I am required to advise you that you must not base your decision on chance, such as a flip of a coin. If you decide to award damages, you may not agree in advance to simply add up the amounts each juror thinks is right and then, without further deliberations, make the average your verdict.

You may take breaks, but do not discuss this case with anyone, including each other, until all of you are back in the jury room.

New September 2003; Revised April 2004, October 2004, February 2007, December 2009, June 2011, June 2013, May 2019

Directions for Use

The advisory committee recommends that this instruction be read to the jury after closing arguments and after reading instructions on the substantive law.

~~Read the sixth paragraph if a general verdict form is to be used.~~ If a special verdict will be used, give CACI No. 5012, *Introduction to Special Verdict Form*. If a general verdict is to be used, give CACI No. 5022, *Introduction to General Verdict Form*.

Judges may want to provide each juror with a copy of the verdict form so that the jurors can use it to keep track of how they vote. Jurors can be instructed that this copy is for their personal use only and that the presiding juror will be given the official verdict form to record the jury's decision. Judges may also want to advise jurors that they may be polled in open court regarding their individual verdicts.

Delete the reference to reading back testimony if the proceedings are not being recorded.

Sources and Authority

- Conduct of Jury Deliberations. Code of Civil Procedure section 613.
- Further Instructions After Deliberation Begins. Code of Civil Procedure section 614.
- Verdict Requires Three Fourths. Code of Civil Procedure section 618, article I, section 16, of the California Constitution.
- Juror Misconduct as Grounds for New Trial. Code of Civil Procedure section 657.
- "Chance is the 'hazard, risk, or the result or issue of uncertain and unknown conditions or forces.' Verdicts reached by tossing a coin, drawing lots, or any other form of gambling are examples of improper chance verdicts. 'The more sophisticated device of the *quotient verdict* is equally improper: The jurors agree to be bound by an *average* of their views; each writes the amount he favors on a slip of paper; the sums are added and divided by 12, and the resulting "quotient" pursuant to the prior agreement, is accepted as the verdict without further deliberation or consideration of its fairness.' " (*Chronakis v. Windsor* (1993) 14 Cal.App.4th 1058, 1064 [18 Cal.Rptr.2d 106], original italics.)
- " '[T]here is no impropriety in the jurors making an average of their individual estimates as to the amount of damages for the purpose of arriving at a basis for discussion and consideration, nor in adopting such average if it is subsequently agreed to by the jurors; but

to agree beforehand to adopt such average and abide by the agreement, without further discussion or deliberation, is fatal to the verdict.' " (*Chronakis, supra,* 14 Cal.App.4th at p. 1066.)

- Jurors should be encouraged to deliberate on the case. (*Vomaska v. City of San Diego* (1997) 55 Cal.App.4th 905, 911 [64 Cal.Rptr.2d 492].)

- The jurors may properly be advised of the duty to hear and consider each other's arguments with open minds, rather than preventing agreement by stubbornly sticking to their first impressions. (*Cook v. Los Angeles Ry. Corp.* (1939) 13 Cal.2d 591, 594 [91 P.2d 118].)

- "The trial court properly denied the motion for new trial on the ground that [the plaintiff] did not demonstrate the jury reached a chance or quotient verdict. The jury agreed on a high and a low figure and, before calculating an average, they further agreed to adjust downward the high figure and to adjust upward the low figure. There is no evidence that this average was adopted without further consideration or that the jury agreed at any time to adopt an average and abide by the agreement without further discussion or deliberation." (*Lara v. Nevitt* (2004) 123 Cal.App.4th 454, 462–463 [19 Cal.Rptr.3d 865].)

- "It is not improper for a juror, regardless of his or her educational or employment background, to express an opinion on a technical subject, so long as the opinion is based on the evidence at trial. Jurors' views of the evidence, moreover, are necessarily informed by their life experiences, including their education and professional work. A juror, however, should not discuss an opinion explicitly based on specialized information obtained from outside sources. Such injection of external information in the form of a juror's own claim to expertise or specialized knowledge of a matter at issue is misconduct." (*In re Malone* (1996) 12 Cal.4th 935, 963 [50 Cal.Rptr.2d 281, 911 P.2d 468].)

- "[The juror]'s comments to the jury, in the nature of an expert opinion concerning the placement of crossing gate 'sensors,' their operation, and the consequent reason why gates had not been or could not be installed at the J-crossing, constituted misconduct … . Speaking with the authority of a professional transportation consultant, [the juror] interjected the subject of 'sensors,' on which there had been no evidence at trial." (*McDonald v. S. Pac. Transp. Co.* (1999) 71 Cal.App.4th 256, 263–264 [83 Cal.Rptr.2d 734].)

- "Jurors cannot, without violation of their oath, receive or communicate to fellow jurors information from sources outside the evidence in the case. '[It] is misconduct for a juror during the trial to discuss the matter under investigation outside the court or to receive any information on the subject of the litigation except in open court and in the manner provided by law. Such misconduct *unless shown by the prevailing party to have been harmless will invalidate the verdict*.' " (*Smith v. Covell* (1980) 100 Cal.App.3d 947, 952–953 [161 Cal.Rptr. 377], original italics, internal citations omitted.)

- " 'All the jurors, including those with relevant personal backgrounds, were entitled to consider this evidence and express opinions regarding it. "[I]t is an impossible standard to require … [the jury] to be a laboratory, completely sterilized and freed from any external

> factors." [Citation.] "It is 'virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote.' " [Citation.] A juror may not express opinions based on asserted personal expertise that is different from or contrary to the law as the trial court stated it or to the evidence, but if we allow jurors with specialized knowledge to sit on a jury, and we do, we must allow those jurors to use their experience in *evaluating and interpreting* that evidence. Moreover, during the give and take of deliberations, it is virtually impossible to divorce completely one's background from one's *analysis* of the evidence. We cannot demand that jurors, especially lay jurors not versed in the subtle distinctions that attorneys draw, never refer to their background during deliberations. "Jurors are not automatons. They are imbued with human frailties as well as virtues." [Citation.]' " (*People v. Allen and Johnson* (2011) 53 Cal.4th 60, 77 [133 Cal.Rptr.3d 548, 264 P.3d 336], original italics.)

Secondary Sources

7 Witkin, California Procedure (5th ed. 2008) Trial, §§ 318, 321, 380

Wegner et al., California Practice Guide: Civil Trials & Evidence, Ch. 15-A, *Jury Deliberations: General Considerations*, ¶ 15:15 et seq. (The Rutter Group)

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

28 California Forms of Pleading and Practice, Ch. 326, *Jury Instructions*, § 326.32[3] (Matthew Bender)
28 California Forms of Pleading and Practice, Ch. 326A, *Jury Verdicts*, § 326A.14 (Matthew Bender)

1 Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 17, *Dealing With the Jury*, 17.33

California Judges Benchbook: Civil Proceedings—Trial (2d ed.) §§ 5.129, 14.8, 14.32, 14.50, 14.53, 14.59, 15.6, 15.21 (Cal CJER 2010)

5012. Introduction to Special Verdict Form

I will give you [a] verdict form[s] with questions you must answer. I have already instructed you on the law that you are to use in answering these questions. You must follow my instructions and the form[s] carefully. You must consider each question separately. Although you may discuss the evidence and the issues to be decided in any order, you must answer the questions on the verdict form[s] in the order they appear. After you answer a question, the form tells you what to do next.

At least 9 of you must agree on an answer before you can move on to the next question. However, the same 9 or more people do not have to agree on each answer.

All 12 of you must deliberate on and answer each question regardless of how you voted on any earlier question. Unless the verdict form tells all 12 jurors to stop and answer no further questions, every juror must deliberate and vote on all of the remaining questions.

When you have finished filling out the form[s], your presiding juror must write the date and sign it at the bottom [of the last page] and then notify the [bailiff/clerk/court attendant] that you are ready to present your verdict in the courtroom.

New September 2003; Revised April 2004, October 2008, December 2009, December 2014, May 2019

Directions for Use

This instruction should be given if a special verdict form is used. The second and third paragraphs will have to be modified in a case under the Lanterman-Petris-Short Act. (See CACI No. 4012, *Concluding Instruction* (for LPS Act).)

Sources and Authority

- General and Special Verdict Forms. Code of Civil Procedure section 624.
- Special Verdicts; Requirements for Award of Punitive Damages. Code of Civil Procedure section 625.
- " 'The verdict of a jury is either general or special. A general verdict is that by which they pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant; a special verdict is that by which the jury find the facts only, leaving the judgment to the Court. The special verdict must present the conclusions of fact as established by the evidence, and not the evidence to prove them; and those conclusions of fact must be so presented as that nothing shall remain to the Court but to draw from them conclusions of law.' (Code Civ. Proc., § 624.)" (*J.P. v. Carlsbad Unified School Dist.* (2014) 232 Cal.App.4th 323, 338 [181 Cal.Rptr.3d 286].)
- "A special verdict is 'fatally defective' if it does not allow the jury to resolve every controverted issue." (*Trejo v. Johnson & Johnson* (2017) 13 Cal.App.5th 110, 136 [220 Cal.Rptr.3d 127].)

- "It is true that, in at least some respects, a special verdict—if carefully drawn and astutely employed—may improve the quality of the factfinding process. It can focus the jury's attention on the relevant questions, incorporating the pertinent legal principles, and guiding the jury away from irrelevant or improper considerations. It can also expose defects in the jury's deliberations when they occur, providing an opportunity for the court to seek correction through further deliberations." (*Ryan v. Crown Castle NG Networks, Inc.* (2016) 6 Cal.App.5th 775, 795 [211 Cal.Rptr.3d 743].)

- " 'This procedure presents certain problems: " 'The requirement that the jury must resolve every controverted issue is one of the recognized pitfalls of special verdicts. "[T]he possibility of a defective or incomplete special verdict, or possibly no verdict at all, is much greater than with a general verdict that is tested by special findings … ." [Citation.]' [Citation.]" ' 'A special verdict is "fatally defective" if it does not allow the jury to resolve every controverted issue.' "(*J.P., supra,* 232 Cal.App.4th at p. 338, internal citations omitted.)

- "All litigation is ultimately a matter of striking a reasonable compromise among competing interests, particularly the interest in resolving cases fairly and that of utilizing public and private resources economically. A special verdict is unlikely to serve either of these objectives unless it is drawn with considerable care." (*Ryan, supra,* 6 Cal.App.5th at p. 796.)

- "[T]hat the jury instruction … defined [the element] did not obviate the necessity of including that required element in the special verdict. 'A jury instruction alone does not constitute a finding. Nor does the fact that the evidence might support such a finding constitute a finding.' " (*Trejo, supra,* 13 Cal.App.5th at p. 138.)

- "When a jury is composed of 12 persons, it is sufficient if *any* nine jurors arrive at each special verdict, regardless of the jurors' votes on other special verdict questions." (*Keener v. Jeld-Wen, Inc.* (2009) 46 Cal.4th 247, 255 [92 Cal.Rptr.3d 862, 206 P.3d 403], original italics.)

- "Appellate courts differ concerning the use of special verdicts. In one case the court said, 'we should utilize opportunities to force counsel into requesting special verdicts.' In contrast, a more recent decision included the negative view: 'Toward this end we advise that special findings be requested of juries only when there is a compelling need to do so. Absent strong reason to the contrary their use should be discouraged.' Obviously, it is easier to tell after the fact, rather than before, whether the special verdict is helpful in disclosing the jury conclusions leading to the end result." (*All-West Design, Inc. v. Boozer* (1986) 183 Cal.App.3d 1212, 1221 [228 Cal.Rptr. 736], internal citations omitted.)

- "[W]e begin with the requirement that at least nine of twelve jurors agree that each element of a cause of action has been proved by a preponderance of the evidence. The elements of a cause of action constitute the essential or ultimate facts in a civil case comparable to the elements of a single, discrete criminal offense in a criminal case. Analogizing a civil 'cause of action' to a single, discrete criminal offense, and applying the criminal law jury agreement principles to civil law, we conclude that jurors need not agree from among a number of alternative acts which act is proved, so long as the jurors agree that each element of the cause of action is proved." (*Stoner v. Williams* (1996) 46 Cal.App.4th 986, 1002 [54 Cal.Rptr.2d 243, footnote omitted.)

- "In civil cases in which there exist multiple causes of action for which multiple or alternative acts could support elements of more than one cause of action, possible jury confusion could result as to whether a specific cause of action is proved. In those cases, … we presume that jury instructions may be appropriate to inform the jury that it must agree on specific elements of each specific cause of action. Yet, this still does not require that the jurors agree on exactly how each particular element of a particular cause of action is proved." (*Stoner, supra,* 46 Cal.App.4th at p. 1002.)

- "[A] juror who dissented from a special verdict finding negligence should not be disqualified from fully participating in the jury's further deliberations, including the determination of proximate cause. The jury is to determine all questions submitted to it, and when the jury is composed of twelve persons, each should participate as to each verdict submitted to it. To hold that a juror may be disqualified by a special verdict on negligence from participation in the next special verdict would deny the parties of 'the right to a jury of 12 persons deliberating on all issues.' Permitting any nine jurors to arrive at each special verdict best serves the purpose of less-than-unanimous verdicts, overcoming minor disagreements and avoiding costly mistrials. Once nine jurors have found a party negligent, dissenting jurors can accept the finding and participate in determining proximate cause just as they may participate in apportioning liability, and we may not assume that the dissenting jurors will violate their oaths to deliberate honestly and conscientiously on the proximate cause issue." (*Resch v. Volkswagen of America, Inc.* (1984) 36 Cal.3d 676, 682 [205 Cal.Rptr. 827, 685 P.2d 1178], internal citations omitted.)

Secondary Sources

7 Witkin, California Procedure (5th ed. 2008) Trial, §§ 342–346

4 California Trial Guide, Unit 91, *Jury Deliberations and Rendition of Verdict,* § 91.21 (Matthew Bender)

27 California Forms of Pleading and Practice, Ch. 318, *Judgments*, § 318.49 (Matthew Bender)

28 California Forms of Pleading and Practice, Ch. 326A, *Jury Verdicts*, § 326A.11 et seq. (Matthew Bender)

1 Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 18, *Jury Verdicts*, 18.11 et seq.

California Judges Benchbook: Civil Proceedings—Trial (2d ed.) § 15.14 (Cal CJER 2010)

5017. Polling the Jury

After your verdict is read in open court, you may be asked individually to indicate whether the verdict expresses your personal vote. This is referred to as "polling" the jury and is done to ensure that at least nine jurors have agreed to each decision.

The verdict form[s] that you will receive ask[s] you to answer several questions. You must vote separately on each question. Although nine or more jurors must agree on each answer, it does not have to be the same nine for each answer. Therefore, it is important for each of you to remember how you have voted on each question so that if the jury is polled, each of you will be able to answer accurately about how you voted.

[Each of you will be provided a draft copy of the verdict form[s] for your use in keeping track of your votes.]

New October 2008; Revised May 2019

Directions for Use

Use this instruction to explain the process of polling the jury, particularly if a long special verdict form will be used to assess the liability of multiple parties and the damages awarded to each plaintiff from each defendant.

The third sentence in the second paragraph referring to the agreement of nine or more jurors must be revised in a case under the Lanterman-Petris-Short Act. (See CACI No. 4012, *Concluding Instruction* (for LPS Act).

Sources and Authority

- Verdict by Three Fourths in Civil Case. Article I, section 16 of the California Constitution.
- Polling the Jury. Code of Civil Procedure section 618.
- "The polling process is designed to reveal mistakes in the written verdict, or to show 'that one or more jurors acceded to a verdict in the jury room but was unwilling to stand by it in open court.' " (*Keener v. Jeld-Wen, Inc.* (2009) 46 Cal.4th 247, 256 [92 Cal.Rptr.3d 862, 206 P.3d 403].)
- "[A] juror may change his or her vote at the time of polling." (*Keener, supra,* 46 Cal.4th at p. 256.)
- "[I]t is quite apparent that when a poll discloses that more than one-quarter of the members of the jury disagree with the verdict, the trial judge retains control of the proceedings, and may properly order the jury to retire and again consider the case." (*Van Cise v. Lencioni* (1951) 106 Cal.App.2d 341, 348 [235 P.2d 236].)

- "[W]e begin with the requirement that at least nine of twelve jurors agree that each element of a cause of action has been proved by a preponderance of the evidence. The elements of a cause of action constitute the essential or ultimate facts in a civil case comparable to the elements of a single, discrete criminal offense in a criminal case. Analogizing a civil 'cause of action' to a single, discrete criminal offense, and applying the criminal law jury agreement principles to civil law, we conclude that jurors need not agree from among a number of alternative acts which act is proved, so long as the jurors agree that each element of the cause of action is proved." (*Stoner v. Williams* (1996) 46 Cal.App.4th 986, 1002 [54 Cal.Rptr.2d 243], footnote omitted.)

- "In civil cases in which there exist multiple causes of action for which multiple or alternative acts could support elements of more than one cause of action, possible jury confusion could result as to whether a specific cause of action is proved. In those cases, … we presume that jury instructions may be appropriate to inform the jury that it must agree on specific elements of each specific cause of action. Yet, this still does not require that the jurors agree on exactly how each particular element of a particular cause of action is proved." (*Stoner, supra,* 46 Cal.App.4th at p. 1002.)

- "[I]f nine identical jurors agree that a party is negligent and that such negligence is the proximate cause of the other party's injuries, special verdicts apportioning damages are valid so long as they command the votes of any nine jurors. To hold otherwise would be to prohibit jurors who dissent on the question of a party's liability from participation in the important remaining issue of allocating responsibility among the parties, a result that would deny all parties the right to a jury of 12 persons deliberating on all issues." (*Juarez v. Superior Court* (1982) 31 Cal.3d 759, 768 [183 Cal.Rptr. 852, 647 P.2d 128].)

Secondary Sources

7 Witkin, California Procedure (5th ed. 2008) Trial, §§ 339, 350

4 California Trial Guide, Unit 91, *Jury Deliberations and Rendition of Verdict*, § 91.30[3][b] (Matthew Bender)

28 California Forms of Pleading and Practice, Ch. 326A, *Jury Verdicts*, § 326A.14 (Matthew Bender)

1 Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 18, *Jury Verdicts*, 18.43

California Judges Benchbook: Civil Proceedings—Trial (2d ed.) § 15.28 (Cal CJER 2010)

5022. Introduction to General Verdict Form

I will give you [a] general verdict form[s]. The form[s] ask[s] you to find either in favor of [*name of plaintiff*] or [*name of defendant*]. [It also asks you to answer [an] additional question[s] regarding [*specify, e.g., the right to punitive damages*].] I have already instructed you on the law that you are to refer to in making your determination[s].

At least nine of you must agree on your decision [and in answering the additional question[s]]. [If there is more than one question on the verdict form, as long as nine of you agree on your answers to each question, the same nine do not have to agree on each answer.]

In reaching your verdict [and answering the additional question[s]], you must decide whether the party with the burden of proof has proved all of the necessary facts in support of each required element of [his/her/its] claim or defense. You should review the elements addressed in the other instructions that I have given you and determine if at least nine of you agree that each element has been proven by the evidence received in the trial. The same nine do not have to agree on each element.

When you have finished filling out the form, your presiding juror must write the date and sign it at the bottom and then notify the [bailiff/clerk/court attendant] that you are ready to present your verdict in the courtroom.

New May 2018; Revised May 2019

Directions for Use

If a general verdict will be used, this instruction may be given to guide the jury on how to go about reaching a verdict. With a general verdict, there is a danger that the jury will shortcut the deliberative process of carefully looking at each element of each claim or defense and simply vote for the plaintiff or for the defendant. This instruction directs the jury to approach its task as if a special verdict were being used and questions on each element of each claim or defense had to be answered. This instruction assumes that the rule applicable to special verdicts, that the same nine jurors do not need to agree on every element of a claim as long as there are nine in favor of each (see *Juarez v. Superior Court* (1982) 31 Cal.3d 759, 768–769 [183 Cal.Rptr. 852, 647 P.2d 128]; CACI No. 5012, *Introduction to Special Verdict Form*), would apply to deliberations using a general verdict.

This purpose of this instruction is to lessen the possibility that the "paradox of shifting majorities" will happen. This paradox occurs when the same jury analyzing the same evidence would find liability with a special verdict, but not with a general verdict. The possibility arises because with a special verdict, a juror who votes no on one question but is in a minority of three or fewer must continue to deliberate and vote on all of the remaining questions.

If, for example, the vote on element 3 is 9-3 yes with jurors 10-12 voting no, and the vote on element 4 is 11-1 yes with juror 1 voting no, there will be liability with a special verdict because each element has received nine yes votes. But if a general verdict is used, there would be no liability because only eight

jurors have found true every element of the claim. The California Supreme Court has found this result to be proper with regard to special verdicts. (See *Juarez, supra,* 31 Cal.3d at p. 768.) With a general verdict, if the jury votes on each element of each claim or defense, it is more likely to find nine votes for each element, even though it may be a different nine each time.

The second and third paragraphs will have to be modified in a case under the Lanterman-Petris-Short Act. (See CACI No. 4012, *Concluding Instruction* (for LPS Act).)

Sources and Authority

- "[I]f nine identical jurors agree that a party is negligent and that such negligence is the proximate cause of the other party's injuries, special verdicts apportioning damages are valid so long as they command the votes of *any* nine jurors. To hold otherwise would be to prohibit jurors who dissent on the question of a party's liability from participation in the important remaining issue of allocating responsibility among the parties, a result that would deny all parties the right to a jury of 12 persons deliberating on all issues." (*Juarez, supra,* 31 Cal.3d at p. 768, original italics.)

- "To determine whether a general verdict is supported by the evidence it is necessary to ascertain the issues embraced within the verdict and measure the sufficiency of the evidence as related to those issues. For this purpose reference may be had to the pleadings, the pretrial order and the charge to the jury. A general verdict implies a finding of every fact essential to its validity which is supported by the evidence. Where several issues responsive to different theories of law are presented to the jury and the evidence is sufficient to support facts sustaining the verdict under one of those theories, it will be upheld even though the evidence is insufficient to support facts sustaining it under any other theory." (*Owens v. Pyeatt* (1967) 248 Cal.App.2d 840, 844 [57 Cal.Rptr. 100], internal citations omitted.)

- "Implicit in [general] verdicts is the presumption that 'all material facts in issue as to which substantial evidence was received were determined in a manner consistent and in conformance with the verdict.' " (*Coorough v. De Lay* (1959) 171 Cal.App.2d 41, 45 [339 P.2d 963].)

- "A general verdict imports a finding in favor of the winning party on all the averments of his pleading material to his recovery." (*Behr v. County of Santa Cruz* (1959) 172 Cal.App.2d 697, 712 [342 P.2d 987].)

Secondary Sources

7 Witkin, California Procedure (5th ed. 2008) Trial, § 338

Wegner, et al., California Practice Guide: Civil Trials & Evidence, Ch. 17-A, *Verdicts,* ¶ 17:1 et seq. (The Rutter Group)

Haning, et al., California Practice Guide: Personal Injury Ch. 9-M, *Trial of a Personal Injury Case--Verdicts and Judgment* ¶ 9:645 et seq. (The Rutter Group)

4 California Trial Guide, Unit 91, *Jury Deliberations and Rendition of Verdict,* § 91.21 (Matthew

Bender)

28 California Forms of Pleading and Practice, Ch. 326A, *Jury Verdicts,* § 326A.11 et seq. (Matthew Bender)

Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 18, *Jury Verdicts,* 18.03 et seq.

Guide for Using Judicial Council of California Civil Jury Instructions

USER GUIDE

USER GUIDE

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

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

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

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

Using the Instructions

Revision Dates: The original date of approval and all revision dates of each instruction are presented. An instruction is considered as having been revised if there is a nontechnical change to the title, instruction text, or Directions for Use. Additions or changes to the Sources and Authority and Secondary Sources do not generate a new revision date.

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

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

Cases included in the Sources and Authority should be treated as a digest of relevant citations. They are not meant to provide a complete analysis of the legal subject of the instruction. Nor does the inclusion of an excerpt necessarily mean that the committee views it as binding authority. Rather, they provide a starting point for further legal research on the subject. The standard is that the committee believes that the excerpt would be of interest and relevant to CACI users.

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

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

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

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

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

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

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

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

1. That [plaintiff] and [defendant] entered into a contract (which is not disputed in this case);

2. That [plaintiff] did all, or substantially all, of the significant things that the contract required it to do;

3. That all conditions required for [defendant]'s performance had occurred (which is also not disputed in this case).

Irrelevant Factors: Factors are matters that the jury might consider in determining whether a party's burden of proof on the elements has been met. A list of possible factors may include some

that have no relevance to the case and on which no evidence was presented. These irrelevant factors may safely be omitted from the instruction.

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

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

Titles and Definitions

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

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

Evidence

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

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

Using Verdict Forms

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

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

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

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

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

November 2017

Hon. Martin J. Tangeman
Chair, Judicial Council Advisory Committee on Civil Jury Instructions

Instruction	Commentator	Comment	Committee Response
101, *Overview of Trial*	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	We do not agree with the proposal. We see no need to use the terms "petitioner" and "respondent" when "plaintiff" and "defendant" would be more understandable to the jury and would be consistent with the use of the terms "plaintiff," "defendant" and "cross-defendant" later in the instruction.	All of those terms are options; the user picks the terms that apply to the case.
105, 5001, *Insurance*	Civil Justice Association of California, by Kim Stone, Interim President	We recommend removing the cite to *Pebley v. Santa Clara Organics, LLC* (2018) 22 Cal.App.5th 1266, 1278, from the Sources and Authority. (The comment included numerous arguments as to why *Pebley* is wrongly decided.)	The committee's general policy when there may be legitimate arguments that the case is wrongly decided is not to remove cases from the Sources and Authority. As stated in the User Guide, the fact that a case excerpt is included in the Sources and Authority does not mean that the committee necessarily is endorsing the language as binding precedent.
	Thomas Murray, Attorney at Law, San Francisco	The *Pebley* case holding will continue to drive up health care costs and encourage fraud in medical billing and claimed need for treatment. Terrible policy. If we can force people to buy health insurance, we can force them to use it or face a mitigation argument.	See response above.
472, *Primary Assumption of Risk—Exception to Nonliability—Facilities Owners and Operators and Event Sponsors*	Association of Southern California Defense Counsel, by Robert A. Olson, Greines, Martin, Stein & Richland, Los Angeles	The proposed jury instruction takes out of context the discussion in *Hass v.RhodyCo Productions* (2018) 26 Cal.App.5th 11, 38. The proposal suggests that it is up to a jury to determine what risks are "not inherent in" a particular activity. But *Hass* does not say that. To the contrary, the Court of Appeal in *Hass* determined on its own what risks are inherent in or extrinsic to the sport of competitive distance running, without reference to what is or is not a fact issue. *Hass* determined as a matter of law that cardiac arrest is an inherent risk associated with long-distance running and that providing grossly negligent emergency medical services to long distance runners is "a risk extrinsic to the sport of long distance running. . . ."	The issue for the jury is not to determine the nature of a risk, but to decide whether the defendant addressed the risk appropriately.

Instruction	Commentator	Comment	Committee Response
		(See *id.* at pp. 38-40.) *Hass* only found a triable issue as to whether the race organizer provided grossly negligent medical services, not as to what risks are inherent or extrinsic.	
		The proposed revisions to the Directions for Use add to the confusion by using a "but see" reference for *Willhide-Michiulis*, erroneously suggesting the case is an outlier and is inconsistent with the previously cited case, *Luna v. Vela* (2008) 169 Cal.App.4th 102. *Willhide-Michiulis* is entirely consistent with *Luna,* which holds that a jury can decide if a defendant has increased the activity's inherent risks. (See 169 Cal.App.4th at pp. 112-113.) A jury cannot make such a determination until after the court determines the inherent risks.	*Luna* (and cases cited therein) holds that whether the defendant increased the risk is for the jury. *Willhide-Michiulis* says it is for the court. The committee, however, has changed the citation signal from "but see" to "cf."
		The proposed revision also fails to mention *Martine v. Heavenly Valley Limited Partnership* (2018) 27 Cal.App.5th 715, 724, which holds that collisions with other skiers while being taken down the mountain by the ski patrol in a sled after an initial fall is, as a matter of law, part of the inherent risks of skiing. Again, it is the court, not a jury, that decides what risks are inherent in or extrinsic to an activity.	*Martine* does not add anything different that is particularly on point. The revisions do not suggest that the jury is to decide what risks are inherent and what are extrinsic. The jury has the task of deciding whether the defendant increased or failed to minimize a risk.
		The instruction nowhere defines for the jury what a risk inherent in the activity is, and likely could never do so adequately. Such risks must be decided by a court on a case-by-case basis, which the instruction does not say.	Since the instruction is not giving the jury the task of determining what risk are inherent or extrinsic, it doesn't need to say anything about what the court should do.
		The proposed revision is also entirely unnecessary and therefore confusing. *Hass* recognizes that failing to minimize risks that are not inherent in the activity means that the defendant has unreasonably increased inherent risks. Yet the proposed instruction poses its two options for element 2 as alternatives. As soon as a plaintiff makes a claim that a defendant both increased inherent risks and failed to minimize a risk that is not inherent, the plaintiff is going to request both redundant paragraphs. The jury	The current element 2 does not encompass the *Hass* facts. Current element 2 addresses inherent risks. The proposed new option for element 2 addresses the *Hass* situation involving extrinsic risks.

Instruction	Commentator	Comment	Committee Response
		will end up being be instructed twice on the same legal theory, improperly increasing that theory's impact on the jury. The fact of the matter is that the current "unreasonably increased the risks … over and above those inherent in …" formulation already encompasses the *Hass* circumstance (the defendant arguably increasing the inherent running risk by not having promised available medical care).	
	Civil Justice Association of California, by Kim Stone, Interim President	By effectively declaring or requiring a jury to find that a defendant "unreasonably exposed" the plaintiff to an increased risk of harm, the proposed addition also ignores that, in many circumstances involving recreational activities or sporting events, "the risk cannot be eliminated without altering the fundamental nature of the activity." (*Beninati v. Black Rock City, LLC* (2009) 175 Cal.App.4th 650, 658; *Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148, 1156.)	This comment does not address the actual reason for the proposed additional option for element 2 – that there is a different rule for extrinsic risks. The comment addresses only inherent risks. Extrinsic risks, by definition, *can* be eliminated without altering the fundamental nature of the activity.
		Although the appellate court in *Hass v. Rohody Co Prodution* (2018 26 Cal, App 5th 11, indicates that the *Nalwa* supports its version of this rule, no such language similar to the proposed revised instruction is referenced in *Nalwa*.	*Nalwa* was not an extrinsic risk case.
	James P. Lemieux, Attorney at Law, Demler, Armstrong & Rowland, Long Beach	CACI 472's proposed modification does not address the "without altering the nature of the activity" parameter which is the crux of the 'new rule' in *Hass v RhodyCo Productions* (2018) 26 Cal.App.5th 11, 38. To address that, it should read: 2. That defendant <u>could have reasonably minimized</u> a risk that is not inherent in [e.g., snowboarding], <u>without altering the nature of that activity,</u> but failed to <u>reasonably</u> minimize that risk and unreasonably exposed plaintiff to an increased risk of harm.	The committee sees no need to add "without altering the nature of the activity." As noted above, an extrinsic risk is by definition one that does not involve the nature of the activity. However, the committee agreed to revise the element to clarify that there are two reasonableness standards. The court in *Hass* says: "the operator or organizer of a recreational activity … does have a duty to *reasonably* minimize extrinsic risks so as not to *unreasonably* expose participants to an increased risk of harm." (italics added)

Instruction	Commentator	Comment	Committee Response
			The "reasonably" and the "unreasonably" apply to two different matters: "minimize risk" and "expose."
	Thomas Murray, Attorney at Law, San Francisco	The existing language is clear and concise in stating the law. The proposed change is gobblydegook providing less clarity for both businesses and jurors.	The committee is unable to respond as the comment provides no reasoning for its "gobblydegook" conclusion.
1204, *Strict Liability—Design Defect—Risk-Benefit Test—Essential Factual Elements—Shifting Burden of Proof*	Association of Southern California Defense Counsel, by David K. Schultz, Polsinelli LLP, Los Angeles	By limiting and directing the proposed addition to the risk-benefit test, there is a significant risk that the Use Note will be improperly cited as a basis to preclude the admission of industry custom and practice evidence or argue that a jury cannot consider such on other issues, including to evaluate claims for negligence and punitive damages. This would result in legal error and unfairly prejudice defendants. Notably, the plaintiff in *Kim* did not argue, and the California Supreme Court did not hold, that evidence of custom and practice was inadmissible or a limiting instruction must be provided when claims are asserted in the case that involve the reasonableness of a manufacturer's conduct-which is directly at issue in claims for negligence and punitive damages.	This is an instruction on the risk-benefit test. The added language specifically mentions the risk-benefit test. The comment's concern is speculation that somebody might misconstrue the language and apply it in other areas. It is not the role of a jury instruction to guard against possible collateral misuse.
		A trial court should have discretion to consider when and whether to provide a limiting instruction. (See e.g. *People v. Dennis* (1998) 17 Cal.4th 468, 533- 34; *Continental Airlines, Inc. v. McDonnell Douglas Corp.* (1990) 216 Cal.App.3d 388, 412.) However, the proposed addition to the Directions for Use mandates and directs that a limiting instruction should be requested by the opposing party and given in every case. This ignores the discretion that trial courts must be afforded when considering limiting instruction requests.	The trial court has no discretion. Per the Supreme Court in *Kim:* "[I]f the party opposing admission of this evidence makes a timely request, the trial court *must* issue a jury instruction that explains how this evidence may and may not be considered *under the risk-benefit test*." (*Kim, supra,* 6 Cal.5th at p. 38, emphasis added.)
		Even when a case only involves a strict product liability design defect claim, as in *Kim*, "evidence of industry custom and practice" is relevant for many purposes. (*Kim*, 6 Cal.5th at 26, 34-38.)	The court in *Kim* makes clear that there may be situations in which custom and practice evidence is not relevant. Nothing in the added language suggests that custom and practice can never be relevant.

Instruction	Commentator	Comment	Committee Response
		The comment then goes on to list 10 ways in which custom and practice may be relevant.	
		ASCDC respectfully requests that the proposed addition to the Directions for Use should be revised as follows: "If evidence of industry custom and practice has been admitted, a limiting instruction may be provided to the jury to explain how it may be considered under the risk-benefit test for a strict product liability claim. (See *Kim v. Toyota Motor Corp.* 6 Cal.5th 21, 30, 38, 40.) Evidence of industry custom and practice is also relevant and admissible when claims such as negligence are asserted that involve the reasonableness of a defendant's conduct. See *Bouse v. Madonna Const. Co.* (1962) 201 Cal.App.2d 26, 29 ["Evidence of the custom in a business or industry is admissible in negligence cases on the issue of what constitutes due care or negligence under the circumstances. Thus, an instruction relative to the effect of such evidence was not only proper but necessary."]; *Morgan v. Stubble.field* (1972) 6 Cal.3d 606, 621 fn.9 ["It is settled that proof of practice or custom is admissible to assist the trier of fact in determining what constitutes due care."]; *Kim,* 6 Cal.5th at 34 [Evidence "of industry custom and practice sometimes does shed light not just on the reasonableness of the manufacturer's conduct in designing a product, but on the adequacy of the design itself."]"	The Directions for Use to an instruction on the risk-benefit test is not the place for a lengthy discussion on industry custom and practice evidence.
		Alternatively, the Judicial Council is requested to include specific examples concerning the proper purposes for which industry custom and practice evidence may be considered to defend against strict product liability claims, by quoting the excerpts from the California Supreme Court's opinion in *Kim* that endorse the admissibility of custom and practice evidence.	There are also examples in *Kim* that indicate that custom and practice evidence would not be admissible. This is a jury instruction on the risk-benefit test, not on industry custom and practice evidence.

Instruction	Commentator	Comment	Committee Response
	Civil Justice Association of California, by Kim Stone, Interim President	There is no need for such a directive, as the law governing limiting instructions and the *Kim* case can certainly be applied without the proposed addition.	Including the proposed additional language flags the issue for bench and bar.
		There will be circumstances for which industry custom and practice evidence will be admitted for purposes other than defending against a strict product liability design defect claim—such as to defend against negligence and punitive damage claims. Thus, a direction to provide a limiting instruction for the opposing party and only for the strict product limiting claim is unduly biased in favor of a plaintiff.	Addressed above in response to comments of ASCDC.
		A trial court does have the discretion to consider when and whether to even provide a limiting instruction. See e.g. *People v. Dennis* (1998) 17 Cal.4th 468, 533–34; *Continental Airlines, Inc. v. McDonnell Douglas Corp.* (1990) 216 Cal.App.3d 388, 412.) When a proposed limiting instruction is too restrictive, argumentative, narrow and/or misstates the purposes for which the evidence can be used, a trial court always has discretion to deny such. By essentially directing that a limiting instruction should be requested by the opposing party and given in every case, this will invite litigation and appeals over the use of improper limiting instructions.	Addressed above in response to comments of ASCDC.
		Whenever evidence has limited use or application, either side can request a limiting instruction to explain to the jury the purpose for which the evidence may and may not be considered.	The proposed language says: "a party opposing this evidence" may request a limiting instruction.
	California Lawyers Association, Litigation Section, Jury Instructions Committee, by	In the Directions for Use, we would refer to a "timely request" for a limiting instruction, to be more consistent with *Kim v. Toyota Motor Corp.* (2018) 6 Cal5th 21, 38.	The committee has made this addition.

Instruction	Commentator	Comment	Committee Response
	Reuben A. Ginsberg, Chair		
	Thomas Murray, Attorney at Law, San Francisco	The requirement that a trial court must, in all circumstances, give a limiting instruction with respect to custom and practice vis a vis the risk-benefit test is extreme and reduces the ability of the trial judge to consider context. And the requirement of a limiting instruction was not the holding in *Kim*.	The committee believes that the court's "must" language in *Kim* a holding.
	Orange County Bar Association, by Deirdre Kelly, President	The change fails to properly cite this case with its year. It should be cited as *Kim v. Toyota Motor Corp.* (2018) 6 Cal. 5th 21	The error was caught and corrected.
		the proposed language is not directly on point with the Court's decision. The *Kim* Court adopted the appellate court's limited approach to the admissibility and inadmissibility of evidence of industry custom and practice relating to a product defect allegation. (*Id.* at 37.) The Court held if the trial court determines that evidence of industry custom and practice is relevant to an element of the Risk-Benefit test and it is not being used simply for the purpose of showing that a manufacturer was acting no worse than its competitors, such evidence can be admitted subject to Evidence Code section 352 and a limiting instruction based on Evidence Code section 355 must be given on how this evidence should be considered by the jury if the opposing party makes a timely request. (*Id* at 37-38.) We propose the following instead of the current proposed change: "If the trial court determines that evidence of industry custom and practice is relevant to an element of the Risk-Benefit test and it is not being used simply for the purpose of showing that a manufacturer was acting no worse than its competitors, such evidence can be admitted subject to	The committee believes that it is not necessary to get into the question of admissibility. The proposed language says: "If evidence of industry custom and practice has been admitted… ." The intent is to simply advise bench and bar that a limiting instruction will be required under some circumstances.

Instruction	Commentator	Comment	Committee Response
		Evidence Code section 352 and a limiting instruction based on Evidence Code section 355 must be given on how this evidence should be considered by the jury if the opposing party makes a timely request. (*Kim v. Toyota Motor Corp.* (2018) 6 Cal. 5th 21, 37-38.)"	
	Otis Elevator Company and PBF Holding Company, by Jayme C. Long, Dentons US LLP, Los Angeles (same letter submitted on behalf of both companies)	The proposed change essentially mischaracterizes *Kim,* suggesting that a limiting instruction is all that is required for evidence of industry custom and practice to be admissible in a strict liability design defect case. By failing to describe the additional requirements for admission of such evidence set forth in *Kim*, the Advisory Committee has defaulted in its responsibility to provide impartial guidance to the Judicial Council.	The committee does not believe that the language mischaracterizes *Kim* in any way. True, the proposed language does not address when custom and practice may be admitted. The language tells what to do *if* the evidence has been admitted.
		we object to the proposal because it mandates that a limiting instruction is required in all cases upon request.	Addressed in response to comment of ASCDC above
		we object to the proposal because it fails to explain what a party must show to establish, and what the court must consider, to determine that evidence of industry custom and practice is relevant to the risk-benefit test, as set forth in the factors enumerated in the instruction.	The Supreme Court in Kim does not address exactly what the limiting instruction should say. The court only imposes a requirement that a limiting instruction be given if evidence of custom and practice is admitted for a limited purpose. The committee can do no more than to let bench and bar know that under some circumstances, a limiting instruction will be required.
		we object to the proposal because it does not explain that the court retains discretion to exclude such evidence even if it is found to be relevant.	Addressed in response to comment of ASCDC above.
		Suggested Modifications in Directions for Use: A party seeking admission of evidence of industry custom and practice in a strict products liability cases involving an alleged design defect bears the initial burden to establish the relevance of the evidence to one of the elements of the risk-benefit test, either causation or factors outlined in CACI 1204. (See *Kim v. Toyota Motor Corp.* (2018) 6 Cal.5th 21, 37.) Relevance depends on whether the	The committee has added "for a limited purpose" even though it's not in the court's language. The evidence could have been admitted with no limitation. As seen from the comments, custom and practice is a very complex issue, which is beyond the scope of the modest addition proposed for the Directions for Use to this instruction.

Instruction	Commentator	Comment	Committee Response
		evidence "sheds light on whether, objectively speaking, the product was designed as safely as it should have been, given 'the complexity of, and trade-offs implicit in, the design process.'" (*Ibid*.) The court retains discretion under the Evidence Code to exclude the evidence even if it is found to be relevant. (*Id.* at p. 38.) But if evidence of industry custom and practice has been admitted for a limited purpose, at the request of a party opposing this evidence or seeking its admission for a limited purpose, the jury must be given a limiting instruction on how this evidence may and may not be considered under the risk-benefit test. (*Ibid.*)	
2020, *Public Nuisance—Essential Factual Elements*, 2021 *Private Nuisance—Essential Factual Elements*	Association of Southern California Defense Counsel, by David K. Schultz, Polsinelli LLP, Los Angeles	We believe that the proposed deletion of language in CACI 2021 to eliminate the requirement that an alleged nuisance "interfere with a plaintiff's use and enjoyment" of land, conflicts with cases that recognize this is the "very essence" of a claim for private nuisance. (See e.g *Oliver v. AT&T Wireless Services* (1990)76 Cal.App.4th 521 , 534 ["However, the essence of a private nuisance is its interference with the use and enjoyment of land. '1; *San Diego Gas & Elec. Co. v. Superior Court* (1996) 13 Cal.4th 893, 937 ["Plaintiffs attempt to state a cause of action for private nuisance, i.e., a nontrespassory interference with the private use and enjoyment of land."]; *Chee v. Amanda Goldt Property Mgmt.* (2006) 143 Cal.App.4th 1360, 1373 ["Nuisance liability arises from violation of a duty to another that interferes with the free use and enjoyment of his or her property."].)	Substantial interference is element 4. It does not need to be in the introductory paragraph. The change conforms 2021 to 2020.
		The same is true with respect to the proposed modifications to eliminate the element of lack of consent from CACI 2020 and 2021- which numerous courts recognize is a required element for nuisance claims. See e.g. *Dep't of Fish & Game v. Superior Court* (2011) 197 Cal.App.4th 1323, 1352 ["The elements of a public nuisance, under the circumstances of this case, are … (5)	The committee agreed and has restored the element for lack of consent but bracketed to make it optional. The committee has expanded the Directions for Use to note that there is authority both for an element and a defense. The cases cited in the comment do support lack of consent as an element. But *Mangini v. Aerojet-General Corp.* (1991) 230 Cal.App.3d

Instruction	Commentator	Comment	Committee Response
		plaintiffs did not consent to the 2007 poisoning; *Birke v. Oakwood Worldwide* (2009) I69 Cal.App.4th 1540, 1548 ["Thus, to adequately plead a cause of action for public nuisance ... fplaintiffs) must allege .... (5) neither Melinda Birke nor her parents consented to the conduct ... "].)	1125, 1138 and *Newhall Land & Farming Co. v. Superior Court* (1993) 19 Cal. App. 4th 334, 341–345 refer to the defense of consent, albeit in the context of claims between prior and subsequent owners of the same property.
		Although The twenty-eight year old case of *Mangini v. Aerojet-General Corp*. (1991) 230 Cal.App.3d 1125 discusses a plaintiff's consent as a "defense" to a nuisance claim (230 Cal.App.3d at p. 1140), the issue was still evaluated in the context of considering whether the complaint properly and sufficiently alleged a nuisance claim. When considering whether the defendant's activities were "undertaken with the consent of the owner" (*Id.* at 1138), the appellate court initially reviewed the lease provisions that governed the premises and alleged hazardous activities that constituted the claimed nuisance. The lease provisions were "patently ambiguous" (*Id.* at 1 I 40) because they did "not identify either the nature of the contemplated hazardous activity nor the nature of the contemplated nuisance," and "other provisions" made it "unclear whether the lease contemplated the disposal of waste of the kind and in the amounts pleaded in the complaint." (Id.) As a result, *Mangini* held the plaintiff's nuisance claim should be allowed to "survive demurer" because it could not determine the elements of "consent and lawful use" against the plaintiff "as a matter of law." (*Id.* at 1131, 1140.)	The court in *Mangini* says: "where, as here, an owner of property seeks damages for creation of a nuisance by a prior lessee, the lessee has a *defense* that his use of the property was lawful and was authorized by the lease; i.e., his use of the property was undertaken with the consent of the owner." (italics added). *Newhall* two years later cites *Mangini* for its handling of the defense of consent but finds no consent on its facts (prior owner cannot consent to its own contamination of property in action by subsequent owner).
	Civil Justice Association of California, by Kim Stone, Interim President	While *Mangini* referred to consent as a defense, the court did not expressly analyze whether consent was more properly an element or a defense.	That is true, but the courts in the cases listing lack of consent as an element provided no analysis either. In the absence of a case that analyzes the burden of proof and holds one way or the other, the committee believes that the issue is unresolved.
		Cites *Fish & Game* and *Birke* for proposition that lack of consent is an element	Addressed in response to comment of ASCDC above.

Instruction	Commentator	Comment	Committee Response
		Makes point that interference with use and enjoyment is the very essence of a claim for private nuisance.	Addressed in response to comment of ASCDC above.
	Thomas Murray, Attorney at Law, San Francisco	The holding in *Mangini* was specifically limited to a statute of limitations question. That is not authority to eliminate an element of the cause of action.	*Mangini* is not authority for dropping the consent elements. But it does raise enough doubt to to bracket them.
	Orange County Bar Association, by Deirdre Kelly, President	The added prefatory language of "created a nuisance" should be modified to read: "created or assisted in the creation of the nuisance." Case law is clear that a defendant may be liable for a nuisance, not just where the defendant created the nuisance, but also where the defendant "assisted in the creation of the nuisance." (See *People v. ConAgra Grocery Products Co.* (2017) 17 Cal.App.5th 51, 109.)	*ConAgra* does include "assisted in creating a nuisance." But there is a question as to whether this rule is limited to public nuisance or whether one can also be liable for assisting in the creation of a private nuisance. The committee has elected to defer consideration of the comment to the next release cycle.
		The second proposed modification to these proposed instructions concerns the deletion of the lack-of- consent elements. These elements should not be deleted from the Instruction. It is unclear, therefore why the element of lack of consent is being proposed to be deleted from the Instruction. To the extent the deletion was made on the theory that the defense of consent is an affirmative defense and thus should be the subject of a separate instruction, then a separate instruction would need to be crafted in this regard and included to accompany this proposed deletion. Without such a separate proposed instruction, the deletion of the element of the lack of consent, would be inappropriate.	The comment is correct that if the issue were settled as a defense, a separate instruction would be appropriate. But in light of the committee's conclusion that the issue is unsettled, a separate instruction would be premature.
		The addition of the discussion of the case of *Mangini v. Aerojet-General Corp*. (1991) 230 Cal. App. 2d 1125 to the "Sources and Authority" is appropriate, because it provides support for the essential factual element of lack of consent.	No response is necessary.
		The additional quoted language from the *Mangini* case (proposed to be added to CACI 2021 Private Nuisance), should also be added to the *Mangini* quote for the Public	The committee agreed and has added the additional language.

Instruction	Commentator	Comment	Committee Response
		Nuisance Instruction; i.e., the following should be added to the beginning of the *Mangini* quote in the "Sources and Authority" section for this Public Nuisance Instruction: "[W]here, as here, an owner of property seeks damages for creation of a nuisance by a prior lessee, the lessee has a defense that his use of the property was lawful and was authorized by the lease, i.e, his use of the property was undertaken with the consent of the owner." (*Mangini v. Aerojet-General Corp.* (1991) 230 Cal. App. 2d 1125, 1138.	
2506, *Limitation on Remedies—After-Acquired Evidence*	Association of Southern California Defense Counsel, by Eric C. Schwettmann, Co-chair, Employment Law Subcommittee, Ballard Rosenberg Golper & Savitt, Encino	The added full paragraph appears to suggest that damages must be awarded for any time before the date the defendant discovered the plaintiff's misconduct. However, this language appears inconsistent with the holding of *Salas v. Sierra Chemical Co.* (2014) 59 Cal.4th 407, 430-31 (after-acquired evidence is not a complete defense to liability but may foreclose other available remedies, i.e. the amount of damages). ASCDC suggests that the last paragraph be amended to read: "If you find that [*name of defendant*] has proved that [*name of plaintiff*] [*describe misconduct*] and that [*name of defendant*] would have validly discharged [*name of plaintiff*] if [he/she/it] had known of the misconduct, then [*name of plaintiff*] may recover damages, **if any,** from any time before the date on which [*name of defendant*] discovered the misconduct."	The proposed language says: "may recover damages;" the committee sees no need to also add "if any."
	California Employment Lawyers Association, by Craig T. Byrnes	We could not posit a situation in which the court would get to "decide[] to allow the jury to award damages or to make a finding on damages" as a consequence of this affirmative defense. Whether damages are to be awarded is not a decision left to the trial judge. That is a factual	The "decides to allow" refers to the previous discussion in the Directions for Use, that the court could take the fact-finding away from the jury because the judge deems the claim to be purely equitable.

Instruction	Commentator	Comment	Committee Response
	and Leonard H. Sansanowicz	question for the jury. Therefore, the comment should be deleted and the paragraph made mandatory.	
		We also propose deleting the last sentence from this paragraph and adding it as element 4 to the affirmative defense. That is, make "[[*Name of defendant*] must prove the date of discovery]]" as a fourth element. After-acquired evidence is an affirmative defense, and the burden is on defendant to prove every element of it. (See *Murillo v. Rite-Stuff Foods, Inc.* (1998) 65 Cal.App.4th 833, 842, 845–846 (1998) (discussing after-acquired evidence as an affirmative defense).)	The burden of proof is made clear in the last paragraph.
	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	We believe that whether particular conduct constitutes misconduct can depend on the facts, so an example such as the bracketed example in the second line of the instruction "e.g. had provided a false Social Security Number," may not be helpful. We would delete this language.	Whether particular conduct constitutes misconduct depends on the facts and therefore an example was provided. The committee finds the example to be helpful.
		The language "validly discharged" in the final paragraph of the instruction is not adequately defined. We would make a more specific reference to the language in element 3 stating the appropriate standard: ". . . would have ~~validly~~ discharged [*name of plaintiff*] as a matter of settled company policy if . . . ."	"Validly" does not just refer to element 3; it refers to all of the elements. While disagreeing with the comment's proposed revision, the committee did agree that "validly" without further explanation, would be confusing to the jury. The committee has revised this language to omit "validly."
	Orange County Bar Association, by Deirdre Kelly, President	The after-acquired evidence defense also applies to failure to hire. (See *Salas v. Sierra Chemical Co.* (2014) 59 Cal. 4th 407, 428 ("The doctrine of after-acquired evidence refers to an employer's discovery, after an allegedly wrongful termination of employment or refusal to hire, of information that would have justified a lawful termination or refusal to hire.")	The committee agreed and has added "refused to hire" as an option to "terminated" throughout the instruction.
		Propose deleting the word "validly" as it could result in confusion and there is no authority using or defining the term.	Addressed above in response to the comment of the California Lawyers Association.

Instruction	Commentator	Comment	Committee Response
2508, *Failure to File Timely Administrative Complaint (Gov. Code, § 12960(d))—Plaintiff Alleges Continuing Violation*	Association of Southern California Defense Counsel, by Eric C. Schwettmann, Co-chair, Employment Law Subcommittee, Ballard Rosenberg Golper & Savitt, Encino	The revised paragraph 1 states "That [*name of defendant*]'s [*e.g. harassment*]" This appears confusing and given the reference to "conduct" in elements 2 and 3, the word "conduct" should be added between "[name of defendant]'s and "[*e.g. harassment*]."	The "*e.g., harassment*" refers back to the previous reference in the second paragraph: "[*specify the unlawful practice, e.g., harassment*]" That is the CACI format for providing examples after the first iteration. For elements 2 and 3, it is not necessary to use "*e.g., harassment*" again; it's fine to switch to just "conduct."
	California Employment Lawyers Association, by Craig T. Byrnes and Leonard H. Sansanowicz	The way the instruction currently reads, juries could be confused as to the scope of a DFEH administrative complaint, and what it reasonably should be read to include. Therefore, we propose the following optional language to be included in this instruction, and changing the title of the instruction to: "Failure to File Timely Administrative Complaint (Gov. Code, §12960(d)): [[*Name of defendant*] claims that [*name of plaintiff*] did not include in [his/her] DFEH complaint the [harassment/discrimination/retaliation] issue for which [he/she] is suing. If [*name of defendant*] proves that the [harassment/discrimination/retaliation] issue was not included in the DFEH complaint, [*name of plaintiff*] may still recover for those acts if you find them to be like or related to those issues that were included.]	The comment is really proposing a different instruction unrelated to the continuing violation rule. They would broaden this instruction to encompass a second issue that might come up with regard to a DFEH complaint; a deviation between the conduct alleged in the administrative complaint and the conduct sued on. The committee will consider drafting such an instruction in the next release cycle.
		The comment proposes adding three cases, *Baker v. Children's Hospital Medical Center* (1989) 209 Cal.App.3d 1057, 1064, 1065; *Rope v. Auto-Chlor System of Washington, Inc.* (2013) 220 Cal.App.4th 635, 655; and	The three excerpts proposed all present points related to deviation between the administrative complaint and the pleadings. None have anything to do with the continuing violation rule. They would be

Instruction	Commentator	Comment	Committee Response
		Nazir v. United Airlines, Inc. (2009) 178 Cal.App.4th 243, 267, 266 - 67 (2009) to Sources and Authority:	appropriate should the committee go forward with a new instruction.
	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	We believe the proposed new language in the second paragraph of the instruction could be stated more clearly. We propose: "[*Name of plaintiff*] may recover ~~only~~ for acts of alleged [*specify the unlawful practice, e.g., harassment*] that occurred ~~after~~ before [*insert date one year before the DFEH complaint was filed*], ~~unless~~ only if [he/she] proves all of the following:" If the language is not changed as proposed, we would change "that occurred after" to "that occurred on or after" so as to capture the day exactly one year before the complaint was filed, which is within the limitations period.	The committee agreed with the comment and has made the proposed revisions.
		In element 1, we would change "that occurred after that date" to "that occurred on or after that date" so as to capture the day exactly one year before the complaint was filed, which is within the limitations period.	The committee agreed and has made the change.
2510, *"Constructive Discharge" Explained*	Association of Southern California Defense Counsel, by Eric C. Schwettmann, Co-chair, Employment Law Subcommittee, Ballard Rosenberg Golper & Savitt, Encino	The added paragraph, taken from *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, is misleading and does not include the full context of the quoted excerpts as demonstrated in the Sources and Authority. The last sentence ("But in some circumstances, a single intolerable incident may constitute a constructive discharge") in particular could badly mislead a jury because they are not going to have read the rest of the *Turner* decision, which makes it clear that last sentence almost never applies. ASCDC is generally not aware of any published decision finding a viable constructive discharge claim based on a single outrageous act. The first added sentence is consistent with *Turner* as is the second sentence. However, in the event the last sentence is deleted as it	What is not included is *Turner's* specific reference to criminal acts as an example of a single intolerable incident. The committee believes that the added language captures the language of *Turner* in a balanced way.

Instruction	Commentator	Comment	Committee Response
		should be to accurately reflect constructive discharge principles, then the second sentence should likewise be omitted.	
2521A, B, and C, 2522A, B, and C, *Hostile Work Environment Harassment* 2524, *"Severe or Pervasive" Explained*	Association of Southern California Defense Counsel, by Eric C. Schwettmann, Co-chair, Employment Law Subcommittee, Ballard Rosenberg Golper & Savitt, Encino	The Committee has indicated that it is considering possible revisions to this set of instructions relating to hostile work environment harassment in light of the passage of Government Code § 12923. ASCDC submits that the majority of § 12923 (particularly (b), (c), (d) and (e)) relate to the Court's analysis of prior case authority in relation to motions for summary judgment. Whether or not a single incident of harassment (sub. (b)) may create a triable issue of fact is irrelevant for the jury. The rejection of the "stray remarks" doctrine (affirming *Reid v. Google, Inc.* (2010) 50 Cal.4th 512) (sub. (c)) likewise is not a matter the jury would be considering in relation to the CACI instructions. Likewise, the determination that the standards for determining the existence of a hostile work environment should not vary from workplace to workplace (disapproving in whole or in part *Kelly v. Conco Companies* (2011) 196 Cal.App.4th 191) (sub. (d)) is not a matter which needs to be included or considered vis-à-vis the existing instruction language. ASCDC submits that this set of instructions still accurately reflect the standards for hostile work environment harassment. Further, ASCDC believes that any attempt to graft on the summary judgment-related, or non-jury question, standards of pars. (b)-(d) would be confusing, misleading, and improper as a matter of fact and law.	Consideration of possible revisions to the harassment instructions is currently underway. This comment has been provided to the committee. It will be substantively addressed in an upcoming release when the committee completes its work on these instructions.
	California Employment Lawyers Association, by Craig T. Byrnes and Leonard H. Sansanowicz	We support adding to the second element of each of these instructions to include harassment on the basis that the plaintiff was perceived to be a member of the protected class or associated with a member of the protected class. Each element would therefore read:	The Directions for Use say to "Modify element 2 if plaintiff was not actually a member of the protected class but alleges harassment because he or she was perceived to be a member or associated with someone who was or was perceived to be a member, of the protected class. (See Gov. Code, § 12926(o).) The committee believes that this is sufficient.

Instruction	Commentator	Comment	Committee Response
		2. That [name of plaintiff] was subjected to unwanted harassing conduct because [he/she] was [*protected status, e.g., a woman; and/or perceived to be [a member of the protected class] and/or associated with [a member of the protected class*]	
		Add to "Sources and Authority:" Gov. Code § 12926(o) (" 'Race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, age, sexual orientation, or military and veteran status' includes a perception that the person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics.")	GC 12926(o) is currently included under the label "Perception and Association. The committee no longer quotes statutory language in the Sources and Authority.
		In response to the advisory committee currently considering revisions to the harassment instructions in light of SB 1300 (Stats. 2018, ch. 955.), we have submitted a separate letter detailing how the committee should incorporate the new language into the harassment jury instructions.	This separate letter has also been provided to the committee for its consideration of possible changes to these instructions.
	Orange County Bar Association, by Deirdre Kelly, President	Government Code Section 12923 includes the legislature's intent regarding harassment claims but does not otherwise alter the elements of this claim. While Government Code section 12923(b) states that a single incident of harassing conduct may be sufficient to create a triable issue of fact, this deals with evaluating claims at the summary judgment stage. In addition, this provision within Government Code Section 12923 simply codified pre-existing law. Could consider referencing statute in source of authority section.	This comment has also been provided to the committee.
2540, 2541, 2544, Disability Discriminatio n	Association of Southern California Defense Counsel, by Eric C. Schwettmann,	ASCDC believes that the proposed revisions to these instructions to reflect the legal protections afforded job applicants as set forth in *Atkins v. City of Los Angeles* (2017) 8 Cal.App.5th 696 are consistent with that decision and existing standards.	No response is necessary.

Instruction	Commentator	Comment	Committee Response
	Co-chair, Employment Law Subcommittee, Ballard Rosenberg Golper & Savitt, Encino		
2540, 2541	California Employment Lawyers Association, by Craig T. Byrnes and Leonard H. Sansanowicz	We propose that the language of the "essential job duties" element be modified to reflect the language of the statute: Revise element 4 of 2540 as follows: "[with or without reasonable accommodation for [his/her] [*e.g., physical condition*]];"	By bracketing the language to make it optional, "without" is not needed. If no reasonable accommodation is needed, the optional language is omitted.
		We propose a similar change for element 5 of 2541, but since that instruction also addresses reassignment, it should include language encompassing union members who seek to use their bumping rights, as follows: To: That [*name of plaintiff*] was able to perform the essential job duties of [[his/her] current position or a vacant alternative position to which [he/she] could have been reassigned/the position for which [he/she] applied][or, if plaintiff was in a union and had seniority bumping rights, that plaintiff was able to perform the essential job duties of the job that they sought pursuant to those rights] with or without reasonable accommodation for [his/her] [e.g., physical condition];	The committee sees no reason to elevate one particular fact situation into the instruction. And since this is the "reasonable accommodation" instruction, there is no need for "or without," since it will always be "with."
2544, *Disability Discrimination—Affirmative Defense—*	California Employment Lawyers Association, by Craig T. Byrnes and Leonard H. Sansanowicz	The current Instruction 2544 relies on section 11067(c)-(e) of the California Code of Regulations for authority. Since the date this instruction originally was adopted, the Fair Employment and Housing Council substantially revised that section of the regulations. To date, the instruction has not been updated to reflect those revised regulations and the current proposed revision to the instruction does not	The comment is beyond the scope of matters considered by the committee. It will be addressed in the next release cycle.

Instruction	Commentator	Comment	Committee Response
Health or Safety Risk		account for those regulatory changes. Those considerations should be included in the jury instruction. (The comment then presents a complete revision of the instruction.)	
		Also add: "In determining whether [*name of defendant*]'s above defense has merit, you must consider the following factors: o The duration of the risk; o The nature and severity of the potential harm; o The likelihood that the potential harm would have occurred; o How imminent the potential harm was; and o Relevant information regarding [*name of plaintiff*]'s past work history. The analysis of these factors should be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence."	This will be addressed in the next release cycle.
		Add to "Sources and Authority:" 2 CCR § 11067(b)-(e), which has this exact language.	This will be addressed in the next release cycle.
2704, *Damages—Waiting-Time Penalty for Nonpayment of Wages*	California Employment Lawyers Association, by Craig T. Byrnes and Leonard H. Sansanowicz	Change: "may be entitled to receive an award of a civil penalty" to "may be entitled to receive an award of a statutory penalty" The cases make a distinction between civil and statutory penalty. They can be cumulative. This penalty is a statutory one.	The committee believes that the jury does not need to know the difference between a civil penalty and a statutory penalty. However, the language has been changed to refer to an "additional penalty."
		Add to "Sources and Authority:" *Caliber Bodyworks, Inc., v. Sup. Ct.* (2005), 134 Cal.App.4th 365, 378 (referring to "the statutory penalty provided by section 203).	The committee agreed and has made this addition.

Instruction	Commentator	Comment	Committee Response
		Change: "That [*name of plaintiff*] [was terminated from/quit] [his/her] employment with [*name of defendant*];" To: ""That [*name of plaintiff*]'s employment with [*name of defendant*] ended" The statute requires only that the plaintiff's employment ended. There is no requirement to prove the nature of the end of employment as either a termination or a quit.	The committee agreed and has made this revision.
		Change: "The term 'willfully' means that the employer intentionally failed or refused to pay the wages" To: "The term 'willfully' means that the employer intentionally failed or refused to pay the wages <u>when owed. [*Name of plaintiff*] does not need to prove that [*name of defendant*] acted with malice or bad intent</u>."	"When owed" is not needed because "when due" is in element 2. The committee agreed to add the limitation on not having to prove malice or bad intent, which comes from the recent case of *Nishiki v. Danko Meredith, P.C.* (2018) 25 Cal.App.5th 883, 891. The opinion says that "'willful' … does not necessarily imply anything blamable." But the committee doubts that a jury will correctly understand the word "malice." It has added the following language: The term "willfully" means <u>only</u> that the employer intentionally failed or refused to pay the wages. <u>It does not imply a need for any additional bad motive.</u>
		In Directions for Use. change Labor Code section cites from "(see Lab. Code, §§ 201, 201.5, 201.7, 202, 205.5)" to "(see Lab. Code, §§ 201, <u>201.3</u>, 201.5, ~~201.7~~, <u>201.9</u>, 202, 205.5)" (These citations support the statement that "Final wages generally are due on the day an employee is discharged by the employer, but are not due for 72 hours if an employee quits without notice."	The "due when discharged" clause is from Labor Code § 201(a); the 72-hour "quit without notice" rule is in Labor Code § 202. Those are the only cites that are needed.

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		Add to "Sources and Authority:" "Currently, the question of whether meal period premium wages can serve as the predicate violation for Section 203 waiting time penalties where the employer does not include the premium wage in the employee's pay or pay statements during the course of the violations has been certified by the United States Court of Appeals, Ninth Circuit to the California Supreme Court. See *Stewart v. San Luis Ambulance, Inc.* (9th Cir. 2017) 878 F.3d 883 (request for certification granted March 28, 2018, S246255)."	The proposed addition is not an excerpt from an opinion.
		Add to "Sources and Authority:" "The purpose of section 203 is to compel the prompt payment of earned wages; the section is to be given a reasonable but strict construction. [Citation.] ... '[The] statute should have reasonable construction. Its design is to protect the employee and to promote the welfare of the community .... But it is to be observed that the most formidable objection to the statute derives its principal force from the supposed hardships of a hypothetical case wherein the employer is without fault or the employee is guilty of culpable conduct. The statute ... contemplates that the penalty shall be enforced against an employer who is at fault. It must be shown that he owes the debt and refuses to pay it. He is not denied any legal defense to the validity of the claim.' [¶] However, to be at fault within the meaning of the statute, the employer's refusal to pay need not be based on a deliberate evil purpose to defraud [employees] of wages which the employer knows to be due. As used in section 203, 'willful' merely means that the employer intentionally failed or refused to perform an act which was required to be done." Similarly, "[i]n civil cases the word "willful" as ordinarily used in courts of	The Sources and Authority already have the underlined part of the excerpt. The committee believes that is sufficient. If one clicks on the citation in an electronic product, one can read the rest of it on Lexis or Westlaw.

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		law, does not necessarily imply anything blameable, or any malice or wrong toward the other party, or perverseness or moral delinquency, but merely that the thing done or omitted to be done, was done or omitted intentionally. It amounts to nothing more than this: "That the person knows what he is doing, intends to do what he is doing, and is a free agent." ' " (*Nishiki v. Danko Meridith, APC* (2018) 25 Cal.App.5th 883, 891 (citations omitted)	
	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	As revised, the instruction essentially uses the term "willfully" and then defines "willfully" as "intentionally." We would use the term "intentionally" instead of "willfully" in the first item 3: 3. That [*name of defendant*] ~~willfully~~ intentionally failed to pay these wages."	The committee does not think that it should avoid the word "willfully" since it is in the statute. Note that the proposed rewrite would also remove "or refused." The committee believes that "or refused" is required; In fact, "refused" fits better with "intentionally" than does "failed."
		Nishiki v. Danko Meredith, P.C. (2018) 25 Cal.App.5th 1460, 1468, elaborates on the meaning of "willful" or "intentional." We would replace the sentence after the first element 3 with the following language based on *Nishiki*: "A person acts intentionally if the person knows what he or she is doing and intends to do what he or she is doing."	By replacing "willfully" with "intentionally," the language is now circular (acts intentionally if intends).
	Orange County Bar Association, by Deirdre Kelly, President	The language in the instruction that the Plaintiff must demonstrate the defendant failed to pay the wages "when due" creates unnecessary ambiguity, because it is not clear from the instruction when the payment was due. It is likely that, since this is an element of the claim, if the parties do not agree to the date on which the wages were due, the jurors will either be (1) unable to determine the answer or (2) seek guidance from the parties and the court, slowing down the process of them reaching a verdict. The instruction as it currently exists alleviates these problems	The committee saw the issue and has made a small change to address it. In the second part of the instruction as proposed, the jury must find the date on which employment ended. This has been revised to find the date on which the wages were due. Wages are not always due on the date when employment ends; for example, when a person quits without notice.

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		by including the date that the wages were due as part of the instruction.	
3725, *Going-and-Coming Rule—Vehicle-Use Exception*	Association of Southern California Defense Counsel, by Edward L. Xanders, Greines, Martin, Stein & Richland, Los Angeles	The proposed revision should—indeed, must—be rejected. The proposed revision misstates the holding in *Newland v. County of L.A.* (2018) 24 Cal.App.5th 676, improperly denigrating it. What *Newland* holds is that the going and coming rule applies (and the Vehicle Use Exception to that rule does not apply) where the employer did not require the employee to have the vehicle available at work on the day of the accident and did not benefit from the vehicle being available *that day*. The proposed CACI revision fundamentally mischaracterizes *Newland's* actual language and holding. It characterizes *Newland* as holding that the employee must have been using the vehicle "to do the employer's business or provide a benefit for the employer at the time of the accident." That characterization of *Newland* makes no sense. If the issue in *Newland* were (as the proposal suggests) whether the employee was conducting the employee's business or benefitting the employer at the time of the accident, the Vehicle Use Exception would have been irrelevant. (The comment goes on to support this position with several pages of argument, but it all comes down to whether the holding is "day of accident" or "time of accident.")	There is language in *Newland* that could lead to one of two conclusions re: a temporal requirement. The words "time of the accident" appear many times. The committee sees no way to construe that language other than as meaning that the employee must have been driving within the scope of employment when the accident happened. But the words "day of the accident" also appear many times including this summation at the end: "There was no evidence that [employee] required a vehicle for work on the day of the accident, and no evidence that the [employer] received any direct or incidental benefit from [employee] driving to and from work that day." So under this construction as advanced by ASCDC, if the employee will need the car on Monday, Monday's commute is within the scope of employment whether or not the employee was engaged in the employer's business at the time of the accident. But if the employee will not need a car on Tuesday, then Tuesday's commute is not excepted. That would arguably be a reasonable limitation on the vehicle use exception, albeit not one clearly established before *Newland*. The committee now believes that both possible constructions of *Newland* need to be presented. The proposed additional language in the Directions for Use has been expanded to include the possibility that it is the day of the accident that must be looked to.

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	Association of Defense Counsel of Northern California and Nevada, by Don Willenburg, Chair, Amicus Brief Committee, Gordon & Reese, San Francisco	The proposed change focuses on "at the time of the accident." But as is clear from the larger quote (and the rest of the decision), the time frame is "that day:" whether the employer "required [the employee] to use his personal vehicle for work purposes that day" or "otherwise benefit[ted] from his use of a personal vehicle that day." The issue arose in *Newland* because the employee needed the car for work some but not all days.	See response above.
	Thomas Murray, Attorney at Law, San Francisco	If we are going to continue to whittle away at the going and coming rule, I suggest adding that "a benefit to the employer" does not include the employee showing up for work.	No citation has been provided for the proposed addition.
	Orange County Bar Association, by Deirdre Kelly, President	The proposed language in the Directions for Use is not helpful to the litigant or the judge relating to the time during which an employee or agent was using their vehicle. The proposed language is based on appellate court case *Newland v. County of L.A.* (2018) 24 Cal.App.5th 676. As the proposed language clearly points out, there is time-honored case law that differs from the reasoning in *Newland* that relates to the absence of any temporal requirement when upholding the use of the vehicle use exception to the going and coming rule. See e.g. *Lobo v. Tamco* (2010) 182 Cal.App.4th 297, 301; *Huntsinger v. Glass Containers Corp.* (1972) 22 Cal.App.3d 803. As such, the addition of the proposed language will confuse and unnecessarily frustrate the application of the vehicle use exception to the going and coming rule.	The committee believes that it is better to flag the case for bench and bar and point out possible concerns than to ignore it.
		The timing by which a person is using their vehicle has been addressed is several precedential cases. In fact, case law has found that a person not using their vehicle at the time of the accident for the benefit of the employer to still be considered a vehicle use exception to the going and	The committee agrees with the comment if *Newland* means that the employee must be doing the employer's work "the time of the accident." But this is the point that the committee wants to make in the

Instruction	Commentator	Comment	Committee Response
		coming rule. (See *Richards v. Metropolitan Life Ins. Co.* (1941) 19 Cal.2d 236.) This general rule was expanded in *Huntsinger v. Glass Containers Corp.* (1972) 22 Cal.App.3d 803 and *Lobo v. Tamco* (2010) 182 Cal.App.4th 297. Most recently, in *Sumrall v. Modern Alloys, Inc.* (2017) 10 Cal. App. 5th 961, though not a vehicle use exception case but rather a business errand case, the appellate court found that there was a triable issue of fact relating to whether a vehicle user was in the course and scope of his employment while in his personal vehicle on his way to drop off his vehicle to get into a work vehicle.	Directions for Use; that so construed, *Newland* is contra to a long line of authority.
3903Q, *Survival Damages (Economic Damage)*	Civil Justice Association of California, by Kim Stone, Interim President	Our members oppose the new proposed CACI 3903Q because the instruction circumvents case law that holds in the case of instantaneous death, punitive damages don't "survive' to be recovered by the estate or representative(s) in the survival action. Although the new instruction has a title of economic damages, the commentary includes reference to punitive damages. We think this instruction confuses wrongful death actions with survival actions. We suggest changing the language to the following: If you decide that [*name of plaintiff*] has proved [his/her] claim against [name of defendant] for the death of [*name of decedent*], you also must decide the amount of damages that [*name of decedent*] sustained before death and would have been entitled to recover because of [*name of defendant*]'s conduct ~~The recoverable damages are limited to the loss or damage that [name of decedent] sustained or that occurred before [his/her] death~~[, including any [penalties/ [or] punitive damages] as explained in the other instructions that I will give you]. [[[Specify other ~~types~~ categories of recoverable damage listed in CACI 3903 to the extent they are supported by	The committee does not believe that the instantaneous death point is needed in the instruction. In any event, the comment's proposed rewrite does not address the effect of instantaneous death. The committee agreed to delete the limitation sentence in favor of just saying "sustained before death" as proposed. The committee believes that changing "types" to "categories" is of no significance but has decided that neither word is really needed. The reference to CACI No. 3903 is of no value as 3903 is just a lead-in sentence to listing all items of economic damage. The committee is concerned that by telling the jury that it may not award damages for "pain, suffering, or disfigurement," it might award damages for grief, anxiety, humiliation, etc. – those aspects of noneconomic damages that are not expressly excepted in § 377.34. The committee has, however,

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		the evidence, but not including damages for pain, suffering, or disfigurement, and not including "lost years" future damages.	added a reference to the prohibition on pain, suffering or disfigurement in the Directions for Use. With regard to "lost years future damages," the committee has added this sentence to the end of the instruction: "You may not award damages for any loss for [*name of decedent*]'s shortened life span attributable to [his/her] death."
	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	We would revise the second sentence in the instruction for greater clarity: "The recoverable damages are limited to the loss or damage that [name of decedent] sustained ~~or that occurred~~ before [his/her] death, including . . . ."	The committee agreed and has removed "or that occurred."
		We would add to the Directions for Use a statement that if this instruction is given other instructions such as CACI Nos. 3903A, 3903C, and 3903E that might duplicate some of the items of damages should not be given.	The committee agreed with the comment and has addressed other possible damages instructions in the Directions for Use. If, for example, 3903A on past and future medicals were given, the future medicals language would have to be deleted. Optional item 1 says everything that the "past" part of 3903A says. The same is true for 3903C on lost income (past and future).
	Otis Elevator and PBF Holdings (same letter)	This is a long letter, which would be tedious to try to reproduce here. On pp. 6 and 7 is their proposed revised instruction. I'm going to take each proposed revision and address them one at a time. First: Change item 1 on medical expenses to read: 1. The ~~reasonable~~ cost of ~~health~~ medical care that [name of decedent] received from health care professionals;]	The committee believes that item 1 should mirror 3903A, which includes "reasonable," but uses "medical" instead of "health."

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		We object to the proposal because it Indicates that damages for medical expenses may be awarded for an amount that is reasonable rather than for the actual, out-of-pocket loss, even when those services are provided by a professional.	
		Add and make optional the following two items of potential recovery: [2. The reasonable value of health care services provided to [*name of decedent*] by family members;] [3. The reasonable value of health care services that [*name of decedent*] would have provided to [*name of family member*] prior to [*name of decedent*]'s death;] We object to the proposal because it omits to include a specific type of damage for the reasonable value of home health care services provided by the decedent before death. Both measures of damages related to health care services were expressly allowed by the court in *Williams v. The Pep Boys Manny Moe & Jack of California* (2018) 27 Cal.App.5th 225. The instruction would enable a jury to award all types of health care damage in a lump sum. For example, unless directed to do otherwise by a special verdict, a jury could render an unapportioned award for out-of-pocket medical expenses and gratuitously provided services, making any post-verdict or appellate challenge to the award virtually impossible.	The committee believes that family-provided medical services (comment additional item 2) would constitute "reasonably necessary medical care" per item 1 (with "health" changed to "medical") as item 1 is not limited to health care professionals. As the comment notes, separation can be addressed in the verdict form if there is a reason to get separate dollar amounts from the jury. The committee agreed to add a specific item for services that the decedent could have provided to someone else (comment additional item 3).
		The cases cited as authority for the instruction in the Sources and Authority are neither complete nor in an order that logically explains how distinct elements of damage should be included in the instruction. While the cases are cited accurately for their principles, they are not	It is not the purpose of the case extracts in the Sources and Authority to explain how and under what circumstances the instruction should be used. That is the function of the Directions for Use. Proposed additions to the Directions for Use in

Instruction	Commentator	Comment	Committee Response
		provided in a manner that best explains how and under what circumstances the instruction should be used and/or modified.	response to other comments above at least partially address this concern, which is not specific enough to address further.
4002, *"Gravely Disabled" Explained*, and 4003, *"Gravely Disabled" Minor Explained*	Orange County Public Defender, by Sara Ross, Assistant Public Defender	The proposed deletion is based on In *Conservatorship of M.B.* (2018) 27 Cal.App.5th 98 (M.B.), a recent case that represents a drastic sea change to the minor's definition of gravely disabled. *M.B.'s* determination that Section 5008, subdivision (h)(1)(A), is the appropriate definition for gravely disabled minors is problematic for several reasons. *M.B.* bases its rationale, in part, on the fact that Section 5585.25 is not located in the LPS Act and is instead found in the Children's Civil Commitment and Mental Health Treatment Act of 1998. There is little to support the *M.B.* court's conclusion that this fact should so drastically change the definition of "gravely disabled" for minors and thus result in the deletion of CACI 4003. Furthermore, while M.B. also bases its ruling on prior precedent, such precedent is questionable; in support of its holding, *M.B.* relies upon a footnote from *In re Michael E.* (1975) 14 Cal.3d 183, a case published nearly forty-five years ago which pre-dates the publication of CACI 4003.	The comment argues that the case is wrongly decided, so it shouldn't be addressed in CACI. If there were some authority contra, the committee would be sure to include that authority. But the comment points to no case that could be advanced as supporting a different result. And the committee believes that on the law if not on policy, the court's holding is correct. Courts shouldn't go outside of the Lanterman Petris Short Act to define terms that are expressly defined in the LPS.
		The decision to revoke CACI 4003 defies common sense. Put simply, children are different than adults. Indeed, children, even those who are not suffering from mental disorders, are not expected to provide their own food, clothing, and shelter. Instead, the analysis for whether a minor is gravely disabled is whether a minor is able to utilize resources provided to him or her for purposes of food, clothing, and shelter. In other words, the failure of a child to provide his or her own food, clothing, and shelter does not demonstrate that the child is "gravely disabled"; it reflects that the child is just *a child*. Thus, the original definition found in CACI 4003, based upon Section	While the committee sees some validity to the policy arguments presented, it is the province of the Legislature, not of a jury instructions committee, to improve the law.

Instruction	Commentator	Comment	Committee Response
		5585.25, is appropriate because it reflects a minor's ability to utilize "those things that are essential to health, safety, and development, including food, clothing, and shelter, even if they are provided to the minor by others…" (CACI 4003.)	
4106, *Breach of Fiduciary Duty by Attorney—Essential Factual Elements*	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	We believe the word "intentional" encompasses "fraudulent" as that word is used in this context, so we would delete "or fraudulent" in the first sentence of the second paragraph in the Directions for Use.	The committee agrees that "intentional" and "fraudulent" do not mean the same thing. But the *Knutson* case (*Knutson v. Foster* (2018) 25 Cal.App.5th 1075, 1093–1094) on which the paragraph is based is a fraud case. The committee sees no harm in leaving "fraudulent" in.
	Paul R. Johnson, Attorney at Law, King & Spalding, Los Angeles	I write to express concern about the paragraph proposed to be added to the Directions for Use and would delete it. This paragraph presents a problem broader than this one instruction by suggesting a false dichotomy between the "substantial factor" test and basic "but for"/cause-in-fact causation. This could confuse the "substantial factor" test for any intentional tort. As explained by the California Supreme Court in *Viner v. Sweet* (2003) 30 Cal.4th 1232, 1239–1240, the "substantial factor" test subsumes the requirement of "but for" causation (i.e., cause in fact), except in cases of concurrent independent causes. (See *ibid.* [citing Restatement Second of Torts, § 432]; accord CACI 430, Directions for Use.) That is, absent concurrent independent causes, conduct is not a "substantial factor" in causing harm unless it is a cause-in-fact of that harm. The meaning of "substantial factor" does not change depending on whether a cause of action involves conduct that is negligent as opposed to intentional. The Guide for Using Judicial Council of California Civil Jury	The new paragraph says that "substantial factor" is the test for intentional or fraudulent breach of fiduciary duty. The committee finds no suggestion that substantial factor is intended to be limited to negligence, here or anywhere. The issue to be spotted is that *Viner v. Sweet* (2003) 30 Cal.4th 1232 requires "but for" (would have happened anyway) causation for legal malpractice, and *Knutson* says that this applies to negligent breach of fiduciary duty.

Instruction	Commentator	Comment	Committee Response
		Instructions that precedes all CACI instructions recognizes as much: "Substantial Factor: The instructions frequently use the term 'substantial factor' to state the element of causation, rather than referring to 'cause' and then defining that term in a separate instruction as a 'substantial factor.' An instruction that defines 'substantial factor' [CACI 430] is located in the Negligence series. *The use of the instruction is not intended to be limited to cases involving negligence.*" (CACI User Guide (2019 ed.), emphasis added.)	
		The recent Court of Appeal case cited in the proposed direction for CACI 4106, *Knutson v. Foster* (2018) 25 Cal.App.5th 1075, said that the "substantial factor" test applies to a fraud claim. It used the term "but for" as the equivalent of the "trial within a trial" standard in noting a more stringent causation test for legal-malpractice claims based on negligence. (*Id.* at pp. 1078–1079.) It is possible the *Knutson* court erroneously saw the "substantial factor" test as at odds with basic "but for" causation instead of subsuming it. (See *id.* at pp. 1091–1092.) But *Knutson* should be read more narrowly, as using "but for" in a specific application in the more stringent causation test for legal-malpractice claims based on negligence. The CACI 4106 Directions for Use should not suggest a false conflict between the "substantial factor" test and basic, commonly understood "but for"/cause-in-fact causation when the California Supreme Court has already shown there is no such conflict, absent the exception for concurrent independent causes. (*Viner v. Sweet, supra*, 30 Cal.4th at pp. 1239–1240.)	The committee does not believe that the court in *Knutson* was erroneous in any way. This extension of *Viner v. Sweet* to negligent breach of fiduciary duty in this instruction does not raise any of the concerns of the comment.
4570 et seq. *Right to*	Association of Defense Counsel	As a first impression of the Right to Repair Act instructions, it is our opinion that the proposed	A "functionality standard" is not plain language readily understood by a jury.

Instruction	Commentator	Comment	Committee Response
Repair Act – General Comments	of Northern California and Nevada, by Bobby Dale Sims Jr., Sims, Lawrence & Arruti, Sacramento	instructions use language contrary to Civil Code § 895 et seq. For example, the title for Proposed CACI 4570 states "Right to Repair Act – Construction Defects." This is in opposition to Civil Code § 895, et seq., which use the terms "functionality standards" and not the terms "construction defects." Every claim/allegation is now judged by whether it meets the specified functionality standard. We respectfully proffer that a better title for CACI 4570 (and subsequent instructions) should read: "Right to Repair - Violation of Functionality Standards - Essential Factual Elements." And, the first sentence of 4570 should not have the term "defects" but should use the phrase "violation of functionality standards." The rest of the proposed instructions also use the word "defect" or the term "construction defects". As this is not the language of the Code, these misnomers should be replaced in each proposed instruction as described above.	
		There is no proposed instruction for each affirmative defense under Civil Code § 945.5. Our members have drafted jury instructions for use in prior cases and we would be happy to submit proposed instructions for those defenses if the Committee would allow such submission.	Proposed new CACI Nos. 4572-4574 are on the affirmative defenses of CC 945.5(a), (b) and (d). And ADC-NCN has submitted comments on 4573 and 4574. So the committee does understand why they would say that "there is no proposed instruction for each affirmative defense." It is true that no instruction is proposed at this time on Civil Code § 945.5(c), the affirmative defense of failure to follow specifications. The committee is continuing to work on that instruction, which it intends to propose in the next release cycle.
4570, *Right to Repair Act—Construction*	Association of Defense Counsel of Northern California and	The Association of Defense Counsel of Northern California and Nevada opposes the proposed "Directions for Use" in that this portion of the "Directions for Use"	The alleged limitation is not in Civil Code § 942, which on its face it would seem apply to all possible defendants. So the question is whether Civil Code § 936 qualifies § 942.

Instruction	Commentator	Comment	Committee Response
Defects—Essential Factual Elements	Nevada, by Bobby Dale Sims Jr., Sims, Lawrence & Arruti, Sacramento	accompanying draft instruction 4570 is not entirely accurate: "In order to make a claim for violation of the Act, a homeowner need only show that the home does not meet the applicable standard. No further showing of causation or damages is required to meet the burden of proof regarding a violation of the Act provided that the violation arises out of, pertains to, or is related to, the original construction. (Civ. Code, § 942.)" That is a true statement of the homeowner's claim is against a builder as that term is defined in Civil Code § 911, but not with respect to general contractors, subcontractors, material suppliers, individual product manufacturers, and design professionals. Those persons and entities are only responsible to the extent they caused a violation of a standard by their negligence or breach of contract. (Civ. Code § 936.) Moreover, a certificate of merit is still required for a claim against a design professional. (Civ. Code § 937.) However, the negligence standard in this section does not apply to any general contractor, subcontractor, material supplier, individual product manufacturer, or design professional with respect to claims for which strict liability would apply. [Civil Code § 911(a) defines a "builder" as follows: (a) For purposes of this title, except as provided in subdivision "builder" means any entity or individual, including, but not limited to a builder, developer, general contractor, contractor, or original seller, who, at the time of sale, was also in the business of selling residential units to the public for the property that is the subject of the	Section 936 says that negligence or breach of contract must be shown with regard to the specified group. Section 942 says that the plaintiff need not show causation or damages. Because causation and damages are elements of both negligence and breach of contract, the committee sees the possible validity of the comment. But the lack of specificity in § 942 doesn't answer the question. But Civil Code § 911 defining "builder" appears in the prelitigation process part of the Act. Further, the definition includes general contractors, who are also within the § 936 group. So the comment's distinction between builders but not general contractors being subject to 942 does not hold up. The committee has added a citation to § 936 with a parenthetical. It has also added "original construction" to the paragraph as § 942 specifies it.

Instruction	Commentator	Comment	Committee Response
		homeowner's claim or was in the business of building, developing, or constructing residential units for public purchase for the property that is the subject of the homeowner's claim.	
	Orange County Bar Association, by Deirdre Kelly, President	This instruction must combine the statutory intent behind Civil Code § 895 (definitions), §896 (standards), and relevant court cases including *Gillotti vs Stewart* (2017) 11 Cal.App. 5th 875 and *McMillin Albany LLC vs Superior Court* (2018) 4 Cal. 5th 241. The OCBA recommends the following modifications: (1) change the first sentence of the instruction to read: "[*Name of plaintiff*] claims that he/she/it has been harmed because of defects in [*name of defendant*]'s original construction of [*name of plaintiff*]'s home, <u>residential property, condominium, common area, or any improvements located on the lot or common area;</u>	It is not necessary to be this precise in an introductory sentence. Civil Code § 896 says; "This title applies to original construction intended to be sold as an individual dwelling unit." The committee believes that that "home" is a good plain-language translation of "individual dwelling unit."
		Modify the Directions for Use to more accurately reference the definitions of Civil Code § 895, which makes the Act applicable to the owners of all single-family homes, individual owners of attached dwellings, and any common-interest association defined in Civil Code § 4080 (Davis-Stirling Common Interest Development Act) – currently the instruction only makes reference to "the plaintiff's home."	This is more information than is needed for the Directions for Use.
		Add the reference from CACI 4571 to the *Gillotti* case which makes the Act applicable not only to the "home" but also any improvements such as landscaping, driveways, and the lot itself.	The committee added an excerpt from *Gillotti*.
		Delete the reference to CACI 4575 as we can find no such instruction;	The reference has been deleted.
		In the Sources and Authority add references to Civil Code § 895 (definitions) and Civil Code § 897 (intent of standards).	The references have been added.

Instruction	Commentator	Comment	Committee Response
	Thomas Olsen, Lorber, Greenfield & Polito, Poway	The law is clear - a claimant who does not reasonably go through the right to repair procedures listed in Civil Code Section 910 et seq. is not allowed to pursue their claim and may not recover damages for it in court. The problem with proposed instruction 4570 is that it assumes that a claimant will automatically prevail if it establishes a violation of the standards set forth in Civil Code Sections 896 and 897. However, that instruction is missing crucial language saying that the claimant must first have gone through the procedures set forth in Civil Code Section 910 et seq. in order to prevail. That language needs to be included in the instruction for it to be an accurate statement of the law. Otherwise, a jury would be misled into believing that a claimant could prevail on their claims without having gone through such a procedure first.	The committee believes that a failure to follow the required prefiling process would be resolved on summary judgment and never be a jury issue. If there might be an issue of fact as to whether the procedures were followed, that would have to be a separate instruction. But until there is a case in which the jury is given that issue to resolve, the committee does not think that such an instruction would be appropriate.
4571, *Right to Repair Act—Damages*	Orange County Bar Association, by Deirdre Kelly, President	This instruction must track the language of both Civil Code §943(b) and §944 together. The proposal tracks Civic Code § 944 but appears to misstate the language of Civil Code §943(b). The OCBA recommends adding to the beginning of the last optional sentence the following: "[Optional Language Applicable Only to Detached Single-Family Homes];"	This is stated in the Directions for Use.
		The last sentence of the Directions for Use needs a better explanation of "the common-law personal use exception," which is being preserved by this statute – neither the statute nor the instructions provide any guidance in these regards.	While the committee would like to accommodate this comment, it is not sure what the "common-law personal use exception" is." Without some assistance from the Legislature as to what is meant, the committee cannot speculate. The reference could be taken out entirely, but that would not flag the issue.
4572, *Right to Repair*	California Lawyers	Although Civil Code section 945.5(a) defines an "unforeseen act of nature" to include manmade events	The committee agrees that there is imprecise statutory drafting in mixing nature and manmade

Instruction	Commentator	Comment	Committee Response
Act—Affirmative Defense—Act of Nature	Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	such as war, terrorism, and vandalism, the jury might be perplexed by an instruction that first states the defendant claims the harm was caused by an unforeseen act of nature and later states the defendant must prove that a manmade event such as war, terrorism, or vandalism caused the damage (if the second bracketed option is selected). We would avoid this by revising the instruction: "[*Name of defendant*] claims that [he/she/it] is not responsible for [*name of plaintiff*]'s harm because it was caused by an ~~unforeseen act of nature~~ event. To establish this defense, [*name of defendant*] must prove ."	events and has made some revisions. But the key word is "unforeseen," which would apply to a manmade event also and should not be in the brackets. The committee does agree, however, the comment's substitution of "event" for "unforeseen act of nature" is better given that some events are manmade. The committee also agrees that the "such as war, terrorism, or vandalism" language qualifying "manmade event" is not needed. There's no need to put in examples that wouldn't necessarily be involved in the case. The event will show up in the "specify" line.
	Orange County Bar Association, by Deirdre Kelly, President	The OCBA recommends that the language of CACI No. 4572 be modified as follows in order to more accurately track the statute: (a) add to the end of the first sentence: "or a manmade event as described"	Changing to "event" resolves this issue.
		Change the end of the last sentence to read: "was caused by a weather condition, earthquake, etc. which was an unforeseen act of nature or by a manmade event such as war, terrorism, or vandalism, that was in excess of the design criteria in effect at the time of the original construction."	The proposed revision would remove the specification of the actual event, which is really more important than the statutory category that the event comes from. Also, "unforeseen" is not used with "manmade event." The committee has elect not to address "design criteria" because it is not sure what it means. The Directions for Use say to modify the instruction if there is an issue.
4573, *Right to Repair Act—*	Association of Defense Counsel of Northern	This instruction provides a listing of things that a defendant must prove to establish an affirmative defense for what amounts to failure to mitigate under Civil Code §	CACI No. 3931 is a general instruction on the rule of mitigation. The mitigation points in this instruction are specific; a and b are directly from the statute.

Instruction	Commentator	Comment	Committee Response
Affirmative Defense—Unreasonable Failure to Minimize or Prevent Damage	California and Nevada, by Bobby Dale Sims Jr., Sims, Lawrence & Arruti, Sacramento	945.5(b). We question the efficacy of paragraph c. of this instruction – c. [Specify other act or omission of plaintiff that is alleged to constitute failure to minimize or prevent damage.]. This provision is not a part of Civil Code § 945.5(b) and appears to be an abbreviation of CACI 3931 Mitigation of Damages (Property Damage). It is our opinion that CACI 3931 is the appropriate instruction and that paragraph c. of the proposed CACI 4573 should not be substituted for the failure to mitigate as instructed in CACI 3931.	The statute also says: "a homeowner's unreasonable failure to minimize or prevent those damages in a timely manner, *including*…" . So the statutory failures are not exclusive. So if, for example, homeowners, knowing the roof is leaking, go on a month-long vacation during the rainy season. In this instruction under (c), one would specifically say exactly that. One would not in 3931. The committee has, however, added a cross reference to CACI No. 3931.
	Thomas Olsen, Lorber, Greenfield & Polito, Poway	The issue with proposed instruction 4573 is that it incorrectly characterizes the failure of the claimant to go through the right to repair process as an affirmative defense – it's not. It's a required prelitigation remedy. Second, it fails to include an important point - per the *Standard Pacific Corporation v. Superior Court* (2009) 176 Cal. App. 4th 828 case, the burden is on the plaintiff to prove that they went through the right to repair process. Third, another issue is the last sentence of the instruction which is extremely poorly written, and certain to confuse a jury. What is an untimely or inadequate response? Per the *KB Home* case, if plaintiffs failed to reasonably go through the right to repair process then they are barred from pursuing their claim. Thus an accurate statement of the law, and an accurate jury instruction would state that the plaintiffs have the burden of proof to show that they went through the right to repair process set forth in Civil Code Section 910 et seq. in order to prevail upon their claim, unless they were excused from completing such process by the failure of the defendant to follow such procedures.	See response to this commenter's comment to 4570, regarding the role of the prefiling requirements. This instruction is on the affirmative defense of failure to mitigate, not the prefiling requirement. There is no dispute but that the plaintiff must prove compliance with the prefiling requirements. But that is irrelevant to this instruction.

Instruction	Commentator	Comment	Committee Response
4574, *Right to Repair Act—Affirmative Defense—Plaintiff's Subsequent Acts or Omissions*	Association of Defense Counsel of Northern California and Nevada, by Bobby Dale Sims Jr., Sims, Lawrence & Arruti, Sacramento	Civil Code § 945.5(d) reads: (d) To the extent it is caused by the homeowner or his or her agent's or an independent third party's alterations, ordinary wear and tear, misuse, abuse, or neglect, or by the structure's use for something other than its intended purpose. The title of proposed CACI 4574 uses the word "subsequent" and the instruction itself uses the word "later." To establish this defense [name of defendant] must prove that the harm was caused by [[name of plaintiff]'s *later* [alterations/ordinary wear and tear/misuse/abuse/[or] neglect]/ [or] the structure's use for something other than its intended purpose]. One must ask, "Subsequent" to what? "Later" than what? The Code does not use either word in characterizing the activities by the homeowner or his or her agent or by a third party that constitute an affirmative defense. It is our opinion that those words should be removed.	While it is correct that neither "subsequent" nor "later" is in the statute, the committee believes that it could not be otherwise. All of these words, "alterations/ordinary wear and tear/misuse/abuse/[or] neglect]/ [or] the structure's use for something other than its intended purpose" require that there be something in place to act on. There must be something there to alter, wear and tear, misuse, abuse, or neglect. Or there has to be a structure to use for something other than its intended purpose. So including "later" adds clarity.

Instruction	Commentator	Comment	Committee Response
	Orange County Bar Association, by Deirdre Kelly, President	This statutory affirmative defense is based upon Civil Code §945.5(d). The instruction should accurately track the language of the statute in order to reflect its intent. The OCBA recommends changing the title to "Right To Repair Act" – Affirmative Defense – Plaintiff's or Others' Subsequent Acts [Civil Code§ 945.5(d)] Add to the end of the first sentence to read: "later acts or omissions described next or those of the plaintiff's agent or some independent third party. Change the last sentence of the Directions for Use to read: "The defendant is relieved of responsibility for any such acts or omissions undertaken by any of plaintiff's agents or by any independent third parties [Civil Code §945.5(d)]."	All three changes are based on the correct view that the statute covers subsequent acts not only of the plaintiff, but also of the plaintiff's agents or independent third parties. This point is noted in the Directions for Use, but the instruction itself is limited to the plaintiff's acts. The committee believes that this approach is sufficient. An instruction does not have to cover every possible scenario in which the claim might arise. However, a sentence has been added to modify the instruction if it is an agent or third party who made the modifications.
User Guide	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	We agree with the concept, but find the proposed language verbose and would revise it to state: "Absence of Instruction: The absence of a CACI instruction on a particular rule of law does not indicate that no instruction would be appropriate."	The committee finds the comment's language to be somewhat better but prefers retaining "claim, defense, rule, or situation" instead of "rule of law."
All other instructions except as noted above	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	Agree	No response is necessary.

Instruction	Commentator	Comment	Committee Response
All other instructions except as noted above	Orange County Bar Association, by Deidre Kelly, President	Agree	No response is necessary.

Item number: 03

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Submit to JC (without circulating for comment)**

RUPRO Meeting: May 6, 2019

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Civil Practice and Procedure: Adjustment of Maximum Amount of Imputed Liability of Parent or Guardian for Tort of a Minor

Committee or other entity submitting the proposal:
Civil and Small Claims Advisory Committee

Staff contact (name, phone and e-mail): Anne M. Ronan, 415-865-8933, anne.ronan@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: technical changes required by statute
Project description from annual agenda:

If requesting July 1 or out of cycle, explain:
Statute requires that the council adjust the dollar amounts of imputed liability of parents or guardians by July 1, 2019, based on the 2019 California Consumer Price Index, which was released February 14, 2019. Because the revisions are all technical changes they do not require circulation for public comment.

Additional Information: (To facilitate RUPRO's review of your proposal, please include any relevant information not contained in the attached summary.)

JUDICIAL COUNCIL OF CALIFORNIA

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

www.courts.ca.gov

REPORT TO THE JUDICIAL COUNCIL

For business meeting on: May 16–17, 2019

Title
Civil Practice and Procedure: Adjustment of Maximum Amount of Imputed Liability of Parent or Guardian for Tort of a Minor

Rules, Forms, Standards, or Statutes Affected
Amend Cal. Rules of Court, Appendix B

Recommended by
Judicial Council staff
Susan McMullan, Supervising Attorney
Legal Services

Agenda Item Type
Action Required

Effective Date
July 1, 2019

Date of Report
April 4, 2019

Contact
Anne M. Ronan, 415-865-8933
anne.ronan@jud.ca.gov

Executive Summary

Judicial Council staff recommends that the Judicial Council amend Appendix B of the California Rules of Court to reflect the biannual adjustments to the dollar amounts of the maximum amount of liability of parents or guardians to be imputed for the torts of a minor under Civil Code section 1714.1, and direct that staff publish the adjusted amounts.

Recommendation

Judicial Council staff recommends that the Judicial Council, effective July 1, 2019, amend Appendix B of the California Rules of Court to adjust the maximum liability of the parent or guardian having custody and control of a minor for the willful misconduct of the minor, under Civil Code section 1714.1(a) or (b), from $ $42,100 to 45,000.

The text of amended Appendix B is attached at page 4.

Relevant Previous Council Action

Since January 1, 1997, Civil Code section 1714.1(c) has required that the council compute an adjustment to the dollar amounts stated in subdivisions (a) and (b) of that code section every two years, based on the change in the California Consumer Price Index. By Circulating Order CO-97-07, the council authorized the Administrative Director to make those adjustments on an ongoing basis and to report that action to the council. The Administrative Director did so every odd-numbered year since that time until 2013, at which time the council itself approved the adjustment. The revised Appendix B has been published with the California Rules of Court each time.

Analysis/Rationale

Civil Code section 1714.1(a) and (b)[1] imputes liability for any act of willful misconduct of a minor that results in injury or death to another person, injury to the property of another, or the defacement of the property of another by paint, to the parent or guardian having custody and control of the minor. Both subdivisions state that the maximum liability of the parent or guardian shall not exceed $25,000 for each tort of the minor, but note that the maximum amount is subject to subdivision (c). Subdivision (c) requires the Judicial Council to compute an adjustment to the maximum amount every two years to reflect increases in the cost of living, as indicated by the annual average of the California Consumer Price Index (CCPI), and to publish the adjusted maximum amounts of liability on or before July 1 of each odd-numbered year.

The formula[2] for determining each adjustment is published in Appendix B to the California Rules of Court, which gives the adjustments and calculations a permanent place for reference. Applying that formula and the annual average of the 2016 California Consumer Price Index of 255.303,[3] the adjusted liability limit as of July 1, 2019, should be $45,000, as shown in the attached amended Appendix B.

This amendment to Appendix B will be published—as required by section 1714.1(c)—in the *California Official Reports*, as are all amendments to the California Rules of Court; it will also be published on the judicial branch (California Courts) website.

Policy implications

There are no policy implications in this statutorily mandated adjustment to the published liability limits.

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[1] All further statutory references are to the Civil Code, unless otherwise indicated.

[2] A copy of the letter from the Department of Finance setting out the formula for the original adjustment, which has been followed since 1997, is attached as Attachment A.

[3] The California Consumer Price Index is published each year by the California Department of Industrial Relations. A copy of the most recent chart is attached as Attachment B.

Comments

The proposed amendment of Appendix B is a technical amendment made in response to a statutory mandate, which has not been circulated for comment. See California Rules of Court, rule 10.22(d)(2).

Alternatives considered

None.

Fiscal and Operational Impacts

There are no court costs or operational impacts associated with this amendment of Appendix B.

Attachments

1. Cal. Rules of Court, Appendix B, at page 4
2. Attachment A: April 21, 1997 letter from Department of Finance
3. Attachment B: Consumer Price Index–California, 2018

Appendix B of the California Rules of Court is amended, effective July 1, 2019, to read:

Appendix B
Liability Limits of a Parent or Guardian Having Custody and Control of a Minor for the Torts of a Minor (Civ. Code, § 1714.1)

Formula

Pursuant to Civil Code section 1714.1, the joint and several liability limit of a parent or guardian having custody and control of a minor under subdivisions (a) and (b) for each tort of the minor shall be computed and adjusted as follows:

$$\text{Adjusted limit} = \left[\frac{\text{Current CCPI} - \text{January 1, 1995, CCPI}}{\text{January 1, 1995, CCPI}} + 1 \right] \times \text{January 1, 1995, limit}$$

Definition

"CCPI" means the California Consumer Price Index, as established by the California Department of Industrial Relations.

July 1, 201~~7~~9, calculation and adjustment

The joint and several liability of a parent or guardian having custody and control of a minor under Civil Code section 1714.1, subdivision (a) or (b), effective July 1, 201~~7~~9, shall not exceed **~~$42,100~~** **$45,000** for each tort.

The calculation is as follows:

$$\text{~~\$42,129.21~~\$44,968.65} = \left[\frac{\text{~~255.303~~ 272.51} - 151.5}{151.5} + 1 \right] \times \$25{,}000$$

Under section 1714.1, subdivision (c), the adjusted limit is rounded to the nearest hundred dollars, so the dollar amount of the adjusted limit is rounded to ~~$42,100~~ $45,000.

DEPARTMENT OF FINANCE
915 L STREET
SACRAMENTO, CA 95814-3706

CO-97-07

Attachment A

April 21, 1997

Ms. Cara Vonk
Judicial Council of California
Administrative Office of the Courts
303 Second Street, South Tower
San Francisco, CA 94107

Dear Ms. Vonk,

The updated number calculated in accordance with Civil Code section 1714.1 subdivision c is $25,900.00. Proper escalation procedure divides the difference of the end-of-period number and the beginning-of-period number by the beginning-of-period number. Next add one and multiply by the original number in this case $25,000.00.

The California Consumer Price Index (CCPI) formula is established by the Department of Industrial Relations (DIR). The Department of Finance, using the DIR formula for the CCPI, calculates the January 1, 1995 CCPI as 151.5, for January 1, 1996 (154.0), and for January 1, 1997 (157.1). The calculation rests on the assumption that the figure of $25,000.00 originates January 1, 1995 as you stated in our conversation this morning.

$$25{,}925.00 = \left[\frac{(157.1 - 151.5)}{151.5} + 1\right] x 25{,}000.00$$

Subdivision c requires the number to be rounded to the nearest one hundred dollars producing $25,900.00. My phone number is (916) 322-2263 x2423; where I can be reached to answer to any questions. I have included CCPI data tables for purposes of documentation.

Sincerely

Jason Barnhart

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

OFFICE OF THE DIRECTOR - RESEARCH UNIT
P.O. Box 420603, San Francisco, California 94142

http://www.dir.ca.gov/OPRL

CONSUMER PRICE INDEX - CALIFORNIA
Los Angeles-Long Beach-Anaheim, San Francisco-Oakland-Hayward, San Diego-Carlsbad, Riverside-San Bernardino-Ontario
United States City Average, 2018-2019

All Items
1982 - 1984 = 100

Year & Month	All Urban Consumers						Urban Wage Earners and Clerical Workers					
	California[a]	Los Angeles[b] Long Beach Anaheim	San Francisco[b] Oakland Hayward	San Diego[b] Carlsbad	Riverside[b] San Bernardino Ontario	U.S. City[b] Average	California[a]	Los Angeles[b] Long Beach Anaheim	San Francisco[b] Oakland Hayward	San Diego[b] Carlsbad	Riverside[b] San Bernardino Ontario	U.S. City[b] Average
2018 January	-	261.235	-	288.331	100.916	247.867	-	251.785	-	271.120	100.944	241.919
February	269.247	263.012	281.308	-	-	248.991	259.566	253.243	275.699	-	-	242.988
March	-	264.158	-	290.810	101.897	249.554	-	254.451	-	272.813	101.909	243.463
April	271.210	265.095	283.422	-	-	250.546	261.696	255.379	278.039	-	-	244.607
May	-	266.148	-	289.243	102.929	251.588	-	256.652	-	273.534	103.025	245.770
June	272.462	265.522	286.062	-	-	251.989	263.199	256.208	280.219	-	-	246.196
July	-	266.007	-	295.185	103.139	252.006	-	256.632	-	279.145	103.181	246.155
August	273.844	266.665	287.664	-	-	252.146	264.506	257.318	281.536	-	-	246.336
September	-	268.032	-	295.883	103.241	252.439	-	258.246	-	280.827	103.109	246.565
October	275.686	269.482	289.673	-	-	252.885	266.217	259.899	283.183	-	-	247.038
November	-	268.560	-	293.858	103.616	252.038	-	259.064	-	278.473	103.737	245.933
December	274.922	267.631	289.896	-	-	251.233	265.308	258.101	283.278	-	-	244.786
Annual Average	272.510	265.962	285.550	292.547	102.732	251.107	263.048	256.415	279.572	276.353	102.761	245.146
2019 January												
February												
March												
April												
May												
June												
July												
August												
September												
October												
November												
December												
Annual Average												

[a] Weighted average of the consumer price indexes for Los Angeles-Long Beach-Anaheim, San Francisco-Oakland-Hayward, San Diego-Carlsbad, and Riverside-San Bernardino-Ontario. A conversion factor has been included for comparability of 2018 data with 2017 and prior years. Computed by the Department of Industrial Relations, Office of the Director - Research Unit from indexes issued by the U.S. Department of Labor.

[b] Source: U.S. Department of Labor, Bureau of Labor Statistics. Beginning with the November 2017 data, indexes for San Diego-Carlsbad will be published bi-monthly on odd months only (January, March, May, etc.). The Riverside-San Bernardino-Ontario indexes are on a December 2017 = 100 base and will be published bi-monthly on odd months only (January, March, May, etc.).