Item number: 01

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Circulate for comment (out of cycle)**

RUPRO Meeting: October 15, 2019

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Judicial Branch Administration: Judicial Branch Policies on Workplace Conduct (Adopt Cal. Rule of Court, rule 10.351)

Committee or other entity submitting the proposal:
Rules and Projects Committee

Staff contact (name, phone and e-mail): Mike Etchepare, 916-643-7019, michael.etchepare@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: N/A
Project description from annual agenda: N/A

If requesting July 1 or out of cycle, explain:
This rule proposal originates from recommendations made by the Work Group for the Prevention of Discrimination and Harassment (Work Group), appointed by Chief Justice Tani G. Cantil-Sakauye. The Work Group's recommendations, including a recommendation to adopt a rule establishing standardized, baseline requirements for court policies on the prevention, reporting, and resolution of complaints of harassment, discrimination, retaliation, and inappropriate workplace conduct based on a protected classification, were approved by the Judicial Council on July 19, 2019. The Judicial Council directed RUPRO to oversee this rule-making process at the earliest possible convenience.

Additional Information: (To facilitate RUPRO's review of your proposal, please include any relevant information not contained in the attached summary.)
N/A

JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue. San Francisco, California 94102-3688
www.courts.ca.gov/policyadmin-invitationstocomment.htm

INVITATION TO COMMENT

SP19- 10

Title Judicial Branch Administration: Policies on Workplace Conduct	**Action Requested** Review and submit comments by November 15, 2019
Proposed Rules, Forms, Standards, or Statutes Adopt Cal. Rules of Court, rule 10.351	**Proposed Effective Date** January 17, 2020
Proposed by Rules and Projects Committee Hon. Harry E. Hull, Jr., Chair	**Contact** Michael Etchepare, 916-643-7019 michael.etchepare@jud.ca.gov

Executive Summary and Origin

To promote improvement and greater consistency in how judicial branch entities prevent and address harassment, discrimination, retaliation, and inappropriate workplace conduct based on a protected classification, the Rules and Projects Committee (RUPRO) proposes a new rule of court to establish standardized baseline requirements for court policies on the prevention, reporting, and resolution of these types of complaints. This proposal originated from recommendations made by the Work Group for the Prevention of Discrimination and Harassment, appointed by Chief Justice Tani G. Cantil-Sakauye. Those recommendations, including a recommendation to adopt a rule on these issues, were approved by the Judicial Council on July 19, 2019.

Background

In April 2018, the Chief Justice asked the Judicial Council to take immediate action to amend the court rule on public records to clarify that settlement agreements to resolve sexual harassment and discrimination complaints against judicial officers must be publicly disclosed in response to records requests. She also created the Rule 10.500 Working Group to develop the necessary rule changes required to achieve this goal. Through developing its proposals, the Rule 10.500 Working Group identified other related issues that were beyond its scope, including harassment and discrimination prevention.

In October 2018, the Chief Justice appointed the Work Group for the Prevention of Discrimination and Harassment (Work Group) to examine these related issues and further support the judicial branch's commitment to a workplace free of harassment and discrimination.

The Work Group examined research and discussed potential areas for improvement relating to harassment, discrimination, retaliation, and inappropriate workplace conduct based on a protected classification. The Work Group ultimately proposed recommendations to the Judicial Council, including, among others, that RUPRO "oversee the rulemaking process to propose a California Rule of Court clarifying the responsibility of courts to adopt updated policies that: (a) prohibit harassment, discrimination, retaliation, and inappropriate workplace conduct based on a protected classification; (b) contain definitions and examples of prohibited harassment, discrimination, retaliation, and inappropriate workplace conduct based on a protected classification; and (c) address and clarify complaint reporting and response procedures."[1] Those recommendations were approved by the Judicial Council on July 19, 2019.

RUPRO created an ad hoc RUPRO subcommittee to develop a rule of court consistent with the Work Group's direction to the Judicial Council. RUPRO considered the subcommittee's rule proposal and recommends it.

The Proposal

California Rule of Court, rule 10.351, Judicial Branch Policies on Workplace Conduct, would require courts to adopt updated policies on the prevention, reporting, and resolution of complaints of harassment, discrimination, retaliation, and inappropriate workplace conduct based on a protected classification. The new rule would require court policies to contain, at minimum:

1. A list of all protected classifications under applicable state and federal laws.
2. Definitions and examples of harassment, discrimination, retaliation, and inappropriate workplace conduct based on a protected classification.
3. A prohibition against harassment, discrimination, retaliation, and inappropriate workplace conduct based on a protected classification by judicial officers, supervisors, managers, coworkers, third parties, and other individuals with whom employees come into contact.
4. A comprehensive complaint reporting procedure that clearly identifies individuals, in addition to an employee's supervisor, to whom complaints may be made; individuals to whom complaints may be made involving administrative presiding justices, appellate court clerk/executive officers, presiding judges, court executive officers, judicial officers,

[1] Judicial Council of Cal., Adv. Body Rep., *Judicial Branch Administration: Prevention of Discrimination, Harassment, Retaliation, and Inappropriate Workplace Conduct Based on a Protected Classification* (June 12, 2019), p. 2. The phrase "protected classification" is used throughout proposed rule 10.351 and does not limit the scope of the proposed rule to only certain groups of employees. "Protected classifications" apply to and protect all employees, not just those of a particular status within the classification. As an example, the protected classification of sex/gender protects all employees based on their sex, gender expression, and gender identification, regardless of whether they are male or female, identify or express as a gender other than their sex assigned at birth, or identify or express as gender nonbinary. This example applies to other protected classifications as well; the rule applies equally to all groups within that classification. The phrase "protected classification" is used to ensure that all employees are protected and treated equally and that courts are also aware that they have legal obligations to investigate and resolve complaints that involve issues related to classifications that are specifically enumerated by statute.

and court management; and outside administrative agencies to whom employees may complain.

5. Comprehensive complaint intake, investigatory, and follow-up processes that provide for fair, timely, and thorough investigations conducted by impartial, qualified personnel; consideration of appropriate options for remedial action and resolution; appropriate reassurances of confidentiality, and an explanation that disclosure of information will be limited to the extent consistent with conducting a fair, effective, and thorough investigation; and a clear prohibition on retaliation against anyone making a complaint of harassment, discrimination, retaliation, or inappropriate workplace conduct based on a protected classification or participating in an investigation into such claims.

The proposed rule is consistent with and carries out the first recommendation made by the Work Group and approved by the Judicial Council in July 2019, and it would standardize minimum requirements for court policies on the prevention, reporting, and resolution of complaints of harassment, discrimination, retaliation, and inappropriate workplace conduct based on a protected classification.[2] The proposed rule would benefit judicial branch employees and judicial officers by:

1. Requiring courts to use consistent definitions of harassment, discrimination, retaliation, and inappropriate workplace conduct based on a protected classification;
2. Removing barriers for employees to report such conduct by clearly identifying individuals to whom complaints may be made;
3. Providing a more consistent response to complaints of such conduct throughout the branch;
4. Educating employees who are subject to such conduct as to their rights and available resources; and
5. Clarifying the responsibilities of court management to prevent and address such conduct.

Alternatives Considered

The Judicial Council directed that a rule of court be developed and proposed, including suggested topics for the rule to address. Rule 10.351 was developed consistent with the direction and guidance of the Work Group's recommendations and approval of those recommendations by the Judicial Council, and consistent with industry-approved best practices for policies on the prevention of harassment, discrimination, retaliation, and inappropriate workplace conduct based on a protected classification.

Even so, the ad hoc RUPRO subcommittee considered alternative requirements to include in the proposed rule, including how to best standardize complaint reporting procedures while ensuring

[2] The Work Group proposed other recommendations, all of which were adopted by the Judicial Council on July 19, 2019. Proposed rule 10.351 is intended to address only the recommendation requiring RUPRO to oversee a rulemaking process. The other recommendations proposing training, creation of sample policies and procedures, improved communication, and follow-up will be addressed by other actions taken by the Center for Judicial Education and Research Advisory Committee, Judicial Council staff, and individual courts.

that the rule provides courts with the ability to adopt reporting and response procedures that suit the size and organization of each court. The result is language mandating broad requirements—that courts provide "multiple avenues for raising complaints" and "identify individuals to whom complaints may be made" against court leadership—while leaving courts to determine the specific avenues and identification of individuals to receive complaints.

The ad hoc RUPRO subcommittee also considered providing specific examples of harassment, discrimination, retaliation, and inappropriate workplace conduct based on a protected characteristic in the proposed rule, and considered providing definitions of industry-accepted terms such as "intake," "follow-up," "reporting processes," "fair, timely, and thorough investigations," "impartial qualified investigators," and other similar terms used in the proposed rule. The ad hoc RUPRO subcommittee ultimately determined that these examples and clarifications were best addressed in the sample policy language to be generated by Judicial Council staff, in compliance with the requirements of the Work Group's recommendations, approved by the Judicial Council. RUPRO anticipates that Judicial Council staff will provide courts with sample policy language that complies with the requirements of proposed rule 10.351 shortly after the proposed rule is approved.

Fiscal and Operational Impacts

RUPRO does not anticipate any significant one-time or sustained annual costs associated with adoption of the rule. It does anticipate some operational impacts for Judicial Council staff and courts in the short term, primarily in the period leading up to the rule implementation date. Specifically, it is anticipated that court leadership and human resources staff will examine existing harassment prevention policies to ensure compliance with rule 10.351 and draft or revise informal complaint resolution policies and investigation protocols consistent with the requirements of the rule. Although Judicial Council staff will attempt to alleviate some of these operational impacts through the creation of sample policy language, RUPRO anticipates that some courts will want to create their own policies and procedures or, at the very least, customize sample language to fit the operational realities of their courts.

RUPRO also anticipates that some courts may be unable to meet the proposed June 30, 2020, implementation date because of obligations to meet and confer or consult with recognized employee organizations regarding changes to personnel policies. The proposed rule specifically accounts for this possibility by allowing courts to implement the rule "by June 30, 2020, or as soon thereafter as possible," if satisfying any such obligations delays implementation beyond the deadline.

Request for Specific Comments

In addition to comments on the proposal as a whole, RUPRO is interested in comments on the following:

- Does the rule appropriately address the stated goal of promoting improvement and consistency in how judicial branch entities prevent and address harassment, discrimination, retaliation, and inappropriate workplace conduct based on a protected classification?

RUPRO also seeks comments from courts on the following implementation matters:

- Does the proposal create any additional workload not considered by this *Invitation to Comment*?
- Does the currently proposed implementation date provide sufficient time for implementation, specifically considering each court's unique process for proposing and approving changes to personnel policies?

Attachments and Links

1. Cal. Rules of Court, rule 10.351, at pages 6–8

Rule 10.351 of the California Rules of Court would be adopted, effective January 17, 2020, to read:

Rule 10.351. Judicial branch policies on workplace conduct

The judicial branch is committed to providing a workplace free of harassment, discrimination, retaliation, and inappropriate workplace conduct based on a protected classification. Consistent with this commitment, each court must take reasonable steps to prevent and address such conduct, including adopting policies prohibiting harassment, discrimination, retaliation, and inappropriate workplace conduct based on a protected classification and establishing for such conduct complaint reporting and response procedures that satisfy the minimum requirements stated in this rule.

(a) Prohibition policies

Each court must ensure that its policies prohibiting harassment, discrimination, retaliation, and inappropriate workplace conduct based on a protected classification conform with the minimum requirements stated in this rule. These policies must contain:

(1) A prohibition against harassment, discrimination, retaliation, and inappropriate workplace conduct based on a protected classification by judicial officers, managers, supervisors, employees, other personnel, and other individuals with whom employees come into contact;

(2) A list of all protected classifications under applicable state and federal laws;

(3) Definitions and examples of harassment, discrimination, retaliation, and inappropriate workplace conduct based on a protected classification;

(4) A clear prohibition of retaliation against anyone making a complaint or participating in an investigation of harassment, discrimination, retaliation, or inappropriate workplace conduct based on a protected classification; and

(5) Comprehensive complaint reporting, intake, investigatory, and follow-up processes.

(b) Complaint reporting process

Each court must adopt a process for employees to report complaints of harassment, discrimination, retaliation, and inappropriate workplace conduct based on a protected classification. These reporting processes must:

(1) Establish effective open-door policies and procedures for reporting complaints;

(2) Offer multiple avenues for raising complaints, either orally or in writing, and not require that the employee bring concerns to his or her immediate supervisor;

(3) Clearly identify individuals to whom complaints may be made regarding administrative presiding justices, appellate court clerk/executive officers, presiding judges, court executive officers, judicial officers, and court management;

(4) Identify the Commission on Judicial Performance, California Department of Fair Employment and Housing, and U.S. Equal Employment Opportunity Commission as additional avenues for employees to lodge complaints, and provide contact information for those entities; and

(5) Instruct supervisors, managers, and directors with knowledge of harassment, discrimination, retaliation, or inappropriate workplace conduct based on a protected classification to report this information to the administrative presiding justice or an appellate court clerk/executive officer, a presiding judge, a court executive officer, human resources, and/or another appropriate judicial officer who is not involved with the conduct or named in the complaint.

(c) Court responsibility on receipt of complaint or knowledge of potential misconduct

Each court must develop processes to intake, investigate, and respond to complaints or known instances of harassment, discrimination, retaliation, or inappropriate workplace conduct based on a protected classification. These processes must provide for:

(1) Appropriate reassurances to complainants that their confidentiality in making a complaint will be preserved to the extent possible, including an explanation that disclosure of information will be limited to the extent consistent with conducting a fair, effective, and thorough investigation;

(2) Fair, timely, and thorough investigations of such complaints that provide all parties with appropriate consideration and an opportunity to be heard. These investigations should be conducted by impartial, qualified investigators.

(3) Communication with complainants throughout the investigation process, including initial acknowledgment of complaints, follow-up communication as appropriate, and communication at the end of the process;

(4) Consideration of appropriate options for remedial action and resolution based on the evidence collected in the investigation; and

(5) Timely case closures.

(d) Implementation

All courts must implement the requirements of this rule by June 30, 2020, or as soon thereafter as possible, subject to any applicable obligations to meet and confer or consult with recognized employee organizations.

Item number: 02

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Approve**

RUPRO Meeting: October 15, 2019

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Civil Jury Instructions: Instructions with Minor Revisions (Release 36)

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

Staff contact (name, phone and e-mail): Eric Long, Attorney, Legal Services, 415-865-7691 eric.long@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: October 18, 2019
Project description from annual agenda: Maintenance—Sources and Authority; Technical Corrections

If requesting July 1 or out of cycle, explain:
California Rules of Court, rules 2.1050(d) and 10.58(a), 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. The Judicial Council has given RUPRO final authority to approve instructions with only changes to the Directions for Use or additions to the Sources and Authority under the provisions of the guidelines adopted on December 19, 2006, titled Jury Instructions Corrections and Technical and Minor Substantive Changes. Pursuant to this delegation of authority, the advisory committee requests that RUPRO give final approval to 34 revised CACI instructions for Release 36.

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

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MEMORANDUM

Date
September 25, 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 36)

Action Requested
Review and Approve Publication of Instructions with Minor Revisions

Deadline
October 15, 2019

Contact
Eric Long
415-865-7691 phone
eric.long@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 34 instructions in this release, prepared by the advisory committee, contain only the types of revisions that the Judicial Council has given RUPRO final authority to approve—primarily instructions with only changes to the Directions for Use or additions to the Sources and Authority.

Recommendation

The Advisory Committee on Civil Jury Instructions recommends that RUPRO approve for publication revisions to 34 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 2020 edition of *CACI* and posted online on the California Courts website, and on Lexis and Westlaw.

The revised instructions are attached at pages 5–138.

Relevant Previous Council Action

In July 2003, the Judicial Council approved civil jury instructions—drafted by the Task Force on 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 34 revised instructions in this release (Release 36) that are presented for final RUPRO approval, all have revisions under category (a) above (additional cases added to Sources and Authority). Two also have revisions to the Directions for Use (category (c) above). CACI No.

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[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.

1720 has a citation added to the Directions for Use, and a case moved from the Directions for Use into the Sources and Authority. CACI No. 2700 has removed from the Directions for Use the number of wage orders identified as authority. Six instructions have minor, nonsubstantive typographical changes that do not affect the legal basis of the instruction (category (d) above).

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. With the exception of citations to the *United States Reports*, 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 being revised or updated, 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. Where found in instructions otherwise being revised or updated, 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

California Rules of Court, rules 2.1050 and 10.58, 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 5–138

300. Breach of Contract—Introduction

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

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

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

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

New September 2003; Revised December 2007

Directions for Use

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

Sources and Authority

- The Supreme Court has observed that "[c]ontract and tort are different branches of law. Contract law exists to enforce legally binding agreements between parties; tort law is designed to vindicate social policy." (*Applied Equipment Corp. v. Litton Saudi Arabia, Ltd.* (1994) 7 Cal.4th 503, 514 [28 Cal.Rptr.2d 475, 869 P.2d 454].)

- "The differences between contract and tort give rise to distinctions in assessing damages and in evaluating underlying motives for particular courses of conduct. Contract damages seek to approximate the agreed-upon performance ... and 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 expectations of the parties are not recoverable." (*Applied Equipment Corp., supra,* 7 Cal.4th at p. 515, internal citations omitted.)

- Certain defenses are decided as questions of law, not as questions of fact. These defenses include frustration of purpose, impossibility, and impracticability. (*Oosten v. Hay Haulers Dairy Employees and Helpers Union* (1955) 45 Cal.2d 784, 788 [291 P.2d 17]; *Mitchell v. Ceazan Tires, Ltd.* (1944) 25 Cal.2d 45, 48 [153 P.2d 53]; *Autry v. Republic Productions, Inc.* (1947) 30 Cal.2d 144, 157 [180 P.2d 888]; *Glen Falls Indemnity Co. v. Perscallo* (1950) 96 Cal.App.2d 799, 802 [216 P.2d 567].)

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

- Estoppel is a "nonjury fact question to be determined by the trial court in accordance with applicable law." (*DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe and Takeout III, Ltd.* (1994) 30 Cal.App.4th 54, 61 [35 Cal.Rptr.2d 515].)

- "A settlement agreement is a contract, and the legal principles which apply to contracts generally apply to settlement contracts." (*Monster Energy Co. v. Schechter* (2019) 7 Cal.5th 781, 789 [249 Cal.Rptr.3d 295,444 P.3d 97].)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 847–867

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

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

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

302. Contract Formation—Essential Factual Elements

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

1. **That the contract terms were clear enough that the parties could understand what each was required to do;**

2. **That the parties agreed to give each other something of value [a promise to do something or not to do something may have value]; and**

3. **That the parties agreed to the terms of the contract.**

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

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

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

Directions for Use

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

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

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

Sources and Authority

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

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

- "The failure to specify the amount or a formula for determining the amount of the bonus does not render the agreement too indefinite for enforcement. It is not essential that the contract specify the amount of the consideration or the means of ascertaining it." (*Moncada v. West Coast Quartz Corp.* (2013) 221 Cal.App.4th 768, 778 [164 Cal.Rptr.3d 601].)

- " 'An essential element of any contract is "consent." [Citations.] The "consent" must be "mutual." [Citations.] "Consent is not mutual, unless the parties all agree upon the same thing in the same sense." ' "The existence of mutual consent is determined by objective rather than subjective criteria, the test being what the outward manifestations of consent would lead a reasonable person to believe. [Citation.] Accordingly, the primary focus in determining the existence of mutual consent is upon the acts of the parties involved.' ' " (*Monster Energy Co. v. Schechter* (2019) 7 Cal.5th 781, 789 [249 Cal.Rptr.3d 295,444 P.3d 97]~~Contract formation is governed by objective manifestations, not subjective intent of any individual involved. The test is 'what the outward manifestations of consent would lead a reasonable person to believe.' " (*Roth v. Malson* (1998) 67 Cal.App.4th 552, 557 [79 Cal.Rptr.2d 226]~~, internal citations omitted.)

- "The manifestation of assent to a contractual provision may be 'wholly or partly by written or spoken words or by other acts or by failure to act.' " (*Merced County Sheriff's Employees' Assn. v. County of Merced* (1987) 188 Cal.App.3d 662, 670 [233 Cal.Rptr. 519] (quoting Rest. 2d Contracts, § 19).)

- "A letter of intent can constitute a binding contract, depending on the expectations of the parties. These expectations may be inferred from the conduct of the parties and surrounding circumstances." (*California Food Service Corp., Inc. v. Great American Insurance Co.* (1982) 130 Cal.App.3d 892, 897 [182 Cal.Rptr. 67], internal citations omitted.)

- "If words are spoken under circumstances where it is obvious that neither party would be entitled to believe that the other intended a contract to result, there is no contract." (*Fowler v. Security-First National Bank* (1956) 146 Cal.App.2d 37, 47 [303 P.2d 565].)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, § 116 et seq.

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

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

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

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

314. Interpretation—Disputed Words

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

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

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

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

New September 2003; Revised December 2014

Directions for Use

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

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

Sources and Authority

- Contract Interpretation: Intent. Civil Code section 1636.
- Contracts Explained by Circumstances. Civil Code section 1647.
- "Juries are not prohibited from interpreting contracts. Interpretation of a written instrument becomes solely a judicial function only when it is based on the words of the instrument alone, when there is no conflict in the extrinsic evidence, or a determination was made based on incompetent evidence. But when, as here, ascertaining the intent of the parties at the time the contract was executed depends on the credibility of extrinsic evidence, that credibility determination and the interpretation of the contract are questions of fact that may properly be resolved by the jury." (*City of Hope National Medical Center, supra,* 43 Cal.4th at p. 395, footnote and internal citations omitted.)
- "This rule—that the jury may interpret an agreement when construction turns on the credibility of

extrinsic evidence—is well established in our case law. California's jury instructions reflect this (Judicial Council of Cal. Civ. Jury Instns. (2008) CACI No. 314) … , as do authoritative secondary sources." (*City of Hope National Medical Center, supra,* 43 Cal.4th at pp. 395−396, internal citations omitted.)

- "The trial court's determination of whether an ambiguity exists is a question of law, subject to independent review on appeal. The trial court's resolution of an ambiguity is also a question of law if no parol evidence is admitted or if the parol evidence is not in conflict. However, where the parol evidence is in conflict, the trial court's resolution of that conflict is a question of fact and must be upheld if supported by substantial evidence. Furthermore, '[w]hen two equally plausible interpretations of the language of a contract may be made . . . parol evidence is admissible to aid in interpreting the agreement, thereby presenting a question of fact which precludes summary judgment if the evidence is contradictory.' " (*WYDA Associates v. Merner* (1996) 42 Cal.App.4th 1702, 1710 [50 Cal.Rptr.2d 323].)

- "In interpreting a contract, the objective intent, as evidenced by the words of the contract is controlling. We interpret the intent and scope of the agreement by focusing on the usual and ordinary meaning of the language used and the circumstances under which the agreement was made." (*Lloyd's Underwriters v. Craig & Rush, Inc.* (1994) 26 Cal.App.4th 1194, 1197-1198 [32 Cal.Rptr.2d 144], internal citations omitted.)

- "Ordinarily, even in an integrated contract, extrinsic evidence can be admitted to explain the meaning of the contractual language at issue, although it cannot be used to contradict it or offer an inconsistent meaning. The language, in such a case, must be ' "reasonably susceptible" ' to the proposed meaning." (*Hot Rods, LLC v. Northrop Grumman Systems Corp.* (2015) 242 Cal.App.4th 1166, 1175–1176 [196 Cal.Rptr.3d 53].)

- " 'When there is no material conflict in the extrinsic evidence, the trial court interprets the contract as a matter of law. [Citation.] This is true even when conflicting inferences may be drawn from the undisputed extrinsic evidence [citations] or that extrinsic evidence renders the contract terms susceptible to more than one reasonable interpretation. [Citations.] If, however, there is a conflict in the extrinsic evidence, the factual conflict is to be resolved by the jury. [Citations.] ' " (*Brown v. Goldstein* (2019) 34 Cal.App.5th 418, 433 [246 Cal.Rptr.3d 161].)

- "[I]t is indisputably the law that 'when ambiguous terms in a memorandum are disputed, extrinsic evidence is admissible to resolve the uncertainty.' The agreement must still provide the essential terms, and it is 'clear that extrinsic evidence cannot *supply* those required terms.' 'It can, however, be used to *explain* essential terms that were understood by the parties but would otherwise be unintelligible to others.' " (*Jacobs v. Locatelli* (2017) 8 Cal.App.5th 317, 325 [213 Cal.Rptr.3d 514], original italics, internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 741–743

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

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

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

400. Negligence—Essential Factual Elements

[*Name of plaintiff***] claims that [he/she] was harmed by [***name of defendant***]'s negligence. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was negligent;**

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

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

New September 2003; Revised February 2005, June 2005, December 2007, December 2011

Directions for Use

In medical malpractice or professional negligence cases, the word "medical" or "professional" should be added before the word "negligence" in the first paragraph.

The word "harm" is used throughout these instructions, instead of terms like "loss," "injury," and "damage," because "harm" is all-purpose and suffices in their place.

Sources and Authority

- General Duty to Exercise Due Care. Civil Code section 1714(a).

- "Although it is true that some exceptions have been made to the general principle that a person is liable for injuries caused by his failure to exercise reasonable care in the circumstances, it is clear that in the absence of statutory provision declaring an exception to the fundamental principle enunciated by section 1714 of the Civil Code, no such exception should be made unless clearly supported by public policy." (*Rowland v. Christian* (1968) 69 Cal.2d 108, 112 [70 Cal.Rptr. 97, 443 P.2d 561].)

- " 'The elements of a cause of action for negligence are well established. They are "(a) a legal duty to use due care; (b) a breach of such legal duty; [and] (c) the breach as the proximate or legal cause of the resulting injury." ' " (*Ladd v. County of San Mateo* (1996) 12 Cal.4th 913, 917 [50 Cal.Rptr.2d 309, 911 P.2d 496].)

- "Breach is the failure to meet the standard of care." (*Coyle v. Historic Mission Inn Corp.* (2018) 24 Cal.App.5th 627, 643 [234 Cal.Rptr.3d 330].)

- "The element of causation requires there to be a connection between the defendant's breach and the plaintiff's injury." (*Coyle, supra,* 24 Cal.App.5th at p. 645.)

- " 'In most cases, courts have fixed no standard of care for tort liability more precise than that of a

reasonably prudent person under like circumstances.' This is because '[e]ach case presents different conditions and situations. What would be ordinary care in one case might be negligence in another.' " (*Coyle, supra,* 24 Cal.App.5th at pp. 639–640, internal citation omitted.)

- " ' "[I]t is the further function of the court to determine and formulate the standard of conduct to which the duty requires the defendant to conform." [Citation.] [¶] The formulation of the standard of care is a question of law for the court. [Citations.] Once the court has formulated the standard, its application to the facts of the case is a task for the trier of fact if reasonable minds might differ as to whether the defendant's conduct has conformed to the standard. [Citations.]' " (*Regents of University of California v. Superior Court* (2018) 29 Cal.App.5th 890, 902-903 [240 Cal.Rptr.3d 675].)

- "The first element, duty, 'may be imposed by law, be assumed by the defendant, or exist by virtue of a special relationship.' " (*Doe v. United States Youth Soccer Assn., Inc.* (2017) 8 Cal.App.5th 1118, 1128 [214 Cal.Rptr.3d 552].)

- "[T]he existence of a duty is a question of law for the court." (*Ky. Fried Chicken of Cal. v. Superior Court* (1997) 14 Cal.4th 814, 819 [59 Cal.Rptr.2d 756, 927 P.2d 1260].)

- "In the *Rowland* [*Rowland, supra,* 69 Cal.2d at p. 113] decision, this court identified several considerations that, when balanced together, may justify a departure from the fundamental principle embodied in Civil Code section 1714: 'the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.' As we have also explained, however, in the absence of a statutory provision establishing an exception to the general rule of Civil Code section 1714, courts should create one only where 'clearly supported by public policy.' " (*Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 771 [122 Cal.Rptr.3d 313, 248 P.3d 1170], internal citations omitted.)

- "[T]he analysis of foreseeability for purposes of assessing the existence or scope of a duty is different, and more general, than it is for assessing whether any such duty was breached or whether a breach caused a plaintiff's injuries. '[I]n analyzing duty, the court's task ' " 'is not to decide whether a *particular* plaintiff's injury was reasonably foreseeable in light of a *particular* defendant's conduct, but rather to evaluate more generally whether the *category* of negligent conduct at issue is sufficiently likely to result in the *kind* of harm experienced that liability may appropriately be imposed on the negligent party.' " ' " -'The jury, by contrast, considers "foreseeability" in two more focused, fact-specific settings. First, the jury may consider the likelihood or foreseeability of injury in determining whether, in fact, the particular defendant's conduct was negligent in the first place. Second, foreseeability may be relevant to the jury's determination of whether the defendant's negligence was a proximate or legal cause of the plaintiff's injury.' " (*Staats v. Vintner's Golf Club, LLC* (2018) 25 Cal.App.5th 826, 837 [236 Cal.Rptr.3d 236], original italics, internal citation omitted.)

- "[T]he concept of foreseeability of risk of harm in determining whether a duty should be imposed is to be distinguished from the concept of ' "foreseeability" in two more focused, fact-specific settings' to be resolved by a trier of fact. 'First, the [trier of fact] may consider the likelihood or foreseeability

of injury in determining whether, in fact, the particular defendant's conduct was negligent in the first place. Second, foreseeability may be relevant to the [trier of fact's] determination of whether the defendant's negligence was a proximate or legal cause of the plaintiff's injury.' " (*Burns v. Neiman Marcus Group, Inc.* (2009) 173 Cal.App.4th 479, 488, fn. 8 [93 Cal.Rptr.3d 130], internal citation omitted.)

- "By making exceptions to Civil Code section 1714's general duty of ordinary care only when foreseeability and policy considerations justify a categorical no-duty rule, we preserve the crucial distinction between a determination that the defendant owed the plaintiff no duty of ordinary care, which is for the *court* to make, and a determination that the defendant did not breach the duty of ordinary care, which in a jury trial is for the *jury* to make. … While the court deciding duty assesses the foreseeability of injury from 'the category of negligent conduct at issue,' if the defendant did owe the plaintiff a duty of ordinary care the jury 'may consider the likelihood or foreseeability of injury in determining whether, in fact, the particular defendant's conduct was negligent in the first place.' An approach that instead focused the duty inquiry on case-specific facts would tend to 'eliminate the role of the jury in negligence cases, transforming the question of whether a defendant breached the duty of care under the facts of a particular case into a legal issue to be decided by the court … .' " (*Cabral, supra,* 51 Cal.4th at pp. 772–773, original italics, internal citations omitted.)

- "[W]hile foreseeability with respect to duty is determined by focusing on the general character of the event and inquiring whether such event is 'likely enough in the setting of modern life that a reasonably thoughtful [person] would take account of it in guiding practical conduct', foreseeability in evaluating negligence and causation requires a 'more focused, fact-specific' inquiry that takes into account a particular plaintiff's injuries and the particular defendant's conduct." (*Laabs v. Southern California Edison Company* (2009) 175 Cal.App.4th 1260, 1273 [97 Cal.Rptr.3d 241], internal citation omitted.)

- "The issue here is whether [defendant]—separate from other legal and practical reasons it had to prevent injury of any kind to the public—had a tort duty to guard against negligently causing what we and others have called 'purely economic loss[es].' We use that term as a shorthand for 'pecuniary or commercial loss that does not arise from actionable physical, emotional or reputational injury to persons or physical injury to property.' And although [defendant] of course had a tort duty to guard against the latter kinds of injury, we conclude it had no tort duty to guard against purely economic losses." (*Southern California Gas Leak Cases* (2019) 7 Cal.5th 391, 398 [247 Cal.Rptr.3d 632, 441 P.3d 881], internal citations omitted.)

- "[Defendant] relies on the rule that a person has no general duty to safeguard another from harm or to rescue an injured person. But that rule has no application where the person has caused another to be put in a position of peril of a kind from which the injuries occurred." (*Carlsen v. Koivumaki* (2014) 227 Cal.App.4th 879, 883 [174 Cal.Rptr.3d 339].)

- "A defendant may owe a duty to protect the plaintiff from third party conduct if the defendant has a special relationship with either the plaintiff or the third party." (*University of Southern California v. Superior Court* (2018) 30 Cal.App.5th 429, 440 [241 Cal.Rptr.3d 616].)

- " 'Typically, in special relationships, "the plaintiff is particularly vulnerable and dependent upon the

defendant who, correspondingly, has some control over the plaintiff's welfare. [Citation.]" [Citation.] A defendant who is found to have a "special relationship" with another may owe an affirmative duty to protect the other person from foreseeable harm, or to come to the aid of another in the face of ongoing harm or medical emergency.' " (*Carlsen, supra,* 227 Cal.App.4th at p. 893.)

- " Generally, a greater degree of care is owed to children because of their lack of capacity to appreciate risks and avoid danger. [Citation.] Consequently, California courts have frequently recognized special relationships between children and their adult caregivers that give rise to a duty to prevent harms caused by the intentional or criminal conduct of third parties." (*Doe, supra,* 8 Cal.App.5th at p. 1129, internal citations omitted.)

- "[P]ostsecondary schools *do* have a special relationship with students while they are engaged in activities that are part of the school's curriculum or closely related to its delivery of educational services." (*The Regents of the University of California v. Superior Court* 4 Cal.5th 607, 624-625 [230 Cal.Rptr.3d 415, 413 P.3d 656], original italics.)

- "[A] university's duty to protect students from foreseeable acts of violence is governed by the ordinary negligence standard of care, namely 'that degree of care which people of ordinarily prudent behavior could be reasonably expected to exercise under the circumstances.' " (*Regents of University of California, supra,* 29 Cal.App.5th at p. 904.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 956–964, 988–990, 993–996

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 1.4–1.18

1 Levy et al., California Torts, Ch. 1, *Negligence: Duty and Breach*, §§ 1.02, 1.12, Ch. 2, *Causation*, § 2.02, Ch. 3, *Proof of Negligence*, § 3.01 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence,* § 380.10 (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence*, §§ 165.10, 165.20 (Matthew Bender)

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." (*Jacobs*

Farm/Del Cabo, Inc. v. Western Farm Service, Inc. (2010) 190 Cal.App.4th 1502, 1526 [119 Cal.Rptr.3d 529]; see also Cal. Law Revision Com. Comment to Evid. Code, § 669.)

- " 'The negligence per se doctrine is codified in Evidence Code section 669, subdivision (a), under which negligence is presumed if the plaintiff establishes four elements: (1) the defendant violated a statute, ordinance, or regulation; (2) the violation proximately caused death or injury to person or property; (3) the death or injury resulted from an occurrence the nature of which the statute, ordinance, or regulation was designed to prevent; and (4) the person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted.' 'The burden is on the proponent of a negligence per se instruction to demonstrate that these elements are met.' " (*Taulbee v. EJ Distribution Corp.* (2019) 35 Cal.App.5th 590, 596 [247 Cal.Rptr.3d 538], internal citations omitted.)

- "~~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.*, *supra*, ~~*v. Western Farm Service, Inc.* (2010)~~ 190 Cal.App.4th at p.~~1502,~~ 1526 ~~[119 Cal.Rptr.3d 529]~~, internal citation~~s~~ omitted; see also Cal. Law Revision Com. comment 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)

426. Negligent Hiring, Supervision, or Retention of Employee

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

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

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

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

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

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

New December 2009; Revised December 2015, June 2016

Directions for Use

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

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

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

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

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

Sources and Authority

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

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

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

- "[A] negligent supervision claim depends, in part, on a showing that the risk of harm was reasonably foreseeable. [Citations.] 'Foreseeability is determined in light of all the circumstances and does not require prior identical events or injuries.' [Citations.] ' "It is not necessary to prove that the very injury which occurred must have been foreseeable by the school authorities . . . . Their negligence is established if a reasonably prudent person would foresee that injuries of the same general type would be likely to happen in the absence of [adequate] safeguards." ' " (*D.Z. v. Los Angeles Unified School Dist.* (2019) 35 Cal.App.5th 210, 229 [247 Cal.Rptr.3d 127], internal citations omitted.)

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

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

- "To establish negligent supervision, a plaintiff must show that a person in a supervisorial position over the actor had prior knowledge of the actor's propensity to do the bad act." (*Z.V. v. County of*

Riverside (2015) 238 Cal.App.4th 889, 902 [189 Cal.Rptr.3d 570].)

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

- "We note that the jury instructions issued by our Judicial Council include 'substantial factor' causation as an element of the tort of negligent hiring, retention, or supervision. The fifth element listed in CACI No. 426 is '[t]hat [name of employer defendant]'s negligence in [hiring/ supervising/ [or] retaining] [name of employee] *was a substantial factor in causing [name of plaintiff]'s harm.*' [¶] CACI No. 426 is consistent with California case law on the causation element of [plaintiff]'s claim against [employer]." (*Liberty Surplus Ins. Corp. v. Ledesma & Meyer Construction Co., Inc.* (2018) 5 Cal.5th 216, 224, fn.5 [233 Cal.Rptr.3d 487, 418 P.3d 400], original italics.)

- "A claim that an employer was negligent in hiring or retaining an employee-driver rarely differs in substance from a claim that an employer was negligent in entrusting a vehicle to the employee. Awareness, constructive or actual, that a person is unfit or incompetent to drive underlies a claim that an employer was negligent in hiring or retaining that person as a driver. (See Judicial Council of Cal. Civ. Jury Instns. (2011) CACI No. 426.) That same awareness underlies a claim for negligent entrustment. (See CACI No. 724.) In a typical case, like this, the two claims are functionally identical." (*Diaz v. Carcamo* (2011) 51 Cal.4th 1148, 1157 [126 Cal.Rptr.3d 443, 253 P.3d 535].)

- "The language of the instruction used specifies the particular risk at issue in this case. That is consistent with the model instruction, which prompts the user to 'specify other particular risk,' as well as the Directions for Use for CACI No. 426, which state: 'In most cases, "unfitness" or "incompetence" (or both) will adequately describe the particular risk that the employee represents. However, there may be cases in which neither word adequately describes the risk that the employer should have known about.' It is also consistent with the case law, discussed above, holding that a claim for negligent supervision requires a showing of foreseeability of a *particular* risk of harm." (*D.Z., supra,* 35 Cal.App.5th at p. 235, original italics.)

- "[I]f an employer admits vicarious liability for its employee's negligent driving in the scope of employment, 'the damages attributable to both employer and employee will be coextensive.' Thus, when a plaintiff alleges a negligent entrustment or hiring cause of action against the employer and the employer admits vicarious liability for its employee's negligent driving, the universe of defendants who can be held responsible for plaintiff's damages is reduced by one—the employer—for purposes of apportioning fault under Proposition 51. Consequently, the employer would not be mentioned on the special verdict form. The jury must divide fault for the accident among the listed tortfeasors, and the employer is liable only for whatever share of fault the jury assigns to the employee." (*Diaz, supra,* 41 Cal.4th at p. 1159, internal citations omitted.)

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

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

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

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

- "Any claim alleging negligent hiring by an employer will be based in part on events predating the employee's tortious conduct. Plainly, that sequence of events does not itself preclude liability." (*Liberty Surplus Ins. Corp., supra,* 5 Cal.5th at p. 225, fn. 7.)

- "We find no relevant case law approving a claim for direct liability based on a public entity's allegedly negligent hiring and supervision practices. … Here, … there is no statutory basis for declaring a governmental entity liable for negligence in its hiring and supervision practices and, accordingly, plaintiffs' claim against County based on that theory is barred … ." (*de Villers v. County of San Diego* (2007) 156 Cal.App.4th 238, 252-253 [67 Cal.Rptr.3d 253].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1350

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

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

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

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

457. Statute of Limitations—Equitable Tolling—Other Prior Proceeding

[*Name of plaintiff***] claims that even if [his/her/its] lawsuit was not filed by [***insert date from applicable statute of limitations***], [he/she/it] may still proceed because the deadline for filing the lawsuit was extended by the time during which [***specify prior proceeding that qualifies as the tolling event, e.g., she was seeking workers' compensation benefits***]. In order to establish the right to proceed, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] received timely notice that [***name of plaintiff***] was [***e.g., seeking workers' compensation***] instead of filing a lawsuit;**

2. **That the facts of the two claims were so similar that an investigation of the [***e.g., workers' compensation claim***] gave or would have given [***name of defendant***] the information needed to defend the lawsuit; and**

3. **That [***name of plaintiff***] was acting reasonably and in good faith by [***e.g., seeking workers' compensation***].**

For [*name of defendant***] to have received timely notice, [***name of plaintiff***] must have filed the [***e.g., workers' compensation claim***] by [***insert date from applicable statute of limitations***] and the [***e.g., claim***] notified [***name of defendant***] of the need to begin investigating the facts that form the basis for the lawsuit.**

In considering whether [*name of plaintiff***] acted reasonably and in good faith, you may consider the amount of time after the [***e.g., workers' compensation claim***] was [resolved/abandoned] before [he/she/it] filed the lawsuit.**

New December 2009; Revised December 2014

Directions for Use

Equitable tolling, including any disputed issue of fact, is to be decided by the court, even if there are disputed issues of fact. (*Hopkins v. Kedzierski* (2014) 225 Cal.App.4th 736, 745 [170 Cal.Rptr.3d 551].) This instruction is for use if the court submits the issue to the jury for advisory findings.

Equitable tolling is not available for legal malpractice (see *Laird v. Blacker* (1992) 2 Cal.4th 606, 618 [7 Cal.Rptr.2d 550, 828 P.2d 691] [statutory tolling provisions of Code Civ Proc., § 340.6 are exclusive for both one-year and four-year limitation periods]; see also CACI No. 610, *Affirmative Defense—Statute of Limitations—Attorney Malpractice—One-Year Limit,* and CACI No. 611, *Affirmative Defense—Statute of Limitations—Attorney Malpractice—Four-Year Limit*) nor for medical malpractice with regard to the three-year limitation period of Code of Civil Procedure section 340.5. (See *Belton v. Bowers Ambulance Serv.* (1999) 20 Cal.4th 928, 934 [86 Cal.Rptr.2d 107, 978 P.2d 591] [statutory tolling provisions of Code Civ. Proc., § 340.5 are exclusive only for three-year period; one-year period may be tolled on other grounds]; see also CACI No. 555, *Affirmative Defense—Statute of Limitations—Medical Malpractice—*

One-Year Limit, and CACI No. 556, *Affirmative Defense—Statute of Limitations—Medical Malpractice—Three-Year Limit*.)

Sources and Authority

- Tolling for Equal Employment Opportunity Commission Investigation. Government Code section 12965(d)(1).

- "The equitable tolling of statutes of limitations is a judicially created, nonstatutory doctrine. It is 'designed to prevent unjust and technical forfeitures of the right to a trial on the merits when the purpose of the statute of limitations—timely notice to the defendant of the plaintiff's claims—has been satisfied.' Where applicable, the doctrine will 'suspend or extend a statute of limitations as necessary to ensure fundamental practicality and fairness.' " (*McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, 99 [84 Cal.Rptr.3d 734, 194 P.3d 1026], internal citations omitted.)

- "The purpose of equitable tolling is to 'ease[] the pressure on parties "concurrently to seek redress in two separate forums with the attendant danger of conflicting decisions on the same issue." ' It is intended to benefit the court system 'by reducing the costs associated with a duplicative filing requirement, in many instances rendering later court proceedings either easier and cheaper to resolve or wholly unnecessary.' " (*Long v. Forty Niners Football Co.* (2019) 33 Cal.App.5th 550, 555 [244 Cal.Rptr.3d 887], internal citation omitted.)

- "While the case law is not entirely clear, it appears that the weight of authority supports our conclusion that whether a plaintiff has demonstrated the elements of equitable tolling presents a question of fact." (*Hopkins, supra,* 225 Cal.App.4th at p. 755.)

- "[E]quitable tolling, '[a]s the name suggests … is an equitable issue for court resolution.' " (*Hopkins, supra,* 225 Cal.App.4th at p. 745.)

- "While the judge determines equitable causes of action, the judge may (in rare instances) empanel an advisory jury to make preliminary factual findings. The factual findings are purely advisory because, on equitable causes of action, the judge is the proper fact finder. '[W]hile a jury may be used for advisory verdicts as to questions of fact [in equitable actions], it is the duty of the trial court to make its own independent findings and to adopt or reject the findings of the jury as it deems proper.' " (*Hoopes v. Dolan* (2008) 168 Cal.App.4th 146, 156 [85 Cal.Rptr.3d 337], internal citations omitted.)

- "[CACI No. 457 is] appropriate for use when a trial court 'empanel[s] an advisory jury to make preliminary factual findings,' with respect to equitable … tolling." (*Hopkins, supra,* 225 Cal.App.4th at p. 745.)

- "The equitable tolling doctrine rests on the concept that a plaintiff should not be barred by a statute of limitations unless the defendant would be unfairly prejudiced if the plaintiff were allowed to proceed. '[T]he primary purpose of the statute of limitations is normally satisfied when the defendant receives timely notification of the first of two proceedings.' " (*Aguilera v. Heiman*

(2009) 174 Cal.App.4th 590, 598 [95 Cal.Rptr.3d 18], internal citations omitted.)

- "Broadly speaking, the doctrine applies ' "[w]hen an injured person has several legal remedies and, reasonably and in good faith, pursues one." ' [Citation.] Thus, it may apply where one action stands to lessen the harm that is the subject of a potential second action; where administrative remedies must be exhausted before a second action can proceed; or where a first action, embarked upon in good faith, is found to be defective for some reason." (*Wassmann v. South Orange County Community College Dist.* (2018) 24 Cal.App.5th 825, 853 [234 Cal.Rptr.3d 712].)

- "[T]he effect of equitable tolling is that the limitations period stops running during the tolling event, and begins to run again only when the tolling event has concluded. As a consequence, the tolled interval, no matter when it took place, is tacked onto the end of the limitations period, thus extending the deadline for suit by the entire length of time during which the tolling event previously occurred." (*Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 370–371 [2 Cal.Rptr.3d 655, 73 P.3d 517].)

- "A major reason for applying the doctrine is to avoid 'the hardship of compelling plaintiffs to pursue several duplicative actions simultaneously on the same set of facts.' '[D]isposition of a case filed in one forum may render proceedings in the second unnecessary or easier and less expensive to resolve.' " (*Guevara v. Ventura County Community College Dist.* (2008) 169 Cal.App.4th 167, 174 [87 Cal.Rptr.3d 50], internal citations omitted.)

- "[A]pplication of the doctrine of equitable tolling requires timely notice, and lack of prejudice, to the defendant, and reasonable and good faith conduct on the part of the plaintiff. These elements seemingly are present here. As noted, the federal court, without prejudice, declined to assert jurisdiction over a timely filed state law cause of action and plaintiffs thereafter promptly asserted that cause in the proper state court. Unquestionably, the same set of facts may be the basis for claims under both federal and state law. We discern no reason of policy which would require plaintiffs to file simultaneously two separate actions based upon the same facts in both state and federal courts since 'duplicative proceedings are surely inefficient, awkward and laborious.' " (*Addison v. State* (1978) 21 Cal.3d 313, 319 [146 Cal.Rptr. 224, 578 P.2d 941], internal citations omitted.)

- " ' "The timely notice requirement essentially means that the first claim must have been filed within the statutory period. Furthermore[,] the filing of the first claim must alert the defendant in the second claim of the need to begin investigating the facts which form the basis for the second claim. Generally this means that the defendant in the first claim is the same one being sued in the second." "The second prerequisite essentially translates to a requirement that the facts of the two claims be identical or at least so similar that the defendant's investigation of the first claim will put him in a position to fairly defend the second." "The third prerequisite of good faith and reasonable conduct on the part of the plaintiff is less clearly defined in the cases. But in *Addison v. State of California, supra,* 21 Cal.3d 313[,] the Supreme Court did stress that the plaintiff filed his second claim a short time after tolling ended." ' " (*McDonald, supra,* 45 Cal.4th at p. 102, fn. 2, internal citations omitted.)

- "The third requirement of good faith and reasonable conduct may turn on whether 'a plaintiff

delayed filing the second claim until the statute on that claim had nearly run …' or 'whether the plaintiff [took] affirmative actions which … misle[d] the defendant into believing the plaintiff was foregoing his second claim.' " (*Tarkington v. California Unemployment Ins. Appeals Bd.* (2009) 172 Cal.App.4th 1494, 1505 [92 Cal.Rptr.3d 131].)

- "Where exhaustion of an administrative remedy is mandatory prior to filing suit, equitable tolling is automatic: 'It has long been settled in this and other jurisdictions that whenever the exhaustion of administrative remedies is a prerequisite to the initiation of a civil action, the running of the limitations period is tolled during the time consumed by the administrative proceeding.' This rule prevents administrative exhaustion requirements from rendering illusory nonadministrative remedies contingent on exhaustion." (*McDonald, supra,* 45 Cal.4th at p. 101, internal citation omitted.)

- "The trial court rejected equitable tolling on the apparent ground that tolling was unavailable where, as here, the plaintiff was advised the alternate administrative procedure he or she was pursuing was voluntary and need not be exhausted. In reversing summary judgment, the Court of Appeal implicitly concluded equitable tolling is in fact available in such circumstances and explicitly concluded equitable tolling is not foreclosed as a matter of law under the FEHA. The Court of Appeal was correct on each count." (*McDonald, supra,* 45 Cal.4th at p. 114.)

- "Equitable tolling and equitable estoppel [see CACI No. 456] are distinct doctrines. ' "Tolling, strictly speaking, is concerned with the point at which the limitations period begins to run and with the circumstances in which the running of the limitations period may be suspended. … Equitable estoppel, however, … comes into play only after the limitations period has run and addresses … the circumstances in which a party will be estopped from asserting the statute of limitations as a defense to an admittedly untimely action because his conduct has induced another into forbearing suit within the applicable limitations period. [Equitable estoppel] is wholly independent of the limitations period itself and takes its life … from the equitable principle that no man [may] profit from his own wrongdoing in a court of justice." ' " (*Lantzy, supra,* 31 Cal.4th at pp. 383–384.)

- "[V]oluntary abandonment [of the first proceeding] does not categorically bar application of equitable tolling, but it may be relevant to whether a plaintiff can satisfy the three criteria for equitable tolling." (*McDonald, supra,* 45 Cal.4th at p. 111.)

- "The equitable tolling doctrine generally requires a showing that the plaintiff is seeking an alternate remedy in an established procedural context. Informal negotiations or discussions between an employer and employee do not toll a statute of limitations under the equitable tolling doctrine." (*Acuna v. San Diego Gas & Electric Co.* (2013) 217 Cal.App.4th 1402, 1416 [159 Cal.Rptr.3d 749], internal citation omitted.)

- "Tolling the FEHA limitation period while the employee awaits the outcome of an EEOC investigation furthers several policy objectives: (1) the defendant receives timely notice of the claim; (2) the plaintiff is relieved of the obligation of pursuing simultaneous actions on the same set of facts; and (3) the costs of duplicate proceedings often are avoided or reduced." (*Mitchell v. State Dept. of Public Health* (2016) 1 Cal.App.5th 1000, 1008 [205 Cal.Rptr.3d 261].)

- " '[P]utative class members would be ill advised to rely on the mere filing of a class action complaint to toll their individual statute of limitations.' A trial court may, nonetheless, apply tolling to save untimely claims. But in doing so, the court must address 'two major policy considerations.' The first is 'protection of the class action device,' which requires the court to determine whether the denial of class certification was 'unforeseeable by class members,' or whether potential members, in anticipation of a negative ruling, had already filed ' "protective motions to intervene or to join in the event that a class was later found unsuitable," depriving class actions "of the efficiency and economy of litigation which is a principal purpose of the procedure." ' The second consideration is 'effectuation of the purposes of the statute of limitations,' and requires the court to determine whether commencement of the class suit ' "notifie[d] the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment." [Citation.] In these circumstances, … the purposes of the statute of limitations would not be violated by a decision to toll.' " (*Batze v. Safeway, Inc.* (2017) 10 Cal.App.5th 440, 482-483 [216 Cal.Rptr.3d 390], internal citations omitted.)

- "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, supra,* 2 Cal.4th at p. 618 [applying rule to one-year limitation period].)

- "We see no reason to apply the second sentence of section 340.5 to the one-year period it does not mention, in addition to the three-year period it does mention. The general purpose of MICRA does not require us to expand that sentence beyond its language." (*Belton, supra,* 20 Cal.4th at p. 934 [rejecting application of rule to one-year limitation period].)

- "[E]quitable tolling has never been applied to allow a plaintiff to extend the time for pursuing an administrative remedy by filing a lawsuit. Despite broad language used by courts in employing the doctrine, equitable tolling has been applied almost exclusively to extend statutory deadlines for judicial actions, rather than deadlines for commencing administrative proceedings." (*Bjorndal v. Superior Court* (2012) 211 Cal.App.4th 1100, 1109 [150 Cal.Rptr.3d 405].)
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- "Plaintiffs cite no authority, and we are aware of none, that would allow a plaintiff in one case to equitably toll the limitation period based on the filing of a stranger's lawsuit." (*Reid v. City of San Diego* (2018) 23 Cal.App.5th 901, 916 [234 Cal.Rptr.3d 636].)

- "Equitable tolling applies to claims under FEHA during the period in which the plaintiff exhausts administrative remedies or when the plaintiff voluntarily pursues an administrative remedy or nonmandatory grievance procedure, even if exhaustion of that remedy is not mandatory." (*Wassmann, supra,* 24 Cal.App.5th at pp. 853–854.)

Secondary Sources

4 Witkin, California Procedure (5th ed. 2008) Actions, § 760 et seq.

Turner et al., California Practice Guide: Civil Procedure Before Trial—Statutes of Limitations, Ch. 1-A, *Definitions And Distinctions* ¶ 1:57.2 (The Rutter Group)

3 California Torts, Ch. 32, *Liability of Attorneys,* § 32.60[1][g.1] (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions*, § 345.21 (Matthew Bender)

14 California Points and Authorities, Ch. 143, *Limitation of Actions,* § 143.46 (Matthew Bender)

473. Primary Assumption of Risk—Exception to Nonliability—Occupation Involving Inherent Risk

[*Name of plaintiff***] claims that [he/she] was harmed by [***name of defendant***] while [***name of plaintiff***] was performing [his/her] job duties as [***specify, e.g., a firefighter***]. [***Name of defendant***] is not liable if [***name of plaintiff***]'s injury arose from a risk inherent in the occupation of [***e.g., firefighter***]. However, [***name of plaintiff***] may recover if [he/she] proves all of the following:**

[1. That [*name of defendant***] unreasonably increased the risks to [***name of plaintiff***] over and above those inherent in [***e.g., firefighting***];]**

[*or*]

[1. That [*name of defendant***] [misrepresented to/failed to warn] [***name of plaintiff***] [of] a dangerous condition that [***name of plaintiff***] could not have known about as part of [his/her] job duties;]**

[*or*]

[1. That the cause of [*name of plaintiff***]'s injury was not related to the inherent risk;]**

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 May 2017

Directions for Use

Give this instruction if the plaintiff asserts an exception to assumption of risk of the injury that he or she suffered because the risk is an inherent part of his or her job duties. This has traditionally been referred to as the "firefighter's rule." (See *Gregory v. Cott* (2014) 59 Cal. 4th 996, 1001 [176 Cal. Rptr. 3d 1, 331 P.3d 179].)

There are, however, exceptions to nonliability under the firefighter's rule. The plaintiff may recover if (1) the defendant's actions have unreasonably increased the risks of injury beyond those inherent in the occupation; (2) the defendant misrepresented or failed to disclose a hazardous condition that the plaintiff had no reason to know about; or (3) the cause of the injury was not related to the inherent risk. This instruction asks the jury to determine whether an exception applies. (*Gregory, supra,* 59 Cal.4th at p. 1010.) These exceptions are presented in the options to element 1.

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].)

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 applicable to coaches, instructors, or trainers, see CACI No. 471, *Primary Assumption of Risk─Exception to Nonliability─Instructors, Trainers, or Coaches*. For an instruction applicable to facilities owners and operators and to event sponsors, see CACI No. 472, *Primary Assumption of Risk─Exception to Nonliability─Facilities Owners and Operators and Event Sponsors*.

Sources and Authority

- "Primary assumption of risk cases often involve recreational activity, but the doctrine also governs claims arising from inherent occupational hazards. The bar against recovery in that context first developed as the 'firefighter'-s rule,' which precludes firefighters and police officers from suing members of the public for the conduct that makes their employment necessary. After *Knight,* we have viewed the firefighter'-s rule 'not … as a separate concept,' but as a variant of primary assumption of risk, 'an illustration of when it is appropriate to find that the defendant owes no duty of care.' Whether a duty of care is owed in a particular context depends on considerations of public policy, viewed in light of the nature of the activity and the relationship of the parties to the activity." (*Gregory, supra,* 59 Cal. 4th at pp. 1001−1002, internal citations omitted.)

- "The firefighter'-s rule, upon which the [defendant] relies, and the analogous veterinarian'-s rule, are examples of the primary assumption of risk doctrine applied in the employment context." (*Moore v. William Jessup University* (2015) 243 Cal.App.4th 427, 435 [197 Cal.Rptr.3d 51].)

- "Our holding does not preclude liability in situations where caregivers are not warned of a known risk, where defendants otherwise increase the level of risk beyond that inherent in providing care, or where the cause of injury is unrelated to the symptoms of [Alzheimers] disease." (*Gregory, supra,* 59 Cal.4th at p. 1000.)

- "[T]he principle of assumption of risk, which forms the theoretical basis for the fireman'-s rule, is not applicable where a fireman's injuries are proximately caused by his being misled as to the nature of the danger to be confronted." (*Lipson v. Superior Court* (1982) 31 Cal.3d 362, 371 [182 Cal. Rptr. 629, 644 P.2d 822].)

- "The firefighter'-s rule, however, is hedged about with exceptions. The firefighter does not assume every risk of his or her occupation. The rule does not apply to conduct other than that which necessitated the summoning of the firefighter or police officer, and it does not apply to independent acts of misconduct that are committed after the firefighter or police officer has arrived on the scene." (*Neighbarger v. Irwin Industries, Inc.* (1994) 8 Cal.4th 532, 538 [34 Cal. Rptr. 2d 630, 882 P.2d 347], internal citation omitted.)

- "We have noted that the duty to avoid injuring others 'normally extends to those engaged in hazardous work.' 'We have never held that the doctrine of assumption of risk relieves all persons of a duty of care to workers engaged in a hazardous occupation.' However, the doctrine does apply in favor of those who hire workers to handle a dangerous situation, in both the public and the private sectors. Such a worker, 'as a matter of fairness, should not be heard to complain of the

negligence that is the cause of his or her employment. [Citations.] In effect, we have said it is unfair to charge the defendant with a duty of care to prevent injury to the plaintiff arising from the very condition or hazard the defendant has contracted with the plaintiff to remedy or confront.' This rule encourages the remediation of dangerous conditions, an important public policy. Those who hire workers to manage a hazardous situation are sheltered from liability for injuries that result from the risks that necessitated the employment." (*Gregory, supra,* 59 Cal.4th at p. 1002, internal citations omitted.)

- "[A] person whose conduct precipitates the intervention of a police officer owes no duty of care to the officer 'with respect to the original negligence that caused the officer's intervention.' " (*Harry v. Ring the Alarm, LLC* (2019) 34 Cal.App.5th 749, 759 [246 Cal.Rptr.3d 471].)

- "Because of the nature of the activity, caring for the mentally infirm, and the relationship between the parties, patient and caregiver, mentally incompetent patients should not owe a legal duty to protect caregivers from injuries suffered in attending to them. Here, the very basis of the relationship between plaintiff and [defendant] was to protect [defendant] from harming either herself or others." (*Herrle v. Estate of Marshall* (1996) 45 Cal.App.4th 1761, 1770 [53 Cal.Rptr.2d 713].)

Secondary Sources

9 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1355

1 Levy et al., California Torts, Ch. 15, *General Premises Liability*, § 15.23 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.173 (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence*, § 165.412 (Matthew Bender)

1401. False Arrest Without Warrant by Peace Officer—Essential Factual Elements

[*Name of plaintiff*] claims that [he/she] was wrongfully arrested by [*name of defendant*]. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] arrested [*name of plaintiff*] without a warrant;**
2. **That [*name of plaintiff*] was [actually] harmed; and**
3. **That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

New September 2003

Directions for Use

Give CACI No. 1402, *False Arrest Without Warrant—Affirmative Defense—Peace Officer—Probable Cause to Arrest*, if applicable, immediately after this instruction.

If plaintiff is seeking nominal damages as an alternative to actual damages, insert the following paragraph above element 2:

> If you find the above, then the law assumes that [*name of plaintiff*] has been harmed and [he/she] is entitled to a nominal sum such as one dollar. [*Name of plaintiff*] is also entitled to additional damages if [he/she] proves the following:

The second sentence of the above paragraph, along with the final two elements of this instruction, should be omitted if plaintiff is seeking nominal damages only. Read "actually" in the second element only if nominal damages are also being sought.

Sources and Authority

- "Arrest" Defined. Penal Code section 834.
- "False arrest and false imprisonment are the same tort. False arrest is a way of committing false imprisonment." (*Cox v. Griffin* (2019) 34 Cal.App.5th 440, 446, fn. 6 [246 Cal.Rptr.3d 185].) ~~"[F]alse arrest' and 'false imprisonment' are not separate torts. False arrest is but one way of committing a false imprisonment, and they are distinguishable only in terminology." (*Collins v. City and County of San Francisco* (1975) 50 Cal.App.3d 671, 673 [123 Cal.Rptr. 525].)~~
- Government Code section 820.4 provides: "A public employee is not liable for his act or omission, exercising due care, in the execution or enforcement of any law. Nothing in this section exonerates a public employee from liability for false arrest or false imprisonment."

- A person is liable for false imprisonment if he or she " 'authorizes, encourages, directs, or assists an officer to do an unlawful act, or procures an unlawful arrest, without process, or participates in the unlawful arrest ... .' " (*Du Lac v. Perma Trans Products, Inc.* (1980) 103 Cal.App.3d 937, 941 [163 Cal.Rptr. 335], internal citation omitted.) Where a defendant "knowingly [gives] the police false or materially incomplete information, of a character that could be expected to stimulate an arrest" ... "such conduct can be a basis for imposing liability for false imprisonment." (*Id.* at p. 942.)

- "It has long been the law that a cause of action for false imprisonment is stated where it is alleged that there was an arrest without process, followed by imprisonment and damages. Upon proof of those facts the burden is on the defendant to prove justification for the arrest." (*Cervantez v. J.C. Penney Co.* (1979) 24 Cal.3d 579, 592 [156 Cal.Rptr. 198, 595 P.2d 975].)

- Penal Code section 830 and following provisions define who are peace officers in California.

- "False imprisonment and malicious prosecution are mutually inconsistent torts and only one, if either, will lie in this case. In a malicious criminal prosecution, the detention was malicious but it was accomplished properly, i.e., by means of a procedurally valid arrest. In contrast, if the plaintiff is arrested pursuant to a procedurally improper warrant or warrantless arrest, the remedy is a cause of action for false imprisonment." (*Cummings v. Fire Ins. Exch.* (1988) 202 Cal.App.3d 1407, 1422 [249 Cal.Rptr. 568].)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 434–440

3 Levy et al., California Torts, Ch. 42, *False Imprisonment and False Arrest*, § 42.23 (Matthew Bender)

22 California Forms of Pleading and Practice, Ch. 257, *False Imprisonment* (Matthew Bender)

1 California Civil Practice: Torts § 13:20 (Thomson Reuters)

1403. False Arrest Without Warrant by Private Citizen—Essential Factual Elements

[*Name of plaintiff*] claims that [he/she] was wrongfully arrested by [*name of defendant*]. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] intentionally caused [*name of plaintiff*] to be arrested without a warrant; [and]**

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

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

[A private person does not need to physically restrain a suspect in order to make a citizen's arrest. A private person can make a citizen's arrest by calling for a peace officer, reporting the offense, and pointing out the suspect.]

New September 2003; Revised December 2011

Directions for Use

Give CACI No. 1404, *False Arrest Without Warrant—Affirmative Defense—Private Citizen—Probable Cause to Arrest*, if applicable, immediately after this instruction.

If the plaintiff is seeking nominal damages as an alternative to actual damages, insert the following paragraph above element 2:

> If you find the above, then the law assumes that [*name of plaintiff*] has been harmed and [he/she] is entitled to a nominal sum such as one dollar. [*Name of plaintiff*] is also entitled to additional damages if [he/she] proves the following:

The second sentence, along with the final two elements of this instruction, should be omitted if plaintiff is seeking nominal damages only. Read "actually" in the second element only if nominal damages are also being sought.

Sources and Authority

- "Arrest" Defined. Penal Code section 834.

- "False arrest and false imprisonment are the same tort. False arrest is a way of committing false imprisonment." (*Cox v. Griffin* (2019) 34 Cal.App.5th 440, 446, fn. 6 [246 Cal.Rptr.3d 185].) ~~'[F]alse arrest' and 'false imprisonment' are not separate torts. False arrest is but one way of committing a false imprisonment, and they are distinguishable only in terminology." (*Collins v. City and County of San Francisco* (1975) 50 Cal.App.3d 671, 673 [123 Cal.Rptr. 525].)~~

- "It has long been the law that a cause of action for false imprisonment is stated where it is alleged that there was an arrest without process, followed by imprisonment and damages. Upon proof of those facts the burden is on the defendant to prove justification for the arrest." (*Cervantez v. J.C. Penney Co.* (1979) 24 Cal.3d 579, 592 [156 Cal.Rptr. 198, 595 P.2d 975].)

- " '[T]he delegation of the physical act of arrest need not be express, but may be implied from the citizen's act of summoning an officer, reporting the offense, and pointing out the suspect.' " (*Johanson v. Dept. of Motor Vehicles* (1995) 36 Cal.App.4th 1209, 1216 [43 Cal.Rptr.2d 42], internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 438, 439

3 Levy et al., California Torts, Ch. 42, *False Imprisonment and False Arrest*, § 42.22 (Matthew Bender)

22 California Forms of Pleading and Practice, Ch. 257, *False Imprisonment* (Matthew Bender)

1 California Civil Practice: Torts §§ 13:8–13:10 (Thomson Reuters)

1405. False Arrest With Warrant—Essential Factual Elements

[*Name of plaintiff***] claims that [he/she] was wrongfully arrested by [***name of defendant***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **[That [***name of defendant***] arrested [***name of plaintiff***];]**

   [*or***]**

   [That [*name of defendant***] intentionally caused [***name of plaintiff***] to be wrongfully arrested;]**

2. **That [***insert facts supporting the invalidity of the warrant or the unlawfulness of the arrest, e.g., "the warrant for [name of plaintiff]'s arrest had expired"***];**

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

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

New September 2003; Revised December 2011

Directions for Use

CACI No. 1406, *False Arrest With Warrant—Peace Officer—Affirmative Defense—"Good-Faith" Exception*, should be given after this instruction if that defense is asserted.

If the plaintiff is seeking nominal damages as an alternative to actual damages, insert the following paragraph above element 3:

> If you find both of the above, then the law assumes that [*name of plaintiff*] has been harmed and [he/she] is entitled to a nominal sum such as one dollar. [*Name of plaintiff*] is also entitled to additional damages if [he/she] proves the following:

The second sentence of the above paragraph, along with the final two elements of this instruction, should be omitted if plaintiff is seeking nominal damages only. Read "actually" in the third element only if nominal damages are also being sought.

Sources and Authority

- "Arrest" Defined. Penal Code section 834.
- Public Employee Liability for False Arrest. Government Code section 820.4.

- "False arrest and false imprisonment are the same tort. False arrest is a way of committing false imprisonment." (*Cox v. Griffin* (2019) 34 Cal.App.5th 440, 446, fn. 6 [246 Cal.Rptr.3d 185].) ~~'[F]alse arrest' and 'false imprisonment' are not separate torts. False arrest is but one way of committing a false imprisonment, and they are distinguishable only in terminology." (*Collins v. City and County of San Francisco* (1975) 50 Cal.App.3d 671, 673 [123 Cal.Rptr. 525].)~~

- " 'The action for false imprisonment is frequently alleged to have been committed by reason of some wrongful arrest under some pretended or void order of some court, in which class of false imprisonment cases it is incumbent on the plaintiff to allege facts showing or tending to show that such arrest, under such court procedure, was wrongful, unauthorized and without any probable cause; ….' " (*Peters v. Bigelow* (1934) 137 Cal.App. 135, 139 [30 P.2d 450].)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 441–443

3 Levy et al., California Torts, Ch. 42, *False Imprisonment and False Arrest*, § 42.25 (Matthew Bender)

22 California Forms of Pleading and Practice, Ch. 257, *False Imprisonment*, § 257.20 (Matthew Bender)

10 California Points and Authorities, Ch. 103, *False Imprisonment,* § 103.77 et seq. (Matthew Bender)

1 California Civil Practice: Torts §§ 13:26–13:30 (Thomson Reuters)

1500. Former Criminal Proceeding—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] wrongfully caused a criminal proceeding to be brought against [him/her/it]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was actively involved in causing [***name of plaintiff***] to be arrested [and prosecuted] [or in causing the continuation of the prosecution];**

[2. That the criminal proceeding ended in [*name of plaintiff***]'s favor;]**

[3. That no reasonable person in [*name of defendant***]'s circumstances would have believed that there were grounds for causing [***name of plaintiff***] to be arrested [and prosecuted];]**

4. **That [***name of defendant***] acted primarily for a purpose other than to bring [***name of plaintiff***] to justice;**

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

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

[The law requires that the trial judge, rather than the jury, decide if [*name of plaintiff***] has proven element 2 above, whether the criminal proceeding ended in [his/her/its] favor. But before I can do so, you must decide whether [***name of plaintiff***] has proven the following:**

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

The special [verdict/interrogatory] form will ask for your finding on [this/these] issue[s].]

[The law [also] requires that the trial judge, rather than the jury, decide if [*name of plaintiff***] has proven element 3 above, whether a reasonable person in [***name of defendant***]'s circumstances would have believed that there were grounds for causing [***name of plaintiff***] to be arrested [and prosecuted]. But before I can do so, you must decide whether [***name of plaintiff***] has proven the following:**

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

The special [verdict/interrogatory] form will ask for your finding on [this/these] issue[s].]

New September 2003; Revised April 2008, October 2008, June 2015, May 2018

Directions for Use

Give this instruction in a malicious prosecution case based on an underlying criminal prosecution. If there is an issue as to what it means to be "actively involved" in element 1, also give CACI No. 1504, *Former Criminal Proceeding—"Actively Involved" Explained*.

In elements 1 and 3 and in the next-to-last paragraph, include the bracketed references to prosecution if the arrest was without a warrant. Whether prosecution is required in an arrest on a warrant has not definitively been resolved. (See *Van Audenhove v. Perry* (2017) 11 Cal.App.5th 915, 919–925 [217 Cal.Rptr.3d 843].)

Malicious prosecution requires that the criminal proceeding have ended in the plaintiff's favor (element 2) and that the defendant did not reasonably believe that there were any grounds (probable cause) to initiate the proceeding (element 3). Probable cause is to be decided by the court as a matter of law. However, it may require the jury to find some preliminary facts before the court can make its legal determination, including facts regarding what the defendant knew or did not know at the time. (See *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 881 [254 Cal.Rptr. 336, 765 P.2d 498].) If so, include element 3 and also the bracketed part of the instruction that refers to element 3.

Favorable termination is handled in much the same way. If a proceeding is terminated other than on the merits, there may be disputed facts that the jury must find in order to determine whether there has been a favorable termination. (See *Fuentes v. Berry* (1995) 38 Cal.App.4th 1800, 1808 [45 Cal.Rptr.2d 848].) If so, include element 2 and also the bracketed part of the instruction that refers to element 2. Once these facts are determined, the jury does not then make a second determination as to whether there has been a favorable termination. The matter is determined by the court based on the resolution of the disputed facts. (See *Sierra Club Found. v. Graham* (1999) 72 Cal.App.4th 1135, 1159 [85 Cal.Rptr.2d 726] [element of favorable termination is for court to decide].)

Either or both of the elements of probable cause and favorable termination should be omitted if there are no disputed facts regarding that element for the jury.

Element 4 expresses the malice requirement.

Sources and Authority

- Public Employee Immunity. Government Code section 821.6.

- "Malicious prosecution consists of initiating or procuring the arrest and prosecution of another under lawful process, but from malicious motives and without probable cause." (*Cedars-Sinai Medical Center v. Superior Court* (1988) 206 Cal.App.3d 414, 417 [253 Cal.Rptr. 561], internal citation omitted.)

- "The remedy of a malicious prosecution action lies to recompense the defendant who has suffered out of pocket loss in the form of attorney fees and costs, as well as emotional distress and injury to reputation because of groundless allegations made in pleadings which are public records." (*Sagonowsky v. More* (1998) 64 Cal.App.4th 122, 132 [75 Cal.Rptr.2d 118], internal citations omitted.)

- "[A] cause of action for malicious prosecution cannot be premised on an arrest that does not result in formal charges (at least when the arrest is not pursuant to a warrant)." (*Van Audenhove, supra,* 11 Cal.App.5th at p. 917 [rejecting Rest.2d Torts, § 654. subd. (2)(c)].)

- "Cases dealing with actions for malicious prosecution against private persons require that the defendant has at least sought out the police or prosecutorial authorities and falsely reported facts to them indicating that plaintiff has committed a crime." (*Sullivan v. County of Los Angeles* (1974) 12 Cal.3d 710, 720 [117 Cal.Rptr. 241, 527 P.2d 865], internal citations omitted.)

- "[T]he effect of the approved instruction [in *Dreux v. Domec* (1861) 18 Cal. 83] was to impose liability upon one who had not taken part until after the commencement of the prosecution." (*Lujan v. Gordon* (1977) 70 Cal.App.3d 260, 263 [138 Cal.Rptr. 654].)

- "When, as here, the claim of malicious prosecution is based upon initiation of a criminal prosecution, the question of probable cause is whether it was objectively reasonable for the defendant … to suspect the plaintiff … had committed a crime." (*Greene v. Bank of America* (2013) 216 Cal.App.4th 454, 465 [156 Cal.Rptr.3d 901].)

- "When there is a dispute as to the state of the defendant's knowledge and the existence of probable cause turns on resolution of that dispute, … the jury must resolve the threshold question of the defendant's factual knowledge or belief. Thus, when … there is evidence that the defendant may have known that the factual allegations on which his action depended were untrue, the jury must determine what facts the defendant knew before the trial court can determine the legal question whether such facts constituted probable cause to institute the challenged proceeding." (*Sheldon Appel Co., supra,* 47 Cal.3d at p. 881, internal citations omitted.)

- "Admittedly, the fact of the grand jury indictment gives rise to a prima facie case of probable cause, which the malicious prosecution plaintiff must rebut. However, as respondents' own authorities admit, that rebuttal may be by proof that the indictment was based on false or fraudulent testimony." (*Williams v. Hartford Ins. Co.* (1983) 147 Cal.App.3d 893, 900 [195 Cal.Rptr. 448].)

- "Acquittal of the criminal charge, in the criminal action, did not create a conflict of evidence on the issue of probable cause. [Citations.]" (*Verdier v. Verdier* (1957) 152 Cal.App.2d 348, 352, fn. 3 [313 P.2d 123].)

- " '[T]he plaintiff in a malicious prosecution action must plead and prove that the prior judicial proceeding of which he complains terminated in his favor.' Termination of the prior proceeding is not necessarily favorable simply because the party prevailed in the prior proceeding; the termination must relate to the merits of the action by reflecting either on the innocence of or lack of responsibility for the misconduct alleged against him." (*Sagonowsky, supra,* 64 Cal.App.4th at p. 128, internal citations omitted.)

- " 'The theory underlying the requirement of favorable termination is that it tends to indicate the innocence of the accused, and coupled with the other elements of lack of probable cause and malice, establishes the tort, that is, the malicious and unfounded charge of crime against an innocent person.'

" (*Cote v. Henderson* (1990) 218 Cal.App.3d 796, 804 [267 Cal.Rptr. 274], quoting *Jaffe v. Stone* (1941) 18 Cal.2d 146, 150 [114 P.2d 335].)

- "[I]n most cases, a person who merely alerts law enforcement to a possible crime … is not liable if … law enforcement, on its own, after an independent investigation, decides to prosecute." (*Cox v. Griffin* (2019) 34 Cal.App.5th 440, 452 [246 Cal.Rptr.3d 185].)

- "Where a proceeding is terminated other than on the merits, the reasons underlying the termination must be examined to see if it reflects the opinion of the court or the prosecuting party that the action would not succeed. If a conflict arises as to the circumstances explaining a failure to prosecute an action further, the determination of the reasons underlying the dismissal is a question of fact." (*Fuentes, supra,* 38 Cal.App.4th at p. 1808, internal citations omitted.)

- "Generally, the requirements of the doctrine of collateral estoppel 'will be met when courts are asked to give preclusive effect to preliminary hearing probable cause findings in subsequent civil actions for false arrest and malicious prosecution. [Citation.]' 'A determination of probable cause at a preliminary hearing may preclude a suit for false arrest or for malicious prosecution'].) 'One notable exception to this rule would be in a situation where the plaintiff alleges that the arresting officer lied or fabricated evidence presented at the preliminary hearing. [Citation.] When the officer misrepresents the nature of the evidence supporting probable cause and that issue is not raised at the preliminary hearing, a finding of probable cause at the preliminary hearing would not preclude relitigation of the issue of integrity of the evidence.' Defendants argue, and we agree, that the stated exception itself contains an exception—i.e., if the plaintiff alleges that the arresting officer lied or fabricated evidence at the preliminary hearing, plaintiff challenges that evidence at the preliminary hearing as being false, and the magistrate decides the credibility issue in the arresting officer's favor, then collateral estoppel still may preclude relitigation of the issue in a subsequent civil proceeding involving probable cause." (*Greene v. Bank of America* (2015) 236 Cal.App.4th 922, 933 [186 Cal.Rptr.3d 887], internal citations omitted.)

- "The plea of nolo contendere is considered the same as a plea of guilty. Upon a plea of nolo contendere the court shall find the defendant guilty, and its legal effect is the same as a plea of guilty for all purposes. It negates the element of a favorable termination, which is a prerequisite to stating a cause of action for malicious prosecution." (*Cote, supra,* 218 Cal.App.3d at p. 803, internal citation omitted.)

- " '*Should a conflict arise as to the circumstances explaining the failure to prosecute, the trier of fact must exercise its traditional role in deciding the conflict.*' " (*Weaver v. Superior Court* (1979) 95 Cal.App.3d 166, 185 [156 Cal.Rptr. 745], disapproved on other grounds in *Sheldon Appel Co., supra,* 47 Cal.3d at p. 882, original italics, internal citations omitted.)

- " 'For purposes of a malicious prosecution claim, malice "is not limited to actual hostility or ill will toward the plaintiff. …" [Citation.]' '[I]f the defendant had no substantial grounds for believing in the plaintiff's guilt, but, nevertheless, instigated proceedings against the plaintiff, it is logical to infer that the defendant's motive was improper.' " (*Greene, supra,* 216 Cal.App.4th at pp. 464–465, internal citation omitted.)

- "Malice may be inferred from want of probable cause, but want of probable cause cannot be inferred from malice, but must be affirmatively shown by the plaintiff." (*Verdier, supra,* 152 Cal.App.2d at p. 354.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 552–570, 605

4 Levy et al., California Torts, Ch. 43, *Malicious Prosecution and Abuse of Process,* §§ 43.01–43.06 (Matthew Bender)

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

14 California Points and Authorities, Ch. 147, *Malicious Prosecution and Abuse of Process*, §§ 147.20–147.53 (Matthew Bender)

1501. Wrongful Use of Civil Proceedings

[*Name of plaintiff***] claims that [***name of defendant***] wrongfully brought a lawsuit against [him/her/it]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was actively involved in bringing [or continuing] the lawsuit;**

[2. That the lawsuit ended in [*name of plaintiff***]'s favor;]**

[3. That no reasonable person in [*name of defendant***]'s circumstances would have believed that there were reasonable grounds to bring the lawsuit against [***name of plaintiff***];]**

4. **That [***name of defendant***] acted primarily for a purpose other than succeeding on the merits of the claim;**

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

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

[The law requires that the trial judge, rather than the jury, decide if [*name of plaintiff***] has proven element 2 above, whether the earlier lawsuit ended in [his/her/its] favor. But before I can do so, you must decide whether [***name of plaintiff***] has proven the following:**

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

The special [verdict/interrogatory] form will ask for your finding on [this/these] issue[s].]

[The law [also] requires that the trial judge, rather than the jury, decide if [*name of plaintiff***] has proven element 3 above, whether [***name of defendant***] had reasonable grounds for bringing the earlier lawsuit against [him/her/it]. But before I can do so, you must decide whether [***name of plaintiff***] has proven the following:**

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

The special [verdict/interrogatory] form will ask for your finding on [this/these] issue[s].]

New September 2003; Revised April 2008, October 2008

Directions for Use

Malicious prosecution requires that the proceeding have ended in the plaintiff's favor (element 2) and that the defendant did not reasonably believe that there were any grounds (probable cause) to initiate the

proceeding (element 3). Probable cause is to be decided by the court as a matter of law. However, the jury may be required to find some preliminary facts before the court can make its legal determination, including facts regarding what the defendant knew or did not know at the time. (See *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 881 [254 Cal.Rptr. 336, 765 P.2d 498].) If so, include element 3 and also the bracketed part of the instruction that refers to element 3.

Favorable termination is handled in much the same way. If a proceeding is terminated other than on the merits, there may be disputed facts that the jury must find in order to determine whether there has been a favorable termination. (See *Fuentes v. Berry* (1995) 38 Cal.App.4th 1800, 1808 [45 Cal.Rptr.2d 848].) If so, include element 2 and also the bracketed part of the instruction that refers to element 2. Once these facts are determined, the jury does not then make a second determination as to whether there has been a favorable termination. The matter is determined by the court based on the resolution of the disputed facts. (See *Sierra Club Found. v. Graham* (1999) 72 Cal.App.4th 1135, 1159 [85 Cal.Rptr.2d 726] [element of favorable termination is for court to decide].)

Either or both of the elements of probable cause and favorable termination should be omitted if there are no disputed facts regarding that element for the jury to decide.

Element 4 expresses the malice requirement.

Sources and Authority

- Public Employee Immunity. Government Code section 821.6.

- "Although the tort is usually called 'malicious prosecution,' the word 'prosecution' is not a particularly apt description of the underlying civil action. The Restatement uses the term 'wrongful use of civil proceedings' to refer to the tort." (5 Witkin, Summary of California Law (10th ed. 2005) Torts, § 486, internal citations omitted.)

- "To establish a cause of action for the malicious prosecution of a civil proceeding, a plaintiff must plead and prove that the prior action (1) was commenced by or at the direction of the defendant and was pursued to a legal termination in his, plaintiff's, favor; (2) was brought without probable cause; and (3) was initiated with malice." (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 50 [118 Cal.Rptr. 184, 529 P.2d 608], internal citations omitted.)

- "The remedy of a malicious prosecution action lies to recompense the defendant who has suffered out of pocket loss in the form of attorney fees and costs, as well as emotional distress and injury to reputation because of groundless allegations made in pleadings which are public records." (*Sagonowsky v. More* (1998) 64 Cal.App.4th 122, 132 [75 Cal.Rptr.2d 118], internal citations omitted.)

- "The malicious commencement of a civil proceeding is actionable because it harms the individual against whom the claim is made, and also because it threatens the efficient administration of justice. The individual is harmed because he is compelled to defend against a fabricated claim which not only subjects him to the panoply of psychological pressures most civil defendants suffer, but also the additional stress of attempting to resist a suit commenced out of spite or ill will, often magnified by

slanderous allegations in the pleadings." (*Merlet v. Rizzo* (1998) 64 Cal.App.4th 53, 59 [75 Cal.Rptr.2d 83], internal citation omitted.)

- "[The litigation privilege of Civil Code section 47] has been interpreted to apply to virtually all torts except malicious prosecution." (*Kimmel v. Goland* (1990) 51 Cal.3d 202, 209 [271 Cal.Rptr. 191, 793 P.2d 524].)

- "Liability for malicious prosecution is not limited to one who initiates an action. A person who did not file a complaint may be liable for malicious prosecution if he or she 'instigated' the suit or 'participated in it at a later time.' " (*Nunez v. Pennisi* (2015) 241 Cal.App.4th 861, 873 [193 Cal.Rptr.3d 912].)

- "[A] cause of action for malicious prosecution lies when predicated on a claim for affirmative relief asserted in a cross-pleading even though intimately related to a cause asserted in the complaint." (*Bertero, supra,* 13 Cal.3d at p. 53.)

- "A claim for malicious prosecution need not be addressed to an entire lawsuit; it may … be based upon only some of the causes of action alleged in the underlying lawsuit." (*Franklin Mint Co. v. Manatt, Phelps & Phillips, LLP* (2010) 184 Cal.App.4th 313, 333 [109 Cal.Rptr.3d 143].)

- "[A] lawyer is not immune from liability for malicious prosecution simply because the general area of law at issue is complex and there is no case law with the same facts that establishes that the underlying claim was untenable. Lawyers are charged with the responsibility of acquiring a reasonable understanding of the law governing the claim to be alleged. That achieving such an understanding may be more difficult in a specialized field is no defense to alleging an objectively untenable claim." (*Franklin Mint Co., supra,* 184 Cal.App.4th at p. 346.)

- "Our repeated references in *Bertero* to the types of harm suffered by an 'individual' who is forced to defend against a baseline suit do not indicate … that a malicious prosecution action can be brought only by an individual. On the contrary, there are valid policies which would be furthered by allowing nonindividuals to sue for malicious prosecution." (*City of Long Beach v. Bozek* (1982) 31 Cal.3d 527, 531 [183 Cal.Rptr. 86, 645 P.2d 137], reiterated on remand from United States Supreme Court at 33 Cal.3d 727 [but holding that public entity cannot sue for malicious prosecution].)

- "[T]he courts have refused to permit malicious prosecution claims when they are based on a prior proceeding that is (1) less formal or unlike the process in the superior court (i.e., a small claims hearing, an investigation or application not resulting in a formal proceeding), (2) purely defensive in nature, or (3) a continuation of an existing proceeding." (*Merlet, supra,* 64 Cal.App.4th at p. 60.)

- "[I]t is not enough that the present plaintiff (former defendant) prevailed in the action. The termination must ' "reflect on the merits," ' and be such that it 'tended to indicate [the former defendant's] innocence of or lack of responsibility for the alleged misconduct.' " (*Drummond v. Desmarais* (2009) 176 Cal.App.4th 439, 450 [98 Cal.Rptr.3d 183], internal citations omitted.)

- " 'The entry of summary judgment for the defense on an underlying claim on grounds of insufficient evidence does not establish as a matter of law that the litigant necessarily can "state[] and

substantiate[]" … a subsequent malicious prosecution claim.' " (*Cuevas-Martinez v. Sun Salt Sand, Inc.* (2019) 35 Cal.App.5th 1109, 1120 [238 Cal.Rptr.3d 200].)

- " '[A] voluntary dismissal on technical grounds, such as lack of jurisdiction, laches, the statute of limitations or prematurity, does not constitute a favorable termination because it does not reflect on the substantive merits of the underlying claim. … ' " (*Drummond, supra,* 176 Cal.App.4th at p. 456.)

- "[Code of Civil Procedure] Section 581c, subdivision (c) provides that where a motion for judgment of nonsuit is granted, 'unless the court in its order for judgment otherwise specifies, the judgment of nonsuit operates as an adjudication upon the merits.' … [¶] We acknowledge that not every judgment of nonsuit should be grounds for a subsequent malicious prosecution action. Some will be purely technical or procedural and will not reflect the merits of the action. In such cases, trial courts should exercise their discretion to specify that the judgment of nonsuit shall not operate as an adjudication upon the merits." (*Nunez, supra,* 241 Cal.App.4th at p. 874.)

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

- " ' "A voluntary dismissal may be an implicit concession that the dismissing party cannot maintain the action and may constitute a decision on the merits. [Citations.] 'It is not enough, however, merely to show that the proceeding was dismissed.' [Citation.] The reasons for the dismissal of the action must be examined to determine whether the termination reflected on the merits." [Citations.]' Whether that dismissal is a favorable termination for purposes of a malicious prosecution claim depends on whether the dismissal of the [earlier] Lawsuit is considered to be on the merits reflecting [plaintiff's 'innocence' of the misconduct alleged." (*JSJ Limited Partnership v. Mehrban* (2012) 205 Cal.App.4th 1512, 1524 [141 Cal.Rptr.3d 338], internal citations omitted.)

- "If a conflict arises as to the circumstances explaining a failure to prosecute an action further, the determination of the reasons underlying the dismissal is a question of fact." (*Fuentes, supra,* 38 Cal.App.4th at p. 1808, internal citations omitted.)

- "[W]hen a dismissal results from negotiation, settlement, or consent, a favorable termination is normally not recognized. Under these latter circumstances, the dismissal reflects ambiguously on the merits of the action." (*Weaver v. Superior Court* (1979) 95 Cal.App.3d 166, 184–185 [156 Cal.Rptr. 745], internal citations omitted, disapproved on other grounds in *Sheldon Appel Co., supra,* 47 Cal.3d at p. 882.)

- "Not every case in which a terminating sanctions motion is granted necessarily results in a 'favorable termination.' But where the record from the underlying action is devoid of any attempt during discovery to substantiate allegations in the complaint, and the court's dismissal is justified by the

plaintiff's lack of evidence to submit the case to a jury at trial, a prima facie showing of facts sufficient to satisfy the 'favorable termination' element of a malicious prosecution claim is established … ." (*Daniels v. Robbins* (2010) 182 Cal.App.4th 204, 219 [105 Cal.Rptr.3d 683].)

- "[T]he existence or absence of probable cause has traditionally been viewed as a question of law to be determined by the court, rather than a question of fact for the jury …. [¶] [It] requires a sensitive evaluation of legal principles and precedents, a task generally beyond the ken of lay jurors ... ." (*Sheldon Appel Co., supra,* 47 Cal.3d at p. 875.)

- "When there is a dispute as to the state of the defendant's knowledge and the existence of probable cause turns on resolution of that dispute, … the jury must resolve the threshold question of the defendant's factual knowledge or belief. Thus, when … there is evidence that the defendant may have known that the factual allegations on which his action depended were untrue, the jury must determine what facts the defendant knew before the trial court can determine the legal question whether such facts constituted probable cause to institute the challenged proceeding." (*Sheldon Appel Co., supra,* 47 Cal.3d at p. 881, internal citations omitted.)

- "Whereas the malice element is directly concerned with the *subjective* mental state of the defendant in instituting the prior action, the probable cause element calls on the trial court to make an objective determination of the 'reasonableness' of the defendant's conduct, i.e., to determine whether, on the basis of the facts known to the defendant, the institution of the prior action was legally tenable." (*Sheldon Appel Co., supra,* 47 Cal.3d at p. 878, original italics.)

- " 'The benchmark for legal tenability is whether any reasonable attorney would have thought the claim was tenable. [Citation.]' " (*Oviedo v. Windsor Twelve Properties, LLC* (2012) 212 Cal.App.4th 97, 114 [151 Cal.Rptr.3d 117], internal citation omitted.)

- " 'The facts to be analyzed for probable cause are those known to the defendant [in the malicious prosecution action] at the time the underlying action was filed.' " (*Walsh v. Bronson* (1988) 200 Cal.App.3d 259, 264 [245 Cal.Rptr. 888], internal citations omitted.)

- "A litigant will lack probable cause for his action either if he relies upon facts which he has no reasonable cause to believe to be true, or if he seeks recovery upon a legal theory which is untenable under the facts known to him." (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 292 [46 Cal.Rptr.3d 638, 139 P.3d 30].)

- "[W]e reject their contention that unpled hidden theories of liability are sufficient to create probable cause." (*Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1542 [161 Cal.Rptr.3d 700].)

- "California courts have held that victory at *trial,* though reversed on appeal, conclusively establishes probable cause." (*Roberts v. Sentry Life Insurance* (1999) 76 Cal.App.4th 375, 383 [90 Cal.Rptr.2d 408], original italics.)

- "California courts have long embraced the so-called interim adverse judgment rule, under which 'a trial court judgment or verdict in favor of the plaintiff or prosecutor in the underlying case, unless obtained by means of fraud or perjury, establishes probable cause to bring the underlying action, even

though the judgment or verdict is overturned on appeal or by later ruling of the trial court.' This rule reflects a recognition that '[c]laims that have succeeded at a hearing on the merits, even if that result is subsequently reversed by the trial or appellate court, are not so lacking in potential merit that a reasonable attorney or litigant would necessarily have recognized their frivolousness.' That is to say, if a claim succeeds at a hearing on the merits, then, unless that success has been procured by certain improper means, the claim cannot be 'totally and completely without merit.' Although the rule arose from cases that had been resolved after trial, the rule has also been applied to the 'denial of defense summary judgment motions, directed verdict motions, and similar efforts at pretrial termination of the underlying case.' " (*Parrish v. Latham & Watkins* (2017) 3 Cal.5th 767, 776–777 [~~—~~221 Cal.Rptr.3d 432, 400 P.3d 1~~Cal.Rptr.3d --, -- P.3d --~~], internal citations omitted.)

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

- "Probable cause may be present even where a suit lacks merit. ... Suits which all reasonable lawyers agree totally lack merit—that is, those which lack probable cause—are the least meritorious of all meritless suits. Only this subgroup of meritless suits present[s] no probable cause." (*Roberts, supra,* 76 Cal.App.4th at p. 382.)

- "[A]n attorney may be held liable for malicious prosecution for continuing to prosecute a lawsuit discovered to lack probable cause." (*Zamos v. Stroud* (2004) 32 Cal.4th 958, 970 [12 Cal.Rptr.3d 54, 87 P.3d 802].)

- "Although attorneys may rely on their clients' allegations at the outset of a case, they may not continue to do so if the evidence developed through discovery indicates the allegations are unfounded or unreliable. (*Cuevas-Martinez, supra,* 35 Cal.App.5th at p. 1121.)

- "[W]here several claims are advanced in the underlying action, each must be based on probable cause." (*Lanz v. Goldstone* (2015) 243 Cal.App.4th 441, 459 [197 Cal.Rptr.3d 227].)

- "As an element of the tort of malicious prosecution, malice at its core refers to an improper *motive* for bringing the prior action. As an element of liability it reflects the core function of the tort, which is to secure compensation for harm inflicted by *misusing* the judicial system, i.e., using it for something other than to enforce legitimate rights and secure remedies to which the claimant may tenably claim an entitlement. Thus the cases speak of malice as being present when a suit is actuated by hostility or ill will, or for some purpose other than to secure relief. It is also said that a plaintiff acts with malice when he asserts a claim with knowledge of its falsity, because one who seeks to establish such a claim 'can only be motivated by an improper purpose.' A lack of probable cause will therefore support an inference of malice." (*Drummond, supra,* 176 Cal.App.4th at pp. 451–452, original italics, internal citations omitted.)

- "A lack of probable cause is a factor that may be considered in determining if the claim was prosecuted with malice [citation], but the lack of probable cause must be supplemented by other, additional evidence." (*Silas v. Arden* (2013) 213 Cal.App.4th 75, 90 [152 Cal.Rptr.3d 255].)

- "Because malice concerns the former plaintiff's actual mental state, it necessarily presents a question

of fact." (*Drummond, supra,* 176 Cal.App.4th at p. 452.)

- " 'Since parties rarely admit an improper motive, malice is usually proven by circumstantial evidence and inferences drawn from the evidence.' '[M]alice can be inferred when a party *continues* to prosecute an action after becoming aware that the action lacks probable cause.' " (*Cuevas-Martinez, supra*, 35 Cal.App.5th at p. 1122, original italics.)

- "Negligence does not equate with malice. Nor does the negligent filing of a case necessarily constitute the malicious prosecution of that case." (*Grindle v. Lorbeer* (1987) 196 Cal.App.3d 1461, 1468 [242 Cal.Rptr. 562].)

- "The motive of the defendant must have been something other than that of bringing a perceived guilty person to justice or the satisfaction in a civil action of some personal or financial purpose." (*Downey Venture v. LMI Insurance Co.* (1998) 66 Cal.App.4th 478, 494 [78 Cal.Rptr.2d 142], internal citations omitted.)

- "Malice does not require that the defendants harbor actual ill will toward the plaintiff in the malicious prosecution case, and liability attaches to attitudes that range ' "from open hostility to indifference. [Citations.]" ' " (*Cole v. Patricia A. Meyer & Associates, APC* (2012) 206 Cal.App.4th 1095, 1113–1114 [142 Cal.Rptr.3d 646], internal citations omitted.)

- " 'Suits with the hallmark of an improper purpose' include, but are not necessarily limited to, 'those in which: " '… (1) the person initiating them does not believe that his claim may be held valid; (2) the proceedings are begun primarily because of hostility or ill will; (3) the proceedings are initiated solely for the purpose of depriving the person against whom they are initiated of a beneficial use of his property; (4) the proceedings are initiated for the purpose of forcing a settlement which has no relation to the merits of the claim.' " ' [Citation.] [¶] Evidence tending to show that the defendants did not subjectively believe that the action was tenable is relevant to whether an action was instituted or maintained with malice. [Citation.]' " (*Oviedo, supra,* 212 Cal.App.4th at pp. 113-114.)

- "Although *Zamos* [*supra*] did not explicitly address the malice element of a malicious prosecution case, its holding and reasoning compel us to conclude that malice formed after the filing of a complaint is actionable." (*Daniels, supra,* 182 Cal.App.4th at p. 226.)

Secondary Sources

9 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 554, 557, 562–569, 571–606

Ahart, California Practice Guide: Enforcing Judgments & Debts, Ch. 2-C, *Liability For Unfair Collection Practices—Tort Liability,* ¶ 2:455 (The Rutter Group)

4 Levy et al., California Torts, Ch. 43, *Malicious Prosecution and Abuse of Process,* §§ 43.01-43.10 (Matthew Bender)

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

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

1720. Affirmative Defense—Truth

[*Name of defendant*] is not responsible for [*name of plaintiff*]'s harm, if any, if [*name of defendant*] proves that [his/her/its] statement(s) about [*name of plaintiff*] [was/were] true. [*Name of defendant*] does not have to prove that the statement(s) [was/were] true in every detail, so long as the statement(s) [was/were] substantially true.

New September 2003; Revised October 2008, May 2017

Directions for Use

This instruction is to be used only in cases involving private plaintiffs on matters of private concern. In cases involving public figures or matters of public concern, the burden of proving falsity is on the plaintiff. (*Sonoma Media Investments, LLC v. Superior Court* (2019) 34 Cal.App.5th 24, 37 [247 Cal.Rptr.3d 5~~*Eisenberg v. Alameda Newspapers* (1999) 74 Cal.App.4th 1359, 1382 [88 Cal.Rptr.2d 802~~].)

Sources and Authority

- "Truth, of course, is an absolute defense to any libel action." (*Campanelli v. Regents of Univ. of Cal.* (1996) 44 Cal.App.4th 572, 581-582 [51 Cal.Rptr.2d 891].)

- "California law permits the defense of substantial truth and would absolve a defendant even if she cannot 'justify every word of the alleged defamatory matter; it is sufficient if the substance of the charge be proved true, irrespective of slight inaccuracy in the details.' 'Minor inaccuracies do not amount to falsity so long as 'the substance, the gist, the sting, of the libelous charge be justified.' " (*GetFugu, Inc. v. Patton Boggs LLP* (2013) 220 Cal.App.4th 141, 154 [162 Cal.Rptr.3d 831], internal citation omitted.)

- "Put another way, the statement is not considered false unless it 'would have a different effect on the mind of the reader from that which the pleaded truth would have produced.' "" (*Jackson v. Mayweather* (2017) 10 Cal.App.5th 1240, 1262-1263 [217 Cal.Rptr.3d 234].)

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

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 655–659, 720

4 Levy et al., California Torts, Ch. 45, *Defamation*, § 45.10 (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 340, *Libel and Slander*, § 340.55 (Matthew Bender)

14 California Points and Authorities, Ch. 142, *Libel and Slander (Defamation)*, § 142.39 (Matthew Bender)

1 California Civil Practice: Torts §§ 21:19, 21:52 (Thomson Reuters)

1908. Reasonable Reliance

In determining whether [*name of plaintiff*]'s reliance on the [misrepresentation/concealment/false promise] was reasonable, [he/she/it] must first prove that the matter was material. A matter is material if a reasonable person would find it important in determining his or her choice of action.

If you decide that the matter is material, you must then decide whether it was reasonable for [*name of plaintiff*] to rely on the [misrepresentation/concealment/false promise]. In making this decision, take into consideration [*name of plaintiff*]'s intelligence, knowledge, education, and experience.

However, it is not reasonable for anyone to rely on a [misrepresentation/concealment/false promise] that is preposterous. It also is not reasonable for anyone to rely on a [misrepresentation/concealment/false promise] if facts that are within [his/her] observation show that it is obviously false.

New September 2003; Revised October 2004, December 2013

Directions for Use

There would appear to be three considerations in determining reasonable reliance. First, the representation or promise must be material, as judged by a reasonable-person standard. (*Charpentier v. Los Angeles Rams* (1999) 75 Cal.App.4th 301, 312–313 [89 Cal.Rptr.2d 115].) Second, if the matter is material, reasonableness must take into account the plaintiff's own knowledge, education, and experience; the objective reasonable person is irrelevant at this step. Third, some matters are simply too preposterous to be believed by anyone, notwithstanding limited knowledge, education, and experience. (*Blankenheim v. E. F. Hutton, Co., Inc.* (1990) 217 Cal.App.3d 1463, 1474 [266 Cal.Rptr. 593].)

See also CACI No. 1907, *Reliance.*

Sources and Authority

- "After establishing actual reliance, the plaintiff must show that the reliance was reasonable by showing that (1) the matter was material in the sense that a reasonable person would find it important in determining how he or she would act, and (2) it was reasonable for the plaintiff to have relied on the misrepresentation." (*Hoffman v. 162 North Wolfe LLC* (2014) 228 Cal.App.4th 1178, 1194 [175 Cal.Rptr.3d 820], internal citations omitted.)

- "According to the Restatement of Torts, '[r]eliance upon a fraudulent misrepresentation is not justifiable unless the matter misrepresented is material. ... The matter is material if ... a reasonable [person] would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question ... .' But materiality is a jury question, and a 'court may [only] withdraw the case from the jury if the fact misrepresented is so obviously unimportant that the jury could not reasonably find that a reasonable man would have been influenced by it.' " (*Charpentier, supra,* 75 Cal.App.4th at pp. 312–313, internal citations omitted.)

- "[T]he issue is whether the person who claims reliance was justified in believing the representation in the light of his own knowledge and experience." (*Gray v. Don Miller & Associates, Inc.* (1984) 35 Cal.3d 498, 503 [198 Cal.Rptr. 551, 674 P.2d 253], internal citations omitted.)

- "[N]or is a plaintiff held to the standard of precaution or of minimum knowledge of a hypothetical, reasonable man. Exceptionally gullible or ignorant people have been permitted to recover from defendants who took advantage of them in circumstances where persons of normal intelligence would not have been misled. 'No rogue should enjoy his ill-gotten plunder for the simple reason that his victim is by chance a fool.'" (*Blankenheim, supra,* 217 Cal.App.3d at p. 1474, internal citations omitted.)

- "[G]enerally speaking, ' "[a] plaintiff will be denied recovery only if his conduct is manifestly unreasonable in the light of his own intelligence or information. It must appear that he put faith in representations that were 'preposterous' or 'shown by facts within his observation to be so patently and obviously false that he must have closed his eyes to avoid discovery of the truth.' [Citation.] Even in case of a mere negligent misrepresentation, a plaintiff is not barred unless his conduct, in the light of his own information and intelligence, is preposterous and irrational. … The effectiveness of disclaimers is assessed in light of these principles. [Citation.]" ' " (*Public Employees' Retirement System v. Moody's Investors Service, Inc.* (2014) 226 Cal.App.4th 643, 673 [172 Cal.Rptr.3d 238].)

- "[I]f the conduct of the plaintiff in the light of his own intelligence and information was manifestly unreasonable, however, he will be denied a recovery." (*Thrifty Payless, Inc. v. The Americana at Brand, LLC* (2013) 218 Cal.App.4th 1230, 1239 [160 Cal.Rptr.3d 718].)

- "Except in the rare case where the undisputed facts leave no room for a reasonable difference of opinion, the question of whether a plaintiff's reliance is reasonable is a question of fact." (*Beckwith v. Dahl* (2012) 205 Cal.App.4th 1039, 1067 [141 Cal.Rptr.3d 142].)

- " 'What would constitute fraud in a given instance might not be fraudulent when exercised toward another person. The test of the representation is its actual effect on the particular mind ... .' " (*Blankenheim, supra,* 217 Cal.App.3d at p. 1475, internal citation omitted.)

- "[Plaintiff]'s deposition testimony on which appellants rely also reveals that she is a practicing attorney and uses releases in her practice. In essence, she is asking this court to rule that a practicing attorney can rely on the advice of an equestrian instructor as to the validity of a written release of liability that she executed without reading. In determining whether one can reasonably or justifiably rely on an alleged misrepresentation, the knowledge, education and experience of the person claiming reliance must be considered. Under these circumstances, we conclude as a matter of law that any such reliance was not reasonable." (*Guido v. Koopman* (1991) 1 Cal.App.4th 837, 843–844 [2 Cal.Rptr.2d 437], internal citations omitted.)

- "[I]t is inherently unreasonable for any person to rely on a prediction of future IRS enactment, enforcement, or non-enforcement of the law by someone unaffiliated with the federal government. As such, the reasonable reliance element of any fraud claim based on these predictions fails as a matter of law." (*Brakke v. Economic Concepts, Inc.* (2013) 213 Cal.App.4th 761, 769 [153 Cal.Rptr.3d 1].)

- "[A] presumption, or at least an inference, of reliance arises wherever there is a showing that a misrepresentation was material. A misrepresentation is judged to be 'material' if 'a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question' and as such, materiality is generally a question of fact unless the 'fact misrepresented is so obviously unimportant that the jury could not reasonably find that a reasonable man would have been influenced by it.' " (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 977 [64 Cal.Rptr.2d 843, 938 P.2d 903], internal citations omitted.)

- "[I]t is well established that the kind of disclaimers and exculpatory documents—such as the 'estoppel' attached to the lease and signed by [plaintiff] that disavowed any representations made by landlord or its agents to him—do not operate to insulate defrauding parties from liability or preclude [plaintiff] from demonstrating justifiable reliance on misrepresentations." (*Orozco v. WPV San Jose, LLC* (2019) 36 Cal.App.5th 375, 393 [248 Cal.Rptr.3d 623].)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 812–815

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.06 (Matthew Bender)

23 California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit,* § 269.19 (Matthew Bender)

10 California Points and Authorities, Ch. 105, *Fraud and Deceit,* § 105.229 (Matthew Bender)

2 California Civil Practice: Torts, § 22:32 (Thomson Reuters)

2000. Trespass—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] trespassed on [his/her/its] property. To establish this claim, [***name of plaintiff***] must prove all of the following:**

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

2. **That [***name of defendant***] [intentionally/, although not intending to do so, [recklessly [or] negligently]] entered [***name of plaintiff***]'s property] [or]**

   [intentionally/, although not intending to do so, [recklessly [or] negligently]] caused [another person/[*insert name of thing***]] to enter [***name of plaintiff***]'s property];**

3. **That [***name of plaintiff***] did not give permission for the entry [or that [***name of defendant***] exceeded [***name of plaintiff***]'s permission];**

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

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

[Entry can be on, above, or below the surface of the land.]

[Entry may occur indirectly, such as by causing vibrations that damage the land or structures or other improvements on the land.]

New September 2003; Revised June 2013

Directions for Use

With regard to element 2, liability for trespass may be imposed for conduct that is intentional, reckless, negligent, or the result of an extra-hazardous activity. (*Staples v. Hoefke* (1987) 189 Cal.App.3d 1397, 1406 [235 Cal.Rptr. 165].) However, intent to trespass means only that the person intended to be in the particular place where the trespass is alleged to have occurred. (*Miller v. National Broadcasting Corp.* (1986) 187 Cal.App.3d 1463, 1480-1481 [232 Cal.Rptr. 668].) Liability may be also based on the defendant's unintentional, but negligent or reckless, act, for example, an automobile accident. An intent to damage is not necessary. (*Meyer v. Pacific Employers Insurance Co.* (1965) 233 Cal.App.2d 321, 326 [43 Cal.Rptr. 542].)

It is no defense that the defendant mistakenly, but in good faith, believed that he or she had a right to be in that location. (*Cassinos v. Union Oil Co.* (1993) 14 Cal.App.4th 1770, 1780 [18 Cal.Rptr.2d 574].) In such a case, the word "intentionally" in element 2 might be confusing to the jury. To alleviate this possible confusion, give the third option to CACI No. 2004, *"Intentional Entry" Explained*.

If plaintiff is seeking nominal damages as an alternative to actual damages, insert the following paragraph

above element 4, add "and" at the end of element 2, and adjust punctuation accordingly:

> If you find all of the above, then the law assumes that [*name of plaintiff*] has been harmed and [*name of plaintiff*] is entitled to a nominal sum such as one dollar. [*Name of plaintiff*] is entitled to additional damages if [*name of plaintiff*] proves the following:

The last sentence of the above paragraph, along with the final two elements of this instruction, should be omitted if plaintiff is seeking nominal damages only. Read "actually" in the fourth element only if nominal damages are also being sought.

Nominal damages alone are not available in cases involving intangible intrusions such as noise and vibrations; proof of actual damage to the property is required: "[T]he rule is that actionable trespass may not be predicated upon nondamaging noise, odor, or light intrusion. …" (*San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 936 [55 Cal.Rptr.2d 724, 920 P.2d 669], internal citation omitted.) For an instruction on control of property, see CACI No. 1002, *Extent of Control Over Premises Area*, in the Premises Liability series.

Sources and Authority

- "Generally, landowners and tenants have a right to exclude persons from trespassing on private property; the right to exclude persons is a fundamental aspect of private property ownership." (*Ralphs Grocery Co. v. Victory Consultants, Inc.* (2017) 17 Cal.App.5th 245, 258 [225 Cal.Rptr.3d 305].)

- " 'Trespass is an unlawful interference with possession of property.' The elements of trespass are: (1) the plaintiff's ownership or control of the property; (2) the defendant's intentional, reckless, or negligent entry onto the property; (3) lack of permission for the entry or acts in excess of permission; (4) harm; and (5) the defendant's conduct was a substantial factor in causing the harm. (See CACI No. 2000.)" (*Ralphs Grocery Co., supra,* 17 Cal.App.5th at pp. 261–262, internal citation omitted.)

- "[I]n order to state a cause of action for trespass a plaintiff must allege an unauthorized and tangible entry on the land of another, which interfered with the plaintiff's exclusive possessory rights." (*McBride v. Smith* (2018) 18 Cal.App.5th 1160, 1174 [227 Cal.Rptr.3d 390].)

- "The emission of sound waves which cause actual physical damage to property constitutes a trespass. Liability for trespass may be imposed for conduct which is intentional, reckless, negligent or the result of an extra-hazardous activity." (*Staples, supra,* 189 Cal.App.3d at p. 1406, internal citations omitted.)

- "California's definition of trespass is considerably narrower than its definition of nuisance. " 'A trespass is an invasion of the interest in the exclusive possession of land, as by entry upon it ... . 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.' " California has adhered firmly to the view that '[t]he cause of action for trespass is designed to protect possessory-not necessarily ownership-interests in land from unlawful interference.' " (*Capogeannis v. Superior Court* (1993) 12 Cal.App.4th 668, 674 [15 Cal.Rptr.2d 796], internal citations omitted.)

- "In the context of a trespass action, 'possession' is synonymous with 'occupation' and connotes a subjection of property to one's will and control." (*Veiseh v. Stapp* (2019) 35 Cal.App.5th 1099, 1105 [247 Cal.Rptr.3d 868].)

- " '[A] trespass may be committed by the continued presence on the land of a structure, chattel, or other thing which the actor has tortiously placed there, whether or not the actor has the ability to remove it.' Under this definition, 'tortious conduct' denotes that conduct, whether of act or omission, which subjects the actor to liability under the principles of the law of torts." (*Newhall Land & Farming Co. v. Superior Court* (1993) 19 Cal.App.4th 334, 345 [23 Cal.Rptr.2d 377], internal citations omitted.)

- The common-law distinction between direct and constructive trespass is not followed in California. A trespass may be committed by consequential and indirect injuries as well as by direct and forcible harm. (*Gallin v. Poulou* (1956) 140 Cal.App.2d 638, 641 [295 P.2d 958].)

- " 'It is a well-settled proposition that the proper party plaintiff in an action for trespass to real property is the person in actual possession. No averment of title in plaintiff is necessary. [Citations.]' … 'A defendant who is a mere stranger to the title will not be allowed to question the title of a plaintiff in possession of the land. It is only where the trespasser claims title himself, or claims under the real owner, that he is allowed to attack the title of the plaintiff whose peaceable possession he has disturbed.' " (*Veiseh, supra,* 35 Cal.App.5th at p. 1104, internal citation omitted.)

- "An action for trespass may technically be maintained only by one whose right to possession has been violated; however, an out-of-possession property owner may recover for an injury to the land by a trespasser which damages the ownership interest." (*Smith v. Cap Concrete, Inc.* (1982) 133 Cal.App.3d 769, 774 [184 Cal.Rptr. 308], internal citation omitted.)

- "Under the forcible entry statutes the fact that a defendant may have title or the right to possession of the land is no defense. The plaintiff's interest in peaceable even if wrongful possession is secured against forcible intrusion by conferring on him the right to restitution of the premises, the primary remedy, and incidentally awarding damages proximately caused by the forcible entry." (*Allen v. McMillion* (1978) 82 Cal.App.3d 211, 218-219 [147 Cal.Rptr. 77], internal citations omitted.)

- "Where there is a consensual entry, there is no tort, because lack of consent is an element of the wrong." (*Civic Western Corp. v. Zila Industries, Inc.* (1977) 66 Cal.App.3d 1, 16–17 [135 Cal.Rptr. 915].)

- " 'A conditional or restricted consent to enter land creates a privilege to do so only insofar as the condition or restriction is complied with.' " (*Civic Western Corp., supra,* 66 Cal.App.3d at p. 17, quoting Rest.2d Torts, § 168.)

- "Where one has permission to use land for a particular purpose and proceeds to abuse the privilege, or commits any act hostile to the interests of the lessor, he becomes a trespasser. [¶] 'A good faith belief that entry has been authorized or permitted provides no excuse for infringement of property rights if consent was not in fact given by the property owner whose rights are at issue. Accordingly, by showing they gave no authorization, [plaintiffs] established the lack of consent necessary to support

their action for injury to their ownership interests.' " (*Cassinos, supra,* 14 Cal.App.4th at p. 1780, internal citations omitted.)

- " '[T]he intent required as a basis for liability as a trespasser is simply an intent to be at the place on the land where the trespass allegedly occurred ... . The defendant is liable for an intentional entry although he has acted in good faith, under the mistaken belief, however reasonable, that he is committing no wrong.' " (*Miller, supra,* 187 Cal.App.3d at pp. 1480-1481, internal citation omitted.)

- "The general rule is simply that damages may be recovered for annoyance and distress, including mental anguish, proximately caused by a trespass." (*Armitage v. Decker* (1990) 218 Cal.App.3d 887, 905 [267 Cal.Rptr. 399], internal citations omitted.)

- "Causes of action for conversion and trespass support an award for exemplary damages." (*Krieger v. Pacific Gas & Electric Co.* (1981) 119 Cal.App.3d 137, 148 [173 Cal.Rptr. 751], internal citation omitted.)

- "It is true that an action for trespass will support an award of nominal damages where actual damages are not shown. However, nominal damages need not be awarded where no actual loss has occurred. 'Failure to return a verdict for nominal damages is not in general ground for reversing a judgment or granting a new trial.'" (*Staples, supra,* 189 Cal.App.3d at p. 1406, internal citations omitted.)

- "Trespass may be ' "by personal intrusion of the wrongdoer or by his failure to leave; by throwing or placing something on the land; or by causing the entry of some other person." ' A trespass may be on the surface of the land, above it, or below it. The migration of pollutants from one property to another may constitute a trespass, a nuisance, or both." (*Martin Marietta Corp. v. Insurance Co. of North America* (1995) 40 Cal.App.4th 1113, 1132 [47 Cal.Rptr.2d 670], internal citations omitted.)

- "Respondent's plant was located in a zone which permitted its operation. It comes within the protection of section 731a of the Code of Civil Procedure which, subject to certain exceptions, generally provides that where a manufacturing or commercial operation is permitted by local zoning, no private individual can enjoin such an operation. It has been determined, however, that this section does not operate to bar recovery for damages for trespassory invasions of another's property occasioned by the conduct of such manufacturing or commercial use." (*Roberts v. Permanente Corp.* (1961) 188 Cal.App.2d 526, 529 [10 Cal.Rptr. 519], internal citations omitted.)

- "[A]s a matter of law, [plaintiff] cannot state a cause of action against the [defendants] for trespassing on the Secondary Access Easement because they own that land and her easement does not give her a possessory right, not to mention an exclusive possessory right in that property." (*McBride, supra,* 18 Cal.App.5th at p. 1174.)

- "[A] failure to comply with one or more provisions of the California Uniform Transfers to Minors Act does not render the grantor's continued possession and control of the real property unlawful for purposes of the tort of trespass to realty." (*Veiseh, supra*, 35 Cal.App.5th at p. 1107.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 693–695

2 Levy et al., California Torts, Ch. 17, *Nuisance and Trespass*, § 17.20 (Matthew Bender)

48 California Forms of Pleading and Practice, Ch. 550, *Trespass*, §§ 550.11, 550.19 (Matthew Bender)

22 California Points and Authorities, Ch. 225, *Trespass*, § 225.20 (Matthew Bender)

1 California Civil Practice: Torts §§ 18:1, 18:4–18:8, 18:10 (Thomson Reuters)

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

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

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

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

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

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

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

–When investigating [*name of plaintiff*]'s claim, [*name of defendant*] had a duty to diligently search for and consider evidence that supported coverage of the claimed loss.

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

Directions for Use

This instruction sets forth a claim for breach of the implied covenant of good faith and fair dealing based on the insurer's failure or refusal to conduct a proper investigation of the plaintiff's claim. –The claim alleges that the insurer acted unreasonably, that is, without proper cause, by failing to properly investigate the claim. (See *Rappaport-Scott v. Interinsurance Exch. of the Auto. Club* (2007) 146 Cal.App.4th 831, 837 [53 Cal.Rptr.3d 245].)

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

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

Sources and Authority

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

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

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

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

- "An insurer is not permitted to rely selectively on facts that support its position and ignore those facts that support a claim. Doing so may constitute bad faith." (*Mazik v. Geico General Ins. Co.* (2019) 35 Cal.App.5th 455, 462 [247 Cal.Rptr.3d 450].)

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

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

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

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

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

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

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

Secondary Sources

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

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

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

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

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

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

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

2336. Bad Faith (Third Party)—Unreasonable Failure to Defend—Essential Factual Elements

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

1. **That [*name of plaintiff*] was insured under an insurance policy with [*name of defendant*];**

2. **That a lawsuit was brought against [*name of plaintiff*];**

3. **That [*name of plaintiff*] gave [*name of defendant*] timely notice that [he/she/it] had been sued;**

4. **That [*name of defendant*], unreasonably, that is, without proper cause, failed to defend [*name of plaintiff*] against the lawsuit;**

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

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

New October 2004; Revised December 2007, December 2014, December 2015

Directions for Use

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

The court will decide the issue of whether the claim was potentially covered by the policy. (See *California Shoppers, Inc. v. Royal Globe Ins. Co.* (1985) 175 Cal.App.3d 1, 52 [221 Cal.Rptr. 171].) If coverage depends on an unresolved dispute over a factual question, the very existence of that dispute establishes a possibility of coverage and thus a duty to defend. (*North Counties Engineering, Inc. v. State Farm General Ins. Co.* (2014) 224 Cal.App.4th 902, 922 [169 Cal.Rptr.3d 726].) Therefore, the jury does not resolve factual disputes that determine coverage.

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

Sources and Authority

- "A breach of the duty to defend in itself constitutes only a breach of contract, but it may also violate the covenant of good faith and fair dealing where it involves unreasonable conduct or an action taken

without proper cause. On the other hand, '[i]f the insurer's refusal to defend is reasonable, no liability will result.' " (*Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* 78 Cal.App.4th 847, 881 [93 Cal.Rptr.2d 364], internal citations omitted.)

- "To prevail in an action seeking declaratory relief on the question of the duty to defend, 'the insured must prove the existence of a *potential for coverage*, while the insurer must establish *the absence of any such potential*. In other words, the insured need only show that the underlying claim *may* fall within policy coverage; the insurer must prove it *cannot*.' The duty to defend exists if the insurer 'becomes aware of, or if the third party lawsuit pleads, facts giving rise to the potential for coverage under the insuring agreement.' " (*Delgado v. Interinsurance Exchange of Automobile Club of Southern California* (2009) 47 Cal.4th 302, 308 [97 Cal.Rptr.3d 298, 211 P.3d 1083], original italics, internal citation omitted.)

- " ' [A]n insurer has a duty to defend an insured if it becomes aware of, or if the third party lawsuit pleads, facts giving rise to the potential for coverage under the insuring agreement. … This duty … is separate from and broader than the insurer's duty to indemnify. … ' " ' "[F]or an insurer, the existence of a duty to defend turns not upon the ultimate adjudication of coverage under its policy of insurance, but upon those facts known by the insurer at the inception of a third party lawsuit. … Hence, the duty 'may exist even where coverage is in doubt and ultimately does not develop.' … " … ' " (*State Farm Fire & Casualty Co. v. Superior Court* (2008) 164 Cal.App.4th 317, 323 [78 Cal.Rptr.3d 828], internal citations omitted.)

- "If any facts stated or fairly inferable in the complaint, or otherwise known or discovered by the insurer, suggest a claim potentially covered by the policy, the insurer's duty to defend arises and is not extinguished until the insurer negates all facts suggesting potential coverage. On the other hand, if, as a matter of law, neither the complaint nor the known extrinsic facts indicate any basis for potential coverage, the duty to defend does not arise in the first instance." (*GGIS Ins. Services, Inc. v. Superior Court* (2008) 168 Cal.App.4th 1493, 1506 [86 Cal.Rptr.3d 515].)

- " 'The proper focus is on the facts alleged in the complaint, rather than the alleged theories for recovery. … "The ultimate question is whether the facts alleged 'fairly apprise' the insurer that the suit is upon a covered claim." ' " (*Albert v. Truck Ins. Exchange* (2018) 23 Cal. App. 5th 367, 378 [232 Cal.Rptr.3d 774].)

- "The duty to defend was not a question of fact for the jury; the trial court was compelled to determine as a matter of law that [indemnitee]'s claim was embraced by the indemnity agreement." (*Centex Homes v. R-Help Construction Co., Inc.* (2019) 32 Cal.App.5th 1230, 1236 [244 Cal.Rptr.3d 574].)

- "A duty to defend can be extinguished only prospectively and not retrospectively." (*Navigators Specialty Ins. Co. v. Moorefield Construction, Inc.* (2016) 6 Cal.App.5th 1258, 1284 [212 Cal.Rptr.3d 231].)

- "[F]acts known to the insurer and extrinsic to the third party complaint can generate a duty to defend, even though the face of the complaint does not reflect a potential for liability under the policy. [Citation.] This is so because current pleading rules liberally allow amendment; the third party plaintiff cannot be the arbiter of coverage." (*Tidwell Enterprises, Inc. v. Financial Pacific Ins. Co.,*

Inc. (2016) 6 Cal.App.5th 100, 106 [210 Cal.Rptr.3d 634].)

- "An insurer does not have a continuing duty to investigate the potential for coverage if it has made an informed decision on coverage at the time of tender. However, where the information available at the time of tender shows no coverage, but information available later shows otherwise, a duty to defend may then arise." (*American States Ins. Co. v. Progressive Casualty Ins. Co.* (2009) 180 Cal.App.4th 18, 26 [102 Cal.Rptr.3d 591], internal citations omitted.)

- "The duty does not depend on the labels given to the causes of action in the underlying claims against the insured; 'instead it rests on whether the *alleged facts or known extrinsic facts* reveal a *possibility* that the claim may be covered by the policy.' " (*Travelers Property Casualty Co. of America v. Charlotte Russe Holding, Inc.* (2012) 207 Cal.App.4th 969, 976 [144 Cal.Rptr.3d 12], original italics, disapproved on other grounds in *Hartford Casualty Ins. Co. v. Swift Distribution, Inc.* (2014) 59 Cal.4th 277, 295 [172 Cal.Rptr.3d 653, 326 P.3d 253].)

- "The obligation of the insurer to defend is of vital importance to the insured. 'In purchasing his insurance the insured would reasonably expect that he would stand a better chance of vindication if supported by the resources and expertise of his insurer than if compelled to handle and finance the presentation of his case. He would, moreover, expect to be able to avoid the time, uncertainty and capital outlay in finding and retaining an attorney of his own.' 'The insured's desire to secure the right to call on the insurer's superior resources for the defense of third party claims is, in all likelihood, typically as significant a motive for the purchase of insurance as is the wish to obtain indemnity for possible liability.' " (*Amato v. Mercury Casualty Co. (Amato II)* (1997) 53 Cal.App.4th 825, 831–832 [61 Cal.Rptr.2d 909], internal citations omitted.)

- "An anomalous situation would be created if, on the one hand, an insured can sue for the tort of breach of the implied covenant if the insurer accepts the defense and later refuses a reasonable settlement offer, but, on the other hand, an insured is denied tort recovery if the insurer simply refuses to defend. ... This dichotomy could have the effect of encouraging an insurer to stonewall the insured at the outset by simply refusing to defend." (*Campbell v. Superior Court* (1996) 44 Cal.App.4th 1308, 1319–1320 [52 Cal.Rptr.2d 385].)

- "[T]he mere existence of a legal dispute does not create a potential for coverage: 'However, we have made clear that where the third party suit never presented any potential for policy coverage, the duty to defend does not arise in the first instance, and the insurer may properly deny a defense. *Moreover, the law governing the insurer's duty to defend need not be settled at the time the insurer makes its decision*.' " (*Griffin Dewatering Corp. v. Northern Ins. Co. of New York* (2009) 176 Cal.App.4th 172, 209 [97 Cal.Rptr.3d 568], original italics.)

- "The trial court erroneously thought that because the case law was 'unsettled' when the insurer first turned down the claim, that unsettledness created a potential for a covered claim. … [I]f an insurance company's denial of coverage is reasonable, as shown by substantial case law in favor of its position, there can be no bad faith even though the insurance company's position is *later* rejected by our state Supreme Court." (*Griffin Dewatering Corp., supra,* 176 Cal.App.4th at p. 179, original italics.)

- "Unresolved factual disputes impacting insurance coverage do not absolve the insurer of its duty to

defend. 'If coverage depends on an unresolved dispute over a factual question, the very existence of that dispute would establish a possibility of coverage and thus a duty to defend.' " (*Howard v. American National Fire Insurance Company* (2010) 187 Cal.App.4th 498, 520 [115 Cal.Rptr.3d 42].)

- " 'If the insurer is obliged to take up the defense of its insured, it must do so as soon as possible, both to protect the interests of the insured, and to limit its own exposure to loss. . . . [T]he duty to defend must be assessed at the outset of the case.' It follows that a belated offer to pay the costs of defense may mitigate damages but will not cure the initial breach of duty." (*Shade Foods, Inc., supra,* 78 Cal.App.4th at p. 881, internal citations omitted.)

- "When a complaint states multiple claims, some of which are potentially covered by the insurance policy and some of which are not, it is a mixed action. In these cases, 'the insurer has a duty to defend as to the claims that are at least potentially covered, having been paid premiums by the insured therefor, but does not have a duty to defend as to those that are not, not having been paid therefor.' However, in a ' "mixed" action, the insurer has a duty to defend the action in its entirety.' Thereafter, the insurance company is entitled to seek reimbursement for the cost of defending the claims that are not potentially covered by the policy." (*Gonzalez v. Fire Ins. Exchange* (2015) 234 Cal.App.4th 1220, 1231 [184 Cal.Rptr.3d 394], internal citations omitted.)

- "No tender of defense is required if the insurer has already denied coverage of the claim. In such cases, notice of suit and tender of the defense are excused because other insurer has already expressed its unwillingness to undertake the defense." (Croskey et al., California Practice Guide: Insurance Litigation, ¶ 7:614 (The Rutter Group).)

Secondary Sources

2 Witkin, Summary of California Law (11th ed. 2017) Insurance, §§ 427, 428

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 12B-D, Third Party Cases—Refusal To Defend Cases, ¶¶ 12:598–12:650.5 (The Rutter Group)

2 California Liability Insurance Practice: Claims and Litigation (Cont.Ed.Bar) Actions for Failure to Defend, §§ 25.1–26.38

2 California Insurance Law and Practice, Ch. 13, *Claims Handling and the Duty of Good Faith*, § 13.08 (Matthew Bender)

6 Levy et al., California Torts, Ch. 82, *Claims and Disputes Under Insurance Policies*, §§ 82.10–82.16 (Matthew Bender)

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

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

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

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

2. **[That [***name of defendant***] [discharged/demoted/[***specify other adverse employment action***]] [***name of plaintiff***];]**

   [**or**]

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

   [**or**]

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

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

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

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

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

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

Directions for Use

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

disability, regardless of whether the request was granted. (Gov. Code, § 12940(*l*)(4) [religious practice], (m)(2) [disability].)

Read the first option for element 2 if there is no dispute as to whether the employer's acts constituted an adverse employment action. Read the second option and also give CACI No. 2509, *"Adverse Employment Action" Explained,* if whether there was an adverse employment action is a question of fact for the jury. For example, the case may involve a pattern of employer harassment consisting of acts that might not individually be sufficient to constitute retaliation, but taken as a whole establish prohibited conduct. (See *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1052–1056 [32 Cal.Rptr.3d 436, 116 P.3d 1123].) Give both the first and second options if the employee presents evidence supporting liability under both a sufficient-single-act theory or a pattern-of-harassment theory. (See, e.g., *Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 423–424 [69 Cal.Rptr.3d 1].) Also select "conduct" in element 3 if the second option or both the first and second options are included for element 2.

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

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

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

This instruction has been criticized in dictum because it is alleged that there is no element requiring retaliatory intent. (See *Joaquin v. City of Los Angeles* (2012) 202 Cal.App.4th 1207, 1229–1231 [136 Cal.Rptr.3d 472].) The court urged the Judicial Council to redraft the instruction and the corresponding special verdict form so as to clearly state that retaliatory intent is a necessary element of a retaliation claim under FEHA.

The jury in the case was instructed per element 3 "that Richard Joaquin's reporting that he had been sexually harassed was a motivating reason for the City of Los Angeles' decision to terminate Richard Joaquin's employment or deny Richard Joaquin promotion to the rank of sergeant." The committee believes that the instruction as given is correct for the intent element in a retaliation case. (Cf. *Wallace v. County of Stanislaus* (2016) 245 Cal.App.4th 109, 127−132 [199 Cal.Rptr.3d 462] [for disability discrimination, "substantial motivating reason" is only language required to express intent].) However, in cases such as *Joaquin* that involve allegations of a prohibited motivating reason (based on a report of

sexual harassment) and a permitted motivating reason (based on a good faith belief that the report was falsified), the instruction may need to be modified to make it clear that plaintiff must prove that defendant acted based on the *prohibited* motivating reason and not the *permitted* motivating reason.

Sources and Authority

- Retaliation Prohibited Under Fair Employment and Housing Act. Government Code section 12940(h).

- Retaliation for Requesting Reasonable Accommodation for Religious Practice and Disability Prohibited. Government Code section 12940(*l*)(4), (m)(2).

- "Person" Defined Under Fair Employment and Housing Act. Government Code section 12925(d).

- Prohibited Retaliation. Title 2 California Code of Regulations section 11021.

- "[I]n order to establish a prima facie case of retaliation under the FEHA, a plaintiff must show (1) he or she engaged in a 'protected activity,' (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer's action. Once an employee establishes a prima facie case, the employer is required to offer a legitimate, nonretaliatory reason for the adverse employment action. If the employer produces a legitimate reason for the adverse employment action, the presumption of retaliation ' " 'drops out of the picture,' " ' -and the burden shifts back to the employee to prove intentional retaliation." (*Yanowitz, supra,* 36 Cal.4th at p. 1042, internal citations omitted.)

- "Actions for retaliation are 'inherently fact-driven'; it is the jury, not the court, that is charged with determining the facts." (*McCoy v. Pacific Maritime Assn.* (2013) 216 Cal.App.4th 283, 299 [156 Cal.Rptr.3d 851].)

- "It is well established that a plaintiff in a retaliation case need only prove that a retaliatory animus was at least a substantial or motivating factor in the adverse employment decision." (*George v. California Unemployment Ins. Appeals Bd.* (2009) 179 Cal.App.4th 1475, 1492 [102 Cal.Rptr.3d 431].)

- "Retaliation claims are inherently fact-specific, and the impact of an employer's action in a particular case must be evaluated in context. Accordingly, although an adverse employment action must materially affect the terms, conditions, or privileges of employment to be actionable, the determination of whether a particular action or course of conduct rises to the level of actionable conduct should take into account the unique circumstances of the affected employee as well as the workplace context of the claim." (*Yanowitz, supra,* 36 Cal.4th at p. 1052.)

- "Contrary to [defendant]'s assertion that it is improper to consider collectively the alleged retaliatory acts, there is no requirement that an employer's retaliatory acts constitute one swift blow, rather than a series of subtle, yet damaging, injuries. -Enforcing a requirement that each act separately constitute an adverse employment action would subvert the purpose and intent of the statute." (*Yanowitz, supra,* 36 Cal.4th at pp. 1055–1056, internal citations omitted.)

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

- "Clearly, section 12940, subdivision (h) encompasses a broad range of protected activity. An employee need not use specific legal terms or buzzwords in opposing discrimination. Nor is it necessary for an employee to file a formal charge. The protected activity element may be established by evidence that the plaintiff threatened to file a discrimination charge, by a showing that the plaintiff mistakenly, but reasonably and sincerely believed he was opposing discrimination, or by evidence an employer believed the plaintiff was a potential witness in another employee's FEHA action." (*Rope v. Auto-Chlor System of Washington, Inc.* (2013) 220 Cal.App.4th 635, 652 [163 Cal.Rptr.3d 392], internal citations and footnote omitted.)

- " 'Standing alone, an employee's unarticulated belief that an employer is engaging in discrimination will not suffice to establish protected conduct for the purposes of establishing a prima facie case of retaliation, where there is no evidence the employer knew that the employee's opposition was based upon a reasonable belief that the employer was engaging in discrimination.' '[C]omplaints about personal grievances or vague or conclusory remarks that fail to put an employer on notice as to what conduct it should investigate will not suffice to establish protected conduct.' [¶] But employees need not explicitly and directly inform their employer that they believe the employer's conduct was discriminatory or otherwise forbidden by FEHA." (*Castro-Ramirez v. Dependable Highway Express, Inc.* (2016) 2 Cal.App.5th 1028, 1046 [207 Cal.Rptr.3d 120], internal citation omitted.)

- "The relevant question … is not whether a formal accusation of discrimination is made but whether the employee's communications to the employer sufficiently convey the employee's reasonable concerns that the employer has acted or is acting in an unlawful discriminatory manner." (*Husman v. Toyota Motor Credit Corp.* (2017) 12 Cal.App.5th 1168, 1193 [220 Cal.Rptr.3d 42].)

- "Notifying one's employer of one's medical status, even if such medical status constitutes a 'disability' under FEHA, does not fall within the protected activity identified in subdivision (h) of section 12940—i.e., it does not constitute engaging in opposition to any practices forbidden under FEHA or the filing of a complaint, testifying, or assisting in any proceeding under FEHA." (*Moore v. Regents of University of California* (2016) 248 Cal.App.4th 216, 247 [206 Cal.Rptr.3d 841].)

- "[Plaintiff]'s advocacy for the disabled community and opposition to elimination of programs that might benefit that community do not fall within the definition of protected activity. [Plaintiff] has not shown the [defendant]'s actions amounted to discrimination against disabled citizens, but even if they could be so construed, discrimination by an employer against members of the general public is not a prohibited *employment* practice under the FEHA." (*Dinslage v. City and County of San Francisco* (2016) 5 Cal.App.5th 368, 383 [209 Cal.Rptr.3d 809], original italics.)

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

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

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

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

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

- "Plaintiff, although a partner, is a person whom section 12940, subdivision (h) protects from retaliation for opposing the partnership-employer's harassment against those employees." (*Fitzsimons v. California Emergency Physicians Medical Group* (2012) 205 Cal.App.4th 1423, 1429 [141 Cal.Rptr.3d 265].)

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

- "[T]he employer is liable for retaliation under section 12940, subdivision (h), but nonemployer individuals are not personally liable for their role in that retaliation." (*Jones v. The Lodge at Torrey*

Pines Partnership (2008) 42 Cal.4th 1158, 1173 [72 Cal.Rptr.3d 624, 177 P.3d 232].)

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

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

- "The showing of pretext, while it may indicate retaliatory intent or animus, is not the sole means of rebutting the employer's evidence of nonretaliatory intent. ' "While 'pretext' is certainly a relevant issue in a case of this kind, making it a central or necessary issue is not sound. The central issue is and should remain whether the evidence as a whole supports a reasoned inference that the challenged action was the product of discriminatory or retaliatory animus. The employer's mere articulation of a legitimate reason for the action cannot answer this question; it can only dispel the *presumption* of improper motive that would otherwise *entitle* the employee to a judgment in his favor." ' " (*Light v. Department of Parks & Recreation* (2017) 14 Cal.App.5th 75, 94 [221 Cal.Rptr.3d 668], original italics.)

- "Government Code section 12940, subdivision (h), does not shield an employee against termination or lesser discipline for either lying or withholding information during an employer's internal investigation of a discrimination claim. In other words, public policy does not protect deceptive activity during an internal investigation. Such conduct is a legitimate reason to terminate an at-will employee." (*McGrory v. Applied Signal Technology, Inc.* (2013) 212 Cal.App.4th 1510, 1528 [152 Cal.Rptr.3d 154], footnotes omitted.)

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

- "The phrase 'because of' [in Gov. Code, § 12940(a)] is ambiguous as to the type or level of intent (i.e., motivation) and the connection between that motivation and the decision to treat the disabled person differently. This ambiguity is closely related to [defendant]'s argument that it is liable only if motivated by discriminatory animus. [¶] The statutory ambiguity in the phrase 'because of" was resolved by our Supreme Court about six months after the first jury trial [in *Harris, supra,* 56 Cal.4th at p. 203]." (*Wallace, supra,* 245 Cal.App.4th at p. 127.)

- " '[W]hile discrimination may be carried out by means of speech, such as a written notice of termination, and an illicit animus may be evidenced by speech, neither circumstance transforms a discrimination suit to one arising from speech. What gives rise to liability is not that the defendant spoke, but that the defendant denied the plaintiff a benefit, or subjected the plaintiff to a burden, on account of a discriminatory or retaliatory consideration.' " (*Laker v. Board of Trustees of California State University* (2019) 32 Cal.App.5th 745, 772 [244 Cal.Rptr.3d 238].)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 1028, 1052–1054

Chin et al., California Practice Guide: Employment Litigation, Ch. 7-A, *Title VII And The California Fair Employment And Housing Act,* ¶¶ 7:121–7:205 (The Rutter Group)

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

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

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

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

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 ~~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]; 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 Industrial Welfare Commission (IWC) was created in 1913 with express authority to adopt regulations—called wage orders—governing wages, hours, and working conditions in the state of California. These wage orders, being the product of quasi-legislative rulemaking under a broad delegation of legislative power, are entitled to great deference, and they have the dignity and force of statutory law." (*Stoetzl v. Department of Human Resources* (2019) 7 Cal.5th 718, 724–725 [248 Cal.Rptr.3d 891, 443 P.3d 924], internal citations omitted.)

- "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)

3000. Violation of Federal Civil Rights—In General—Essential Factual Elements (42 U.S.C. § 1983)

[*Name of plaintiff***] claims that [***name of defendant***] violated [his/her] civil rights. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] [intentionally/[***other applicable state of mind***]] [***insert wrongful act***];**

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

3. **That [***name of defendant***]'s conduct violated [***name of plaintiff***]'s right [***insert right, e.g., "of privacy"***];**

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

5. **That [***name of defendant***]'s [***insert wrongful act***] was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003

Directions for Use

In element 1, the standard is not always based on intentional conduct. Insert the appropriate level of scienter. For example, Eighth Amendment cases involve conduct carried out with "deliberate indifference," and Fourth Amendment claims do not necessarily involve intentional conduct. The "official duties" referred to in element 2 must be duties created pursuant to any state, county, or municipal law, ordinance, or regulation. This aspect of color of law most likely will not be a jury issue, so it has been omitted to shorten the wording of element 2. This instruction is intended for claims not covered by any of the following more specific instructions regarding the elements that the plaintiff must prove.

Sources and Authority

- Civil Action for Deprivation of Rights. Title 42 United States Code section 1983.
- "A § 1983 claim creates a species of tort liability, with damages determined 'according to principles derived from the common law of torts.' " (*Mendez v. Cty. of L.A.* (9th Cir. 2018) 897 F.3d 1067, 1074.)
- "As we have said many times, § 1983 'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.' " (*Graham v. Connor* (1989) 490 U.S. 386, 393-394 [109 S.Ct. 1865, 104 L.Ed.2d 443], internal citation omitted.)

- "42 U.S.C. § 1983 creates a cause of action against a person who, acting under color of state law, deprives another of rights guaranteed under the Constitution. Section 1983 does not create any substantive rights; rather it is the vehicle whereby plaintiffs can challenge actions by governmental officials." (*Jones v. Williams* (9th Cir. 2002) 297 F.3d 930, 934.)

- "By the plain terms of § 1983, two—and only two—allegations are required in order to state a cause of action under that statute. First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law." (*Catsouras v. Department of California Highway Patrol* (2010) 181 Cal.App.4th 856, 890 [104 Cal.Rptr.3d 352].)

- "Section 1983 can also be used to enforce federal statutes. For a statutory provision to be privately enforceable, however, it must create an individual right." (*Henry A. v. Willden* (9th Cir. 2012) 678 F.3d 991, 1005, internal citation omitted.)

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

- "The jury was properly instructed on [plaintiff]'s burden of proof and the particular elements of the section 1983 claim. (CACI No. 3000.)" (*King v. State of California* (2015) 242 Cal.App.4th 265, 280 [195 Cal.Rptr.3d 286].)

- " 'State courts look to federal law to determine what conduct will support an action under section 1983. The first inquiry in any section 1983 suit is to identify the precise constitutional violation with which the defendant is charged.' " (*Weaver v. State of California* (1998) 63 Cal.App.4th 188, 203 [73 Cal.Rptr.2d 571], internal citations omitted.)

- " 'Qualified immunity is an affirmative defense against section 1983 claims. Its purpose is to shield public officials "from undue interference with their duties and from potentially disabling threats of liability." The defense provides immunity from suit, not merely from liability. Its purpose is to spare defendants the burden of going forward with trial.' Because it is an immunity from suit, not just a mere defense to liability, it is important to resolve immunity questions at the earliest possible stage in litigation. Immunity should ordinarily be resolved by the court, not a jury." (*Martinez v. County of Los Angeles* (1996) 47 Cal.App.4th 334, 342 [54 Cal.Rptr.2d 772], internal citations omitted.)

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

- "Constitutional torts employ the same measure of damages as common law torts and are not augmented 'based on the abstract "value" or "importance" of constitutional rights ... .' Plaintiffs have the burden of proving compensatory damages in section 1983 cases, and the amount of damages depends 'largely upon the credibility of the plaintiffs' testimony concerning their injuries.' " (*Choate v. County of Orange* (2000) 86 Cal.App.4th 312, 321 [103 Cal.Rptr.2d 339], internal citations

omitted.)

- "[E]ntitlement to compensatory damages in a civil rights action is not a matter of discretion: 'Compensatory damages . . . are mandatory; once liability is found, the jury is required to award compensatory damages in an amount appropriate to compensate the plaintiff for his loss.' " (*Hazle v. Crofoot* (9th Cir. 2013) 727 F.3d 983, 992.)

- "[T]he state defendants' explanation of the jury's zero-damages award as allocating all of [plaintiff]'s injury to absent persons reflects the erroneous view that not only could zero damages be awarded to [plaintiff], but that [plaintiff]'s damages were capable of apportionment. [Plaintiff] independently challenges the jury instruction and verdict form that allowed the jury to decide this question, contending that the district judge should have concluded, as a matter of law, that [plaintiff] was entitled to compensatory damages and that defendants were jointly and severally liable for his injuries. He is correct. The district judge erred in putting the question of apportionment to the jury in the first place, because the question of whether an injury is capable of apportionment is a legal one to be decided by the judge, not the jury." (*Hazle, supra,* 727 F.3d at pp. 994−995.)

- "An individual acts under color of state law when he or she exercises power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.' " (*Naffe v. Frey* (9th Cir. 2015) 789 F.3d 1030, 1036.)

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

- "A state employee who is off duty nevertheless acts under color of state law when (1) the employee 'purport[s] to or pretend[s] to act under color of law,' (2) his 'pretense of acting in the performance of his duties . . . had the purpose and effect of influencing the behavior of others,' and (3) the harm inflicted on plaintiff 'related in some meaningful way either to the officer's governmental status or to the performance of his duties,' " (*Naffe, supra,* 789 F.3d at p. 1037, internal citations omitted.)

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

- " 'While generally not applicable to private parties, a § 1983 action can lie against a private party

when "he is a willful participant in joint action with the State or its agents." ' " (*Julian v. Mission Community Hospital* (2017) 11 Cal.App.5th 360, 396 [218 Cal.Rptr.3d 38].)

- "Under this Court's cases, a private entity can qualify as a state actor in a few limited circumstances—including, for example, (i) when the private entity performs a traditional, exclusive public function; (ii) when the government compels the private entity to take a particular action; or (iii) when the government acts jointly with the private entity." (*Manhattan Cmty. Access Corp. v. Halleck* (2019) — U.S. — [139 S.Ct. 1921, 1928, 204 L.Ed.2d 405], internal citations omitted.)

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

- "Under the Court's cases, a private entity may qualify as a state actor when it exercises 'powers traditionally exclusively reserved to the State.' It is not enough that the federal, state, or local government exercised the function in the past, or still does. And it is not enough that the function serves the public good or the public interest in some way. Rather, to qualify as a traditional, exclusive public function within the meaning of our state-action precedents, the government must have traditionally *and* exclusively performed the function." (*Manhattan Cmty. Access Corp., supra,* — U.S. — [139 S.Ct. at p. 1928], original italics.)

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

Secondary Sources

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

2 Civil Rights Actions, Ch. 7, *Deprivation of Rights Under Color of State Law-General Principles (Civil Rights Act of 1871, 42 U.S.C. § 1983)*, ¶¶ 7.05–7.07, Ch. 17, *Deprivation of Rights Under Color of State Law-General Principles (Civil Rights Act of 1871, 42 U.S.C. § 1983)*, ¶ 17.02 (Matthew Bender)

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

1 Matthew Bender Practice Guide: Federal Pretrial Civil Procedure in California, Ch. 8, *Answers and*

Responsive Motions Under Rule 12, 8.40

3002. "Official Policy or Custom" Explained (42 U.S.C. § 1983)

"Official [policy/custom]" means: [*insert one of the following:***]**

[A rule or regulation approved by the [city/county]'s legislative body;] [or]

[A policy statement or decision that is officially made by the [city/county]'s lawmaking officer or policymaking official;] [or]

[A custom that is a permanent, widespread, or well-settled practice of the [city/county];] [or]

[An act or omission approved by the [city/county]'s lawmaking officer or policymaking official.]

New September 2003; Revised June 2012; Renumbered from CACI No. 3008 December 2012

Directions for Use

These definitions are selected examples of official policy drawn from the cited cases. The instruction may need to be adapted to the facts of a particular case. The court may need to instruct the jury regarding the legal definition of "policymakers."

In some cases, it may be necessary to include additional provisions addressing factors that may indicate an official custom in the absence of a formal policy. The Ninth Circuit has held that in some cases the plaintiff is entitled to have the jury instructed that evidence of governmental inaction—specifically, failure to investigate and discipline employees in the face of widespread constitutional violations—can support an inference that an unconstitutional custom or practice has been unofficially adopted. (*Hunter v. County of Sacramento* (9th Cir. 2011) 652 F.3d 1225, 1234, fn. 8.)

Sources and Authority

- "The [entity] may not be held liable for acts of [employees] unless 'the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers' or if the constitutional deprivation was 'visited pursuant to governmental "custom" even though such a custom has not received formal approval through the body's official decisionmaking channels.' " (*Redman v. County of San Diego* (9th Cir. 1991) 942 F.2d 1435, 1443-1444, internal citation omitted.)

- "[A]n act performed pursuant to a 'custom' that has not been formally approved by an appropriate decisionmaker may fairly subject a municipality to liability on the theory that the relevant practice is so widespread as to have the force of law." (*Bd. of the County Comm'rs v. Brown* (1997) 520 U.S. 397, 404 [117 S.Ct. 1382, 137 L.Ed.2d 626].)

- "The custom or policy must be a 'deliberate choice to follow a course of action . . . made from among

various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question.' "" (*Castro v. County~~nty.~~ of L.A.* (9th Cir. 2016) 833 F.3d 1060, 1075 (en banc).)

- "While a rule or regulation promulgated, adopted, or ratified by a local governmental entity's legislative body unquestionably satisfies *Monell's* policy requirement, a 'policy' within the meaning of § 1983 is not limited to official legislative action. Indeed, a decision properly made by a local governmental entity's authorized decisionmaker—i.e., an official who 'possesses final authority to establish [local government] policy with respect to the [challenged] action'—may constitute official policy. 'Authority to make municipal policy may be granted directly by legislative enactment or may be delegated by an official who possesses such authority, and of course whether an official had final policymaking authority is a question of state law.' " (*Thompson v. City of Los Angeles* (9th Cir. 1989) 885 F.2d 1439, 1443, internal citations and footnote omitted.)

- "[A] plaintiff can show a custom or practice of violating a written policy; otherwise an entity, no matter how flagrant its actual routine practices, always could avoid liability by pointing to a pristine set of policies." (*Castro, supra,* 833 F.3d at p. 1075 fn. 10.)

- "Appellants need not show evidence of a policy or deficient training; evidence of an informal practice or custom will suffice." (*Nehad v. Browder* (9th Cir. 2019) 929 F.3d 1125, 1141.)

- "As with other questions of state law relevant to the application of federal law, the identification of those officials whose decisions represent the official policy of the local governmental unit is itself a legal question to be resolved by the trial judge *before* the case is submitted to the jury." (*Jett v. Dallas Independent School Dist.* (1989) 491 U.S. 701, 737 [109 S.Ct. 2702, 105 L.Ed.2d 598].)

- "[I]t is settled that whether an official is a policymaker for a county is dependent on an analysis of state law, not fact." (*Pitts v. County of Kern* (1998) 17 Cal.4th 340, 352 [70 Cal.Rptr.2d 823, 949 P.2d 920], internal citations omitted.)

- "Once those officials who have the power to make official policy on a particular issue have been identified, it is for the jury to determine whether *their* decisions have caused the deprivation of rights at issue by policies which affirmatively command that it occur, or by acquiescence in a longstanding practice or custom which constitutes the 'standard operating procedure' of the local governmental entity." (*Jett, supra,* 491 U.S. at p. 737, internal citations omitted.)

- "*Gibson v. County of Washoe* [(9th Cir. 2002) 290 F.3d 1175, 1186] discussed two types of policies: those that result in the municipality itself violating someone's constitutional rights or instructing its employees to do so, and those that result, through omission, in municipal responsibility 'for a constitutional violation committed by one of its employees, even though the municipality's policies were facially constitutional, the municipality did not direct the employee to take the unconstitutional action, and the municipality did not have the state of mind required to prove the underlying violation.' We have referred to these two types of policies as policies of action and inaction." (*Tsao v. Desert Palace, Inc.* (9th Cir. 2012) 698 F.3d 1128, 1143, internal citations omitted.)

- "A policy of inaction or omission may be based on failure to implement procedural safeguards to

prevent constitutional violations. To establish that there is a policy based on a failure to preserve constitutional rights, a plaintiff must show, in addition to a constitutional violation, 'that this policy "amounts to deliberate indifference" to the plaintiff's constitutional right[,]' and that the policy caused the violation, 'in the sense that the [municipality] could have prevented the violation with an appropriate policy.' " (*Tsao, supra,* 698 F.3d at p. 1143, internal citations omitted.)

- "To show deliberate indifference, [plaintiff] must demonstrate 'that [defendant] was on actual or constructive notice that its omission would likely result in a constitutional violation.' " (*Tsao, supra,* 698 F.3d at p. 1145.)

- "[P]laintiff may prove … deliberate indifference, through evidence of a 'failure to investigate and discipline employees in the face of widespread constitutional violations.' Thus, it is sufficient under our case law to prove a 'custom' of encouraging excessive force to provide evidence that personnel have been permitted to use force with impunity." (*Rodriguez v. ~~Cty.~~County of L.A.* (9th Cir. 2018) 891 F.3d 776, 803, internal citations omitted.)

- "Discussing liability of a municipality under the federal Civil Rights Act based on 'custom,' the California Court of Appeal for the Fifth Appellate District recently noted, 'If the plaintiff seeks to show he was injured by governmental "custom," he must show that the governmental entity's "custom" was "made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy." ' " (*Bach v. County of Butte* (1983) 147 Cal.App.3d 554, 569, fn. 11 [195 Cal.Rptr. 268], internal citations omitted.)

- "The federal courts have recognized that local elected officials and appointed department heads can make official policy or create official custom sufficient to impose liability under section 1983 on their governmental employers." (*Bach, supra,* 147 Cal.App.3d at p. 570, internal citations omitted.)

Secondary Sources

10 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §~~§~~ 890 et seq.

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

1 Matthew Bender Practice Guide: Federal Pretrial Civil Procedure in California, Ch. 8, *Answers and Responsive Motions Under Rule 12,* 8.40

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 County~~nty.~~* (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* 57 Cal.4th 622, 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,* 238 Cal.App.4th at p. 1372.)

- "[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].)

- "Where … 'an officer's particular use of force is based on a mistake of fact, we ask whether a reasonable officer would have or *should* have accurately perceived that fact.' '[W]hether the mistake was an *honest* one is not the concern, only whether it was a *reasonable* one.' " (*Nehad v. Browder* (9th Cir. 2019) 929 F.3d 1125, 1133, original italics, internal citation and footnote omitted.)

- "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.)

- "Whether an officer warned a suspect that failure to comply with the officer's commands would result in the use of force is another relevant factor in an excessive force analysis." (*Nehad, supra,* 929 F.3d at p. 1137.)

- "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.)

- "Sometimes, however, officers themselves may 'unnecessarily creat[e] [their] own sense of urgency.' Reasonable triers of fact can, taking the totality of the circumstances into account, conclude that an officer's poor judgment or lack of preparedness caused him or her to act unreasonably, 'with undue haste.' " (*Nehad, supra,* 929 F.3d at p. 1135, internal citation and footnote 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. County~~ty.~~ 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)

3026. Affirmative Defense—Exigent Circumstances

[*Name of defendant***] claims that a search warrant was not required. To succeed, [***name of defendant***] must prove both of the following:**

1. **That a reasonable officer would have believed that, under the circumstances, there was not enough time to get a search warrant because entry or search was necessary to prevent [***insert one of the following:***]**

   [physical harm to the officer or other persons;]

   [the destruction or concealment of evidence;]

   [the escape of a suspect;] and

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

In deciding whether the search was reasonable, you should consider, among other factors, the following:

(a) The extent of the particular intrusion;

(b) The place in which the search was conducted; [and]

(c) The manner in which the search was conducted; [and]

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

New September 2003; Renumbered from CACI No. 3006 December 2012

Sources and Authority

- "Absent consent, exigent circumstances must exist for a warrantless entry into a home, despite probable cause to believe that a crime has been committed or that incriminating evidence may be found inside. Such circumstances are 'few in number and carefully delineated.' 'Exigent circumstances' means 'an emergency situation requiring swift action to prevent imminent danger to life or serious damage to property, or to forestall the imminent escape of a suspect or destruction of evidence.' " (*Conway v. Pasadena Humane Society* (1996) 45 Cal.App.4th 163, 172 [52 Cal.Rptr.2d 777], internal citation omitted.)

- "Before agents of the government may invade the sanctity of the home, the burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries." (*Welsh v. Wisconsin* (1984) 466 U.S. 740, 750 [104 S.Ct. 2091, 80 L.Ed.2d 732-].)

- " 'There are two general exceptions to the warrant requirement for home searches: exigency and emergency.' These exceptions are 'narrow' and their boundaries are 'rigorously guarded' to prevent any expansion that would unduly interfere with the sanctity of the home. In general, the difference between the two exceptions is this: The 'emergency' exception stems from the police officers' 'community caretaking function' and allows them 'to respond to emergency situations' that threaten life or limb; this exception does '*not* [derive from] police officers' function as criminal investigators.' By contrast, the 'exigency' exception does derive from the police officers' investigatory function; it allows them to enter a home without a warrant if they have both probable cause to believe that a crime has been or is being committed and a reasonable belief that their entry is 'necessary to prevent . . . the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts.' (*Hopkins v. Bonvicino* (9th Cir. 2009) 573 F.3d 752, 763, original italics, internal citations omitted.)

- "[D]etermining whether an official had 'reasonable cause to believe exigent circumstances existed in a given situation … [is a] "question[] of fact to be determined by a jury." [Citation.]' " (*Arce v. Childrens Hospital Los Angeles* (2012) 211 Cal.App.4th 1455, 1475 [150 Cal.Rptr.3d 735].)

- "There is no litmus test for determining whether exigent circumstances exist, and each case must be decided on the facts known to the officers at the time of the search or seizure. However, two primary considerations in making this determination are the gravity of the underlying offense and whether the delay in seeking a warrant would pose a threat to police or public safety." (*Conway, supra,* 45 Cal.App.4th at p. 172.)

- " '[W]hile the commission of a misdemeanor offense,' such as the petty theft that [defendants] were investigating, 'is not to be taken lightly, it militates against a finding of exigent circumstances where the offense . . . is not inherently dangerous.' " (*Lyall v. City of Los Angeles* (9th Cir. 2015) 807 F.3d 1178, 1189.)

- "Finally, even where exigent circumstances exist, '[t]he search must be "strictly circumscribed by the exigencies which justify its initiation".' 'An exigent circumstance may justify a search without a warrant. However, after the emergency has passed, the [homeowner] regains his right to privacy, and ... a second entry [is unlawful].' " (*Conway, supra,* 45 Cal.App.4th at p. 173, internal citation omitted.)

- " 'Exigent circumstances are those in which a substantial risk of harm to the persons involved or to the law enforcement process would arise if the police were to delay a search [] until a warrant could be obtained.' Mere speculation is not sufficient to show exigent circumstances." (*U.S. v. Reid* (9th Cir. 2000) 226 F.3d 1020, 1027−1028, internal citations omitted.)

- "The government bears the burden of showing specific and articulable facts to justify the finding of exigent circumstances." (*United States v. Iwai* (9th Cir. 2019) 930 F.3d 1141, 1144.)

- ~~Rather, 'the government bears the burden of showing the existence of exigent circumstances by particularized evidence.'~~ "This is a heavy burden and can be satisfied 'only by demonstrating specific and articulable facts to justify the finding of exigent circumstances.' Furthermore, 'the presence of

exigent circumstances necessarily implies that there is insufficient time to obtain a warrant; therefore, the government must show that a warrant could not have been obtained in time.' " (*U.S. v. Reid*, *supra*, ~~(9th Cir. 2000)~~ 226 F.3d at p.~~1020, 1027=~~1028, internal citations omitted.)

- "When the domestic violence victim is still in the home, circumstances may justify an entry pursuant to the exigency doctrine." (*Bonivert v. City of Clarkston* (9th Cir. 2018) 883 F.3d 865, 878.)

Secondary Sources

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

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

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.)

- "Consistent with that concept and the clear connections between mental health treatment and the dignity and welfare of prisoners, the Eighth Amendment's prohibition against cruel and unusual punishment requires that prisons provide mental health care that meets 'minimum constitutional requirements.' When the level of a prison's mental health care 'fall[s] below the evolving standards of decency that mark the progress of a maturing society,' the prison fails to uphold the constitution's dignitary principles." (*Disability Rights Montana, Inc. v. Batista* (9th Cir. 2019) 930 F.3d 1090, 1097, internal citation omitted.)

- "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.)

- "Where a plaintiff alleges systemwide deficiencies, 'policies and practices of statewide and systematic application [that] expose all inmates in [the prison's] custody to a substantial risk of serious harm,' we assess the claim through a two-pronged inquiry. The first, objective, prong requires that the plaintiff show that the conditions of the prison pose 'a substantial risk of serious harm.' The second, subjective, prong requires that the plaintiff show that a prison official was deliberately indifferent by being 'aware of the facts from which the inference could be drawn that a substantial risk of serious harm exists,' and 'also draw[ing] the inference.' " (*Disability Rights Montana, Inc., supra,* 930 F.3d at p. 1097, internal citations and footnote omitted.)

- "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. County~~ty.~~ 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)

3053. Retaliation for Exercise of Free Speech Rights—Essential Factual Elements (42 U.S.C. § 1983)

[*Name of plaintiff*] claims that [*name of defendant*] retaliated against [him/her] because [he/she] exercised [his/her] right to speak as a private citizen about a matter of public concern. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **[That [*name of plaintiff*] was speaking as a private citizen and not as a public employee when [he/she] [*describe speech alleged to be protected by the First Amendment, e.g., criticized the mayor at a city council meeting*];]**

2. **That [*name of defendant*] [*specify retaliatory acts, e.g., terminated plaintiff's employment*];**

3. **That [*name of plaintiff*]'s [*e.g., speech to the city council*] was a substantial motivating reason for [*name of defendant*]'s decision to [*e.g., terminate plaintiff's employment*];**

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

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

If [*name of plaintiff*] proves all of the above, [*name of defendant*] is not liable if [he/she/it] proves either of the following:

6. **That [*name of defendant*] had an adequate employment-based justification for treating [*name of plaintiff*] differently from any other member of the general public; or**

7. **That [*name of defendant*] would have [*specify adverse action, e.g., terminated plaintiff's employment*] anyway for other legitimate reasons, even if [he/she/it] also retaliated based on [*name of plaintiff*]'s protected conduct.**

In deciding whether [*name of plaintiff*] was speaking as a public citizen or a public employee (element 1), you should consider whether [his/her] [*e.g., speech*] was within [his/her] job responsibilities. [However, the listing of a given task in an employee's written job description is neither necessary nor sufficient alone to demonstrate that conducting the task is part of the employee's professional duties.]

New November 2017

Directions for Use

This instruction is for use in a claim by a public employee who alleges that he or she suffered an adverse employment action in retaliation for his or her private speech on an issue of public concern. Speech made by public employees in their official capacity is not insulated from employer discipline by the First

Amendment but speech made in one's private capacity as a citizen is. (*Garcetti v. Ceballos* (2006) 547 U.S. 410, 421 [126 S.-Ct. 1951, 164 L.-Ed.-2d 689].)

Element 1, whether the employee was speaking as a private citizen or as a public employee, and element 6, whether the public employer had an adequate justification for the adverse action, are ultimately determined as a matter of law, but may involve disputed facts. (*Eng v. Cooley* (9th Cir. 2009) 552 F.3d 1062, 1071.) If there are no disputed facts, these elements should not be given. -They may be modified to express the particular factual issues that the jury must resolve.

Give the bracketed optional sentence in the last paragraph if the defendant has placed the plaintiff's formal written job description in evidence. (See *Garcetti, supra,* 547 U.S. at p. 424.)

Note that there are two causation elements. -The protected speech must have caused the employer's adverse action (element 3), and the adverse action must have caused the employee harm (element 5). This second causation element will rarely be disputed in a termination case. -For optional language if the employer claims that there was no adverse action, see CACI No. 2505, *Retaliation—Essential Factual Elements* (under California's Fair Employment and Housing Act). See also CACI No. 2509, *"Adverse Employment Action" Explained* (under FEHA).

Sources and Authority

- " '[C]itizens do not surrender their First Amendment rights by accepting public employment.' Moreover, '[t]here is considerable value– . . . in encouraging, rather than inhibiting, speech by public employees,' because 'government employees are often in the best position to know what ails the agencies for which they work.' At the same time, '[g]overnment employers, like private employers, need a significant degree of control over their employees' words and actions.' Accordingly, government employees may be subject to some restraints on their speech 'that would be unconstitutional if applied to the general public.' " (*Moonin v. Tice* (9th Cir. 2017) 868 F.3d 853, 860-861, internal citations omitted.)

- "First Amendment retaliation claims are governed by the framework in *Eng.* See 552 F.3d at 1070-72. [Plaintiff] must show that (1) he spoke on a matter of public concern, (2) he spoke as a private citizen rather than a public employee, and (3) the relevant speech was a substantial or motivating factor in the adverse employment action. Upon that showing, the State must demonstrate that (4) it had an adequate justification for treating [plaintiff] differently from other members of the general public, or (5) it would have taken the adverse employment action even absent the protected speech. '[A]ll the factors are necessary, in the sense that failure to meet any one of them is fatal to the plaintiff's case.' " (*Kennedy v. Bremerton Sch. Dist.* (9th Cir. 2017) 869 F.3d 813, 822, internal citations omitted.)

- "In a First Amendment retaliation case, an adverse employment action is an act that is reasonably likely to deter employees from engaging in constitutionally protected speech." (*Greisen v. Hanken* (9th Cir. 2019) 925 F.3d 1097, 1113.)

- "*Pickering* [~~*Pickering*~~ *v. Bd. of Educ.* (1968) 391 U.S. 563 [88 S.Ct. 1731, 20 L.Ed.2d 811]] and the cases decided in its wake identify two inquiries to guide interpretation of the constitutional

protections accorded to public employee speech. The first requires determining whether the employee spoke as a citizen on a matter of public concern. If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech. If the answer is yes, then the possibility of a First Amendment claim arises. The question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public. This consideration reflects the importance of the relationship between the speaker's expressions and employment. A government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations." (*Garcetti, supra,* 547 U.S. at p. 418, internal citations omitted.)

- "In the forty years since *Pickering,* First Amendment retaliation law has evolved dramatically, if sometimes inconsistently. Unraveling *Pickering's* tangled history reveals a sequential five-step series of questions: (1) whether the plaintiff spoke on a matter of public concern; (2) whether the plaintiff spoke as a private citizen or public employee; (3) whether the plaintiff's protected speech was a substantial or motivating factor in the adverse employment action; (4) whether the state had an adequate justification for treating the employee differently from other members of the general public; and (5) whether the state would have taken the adverse employment action even absent the protected speech. Analysis of these questions, further complicated by restraints on our interlocutory appellate jurisdiction, involves a complex array of factual and legal inquiries requiring detailed explanation." (*Eng, supra,* 552 F.3d at p. 1070.)

- "Whether speech is on a matter of public concern is a question of law, determined by the court…. The speech need not be entirely about matters of public concern, but it must 'substantially involve' such matters. '[S]peech warrants protection when it "seek[s] to bring to light actual or potential wrongdoing or breach of public trust." ' " (*Greisen, supra,* 925 F.3d at p. 1109.)~~The public concern inquiry is purely a question of law … ." (*Eng, supra,* 552 F.3d at p. 1070.)~~

- "Whether an individual speaks as a public employee is a mixed question of fact and law. 'First, a factual determination must be made as to the "scope and content of a plaintiff's job responsibilities." ' 'Second, the "ultimate constitutional significance" of those facts must be determined as a matter of law.' " (*Barone v. City of Springfield* (9th Cir. 2018) 902 F.3d 1091, 1099, internal citations omitted.)

- "An employee does not speak as a citizen merely because the employee directs speech towards the public, or speaks in the presence of the public, particularly when an employee's job duties include interacting with the public." (*Barone, supra,* 902 F.3d at p. 1100.)

- "[T]he parties in this case do not dispute that [plaintiff] wrote his disposition memo pursuant to his employment duties. We thus have no occasion to articulate a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate. We reject, however, the suggestion that employers can restrict employees' rights by creating excessively broad job descriptions. The proper inquiry is a practical one. Formal job descriptions often bear little resemblance to the duties an employee actually is expected to perform, and the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties

for First Amendment purposes." (*Garcetti, supra,* 547 U.S. at p. 424.)

- "[I]n synthesizing relevant Ninth Circuit precedent since *Garcetti*, an en banc panel of this Court in *Dahlia v. Rodriguez,* 735 F.3d 1060, 1074-76 (9th Cir. 2013), announced three guiding principles for undertaking the practical factual inquiry of whether an employee's speech is insulated from employer discipline under the First Amendment. … The guiding principles are: [¶] 1. 'First, particularly in a highly hierarchical employment setting such as law enforcement, whether or not the employee confined his communications to his chain of command is a relevant, if not necessarily dispositive, factor in determining whether he spoke pursuant to his official duties. When a public employee communicates with individuals or entities outside of his chain of command, it is unlikely that he is speaking pursuant to his duties.' [¶] 2. 'Second, the subject matter of the communication is also of course highly relevant to the ultimate determination whether the speech is protected by the First Amendment … When an employee prepares a routine report, pursuant to normal departmental procedure, about a particular incident or occurrence, the employee's preparation of that report is typically within his job duties. . . By contrast, if a public employee raises within the department broad concerns about corruption or systemic abuse, it is unlikely that such complaints can reasonably be classified as being within the job duties of an average public employee, except when the employee's regular job duties involve investigating such conduct.' [¶] 3. 'Third, we conclude that when a public employee speaks in direct contravention to his supervisor's orders, that speech may often fall outside of the speaker's professional duties. Indeed, the fact that an employee is threatened or harassed by his superiors for engaging in a particular type of speech provides strong evidence that the act of speech was not, as a 'practical' matter, within the employee's job duties notwithstanding any suggestions to the contrary in the employee's formal job description.' " (*Brandon v. Maricopa County* (9th Cir. 2017) 849 F.3d 837, 843–844, internal citations omitted.)

- "Initially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that this conduct was a 'substantial factor' - or, to put it in other words, that it was a 'motivating factor' in the [defendant]'s decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the [defendant] had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's re-employment even in the absence of the protected conduct." (*Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle* (1977) 429 U.S. 274, 287 [97 S.Ct. 568, 50 L.Ed.2d 471].)

- "Although the *Pickering* balancing inquiry is ultimately a legal question, like the private citizen inquiry, its resolution often entails underlying factual disputes. Thus we must once again assume any underlying disputes will be resolved in favor of the plaintiff to determine, as a matter of law, whether the state has 'adequate justification' to restrict the employee's speech. If the allegations, viewed in light most favorable to the plaintiff, indicate adequate justification, qualified immunity should be granted." (*Eng, supra,* 552 F.3d at pp. 1071–1072, internal citations omitted.)

- "Although the *Pickering* framework is most often applied in the retaliation context, a similar analysis is used when assessing prospective restrictions on government employee speech. Where a 'wholesale deterrent to a broad category of expression' rather than 'a post hoc analysis of one employee's speech and its impact on that employee's public responsibilities' is at issue, the Court

weighs the impact of the ban as a whole—both on the employees whose speech may be curtailed and on the public interested in what they might say—against the restricted speech's ' "necessary impact on the actual operation" of the Government,' '[U]nlike an adverse action taken in response to actual speech,' a prospective restriction 'chills potential speech before it happens.' The government therefore must shoulder a heavier burden when it seeks to justify an ex ante speech restriction as opposed to 'an isolated disciplinary action.' " (*Moonin, supra,* 868 F.3d at p. 861, internal citations omitted.)

Secondary Sources

7 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, § 563

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law §§ 894, 895

1 Civil Rights Actions, Ch. 2, *Governmental Liability and Immunity*, ¶ 2.03 (Matthew Bender)

3610. Aiding and Abetting Tort—Essential Factual Elements

[*Name of plaintiff***] claims that [he/she] was harmed by [***name of actor***]'s [***insert tort theory, e.g., assault and battery***] and that [***name of defendant***] is responsible for the harm because [he/she] aided and abetted [***name of actor***] in committing the [***e.g., assault and battery***].**

If you find that [*name of actor***] committed [a/an] [***e.g., assault and battery***] that harmed [***name of plaintiff***], then you must determine whether [***name of defendant***] is also responsible for the harm. [***Name of defendant***] is responsible as an aider and abetter if [***name of plaintiff***] proves all of the following:**

1. That [*name of defendant***] knew that [a/an] [***e.g., assault and battery***] was [being/going to be] committed by [***name of actor***] against [***name of plaintiff***];**

2. That [*name of defendant***] gave substantial assistance or encouragement to [***name of actor***]; and**

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

Mere knowledge that [a/an] [*e.g., assault and battery***] was [being/going to be] committed and the failure to prevent it do not constitute aiding and abetting.**

New April 2008; Revised December 2015

Directions for Use

Give this instruction if the plaintiff seeks to hold a defendant responsible for the tort of another on a theory of aiding and abetting, whether or not the active tortfeasor is also a defendant.

Some cases seem to hold that in addition to the elements of knowledge and substantial assistance, a complaint must allege the aider and abettor had the specific intent to facilitate the wrongful conduct. (See *Schulz v. Neovi Data Corp.* (2007) 152 Cal.App.4th 86, 95 [60 Cal.Rptr.3d 810].)

It appears that one may be liable as an aider and abetter of a negligent act. (See *Navarrete v. Meyer* (2015) 237 Cal.App.4th 1276, 1290 [188 Cal.Rptr.3d 623]; *Orser v. George* (1967) 252 Cal.App.2d 660, 668 [60 Cal.Rptr. 708].)

Sources and Authority

- "The jury was also instructed on aiding and abetting, as follows: 'A person aids and abets the commission of a crime when he or she: [¶] (1) With knowledge of the unlawful purpose of the perpetrator, and [¶] (2) With the intent or purpose of committing or encouraging or facilitating the commission of the crime, and [¶] (3) By act or advice aids, promotes, encourages or instigates the

commission of the crime. [¶] A person who aids and abets the commission of a crime need not be present at the scene of the crime. [¶] Mere presence at the scene of a crime which does not itself assist the commission of the crime does not amount to aiding and abetting. [¶] Mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting." (*Casella v. SouthWest Dealer Services, Inc.* (2007) 157 Cal.App.4th 1127, 1140–1141 [69 Cal.Rptr.3d 445].)

- "The elements of a claim for aiding and abetting a breach of fiduciary duty are: (1) a third party's breach of fiduciary duties owed to plaintiff; (2) defendant's actual knowledge of that breach of fiduciary duties; (3) substantial assistance or encouragement by defendant to the third party's breach; and (4) defendant's conduct was a substantial factor in causing harm to plaintiff. (Judicial Council of Cal., Civ. Jury Instns. (CACI) (2014) No. 3610 …)." (*Nasrawi v. Buck Consultants LLC* (2014) 231 Cal.App.4th 328, 343 [179 Cal.Rptr.3d 813].)

- "[C]ausation is an essential element of an aiding and abetting claim, i.e., plaintiff must show that the aider and abettor provided assistance that was a substantial factor in causing the harm suffered." (*American Master Lease LLC v. Idanta Partners, Ltd.* (2014) 225 Cal.App.4th 1451, 1476 [171 Cal.Rptr.3d 548].)

- "The fact the instruction [CACI No. 3610] does not use the word 'intent' is not determinative. 'California courts have long held that liability for aiding and abetting depends on proof the defendant had actual knowledge of the specific primary wrong the defendant substantially assisted. … "The words 'aid and abet' as thus used have a well understood meaning, and may fairly be construed to imply an intentional participation *with knowledge of the object to be attained*." [Citation.]' A defendant who acts with actual knowledge of the intentional wrong to be committed and provides substantial assistance to the primary wrongdoer is not an accidental participant in the enterprise." (*Upasani v. State Farm General Ins. Co.* (2014) 227 Cal.App.4th 509, 519 [173 Cal.Rptr.3d 784], original italics, internal citations omitted.)

- "As noted, some cases suggest that a plaintiff also must plead specific intent to facilitate the underlying tort. We need not decide whether specific intent is a required element because, read liberally, the fifth amended complaint alleges that [defendant] intended to assist the Association in breaching its fiduciary duties. In particular, plaintiffs allege that, with knowledge of the Association's breaches, [defendant] 'gave substantial encouragement and assistance to [the Association] *to breach its fiduciary duties.*' Fairly read, that allegation indicates intent to participate in tortious activity." (*Nasrawi, supra,* 231 Cal.App.4th at p. 345, original italics, internal citations omitted.)

- "[W]e consider whether the complaint states a claim based upon 'concert of action' among defendants. The elements of this doctrine are prescribed in section 876 of the Restatement Second of Torts. The section provides, 'For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he (a) does a tortious act in concert with the other or pursuant to a common design with him, or (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.' With respect to this

doctrine, Prosser states that 'those who, in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify and adopt his acts done for their benefit, are equally liable with him. [para.] Express agreement is not necessary, and all that is required is that there be a tacit understanding . . . .' " (*Sindell v. Abbott Laboratories* (1980) 26 Cal.3d 588, 604 [163 Cal.Rptr. 132, 607 P.2d 924], internal citations omitted.)

- "Liability may … be imposed on one who aids and abets the commission of an intentional tort if the person (a) knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act or (b) gives substantial assistance to the other in accomplishing a tortious result and the person's own conduct, separately considered, constitutes a breach of duty to the third person." (*IIG Wireless, Inc. v. Yi* (2018) 22 Cal.App.5th 630, 653–654 [231 Cal.Rptr.3d 771].)

- "Restatement Second of Torts … recognizes a cause of action for aiding and abetting in a civil action when it provides: 'For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he [¶] … [¶] (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself … .' 'Advice or encouragement to act operates as a moral support to a tortfeasor and if the act encouraged is known to be tortious it has the same effect upon the liability of the adviser as participation or physical assistance. … It likewise applies to a person who knowingly gives substantial aid to another who, as he knows, intends to do a tortious act.' " (*Schulz, supra,* 152 Cal.App.4th at pp. 93–94, internal citations omitted.)

- "California courts have long held that liability for aiding and abetting depends on proof the defendant had actual knowledge of the specific primary wrong the defendant substantially assisted. … 'The words "aid and abet" as thus used have a well understood meaning, and may fairly be construed to imply an intentional participation *with knowledge of the object to be attained*.' " (*Casey v. U.S. Bank Nat. Assn.* (2005) 127 Cal.App.4th 1138, 1145–1146 [26 Cal.Rptr.3d 401], original italics, internal citations omitted.)

- " 'Mere knowledge that a tort is being committed and the failure to prevent it does not constitute aiding and abetting. "As a general rule, one owes no duty to control the conduct of another . . . ." More specifically, a supervisor is not liable to third parties for the acts of his or her subordinates.' " (*Austin B. v. Escondido Union School Dist.* (2007) 149 Cal.App.4th 860, 879 [57 Cal.Rptr.3d 454], internal citations omitted.)

- " 'In the civil arena, an aider and abettor is called a cotortfeasor. To be held liable as a cotortfeasor, a defendant must have knowledge and intent. … A defendant can be held liable as a cotortfeasor on the basis of acting in concert only if he or she knew that a tort had been, or was to be, committed, and acted *with the intent of facilitating the commission of that tort*.' Of course, a defendant can only aid and abet another's tort if the defendant knows what 'that tort' is. … [T]he defendant must have acted to aid the primary tortfeasor 'with knowledge of the object to be attained.' " (*Casey, supra,* 127 Cal.App.4th at p. 1146, original italics, internal citations omitted.)

- "The concert of action theory of group liability 'may be used to impose liability on a person who

did not personally cause the harm to plaintiff, but whose " '[a]dvice or encouragement to act operates as a moral support to a tortfeasor[,] and if the act encouraged is known to be tortious[,] it has the same effect upon the liability of the adviser as participation or physical assistance. If the encouragement or assistance is a substantial factor in causing the resulting tort, the one giving it is himself a tortfeasor and is responsible for the consequences of the other's act.' " ' The doctrine is likened to aiding and abetting." (*Navarrete, supra,* 237 Cal.App.4th at p. 1286.)

- " 'Despite some conceptual similarities, civil liability for aiding and abetting the commission of a tort, which has no overlaid requirement of an independent duty, differs fundamentally from liability based on conspiracy to commit a tort. [Citations.] " '[A]iding-abetting focuses on whether a defendant knowingly gave "substantial assistance" to someone who performed wrongful conduct, not on whether the defendant agreed to join the wrongful conduct.' " ' " (*Stueve Bros. Farms, LLC v. Berger Kahn* (2013) 222 Cal.App.4th 303, 324 [166 Cal.Rptr.3d 116].)

- " '[W]hile aiding and abetting may not require a defendant to agree to join the wrongful conduct, it necessarily requires a defendant to reach a conscious decision to participate in tortious activity for the purpose of assisting another in performing a wrongful act. …' [Citation.] The aider and abetter's conduct need not, as 'separately considered,' constitute a breach of duty." (*American Master Lease LLC, supra,* 225 Cal.App.4th at pp. 1475–1476.)

- "Nor do we agree with [defendant]'s contention that there is no evidence she aided and abetted [tortfeasor]. Her claim is premised on the assertion that the law in California does not permit liability for aiding and abetting 'unintentional conduct'; that [plaintiff] alleged no intentional tort, only that [tortfeasor] acted negligently, and there is no evidence he intended to harm anyone. She argues, 'Even if [tortfeasor] inadvertently violated the law against an "exhibition of speed," which he did not, [defendant] could not be liable for aiding and abetting such unintentional conduct.' However, for purposes of joint liability under a concert of action theory, it suffices that [defendant] assist or encourage [tortfeasor]'s breach of a duty, which Vehicle Code section 23109 imposed upon him (and also upon her not to aid and abet [tortfeasor])." (*Navarrete, supra,* 237 Cal.App.4th at p. 1290.)

- "James too must be held as a defendant because, although he did not fire the fatal bullet, there is evidence (*which may or may not be sufficient to prove him liable at the trial*) creating a question for the trier of fact. This evidence indicates he was firing alternately with Vierra at the same mudhen, in the same line of fire and possibly tortiously. In other words (to paraphrase the Restatement …), the record permits a possibility James knew Vierra's conduct constituted a breach of duty owed Orser and that James was giving Vierra substantial 'assistance or encouragement'; also that this was substantial assistance to Vierra in a tortious result with James' own conduct, 'separately considered, constituting a breach of duty to' Orser.", (*Orser, supra,* 252 Cal.App.2d at p. 668, original italics; see also Rest. 2d Torts, § 876, Com. on Clause (b), Illustration 6.)

- "Because transferring funds in order to evade creditors constitutes an intentional tort, it logically follows that California common law should recognize liability for aiding and abetting a fraudulent transfer." (*Berger v. Varum* (2019) 35 Cal.App.5th 1013, 1025 [248 Cal.Rptr.3d 51].)

Secondary Sources

9 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 149, 150

1 Levy et al., California Torts, Ch. 9, *Civil Conspiracy, Concerted Action, and Related Theories of Joint Liability,* §§ 9.01, 9.02 (Matthew Bender)

13 California Forms of Pleading and Practice, Ch. 126, *Conspiracy*, §§ 126.10, 126.11 (Matthew Bender)

4 California Points and Authorities, Ch. 46, *Conspiracy*, § 46.04 (Matthew Bender)

3705. Existence of "Agency" Relationship Disputed

[*Name of plaintiff*] claims that [*name of agent*] was [*name of defendant*]'s agent and that [*name of defendant*] is therefore responsible for [*name of agent*]'s conduct.

If [*name of plaintiff*] proves that [*name of defendant*] gave [*name of agent*] authority to act on [his/her/its] behalf, then [*name of agent*] was [*name of defendant*]'s agent. This authority may be shown by words or may be implied by the parties' conduct. This authority cannot be shown by the words of [*name of agent*] alone.

New September 2003; Revised November 2017

Directions for Use

This instruction should be used when the factual setting involves a relationship other than employment, such as homeowner-real estate agent or franchisor-franchisee. For an instruction for use for employment, give CACI No. 3704, *Existence of "Employee" Status Disputed*. The secondary factors (a) through (j) in CACI No. 3704 may be given with this instruction also. (See *Secci v. United Independent Taxi Drivers, Inc.* (2017) 8 Cal.App.5th 846, 855 [214 Cal.Rptr.3d 379].)

Sources and Authority

- "Agent" Defined. Civil Code section 2295.

- "[A] principal who personally engages in no misconduct may be vicariously liable for the tortious act committed by an agent within the course and scope of the agency. [Citation.] Agency is the relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act . . . . [Citation.] While the existence of an agency relationship is 'typically a question of fact, when ' "the evidence is susceptible of but a single inference," ' summary judgment may be appropriate." *Barenborg v. Sigma Alpha Epsilon Fraternity* (2019) 33 Cal.App.5th 70, 85 [244 Cal.Rptr.3d 680], internal citations omitted.)

- " ' "The existence of an agency is a factual question within the province of the trier of fact whose determination may not be disturbed on appeal if supported by substantial evidence. [Citation.]" [Citation.] Inferences drawn from conflicting evidence by the trier of fact are generally upheld. [Citation.]' 'Only when the essential facts are not in conflict will an agency determination be made as a matter of law. [Citation.]' " (*Secci, supra,* 8 Cal.App.5th at p. 854.)

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

- One who performs a mere favor for another without being subject to any legal duty of service and without assenting to right of control is not an agent, because the agency relationship rests upon

mutual consent. (*Hanks v. Carter & Higgins of Cal., Inc.* (1967) 250 Cal.App.2d 156, 161 [58 Cal.Rptr. 190].)

- An agency must rest upon an agreement. (*D'Acquisto v. Evola* (1949) 90 Cal.App.2d 210, 213 [202 P.2d 596].) "Agency may be implied from the circumstances and conduct of the parties." (*Michelson v. Hamada* (1994) 29 Cal.App.4th 1566, 1579 [36 Cal.Rptr.2d 343], internal citations omitted.)

- "Whether a person performing work for another is an agent or an independent contractor depends primarily upon whether the one for whom the work is done has the legal right to control the activities of the alleged agent. ... It is not essential that the right of control be exercised or that there be actual supervision of the work of the agent. The existence of the right of control and supervision establishes the existence of an agency relationship." (*Malloy v. Fong* (1951) 37 Cal.2d 356, 370 [232 P.2d 241], internal citations omitted.)

- "For an agency relationship to exist, the asserted principal must have a sufficient right to control the relevant aspect of the purported agent's day-to-day operations." (*Barenborg, supra,* 33 Cal.App.5th at p. 85.)

- When the principal controls only the results of the work and not the means by which it is accomplished, an independent contractor relationship is established. (*White v. Uniroyal, Inc.* (1984) 155 Cal.App.3d 1, 25 [202 Cal.Rptr. 141], overruled on other grounds in *Soule v. GM Corp.* (1994) 8 Cal.4th 548 [34 Cal.Rptr.2d 607, 882 P.2d 298].)

- " '[W]hether an agency relationship has been created or exists is determined by the relation of the parties as they in fact exist by agreement or acts [citation], and the primary right of control is particularly persuasive. [Citations.] Other factors may be considered to determine if an independent contractor is acting as an agent, including: whether the "principal" and "agent" are engaged in distinct occupations; the skill required to perform the "agent's" work; whether the "principal" or "agent" supplies the workplace and tools; the length of time for completion; whether the work is part of the 'principal's" regular business; and whether the parties intended to create an agent/principal relationship. [Citation.]' " (*Secci, supra,* 8 Cal.App.5th at p. 855.)

- "[T]here is substantial overlap in the factors for determining whether one is an employee or an agent." (*Jackson v. AEG Live, LLC* (2015) 233 Cal.App.4th 1156, 1184 [183 Cal.Rptr.3d 384].)

- "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.)

- "[Defendant] argues that when public regulations require a company to exert control over its independent contractors, evidence of that government-mandated control cannot support a finding of vicarious liability based on agency. This argument conflicts with the policy behind the regulated hirer exception, which emphasizes that the effectiveness of public regulations 'would be impaired if the carrier could circumvent them by having the regulated operations conducted by an independent

contractor.' " (*Secci, supra,* 8 Cal.App.5th at pp. 860–861.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 92–96

Greenwald, et al., California Practice Guide: Real Property Transactions, Ch. 2-C *Broker's Relationship and Obligations to Principal and Third Parties*, ¶ 2:120 et seq. (The Rutter Group)

Haning, et al., California Practice Guide: Personal Injury, Ch. 2(II)-A, *Theories of Recovery*, ¶ 2:600, 2:611 (The Rutter Group)

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, § 8.04 (Matthew Bender)

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

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

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent*, § 427.12 (Matthew Bender)

18 California Points and Authorities, Ch. 182, *Principal and Agent*, § 182.30 et seq. (Matthew Bender)

1 California Civil Practice: Torts, §§ 3:26–3:27 (Thomson Reuters)

3900. Introduction to Tort Damages—Liability Contested

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

The amount of damages must include an award for each item of harm that was caused by [*name of defendant*]'s wrongful conduct, even if the particular harm could not have been anticipated.

[*Name of plaintiff*] does not have to prove the exact amount of damages that will provide reasonable compensation for the harm. However, you must not speculate or guess in awarding damages.

[The following are the specific items of damages claimed by [*name of plaintiff*]:]

[*Insert applicable instructions on items of damage.***]**

New September 2003

Directions for Use

Read last bracketed sentence and insert instructions on items of damages here only if CACI No. 3902, *Economic and Noneconomic Damages*, is not being read. If CACI No. 3902 is not used, this instruction should be followed by applicable instructions (see CACI Nos. 3903A through 3903N, and 3905A) concerning the items of damage claimed by the plaintiff. These instructions should be inserted into this instruction as sequentially numbered items.

Sources and Authority

- Measure of Tort Damages. Civil Code section 3333.
- Recovery of Damages Generally. Civil Code section 3281.
- Recovery of Future Damages. Civil Code section 3283.
- Damages Must Be Reasonable. Civil Code section 3359.
- " 'Damages' are monetary compensation awarded to parties who suffer detriment for the unlawful act or omission of another; they are assessed by a court against wrongdoers for the commission of a legal wrong of a private nature." (*Meister v. Mensinger* (2014) 230 Cal.App.4th 381, 396 [178 Cal.Rptr.3d 604].)
- Under Civil Code section 3333 "[t]ort damages are awarded to compensate a plaintiff for all of the damages suffered as a legal result of the defendant's wrongful conduct." (*North American Chemical Co. v. Superior Court* (1997) 59 Cal.App.4th 764, 786 [69 Cal.Rptr.2d 466], italics omitted.)

- "Whatever its measure in a given case, it is fundamental that 'damages which are speculative, remote, imaginary, contingent, or merely possible cannot serve as a legal basis for recovery.' However, recovery is allowed if claimed benefits are reasonably certain to have been realized but for the wrongful act of the opposing party." (*Piscitelli v. Friedenberg* (2001) 87 Cal.App.4th 953, 989 [105 Cal.Rptr.2d 88], internal citations omitted.)

- "In general, one who has been tortiously injured is entitled to be compensated for the harm and the injured party must establish 'by proof the extent of the harm and the amount of money representing adequate compensation with as much certainty as the nature of the tort and the circumstances permit.' However, '[t]here is no general requirement that the injured person should prove with like definiteness the extent of the harm that he has suffered as a result of the tortfeasor's conduct. It is desirable that responsibility for harm should not be imposed until it has been proved with reasonable certainty that the harm resulted from the wrongful conduct of the person charged. It is desirable, also, that there be definiteness of proof of the amount of damage as far as is reasonably possible. It is even more desirable, however, that an injured person not be deprived of substantial compensation merely because he cannot prove with complete certainty the extent of harm he has suffered.' " (*Clemente v. State of California* (1985) 40 Cal.3d 202, 219 [219 Cal.Rptr. 445, 707 P.2d 818], internal citations omitted.)

- " 'Where the *fact* of damages is certain, the amount of damages need not be calculated with absolute certainty.' 'The law requires only that some reasonable basis of computation of damages be used, and the damages may be computed even if the result reached is an approximation.… .' " (*Meister, supra,* 230 Cal.App.4th at pp. 396−397, original italics, internal citation omitted.)

- "If plaintiff's inability to prove his damages with certainty is due to defendant's actions, the law does not generally require such proof." (*Clemente, supra,* 40 Cal.3d at p. 219, internal citations omitted.)

- "While a defendant is liable for all the damage that his tortuous act proximately causes to the plaintiff, regardless of whether or not it could have been anticipated, nevertheless a proximate causal connection must still exist between the damage sustained by the plaintiff and the defendant's wrongful act or omission, and the detriment inflicted on the plaintiff must still be the natural and probable result of the defendant's conduct." (*Chaparkas v. Webb* (1960) 178 Cal.App.2d 257, 260 [2 Cal.Rptr. 879], internal citations omitted.)

- "The issue here is whether [defendant]—separate from other legal and practical reasons it had to prevent injury of any kind to the public—had a tort duty to guard against negligently causing what we and others have called 'purely economic loss[es].' We use that term as a shorthand for 'pecuniary or commercial loss that does not arise from actionable physical, emotional or reputational injury to persons or physical injury to property.' And although [defendant] of course had a tort duty to guard against the latter kinds of injury, we conclude it had no tort duty to guard against purely economic losses." (*Southern California Gas Leak Cases* (2019) 7 Cal.5th 391, 398 [247 Cal.Rptr.3d 632, 441 P.3d 881], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1548–1552, 1555–1558

California Tort Damages (Cont.Ed.Bar) Bodily Injury, §§ 1.2-1.6

4 Levy et al., California Torts, Ch. 50, *Damages*, § 50.02 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages,* § 177.41 (Matthew Bender)

1 California Civil Practice: Torts, § 5:1 (Thomson Reuters)

3903N. Lost Profits (Economic Damage)

[*Insert number, e.g.,* "13."**] Lost profits.**

To recover damages for lost profits, [*name of plaintiff***] must prove it is reasonably certain [he/she/it] would have earned profits but for [***name of defendant***]'s conduct.**

To decide the amount of damages for lost profits, you must determine the gross amount [*name of plaintiff***] would have received but for [***name of defendant***]'s conduct and then subtract from that amount the expenses [including the value of the [***specify categories of evidence, such as labor/materials/rents/all expenses/interest of the capital employed***]] [***name of plaintiff***] would have had if [***name of defendant***]'s conduct had not occurred.**

The amount of the lost profits need not be calculated with mathematical precision, but there must be a reasonable basis for computing the loss.

New September 2003

Directions for Use

This instruction is not intended for personal injury cases. Instead, use CACI No. 3903C, *Past and Future Lost Earnings (Economic Damage)*. (See *Pretzer v. California Transit Co.* (1930) 211 Cal. 202, 207–208 [294 P. 382].)

Insertion of specified types of costs to be deducted from gross earnings is optional, depending on the facts of the case. Other types of costs may be inserted as appropriate.

Sources and Authority

- "The measure of damages in this state for the commission of a tort, as provided by statute, is that amount which will compensate the plaintiff for all detriment sustained by him as the proximate result of the defendant's wrong, regardless of whether or not such detriment could have been anticipated by the defendant. It is well established in California, moreover, that such damages may include loss of anticipated profits where an established business has been injured." (*Fibreboard Paper Products Corp. v. East Bay Union of Machinists, Local 1304, United Steelworkers of America, AFL-CIO* (1964) 227 Cal.App.2d 675, 702 [39 Cal.Rptr. 64], internal citations omitted.)

- "In business cases, damages are based on net profits, as opposed to gross revenue." (*Meister v. Mensinger* (2014) 230 Cal.App.4th 381, 397 [178 Cal.Rptr.3d 604].)

- " 'Lost profits, if recoverable, are more commonly special rather than general damages … , and subject to various limitations. Not only must such damages be pled with particularity [citation], but they must also be proven to be certain both as to their occurrence and their extent, albeit not with "mathematical precision." ' " (*Greenwich S.F., LLC v. Wong* (2010) 190 Cal.App.4th 739, 754 [118

Cal.Rptr.3d 531].)

- " '[T]he general principle [is] that damages for the loss of prospective profits are recoverable where the evidence makes reasonably certain their occurrence and extent.' Such damages must 'be proven to be certain both as to their occurrence and their extent, albeit not with 'mathematical precision.' " (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 773−774 [149 Cal.Rptr.3d 614, 288 P.3d 1237]), internal citation omitted.)

- "It is for the jury to determine the probabilities as to whether damages are reasonably certain to occur in any particular case." (*Asahi Kasei Pharma Corp. v. Actelion Ltd.* (2013) 222 Cal.App.4th 945, 972 [166 Cal.Rptr.3d 134].)

- "It is enough to demonstrate a reasonable probability that profits would have been earned except for the defendant's conduct. The plaintiff has the burden to produce the best evidence available in the circumstances to attempt to establish a claim for loss of profits." (*S. C. Anderson, Inc. v. Bank of America N.T. & S.A.* (1994) 24 Cal.App.4th 529, 536 [30 Cal.Rptr.2d 286], internal citations omitted.)

- "Historical data, such as past business volume, supply an acceptable basis for ascertaining lost future profits. [Citations.] In some instances, lost profits may be recovered where plaintiff introduces evidence of the profits lost by similar businesses operating under similar conditions. [Citations.]" (*Sargon Enterprises, Inc., supra,* 55 Cal.4th at p. 773.)

- "Regarding lost business profits, the cases have generally distinguished between established and unestablished businesses. '[W]here the operation of an established business is prevented or interrupted, as by a … breach of contract … , damages for the loss of prospective profits that otherwise might have been made from its operation are generally recoverable for the reason that their occurrence and extent may be ascertained with reasonable certainty from the past volume of business and other provable data relevant to the probable future sales.' " (*Sargon Enterprises, Inc., supra,* 55 Cal.4th at p. 774.)

- "[T]he lost profit inquiry is always speculative to some degree. Inevitably, there will always be an element of uncertainty. Courts must not be too quick to exclude expert evidence as speculative merely because the expert cannot say with absolute certainty what the profits would have been. Courts must not eviscerate the possibility of recovering lost profits by too broadly defining what is too speculative. A reasonable certainty only is required, not absolute certainty." (*Orozco v. WPV San Jose, LLC* (2019) 36 Cal.App.5th 375, 397–398 [248 Cal.Rptr.3d 623].)

- " 'On the other hand, where the operation of an unestablished business is prevented or interrupted, damages for prospective profits that might otherwise have been made from its operation are not recoverable for the reason that their occurrence is uncertain, contingent and speculative. [Citations.] … But although generally objectionable for the reason that their estimation is conjectural and speculative, anticipated profits dependent upon future events are allowed where their nature and occurrence can be shown by evidence of reasonable reliability.' " (*Sargon Enterprises, Inc., supra,* 55 Cal.4th at p. 774.)

- "[I]f the business is … new … or … speculative … , damages may be established with reasonable certainty with the aid of expert testimony, economic and financial data, market surveys and analyses, business records of similar enterprises, and the like." (*Meister, supra,* 230 Cal.App.4th at p. 397.)

- "In some instances, lost profits may be recovered where plaintiff introduces evidence of the profits lost by similar businesses operating under similar conditions. In either case, recovery is limited to net profits." (*Berge v. International Harvester Co.* (1983) 142 Cal.App.3d 152, 161–162 [190 Cal.Rptr. 815], internal citations omitted.)

- "Even in cases of unestablished businesses, while a plaintiff may base its lost profits on the experience of comparable businesses, there is no requirement that it must do so." (*Orozco, supra,* 36 Cal.App.5th at p. 399.)

- "[T]he case law requires reasonable certainty, not absolute certainty, and once the occurrence of lost profits is established a plaintiff has greater leeway in establishing the extent of lost profits, particularly if the defendant was shown to have prevented the relevant data from being collected through its wrongful behavior." (*Asahi Kasei Pharma Corp., supra,* 222 Cal.App.4th at p. 975.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1729

Hanning et al., California Practice Guide: Personal Injury, Ch. 3-C, *Specific Items Of Compensatory Damages*, ¶¶ 3:66–3:233 (The Rutter Group)

4 Levy et al., California Torts, Ch. 52, *Medical Expenses and Economic Loss*, §§ 52.12, 52.37 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages,* § 177.44 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort,* § 64.27 (Matthew Bender)

3905A. Physical Pain, Mental Suffering, and Emotional Distress (Noneconomic Damage)

[*Insert number, e.g.,* "1."**] [Past] [and] [future] [physical pain/mental suffering/loss of enjoyment of life/disfigurement/physical impairment/inconvenience/grief/anxiety/humiliation/emotional distress/[***insert other damages***]].**

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

[To recover for future [*insert item of pain and suffering***], [***name of plaintiff***] must prove that [he/she] is reasonably certain to suffer that harm.**

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

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

Directions for Use

Insert the bracketed terms that best describe the damages claimed by the plaintiff.

If future noneconomic damages are sought, include the last two paragraphs. Do not instruct the jury to further reduce the award to present cash value. (See CACI No. 3904A, *Present Cash Value,* and CACI No. 3904B, *Use of Present-Value Tables*.) 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].) Include the last sentence only if the plaintiff is claiming both future economic and noneconomic damages.

Sources and Authority

- "One of the most difficult tasks imposed on a fact finder is to determine the amount of money the plaintiff is to be awarded as compensation for pain and suffering. The inquiry is inherently subjective and not easily amenable to concrete measurement." (*Pearl v. City of Los Angeles* (2019) 36 Cal.App.5th 475, 491 [248 Cal.Rptr.3d 508], internal citations omitted.)

- "In general, courts have not attempted to draw distinctions between the elements of 'pain' on the one hand, and 'suffering' on the other; rather, the unitary concept of 'pain and suffering' has served as a convenient label under which a plaintiff may recover not only for physical pain but for fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation, indignity, embarrassment, apprehension, terror or ordeal. Admittedly these terms refer to subjective states, representing a detriment which can be translated into monetary loss only with great difficulty. But the detriment, nevertheless, is a genuine one that requires compensation, and the issue generally must be resolved by

the 'impartial conscience and judgment of jurors who may be expected to act reasonably, intelligently and in harmony with the evidence.' " (*Capelouto v. Kaiser Foundation Hospitals* (1972) 7 Cal.3d 889, 892–893 [103 Cal.Rptr. 856, 500 P.2d 880], internal citations and footnote omitted.)

- "[N]oneconomic damages do not consist of only emotional distress and pain and suffering. They also consist of such items as invasion of a person's bodily integrity (i.e., the fact of the injury itself), disfigurement, disability, impaired enjoyment of life, susceptibility to future harm or injury, and a shortened life expectancy." (*Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.5th 276, 300 [213 Cal.Rptr.3d 82].)

- " ' " '[T]here is no fixed or absolute standard by which to compute the monetary value of emotional distress,' " ' and a ' "jury is entrusted with vast discretion in determining the amount of damages to be awarded … ." [Citation.]' " (*Plotnik v. Meihaus* (2012) 208 Cal.App.4th 1590, 1602 [146 Cal.Rptr.3d 585].

- "Compensatory damages may be awarded for bodily harm without proof of pecuniary loss. The fact that there is no market price calculus available to measure the amount of appropriate compensation does not render such a tortious injury noncompensable. 'For harm to body, feelings or reputation, compensatory damages reasonably proportioned to the intensity and duration of the harm can be awarded without proof of amount other than evidence of the nature of the harm. There is no direct correspondence between money and harm to the body, feelings or reputation. There is no market price for a scar or for loss of hearing since the damages are not measured by the amount for which one would be willing to suffer the harm. The discretion of the judge or jury determines the amount of recovery, the only standard being such an amount as a reasonable person would estimate as fair compensation.' " (*Duarte v. Zachariah* (1994) 22 Cal.App.4th 1652, 1664–1665 [28 Cal.Rptr.2d 88], internal citations omitted.)

- "The general rule of damages in tort is that the injured party may recover for all detriment caused whether it could have been anticipated or not. In accordance with the general rule, it is settled in this state that mental suffering constitutes an aggravation of damages when it naturally ensues from the act complained of, and in this connection mental suffering includes nervousness, grief, anxiety, worry, shock, humiliation and indignity as well as physical pain." (*Crisci v. The Security Insurance Co. of New Haven, Connecticut* (1967) 66 Cal.2d 425, 433 [58 Cal.Rptr. 13, 426 P.2d 173], internal citations omitted.)

- "We note that there may be certain cases where testimony of an expert witness would be necessary to support all or part of an emotional distress damages claim. For example, expert testimony would be required to the extent a plaintiff's damages are alleged to have arisen from a psychiatric or psychological disorder caused or made worse by a defendant's actions and the subject matter is beyond common experience. We are not addressing such a case here. In this case, the emotional distress damages arose from feelings of anxiety, pressure, betrayal, shock, and fear of others to which [plaintiff] herself could and did testify. Expert testimony was not required." (*Knutson v. Foster* (2018) 25 Cal.App.5th 1075, 1099 [236 Cal.Rptr.3d 473].)

- "The law in this state is that the testimony of a single person, *including the plaintiff,* may be sufficient to support an award of emotional distress damages." (*Knutson, supra,* 25 Cal.App.5th at p. 1096,

original italics.)

- "[W]here a plaintiff has undergone surgery in which a herniated disc is removed and a metallic plate inserted, and the jury has expressly found that defendant's negligence was a cause of plaintiff's injury, the failure to award any damages for pain and suffering results in a damage award that is inadequate as a matter of law." (*Dodson v. J. Pacific, Inc.* (2007) 154 Cal.App.4th 931, 933 [64 Cal.Rptr.3d 920].)

- " 'To entitle a plaintiff to recover present damages for apprehended future consequences, there must be evidence to show such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury.' " (*Bellman v. San Francisco High School Dist.* (1938) 11 Cal.2d 576, 588 [81 P.2d 894], internal citation omitted.)

- "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.)

- "[R]ecovery for emotional distress caused by injury to property is permitted only where there is a preexisting relationship between the parties or an intentional tort." (*Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182, 203 [147 Cal.Rptr.3d 41].)

- "[W]e uphold both the economic and emotional distress damages plaintiffs recovered for trespass to personal property arising from [defendant]'s act of intentionally striking [plaintiff's dog] with a bat." (*Plotnik, supra,* 208 Cal.App.4th at p. 1608 [under claim for trespass to chattels].)

- "Furthermore, 'the *negligent* infliction of emotional distress—anxiety, worry, discomfort—is compensable without physical injury in cases involving the tortious interference with *property rights* [citations].' Thus, if [defendant]'s failure to repair the premises constitutes a tort grounded on negligence, appellant is entitled to prove his damages for emotional distress because the failure to repair must be deemed to constitute an injury to his tenancy interest (right to habitable premises), which is a species of property." (*Erlach v. Sierra Asset Servicing, LLC* (2014) 226 Cal.App.4th 1281, 1299 [173 Cal.Rptr.3d 159], original italics, internal citation omitted.)

- "[U]nless the defendant has assumed a duty to plaintiff in which the emotional condition of the plaintiff is an object, recovery is available only if the emotional distress arises out of the defendant's breach of some other legal duty and the emotional distress is proximately caused by that breach of duty. Even then, with rare exceptions, a breach of the duty must threaten physical injury, not simply damage to property or financial interests." (*Wilson v. Southern California Edison Co.* (2015) 234 Cal.App.4th 123, 156 [184 Cal.Rptr.3d 26].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1850–1854

Haning et al., California Practice Guide: Personal Injury, Ch. 3-C, *Specific Items Of Compensatory Damages*, ¶ 3:140 et seq. (The Rutter Group)

California Tort Damages (Cont.Ed.Bar) Bodily Injury, §§ 1.68–1.74

4 Levy et al., California Torts, Ch. 51, *Pain and Suffering*, §§ 51.01–51.14 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.44 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort*, § 64.145 et seq. (Matthew Bender)

1 California Civil Practice Torts, § 5:10 (Thomson Reuters)

3924. No Punitive Damages

You must not include in your award any damages to punish or make an example of [*name of defendant*]. Such damages would be punitive damages, and they cannot be a part of your verdict. You must award only the damages that fairly compensate [*name of plaintiff*] for [his/her/its] loss.

New September 2003

Directions for Use

Do not use this instruction if punitive damages are being sought in the phase of the trial in which these instructions are given.

Sources and Authority

- No Governmental Liability for Punitive Damages. Government Code section 818.
- "Punitive damages are not permitted in wrongful death actions." (*Cortez v. Macias* (1980) 110 Cal.App.3d 640, 657 [167 Cal.Rptr. 905].)
- "[P]unitive damages are prohibited in an action against a public entity." (*Pearl v. City of Los Angeles* (2019) 36 Cal.App.5th 475, 486 [248 Cal.Rptr.3d 508].)
- "The punitive damages theory cannot be predicated on the breach of contract cause of action without an underlying tort." (*Palmer v. Ted Stevens Honda, Inc.* (1987) 193 Cal.App.3d 530, 536 [238 Cal.Rptr. 363], internal citations omitted.)
- "An award of punitive damages is not supported by a verdict based on breach of contract, even where the defendant's conduct in breaching the contract was wilful, fraudulent, or malicious. Even in those cases in which a separate tort action is alleged, if there is 'but one verdict based upon contract' a punitive damage award is improper." (*Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 960 [17 Cal.Rptr.2d 242], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1580

California Tort Damages (Cont.Ed.Bar) Punitive Damages, § 14.3

4 Levy et al., California Torts, Ch. 54, *Punitive Damages*, §§ 54.05, 54.08 (Matthew Bender)

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

4200. Actual Intent to Hinder, Delay, or Defraud a Creditor—Essential Factual Elements (Civ. Code, § 3439.04(a)(1))

[*Name of plaintiff***] claims [he/she/it] was harmed because [***name of debtor***] [transferred property/incurred an obligation] to [***name of defendant***] in order to avoid paying a debt to [***name of plaintiff***]. [This is called "actual fraud."] To establish this claim against [***name of defendant***], [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] has a right to payment from [***name of debtor***] for [***insert amount of claim***];**

2. **That [***name of debtor***] [transferred property/incurred an obligation] to [***name of defendant***];**

3. **That [***name of debtor***] [transferred the property/incurred the obligation] with the intent to hinder, delay, or defraud one or more of [his/her/its] creditors;**

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

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

To prove intent to hinder, delay, or defraud creditors, it is not necessary to show that [*name of debtor***] had a desire to harm [his/her/its] creditors. [***Name of plaintiff***] need only show that [***name of debtor***] intended to remove or conceal assets to make it more difficult for [his/her/its] creditors to collect payment.**

[It does not matter whether [*name of plaintiff***]'s right to payment arose before or after [***name of debtor***] [transferred property/incurred an obligation].]**

New June 2006; Revised June 2013, June 2016

Directions for Use

Under the Uniform Voidable Transactions Act (formerly the Uniform Fraudulent Transfer Act), a transfer made or obligation incurred by a debtor is voidable as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation with actual intent to hinder, delay, or defraud a creditor. (Civ. Code, § 3439.04(a)(1).)

This instruction assumes the defendant is a transferee of the original debtor. Read the bracketed second sentence if the plaintiff is asserting claims for both actual and constructive fraud. Read the last bracketed sentence if the plaintiff's alleged claim arose after the defendant's property was transferred or the obligation was incurred.

Note that in element 3, only the debtor-transferor's intent is required. (See Civ. Code, § 3439.04(a)(1).)

The intent of the transferee is irrelevant. However, a transferee who receives the property both in good faith and for a reasonably equivalent value has an affirmative defense. (See Civ. Code, § 3439.08(a); CACI No. 4207, *Affirmative Defense—Good Faith*.)

If the case concerns an incurred obligation, users may wish to insert a brief description of the obligation in this instruction, e.g., "a lien on the property."

Courts have held that there is a right to a jury trial whenever the remedy sought is monetary relief, including even the return of a "determinate sum of money." (*Wisden v. Superior Court* (2004) 124 Cal.App.4th 750, 757 [21 Cal.Rptr.3d 523].) If the only remedy sought is the return of a particular nonmonetary asset, the action is an equitable action. However, even if a specific nonmonetary asset is involved, a conspiracy claim or an action against any party other than the transferee who possesses the asset (e.g., "the person for whose benefit the transfer was made") (Civ. Code, § 3439.08(b)(1)(A)) necessarily would seek monetary relief and give rise to a right to a jury trial.

Note that there may be a split of authority regarding the appropriate standard of proof of intent. The Sixth District Court of Appeal has stated: "Actual intent to defraud must be shown by clear and convincing evidence. (*Hansford v. Lassar* (1975) 53 Cal.App.3d 364, 377 [125 Cal.Rptr. 804].)" (*Reddy v. Gonzalez* (1992) 8 Cal.App.4th 118, 123 [10 Cal.Rptr.2d 58].) Note that the case relied on by the *Hansford* court (*Aggregates Assoc., Inc. v. Packwood* (1962) 58 Cal.2d 580 [25 Cal.Rptr. 545, 375 P.2d 425]) was disapproved by the Supreme Court in *Liodas v. Sahadi* (1977) 19 Cal.3d 278, 291–292 [137 Cal.Rptr. 635, 562 P.2d 316]. The Fourth District Court of Appeal, Division Two, disagreed with *Reddy*: "In determining whether transfers occurred with fraudulent intent, we apply the preponderance of the evidence test, even though we recognize that some courts believe that the test requires clear and convincing evidence." (*Gagan v. Gouyd* (1999) 73 Cal.App.4th 835, 839 [86 Cal.Rptr.2d 733], internal citations omitted, disapproved on other grounds in *Mejia v. Reed* (2003) 31 Cal.4th 657, 669, fn. 2 [3 Cal.Rptr.3d 390, 74 P.3d 166].)

Sources and Authority

- Uniform Voidable Transactions Act. Civil Code section 3439 et seq.
- "Claim" Defined for UVTA. Civil Code section 3439.01(b).
- Creditor Remedies Under UVTA. Civil Code section 3439.07.
- "The UFTA permits defrauded creditors to reach property in the hands of a transferee." (*Mejia, supra,* 31 Cal.4th at p. 663.)
- "The UVTA, formerly known as the Uniform Fraudulent Transfer Act, 'permits defrauded creditors to reach property in the hands of a transferee.' 'A fraudulent conveyance is a transfer by the debtor of property to a third person undertaken with the intent to prevent a creditor from reaching that interest to satisfy its claim.' … The purpose of the voidable transactions statute is ' "to prevent debtors from placing property which legitimately should be available for the satisfaction of demands of creditors beyond their reach … ." ' " (*Lo v. Lee* (2018) 24 Cal.App.5th 1065, 1071 [234 Cal.Rptr.3d 824], internal citations omitted.)

- "Under the UFTA, 'a transfer of assets made by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer, if the debtor made the transfer (1) with an actual intent to hinder, delay or defraud any creditor, or (2) without receiving reasonably equivalent value in return, and either (a) was engaged in or about to engage in a business or transaction for which the debtor's assets were unreasonably small, or (b) intended to, or reasonably believed, or reasonably should have believed, that he or she would incur debts beyond his or her ability to pay as they became due.' " (*Hasso v. Hapke* (2014) 227 Cal.App.4th 107, 121−122 [173 Cal.Rptr.3d 356], internal citations omitted.)

- "[A] conveyance will not be considered fraudulent if the debtor merely transfers property which is otherwise exempt from liability for debts. That is, because the theory of the law is that it is fraudulent for a judgment debtor to divest himself of assets against which the creditor could execute, if execution by the creditor would be barred while the property is in the possession of the debtor, then the debtor's conveyance of that exempt property to a third person is not fraudulent." (*Yaesu Electronics Corp. v. Tamura* (1994) 28 Cal.App.4th 8, 13 [33 Cal.Rptr.2d 283].)

- "A transfer is not voidable against a person 'who took in good faith and for a reasonably equivalent value or against any subsequent transferee.' " (*Filip, supra,* 129 Cal.App.4th at p. 830, internal citations omitted.)

- " '[T]he UFTA is not the exclusive remedy by which fraudulent conveyances and transfers may be attacked'; they 'may also be attacked by, as it were, a common law action.' " (*Wisden, supra,* 124 Cal.App.4th- at p. 758, internal citation omitted.)

- "Case law has established the remedies specified in the UVTA are cumulative and not the exclusive remedy for fraudulent conveyances. 'They may also be attached by, as it were, a common law action.' By its terms the UVTA was intended to supplement, not replace, common law principles relating to fraud." (*Berger v. Varum* (2019) 35 Cal.App.5th 1013, 1019 [248 Cal.Rptr.3d 51].)

- "[E]ven if the Legislature intended that all fraudulent conveyance claims be brought under the UFTA, the Legislature could not thereby dispense with a right to jury trial that existed at common law when the California Constitution was adopted." (*Wisden, supra,* 124 Cal.App.4th at p. 758, internal citation omitted.)

- "Whether a conveyance was made with fraudulent intent is a question of fact, and proof often consists of inferences from the circumstances surrounding the transfer." (*Filip, supra,* 129 Cal.App.4th at p. 834, internal citations omitted.)

- "In order to constitute intent to defraud, it is not necessary that the transferor act maliciously with the desire of causing harm to one or more creditors." (*Economy Refining & Service Co. v. Royal Nat'l Bank* (1971) 20 Cal.App.3d 434, 441 [97 Cal.Rptr. 706].)

- "There is no minimum number of factors that must be present before the scales tip in favor of finding of actual intent to defraud. This list of factors is meant to provide guidance to the trial court, not compel a finding one way or the other." (*Filip, supra,* 129 Cal.App.4th at p. 834.)

- " 'A well-established principle of the law of fraudulent transfers is, ' "A transfer in fraud of creditors may be attacked only by one who is injured thereby. Mere intent to delay or defraud is not sufficient; injury to the creditor must be shown affirmatively. In other words, prejudice to the plaintiff is essential." ' " (*Berger, supra,* 35 Cal.App.5th at p. 1020.)

- "It cannot be said that a creditor has been injured unless the transfer puts beyond [her] reach property [she] otherwise would be able to subject to the payment of [her] debt.'–" (*Mehrtash v. Mehrtash* (2001) 93 Cal.App.4th 75, 80 [112 Cal.Rptr.2d 802], internal citations omitted.)

- "[G]ranting [plaintiff judgment creditor] an additional judgment against [defendant judgment debtor] under the UFTA for … 'the amount transferred here to avoid paying part of his underlying judgment, *would in effect allow [him] to recover more than the underlying judgment,* which the [UFTA] does not allow.' (Italics added.) We thus conclude that because [plaintiff] obtained a judgment in the prior action for the damages [defendant] caused him, the principle against double recovery for the same harm bars him from obtaining a second judgment against her under the UFTA for a portion of those same damages." (*Renda v. Nevarez* (2014) 223 Cal.App.4th 1231, 1238 [167 Cal.Rptr.3d 874], original italics.)

- "Certain cases, while not awarding consequential damages, have recognized the availability of such damages." (*Berger, supra,* 35 Cal.App.5th at p. 1021.)

Secondary Sources

8 Witkin, California Procedure (5th ed. 2008) Enforcement of Judgment, § 495 et seq.

Ahart, California Practice Guide: Enforcing Judgments & Debts, Ch. 3-C, *Prejudgment Collection—Prelawsuit Considerations*, ¶ 3:291 et seq. (The Rutter Group)

Wiseman & Reese, California Practice Guide: Civil Procedure Before Trial Claims & Defenses, Ch. 5(III)-B, *Fraud--Fraudulent Transfers--Elements of Claim*, ¶ 5:528 (The Rutter Group)

23 California Forms of Pleading and Practice, Ch. 270, *Fraudulent Conveyances*, § 270.40 (Matthew Bender)

1 Goldsmith et al., Matthew Bender Practice Guide: California Debt Collection and Enforcement of Judgments, Ch. 4, *Fraudulent Transfers*, 4.05

4700. Consumers Legal Remedies Act—Essential Factual Elements (Civ. Code, § 1770)

[*Name of plaintiff***] claims that [***name of defendant***] engaged in unfair methods of competition and unfair or deceptive acts or practices in a transaction that resulted, or was intended to result, in the sale or lease of goods or services to a consumer, and that [***name of plaintiff***] was harmed by [***name of defendant***]'s violation. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] acquired, or sought to acquire, by purchase or lease, [***specify product or service***] for personal, family, or household purposes;**

2. **That [***name of defendant***] [***specify one or more prohibited practices from Civ. Code, § 1770(a), e.g., represented that [product or service] had characteristics, uses, or benefits that it did not have***];**

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

4. **That [***name of plaintiff***]'s harm resulted from [***name of defendant***]'s conduct.**

[[*Name of plaintiff***]'s harm resulted from [***name of defendant***]'s conduct if [***name of plaintiff***] relied on [***name of defendant***]'s representation. To prove reliance, [***name of plaintiff***] need only prove that the representation was a substantial factor in [his/her] decision. [He/She] does not need to prove that it was the primary factor or the only factor in the decision.**

If [*name of defendant***]'s representation of fact was material, reliance may be inferred. A fact is material if a reasonable consumer would consider it important in deciding whether to buy or lease the [goods/services].]**

New November 2017

Directions for Use

Give this instruction for a claim under the Consumers Legal Remedies Act (CLRA).

The CLRA prohibits 27 distinct unfair methods of competition and unfair or deceptive acts or practices with regard to consumer transactions. (See Civ. Code, § 1770(a).) In element 2, insert the prohibited practice or practices at issue in the case.

The last two optional paragraphs address the plaintiff's reliance on the defendant's conduct. Give these paragraphs in a case sounding in fraud. CLRA claims not sounding in fraud do not require reliance. (See, e.g., Civ. Code, § 1770(a)(19) [inserting an unconscionable provision in a contract].)

Many of the prohibited practices involve a misrepresentation made by the defendant. (See, e.g., Civ. Code, § 1770(a)(4) [using deceptive representations or designations of geographic origin in connection with goods or services].) In a misrepresentation claim, the plaintiff must have relied on the information given. (*Nelson v. Pearson Ford Co.* (2010) 186 Cal.App.4th 983, 1022 [112 Cal.Rptr.3d 607],

disapproved of on other grounds in *Raceway Ford Cases* (2016) 2 Cal.5th 161, 180 [211 Cal.Rptr.3d 244, 385 P.3d 397].) An element of reliance is that the information must have been material (or important). (*Collins v. eMachines, Inc.* (2011) 202 Cal.App.4th 249, 256 [134 Cal.Rptr.3d 588].)

Other prohibited practices involve a failure to disclose information. (See *Gutierrez v. Carmax Auto Superstores California* (2018) 19 Cal.App.5th 1234, 1258 [228 Cal.Rptr.3d 699]; see, e.g., Civ. Code, § 1770(a)(9) [advertising goods or services with intent not to sell them as advertised].) Reliance in concealment cases is best expressed in terms that the plaintiff would have behaved differently had the true facts been known. (See *Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1093 [23 Cal.Rptr.2d 101, 858 P.2d 568].) The next-to-last paragraph may be modified to express reliance in this manner. (See CACI No. 1907, *Reliance*.)

The CLRA provides for class actions. (See Civ. Code, § 1781.) In a class action, this instruction should be modified to state that only the named plaintiff's reliance on the defendant's representation must be proved. Class-wide reliance does not require a showing of actual reliance on the part of every class member. Rather, if all class members have been exposed to the same material misrepresentations, class-wide reliance will be inferred, unless rebutted by the defendant. (*Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 814–815 [94 Cal.Rptr. 796, 484 P.2d 964]; *Occidental Land, Inc. v. Superior Court* (1976) 18 Cal.3d 355, 362–363 [134 Cal.Rptr. 388, 556 P.2d 750]; *Massachusetts Mut. Life Ins. Co. v. Superior Court* (2002) 97 Cal.App.4th 1282, 1293 [119 Cal.Rptr.2d 190].) In class cases then, exposure and materiality are the only facts that need to be established to justify class-wide relief. Those determinations are a part of the class certification analysis and will, therefore, be within the purview of the court.

Sources and Authority

- Consumers Legal Remedies Act: Prohibited Practices. Civil Code section 1770(a).
- Consumers Legal Remedies Act: Private Cause of Action. Civil Code section 1780(a).
- " 'The CLRA makes unlawful, in Civil Code section 1770, subdivision (a) … various "unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer." ' The CLRA proscribes 27 specific acts or practices." (*Rubenstein v. The Gap, Inc.* (2017) 14 Cal.App.5th 870, 880–881 [222 Cal.Rptr.3d 397], internal citation omitted.)
- "The Legislature enacted the CLRA 'to protect consumers against unfair and deceptive business practices and to provide efficient and economical procedures to secure such protection.' " (*Valdez v. Seidner–Miller, Inc.* (2019) 33 Cal.App.5th 600, 609 [245 Cal.Rptr.3d 268].)
- " 'Whether a practice is deceptive, fraudulent, or unfair is generally a question of fact which requires "consideration and weighing of evidence from both sides" and which usually cannot be made on demurrer.' " (*Brady v. Bayer Corp.* (2018) 26 Cal.App.5th 1156, 1164 [237 Cal.Rptr.3d 683].)
- "The CLRA is set forth in Civil Code section 1750 et seq. … [U]nder the CLRA a consumer may

recover actual damages, punitive damages and attorney fees. However, relief under the CLRA is limited to '[a]ny consumer who suffers any damage *as a result* of the use or employment by any person of a method, act, or practice' unlawful under the act. As [defendant] argues, this limitation on relief requires that plaintiffs in a CLRA action show not only that a defendant's conduct was deceptive but that the deception caused them harm." (*Massachusetts Mutual Life Ins. Co., supra,* 97 Cal.App.4th at p. 1292, original italics, internal citations omitted.)

- "[T]he CLRA does not require lost injury or property, but does require damage and causation. 'Under Civil Code section 1780, subdivision (a), CLRA actions may be brought "only by a consumer 'who suffers any damage as a result of the use or employment' of a proscribed method, act, or practice. … Accordingly, 'plaintiffs in a CLRA action [must] show not only that a defendant's conduct was deceptive but that the deception caused them harm." ' " (*Veera v. Banana Republic, LLC* (2016) 6 Cal.App.5th 907, 916, fn. 3 [211 Cal.Rptr.3d 769].)

- " 'To have standing to assert a claim under the CLRA, a plaintiff must have "suffer[ed] any damage as a result of the … practice declared to be unlawful." ' Our Supreme Court has interpreted the CLRA's 'any damage' requirement broadly, concluding that the 'phrase … is not synonymous with "actual damages," which generally refers to pecuniary damages.' Rather, the consumer must merely 'experience some [kind of] damage,' or 'some type of increased costs' as a result of the unlawful practice." (*Hansen v. Newegg.com Americas, Inc.* (2018) 25 Cal.App.5th 714, 724 [236 Cal.Rptr.3d 61], internal citations omitted.)

- "This language does not create an automatic award of statutory damages upon proof of an unlawful act." (*Moran v. Prime Healthcare Management, Inc.* (2016) 3 Cal.App.5th 1131, 1152 [208 Cal.Rptr.3d 303].)

- "[Civil Code section 1761(e)] provides a broad definition of 'transaction' as 'an agreement between a consumer and any other person, whether or not the agreement is a contract enforceable by action, and includes the making of, and the performance pursuant to, that agreement.' " (*Wang v. Massey Chevrolet* (2002) 97 Cal.App.4th 856, 869 [118 Cal.Rptr.2d 770].)

- " 'While a plaintiff must show that the misrepresentation was an immediate cause of the injury-producing conduct, the plaintiff need not demonstrate it was the only cause. " 'It is not … necessary that [the plaintiff's] reliance upon the truth of the fraudulent misrepresentation be the sole or even the predominant or decisive factor in influencing his conduct. … It is enough that the representation has played a substantial part, and so has been a substantial factor, in influencing his decision.' [Citation.]" ' In other words, it is enough if a plaintiff shows that ' "in [the] absence [of the misrepresentation] the plaintiff 'in all reasonable probability' would not have engaged in the injury-producing conduct.' [Citation.]' " (*Veera, supra,* 6 Cal.App.5th at p. 919, internal citations omitted.)

- "Under the CLRA, plaintiffs must show actual reliance on the misrepresentation and harm." (*Nelson, supra,* 186 Cal.App.4th at p. 1022.)

- "A ' "misrepresentation is material for a plaintiff only if there is reliance—that is, ' " 'without the misrepresentation, the plaintiff would not have acted as he did' " ' … ." [Citation.]' " (*Moran,*

supra, 3 Cal.App.5th at p. 1152.)

- "[M]ateriality usually is a question of fact. In certain cases, a court can determine the factual misrepresentation or omission is so obviously unimportant that the jury could not reasonably find that a reasonable person would have been influence (*sic*) by it." (*Gutierrez, supra,* 19 Cal.App.5th at p. 1262, internal citations omitted.)

- "If a claim of misleading labeling runs counter to ordinary common sense or the obvious nature of the product, the claim is fit for disposition at the demurrer stage of the litigation." (*Brady, supra,* 26 Cal.App.5th at p. 1165.)

- "In the CLRA context, a fact is deemed 'material,' and obligates an exclusively knowledgeable defendant to disclose it, if a ' "reasonable [consumer]" ' would deem it important in determining how to act in the transaction at issue." (*Collins, supra,* 202 Cal.App.4th at p. 256.)

- "If the undisclosed assessment was material, an inference of reliance as to the entire class would arise, subject to any rebuttal evidence [defendant] might offer." (*Massachusetts Mutual Life Ins. Co., supra,* 97 Cal.App.4th at p. 1295.)

- "[U]nless the advertisement targets a particular disadvantaged or vulnerable group, it is judged by the effect it would have on a reasonable consumer." (*Consumer Advocates v. Echostar Satellite Corp.* (2003) 113 Cal.App.4th 1351, 1360 [8 Cal.Rptr.3d 22].)

- "In California … product mislabeling claims are generally evaluated using a 'reasonable consumer' standard, as distinct from an 'unwary consumer' or a 'suspicious consumer' standard." (*Brady, supra,* 26 Cal.App.5th at p. 1174.)

- "Not every omission or nondisclosure of fact is actionable. Consequently, we must adopt a test identifying which omissions or nondisclosures fall within the scope of the CLRA. Stating that test in general terms, we conclude an omission is actionable under the CLRA if the omitted fact is (1) 'contrary to a [material] representation actually made by the defendant' or (2) is 'a fact the defendant was obliged to disclose.' " (*Gutierrez, supra,* 19 Cal.App.5th at p. 1258.)

- "[T]here is no independent duty to disclose [safety] concerns. Rather, a duty to disclose material safety concerns 'can be actionable in four situations: (1) when the defendant is in a fiduciary relationship with the plaintiff; (2) when the defendant had exclusive knowledge of material facts not known to the plaintiff; (3) when the defendant actively conceals a material fact from the plaintiff; or (4) when the defendant makes partial representations but also suppresses some material fact.' " (*Gutierrez, supra,* 19 Cal.App.5th at p. 1260.)

- "Under the CLRA, even if representations and advertisements are true, they may still be deceptive because ' "[a] perfectly true statement couched in such a manner that it is likely to mislead or deceive the consumer, such as by failure to disclose other relevant information, is actionable." [Citation.]' " (*Jones, supra,* 237 Cal.App.4th Supp. at p. 11.)

- "Defendants next allege that plaintiffs cannot sue them for violating the CLRA because their debt

collection efforts do not involve 'goods or services.' The CLRA prohibits 'unfair methods of competition and unfair or deceptive acts or practices.' This includes the inaccurate 'represent[ation] that a transaction confers or involves rights, remedies, or obligations which it does not have or involve … .' However, this proscription only applies with respect to 'transaction[s] intended to result or which result[] in the sale or lease of goods or services to [a] consumer … .' The CLRA defines 'goods' as 'tangible chattels bought or leased for use primarily for personal, family, or household purposes', and 'services' as 'work, labor, and services for other than a commercial or business use, including services furnished in connection with the sale or repair of goods.' " (*Alborzian v. JPMorgan Chase Bank, N.A.* (2015) 235 Cal.App.4th 29, 39−40 [185 Cal.Rptr.3d 84], internal citations omitted [mortgage loan is neither a good nor a service].)

- "[A] 'reasonable correction offer prevent[s] [the plaintiff] from maintaining a cause of action for damages under the CLRA, but [does] not prevent [the plaintiff] from pursuing remedies based on other statutory violations or common law causes of action based on conduct under those laws.' " (*Valdez, supra,* 33 Cal.App.5th at p. 612.)

Secondary Sources

4 Witkin, Summary of California Law (11th ed. 2017) Sales, § 298 et seq.

Wiseman & Reese, California Practice Guide: Civil Procedure Before Trial Claims & Defenses, Ch.1 4(II)-B, *Consumers Legal Remedies Act—Elements of Claim*, ¶ 14:315 et seq. (The Rutter Group)

Cabraser, California Class Actions and Coordinated Proceedings, Ch. 4, California's Consumer Legal Remedies Act, § 4.01 et seq. (Matthew Bender)

44 California Forms of Pleading and Practice, Ch. 504, *Sales: Consumers Legal Remedies Act*, § 504.12 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 1, *Determining the Applicable Law*, 1.33

Item number: 03

RUPRO ACTION REQUEST FORM

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

RUPRO Meeting: October 15, 2019

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Jury Instructions: Civil Jury Instructions (Release 36)

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

Staff contact (name, phone and e-mail): Eric Long, Attorney, Legal Services, 415-865-7691 eric.long@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: October 19, 2018
Project description from annual agenda: Maintenance—Case Law; Maintenance—Legislation; New Instructions and Expansion into New Areas; Maintenance—Sources and Authority; Maintenance—Comments From Users

If requesting July 1 or out of cycle, explain:
California Rules of Court, rules 2.1050(d) and 10.58(a), 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 36 is the second full CACI release for 2019. Release 34 was approved by the Judicial Council May 2019, and Release 35, a special out-of-cycle release in response to Government Code section 12923, effective January 1, 2019, was approved by the Judicial Council July 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 to the council approval of 32 instructions, 3 verdict forms, and one addition to the CACI User Guide, the advisory committee also requests that RUPRO give final approval to 34 revised CACI instructions under the provisions of the guidelines adopted on December 19, 2006, titled 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: November 15, 2019

Title
Jury Instructions: Civil Jury Instructions (Release 36)

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
November 15, 2019

Date of Report
October 2, 2019

Contact
Eric Long, 415-865-7691
eric.long@jud.ca.gov

Executive Summary

The Advisory Committee on Civil Jury Instructions recommends approving for publication the new and revised 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 2020 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 November 15, 2019, approve for publication the following civil jury instructions prepared by the committee:

1. Revisions to 28 instructions and verdict forms: CACI Nos. 105, 301, 325, 372, 373, 434, 513, 2020, 2423, 2424, 2544, 2545, 2560, 2561, 2703, 2740, 3023, 3709, 3903J, 3903K, 3903Q, 4303, 4305, VF-4300, VF-4301, VF-4302, 4603, and 5001;
2. The addition of 7 new instructions: CACI Nos. 375, 1125, 4575, 4900, 4901, 4902, and 4910; and

3. One addition to the User Guide.

A table of contents and the proposed new and revised civil jury instructions are attached at pages 8–115.

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 36 of *CACI* and the third release for 2019. The council approved regular release 34 at its May 2019 meeting and special release 35 on workplace harassment instructions at its July 2019 meeting.[2]

Analysis/Rationale

A total of 32 instructions, 3 verdict forms, 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 34 additional instructions under a delegation of authority from the council to RUPRO.[3]

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

[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 36A and 37A for 2020—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. 375, *Restitution From Transferee Based on Quasi Contract or Unjust Enrichment.* Two cases from 2018 presented the possibility of a new instruction based on principles of restitution. *Welborne v. Ryman-Carroll Foundation*[4] addressed the principle of quasi-contract, under which one is entitled to restitution of one's money or property that a third party has misappropriated and transferred to the defendant if the defendant *had reason to believe* that the thing received had been unlawfully taken from the plaintiff by the third party. Original efforts to draft an instruction based on *Welborne* encountered difficulty with the language "had reason to believe." The committee found this language problematic and was reluctant to give it to a jury. But a later case, *Professional Tax Appeal v. Kennedy-Wilson Holdings, Inc.*[5], involved a similar claim for restitution based on unjust enrichment. In this case, the court framed the scienter requirement as the more traditional "knew or had reason to know." The committee concluded that quasi-contract and unjust enrichment were really two similar avenues to the remedy of restitution. Using the scienter language from *Professional Tax Appeal* allayed the committee's concerns over "reason to believe."

CACI No. 1125, *Conditions on Adjacent Property.* In *Guernsey v. City of Salinas,*[6] conditions on adjacent property combined with conditions on public property to expose users of the public property to a substantial risk of injury. The case included a jury instruction addressing this situation, which was cited with approval. The committee now proposes including a similar instruction in CACI.

CACI No. 4575. *Right to Repair Act—Affirmative Defense—Failure to Properly Maintain Home.* The Right to Repair Act (the Act)[7] supplants the common law with regard to construction defect claims based on negligence and strict liability.[8] It allows for a statutory cause of action for construction defects causing property damage or purely economic loss (but not personal injury).[9] There are eight affirmative defenses.[10] In release 34, the council approved a group of new instructions on the Act to be added to the Construction Law series (CACI No. 4500 et seq.) The new instructions included one on the essential factual elements of a claim under the Act, one on damages, and three on the affirmative defenses. But the committee withdrew a proposed additional instruction on the affirmative defense of the homeowner's failure to properly maintain the home.[11] After the committee gave initial approval, the chair noted several problems with the

[4] (2018) 22 Cal.App.5th 719, 725–726.

[5] (2018) 29 Cal.App.5th 230.

[6] (2018) 30 Cal.App.5th 269.

[7] Civ. Code, § 895 et seq.

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

[9] Civ. Code, § 896.

[10] Civ. Code, § 945.5.

[11] Civ. Code, § 945.5(c).

instruction, primarily that it lacked a requirement that the failure to maintain caused the harm. These issues have now been addressed by structuring the defense as involving the proof of certain elements. The committee now proposes adding this instruction to those on the Right to Repair Act.

CACI No. 4900 et seq. New series on Real Property law. Over several years, committee staff has been compiling cases on various aspects of real property law that involve jury issues with the thought of creating a new series. The committee now feels that there are sufficient instructions to justify a series. The committee therefore proposes new instructions CACI Nos. 4900, *Adverse Possession,* 4901, *Prescriptive Easement,* 4902, *Interference With Secondary Easement,* and 4910, *Violation of Homeowner Bill of Rights—Essential Factual Elements*. Additional instructions on wrongful foreclosure are under consideration for the next release cycle.

Revised instructions

CACI Nos. 372 and 373. Common counts. A trial judge reported that her jury had significant difficulty understanding the difference between CACI Nos. 372, *Common Count: Open Book Account*, and 373, *Common Count: Account Stated*, given that both are denominated "accounts," but have significant differences. The committee agreed that the instructions could be more helpful and has added an opening paragraph to each presenting the basic premise of each claim. Revisions have also been made to clarify that an open book account must be a writing, but an account stated may be based on an oral agreement or implied from the conduct of the parties.

CACI No. 2544, *Disability Discrimination—Affirmative Defense—Health or Safety Risk.* This instruction is based on the Fair Employment and Housing Act regulation addressing the defense of health or safety risk.[12] The regulation was significantly revised recently, and the instruction no longer accurately presented the regulation. The proposed revision brings the instruction in line with the law.

CACI Nos. 2545 and 2561. Reasonable accommodation for disability and religious creed discrimination. The law on reasonable accommodation is the same for both disability and religious creed discrimination.[13] CACI No. 2545 is *Disability Discrimination—Affirmative Defense—Undue Hardship;* CACI No. 2561 is *Religious Creed Discrimination—Reasonable Accommodation—Affirmative Defense—Undue Hardship*. But CACI No. 2561 is not an actual instruction; the user is referred to CACI No. 2545. The Church State Council, a religious freedom advocacy organization, noted that CACI No. 2545 had a requirement that the employee actually request a reasonable accommodation. The Church State Council pointed out that there is no such requirement for religious observance accommodation and requested a separate instruction. But on investigation, there is no such requirement for disability accommodation

[12] See Cal. Code Regs., tit. 2, § 11067.

[13] Gov. Code, § 12940(*l*)(1); see Gov. Code, § 12926(u).

either. The committee proposes a slight wording change to CACI No. 2545 to address this concern.

CACI No. 2560, *Religious Creed Discrimination—Failure to Accommodate—Essential Factual Elements*. The Church State Council also requested two additions to CACI based on implementing regulations. First, the organization requested that an instruction provide that it is unlawful for an employer to terminate or refuse to hire someone in order to avoid the need to reasonably accommodate the person's religious beliefs or observance.[14] The committee proposes adding this language to CACI No. 2560 as a second option to element 6. Second, the organization asked that CACI include a provision that a reasonable accommodation is one that *eliminates* the conflict between the religious practice and the job requirement.[15] The committee proposes adding this language to CACI No. 2560 as an additional sentence following the elements.

CACI No. 2740, *Violation of Equal Pay Act—Essential Factual Elements*. Labor Code section 1197.5(a) provides: "An employer shall not pay any of its employees at wage rates less than the rates paid to employees of the opposite sex for substantially similar work.[16] The use of the plural "employees" might indicate that more is required than a comparison of one employee to another single employee of the opposite sex. CACI No. 2740 currently provides for a singular/plural option with regard to the number of comparators required. Nevertheless, commenters have argued that the statute has long been interpreted to mean that a single comparator is sufficient. The authority submitted for this view is, however, exclusively federal, construing the federal Equal Pay Act. While at least two California cases contain language that suggest that a single comparator is sufficient,[17] in neither case was the number of comparators an issue analyzed and decided by the court. Because CACI instructions must be based on settled California law, the committee recommends retaining the singular/plural options in the instruction and presenting this issue as unresolved in the Directions for Use.

CACI No. 3023, *Unreasonable Search or Seizure—Search or Seizure Without a Warrant—Essential Factual Elements*. A recent case from the federal Ninth Circuit Court of Appeal, *Sandoval v. Cty. of Sonoma*[18], involved a warrantless arrest, which the court called "per se unreasonable under the Fourth Amendment—subject only to a few specifically established and

[14] Cal. Code Regs. tit. 2, § 11062.

[15] Cal. Code Regs. tit. 2, § 11062(a).

[16] Labor Code section 1197.5(b) includes the same "employees" language with regard to race and ethnicity.

[17] See *Hall v. County of Los Angeles* (2007) 148 Cal.App.4th 318, 324 [plaintiff had to show that she is paid lower wages than *a male comparator*, italics added]; *Green v. Par Pools, Inc.* (2003) 111 Cal.App.4th 620, 628 [plaintiff in a section 1197.5 action must first show that the employer paid *a male employee* more than a female employee for equal work, italics added].

[18] (9th Cir. 2018) 912 F.3d 509, 515.

well-delineated exceptions." CACI No. 3023 currently addresses warrantless searches. The committee proposes expanding the instruction to also cover warrantless seizures.

CACI Nos. 4303, 4305, VF-4300, VF-4301, and VF-4302. Sufficiency and Service of Notice (Unlawful Detainer series). 2018 legislation[19] changed the computation of the time allowed to a tenant to cure a failure to pay rent or a breach of the lease after service of a three-day notice. Saturdays, Sundays, and judicial holidays are now excluded entirely from the three-day period, whether or not they fall on the last day of the notice period. CACI unlawful detainer instructions and verdict forms have been revised to reflect this change in the law.

User Guide: Personal pronouns. The California Department of Fair Employment and Housing requested that all CACI instructions be revised to permit users to select nonbinary pronouns for persons who identify as neither male nor female. Currently, CACI instructions include many male/female pronoun options.[20] There is currently no clear consensus on what pronoun(s) should be used for nonbinary persons. The most commonly proffered words are "they," "their," and "them." But use of these words presents a particular problem for CACI as these pronouns have a commonly understood plural meaning. As such, their use would suggest that multiple parties may be referenced, which is contrary to standard CACI format. Instructions are drafted to present single parties. For now, the committee's proposal is a limited one: to present the issue in the User Guide. The committee will continue to consider the issue and look for other solutions.

Policy implications

Jury instructions express the law; there are no policy implications.

Comments

The proposed additions and revisions to *CACI* circulated for comment from July 22 through August 30, 2019. Comments were received from 12 different commenters, one of which was a joint submission from four different organizations. Some submitted comments on multiple instructions, and some commented on only a single instruction. No single instruction generated a 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 116–163.

Alternatives considered

Rules 2.1050(d) and 10.58(a) of the California Rules of Court require the committee to update, revise, and add topics to *CACI* on a regular basis and to submit its recommendations to the council for approval. There are no alternative actions for the committee to consider.

[19] AB 2343, effective Sept. 1, 2019, amending Code Civ. Proc., § 1161.

[20] E.g., he/she, his/her, him/her.

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 2020 edition of *CACI* and pay royalties to the Judicial Council. Other licensing agreements with other publishers provide additional royalties.

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Attachments

1. *CACI* instructions, at pages 8–115
2. Chart of comments and the committee's responses, at pages 116–163

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Release 36: November 2019

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, November 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, (1) this instruction may need to be modified to clarify that insurance may not be considered for purposes of determining liability; and (2) 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, 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].)
- "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].)

- "[M]ost of these references to Kaiser and Medicare, as well as the single reference to Social Security, merely provided context and background information on [plaintiff]'s past treatment at Kaiser and on some aspects of [defendant]'s experts' calculation of past and future reasonable medical expenses. They were helpful and even necessary to the jury's understanding of the issues. [Plaintiff] has not shown the court abused its discretion in admitting these references to assist the jury's understanding of the facts." (*Stokes v. Muschinske* (2019) 34 Cal.App.5th 45, 58 [245 Cal.Rptr.3d 764].)

Secondary Sources

8 Witkin, California Procedure (5th ed. ~~2018~~2008) Trial, § 217 et seq.

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

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 a motivating purpose of [~~*insert*~~ *names of the contracting parties*] was ~~intended~~ for [***name of plaintiff***] to benefit from their contract.**

You should consider all of the circumstances under which the contract was made. 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; Revised November 2019

Directions for Use

The right of a third-party beneficiary to enforce a contract might~~is 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. (See, e.g., *Kalmanovitz v. Bitting* (1996) 43 Cal.App.4th 311, 315 [50 Cal.Rptr.2d 332].)

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

~~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, 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.]' " (*Brinton v. Bankers Pension Services, Inc.* (1999) 76 Cal.App.4th 550, 558 [90

Cal.Rptr.2d 469].)

- "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, supra, ~~v. ADP, LLC~~* (2019) 6 Cal.5th at pp.~~817,~~ 829–830 ~~[243 Cal.Rptr.3d 299, 434 P.3d 124]~~.)

- "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.)

- "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." (*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.' " (*Outdoor Services v. Pabagold* (1986) 185 Cal.App.3d 676, 684 [230 Cal.Rptr. 73].)

- "[T]~~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." (*Garcia v. Truck Insurance Exchange* (1984) 36 Cal.3d 426, 436 [204 Cal.Rptr. 435, 682 P.2d 1100].)

Secondary Sources

1 Witkin, Summary of California Law (~~10th~~ 11th ed. 201705) Contracts, §§ ~~685~~705–~~706~~726

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

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

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

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

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

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

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

4. That [*name of defendant***] [***specify conduct that plaintiff claims prevented him/her/it from receiving the benefits that he/she/it was entitled to have received under the contract***];**

54. That by doing so,[*name of defendant***] did not act fairly and in good faith~~That [*name of defendant*] unfairly interfered with [*name of plaintiff*]'s right to receive the benefits of the contract~~; and**

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

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

Directions for Use

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

Include element 2 if the plaintiff's substantial performance of contract requirements is at issue. Include element 3 if the contract contains conditions precedent that must occur before the defendant is required to perform. For discussion of element 3, see the Directions for Use to CACI No. 303.

In element 4, insert an explanation of the defendant's conduct that violated the duty to act in good faith.

If a claim for breach of the implied covenant does nothing more than allege a mere contract breach and, relying on the same alleged acts, simply seeks the same damages or other relief already claimed in a contract cause of action, it may be disregarded as superfluous because no additional claim is actually stated. (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1395 [272 Cal.Rptr. 387].) The harm alleged in element ~~5~~ 6 may produce contract damages that are different from those claimed for breach of the express contract provisions. (See *Digerati Holdings, LLC v. Young Money Entertainment, LLC* (2011) 194 Cal.App.4th 873, 885 [123 Cal.Rptr.3d 736] [noting that gravamen of the two claims rests on different facts and different harm].)

It has been noted that one may bring a claim for breach of the implied covenant without also bringing a claim for breach of other contract terms. (See *Careau & Co., supra,* 222 Cal.App.~~4th~~ 3rd at p. 1395.) Thus it would seem that a jury should be able to find a breach of the implied covenant even if it finds for the defendant on all other breach of contract claims.

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], internal citation omitted.)

- " ' "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." ' [] The covenant of good faith finds particular application in situations where one party is invested with a discretionary power affecting the rights of another. Such power must be exercised in good faith." (*Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 371-372 [6 Cal.Rptr.2d 467, 826 P.2d 710], internal citations omitted.)

- "When one party to a contract retains the unilateral right to amend the agreement governing the parties' relationship, its exercise of that right is constrained by the covenant of good faith and fair dealing which precludes amendments that operate retroactively to impair accrued rights." (*Cobb v. Ironwood Country Club* (2015) 233 Cal.App.4th 960, 963 [183 Cal.Rptr.3d 282].)

- "The covenant of good faith and fair dealing, implied by law in every contract, exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive the *benefits of the agreement actually made*. The covenant thus cannot ' " 'be endowed with an existence independent of its contractual underpinnings.' " ' It cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 349-350 [100 Cal.Rptr.2d 352, 8 P.3d 1089], original italics, internal citations omitted.)

- "The implied covenant of good faith and fair dealing cannot be read to require defendants to take a particular action that is discretionary under the contract when the contract also expressly grants them the discretion to take a different action. To apply the covenant to *require* a party to take one of two alternative actions expressly allowed by the contract and forgo the other would contravene the rule that the implied covenant of good faith and fair dealing may not be 'read to prohibit a party from doing that which is expressly permitted by an agreement.' " (*Bevis v. Terrace View Partners, LP*

(2019) 33 Cal.App.5th 230, 256 [244 Cal.Rptr.3d 797], original italics.)

- "The implied covenant of good faith and fair dealing rests upon the existence of some specific contractual obligation. 'The covenant of good faith is read into contracts in order to protect the express covenants or promises of the contract, not to protect some general public policy interest not directly tied to the contract's purpose.' ... 'In essence, the covenant is implied as a supplement to the express contractual covenants, to prevent a contracting party from engaging in conduct which (while not technically transgressing the express covenants) frustrates the other party's rights to the benefits of the contract.' " (*Racine & Laramie, Ltd. v. Department of Parks & Recreation* (1992) 11 Cal.App.4th 1026, 1031-1032 [14 Cal.Rptr.2d 335], internal citations omitted.)

- "There is no obligation to deal fairly or in good faith absent an existing contract. If there exists a contractual relationship between the parties ... the implied covenant is limited to assuring compliance with the express terms of the contract, and cannot be extended to create obligations not contemplated in the contract." (*Racine & Laramie, Ltd., supra,* 11 Cal.App.4th at p. 1032, internal citations omitted.)

- "Although breach of the implied covenant often is pleaded as a separate count, a breach of the implied covenant is necessarily a breach of contract." (*Digerati Holdings, LLC, supra,* 194 Cal.App.4th at p. 885.)

- " '[B]reach of a specific provision of the contract is not … necessary' to a claim for breach of the implied covenant of good faith and fair dealing." (*Thrifty Payless, Inc. v. The Americana at Brand, LLC* (2013) 218 Cal.App.4th 1230, 1244 [160 Cal.Rptr.3d 718].)

- "The issue of whether the implied covenant of good faith and fair dealing has been breached is ordinarily 'a question of fact unless only one inference [can] be drawn from the evidence.' " (*Hicks v. E.T. Legg & Associates* (2001) 89 Cal.App.4th 496, 509 [108 Cal.Rptr.2d 10], internal citation omitted.)

- "If the allegations do not go beyond the statement of a mere contract breach and, relying on the same alleged acts, simply seek the same damages or other relief already claimed in a companion contract cause of action, they may be disregarded as superfluous as no additional claim is actually stated. Thus, absent those limited cases where a breach of a consensual contract term is not claimed or alleged, the only justification for asserting a separate cause of action for breach of the implied covenant is to obtain a tort recovery." (*Careau & Co., supra,* 222 Cal.App.3d at p. 1395.)

- "[W]e believe that the gravamen of the two counts differs. The gravamen of the breach of contract count is [cross defendants'] alleged failure to comply with their express contractual obligations specified in paragraph 37 of the cross-complaint, while the gravamen of the count for breach of the implied covenant of good faith and fair dealing is their alleged efforts to undermine or prevent the potential sale and distribution of the film, both by informing distributors that the film was unauthorized and could be subject to future litigation and by seeking an injunction. (*Digerati Holdings, LLC, supra,* 194 Cal. App. 4th at p. 885.)

Secondary Sources

1 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Contracts, §§ 822, 824-826~~798, 800–802~~

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, §§ 140.12, 140.50 et seq. (Matthew Bender)

2 Matthew Bender Practice Guide: California Contract Litigation, Ch. 23, *Suing or Defending Action for Breach of Duty of Good Faith and Fair Dealing*, 23.05

372. Common Count: Open Book Account

A book account is a written record of the credits and debts between parties [to a contract/in a fiduciary relationship]. [The contract may be oral, in writing, or implied by the parties' words and conduct.] A book account is "open" if entries can be added to it from time to time.

[*Name of plaintiff***] claims that there was an open book account in which financial transactions between the parties were recorded and that [***name of defendant***] owes [him/her/it] money on the ~~an open book~~ account. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] and [***name of defendant***] had ~~(a)~~ financial transaction~~(s)~~ with each other;**
2. **That [***name of plaintiff***], in the regular course of business, kept [a written/an electronic] account of the debits and credits involved in the transaction~~(s)~~;**
3. **That [***name of defendant***] owes [***name of plaintiff***] money on the account; and**
4. **The amount of money that [***name of defendant***] owes [***name of plaintiff***].**

New December 2005; Revised November 2019

Directions for Use

The instructions in this series are not intended to cover all available common counts. Users may need to draft their own instructions or modify the CACI instructions to fit the circumstances of the case.

Include the second sentence in the opening paragraph if the account is based on a contract rather than a fiduciary relationship. It is the contract that may be oral or implied; the book account must be in writing. (See Code Civ. Proc., § 337a [book account must be kept in a reasonably permanent form]; *Joslin v. Gertz* (1957) 155 Cal.App.2d 62, 65-66 [317 P.2d 155] [book account is a detailed statement kept in a *book*].)

Sources and Authority

- " 'A book account may be deemed to furnish the foundation for a suit in assumpsit ... only when it contains a statement of the debits and credits of the transactions involved completely enough to supply evidence from which it can be reasonably determined what amount is due to the claimant.' ... 'The term "account," ... clearly requires the recording of sufficient information regarding the transaction involved in the suit, from which the debits and credits of the respective parties may be determined, so as to permit the striking of a balance to ascertain what sum, if any, is due to the claimant.' " (*Robin v. Smith* (1955) 132 Cal.App.2d 288, 291 [282 P.2d 135], internal citations omitted.)
- "A book account is defined ... as 'a detailed statement, kept in a book, in the nature of debit and

credit, arising out of contract or some fiduciary relation.' It is, of course, necessary for the book to show against whom the charges are made. It must also be made to appear in whose favor the charges run. This may be shown by the production of the book from the possession of the plaintiff and his identification of it as the book in which he kept the account between him and the debtor. An open book account may consist of a single entry reflecting the establishment of an account between the parties, and may contain charges alone if there are no credits to enter. Money loaned is the proper subject of an open book account. Of course a mere private memorandum does not constitute a book account." (*Joslin, supra, ~~v. Gertz~~ ~~(1957)~~* 155 Cal.App.2d at pp.~~62,~~ 65-66 ~~[317 P.2d 155]~~, internal citations omitted.)

- "A book account may furnish the basis for an action on a common count ~~"~~ ' "... when it contains a statement of the debits and credits of the transactions involved completely enough to supply evidence from which it can be reasonably determined what amount is due to the claimant.~~'~~" ' A book account is described as 'open' when the debtor has made some payment on the account, leaving a balance due." (*Interstate Group Administrators, Inc. v. Cravens, Dargan & Co.* (1985) 174 Cal.App.3d 700, 708 [220 Cal.Rptr. 250], internal citations and footnote omitted.)

- "A *book account* is a detailed statement of debit/credit transactions kept by a creditor in the regular course of business, and in a reasonably permanent manner. In one sense, *an open-book account* is an account with one or more items unsettled. However, even if an account is technically settled, the parties may still have an open-book account, if they anticipate possible future transactions between them." (*Reigelsperger v. Siller* (2007) 40 Cal.4th 574, 579, fn. 5 [53 Cal.Rptr.3d 887, 150 P.3d 764], original italics, internal citation omitted.)

- "[T]he most important characteristic of a suit brought to recover a sum owing on a book account is that the amount owed is determined by computing *all* of the credits and debits entered in the book account." (*Interstate Group Administrators, Inc., supra,* 174 Cal.App.3d at p. 708.)

- "It is apparent that the mere entry of dates and payments of certain sums in the credit column of a ledger or cash book under the name of a particular individual, without further explanation regarding the transaction to which they apply, may not be deemed to constitute a 'book account' upon which an action in *assumpsit* may be founded." (*Tillson v. Peters* (1940) 41 Cal.App.2d 671, 679 [107 P.2d 434].)

- "The law does not prescribe any standard of bookkeeping practice which all must follow, regardless of the nature of the business of which the record is kept. We think it makes no difference whether the account is kept in one book or several so long as they are permanent records, and constitute a system of bookkeeping as distinguished from mere private memoranda." (*Egan v. Bishop* (1935) 8 Cal.App.2d 119, 122 [47 P.2d 500].)

- " 'The common count is a general pleading which seeks recovery of money without specifying the nature of the claim-. ~~...~~ Because of the uninformative character of the complaint, it has been held that the typical answer, a *general denial*, is sufficient to raise almost any kind of defense, including some which ordinarily require special pleading.' However, even where the plaintiff has pleaded in the form of a common count, the defendant must raise in the answer any new matter, that is, anything he or she relies on that is not put in issue by the plaintiff." (*Title Ins. Co. v. State Bd. of Equalization* (1992) 4

Cal.4th 715, 731 [14 Cal.Rptr.2d 822, 842 P.2d 121], internal citations and footnote omitted.)

- "Although such an action is one at law, it is governed by principles of equity. It may be brought 'wherever one person has received money which belongs to another, and which "in equity and good conscience," or in other words, in justice and right, should be returned. ... The plaintiff's right to recover is governed by principles of equity, although the action is one at law.' " (*Mains v. City Title Ins. Co.* (1949) 34 Cal.2d 580, 586 [212 P.2d 873], internal citations omitted.)

- "[S]ince the basic premise for pleading a common count ... is that the person is thereby 'waiving the tort and suing in assumpsit,' any tort damages are out. Likewise excluded are damages for a breach of an express contract. The relief is something in the nature of a constructive trust and ... 'one cannot be held to be a constructive trustee of something he had not acquired.' One must have acquired some money which in equity and good conscience belongs to the plaintiff or the defendant must be under a contract obligation with nothing remaining to be performed except the payment of a sum certain in money." (*Zumbrun v. University of Southern California* (1972) 25 Cal.App.3d 1, 14-15 [101 Cal.Rptr. 499], internal citations omitted.)

- " 'As Witkin states in his text, "[a] common count is proper whenever the plaintiff claims a sum of money due, either as an indebtedness in a sum certain, or for the reasonable value of services, goods, etc., furnished. It makes no difference in such a case that the proof shows the original transaction to be an express contract, a contract implied in fact, or a quasi-contract." ' A claim for money had and received can be based upon money paid by mistake, money paid pursuant to a void contract, or a performance by one party of an express contract." (*Utility Audit Co., Inc. v. City of Los Angeles* (2003) 112 Cal.App.4th 950, 958 [5 Cal.Rptr.3d 520], internal citations omitted.)

- "In the common law action of general assumpsit, it is customary to plead an indebtedness using 'common counts.' In California, it has long been settled the allegation of claims using common counts is good against special or general demurrers. The only essential allegations of a common count are '(1) the statement of indebtedness in a certain sum, (2) the consideration, i.e., goods sold, work done, etc., and (3) nonpayment.' " (*Farmers Ins. Exchange v. Zerin* (1997) 53 Cal.App.4th 445, 460 [61 Cal.Rptr.2d 707], internal citations omitted.)

- "A common count is not a specific cause of action, ... rather, it is a simplified form of pleading normally used to aver the existence of various forms of monetary indebtedness, including that arising from an alleged duty to make restitution under an assumpsit theory. When a common count is used as an alternative way of seeking the same recovery demanded in a specific cause of action, and is based on the same facts, the common count is demurrable if the cause of action is demurrable." (*McBride v. Boughton* (2004) 123 Cal.App.4th 379, 394 [20 Cal.Rptr.3d 115], internal citations omitted.)

Secondary Sources

4 Witkin, California Procedure (~~4th~~ 5th ed. ~~1997~~2008) Pleading, § ~~522~~561

1 California Forms of Pleading and Practice, Ch. 8, *Accounts Stated and Open Accounts*, §§ 8.20, 8.47 (Matthew Bender)

4 California Points and Authorities, Ch. 43, *Common Counts and Bills of Particulars*, § 43.28 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 9, *Seeking or Opposing Quantum Meruit or Quantum Valebant Recovery in Contract Actions,* 9.02, 9.15, 9.32

373. Common Count: Account Stated

An account stated is an agreement between the parties, based on prior transactions between them establishing a debtor-creditor relationship, that a particular amount is due and owing from the debtor to the creditor. The agreement may be oral, in writing, or implied from the parties' words and conduct.

[*Name of plaintiff***] claims that [***name of defendant***] owes [him/her/it] money on an account stated. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] owed [***name of plaintiff***] money from previous financial transactions;**

2. **That [***name of plaintiff***] and [***name of defendant***], by words or conduct, agreed that the amount that [***name of plaintiff***] claimed to be due from [***name of defendant***]~~stated in the account~~ was the correct amount owed ~~to [*name of plaintiff*]~~;**

3. **That [***name of defendant***], by words or conduct, promised to pay the stated amount to [***name of plaintiff***];**

4. **That [***name of defendant***] has not paid [***name of plaintiff***] [any/all] of the amount owed under this account; and**

5. **The amount of money [***name of defendant***] owes [***name of plaintiff***].**

New December 2005; Revised November 2019

Sources and Authority

" 'An account stated is an agreement, based on prior transactions between the parties, that the items of an account are true and that the balance struck is due and owing. [Citation.] To be an account stated, "it must appear that at the time of the statement an indebtedness from one party to the other existed, that a balance was then struck and agreed to be the correct sum owing from the debtor to the creditor, and that the debtor expressly or impliedly promised to pay to the creditor the amount thus determined to be owing." [Citation.]' " (*Leighton v. Forster* (2017) 8 Cal.App.5th 467, 491 [213 Cal.Rptr.3d 899].)

The essential elements of an account stated are: (1) previous transactions between the parties establishing the relationship of debtor and creditor; (2) an agreement between the parties, express or implied, on the amount due from the debtor to the creditor; (3) a promise by the debtor, express or implied, to pay the amount due." (*Zinn v. Fred R. Bright Co.* (1969) 271 Cal.App.2d 597, 600 [76 Cal.Rptr. 663], internal citations omitted.)

- "The agreement of the parties necessary to establish an account stated need not be express and

frequently is implied from the circumstances. In the usual situation, it comes about by the creditor rendering a statement of the account to the debtor. If the debtor fails to object to the statement within a reasonable time, the law implies his agreement that the account is correct as rendered." (*Zinn, supra,* 271 Cal.App.2d at p. 600, internal citations omitted.)

- "An account stated is an agreement, based on the prior transactions between the parties, that the items of the account are true and that the balance struck is due and owing from one party to another. When the account is assented to, ' "it becomes a new contract. An action on it is not founded upon the original items, but upon the balance agreed to by the parties. ..." Inquiry may not be had into those matters at all. It is upon the new contract by and under which the parties have adjusted their differences and reached an agreement.' " (*Gleason v. Klamer* (1980) 103 Cal.App.3d 782, 786-787 [163 Cal.Rptr. 483], internal citations omitted.)

- "To be an account stated, 'it must appear that at the time of the statement an indebtedness from one party to the other existed, that a balance was then struck and agreed to be the correct sum owing from the debtor to the creditor, and that the debtor expressly or impliedly promised to pay to the creditor the amount thus determined to be owing.' The agreement necessary to establish an account stated need not be express and is frequently implied from the circumstances. When a statement is rendered to a debtor and no reply is made in a reasonable time, the law implies an agreement that the account is correct as rendered. Actions on accounts stated frequently arise from a series of transactions which also constitute an open book account. However, an account stated may be found in a variety of commercial situations. The acknowledgement of a debt consisting of a single item may form the basis of a stated account. The key element in every context is agreement on the final balance due." (*Maggio, Inc. v. Neal* (1987) 196 Cal.App.3d 745, 752-753 [241 Cal.Rptr. 883], internal citations omitted.)

- "An account stated need not be submitted by the creditor to the debtor. A statement expressing the debtor's assent and acknowledging the agreed amount of the debt to the creditor equally establishes an account stated." (*Truestone, Inc. v. Simi West Industrial Park II* (1984) 163 Cal.App.3d 715, 726 [209 Cal.Rptr. 757], internal citations omitted.)

- " 'The common count is a general pleading which seeks recovery of money without specifying the nature of the claim . ... Because of the uninformative character of the complaint, it has been held that the typical answer, a *general denial*, is sufficient to raise almost any kind of defense, including some which ordinarily require special pleading.' However, even where the plaintiff has pleaded in the form of a common count, the defendant must raise in the answer any new matter, that is, anything he or she relies on that is not put in issue by the plaintiff." (*Title Ins. Co. v. State Bd. of Equalization* (1992) 4 Cal.4th 715, 731 [14 Cal.Rptr.2d 822, 842 P.2d 121], internal citations and footnote omitted.)

- "The account stated may be attacked only by proof of 'fraud, duress, mistake, or other grounds cognizable in equity for the avoidance of an instrument.' The defendant 'will not be heard to answer when action is brought upon the account stated that the claim or demand was unjust, or invalid.' " (*Gleason, supra,* 103 Cal.App.3d at p. 787, internal citations omitted.)

- "An account stated need not cover all the dealings or claims between the parties. There may be a partial settlement and account stated as to some of the transactions." (*Gleason, supra,* 103 Cal.App.3d

at p. 790, internal citation omitted.)

- "In the common law action of general assumpsit, it is customary to plead an indebtedness using 'common counts.' In California, it has long been settled the allegation of claims using common counts is good against special or general demurrers. The only essential allegations of a common count are '(1) the statement of indebtedness in a certain sum, (2) the consideration, i.e., goods sold, work done, etc., and (3) nonpayment.' " (*Farmers Ins. Exchange v. Zerin* (1997) 53 Cal.App.4th 445, 460 [61 Cal.Rptr.2d 707], internal citations omitted.)

- "A common count is not a specific cause of action, ... rather, it is a simplified form of pleading normally used to aver the existence of various forms of monetary indebtedness, including that arising from an alleged duty to make restitution under an assumpsit theory. When a common count is used as an alternative way of seeking the same recovery demanded in a specific cause of action, and is based on the same facts, the common count is demurrable if the cause of action is demurrable." (*McBride v. Boughton* (2004) 123 Cal.App.4th 379, 394 [20 Cal.Rptr.3d 115], internal citations omitted.)

Secondary Sources

4 Witkin, California Procedure (~~4th~~ 5th ed. ~~1997~~2008) Pleading, § ~~515~~554

1 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Contracts, §§ 1003, 1004~~972–973~~

1 California Forms of Pleading and Practice, Ch. 8, *Accounts Stated and Open Accounts*, §§ 8.10, 8.40–8.46 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 9, *Seeking or Opposing Quantum Meruit or Quantum Valebant Recovery in Contract Actions,* 9.02, 9.15, 9.32

375. Restitution From Transferee Based on Quasi-Contract or Unjust Enrichment

[*Name of plaintiff***] claims that [***name of defendant***] must restore to [***name of plaintiff***] [***specify, e.g., money***] that [***name of defendant***] received from [***name of third party***], but that really should belong to [***name of plaintiff***]. [***Name of plaintiff***] is entitled to restitution if [he/she] proves that [***name of defendant***] knew or had reason to know that [***name of third party***] [***specify act constituting unjust enrichment, e.g., embezzled money from [name of plaintiff]***].**

New November 2019

Directions for Use

This instruction is for use in a claim for restitution based on the doctrines of quasi-contract and unjust enrichment. Under quasi-contract, one is entitled to restitution of one's money or property that a third party has misappropriated and transferred to the defendant if the defendant had reason to believe that the thing received had been unlawfully taken from the plaintiff by the third party. (*Welborne v. Ryman-Carroll Foundation* (2018) 22 Cal.App.5th 719, 725–726 [231 Cal.Rptr.3d 806].) The elements of a claim for unjust enrichment are receipt of a benefit and unjust retention of the benefit at the expense of another. (*Professional Tax Appeal v. Kennedy-Wilson Holdings, Inc.* (2018) 29 Cal.App.5th 230, 238-242 [239 Cal.Rptr.3d 908].) Unlawfulness is not required.

Sources and Authority

- " ' "[Quasi-contract] is an *obligation* … created by the law without regard to the intention of the parties, and is designed to restore the aggrieved party to [its] former position by return of the thing or its equivalent in money. [Citations.]" ' The doctrine focuses on equitable principles; its key phrase is ' "unjust enrichment," ' which is used to identify the 'transfer of money or other valuable assets to an individual or a company that is not entitled to them.' " (*Welborne, supra,* 22 Cal.App.5th at p. 725, original italics, internal citations omitted.)

- "Under the law of restitution, an individual may be required to make restitution if he is unjustly enriched at the expense of another. A person is enriched if he receives a benefit at another's expense. The term 'benefit' 'denotes any form of advantage.' Thus, a benefit is conferred not only when one adds to the property of another, but also when one saves the other from expense or loss. Even when a person has received a benefit from another, he is required to make restitution 'only if the circumstances of its receipt or retention are such that, as between the two persons, it is unjust for him to retain it.' " (*Ghirardo v. Antonioli* (1996) 14 Cal.4th 39, 51 [57 Cal.Rptr.2d 687, 924 P.2d 996], internal citations omitted.)

- "[T]he recipient of money *who has reason to believe* that the funds he or she receives were stolen may be liable for restitution" (*Welborne, supra,* 22 Cal.App.5th at p. 726, original italics.)

- "A transferee who would be under a duty of restitution if he had knowledge of pertinent facts, is under such duty if, at the time of the transfer, he suspected their existence." (*Welborne, supra,* 22 Cal.App.5th at p. 726 [quoting Restatement of Restitution, § 10].)

- "[Defendant] also errs in its claim that this matter may not be tried to a jury. The gist of an action in which a party seeks only money damages is legal in nature even though equitable principles are to be applied. As appellant argues, this is an express holding of *Lectrodryer v. SeoulBank* (2000) 77 Cal.App.4th 723, 728 [91 Cal.Rptr.2d 881]." (*Welborne, supra,* 22 Cal.App.5th at p. 728, fn. 8, internal citation omitted.)

- "[U]njust enrichment is not a cause of action. Rather, it is a general principle underlying various doctrines and remedies, including quasi-contract." (*Jogani v. Superior Court* (2008) 165 Cal.App.4th 901, 911 [81 Cal.Rptr.3d 503], internal citation omitted.)

- "Unlike a claim for damages based on breach of a legal duty, appellants' unjust enrichment claim is grounded in equitable principles of restitution. An individual is required to make restitution when he or she has been unjustly enriched at the expense of another. A person is enriched if he or she receives a benefit at another's expense. The term 'benefit' connotes any type of advantage. [¶] Appellants have stated a valid cause of action for unjust enrichment based on [defendant]'s unjustified charging and retention of excessive fees which the title companies passed through to them." (*Hirsch v. Bank of America* (2003) 107 Cal.App.4th 708, 721-722 [132 Cal.Rptr.2d 220], internal citations omitted.)

- "Although some California courts have suggested the existence of a separate cause of action for unjust enrichment, this court has recently held that ' "[t]here is no cause of action in California for unjust enrichment." [Citations.] Unjust enrichment is synonymous with restitution. [Citation.]' " (*Levine v. Blue Shield of California* (2010) 189 Cal.App.4th 1117, 1138 [117 Cal.Rptr.3d 262], internal citation omitted.)

- "California law on unjust enrichment is not narrowly and rigidly limited to quasi-contract principles, as defendants contend. '[T]he doctrine also recognizes an obligation *imposed* by law regardless of the intent of the parties. In these instances there need be no relationship that gives substance to an implied intent basic to the "contract" concept, rather the obligation is imposed because good conscience dictates that under the circumstances the person benefited should make reimbursement.' " (*Professional Tax Appeal, supra,* 29 Cal.App.5th at p. 240, original italics.)

- "Finally, plaintiff's complaint also stated facts that, if proven, are sufficient to defeat a claim that defendants were bona fide purchasers without notice of plaintiff's claim. '[A] bona fide purchaser is generally not required to make restitution.' But, '[a] transferee with knowledge of the circumstances surrounding the unjust enrichment may be obligated to make restitution.' [¶] For a defendant to be ' "without notice" ' means to be 'without notice of the facts giving rise to the restitution claim.' 'A person has notice of a fact if the person either knows the fact or has reason to know it. [¶] … A person has reason to know a fact if [¶] (a) the person has received an effective notification of the fact; [¶] (b) knowledge of the fact is imputed to the person by statute … or by other law (including principles of agency); or [¶] (c) other facts known to the person would make it reasonable to infer the existence of the fact, or prudent to conduct further inquiry that would reveal it.' " (*Professional Tax Appeal, supra,* 29 Cal.App.5th at p. 241, internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 1050 et seq.

12 California Forms of Pleading and Practice, Ch. 121, *Common Counts*, § 121.25 (Matthew Bender)

434. Alternative Causation

You may decide that more than one of the defendants was negligent, but that the negligence of only one of them could have actually caused [*name of plaintiff*]'s harm. If you cannot decide which defendant caused [*name of plaintiff*]'s harm, you must decide that each defendant is responsible for the harm.

However, if a defendant proves that [he/she/it] did not cause [*name of plaintiff*]'s harm, then you must conclude that defendant is not responsible.

New September 2003; Revised November 2019

Directions for Use

This instruction is based on the rule stated in the case of *Summers v. Tice* (1948) 33 Cal.2d 80, 86 [199 P.2d 1], in which the court held that the burden of proof on causation shifted to the two defendants to prove that each was not the cause of plaintiff's harm.

Sources and Authority

- ~~This instruction is based on the rule stated in the case of *Summers v. Tice* (1948) 33 Cal.2d 80, 86 [199 P.2d 1], in which the Court held that the burden of proof on causation shifted to the two defendants to prove that each was not the cause of plaintiff's harm:~~ "When we consider the relative position of the parties and the results that would flow if plaintiff was required to pin the injury on one of the defendants only, a requirement that the burden of proof on that subject be shifted to defendants becomes manifest. They are both wrongdoers-both negligent toward plaintiff. They brought about a situation where the negligence of one of them injured the plaintiff, hence it should rest with them each to absolve himself if he can. The injured party has been placed by defendants in the unfair position of pointing to which defendant caused the harm. If one can escape the other may also and plaintiff is remediless." (*Summers, supra,* 33 Cal.2d 80 at p. 86.)

- "California courts have applied the [*Summers*] alternative liability theory only when all potential tortfeasors have been joined as defendants." (*Setliff v. E. I. Du Pont de Nemours & Co.* (1995) 32 Cal.App.4th 1525, 1534-1535 [38 Cal.Rptr.2d 763].)

  "There is an important difference between the situation involved in *Summers* and the present case. There, all the parties who were or could have been responsible for the harm to the plaintiff were joined as defendants. Here, by contrast, there are approximately 200 drug companies which made DES, any of which might have manufactured the injury-producing drug." (*Sindell v. Abbott Laboratories* (1980) 26 Cal.3d 588, 602 [163 Cal.Rptr. 132, 607 P.2d 924].)

- "According to the Restatement, the burden of proof shifts to the defendants only if the plaintiff can demonstrate that all defendants acted tortiously and that the harm resulted from the conduct of one of them. (Rest.2d Torts, § 433B, com. g, p. 446.) It goes on to state that the rule thus far has been

applied only where all the actors involved are joined as defendants and where the conduct of all is simultaneous in time, but cases might arise in which some modification of the rule would be necessary if one of the actors is or cannot be joined, or because of the effects of lapse of time, or other circumstances." (*Sindell, supra,* 26 Cal.3d at p. 602, fn. 16.)

- ~~Restatement Second of Torts, section 433B(3), provides: "Where the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one has caused it, the burden is upon each such actor to prove that he has not caused the harm."~~

- "*Summers* applies to multiple *tortfeasors* not to multiple *defendants,* and it is immaterial in this case that the matter went to trial only as against respondent, for A, B, and/or C was also a tortfeasor." (*Vahey v. Sacia* (1981) 126 Cal.App.3d 171, 177 [178 Cal.Rptr. 559], original italics, footnote omitted.)

- "[Restatement Second of Torts] Section 433B, subdivision (3) sets forth the rule of *Summers v. Tice, supra,* 33 Cal. 2d 80, using its facts as an example. Comment *h* provides: 'The cases thus far decided in which the rule stated in Subsection (3) has been applied all have been cases in which all of the actors involved have been joined as defendants. All of these cases have involved conduct simultaneous in time, or substantially so, and all of them have involved conduct of substantially the same character, creating substantially the same risk of harm, on the part of each actor. It is possible that cases may arise in which some modification of the rule stated may be necessary because of complications arising from the fact that one of the actors involved is not or cannot be joined as a defendant, or because of the effect of lapse of time, or because of substantial differences in the character of the conduct of the actors or the risks which they have created. Since such cases have not arisen, and the situations which might arise are difficult to forecast, no attempt is made to deal with such problems in this Section. The rule stated in Subsection (3) is not intended to preclude possible modification if such situations call for it.' " (*Setliff, supra,* 32 Cal.App.4th at p. 1535.)

- ~~The *Summers* rule applies to multiple causes, at least one of which is tortious. (*Vahey v. Sacia* (1981) 126 Cal.App.3d 171, 177, fn. 2 [178 Cal.Rptr. 559].) Thus, it can apply where there is only one defendant. (*Id.* at p. 177.) However, California courts apply the alternative liability theory only when all potential tortfeasors have been joined as defendants. (*Setliff v. E. I. Du Pont De Nemours & Co.* (1995) 32 Cal.App.4th 1525, 1534-1535 [38 Cal.Rptr.2d 763].)~~

Secondary Sources

6 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Torts, § ~~1194~~1345

California Tort Guide (Cont.Ed.Bar 3d ed.) § 1.16

1 Levy et al., California Torts, Ch. 2, *Causation*, § 2.03 (Matthew Bender)

California Products Liability Actions, Ch. 7, *Proof*, § 7.06 (Matthew Bender)

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

16 California Points and Authorities, Ch. 165, *Negligence*, § 165.330 (Matthew Bender)

513. Wrongful Life—Essential Factual Elements

[*Name of plaintiff*] claims that [*name of defendant*] was negligent because [he/she] failed to inform [*name of plaintiff*]'s parents of the risk that [he/she] would be born [genetically impaired/disabled]. To establish this claim, [*name of plaintiff*] must prove all of the following:

[1. That [*name of defendant*] negligently failed to [diagnose/ [or] warn [*name of plaintiff*]'s parents of] the risk that [*name of plaintiff*] would be born with a [genetic impairment/disability];]

[*or*]

[1. That [*name of defendant*] negligently failed to [perform appropriate tests/advise [*name of plaintiff*]'s parents of tests] that would more likely than not have disclosed the risk that [*name of plaintiff*] would be born with a [genetic impairment/disability];]

2. That [*name of plaintiff*] was born with a [genetic impairment/disability];

3. That if [*name of plaintiff*]'s parents had known of the risk of [genetic impairment/disability], [his/her] mother would not have conceived [him/her] [or would not have carried the fetus to term]; and

4. That [*name of defendant*]'s negligence was a substantial factor in causing [*name of plaintiff*]'s parents to have to pay extraordinary expenses for [*name of plaintiff*].

New September 2003; Revised April 2007, April 2008, November 2019

Directions for Use

The general medical negligence instructions on the standard of care and causation (see CACI Nos. 500–502) may be used in conjunction with this instruction. Read also CACI No. 512, *Wrongful Birth—Essential Factual Elements*, if the parents' cause of action for wrongful birth is joined with the child's cause of action for wrongful life.

In element 1, select the first option if the claim is that the defendant failed to diagnose or warn the plaintiff of a possible genetic impairment. Select the second option if the claim is that the defendant failed to order or advise of available genetic testing. In a testing case, there is no causation unless the chances that the test would disclose the impairment were at least 50 percent. (See *Simmons v. West Covina Medical Clinic* (1989) 212 Cal.App.3d 696, 702–703 [260 Cal.Rptr. 772].)

In order for this instruction to apply, the genetic impairment must result in a physical or mental disability. This is implied by the fourth element in the instruction.

Sources and Authority

- No Wrongful Life Claim Against Parent. Civil Code section 43.6(a).

- "[I]t may be helpful to recognize that although the cause of action at issue has attracted a special name—'wrongful life'—plaintiff's basic contention is that her action is simply one form of the familiar medical or professional malpractice action. The gist of plaintiff's claim is that she has suffered harm or damage as a result of defendants' negligent performance of their professional tasks, and that, as a consequence, she is entitled to recover under generally applicable common law tort principles." (*Turpin v. Sortini* (1982) 31 Cal.3d 220, 229 [182 Cal.Rptr. 337, 643 P.2d 954].)

- "Claims for 'wrongful life' are essentially actions for malpractice based on negligent genetic counseling and testing." (*Gami v. Mullikin Medical Center* (1993) 18 Cal.App.4th 870, 883 [22 Cal.Rptr.2d 819].)

- General damages are not available: "[W]e conclude that while a plaintiff-child in a wrongful life action may not recover general damages for being born impaired as opposed to not being born at all, the child—like his or her parents—may recover special damages for the extraordinary expenses necessary to treat the hereditary ailment." (*Turpin, supra,* 31 Cal.3d at p. 239.)

- A child may not recover for loss of earning capacity in a wrongful-life action. (*Andalon v. Superior Court* (1984) 162 Cal.App.3d 600, 614 [208 Cal.Rptr. 899].)

- The negligent failure to administer a test that had only a 20 percent chance of detecting Down syndrome did not establish a reasonably probable causal connection to the birth of a child with this genetic abnormality. (*Simmons, supra,* 212 Cal.App.3d at pp. 702–703.)

- "Wrongful life claims are actions brought on behalf of children, while wrongful birth claims refer to actions brought by parents. California courts do recognize a wrongful life claim by an 'impaired' child for special damages (but not for general damages), when the physician's negligence is the proximate cause of the child's need for extraordinary medical care and training. No court, however, has expanded tort liability to include wrongful life claims by children born without any mental or physical impairment."~~Wrongful life does not apply to normal children.~~ (*Alexandria S. v. Pac. Fertility Medical Ctr.* (1997) 55 Cal.App.4th 110, 122 [64 Cal.Rptr.2d 23], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Torts, §§ ~~979~~1112–~~985~~1123

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 9.21–9.22

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, §§ 31.15, 31.50 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 415, *Physicians: Medical Malpractice*, § 415.11 (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence*, § 165.70 (Matthew Bender)

1125. Conditions on Adjacent Property

[*Name of public entity defendant***]'s property may be considered dangerous if [a] condition[s] on adjacent property contribute[s] to exposing those using [***name of public entity defendant***]'s property to a substantial risk of injury.**

[*Name of plaintiff***] claims that the following condition[s] on adjacent property contributed to making [***name of public entity defendant***]'s property dangerous: [***specify***]. You should consider [this/these] condition[s] in deciding whether [***name of public entity defendant***]'s property was in a dangerous condition.**

New November 2019

Directions for Use

Give this instruction if the plaintiff claims that conditions on property adjacent to the public property that is alleged to be dangerous contributed to making the public property dangerous. This instruction should be given with, and not instead of, the applicable basic instructions for dangerous conditions on public property (see CACl Nos. 1100 through 1103).

This instruction is for use when a plaintiff's claim involves conditions on property adjacent to the public property. A different instruction will be required if a dangerous condition on public property creates a substantial risk of injury to one using adjacent property.

Sources and Authority

- "A California Law Revision Commission comment accompanying the statute's 1963 enactment expands on the relationship between public property and adjacent property with regard to dangerous conditions: ' "Adjacent property" as used in the definition of "dangerous condition" refers to the area that is exposed to the risk created by a dangerous condition of the public property. . . . [¶] . . . A public entity may be liable only for dangerous conditions of its own property. But its own property may be considered dangerous if it creates a substantial risk of injury to adjacent property or to persons on adjacent property; and its own property may be considered dangerous if a condition on the adjacent property exposes those using the public property to a substantial risk of injury.' " (*Bonanno v. Central Contra Costa Transit Authority* (2003) 30 Cal.4th 139, 147–148 [132 Cal.Rptr.2d 341, 65 P.3d 807].)

- "The third and fourth sentences of the City's '[d]esign of the [d]riveway' instruction improperly told the jury that it could not 'rely on' elements of the driveway, including 'the placement of the stop sign, the left turn pocket, and the presence of the pink cement' in deciding whether 'a dangerous condition existed.' This was legally incorrect, and it directly conflicted with another instruction given to the jury, which told it that the City's 'property may be considered dangerous if a condition on adjacent property, such as the pink stamped concrete or the location of the stop sign, exposes those using the public property to a substantial risk of injury in conjunction with the adjacent property.' Giving the jury these two conflicting instructions could not have been

anything but hopelessly confusing to the jury." (*Guernsey v. City of Salinas* (2018) 30 Cal.App.5th 269, 281-282 [241 Cal.Rptr.3d 335].)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, § 321 et seq.

5 Levy et al., California Torts, Ch. 61, *Tort Claims Against Public Entities and Employees*, § 61.01 et seq. (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 464, *Public Entities and Officers*, § 464.84 (Matthew Bender)

19A California Points and Authorities, Ch. 196, *Public Entities*, § 190.213 (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 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;]

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, November 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 v. Owens-Corning Fiberglas Corp.*, ~~*supra,*~~ (1971) 22 Cal.App.3d 116,~~at p~~. 124 [99 Cal.Rptr. 350], internal citations omitted; but see *Birke, supra,* 169 Cal.App.4th at p. 1550 ["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 [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,* 17 Cal.App.5th at p. 112.)

- "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,* 230 Cal.App.3d at p. 1139.)

- "[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)

2423. Breach of ~~the~~ Implied Covenant of Good Faith and Fair Dealing—Employment Contract—Essential Factual Elements

In every employment [contract/agreement] there is an implied promise of good faith and fair dealing. This implied promise means that neither the employer nor the employee will do anything to unfairly interfere with the right of the other to receive the benefits of the employment relationship. Good faith means honesty of purpose without any intention to mislead or to take unfair advantage of another. Generally speaking, it means being faithful to one's duty or obligation. However, the implied promise of good faith and fair dealing cannot create obligations that are inconsistent with the terms of the contract.

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

1. **That [***name of plaintiff***] and [***name of defendant***] entered into an employment relationship;**

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

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

~~3~~4. **That [***name of defendant***] [***specify conduct that plaintiff claims prevented him/her from receiving the benefits that he/she was entitled to have received under the contract***];**

54. **That by doing so, [***name of defendant***]~~'s conduct was a failure to~~ did not act fairly and in good faith; and**

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

~~**Both parties to an employment relationship have a duty not to do anything that prevents the other party from receiving the benefits of their agreement. Good faith means honesty of purpose without any intention to mislead or to take unfair advantage of another. Generally speaking, it means being faithful to one's duty or obligation.**~~

New September 2003; Revised November 2019

Directions for Use

In every contract, there is an implied promise that each party will not do anything to unfairly interfere with the right of any other party to receive the benefits of the contract. (*Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 658 [328 P.2d 198].) Give this instruction if the employee asserts a claim that his or her termination or other adverse employment action was in breach of this implied covenant. If

the existence of a contract is at issue, see instructions on contract formation in the 300 series.

~~This instruction must be completed by inserting an explanation of the conduct that violated the duty to act in good faith.~~

Include element 2 if the employee's substantial performance of his or her required job duties is at issue. Include element 3 if there are conditions precedent that the employee must fulfill before the employer is required to perform. In element 4, insert an explanation of the employer's conduct that violated the duty to act in good faith.~~The element of substantial performance should not be confused with the "good cause" defense: "The action is primarily for breach of contract. It was therefore incumbent upon plaintiff to prove that he was able and offered to fulfill all obligations imposed upon him by the contract. Plaintiff failed to meet this requirement; by voluntarily withdrawing from the contract he excused further performance by defendant." (*Kane v. Sklar* (1954) 122 Cal.App.2d 480, 482 [265 P.2d 29], internal citation omitted.) Element 2 may be deleted if substantial performance is not an issue.~~

Do not give this instruction if the alleged breach is only the termination of an at-will contract. (See *Eisenberg v. Alameda Newspapers* (1999) 74 Cal.App.4th 1359, 1391 [88 Cal.Rptr.2d 802].)

See also the Sources and Authority to CACI No. 325, *Breach of Implied Covenant of Good Faith and Fair Dealing—Essential Factual Elements,* for more authorities on the implied covenant outside of employment law.

Sources and Authority

- Contractual Conditions Precedent. Civil Code section 1439.

- "We therefore conclude that the employment relationship is not sufficiently similar to that of insurer and insured to warrant judicial extension of the proposed additional tort remedies in view of the countervailing concerns about economic policy and stability, the traditional separation of tort and contract law, and finally, the numerous protections against improper terminations already afforded employees." (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 693 [254 Cal.Rptr. 211, 765 P.2d 373].)

- ~~"The covenant of good faith and fair dealing, implied by law in every contract, exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive the benefits of the agreement actually made. The covenant thus cannot ' "be endowed with an existence independent of its contractual underpinnings." ' It cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 349-350 [100 Cal.Rptr.2d 352, 8 P.3d 1089], internal citations omitted.)~~

- "A breach of the contract may also constitute a breach of the implied covenant of good faith and fair dealing. But insofar as the employer's acts are directly actionable as a breach of an implied-in-fact contract term, a claim that merely realleges that breach as a violation of the covenant is superfluous. This is because, as we explained at length in *Foley*, the remedy for breach of an employment agreement, including the covenant of good faith and fair dealing implied by law therein, is solely contractual. In the employment context, an implied covenant theory affords no separate measure of

recovery, such as tort damages." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 352 [100 Cal.Rptr.2d 352, 8 P.3d 1089]~~*Guz, supra,* 24 Cal.4th at p. 352~~, internal citation omitted.)

- ~~"Where there is no underlying contract there can be no duty of good faith arising from the implied covenant." (*Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 819 [85 Cal.Rptr.2d 459].)~~

- "We do not suggest the covenant of good faith and fair dealing has no function whatever in the interpretation and enforcement of employment contracts. As indicated above, the covenant prevents a party from acting in bad faith to frustrate the contract's actual benefits. Thus, for example, the covenant might be violated if termination of an at-will employee was a mere pretext to cheat the worker out of another contract benefit to which the employee was clearly entitled, such as compensation already earned." (*Guz, supra,* 24 Cal.4th at p. 353, fn. 18.)

- "The reason for an employee's dismissal and whether that reason constitutes bad faith are evidentiary questions most properly resolved by the trier of fact." (*Luck v. Southern Pacific Transportation Co.* (1990) 218 Cal.App.3d 1, 26 [267 Cal.Rptr. 618], internal citations omitted.)

Secondary Sources

Chin et al., California Practice Guide: Employment Litigation ¶¶ 4:330, 4:331, 4:340, 4:343, 4:346 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Contract Actions, §§ 8.27–8.28

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, §§ 60.02[2][c], 60.06 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, § 249.14 (Matthew Bender)

California Civil Practice: Employment Litigation §§ 6:21–6:22 (Thomson Reuters)

2424. Affirmative Defense—Breach of the Implied Covenant of Good Faith and Fair Dealing—Good Faith Though Mistaken Belief ~~Defense~~

[*Name of defendant*] claims that [he/she/it] did not breach the duty to act fairly and in good faith because [he/she/it] believed that there was a legitimate and reasonable business purpose for the conduct.

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

1. **That [his/her/its] conduct was based on an honest belief that [*insert alleged mistake*]; and**

2. **That, if true, [*insert alleged mistake*] would have been a legitimate and reasonable business purpose for the conduct.**

New September 2003; Revised November 2019

Directions for Use

In every contract, there is an implied promise that each party will not do anything to unfairly interfere with the right of any other party to receive the benefits of the contract. (*Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 658 [328 P.2d 198].) Give CACI No. 2423, *Breach of Implied Covenant of Good Faith and Fair Dealing—Employment Contract—Essential Factual Elements,* if the employee asserts a claim that his or her termination or other adverse employment action was in breach of this implied covenant. Give this instruction if the employer asserts the defense that an honest, though mistaken, belief does not constitute a breach.

Sources and Authority

- "[B]ecause the implied covenant of good faith and fair dealing requires the employer to act fairly and in good faith, an employer's honest though mistaken belief that legitimate business reasons provided good cause for discharge, will negate a claim it sought in bad faith to deprive the employee of the benefits of the contract." (*Wilkerson v. Wells Fargo Bank* (1989) 212 Cal.App.3d 1217, 1231 [261 Cal.Rptr. 185], internal citation omitted, disapproved on other grounds in *Cotran v. Rollins Hudig Hall International, Inc.* (1998) 17 Cal.4th 93, 96 [69 Cal.Rptr.2d 900, 948 P.2d 412].)

- "The jury was instructed that the neglect or refusal to fulfill a contractual obligation based on an honest, mistaken belief did not constitute a breach of the implied covenant." (*Luck v. Southern Pacific Transportation Co.* (1990) 218 Cal.App.3d 1, 26 [267 Cal.Rptr. 618].)

- "[*F*]*oley* does not preclude inquiry into an employer's motive for discharging an employee ... ." (*Seubert v. McKesson Corp.* (1990) 223 Cal.App.3d 1514, 1521 [273 Cal.Rptr. 296], overruled on other grounds, *Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 389 [46 Cal.Rptr.3d 668, 139 P.3d 56].)

- "[T]he jury was asked to determine in its special verdict whether appellants had a legitimate reason to terminate [plaintiff]'s employment and whether appellants acted in good faith on an honest but mistaken belief that they had a legitimate business reason to terminate [plaintiff]'s employment." (*Seubert, supra, v. McKesson Corp.* (1990) 223 Cal.App.3d at p.1514, 1521 [273 Cal.Rptr. 296] [upholding jury instruction].)

Secondary Sources

Chin et al., Cal. Practice Guide: Employment Litigation, Ch. 4-A, Employment Contract Claims—Employment Presumed At Will, ¶¶ 4:5, 4:271 (The Rutter Group)Employment Litigation (The Rutter Group) ¶¶ 4:5, 4:271

Chin et al., Cal. Practice Guide: Employment Litigation, Ch. 4-D, Employment Contract Claims—Implied Covenant of Good Faith and Fair Dealing, ¶¶ 4:271 et seq., 4:342 et seq. (The Rutter Group)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, § 100.30 (Matthew Bender)

2544. Disability Discrimination—Affirmative Defense—Health or Safety Risk

[*Name of defendant*] claims that [his/her/its] conduct was ~~lawful~~ not discriminatory because, even with reasonable accommodations, [*name of plaintiff*] was unable to perform ~~an~~ at least one essential job duty without endangering [[his/her] health or safety~~/~~ [or] [the health or safety of others]. To succeed on this defense, [*name of defendant*] must prove ~~both~~ all of the following:

1. **That [*describe job duty*] was an essential job duty;~~ and~~**

2. **That there was no reasonable accommodation that would have allowed [*name of plaintiff*] to perform this job duty~~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];~~ and~~~~more than if an individual without a disability performed the job duty.~~**

3. **That [*name of plaintiff*]'s performance of this job duty would present an immediate and substantial degree of risk to [[him/her]/ [or] others].**

[However, it is not a defense to assert that [*name of plaintiff*] has a disability with a future risk, as long as the disability does not presently interfere with [his/her] ability to perform the job in a manner that will not endanger [him/her]/ [or] others].
~~[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 determining whether [*name of defendant*] has proved this defense, factors that you may consider include the following:

a. The duration of the risk;

b. The nature and severity of the potential harm;

c. The likelihood that the potential harm would have occurred;

d. How imminent the potential harm was; [and]

e. Relevant information regarding [*name of plaintiff*]'s past work history[;/and]

[f. [*Specify other relevant factors*].]

Your consideration of these factors should be based on a reasonable medical judgment that relies on the most current medical knowledge or on the best available objective evidence.

New September 2003; Revised May 2019, November 2019

Directions for Use

This instruction is based on the Fair Employment and Housing Council regulation addressing the defense of health or safety risk. (See Cal. Code Regs., tit. 2, § 11067.) Give CACI No. 2543, *Disability Discrimination—"Essential Job Duties" Explained*, to instruct on when a job duty is essential.

If more than one essential job duty is alleged to involve a health or safety risk, pluralize the elements accordingly.

Give the optional paragraph following the elements if there is concern about a future risk. (See Cal. Code Regs., tit. 2, § 11067(d).)

The list of factors to be considered is not exclusive. (See Cal. Code Regs., tit. 2, § 11067(e).) Additional factors may be added according to the facts and circumstances of the case.

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(be)-(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~~ 11th ed. ~~2005~~2017) Constitutional Law, §§ ~~936, 937~~1045–1048

Chin et al., Cal. Practice Guide: Employment Litigation, Ch. 9-C, *Disability Discrimination—California Fair Employment And Housing Act (FEHA)*, ¶¶ 9:2158, 9:2251–2253~~98~~, 9:2346.3, 9:2402–9:2402.13~~, 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)

2545. Disability Discrimination—Affirmative Defense—Undue Hardship

[*Name of defendant*] claims that accommodating [*name of plaintiff*]'s disability~~proposed accommodations~~ would create an undue hardship to the operation of [his/her/its] business. To succeed, [*name of defendant*] must prove that ~~the~~ accommodation~~s~~ would be significantly difficult or expensive ~~to make~~. In deciding whether an accommodation would create an undue hardship, you may consider the following factors:

a. The nature and cost of the accommodation;

b. [*Name of defendant*]'s ability to pay for the accommodation;

c. The type of operations conducted at the facility;

d. The impact on the operations of the facility;

e. The number of [*name of defendant*]'s employees and the relationship of the employees' duties to one another;

f. The number, type, and location of [*name of defendant*]'s facilities; and

g. The administrative and financial relationship of the facilities to one another.

New September 2003; Revised November 2019

Directions for Use

The issue of whether undue hardship is a true affirmative defense or whether the defendant only has the burden of coming forward with the evidence of hardship as a way of negating the element of plaintiff's case concerning the reasonableness of an accommodation appears to be unclear.

Sources and Authority

- Employer Duty to Provide Reasonable Accommodation. Government Code section 12940(m).
- "Undue Hardship" Defined. Government Code section 12926(u).
- " 'Undue hardship' means 'an action requiring significant difficulty or expense, when considered in light of the following factors: [¶] (1) The nature and cost of the accommodation needed. [¶] (2) The overall financial resources of the facilities involved in the provision of the reasonable accommodations, the number of persons employed at the facility, and the effect on expenses and resources or the impact otherwise of these accommodations upon the operation of the facility. [¶] (3) The overall financial resources of the covered entity, the overall size of the business of a covered entity with respect to the number of employees, and the number, type, and location of its facilities. [¶]

(4) The type of operations, including the composition, structure, and functions of the workforce of the entity. [¶] (5) The geographic separateness or administrative or fiscal relationship of the facility or facilities.' (§ 12926, subd. (u).) ' "Whether a particular accommodation will impose an undue hardship for a particular employer is determined on a case by case basis" ' and 'is a multi-faceted, fact-intensive inquiry.' " (*Atkins v. City of Los Angeles* (2017) 8 Cal.App.5th 696, 733 [214 Cal.Rptr.3d 113].)

- "[U]nder California law and the instructions provided to the jury, an employer must do more than simply assert that it had economic reasons to reject a plaintiff's proposed reassignment to demonstrate undue hardship. An employer must show *why* and *how* asserted economic reasons would affect its ability to provide a particular accommodation." (*Atkins, supra,* 8 Cal.App.5th at p. 734, original italics, internal citation omitted.)

Secondary Sources

Chin et al., California Practice Guide: Employment Litigation, Ch. 9-C, *California Fair Employment And Housing Act (FEHA)*, ¶¶ 9:2250, 9:2345, 9:2366, 9:2367 (The Rutter Group)

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

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.51[4][b] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.35, 115.54, 115.100 (Matthew Bender)

2560. Religious Creed Discrimination—Failure to Accommodate—Essential Factual Elements (Gov. Code, § 12940(*l*))

[*Name of plaintiff***] claims that [***name of defendant***] wrongfully discriminated against [him/her] by failing to reasonably accommodate [his/her] religious [belief/observance]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

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

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

3. **That [***name of plaintiff***] has a sincerely held religious belief that [***describe religious belief, observance, or practice***];**

4. **That [***name of plaintiff***]'s religious [belief/observance] conflicted with a job requirement;**

5. **That [***name of defendant***] knew of the conflict between [***name of plaintiff***]'s religious [belief/observance] and the job requirement;**

6. [**That [***name of defendant***] did not reasonably accommodate [***name of plaintiff***]'s religious [belief/observance];**]

   [*or*]

   [That [*name of defendant***] [terminated/refused to hire] [***name of plaintiff***] in order to avoid having to accommodate [***name of plaintiff***]'s religious [belief/observance];]**

7. **That [***name of plaintiff***]'s failure to comply with the conflicting job requirement was a substantial motivating reason for**

   [[*name of defendant***]'s decision to [discharge/refuse to hire/[***specify other adverse employment action***]] [***name of plaintiff***];]**

   [**or**]

   [[*name of defendant***]'s subjecting [him/her] to an adverse employment action;]**

   [**or**]

   [[his/her] constructive discharge;]

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

9. That [*name of defendant*]'s failure to reasonably accommodate [*name of plaintiff*]'s religious [belief/observance] was a substantial factor in causing [his/her] harm.

A reasonable accommodation is one that eliminates the conflict between the religious practice and the job requirement.

If more than one accommodation is reasonable, an employer satisfies its obligation to make a reasonable accommodation if it selects one of those accommodations in good faith.

New September 2003; Revised June 2012, December 2012, June 2013, November 2019

Directions for Use

If element 1 is given, the court may need to instruct the jury on the statutory definition of "employer" under the FEHA. Other covered entities under the FEHA include labor organizations, employment agencies, and apprenticeship training programs. (See Gov. Code, § 12940(a)–(d).)

Regulations provide that refusing to hire an applicant or terminating an employee in order to avoid the need to accommodate a religious practice constitutes religious creed discrimination. (Cal. Code Regs., tit. 2, § 11062.) Give the second option for element 6 if the plaintiff claims that the employer terminated or refused to hire the plaintiff to avoid a need for accommodation.

Element 7 requires that the plaintiff's failure to comply with the conflicting job requirement be a substantial motivating reason for the employer's adverse action. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; see also CACI No. 2507, *"Substantial Motivating Reason" Explained*.) Read the first option if there is no dispute as to whether the employer's acts constituted an adverse employment action. Read the second option and also give CACI No. 2509, *"Adverse Employment Action" Explained,* if whether there was an adverse employment action is a question of fact for the jury. If constructive discharge is alleged, give the third option for element 7 and also give CACI No. 2510, *"Constructive Discharge" Explained*.

Federal courts construing Title VII of the Civil Rights Act of 1964 have held that the threat of an adverse employment action is a violation if the employee acquiesces to the threat and foregoes religious observance. (See, e.g., *EEOC v. Townley Engineering & Mfg. Co.* (9th Cir. 1988) 859 F.2d 610, 614 fn. 5.) While no case has been found that construes the FEHA similarly, element 7 may be modified if the court agrees that this rule applies. In the first option, replace "decision to" with "threat to."~~a threat of discharge or discipline may be inserted as an "other adverse employment action."~~ Or in the second option, "~~subjected~~ subjecting [*name of plaintiff*] to" may be replaced with "~~threatened~~ threatening [*name of plaintiff*] with."

Sources and Authority

- Religious Accommodation Required Under Fair Employment and Housing Act. Government Code section 12940(*l*).

- Scope of Religious Protection. Government Code section 12926(q).
- Scope of Religious Protection. Cal. Code Regs., tit. 2, § 11060(b).
- Reasonable Accommodation and Undue Hardship. Cal. Code Regs., tit. 2, § 11062.
- "In evaluating an argument the employer failed to accommodate an employee's religious beliefs, the employee must establish a prima facie case that he or she had a bona fide religious belief, of which the employer was aware, that conflicts with an employment requirement ... . Once the employee establishes a prima facie case, then the employer must establish it initiated good faith efforts to accommodate or no accommodation was possible without producing undue hardship." (*Soldinger v. Northwest Airlines, Inc.* (1996) 51 Cal.App.4th 345, 370 [58 Cal.Rptr.2d 747], internal citation omitted.)
- "Any reasonable accommodation is sufficient to meet an employer's obligations. However, the employer need not adopt the most reasonable accommodation nor must the employer accept the remedy preferred by the employee. The reasonableness of the employer's efforts to accommodate is determined on a case by case basis ... . '[O]nce it is determined that the employer has offered a reasonable accommodation, the employer need not show that each of the employee's proposed accommodations would result in undue hardship.' '[W]here the employer has already reasonably accommodated the employee's religious needs, the ... inquiry [ends].' " (*Soldinger, supra,* 51 Cal.App.4th at p. 370, internal citations omitted.)
- "Requiring the plaintiff to show that discrimination was a *substantial* motivating factor, rather than simply *a* motivating factor, more effectively ensures that liability will not be imposed based on evidence of mere thoughts or passing statements unrelated to the disputed employment decision. At the same time, … proof that discrimination was a *substantial* factor in an employment decision triggers the deterrent purpose of the FEHA and thus exposes the employer to liability, even if other factors would have led the employer to make the same decision at the time." (*Harris, supra,* 56 Cal.4th at p. 232, original italics.)
- "We do not suggest that discrimination must be alone sufficient to bring about an employment decision in order to constitute a substantial motivating factor. But it is important to recognize that discrimination can be serious, consequential, and even by itself determinative of an employment decision without also being a ~~"~~"but for"~~"~~ cause." (*Harris, supra,* 56 Cal.4th at p. 229.)

Secondary Sources

8 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Constitutional Law, §§ 967, 1028, 1052-1054~~876, 922, 940, 941~~

Chin et al., California Practice Guide: Employment Litigation, Ch. 7-A, *Title VII And The California Fair Employment And Housing Act,* ¶¶ 7:151, 7:215, 7:305, 7:610–7:611, 7:631–7:634, 7:641 (The Rutter Group)

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment*

Opportunity Laws, § 41.52[3] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.22, 115.35[d], 115.91 (Matthew Bender)

California Civil Practice: Employment Litigation §§ 2:71–2:73 (Thomson Reuters)

1 Lindemann and Grossman, Employment Discrimination Law (3d ed. 1996) Religion, pp. 219–224, 226–227; *id.* (2000 supp.) at pp. 100–101

2561. Religious Creed Discrimination—Reasonable Accommodation—Affirmative Defense—Undue Hardship (Gov. Code, §§ 12940(*l*)(1), 12926(u))

Please see CACI No. 2545, *Disability Discrimination—Affirmative Defense—Undue Hardship.*

New September 2003; Revoked December 2012; Restored and Revised June 2013; Revised November 2019

Directions for Use

"Undue hardship" for purposes of religious creed discrimination is defined in the same way that it is defined for disability discrimination. (~~See~~ Gov. Code, §§ 12940(*l*)(1); ~~see,~~ Gov. Code, § 12926(u).) CACI No. 2545, *Disability Discrimination—Affirmative Defense—Undue Hardship,* may be given in religious accommodation cases also. Replace "disability" with "religious observance" in the first sentence of CACI No. 2545.

Sources and Authority

- Religious Accommodation Required Under Fair Employment and Housing Act. Government Code section 12940(*l*)(1).
- "Undue Hardship" Defined. Government Code section 12926(u).
- "If the employee proves a prima facie case and the employer fails to initiate an accommodation for the religious practices, the burden is then on the employer to prove it will incur an undue hardship if it accommodates that belief. '[T]he extent of undue hardship on the employer's business is at issue only where the employer claims that it is unable to offer any reasonable accommodation without such hardship.' ..." (*Soldinger v. Northwest Airlines, Inc.* (1996) 51 Cal.App.4th 345, 371 [58 Cal.Rptr.2d 747], internal citations omitted.)
- "It would be anomalous to conclude that by 'reasonable accommodation' Congress meant that an employer must deny the shift and job preference of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others, and we conclude that Title VII does not require an employer to go that far ...¶¶. Alternatively, the Court of Appeals suggested that [the employer] could have replaced [plaintiff] on his Saturday shift with other employees through the payment of premium wages ... . To require [the employer] to bear more than a de minimus cost ... is an undue hardship. Like abandonment of the seniority system, to require [the employer] to bear additional costs when no such costs are incurred to give other employees the days off that they want would involve unequal treatment of employees on the basis of their religion." (*TWA v. Hardison* (1977) 432 U.S. 63, 81, 84 [97 S.Ct. 2264, 53 L.Ed.2d 113], footnote omitted.)

Secondary Sources

8 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Constitutional Law, § 1025, 1026~~921~~

Chin et al., Cal. Practice Guide: Employment Litigation, Ch. 7-A, *Title VII And The California Fair Employment and Housing Act,* ¶¶ 7:215, 7:305, 7:610, 7:631, 7:640−7:641 (The Rutter Group)

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.52[4] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.35[2][a]–[c], 115.54, 115.91 (Matthew Bender)

California Civil Practice: Employment Litigation §§ 2:71–2:73 (Thomson Reuters)

1 Lindemann and Grossman, Employment Discrimination Law (3d ed.) Religion, pp. 227–234 (2000 supp.) at pp. 100–105

2703. Nonpayment of Overtime Compensation—Proof of Overtime Hours Worked

State law requires California employers to keep payroll records showing the hours worked by and wages paid to employees.

If [*name of defendant***] did not keep accurate records of the hours worked by [***name of plaintiff***], then [***name of plaintiff***] may prove the number of overtime hours worked by making a reasonable estimate of those hours.**

In determining the amount of overtime hours worked, you may consider [*name of plaintiff***]'s estimate of the number of overtime hours worked and any evidence presented by [***name of defendant***] that [***name of plaintiff***]'s estimate is unreasonable.**

New September 2003; Revised June 2005, December 2005, November 2019

Directions for Use

This instruction is intended for use when ~~the~~ a nonexempt employee plaintiff is unable to provide evidence of the precise number of hours worked because of the employer's failure to keep accurate payroll records. (See *Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721, 727–728 [245 Cal.Rptr. 36].)

Sources and Authority

- Right of Action for Unpaid Overtime. Labor Code section 1194(a).
- Employer Duty to Keep Payroll Records. Labor Code section 1174(d).
- "[W]here the employer has failed to keep records required by statute, the consequences for such failure should fall on the employer, not the employee. In such a situation, imprecise evidence by the employee can provide a sufficient basis for damages." (*Furry v. East Bay Publishing, LLC* (2018) 30 Cal.App.5th 1072, 1079 [242 Cal.Rptr.3d 144].)
- "Although the employee has the burden of proving that he performed work for which he was not compensated, public policy prohibits making that burden an impossible hurdle for the employee. ... 'In such situation ... an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate.' " (*Hernandez, supra,* 199 Cal.App.3d at p. 727, internal citation omitted.)
- "Once an employee shows that he performed work for which he was not paid, the *fact* of damage is

certain; the only uncertainty is the *amount* of damage. [Citation.] In such a case, it would be a perversion of justice to deny all relief to the injured person, thereby relieving the wrongdoer from making any restitution for his wrongful act." (*Furry, supra,* 30 Cal.App.5th at p. 1080, original italics.)

- "That [plaintiff] had to draw his time estimates from memory was no basis to completely deny him relief." (*Furry, supra,* 30 Cal.App.5th at p. 1081.)

- "It is the trier of fact's duty to draw whatever reasonable inferences it can from the employee's evidence where the employer cannot provide accurate information." (*Hernandez, supra,* 199 Cal.App.3d at p. 728, internal citation omitted.)

- "Absent an explicit, mutual wage agreement, a fixed salary does not serve to compensate an employee for the number of hours worked under statutory overtime requirements. ... [¶] Since there was no evidence of a wage agreement between the parties that appellant's ... per week compensation represented the payment of minimum wage or included remuneration for hours worked in excess of 40 hours per week, ... appellant incurred damages of uncompensated overtime." (*Hernandez, supra,* 199 Cal.App.3d at pp. 725–726, internal citations omitted.)

Secondary Sources

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-D, *Payment of Wages,* ¶ 11:456 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-F, *Payment of Overtime Compensation,* ¶ :900 et seq.~~11:955.2~~ (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-J, *Enforcing California Laws Regulating Employee Compensation,* ¶ 11:1478.5 (The Rutter Group)

1 Wilcox, California Employment Law, Ch. 5, *Administrative and Judicial Remedies Under Wage and Hour Laws,* § 5.72[1] (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 250, *Employment Law: Wage and Hour Disputes,* § 250.40 (Matthew Bender)

2740. Violation of Equal Pay Act—Essential Factual Elements (Lab. Code, § 1197.5)

[*Name of plaintiff*] claims that [he/she] was paid at a wage rate that is less than the rate paid to employees of [the opposite sex/another race/another ethnicity]. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. That [*name of plaintiff*] was paid less than the rate paid to [a] person[s] of [the opposite sex/another race/another ethnicity] working for [*name of defendant*];

2. That [*name of plaintiff*] was performing substantially similar work as the other person[s], considering the overall combination of skill, effort, and responsibility required; and

3. That [*name of plaintiff*] was working under similar working conditions as the other person[s].

New May 2018; Revised January 2019, November 2019

Directions for Use

The California Equal Pay Act prohibits paying employees at lower wage rates than rates paid to employees of the opposite sex or a different race or ethnicity for substantially similar work. (Lab. Code, § 1197.5(a), (b).) An employee receiving less than the wage to which he or she is entitled may bring a civil action to recover the balance of the wages, including interest, and an equal amount as liquidated damages. Costs and attorney fees may also be awarded. (Lab. Code, § 1197.5(h).) There is no requirement that an employee show discriminatory intent as an element of the claim. (*Green v. Par Pools, Inc.* (2003) 111 Cal.App.4th 620, 622–625, 629 [3 Cal.Rptr.3d 844].)

This instruction presents singular and plural options for the comparator, the employee or employees whose pay and work are being compared to the plaintiff's to establish a violation of the Equal Pay Act. The statute refers to *employees* of the opposite sex or different race or ethnicity. There is language in cases, however, that suggests that a single comparator (e.g., one woman to one man) is sufficient. (See *Hall v. County of Los Angeles* (2007) 148 Cal.App.4th 318, 324 [55 Cal.Rptr.3d 732] [plaintiff had to show that she is paid lower wages than *a male comparator*, italics added]; *Green, supra,* 111 Cal.App.4th at p. 628 [plaintiff in a section 1197.5 action must first show that the employer paid *a male employee* more than a female employee for equal work, italics added].) No California case has expressly so held, however.

There are a number of defenses that the employer may assert to defend what appears to be an improper pay differential. (Lab. Code, § 1197.5(a), (b).) See CACI No. 2741, *Affirmative Defense—Different Pay Justified,* and CACI No. 2742, *Bona Fide Factor Other Than Sex, Race, or Ethnicity*, for instructions on the employer's affirmative defenses. (See Lab. Code, § 1197.5(a)(1), (b)(1).)

Sources and Authority

- Right to Equal Pay Based on Gender, Race, or Ethnicity. Labor Code section 1197.5(a), (b).

- Private Right of Action to Enforce Equal Pay Claim. Labor Code section 1197.5(h).

- "This section was intended to codify the principle that an employee is entitled to equal pay for equal work without regard to gender." (*Jones v. Tracy School Dist.* (1980) 27 Cal.3d 99, 104 [165 Cal.Rptr. 100, 611 P.2d 441].)

- "To establish her prima facie case, [plaintiff] had to show not only that she is paid lower wages than a male comparator for equal work, but that she has selected the proper comparator. 'The EPA does not require perfect diversity between the comparison classes, but at a certain point, when the challenged policy effects [*sic*] both male and female employees equally, there can be no EPA violation. [Citation.] [A plaintiff] cannot make a comparison of one classification composed of males and females with another classification of employees also composed of males and females.' " (*Hall, supra, ~~v. County of Los Angeles (2007)~~* 148 Cal.App.4th at pp.~~318,~~ 324–325 ~~[55 Cal.Rptr.3d 732]~~.)

- "[T]he plaintiff in a section 1197.5 action must first show that the employer paid a male employee more than a female employee ' "for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." ' " *Green, supra,* 111 Cal.App.4th at p. 628.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 355 et seq., 430, 431

Chin, et al., California Practice Guide: Employment Litigation, Ch. 11-G, *Compensation—Wage Discrimination,* ¶ 11:1075 et seq. (The Rutter Group)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.02 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 250, Employment Law: *Wage and Hour Disputes,* § 250.14 (Matthew Bender)

3023. Unreasonable Search or Seizure—Search or Seizure Without a Warrant—Essential Factual Elements (42 U.S.C. § 1983)

[*Name of plaintiff***] claims that [***name of defendant***] carried out an unreasonable [search/seizure] of [his/her] [person/home/automobile/office/property/[***insert other***]] because [he/she] did not have a warrant. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] [searched/seized] [***name of plaintiff***]'s [person/home/automobile/office/property/[***insert other***]];**

2. **That [***name of defendant***] did not have a warrant;**

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

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

5. **That [***name of defendant***]'s [search/seizure] was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003; Renumbered from CACI No. 3003 December 2012; Revised November 2019

Directions for Use

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

Sources and Authority

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

- "A Fourth Amendment 'search' occurs when a government agent 'obtains information by physically intruding on a constitutionally protected area,' or infringes upon a 'reasonable expectation of privacy,' As we have explained, … 'when the government "physically occupie[s] private property for the purpose of obtaining information," a Fourth Amendment search occurs, regardless whether the intrusion violated any reasonable expectation of privacy. Only where the search *did not* involve a physical trespass do courts need to consult *Katz*'s reasonable-expectation-of-privacy test.' " (*Whalen v. McMullen* (9th Cir. 2018) 907 F.3d 1139, 1146–1147, original italics, internal citations omitted.)

- "[A] seizure conducted without a warrant is *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." (*Sandoval v. Cty. of Sonoma* (9th Cir. 2018) 912 F.3d 509, 515.)

- "[F]or the purposes of § 1983, a properly issued warrant makes an officer's otherwise unreasonable entry non-tortious—that is, not a trespass. Absent a warrant or consent or exigent circumstances, an officer must not enter; it is the entry that constitutes the breach of duty under the Fourth Amendment. As a result, the relevant counterfactual for the causation analysis is not what would have happened had the officers procured a warrant, but rather, what would have happened had the officers not unlawfully entered the residence." (*Mendez v. Cty. of L.A.* (9th Cir. 2018) 897 F.3d 1067, 1076.)

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

- " 'The Fourth Amendment prohibits only unreasonable searches ... . [¶] The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.'" (*Sacramento County Deputy Sheriffs' Assn. v. County of Sacramento* (1996) 51 Cal.App.4th 1468, 1477 [59 Cal.Rptr.2d 834], internal citation omitted.)

- " '[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.' 'And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search "warrant a man of reasonable caution in the belief" that the action taken was appropriate?' An officer's good faith is not enough." (*King v. State of California* (2015) 242 Cal.App.4th 265, 283 [195 Cal.Rptr.3d 286], internal citations omitted.)

- "Thus, the fact that the officers' reasonable suspicion of wrongdoing is not particularized to each member of a group of individuals present at the same location does not automatically mean that a search of the people in the group is unlawful. Rather, the trier of fact must decide whether the search was reasonable in light of the circumstances." (*Lyall v. City of Los Angeles* (9th Cir. 2015) 807 F.3d 1178, 1194.)

- " 'It is settled doctrine that probable cause for belief that certain articles subject to seizure are in a dwelling cannot of itself justify a search without a warrant.' Thus, a warrantless entry into a residence is presumptively unreasonable and therefore unlawful. Government officials 'bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests.' " (*Conway, supra,* 45 Cal.App.4th at p. 172, internal citations omitted.)

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

873.)

- "The Fourth Amendment shields not only actual owners, but also anyone with sufficient possessory rights over the property searched. … To be shielded by the Fourth Amendment, a person needs 'some joint control and supervision of the place searched,' not merely permission to be there." (*Lyall, supra,* 807 F.3d at pp. 1186–1187.)

- "[T]he Fourth Amendment's 'prohibition on unreasonable searches and seizures applies to searches conducted by public school officials.' " (*Scott v. Cty. of San Bernardino* (9th Cir. 2018) 903 F.3d 943, 948.)

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

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

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

Secondary Sources

8 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Constitutional Law, §~~§ 816, 819~~ 888 et seq.

3 Civil Rights Actions, Ch. 10, *Deprivation of Rights Under Color of State Law—Law Enforcement and Prosecution*, ¶ 10.04 (Matthew Bender)

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

3709. Ostensible Agent

[*Name of plaintiff*] claims that [*name of defendant*] is responsible for [*name of agent*]'s conduct because [he/she] was [*name of defendant*]'s apparent [employee/agent]. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] intentionally or carelessly created the impression that [*name of agent*] was [*name of defendant*]'s [employee/agent];**

2. **That [*name of plaintiff*] reasonably believed that [*name of agent*] was [*name of defendant*]'s [employee/agent]; and**

3. **That [*name of plaintiff*] ~~was harmed because [he/she]~~ reasonably relied on [his/her] belief.**

New September 2003; Revised November 2019

Directions for Use

Give this instruction with CACI No. 3701, *Tort Liability Asserted Against Principal—Essential Factual Elements,* if the plaintiff is relying on the doctrine of ostensible agency to establish the principal-agent relationship in CACI No. 3701.

A somewhat different instruction is required to hold a hospital responsible for the acts of a physician under ostensible agency when the physician is actually an employee of a different entity. In that context, it has been said that the only relevant factual issue is whether the patient had reason to know that the physician was not an agent of the hospital. (See *Markow v. Rosner* (2016) 3 Cal.App.5th 1027 [208 Cal.Rptr.3d 363]; see also *Mejia v. Community Hospital of San Bernardino* (2002) 99 Cal.App.4th 1448, 1454 [122 Cal.Rptr.2d 233].)

Sources and Authority

- Agency Is Actual or Ostensible. Civil Code section 2298.
- "Ostensible Agency" Defined. Civil Code section 2300.
- "Ostensible Authority" Defined. Civil Code section 2317.
- When Principal is Bound by Ostensible Agent. Civil Code section 2334.
- " '[O]stensible authority arises as a result of conduct of the principal which causes the *third party* reasonably to believe that the agent possesses the authority to act on the principal's behalf.' 'Ostensible authority may be established by proof that the principal approved prior similar acts of the agent.' ' "[W]here the principal knows that the agent holds himself out as clothed with certain

authority, and remains silent, such conduct on the part of the principal may give rise to liability. …" …' " (*Chicago Title Ins. Co. v. AMZ Ins. Services, Inc.* (2010) 188 Cal.App.4th 401, 426–427 [115 Cal.Rptr.3d 707], original italics, internal citations omitted.)

- "Whether an agent has ostensible authority is a question of fact and such authority may be implied from circumstances." (*Pierson v. Helmerich & Payne Internat. Drilling Co.* (2016) 4 Cal.App.5th 608, 635 [209 Cal.Rptr.3d 222].)

- " 'It is elementary that there are three requirements necessary before recovery may be had against a principal for the act of an ostensible agent. The person dealing with the agent must do so with belief in the agent's authority and this belief must be a reasonable one; such belief must be generated by some act or neglect of the principal sought to be charged; and the third person in relying on the agent's apparent authority must not be guilty of negligence.' " (*Associated Creditors' Agency v. Davis* (1975) 13 Cal.3d 374, 399 [118 Cal.Rptr. 772, 530 P.2d 1084], internal citations omitted.)

- "Ostensible agency cannot be established by the representations or conduct of the purported agent; the statements or acts of the principal must be such as to cause the belief the agency exists." (*American Way Cellular, Inc. v. Travelers Property Casualty Co. of America* (2013) 216 Cal.App.4th 1040, 1053 [157 Cal.Rptr.3d 385].)

- "Liability of the principal for the acts of an ostensible agent rests on the doctrine of 'estoppel,' the essential elements of which are representations made by the principal, justifiable reliance by a third party, and a change of position from such reliance resulting in injury." (*Preis v. American Indemnity Co.* (1990) 220 Cal.App.3d 752, 761 [269 Cal.Rptr. 617], internal citation omitted.)

- "But the adequacy of the notice is only one of the many fact questions that arise under ostensible agency. The jury must also determine whether the patient entrusted herself to the hospital, whether the hospital selected the doctor, and whether the patient reasonably believed the doctor was an agent of the hospital." (*Whitlow v. Rideout Memorial Hospital* (2015) 237 Cal.App.4th 631, 641 [188 Cal.Rptr.3d 246].)

- "Where a patient seeks to hold a hospital liable for the negligence of a physician, the doctrine of ostensible agency is now commonly expressed as having two elements: '(1) conduct by the hospital that would cause a reasonable person to believe that the physician was an agent of the hospital, and (2) reliance on that apparent agency relationship by the plaintiff.' Generally, the first element is satisfied 'when the hospital "holds itself out" to the public as a provider of care,' 'unless it gave the patient contrary notice.' Nonetheless, a hospital's 'contrary notice' may be insufficient 'to avoid liability in an emergency room context, where an injured patient in need of immediate medical care cannot be expected to understand or act upon that information.' Reliance upon an apparent agency is demonstrated 'when the plaintiff "looks to" the hospital for services, rather than to an individual physician.' Ultimately, 'there is really only one relevant factual issue: whether the patient had reason to know that the physician was not an agent of the hospital. As noted above, hospitals are generally deemed to have held themselves out as the provider of services unless they gave the patient contrary notice, and the patient is generally presumed to have looked to the hospital for care unless he or she was treated by his or her personal physician. Thus, unless the patient had some reason to know of the true relationship between the hospital and the physician—i.e., because the hospital gave the patient

actual notice or because the patient was treated by his or her personal physician—ostensible agency is readily inferred.' " (*Markow, supra, ~~v. Rosner~~ (2016)* 3 Cal.App.5th at p.~~1027,~~ 1038 ~~[208 Cal.Rptr.3d 363]~~, internal citations omitted.)

Secondary Sources

3 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Agency and Employment, §§ ~~144~~154–~~149~~159

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-A, *Vicarious Liability*, ¶¶ 2:676, 2:677 (The Rutter Group)

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, § 8.04[6] (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent*, §§ 427.11, 427.22 (Matthew Bender)

18 California Points and Authorities, Ch. 182, *Principal and Agent*, §§ 182.04, 182.120 et seq. (Matthew Bender)

1 California Civil Practice: Torts, § 3:29 (Thomson Reuters)

3903J. Damage to Personal Property (Economic Damage)

[*Insert number, e.g.,* "10."**] The harm to [***name of plaintiff***]'s [***item of personal property, e.g., automobile***].**

To recover damages for harm to personal property, [*name of plaintiff***] must prove the reduction in the [***e.g., automobile***]'s value or the reasonable cost of repairing it, whichever is less. [If there is evidence of both, [***name of plaintiff***] is entitled to the lesser of the two amounts.]**

[However, if you find that the [*e.g., automobile***] can be repaired, but after repairs it will be worth less than it was before the harm, the damages are (1) the difference between its value immediately before the harm and its lesser value immediately after the repairs have been made; plus (2) the reasonable cost of making the repairs. The total amount awarded may not exceed the [***e.g., automobile***]'s value immediately before the harm occurred.]**

To determine the reduction in value if repairs cannot be made, you must determine the fair market value of the [*e.g., automobile***] immediately before the harm occurred and then subtract the fair market value immediately after the harm occurred.**

"Fair market value" is the highest price that a willing buyer would have paid to a willing seller, assuming:

1. **That there is no pressure on either one to buy or sell; and**

2. **That both ~~the~~ buyer and seller ~~are fully informed of~~ have reasonable knowledge of all relevant facts about the condition and quality of the [***e.g., automobile***].**

New September 2003; Revised December 2011, June 2013, December 2015, November 2018, November 2019

Directions for Use

Do not give this instruction if the property had no monetary value either before or after injury. (See *Kimes v. Grosser* (2011) 195 Cal.App.4th 1556, 1560 [126 Cal.Rptr.3d 581] [CACI No. 3903J has no application to prevent proof of out-of-pocket expenses to save the life of a pet cat].) See CACI No. 3903O, *Injury to Pet (Economic Damage)*.

An insurer may draft around this rule in the policy by limiting recovery to either cost of repair or diminution in value, but not both. (*Baldwin v. AAA Northern California, Nevada & Utah Ins. Exchange* (2016) 1 Cal.App.5th 545, 550 [204 Cal.Rptr.3d 433].)

Give the optional second paragraph if the property can be repaired, but the value after repair may be less than before the harm occurred. (See *Merchant Shippers Association v. Kellogg Express and Draying Co.* (1946) 28 Cal.2d 594, 600 [170 P.2d 923].)

There are exceptions to the general rule that recovery is limited to the lesser of cost of repair or diminution in value. (See *AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807, 834 [274 Cal.Rptr. 820, 799 P.2d 1253].) If an exception is at issue, modifications will be required to the first two paragraphs.

The definition of "fair market value" has been adapted from Treasury regulations. (See 26 C.F.R. § 20.2031-1(b); *United States v. Cartwright* (1973) 411 U.S. 546, 550 [93 S.Ct. 1713, 36 L.Ed.2d 528]; see also CACI No. 3501, *"Fair Market Value" Explained*; Code Civ. Proc., § 1263.320 [definition for eminent domain].)

Sources and Authority

- "The general rule is that the measure of damages for tortious injury to personal property is the difference between the market value of the property immediately before and immediately after the injury, or the reasonable cost of repair if that cost be less than the diminution in value. This rule stems from the basic code section fixing the measure of tort damage as 'the amount which will compensate for all the detriment proximately caused thereby.' [citations]" (*Pacific Gas & Electric Co. v. Mounteer* (1977) 66 Cal.App.3d 809, 812 [136 Cal.Rptr. 280].)

- "It has also been held that the price at which a thing can be sold at public sale, or in the open market, is some evidence of its market value. In *San Diego Water Co. v. San Diego,* the rule is announced that the judicial test of market value depends upon the fact that the property in question is marketable at a given price, which in turn depends upon the fact that sales of similar property have been and are being made at ascertainable prices. In *Quint v. Dimond,* it was held competent to prove market value in the nearest market." (*Tatone v. Chin Bing* (1936) 12 Cal.App.2d 543, 545–546 [55 P.2d 933], internal citations omitted.)

- " 'Where personal property is injured but not wholly destroyed, one rule is that the plaintiff may recover the depreciation in value (the measure being the difference between the value immediately before and after the injury), and compensation for the loss of use.' In the alternative, the plaintiff may recover the reasonable cost of repairs as well as compensation for the loss of use while the repairs are being accomplished. If the cost of repairs exceeds the depreciation in value, the plaintiff may only recover the lesser sum. Similarly, if depreciation is greater than the cost of repairs, the plaintiff may only recover the reasonable cost of repairs. If the property is wholly destroyed, the usual measure of damages is the market value of the property." (*Hand Electronics, Inc. v. Snowline Joint Unified School Dist.* (1994) 21 Cal.App.4th 862, 870 [26 Cal.Rptr.2d 446], internal citations omitted.)

- The cost of replacement is not a proper measure of damages for injury to personal property. (*Hand Electronics Inc., supra,* 21 Cal.App.4th at p. 871.)

- "When conduct complained of consists of intermeddling with personal property 'the owner has a cause of action for trespass or case, and may recover only the actual damages suffered by reason of the impairment of the property or the loss of its use.' " (*Itano v. Colonial Yacht Anchorage* (1968) 267 Cal.App.2d 84, 90 [72 Cal.Rptr. 823], internal citations omitted.)

- "The measure of damage for wrongful injury to personal property is the difference between the

market value of the property immediately before and immediately after the injury, or the reasonable cost of repair if such cost be less than the depreciation in value." (*Smith v. Hill* (1965) 237 Cal.App.2d 374, 388 [47 Cal.Rptr. 49], internal citations omitted.)

- "[I]t is said ... that 'if the damaged property cannot be completely repaired, the measure of damages is the difference between its value before the injury and its value after the repairs have been made, plus the reasonable cost of making the repairs. The foregoing rule gives the plaintiff the difference between the value of the machine before the injury and its value after such injury, the amount thereof being made up of the cost of repairs and the depreciation notwithstanding such repairs.' The rule urged by defendant, which limits the recovery to the cost of repairs, is applicable only in those cases in which the injured property 'can be entirely repaired.' This latter rule presupposes that the damaged property can be restored to its former state with no depreciation in its former value." (*Merchant Shippers Association, supra,* 28 Cal.2d at p. 600, internal citations omitted.)

- "In personal property cases, the plaintiffs are entitled to present evidence of the cost of repairs even in cases where recovery is limited to the lost market value of property. The cost of repairs constitutes a prima facie measure of damages, and it is the defendant's burden to respond with proof of a lesser diminution in value." (*Kimes, supra,* 195 Cal.App.4th at p. 1560, internal citation omitted.)

- "[R]ecovery of tort damages is not invariably limited by the value of damaged property. The courts have recognized that recovery in excess of such value may be necessary to restore the plaintiff to the position it occupied prior to a defendant's wrongdoing." (*AIU Ins. Co., supra,* 51 Cal.3d at p. 834.)

- "In this case, the policy language was clear and explicit. Regarding coverage for car damage, it provided that [insurer] '*may* pay the loss in money *or* repair … damaged … property.' The policy's use of the term 'may' suggests [insurer] had the discretion to choose between the two options." (*Baldwin, supra,* 1 Cal.App.5th at p. 550, original italics.)

- "The trial court based its restitution order on the fair market value method, but it abused its discretion by also awarding the cost to [plaintiff] to repair the truck … . Having fully recovered the decrease in fair market value, [plaintiff] was not entitled to also recover the cost of repair because repairing the truck made it more valuable. Put another way, before the crime, [plaintiff] owned a truck that was worth more than $20,000. After the crime, Smith was left with a truck that was worth not much more than $3,000. [Plaintiff] was compensated for this decrease in fair market value. However, if the truck is repaired, the value of the truck goes up, even though it does not go all the way up to the former fair market value. Therefore, adding the cost of repair improperly alters the results of the fair market value formula." (*People v. Sharpe* (2017) 10 Cal.App.5th 741, 747 [216 Cal.Rptr.3d 744].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1865-1871

Haning et al., California Practice Guide: Personal Injury, Ch. 3-C, *Specific Items Of Compensatory Damages*, ¶ 3:220 et seq. (The Rutter Group)

California Tort Damages (Cont.Ed.Bar) Vehicles and Other Personal Property, §§ 13.8–13.11

4 Levy et al., California Torts, Ch. 52, *Medical Expenses and Economic Loss*, § 52.31 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages,* §§ 177.41, 177.44 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort,* § 64.26 et seq. (Matthew Bender)

1 California Civil Practice: Torts § 5:16 (Thomson Reuters)

3903K. Loss or Destruction of Personal Property (Economic Damage)

[*Insert number, e.g.,* "11."**] The [loss/destruction] of [***name of plaintiff***]'s [***item of personal property***].**

To recover damages for the [loss/destruction], [*name of plaintiff***] must prove the fair market value of the [***item of personal property***] just before the harm occurred.**

"Fair market value" is the highest price that a willing buyer would have paid to a willing seller, assuming:

1. **That there is no pressure on either one to buy or sell; and**
2. **That both~~the~~ buyer and seller have reasonable knowledge of all relevant facts about~~are fully informed of~~ the condition and quality of the [***item of personal property***].**

New September 2003; Revised November 2019

Directions for Use

The definition of "fair market value" has been adapted from Treasury regulations. (See 26 C.F.R. § 20.2031-1(b); *United States v. Cartwright* (1973) 411 U.S. 546, 550 [93 S.Ct. 1713, 36 L.Ed.2d 528]; see also CACI No. 3501, *"Fair Market Value" Explained*; Code Civ. Proc., § 1263.320 [definition for eminent domain].)

Sources and Authority

- " 'As a general rule the measure of damage for the loss or destruction of personal property is the value of the property at the time of such loss or destruction.' " (*Hand Electronics, Inc. v. Snowline Joint Unified School Dist.* (1994) 21 Cal.App.4th 862, 870 [26 Cal.Rptr.2d 446], internal citation omitted.)
- "It is well established that under [Civil Code] section 3333, the measure of damages for the loss or destruction of personal property is generally determined by the value of the property at the time of such loss or destruction." (*Pelletier v. Eisenberg* (1986) 177 Cal.App.3d 558, 567 [223 Cal.Rptr. 84].)

Secondary Sources

6 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Torts, § ~~1720~~1904

California Tort Damages (Cont.Ed.Bar) Vehicles & Other Personal Property, § 13.6

4 Levy et al., California Torts, Ch. 52, *Medical Expenses and Economic Loss*, § 52.32 (Matthew Bender)

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

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

1 California Civil Practice: Torts, § 5:17 (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~~4. [*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; Revised November 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. This instruction addresses survival damages in a claim against a defendant who is alleged to have caused the decedent's death. However, survival damages are available for any claim incurred while alive, not just a claim based on the decedent's death. (See *County of Los Angeles v. Superior Court* (1999) 21 Cal.4th 292, 294 [87 Cal.Rptr.2d 441, 981 P.2d 68].) In a case that does not involve conduct that caused the decedent's death, modify the instruction to include the damages recoverable under the particular claim rather than the damages attributable to the death.

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.*, ~~*supra v. Superior Court* (1999)~~ 21 Cal.4th at pp.~~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.)

- "The second category requires more discussion. That consists of the reasonable value of 24-hour nursing care that Decedent *would have provided* to his wife *after* his death and before she passed away in 2014, nearly four years later. As appellants explain this claim, 'to the extent his children were forced to provide gratuitous home health care and other household services to [wife] up to the time of her death, [Decedent's] estate is also entitled to recover those costs as damages since he had been providing those services for his wife before he died.' … The parties disagree as to whether such damages are recoverable. Appellants contend that they are properly recovered as ' "lost years" damages,' representing economic losses the decedent incurred during the period by which his life expectancy was shortened; [defendant], in contrast, contends that they are not recoverable because they were not 'sustained or incurred before death,' as required by section 377.34. We conclude that [defendant] has the better argument." (*Williams, supra,* 27 Cal.App.5th at p. 238, original italics.)

- "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, original italics, 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)

4303. Sufficiency and Service of Notice of Termination for Failure to Pay Rent

[*Name of plaintiff***] contends that [he/she/it] properly gave [***name of defendant***] three days' notice to pay the rent or vacate the property. To prove that the notice contained the required information and was properly given, [***name of plaintiff***] must prove all of the following:**

1. **That the notice informed [***name of defendant***] in writing that [he/she/it] must pay the amount due within three days or vacate the property;**

2. **That the notice stated [no more than/a reasonable estimate of] the amount due, and the name, telephone number, and address of the person to whom the amount should be paid, and**

   [*Use if payment was to be made personally:***

   the usual days and hours that the person would be available to receive the payment; and]**

   [*or: Use if payment was to be made into a bank account:*

   the number of an account in a bank located within five miles of the rental property into which the payment could be made, and the name and street address of the bank; and]

   [*or: Use if an electronic funds transfer procedure had been previously established:*

   that payment could be made by electronic funds transfer; and]

3. **That the notice was given to [***name of defendant***] at least three days before [***insert date on which action was filed***].**

[The three-day notice period excludes Saturdays, Sundays, and judicial holidays, but otherwise begins the day after the notice to pay the rent or vacate the property was given to [*name of defendant***].]**

Notice was properly given if [*select one or more of the following manners of service:***]**

[the notice was delivered to [*name of defendant***] personally[./; or]]**

[[*name of defendant***] was not at [home or work/the commercial rental property], and the notice was left with a responsible person at [[***name of defendant***]'s residence or place of work/the commercial property], and a copy was also mailed in an envelope addressed to [***name of defendant***] at [[his/her] residence/the commercial property]. In this case, notice**

is considered given on the date the second notice was [received by [*name of defendant*]/placed in the mail][./; or]]

[*for a residential tenancy:*

[*name of defendant*]'s place of residence and work could not be discovered, or a responsible person could not be found at either place, and (1) the notice was posted on the property in a place where it would easily be noticed, (2) a copy was given to a person living there if someone could be found, and (3) a copy was also mailed to the address of the rented property in an envelope addressed to [*name of defendant*]. In this case, notice is considered given on the date the second notice was [received by [*name of defendant*]/placed in the mail].]

[*or for a commercial tenancy:*

at the time of attempted service, a responsible person could not be found at the commercial rental property through the exercise of reasonable diligence, and (1) the notice was posted on the property in a place where it would easily be noticed, and (2) a copy was also mailed to the address of the commercial property in an envelope addressed to [*name of defendant*]. In this case, notice is considered given on the date the second notice was [received by [*name of defendant*]/placed in the mail].]

~~**[The three-day notice period begins the day after the notice was given to [*name of defendant*]. If the last day of the notice period falls on a Saturday, Sunday, or holiday, [*name of defendant*]'s time to pay the rent or vacate the property is extended to include the first day after the Saturday, Sunday, or holiday that is not also a Saturday, Sunday, or holiday.]**~~

[A notice stating a reasonable estimate of the amount of rent due that is within 20 percent of the amount actually due is reasonable unless [*name of defendant*] proves that it was not reasonable. In determining the reasonableness of the estimate, you may consider whether calculating the amount of rent required information primarily within the knowledge of [*name of defendant*] and whether [*name of defendant*] accurately furnished that information to [*name of plaintiff*].]

New August 2007; Revised December 2010; June 2011, December 2011, November 2019

Directions for Use

Use the reasonable-estimate option in the first sentence of element 2 and include the final paragraph only in cases involving commercial leases. (Code Civ. Proc., § 1161.1(a); see also Code Civ. Proc., § 1161.1(e) [presumption that if amount found to be due is within 20 percent of amount stated in notice, then estimate was reasonable].)

In element 2, select the applicable manner in which the notice specifies that payment is to be made; directly to the landlord, into a bank account, or by electronic funds transfer. (Code Civ. Proc., § 1161(2).)

Select the manner of service used: personal service, substituted service by leaving the notice at the defendant's home or place of work or at the commercial rental property, or substituted service by posting on the property. (See Code Civ. Proc., § 1162.)

There is a conflict in the case law with respect to when the three-day period begins if substituted service is used. Compare *Davidson v. Quinn* (1982) 138 Cal.App.3d Supp. 9, 14 [188 Cal.Rptr. 421] [tenant must be given three days to pay, so period does not begin until actual notice is received] with *Walters v. Meyers* (1990) 226 Cal.App.3d Supp. 15, 19–20 [277 Cal.Rptr. 316] [notice is effective when posted and mailed]. This conflict is accounted for in the second, third, and fourth bracketed options for the manner of service.

Read the ~~third~~next-to-last paragraph if any of the ~~last day~~three days of the notice period fell on a Saturday, Sunday, or judicial holiday. (See Code Civ. Proc., § 1161(2).) Judicial holidays are shown on the judicial branch website www.courts.ca.gov/holidays.htm.

If a lease specifies a time period for giving notice other than the three-day period, substitute that time period for three days throughout, provided that it is not less than three days.

Defective service may be waived if defendant admits receipt of notice. (See *Valov v. Tank* (1985) 168 Cal.App.3d 867, 876 [214 Cal.Rptr. 546].) However, if the fact of service is contested, compliance with the statutory requirements must be shown. (*Palm Property Investments, LLC v. Yadegar* (2011) 194 Cal.App.4th 1419, 1425 [123 Cal.Rptr.3d 816].) Therefore, this instruction does not provide an option for the jury to determine whether or not defective service was waived if there was actual receipt.

If a commercial lease requires service by a particular method, actual receipt by the tenant will not cure the landlord's failure to comply with the service requirements of the lease. (*Culver Center Partners East #1, L.P. v. Baja Fresh Westlake Village, Inc.* (2010) 185 Cal.App.4th 744, 752 [110 Cal.Rptr.3d 833].) Whether the same rule applies to a residential lease that specifies a method of service has not yet been decided.

Local ordinances may impose additional notice requirements for the termination of a rental agreement. This instruction should be modified accordingly.

Sources and Authority

- Conclusive Presumption of Receipt of Rent Sent to Address Provided in Notice. Code of Civil Procedure section 1161(2).
- Commercial Tenancy: Estimate of Rent Due in Notice. Code of Civil Procedure 1161.1.
- Manner of Service of Notice. Code of Civil Procedure section 1162.

- " '[P]roper service on the lessee of a valid three-day notice to pay rent or quit is an essential prerequisite to a judgment declaring a lessor's right to possession under section 1161, subdivision 2. [Citations.]' [Citation.] 'A lessor must allege and prove proper service of the requisite notice. [Citations.] Absent evidence the requisite notice was properly served pursuant to section 1162, no judgment for possession can be obtained. [Citations.]' " (*Borsuk v. Appellate Division of Superior Court* (2015) 242 Cal.App.4th 607, 611 [195 Cal.Rptr.3d 581].)

- "A three-day notice must contain 'the amount which is due.' A notice which demands rent in excess of the amount due does not satisfy this requirement. This rule ensures that a landlord will not be entitled to regain possession in an unlawful detainer action unless the tenant has had the opportunity to pay the delinquent rent." (*Bevill v. Zoura* (1994) 27 Cal.App.4th 694, 697 [32 Cal.Rptr.2d 635], internal citations and footnote omitted.)

- "As compared to service of summons, by which the court acquires personal jurisdiction, service of the three-day notice is merely an element of an unlawful detainer cause of action that must be alleged and proven for the landlord to acquire possession." (*Borsuk, supra,* 242 Cal.App.4th at pp. 612–613.)

- "[W]e do not agree that a proper notice may not include anything other than technical rent. It is true that subdivision 2 of Code of Civil Procedure section 1161 relates to a default in the payment of rent. However, the subdivision refers to the 'lease or agreement under which the property is held' and requires the notice state 'the amount which is due.' The language is not 'the amount of rent which is due' or 'the rent which is due.' We think the statutory language is sufficiently broad to encompass any sums due under the lease or agreement under which the property is held." (*Canal-Randolph Anaheim, Inc. v. Wilkoski* (1978) 78 Cal.App.3d 477, 492 [144 Cal.Rptr. 474].)

- "[T]he service and notice provisions in the unlawful detainer statutes and [Code of Civil Procedure] section 1013 are mutually exclusive, and thus, section 1013 does not extend the notice periods that are a prerequisite to filing an unlawful detainer action." (*Losornio v. Motta* (1998) 67 Cal.App.4th 110, 112 [78 Cal.Rptr.2d 799].)

- "Section 1162 does not authorize service of a three-day notice to pay rent or quit by mail delivery alone, certified or otherwise. It provides for service by: personal delivery; leaving a copy with a person of suitable age and discretion at the renter's residence or usual place of business and sending a copy through the mail to the tenant's *residence*; or posting *and* delivery of a copy to a person there residing, if one can be found, *and* sending a copy through the mail. Strict compliance with the statute is required." (*Liebovich v. Shahrokhkhany* (1997) 56 Cal.App.4th 511, 516 [65 Cal.Rptr.2d 457], original italics, internal citation omitted.)

- "We … hold that service made in accordance with section 1162, subdivision 3, as applied to section 1161, subdivision 2, must be effected in such a manner as will give a tenant the three days of written notice required by the Legislature in which he may cure his default in the payment of rent." (*Davidson, supra,* 138 Cal.App.3d Supp. at p. 14.)

- "We … hold that service of the three-day notice by posting and mailing is effective on the date the notice is posted and mailed." (*Walters, supra,* 226 Cal.App.3d Supp. at p. 20.)

- "An unlawful detainer action based on failure to pay rent must be preceded by a three-day notice to the tenant to pay rent or quit the premises. Failure to state the exact amount of rent due in the notice is fatal to the subsequent unlawful detainer action." (*Lynch & Freytag v. Cooper* (1990) 218 Cal.App.3d 603, 606, fn. 2 [267 Cal.Rptr. 189], internal citations omitted.)

- "[D]efendant admitted in his answer that he 'ultimately received [the relevant] notice' but 'affirmatively allege[d] that he was not properly and legally served' with a valid notice. We find that, under the circumstances of this case, the defendant waived any defect in the challenged service of the notice under section 1162, subdivision 1." (*Valov, supra,* 168 Cal.App.3d at p. 876.)

- "In the cases discussed … , a finding of proper service turned on a party's acknowledgment or admission the notice in question was in fact received. In the present case, defendant denied, in his answer and at trial, that he had ever received the three-day notice. Because there was no admission of receipt in this case, service by certified mail did not establish or amount to personal delivery. Further, there was no evidence of compliance with any of the three methods of service of a three-day notice to pay rent or quit provided in section 1162. Therefore, the judgment must be reversed." (*Liebovich, supra,* 56 Cal.App.4th at p. 518.)

- "[Code of Civil Procedure section 1162 specifies] three ways in which service of the three-day notice may be effected on a residential tenant: … . As explained in *Liebovich, supra,* … , '[w]hen the fact of service is contested, compliance with one of these methods must be shown or the judgment must be reversed.' " (*Palm Property Investments, LLC, supra,* 194 Cal.App.4th at p. 1425.)

- "In commercial leases the landlord and commercial tenant may lawfully agree to notice procedures that differ from those provided in the statutory provisions governing unlawful detainer." (*Culver Center Partners East #1, L.P., supra,* 185 Cal.App.4th at p.750.)

- "[E]ven if some policy rationale might support such a waiver/forfeiture [by actual receipt] rule in the residential lease context, there is no basis to apply it in the commercial context where matters of service and waiver are prescribed in the lease itself. Nothing in the parties' lease suggests actual receipt of a notice to quit results in the waiver or forfeiture of [tenant]'s right to service accomplished in the manner prescribed. To the contrary, the lease specifically provides, 'No covenant, term or condition, or breach' of the lease 'shall be deemed waived except if expressly waived in a written instrument executed by the waiving party.' Although [tenant's agent] acted on the notice to quit by attempting to deliver the rent check, neither her fortuitous receipt of the notice nor her actions in response to it constitutes an express waiver of the notice provisions in the lease." (*Culver Center Partners East #1, L.P., supra,* 185 Cal.App.4th at p. 752, internal citation omitted.)

Secondary Sources

12 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2006~~2017) Real Property, §§ 745–760~~720, 722–725, 727~~

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.26–8.68

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) §§ 5.2, 6.10–6.30, Ch. 8

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 5-G, *Eviction Controls*, ¶¶ 5:224.3, 5:277.1 et seq. (The Rutter Group)

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 7-C, *Bases For Terminating Tenancy*, ¶¶ 7:98.10, 7:327 (The Rutter Group)

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, §§ 210.21, 210.22 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.11, 5.12

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.11 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, §§ 236.13, 236.13A (Matthew Bender)

Miller & Starr, California Real Estate 4th (2015), ~~Ch. 19, *Landlord-Tenant*,~~ §§ 34:183-34:187~~19:202–19:204~~ (Ch. 34, *Landlord-Tenant*) (Thomson Reuters)

4305. Sufficiency and Service of Notice of Termination for Violation of Terms of Agreement

[*Name of plaintiff***] contends that [he/she/it] properly gave [***name of defendant***] three days' notice to [either comply with the requirements of the [lease/rental agreement/sublease] or] vacate the property. To prove that the notice contained the required information and was properly given, [***name of plaintiff***] must prove all of the following:**

1. **That the notice informed [***name of defendant***] in writing that [he/she/it] must, within three days, [either comply with the requirements of the [lease/rental agreement/sublease] or] vacate the property;**

2. **That the notice described how [***name of defendant***] failed to comply with the requirements of the [lease/rental agreement/sublease] [and how to correct the failure];**

3. **That the notice was given to [***name of defendant***] at least three days before [***insert date on which action was filed***].**

[The three-day notice period excludes Saturdays, Sundays, and judicial holidays, but otherwise begins on the day after the notice to correct the failure or vacate the property was given to [*name of defendant***].]**

Notice was properly given if [*select one or more of the following manners of service:***]**

[the notice was delivered to [*name of defendant***] personally[./; or]]**

[[*name of defendant***] was not at [home or work/the commercial rental property], and the notice was left with a responsible person at [[***name of defendant***]'s home or place of work/the commercial property], and a copy was also mailed in an envelope addressed to [***name of defendant***] at [[his/her] residence/the commercial property]. In this case, notice is considered given on the date the second notice was [received by [***name of defendant***]/placed in the mail][./; or]]**

[*for a residential tenancy:*

[*name of defendant***]'s place of residence and work could not be discovered, or a responsible person could not be found at either place, and (1) the notice was posted on the property in a place where it would easily be noticed, (2) a copy was given to a person living there if someone could be found, and (3) a copy was also mailed to the address of the rented property in an envelope addressed to [***name of defendant***]. In this case, notice is considered given on the date the second notice was [received by [***name of defendant***]/placed in the mail].]**

[*or for a commercial tenancy:*

at the time of attempted service, a responsible person could not be found at the commercial rental property through the exercise of reasonable diligence, and (1) the notice was posted on the property in a place where it would easily be noticed, and (2) a copy was also mailed to the address of the commercial property in an envelope addressed to [*name of defendant***]. In this case, notice is considered given on the date the second notice was [received by [***name of defendant***]/placed in the mail].]**

~~**[The three-day notice period begins on the day after the notice was given to [***name of defendant***]. If the last day of the notice period falls on a Saturday, Sunday, or holiday, [***name of defendant***]'s time to correct the failure or to vacate the property is extended to include the first day after the Saturday, Sunday, or holiday that is not also a Saturday, Sunday, or holiday.]**~~

New August 2007; Revised December 2010, June 2011, December 2011, November 2019

Directions for Use

If the violation of the condition or covenant involves assignment, subletting, or waste, or if the breach cannot be cured, the landlord is entitled to possession on service of a three-day notice to quit; no opportunity to cure by performance is required. (Code Civ. Proc., § 1161(4); *Salton Community Services Dist. v. Southard* (1967) 256 Cal.App.2d 526, 529 [64 Cal.Rptr. 246].) In such a case, omit the bracketed language in the first paragraph and in elements 1 and 2. If the violation involves nuisance or illegal activity, give CACI No. 4309, *Sufficiency and Service of Notice of Termination for Nuisance or Unlawful Use*.

If the plaintiff is the landlord or owner, select either "lease" or "rental agreement" in the optional language in the opening paragraph and in elements 1 and 2. Commercial documents are usually called "leases" while residential documents are often called "rental agreements." Select the term that is used on the written document. If the plaintiff is a tenant seeking to recover possession from a subtenant, select "sublease." (Code Civ. Proc., § 1161(3).)

Select the manner of service used: personal service, substituted service by leaving the notice at the defendant's home or place of work or at the commercial rental property, or substituted service by posting on the property. (See Code Civ. Proc., § 1162.)

There is a conflict in the case law with respect to when the three-day period begins if substituted service is used. Compare *Davidson v. Quinn* (1982) 138 Cal.App.3d Supp. 9, 14 [188 Cal.Rptr. 421] [tenant must be given three days to pay, so period does not begin until actual notice is received] with *Walters v. Meyers* (1990) 226 Cal.App.3d Supp. 15, 19–20 [277 Cal.Rptr. 316] [notice is effective when posted and mailed]. This conflict is accounted for in the second, third, and fourth bracketed options for the manner of service.

Read the ~~next to~~ last paragraph if any of the three~~the last~~ days of the notice period fell on a Saturday, Sunday, or judicial holiday. (See Code Civ. Proc., § 1161(3).) Judicial holidays are shown on the judicial branch website www.courts.ca.gov/holidays.htm.

If a lease specifies a time period for giving notice other than the three-day period, substitute that time period for three days throughout the instruction, provided that it is not less than three days.

Defective service may be waived if defendant admits timely receipt of notice. (See *Valov v. Tank* (1985) 168 Cal.App.3d 867, 876 [214 Cal.Rptr. 546].) However, if the fact of service is contested, compliance with the statutory requirements must be shown. (*Palm Property Investments, LLC v. Yadegar* (2011) 194 Cal.App.4th 1419, 1425 [123 Cal.Rptr.3d 816].) Therefore, this instruction does not provide an option for the jury to determine whether or not defective service was waived if there was actual receipt.

If a commercial lease requires service by a particular method, actual receipt by the tenant will not cure the landlord's failure to comply with the service requirements of the lease. (*Culver Center Partners East #1, L.P. v. Baja Fresh Westlake Village, Inc.* (2010) 185 Cal.App.4th 744, 752 [110 Cal.Rptr.3d 833].) Whether the same rule applies to a residential lease that specifies a method of service has not yet been decided.

Local ordinances may impose additional notice requirements for the termination of a rental agreement. This instruction should be modified accordingly.

Sources and Authority

- Unlawful Detainer Based on Failure to Perform Conditions. Code of Civil Procedure section 1161(3), (4).

- Manner of Service of Notice. Code of Civil Procedure section 1162.

- "[T]he service and notice provisions in the unlawful detainer statutes and [Code of Civil Procedure] section 1013 are mutually exclusive, and thus, section 1013 does not extend the notice periods that are a prerequisite to filing an unlawful detainer action." (*Losornio v. Motta* (1998) 67 Cal.App.4th 110, 112 [78 Cal.Rptr.2d 799].)

- "Section 1162 does not authorize service of a three-day notice to pay rent or quit by mail delivery alone, certified or otherwise. It provides for service by: personal delivery; leaving a copy with a person of suitable age and discretion at the renter's residence or usual place of business and sending a copy through the mail to the tenant's *residence*; or posting *and* delivery of a copy to a person there residing, if one can be found, *and* sending a copy through the mail. Strict compliance with the statute is required." (*Liebovich v. Shahrokhkhany* (1997) 56 Cal.App.4th 511, 516 [65 Cal.Rptr.2d 457], original italics, internal citation omitted.)

- "We … hold that service made in accordance with section 1162, subdivision 3, as applied to section 1161, subdivision 2, must be effected in such a manner as will give a tenant the three

days of written notice required by the Legislature in which he may cure his default in the payment of rent." (*Davidson, supra,* 138 Cal.App.3d Supp. at p. 14.)

- "We … hold that service of the three-day notice by posting and mailing is effective on the date the notice is posted and mailed." (*Walters, supra,* 226 Cal.App.3d Supp. at p. 20.)

- "It is well settled that the notice required under [Code Civ. Proc., § 1161] subdivisions 2 and 3 (where the condition or covenant assertedly violated is capable of being performed) must be framed in the alternative, viz., pay the rent *or* quit, perform the covenant *or* quit, and a notice which merely directs the tenant to quit is insufficient to render such tenant guilty of unlawful detainer upon his continued possession." (*Hinman v. Wagnon* (1959) 172 Cal.App.2d 24, 27 [341 P.2d 749], original italics.)

- "Plaintiff argues, however, that he should be allowed to amend his complaint so as to bring his action under section 1161, subdivision 4. The notice thereunder required need not be framed in the alternative. However, plaintiff has at no time, either by his three days' notice or in any of his pleadings, suggested that defendant had assigned the lease or sublet the property, or had committed waste contrary to the conditions or covenants of the lease, or maintained a nuisance on the premises, or had used the property for an unlawful purpose. Plaintiff had three opportunities to state a cause of action; if he was of the belief that facts existed which brought his case under 1161, subdivision 4, it would have been a simple matter to allege such facts, but this he did not do." (*Hinman, supra,* 172 Cal.App.2d at p. 29.)

- "Where a covenant in a lease has been breached and the breach cannot be cured, a demand for performance is not a condition precedent to an unlawful detainer action." (*Salton Community Services Dist., supra,* 256 Cal.App.2d at p. 529.)

- "[D]efendant admitted in his answer that he 'ultimately received [the relevant] notice' but 'affirmatively allege[d] that he was not properly and legally served' with a valid notice. We find that, under the circumstances of this case, the defendant waived any defect in the challenged service of the notice under section 1162, subdivision 1." (*Valov, supra,* 168 Cal.App.3d at p. 876.)

- "In the cases discussed … , a finding of proper service turned on a party's acknowledgment or admission the notice in question was in fact received. In the present case, defendant denied, in his answer and at trial, that he had ever received the three-day notice. Because there was no admission of receipt in this case, service by certified mail did not establish or amount to personal delivery. Further, there was no evidence of compliance with any of the three methods of service of a three-day notice to pay rent or quit provided in section 1162. Therefore, the judgment must be reversed." (*Liebovich, supra,* 56 Cal.App.4th at p. 518.)

- "[Code of Civil Procedure section 1162 specifies] three ways in which service of the three-day notice may be effected on a residential tenant: … . As explained in *Liebovich, supra,* … , '[w]hen the fact of service is contested, compliance with one of these methods must be shown or the judgment must be reversed.' " (*Palm Property Investments, LLC, supra,* 194 Cal.App.4th at p. 1425.)

- "In commercial leases the landlord and commercial tenant may lawfully agree to notice procedures that differ from those provided in the statutory provisions governing unlawful detainer." (*Culver Center Partners East #1, L.P., supra,* 185 Cal.App.4th at p.750.)

- "[E]ven if some policy rationale might support such a waiver/forfeiture [by actual receipt] rule in the residential lease context, there is no basis to apply it in the commercial context where matters of service and waiver are prescribed in the lease itself. Nothing in the parties' lease suggests actual receipt of a notice to quit results in the waiver or forfeiture of [tenant]'s right to service accomplished in the manner prescribed. To the contrary, the lease specifically provides, 'No covenant, term or condition, or breach' of the lease 'shall be deemed waived except if expressly waived in a written instrument executed by the waiving party.' Although [tenant's agent] acted on the notice to quit by attempting to deliver the rent check, neither her fortuitous receipt of the notice nor her actions in response to it constitutes an express waiver of the notice provisions in the lease." (*Culver Center Partners East #1, L.P., supra,* 185 Cal.App.4th at p. 752, internal citation omitted.)

Secondary Sources

12 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2006~~2017) Real Property, §§ ~~720~~745–760~~, 726, 727~~

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.26–8.68

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) §§ 5.2, 6.10–6.16, 6.25–6.29, 6.38–6.49, Ch. 8

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, §§ 210.21, 210.23, 210.24 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.11, 5.12

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.11 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, §§ 236.11, 236.12 (Matthew Bender)

Miller & Starr, California Real Estate 4th (2015), §§ 34:183-34:187 (Ch. 34, *Landlord-Tenant*) (Thomson Reuters)

~~Miller & Starr, California Real Estate (3d ed. 2008) Ch. 19, *Landlord-Tenant*, §§ 19:202–19:204 (Thomson Reuters)~~

VF-4300. Termination Due to Failure to Pay Rent

We answer the questions submitted to us as follows:

1. **Did [*name of defendant*] fail to make at least one rental payment to [*name of plaintiff*] as required by the [lease/rental agreement/sublease]?**
____ Yes ____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [*name of plaintiff*] properly give [*name of defendant*] a written notice to pay the rent or vacate the property at least three days before [*date on which action was filed*]?**
____ Yes ____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Was the amount due stated in the notice no more than the amount that [*name of defendant*] actually owed?**
____ Yes ____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Did [*name of defendant*] pay [or attempt to pay] the amount stated in the notice within three days after service or receipt of the notice?**
____ Yes ____ No

If your answer to question 4 is no, then answer questions 5 and 6. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **What is the amount of unpaid rent owed to [*name of plaintiff*]?**
Include all amounts owed and unpaid from [*due date of first missed payment*] through [*date*], the date of expiration of the three-day notice.
Total Unpaid Rent: $ _____]

6. **What are [*name of plaintiff*]'s damages?**
Determine the reasonable rental value of the property from [*date*], the date of expiration of the three-day notice, through [*date of verdict*].
Total Damages: $ _____]

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant] that you are ready to present your verdict in the courtroom.

New December 2007; Revised December 2010, June 2013, December 2013, November 2019

Directions for Use

This verdict form is based on CACI No. 4302, *Termination for Failure to Pay Rent—Essential Factual Elements*. See also the Directions for Use for that instruction. Questions 2 and 3 incorporate the notice requirements set forth in CACI No. 4303, *Sufficiency and Service of Notice of Termination for Failure to Pay Rent*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

In question 4, include "or attempt to pay" if the tenant alleges that the landlord refused to accept the rent when tendered. (See CACI No. 4327, *Affirmative Defense—Landlord's Refusal of Rent*.)

If the day of receipt is at issue and any of the three days after the alleged date of receipt falls on a Saturday, Sunday, or judicial holiday, modify questions 2 and 4 to allow the tenant three days excluding weekends and judicial holidays~~until the next day that is not a Saturday, Sunday, or holiday~~ to cure the default. (See Code Civ. Proc., § 1161(2).)

VF-4301. Termination Due to Failure to Pay Rent—Affirmative Defense—Breach of Implied Warranty of Habitability

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] fail to make at least one rental payment to [***name of plaintiff***] as required by the [lease/rental agreement/sublease]?**
   ____ Yes ____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [***name of plaintiff***] properly give [***name of defendant***] a written notice to pay the rent or vacate the property at least three days before [***date on which action was filed***]?**
   ____ Yes ____ No

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Was the amount due stated in the notice no more than the amount that [***name of defendant***] owed under the [lease/rental agreement/sublease]?**
   ____ Yes ____ No

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Did [***name of defendant***] pay [or attempt to pay] the amount stated in the notice within three days after service or receipt of the notice?**
   ____ Yes ____ No

   If your answer to question 4 is no, then answer questions 5 and 6. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **What is the amount of unpaid rent that [***name of defendant***] would owe to [***name of plaintiff***] if the property was in a habitable condition?**
   Include all amounts owed and unpaid from [*due date of first missed payment***] through [***date***], the date of expiration of the three-day notice.**
   Total Unpaid Rent: $ _____]

6. **Did the [***name of plaintiff***] fail to provide substantially habitable premises during the time period for which [***name of defendant***] failed to pay the rent that was due?**
   ____ Yes ____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, answer question 8.

7. Did [*name of defendant*] contribute substantially to the uninhabitable conditions or interfere substantially with [*name of plaintiff*]'s ability to make necessary repairs?
____ Yes ____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, [stop here, answer no further questions, and have the presiding juror sign and date this form. The court will determine the amount by which the rent due found in question 5 should be reduced because of uninhabitable conditions/skip question 8 and answer question 9].

8. What are [*name of plaintiff*]'s damages?
Determine the reasonable rental value of the property from [*date*], the date of expiration of the three-day notice, through [*date of verdict*].
Total Damages: $ _____

[9. What is the amount of reduced monthly rent that represents the reasonable rental value of the property in its uninhabitable condition?
$ _____]

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant] that you are ready to present your verdict in the courtroom.

New December 2007; Revised December 2010, June 2013, December 2013, November 2019

Directions for Use

This verdict form is based on CACI No. 4302, *Termination for Failure to Pay Rent—Essential Factual Elements,* and CACI No. 4320, *Affirmative Defense—Implied Warranty of Habitability*. See also the Directions for Use for those instructions.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If the existence of a landlord-tenant relationship is at issue, additional preliminary questions will be needed based on elements 1 and 2 of CACI No. 4302. Questions 2 and 3 incorporate the notice requirements set forth in CACI No. 4303, *Sufficiency and Service of Notice of Termination for Failure to*

Pay Rent.

In question 4, include "or attempt to pay" if there is evidence that the landlord refused to accept the rent when tendered. (See CACI No. 4327, *Affirmative Defense—Landlord's Refusal of Rent*.)

If the day of receipt is at issue and any of the three days after the alleged date of receipt falls on a Saturday, Sunday, or judicial holiday, modify questions 2 and 4 to allow the tenant three days excluding weekends and judicial holidays ~~until the next day that is not a Saturday, Sunday, or holiday~~ to cure the default.

Code of Civil Procedure section 1174.2(a) provides that the court is to determine the reasonable rental value of the premises in its untenantable state to the date of trial. But whether this determination is to be made by the court or the jury is unsettled. Section 1174.2(d) provides that nothing in this section is intended to deny the tenant the right to a trial by jury. Subsection (d) could be interpreted to mean that in a jury trial, wherever the statute says "the court," it should be read as "the jury." But the statute also provides that the court may order the landlord to make repairs and correct the conditions of uninhabitability, which would not be a jury function. If the court decides to present this issue to the jury, select "skip question 8 and answer question 9" in the transitional language following question 7, and include question 9.

As noted above, if a breach of habitability is found, the court may order the landlord to make repairs and correct the conditions that constitute a breach. (Code Civ. Proc., § 1174.2(a).) The court might include a special interrogatory asking the jury to identify those conditions that it found to create uninhabitability and the dates on which the conditions existed.

VF-4302. Termination Due to Violation of Terms of Lease/Agreement

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] fail to [***insert description of alleged failure to perform***] as required by the [lease/rental agreement/sublease]?**
   ____ Yes ____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Was [***name of defendant***]'s failure to [***insert description of alleged failure to perform***] a substantial breach of [an] important obligation[s] under the [lease/rental agreement/sublease]?**
   ____ Yes ____ No

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [***name of plaintiff***] properly give [***name of defendant***] a written notice to [either [***describe action to correct failure to perform***] or] vacate the property at least three days before [***date on which action was filed***]?**
   ____ Yes ____ No

   [If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.]

[4. Did [*name of defendant***] [***describe action to correct failure to perform***] within three days after service or receipt of the notice?]**
   ____ Yes ____ No

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant] that you are ready to present your verdict in the courtroom.

New December 2007; Revised December 2010, June 2013, November 2019

Directions for Use

This verdict form is based on CACI No. 4304, *Termination for Violation of Terms of Lease/Agreement—Essential Factual Elements*. See also the Directions for Use for that instruction. Question 3 incorporates the notice requirements set forth in CACI No. 4305, *Sufficiency and Service of Notice of Termination for Violation of Terms of Agreement*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Include question 4 if the breach can be cured.

If the day of receipt is at issue and any of the three days after the alleged date of receipt falls on a Saturday, Sunday, or judicial holiday, modify questions 3 and 4 to allow the tenant three days excluding weekends and judicial holidays~~until the next day that is not a Saturday, Sunday, or holiday~~ to cure the default.

4575. Right to Repair Act—Affirmative Defense—Failure to Properly Maintain Home (Civ. Code, § 945.5(c))

[*Name of defendant***] claims that [he/she/it] is not responsible for [***name of plaintiff***]'s harm because [***name of plaintiff***] failed to properly maintain the home. To establish this defense, [***name of defendant***] must prove [all/both] of the following:**

1. That [*name of plaintiff***] failed to follow [[***name of defendant***]'s/ [or] a manufacturer's] recommendations/ [or] commonly accepted homeowner maintenance obligations];**

[2. That [*name of plaintiff***] had written notice of [***name of defendant***]'s recommended maintenance schedules;]**

[3. That the recommendations and schedules were reasonable at the time they were issued;]

4. That [*name of plaintiff***]'s harm was caused by [his/her] failure to follow [[***name of defendant***]'s/ [or] a manufacturer's] recommendations/ [or] commonly accepted homeowner maintenance obligations].**

New November 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 homeowner failed to properly maintain the property. The homeowner is responsible for any maintenance failures by any of his or her agents, employees, general contractors, subcontractors, independent contractors, or consultants. (Civ. Code, § 945.5(c).) Include elements 2 and 3 if the defendant contractor is relying on its own recommended maintenance schedule.

Sources and Authority

- Right to Repair Act Affirmative Defense of Homeowner's Failure to Maintain. Civil Code section 945.5(c).

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1310 et seq.

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, §§ 104.263-104.265 (Matthew Bender)

9 California Legal Forms Transaction Guide, Ch. 23, *Real Property Sales Agreements*, § 23.20A (Matthew Bender)

12 California Real Estate Law and Practice, Ch. 441, *Consumers' Remedies*, § 441.70 (Matthew Bender)

4603. Whistleblower Protection—Essential Factual Elements (Lab. Code, § 1102.5)

[*Name of plaintiff***] claims that [***name of defendant***] [discharged/[***other adverse employment action***]] [him/her] in retaliation for [his/her] [disclosure of information of/refusal to participate in] an unlawful act. In order to establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was [***name of plaintiff***]'s employer;**

2. **[That [***name of defendant***] believed that [***name of plaintiff***] [had disclosed/might disclose] to a [government agency/law enforcement agency/person with authority over [***name of plaintiff***]/ [or] an employee with authority to investigate, discover, or correct legal [violations/noncompliance]] that [***specify information disclosed***];]**

   [*or***]**

   [That [*name of plaintiff***] [provided information to/testified before] a public body that was conducting an investigation, hearing, or inquiry;]**

   [*or***]**

   [That [*name of plaintiff***] refused to [***specify activity in which plaintiff refused to participate***];]**

3. **[That [***name of plaintiff***] had reasonable cause to believe that the information disclosed [a violation of a [state/federal] statute/[a violation of/noncompliance with] a [local/state/federal] rule or regulation];]**

   [*or***]**

   [That [*name of plaintiff***] had reasonable cause to believe that the [information provided to/testimony before] the public body disclosed [a violation of a [state/federal] statute/[a violation of/noncompliance with] a [local/state/federal] rule or regulation];]**

   [*or***]**

   [That [*name of plaintiff***]'s participation in [***specify activity***] would result in [a violation of a [state/federal] statute/[a violation of/noncompliance with] a [local/state/federal] rule or regulation];]**

4. **That [***name of defendant***] [discharged/[***other adverse employment action***]] [***name of plaintiff***];**

5. **That [***name of plaintiff***]'s [disclosure of information/refusal to [***specify***]] was a contributing factor in [***name of defendant***]'s decision to [discharge/[***other adverse employment action***]] [***name of plaintiff***];**

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

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

[The disclosure of policies that an employee believes to be merely unwise, wasteful, gross misconduct, or the like, is not protected. Instead, [*name of plaintiff*] must have reasonably believed that [*name of defendant*]'s policies violated federal, state, or local statutes, rules, or regulations.]

[It is not [*name of plaintiff*]'s motivation for [his/her] disclosure, but only the content of that disclosure, that determines whether the disclosure is protected.]

[A disclosure is protected even though disclosing the information may be part of [*name of plaintiff*]'s job duties.]

New December 2012; Revised June 2013, December 2013, Revoked June 2014; Restored and Revised December 2014; Renumbered from CACI No. 2730 and Revised June 2015; Revised June 2016, November 2019

Directions for Use

The whistleblower protection statute of the Labor Code prohibits retaliation against an employee who, or whose family member, discloses information about, or refuses to participate in, an illegal activity. (Lab. Code, § 1102.5(b), (c), (h).) Liability may be predicated on retaliation by "any person acting on behalf of the employer." (Lab. Code, § 1102.5(a)−(d).) Select any of the optional paragraphs as appropriate to the facts of the case.

Modifications to the instruction may be required if liability is predicated on an agency theory and the agent is also a defendant. Modifications will also be required if the retaliation is against an employee whose family member engaged in the protected activity.

Select the first option for elements 2 and 3 for disclosure of information; select the second options for providing information to or testifying before a public body conducting an investigation, hearing, or inquiry. Select the third options for refusal to participate in an unlawful activity. In the first option for element 2, choose "might disclose" if the allegation is that the employer believed that the employee might disclose the information in the future. (Cf. *Rope v. Auto-Chlor System of Washington, Inc.* (2013) 220 Cal.App.4th 635, 648−649 [163 Cal.Rptr.3d 392] [under prior version of statute, no liability for anticipatory or preemptive retaliation based on fear that plaintiff might file a complaint in the future].)

~~Select any of the optional paragraphs as appropriate to the facts of the case.~~It has been held that a report of publicly known facts is not a protected disclosure. (*Mize-Kurzman v. Marin Community College Dist.* (2012) 202 Cal.App.4th 832, 858 [136 Cal.Rptr.3d 259].) Another court, however, has ~~cast doubt on this limitation and~~ held that protection is not necessarily limited to the first public employee to report unlawful acts to the employer. (*Hager v. County of Los Angeles* (2014) 228 Cal.App.4th 1538, 1548−1553 [176 Cal.Rptr.3d 268]; see Lab. Code, § 1102.5(b), (e).)

"Adverse employment action" is viewed the same as it is under the Fair Employment and Housing Act.

(*Patten v. Grant Joint Union High School Dist.* (2005) 134 Cal.App.4th 1378, 1387 [37 Cal.Rptr.3d 113]; see CACI No. 2505, *Retaliation—Essential Factual Elements.*) Element 4 may be modified to allege constructive discharge or adverse acts that might not be obviously prejudicial. See CACI No. 2509, *"Adverse Employment Action" Explained,* and CACI No. 2510, *"Constructive Discharge" Explained,* for instructions that may be adapted for use with this instruction.

The employee must demonstrate by a preponderance of evidence that a protected activity was a contributing factor in the adverse action against the employee. The employer may then attempt to prove by clear and convincing evidence that the action would have been taken anyway for legitimate, independent reasons even if the employee had not engaged in the protected activities. (See Lab. Code, § 1102.6; CACI No. 4604, *Affirmative Defense—Same Decision*.)

Sources and Authority

- Retaliation Against Whistleblower Prohibited. Labor Code section 1102.5.
- Affirmative Defense: Same Decision. Labor Code section 1102.6.
- "The elements of a section 1102.5(b) retaliation cause of action require that (1) the plaintiff establish a prima facie case of retaliation, (2) the defendant provide a legitimate, nonretaliatory explanation for its acts, and (3) the plaintiff show this explanation is merely a pretext for the retaliation. [¶] We are concerned here with the first element of a section 1102.5(b) retaliation claim, establishing a prima facie case of retaliation. To do that, a plaintiff must show (1) she engaged in a protected activity, (2) her employer subjected her to an adverse employment action, and (3) there is a causal link between the two." (*Patten, supra,* 134 Cal.App.4th at p. 1384, internal citations omitted.)
- "In 1984, our Legislature provided 'whistle-blower' protection in section 1102.5, subdivision (b), stating that an employer may not retaliate against an employee for disclosing a violation of state or federal regulation to a governmental or law enforcement agency. This provision reflects the broad public policy interest in encouraging workplace whistle-blowers to report unlawful acts without fearing retaliation. Section 1102.5, subdivision (b), concerns employees who report to public agencies. It does not protect plaintiff, who reported his suspicions directly to his employer. Nonetheless, it does show the Legislature's interest in encouraging employees to report workplace activity that may violate important public policies that the Legislature has stated. The state's whistle-blower statute includes administrative regulations as a policy source for reporting an employer's wrongful acts and grants employees protection against retaliatory termination. Thus, our Legislature believes that fundamental public policies embodied in regulations are sufficiently important to justify encouraging employees to challenge employers who ignore those policies." (*Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 76–77 [78 Cal.Rptr.2d 16, 960 P.2d 1046].)
- "[T]he purpose of … section 1102.5(b) 'is to '"encourag[e] workplace whistle-blowers to report unlawful acts without fearing retaliation."' " (*Diego v. Pilgrim United Church of Christ* (2014) 231 Cal.App.4th 913, 923 [180 Cal.Rptr.3d 359].)

- "As a general proposition, we conclude the court could properly craft instructions in conformity with law developed in federal cases interpreting the federal whistleblower statute. As the court acknowledged, it was not bound by such federal interpretations. Nevertheless, the court could properly conclude that the jury required guidance as to what did and did not constitute 'disclosing information' or a 'protected disclosure' under the California statutes." (*Mize-Kurzman, supra,* 202 Cal.App.4th at p. 847.)

- "The court erred in failing to distinguish between the disclosure of policies that plaintiff believed to be unwise, wasteful, gross misconduct or the like, which are subject to the [debatable differences of opinion concerning policy matters] limitation, and the disclosure of policies that plaintiff reasonably believed violated federal or state statutes, rules, or regulations, which are not subject to this limitation, even if these policies were also claimed to be unwise, wasteful or to constitute gross misconduct." (*Mize-Kurzman, supra,* 202 Cal.App.4th at pp. 852–853.)

- "[I]t is not the *motive* of the asserted whistleblower, but the nature of the communication that determines whether it is covered." (*Mize-Kurzman, supra,* 202 Cal.App.4th at p. 852, original italics.)

- "[I]f we interpret section 1102.5 to require an employee to go to a different public agency or directly to a law enforcement agency before he or she can be assured of protection from retaliation, we would be encouraging public employees who suspected wrongdoing to do nothing at all. Under the scenario envisioned by the [defendant], if the employee reports his or her suspicions to the agency, … , he or she will *have to suffer any retaliatory* conduct with no legal recourse. If the employee reports suspicions to an outside agency or law enforcement personnel, he or she risks subjecting the agency to negative publicity and loss of public support which could ensue without regard to whether the charges prove to be true. At the same time, a serious rift in the employment relationship will have occurred because the employee did not go through official channels within the agency which was prepared to investigate the charges. We see no reason to interpret the statute to create such anomalous results." (*Gardenhire v. Housing Authority* (2000) 85 Cal.App.4th 236, 243 [101 Cal.Rptr.2d 893].)

- "Labor Code section 1102.5, subdivision (b) protects employee reports of unlawful activity by third parties such as contractors and employees, as well unlawful activity by an employer. In support of our conclusion, we note that an employer may have a financial motive to suppress reports of illegal conduct by employees and contractors that reflect poorly on that employer." (*McVeigh v. Recology San Francisco* (2013) 213 Cal.App.4th 443, 471 [152 Cal.Rptr.3d 595], internal citation omitted.)

- "We are persuaded that [instructing the jury that reporting publicly known facts is not a protected disclosure] was a proper limitation on what constitutes disclosure protected by California law." (*Mize-Kurzman, supra,* 202 Cal.App.4th at p. 858.)

- "The report of 'publicly known' information or 'already known' information is distinct from a rule in which only the first employee to report or disclose unlawful conduct is entitled to protection from whistleblower retaliation." (*Hager, supra,* 228 Cal.App.4th at p. 1552.)

- "Protection only to the first employee to disclose unlawful acts would defeat the legislative purpose of protecting workplace whistleblowers, as employees would not come forward to report unlawful conduct for fear that someone else already had done so. The 'first report' rule would discourage whistleblowing. Thus, the [defendant]'s interpretation is a disincentive to report unlawful conduct. We see no such reason to interpret the statute in a manner that would contradict the purpose of the statute." (*Hager, supra,* 228 Cal.App.4th at p. 1550.)

- "Matters such as transferring employees, writing up employees, and counseling employees are personnel matters. 'To exalt these exclusively internal personnel disclosures with whistleblower status would create all sorts of mischief. Most damagingly, it would thrust the judiciary into micromanaging employment practices and create a legion of undeserving protected ""whistleblowers"" arising from the routine workings and communications of the job site. … ' " (*Mueller v. County of Los Angeles* (2009) 176 Cal.App.4th 809, 822 [98 Cal.Rptr.3d 281].)

- " 'A wrongful termination action is viable where the employee alleges he [or she] was terminated for reporting illegal activity which could cause harm, not only to the interests of the employer but also to the public.' 'An action brought under the whistleblower statute is inherently such an action.' To preclude a whistleblower from revealing improper conduct by the government based on confidentiality would frustrate the legislative intent underlying the whistleblower statutes. For reasons of public policy, actions against a public entity for claims of discharge from or termination of employment grounded on a whistleblower claim are not barred by governmental immunity." (*Whitehall v. County of San Bernardino* (2017) 17 Cal.App.5th 352, 365 [225 Cal.Rptr.3d 321], internal citations omitted.)

Secondary Sources

3 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Agency and Employment, §§ ~~349~~373, 374

~~Chin et al., California Practice Guide: Employment Litigation, Ch. 5-L, *Employment Torts And Related Claims: Other Statutory Claims*, ¶ 5:894 et seq. (The Rutter Group)~~
Chin et al., California Practice Guide: Employment Litigation, Ch. 5(2)-B, *Retaliation Claims: Retaliation Under Other Whistleblower Statutes,* ¶ 5:1740 et seq. (The Rutter Group)

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.03[2][c] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.12, 249.15 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Public Entities and Officers: False Claims Actions*, § 100.42 et seq. (Matthew Bender)

4900. Adverse Possession

[*Name of plaintiff***] claims that [he/she] is the owner of [***briefly describe property***] because [he/she] has obtained title to the property by adverse possession. In order to establish adverse possession, [***name of plaintiff***] must prove that for a period of five years, all of the following were true:**

1. That [*name of plaintiff***] exclusively possessed the property;**

2. That [*name of plaintiff***]'s possession was continuous and uninterrupted;**

3. That [*name of plaintiff***]'s possession of the property was open and easily observable, or was under circumstances that would give reasonable notice to [***name of defendant***];**

4. That [*name of plaintiff***] did not recognize, expressly or by implication, that [***name of defendant***] had any ownership rights in the land;**

5. That [*name of plaintiff***] claimed the property as [his/her] own under [either] [color of title/ [or] a claim of right]; and**

6. That [*name of plaintiff***] timely paid all of the taxes assessed on the property during the five-year period.**

New November 2019

Directions for Use

Use this instruction for a claim that the plaintiff has obtained title of property by adverse possession. A claimant for a prescriptive easement is entitled to a jury trial. (*Arciero Ranches v. Meza* (1993) 17 Cal.App.4th 114, 124 [21 Cal.Rptr.2d 127]; see CACI No. 4901, *Prescriptive Easement*.) Presumably the same right would apply to a claim for adverse possession. (See *Kendrick v. Klein* (1944) 65 Cal.App.2d 491, 496 [150 P.2d 955] [whether occupancy amounted to adverse possession is question of fact].)

By statute, the taxes must have been paid by "the party or persons, their predecessors and grantors." (Code Civ. Proc., §325(b).) Revise element 6 if the taxes were paid by someone other than the plaintiff.

Sources and Authority

- Adverse Possession. Code of Civil Procedure section 325.
- Color of Title: Occupancy Under Written Instrument or Judgment. Code of Civil Procedure section 322.
- Occupancy Under Claim of Right. Code of Civil Procedure section 324.

- "There is a difference between a prescriptive use of land culminating in an easement (i.e., an incorporeal interest) and adverse possession which creates a change in title or ownership (i.e., a corporeal interest); the former deals with the *use* of land, the other with *possession*; although the elements of each are similar, the requirements of proof are materially different." (*Hansen v. Sandridge Partners, L.P.* (2018) 22 Cal.App.5th 1020, 1032 [232 Cal.Rptr.3d 247], original italics.)

- "In an action to quiet title based on adverse possession the burden is upon the claimant to prove every necessary element: (1) Possession must be by actual occupation under such circumstances as to constitute reasonable notice to the owner. (2) It must be hostile to the owner's title. (3) The holder must claim the property as his own, under either color of title or claim of right. (4) Possession must be continuous and uninterrupted for five years. (5) The holder must pay all the taxes levied and assessed upon the property during the period." (*Dimmick v. Dimmick* (1962) 58 Cal.2d 417, 421 [24 Cal.Rptr. 856, 374 P.2d 824].)

- "To establish adverse possession, the claimant must prove: (1) possession under claim of right or color of title; (2) actual, open, and notorious occupation of the premises constituting reasonable notice to the true owner; (3) possession which is adverse and hostile to the true owner; (4) continuous possession for at least five years; and (5) payment of all taxes assessed against the property during the five-year period." (*Hansen, supra,* 22 Cal.App.5th at pp. 1032–1033.)

- " 'The elements necessary to establish title by adverse possession are tax payment and open and notorious use or possession that is continuous and uninterrupted, hostile to the true owner and under a claim of title,' for five years. [Citation.]" (*McLear-Gary v. Scott* (2018) 25 Cal.App.5th 145, 152 [235 Cal.Rptr.3d 443].)

- "Claim of right does not require a belief or claim that the use is legally justified. It simply means that the property was used without permission of the owner of the land. As the American Law of Property states in the context of adverse possession: 'In most of the cases asserting [the requirement of a claim of right], it means no more than that possession must be hostile, which in turn means only that the owner has not expressly consented to it by lease or license or has not been led into acquiescing in it by the denial of adverse claim on the part of the possessor.' One text proposes that because the phrase ' "claim of right " ' has caused so much trouble by suggesting the need for an intent or state of mind, it would be better if the phrase and the notions it has spawned were forgotten." (*Felgenhauer v. Soni* (2004) 121 Cal.App.4th 445, 450 [17 Cal.Rptr.3d 135], internal citations omitted.)

- "Because of the taxes element, it is more difficult to establish adverse possession than a prescriptive easement. The reason for the difference in relative difficulty is that a successful adverse possession claimant obtains ownership of the land (i.e., an estate), while a successful prescriptive easement claimant merely obtains the right to *use* the land in a particular way (i.e., an easement)." (*Hansen, supra,* 22 Cal.App.5th at p. 1033, original italics.)

- " 'The requirement of "hostility" . . . means, not that the parties must have a dispute as to the title during the period of possession, but that the claimant's possession must be adverse to the record

owner, "unaccompanied by any recognition, express or inferable from the circumstances of the right in the latter." . . . "Title by adverse possession may be acquired through [sic] the possession or use commenced under mistake." ' " (*Kunza v. Gaskell* (1979) 91 Cal.App.3d 201, 210–211 [154 Cal.Rptr. 101].)

- "Adverse possession under [Code of Civil Procedure] section 322 is based on what is commonly referred to as color of title. In order to establish a title under this section it is necessary to show that the claimant or 'those under whom he claims, entered into possession of the property under claim of title, exclusive of other right, founding such claim upon a written instrument, as being a conveyance of the property in question, or upon the decree or judgment of a competent court, and that there has been a continued occupation and possession of the property included in such instrument, decree, or judgment, or of some part of the property . . . for five years … .' " (*Sorensen v. Costa* (1948) 32 Cal.2d 453, 458 [196 P.2d 900].)

- "The requirements of possession are more stringent where the possessor acts under mere claim of right than when he occupies under color of title. In the former case, the land is deemed to have been possessed and occupied only where it has (a) been protected by a substantial inclosure, or (b) usually cultivated or improved." (*Brown v. Berman* (1962) 203 Cal.App.2d 327, 329 [21 Cal.Rptr. 401], internal citations omitted; see Code Civ. Proc., § 325.)

- "It is settled too that the burden of proving all of the essential elements of adverse possession rests upon the person relying thereon and it cannot be made out by inference but only by clear and positive proof." (*Mosk v. Summerland Spiritualist Asso.* (1964) 225 Cal.App.2d 376, 382 [37 Cal.Rptr. 366].)

Secondary Sources

12 Witkin, Summary of California Law (11th ed. 2017) Real Property, §§ 223 et seq.

10 California Real Estate Law and Practice, Ch. 360, *Adverse Possession*, § 360.20 (Matthew Bender)

2 California Forms of Pleading and Practice, Ch. 13, *Adverse Possession*, § 13.12 (Matthew Bender)

1 California Points and Authorities, Ch. 13, *Adverse Possession*, §§ 13.10, 13.20 (Matthew Bender)

6 Miller & Starr California Real Estate 4th (2015) §§ 18:1 et seq. (Ch. 18, *Real Property*) (Thomson Reuters)

Smith-Chavez, et al., California Civil Practice, Real Property Litigation § 13:1 et seq. (Thomson Reuters)

4901. Prescriptive Easement

[*Name of plaintiff***] claims that [he/she] is entitled to a nonexclusive use of [***name of defendant***]'s property for the purpose of [***describe use, e.g., reaching the access road***]. This right is called a prescriptive easement. In order to establish a prescriptive easement, [***name of plaintiff***] must prove that for a period of five years all of the following were true:**

1. That [*name of plaintiff***] has been using [***name of defendant***]'s property for the purpose of [***e.g., reaching the access road***];**

2. That [*name of plaintiff***]'s use of the property was continuous and uninterrupted;**

3. That [*name of plaintiff***]'s use of [***name of defendant***]'s property was open and easily observable, or was under circumstances that would give reasonable notice to [***name of defendant***]; and**

4. That [*name of plaintiff***] did not have [***name of defendant***]'s permission to use the land.**

New November 2019

Directions for Use

Use this instruction for a claim that the plaintiff has obtained a prescriptive easement to use the defendant's property. A claimant for a prescriptive easement is entitled to a jury trial. (*Arciero Ranches v. Meza* (1993) 17 Cal.App.4th 114, 124 [21 Cal.Rptr.2d 127].)

If the case involves periods of prescriptive use by successive users (i.e., "tacking"), modify each element to account for the prior use by others. (*Windsor Pacific LLC v. Samwood Co., Inc.* (2013) 213 Cal.App.4th 263, 270 [152 Cal.Rptr.3d 518], disapproved on other grounds in *Mountain Air Enterprises, LLC v. Sundowner Towers, LLC* (2017) 3 Cal.5th 744, 756 fn. 3 [220 Cal.Rptr.3d 650, 398 P.3d 556].)

There is a split of authority over the standard of proof for a prescriptive easement. (Compare *Vieira Enterprises, Inc. v. McCoy* (2017) 8 Cal.App.5th 1057, 1074 [214 Cal.Rptr.3d 193] [preponderance of evidence] with *Grant v. Ratliff* (2008) 164 Cal.App.4th 1304, 1310 [79 Cal.Rptr.3d 902] [clear and convincing evidence].)

Sources and Authority

- " 'The elements necessary to establish a prescriptive easement are well settled. The party claiming such an easement must show use of the property which has been open, notorious, continuous and adverse for an uninterrupted period of five years. [Citations.] Whether the elements of prescription are established is a question of fact for the trial court [citation], and the findings of the court will not be disturbed where there is substantial evidence to support them.' '[A]n essential element necessary to the establishment of a prescriptive easement is visible, open and

notorious use sufficient to impart actual or constructive notice of the use to the owner of the servient tenement. [Citation.]' " (*McLear-Gary v. Scott* (2018) 25 Cal.App.5th 145, 159 [235 Cal.Rptr.3d 443], internal citation omitted.)

- "Periods of prescriptive use by successive owners of the dominant estate can be 'tacked' together if the first three elements are satisfied." (*Windsor Pacific LLC, supra,* 213 Cal.App.4th at p. 270.)

- "[The] burden of proof as to each and all of the requisite elements to create a prescriptive easement is upon the one asserting the claim. [Citations.] [Para.] . . . [The] existence or nonexistence of each of the requisite elements to create a prescriptive easement is a question of fact for the court or jury." (*Twin Peaks Land Co. v. Briggs* (1982) 130 Cal.App.3d 587, 593 [181 Cal.Rptr. 25].)

- "[A] party seeking to establish a prescriptive easement has the burden of proof by clear and convincing evidence. The higher standard of proof demonstrates there is no policy favoring the establishment of prescriptive easements." (*Grant, supra,* 164 Cal.App.4th at p. 1310, internal citation omitted.)

- "[Plaintiff] correctly contends that the burden of proof of a prescriptive easement or prescriptive termination of an easement is not clear and convincing evidence . . . ." (*Vieira Enterprises, Inc., supra,* 8 Cal.App.5th at p. 1064.)

- "Whether the use is hostile or is merely a matter of neighborly accommodation, however, is a question of fact to be determined in light of the surrounding circumstances and the relationship between the parties." (*Warsaw v. Chicago Metallic Ceilings, Inc.* (1984) 35 Cal.3d 564, 572 [199 Cal.Rptr. 773, 676 P.2d 584].)

- " 'The term "adverse" in this context is essentially synonymous with "hostile" and " 'under claim of right.' " [Citations.] A claimant need not believe that his or her use is legally justified or expressly claim a right of use for the use to be adverse. [Citations.] Instead, a claimant's use is adverse to the owner if the use is made without any express or implied recognition of the owner's property rights. [Citations.] In other words, a claimant's use is adverse to the owner if it is wrongful and in defiance of the owner's property rights. [Citation.]' " (*McBride v. Smith* (2018) 18 Cal.App.5th 1160, 1181 [227 Cal.Rptr.3d 390].)

- "Claim of right does not require a belief or claim that the use is legally justified. It simply means that the property was used without permission of the owner of the land. As the American Law of Property states in the context of adverse possession: 'In most of the cases asserting [the requirement of a claim of right], it means no more than that possession must be hostile, which in turn means only that the owner has not expressly consented to it by lease or license or has not been led into acquiescing in it by the denial of adverse claim on the part of the possessor.' One text proposes that because the phrase ' "claim of right " ' has caused so much trouble by suggesting the need for an intent or state of mind, it would be better if the phrase and the notions it has spawned were forgotten." (*Felgenhauer v. Soni* (2004) 121 Cal.App.4th 445, 450 [17 Cal.Rptr.3d 135], internal citations omitted.)

- "Use with the owner's permission, however, is not adverse to the owner. [Citations.] To be adverse to the owner a claimant's use must give rise to a cause of action by the owner against the claimant. [Citations.] This ensures that a prescriptive easement can arise only if the owner had an opportunity to protect his or her rights by taking legal action to prevent the wrongful use, yet failed to do so. [Citations.]" (*McBride, supra,* 18 Cal.App.5th at p. 1181.)

- "Prescriptive rights 'are limited to the uses which were made of the easements during the prescriptive period. [Citations.] Therefore, no different or greater use can be made of the easements without defendants' consent.' While the law permits increases in the scope of use of an easement where 'the change is one of degree, not kind', 'an actual change in the physical objects passing over the road' constitutes a 'substantial change in the nature of the use and a consequent increase of burden upon the servient estate … more than a change in the degree of use.' ' "In ascertaining whether a particular use is permissible under an easement appurtenant created by prescription there must be considered … the needs which result from a normal evolution in the use of the dominant tenement and the extent to which the satisfaction of those needs increases the burden on the servient tenement." ' '[T]he question of whether there has been an unreasonable use of an easement is one of fact … .' " (*McLear-Gary, supra,* 25 Cal.App.5th at p. 160, internal citations omitted.)

Secondary Sources

12 Witkin, Summary of California Law (11th ed. 2017) Real Property, § 415 et seq.

10 California Real Estate Law and Practice, Ch. 343, *Easements*, § 343.15 (Matthew Bender)

2 California Forms of Pleading and Practice, Ch. 13, *Adverse Possession*, § 13.13 (Matthew Bender)

20 California Forms of Pleading and Practice, Ch. 240, *Easements*, § 240.16 (Matthew Bender)

22 California Points and Authorities, Ch. 225, *Trespass*, § 225.180 (Matthew Bender)

4902. Interference With Secondary Easement

[*Name of plaintiff***] has an easement on the land of [***name of defendant***] for the purpose of [***specify***,** *e.g., providing ingress and egress to the public highway***]. A person with an easement and the owner of land on which the easement lies each have a duty not to unreasonably interfere with the rights of the other to use and enjoy their respective rights. Neither party can conduct activities or place obstructions on the property that unreasonably interfere with the other party's use of the property.**

In this case, [*name of plaintiff***] claims that [***name of defendant***] [***specify interference, e.g., built a gate across the path of the easement***]. You must determine whether [***name of defendant***]'s [***e.g., building of a gate***] unreasonably interfered with [***name of plaintiff***]'s use and enjoyment of the easement.**

New November 2019

Directions for Use

Give this instruction in a claim for breach of a secondary easement. A secondary easement is the right to do the things that are necessary for the full enjoyment of the easement itself. (*Dolnikov v. Ekizian* (2013) 222 Cal.App.4th 419, 428 [165 Cal.Rptr.3d 658].)

This instruction is structured for an easement holder's claim against the property owner. A different instruction will be required if the owner is bringing a claim against the easement holder for interference with the owner's property rights.

Sources and Authority

- "A secondary easement can be the right to make 'repairs, renewals and replacements on the property that is servient to the easement' 'and to do such things as are necessary to the exercise of the right'. … A right-of-way to pass over the land of another carries with it 'the implied right … to make such changes in the surface of the land as are necessary to make it available for travel in a convenient manner.' " (*Dolnikov, supra,* 222 Cal.App.4th at p. 428, internal citations omitted.)

- "Incidental or secondary easement rights are limited by a rule of reason. 'The rights and duties between the owner of an easement and the owner of the servient tenement … are correlative. Each is required to respect the rights of the other. Neither party can conduct activities or place obstructions on the property that unreasonably interfere with the other party's use of the property. In this respect, there are no absolute rules of conduct. The responsibility of each party to the other and the "reasonableness" of use of the property depends on the nature of the easement, its method of creation, and the facts and circumstances surrounding the transaction.' " (*Dolnikov, supra,* 222 Cal.App.4th at pp. 428–429.)

- "A servient tenement owner … is ' "entitled to make all uses of the land that are not prohibited by the servitude and that do not interfere unreasonably with the uses authorized by the easement … ." [Citation.] "[T]he servient owner may use his property in any manner not inconsistent with the easement so long as it does not *unreasonably impede* the dominant tenant in his rights."

[Citation.] "*Actions that make it more difficult to use an easement, that interfere with the ability to maintain and repair improvements built for its enjoyment, or that increase the risks attendant on exercise of rights created by the easement are prohibited … unless justified by needs of the servient estate*. In determining whether the holder of the servient estate has unreasonably interfered with exercise of an easement, the interests of the parties must be balanced to strike a *reasonable accommodation* that maximizes overall utility to the extent consistent with effectuating the purpose of the easement … and subject to any different conclusion based on the intent or expectations of the parties … ." ' " (*Inzana v. Turlock Irrigation Dist. Bd. of Directors* (2019) 35 Cal.App.5th 429, 445 [247 Cal.Rptr.3d 427], original italics.)

- "Whether a particular use of the land by the servient owner, or by someone acting with his authorization, is an unreasonable interference is a question of fact for the jury." (*Pasadena v. California–Michigan Land & Water Co.* (1941) 17 Cal.2d 576, 579 [110 P.2d 983].)

Secondary Sources

12 Witkin, Summary of California Law (11th ed. 2017) Real Property, §§ 422, 424, 429

10 California Real Estate Law and Practice, Ch. 343, *Easements*, § 343.16 (Matthew Bender)

2 California Forms of Pleading and Practice, Ch. 13, *Adverse Possession*, § 13.13 (Matthew Bender)

20 California Forms of Pleading and Practice, Ch. 240, *Easements*, § 240.15 (Matthew Bender)

4910. Violation of Homeowner Bill of Rights—Essential Factual Elements (Civ. Code, § 2924.12(b))

[*Name of plaintiff***] claims that [he/she] has been harmed because of [***name of defendant***]'s [***specify, e.g., foreclosure sale of [his/her/their] home***]. To establish this claim, [***name of plaintiff***] must prove:**

1. That [*specify one or more violations of the Homeowner Bill of Rights in Civil Code sections 2923.55, 2923.6, 2923.7, 2924.9, 2924.10, 2924.11, or 2924.17***];**

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

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

The violation claimed by [*name of plaintiff***] must have been "material," which means that it was significant or important.**

New November 2019

Directions for Use

Give this instruction in a case claiming a violation of the Homeowner Bill of Rights (the HBOR). (Civ. Code, §§ 2920.5, 2923.4–2923.7, 2924, 2924.9–2924.12, 2924.15, 2924.17–2924.20). The HBOR provides for a homeowner's civil action for actual economic damages against a mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent for a material violation of specified provisions of the HBOR. (Civ. Code, § 2924.12(b); see Civ. Code, §§ 2923.55, 2923.6, 2923.7, 2924.9, 2924.10, 2924.11, 2924.17.) In element 1, insert the specific violation(s) alleged.

For a violation that is intentional or reckless, or resulted from willful misconduct, there is a penalty of the greater of treble actual damages or $50,000. (Civ. Code, § 2924.12(b).) These terms are not further defined in the HBOR. If the plaintiff seeks a penalty, an additional element should be added to require an intentional or reckless violation or willful misconduct.

Sources and Authority

- Action for Damages Under Homeowner Bill of Rights. Civil Code section 2924.12(b).
- Preforeclosure Requirements. Civil Code section 2923.55.
- "Dual Tracking" Prohibited. Civil Code section 2923.6.
- Single Point of Contact Required. Civil Code section 2923.7.
- Written Notice to Borrower on Recording of Notice of Default. Civil Code section 2924.9.

- Written Acknowledgment of Receipt of Loan Modification Application. Civil Code section 2924.10.

- Approved Foreclosure Prevention Alternative; Prohibition Against Recording Notice of Default or Sale or Conducting Trustee Sale; Rescission or Cancellation. Civil Code section 2924.11.

- Recording Inaccurate Title Document. Civil Code section 2924.17.

- "The Homeowner Bill of Rights (Civ. Code, §§ 2920.5, 2923.4–2923.7, 2924, 2924.9–2924.12, 2924.15, 2924.17–2924.20) (HBOR), effective January 1, 2013, was enacted 'to ensure that, as part of the nonjudicial foreclosure process, borrowers are considered for, and have a meaningful opportunity to obtain, available loss mitigation options, if any, offered by or through the borrower's mortgage servicer, such as loan modifications or other alternatives to foreclosure.' (§ 2923.4, subd. (a).) Among other things, HBOR prohibits 'dual tracking,' which occurs when a bank forecloses on a loan while negotiating with the borrower to avoid foreclosure. (See § 2923.6.) HBOR provides for injunctive relief for statutory violations that occur prior to foreclosure (§ 2924.12, subd. (a)), and monetary damages when the borrower seeks relief for violations after the foreclosure sale has occurred (§ 2924.12, subd. (b))." (*Valbuena v. Ocwen Loan Servicing, LLC* (2015) 237 Cal.App.4th 1267, 1272 [188 Cal.Rptr.3d 668].)

- "A material violation found by the court to be intentional or reckless, or to result from willful misconduct, may result in a trebling of actual damages or statutory damages of $50,000. 'A court may award a prevailing borrower reasonable attorney's fees and costs in an action brought pursuant to this section.' " (*Valbuena, supra,* 237 Cal.App.4th at p. 1273.internal citation omitted.)

- "Nothing in the language of HBOR suggests that a borrower must tender the loan balance before filing suit based on a violation of the requirements of the law. Indeed, such a requirement would completely eviscerate the remedial provisions of the statute." (*Valbuena, supra,* 237 Cal.App.4th at p.1273.)

- "We disagree with the [plaintiffs'] assertion that 'contacts' between the lender or its agent and the borrow [sic] must be initiated by the lender or its agent in order to comply with former section 2923.55, and that any telephone calls initiated by the [plaintiffs], and not by [the loan servicer], in which the [plaintiffs'] financial situation and alternatives to foreclosure were discussed, cannot constitute compliance with former section 2923.55. The language of the statute does not require that a lender *initiate* the contact; rather, the statute requires only that the lender make contact in some manner and provide the borrower with an opportunity to discuss the borrower's financial situation and possible options for avoiding foreclosure." (*Schmidt v. Citibank, N.A.* (2018) 28 Cal.App.5th 1109, 1122 [239 Cal.Rptr.3d 648], original italics.)

Secondary Sources

Greenwald et al., California Practice Guide: Real Property Transactions, Ch. 6-I, *Real Property Foreclosures and Antideficiency Laws*, ¶ 6:511.1 et seq. (The Rutter Group)

5 California Real Estate Law and Practice, Ch. 123, *Nonjudicial Disclosure*, § 123.08C (Matthew Bender)

48 California Forms of Pleading and Practice, Ch. 555, *Trust Deeds and Real Property Mortgages*, § 555.51C (Matthew Bender)

10 California Legal Forms Transaction Guide, Ch. 25D, *Foreclosure*, § 25D.34 (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, November 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, (1) this instruction may need to be modified to clarify that insurance may not be considered for purposes of determining liability; and (2) 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].)

- "[M]ost of these references to Kaiser and Medicare, as well as the single reference to Social Security, merely provided context and background information on [plaintiff]'s past treatment at Kaiser and on some aspects of [defendant]'s experts' calculation of past and future reasonable medical expenses. They were helpful and even necessary to the jury's understanding of the issues. [Plaintiff] has not shown the court abused its discretion in admitting these references to assist the jury's understanding of the facts." (*Stokes v. Muschinske* (2019) 34 Cal.App.5th 45, 58 [245 Cal.Rptr.3d 764].)

Secondary Sources

8 Witkin, California Procedure (5th ed. ~~2018~~2008) Trial, § 217 et seq.

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*, 17.26f

Proposed Addition to User Guide

Personal pronouns: Many CACI instructions include an option to insert the personal pronouns "he/she," “his/her,” or "him/her." The committee does not intend these options to be limiting. It is the policy of the State of California that nonbinary people are entitled to full legal recognition and equal treatment under the law. In accordance with this policy, attorneys and courts should take affirmative steps to ensure that they are using litigants' preferred personal pronouns.

Instruction(s)	Commenter	Comment	Committee Response
105. *Insurance* 5001. *Insurance*	American Property Casualty Insurance Association by Mark Sektnan Vice President, State Government Relations, Washington, DC	The jury instruction of this section, which is unmodified, broadly instructs the jury not to consider whether any of the parties in a case has insurance. The first proposed revision in this section, which appears in the directions, reinforces the authority of CA's Evidence Code § 1155 (evidence that a person was, at the time a harm was suffered by another, insured…against loss arising from liability for that harm is inadmissible to prove negligence or other wrongdoing). The proposed revision clarifies that if evidence of insurance has been admitted for another reason, the jury instruction may need to be modified to clarify that insurance may not be considered for purposes of determining liability. APCIA strongly urges that the second "may" in this revision be replaced with "must" to ensure adherence to California authority.	While "may" and "must" do not mean the same thing, "may not" and "must not" do mean the same thing. No California authority is provided indicating that "must not" is required.
		The next proposed revision, which appears in the authority of this section, is a citation to *Stokes v. Muschinske* (2019), which addresses the court's admission of certain health insurance information (including some aspects of the defendant's experts' calculation of past and future medical expenses) and notes that the plaintiff had not shown the court abused its discretion in admitting the information. As a general observation, the cases cited in this section cover so many applications--liability insurance, health insurance, collateral source rule, treatment outside of a plan-- that the collective authority is confusing.	The purpose of the Sources and Authority is to provide launching points for research. They are not intended to provide a comprehensive analysis.
	Association of Southern	ASCDC previously wrote CACI on March 1, 2019 regarding the last set of proposed	The March 1 letter was not considered for Release 34; however most of the points made in it had been raised

Instruction(s)	Commenter	Comment	Committee Response
	California Defense Counsel, by Steven Fleischman Co-chair, Amicus Committee, Horvitz & Levy LLP, Burbank	changes to these two instructions which were made effective May 2019. We wrote again on April 16, 2019 to make CACI aware of the April 8, 2019, opinion in *Stokes v. Muschinske* (2019) 34 Cal.App.5th 45 (*Stokes*), review denied (July 24, 2019), and to request the addition of *Stokes* to the Sources and Authority. Our understanding is that the March 1, 2019, letter was misplaced, due to inadvertence, and not considered by CACI in connection with the May 2019 changes. It appears that our April 16, 2019, letter was considered, however, in connection with the pending set of modifications. While ASCDC agrees with the two proposed changes to these two instructions, it appears that many of the points raised in our original March 1, 2019, letter continue to go unaddressed by CACI.	in an article from Verdict magazine. The committee did consider the article for Release 34, and for the most part, rejected its positions. The points in the letter are addressed below. The ASCDC's objective, in the Verdict article, in their March letter, and in this current comment, is to be able to get the plaintiff's health care coverage into evidence to rebut the amount billed as the reasonable value of medical expenses. The committee did fully consider and reject this position in Release 34. There is no authority that makes that evidence admissible to limit liability, though the cases that ASCDC presents suggest a possibility that it could be admissible, at least under some circumstances.
		The CACI Committee should revise the proposed instructions to specify juries cannot consider insurance when determining liability.	The committee fully considered this issue from the Verdict article. Its decision was that adding a sentence in the Directions for Use with regard to evidence of insurance admitted for another purpose was sufficient. The additional sentence proposed to be added for this release further makes it clear that evidence of insurance sometimes is admitted, and the instruction should be modified to stress that insurance cannot be considered for liability.
		Regarding the Sources and Authority: ASCDC agrees with the current citation to *Neumann v. Bishop* (1976) 59 Cal.App.3d 451, 469 for the proposition that evidence of the defendant's liability insurance " ' "is . . . both irrelevant and prejudicial to the defendant." ' " But ASCDC requests that the CACI	The committee declined to add cases from 1927 and 1930 that are of limited (*Perez*) or no (*Hodge*) current relevance.

Instruction(s)	Commenter	Comment	Committee Response
		Committee supplement this citation with additional authorities supporting the longstanding principle that both direct and indirect references to insurance are reversible errors and cannot be easily remedied with a limiting instruction. ASCDC recommends the following additional authorities be added to the Neumann excerpt: [; accord, *Hodge v. Weinstock, Lubin & Co.* (1930) 109 Cal.App. 393, 404 ["There is no rule better settled than that if a party introduces evidence that the defendant in such a case as this is insured, or by deliberate purpose or by successful tactics purposefully suggests this fact to the jury, it constitutes reversible error"]; *Perez v. Crocker* (1927) 86 Cal.App. 288, 293 ["Without abundant citation of authority we may here reaffirm it to be the law of this jurisdiction that it is improper to either directly or indirectly get before the jury any fact which conveys the information that defendant is insured against loss in case of a recovery against him, and the striking of the answers conveying such information and the instructing of the jury not to consider it will not save the error"].)] The citation to *Perez* would be particularly useful to demonstrate that it is improper to directly or indirectly refer to liability insurance.	
		The CACI Committee should remove or revise the general references to the collateral source rule from the Sources and Authority,	The article in Verdict did address the *Blake* case, but did not address this excerpt, which is currently included in the Sources and Authority:

Instruction(s)	Commenter	Comment	Committee Response
		especially the second excerpt from *Blake v. E. Thompson Petroleum Repair Co.* (1985) 170 Cal.App.3d 823, 830 (*Blake*). As stated in the proposed "Directions for Use," CACI Nos. 105 and 5001 instruct juries on Evidence Code section 1155, which prohibits the use of defendant's liability insurance to prove liability. But the collateral source rule is a separate doctrine—a substantive rule of law prohibiting the reduction (not mitigation) of damages based on plaintiff's insurance coverage. (See *Helfend v. Southern Cal. Rapid Transit Dist.* (1970) 2 Cal.3d 1, 16-18.) Moreover, there is an existing CACI instruction addressing the collateral source rule (CACI No. 3923), so any new or revised instruction regarding that doctrine should be done there.	"[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.'" Whether or not the ASCDC analysis of the collateral source rule is correct, the excerpt is directly from the case, and it concerns insurance coverage. Further, there is a "see" cite to *Helfend*.

Instruction(s)	Commenter	Comment	Committee Response
		The citation to the doctrine of mitigation of damages from the *Blake* decision is misleading because mitigation is a separate legal doctrine. (citations omitted) The doctrine of mitigation of damages is addressed in another CACI instruction (CACI No. 3930), and should not be included in CACI Nos. 105 and 5001. Accordingly, ASCDC requests that CACI omit the second *Blake* excerpt in the "Sources and Authority" in its entirety. Alternatively, ASCDC requests that excerpt be revised as follows: "[E]vidence of a plaintiff's insurance coverage is not admissible for the purpose of [~~mitigating~~ **barring**] 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, original italics; see *Helfend v. Southern California Rapid Transit Dist.* (1970) 2 Cal.3d 1, 16-18)[**However, evidence of a plaintiff's insurance coverage may be relevant to a plaintiff's duty to mitigate their damages (*Withrow v. Becker* (1935) 6 Cal.App.2d 723, 729-730 [doctrine of mitigation of damages applies to medical decisions made by a plaintiff to treat their injuries]) and/or the reasonable value of medical services (e.g., *Cuevas v. Contra Costa County* (2017) 11 Cal.App.5th 163, 178-180 [evidence of insurance available under the Affordable Care Act admissible to determine future medical damages]; *Luttrell v. Island Pacific Supermarkets, Inc.*	Sources and Authority excerpts are exact quotes from cases. The committee does not change the court's language, even if it could be clearer. The Verdict magazine article did address the issue of admitting the plaintiff's health care coverage into evidence. The committee declined to make any change in the instruction that would suggest that this is the law.

Instruction(s)	Commenter	Comment	Committee Response
		(2013) 215 Cal.App.4th 196, 207-208 [both mitigation of damages and *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541 apply to determine reasonable value of medical services]).]	
		The CACI Committee should remove unneeded references to Evidence Code section 352. The trial court's discretion to exclude evidence under Evidence Code section 352 is well-established and limited to the facts of any particular case. However, the admission or exclusion of evidence is something which belongs in Jefferson's California Evidence Benchbook, not in jury instructions.	The references to Evidence Code section 352 are only in two excerpts in the Sources and Authority. The committee included these decisions because they are relevant to the subject and may provide a useful starting point for research.
		The CACI Committee should remove the unneeded reference to *Pebley v. Santa Clara Organics*.	*Pebley* was addressed in the Verdict article and also was criticized by the Civil Justice Association (CJA) in a comment for Release 34. The committee thoroughly considered it and declined to remove it from the

Instruction(s)	Commenter	Comment	Committee Response
			Sources and Authority. Here is the committee's response to the CJA comment: "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."
	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair, Sacramento	The committee believes the following language in the instruction is overbroad: "The presence or absence of insurance is totally irrelevant." We believe the prohibition on consideration of insurance is more limited. The collateral source rule prohibits reducing damages by compensation received from a source other than the tortfeasor (such as an insurance payment) and makes evidence of such a payment inadmissible, while Evidence Code section 1155 makes evidence of insurance inadmissible to prove negligence or other wrongdoing. Rather than leave the instruction unchanged and add language to the Directions for Use suggesting that the instruction be modified in some cases, we would revise the instruction to describe the prohibition on consideration of insurance more precisely. This should include both the prohibition on consideration of defendant's insurance (which is reflected in the proposed revision to the Directions for Use) and the prohibition on consideration of	This is essentially the same proposal made by ASCDC, above. In rejecting the ASCDC proposal in Release 34, the committee decided that no changes were appropriate for the instruction itself.

Instruction(s)	Commenter	Comment	Committee Response
		plaintiff's insurance (which is not mentioned in the proposal). We would modify the instruction as follows: "You must not consider whether any of the parties in this case has insurance <u>in deciding whether [name of defendant] [was negligent/is liable for damages] or in deciding the amount of any damages.</u> ~~The presence or absence of insurance is totally irrelevant.~~ You must decide this case based only on the law and the evidence."	
		The Directions for Use mention the restriction on considering the defendant's insurance but do not mention the restriction on considering the plaintiff's insurance (i.e., the collateral source rule). The Sources and Authority include authority for both restrictions. We would modify the Directions for Use to include some mention of the collateral source rule and to reflect our proposed modification stated above.	The comment does not suggest specific language, and the committee does not feel any need for changes. As noted above in response to ASCDC, emerging issues with plaintiff's insurance center on health care coverage. That area is unsettled; additional authority is needed before it can be addressed in jury instructions. To the extent that the sentence that insurance is irrelevant is overbroad, it is addressed in the Directions for Use by noting that evidence of insurance might be admitted for a limited purpose.
	Orange County Bar Association, by Deirdre Kelly, President	We agree if modified. We agree with the additions to the Directions of Use but suggest that the Directions indicate that this instruction applies to health insurance and the collateral source rule.	The committee believes that the suggestions are more information than is needed.
		Clarify the case citation in the Sources and Authority for *Stokes v. Muschinske* (2019) 34 Cal.App.5th 45, 58 [245 Cal.Rptr.3d 764] by adding the underlined text:	The Sources and Authority quote directly from cases. The proposed additions are not quotations from the case.

Instruction(s)	Commenter	Comment	Committee Response
		"[M]ost of these references to Kaiser and Medicare, as well as the single reference to Social Security, though they did approach the line between permissible background information and reference to collateral sources, merely provided context and background information on [plaintiff]'s past treatment at Kaiser and on some aspects of [defendant]'s experts' calculation of past and future reasonable medical expenses. [Plaintiff] has not shown the court abused its discretion in admitting these references nor did Plaintiff demonstrate any specific insurance payment or specific insurance deduction as a result of any health insurance collateral source."	
301. *Third-Party Beneficiary*	Superior Court of Riverside County, by Susan Ryan, Chief Deputy	The proposed revision is an oversimplification of *Goonewardene* As is acknowledged in the notes, the court in *Goonewardene* court used the term "motivating purpose" rather than "intent" because of the "ambiguous and potentially confusing nature" of the latter term, but did state clearly that "motivating purpose" means "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*, 6 Cal.5th 817, 830. Without this qualification, the instruction seems likely to lead to confusion. When the instruction refers to "motivating purpose" without defining the term or distinguishing it from "knowledge" the clarity the court sought to obtain from the use of the term "motivating purpose" is lost and a	The instruction, as proposed to be revised, says: "a motivating purpose of [*names of the contracting parties*] was for [*name of plaintiff*] to benefit from their contract. The committee sees no likelihood of confusion.

Instruction(s)	Commenter	Comment	Committee Response
		reasonable trier of fact could conclude that a motivating purpose of a contract between an employer and a payroll service provider was to provide prompt payment of wages to the employee. I suggest clarifying the instruction to define the term more clearly.	
325. *Breach of Implied Covenant of Good Faith and Fair Dealing—Essential Factual Elements*;	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair, Sacramento	We suggest the following modification to the second sentence in the instruction to make it clear that "covenant" refers to the "implied promise" described in the first sentence: "This implied promise, or covenant, means that each party will not do anything . . . ."	See response to Superior Court of Riverside County, below.
		We suggest substituting "implied promise" for the word "duty" in the second paragraph of the instruction for consistency and to clarify the point: "[*Name of plaintiff*] claims that [*name of defendant*] violated the ~~duty~~ implied promise to act fairly and in good faith."	The committee does not see this as an improvement and declined to make the change.
2423. *Breach of Implied Covenant of Good Faith and Fair Dealing—Employment Contract—Essential Factual Elements*		We would express new element 5 in a more active voice for greater clarity: "That [~~*name of defendant*~~]~~'s conduct was a failure to~~ by doing so [*name of defendant*] did not act fairly and in good faith;"	The committee agreed and made the proposed change.
	Superior Court of Riverside County, by Susan Ryan, Chief Deputy	The substantive changes (consisting of the definition of good faith) are fine.	No response is necessary.
		I suggest getting rid of the technical term "covenant" from the instruction.	The committee agreed with the comment and changed "covenant" to "implied promise."
372. *Common Count: Open Book Account*	California Lawyers Association,	We agree that an introductory paragraph explaining the language "open book account" would be helpful. But we would modify the	The committee agreed and made the proposed change.

Instruction(s)	Commenter	Comment	Committee Response
	Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair, Sacramento	proposed language to more accurately convey that a book account must include substantially all of the credits and debits between the parties in connection with their transaction ("the credits and debits"), rather than only some credits and debts ("credits and debits"). Code of Civil Procedure section 337a and the cases cited in the Sources and Authority refer to "the credits and debits." " 'A book account . . . only when it contains a statement of the debits and credits involved in the transactions completely enough to supply evidence from which it can be reasonably determined what amount is due . . . ." (*Robin v. Smith* (1955) 132 Cal.App.2d 288, 291 [bullet 1].) Thus, a book account must be substantially complete."	
		We would include a description of the fiduciary relationship at issue in the first sentence, when that alternative language is given, so the jury can relate the term "fiduciary relationship" to the relationship at issue. "A book account is a record of the credits and debits between parties [to a contract/in a fiduciary relationship, such as [*describe fiduciary relationship*]].	The committee did not find the proposed change to be helpful.
		The authorities cited in the Sources and Authority do not support the statement that a book account is open if entries can be added to it from time to time. The *Interstate Group Administrators* case cited in bullet 3 and other cases state that a book account is open if there is a balance due. (E.g., *Professional Collection*	Footnote 5 of *Reigelsperger,* as noted in the comment, says that the parties may have an open book account, even if the account is settled, if they anticipate future transactions. Footnote 5 has been added to the Sources and Authority.

Instruction(s)	Commenter	Comment	Committee Response
		Consultants v. Lujan (2018) 23 Cal.App.5th 685, 691.) *Reigelsperger v. Siller* (2007) 40 Cal.4th 574, 579, footnote 5, stated that the parties may have "an open-book account relationship within the meaning of [Code of Civil Procedure] section 1295(c)" even if the account is settled if they anticipate future transactions. But section 1295, relating to arbitration provisions in medical service contracts, is not involved in this instruction, and the plaintiff would not be suing on an open book account if the account were settled (i.e. fully paid).	*Reigelsperger* would seem to limit *Interstate Group Administrators*; the account can be "open" even if there is no balance due. Of course, if there were no balance due, there would be no claim.
		Code of Civil Procedure section 337a describes a "book account" as "a detailed statement which constitutes the principal record of one or more transactions between a debtor and a creditor arising out of a contract or some fiduciary relation, and *shows the debits and credits in connection therewith* . . . ." Thus, a book account shows the debits and credits in connection with one or more transactions between the parties. Just as the first paragraph in the instruction refers to "a record of the credits and debits between parties," we believe the second paragraph should refer to "an open book account in which the credits and debits . . . were recorded," rather than "open book account in which financial transactions . . . were recorded."	The second paragraph is introductory. Element 2 specifies debits and credits. The committee believes that is sufficient.
		Code of Civil Procedure section 337a states that the creditor must make entries in the regular course of business. This instruction omits this requirement, which should be added.	The committee agreed and added the requirement to element 2.

Instruction(s)	Commenter	Comment	Committee Response
		Code of Civil Procedure section 337a states that a book account "is kept in a reasonably permanent form and manner and is (1) in a bound book, or (2) on a sheet or sheets fastened in a book or to backing but detachable therefore, or (3) on a card or cards of a permanent character, or is kept in *any other reasonably permanent form and manner*." (Italics added.) This instruction omits this requirement, and the Sources and Authority cite no authority for an electronic book account or that a book account must be written, rather than recorded in some other reasonably permanent form and manner.	The committee does not believe that the jury needs to be told how the account must be kept. However, the committee has added "written" to the definition in the opening paragraph. And the statute provides additional authority that the account must be in writing.
373. *Common Count: Account Stated*	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair, Sacramento	For consistency and to avoid confusion, we believe the language "prior transactions" in the introductory paragraph should be repeated in element 1 rather than use other language, "previous financial transactions," to refer to the same thing. And we believe the qualifier "financial" is unneeded and potentially misleading when any prior transactions resulting in a creditor/debtor relationship will do.	The committee sees no likely confusion from using "prior transactions" in the introductory paragraph and "previous financial transactions" in element 1.
		We find the language in element 2 "the amount claimed to be due" ambiguous. It could refer to the amount claimed to be due in the present lawsuit or the amount claimed to be due at some time in the past. We believe it should be the latter and would clarify element 2 to make this clear. "That [*name of plaintiff*] and [*name of defendant*], by words or conduct, agreed that ~~the amount claimed to be due was the correct~~	The committee sees no ambiguity in the words "claimed to be due," but it has rephrased this element to the active voice.

Instruction(s)	Commenter	Comment	Committee Response
		~~amount owed by~~ [*name of defendant*] ~~to~~ owed [*name of plaintiff*] a specified amount;"	
		The language in element 3 "the stated amount" refers to "the amount stated in the account" in current element 2. The proposed revision eliminates "the amount stated in the account" from element 2, making it unclear what "the stated amount" refers to. Revise: "That [*name of defendant*], by words or conduct, promised to pay the ~~stated~~specified amount to [name of plaintiff];"	The committee sees no difference between the "stated" amount and the "specified" amount and declined to make this change.
		We would add *Leighton v. Forster* (2017) 8 Cal.App.5th 467, 491, to the Sources and Authority as a more recent case stating the same elements.	The committee agreed and has added *Leighton* to the Sources and Authority.
375. *Restitution From Transferee Based on Quasi Contract or Unjust Enrichment*	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair, Sacramento	We agree with the proposed new instruction and the Directions for Use.	No response is necessary.
		We would modify the *Jogani* (fifth) excerpt in the Sources and Authority to reflect the split of authority on the question whether unjust enrichment is a cause of action. Some courts state that there is no cause of action for unjust enrichment (*Everett v. Mountains Recreation & Conservation Authority* (2015) 239 Cal.App.4th 541, 553; *Levine v. Blue Shield of California* (2010) 189 Cal.App.4th 1117, 1138; *Jogani v. Superior Court* (2008) 165 Cal.App.4th 901, 911; *Melchior v. New Line Productions, Inc.* (2003) 106 Cal.App.4th 779, 793), while others recognize such a cause of action (*Prakashpalan v. Engstrom, Lipscomb & Lack* (2014) 223 Cal.App.4th 1105, 1132; *Peterson*	The language proposed is not the correct style and format for Sources and Authority, which must be direct case excerpts. Two of the three cases cited in the comment for the proposition that unjust enrichment is a cause of action do not say that. In both *Prakashpalan* and *Peterson*, the complaints included a cause of action for unjust enrichment, but in both cases, the courts relabeled it as a "claim." A cause of action and a claim are not the same thing. One can make a claim for e.g., vicarious liability, or comparative fault, or conspiracy; but none of these are causes of action. Only *Hirsch* calls unjust enrichment a cause of action, but the court also refers to "appellant's unjust enrichment claim."

Instruction(s)	Commenter	Comment	Committee Response
		v. Cellco Partnership (2008) 164 Cal.App.4th 1583, 1593; *Hirsch v. Bank of America* (2003) 107 Cal.App.4th 708, 722 [finding "a valid cause of action for unjust enrichment"].) Some courts state that unjust enrichment is synonymous with restitution and recognize a cause of action for restitution based on unjust enrichment. (*Rutherford Holdings, LLC v. Plaza Del Rey* (2014) 223 Cal.App.4th 221, 231; *Chapman v. Skype, Inc.* (2013) 220 Cal.App.4th 217, 233-234; *Durell v. Sharp Healthcare* (2010) 183 Cal.App.4th 1350, 1370.) *Ghirardo v. Antonioli* (1996) 14 Cal.4th 39, 50, held that a real property seller who understated the amount due to payoff a prior loan was entitled to judgment "under traditional equitable principles of unjust enrichment." *Ghirardo* stated, "The complaint set forth a common count 'for payment of money' that rests on a theory of unjust enrichment. The claim was adequately pleaded and proved." (*Ghirardo, supra,* 14 Cal.4th at p. 54.) *Ghirardo* therefore reversed the judgment with directions to enter judgment for the plaintiff in the amount of the unpaid balance. (Id. at p. 55.) *Ghirardo* arguably supports the existence of a cause of action for unjust enrichment or restitution based on unjust enrichment.	*Ghirardo* does not resolve the matter, but the point quoted in the comment suggests no conflict. The cause of action was for a common count resting on a theory of unjust enrichment. Whether or not there is a conflict, it makes no difference as far as the instruction is concerned. Whether it is a cause of action, a claim, or a count, unjust enrichment is a valid legal doctrine that supports recovery of money under the umbrella of restitution. Still, the committee finds some of the comment's cases to be of interest, and has added *Levine*, *Hirsch*, and *Ghirardo* to the Sources and Authority. Although some are more recent, *Jogani* must stay because it mentions quasi contract.
	Orange County Bar Association,	Strike "embezzled;" no wrongful act is required.	The Directions for Use recognize that unlawfulness is not required. The word "embezzled" appears in the instruction's example of an act that might constitute

Instruction(s)	Commenter	Comment	Committee Response
	by Deirdre Kelly, President		unjust enrichment. But any act constituting unjust enrichment—lawful or unlawful—can be specified.
434. *Alternative Causation*	American Property Casualty Insurance Association by Mark Sektnan Vice President, State Government Relations, Washington, DC	This jury instruction addresses alternative causation–where the jury decides that more than one of the defendants is negligent, but the negligence of only one of them could have actually caused harm. The Directions for Use, which is a whole new section constituting the first proposed revision, discusses *Summers v. Tice,* the basis for this jury instruction, and notes the split of authority over whether all potential tortfeasors must be defendants at trial for the *Summers* rule to apply. This proposal does not provide any directions and thus appears misplaced as a directions section.	In the Directions for Use, CACI presents and discusses unsettled issues in the law that could affect the language of the instruction.
		APCIA's larger concern in this section, however, is the addition of a citation to the Restatement Second of Torts as a part of the revisions to the Sources and Authority. A Restatement does not constitute binding legal authority as it is neither case law nor statute. As such, the proposed reference to The Restatement Second of Torts should be removed or placed with secondary sources. As indicated in the Guide for Using Judicial Council of California Civil Jury Instructions (p.1): *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 … [underscored added for emphasis]*.	The committee agreed to remove the excerpt from the Restatement. CACI instructions do occasionally include Restatement excerpts if the excerpt addresses a point that is not settled under California law. This is not such an instance. The Restatement excerpt addresses only the basic rule of *Summers*, not the unresolved issue of joinder.

Instruction(s)	Commenter	Comment	Committee Response
	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair, Sacramento	We believe the statement that there is a split of authority on whether all potential tortfeasors must be named as defendants goes too far. The discussion on this point in *Vahey v. Sacia* (1981) 126 Cal.App.3d 171, 177, is very limited and arguably is contrary to *Sindell v. Abbott Laboratories* (1980) 26 Cal.3d 588. We would relegate *Vahey* to "but see." *Sindell* stated, "There is an important difference between the situation involved in *Summers* and the present case. There, all the parties who were or could have been responsible for the harm to the plaintiff were joined as defendants. Here, by contrast, there are approximately 200 drug companies which made DES, any of which might have manufactured the injury-producing drug." (*Sindell,* 26 Cal.3d at p. 602; see also *Setliff v. E. I. Du Pont de Nemours & Co.* (1995) 32 Cal.App.4th 1525, 1534.) *Sindell* stated, "According to the Restatement, the burden of proof shifts to the defendants only if the plaintiff can demonstrate that all defendants acted tortiously and that the harm resulted from the conduct of one of them. (Rest.2d Torts, § 433B, com. g, p. 446.) It goes on to state that the rule thus far has been applied only where all the actors involved are joined as defendants and where the conduct of all is simultaneous in time, but cases might arise in which some modification of the rule would be necessary if one of the actors is or cannot be joined, or because of the effects of lapse of time, or other circumstances. (*Id.*, com. h, p.	*Sindell* is a Supreme Court case in which the court rejected applying *Summers* in a case involving multiple drug manufacturers, not all of whom were sued as defendants. As noted in the comment, the court gives the lack of joinder as one of the reasons for its ruling. But as also is noted in the comment, in footnote 16 the court notes that the Restatement provides for a possible exception if one of the actors cannot be joined. *Vahey* cites *Sindell*, but not for its language on joinder or for fn. 16. To present the issue, CACI would have to address *Sindell*. If it were not for fn. 16, the comment would be correct, that instead of a split, there is a Supreme Court rule and an outlier. But fn. 16 does suggest that the joinder of all may not be required in all cases. Because the issue is so complex, because there appears to be no definitive answer, and because the issue is not essential to drafting the instruction, the committee has deleted the discussion from the Directions for Use. Excerpts from *Sindell*, *Setliff*, and *Vahey* are included in the Sources and Authority.

Instruction(s)	Commenter	Comment	Committee Response
		446.)" (Sindell, at p. 602, fn. 16.) Because not all defendants were joined, *Sindell* modified the alternative liability theory: "Where, as here, all defendants produced a drug from an identical formula and the manufacturer of the DES which caused plaintiff's injuries cannot be identified through no fault of plaintiff, a modification of the rule of *Summers* is warranted."	
	Civil Justice Association of California, by Kyla Powell, President and Chief Executive Officer, Sacramento	We recommend the Advisory Committee provide direction on how to instruct the jury under CACI 434 regarding the split in authority on whether the instruction applies if all potential tortfeasors are not defendants at trial. While the proposed revisions to the Directions for Use add an opening paragraph about the split in authority and make related changes to the Sources and Authority, there is no corresponding direction or guidance on how to deal with the split in authority.	The possible split of authority would not affect how the instruction is drafted. The committee has removed this discussion from the Directions for Use in response to the comment of the California Lawyers Association, above.
	Orange County Bar Association, by Deirdre Kelly, President	We disagree with including the new paragraph in the Directions for Use concerning multiple tortfeasors because it is not helpful and is duplicative of information in the Sources and Authority.	While the committee believes that it is important to recognize a split of authority if it might affect how an instruction is worded, for reasons presented in response to the comment of the California Lawyers Association, above, the discussion of the joinder issue has been removed from the Directions for Use.
513. *Wrongful Life—Essential Factual Elements*	California Lawyers Association, Litigation Section, Jury Instructions Committee, by	We agree with the proposed revision to the instruction.	No response is necessary.
		Although it is not within the scope of the invitation to comment, we suggest modifying the final excerpt in the Sources and Authority as follows:	This entry is currently out of format; it is not a direct quotation from the case. The committee has replaced it with a direct quote from the case that does not use "normal."

Instruction(s)	Commenter	Comment	Committee Response
	Reuben A. Ginsberg, Chair, Sacramento	"Wrongful life does not apply to ~~normal~~ children born without any mental or physical impairment."	
1125. *Conditions on Adjacent Property*	California Department of Transportation (CalTrans), by Jeanne Scherer, Chief Counsel, Sacramento	As drafted, the proposed instruction addresses one scenario involving conditions of adjacent property but does not address another common scenario regarding adjacent property - where the condition of public property exposes users of adjacent property to a substantial risk of injury.	The committee structured the instruction as Conditions on Adjacent Property. There may be circumstances in which a condition on public property is alleged to be dangerous to users of adjacent property; that would be a different circumstance than the one that this instruction addresses. The committee has expanded the Directions for Use to note the need for a different instruction in that other situation. The committee will consider drafting a new instruction to cover this additional situation in the next release cycle.
		Revise the first paragraph as follows: [*Name of public entity defendant*] 's property may be considered dangerous if [a] **dangerous** condition[s] on adjacent property contribute[s] to exposing those using **[*name of public entity defendant*]'s** ~~the public~~ property to a substantial risk of injury **when the adjacent property is used with due care**. The suggested edit for the first paragraph would reiterate that the public property at issue must belong to the defendant public entity. It would also help avoid confusion when the adjacent property is owned by another public entity.	The condition on the adjacent property does not need to be something that is itself dangerous. It only needs to contribute to the public property being dangerous. The committee made the second proposed change should the adjacent property also be public. No authority is provided, and no specific argument is presented for adding "… when the adjacent property is used with due care" to the end of the paragraph. The committee believes that addition is legally incorrect. "The status of a condition as 'dangerous' for purposes of the statutory definition does not depend on whether the plaintiff or other persons were actually exercising due care but on whether the condition of the property posed a substantial risk of injury to persons who were exercising due care." (*Cole v. Town of Los Gatos* (2012) 205 Cal.App.4th 749, 768; see CACI No. 1102, *Definition of "Dangerous Condition*.") Nothing

Instruction(s)	Commenter	Comment	Committee Response
			suggests that the manner of use of the adjacent property is an element for this claim.
		Revise the second paragraph as follows: "[*Name of plaintiff*] claims that the following condition[s] on adjacent property contributed to making [*name of public entity defendant*]'s property **a** dangerous condition: [*specify*]." Adding the word "condition" to dangerous (i.e. "dangerous condition") tracks the intent of the statutory scheme and addresses the Supreme Court's holding in *Bonanno v. Central Contra Costa Transit Authority* (2003) 30 Cal.4th 139, 154-155 (stating that all elements of a dangerous condition claim must be met, even in the context of an adjacent property theory of liability).	The proposed change adds extra words ("… make the property a dangerous condition.") that are not in plain language.
		Change "should" to "may" in the second paragraph. "You may consider" is consistently used in the 100 and 200 series to discuss the jury's use of evidence. (See CACI 106, 107, 203, 204, 206, and 211.) Also, CACI 1104 uses "you may consider" in the context of dangerous condition liability. The proposed "you should consider" language could be criticized as violating the impartiality of judges; it could be perceived that the bench is providing credence to those claims, and thus, favoring one party over another.	The committee believes that this change would be incorrect. The instruction first asks the user to specify the conditions that are alleged to be dangerous. If it then were to tell the jury that it "may" consider them, it suggests that the jury is free to ignore them, which it is not. The committee has no concerns that judicial impartiality might be cast in doubt.
		Add to the Directions for Use: "This instruction should be given with, and not in substitution of, CACIs 1100 through 1103."	The committee agreed and has made this addition.

Instruction(s)	Commenter	Comment	Committee Response
		Add a second excerpt from *Bonanno.:* "[W]e have addressed in this case only one element of liability under section 835, the existence of a "dangerous condition" of public property. Indeed, we have focused almost exclusively on one aspect of that element, the dangerousness that may arise from the property's location or physical situation. We have not addressed the requirement of a "substantial" (as distinguished from a minor, trivial or insignificant) risk of injury" (§ 830 subd. (a)) or, except in broad terms, the necessity of proving the entity's ownership or control of the dangerous property (*id.,* subj. (c)). Either of these requirements may pose an insuperable burden to a plaintiff claiming the location of public property rendered it dangerous. As to other elements, a plaintiff seeking to prove liability under section 835 must show, in addition, that the dangerous condition proximately caused his or her injury; that the condition created a reasonably foreseeable risk of the type of injury that was actually incurred; and that the public entity either created the dangerous condition through a negligent or wrongful act or omission of its employee, or had actual or constructive notice of the dangerous condition sufficiently in advance of the accident as to have had time to remedy it." (*Bonanno v. Central Contra Costa Transit Authority* (2003) 30 Cal.4th 139, 154-155. [132 Cal.Rptr.2d 341, 65 P.3d 807].)	The proposed excerpt covers general points not specific to adjacent property.
	Orange County	We agree if modified. We agree that this new instruction would be helpful to the court, jury,	See response to same point raised by CalTrans, above.

Instruction(s)	Commenter	Comment	Committee Response
	Bar Association, by Deirdre Kelly, President	and the litigant, but the instruction, as worded, only partially reflects the law. The court in *Bonanno v. Central Contra Costa Transit Authority* (2003) 30 Cal.4th 139, 147–148 [132 Cal.Rptr.2d 341, 65 P.3d 807] held that a public entity's property can be considered dangerous if a condition on public property exposes users of the adjacent property to a substantial risk of injury. We suggest adding: [*Name of public entity defendant*]'s property may also be considered dangerous if [a] condition[s] on its own property, contribute[s] to exposing those using the adjacent property to a substantial risk of injury.	
2020. *Public Nuisance—Essential Factual Elements*	Orange County Bar Association, by Deirdre Kelly, President	The addition of the words "or permitted a condition to exist" is not supported by authority, and would improperly expand liability for a public nuisance, especially where the defendant is not an owner of the property upon which the nuisance is alleged to exist.	The committee believes there is support for adding "permitted a condition to exist." In *Citizens for Odor Nuisance Abatement v. City of San Diego* (2017) 8 Cal.App.5th 350, 359, a public nuisance case, the court said: "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 private interest.' " Therefore, a failure to act can constitute a public nuisance if the defendant is under some duty to act for the public benefit.
2423. *Breach of Implied Covenant of Good Faith and Fair Dealing—Employment Contract—Essential Factual Elements*	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A.	We suggest moving the first two sentences of the proposed new language in the Directions for Use for CACI No. 2424 to the Directions for Use for this instruction because that language explains when to use this instruction.	The committee agreed that the first two sentences should be included in CACI No. 2423, but they should also stay in CACI No. 2424. Together, they explain the relation between the two instructions.

Instruction(s)	Commenter	Comment	Committee Response
	Ginsberg, Chair, Sacramento		
2424. *Affirmative Defense—Breach of the Implied Covenant of Good Faith and Fair Dealing—Good Faith Though Mistaken Belief*	Orange County Bar Association, by Deirdre Kelly, President	Agree with proposed changes to the essential elements but disagree with the proposed deletions in the "Sources and Authority" section. The cited reference to *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 349-350 in the Sources and Authority section should remain as this holding in *Guz* has not been overruled. Similarly, the reference to the decision in *Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 819, should remain as this decision and holding has not been overruled.	To cut down on duplication of case excerpts, the committee decided to place all excerpts dealing with the implied covenant generally in CACI No. 325 *Breach of Implied Covenant of Good Faith and Fair Dealing—Essential Factual Elements,* and to limit the excerpts for CACI No. 2423 to only points specific to the implied covenant in an employment law context. The following language has been added to the Directions for Use: "See also the Sources and Authority to CACI No. 325, *Breach of Implied Covenant of Good Faith and Fair Dealing—Essential Factual Elements*, for more authorities on the implied covenant outside of employment law."
2544. *Disability Discrimination—Affirmative Defense—Health or Safety Risk*	Joint Commenters on Employment Law[1]	We request that the committee reconsider its proposed elimination of the comparator language in element 2 ("more than if an individual without a disability performed the job duty"). If the performance of a job duty by an individual with a disability poses the same risk of harm as it would if performed by an individual without a disability, then refusing to allow the individual with a disability to perform that job duty would be discriminatory. (See e.g. *Echazabal v. Chevron USA, Inc.* (9th Cir. 2003) 336 F.3d 1023, 1030, 1032 & fn.10). Instruction 2544's current comparator language correctly indicates that a proper analysis of a "health or safety risk" should	Although the policy arguments presented by the commenters may have merit, the regulation does not support the revision. Cal. Code Regs., tit. 2, § 11067(b) provides: "It is a permissible defense for an employer or other covered entity to demonstrate that, after engaging in the interactive process, there is no reasonable accommodation that would allow the applicant or employee to perform the essential functions of the position in question in a manner that would not endanger his or her health or safety because the job imposes an imminent and substantial degree of risk to the applicant or employee." Given this language, no comparator language has been included in the revised instruction.

[1] Four organizations submitted joint comments: California Employment Lawyers Association, by Mariko Yoshihara; Equal Rights Advocates, by Jennifer A. Reisch, Legal Director; Legal Aid at Work, by Alexis Alvarez, Senior Staff Attorney, Disability Rights Program; and Consumer Attorneys of California, by Micha Star Liberty, President-Elect (referred to collectively as "Joint Commenters on Employment Law").

Instruction(s)	Commenter	Comment	Committee Response
		include a determination of whether that risk is any greater for the individual with a disability, with or without reasonable accommodation, than for an individual without a disability. The paragraph would read: "2. That there was no reasonable accommodation that would have allowed [*name of plaintiff*] to perform this 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."	The federal regulation addressing generalized fears mentioned in the federal case is not plainly analogous, nor does it address comparisons.
	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair, Sacramento	Agree. We note that the opening bracket is missing from the paragraph beginning "However."	This error has been fixed.
	Disability Rights California, by Heidi Joya, Staff Attorney Oakland	We commend the Advisory Committee for including all provisions of California Code of Regulations § 11067 in CACI 2544, *Disability Discrimination-Affirmative Defense-Health or Safety Risk*. We believe the proposed revisions conform more closely to our current Fair Employment and Housing regulations and that explicitly incorporating the provisions of Section 11067 is necessary to ensure that jurors have clear guidance when determining the applicability of this defense and the factors	No response is necessary.

Instruction(s)	Commenter	Comment	Committee Response
		they should consider. As such, we support the proposed revisions to this jury instruction.	
	Orange County Bar Association, by Deirdre Kelly, President	In element 2, add "after engaging in the interactive process" to the beginning of the element.	Although the interactive process is required and the regulation mentions the interactive process, adding it to element 2 is not necessary because it is not part of the affirmative defense, instead it is part of the essential elements of a plaintiff's claim for failure to accommodate under section 12940(m), and to a claim for failure to engage in the interactive process under section 12940(n).
		In the first sentence in the paragraph that follows the elements, delete "can be accommodated in a way that," so that the sentence reads: "However, it is not a defense to assert that [*name of plaintiff*] has a disability with a future risk, as long as the disability does not presently interfere with [his/her] ability to perform the job in a manner that will not endanger [him/her]/ [or] others]."	The committee agreed. The language proposed to be deleted is not in the regulation.
2560. *Religious Creed Discrimination—Failure to Accommodate—Essential Factual Elements*	Joint Commenters on Employment Law Church State Council, by Alan J. Reinach, Executive Director and General Counsel, Westlake Village	The most important change in CACI 2560 is the one recognizing the "elimination test," i.e., that a reasonable accommodation is one that eliminates the conflict between religion and job. However, the elimination test is not added to the instructions, per se, but as an explanation below. We are concerned that many, if not most judges will utilize only the numbered paragraphs, and juries will receive no instruction on the elimination test. We would propose modifying element 6 to read: 6. That [*name of defendant*] did not eliminate the conflict between [*name of plaintiff*]'s	Contrary to the comment, the elimination test is included in the instruction itself; it is just not as an element. The instruction includes the elimination test as part of the definition of a reasonable accommodation. This definition follows the nine elements. The commenters request that the test found in the definition be built into Element No. 6. The request does not conform to CACI's standard format. The instruction is structured to set out the elements, and then provide the necessary definitions.

Instruction(s)	Commenter	Comment	Committee Response
		religious [belief/observance] and the job requirement, i.e., provide reasonable accommodation.	
		The committee has also proposed adding language to CACI 2560 paragraph six (6) that is quite essential. In fact, it satisfies a void that has required some of our members to submit special jury instructions to explain that terminating an employee in order to avoid the need to accommodate a religious practice constitutes religious discrimination. (See 2 CCR § 11062; *EEOC v. Abercrombie & Fitch Stores, Inc.* (2015) 135 S.Ct. 2028, 2033. [§ 11062. Reasonable Accommodation: *Refusing to hire an applicant or terminating an employee in order to avoid the need to accommodate a religious practice constitutes religious creed discrimination.* (emphasis added)]). Since your proposed jury instruction accurately tracks the regulation, it is entirely necessary and appropriate.	No response is necessary.
	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair, Sacramento	We would revise the second sentence in the second paragraph of the Directions for Use as follows to avoid suggesting that the instruction "alleges" anything: "Give the second option for element 6 ~~in order to allege the employer's desire~~ if the plaintiff claims the employer terminated or refused to hire the plaintiff to avoid a need for accommodation."	The committee agreed and has made the proposed change.
2561. *Religious Creed Discrimination—*	Joint Commenters on	The proposed revision to CACI 2561 is sufficient to instruct on what constitutes an undue hardship. However, to date, no jury	This proposal will be considered in the next release cycle.

Instruction(s)	Commenter	Comment	Committee Response
Reasonable Accommodation—Affirmative Defense—Undue Hardship	Employment Law Church State Council, by Alan J. Reinach, Executive Director and General Counsel, Westlake Village	instruction captures the obligation of the employer to make good faith efforts to explore the available accommodation options. Government Code § 12940(*l*) requires employers to "explore any available reasonable alternative means of accommodating the religious belief or observance..." short of an undue hardship. Please give due consideration to drafting an additional jury instruction to address the specific contents of the statutory language.	
	Joint Commenters on Employment Law	We propose the following language (for the new instruction proposed above): [*Name of defendant*] claims that providing [*specific accommodations*] would create an undue hardship to the operation of [his/her/its] business. To succeed, [*name of defendant*] must prove that the accommodations would be significantly difficult or expensive to make. In deciding whether an accommodation would create an undue hardship, you must consider whether the employer explored any available reasonable alternative means of accommodating the religious believe or observance by: a. Excusing the person from those duties that conflict with the person's religious belief or observance; and	The committee finds this comment difficult to understand. The comment would start with current CACI No. 2545. *Disability Discrimination—Affirmative Defense—Undue Hardship*, remove the current factors (a)–(g), and instead insert two possible nonexclusive factors mentioned in the statute that the employer should consider as a reasonable accommodation. But these factors are outside of the area of undue hardship, as the comment recognizes. So starting with CACI No. 2545 would not be correct. This situation is more like the good-faith interactive process for disability discrimination. The employer must try to accommodate and can only raise an undue hardship defense if no solution is found. But while it is settled that a violation of the interactive process is a separate FEHA claim, it is not settled that a failure to "explore all available reasonable alternative means of accommodating religious belief or observance" is a separate claim.

Instruction(s)	Commenter	Comment	Committee Response
		b. Permitting those duties to be performed at another time or by another person.	
2740. *Violation of Equal Pay Act—Essential Factual Elements*	Joint Commenters on Employment Law	The proposed additional paragraph in the Directions for Use raises uncertainty and creates ambiguity about whether a plaintiff can demonstrate unequal pay with respect to a single comparator in order to establish a prima facie case -- a matter of statutory interpretation that has been well settled for decades. The overwhelming weight of authority shows that plaintiffs may establish a prima facie case under the federal Equal Pay Act by reference to only one comparator. The use of the plural ("employees") in Labor Code section 1197.5 mirrors language used in the federal Equal Pay Act (29 U.S.C. § 206(d)). We recommend modifying the proposed additional paragraph in the Directions for Use and adding to the instruction as follows: "This instruction presents singular and plural options for the employee or employees whose wage rate and work are being compared to the plaintiff's to establish a prima facie case under the Equal Pay Act."	The authority cited by the commenters is exclusively federal authority. This federal authority is not binding on California courts. The committee has not found, and has not been cited to, any existing California case law holding that a single comparator is sufficient. The proposed new language to be added to the Directions for Use says: "No California case has expressly so held." The committee believes that is a correct statement of the state of the law. The committee located two cases suggesting that a single comparator might be sufficient, but in neither case was the question addressed and determined, so the cases, which are included in the Directions for Use, at best provide supporting dicta.
		The Directions do not make clear that in evaluating whether the plaintiff has established that s/he has been paid less than someone of a different sex, race, or ethnicity for "substantially similar work," the jury should compare the jobs – not the individual employees holding those jobs. We recommend modifying the proposed additional paragraph in the Directions for Use and adding to the	The only support for the proposed change cited by the commenters is federal model jury instructions from the First, Third, Eighth, and Eleventh federal Circuit Courts for the federal Equal Pay Act. No California authority has been provided, and the Labor Code does not directly speak to this issue. But element 2 of the instruction requires "substantially similar *work*." That places the emphasis on where it

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		instruction as follows: "In determining whether plaintiff's work is substantially similar to that of an employee of the opposite sex or a different race or ethnicity, it is important to compare the jobs and not the individual employees holding those jobs."	belongs. Absent authority on this issue, there is no reason to do anything more, either in the instruction or in the Directions for Use.
		The term "wage discrimination" should not be part of the Directions for Use because intent is not required. (*Green v. Par Pools, Inc.* (2003) 111 Cal.App.4th 620, 629). Further, The Directions for Use and the instruction itself should be modified to make clear that no showing of discriminatory intent is required in order to prove a violation of the EPA. We recommend modifying the proposed additional paragraph in the Directions for Use and adding to the instruction as follows: "The plaintiff does not need to prove that the employer acted with discriminatory intent in paying the plaintiff less than the chosen comparator(s) in order to establish a prima facie case under the EPA."	The point appears to be consistent with California law, and has been added to the Directions for Use. With respect to the instruction itself, there is nothing in the elements or prefatory language suggesting an intent requirement. The committee has changed "a prima facie case of wage discrimination" to "a violation of the Equal Pay Act."
		The proposed additional paragraph in the Directions for Use uses the terms "salary" to refer to the comparison that jurors must undertake to determine whether plaintiff has established a prima facie case under the EPA. Like the phrase "wage discrimination," this term does not appear in the text of Labor Code § 1197.5.	The committee has changed "salary" to "pay."
		The proposed additional paragraph in the Directions for Use uses the terms "person or persons" to refer to the comparison that jurors	The committee has changed "person or persons" to "employee or employees."

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		must undertake to determine whether plaintiff has established a prima facie case under the EPA. Like the phrase "wage discrimination," these terms do not appear in the text of Labor Code § 1197.5.	
	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair, Sacramento	We would strike the final sentence in the Directions for Use, "No California case has expressly so held, however," because we believe it is not clear that the cited cases did not hold on point.	There is no discussion in either case on how many comparators are required. Cases are not authority for points not addressed and resolved.
	Senator Hannah-Beth Jackson, Sacramento	Recently, you released a proposed revision to the jury instruction for the essential factual elements which must be proven in order to make out a prima facie case that the Equal Pay Act (EPA) has been violated. The primary purpose behind the proposed revisions is to address the use of a single comparator to establish an EPA violation. I am disappointed that the proposed revisions still treat this matter as an open question of law. As I have pointed out before, the pre-existing law in this area, which used the plural "employees" to refer to the comparator, has long been interpreted to mean that a single comparator is sufficient. (See, e.g., *Goodrich v. Int'l Bhd. of Electrical Workers* (D.C. Cir. 1987) 815 F.2d 1519 (plaintiff needs to show	The commenter provides no controlling authority for the statement that the statute has "long been interpreted" to provide for a single comparator.

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		only one comparator to establish EPA claim); see also Compliance Manual, Equal Employment Opportunity Commission, Section 10-IV(E)(1)("A prima facie EPA violation is established by showing that a male and a female receive unequal compensation for substantially equal jobs within the same establishment. A complainant cannot compare herself or himself to a hypothetical male or female; rather, the complainant must show that a *specific employee* of the opposite sex earned higher compensation for a substantially equal job. There is no requirement that the complainant show a pattern of sex-based compensation disparities in a job category." Emphasis added.)	
		Fortunately, I think any such confusion can be put to rest relatively easily. One option would be to eliminate all but the first sentence of the proposed new paragraph in the Directions for Use and modify it slightly so that it reads: "This instruction presents singular and plural options for the comparator, the person or persons whose salary is being compared to the plaintiff's to establish a prima facie case of a violation of the Equal Pay Act." I respectfully urge you to consider making this modification before the proposed jury instructions are adopted.	The confusion, if any, can be put to rest only with controlling California authority.
	Orange County Bar Association, by Deirdre Kelly, President	The decision in *Hall v. County of Los Angeles* (2007) 148 Cal.App.4th 318, 324 does not appear to support the proposed change in the Directions for Use section concerning a single comparator because the court in *Hall* did not consider whether a single comparator is	The Directions for Use note only that there is language in these two cases that suggests that a single comparator is sufficient. No claim is made that it is settled law.

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		sufficient. The decision in *Hall* appears to suggest, contrary to the proposed change, that looking at the salary of a single comparator in an Equal Pay Act claim is insufficient. Similarly, the decision in *Green v. Par Pools, Inc.* (2003) 111 Cal. App. 4th 620 did not consider the issue of whether a single comparator was sufficient. And the plaintiff in *Green* appears to have introduced evidence of the salaries of all the male comparators in the same position.	
3709. *Ostensible Agent*	Association of Southern California Defense Counsel, by Allison W. Meredith, Horvitz & Levy LLP, Burbank	ASCDC agrees with the Advisory Committee's decision to omit the phrase "was harmed because [he/she]" from CACI 3709. The phrase is redundant to the element of harm set forth in CACI 3701, *Tort Liability Asserted Against Principal—Essential Factual Elements*. The elimination of the redundancy should help clarify that CACI 3709 does not provide an independent basis for liability, but rather should be given in addition to CACI 3700, *Introduction to Vicarious Liability,* and 3701 where ostensible agency has been alleged. ASCDC's support for the revision to CACI 3709 is conditioned, however, on the Advisory Committee's addition of a use note explaining that the instruction should be given with CACI 3700 and 3701. Without that explanation, omitting the "was harmed" language will exacerbate the error in giving CACI 3709 as a standalone instruction.	The committee agrees that CACI No. 3701, *Tort Liability Asserted Against Principal—Essential Factual Elements*, should be given if ostensible agency is at issue. There must be an underlying tort based on the act of the alleged agent, which will require a separate instruction that has harm and substantial factor elements. Because the tort instruction will contain the essential factual elements, including harm, there is no need for CACI No. 3709 to reference harm. CACI No. 3700 is "*Introduction to Vicarious Responsibility*." While it may be a good idea to give this instruction, the committee does not believe that CACI No. 3709 must be given with CACI No. 3700.

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		ASCDC also suggests that the Advisory Committee add the same use note to all of the fact-scenario instructions, to provide the same clarity the ASCDC seeks with respect to CACI 3709.	
	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair, Sacramento	Contrary to the proposed new language in the Directions for Use, we believe the situation where a physician is not an employee or agent of the hospital does not require a different instruction. We construe the language from *Markow v. Rosner* (2016) 3 Cal.App.5th 1027, 1038, quoted in the Sources and Authority to mean the first element is readily inferred in the hospital setting and the dispute typically turns on whether the plaintiff had reason to know that the physician was not an agent or employee of the hospital; in other words, whether the plaintiff reasonably believed that the physician was the hospital's employee or agent and reasonably relied on his or her belief to that effect. An instruction should include all elements even if an element is uncontested because "[o]mitting uncontested elements may leave the jury with an incomplete understanding of the cause of action and the plaintiff's full burden of proof." (CACI User Guide, p. 2.) As stated in the User Guide, rather than eliminate any uncontested elements, an instruction should indicate when the parties have agreed that an element is established.	Both *Markow* and *Mejia v. Community Hospital of San Bernardino* (2002) 99 Cal.App.4th 1448, 1454 suggest that in the doctor-hospital setting, the only relevant question is whether the patient had a reason to know that the doctor was not an agent of the hospital. That language suggests that it is not necessary to prove the current three elements of the instruction, whether or not they are contested. It is not clear whether "reason to know" means "reasonably believed" and "reasonably relied."
3903J. *Damage to Personal Property (Economic Damage)*	American Property Casualty Insurance	APCIA's key concern with the proposed revisions of this section is with the proposed citation to *AIU Ins. Co. v. Superior Court* in the Sources and Authority. *AIU Ins. Co.* notes	Economic damages are recoverable on a tort claim. This instruction is on the measure of damages for lost property, stating the general rule that one gets the lesser of cost of repair or diminution in value. The new

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	Association by Mark Sektnan Vice President, State Government Relations, Washington, DC	that [t]he courts have recognized that recovery in excess of the [value of damaged property] may be necessary to restore the plaintiff to her position it occupied prior to a defendant's wrongdoing. APCIA strongly urges that this proposed citation be removed. The case has no relevance to this jury instruction. This discussion of tort damages has no place in an economic damage section.	excerpt from *AIU* presents a possibility that this limitation does not always apply.
	Montie S. Day Attorney at Law, Reno, Nevada	I do appreciate your adding the word "immediate" to the proposed Jury Instruction CACI 3903J instruction as well as the proposed amendment to the definition of "Fair Market Value" to provide that the seller and buyer "have reasonable knowledge of all relevant facts about condition and quality" of the property rather than being "fully informed" as to the quality and condition. This brings it in reconciliation with the actual law as well as the realities of the market place.	No response is necessary.
		I am objecting to the inclusion of the following in the Directions for Use: "An insurer may draft around this rule in the policy by limiting recovery to either cost of repair or diminution in value, but not both. (Baldwin v. AAA Northern California, Nevada & Utah Ins. Exchange (2016) 1 Cal.App.5th 545, 550 [204 Cal.Rptr.3d 433].)" Recognizing an insurer's right to limit recovery to either cost of repair or diminution in value, but not both" is to condone the continued fraud, false advertisement, deception, deceit and even racketeering	This addition was made several releases ago and is not among the new material on which comments are sought.

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		continuing by the insurance industry. It essentially instructs the trial court they may disregard the actual statutes and legal principles which should control the issue presented. The fact of the matter is that if an insurance company may engage in such fraudulent conduct as is continuing, advertising and promotion as product as "Insurance" but excluding the legal obligation to deliver an actual "Insurance" policy in compliance with law, the same principles should apply to approve any type of fraud on the public.	
		I am suggesting the elimination of the sentence or words limiting property damage to the value of the property immediately before the happening of the accident or event causing the damages or loss. There is no authority for limiting the damages to the value of the property before the peril causing the damages or the lesser of repair costs or value before the damages, i.e., whichever is less. There are two provisions of CACI No. 3903J that are not consistent with the laws. They are (in bold): "To recover damages for harm to personal property, [name of plaintiff] must prove the reduction in the [e.g., automobile]'s value or the reasonable cost of repairing it, whichever is less. **[If there is evidence of both, [name of plaintiff] is entitled to the lesser of the two amounts.]"**	This argument was part of this commenter's proposal that the committee fully considered at its July meeting. As included in the Sources and Authority: "If the cost of repairs exceeds the depreciation in value, the plaintiff may only recover the lesser sum. Similarly, if depreciation is greater than the cost of repairs, the plaintiff may only recover the reasonable cost of repairs. If the property is wholly destroyed, the usual measure of damages is the market value of the property." (*Hand Electronics, Inc. v. Snowline Joint Unified School Dist.* (1994) 21 Cal.App.4th 862, 870.) Therefore, the statement that there is "absolutely no legal or statutory authority" for the sentence is incorrect. But *AIU Ins. Co. v. Superior Court* (1990) 51 Cal. 3d 807, at 834–835 does establish that there are exceptions. The committee concluded that it was sufficient to present the exceptions in the Directions for Use. The Directions for Use now say: "If an exception

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		[However, if you find that the [e.g., automobile] can be repaired, but after repairs it will be worth less than it was before the harm, the damages are (1) the difference between its value immediately before the harm and its lesser value immediately after the repairs have been made; plus (2) the reasonable cost of making the repairs. **The total amount awarded may not exceed the [e.g., automobile]'s value immediately before the harm occurred.]** There is absolutely no legal or statutory authority for the statements as set forth above and in fact to limit the damages to the value of the property before the event causing the damage conflicts with well-established statutory law, which requires the payment for "all detriment" to the victim.	is at issue, modifications will be required to the first two paragraphs."
		I am aware that even some attorneys as well as the courts have the general understanding that the standards in California Jury Instruction 3903J will apply ONLY TO TORT ACTIONS (Third Party Claims) and not to BREACH OF CONTRACT actions (First Party Claims) and even though there is support filed with the Judicial Council support for the proposed amended while there is a different standard applied to contracts. As noted above, in 1872, the California Legislature enacted what is Civil Code Section 3282 further defines "detriment," providing that **"Detriment is a loss or harm suffered in person or property"**, and then:	This point is outside of the scope of matters presented for public comment in this release. It will be addressed in the next release cycle.

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		Civil Code Section 3300. (Measure of damages for breach of contract) "...**the amount which will compensate ... for all the detriment proximately caused thereby, ...**" Civil Code Section 3333. (Measure of damages (Not Arising from Contract) **"...the amount which will compensate for all the detriment proximately caused thereby, ..."** This theory would mean that the California Legislature had a different meaning for the words "all the detriment proximately caused thereby" depending upon whether the "detriment" was caused by a breach of contract or tort. That theory does not comply with common sense. It is suggested that the confusion in part is based upon the fact that the California Judicial Council's Jury Instructions under the Series 2300 (Insurance Litigation) does not attempt to define the measure of damages for "Loss". CACI No. 2300, *Breach of Contractual Duty to Pay a Covered Claim—Essential Factual Elements*, does recognize that if the "loss" is covered by a peril which was the primary cause of the "loss", such loss is covered but does not incorporate a definition of "loss" or "detriment." Accordingly, it is suggested that the "Measure of Damages" for "loss" be added similar to that under CACI 3903J (subject to the policy limit and deductible) and again without the limitation on the damages or	

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		detriment (which is always subject to a defense of the failure to act reasonable to mitigate the damages).	
4303. *Sufficiency and Service of Notice of Termination for Failure to Pay Rent* 4305. *Sufficiency and Service of Notice of Termination for Violation of Terms of Agreement*	Orange County Bar Association, by Deirdre Kelly, President	In keeping with the language of Section 1611(2), to enhance flow, and for greater clarity, we suggest that the phrase describing the three-day period and the phrase describing the notice be shifted, as proposed, and the next-to-last paragraph of the Instruction to read: "The three-day notice period excludes Saturdays, Sundays, and judicial holidays, but otherwise begins the day after the notice to pay the rent or vacate the property was given to *[name of defendant*].	The committee agreed with the comment and has made the proposed change. Both the wording and the location of the sentence concerning computation of three days have been revised as proposed by the comment.
VF-4300. *Termination Due to Failure to Pay Rent* VF-4301. *Termination Due to Failure to Pay Rent—Affirmative Defense—Breach of Implied Warranty of Habitability* VF-4302. *Termination Due to Violation of Terms of Lease/Agreement*	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair, Sacramento	We would insert the word "judicial" before "holidays" in the Directions for Use to make it clear that only judicial holidays are excluded.	The addition has been made.

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4575. *Right to Repair Act—Affirmative Defense—Failure to Properly Maintain Home*	Association of Southern California Defense Counsel, by John T. Brazier, Horvitz & Levy LLP, Los Angeles	The author of this letter, like many members of ASCDC, maintains a thriving practice in defending construction defect actions and we regularly navigate California Right to Repair Act. When my colleagues and I reviewed the CACI Committee's proposed instruction related to the affirmative defense proscribed by Code of Civil Procedure section 945.5(c)—the Failure to Maintain Home—we compared its scope and content against the Code and relevant case law developments. After such scrutiny, we have concluded the proposed instruction accurately reflects both the letter and intent of California Right to Repair Act and, specifically §945.5(c). Accordingly, we endorse the instruction as proposed.	No response is necessary.
	Orange County Bar Association, by Deirdre Kelly, President	The instruction's title (*Right to Repair Act—Affirmative Defense—Failure to Properly Maintain Home* (Civ. Code, § 945.5(c)) is misleading since this affirmative defense covers more than just a "failure to properly maintain." It covers any builder or manufacturer recommendations whether related to maintenance or otherwise. The title should be amended accordingly to avoid confusion.	The committee disagreed. The defense is that it's the homeowners' fault because they didn't take care of the house properly. One of the ways that the builder can prove the defense is to show that there was recommended maintenance that the owner ignored.
4603. *Whistleblower Protection—Essential Factual Elements*	Joint Commenters on Employment Law	The proposed revisions to discuss whether protection from retaliation is limited to the first employee to report a violation are inappropriate and contrary to law. No such "first report" limitation was discussed in *Mize-Kurzman v. Marin Community College Dist.* (2012) 202 Cal.App.4th 832. Likewise, no such "first report" limitation appears in section 1102.5(b), or is addressed in the federal and	The commenters' concern is limited to the Directions for Use's inclusion of *Mize-Kurzman v. Marin Community College Dist.* (2012) 202 Cal.App.4th 832, 858 and the sentence: "It has been held that a report of publicly known facts is not a protected disclosure." The commenters would prefer that the committee not include *Mize-Kirzman*'s holding and cite only *Hager*, which holds that protection is not necessarily limited to the first reporter.

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		state cases cited and relied on by the *Mize-Kurzman* court. *Hager v. County of Los Angeles* (2014) 228 Cal.App.4th 1538, 1549 rejected the limitation. It is also important to note that *Mize-Kurzman* was decided prior to legislation in 2013, which broadened the scope of what constitutes a protected disclosure under section 1102.5. At the time *Mize-Kurman* was decided in 2012, section 1102.5(b) did not provide protections for employees who report internally within a company or organization. The proposed revision to the instruction makes it seem as if there is a debate regarding whether there is a "first report" rule. There is not. The *Mize-Kurman* court did not fashion any such rule, and the *Hager* court expressly rejected the suggestion of the same. The jury instruction should be revised as follows: "It has been held that the protection for making a report of publicly known facts ~~is not a protected disclosure. (*Mize-Kurzman v. Marin Community College Dist.* (2012) 202 Cal.App.4th 832, 858 [136 Cal.Rptr.3d 259].) Another court, however, has cast doubt on this limitation and held that The protection~~ is not ~~necessarily~~ limited to the first public employee to report unlawful acts to the employer. (*Hager v. County of Los Angeles* (2014) 228 Cal.App.4th 1538, 1548−1553 [176	The Directions for Use fairly state the holding of *Mize-Kurzman* ["We are persuaded that [instructing the jury that reporting publicly known facts is not a protected disclosure] was a proper limitation on what constitutes disclosure protected by California law."]. Because *Mize-Kurzman* remains good law on this point, the committee decided to include it. The change to the law in 2013 expanding who an employee can report to has nothing to do with the meaning of "disclosure" considered in *Mize-Kurzman*, and the commenters' suggestion that the 2013 change in law affected this issue is not correct. Further, the commenters' construe the Directions for Use's discussion to mean a "first report" rule exists, but *Mize-Kurzman* can be, and has been, limited to publicly known facts. (See *Hager, supra,* 228 Cal.App.4th at pp. 1548−1553.) The Directions for Use reference both cases. To the extent that the commenters are concerned about a "first report" limitation, the Directions for Use do not endorse any such rule. The committee has added subdivision (b) of Labor Code section 1102.5 to the final citation in the paragraph as suggested. See also response to comment of the California Lawyers Association, below.

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		Cal.Rptr.3d 268]; see Lab. Code, § 1102.5(b), (e).)	
	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair, Sacramento	*Hager v. County of Los Angeles* (2014) 228 Cal.App.4th 1538, 1549-1552, considered and rejected the proposition based on *Mize-Kurzman v. Marin Community College Dist.* (2012) 202 Cal.App.4th 832, 858, that a report is not protected if the information was previously reported. We believe the Directions for Use should state this more clearly: "It has been held that a report of publicly known facts is not a protected disclosure. (*Mize-Kurzman v. Marin Community College Dist.* (2012) 202 Cal.App.4th 832, 858 [136 Cal.Rptr.3d 259].) Another court, however, disagreed and held that protection is not ~~necessarily~~ limited to the first public employee to report unlawful acts to the employer. (*Hager v. County of Los Angeles* (2014) 228 Cal.App.4th 1538, 1548−1553 [176 Cal.Rptr.3d 268]; see Lab. Code, § 1102.5(e).)"	There is no conflict between the *Mize-Kurzman* holding that a report of publicly-known facts is not protected and the *Hager* holding that protection is not necessarily limited to the first reporter. The fact that there was a prior report does not necessarily mean that the facts then became publicly known.
4900. *Adverse Possession*	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair, Sacramento	We question the need for this proposed new instruction. The Directions for Use presumes there is a right to jury trial on the existence of adverse possession, but the controlling authority is to the contrary in many circumstances An action to establish title by adverse possession is a quiet title action, which is an action in equity. There is no right to jury trial of a quiet title action if only title is at issue. (*Thompson v. Thompson* (1936) 7 Cal.2d 671,	The proposed Directions for Use say: "A claimant for a prescriptive easement is entitled to a jury trial if there are disputed issues of fact and legal relief (e.g., damages) is sought. (*Arciero Ranches v. Meza* (1993) 17 Cal.App.4th 114, 124 [21 Cal.Rptr.2d 127]; see CACI No. 4901, *Prescriptive Easement*.) Presumably the same right would apply to a claim for adverse possession. (See *Kendrick v. Klein* (1944) 65 Cal.App.2d 491, 496 [150 P.2d 955] [whether occupancy amounted to adverse possession is question of fact]."

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		681; *Aguayo v. Amaro* (2013) 213 Cal.App.4th 1102, 1109-1110; *Estate of Phelps* (1990) 223 Cal.App.3d 332, 340.) If the right to possession is at issue, whether the action is equitable and triable by the court or legal and triable by a jury depends on the circumstances. (*Thompson*, at p. 681.) If the plaintiff is out of possession and seeks to both quiet title and recover possession, the action is legal and there is a right to jury trial. (*Thompson,* 7 Cal.2d at p. 681; *Medeiros v. Medeiros* (1960) 177 Cal.App.2d 69, 72-73.) If the plaintiff is in possession and the defendant claims a recent ouster and seeks to recover possession, the action is legal and there is a right to jury trial. (*Thompson,* at p. 681.) If the plaintiff is in possession and the defendant claims an ouster and seeks to recover possession, but the ouster was not recent, the quiet title claim is tried by the court while the defendant's claim for possession is tried by a jury. (*Thompson,* at pp. 681-682.) Thus, adverse possession is triable by jury only if possession is also at issue, and even then, only in some circumstances. Any standard instruction should include the issues relevant to possession, and the Directions for Use should explain when the instructions should be given and the appropriate modifications. We believe such a complicated instruction is not well suited for a standard instruction. So we disagree with this proposed new instruction.	*Thompson* and *Estate of Phelps* are quiet title cases, but not adverse possessions cases. The rule is "Generally, there is no right to a jury trial in a quiet title action which is fundamentally equitable in nature. A quiet title action becomes a legal action when it takes on the character of an ejectment proceeding to recover possession of the property." So if it is assumed that this rule applies to adverse possession, the question would be whether an action for adverse possession is one "to recover possession of the property." Since these are not adverse possession cases, that question is not addressed. But the purpose of adverse *possession* is to recover possession of the property. *Aguayo* was an adverse possession case, but "neither party sought possession of the property under an ejectment theory." Nothing in any of these cases conflicts with *Arciero Ranches*. The logical conclusion is that if there is a right to a jury for prescriptive easement, there also should be one for adverse possession given the similarity of the claims.

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	Orange County Bar Association, by Deirdre Kelly, President	We suggest adding the word "continuous" in between the words "five" and "years" in the prefatory language of the instruction, e.g., so it reads as follows: "for a period of five continuous years,"	Continuous and uninterrupted possession is a requirement set out in Element No. 2. The committee does not believe the requirement needs to be fully expressed in the introductory paragraph.
		Element 6 should be revised to make clear that plaintiff need not pay the taxes but any party could have paid the taxes. Suggested to modify to read as follows: "That all of the taxes assessed on the property during the five-year period have been timely paid."	The committee agreed with respect to payment of taxes by someone other than plaintiff and has revised the Directions for Use to advise users to modify the instruction if the taxes were paid by someone other than the plaintiff. instruction. (See Code. Civ. Proc., § 325(b) ["the party or persons, *their predecessors and grantors,* have timely paid all state, county, or municipal taxes that have been levied and assessed upon the land for the period of five years during which the land has been occupied and claimed."].)
4901. *Prescriptive Easement*	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair, Sacramento	We agree with this proposed new instruction, but we would include "was using" as an alternative to "has been using" in element 1. Stating that plaintiff "was using" the property for a period of five years seems more consistent with the past tense used in the introductory paragraph ("all of the following were true") and in the other elements ("was," "was," and "did not have"). On the other hand, if it is desirable to emphasize that plaintiff's use is ongoing at the time of trial, "has been using" can be selected.	The committee agreed; because of the "continuous" requirement, "has been using" is needed.
		The Directions for Use state that a claimant for a prescriptive easement is entitled to a jury trial if there are disputed factual issues and the claimant seeks damages or other legal relief. But there is a right to jury trial on the existence of a prescriptive easement even if the plaintiff only seeks an injunction. (*Arciero Ranches v. Meza (*1993) 17 Cal.App.4th 114, 124.)	The committee agreed with the comment. The originally proposed language suggested that in order to have a right to a jury trial, the plaintiff must seek damages, but the crucial sentence from *Arciero Ranches* is: "'if a plaintiff applies for an injunction to restrain the violation of a common-law right, if either the existence of the right or the fact of its violation be disputed, he must establish that right at law; or, in other

Instruction(s)	Commenter	Comment	Committee Response
		" ' "If, however, [as here, the] right to an easement is involved in substantial dispute, no injunction will be granted until the claim has been established at law." ' [Citations.] This differentiation rests upon the rule that ' "under the English common law as it stood in 1850, at the time it was adopted as the rule of decision in this state, 'if a plaintiff applies for an injunction to restrain the violation of a common-law right, if either the existence of the right or the fact of its violation be disputed, he must establish that right at law;" or, in other words by a jury, if one be demanded." ' [Citations.] [¶] The proper remedy available to appellants '[a]t common law . . . was an action on the case.' [Citations.] 'The right of trial by jury existed with respect to [this] common law remedy . . . and, consequently, such right exists in a civil action under modern practice which formerly would have fallen within that common law form of action.' " (*Arciero,* 17 Cal.App.4th at p. 124.) Accordingly, we would modify the second sentence in the Directions for Use: A claimant for a prescriptive easement is entitled to a jury trial ~~if there are disputed issues of fact and legal relief (e.g., damages) is sought~~ <u>the existence of a prescriptive easement is disputed, even if the only remedy sought is an injunction.</u> (*Arciero Ranches v. Meza* (1993) 17 Cal.App.4th 114, 124.)	words by a jury, if one be demanded." So the establishment of a prescriptive easement is legal, even if only equitable relief is sought. The committee does not, however, see a need to mention injunctive relief. The same change has been made to CACI No. 4900.
	Orange County	The instruction does not account for the plaintiff to "tack" on to prior party uses. As	The committee agrees that there is authority that supports a plaintiff's "tacking" together periods of use.

Instruction(s)	Commenter	Comment	Committee Response
	Bar Association, by Deirdre Kelly, President	such each element should be revised to account for it.	(See *Windsor Pacific LLC v. Samwood Co., Inc.* (2013) 213 Cal.App.4th 263, 270, disapproved on other grounds in *Mountain Air Enterprises, LLC v. Sundowner Towers, LLC* (2017) 3 Cal.5th 744, 756 fn. 3.) A reference to tacking and possible modifications of the elements of the instruction have been added to the Directions for Use.
4902. *Secondary Easement*	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair, Sacramento	We would change the title to "Interference with Secondary Easement" to make the title more descriptive, consistent with other CACI titles.	The committee agreed and has changed the title.
		We believe the language "land on which the easement lies" is potentially confusing because it suggests physical use of the surface of the property; but an easement may involve some other use. We also find the language "a duty not to do anything unreasonable that interferes with the rights . . ." imprecise because "unreasonable" should modify "interference" rather than "anything." The conduct itself may be reasonable, but the interference unreasonable. We would modify the second sentence for greater clarity: "~~A person with an easement~~ An easement owner and the owner of land ~~on which the easement lies~~ subject to an easement each have a duty not to ~~do anything unreasonable that interferes~~ unreasonably interfere with the rights of the other to use and enjoy their respective rights."	The committee sees no issue with "on which the easement lies and believes that "subject to" is not good plain language. The committee does agree that "Unreasonably interfere" is fewer words to express the same idea and has made this change.

Instruction(s)	Commenter	Comment	Committee Response
		We would strike "In this case," in the second paragraph of the instruction as superfluous and unnecessary.	The language provides transition.
	Orange County Bar Association, by Deirdre Kelly, President	The title of the instruction should be changed to "Interference of Secondary Easement."	The committee agrees and has changed the title, but to "Interference *With* Secondary Easement," per the comment from the California Lawyers Association, above.
		The second sentence of the instruction should be revised to read "The easement holder" in place of "a person with an easement."	The committee prefers retaining "a person with an easement," which is slightly more plain language.
4910. *Violation of Homeowner Bill of Rights—Essential Factual Elements*	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair, Sacramento	We agree with this proposed new instruction.	No response is necessary.
		We would modify the Directions for Use to state that if the plaintiff seeks a penalty the instruction should be modified to require an intentional or reckless violation or willful misconduct.	The committee has made this addition.
	Orange County Bar Association, by Deirdre Kelly, President	We disagree. Although there is a need for such an instruction, the instruction is overly simplified and requires substantial reworking. Please consider the following points. The introductory paragraph has brackets in which to put the reason for Plaintiff's alleged harm. Section 2924.12(b) claims appear only to be allowed after a trustee's deed upon sale has been recorded. Accordingly, providing a fill-in might invite confusion or inaccuracy.	The committee sees no possible confusion or inaccuracy. If no trustee's deed has been recorded, the case will not get to the jury. The HBOR sets forth several civil violations against a mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent for a material violation of specified provisions. Entering a brief description of the alleged cause of harm in the introductory paragraph is helpful.
		In element 1, the bracketed language tells the practitioner to "*[s]pecify one or more claims*	The committee has changed the bracketed "claims arising under" to "violations of."

Instruction(s)	Commenter	Comment	Committee Response
		arising under the" HBOR. Perhaps "claim" in the introduction is acceptable for the jury, but it might be less confusing, consistent with the title of the Instruction, to direct the practitioner to "[s]pecify one or more violations of the" HBOR.	
		Elements 2 and 3 contain reference, respectively, to Plaintiff's being "harmed" and to caused "harm." "Harm" is also mentioned in the introduction to the Instruction, but that would appear to be acceptable. Here, however, the actual damage to plaintiff is being determined. Section 2924.12(b) imposes liability "for actual economic damages," not "harm." The reference to the damage suffered by Plaintiff should be more defined, rather than just referred to as "harm."	Elements 2 and 3 are CACI's standard elements for causation and damages; essential elements of many claims. The jury is not being asked to calculate damages, nor are the elements intended to expand the type of damages available. The HBOR does, however, allow for "actual economic damages." The committee has addressed this point in the Directions for Use.
		After the elements, a sentence about "material" has been included. It references nothing in the Elements, though violations under 2924.12(b) (and (a) for that matter), must be material. It is recalled that years back, the CJC eradicated the term "material' and chose to describe the concept to juries instead. Perhaps this is where the "significant or important" phrase derived. These concepts should be incorporated in Element 3, and this line of explanation deleted. Element 3 currently references "substantial factor" which would be retained, though it seems that phrase is not found in 2924.12(b).	"Substantial factor" is CACI's standard expression for causation and is defined in CACI No. 430. That term is unrelated to the HBOR's requirement that any violation be material. The committee agrees that a "material" violation should be connected to the violation(s) alleged in Element 1 and has made a minor revision to the instruction.
105. *Insurance* 472. *Primary Assumption of*	Kyla Powell, President and Chief Executive Officer	CJAC wishes to express our appreciation for the Advisory Committee's consideration of CJAC's prior comments filed on March 1, 2019 on proposed revisions to CACI-19-01	The committee will not reopen these issues previously resolved.

Instruction(s)	Commenter	Comment	Committee Response
Risk—Exception to Nonliability—Facilities Owners and Operators and Event Sponsors 1204. *Strict Liability—Design Defect—Risk-Benefit Test—Essential Factual Elements—Shifting Burden of Proof*		[CACI Release 34]. To the extent the Advisory Committee is willing to reopen and revisit any of the issues that were open in the CACI-19-01 invitation for comments, we reassert our comments on the proposed revisions to CACI 105, 472, and 1204.	
All except as noted above	Orange County Bar Association, by Deirdre Kelly, President	Agree	No response is necessary.
All except as noted above	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair, Sacramento	Agree	No response is necessary.

Item number: 04

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Submit to JC (without circulating for comment)**

RUPRO Meeting: 10/15/2019

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Juvenile Law: Transfer of Jurisdiction to Criminal Court (Revoke action taken on September 24, 2019, to amend Cal. Rules of Court, rules 5.766, 5.768, and 5.770, and revise forms JV-060-INFO and JV-710)

Committee or other entity submitting the proposal:
Family and Juvenile Law Advisory Committee

Staff contact (name, phone and e-mail): Tracy Kenny, 916-263-838 tracy.kenny@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: October 19, 2018
Project description from annual agenda: Item 1: As directed by the Judicial Council, review legislation identified by Governmental Affairs that may have an impact on family and juvenile law issues within the advisory committee's purview. The committee will review the legislation below, and any other identified legislation, and propose rules and forms as may be appropriate for the council's consideration.
u. SB 1391 (Lara) Juveniles: fitness for juvenile court (Ch. 1012, Statutes of 2018) Repeals the authority of a prosecutor to make a motion to transfer a minor from juvenile court to adult criminal court in a case in which a minor is alleged to have committed a specified serious offense when he or she was 14 or 15 years of age, unless the individual was not apprehended prior to the end of juvenile court jurisdiction.

If requesting July 1 or out of cycle, explain:
Since this is an action to revoke a proposal that was to go into effect on January 1, 2020 due to legal uncertainty regarding the underlying law it is proposed to go into effect the day after the council meeting so that the public will be on notice that the rules and forms are not being amended or revised.

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: November 14–15, 2019

Title
Juvenile Law: Transfer of Jurisdiction to Criminal Court

Rules, Forms, Standards, or Statutes Affected
Revoke action taken on September 24, 2019, to amend Cal. Rules of Court, rules 5.766, 5.768, and 5.770, and revise forms JV-060-INFO and JV-710

Recommended by
Family and Juvenile Law Advisory Committee
Hon. Jerilyn L. Borack, Cochair
Hon. Mark A. Juhas, Cochair

Agenda Item Type
Action Required

Effective Date
November 25, 2019

Date of Report
October 7, 2019

Contact
Tracy Kenny, 916-263-2838
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Executive Summary

The Family and Juvenile Law Advisory Committee recommends that the Judicial Council revoke its action on September 24, 2019, to revise rules and forms to implement recent changes in the law on the transfer of jurisdiction to a criminal court for children 14 and 15 years of age because there is a split of authority within the California Courts of Appeal as to whether these changes were enacted in a constitutional manner. Thus, there is no clear rule for trial courts to follow at this time.

Recommendation

The Family and Juvenile Law Advisory Committee recommends that the Judicial Council, effective November 25, 2019, revoke the action taken on September 24, 2019, to implement proposed changes to rules and forms effective January 1, 2020, in the attached report entitled *Juvenile Law: Transfer of Jurisdiction to Criminal Court*. This action would restore the

following rules and forms to their prior states pending the legal resolution of the status of the changes made to Welfare and Institutions Code section 707 by Senate Bill 1391:

1. California Rules of Court, rules 5.766, 5.768, and 5.770; and
2. Judicial Council forms JV-060-INFO and JV-710.

Relevant Previous Council Action

The Judicial Council adopted rules 5.766, 5.768, 5.770, and 5.772 effective January 1, 1991, as rules 1480, 1481, 1482, and 1483 respectively; they were renumbered effective January 1, 2007. These rules have been amended numerous times, most recently effective May 22, 2017, to implement the changes enacted by Proposition 57, the Public Safety and Rehabilitation Act of 2016.

Juvenile Fitness Hearing Order (Welfare and Institutions Code, § 707) (form JV-710) was adopted by the council effective January 1, 2006, and made optional effective January 1, 2012. It was significantly revised effective May 22, 2017, to implement the changes enacted by Prop. 57. *Juvenile Justice Court: Information for Parents* (form JV-060-INFO) was significantly revised effective January 1, 2019, to make it legally accurate (using plain language), and to reformat it to make printing easier.

On September 24, 2019, the Judicial Council approved a proposal to implement changes to rules and forms to make them consistent to the changes to Welfare and Institutions Code section 707 made by SB 1391.

Analysis/Rationale

Senate Bill 1391 (Lara; Stats. 2018, ch. 1012) amended Welfare and Institutions Code section 707 to provide that a child must be at least 16 years of age to be considered for transfer of jurisdiction to criminal court unless (1) the individual for whom transfer is sought was 14 or 15 at the time of the offense, (2) the offense is listed in section 707(b), and (3) the individual was not apprehended until after the end of juvenile court jurisdiction. At the time the council took its action, there had been three appellate court opinions in two different districts upholding the constitutionality of the statutory changes being implemented; review had been denied by the Supreme Court in those cases. Since that time, the Second District has ruled that the provision was not constitutionally enacted. Thus, until the Supreme Court acts, the validity of the change is in question and it is premature to implement its provisions in rules and forms.

The committee was aware that there were constitutional questions about SB 1391 as it developed the proposal recently approved by the council, but moved it forward to ensure that a proposal would be ready if the law were to be upheld. The question faced by the courts in each of the challenges has been whether the changes made by SB 1391 to the provisions of Prop. 57 were consistent with the intent of the ballot measure and thus lawfully enacted by the Legislature. At the time of the council meeting, courts in the First and Third Districts of the Courts of Appeal had issued opinions finding that SB 1391 was consistent with the intent of the voters in enacting

Prop. 57—and thus a constitutional exercise of the Legislature's authority—and while the petitioners in each case sought review of those decisions in the Supreme Court, the court denied such review in both cases.[1] Subsequently, the Fifth, Sixth, and most recently the Fourth District Courts of Appeal have also ruled in favor of the constitutionality of the statute, in split 2–1 opinions.[2]

Bucking this trend, on September 30, an opinion was filed in the Court of Appeal, Second Appellate District, holding that the provisions of SB 1391 were not consistent with the voters intent in enacting Prop. 57 and thus holding that the amendments to Welfare and Institutions Code section 707 were an unconstitutional exercise of legislative authority.[3] As a result of that decision, which preserves the right of the prosecution to seek a transfer to criminal court for an offense committed by a 14 or 15 year old, the legal accuracy of the amended and revised rules and forms adopted by the council on September 24 is now in doubt. Until the Supreme Court takes action to make a final determination on the constitutionality of the changes made by SB 1391, the committee deemed it prudent to leave the existing rules and forms unchanged.

Policy implications

Implementing amended rules of court and revised forms while the constitutionality of SB 1391 is actively being litigated may create the impression that the validity of the statute is not in question. The rules and forms currently in effect can be used by courts regardless of which opinion they follow, while the proposal to be revoked is only consistent with the law as amended by SB 1391.

Comments

This recommendation to revoke the prior council action was not circulated for comment as it simply restores the status quo until a final determination is made on the constitutionality of the underlying statutory change.

Alternatives considered

The committee considered making no recommendation and thus allowing the amended and revised rules and forms to go into effect on January 1, 2020, but was concerned that doing so would only add to the confusion regarding the changes in the law and would provide no mechanism for those trial courts that opt to follow the reasoning in *O.G.*

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[1] *People v. Superior Court* (*Alexander C.*) (2019) 34 Cal.App.5th 994, review denied June 26, 2019, S255985; and *People v. Superior Court of Sacramento County (K.L. and R.Z.)* (2019) 36 Cal.App.5th 529, review denied July 17, 2019, S256637.

[2] *People v. Superior Court (T.D.)* (2019) 38 Cal.App.5th 360; *People v. Superior Court (I.R.)* (2019) 38 Cal.App.5th 385; *People v. Superior Court (S.L.)* (Sept. 20, 2019, H046598)__Cal.App.5th __ [2019 Cal.App. LEXIS 904]; and *B.M. v. Superior Court* (Oct. 1, 2019, E072265).

[3] *O.G. v. Superior Court* (Oct. 1, 2019, B295555).

Fiscal and Operational Impacts

If the council were to implement the provisions of SB 1391 only to have it ruled unconstitutional by the Supreme Court, courts would be in the position of implementing new forms twice, whereas the decision to delay until the status of the law is final will ensure that any necessary changes are made one time at most.

Attachments and Links

1. Attachment A: *Juvenile Law: Transfer of Jurisdiction to Criminal Court*, report to the Judicial Council for its Sept. 24, 2019 meeting, pp. 5-34.
2. Link A: Sen. Bill 1391 (Stats. 2018, ch. 1012), *http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180SB1391*

REPORT TO THE JUDICIAL COUNCIL

For business meeting on: September 24, 2019

Title
Juvenile Law: Transfer of Jurisdiction to Criminal Court

Rules, Forms, Standards, or Statutes Affected
Amend Cal. Rules of Court, rules 5.766, 5.768, and 5.770; revise forms JV-060-INFO and JV-710

Recommended by
Family and Juvenile Law Advisory Committee
Hon. Jerilyn L. Borack, Cochair
Hon. Mark A. Juhas, Cochair

Agenda Item Type
Action Required

Effective Date
January 1, 2020

Date of Report
September 5, 2019

Contact
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Executive Summary

Recent changes in the law on the transfer of jurisdiction to a criminal court for children 14 and 15 years of age require rule and form changes to be consistent with the new provisions. Senate Bill 1391 (Lara; Stats. 2018, ch. 1012) amends Welfare and Institutions Code section 707 to provide that a child must be at least 16 years of age to be considered for transfer of jurisdiction to criminal court unless the individual for whom transfer is sought was 14 or 15 at the time of the offense, the offense is listed in section 707(b), and the individual was not apprehended until after the end of juvenile court jurisdiction. To implement these age-related changes in the jurisdiction of the juvenile court, the Family and Juvenile Law Advisory Committee recommends that the Judicial Council amend three rules of court and one form pertaining to the transfer-of-jurisdiction process and an informational form to reflect the new provisions.

Recommendation

The Family and Juvenile Law Advisory Committee recommends that the Judicial Council, effective January 1, 2020:

1. Amend California Rules of Court, rules 5.766, 5.768, and 5.770 to implement statutory and recent case law changes pertaining to the transfer-of-jurisdiction process;

2. Revise *Juvenile Justice Court: Information for Parents* (form JV-060-INFO) to reflect modified age limits on transferring jurisdiction to criminal court over juvenile offenders; and

3. Revise *Order to Transfer Juvenile to Criminal Court Jurisdiction* (form JV-710) to reflect recent changes in the transfer statute and case law.

The text of the amended rules and the revised forms are attached at pages 6–17.

Relevant Previous Council Action

The Judicial Council adopted California Rules of Court,[1] rules 5.766, 5.768, and 5.770 effective January 1, 1991, as rules 1480, 1481, 1482, and 1483 respectively, and they were renumbered effective January 1, 2007. These rules have been amended numerous times, most recently effective May 22, 2017, to implement the changes enacted by Proposition 57.

Juvenile Fitness Hearing Order (Welfare and Institutions Code, § 707) (form JV-710) was adopted by the council effective January 1, 2006, and made optional effective January 1, 2012. It was significantly revised effective May 22, 2017, to implement the changes enacted by Prop. 57. *Juvenile Justice Court: Information for Parents* (form JV-060-INFO) was significantly revised effective January 1, 2019, to bring it up to date (using plain language), and to reformat it to make printing easier.

Analysis/Rationale

On November 8, 2016, the people of the State of California enacted Prop. 57, the Public Safety and Rehabilitation Act of 2016, effective November 9, 2016. Proposition 57 amended existing law to require that the juvenile court consider a motion by the district attorney or other appropriate prosecuting officer to transfer the minor to the jurisdiction of the criminal court before a juvenile can be prosecuted in a criminal court. To that end, the proposition repealed Welfare and Institutions Code section 602(b),[2] which had provided that certain serious and violent felonies were to be prosecuted in criminal court, as well as section 707(d), which had authorized the district attorney to directly file an accusatory pleading involving certain minors in criminal court. In addition, the proposition eliminated a set of presumptions that applied in determining whether a case should be transferred and instead provided the court with broad discretion to determine whether the child should be transferred to a court of criminal jurisdiction, taking into account numerous factors and criteria.

Senate Bill 1391 (see Link A) further amended these provisions to limit the transfer of cases involving offenders who were 14 or 15 years old at the time of the alleged offense to those in

[1] All further references to "rule" or "rules" are to the California Rules of Court.

[2] Hereinafter, all statutory references are to the Welfare and Institutions Code unless otherwise specified.

which the alleged offender is not apprehended until after reaching adulthood, and the offense is one listed in section 707(b). Since January 1, 2019, district attorneys in at least 10 counties have lodged challenges to the constitutionality of the law. Trial courts have ruled both for and against upholding the constitutionality of the statute and, thus, its status is in question. However, the Court of Appeal has ruled, in two cases in different appellate districts, that SB 1391 is not an unconstitutional modification of the voters' intent in enacting Prop. 57. The Supreme Court has denied review in both cases.[3]

To implement the new jurisdictional changes, the transfer rules and form must be changed. In addition, the information form for parents whose children have been arrested must be updated to contain the accurate information about transfer of jurisdiction to criminal court and the lower limit on jurisdiction for children under 12 years of age in most cases.

Transfer rules 5.766, 5.768, and 5.770

The current rules of court governing the process for transfer of jurisdiction from juvenile to criminal court provide that transfer can occur when the subject of the petition is age 14 or 15 and is alleged to have committed an offense listed in Welfare and Institutions Code section 707(b), or is 16 years of age or older and is alleged to have committed a felony. These rules must be amended to state that a transfer petition may be considered only for those who were 14 or 15 years of age at the time of the offense when the individual who is the subject of the petition was apprehended after the end of juvenile court jurisdiction. In addition, the changes to section 707 require that code references be updated to reflect the new structure of the statute. The proposal would also update rule 5.770 to include the requirement that the court make specific findings for each of the transfer criteria in section 707(a)(3) as provided in *C.S. v. Superior Court* (2018) 29 Cal.App.5th 1009. Finally, the committee recommends revising rule 5.776 to correct a typographical error in the most recent version approved by the council.

Transfer order form JV-710

Order to Transfer Juvenile to Criminal Court Jurisdiction (form JV-710), for optional use, would be revised to update item 3 to include the limitation on transferring individuals who were age 14 or 15 at the time of the offense to those situations in which apprehension of the subject of the petition occurred after the end of juvenile court jurisdiction; and to update item 4 to correct the statutory reference to 707(a)(2) and make it 707(a)(3), consistent with the changes enacted by SB 1391.

Information form for parents (JV-060-INFO)

To provide accurate information to parents about when a juvenile case can be transferred to criminal court, *Juvenile Justice Court: Information for Parents* (form JV-060-INFO) would be revised to reflect the limitations on transfer of people 14 and 15 years of age.

[3] *People v. Superior Court (Alexander C.)* (2019) 34 Cal.App.5th 994, review denied June 26, 2019, S255985; and *People v. Superior Court of Sacramento County (K.L. and R.Z.)*, (2019) 36 Cal.App.5th 529, review denied July 17, 2019, S256637.

Policy implications

The change to the law made by SB 1391 will result in fewer cases being eligible to transfer to criminal court jurisdiction. As a result, juvenile courts will have to determine appropriate dispositions for offenders who have been found to have committed serious offenses, including homicide, between ages 14 and 16. This proposal seeks to provide accurate rules and forms for the courts to use to carry out their transfer obligations, given the new law, and to ensure that the information form for parents reflects the current state of the law.

Comments

This proposal was circulated for public comment from April 11 to June 10, 2019, as part of the regular spring comment cycle. Six organizations submitted comments on this proposal. Three commenters agreed with the proposal. Three organizations agreed if the proposal was modified. A chart with the full text of the comments received and the committee's responses is attached at pages 18–30.

Implementing C.S. v. Superior Court (2018) 29 Cal.App.5th 1009

The committee asked for specific comment on whether the proposal should include rule or form changes to assist the courts in implementing the holding in *C.S. v. Superior Court* (2018) 29 Cal.App.5th 1009, which requires the court to articulate its findings on each of the transfer criteria in the statute. The committee asked whether rule 5.770 or form JV-710 should be changed to reflect this holding. The commenters expressed an array of opinions on this question, from making no change to changing both the rule and the form. The committee concluded that it was critical for courts to be prompted to make the detailed and specific findings required for each statutory criterion, but also agreed with a number of commenters that form JV-170 was not the optimal place to record such findings. Thus, the committee recommends adding language requiring such findings to rule 5.770, and revising the text of item 4 of form JV-710 to clearly state that the court has considered and made findings on the record for each of the criteria.

Referring to the subject of a transfer order—minor v. child

The committee in recent rules and forms cycles has been confronted with what is the best term to use to refer to the young people subject to the jurisdiction of the juvenile justice courts. The last time the transfer rules and forms were amended or revised to implement Prop. 57, the committee opted to stick with its general practice of using the term "child" as opposed to the term "minor"—which is used in the statute. In this comment cycle, two commenters objected to the use of the term child with one suggesting "youth" as a substitute and one suggesting "minor" or "youth." While there was significant division within the committee on this issue, the majority favored maintaining the status quo and retaining the use of child because it is defined in both statute and rule of court, and because it signals the developmental differences that impact those who are subject to transfer motions and that the Legislature has directed the courts to take into account.

Adding an item to form JV-710 for withdrawal of a transfer motion

One commenter suggested that form JV-710 be revised to allow for the withdrawal of a transfer order to accommodate cases impacted by SB 1391's restrictions on the age for transfers. The

committee ultimately determined that this was not a necessary addition to the form because it did not fit within the transfer order process and because such motions can easily be made currently without this form.

In addition to these substantive comments, the committee received numerous clarifying and technical suggestions, most of which it adopted.

Alternatives considered

As described in the discussion of the comments, the committee discussed a number of alternative approaches to this proposal, including modifying form JV-710 to allow for courts to record their findings on the section 707(a)(3) criteria, modifying the form to place a check box for a transfer motion to be withdrawn, and changing the terminology on the form to use the term minor or youth in place of child. For the reasons set forth above, the committee opted not to adopt those alternatives.

In addition, given the legal challenges to the underlying legislation that the proposal seeks to implement, the committee considered deferring action until all appellate review is final, but determined that it would be preferable to move forward at the same time as the litigation in order to assist courts with implementation in a timely manner. Given that two courts have published opinions upholding the statute and the Supreme court has denied petitions for review in both of those cases, the committee has concluded that the statute should be implemented now.

Fiscal and Operational Impacts

The restrictions on the use of transfer to criminal court for juvenile offenders ages 14 and 15 will result in the filing of fewer transfer petitions for these youth and, thus, fewer hearings on those petitions. These impacts are the result of legislative changes. The revisions to form JV-060-INFO may impose additional printing costs for any courts that need to replace existing copies of this form with the revised information form.

Attachments and Links

1. Cal. Rules of Court, rules 5.766, 5.768, and 5.770, at pages 6–7
2. Forms JV-060-INFO and JV-710, at pages 8–17
3. Chart of comments, at pages 18–30
4. Link A: Sen. Bill 1391 (Stats. 2018, ch. 1012), *http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180SB1391*

Rule 5.766. General provisions

(a) Hearing on transfer of jurisdiction to criminal court (§ 707)

A child who is the subject of a petition under section 602 and who was 14 years or older at the time of the alleged felony offense may be considered for prosecution under the general law in a court of criminal jurisdiction. The district attorney or other appropriate prosecuting officer may make a motion to transfer the child from juvenile court to a court of criminal jurisdiction, in one of the following circumstances:

(1) The ~~child~~ individual was 14 or 15 years ~~or older~~ of age at the time of the alleged offense listed in section 707(b) and was not apprehended before the end of juvenile court jurisdiction.

(2) The child was 16 years or older at the time of the alleged felony offense.

(b)–(c) * * *

(d) Time of transfer hearing—rules 5.774, 5.776

The transfer of jurisdiction hearing must be held and the court must rule on ~~the~~ the request to transfer jurisdiction before the jurisdiction hearing begins. Absent a continuance under rule 5.776 or the child's waiver of the statutory time period to commence the jurisdiction hearing, the jurisdiction hearing must begin within the time limits under rule 5.774.

Rule 5.768. Report of probation officer

(a) Contents of report (§ 707)

The probation officer must prepare and submit to the court a report on the behavioral patterns and social history of the child being considered. The report must include information relevant to the determination of whether the child should be retained under the jurisdiction of the juvenile court or transferred to the jurisdiction of the criminal court, including information regarding all of the criteria in section 707(a)~~(2)~~(3). The report must also include any written or oral statement offered by the victim pursuant to section 656.2.

(b)–(c) * * *

Rule 5.770. Conduct of transfer of jurisdiction hearing under section 707

(a) * * *

(b) Criteria to consider (§ 707)

Following receipt of the probation officer's report and any other relevant evidence, the court may order that the child be transferred to the jurisdiction of the criminal court if the court finds:

(1) The child was 16 years or older at the time of any alleged felony offense, or the ~~child~~ individual was 14 or 15 years of age at the time of an alleged felony offense listed in section 707(b) and was not apprehended before the end of juvenile court jurisdiction; and

(2) The child should be transferred to the jurisdiction of the criminal court based on an evaluation of all of the criteria in section 707(a)~~(2)~~(3) as provided in that section. The court must document on the record the basis for its decision, detailing how it weighed the evidence and identifying the specific facts that persuaded the court to reach its decision, notwithstanding that the decision must be based on the totality of the circumstances and the child need not be found amenable on each of the five criteria in order to remain in juvenile court.

(c)–(h) * * *

Juvenile justice court (sometimes called *delinquency* court) is a court that decides if a child broke the law. The juvenile justice court helps to protect, guide, and rehabilitate children. And it helps keep the community safe.

This information sheet answers common questions that many parents have. It has three sections:

1. What Happens When Your Child Is Arrested
2. Your child's Court Hearings and Orders
3. How to Keep Your Child's Juvenile Court Record Private

This form describes the juvenile justice court process. Some children who break the law and become involved with law enforcement or probation never need to go to court.

1 What Happens When Your Child Is Arrested

This section is about:

- What to expect when your child is arrested,
- What your child's legal rights are,
- What the *notice to appear* and the *petition* are,
- What it means to transfer your child to adult court, and
- What a *probation officer* does.

My child was arrested. What happens next?

Your child might be brought home or allowed to go home with you.

You will be given or mailed a notice to appear that tells you the date, time, and place you and your child need to go to the probation department or juvenile court. Talk to a qualified juvenile defense lawyer about your child's case. Many juvenile defenders offer free consultations.

Warning! You and your child *must* go to the meeting listed on the notice to appear even if no one contacts you again. Sometimes the meeting will be at probation. Sometimes the notice will order you to go to the juvenile court.

Your child might NOT be sent home immediately after the arrest.

If that happens, the officer who arrested your child may:

- Let your child go later.
- Take your child to juvenile hall and keep them there. This is called *in-custody detention.* If this happens, the arresting officer *must* try to contact you immediately to tell you where your child is and that your child is in custody.

What are my child's legal rights after arrest?

Your child has the right to make at least **two phone calls** within **1 hour** of being arrested.

- One call must be a *completed* call to a parent, guardian, responsible relative, or employer.
- The other call must be a *completed* call to a lawyer.
- If your child is currently in court-ordered foster care, your child may also be allowed to call a foster parent or social worker.

Will they tell my child about the right to remain silent?

Yes. Before any officer asks your child about what happened, the officer must first tell your child about your child's *Miranda* rights.

They will say:

"You have the right to remain silent. Anything you say will be used against you in court. You have a right to have a lawyer with you during questioning. If you or your parents cannot afford a lawyer, one will be appointed for you."

NOTE: If your child is 15 years old or younger and in custody, your child *must* talk to a lawyer—in person, by phone, or by videoconference (like Skype or FaceTime)—before answering any questions or giving up any rights. Your child cannot decide to answer questions or give up rights without first talking to a lawyer.

Does my child need a lawyer?

If a petition is filed, your child has a right to an *effective* and *prepared* court-appointed lawyer, who must have specific education and training in juvenile justice cases. Many parents hire a lawyer for their child as soon as the child is arrested.

Your child's lawyer represents only your child, not you, even if you are paying for that lawyer.

Do I need a lawyer for myself?

The court can order you to do things for your child and can order you to pay *restitution* to the *victim.* Some parents hire lawyers for legal advice about these issues.

NOTE: If you think you need your own lawyer and cannot afford to hire one, you can ask the court to appoint a lawyer for you. The court will decide whether to appoint you a lawyer. If it does, you might be ordered to pay back the cost of the lawyer if the court decides you can.

If my child is required to meet with probation, how can we get ready?

It's a good idea to get legal advice. A defense lawyer who specializes in juvenile justice cases can help you understand your child's rights and know what to expect. Try to find school records and other information that shows what you and your child are doing to get back on track.

At the meeting, the probation officer will talk with you and your child to figure out the best way to handle your child's case.

NOTE: At this meeting, the probation officer must tell you and your child about the *Miranda* rights. Any information you or your child share with the probation officer might be shared with the court or the prosecuting attorney (DA).

- If the alleged offense is not serious or it's the first time your child has been accused of breaking the law, the probation officer might just tell your child what they did was wrong (reprimand them) and let your child go.
- The probation officer might offer to let your child do a special *diversion program* instead of going to court. Each county has different rules and different programs. If you and your child agree to the program and your child does everything the program requires, the juvenile court does not need to get involved.
- If the offense is more serious, the probation officer might refer your child's case to the prosecuting attorney (DA). If the prosecutor decides to file charges, they will file a petition in juvenile court. That's what the rest of this form is about.

What happens if my child is taken to juvenile hall after getting arrested?

The probation officer can decide to:

- Keep your child in custody, or
- Let your child go home with you.

If the officer lets your child go, they may still:

- Ask the DA to file a petition, and
- Set limits on what your child is allowed to do while at home.

If the officer does *not* let your child go, a petition *must* be filed within 48 hours of the arrest. A detention hearing must be held the next day the court is in session. The courts are closed on Saturdays, Sundays, and holidays. You and your child *must* be given a copy of the petition. ***Exception:*** If your child is under 8, your child does not have a right to get a copy of the petition.

How long can they keep my child in juvenile hall?

The judge will decide at the detention hearing. The judge may release your child or keep your child in juvenile hall until the next hearing or until the whole case is over.

Can I visit my child in juvenile hall?

Usually, but before you go, contact the juvenile hall or the probation officer to find out when you can see your child.

What if the probation officer says a petition will be filed?

The petition states the things your child is accused of or charged with. It means your child's case will be sent to juvenile court. You have the right to receive a copy of the petition. If you have not received a copy of the petition, ask the probation officer or the court clerk for one.

The petition says your child did something against the law and asks the juvenile court to decide that what it says is true, but it does not prove anything.
Read the Petition Carefully! It is important to know what your child is accused of.

Are all petitions the same?

No. Each petition is tailored to the child and the alleged offense. There are two kinds of petitions:

A **601 Petition** is filed when a child has:

- Run away,
- Skipped school a lot,
- Violated a curfew, or
- Regularly disobeyed a parent or guardian.

These petitions are filed by the probation department at the juvenile court. If the court decides the charges are true, your child can become a "ward" of the court. That means the court will supervise your child, and your child must obey the court's orders.

A **602 Petition** is for a charge that would be a *misdemeanor* (like shoplifting or simple assault) or *felony* (like stealing a car, selling drugs, rape, or murder) if an adult had done it.

These petitions are filed by the prosecuting attorney (DA). If the court decides the charges are true, the judge can:

- Order your child put on probation,
- Make your child a "ward" of the court, and
- Order your child placed out of your home or committed (locked up).

NOTE: If your family is involved with the child welfare system, talk with your lawyer about what your child's arrest means for that case. Depending on everything that has happened, the court might decide that it's best for your child to stay in the child welfare system, to be supervised in the juvenile justice system, or to be supervised and served in both systems.

Can my child's case be moved to adult court?

In certain situations, the prosecuting attorney (DA) can ask the juvenile court to transfer your child's case to adult criminal court. If that happens, talk to your child's lawyer right away. Adult criminal cases are handled very differently and there may be very serious consequences for your child.

A case can be transferred to adult court only if your child is:

- 16 years old or older; and
- Charged with a felony.

What does the probation officer do?

Probation officers investigate children's situations and backgrounds and write reports for the court. They also supervise children to see if they are doing what the court has ordered them to do.

Why does the probation officer write a report?

The probation officer writes reports to give the court information about your child. The reports give the judge a description of your child's situation, including life at home and school, the current charge(s), and any previous arrests or petitions. It can also include:

- Statements from your child, you, your family, and other people who know your child well;
- A school report;
- A statement by the victim; and
- Recommendations about what the court should do if the judge finds that your child did what the petition says.

When does the judge see the reports?

The probation officer presents a report at the *detention hearing*, *disposition hearing*, and each *review hearing*. The judge uses the reports to help decide how to handle your child's case.

2 Your Child's Court Hearings and Orders

If a petition is filed in your child's case, you and your child will have to go to juvenile court. Each time you go to court is called a "hearing." You may have to go to several court hearings. This section is about:

- What happens at the different court hearings,
- What happens after the hearings,
- What if your child becomes a ward of the court, and
- What your duties and responsibilities as a parent are.

Get Ready for Court

How will I find out about court hearings?

If your child is in custody, both you and your child will get notice at least 5 days before the hearing. Someone will deliver it personally or by certified mail.

If your child is* not *in custody, both you and your child will get notice of each court hearing at least 10 days before the date of the hearing. Someone will deliver it personally, by first-class mail, or, if you agree, electronically.

Can I go to my child's court hearings?

Yes. In fact, the law says you *must* go. The judge decides what is best for your child. Depending on the charges, if you can show that your child will listen to you and follow your rules, and that you will hold your child accountable and be supportive at home, the judge may let your child go home with you.

How many times will we have to go to court?

You and your child will probably need go to court several times. There will be different kinds of hearings where the court makes different decisions. *See page 8 for a table of different hearing types.*

Do we have the right to an interpreter?

Your child has a right to an interpreter. You might have a right to one, too. Ask for one if you do not speak English well and don't understand everything being said in court.

Can I speak at the court hearings?

Yes. You may speak when:

- The judge asks you questions,
- You are called as a witness, or
- The judge gives you permission.

Who else speaks at the court hearings?

Your child's lawyer will speak for your child. The prosecuting attorney (DA) will speak for the government. The probation officer may speak for the Probation Department.

Can the victim go to the hearings?

Yes. A crime victim has a right to go to and speak at any court hearing. The victim and the victim's parents (if the victim is under 18) will get notice of the hearing. Do not talk to the victim unless your lawyer tells you to.

When is the first court hearing?

If your child is in custody, the first hearing, called the *detention hearing*, must take place on the court day immediately after the petition is filed. The probation officer or prosecuting attorney (DA) must tell you when and where the hearing will be. You will also get a copy of the petition. At this hearing, the court decides only whether your child can go home or needs to stay in custody until the next hearing.

If your child is* not *in custody, the first hearing, often called the *initial hearing*, must take place no more than 30 days after the petition is filed. In addition to the notice described earlier, you and your child will get a copy of the petition at least 10 days before the date of this hearing.

What is a jurisdiction hearing?

The jurisdiction hearing is when the judge decides if your child actually did what it says in the petition.

Here's what to expect:

- The judge will ask your child to *admit* or *deny* the charges listed in the petition.
- Your child's lawyer will consider the evidence and the possible outcomes, and then advise your child what to do.

- If your child *admits* the charges, they give up the right to a trial. The judge will decide that the petition is true.
- If your child *denies* the charges, there will be a trial (called a *contested hearing*). The court may hold the trial on another day to give your child's lawyer time to get ready.

What happens at the "trial"?

At the trial, the prosecuting attorney (DA) will show evidence to prove the charges. Then your child's lawyer will show evidence in your child's defense. The judge will consider all the evidence and decide if the charges are true "beyond a reasonable doubt."

If there is not enough proof to decide the charges are true, the judge will dismiss the case. If your child is in custody, she or he will be let go. If this happens, skip ahead to section 3 of this form.

If the judge decides the charges are true, there will be a *disposition hearing.* That's when the judge will say what your child will need to do and where your child will live. Sometimes this hearing is right after the jurisdiction hearing, but it can also be later on the same day or on another day.

If your child is in custody, the judge can order your child to stay in custody or be released until the disposition hearing.

> ***If you live in a different county***, the court can transfer the case to your county court for the disposition hearing. Ask your child's lawyer if that is a good idea for your child's case.

What happens at the disposition hearing?

The judge will decide what orders to make to protect and rehabilitate your child and to protect the community.

The judge might order your child to:

- Live at home and obey informal probation rules for up to six months.
- Live at home, be supervised by a probation officer, and obey rules set by the judge.
- Live at a relative's home, a foster family home, a private group home, or a residential treatment program; be supervised by a probation officer; and obey rules set by the judge.
- Spend time in a county camp, home, ranch, or hall (in custody) and on probation.
- Spend time in the Division of Juvenile Justice (DJJ) of the California Department of Corrections and Rehabilitation (in custody).

The judge may also order *you*, the parent, to get counseling or parent training or do other activities.

What if the judge puts my child on probation?

If your child is put on probation, the probation officer will supervise and work with your child to make sure that your child follows:

- The law,
- The court's orders, and
- All the rules of probation.

The probation officer will also encourage your child to do well in school and participate in job training, counseling, and community programs.

How often will the probation officer see my child?

Each case is different. The probation officer may meet with your child twice a week or only once a month.

What if the judge makes my child a *ward* of the court?

The juvenile law uses special language. Children who have committed offenses become wards of the court, but are not convicted. If your child becomes a ward of the court, that means the court is in charge of some of your child's care and conduct. The court does this to protect your child and the community.

What if the judge orders my child placed in foster care?

If the judge orders suitable out-of-home or foster placement, the probation officer may place your child in:

- An adult relative's home,
- An approved foster family home,
- A licensed private group home, or
- A residential treatment program.

What if the court sends my child to a secure county facility?

Most wards of the court who need secure confinement are sent to county facilities, like a ranch, camp, or juvenile hall, where they can be close to their families and local rehabilitative services. Ask the probation department about your child's program and how you can visit and stay in touch.

What if the court sends my child to DJJ?

Only wards who have committed the most serious violent actions or need intensive treatment are sent to DJJ. If the court sends your child to DJJ, visit www.cdcr.ca.gov/Juvenile_Justice/ to get more information about where your child might go and how you can visit and stay in touch.

If my child's case was moved to adult court, can my child be sent to adult prison?

Yes, but there are limits:

- Between the ages of 16 and 18, your child *must* stay at a juvenile facility (DJJ) *even if* sentenced to adult prison.
- If your child's sentence will end before your child turns 25, your child can stay at a juvenile facility (DJJ) for the entire sentence.
- If your child's sentence will last past the age of 25, your child can stay at DJJ until age 18, then be moved to an adult prison on the child's 18th birthday.

Important! If your child's case gets moved to adult court, talk to your child's lawyer right away.

Do I have to pay for what my child did?

The court may order you to pay fines or penalties.

If the court decides that the victim is entitled to restitution, you and your child are equally responsible for paying the victim back. *Restitution* is money that pays the victim to make up for the damage or harm your child caused. Restitution can pay the victim back for:

- Stolen or damaged property,
- Medical expenses, and
- Lost wages.

If restitution is not completely paid when your child's case is closed, it will become a *civil judgment*, which can affect your credit score.

Do I have to pay fees for services my child receives from the court or county?

No. You do not have to pay fees or pay back the cost of services, support, or an attorney *given to your child* by the county or court as part of this case.

But if you can afford it, you might have to pay back the cost of services, including an attorney, *given to you or other family members* by the county or the court.

What are my responsibilities as a parent?

Your parental duties do not end when the court gets involved. Your child may need you now more than ever.

If the judge decides the charges in the petition are true, you may be ordered to do things to:

- Help make up for harm your child caused, and
- Keep your child out of trouble in the future.

The court may order you to:

- Take classes,
- Go to counseling, or
- Do other activities that will help you and your child.

What if my child is in foster care or in custody?

Wherever your child goes, stay in touch as much as you can, however you can. Visit your child as often as you can. Support your child's programs and activities. Encourage your child to obey the court's orders and not to leave the placement without permission.

Find out what is happening in your child's life so that you can get ready for your child to return home. Learn how to make a protective and supportive environment for your child's return to school or work. Develop plans to hold your child accountable for their actions.

Where can I find parenting resources?

Contact your child's probation officer. Ask for referrals to community organizations, such as parents' groups or counseling services, that can help you. Your school district and local hospital or mental health department may also have useful programs.

If you have any questions that have not been answered, you may want to contact a lawyer for help.

3 How to Keep Your Child's Juvenile Court Records Private

Will anyone be able to look at my child's juvenile records?

Maybe. Although most juvenile court records are confidential, the law sometimes allows government officials to look at them.

However, in many cases the court will "seal" your child's juvenile records. Once the records are sealed, the law treats the arrest and court case as if they never happened. That means your child can truthfully say that your child does not have a criminal or juvenile record.

Exception: If your child wants to join the military or get a federal security clearance, your child may need to disclose information about the juvenile record.

How can we seal my child's juvenile records?

It depends on your child's situation.

Sealing at dismissal. If the juvenile court dismisses your child's case without making your child a ward of the court, the court must seal your child's records.

If the court does make your child a ward and later dismisses the case because your child has satisfactorily completed probation, the court will also seal your child's records and send your child copies of the sealing order and form JV-596-INFO, *Sealing of Records for Satisfactory Completion of Probation.*

If your child completes a probation diversion program, the probation department will seal those records and give notice to your child.

Sealing on request. If your child does *not* satisfactorily complete probation or the probation diversion program, the court will *not* dismiss the case and your child's records will not be automatically sealed. Your child can either:

- Ask the court to review the probation department's decision and order the records sealed, or
- Ask the court later to seal the records. (See form JV-595-INFO, *How to Ask the Court to Seal Your Records,* for more information.)

If your child is made a ward for an offense listed in Welfare and Institutions Code section 707(b), other than sex offenses requiring the child to register as a sex offender, your child can ask the court to seal the records:

- At age 21, if your child was sent to DJJ; or
- At age 18, if your child was not sent to DJJ.

Even sealed records can be viewed by the prosecuting attorney in some cases.

Sealing not allowed. If the court found that that your child committed a sex offense listed in Welfare & Institutions Code section 707(b) when your child was 14 or older for which your child needs to register as a sex offender, then the court cannot seal your child's records.

Can my child's juvenile court record be used against him or her as an adult?

Under the three-strikes law, some serious or violent felonies committed by a child at age 16 or 17 can be counted as strikes and used against the child in the future.

Court Hearings in Juvenile Justice Court

You and your child may have go to court several times. Each time you go is called a "hearing." Depending on your case, there may be different kinds of hearings to make different decisions. Here are some of them. Each time you have to go to court, you and your child (if 8 or older) will get a notice. The notice will tell you the date, time, and place to go.

Kind of Hearing	**What happens at this hearing**
Detention	The judge will decide if your child can go home or must stay in custody until the next hearing.
Transfer to Criminal Court	The juvenile court judge will decide if the case of a child who is 16 or older should be transferred to adult criminal court. Children under 16 cannot have their cases transferred to adult court. This hearing only happens for felony charges and only if the prosecuting attorney (DA) asks for the transfer.
Jurisdiction, part 1 (pretrial or settlement conference)	The judge, lawyers, and probation officer try to resolve the case without having a trial. The judge decides if your child actually did what the petition says. The judge will ask your child to *admit* or *deny* the charges listed in the petition. Your child's lawyer will consider the evidence and possible outcomes, and then advise your child what to do. If your child **admits** the charges, your child will give up the right to a trial. The judge will decide that the petition is true. If your child **denies** the charges, there will be a trial, usually a week or two later.
Jurisdiction, part 2 (trial)	At the trial, the prosecuting attorney will show evidence to prove the charges. Then your child's lawyer will present your child's defense. The judge will consider all the evidence and decide if the charges are true "beyond a reasonable doubt." – ***If there is not enough proof to decide the charges are true****,* the judge will dismiss the case. If your child is in custody, she or he will be let go. – ***If the judge decides the charges are true****,* there will be a disposition hearing.
Disposition	This happens *only* if the judge decides that the petition is true. The judge then decides what orders to make for your child. This hearing is often right after the jurisdiction hearing but can also be postponed to another day.
Hearings on Motions	The court decides legal questions that affect the case.
Review Hearings	This hearing provides a way for the court to check how your child is doing on probation or in placement. If your child is placed in foster care, the court must hold a review hearing at least once every six months.

GLOSSARY OF TERMS

Civil Judgment: A court order requiring a person to pay money to another person.

Detention hearing: The first court hearing after an arrest if the child is detained in custody.

Felony: An action that would be a serious crime if committed by an adult.

In-custody detention: Keeping a person in a secure place and not letting them go free or go home.

Juvenile delinquency: See *juvenile justice*, below.

Juvenile justice: The legal system designed to guide, rehabilitate, and protect children who break the law, and to keep the community safe. Also known as "juvenile delinquency."

Miranda: The U.S. Supreme Court case that requires law enforcement to tell persons detained in custody their rights before asking them questions.

Misdemeanor: An action that would be a less serious crime if committed by an adult.

Notice to appear: A paper telling you and your child to meet with a probation officer or go to juvenile court at a specific time and place.

Notice of hearing: A paper telling you the date, time, and place of a court hearing, and what will happen there.

Petition: A paper filed with the court that says your child did something against the law.

601 petition: A petition filed by the probation officer that accuses your child of something that's against the law for a child to do, for example, skipping school or breaking curfew.

602 petition: A petition filed by the prosecuting attorney that accuses your child of doing something that would be a crime if an adult did it.

Probation officer: A law enforcement officer who advises the court about the orders the child needs to protect and rehabilitate the child, and supervises the child as ordered by the court.

Restitution: Money owed to the victim of an act to make up for the damage or harm done.

Terms* or *terms and conditions of probation: Court orders that tell a person on probation what they must and must not do.

Ward: A child whom the court has decided to supervise because the child did something against the law.

JV-710

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NUMBER:	*FOR COURT USE ONLY*
NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: EMAIL ADDRESS: ATTORNEY FOR (*name*):	**DRAFT** **Not approved by** **the Judicial Council**
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
Case Name:	
ORDER TO TRANSFER JUVENILE TO CRIMINAL COURT JURISDICTION **(Welfare and Institutions Code, § 707)**	CASE NUMBER:

1. a. Date of hearing: Dept.: Room:
   b. Judicial officer *(name):*
   c. Persons present:
   ☐ Child ☐ Child's attorney *(name):*
   ☐ Deputy District Attorney *(name):* ☐ Other:

2. ☐ The court has read and considered ☐ the petition and report of the probation officer ☐ other relevant evidence.

3. **THE COURT FINDS** *(check one)*
   Welfare and Institutions Code section 707
   a. ☐ The child was 16 years old or older at the time of the alleged felony offense; or
   b. ☐ The individual was 14 or 15 years of age at the time of the alleged offense, the alleged offense is an offense listed in Welfare and Institutions Code section 707(b), and the individual was not apprehended before the end of juvenile court jurisdiction.

4. **AFTER CONSIDERING EACH OF THE TRANSFER OF JURISDICTION CRITERIA, THE COURT ALSO FINDS AND ORDERS:**
   The court has considered each of the criteria in section 707(a)(3) and has documented its findings on each of the criteria on the record, and based on those findings makes the following orders:
   a. ☐ The transfer motion is denied. The child is retained under the jurisdiction of the juvenile court.
   The next hearing is on *(date):* at *(time):*
   for *(specify):*

   b. ☐ The transfer motion is granted. The prosecutor has shown by a preponderance of the evidence that the child should be transferred to the jurisdiction of the criminal court.
   (1) ☐ The matter is referred to the District Attorney for prosecution under the general law.
   (2) ☐ The child is ordered to appear in criminal court on *(date):* at *(time):*
   in Department:
   (3) ☐ The petition filed on *(date):* is dismissed without prejudice on the appearance date in (2).
   (4) ☐ The child is to be detained in ☐ juvenile hall ☐ county jail (section 207.1).
   (5) ☐ Bail is set in the amount of: $
   (6) ☐ The child is released ☐ on own recognizance ☐ to the custody of:

Date:

JUDICIAL OFFICER

Form Approved for Optional Use
Judicial Council of California
JV-710 [Rev. January 1, 2020]

ORDER TO TRANSFER JUVENILE TO CRIMINAL COURT JURISDICTION
(Welfare and Institutions Code, § 707)

Welfare and Institutions Code, §§ 207.1, 389(c), 707, 781(d);
Cal. Rules of Court, rules 5.504, 5.770
www.courts.ca.gov

	Commenter	Position	Comment	Committee Response
1.	Orange County Bar Association By: Deirdre Kelly President	A	Does the proposal appropriately address the stated purpose? Yes. Should rule 5.770 or form JV-710 be modified in to C.S. v. Superior Court, 29 Cal.App.5th 1009 (2018), which held that the court must clearly articulate its findings for each criterion in issuing a transfer order? No. Prior to the most recent amendments to JV-710 (to comport with Prop. 57), the form contained the five factors the court needed consider for transfer and then asked the court to check a box next to each factor on which transfer was based. This committee recognized this was an outdated holdover from pre-Proposition 57 fitness hearings and needed to be changed to conform with the change in law. Specifically, prior to Proposition 57, a juvenile court judicial officer could declare a minor unfit for juvenile court by finding the minor unfit under a single factor. The Proposition 57 amendments to Welfare and Institutions Code section 707, subdivision (a)(2), clarified that the court must look to the totality of circumstances, not a single factor: "In making its decision, the court shall consider the criteria specified in subparagraphs (A) to (E) below." This committee recognized there was an inherent and irreconcilable tension between asking the court to consider the totality of circumstances on the one hand and asking the court to check a box related to an individual circumstance in support	No response required. The committee determined that the best way to ensure that the rules and forms are consistent with the C.S. case and prompt judges to create a detailed record of their findings on each criterion in 707(a)(3) would be to amend the rule to include that requirement and to reword the findings and orders section of the form order to clarify that the record must document the court's findings on each of the criteria.

	Commenter	Position	Comment	Committee Response
			of transfer and deleted the check-the-box approach of the prior form. C.S. v. Superior Court (2018) 29 Cal.App.5th 1009 ("C.S."), should not cause this committee to re-adopt the old approach. In C.S., the Court of Appeal made clear that to provide a sufficient record for review, a judge considering transfer must provide a "statement of reasons" which "articulates its evaluative process and shows how it weighed the evidence presented in light of the applicable standards." (Id. at p. 1029, internal citations and quotation marks omitted.) The court explained that "without a statement of reasons detailing the lower court's analytical process an appellate court cannot determine whether the trial court properly exercised its discretion." (Ibid.) Stated plainly, C.S. urged trial courts to show their work: "[W]e conclude that the juvenile court's transfer decision does not permit meaningful appellate review because the juvenile court did not clearly and explicitly articulate it's evaluative process by detailing how it weighed the evidence and by identifying[ing] the specific facts which persuaded the court to reach its decision to transfer C.S. to adult/criminal court." (Id. at p. 1035, internal citations and quotation marks omitted.) Reverting to the check-the-box approach of the prior form is the opposite of what the court in C.S. is asking of trial judges, which is to create a record of how the court reached its conclusion.	

	Commenter	Position	Comment	Committee Response
2.	Pacific Juvenile Defender Center By Sue Burrell, Policy and Training Director San Francisco	AM	Does the proposal appropriately address the stated purpose? Yes. Should rule 5.770 or form JV-710 be modified in to C.S. v. Superior Court, 29 Cal.App.5th 1009 (2018), which held that the court must clearly articulate its findings for each criterion in issuing a transfer order? Yes, but we also believe the rule should clarify that while specific findings are needed, the law has changed through Proposition 57, so that it is no longer required that a youth be amenable to juvenile court treatment (previously "fit") on each of the criteria to avoid transfer. Prior to Proposition 57, Welfare and Institutions Code section 707, subdivision (c), required that in order to overcome the presumption of unfitness, the young person had to be found fit on all five statutory criteria: A determination that the minor is a fit and proper subject to be dealt with under the juvenile court law shall be based on a finding of amenability after consideration of the five criteria set forth in subparagraph (A) of paragraphs (1) to (5) inclusive, and findings therefore recited in the order as to each of those criteria that the minor is a fit and proper minor under each and every one of those criteria, in making a	No response required. The committee determined that the best way to ensure that the rules and forms are consistent with the C.S. case and prompt judges to create a detailed record of their findings on each criterion in 707(a)(3) would be to amend the rule to include that requirement and to reword the findings and orders section to clarify that the record must document the court's findings on each of the criteria.

	Commenter	Position	Comment	Committee Response
			finding of fitness. (Former Welf. & Inst. Code §707, subd. (c), italics added.) For youth who were presumed fit for juvenile court, transfer could occur based on "any one or a combination of the factors set forth in clause (i) of subparagraphs (A) to (E)". (Former Welf. & Inst Code, § 707, subd. (a).) Those specific statutory directives were eliminated by Proposition 57. (Prop 57, § 4.2, approved Nov. 8, 2016, Ballot Pamp., Gen. Elec. (Nov. 8, 2016) text of Prop. 57, p. 144.) Section 707 now provides only that the court "shall consider the criteria specified in subparagraphs (A) to (E), inclusive; shall "decide whether the minor shall be transferred to a court of criminal jurisdiction"; and "shall recite the basis for its decision in an order entered upon the minutes." (Welf. & Inst. Code, § 707 (a)(3), as amended by Prop 57, §4.2, approved Nov. 8, 2016.) Prior to Proposition 57, many youths were found "unfit" based on one or two of the five criteria. So while we agree with the proposal to include the principle in the C.S. case on having findings sufficient to facilitate appellate review, we also think it is important to clarify that C.S. does not take us back to the pre-Proposition 57 law requiring youth to be fit on all five criteria to stay in juvenile court. **Additional global comment: Consider changing "minor" to "youth" throughout.**	The committee determined that it was appropriate to continue using the standard Judicial Council

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			We are pleased at the efforts to modernize the terminology for referring to young people through use of the term "child" or "individual" to replace "minor." We suggest further changing the term to "youth" whenever possible. That would get rid of the pejorative term "minor," which the dictionary defines as meaning "lesser in importance, seriousness, or significance." "Youth" seems even more appropriate than "child" for the transfer rules since most will be 16 or 17 years of age, and the ones who are eligible for crimes alleged to have been committed at 14 or 15 years of age will be past the age for juvenile court jurisdiction. A number of statutes have used the term "youth," for example, Welfare and Institutions Code sections 224.73, 625.6, 992, 1177, 1788, 1900, 2011, 2023, 13754; some statutes use a combination of "child", "youth," and "minor." **Suggested Language** **Rule 5.766. General provisions** (a) Hearing on transfer of jurisdiction to criminal court (§ 707) A ~~child~~ youth who is the subject of a petition under section 602 and who was 14 years or older at the time of the alleged felony offense may be considered for prosecution under the general law in a court of criminal jurisdiction. The district attorney or other appropriate prosecuting officer may make a motion to transfer the ~~child~~ youth from juvenile court to a	term "child" because it has a definition in statute and rule and serves as a reminder that the juvenile justice courts are focused on persons who are developmentally different from adults. The committee declined to change the term to youth because that latter term is not defined and is too broad.

	Commenter	Position	Comment	Committee Response
			court of criminal jurisdiction, in one of the following circumstances: (1) The individual was 14 or 15 years or older of age at the time of the alleged offense listed in section 707(b) and was not apprehended before the end of juvenile court jurisdiction. (2) The ~~child~~ youth was 16 years or older at the time of the alleged felony offense. (b)–(d) * * * Rule 5.768. Report of probation officer (a) Contents of report (§ 707) The probation officer must prepare and submit to the court a report on the behavioral patterns and social history of the ~~child~~ youth being considered. The report must include information relevant to the determination of whether the ~~child~~ youth should be retained under the jurisdiction of the juvenile court or transferred to the jurisdiction of the criminal court, including information regarding all of the criteria in section 707(a)(2)(3). The report must also include any written or oral statement offered by the victim pursuant to section 656.2. (b)–(c) * * * Rule 5.770. Conduct of transfer of jurisdiction hearing under section 707 (a) * * * (b) Criteria to consider (§ 707) Following receipt of the probation officer's report and any other relevant evidence, the court may order that the child youth be transferred to the jurisdiction of the criminal court if the	

	Commenter	Position	Comment	Committee Response
			court finds: (1) The ~~child~~ youth was 16 years or older at the time of any alleged felony offense, or the individual was 14 or 15 years at the time of an alleged felony offense listed in section 707(b) and was not apprehended before the end of juvenile court jurisdiction; and (2) The child youth should be transferred to the jurisdiction of the criminal court based on an evaluation of all of the criteria in section 707(a)(2)(3) as provided in that section. <u>The court shall recite the basis for its decision, detailing how it weighed the evidence and identifying the specific facts that persuaded the court to reach its decision, notwithstanding that the decision shall be based on the totality of the circumstances and the youth need not be found amenable on each of the five criteria in order to remain in juvenile court.</u>	
3.	Superior Court of Los Angeles County	A	Request for Specific Comments Does the proposal appropriately address the stated purpose? -Yes, the proposal addresses the stated purpose. Should rule 5.770 or form JV-710 be modified in to C.S. v. Superior Court, 29 Cal.App.5th 1009 (2018), which held that the court must clearly articulate its findings for each criterion in issuing a transfer order? -Yes, the rule and form should be modified.	No response required. The committee determined that the best way to ensure that the rules and forms are consistent with the C.S. case and prompt judges to create a

	Commenter	Position	Comment	Committee Response
				detailed record of their findings on each criterion in 707(a)(3) would be to amend the rule to include that requirement and to reword the findings and orders section to clarify that the record must document the court's findings on each of the criteria.
			The advisory committee also seeks comments from courts on the following cost and implementation matters: Would the proposal provide cost savings? If so please quantify. -We do not anticipate cost savings.	No response required.
			What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems? -None.	No response required.
			Would four months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? -Yes, four months would be sufficient.	No response required.
			How well would this proposal work in courts of different sizes? -There should be no significant difference.	No response required.
4.	Superior Court of Orange County	AM	**Order to Transfer Juvenile to Criminal Court Jurisdiction (JV-710)**	

	Commenter	Position	Comment	Committee Response
			▪ To remind judges that findings must be considered, and an order must be made pursuant to section 707(a)(3), it is recommended that a new section #4 be added and titled, *The Court Finds*, that will provide a court finding for each individual relevant factor under 707(a)(3). This would comply with the required findings set forth in the *C.S.* case (29 Cal.App.5th 1009). The section should include the language below: Sophistication: □ **does** □ **does not** support the motion to transfer jurisdiction to the criminal court. Sufficiency of time to rehabilitate: □ **does** □ **does not** support the motion to transfer jurisdiction to the criminal court. Previous delinquent history: □ **does** □ **does not** support the motion to transfer jurisdiction to the criminal court. Previous attempts by the juvenile court to rehabilitate the minor: □ **does** □ **does not** support the motion to transfer jurisdiction to the criminal court. Gravity of the offense: □ **does** □ **does not** support the motion to transfer jurisdiction to the criminal court.	The committee determined that the best way to ensure that the rules and forms are consistent with the C.S. case and prompt judges to create a detailed record of their findings on each criterion in 707(a)(3) would be to amend the rule to include that requirement and to reword the findings and orders section to clarify that the record must document the court's findings on each of the criteria.

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			▪ The existing number #4, *The Court Also Finds and Orders* section, should be renumbered to #5. ▪ Minors who were under the adult court jurisdiction prior to section 707 being amended may be referred to juvenile court for a transfer hearing. The prosecutor or the former minor may request to have the motion withdrawn if the petitioner was under 16 years of age at the time of the violation. Due to this, it is recommended that a subsection "b" be added to *The Court Also Finds and Orders* section that reads: □ The transfer motion has been withdrawn by the □ **petitioner** □ **prosecutor.** The next hearing is on (*date*): at (*time*): **Rule 5.766, 5.768, and 5.770** ▪ It is recommended the word "child" be replaced with "minor" in the rules to be consistent with language used in section 707. ▪ Orange County has started referring to "minors" as "youth" since in many cases the accused youth are no longer minors. **Request for Specific Comments** Would the proposal provide a cost savings? -No, the proposal would not provide a cost savings.	The committee determined that this form was not the appropriate place to include this motion as the form is expressly an order on a transfer motion and any withdrawal can be made in a minute order without using a Judicial Council form. The committee determined that it was appropriate to continue using the standard Judicial Council terminology of child because it has a definition in statute and rule and serves as a reminder that the juvenile justice courts are focused persons who are developmentally different from adults. The committee declined to change to youth because that term is not defined and is too broad. No response required.

	Commenter	Position	Comment	Committee Response
			What would the implementation requirements be for courts? -Judges and staff would be notified of the changes in the rule and forms. Procedures updates and changes to the case management system may be needed. Would four months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? -Yes, four months would be sufficient time for implementation.	The committee will note these impacts in its report to the Judicial Council. No response required.
5.	Superior Court of Riverside County By: Susan Ryan Chief Deputy – Legal Services	A	Does the proposal appropriately address the stated purpose? -Yes. The updates to Rules 5.766, 5.768 and 5.770 seem to implement the changes of SB 1391. Updating the JV-060-INFO will give more accurate and updated information to parents of 14 and 15 year olds. Should rule 5.770 or form JV-710 be modified in to C.S. v. Superior Court, 29 Cal.App.5th 1009 (2018), which held that the court must clearly articulate its findings for each criterion in issuing a transfer order? -Updating the JV-710 could be helpful but is not necessary. Some courts do not use the JV-710 but instead would include the findings for each criteria in the minute order for the transfer. It may be a good idea to update Rule 5.770 to state that the trial court must clearly articulate each criterion.	No response required. The committee determined that the best way to ensure that the rules and forms are consistent with the C.S. case and prompt judges to create a detailed record of their findings on each criterion in 707(a)(3) would be to amend the rule to include that requirement and to reword the findings and orders section to clarify that the record must document the court's findings on each of the criteria.

	Commenter	Position	Comment	Committee Response
				No response required.
			Would the proposal provide cost savings? -No.	
			What would the implementation requirements be for courts? -Notify the judicial officers, court staff and justice partners of the forms changes and Rule changes. Some minute codes may need to be created or updated in the case management system to allow the court to clearly articulate the findings for each criteria.	The committee will note these impacts in its report to the Judicial Council.
			Would four months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? -Yes	No response required.
			How well would this proposal work in courts of different sizes? -The same notifications and update codes would likely need to be made in all courts. The proposal should work for courts of all sizes.	No response required.
6.	Superior Court of San Diego County By: Mike Roddy Executive Officer	AM	CRC 5.766(d) has an odd footnote. It says "So in original" to justify a double "the". The sentence should be fixed and the footnote deleted.	The committee has modified the proposal to correct this error in the rule of court.
			CRC 5.770(b)(1): add "of age" after "14 or 15 years"	The committee has adopted this suggestion.

	Commenter	Position	Comment	Committee Response
			CRC 5.770(c): revise to add the requirements of *C.S. v. Superior Court*, 29 Cal.App.5th 1009 (2018) JV-060-INFO: still says age 14 on page 6 when talking about adult prison; change to 16 JV-710: revise to comply with *C.S. v. Superior Court*, 29 Cal.App.5th 1009 (2018)	The committee agrees and has modified the proposal to add these requirements to the rule. The committee has made this recommended change. The committee has revised the proposal for revising form JV-710 to make clearer the required findings that the court must make on the record in transfer cases.