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INVITATION TO COMMENT

CACI19-03

Title
Civil Jury Instructions (CACI) Revisions

Proposed Rules, Forms, Standards, or Statutes
Add and revise civil jury instructions and verdict forms

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

Action Requested
Review and submit comments by August 30, 2019

Proposed Effective Date
November 2019

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Executive Summary and Origin

The Judicial Council Advisory Committee on Civil Jury Instructions has posted proposed additions and revisions to the Judicial Council civil jury instructions (CACI). Under Rule 10.58 of the California Rules of Court, the advisory committee is responsible for regularly reviewing case law and statutes affecting jury instructions and making recommendations to the Judicial Council for updating, revising, and adding topics to the council's civil jury instructions. On approval by the Judicial Council, all changes will be published in the 2020 edition of the official LexisNexis CACI publication.

Attachments

Proposed revised and new instructions and verdict forms: pp. 5–103

The proposals have not been approved by the Judicial Council and are not intended to represent the views of the council, its Rules and Projects Committee, or its Policy Coordination and Liaison Committee. These proposals are circulated for comment purposes only.

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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.)

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- "[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) 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

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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

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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

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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].)

- "the 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 ed. 2005) Contracts, §§ 685–706

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

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

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

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

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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 covenant 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.; hHowever, 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 from receiving the benefits that he/she was entitled to have received under the contract***];**

54. That [*name of defendant***]'s conduct was a failure to act fairly and in good faithThat [***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.

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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 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*

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(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

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Draft—Not Approved by Judicial Council

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

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372. Common Count: Open Book Account

A book account is a record of 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***] kept [a/an] [written/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 *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.)

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- "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.)

- "[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*

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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 ed. 1997) Pleading, § 522

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

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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 claimed to be due by [***name of plaintiff***] ~~stated in the account~~ was the correct amount owed by [***name of defendant***] 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

- "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

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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.)

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- "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 ed. 1997) Pleading, § 515

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

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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, 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.)

- "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.)

- "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.)

- "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

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. There is a split of authority as to whether all potential tortfeasors must be defendants at trial for the rule of *Summers* to apply. (Compare *Setliff v. E. I. Du Pont de Nemours & Co.* (1995) 32 Cal.App.4th 1525, 1534-1535 [38 Cal.Rptr.2d 763] [California courts have applied the alternative liability theory only when all potential tortfeasors have been joined as defendants] with *Vahey v. Sacia* (1981) 126 Cal.App.3d 171, 177 [178 Cal.Rptr. 559] [*Summers* applies to multiple tortfeasors not to multiple defendants].) The issue will arise if there are potential *Summers* tortfeasors who settled before trial, are immune, are beyond the court's jurisdiction, or are not before the court for other reasons.

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.)

- 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

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that the matter went to trial only as against respondent, for A, B, and/or C was also a tortfeasor." (*Vahey, supra,* 126 Cal.App.3d at p. 177.)

- "[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 ed. 2005) Torts, § 1194

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)

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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

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- No Wrongful Life Claim Against Parent. Civil Code section 43.6(a).

- "[I]t may be helpful to recognize that although the cause of action at issue has attracted a special name—'wrongful life'—plaintiff's basic contention is that her action is simply one form of the familiar medical or professional malpractice action. The gist of plaintiff's claim is that she has suffered harm or damage as a result of defendants' negligent performance of their professional tasks, and that, as a consequence, she is entitled to recover under generally applicable common law tort principles." (*Turpin v. Sortini* (1982) 31 Cal.3d 220, 229 [182 Cal.Rptr. 337, 643 P.2d 954].)

- "Claims for 'wrongful life' are essentially actions for malpractice based on negligent genetic counseling and testing." (*Gami v. Mullikin Medical Center* (1993) 18 Cal.App.4th 870, 883 [22 Cal.Rptr.2d 819].)

- General damages are not available: "[W]e conclude that while a plaintiff-child in a wrongful life action may not recover general damages for being born impaired as opposed to not being born at all, the child—like his or her parents—may recover special damages for the extraordinary expenses necessary to treat the hereditary ailment." (*Turpin, supra,* 31 Cal.3d at p. 239.)

- A child may not recover for loss of earning capacity in a wrongful-life action. (*Andalon v. Superior Court* (1984) 162 Cal.App.3d 600, 614 [208 Cal.Rptr. 899].)

- The negligent failure to administer a test that had only a 20 percent chance of detecting Down syndrome did not establish a reasonably probable causal connection to the birth of a child with this genetic abnormality. (*Simmons, supra*.)

- Wrongful life does not apply to normal children. (*Alexandria S. v. Pac. Fertility Medical Ctr.* (1997) 55 Cal.App.4th 110, 122 [64 Cal.Rptr.2d 23].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 979–985

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 9.21–9.22

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, §§ 31.15, 31.50 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 415, *Physicians: Medical Malpractice*, § 415.11 (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence*, § 165.70 (Matthew Bender)

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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 the public 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.

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

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

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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

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2007 poisoning; (6) plaintiffs suffered harm as a result of the 2007 poisoning that was different from the type of harm suffered by the general public; and (7) the 2007 poisoning was a substantial factor in causing plaintiffs' harm." (*Department of Fish & Game, supra,* 197 Cal.App.4th at p. 1352 [citing this instruction].)

- "Where the nuisance alleged is not also a private nuisance as to a private individual he does not have a cause of action on account of a public nuisance unless he alleges facts showing special injury to himself in person or property of a character different in kind from that suffered by the general public." (*Venuto, supra,* 22 Cal.App.3d at p. 124, internal citations omitted; but see *Birke, supra,* 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

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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

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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)

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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 covenant 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***];**

5~~4~~. That [*name of defendant***]'s conduct was a failure to act fairly and in good faith; and**

6~~5~~. That [*name of plaintiff***] was harmed by [***name of defendant***]'s conduct.**

~~**Both parties to an employment relationship have a duty not to do anything that prevents the other party from receiving the benefits of their agreement. Good faith means honesty of purpose without any intention to mislead or to take unfair advantage of another. Generally speaking, it means being faithful to one's duty or obligation.**~~

New September 2003; Revised November 2019

Directions for Use

If the existence of a contract is at issue, see instructions on contract formation in the 300 series.

~~This instruction must be completed by inserting an explanation of the conduct that violated the duty to act in good faith.~~

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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, 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].)~~

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- "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)

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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].)

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- "[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 v. McKesson Corp.* (1990) 223 Cal.App.3d 1514, 1521 [273 Cal.Rptr. 296] [upholding jury instruction].)

Secondary Sources

Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group) ¶¶ 4:5, 4:271

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, § 100.30 (Matthew Bender)

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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 can be accommodated in a way that 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

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Directions for Use

This instruction is based on the Fair Employment and Housing Council regulation addressing the defense of health or safety risk. (See 2 Cal. Code Regs., § 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 2 Cal. Code Regs., § 11067(d).)

The list of factors to be considered is not exclusive. (See 2 Cal. Code Regs., § 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

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reason for discharging employee].)

- "The employer has the burden of proving the defense of the threat to the health and safety of other workers by a preponderance of the evidence." (*Raytheon Co. v. Fair Employment & Housing Com.* (1989) 212 Cal.App.3d 1242, 1252 [261 Cal.Rptr. 197].)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 936, 937

Chin et al., Cal. Practice Guide: Employment Litigation, Ch. 9-C, *California Fair Employment And Housing Act (FEHA)*, ¶¶ 9:2298, 9:2402–9:2403, 9:2405, 9:2420 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, § 2.111

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.97[1] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.54, 115.104 (Matthew Bender)

California Civil Practice: Employment Litigation § 2:86 (Thomson Reuters)

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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. [¶]

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(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)

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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**

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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. (2 Cal.Code Regs. § 11062.) Give the second option for element 6 in order to allege the employer's desire 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*).

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- 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 ed. 2005) Constitutional Law, §§ 876, 922, 940, 941

Chin et al., California Practice Guide: Employment Litigation, Ch. 7-A, *Title VII And The California Fair Employment And Housing Act,* ¶¶ 7:151, 7:215, 7:305, 7:610–7:611, 7:631–7:634, 7:641 (The Rutter Group)

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.52[3] (Matthew Bender)

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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

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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.

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 ed. 2005) Constitutional Law, § 921

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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

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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

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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.)

- "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,* ¶ 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)

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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).)

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 wage discrimination. The statute refers to *employees* of the opposite sex or different race or ethnicity. There is language in cases, however, that suggest 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 v. Par Pools, Inc.* (2003) 111 Cal.App.4th 620, 628 [3 Cal.Rptr.3d 844] [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]~~.)

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.)

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- "[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.

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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 ed. 2005) Constitutional Law, §§ 816, 819 et seq.

3 Civil Rights Actions, Ch. 10, *Deprivation of Rights Under Color of State Law—Law Enforcement and Prosecution*, ¶ 10.04 (Matthew Bender)

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

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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

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.)

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- "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.)

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Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 144–149

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-A, *Vicarious Liability*, ¶¶ 2:676, 2:677 (The Rutter Group)

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, § 8.04[6] (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent*, §§ 427.11, 427.22 (Matthew Bender)

18 California Points and Authorities, Ch. 182, *Principal and Agent*, §§ 182.04, 182.120 et seq. (Matthew Bender)

1 California Civil Practice: Torts, § 3:29 (Thomson Reuters)

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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 have reasonable knowledge of all relevant facts about ~~are fully informed of~~ 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].)

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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

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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

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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)

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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 aboutare 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 ed. 2005) Torts, § 1720

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)

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

1 California Civil Practice: Torts, § 5:17 (Thomson Reuters)

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3903Q. Survival Damages (Economic Damage) (Code Civ. Proc, § 377.34)

If you decide that [*name of plaintiff*] has proved [his/her] claim against [*name of defendant*] for the death of [*name of decedent*], you must also decide the amount of damages that [*name of decedent*] sustained before death and that [he/she] would have been entitled to recover because of [*name of defendant*]'s conduct[, including any [penalties/ [or] punitive damages] as explained in the other instructions that I will give you].

[*Name of plaintiff*] may recover the following damages:

[1. The reasonable cost of reasonably necessary medical care that [*name of decedent*] received;]

[2. The amount of [income/earnings/salary/wages] that [he/she] lost before death;]

[3. The reasonable cost of health care services that [*name of decedent*] would have provided to [*name of family member*] before [*name of decedent*]'s death;]

[3. [*Specify other recoverable economic damage.*]]

You may not award damages for any loss for [*name of decedent*]'s shortened life span attributable to [his/her] death.

New May 2019; 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. v. Superior Court* (1999) 21 Cal.4th 292, 303-304 [87 Cal.Rptr.2d 441, 981 P.2d 68], internal citations omitted.)

- "The first category consists of the reasonable value of nursing and other services that Decedent would have provided to his wife prior to his death, but was unable to provide due to his illness (replacement care). Again, [defendant] does not contest the recoverability of such damages here. Nor did it below. Such damages are recoverable. (See … CACI No. 3903E ["Loss of Ability to Provide Household Services (Economic Damage)"].)" (*Williams v. The Pep Boys Manny Moe & Jack of California* (2018) 27 Cal.App.5th 225, 238 [238 Cal.Rptr.3d 809], internal citations omitted.)

- "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, 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***].**

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:*

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[*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 to pay the rent or vacate the property excludes Saturdays, Sundays, and judicial holidays, but otherwise 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).)

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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 https://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

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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.)

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- "An unlawful detainer action based on failure to pay rent must be preceded by a three-day notice to the tenant to pay rent or quit the premises. Failure to state the exact amount of rent due in the notice is fatal to the subsequent unlawful detainer action." (*Lynch & Freytag v. Cooper* (1990) 218 Cal.App.3d 603, 606, fn. 2 [267 Cal.Rptr. 189], internal citations omitted.)

- "[D]efendant admitted in his answer that he 'ultimately received [the relevant] notice' but 'affirmatively allege[d] that he was not properly and legally served' with a valid notice. We find that, under the circumstances of this case, the defendant waived any defect in the challenged service of the notice under section 1162, subdivision 1." (*Valov, supra,* 168 Cal.App.3d at p. 876.)

- "In the cases discussed … , a finding of proper service turned on a party's acknowledgment or admission the notice in question was in fact received. In the present case, defendant denied, in his answer and at trial, that he had ever received the three-day notice. Because there was no admission of receipt in this case, service by certified mail did not establish or amount to personal delivery. Further, there was no evidence of compliance with any of the three methods of service of a three-day notice to pay rent or quit provided in section 1162. Therefore, the judgment must be reversed." (*Liebovich, supra,* 56 Cal.App.4th at p. 518.)

- "[Code of Civil Procedure section 1162 specifies] three ways in which service of the three-day notice may be effected on a residential tenant: … . As explained in *Liebovich, supra,* … , '[w]hen the fact of service is contested, compliance with one of these methods must be shown or the judgment must be reversed.' " (*Palm Property Investments, LLC, supra,* 194 Cal.App.4th at p. 1425.)

- "In commercial leases the landlord and commercial tenant may lawfully agree to notice procedures that differ from those provided in the statutory provisions governing unlawful detainer." (*Culver Center Partners East #1, L.P., supra,* 185 Cal.App.4th at p.750.)

- "[E]ven if some policy rationale might support such a waiver/forfeiture [by actual receipt] rule in the residential lease context, there is no basis to apply it in the commercial context where matters of service and waiver are prescribed in the lease itself. Nothing in the parties' lease suggests actual receipt of a notice to quit results in the waiver or forfeiture of [tenant]'s right to service accomplished in the manner prescribed. To the contrary, the lease specifically provides, 'No covenant, term or condition, or breach' of the lease 'shall be deemed waived except if expressly waived in a written instrument executed by the waiving party.' Although [tenant's agent] acted on the notice to quit by attempting to deliver the rent check, neither her fortuitous receipt of the notice nor her actions in response to it constitutes an express waiver of the notice provisions in the lease." (*Culver Center Partners East #1, L.P., supra,* 185 Cal.App.4th at p. 752, internal citation omitted.)

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2006) Real Property, §§ 720, 722–725, 727

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1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.26–8.68

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) §§ 5.2, 6.10–6.30, Ch. 8

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 5-G, *Eviction Controls*, ¶¶ 5:224.3, 5:277.1 et seq. (The Rutter Group)

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 7-C, *Bases For Terminating Tenancy*, ¶¶ 7:98.10, 7:327 (The Rutter Group)

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, §§ 210.21, 210.22 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.11, 5.12

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.11 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, §§ 236.13, 236.13A (Matthew Bender)

Miller & Starr, California Real Estate, Ch. 19, *Landlord-Tenant*, §§ 19:202–19:204 (Thomson Reuters)

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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***].**

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

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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 to correct the failure or vacate the property excludes Saturdays, Sundays, and judicial holidays, but otherwise 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 https://www.courts.ca.gov/holidays.htm.

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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.)

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- "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.)

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- "[E]ven if some policy rationale might support such a waiver/forfeiture [by actual receipt] rule in the residential lease context, there is no basis to apply it in the commercial context where matters of service and waiver are prescribed in the lease itself. Nothing in the parties' lease suggests actual receipt of a notice to quit results in the waiver or forfeiture of [tenant]'s right to service accomplished in the manner prescribed. To the contrary, the lease specifically provides, 'No covenant, term or condition, or breach' of the lease 'shall be deemed waived except if expressly waived in a written instrument executed by the waiving party.' Although [tenant's agent] acted on the notice to quit by attempting to deliver the rent check, neither her fortuitous receipt of the notice nor her actions in response to it constitutes an express waiver of the notice provisions in the lease." (*Culver Center Partners East #1, L.P., supra,* 185 Cal.App.4th at p. 752, internal citation omitted.)

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2006) Real Property, §§ 720, 726, 727

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.26–8.68

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) §§ 5.2, 6.10–6.16, 6.25–6.29, 6.38–6.49, Ch. 8

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, §§ 210.21, 210.23, 210.24 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.11, 5.12

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.11 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, §§ 236.11, 236.12 (Matthew Bender)

Miller & Starr, California Real Estate (3d ed. 2008) Ch. 19, *Landlord-Tenant*, §§ 19:202–19:204 (Thomson Reuters)

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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: $ _____]

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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 fall~~s~~ on a Saturday, Sunday, or judicial holiday, modify questions 2 and 4 to allow the tenant three days excluding weekends and holidays~~until the next day that is not a Saturday, Sunday, or holiday~~ to cure the default. (See Code Civ. Proc., § 1161(2).)

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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

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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

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*

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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 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.

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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

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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 fall~~s~~ on a Saturday, Sunday, or judicial holiday, modify question~~s~~ 3 and 4 to allow the tenant three days excluding weekends and holidays~~until the next day that is not a Saturday, Sunday, or holiday~~ to cure the default.

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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

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 explaining what disclosures are and are not protected as appropriate to the facts of the case.~~It has been held that a report of publicly known facts is not a protected disclosure. (*Mize-Kurzman v. Marin Community College Dist.* (2012) 202 Cal.App.4th 832, 858 [136 Cal.Rptr.3d 259].) Another court, however, has ~~cast doubt on this limitation and~~ held that protection is not 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).)

"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 ed. 2005) Agency and Employment, § 349

Chin et al., California Practice Guide: Employment Litigation, Ch. 5-L, *Employment Torts And Related Claims: Other Statutory Claims*, ¶ 5:894 et seq. (The Rutter Group)

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.03[2][c] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.12, 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 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 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].)

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].)

- "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.)

- " '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 section [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

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 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 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].)

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 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].)

- "[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

4902. 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 do anything unreasonable that interferes 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 [-- Cal.Rptr.3d --].)

- "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

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 claims arising under the Homeowners 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 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 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 violations 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.

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. (Ibid.) "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.)

- "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].)

Secondary Sources

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.)

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- "[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) 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

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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.