CACI07-01
Civil Jury Instruction (CACI) Comment Form
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However, we provide this form for those who wish to submit comments in writing.

Please indicate which instruction(s) you are commenting on:

_____

Agree ☐ Agree as Modified ☐ Disagree ☐

Comments: _____

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Name:_____ **Title:**_____

On Behalf of (organization):_____

Address:_____

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Your comments may be written on this *Response Form* or as a letter. If you are not commenting directly on this sheet, please remember to attach it to your comments for identification purposes. All comments will become part of the public record for this proposal.

Mail or **fax** this form to:

Judicial Council of California, 455 Golden Gate Avenue,
San Francisco, CA 94102 Attention: Benita Downs

CACI07-01

Fax: (415) 865-7664

DEADLINE FOR COMMENT: 5:00 P.M. Friday, March 9, 2007.

CIVIL JURY INSTRUCTIONS (CACI)
SPRING 2007 REVISIONS—TABLE OF CONTENTS

102. Taking Notes During the Trial

You have been given notebooks and may take notes during the trial. Do not remove the notebooks from the jury box at any time during the trial. You may take your notes into the jury room during deliberations.

You should use your notes only to remind yourself of what happened during the trial. Do not let your note-taking interfere with your ability to listen carefully to all the testimony and to watch the witnesses as they testify. Nor should you allow your impression of a witness or other evidence to be influenced by whether or not other jurors are taking notes. Your independent recollection of the evidence should govern your verdict and you should not allow yourself to be influenced by the notes of other jurors if those notes differ from what you remember.

[The court reporter is making a record of everything that is said. If during deliberations you have a question about what the witness said, you should ask that the court reporter's records be read to you. You must accept the court reporter's record as accurate.]

Instructional History

(*New September 2003*)

(*Revised April 2007*)

Directions for Use

This instruction may be given as an introductory instruction or as a concluding instruction after trial. (See CACI No. 5010).

The last bracketed paragraph should not be read if a court reporter is not being used to record the trial proceedings.

Sources and Authority

- California Rules of Court, Rule 2.1031 provides: "Jurors must be permitted to take written notes in all civil and criminal trials. At the beginning of a trial, a trial judge must inform jurors that they may take written notes during the trial. The court must provide materials suitable for this purpose."

- "Because of [the risks of note-taking], a number of courts have held that a cautionary instruction is required. For example, [one court] held that the instruction should include 'an explanation ... that [jurors] should not permit their note-taking to distract them from the ongoing proceedings; that their notes are only an aid to their memory and should not take precedence over their independent recollection; that those jurors who do not take notes should rely on their independent recollection of

the evidence and not be influenced by the fact that another juror has taken notes; and that the notes are for the note taker's own personal use in refreshing his recollection of the evidence. The jury must be reminded that should any discrepancy exist between their recollection of the evidence and their notes, they should request that the record of the proceedings be read back and that it is the transcript that must prevail over their notes.'" (*People v. Whitt* (1984) 36 Cal.3d 724, 747 [205 Cal.Rptr. 810, 685 P.2d 1161], internal citations and footnote omitted.)

- "In *People v. Whitt*, we recognized the risks inherent in juror note-taking and observed that it is 'the better practice' for courts to give, sua sponte, a cautionary instruction on note-taking. Although the ideal instruction would advert specifically to all the dangers of note-taking, we found the less complete instruction given in *Whitt* to be adequate: 'Be careful as to the amount of notes that you take. I'd rather that you observe the witness, observe the demeanor of that witness, listen to how that person testifies rather than taking copious note.... [I]f you do not recall exactly as to what a witness might have said or you disagree, for instance, during the deliberation [sic] as to what a witness may have said, we can reread that transcript back ....'" (*People v. Silbertson* (1985) 41 Cal.3d 296, 303 [221 Cal.Rptr. 152, 709 P.2d 1321], internal citations and footnote omitted.)

~~(New September 2003)~~

107. Witnesses

A witness is a person who has knowledge related to this case. You will have to decide whether you believe each witness and how important each witness's testimony is to the case. You may believe all, part, or none of a witness's testimony.

In deciding whether to believe a witness's testimony, you may consider, among other factors, the following:

(a) How well did the witness see, hear, or otherwise sense what he or she described in court?

(b) How well did the witness remember and describe what happened?

(c) How did the witness look, act, and speak while testifying?

(d) Did the witness have any reason to say something that was not true? Did the witness show any bias or prejudice? Did the witness have a personal relationship with any of the parties involved in the case? Does the witness have a personal stake in how this case is decided?

(e) What was the witness's attitude toward this case or about giving testimony?

Sometimes a witness may say something that is not consistent with something else he or she said. Sometimes different witnesses will give different versions of what happened. People often forget things or make mistakes in what they remember. Also, two people may see the same event but remember it differently. You may consider these differences, but do not decide that testimony is untrue just because it differs from other testimony.

However, if you decide that a witness has deliberately testified untruthfully about something important, you may choose not to believe anything that witness said. On the other hand, if you think the witness testified untruthfully about some things but told the truth about others, you may accept the part you think is true and ignore the rest.

Do not make any decision simply because there were more witnesses on one side than on the other. If you believe it is true, the testimony of a single witness is enough to prove a fact.

You must not be biased in favor of or against any witness because of his or her disability, gender, race, ~~sex,~~ religion, ~~occupation,~~ ethnicity, sexual orientation, age, ~~[or]~~ national origin, [or] socioeconomic status [or [*insert any other impermissible form of bias***].**

Instructional History

(Revised June 2005)

(*Revised April 2007*)

Directions for Use

This instruction ~~should~~ may be given as an introductory instruction or as a concluding instruction after trial. (See CACI No. 5003, *Witnesses*).

In the last paragraph, the court may delete inapplicable categories of potential jury bias.

Sources and Authority

- Evidence Code section 312 provides:
  Except as otherwise provided by law, where the trial is by jury:

  (a) All questions of fact are to be decided by the jury.

  (b) Subject to the control of the court, the jury is to determine the effect and value of the evidence addressed to it, including the credibility of witnesses and hearsay declarants.

- Considerations for evaluating the credibility of witnesses are contained in Evidence Code section 780:
  Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following:

  (a) His demeanor while testifying and the manner in which he testifies.

  (b) The character of his testimony.

  (c) The extent of his capacity to perceive, to recollect, or to communicate any matter about which he testifies.

  (d) The extent of his opportunity to perceive any matter about which he testifies.

  (e) His character for honesty or veracity or their opposites.

  (f) The existence or nonexistence of a bias, interest, or other motive.

  (g) A statement previously made by him that is consistent with his testimony at the hearing.

  (h) A statement made by him that is inconsistent with any part of his testimony at the hearing.

  (i) The existence or nonexistence of any fact testified to by him.

(j) His attitude toward the action in which he testifies or toward the giving of testimony.

(k) His admission of untruthfulness.

- Evidence Code section 411 provides that "[e]xcept where additional evidence is required by statute, the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact." According to former Code of Civil Procedure section 2061, the jury should be instructed that "they are not bound to decide in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a less number or against a presumption or other evidence satisfying their minds."

- The willfully false witness instruction was formerly codified at Code of Civil Procedure section 2061. This statute was repealed in 1965 to avoid giving undue emphasis to this rule compared to other common-law rules. Refusal to give an instruction on this point is not error: "It should certainly not be of importance to tell the ordinary man of the world that he should distrust the statements of a witness whom he believes to be a liar." (*Wallace v. Pacific Electric Ry. Co.* (1930) 105 Cal.App. 664, 671 [288 P. 834].)

- The Standards for Judicial Administration, Standard 10.20(a))2) provides: "In all courtroom proceedings, refrain from engaging in conduct and prohibit others from engaging in conduct that exhibits bias, including but not limited to bias based on disability, gender, race, religion, ethnicity, and sexual orientation, whether that bias is directed toward counsel, court personnel, witnesses, parties, jurors, or any other participants."

- The Code of Judicial Ethics, Canon 3(b)(5) provides: "A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, engage in speech, gestures, or other conduct that would reasonably be perceived as (1) bias or prejudice, including but not limited to bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, or (2) sexual harassment." Canon 3(b)(6) requires the judge to impose these standards on attorneys.

Secondary Sources

1A California Trial Guide, Unit 22, *Rules Affecting Admissibility of Evidence*, § 22.30 (Matthew Bender)

48 California Forms of Pleading and Practice, Ch. 551, *Trial*, § 551.122 (Matthew Bender)

~~*(Revised June 2005)*~~

112. Questions From Jurors

If, during the trial, you have a question you believe should be asked of a witness, you may write out the question and send it to me through my courtroom staff. I will share your question with the attorneys. There may be legal reasons why a suggested question is not asked of a witness. You should not try to guess the reason why a question is not asked.

Instructional History

(New February 2005)

(Revised April 2007)

Directions for Use

~~The decision on whether to allow jurors to ask questions is left to the discretion of the judge.~~ The instruction may need to be modified to account for an individual judge's practice.

Sources and Authority

- California Rules of Court, Rule 2.1033 provides: "A trial judge should allow jurors to submit written questions directed to witnesses. An opportunity must be given to counsel to object to such questions outside of the presence of the jury."

- "In a proper case there may be a real benefit from allowing jurors to submit questions under proper control by the court. However, in order to permit the court to exercise its discretion and maintain control of the trial, the correct procedure is to have the juror write the questions for consideration by the court and counsel prior to their submission to the witness." (*People v. McAlister* (1985) 167 Cal.App.3d 633, 644 [213 Cal.Rptr. 271].)

- "[T]he judge has discretion to ask questions submitted by jurors or to pass those questions on and leave to the discretion of counsel whether to ask the questions." (*People v. Cummings* (1993) 4 Cal.4th 1233, 1305 [18 Cal.Rptr.2d 796, 850 P.2d 1].)

- "The appellant urges that when jurymen ask improper questions the defendant is placed in the delicate dilemma of either allowing such question to go in without objection or of offending the jurors by making the objection and the appellant insists that the court of its own motion should check the putting of such improper questions by the jurymen, and thus relieve the party injuriously affected thereby from the odium which might result from making that objection thereto. There is no force in this contention. Objections to questions, whether asked by a juror or by opposing counsel, are presented to the court, and its ruling thereon could not reasonably affect the rights or standing of the party making the objection before the jury in the one case more than in the other." (*Maris v. H. Crummey, Inc.* (1921) 55 Cal.App. 573, 578-579 [204 P. 259].)

Secondary Sources

3 Witkin, California Evidence (4th ed. 2000) Presentation at Trial, § 85

4 California Trial Guide, Unit 91, *Jury Deliberations and Rendition of Verdict*, §§ 91.01-91.03 (Matthew Bender)

~~*(New February 2005)*~~

222. Evidence of Sliding-Scale Settlement

You have heard evidence that there was a settlement agreement between [*name of settling defendant***] and [***name of plaintiff***].**

Under this agreement, the amount of money that [*name of settling defendant***] will have to pay to [***name of plaintiff***] will depend on the amount of money that [***name of plaintiff***] receives from [***name of nonsettling defendant***] at trial. The more money that [***name of plaintiff***] might receive from [***name of nonsettling defendant***], the less that [***name of settling defendant***] will have to pay under the agreement.**

You may consider evidence of the settlement only to decide whether [*name of settling defendant/name of witness***] [who testified on behalf of [***name of settling defendant***]] is biased or prejudiced and whether [his/her] testimony is believable.**

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lnstructional History

(*New April 2007*)

Directions for Use

Use this instruction for cases involving sliding scale or "Mary Carter" settlement agreements if a party who settled appears at trial as a witness. If the settling defendant is an entity, insert the name of the witness who testified on behalf of the entity and include the bracketed language in the third paragraph.

See CACI No. 217, *Evidence of Settlement*.

See also CACI No. 3926, *Settlement Deduction.*

Sources and Authority

- Code of Civil Procedure § 877.5(a)(2) provides:

  If the action is tried before a jury, and a defendant party to the agreement is called as a witness at trial, the court shall, upon motion of a party, disclose to the jury the existence and content of the agreement or covenant, unless the court finds that this disclosure will create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

  The jury disclosure herein required shall be no more than necessary to inform the jury of the possibility that the agreement may bias the testimony of the witness.

- Evidence of a settlement agreement is admissible to show bias or prejudice of an adverse party. Relevant evidence includes evidence relevant to the credibility of a witness. *Moreno v. Sayre* (1984) 162 Cal.App.3d 116, 126 [208 Cal.Rptr. 444].)

- Evidence of prior settlement is not automatically admissible "Even if it appears that a witness could have been influenced in his testimony by the payment of money or the obtaining of a dismissal, the party resisting the admission of such evidence may still appeal to the court's discretion to exclude it under section 352 of the code." *Granville v. Parsons* (1968) 259 Cal.App.2d 298, 305 [66 Cal.Rptr. 149].)

Secondary Sources

435. Causation for Asbestos-Related Cancer Claims

[*Name of plaintiff***] may prove that exposure to asbestos from [***name of defendant***]'s product was a substantial factor causing [his/her/[***name of decedent***]'s] illness by showing, through expert testimony, that there is a reasonable medical probability that the exposure contributed to [his/her] risk of developing cancer.**

Instructional History

(New September 2003)

Directions for Use

If the issue of medical causation is tried separately, then it will be necessary to revise this instruction to focus on that issue.

This instruction is intended to be given along with CACI No. 430, *Causation: Substantial Factor,* and, if necessary, CACI No. 431, *Causation: Multiple Causes.*

Sources and Authority

- "In the context of a cause of action for asbestos-related latent injuries, the plaintiff must first establish some threshold exposure to the defendant's defective asbestos-containing products, and must further establish in reasonable medical probability that a particular exposure or series of exposures was a 'legal cause' of his injury, i.e., a substantial factor in bringing about the injury. In an asbestos-related cancer case, the plaintiff need not prove that fibers from the defendant's product were the ones, or among the ones, that actually began the process of malignant cellular growth. Instead, the plaintiff may meet the burden of proving that exposure to defendant's product was a substantial factor causing the illness by showing that in reasonable medical probability it was a substantial factor contributing ~~contributed~~ to the plaintiff or decedent's risk of developing cancer. The jury should be so instructed. The standard instructions on substantial factor and concurrent causation remain correct in this context and should also be given." (*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 982-983 [67 Cal.Rptr.2d 16, 941 P.2d 1203], internal citation and footnotes omitted.)

- "A threshold issue in asbestos litigation is exposure to the defendant's product. The plaintiff bears the burden of proof on this issue. If there has been no exposure, there is no causation. Plaintiffs may prove causation in an asbestos case by demonstrating that the plaintiff's or decedent's exposure to defendant's asbestos-containing product in reasonable medical probability was a substantial factor in contributing to the aggregate dose of asbestos the plaintiff or decedent inhaled or ingested, and hence to the risk of developing asbestos-related cancer." (*McGonnell v. Kaiser Gypsum Co., Inc.* (2002) 98 Cal.App.4th 1098, 1103 [120 Cal.Rptr.2d 23], internal citations omitted.)

- "Many factors are relevant in assessing the medical probability that an exposure contributed to plaintiff's asbestos disease. Frequency of exposure, regularity of exposure, and proximity of the

asbestos product to plaintiff are certainly relevant, although these considerations should not be determinative in every case. Additional factors may also be significant in individual cases, such as the type of asbestos product to which plaintiff was exposed, the type of injury suffered by plaintiff, and other possible sources of plaintiff's injury. 'Ultimately, the sufficiency of the evidence of causation will depend on the unique circumstances of each case.'" (*Lineaweaver v. Plant Insulation Co.* (1995) 31 Cal.App.4th 1409, 1416-1417 [37 Cal.Rptr.2d 902], internal citations omitted.)

Secondary Sources

1 Levy et al., California Torts, Ch. 2, *Causation*, § 2.03 (Matthew Bender)

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.22, Ch. 7, *Proof*, § 7.06 (Matthew Bender)

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

~~(New September 2003)~~

454. Affirmative Defense--Statute of Limitations

[*Name of defendant***] contends that [***name of plaintiff***]'s lawsuit was not filed within the time set by law. To succeed on this defense, [***name of defendant***] must prove that [***name of plaintiff***]'s claimed harm occurred before [***insert date from applicable statute of limitation***].**

Instructional History

(*New April 2007*)

Directions for Use

This instruction states the common law rule that an action accrues on the date of injury. (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1109 [245 Cal.Rptr. 658; 751 P.2d 923].)

For an instruction on the delayed-discovery rule, see CACI No. 455, *Affirmative Defense—Statute of Limitations-Delayed Discovery*.

Do not use this instruction for attorney malpractice. (See CACI Nos. 610, *Affirmative Defense--Statute of Limitations—Attorney Malpractice—One-Year Limit,* and 611, *Affirmative Defense--Statute of Limitations—Attorney Malpractice—Four-Year Limit*)

Sources and Authority

- "Code of Civil Procedure section 335.1 provides a two-year limitation period for an action for assault, battery, or injury to, or for the death of, an individual caused by the wrongful act or neglect of another.

- Code of Civil Procedure section 338(c) provides a three-year limitation period for an action for taking, detaining, or injuring any goods or chattels, including actions for the specific recovery of personal property.

- Code of Civil Procedure section 340.2(c) provides a one-year limitation period for an action for the wrongful death of any plaintiff's decedent, based on exposure to asbestos, measured by the later of the date of death or the date the plaintiff first knew, or through the exercise of reasonable diligence should have known, that the death was caused or contributed to by exposure to asbestos.

- A limitation period does not begin until a cause of action accrues, i.e., all essential elements are present and a claim becomes legally actionable." (*Glue-Fold, Inc. v. Slautterback Corp.* (2000) 82 Cal. App. 4th 1018, 1029 [98 Cal.Rptr.2d 661], internal citations omitted.)

- "In tort actions, the statute of limitations commences when the last element essential to a cause of action occurs. The statute of limitations does not begin to run and no cause of action accrues in a tort action until damage has occurred. If the last element of the cause of action to occur is damage, the statute of limitations begins to run on the occurrence of 'appreciable and actual harm, however uncertain in amount,' that consists of more than nominal damages. '. . . [O]nce plaintiff has suffered actual and appreciable harm, neither the speculative nor uncertain character of damages nor the difficulty of proof will toll the period of limitation.' Cases contrast actual and appreciable harm with nominal damages, speculative harm or the threat of future harm. The mere breach of duty—causing only nominal damages, speculative harm or the threat of future harm not yet realized—normally does not suffice to create a cause of action." (*San Francisco Unified School Dist. v. W. R. Grace & Co.* (1995) 37 Cal. App. 4th 1318, 1326 [44 Cal. Rptr. 2d 305], internal citations omitted)

- " '[R]esolution of the statute of limitations issue is normally a question of fact … .' " (*Romano v. Rockwell Internat., Inc.* (1996) 14 Cal. 4th 479, 487 [59 Cal. Rptr. 2d 20, 926 P.2d 1114].)

Secondary Sources

3 Witkin, California Procedure (4th ed. 1996) Actions, §§ 459-473, 517-545

455. Affirmative Defense--Statute of Limitations--Delayed Discovery

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If [*name of defendant***] proves that [***name of plaintiff***]'s claimed harm occurred before [***insert date from applicable statute of limitations***], [***name of plaintiff***]'s lawsuit was still filed on time if [***name of plaintiff***] proves that before that date, [he/she/it] did not discover, and did not know of facts that would have caused a reasonable person to suspect, that [he/she/it] had suffered harm that was caused by someone's wrongful conduct.**

Instructional History

(*New April 2007*)

Directions for Use

Read this instruction after CACI No, 454, *Affirmative Defense—Statute of Limitations*, if the plaintiff seeks to overcome the statute-of limitations defense by asserting the "delayed discovery rule" or "discovery rule." The discovery rule provides that the accrual date of a cause of action is delayed until the plaintiff is aware of her injury and its negligent cause. (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1109 [245 Cal.Rptr. 658; 751 P.2d 923].)

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

Do not use this instruction for attorney malpractice. (See CACI Nos. 610, *Affirmative Defense--Statute of Limitations—Attorney Malpractice—One-Year Limit*, and 611, *Affirmative Defense--Statute of Limitations—Attorney Malpractice—Four-Year Limit*)

Sources and Authority

- "An exception to the general rule for defining the accrual of a cause of action--indeed, the "most important" one--is the discovery rule. … It postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action. (¶) [T]he plaintiff discovers the cause of action when he at least suspects a factual basis, as opposed to a legal theory, for its elements, even if he lacks knowledge thereof--when, simply put, he at least "suspects . . . that someone has done something wrong" to him, 'wrong' being used, not in any technical sense, but rather in accordance with its 'lay understanding' He has reason to discover the cause of action when he has reason at least to suspect a factual basis for its

elements. He has reason to suspect when he has 'notice or information of circumstances to put a reasonable person on inquiry'; he need not know the ‘specific 'facts' necessary to establish’ the cause of action; rather, he may seek to learn such facts through the ‘process contemplated by pretrial discovery’; but, within the applicable limitations period, he must indeed seek to learn the facts necessary to bring the cause of action in the first place--he "cannot wait for them to find him and sit on his rights; he must go find them himself if he can and file suit if he does. (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 397-398 [87 Cal.Rptr.2d 453, 981 P.2d 79], internal citations and footnote omitted.)

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

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

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

- A limitation period does not begin until a cause of action accrues, i.e., all essential elements are present and a claim becomes legally actionable. Developed to mitigate the harsh results produced by strict definitions of accrual, the common law discovery rule postpones accrual until a plaintiff discovers or has reason to discover the cause of action.” (*Glue-Fold, Inc. v. Slautterback Corp.* (2000) 82 Cal. App. 4th 1018, 1029 [98 Cal.Rptr.2d 661], internal citations omitted.)

- “[T]he plaintiff may discover, or have reason to discover, the cause of action even if he does not suspect, or have reason to suspect, the identity of the defendant. That is because the identity of the defendant is not an element of any cause of action. It follows that failure to discover, or have reason to discover, the identity of the defendant does not postpone the accrual of a cause of action, whereas a like failure concerning the cause of action itself does. ‘Although never fully articulated, the rationale for distinguishing between ignorance’ of the defendant and ‘ignorance’ of the cause of action itself ‘appears to be premised on the commonsense assumption that once the plaintiff is aware of’ the latter, he ‘normally’ has ‘sufficient opportunity,’ within the ‘applicable limitations period,’ ‘to discover the identity’ of the former. He may ‘often effectively extend[]’ the limitations period in question ‘by the filing’ and amendment ‘of a Doe complaint’ and invocation of the relation-back doctrine. ‘Where’ he knows the ‘identity of at least one defendant . . ., [he] must’ proceed thus.” (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 399 [87 Cal.Rptr.2d 453, 981 P.2d 79], internal citations and footnote omitted.)

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

- "When it is apparent from the face of the complaint that, but for the delayed discovery rule, the action would be time barred, it is the plaintiff's burden to show diligence. (*McKelvey v. North Am. Inc.* (1999) 74 Cal.App.4th 151, 160 [86 Cal.Rptr.3d 645].)

- " '[R]esolution of the statute of limitations issue is normally a question of fact … .' " (*Romano v. Rockwell Internat., Inc.* (1996) 14 Cal. 4th 479, 487 [59 Cal. Rptr. 2d 20, 926 P.2d 1114].)

Secondary Sources

3 Witkin, California Procedure (4th ed. 1996) Actions, §§ 459-473, 517-545

462. Strict Liability for Injury Caused by Domestic Animal With Dangerous Propensities—Essential Factual Elements

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

People who own, keep, or control animals with unusually dangerous natures or tendencies can be held responsible for the harm that their animals cause to others, no matter how carefully they guard or restrain their animals.

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

1. **That [***name of defendant***] owned, kept, or controlled a [***insert type of animal***];**
2. **That the [***insert type of animal***] had an unusually dangerous nature or tendency;**
3. **That before [***name of plaintiff***] was injured, [***name of defendant***] knew or should have known that the [***insert type of animal***] had this nature or tendency;**
4. **That [***name of plaintiff***] was harmed; and**
5. **That the [***insert type of animal***]'s unusually dangerous nature or tendency was a substantial factor in causing [***name of plaintiff***]'s harm.**

Instructional History

(New September 2003)

(Revised April 2007)

Directions for Use

For an instruction on statutory strict liability under the dog-bite statute, see CACI No. 463, *Dog Bite Statute (Civ. Code, § 3342)—Essential Factual Elements.*

Sources and Authority

- "A common law strict liability cause of action may also be maintained if the owner of a domestic animal that bites or injures another person knew or had reason to know of the animal's vicious propensities. If [defendant] knew or should have known of his dog's vicious propensities and failed to inform [plaintiff] of such facts, he could be found to have exposed [plaintiff] to an unknown risk and thereby be held strictly liable at common law for her injuries. Under such circumstances, the defense of primary assumption of risk would not bar [plaintiff]'s claim since she could not be found to have assumed a risk of which she was unaware." (*Priebe v. Nelson* (2006) 39 Cal.4th 1112, 1115-

1116 [47 Cal.Rptr.3d 553; 140 P.3d 848], internal citations omitted.)

- "California has long followed the common law rule of strict liability for harm done by a domestic animal with known vicious or dangerous propensities abnormal to its class." (*Drake v. Dean* (1993) 15 Cal.App.4th 915, 921 [19 Cal.Rptr.2d 325].)

- Any propensity that is likely to cause injury under the circumstances is a dangerous or vicious propensity within the meaning of the law. (*Talizin v. Oak Creek Riding Club* (1959) 176 Cal.App.2d 429, 437 [1 Cal.Rptr. 514].)

- The question of whether a domestic animal is vicious or dangerous is ordinarily a factual one for the jury. (*Heath v. Fruzia* (1942) 50 Cal.App.2d 598, 601 [123 P.2d 560].)

- Section 509 of the Restatement Second of Torts provides:

  (1) A possessor of a domestic animal that he knows or has reason to know has dangerous propensities abnormal to its class, is subject to liability for harm done by the animal to another, although he has exercised the utmost care to prevent it from doing the harm.

  (2) This liability is limited to harm that results from the abnormally dangerous propensity of which the possessor knows or has reason to know.

- "'The gist of the action is not the manner of keeping the vicious animal, but the keeping him at all with knowledge of the vicious propensities. In such instances the owner is an insurer against the acts of the animal, to one who is injured without fault, and the question of the owner's negligence is not in the case.'" (*Hillman v. Garcia-Ruby* (1955) 44 Cal.2d 625, 626 [283 P.2d 1033], internal citations omitted.)

- "The absolute duty to restrain the dog could not be invoked unless the jury found, not only that the dog had the alleged dangerous propensity, but that defendants knew or should have known that it had." (*Hillman, supra,* 44 Cal.2d at p. 628.)

- "[N]egligence may be predicated on the characteristics of the animal which, although not abnormal to its class, create a foreseeable risk of harm. As to those characteristics, the owner has a duty to anticipate the harm and to exercise ordinary care to prevent the harm." (*Drake, supra,* 15 Cal.App.4th at p. 929.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1414–1427
~~6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1227-1240, pp. 662-675~~

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

California Tort Guide (Cont.Ed.Bar 1996) §§ 3.3-3.6

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

1 California Civil Practice (Thomson West 2006) Torts, §§ 2:20–2:21
~~1 Bancroft-Whitney's California Civil Practice (1992) Torts, §§ 2:20-2:21~~

~~(New September 2003)~~

463. Dog Bite Statute (Civ. Code, § 3342)—Essential Factual Elements

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[*Name of plaintiff***] claims that [***name of defendant***]'s dog bit [him/her] and that [***name of defendant***] is responsible for that harm.**

People who own dogs can be held responsible for the harm from a dog bite, no matter how carefully they guard or restrain their dogs.

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

1. **That [***name of defendant***] owned a dog;**

2. **That the dog bit [***name of plaintiff***] while [he/she] was in a public place or lawfully on private property;**

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

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

[[*Name of plaintiff***] was lawfully on private property of the owner if [he/she] was performing any duty required by law or was on the property at the invitation, express or implied, of the owner.]**

Instructional History

(New September 2003)

(Revised April 2007)

Directions for Use

Read the last optional paragraph if there is an issue as to whether the plaintiff was lawfully on private property when he or she was bitten.

For an instruction on common-law liability based on the defendant's knowledge of his or her pet's dangerous propensities, see CACI No. 462, *Strict Liability for Injury Caused by Domestic Animal With Dangerous Propensities—Essential Factual Elements.*

Sources and Authority

- Civil Code section 3342(a) provides: "The owner of any dog is liable for the damages suffered by any person who is bitten by the dog while in a public place or lawfully in a private place, including the property of the owner of the dog, regardless of the former viciousness of the dog or the owner's knowledge of such viciousness. A person is lawfully upon the private property of such owner within

the meaning of this section when he is on such property in the performance of any duty imposed upon him by the laws of this state or by the laws or postal regulations of the United States, or when he is on such property upon the invitation, express or implied, of the owner."

- This statute creates an exception to the general rule that an owner is not strictly liable for harm caused by a domestic animal absent knowledge of the animal's vicious propensity. (*Hicks v. Sullivan* (1932) 122 Cal.App. 635, 639 [10 P.2d 516].)

- ~~"[A] keeper, in contrast to an owner, is not an insurer of the good behavior of a dog, but must have scienter or knowledge of the vicious propensities of the animal before liability for injuries inflicted by such animal shall attach to him." (*Buffington v. Nicholson* (1947) 78 Cal.App.2d 37, 42 [177 P.2d 51].)~~

- It is not necessary that the skin be broken in order for the statute to apply. (*Johnson v. McMahan* (1998) 68 Cal.App.4th 173, 176 [80 Cal.Rptr.2d 173].)

- "The defenses of assumption of the risk and contributory negligence may still be asserted" in an action brought under section 3342. (*Johnson, supra,* 68 Cal.App.4th at p. 176.)

- "A veterinarian or a veterinary assistant who accepts employment for the medical treatment of a dog, aware of the risk that any dog, regardless of its previous nature, might bite while being treated, has assumed this risk as part of his or her occupation." (*Nelson v. Hall* (1985) 165 Cal. App. 3d 709, 715 [211 Cal.Rptr. 668].)

- "[Plaintiff], by virtue of the nature of her occupation as a kennel worker, assumed the risk of being bitten or otherwise injured by the dogs under her care and control while in the custody of the commercial kennel where she worked pursuant to a contractual boarding agreement. The Court of Appeal correctly concluded a strict liability cause of action under the dog bite statute (§ 3342) was therefore unavailable to [plaintiff]." (*Priebe v. Nelson* (2006) 39 Cal. 4th 1112, 1132 [47 Cal.Rptr.3d 553; 140 P.3d 848].)

- The definition of "lawfully upon the private property of such owner" effectively prevents trespassers from obtaining recovery under the Dog Bite Statute. (*Fullerton v. Conan* (1948) 87 Cal.App.2d 354, 358 [197 P.2d 59].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1408–1412~~6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1223-1225, pp. 657-661~~

1 Levy et al., California Torts, Ch. 6, *Strict Liability for Injuries Caused by Animals*, § 6.12

California Tort Guide (Cont.Ed.Bar 1996) § 3.2

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

17 California Points and Authorities, Ch. 178, *Premises Liability* (Matthew Bender)

1 California Civil Practice (Thomson West 2006) Torts, § 2:16
~~1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 2:16~~

~~(New September 2003)~~

503A. Psychotherapist's Duty to Protect Intended Victim From Patient's Threat

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[*Name of plaintiff***] claims that [***name of defendant***]'s failure to protect [***name of plaintiff/decedent***] was a substantial factor in causing [injury to [***name of plaintiff***]/the death of [***name of decedent***]]. To establish this claim [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was a psychotherapist;**

2. **That [***name of plaintiff***] was [***name of defendant***]'s patient;**

3. **That [***name of patient***] communicated to [***name of defendant***] a serious threat of physical violence;**

4. **That [***name of plaintiff/decedent***] was a reasonably identifiable victim of [***name of patient***]'s threat;**

5. **That [***name of patient***] [injured [***name of plaintiff***]/killed [***name of decedent***]];**

6. **That [***name of defendant***] failed to make reasonable efforts to protect [***name of plaintiff/decedent***]; and**

7. **That [***name of defendant***]'s failure was a substantial factor in causing [[***name of plaintiff***]'s injury/the death of [***name of decedent***]].**

Instructional History

(*Derived From Former CACI No. 503 April 2007*)

Directions for Use

Read this instruction for a *Tarasoff* cause of action for professional negligence against a psychotherapist for failure to protect a victim from a patient's act of violence after the patient made a threat to the therapist against the victim. (See *Tarasoff v. Regents of University of Cal.* (1976) 17 Cal.3d 425 [131 Cal.Rptr. 14; 551 P.2d 334.) The liability imposed by *Tarasoff* is modified by the provisions of Civil Code section 43.92(a). First read CACI No. 503B, *Affirmative Defense—Warning to Victim and Law*

Enforcement, if the therapist asserts that he or she is immune from liability under Civil Code section 43.92(b) by having made reasonable efforts to warn the victim and a law enforcement agency of the threat.

In a wrongful death case, insert the name of the decedent victim where applicable.

Sources and Authority

- Civil Code section 43.92(a) provides:
  There shall be no monetary liability on the part of, and no cause of action shall arise against, any person who is a psychotherapist as defined in Section 1010 of the Evidence Code in failing to warn of and protect from a patient's threatened violent behavior or failing to predict and warn of and protect from a patient's violent behavior except where the patient has communicated to the psychotherapist a serious threat of physical violence against a reasonably identifiable victim or victims.

- "[T]herapists cannot escape liability merely because [the victim] was not their patient. When a therapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger. The discharge of this duty may require the therapist to take one or more of various steps, depending upon the nature of the case. Thus it may call for him to warn the intended victim or others likely to apprise the victim of the danger, to notify the police, or to take whatever other steps are reasonably necessary under the circumstances." (*Tarasoff, supra*, 17 Cal. 3d at p. 431.)

- Civil Code section 43.92 was enacted to limit the liability of psychotherapists under *Tarasoff* regarding a therapist's duty to warn an intended victim. (*Barry v. Turek* (1990) 218 Cal.App.3d 1241, 1244–1245 [267 Cal.Rptr. 553].) Under this provision, "[p]sychotherapists thus have immunity from *Tarasoff* claims except where the plaintiff proves that the patient has communicated to his or her psychotherapist a serious threat of physical violence against a reasonably identifiable victim or victims." (*Id.* at p. 1245.)

- "When the communication of the serious threat of physical violence is received by the therapist from a member of the patient's immediate family and is shared for the purpose of facilitating and furthering the patient's treatment, the fact that the family member is not technically a 'patient' is not crucial to the statute's purpose." (*Ewing v. Goldstein* (2004) 120 Cal.App.4th 807, 817 [15 Cal.Rptr.3d 864].)

- "Section 43.92 strikes a reasonable balance in that it does not compel the therapist to predict the dangerousness of a patient. Instead, it requires the therapist to attempt to protect a victim under limited circumstances, even though the therapist's disclosure of a patient confidence will potentially disrupt or destroy the patient's trust in the therapist. However, the requirement is imposed upon the therapist only after he or she determines that the patient has made a credible threat of serious physical violence against a person. (*Calderon v. Glick* (2005) 131 Cal. App. 4th 224, 231 [31 Cal.Rptr.3d 707].)

Secondary Sources

6 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, §§ 1050, 1051

26 California Forms of Pleading and Practice, Ch. 304, *Insane and Other Incompetent Persons* (Matthew Bender)

11 California Points and Authorities, Ch. 117, *Insane and Incompetent Persons* (Matthew Bender)

503B. Affirmative Defense—Psychotherapist's Warning to Victim and Law Enforcement

[*Name of defendant***] is not responsible for [[***name of plaintiff***]'s injury/the death of [***name of decedent***]] if [***name of defendant***] proves that [he/she] made reasonable efforts to communicate the threat to the [***name of plaintif/decedent***] and to a law enforcement agency.**

Instructional History

(*Derived From Former CACI No. 503 April 2007*)

Directions for Use

Read this instruction for a *Tarasoff* cause of action for professional negligence against a psychotherapist (*Tarasoff v. Regents of University of Cal.* (1976) 17 Cal.3d 425 [131 Cal.Rptr. 14; 551 P.2d 334) if there is a dispute of fact as to whether the defendant made reasonable efforts to warn the victim and a law enforcement agency of a threat made by the defendant's The therapist is immune from liability under *Tarasoff* if he or she makes reasonable efforts to communicate the threat to the victim and to a law enforcement agency. (Civ. Code, § 43.92(b).) CACI No. 503A, *Psychotherapist's Duty to Warn and Protect Intended Victim From Patient's Threat*, sets forth the elements of a *Tarasoff* cause of action if the defendant is not immune.

In a wrongful death case, insert the name of the decedent victim where applicable.

Sources and Authority

- Civil Code section 43.92(b) provides:
  There shall be no monetary liability on the part of, and no cause of action shall arise against, a psychotherapist who, under the limited circumstances specified above, discharges his or her duty to warn and protect by making reasonable efforts to communicate the threat to the victim or victims and to a law enforcement agency.

- Failure to inform a law enforcement agency concerning a homicidal threat made by a patient against his work supervisor did not abrogate the "firefighter's rule" and, therefore, did not render the psychiatrist liable to a police officer who was subsequently shot by the patient. (*Tilley v. Schulte* (1999) 70 Cal.App.4th 79, 85–86 [82 Cal.Rptr.2d 497].)

- "When the communication of the serious threat of physical violence is received by the therapist from a member of the patient's immediate family and is shared for the purpose of facilitating and furthering the patient's treatment, the fact that the family member is not technically a 'patient' is not crucial to the statute's purpose." (*Ewing v. Goldstein* (2004) 120 Cal.App.4th 807, 817 [15 Cal.Rptr.3d 864].)

Secondary Sources

6 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, §§ 1050, 1051

26 California Forms of Pleading and Practice, Ch. 304, *Insane and Other Incompetent Persons* (Matthew Bender)

11 California Points and Authorities, Ch. 117, *Insane and Incompetent Persons* (Matthew Bender)

510. Derivative Liability of Surgeon

A surgeon is ~~held~~ responsible for the negligence of other medical practitioners or nurses who are ~~assisting [him/her]~~under his or her supervision and control and actively participating during an operation ~~if the surgeon has direct control over how they perform their duties.~~ .

Instructional History

(*New September 2003*)

(*Revised April 2007*)

Directions for Use

Give this instruction in a case in which the plaintiff seeks to hold a surgeon vicariously responsible under the "captain of the ship" doctrine for the negligence of nurses or other hospital employees that occurs during the course of an operation. There is some disagreement in the courts as to whether the captain-of-the-ship doctrine remains a viable rule of law. (Compare *Truhitte v. French Hospital* (1982) 128 Cal.App.3d 332, 348 [180 Cal.Rptr. 152] (doctrine has been eroded) with *Fields v. Yusuf* (2006) xxx Cal.App.4th xxx, xxx [xxx Cal.Rptr.2d xxx] (doctrine remains viable).)

Sources and~~of~~ Authority

- "The 'captain of the ship' doctrine imposes liability on a surgeon under the doctrine of respondeat superior for the acts of those under the surgeon's special supervision and control during the operation." (*Thomas v. Intermedics Orthopedics, Inc.* (1996) 47 Cal.App.4th 957, 967 [55 Cal. Rptr. 2d 197].)

- "The doctrine has been explained as follows: 'A physician generally is not liable for the negligence of hospital or other nurses, attendants, or internes, who are not his employees, particularly where he has no knowledge thereof or no connection therewith. On the other hand, a physician is liable for the negligence of hospital or other nurses, attendants, or internes, who are not his employees, where such negligence is discoverable by him in the exercise of ordinary care, he is negligent in permitting them to attend the patient, or the negligent acts were performed under conditions where, in the exercise of ordinary care, he could have or should have been able to prevent their injurious effects and did not. The mere fact that a physician or surgeon gives instructions to a hospital employee does not render the physician or surgeon liable for negligence of the hospital employee in carrying [*25] out the instructions. Similarly, the mere right of a physician to supervise a hospital employee is not sufficient to render the physician liable for the negligence of such employee. HN11On the other hand, if the physician has the right to exercise control over the work to be done by the hospital employee and the manner of its performance, or an employee of a hospital is temporarily detached in whole or in part from the hospital's general control so as to become the temporary servant of the physician he assists, the physician will be subject to liability for the employee's negligence. [P] Thus, where a hospital employee, although not in the regular employ of an operating surgeon, is under his special

supervision and control during the operation, the relationship of master and servant exists, and the surgeon is liable, under the doctrine of respondeat superior, for the employee's negligence.'" (*Thomas, supra*, 47 Cal.App.4th at p. 966-967.)

- This doctrine applies only to medical personnel who are actively participating in the surgical procedure. (*Thomas, supra*, 47 Cal.App.4th at p. 966-967.)

- While the ``captain of the ship'' doctrine has never been expressly rejected, it has been eroded by modern courts: ``A theory that the surgeon directly controls *all* activities of whatever nature in the operating room certainly is not realistic in present day medical care.'' (*Truhitte ,supra, ~~v. French Hospital~~* (~~1982~~) 128 Cal.App.3d ~~332,~~at p. 348 ~~[180 Cal.Rptr. 152]~~.)

- "[T]he *Truhitte* court ignores what we have already recognized as the special relationship between a vulnerable hospital patient and the surgeon operating on the patient. A helpless patient on the operating table who cannot understand or control what is happening reasonably expects a surgeon to oversee her care and to look out for her interests. We find this special relationship sufficient justification for the continued application of captain of the ship doctrine. Moreover, in light of the Supreme Court's expressions of approval of the doctrine …., we feel compelled to adhere to the doctrine." (*Fields v. Yusuf, supra*, xxx Cal.App.4th at p. xxx, internal citations omitted.)

- Absent evidence of right to control, an operating surgeon is generally not responsible for the conduct of anesthesiologists or others who independently carry out their duties. (*Seneris v. Haas* (1955) 45 Cal.2d 811, 828 [291 P.2d 915]; *Marvulli v. Elshire* (1972) 27 Cal.App.3d 180, 187 [103 Cal.Rptr. 461].)

~~•This doctrine applies only to medical personnel who are actively participating in the surgical procedure. (*Thomas v. Intermedics Orthopedics, Inc.* (1996) 47 Cal.App.4th 957, 969 [55 Cal.Rptr.2d 197].)~~

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 976
~~6 Witkin, Summary of California Law (2002 supp.) Torts, § 795, p. 73~~

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.45 (Matthew Bender)

California Tort Guide (Cont.Ed.Bar 1996) § 9.4

36 California Forms of Pleading and Practice, Ch. 414, *Physicians and Other Medical Personnel* (Matthew Bender)

17 California Points and Authorities, Ch. 175, *Physicians and Surgeons* (Matthew Bender)

~~*(New September 2003)*~~

512. Wrongful Birth—~~Genetic Testing—~~Essential Factual Elements

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[*Name of plaintiff***] claims that [***name of defendant***] was negligent because [he/she] failed to inform [him/her] of the risk that [he/she] would have a [genetically impaired/disabled] child. 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***] of] the risk that [***name of child***] would ~~probably~~ be born with a [genetic impairment/disability];]**

~~[or:]~~ ~~and~~

[1, That [*name of defendant***] negligently failed to [perform appropriate tests/advise [***name of plaintiff***] of tests] that would more likely than not have disclosed the risk that [***name of child***] would be born with a [genetic impairment/disability];]**

2. That [*name of child***] was born with a [genetic impairment/disability];~~ and~~**

3. That if [*name of plaintiff***] had known of the [genetic impairment/disability], [***insert name of mother***] would not have conceived [***name of child***] [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***] to~~will~~ have to pay extraordinary expenses to care for [***name of child***].**

Instructional History

(New September 2003)

(Revised April 2007)

Directions for Use

The general medical negligence instructions ~~instructions~~ on the standard of care and causation (see CACI Nos. 500-502) ~~could~~ may be used in conjunction with this instruction~~one~~. Read also CACI No. 513, *Wrongful Life—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].)

Sources of Authority

- ``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].) Since the wrongful life action corresponds to the wrongful birth action, it is reasonable to conclude that this principle applies to wrongful birth actions.

- Regarding wrongful life actions, courts have observed: ``[A]s in any medical malpractice action, the plaintiff must establish: `(1) the duty of the professional to use such skill, prudence, and diligence as other members of his profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional's negligence.' [Citation.]'' (*Gami, supra,* 18 Cal.App.4th at p. 877.)

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

- Both parent and child may recover damages to compensate for ``the extraordinary expenses necessary to treat the hereditary ailment.'' (*Turpin v. Sortini* (1982) 31 Cal.3d 220, 239 [182 Cal.Rptr. 337, 643 P.2d 954].)

- In wrongful birth actions, parents are permitted to recover the medical expenses incurred on behalf of a disabled child. (*Turpin, supra,* 31 Cal.3d at p. 238.) Such children can also recover medical expenses in a wrongful life action, though both parent and child may not recover the same expenses. (*Ibid*.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 979–985
~~6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 797-800, pp. 143-152~~

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

California Tort Guide (Cont.Ed.Bar 1996) §§ 9.21-9.22

36 California Forms of Pleading and Practice, Ch. 414, *Physicians and Other Medical Personnel* (Matthew Bender)

~~(New September 2003)~~

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] ~~and~~ warn [*name of plaintiff*]'s parents of] the risk that their child would ~~probably~~ 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 [genetic impairment/~~hereditary ailment or~~ disability], [his/her] mother would not have conceived [him/her] [or would not have carried the fetus to term]; and

4. That defendant's negligence was a substantial factor in causing [*name of plaintiff*]'s parents to~~will~~ have to pay extraordinary ~~medical or training~~ expenses for [*name of plaintiff*]~~because of [his/her] [genetic impairment/disability]~~.

Instructional History

(New September 2003)

(Revised April 2007)

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—Genetic Testing—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.

~~The general medical negligence instructions-instructions on the standard of care and causation-could be used in conjunction with this one.~~

Sources of Authority

- ``[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 twenty-percent chance of detecting ~~a genetic abnormality~~Downs Syndrome did not establish a reasonably probable causal connection to the birth of a child with ~~Down's Syndrome~~this genetic abnormality. (*Simmons, supra ~~v. West Covina Medical Clinic~~* ~~(1989) 212 Cal.App.3d 696, 702-703 [260 Cal.Rptr. 772]~~.)

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

- Civil Code section 43.6(a) provides: ``No cause of action arises against a parent of a child based upon the claim that the child should not have been conceived or, if conceived, should not have been allowed to have been born alive.''

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 979–985
~~6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 797-800, pp. 143-152~~

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

31.50 (Matthew Bender)

California Tort Guide (Cont.Ed.Bar 1996) §§ 9.21-9.22

36 California Forms of Pleading and Practice, Ch. 414, *Physicians and Other Medical Personnel* (Matthew Bender)

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

~~(New September 2003)~~

530A. Medical Battery

[*Name of plaintiff***] claims that [***name of defendant***] committed a medical battery. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **[That [***name of defendant***] performed a medical procedure without [***name of plaintiff***]'s informed consent; [or]]**

   [That [*name of plaintiff***] gave informed consent~~ed~~ to one medical procedure, but [***name of defendant***] performed a substantially different medical procedure; ~~[or]~~]**

   ~~**[That [***name of plaintiff***] consented to a medical procedure, but only on the condition that [***describe what had to occur before consent would be given***], and [***name of defendant***] proceeded without such occurring;]**~~

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

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

A patient can consent to a medical procedure by words or conduct.

Instructional History

(Derived from former CACI No. 530 April 2007)

Directions for Use

Select either or both ~~One or more~~ of the two~~hree~~ bracketed options in the first element ~~should be selected,~~ depending on the nature of the case. In a case of a conditional consent in which it is alleged that the defendant proceeded without the condition having occurred, give CACI No. 530B, *Medcal Battery—Conditional Consent.*

Give also CACI No. 532, *Informed Consent—Definition.*

Sources of Authority

- Battery may also be found if a substantially different procedure is performed: ``Where a doctor obtains consent of the patient to perform one type of treatment and subsequently performs a substantially different treatment for which consent was not obtained, there is a clear case of battery.'' (*Cobbs v. Grant* (1972) 8 Cal.3d 229, 239 [104 Cal.Rptr. 505, 502 P.2d 1].)

- The battery theory should be reserved for those circumstances when a doctor performs an operation to which the patient has not consented. When the patient gives permission to perform one type of

treatment and the doctor performs another, the requisite element of deliberate intent to deviate from the consent given is present. However, when the patient consents to certain treatment and the doctor performs that treatment but an undisclosed inherent complication with a low probability occurs, no intentional deviation from the consent given appears; rather, the doctor in obtaining consent may have failed to meet his due care duty to disclose pertinent information. In that situation the action should be pleaded in negligence. (*Cobb v. Grant, supra*, 8 Cal.3d at 240.)

~~•Battery may also be found if a conditional consent is violated: ``[I]t is well recognized a person may place conditions on [his or her] consent. If the actor exceeds the terms or conditions of the consent, the consent does not protect the actor from liability for the excessive act.'' (*Ashcraft v. King* (1991) 228 Cal.App.3d 604, 610 [278 Cal.Rptr. 900].)~~

- ``Confusion may arise in the area of `exceeding a patient's consent.' In cases where a doctor exceeds the consent and such excess surgery is found necessary due to conditions arising during an operation which endanger the patient's health or life, the consent is presumed. The surgery necessitated is proper (though exceeding specific consent) on the theory of assumed consent, were the patient made aware of the additional need.'' (*Pedesky v. Bleiberg* (1967) 251 Cal.App.2d 119, 123 [59 Cal.Rptr. 294].)

- ``Consent to medical care, including surgery, may be express or may be implied from the circumstances.'' (*Bradford v. Winter* (1963) 215 Cal.App.2d 448, 454 [30 Cal.Rptr. 243].)

- ``It is elemental that consent may be manifested by acts or conduct and need not necessarily be shown by a writing or by express words. [Citations.]'' (*Kritzer v. Citron* (1950) 101 Cal.App.2d 33, 38-39 [224 P.2d 808].)

Secondary Sources

5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 352-562, pp. 439-658

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.41, Ch. 41, *Assault and Battery* (Matthew Bender)

California Tort Guide (Cont.Ed.Bar 1996) §§ 9.11-9.16

6 California Forms of Pleading and Practice, Ch. 58, *Assault and Battery*, § 58.14, Ch. 414, *Physicians and Other Medical Personnel* (Matthew Bender)

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

17 California Points and Authorities, Ch. 175, *Physicians and Surgeons* (Matthew Bender)

33 California Legal Forms, Ch. 104, *Health Care Transactions, Consents, and Directives*, § 104.11 (Matthew Bender)

~~*(Revised October 2004)*~~

530B. Medical Battery—Conditional Consent

[*Name of plaintiff***] claims that [***name of defendant***] committed a medical battery. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] gave informed consent to a medical procedure, but only on the condition that [***describe what had to occur before consent would be given***], and [***name of defendant***] proceeded without this condition having occurred;**

2. **That [***name of defendant***] intended to perform the procedure with knowledge that the condition had not occurred;**

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

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

A patient can consent to a medical procedure by words or conduct.

Instructional History

(*Derived From Former CACI No. 530 April 2007*)

Directions for Use

Give this instruction in a case of a conditional consent in which it is alleged that the defendant proceeded without the condition having occurred. If the claim is that the defendant proceeded without any consent or deviated from the consent given, give CACI No. 530A, *Medical Battery*.

Give also CACI No. 532, *Informed Consent—Definition.*

Sources of Authority

- Battery may also be found if a conditional consent is violated: ``[I]t is well recognized a person may place conditions on [his or her] consent. If the actor exceeds the terms or conditions of the consent, the consent does not protect the actor from liability for the excessive act.'' (*Ashcraft v. King* (1991) 228 Cal.App.3d 604, 610 [278 Cal.Rptr. 900].)

- Battery is an intentional tort. Therefore, a claim for battery against a doctor as a violation of conditional consent requires proof the doctor intentionally violated the condition placed on the patient's consent. (*Piedra v. Dugan* (2004) 123 Cal.App.4th 1483, 1498 [21 Cal.Rptr.3d 36], internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 352-562, pp. 439-65

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.41, Ch. 41, *Assault and Battery* (Matthew Bender)

California Tort Guide (Cont.Ed.Bar 1996) §§ 9.11-9.16

6 California Forms of Pleading and Practice, Ch. 58, *Assault and Battery*, § 58.14, Ch. 414, *Physicians and Other Medical Personnel* (Matthew Bender)

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

17 California Points and Authorities, Ch. 175, *Physicians and Surgeons* (Matthew Bender)

33 California Legal Forms, Ch. 104, *Health Care Transactions, Consents, and Directives*, § 104.11 (Matthew Bender)

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

[*Name of defendant***] contends that [***name of plaintiff***]'s lawsuit was not filed within the time set by law. [***Name of plaintiff***]'s lawsuit was filed too late if [***name of defendant***] proves that before [***insert date one year before date of filing***] [***name of plaintiff***] knew, or with reasonable diligence should have discovered, the facts of [***name of defendant***]'s wrongful act or omission[./,**

unless [*name of plaintiff***] proves:**

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

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

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

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

Instructional History

(*New April 2007*)

Directions for Use

Use CACI No. 611, *Affirmative Defense--Statute of Limitations—Attorney Malpractice—Four-Year Limit (Civ Code, § 340.6),* if the four-year limitation provision is at issue.

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

If no tolling provision from Code of Civil Procedure section 340.6 is at issue, read only through the end of the first paragraph. Read the rest of the instruction if a tolling provision is at issue.

Sources and Authority

- Civil Code section 340.6 provides:

(a) An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first. In no event shall the time for commencement of legal action exceed four years except that the period shall be tolled during the time that any of the following exist:
(1) The plaintiff has not sustained actual injury;
(2) The attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred;
(3) The attorney willfully conceals the facts constituting the wrongful act or omission when such facts are known to the attorney, except that this subdivision shall toll only the four-year limitation; and
(4) The plaintiff is under a legal or physical disability which restricts the plaintiff's ability to commence legal action.
(b) In an action based upon an instrument in writing, the effective date of which depends upon some act or event of the future, the period of limitations provided for by this section shall commence to run upon the occurrence of such act or event.

- Code of Civil Procedure section 352. provides:

  (a) If a person entitled to bring an action, mentioned in Chapter 3 (commencing with Section 335) is, at the time the cause of action accrued either under the age of majority or insane, the time of the disability is not part of the time limited for the commencement of the action.

  (b) This section does not apply to an action against a public entity or public employee upon a cause of action for which a claim is required to be presented in accordance with Chapter 1 (commencing with Section 900) or Chapter 2 (commencing with Section 910) of Part 3, or Chapter 3 (commencing with Section 950) of Part 4, of Division 3.6 of Title 1 of the Government Code. This subdivision shall not apply to any claim presented to a public entity prior to January 1, 1971.

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

- "[P]rior to the enactment of section 340.6 the running of the statute of limitations coincided with accrual of the plaintiff's malpractice cause of action, including damages. By contrast, under the provisions of section 340.6, discovery of the negligent act or omission initiates the statutory period, and the absence of injury or damages serves as a tolling factor." *Adams v. Paul* (1995) 11 Cal.4th 583, 598 n.2 [46 Cal.Rptr.2d 594; 902 P.2d 1205], internal citations omitted)

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

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

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

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

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

Secondary Sources

3 Witkin, California Procedure (4th ed. 1996) Actions, §§ 577-595

611. Affirmative Defense--Statute of Limitations—Attorney Malpractice—Four-Year Limit (Civ. Code, § 340.6)

[*Name of defendant***] contends that [***name of plaintiff***]'s lawsuit was not filed within the time set by law. [***Name of plaintiff***]'s lawsuit was filed too late if [***name of defendant***] proves that [his/her/its] wrongful act or omission occurred before [***insert date four years before date of filing***][./,**

unless [*name of plaintiff***] proves:**

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

[that [he/she/it] did not sustain actual injury until after [*insert date four years and one day before date of filing***].]**

[that after [*insert date four years and one day before date of filing***] [***name of defendant***] continued to represent [***name of plaintiff***] regarding the specific subject matter in which the wrongful act or omission occurred.]**

[that after [*insert date four years and one day before date of filing***] [***name of defendant***] knowingly concealed the facts constituting the wrongful act or omission.]**

[that after [*insert date four years and one day before date of filing***] [he/she/it] was under a legal or physical disability that restricted [his/her/its] ability to file a lawsuit].]**

Instructional History

(*New April 2007*)

Directions for Use

Use CACI No. 610, *Affirmative Defense--Statute of Limitations—Attorney Malpractice—One-Year* Limit (Civ Code, § 340.6), if the one-year limitation provision is at issue.

If no tolling provision from Code of Civil Procedure section 340.6 is at issue, read only through the end of the first paragraph. Read the rest of the instruction if a tolling provision is at issue.

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

Sources and Authority

- Civil Code section 340.6 provides:

  (a) An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within four years after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first. In no event shall the time for commencement of legal action exceed four years except that the period shall be tolled during the time that any of the following exist:
  (1) The plaintiff has not sustained actual injury;
  (2) The attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred;
  (3) The attorney willfully conceals the facts constituting the wrongful act or omission when such facts are known to the attorney, except that this subdivision shall toll only the four-year limitation; and
  (4) The plaintiff is under a legal or physical disability which restricts the plaintiff's ability to commence legal action.
  (b) In an action based upon an instrument in writing, the effective date of which depends upon some act or event of the future, the period of limitations provided for by this section shall commence to run upon the occurrence of such act or event.

- Code of Civil Procedure section 352. provides:

  (a) If a person entitled to bring an action, mentioned in Chapter 3 (commencing with Section 335) is, at the time the cause of action accrued either under the age of majority or insane, the time of the disability is not part of the time limited for the commencement of the action.

  (b) This section does not apply to an action against a public entity or public employee upon a cause of action for which a claim is required to be presented in accordance with Chapter 1 (commencing with Section 900) or Chapter 2 (commencing with Section 910) of Part 3, or Chapter 3 (commencing with Section 950) of Part 4, of Division 3.6 of Title 1 of the Government Code. This subdivision shall not apply to any claim presented to a public entity prior to January 1, 1971.

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

- "[P]rior to the enactment of section 340.6 the running of the statute of limitations coincided with accrual of the plaintiff's malpractice cause of action, including damages. By contrast, under the provisions of section 340.6, discovery of the negligent act or omission initiates the statutory period, and the absence of injury or damages serves as a tolling factor." *Adams v.*

Paul (1995) 11 Cal.4th 583, 598 n.2 [46 Cal.Rptr.2d 594; 902 P.2d 1205], internal citations omitted)

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

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

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

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

Secondary Sources

3 Witkin, California Procedure (4th ed. 1996) Actions, §§ 577-595

1003. Unsafe Concealed Conditions

[*Name of plaintiff***] claims that [he/she] was harmed by an unsafe ~~hidden~~ concealed condition on [***name of defendant***]'s property.**

[~~An owner/A lessee/An occupier/One who controls the property~~*Name of defendant*] is responsible for an injury caused by an unsafe~~hidden~~ concealed condition if:

1. **The condition created an unreasonable risk of harm;**

2. **~~The [owner/lessee/occupier/one who controls the property]~~[*Name of defendant*] knew or should have known about it; and**

3. **~~The [owner/lessee/occupier/one who controls the property~~[*Name of defendant*] failed to repair or give adequate warning of the condition~~take reasonable precautions to protect against the risk of harm~~.**

[~~An owner/A lessee/An occupier/One who controls the property~~*Name of defendant*] must make reasonable inspections of the property to discover ~~such~~ unsafe concealed conditions.

An unsafe condition is concealed if it is either not visible or its dangerous nature is not apparent to a reasonable person.

Instructional History

(New September 2003)

(Revised April 2007)

Directions for Use

Read this instruction with CACI No. 1001, *Basic Duty of Care*, if the evidence indicates the plaintiff's injury was due to a concealed condition on the defendant's property. Read also CACI No. 1000, *Essential Factual Elements*.

Sources and Authority

- If a dangerous condition is created by the owner's negligence or by his or her employees acting within the scope of their employment, then the owner may be presumed to know that the condition exists. (*Hatfield v. Levy Brothers* (1941) 18 Cal.2d 798, 806 [117 P.2d 841].)

- "Where the occupier of land is aware of a concealed condition involving in the absence of precautions an unreasonable risk of harm to those coming in contact with it and is aware that a person on the premises is about to come in contact with it, the trier of fact can reasonably conclude that a failure to

warn or to repair the condition constitutes negligence. Whether or not a guest has a right to expect that his host will remedy dangerous conditions on his account, he should reasonably be entitled to rely upon a warning of the dangerous condition so that he, like the host, will be in a position to take special precautions when he comes in contact with it." (*Rowland v. Christian* (1968) 69 Cal.2d 108, 119 [70 Cal.Rptr. 97, 443 P.2d 561].)

- "An owner of property is not an insurer of safety, but must use reasonable care to keep the premises in a reasonably safe condition and must give warning of latent or concealed perils." (*Lucas v. George T. R. Murai Farms, Inc.* (1993) 15 Cal.App.4th 1578, 1590 [19 Cal.Rptr.2d 436], internal citation omitted.)

- "Although liability might easily be found where the landowner has actual knowledge of the dangerous condition, '[the] landowner's lack of knowledge of the dangerous condition is not a defense. He has an affirmative duty to exercise ordinary care to keep the premises in a reasonably safe condition, and therefore must inspect them or take other proper means to ascertain their condition. And if, by the exercise of reasonable care, he would have discovered the dangerous condition, he is liable.'" (*Swanberg v. O'Mectin* (1984) 157 Cal.App.3d 325, 330 [203 Cal.Rptr. 701], internal citation omitted.)

- Whether a hazard is concealed is a factual matter. (*Kinsman v. Unocal Corp.* (2005) 37 Cal. 4th 659, 682 [36 Cal.Rptr.3d 495; 123 P.3d 931].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1119–1123~~6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 924-928~~

1 Levy et al., California Torts, Ch. 15, *General Premises Liability*, § 15.04 (Matthew Bender)

6 California Real Estate Law and Practice, Ch. 170, *The Premises: Duties and Liabilities*, § 170.02 (Matthew Bender)

11 California Real Estate Law and Practice, Ch. 381, *Tort Liability of Property Owners*, § 381.20 (Matthew Bender)

29 California Forms of Pleading and Practice, Ch. 334, *Landlord and Tenant: Claims for Damages*, § 334.51 (Matthew Bender)

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

17 California Points and Authorities, Ch. 178, *Premises Liability* (Matthew Bender)

California Civil Practice (Thomson West 2006) Torts, § 16:4
~~1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 16:4~~

~~(New September 2003)~~

1009A. Liability to Employees of Independent Contractors for ~~Dangerous~~ Unsafe Concealed Conditions

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

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

2. **That [***name of defendant***] knew, or reasonably should have known, of a preexisting unsafe concealed condition on the property;**

3. **That [***name of plaintiff's employer***] neither knew nor could be reasonably expected to know of the unsafe concealed condition;**

4. **That the condition was not part of the work that [***name of plaintiff's employer***] was hired to perform;**

5. **That [***name of defendant***] failed to warn [***name of plaintiff's employer***] of the condition;**

~~2. [*Insert one or more of the following:*]~~

~~**[That the unsafe condition was created by or known to [***name of defendant***] and was not a known condition that [***name of plaintiff's employer***] was hired to correct or repair;] [or]**~~

~~**[That [***name of defendant***] retained control over safety conditions at the worksite and through [his/her/its] actions [or failure to take actions [he/she/it] was required to take] contributed to [***name of plaintiff***]'s injuries;] [or]**~~

~~**[That [***name of defendant***] negligently provided unsafe equipment that contributed to [***name of plaintiff***]'s injuries;]**~~

6~~3~~. **That [***name of plaintiff***] was harmed; and**

7~~4~~. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

An unsafe condition is concealed if it is either not visible or its dangerous nature is not apparent to a reasonable person.

Instructional History

(*Derived From Former CACI No. 1009 April 2007***)**

Directions for Use

This instruction is for use if a concealed dangerous condition on property causes injury to an employee of an independent contractor hired to perform work on the property. For an instruction for injuries to others due to a concealed condition, see CACI No. 1003, *Unsafe Concealed Conditions*. For an instruction for injuries based on the owner's retained control or faulty equipment, see CACI No. 1009B, *Liability to Employees of Independent Contractors for Unsafe Conditions—Retained Control or Defective Equipment*.

See also the Vicarious Responsibility Series, CACI Nos. 3700 et seq. for instructions on the liability of a hirer for the acts of an independent contractor.

~~The internal bracket within the second bracketed option of element 2 is intended to be read in cases involving alleged omissions that constitute "affirmative contributions" under *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, 212 fn. 3 [115 Cal.Rptr.2d 853, 38 P.3d 1081].~~

Sources and Authority

- "[T]he hirer as landowner may be independently liable to the contractor's employee, even if it does not retain control over the work, if: (1) it knows or reasonably should know of a concealed, preexisting hazardous condition on its premises; (2) the contractor does not know and could not reasonably ascertain the condition; and (3) the landowner fails to warn the contractor." (*Kinsman v. Unocal Corp.* (2005) 37 Cal. 4th 659, 675 [36 Cal.Rptr.3d 495; 123 P.3d 931].)

- "[T]here is no reason to distinguish conceptually between premises liability based on a hazardous substance that is concealed because it is invisible to the contractor and known only to the landowner and premesis liability based on a hazardous substance that is visible but is known to be hazardous only to the landowner. If the hazard is not reasonably apparent, and is known only to the landowner, it is a concealed hazard, whether or not the substance creating the hazard is visible."(*Kinsman*, *supra*, 37 Cal. 4th at p. 678.)

- ~~"[W]e conclude that in the absence of the hirer's retention of control of the methods or operative details of the independent contractor's work, the hirer cannot be held liable to the independent contractor's employee as a result of the dangerous condition on the hirer's property if: 1) a preexisting dangerous condition was known or reasonably discoverable by the contractor, and the condition is the subject of at least a part of the work contemplated by the independent contractor; or 2) the contractor creates the dangerous condition on the hirer's property and the hirer does not increase the risk of harm by its own affirmative conduct." (*Grahn v. Tosco Corp.* (1997) 58 Cal.App.4th 1373, 1401 [68 Cal.Rptr.2d 806], disapproved of on other grounds in *Hooker*, *supra*, 27 Cal.4th at p. 214 and *Camargo v. Tjaarda Dairy* (2001) 25 Cal.4th 1235, 1245 [108 Cal.Rptr.2d 617, 25 P.3d 1096].)~~

- "A landowner's duty generally includes a duty to inspect for concealed hazards. But the responsibility for job safety delegated to independent contractors may and generally does include explicitly or implicitly a limited duty to inspect the premises as well. Therefore, … the landowner would not be

liable when the contractor has failed to engage in inspections of the premises implicitly or explicitly delegated to it. Thus, for example, an employee of a roofing contractor sent to repair a defective roof would generally not be able to sue the hirer if injured when he fell through the same roof due to a structural defect, inasmuch as inspection for such defects could reasonably be implied to be within the scope of the contractor's employment. On the other hand, if the same employee fell from a ladder because the wall on which the ladder was propped collapsed, assuming that this defect was not related to the roof under repair, the employee may be able to sustain a suit against the hirer. Put in other terms, the contractor was not being paid to inspect the premises generally, and therefore the duty of general inspection could not be said to have been delegated to it. Under those circumstances, the landowner's failure to reasonably inspect the premises, when a hidden hazard leads directly to the employee's injury, may well result in liability. (*Kinsman*, *supra*, 37 Cal. 4th at pp. 677-678, internal citations omitted.)

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

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

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

- ~~Restatement Second of Torts, section 414, provides: "One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care."~~

- ~~"[W]e hold that a hirer is liable to an employee of an independent contractor insofar as the hirer's provision of unsafe equipment affirmatively contributes to the employee's injury." (*McKown v. Wal-Mart Stores, Inc.* (2002) 27 Cal.4th 219, 222 [115 Cal.Rptr.2d 868, 38 P.3d 1094.])~~

- ~~"'[W]here the hiring party actively contributes to the injury by supplying defective equipment, it is the hiring party's own negligence that renders it liable, not that of the contractor.'" (*McKown*, *supra*, 27 Cal.4th at p. 225, internal citation omitted.)~~

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1117
~~6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 922~~

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

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

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

17 California Points and Authorities, Ch. 178, *Premises Liability* (Matthew Bender)

~~(New September 2003)~~

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

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

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

2. [*Insert either or both of the following:*]

[That [*name of defendant***] retained control over safety conditions at the worksite, and [his/her/its]'s acts [or failure to take actions that [he/she/it] was required to take] contributed to [***name of plaintiff***]'s injuries; [or]**

[That [*name of defendant***] negligently provided unsafe equipment that contributed to [***name of plaintiff***]'s injuries;]**

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

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

Instructional History

(*Derived From Former CACI No. 1009 April 2007***)**

Directions for Use

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

See also the Vicarious Responsibility Series, CACI Nos. 3700 et seq. for instructions on the liability of a hirer for the acts of an independent contractor.

In the first option for element 2, include the bracketed language in cases involving alleged omissions that constitute "affirmative contributions" under *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, 212 fn. 3 [115 Cal.Rptr.2d 853, 38 P.3d 1081].

Sources and Authority

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

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

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

- Restatement Second of Torts, section 414, provides: "One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care."

- "[W]e hold that a hirer is liable to an employee of an independent contractor insofar as the hirer's provision of unsafe equipment affirmatively contributes to the employee's injury." (*McKown v. Wal-Mart Stores, Inc.* (2002) 27 Cal.4th 219, 222 [115 Cal.Rptr.2d 868, 38 P.3d 1094.])

- "'[W]here the hiring party actively contributes to the injury by supplying defective equipment, it is the hiring party's own negligence that renders it liable, not that of the contractor.'" (*McKown, supra*, 27 Cal.4th at p. 225, internal citation omitted.)

Secondary Sources

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

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

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

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

17 California Points and Authorities, Ch. 178, *Premises Liability* (Matthew Bender)

1111. Affirmative Defense—Condition Created by Reasonable Act or Omission (Gov. Code, § 835.4(a))

A public entity is not legally responsible for harm caused by a dangerous condition if the act or omission of its employee that created the dangerous condition was reasonable. If [*name of defendant***] proves that the act or omission that created the dangerous condition was reasonable, then your verdict must be for [***name of defendant***].**

In determining whether the employee's conduct was reasonable, you must weigh the likelihood and the seriousness of the potential injury against the practicality and cost of either:

(a) taking alternative action that would not have created the risk of injury; or

(b) protecting against the risk of injury.

Instructional History

(New September 2003)

(Revised April 2007)

Directions for Use

This instruction states a defense to the theory that the entity created a dangerous condition of public property. (Gov. Code, §§ 835(a), 835.4(a).)

NOTE: The California Supreme Court has granted review in *Metcalf v. County of San Joaquin* (2006) 139 Cal.App.4th 969 [43 Cal.Rptr.3d 522], review granted September 20, 2006, S144831. The decision in that case may affect the use of this instruction.

Sources and Authority

- Section 835.4(a) provides: "A public entity is not liable under subdivision (a) of Section 835 for injury caused by a condition of its property if the public entity establishes that the act or omission that created the condition was reasonable. The reasonableness of the act or omission that created the condition shall be determined by weighing the probability and gravity of potential injury to persons and property foreseeably exposed to the risk of injury against the practicability and cost of taking alternative action that would not create the risk of injury or of protecting against the risk of injury."

- The Law Revision Commission comment on this section states: "Under this section, a public entity may absolve itself from liability for creating or failing to remedy a dangerous condition by showing that it would have been too costly and impractical for the public entity to have done anything else."

- Government Code section 835.4 is an affirmative defense. (*Hibbs v. Los Angeles County Flood*

Control Dist. (1967) 252 Cal.App.2d 166, 172 [60 Cal.Rptr. 364].)

- "[T]he question of the reasonableness of a public entity's action in any particular situation is one of fact for a jury." (*Swaner v. City of Santa Monica* (1984) 150 Cal.App.3d 789, 810 [198 Cal.Rptr. 208].)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, § 272
~~5 Witkin, Summary of California Law (9th ed. 1988) Torts, § 185~~

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

2 California Government Tort Liability Practice (Cont.Ed.Bar 4th ed. 1999), §§ 12.61-12.62

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

17 California Points and Authorities, Ch. 178, *Premises Liability* (Matthew Bender)

~~(New September 2003)~~

1112. Affirmative Defense—Reasonable Act or Omission to Correct (Gov. Code, § 835.4(b))

A public entity is not responsible for harm caused by a dangerous condition if its failure to take sufficient steps to protect against the risk of injury was reasonable. If [*name of defendant***] proves that its conduct was reasonable, then your verdict must be for [***name of defendant***].**

In determining whether [*name of defendant***]'s conduct was reasonable, you must consider how much time and opportunity it had to take action. You must also weigh the likelihood and the seriousness of the potential injury against the practicality and cost of protecting against the risk of injury.**

Instructional History

(New September 2003)

(Revised April 2007)

Directions for Use

This instruction states a defense to the theory that the entity had notice of a dangerous condition (that it did not create) and failed to take adequate protective measures. (Gov. Code, §§ 835(b), 835.4(b).)

NOTE: The California Supreme Court has granted review in *Metcalf v. County of San Joaquin* (2006) 139 Cal.App.4th 969 [43 Cal.Rptr.3d 522], review granted September 20, 2006, S144831. The decision in that case may affect the use of this instruction.

Sources and Authority

- Government Code section 835.4(b) provides: "A public entity is not liable under subdivision (b) of Section 835 for injury caused by a dangerous condition of its property if the public entity establishes that the action it took to protect against the risk of injury created by the condition or its failure to take such action was reasonable. The reasonableness of the action or inaction of the public entity shall be determined by taking into consideration the time and opportunity it had to take action and by weighing the probability and gravity of potential injury to persons and property foreseeably exposed to the risk of injury against the practicability and cost of protecting against the risk of such injury."

- Government Code section 835.4 is an affirmative defense. (*Hibbs v. Los Angeles County Flood Control Dist.* (1967) 252 Cal.App.2d 166, 172 [60 Cal.Rptr. 364].)

- "[T]he question of the reasonableness of a public entity's action in any particular situation is one of fact for a jury." (*Swaner v. City of Santa Monica* (1984) 150 Cal.App.3d 789, 810 [198 Cal.Rptr. 208]; see also *Ducey v. Argo Sales Co.* (1979) 25 Cal.3d 707, 720 [159 Cal.Rptr. 835, 602 P.2d 755].)

- "Unlike section 830.6 relating to design immunity, section 835.4 subdivision (b), does not provide

that the reasonableness of the action taken shall be determined by the 'trial or appellate court.'" (*De La Rosa v. City of San Bernardino* (1971) 16 Cal.App.3d 739, 749 [94 Cal.Rptr. 175].)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, § 272
~~5 Witkin, Summary of California Law (9th ed. 1988) Torts, § 185~~

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

2 California Government Tort Liability Practice (Cont.Ed.Bar 4th ed. 1999), §§ 12.63-12.65

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

17 California Points and Authorities, Ch. 178, *Premises Liability* (Matthew Bender)

~~(New September 2003)~~

NOTE: The expansion of economic damages into its various components as shown in Question 7 below is proposed for all verdict forms for causes of action likely to involve bodily injury and medical expenses.

VF-1101. Dangerous Condition of Public Property—Affirmative Defense of Reasonable Act or Omission (Gov. Code, § 835.4)

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] own [or control] the property?**
____ 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 the property in a dangerous condition at the time of the incident?
____ 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 the dangerous condition create a reasonably foreseeable risk that this kind of incident would occur?
____ 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 the negligent or wrongful conduct of [*name of defendant***]'s employee acting within the scope of his or her employment create the dangerous condition?]**

[or]

[Did [*name of defendant***] have notice of the dangerous condition for a long enough time to have protected against it?]**
____ Yes ____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. [Was the act or omission that created the dangerous condition reasonable?]

[or]

[Was [*name of defendant***] acting reasonably in failing to take sufficient steps to protect against the risk of injury?]**
____ Yes ____ No

If your answer to question 5 is no, then answer question 6. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Was the dangerous condition a substantial factor in causing harm to [*name of plaintiff***]?**
____ Yes ____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. What are [*name of plaintiff***]'s damages?**

[a. Past economic loss
[lost earnings $ _____]
[lost profits $ _____]
[medical expenses: $ _____]
[other past economic loss $ _____]
Total Past Economic Damages: $ _____]

[b. Future economic loss
[lost earnings $ _____]
[lost profits $ _____]
[medical expenses: $ _____]
[other future economic loss $ _____]
Total Future Economic Damages: $ _____]

~~**[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:]**~~
~~**$ _____]**~~

~~**[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:]**~~
~~**$ _____]**~~

[c. Past noneconomic loss, including [physical pain/mental suffering:]

$ _____]

[d. Future noneconomic loss, including [physical pain/mental suffering:]

$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

Instructional History

(New September 2003)

(Revised April 2007)

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on CACI No. 1100, *Essential Factual Elements (Gov. Code, § 835)*; CACI No. 1111, *Affirmative Defenses—Condition Created by Reasonable Act or Omission (Gov. Code, § 835.4(a))*; and CACI No. 1112, *Affirmative Defenses—Reasonable Act or Omission to Correct (Gov. Code, § 835.4(b))*.

NOTE: The California Supreme Court has granted review in *Metcalf v. County of San Joaquin* (2006) 139 Cal.App.4th 969 [43 Cal.Rptr.3d 522], review granted September 20, 2006, S144831. The decision in that case may affect the use of this verdict form.

For questions 4 and 5, choose the first bracketed options if liability is alleged due to an employee's

negligent conduct under Gov. Code, section 835(a). Use the second bracketed options if liability is alleged for failure to act after actual or constructive notice under Gov. Code, section 835(b).

If specificity is not required, users do not have to itemize all the damages listed in question 7. The breakdown is optional; depending on the circumstances~~, users may wish to break down the damages even further~~.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

This form may be modified if the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest on specific losses that occurred prior to judgment.

~~(New September 2003)~~

NOTE: The expansion of economic damages into its various components as shown in Question 6 below is proposed for all verdict forms for causes of action likely to involve bodily injury and medical expenses.

VF-1201. Strict Products Liability—Design Defect—Consumer Expectation Test

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We answer the questions submitted to us as follows:

1. **Did [*name of defendant*] [manufacture/distribute/sell] the [*product*]?**
____ 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. **At the time the [*product*] was used, was it substantially the same as when it left [*name of defendant*]'s possession?**
____ 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 the [*product*] fail to perform as safely as an ordinary consumer would have expected?**
____ Yes ____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Was the [*product*] used [or misused] in a way that was reasonably foreseeable to [*name of defendant*]?**
____ Yes ____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Was the [*product*]'s design a substantial factor in causing harm to [*name of plaintiff*]?**
____ Yes ____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. What are [*name of plaintiff*]'s damages?

[a. Past economic loss
[lost earnings $ _____]
[lost profits $ _____]
[medical expenses: $ _____]
[other past economic loss $ _____]
Total Past Economic Damages: $ _____]

[b. Future economic loss
[lost earnings $ _____]
[lost profits $ _____]
[medical expenses: $ _____]
[other future economic loss $ _____]
Total Future Economic Damages: $ _____]

~~**[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:]**~~
~~**$ _____]**~~

~~**[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:]**~~
~~**$ _____]**~~

[c. Past noneconomic loss, including [physical pain/mental suffering:]
$ _____]

[d. Future noneconomic loss, including [physical pain/mental suffering:]
$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

Instructional History

(Revised October 2004)

(Revised April 2007)

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on CACI No. 1203, *Strict Liability—Design Defect-Consumer Expectation Test—Essential Factual Elements.*

~~If specificity is not required, users do not have to itemize all the damages listed in question 6. The breakdown is optional; depending on the circumstances, users may wish to break down the damages even further.~~

If there are multiple causes of action, users may wish to combine the individual forms into one form. However, do not combine this verdict form with CACI No. VF-1202, *Strict Products Liability—Design Defect—Risk-Benefit Test*. The verdict forms must make it clear to the jury that the two tests are alternative theories of liability (*Bracisco v. Beech Aircraft Corp.* (1984) 159 Cal.App.3d 1101, 1106-1107 [206 Cal.Rptr. 431].) and that the burden shifting to the defendant to prove that the benefits outweigh the risks does not apply to the consumer-expectation test.

If specificity is not required, users do not have to itemize all the damages listed in question 6. The breakdown is optional; depending on the circumstances.

This form may be modified if the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest on specific losses that occurred prior to judgment.

~~*(Revised October 2004)*~~

NOTE: The expansion of economic damages into its various components as shown in Question 6 below is proposed for all verdict forms for causes of action likely to involve bodily injury and medical expenses.

VF-1202. Strict Products Liability—Design Defect—Risk-Benefit Test

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We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] [manufacture/distribute/sell] the [***product***]?**
   ____ 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. **At the time the [***product***] was used, was it substantially the same as when it left [***name of defendant***]'s possession?**
   ____ 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 [***product***] used [or misused] in a way that was reasonably foreseeable to [***name of defendant***]?**
   ____ Yes ____ No

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Was the [***product***]'s design a substantial factor in causing harm to [***name of plaintiff***]?**
   ____ Yes ____ No

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Did the risks~~benefits~~ of the [***product***]'s design outweigh the benefits~~risks~~ of the design?**
   ____ Yes ____ No

   If your answer to question 5 is ~~no~~yes, then answer question 6. If you answered ~~yes~~no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. What are [*name of plaintiff*]'s damages?

[a. Past economic loss
[lost earnings $ _____]
[lost profits $ _____]
[medical expenses: $ _____]
[other past economic loss $ _____]
Total Past Economic Damages: $ _____]

[b. Future economic loss
[lost earnings $ _____]
[lost profits $ _____]
[medical expenses: $ _____]
[other future economic loss $ _____]
Total Future Economic Damages: $ _____]

~~**[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:]**~~
~~**$ _____]**~~

~~**[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:]**~~
~~**$ _____]**~~

[c. Past noneconomic loss, including [physical pain/mental suffering:]
$ _____]

[d. Future noneconomic loss, including [physical pain/mental suffering:]
$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form

to the [clerk/bailiff/judge].

Instructional History

(*New September 2003*)

(*Revised April 2007*)

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on CACI No. 1204, *Strict Liability—Design Defect—Risk-Benefit Test—Essential Factual Elements—Shifting Burden of Proof.*

~~If specificity is not required, users do not have to itemize all the damages listed in question 6. The breakdown is optional; depending on the circumstances, users may wish to break down the damages even further.~~

If there are multiple causes of action, users may wish to combine the individual forms into one form. However, do not combine this verdict form with CACI No. VF-1201, *Strict Products Liability—Design Defect—Consumer Expectation Test*. The verdict forms must make it clear to the jury that the two tests are alternative theories of liability (*Bracisco v. Beech Aircraft Corp*. (1984) 159 Cal.App.3d 1101, 1106-1107 [206 Cal.Rptr. 431].) and that the burden shifting to the defendant to prove that the benefits outweigh the risks does not apply to the consumer-expectation test.

If specificity is not required, users do not have to itemize all the damages listed in question 6. The breakdown is optional; depending on the circumstances.

This form may be modified if the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest on specific losses that occurred prior to judgment.

~~(*New September 2003*)~~

2322. Affirmative Defense—Insured's Voluntary Payment

[*Name of defendant***] claims that it does not have to pay [***specify, e.g.,* **the amount of the settlement] because [***name of plaintiff***] made a voluntary payment. To succeed on this defense, [***name of defendant***] must prove the following:**

1. [*Select either or both of the following:*]

[That [*name of plaintiff***] [made a payment to [***name of third party claimant***] in [partial/full] settlement of [***name of third party claimant***]'s claim against [***name of plaintiff***]; [or]]**

[That [*name of plaintiff***] [made a payment/ [or] assumed an obligation/ [or] incurred an expense] to [***name***] with regard to [***name of third party claimant***]'s claim against [***name of plaintiff***]];**

AND

2. **That [***name of defendant***] did not give its consent or approval for the [payment/obligation/expense].**

Instructional History

(*New April 2007*)

Directions for Use

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

This instruction is intended for use by an insurer as a defense to a breach of contract action based on a third party liability policy. This instruction also may be modified for use as a defense to a judgment creditor's action to recover on a liability policy. This defense is not available if the insurer refused to defend before the voluntary payment was made.

A voluntary-payments clause in an insurance policy typically provides that the insured may not voluntarily make a payment, assume an obligation, or incur an expense without the insurer's consent. (See, e.g., *Truck Ins. Exchange v. Unigard Ins. Co.* (2000) 79 Cal.App.4th 966, 976 [94 Cal.Rptr.2d 516].) In element 1, select the appropriate options depending on the acts alleged. Modify, as necessary, depending on the actual language of the policy. Use the first option if the insured has made a payment in settlement of the claim. Use the second option if the insured has made a payment, assumed an obligation, or incurred an expense for other reasons, such as to an attorney for legal services, or to a creditor of the claimant such as a provider of medical or repair services.

Sources and Authority

- "The general validity of no-voluntary-payment provisions in liability insurance policies is well established. … [S]uch clauses are common 'to prevent collusion as well as to invest the insurer with the complete control and direction of the defense or compromise of suits or claims.'" (*Insua v. Scottsdale Ins. Co.* (2002) 104 Cal. App. 4th 737, 742 [129 Cal.Rptr.2d 138], internal citations omitted.)

- California law enforces ... no-voluntary-payments provisions in the absence of economic necessity, insurer breach, or other extraordinary circumstances. They are designed to ensure that responsible insurers that promptly accept a defense tendered by their insureds thereby gain control over the defense and settlement of the claim. That means insureds cannot unilaterally settle a claim before the establishment of the claim against them and the insurer's refusal to defend in a lawsuit to establish liability .... [T]he decision to pay any remediation costs outside the civil action context raises a 'judgment call left solely to the insurer. In short, the provision protects against coverage by fait accompli." *Low v. Golden Eagle Ins. Co.* (2003) 110 Cal. App. 4th 1532, 1544 [2 Cal.Rptr.3d 761], internal citations omitted.)

- "Typically, a breach of that provision occurs, if at all, before the insured has tendered the defense to the insurer. … [A voluntary-payments] provision is [also] enforceable posttender until the insurer wrongfully denies tender. 'It is only when the insured has requested and been denied a defense by the insurer that the insured may ignore the policy's provisions forbidding the incurring of defense costs without the insurer's prior consent and under the compulsion of that refusal undertake his own defense at the insurer's expense'" (*Low v. Golden Eagle, supra,* 110 Cal. App. 4th at 1546-1547, internal citations omitted.)

- "[T]he existence or absence of prejudice to [the insurer] is simply irrelevant to [its] duty to indemnify costs incurred *before* notice. The policy plainly provides that notice is a *condition precedent* to the insured's right to be indemnified; a fortiori the right to be indemnified cannot relate back to payments made or obligations incurred before notice···· The prejudice requirement ··· applies only to the insurer's attempt to assert lack of notice as a *policy defense* against payment even of losses and costs incurred *after* belated notice." (*Jamestown Builders,Inc. v. General Star Indemnity Co. (1999)* 77 Cal.App.4th 341, 350 [91 Cal.Rptr.2d 514], italics in original, internal citations omitted.)

- "[There is] an exception where an insured makes an involuntarily payment due to circumstances beyond its control, as where it does not know the insured's identity or the policy contents, or must act immediately to protect its legal interests. (*Low v. Golden Eagle, supra,* 110 Cal. App. 4th at 1545.)

Secondary Sources

Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group 2002) ¶¶ 7:439.5-7.439.10

2330. Implied Obligation of Good Faith and Fair Dealing Explained

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

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

An insurer does not breach the implied obligation of good faith and fair dealing if it only makes an honest mistake, exercises bad judgment, or is negligent. It must have failed or refused to carry out its duties and responsibilities under the policy by a conscious and deliberate act or failure to act that was contrary to the reasonable expectations of the insured and that deprived the insured of the benefits of the policy.

Instructional History

(*New September 2003*)

(*Revised April 2007*)

Directions for Use

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

Sources and Authority

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

- "For the insurer to fulfill its obligation not to impair the right of the insured to receive the benefits of the agreement, it again must give at least as much consideration to the latter's interests as it does to its own." (*Egan v. Mutual of Omaha Insurance Co.* (1979) 24 Cal.3d 809, 818-819 [169 Cal.Rptr. 691, 620 P.2d 141].)

- "[A]n insurer is not required to pay every claim presented to it. Besides the duty to deal fairly with the insured, the insurer also has a duty to its other policyholders and to the stockholders (if it is such a company) not to dissipate its reserves through the payment of meritless claims. Such a practice inevitably would prejudice the insurance seeking public because of the necessity to increase rates, and would finally drive the insurer out of business." (*Austero v. National Cas. Co.* (1978) 84 Cal.App.3d 1, 30 [148 Cal.Rptr. 653], overruled on other grounds in *Egan v. Mutual of Omaha Ins.*

Co. (1979) 24 Cal.3d 809, 824 fn. 7 [169 Cal. Rptr. 691, 620 P.2d 141].)

- "Unique obligations are imposed upon true fiduciaries which are not found in the insurance relationship. For example, a true fiduciary must first consider and always act in the best interests of its trust and not allow self-interest to overpower its duty to act in the trust's best interests. An insurer, however, may give its own interests consideration equal to that it gives the interests of its insured; it is not required to disregard the interests of its shareholders and other policyholders when evaluating claims; and it is not required to pay noncovered claims, even though payment would be in the best interests of its insured." (*Love v. Fire Ins. Exchange* (1990) 221 Cal.App.3d 1136, 1148-1140 [271 Cal.Rptr. 246], internal citations omitted.)

- "Thus, allegations which assert [a claim for breach of the implied covenant of good faith and fair dealing] must show that the conduct of the defendant, whether or not it also constitutes a breach of a consensual contract term, demonstrates a failure or refusal to discharge contractual responsibilities, prompted not by an honest mistake, bad judgment or negligence but rather by a conscious and deliberate act, which unfairly frustrates the agreed common purposes and disappoints the reasonable expectations of the other party thereby depriving that party of the benefits of the agreement. Just what conduct will meet these criteria must be determined on a case by case basis and will depend on the contractual purposes and reasonably justified expectations of the parties." (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1395 [272 Cal.Rptr. 387].)

Secondary Sources

Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group 2006) ¶¶ 11:7 to 11:8; 12:1 to12:200

2 California Insurance Law & Practice, Ch. 13, *Claims Handling and the Duty of Good Faith*, § 13.03[1][a]-[c] (Matthew Bender)

1 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar 200~~2~~6), Ch. 2, *Overview of Rights and Obligations of Policy*, §§ 2.9-2.15~~4, pp. 43-48~~

~~Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group 2002) 12:1-12:6, pp. 12A-1-12A-2~~

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

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

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

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

~~(New September 2003)~~

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

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

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

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

3. **That [***name of defendant***] ~~unreasonably~~ [failed to pay/delayed payment of] policy benefits without proper cause;**

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

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

[*Name of defendant***] acted "without proper cause" if it had no reasonable basis for its actions.**

Instructional History

(New September 2003)

(Revised April 2007)

Directions for Use

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

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

Sources and Authority

- ~~Where~~ If an insurer "fails to deal *fairly and in good faith* with its insured by refusing, without proper cause, to compensate its insured for a loss covered by the policy, such conduct may give rise to a cause of action in tort for breach of an implied covenant of good faith and fair dealing. ... [¶] ... [W]hen the insurer unreasonably and in bad faith withholds payment of the claim of its insured, it is subject to liability in tort." (*Gruenberg v. Aetna Insurance Co.* (1973) 9 Cal.3d 566, 574-575 [108 Cal.Rptr. 480, 510 P.2d 1032], italics in original.)

- "An insurer's obligations under the implied covenant of good faith and fair dealing with respect to first party coverage include a duty not to unreasonably withhold benefits due under the policy. An insurer that unreasonably delays, or fails to pay, benefits due under the policy may be held liable in tort for breach of the implied covenant. The withholding of benefits due under the policy may constitute a breach of contract even if the conduct was reasonable, but liability in tort arises only if the conduct was unreasonable, that is, without proper cause. In a first party case, as we have here, the withholding of benefits due under the policy is not unreasonable if there was a genuine dispute between the insurer and the insured as to coverage or the amount of payment due." (*Rappaport-Scott v. Interinsurance Exch. of the Auto. Club* (2007) 2007 Cal. App. LEXIS 35, 9-10 [], internal citations omitted.)

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

- ~~"[T]he elements of the tort cannot be defined by the terms of the policy; for there to be a breach of the implied covenant, the failure to bestow benefits must have been under circumstances or for reasons which the law defines as tortious. ... '[T]he mere denial of benefits, however, does not demonstrate bad faith.'" (*California Shoppers, Inc. v. Royal Globe Insurance Co.* (1985) 175 Cal.App.3d 1, 15 [221 Cal.Rptr. 171], internal citation omitted.)~~

- "[A]n insurer's erroneous failure to pay benefits under a policy does not necessarily constitute bad faith entitling the insured to recover tort damages. '[T]he ultimate test of [bad faith] liability in the first party cases is whether the refusal to pay policy benefits was unreasonable.' ... In other words, 'before an [insurer] can be found to have acted tortiously, i.e., in bad faith, in refusing to bestow policy benefits, it must have done so "without proper cause."'" (*Opsal v. United Services Automobile Assn.* (1991) 2 Cal.App.4th 1197, 1205 [10 Cal.Rptr.2d 352], citations omitted.)

- "[A]n insurer denying or delaying the payment of policy benefits due to the existence of a genuine dispute with its insured as to the existence of coverage liability or the amount of the insured's coverage claim is not liable in bad faith even though it might be liable for breach of contract." (*Chateau Chamberay Homeowners Assn. v. Associated International Insurance Co.* (2001) 90 Cal.App.4th 335, 347 [108 Cal.Rptr.2d 776].)

- "Despite the difference between the $ 7,000 offered by [the insurer] and the $ 33,000 later determined to be payable on the policy, the vast difference between the $ 346,732.34 in losses claimed by [the insured] and the $ 63,000 in actual losses as determined by the arbitrator demonstrates, *as a matter of law*, that a genuine dispute existed as to the amount payable on the claim." (*Rappaport-Scott, supra*, -- Cal.App.4th at p. --, emphasis the court's.)

- "[I]f the conduct of [the insurer] in defending this case was objectively reasonable, its subjective intent is irrelevant. (*Morris v. Paul Revere Life Insurance Co.* (2003) 109 Cal. App. 4th 966, 973 [135 Cal.Rptr.2d 718].)

- "An insurance company may not ignore evidence which supports coverage. If it does so, it acts unreasonably towards its insured and breaches the covenant of good faith and fair dealing." (*Mariscal v. Old Republic Life Insurance Co.* (1996) 42 Cal.App.4th 1617, 1624 [50 Cal.Rptr.2d 224].)

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

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

Secondary Sources

Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group 2006) ¶¶ 12:822 to 12:1016

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

2 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar 2006) Ch. 24, *General Principles of Contract and Bad Faith Actions*, §§ 24.25-24.45A

~~2 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar 2001) *General Principles of Contract and Bad Faith Actions*, §§ 24.25-24.30, 24.32, pp. 901-908~~

~~Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group 2002) 12:822-12:846.6, pp. 12C-7-12C-13~~

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

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

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

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

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

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

~~(New September 2003)~~

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

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[*Name of plaintiff***] claims that [***name of defendant***] breached the obligation of good faith and fair dealing by failing to properly investigate [his/her/its] loss. To establish this claim, [***name of plaintiff***] must prove all of the following:**

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

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

3. **That [***name of defendant***] ~~unreasonably~~ failed to conduct a fair and thorough investigation of ~~properly investigate~~ the loss and [denied coverage/failed to pay insurance benefits/delayed payment of insurance benefits] without proper cause~~-~~;**

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

5. **That [***name of defendant***]'s ~~unreasonable~~ failure to conduct a fair and thorough investigation of~~properly investigate~~ the loss was a substantial factor in causing [***name of plaintiff***]'s harm.**

[*Name of defendant***] acted "without proper cause" if it had no reasonable basis for its actions.**

~~To properly investigate a~~When investigating the claim, ~~an insurance company~~[*name of defendant***] had a duty to~~must~~ diligently search for and consider evidence that supports~~ed~~ ~~an insured~~[***name of plaintiff***]'s claimed loss. [***Name of defendant***] may not deny payments to [***name of plaintiff***] without thoroughly investigating the grounds for, and evaluating, the claim.**

Instructional History

(Revised December 2005)

(Revised April 2007)

Directions for Use

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

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

Sources and Authority

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

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

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

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

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

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

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

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

Secondary Sources

Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group 2006) ¶¶ 12:848 to 12:904

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

1 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar 2006) Ch. 9, *Investigating the Claim*, §§ 9.2-9.3, 9.14-9.22A

~~1 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar 2002) Investigating the Claim, §§ 9.2, 9.14-9.22, pp. 302-303, 313-321~~

~~Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group 2002) 12:848-12:874, pp. 12C-14-12C-21~~

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

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

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

~~(Revised December 2005)~~

2333. Bad Faith (First Party)—Breach of Duty to Inform Insured of Rights—Essential Factual Elements

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[*Name of plaintiff***] claims that [***name of defendant***] breached the obligation of good faith and fair dealing by failing to ~~reasonably~~ inform [him/her/it] of [his/her/its] rights and obligations under an insurance policy. To succeed, [***name of plaintiff***] must prove all of the following:**

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

2. **That [***name of defendant***] [denied coverage for/refused to pay] [***name of plaintiff***]'s loss;**

3. **That under the policy [***name of plaintiff***] had the [right/obligation] to [***describe right or obligation at issue; e.g., "to request arbitration within 180 days"***];**

4. **That [***name of defendant***]~~, did not reasonably~~ consciously and deliberately failed to inform [***name of plaintiff***] of [his/her/its] [right/obligation] to [***describe right or obligation***];**

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

6. **That [***name of defendant***]'s failure to ~~reasonably~~ inform [***name of plaintiff***] was a substantial factor in causing [his/her/its] harm.**

Instructional History

(New September 2003)

(Revised April 2007)

Directions for Use

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

This instruction is intended for use in appropriate cases ~~where~~ if the insured alleges that the insurer breached the implied covenant of good faith and fair dealing by failing to reasonably inform the insured of his or her remedial rights and obligations under an insurance policy.

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

Sources and Authority

- The insurer's implied duty of good faith and fair dealing includes "the duty reasonably to inform an insured of the insured's rights and obligations under the insurance policy. In particular, in situations in which an insured's lack of knowledge may potentially result in a loss of benefits or a forfeiture of rights, an insurer [is] required to bring to the insured's attention relevant information so as to enable the insured to take action to secure rights afforded by the policy." (*Davis v. Blue Cross of Northern California* (1979) 25 Cal.3d 418, 428 [158 Cal.Rptr. 828, 600 P.2d 1060].)

- "When a court is reviewing claims under an insurance policy, it must hold the insured bound by clear and conspicuous provisions in the policy even if evidence suggests that the insured did not read or understand them. Once it becomes clear to the insurer that its insured disputes its denial of coverage, however, the duty of good faith does not permit the insurer passively to assume that its insured is aware of his rights under the policy. The insurer must instead take affirmative steps to make sure that the insured is informed of his remedial rights." (*Sarchett v. Blue Shield of California* (1987) 43 Cal.3d 1, 14-15 [233 Cal.Rptr. 76, 729 P.2d 267]; but see *Chase v. Blue Cross of California* (1996) 42 Cal.App.4th 1142, 1155 [50 Cal.Rptr.2d 178].)

- An insurer owes a duty to an additional insured under an automobile policy to disclose within a reasonable time the existence and amount of any underinsured motorist coverage. (*Ramirez v. USAA Casualty Insurance Co.* (1991) 234 Cal.App.3d 391, 397-402 [285 Cal.Rptr. 757].)

- "California courts have imposed a duty on the insurer to advise its insureds of the availability of and procedure for initiating arbitration; to notify him of a 31-day option period in which to convert his group insurance policy into individual coverage after termination; and to notify an assignee of a life insurance policy taken as security for a loan to the insured of previous assignments of the policy known to the insurer." (*Westrick v. State Farm Insurance* (1982) 137 Cal.App.3d 685, 692 [187 Cal.Rptr. 214], internal citations omitted.)

Secondary Sources

Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group 2006) ¶¶ 12:953 to 12:963

2 California Insurance Law & Practice, Ch. 13, *Claims Handling and the Duty of Good Faith*, § 13.05 (Matthew Bender)

~~Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group 2002) 11:46-11:47, 12:956-12:961, pp. 11-12-11-13, 12C-42-12C-44~~

2 California Uninsured Motorist Law, Ch. 24, *Bad Faith in Uninsured Motorist Law*, § 24.22 (Matthew Bender)

12 California Points and Authorities, Ch. 120, *Insurance*, §§ 120.383-120.384, 120.390 (Matthew Bender)

~~(New September 2003)~~

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

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

1. ~~[~~**That a lawsuit was brought against [***name of plaintiff***] for a claim that [[he/she/it] alleged] was covered by [***name of defendant***]'s insurance policy;~~]~~

   ~~**[That [***name of defendant***] defended [***name of plaintiff***] in a lawsuit brought against [him/her/it] without reserving the right to deny liability;]**~~

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

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

4. **The amount in excess of the policy limits that [***name of plaintiff***] [paid/is obligated to pay].**

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

A settlement demand is reasonable if the potential judgment in the original lawsuit was likely to exceed the amount of the settlement demand based on what [*name of defendant***] knew or should have known at the time when the settlement demand was rejected about ~~in light of the claimed~~ [***name of plaintiff***]'s injuries or loss and [***name of plaintiff***]'s probable liability~~, the judgment in the lawsuit was likely to exceed the amount of the settlement demand.~~**

Instructional History

(New September 2003)

(Revised April 2007)

Directions for Use

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

This instruction is intended for use ~~where~~ if the insurer assumed the duty to defend the insured, but failed to accept a reasonable settlement offer. For instructions regarding general breach of contract issues, refer

to the Contracts series (CACI No. 300 et seq.).

If it is alleged that a demand was made in excess of limits and there is a claim that the defendant should have contributed the policy limits, then this instruction will need to be modified.

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

Sources and Authority

- "[T]he implied obligation of good faith and fair dealing requires the insurer to settle in an appropriate case although the express terms of the policy do not impose such a duty. [¶] The insurer, in deciding whether a claim should be compromised, must take into account the interest of the insured and give it at least as much consideration as it does to its own interest. When there is great risk of a recovery beyond the policy limits so that the most reasonable manner of disposing of the claim is a settlement which can be made within those limits, a consideration in good faith of the insured's interest requires the insurer to settle the claim." (*Comunale v. Traders and General Insurance Co.* (1958) 50 Cal.2d 654, 659 [328 P.2d 198], citation omitted.)

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

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

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

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

- "The covenant of good faith and fair dealing implied in every insurance policy obligates the insurer, among other things, to accept a reasonable offer to settle a lawsuit by a third party against the insured within policy limits whenever there is a substantial likelihood of a recovery in excess of those limits. The insurer must evaluate the reasonableness of an offer to settle a lawsuit against the insured by considering the probable liability of the insured and the amount of that liability, without regard to any

coverage defenses. An insurer that fails to accept a reasonable settlement offer within policy limits will be held liable in tort for the entire judgment against the insured, even if that amount exceeds the policy limits. An insurer's duty to accept a reasonable settlement offer in these circumstances "is implied in law to protect the insured from exposure to liability in excess of coverage as a result of the insurer's gamble-on which only the insured might lose." (*Rappaport-Scott v. Interinsurance Exch. of the Auto. Club* (2007) 2007 Cal. App. LEXIS 35, 7-8 [], internal citations omitted.)

~~•An insurer's decision to contest or settle a claim "'should be an honest and intelligent one. It must be honest and intelligent if it be a good-faith conclusion. In order that it be honest and intelligent it must be based upon a knowledge of the facts and circumstances upon which liability is predicated, and upon a knowledge of the nature and extent of the injuries so far as they reasonably can be ascertained. [¶] This requires the insurance company to make a diligent effort to ascertain the facts upon which only an intelligent and good-faith judgment may be predicated. If it exhausts the sources of information open to it to ascertain the facts, it has done all that is possible to secure the knowledge upon which a good-faith judgment may be exercised... .'" (*Brown v. Guarantee Insurance Co.* (1957) 155 Cal.App.2d 679, 685-686 [319 P.2d 69], internal citation omitted.)~~

- "The [worker's] compensation-carrier consent prerequisite of a valid settlement is imposed by law. ... In the absence of reasonable provisions for the legal rights of the [worker's compensation carrier], we conclude that [the insurer] cannot be held liable for bad faith 'rejection of a reasonable settlement offer,' or for failing 'to accept a reasonable settlement offer.'" (*Coe v. State Farm Mutual Automobile Insurance Co.* (1977) 66 Cal.App.3d 981, 993 [136 Cal.Rptr. 331], internal citations omitted.)

- "Whether [the insurer] 'refused' the 'offer,' and whether it could reasonably have acted otherwise in light of the 11-day deadline imposed by the offer's terms, were questions for the jury." (*Coe, supra*, 66 Cal.App.3d at p. 994.)

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

- "[A]n insurer's 'good faith,' though erroneous, belief in noncoverage affords no defense to liability flowing from the insurer's refusal to accept a reasonable settlement offer." (*Johansen, supra*, 15 Cal.3d at p. 16, internal citation omitted.)

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

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

Secondary Sources

Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group 2006) ¶¶ 12:201 to 12:686

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

2 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar 2006) Ch. 26, Actions for Failure to Settle, §§ 26.1-26.35

~~1 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar 2002) General Insurance Considerations in Settlement, §§ 14.35-14.37, 14.44-14.46, pp. 514-516, 520-522~~

~~Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group 2002) ¶¶ 12:225-12:360, 12:375-12:458 pp. 12B-7-12B-38, 12B-42-12B-68~~

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

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

~~(New September 2003)~~

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

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

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

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

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

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

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

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

[*Name of defendant***] acted "without proper cause" if it had no reasonable basis for its actions.**

Instructional History

(New October 2004)

(Revised April 2007)

Directions for Use

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

This instruction also assumes the judge will decide the issue of whether the claim was potentially covered by the policy. If there are factual disputes regarding this issue, a special interrogatory could be used.

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

If it is alleged that a demand was made in excess of limits and there is a claim that the defendant should have contributed the policy limits, then this instruction will need to be modified. Note that an excess

insurer generally owes no duty to defend without exhaustion of the primary coverage by judgment or settlement.

Sources and Authority

- "'[T]he insurer must defend in some lawsuits where liability under the policy ultimately fails to materialize; this is one reason why it is often said that the duty to defend is broader than the duty to indemnify.' The duty to defend is a continuing one which arises on tender of the defense and lasts either until the conclusion of the underlying lawsuit or until the insurer can establish conclusively that there is no potential for coverage and therefore no duty to defend. The obligation of the insurer to defend is of vital importance to the insured. 'In purchasing his insurance the insured would reasonably expect that he would stand a better chance of vindication if supported by the resources and expertise of his insurer than if compelled to handle and finance the presentation of his case. He would, moreover, expect to be able to avoid the time, uncertainty and capital outlay in finding and retaining an attorney of his own.' 'The insured's desire to secure the right to call on the insurer's superior resources for the defense of third party claims is, in all likelihood, typically as significant a motive for the purchase of insurance as is the wish to obtain indemnity for possible liability.'" (*Amato v. Mercury Casualty Co. (Amato II)* (1997) 53 Cal.App.4th 825, 831-832 [61 Cal.Rptr.2d 909], internal citations omitted.)

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

- "In order to rely on an insured's lack of notice an insurer bears the burden of demonstrating that it was substantially prejudiced." (*Select Insurance Co. v. Superior Court (Custer)* (1990) 226 Cal.App.3d 631, 636 [276 Cal.Rptr. 598], internal citations omitted.)

- "In our view ... an insurer is not allowed to rely on an insured's failure to perform a condition of a policy when the insurer has denied coverage because the insurer has, by denying coverage, demonstrated performance of the condition would not have altered its response to the claim." (*Select Ins. Co., supra*, 226 Cal.App.3d at p. 637.)

- "A breach of the implied covenant may be predicated on the insurer's breach of its duty to defend the insured, though the insurer's conduct in such cases is commonly coupled with the breach of other aspects of the implied covenant, such as the duty to settle or to investigate. ... The broad scope of the insurer's duty to defend obliges it to accept the defense of 'a suit which potentially seeks damages within the coverage of the policy. ...' A breach of the duty to defend in itself constitutes only a breach of contract, but it may also violate the covenant of good faith and fair dealing where it involves unreasonable conduct or an action taken without proper cause. On the other hand, '[i]f the insurer's refusal to defend is reasonable, no liability will result.'" (*Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 881 [93 Cal.Rptr.2d 364], internal citations omitted.)

- "No tender of defense is required if the insurer has already denied coverage of the claim. In such cases, notice of suit and tender of the defense are excused because other insurer has already expressed its unwillingness to undertake the defense." (Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2003) ¶ 7:614.)

Secondary Sources

Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group 2006) ¶¶ 12:598 to 12:650.5

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

2 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar 2006) Ch. 25, *Actions for Failure to Defend*, §§ 25.1-26.38

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

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

~~(New October 2004)~~

2505. Retaliation (Gov. Code, § 12940(h))

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

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

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

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

[4. That [*name of defendant*]'s retaliatory conduct materially and adversely affected the terms and conditions of [*name of plaintiff*]'s employment;]

[4/5]4. That [*name of plaintiff***] was harmed; and**

[5/6]~~5~~. That [*name of defendant***]'s retaliatory conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

Instructional History

(New September 2003)

(Revised April 2007)

Directions for Use

This instruction must be modified to describe the protected activity in question. Government Code section 12940(h) provides that it is unlawful to retaliate against a person "because the person has opposed any practices forbidden under [Government Code sections 12900 through 12966] or because the person has filed a complaint, testified, or assisted in any proceeding under [the FEHA]."

In element 2, in cases not involving discharge or demotion, set forth specifically all adverse employment actions alleged. Read optional element 4 if there is an issue as to whether the employer's retaliatory conduct was sufficiently substantial to create liability.

Sources and Authority

- Government Code section 12940(h) provides that it is an unlawful employment practice "[f]or any employer, labor organization, employment agency, or person to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this

part."

- The FEHA defines a "person" as "one or more individuals, partnerships, associations, corporations, limited liability companies, legal representatives, trustees, trustees in bankruptcy, and receivers or other fiduciaries." (Gov. Code, § 12925(d).)

- The Fair Employment and Housing Commission's regulations provide: "It is unlawful for an employer or other covered entity to demote, suspend, reduce, fail to hire or consider for hire, fail to give equal consideration in making employment decisions, fail to treat impartially in the context of any recommendations for subsequent employment which the employer or other covered entity may make, adversely affect working conditions or otherwise deny any employment benefit to an individual because that individual has opposed practices prohibited by the Act or has filed a complaint, testified, assisted or participated in any manner in an investigation, proceeding, or hearing conducted by the Commission or Department or their staffs." (Cal. Code Regs., tit. 2, § 7287.8(a).)

- "Employees may establish a prima facie case of unlawful retaliation by showing that (1) they engaged in activities protected by the FEHA, (2) their employers subsequently took adverse employment action against them, and (3) there was a causal connection between the protected activity and the adverse employment action~~To establish a prima facie case of retaliation, 'the plaintiff must show that he engaged in a protected activity, his employer subjected him to adverse employment action, and there is a causal link between the protected activity and the employer's action.'~~" (*Miller v. Dept. of Corrections* (2005) 36 Cal. 4th 446, 472 [30 Cal.Rptr.3d 797, 115 P.3d 77~~*Iwekaogwu v. City of Los Angeles* (1999) 75 Cal.App.4th 803, 814 [89 Cal.Rptr.2d 505]~~, citquoting *Flait v. North American Watch Corp*. (1992) 3 Cal.App.4th 467, 476 [4 Cal.Rptr.2d 522].)

- "Retaliation claims are inherently fact-specific, and the impact of an employer's action in a particular case must be evaluated in context. Accordingly, although an adverse employment action must materially affect the terms, conditions, or privileges of employment to be actionable, the determination of whether a particular action or course of conduct rises to the level of actionable conduct should take into account the unique circumstances of the affected employee as well as the workplace context of the claim." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal 4th 1028, 1052. [32 Cal.Rptr. 3d 436, 11 P.3d 1123].)

- "[W]e believe that the language in section 12940(a) making it an unlawful employment practice for an employer to discriminate against an employee on the basis of race, sex, or the other enumerated characteristics 'in compensation or in the terms, conditions, and privileges of employment' properly must be interpreted broadly to further the fundamental antidiscrimination purposes of the FEHA. Appropriately viewed, this provision protects an employee against unlawful discrimination with respect not only to so-called ultimate employment actions such as termination or demotion, but also the entire spectrum of employment actions that are reasonably likely to adversely and materially affect an employee's job performance or opportunity for advancement in his or her career. Although a mere offensive utterance or even a pattern of social slights by either the employer or coemployees cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment for purposes of section 12940(a) (or give rise to a claim under section 12940(h)), the phrase 'terms, conditions, or privileges' of employment must be interpreted liberally and with a reasonable appreciation of the realities of the workplace in order to afford employees the appropriate and

generous protection against employment discrimination that the FEHA was intended to provide. (*Yanowitz, supra*, 36 Cal.App. 4th at p. 1053, footnotes omitted.)

- Contrary to [defendant]'s assertion that it is improper to consider collectively the alleged retaliatory acts, there is no requirement that an employer's retaliatory acts constitute one swift blow, rather than a series of subtle, yet damaging, injuries. Enforcing a requirement that each act separately constitute an adverse employment action would subvert the purpose and intent of the statute. (*Yanowitz, supra*, 36 Cal.App. 4th at p. 1053, citation omitted.)

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

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

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

- "We ... conclude a supervisor is a 'person' subject to liability under FEHA ... . As to supervisors, we conclude the language of FEHA is unambiguous in imposing personal liability for harassment or retaliation in violation of FEHA." (*Page v. Superior Court* (1995) 31 Cal.App.4th 1206, 1208, 1212 [37 Cal.Rptr.2d 529].)

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

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 922, 940, 941
~~8 Witkin, Summary of California Law (9th ed. 1988) Constitutional Law, § 763, p. 265; *id.* (2002 supp.) at § 763, pp. 168-169~~

Chin, et al., Cal. Practice Guide: Employment Litigation (The Rutter Group 2006) ¶¶ 7:680-7:841

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. ~~1993~~2006) Discrimination Claims, §§ 2.83-2.88~~, pp. 68-72; *id.* (2001 supp.) at §§ 2:84-2:88, pp. 89-96~~

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

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

California Civil Practice (Thomson West 2006) Employment Litigation, §§ 2:74–2:75
~~Bancroft-Whitney's California Civil Practice: Employment Litigation (1993) Discrimination in Employment, §§ 2:70-2:71, pp. 90-92 (rel. 12/93); *id.* (2001 supp.) at §§ 2:70-2:71, pp. 78-81~~

~~*(New September 2003)*~~

2507. "Motivating Reason" Explained

A "motivating reason" is a reason that contributes to the decision to take certain action, even though other reasons also may have contributed to the decision.

Instructional History

(*New April 2007*)

Directions for Use

Read this instruction with CACI No. 2500 (*Disparate Treatment—Essential Factual Elements*), CACI No. 2505 (*Retaliation*), or CACI No. 2540 (*Disability Discrimination—Disparate Treatment—Essential Factual Elements*) in mixed-motive cases; that is, cases in which there is evidence of both a discriminatory and a valid employment reason for the adverse action taken against the plaintiff employee.

Sources and Authority

- Title 42 United States Code section 2000e-2(m) (a provision of the Civil Rights Action of 1991 amending.Title VII of the Civil Rights Act of 1964) provides: "Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."

- "In order to obtain an instruction [on mixed motive], a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that "race, color, religion, sex, or national origin was a motivating factor for any employment practice." Because direct evidence of discrimination is not required in mixed-motive cases, the Court of Appeals correctly concluded that the District Court did not abuse its discretion in giving a mixed-motive instruction to the jury." (*Desert Palace, Inc. v. Costa* (2003) 539 U.S. 90, 101 [123 S. Ct. 2148, 156 L. Ed. 2d 84].)

- "While a complainant need not prove that [discriminatory] animus was the sole motivation behind a challenged action, he must prove by a preponderance of the evidence that there was a 'causal connection' between the employee's protected status and the adverse employment decision." (*Mixon v. Fair Employment and Housing Com.* (1987) 192 Cal.App.3d 1306, 1317 [237 Cal.Rptr. 884].)

- "The United States Supreme Court has explained that 'pretext' refers to 'but for' causation. The employee need not show 'he would have in any event been rejected or discharged solely on the basis of his race, without regard to the alleged deficiencies. ....' In other words, 'while a complainant need not prove that racial animus was the sole motivation behind the challenged action, he must prove by a preponderance of the evidence that there was a 'causal connection' between the employee's protected status and the adverse employment decision.'" (*Clark v. Claremont University Center* (1992) 6 Cal.App.4th 639, 665 [8 Cal.Rptr.2d 151] (citing *McDonald v. Santa Fe Trail Transp. Co.* (1976) 427 U.S. 273, 282, fn. 10 [49 L.Ed.2d 493, 502, 96 S.Ct. 2574] and *Mixon, supra*.).)

- But see: *Horsford v. Board of Trustees* (2005) 132 Cal.Appl.4th 359, 377 [33 Cal.Rptr. 3d 644]. ("A plaintiff's burden is … to produce evidence that, taken as a whole, permits a rational inference that intentional discrimination was a *substantial* motivating factor in the employer's actions toward the plaintiff."), emphasis added.

- Cf. "In some cases, the evidence will establish that the employer had 'mixed motives' for its employment decision. . . . In a mixed motive case, both legitimate and illegitimate factors contribute to the employment decision. 'Once the [employee] establishes . . . that an illegitimate factor played a motivating or substantial role in an employment decision, the burden falls to the [employer] to prove by a preponderance of the evidence that it would have made the same decision even if it had not taken the illegitimate factor into account.' " (*Grant-Burton v. Covenant Care, Inc.* (2002) 99 Cal. App. 4th 1361, 1379 [122 Cal.Rptr.2d 204] (wrongful discharge – public policy case), internal citations omitted.)

Secondary Sources

Chin, et al., Cal. Practice Guide: Employment Litigation (The Rutter Group 2006) ¶¶ 7:485-7:508

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 2006) Discrimination Claims, §§ 2.61-2.65, 2.87

1 California Civil Practice: Employment Litigation (The West Group 2002) Discrimination in Employment, §§ 2:20-2:21, 2:75

2521. Hostile Work Environment Harassment—Essential Factual Elements—Employer or Entity Defendant (Gov. Code, § 12940(j))

[*Name of plaintiff***] claims that [[he/she] was subjected to harassment based on [his/her] [***describe protected status—for example, race, gender, or age***] in [his/her] workplace at [***name of defendant***], causing a hostile or abusive work environment/widespread sexual favoritism created a hostile or abusive work environment]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [was an employee of [***name of defendant***]/applied to [***name of defendant***] for a job/was a person providing services ~~pursuant to~~under a contract with [***name of defendant***]];**

2. **[That [***name of plaintiff***] was subjected to unwanted harassing conduct because [he/she] [was/was believed to be/was associated with a person who was/was associated with a person who was believed to be] [***protected status***];-]**

   [or:]

   [That [*name of plaintiff***], although not personally subjected to unwanted harassing conduct, personally witnessed harassing conduct that took place in [his/her] immediate work environment;]**

   [or;]

   [That there was sexual favoritism in the work environment;]

3. **That the [harassing conduct/sexual favoritism] was so severe or pervasive that it altered the conditions of [***name of plaintiff***]'s employment and created a hostile or abusive working environment~~, widespread, or persistent that a reasonable [***describe member of protected group***] in [***name of plaintiff***]'s circumstances would have considered the work environment to be hostile or abusive~~;**

4. **That [***name of plaintiff***] considered the work environment to be hostile or abusive [because of the widespread sexual favoritism];**

5. **[***Select applicable basis of defendant's liability:***]**

   [That a supervisor [engaged in the conduct/created the widespread sexual favoritism];]

   [That [*name of defendant***] [or [his/her/its] supervisors or agents] knew or should have known of the [conduct/widespread sexual favoritism] and failed to take immediate and appropriate corrective action;]**

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

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

[Sexual favoritism means that other employees have received preferential treatment with regard to promotion, work hours, assignments, or other significant employment benefits or opportunities due to a sexual relationship with an individual representative of the employer who is in a position to grant these preferences.]

Instructional History

(*Revised June 2006*)

(*Revised April 2007*)

Directions for Use

This instruction is ~~intended~~ for use in a hostile work environment case when the defendant is an employer or other entity covered by the FEHA. For an individual defendant, such as the alleged harasser or plaintiff's co-worker, see CACI No. 2522, *Hostile Work Environment Harassment—Essential Factual Elements—Individual Defendant (Gov. Code, § 12940(j)).* Also read CACI No. 2523, *"Harassing Conduct" Explained*, and CACI No. 2524, *"Severe or Pervasive" Explained.*

In element 2, select one or more bases of liability. Use the first option if the plaintiff was the target of the harassment. Select the second option if there is evidence that persons other than the plaintiff were harassed. (See *Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 519 [76 Cal.Rptr.2d 547].) Select the third option if the claim is that the hostile work environment was due to widespread sexual favoritism.

In e~~E~~lement 5, ~~must be modified to~~ select the applicable basis of employer liability: (a) vicarious liability for a supervisor's harassing conduct, or (b) the employer's ratification of the conduct~~/respondeat superior.~~

The issue of whether a supervisor must have actual or apparent authority over the plaintiff in order to trigger vicarious liability for harassing conduct appears to be open. (See *Chapman v. Enos* (2004) 116 Cal.App.4th 920 [10 Cal.Rptr.3d 852].) For a definition of "supervisor," see CACI No. 2525, *Harassment—"Supervisor" Defined.*

Under federal Title VII, an employer's liability may be based on the conduct of an official "within the class of an employer organization's officials who may be treated as the organization's proxy." (*Faragher v. City of Boca Raton* (1998) 524 U.S. 775, 790 [118 S.Ct. 2275, 141 L.Ed.2d 662].)

Employers may be liable for the conduct of certain agents (see Gov. Code, §§ 12925(d), 12926(d), and 12940(j)(1) and *Reno v. Baird* (1998) 18 Cal.4th 640, 648 [76 Cal.Rptr.2d 499, 957 P.2d 1333] [California Supreme Court declined to express opinion whether "agent" language in the FEHA merely incorporates respondeat superior principles or has some other meaning]).

Sources and Authority

- Government Code section 12940(j) provides that it is an unlawful employment practice for "an employer . . . or any other person, because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation, to harass an employee, an applicant, or a person providing services pursuant to a contract. Harassment of an employee, an applicant, or a person providing services pursuant to a contract by an employee other than an agent or supervisor shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action. An entity shall take all reasonable steps to prevent harassment from occurring. Loss of tangible job benefits shall not be necessary in order to establish harassment."

- Government Code section 12940(j)(4)(A) provides: "For purposes of this subdivision only, 'employer' means any person regularly employing one or more persons or regularly receiving the services of one or more persons providing services pursuant to a contract, or any person acting as an agent of an employer, directly or indirectly, the state, or any political or civil subdivision of the state, and cities."

- Government Code section 12940(j)(5) provides that for purposes of claims of harassment under the FEHA, "a person providing services pursuant to a contract" means a person who meets all of the following criteria:
  (A) The person has the right to control the performance of the contract for services and discretion as to the manner of performance.
  (B) The person is customarily engaged in an independently established business.
  (C) The person has control over the time and place the work is performed, supplies the tools and instruments used in the work, and performs work that requires a particular skill not ordinarily used in the course of the employer's work.

- Government Code section 12940(j)(4)(C) provides, in part: " '[H]arassment' because of sex includes sexual harassment, gender harassment, and harassment based on pregnancy, childbirth, or related medical conditions." (Gov. Code, § 12940(j)(4)(C).)

- Government Code section 12940(i) provides that it is an unlawful employment practice "[f]or any person to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under this part, or to attempt to do so."

- Government Code section 12926(m) provides: " 'Race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation' includes a perception that the person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics."

- "The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently

pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)

- "[A]lthough no California cases have directly addressed racial harassment in the workplace, the California courts have applied the federal threshold standard to claims of sexual harassment and held that FEHA is violated when the harassment was 'sufficiently severe or pervasive to alter the conditions of the victim's employment.' " (*Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 464–465 [79 Cal.Rptr.2d 33], internal citations and footnote omitted.)

- "When the workplace is permeated with discriminatory intimidation, ridicule and insult that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,' the law is violated." (*Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 Cal.App.4th 397, 409 [27 Cal.Rptr.2d 457], internal citation omitted.)

- "[N]ot every utterance of a racial slur in the workplace violates the FEHA or Title VII. As the United States Supreme Court has recognized in the context of sexual harassment: '[N]ot all workplace conduct that may be described as "harassment" affects a "term, condition, or privilege" of employment within the meaning of Title VII. For sexual harassment to be actionable, it must be sufficiently severe or pervasive "to alter the conditions of [the victim's] employment and create an abusive working environment." ' . . . 'Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.' . . . California courts have adopted the same standard in evaluating claims under the FEHA." (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 129–130 [87 Cal.Rptr.2d 132, 980 P.2d 846], internal citations omitted.)

- "If an employee other than an agent or supervisor commits the harassment, and the employer takes immediate and appropriate corrective action when it becomes or reasonably should become aware of the conduct—for example, when the victim or someone else informs the employer—there simply is no 'unlawful employment practice' that the FEHA governs." (*Carrisales v. Dept. of Corrections* (1999) 21 Cal.4th 1132, 1136 [90 Cal.Rptr.2d 804, 988 P.2d 1083], called into doubt on other grounds by statute.)

- Under federal Title VII, an employer's liability may be based on the conduct of an official "within the class of an employer organization's officials who may be treated as the organization's proxy." (*Faragher v. City of Boca Raton* (1998) 524 U.S. 775, 790 [118 S.Ct. 2275, 141 L.Ed.2d 662].)

- "The plaintiff's work environment is affected not only by conduct directed at herself but also by the treatment of others. A woman's perception that her work environment is hostile to women will obviously be reinforced if she witnesses the harassment of other female workers." (*Beyda, supra*, 65 Cal.App.4th at p. 519, internal citations omitted.)

- "Harassment against others in the workplace is only relevant to the plaintiff's case if she has personal knowledge of it. Unless plaintiff witnesses the conduct against others, or is otherwise aware of it, that

conduct cannot alter the conditions of her employment and create an abusive working environment. Stated another way, a reasonable person in plaintiff's position would not find the environment hostile or abusive unless that person had knowledge of the objectionable conduct toward others." (*Beyda*, *supra*, at p. 520.)

- "To state that an employee must be the direct victim of the sexually harassing conduct is somewhat misleading as an employee who is subjected to a hostile work environment is a victim of sexual harassment even though no offensive remarks or touchings are directed to or perpetrated upon that employee. Generally, however, sexual conduct that involves or is aimed at persons other than the plaintiff is considered less offensive and severe than conduct that is directed at the plaintiff. A hostile work environment sexual harassment claim by a plaintiff who was not personally subjected to offensive remarks and touchings requires 'an even higher showing' than a claim by one who had been sexually harassed without suffering tangible job detriment: such a plaintiff must 'establish that the sexually harassing conduct permeated [her] direct work environment.' To meet this burden, the plaintiff generally must show that the harassment directed at others was in her immediate work environment, and that she personally witnessed it. The reason for this is obvious: if the plaintiff does not witness the incidents involving others, 'those incidents cannot affect ... her perception of the hostility of the work environment.'" (*Lyle v. Warner Bros. TV Prods.* (2006) 38 Cal.4th 264, 284-285 [42 Cal.Rptr.3d 2, 132 P.3d 211], internal citations omitted.)

- "Following the guidance of the EEOC, and also employing standards adopted in our prior cases, we believe that an employee may establish an actionable claim of sexual harassment under the FEHA by demonstrating that widespread sexual favoritism was severe or pervasive enough to alter his or her working conditions and create a hostile work environment." (*Miller v. Dept. of Corrections* (2005) 36 Cal. 4th 446, 466 [30 Cal.Rptr.3d 797, 115 P.3d 77], internal citations omitted.)

- ~~Government Code section 12940(i) provides that it is an unlawful employment practice "[f]or any person to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under this part, or to attempt to do so."~~

- ~~Government Code section 12926(m) provides: " 'Race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation' includes a perception that the person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics."~~

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 340, 346
~~2 Witkin, Summary of California Law (9th ed. 1988) Agency and Employment, § 310, pp. 304–305; id. (2002 supp.) at § 310, pp. 301–302~~

Chin, et al., Cal. Practice Guide: Employment Litigation (The Rutter Group 2006) ¶¶ 10:40, 10:110-10:260

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 200~~6~~0) Discrimination Claims, §§ 2.68, 2.75~~, pp. 56, 60~~; id., Sexual and Other Harassment, ~~at~~ §§ 3.1, 3.14, 3.17, 3.21, 3.36-3.45~~, pp. 116,~~

~~125–126, 140–141~~

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws,* §§ 41.80[1][a], 41.81[1][b] (Matthew Bender)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws,* § 43.01[10][g][i] (Matthew Bender)

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

California Civil Practice (Thomson West 2006) Employment Litigation, § 2:56
~~Bancroft-Whitney's California Civil Practice: Employment Litigation (1993) Discrimination in Employment, §§ 2.51, 2.53, pp. 68–70, 72–75 (rel. 12/93); id. (2001 supp.) at §§ 2.51, 2.53, pp. 61–66, 69–73~~

~~*(Revised June 2006)*~~

2522. Hostile Work Environment Harassment—Essential Factual Elements—Individual Defendant (Gov. Code, § 12940(j))

[*Name of plaintiff***] claims that [***name of defendant***] [subjected [him/her] to harassment based on [***describe protected status-for example, race, gender, or age***], causing a hostile or abusive work environment/created a hostile or abusive work environment by widespread sexual favoritism]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [was an employee of [***name of employer***]/applied to [***name of employer***] for a job/was a person providing services pursuant to a contract with [***name of employer***]];**

2. **[That [***name of plaintiff***] was subjected to unwanted harassing conduct because [he/she] [was/was believed to be/was associated with a person who was/was associated with a person who was believed to be] [***protected status***];**]

[or~~:~~]

[That [*name of plaintiff***], although not personally subjected to unwanted harassing conduct, personally witnessed harassing conduct that took place in [his/her] immediate work environment;]**

[or]

[That there was widespread sexual favoritism in the work environment;]

3. **That the [harassing conduct/sexual favoritism] was so severe or pervasive that it altered the conditions of [***name of plaintiff***]'s employment and created a hostile or abusive working environment~~, widespread, or persistent that a reasonable [*describe member of protected group*] in [*name of plaintiff*]'s circumstances would have considered the work environment to be hostile or abusive~~;**

4. **That [***name of plaintiff***] considered the work environment to be hostile or abusive [because of the widespread sexual favoritism];**

5. **That [***name of defendant***] [[participated in/assisted/ [or] encouraged] the harassing conduct/created the widespread sexual favoritism ~~[or assisted or encouraged it~~];**

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

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

[Sexual favoritism means that other employees have received preferential treatment with regard to promotion, work hours, assignments, or other significant employment benefits or opportunities due to a sexual relationship with an individual representative of the employer who is in a position to

grant these preferences.]

Instructional History

(New September 2003)

(Revised April 2007)

Directions for Use

This instruction is intended for use when the defendant is an individual. For an employer or other entity defendant covered by the FEHA, see CACI No. 2521, *Hostile Work Environment Harassment—Essential Factual Elements—Employer or Entity Defendant (Gov. Code, § 12940(j)).* Also read CACI No. 2523, *"Harassing Conduct" Explained*, and CACI No. 2524, *"Severe or Pervasive" Explained*.

In element 2, select one or more bases of liability. Use the first option if the plaintiff was the target of the harassment. Select the second option if there is evidence that persons other than the plaintiff were harassed. (See *Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 519 [76 Cal.Rptr.2d 547].) Select the third option if the claim is that the hostile work environment was due to widespread sexual favoritism.

Sources and Authority

- Government Code section 12940(j) provides that it is an unlawful employment practice for "an employer ... or any other person, because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation, to harass an employee, an applicant, or a person providing services pursuant to a contract. Harassment of an employee, an applicant, or a person providing services pursuant to a contract by an employee other than an agent or supervisor shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action. An entity shall take all reasonable steps to prevent harassment from occurring. Loss of tangible job benefits shall not be necessary in order to establish harassment."

- Government Code section 12940(j)(3) provides: "An employee of an entity ... is personally liable for any harassment prohibited by this section that is perpetrated by the employee, regardless of whether the employer or covered entity knows or should have known of the conduct and fails to take immediate and appropriate corrective action."

- Government Code section 12940(j)(4)(A) provides, in part: "For purposes of this subdivision only, 'employer' means any person regularly employing one or more persons or regularly receiving the services of one or more persons providing services pursuant to a contract, or any person acting as an agent of an employer, directly or indirectly, the state, or any political or civil subdivision of the state, and cities."

- Government Code section 12940(j)(5) provides that for purposes of claims of harassment under the

FEHA, "a person providing services pursuant to a contract" means a person who meets all of the following criteria:

(A) The person has the right to control the performance of the contract for services and discretion as to the manner of performance.

(B) The person is customarily engaged in an independently established business.

(C) The person has control over the time and place the work is performed, supplies the tools and instruments used in the work, and performs work that requires a particular skill not ordinarily used in the course of the employer's work.

- Government Code section 12940(i) provides that it is an unlawful employment practice "[f]or any person to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under this part, or to attempt to do so."

- Government Code section 12926(m) provides: "'Race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation' includes a perception that the person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics."

- "The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)

- ~~Government Code section 12940(j)(3), effective January 1, 2001, provides: "An employee of an entity ... is personally liable for any harassment prohibited by this section that is perpetrated by the employee, regardless of whether the employer or covered entity knows or should have known of the conduct and fails to take immediate and appropriate corrective action."~~

- "When the workplace is permeated with discriminatory intimidation, ridicule and insult that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,' the law is violated." (*Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 Cal.App.4th 397, 409 [27 Cal.Rptr.2d 457], internal citation omitted.)

- "[W]e conclude a nonharassing supervisor, who fails to take action to prevent sexual harassment, is not personally liable for sexual harassment under the Fair Employment and Housing Act (FEHA)." (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1322 [58 Cal.Rptr.2d 308].)

- ~~Government Code section 12940(i) provides that it is an unlawful employment practice "[f]or any person to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under this part, or to attempt to do so."~~

- "A supervisor who, without more, fails to take action to prevent sexual harassment of an employee is not personally liable as an aider and abettor of the harasser, an aider and abettor of the employer or an agent of the employer." (*Fiol*, *supra*, 50 Cal.App.4th at p. 1331.)

- "[A]lthough no California cases have directly addressed racial harassment in the workplace, the California courts have applied the federal threshold standard to claims of sexual harassment and held that FEHA is violated when the harassment was 'sufficiently severe or pervasive to alter the conditions of the victim's employment.'" (*Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 464-465 [79 Cal.Rptr.2d 33], internal citations and footnote omitted.)

- "The plaintiff's work environment is affected not only by conduct directed at herself but also by the treatment of others. A woman's perception that her work environment is hostile to women will obviously be reinforced if she witnesses the harassment of other female workers." (*Beyda*, *supra*, 65 Cal.App.4th at p. 519, internal citations omitted.)

- "Harassment against others in the workplace is only relevant to the plaintiff's case if she has personal knowledge of it. Unless plaintiff witnesses the conduct against others, or is otherwise aware of it, that conduct cannot alter the conditions of her employment and create an abusive working environment. Stated another way, a reasonable person in plaintiff's position would not find the environment hostile or abusive unless that person had knowledge of the objectionable conduct toward others." (*Beyda*, *supra*, at p. 520.)

- "To state that an employee must be the direct victim of the sexually harassing conduct is somewhat misleading as an employee who is subjected to a hostile work environment is a victim of sexual harassment even though no offensive remarks or touchings are directed to or perpetrated upon that employee. Generally, however, sexual conduct that involves or is aimed at persons other than the plaintiff is considered less offensive and severe than conduct that is directed at the plaintiff. A hostile work environment sexual harassment claim by a plaintiff who was not personally subjected to offensive remarks and touchings requires 'an even higher showing' than a claim by one who had been sexually harassed without suffering tangible job detriment: such a plaintiff must 'establish that the sexually harassing conduct permeated [her] direct work environment**.'** To meet this burden, the plaintiff generally must show that the harassment directed at others was in her immediate work environment, and that she personally witnessed it. The reason for this is obvious: if the plaintiff does not witness the incidents involving others, 'those incidents cannot affect ... her perception of the hostility of the work environment**.'**" (*Lyle v. Warner Bros. TV Prods.* (2006) 38 Cal.4th 264, 284-285 [42 Cal.Rptr.3d 2, 132 P.3d 211], internal citations omitted.)

- "Following the guidance of the EEOC, and also employing standards adopted in our prior cases, we believe that an employee may establish an actionable claim of sexual harassment under the FEHA by demonstrating that widespread sexual favoritism was severe or pervasive enough to alter his or her working conditions and create a hostile work environment." (*Miller v. Dept. of Corrections* (2005) 36 Cal. 4th 446, 466 [30 Cal.Rptr.3d 797, 115 P.3d 77], internal citations omitted.)

- ~~Government Code section 12926(m) provides: "'Race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation' includes a perception that the person has any of those characteristics or that the person is associated~~

~~with a person who has, or is perceived to have, any of those characteristics."~~

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 340, 346
~~2 Witkin, Summary of California Law (9th ed. 1988) Agency and Employment, § 310, pp. 304-305; *id.* (2002 supp.) at § 310, pp. 301-302~~

Chin, et al., Cal. Practice Guide: Employment Litigation (The Rutter Group 2006) ¶¶ 10:40, 10:110-10:260

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. ~~2000~~2006) Discrimination Claims, §§ 2.68, 2.75, ~~pp. 56, 60; *id.*,~~ Sexual and Other Harassment, ~~at~~ §§ 3.1, 3.14, 3.17, 3.36-3.45~~, pp. 116, 125-126, 140-141~~

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.80[1][a], 41.81[1][b] (Matthew Bender)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01[10][g][i] (Matthew Bender)

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

California Civil Practice (Thomson West 2006) Employment Litigation, §§ 2:56–2:56.1
~~Bancroft-Whitney's California Civil Practice: Employment Litigation (1993) Discrimination in Employment, §§ 2.51, 2.53, pp. 68-70, 72-75 (rel. 12/93); *id.* (2001 supp.) at §§ 2.51, 2.53, pp. 61-66, 69-73~~

~~*(New September 2003)*~~

2523. "Harassing Conduct" Explained

Harassing conduct may include [any of the following:]

[a. Verbal harassment, such as obscene language, demeaning comments, slurs, [or] threats [or] [*describe other form of verbal harassment*];] [or]

[b. Physical harassment, such as unwanted touching, assault, or physical interference with normal work or movement;] [or]

[c. Visual harassment, such as offensive posters, objects, cartoons, or drawings;] [or]

[d. Unwanted sexual advances.~~]~~;] [or]

[e. [*Describe other form of harassment if appropriate*].]

Instructional History

(*New September 2003*)

(*Revised April 2007*)

Directions for Use

Read this instruction with either CACI No. 2521 (*Hostile Work Environment Harassment—Essential Factual Elements—Employer or Entity Defendant*) or CACI No. 2522 (*Hostile Work Environment Harassment—Essential Factual Elements—Individual Defendant*). Read also CACI No. 2524 (*"Severe or Pervasive" Explained*) if appropriate.

Sources and Authority

- Government Code section 12940(j) provides that it is an unlawful employment practice for "an employer ... or any other person, because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation, to harass an employee, an applicant, or a person providing services pursuant to a contract."

- The Fair Employment and Housing Commission's regulations (Cal. Code Regs., tit. 2, § 7287.6(b)(1).) provide:

  "Harassment" includes but is not limited to:

  (A) Verbal harassment, e.g., epithets, derogatory comments or slurs on a basis enumerated in the Act;

(B) Physical harassment, e.g., assault, impeding or blocking movement, or any physical interference with normal work or movement, when directed at an individual on a basis enumerated in the Act;

(C) Visual forms of harassment, e.g., derogatory posters, cartoons, or drawings on a basis enumerated in the Act; or

(D) Sexual favors, e.g., unwanted sexual advances which condition an employment benefit upon an exchange of sexual favors." ~~(Cal. Code Regs., tit. 2, § 7287.6(b)(1).)~~

- "'[H]arassment consists of a type of conduct not necessary for performance of a supervisory job. Instead, harassment consists of conduct outside the scope of necessary job performance, conduct presumably engaged in for personal gratification, because of meanness or bigotry, or for other personal motives. Harassment is not conduct of a type necessary for management of the employer's business or performance of the supervisory employee's job.' We conclude, therefore, that the Legislature intended that commonly necessary personnel management actions such as hiring and firing, job or project assignments, office or work station assignments, promotion or demotion, performance evaluations, the provision of support, the assignment or nonassignment of supervisory functions, deciding who will and who will not attend meetings, deciding who will be laid off, and the like, do not come within the meaning of harassment. These are actions of a type necessary to carry out the duties of business and personnel management. These actions may retrospectively be found discriminatory if based on improper motives, but in that event the remedies provided by the FEHA are those for discrimination, not harassment. Harassment, by contrast, consists of actions outside the scope of job duties which are not of a type necessary to business and personnel management." (*Roby v. McKesson HBOC* (2006 Cal.App. LEXIS 2052) – Cal.App.4th --, -- [-- Cal.Rpr.3d --].)

Secondary Sources

Chin, et al., Cal. Practice Guide: Employment Litigation (The Rutter Group 2006) ¶¶ 10:125-10:155

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. ~~2000~~2006) Sexual and Other Harassment, §§ 3.13, 3.36~~, p. 123~~

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.80[1][a][i] (Matthew Bender)

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

California Civil Practice (Thomson West 2006) Employment Litigation, §§ 2:56–2:56.1
~~Bancroft-Whitney's California Civil Practice: Employment Litigation (2001 supp.) Discrimination in Employment, § 2.51, pp. 61-62~~

~~(New September 2003)~~

2524. "~~Hostile Work Environment~~Severe or Pervasive" Explained

~~**Harassing conduct does not create a hostile work environment if it is only occasional, isolated, or trivial**~~

Harassing conduct is sufficiently severe or pervasive if (1) the conduct would have unreasonably interfered with an employee's work performance and (2) [*name of plaintiff*] was actually offended.

In determining whether the harassing conduct in the work environment was sufficiently severe or pervasive~~hostile or abusive~~, you should consider all the circumstances, including the following:

(a) The nature and severity of the conduct;

(b) How often, and over what period of time, the conduct occurred; and

(c) The circumstances under which the conduct occurred.

[Harassing conduct is not pervasive if it is only occasional, isolated, or trivial.]

Instructional History

(*New September 2003*)

(*Revised April Year*)

Directions for Use

Read this instruction, if appropriate, with either CACI No. 2521 (*Hostile Work Environment Harassment—Essential Factual Elements—Employer or Entity Defendant*) or CACI No. 2522 (*Hostile Work Environment Harassment—Essential Factual Elements—Individual Defendant*). Read also CACI No. 2523 (*"Harassing Conduct" Explained*).

Read the final optional sentence if the plaintiff alleges pervasive conduct.

Sources and Authority

- "We have agreed with the United States Supreme Court that, to prevail, an employee claiming harassment based upon a hostile work environment must demonstrate that the conduct complained of was severe enough or sufficiently pervasive to alter the conditions of employment and create a work environment that qualifies as hostile or abusive to employees because of their sex. The working environment must be evaluated in light of the totality of the circumstances: '[W]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably

interferes with an employee's work performance.'" (*Miller v. Dept. of Corrections* (2005) 36 Cal. 4th 446, 462 [30 Cal.Rptr.3d 797, 115 P.3d 77], internal citations omitted.)

- "'For sexual harassment to be actionable, it must be sufficiently severe or pervasive "to alter the conditions of [the victim's] employment and create an abusive working environment.'" ... [¶] 'Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment-an environment that a reasonable person would find hostile or abusive-is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.' ... California courts have adopted the same standard in evaluating claims under the FEHA." (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 129-130 [87 Cal.Rptr.2d 132, 980 P.2d 846], internal citations omitted.)

- "Whether the sexual conduct complained of is sufficiently pervasive to create a hostile or offensive work environment must be determined from the totality of the circumstances. The plaintiff must prove that the defendant's conduct would have interfered with a reasonable employee's work performance …~~and would have seriously affected the psychological well-being of a reasonable employee~~ and that she was actually offended ... . The factors that can be considered in evaluating the totality of the circumstances are: (1) the nature of the unwelcome sexual acts or works (generally, physical touching is more offensive than unwelcome verbal abuse); (2) the frequency of the offensive encounters; (3) the total number of days over which all of the offensive conduct occurs; and (4) the context in which the sexually harassing conduct occurred." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 609-610 [262 Cal.Rptr. 842], internal citation omitted.)

- "In determining what constitutes 'sufficiently pervasive' harassment, the courts have held that acts of harassment cannot be occasional, isolated, sporadic, or trivial[,] rather the plaintiff must show a concerted pattern of harassment of a repeated, routine or a generalized nature." (*Fisher*, *supra*, 214 Cal.App.3d at p. 610.)

- "The United States Supreme Court ... has clarified that conduct need not seriously affect an employee's psychological well-being to be actionable as abusive work environment harassment. So long as the environment reasonably would be perceived, and is perceived, as hostile or abusive, there is no need for it also to be psychologically injurious." (*Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 Cal.App.4th 397, 412 [27 Cal.Rptr.2d 457], internal citations omitted.)

- "As the Supreme Court recently reiterated, in order to be actionable, '... a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.' The work environment must be viewed from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.' This determination requires judges and juries to exercise '[c]ommon sense, and an appropriate sensitivity to social context' in order to evaluate whether a reasonable person in the plaintiff's position would find the conduct severely hostile or abusive." (*Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 518-519 [76 Cal.Rptr.2d 547], internal citations omitted.)

- "In the present case, the jury was instructed as follows: 'In order to find in favor of Plaintiff on his claim of race harassment, you must find that Plaintiff has proved by a preponderance of the evidence

that the racial conduct complained of was sufficiently severe or pervasive to alter the conditions of employment. In order to find that racial harassment is "sufficiently severe or pervasive," the acts of racial harassment cannot be occasional, isolated, sporadic, or trivial.' ... [W]e find no error in the jury instruction given here ... . [T]he law requires the plaintiff to meet a threshold standard of severity or pervasiveness. We hold that the statement within the instruction that severe or pervasive conduct requires more than 'occasional, isolated, sporadic, or trivial' acts was an accurate statement of that threshold standard." (*Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 465-467 [79 Cal.Rptr.2d 33].)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 340, 346
~~2 Witkin, Summary of California Law (9th ed. 1988) Agency and Employment, § 310, pp. 304-305; *id.* (2002 supp.) at § 310, pp. 301-302~~

Chin, et al., Cal. Practice Guide: Employment Litigation (The Rutter Group 2006) ¶¶ 10:160-10:249

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. ~~2000~~2006) Discrimination Claims, §§ 2.68~~, and~~ 2.75~~, pp. 56, 60~~; *id.*, Sexual and Other Harassment, ~~at~~ §§ 3.1, 3.17, 3.36-3.41~~, pp. 116, 125-126, 140-141~~

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.80[1][a], 41.81[1][b] (Matthew Bender)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01[10][g][i] (Matthew Bender)

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

California Civil Practice (Thomson West 2006) Employment Litigation, § 2:56
~~Bancroft-Whitney's California Civil Practice: Employment Litigation (1993) Discrimination in Employment, §§ 2.51, 2.53, pp. 68-70, 72-75 (rel. 12/93); *id.* (2001 supp.) at §§ 2.51, 2.53, pp. 61-66, 69-73~~

~~*(New September 2003)*~~

2527. Failure to Prevent Harassment, ~~or~~ Discrimination, or Retaliation—Essential Factual Elements—Employer or Entity Defendant (Gov. Code, § 12940(k))

[*Name of plaintiff***] claims that [***name of defendant***] failed to prevent [harassment/discrimination/retaliation] [based on [***describe protected status—e.g., race, gender, or age***]]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [was an employee of [***name of defendant***]/applied to [***name of defendant***] for a job/was a person providing services pursuant to a contract with [***name of defendant***]];**

2. **That [***name of plaintiff***] was subjected to [***either:***]**

   [~~That [*name of plaintiff*] was subjected to~~ [harassing conduct/discrimination] because [he/she] [was/was believed to be/was associated with a person who was/was associated with a person who was believed to be] [*protected status***];**

   [*or*]

   retaliation because [he/she] [opposed [*name of defendant***]'s unlawful and discriminatory employment practices/ [or] [filed a complaint with/testified before/ [or] assisted in a proceeding before] the Department of Fair Employment and Housing].]**

3. **That [***name of defendant***] failed to take reasonable steps to prevent the [harassment/discrimination/retaliation];**

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

5. **That [***name of defendant***]'s failure to take reasonable steps to prevent [harassment/discrimination/retaliation] was a substantial factor in causing [***name of plaintiff***]'s harm.**

Instructional History

(New June 2006)

(Revised April 2007)

Directions for Use

If harassment is at issue, this instruction should be read in conjunction with CACI No. 2523, *"Harassing Conduct" Explained*. If retaliation is alleged, read this instruction in conjunction with CACI No. 2505, *Retaliation (Gov. Code, § 12940(h).*

Read the bracketed language in the opening paragraph beginning with "based on" and the first option for

element 2 if the claim is for failure to prevent harassment or discrimination.

Choose the second option for element 2 if the claim is based on failure to prevent retaliation because the plaintiff (1) opposed practices forbidden by the FEHA; (2) filed a complaint with the DFEH; (3) testified in a DFEH proceeding; or (4) assisted in a DFEH proceeding. (see Gov. Code, § 12940(h).)

Sources and Authority

- Government Code section 12940(k) provides that it is an unlawful employment practice for "an employer, labor organization, employment agency, apprenticeship training program, or any training program leading to employment, to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring."

- Government Code section 12940(h) provides that it is an unlawful employment practice "For any employer, labor organization, employment agency, or person to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part."

- "The employer's duty to prevent harassment and discrimination is affirmative and mandatory." (*Northrop Grumman Corp. v. Workers' Comp. Appeals Bd.* (2002) 103 Cal.App.4th 1021, 1035 [127 Cal. Rptr. 2d 285].)

- "This section creates a tort that is made actionable by statute. ' " '[T]he word "tort" means a civil wrong, other than a breach of contract, for which the law will provide a remedy in the form of an action for damages.' 'It is well settled the Legislature possesses a broad authority ... to establish ... tort causes of action.' Examples of statutory torts are plentiful in California law." ' Section 12960 et seq. provides procedures for the prevention and elimination of unlawful employment practices. In particular, section 12965, subdivision (a) authorizes the Department of Fair Employment and Housing (DFEH) to bring an accusation of an unlawful employment practice if conciliation efforts are unsuccessful, and section 12965, subdivision (b) creates a private right of action for damages for a complainant whose complaint is not pursued by the DFEH." (*Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 286 [73 Cal.Rptr.2d 596], internal citations omitted.)

- "With these rules in mind, we examine the section 12940 claim and finding with regard to whether the usual elements of a tort, enforceable by private plaintiffs, have been established: Defendants' legal duty of care toward plaintiffs, breach of duty (a negligent act or omission), legal causation, and damages to the plaintiff." (*Trujillo, supra,* 63 Cal.App.4th at pp. 286–287, internal citation omitted.)

- "Employers should not be held liable to employees for failure to take necessary steps to prevent such conduct, except where the actions took place and were not prevented. Plaintiffs have not shown this duty was owed to them, under these circumstances. Also, there is a significant question of how there could be legal causation of any damages (either compensatory or punitive) from such a statutory violation, where the only jury finding was the failure to prevent actionable harassment or discrimination, which, however, did not occur." (*Trujillo, supra,* 63 Cal.App.4th at p. 289.)

- "In accordance with … the fundamental public policy of eliminating discrimination in the workplace under the FEHA, we conclude that retaliation is a form of discrimination actionable under [Gov. Code] section 12940, subdivision (k)." (*Taylor v. City of Los Angeles Dept. of Water & Power* (2006) 144 Cal. App. 4th 1216, 1240 [51 Cal.Rptr.3d 206].)

Secondary Sources

Chin, et al., Cal. Practice Guide: Employment Litigation (The Rutter Group 2006) ¶¶ 7:670-7:672

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.02[6], 41.80[1], 41.81[7] (Matthew Bender)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01[10][g] (Matthew Bender)

~~*(New June 2006)*~~x

2540. Disability Discrimination—Disparate Treatment—Essential Factual Elements

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

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

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

3. **[That [***name of defendant***] [knew/thought] [***name of plaintiff***] had a [physical/mental] [condition/disease/disorder/[***describe health condition***]] that limited [***insert major life activity***];] [or]**

   [That [*name of defendant***] [knew/thought] [***name of plaintiff***] had a history of having a [physical/mental] [condition/disease/disorder/[***describe health condition***]] that limited [***insert major life activity***];]**

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

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

6. **[That [***name of plaintiff***]'s [history of a] [physical/mental] [condition/disease/disorder/[***describe health condition***]] was a motivating reason for the [discharge/refusal to hire/[***other adverse employment action***]];] [or]**

   [That [*name of defendant***]'s belief that [***name of plaintiff***] had [a history of] the [physical/mental] [condition/disease/disorder/[***describe health condition***]] was a motivating reason for the [discharge/refusal to hire/***other adverse employment action***];]**

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

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

Instructional History

(Revised June 2006)

(*Revised April 2006***)**

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).)

Under element 3, select the claimed basis of discrimination: an actual disability, a record of a disability, and/or a perceived disability. If the only claimed basis of discrimination is a perceived disability, then delete element 4.

The FEHA also prohibits medical-condition discrimination but defines "medical condition" narrowly (see Gov. Code, § 12926(h)). This instruction may be modified for use in a medical-condition discrimination claim under the FEHA.

Regarding element 4, there appears a divergence in authority on whether the plaintiff is required to prove that he or she has the ability to perform the essential duties of the job. Cases involving discrimination based on disability have stated that the issue is an element of the plaintiff's burden of proof: "The plaintiff can establish a prima facie case by proving that: (1) plaintiff suffers from a disability; (2) plaintiff is a qualified individual; and (3) plaintiff was subjected to an adverse employment action because of the disability." (*Brundage v. Hahn* (1997) 57 Cal.App.4th 228, 236 [66 Cal.Rptr.2d 830], internal citations omitted.) However, in *Bagatti v. Department of Rehabilitation* (2002) 97 Cal.App.4th 344, 360 [118 Cal.Rptr.2d 443], a case involving an alleged failure to provide a reasonable accommodation, the court observed that FEHA, unlike ADA, does not require a plaintiff to prove he or she is a "qualified individual with a disability." Note that the Supreme Court is reviewing this issue. (See *Green v. State of California* (2005) 132 Cal.App.4th 97 [33 Cal.Rptr.3d 254], review granted Nov. 16, 2005, S137770.)~~36 Cal.Rptr.3d 124, 123 P.3d 154.)~~

~~Where~~ If the existence of a qualifying disability is disputed, the court must tailor an instruction to the evidence in the case.

Sources and Authority

- Government Code section 12940(a) provides that it is an unlawful employment practice "[f]or an employer, because of the ... physical disability, mental disability, [or] medical condition ... of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment."

- Government Code section 12940(a)(1) also provides that the FEHA "does not prohibit an employer from refusing to hire or discharging an employee with a physical or mental disability ... where the employee, because of his or her physical or mental disability, is unable to perform his or her essential duties even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger his or her health or safety or the health or safety of others even with reasonable accommodations."

- For a definition of "mental disability," see Government Code section 12926(i).

- For a definition of "physical disability," see Government Code section 12926(k).

- Government Code section 12926.1(c) provides, in part: "[T]he Legislature has determined that the definitions of 'physical disability' and 'mental disability' under the law of this state require a 'limitation' upon a major life activity, but do not require, as does the Americans with Disabilities Act of 1990, a 'substantial limitation.' This distinction is intended to result in broader coverage under the law of this state than under that federal act. Under the law of this state, whether a condition limits a major life activity shall be determined without respect to any mitigating measures, unless the mitigating measure itself limits a major life activity, regardless of federal law under the Americans with Disabilities Act of 1990. Further, under the law of this state, 'working' is a major life activity, regardless of whether the actual or perceived working limitation implicates a particular employment or a class or broad range of employments."

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

- "[Defendant] asserts the statute's 'regarded as' protection is limited to persons who are denied or who lose jobs based on an employer's reliance on the "myths, fears or stereotypes" frequently associated with disabilities. … However, the statutory language does not expressly restrict FEHA's protections to the narrow class to whom [defendant] would limit its coverage. To impose such a restriction would exclude from protection a large group of individuals, like [plaintiff], with more mundane long-term medical conditions, the significance of which is exacerbated by an employer's failure to reasonably accommodate. Both the policy and language of the statute offer protection to a person who is not actually disabled, but is wrongly perceived to be. The statute's plain language leads to the conclusion that the 'regarded as' definition casts a broader net and protects *any* individual 'regarded' or 'treated' by an employer 'as having, or having had, any physical condition that makes achievement of a major life activity difficult' or may do so in the future. We agree most individuals who sue exclusively under this definitional prong likely are and will continue to be victims of an employer's 'mistaken' perception, based on an unfounded fear or stereotypical assumption. Nevertheless, FEHA's protection is nowhere expressly premised on such a factual showing, and we decline the invitation to import such a requirement. (*Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 53 [43 Cal.Rptr.3d 874], internal citations omitted.)

- "An adverse employment decision cannot be made 'because of' a disability when the disability is not known to the employer ... . [A] plaintiff must prove the employer had knowledge of the employee's disability when the adverse employment decision was made." (*Brundage, supra,* 57 Cal.App.4th at pp. 236–237.)

Secondary Sources

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

~~8 Witkin, Summary of California Law (9th ed. 1988) Constitutional Law, § 762, pp. 262–263; *id.* (2002 supp.) at §§ 762, 762A, pp. 159–164~~

Chin, et al., Cal. Practice Guide: Employment Litigation (The Rutter Group 2006) ¶¶ 9:2160-9:2241

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 2006~~0~~) Discrimination Claims, §§ 2.78-2.80~~, pp. 61–63~~

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

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

California Civil Practice (Thomson West 2006) Employment Litigation, § 2:46
~~Bancroft-Whitney's California Civil Practice: Employment Litigation (1993) Discrimination in Employment, §§ 2:45–2:46, pp. 59–61; *id.* (2001 supp.) at § 2:46, pp. 50–52~~

~~*(Revised June 2006)*~~

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

[*Name of plaintiff***] claims that [***name of defendant***] failed to reasonably accommodate [his/her] [physical/mental] [condition/disease/disorder/[***describe health condition***]]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

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

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

3. **That [[***name of defendant***] thought that] [***name of plaintiff***] had a [physical/mental] [condition/disease/disorder/[***describe health condition***]] that limited [***insert major life activity***];**

[4. **That [***name of defendant***] knew of [***name of plaintiff***]'s [physical/mental] [condition/disease/disorder/[***describe health condition***]] that limited [***insert major life activity***];]**

5. **That [***name of defendant***] failed to provide reasonable accommodation for [***name of plaintiff***]'s [physical/mental] [condition/disease/disorder/[***describe health condition***]];**

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

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

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

Instructional History

(New September 2003)

(Revised April Year)

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).)

In a case of perceived disability, include "[*name of defendant*] thought that" in element 3, and delete optional element 4.

~~Where~~ If the existence of a qualifying disability is disputed, the court must tailor an instruction to the evidence in the case.

There appears a divergence in authority regarding whether the plaintiff is required to prove that he or she has the ability to perform the essential duties of the job. Cases involving discrimination based on disability have stated that the issue is an element of the plaintiff's burden of proof: "The plaintiff can establish a prima facie case by proving that: (1) plaintiff suffers from a disability; (2) plaintiff is a qualified individual; and (3) plaintiff was subjected to an adverse employment action because of the disability." (*Brundage v. Hahn* (1997) 57 Cal.App.4th 228, 236 [66 Cal.Rptr.2d 830], internal citations omitted.) However, in *Bagatti v. Department of Rehabilitation* (2002) 97 Cal.App.4th 344, 360 [118 Cal.Rptr.2d 443], a case involving an alleged failure to provide a reasonable accommodation, the court observed that FEHA, unlike ADA, does not require a plaintiff to prove he or she is "a qualified individual with a disability." Note that the Supreme Court is reviewing this issue. (See *Green v. State of California* (2005) 132 Cal.App.4th 97 [33 Cal.Rptr.3d 254], review granted Nov. 16, 2005, S137770.)

Sources and Authority

- Government Code section 12940(m) provides that it is an unlawful employment practice "[f]or an employer or other entity covered by this part to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee. Nothing in this subdivision or in ... subdivision (a) shall be construed to require an accommodation that is demonstrated by the employer or other covered entity to produce undue hardship to its operation."

- "Any employer or other covered entity shall make reasonable accommodation to the disability of any individual with a disability if the employer or other covered entity knows of the disability, unless the employer or other covered entity can demonstrate that the accommodation would impose an undue hardship." (Cal. Code Regs., tit. 2, § 7293.9.)

- Government Code section 12926(n) provides:
  "Reasonable accommodation" may include either of the following:

  (1) Making existing facilities used by employees readily accessible to, and usable by, individuals with disabilities.

  (2) Job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

- Government Code section 12940(n) provides that it is an unlawful employment practice "[f]or an employer or other entity covered by this part to fail to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in

response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition."

- For a definition of "mental disability," see Government Code section 12926(i).

- For a definition of "physical disability," see Government Code section 12926(k).

- Government Code section 12926.1(c) provides, in part: "[T]he Legislature has determined that the definitions of 'physical disability' and 'mental disability' under the law of this state require a 'limitation' upon a major life activity, but do not require, as does the Americans with Disabilities Act of 1990, a 'substantial limitation.' This distinction is intended to result in broader coverage under the law of this state than under that federal act. Under the law of this state, whether a condition limits a major life activity shall be determined without respect to any mitigating measures, unless the mitigating measure itself limits a major life activity, regardless of federal law under the Americans with Disabilities Act of 1990. Further, under the law of this state, 'working' is a major life activity, regardless of whether the actual or perceived working limitation implicates a particular employment or a class or broad range of employments."

- "Employers must make reasonable accommodations to the disability of an individual unless the employer can demonstrate that doing so would impose an 'undue hardship.'" (*Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 947 [62 Cal.Rptr.2d 142].)

- "[A]n employer who knows of the disability of an employee has an affirmative duty to make known to the employee other suitable job opportunities with the employer and to determine whether the employee is interested in, and qualified for, those positions, if the employer can do so without undue hardship or if the employer offers similar assistance or benefit to other disabled or nondisabled employees or has a policy of offering such assistance or benefit to any other employees." (*Prilliman*, *supra*, 53 Cal.App.4th at pp. 950-951.)

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

- "[T]he duty of an employer to provide reasonable accommodation for an employee with a disability is broader under the FEHA than under the ADA." (*Bagatti v. Department of Rehabilitation* (2002) 97 Cal.App.4th 344, 362 [118 Cal.Rptr.2d 443].)

- "Under the FEHA ... an employer is relieved of the duty to reassign a disabled employee whose limitations cannot be reasonably accommodated in his or her current job only if reassignment would impose an 'undue hardship' on its operations or if there is no vacant position for which the employee is qualified." (*Spitzer v. Good Guys, Inc.* (2000) 80 Cal.App.4th 1376, 1389 [96 Cal.Rptr.2d 236].)

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

Secondary Sources

~~2 Witkin, Summary of California Law (9th ed. 1987) Agency and Employment, § 306, p. 301; *id.* (2002 supp.) at § 306, pp. 293-295~~
8 Witkin, Summary of California Law (~~9th~~ 10th ed. ~~1988~~2006) Ch. X Constitutional Law, § 762~~, pp. 262-263; *id.* (2002 supp.) at §§ 762, 762A, pp. 159-164~~

Chin, et al., Cal. Practice Guide: Employment Litigation (The Rutter Group 2006) ¶¶ 9:2250-9:2285

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 200~~6~~0) Discrimination Claims, § 2.79~~, pp. 64-65~~

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

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

California Civil Practice (Thomson West 2006) Employment Litigation, § 2:50
~~Bancroft-Whitney's California Civil Practice: Employment Litigation (1993) Discrimination in Employment, § 2:49, pp. 64-66~~

~~*(New September 2003)*~~

VF-2504. Retaliation (Gov. Code, § 12940(h))

We answer the questions submitted to us as follows:

1. **Did [***name of plaintiff***] [***describe protected activity***]?**
____ 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 defendant***] [discharge/demote/[***other adverse employment action***]] [***name of plaintiff***]?**
____ 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 [***name of plaintiff***]'s [***describe protected activity***] a motivating reason for [***name of defendant***]'s decision to [discharge/demote/[***other adverse employment action***]] [***name of plaintiff***]?**
____ 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***]'s retaliatory conduct materially and adversely affect [***name of plaintiff***]'s terms and conditions of employment?**
____ Yes ____ No

If your answer to questsion 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.]

[4/5]. Was [*name of defendant***]'s retaliatory conduct a substantial factor in causing harm to [***name of plaintiff***]?**
____ Yes ____ No

If your answer to question [4/5] is yes, then answer question [5/6]. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

[5/6]. What are [*name of plaintiff***]'s damages?**

[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:]

$ _____]

[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:]

$ _____]

[c. Past noneconomic loss, including [physical pain/mental suffering:]

$ _____]

[d. Future noneconomic loss, including [physical pain/mental suffering:]

$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

Instructional History

(New September 2003)

(Revised April 2007)

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case. This verdict form is based on CACI No. 2505, *Retaliation (Gov. Code, § 12940(h))*.

Read optional question 4 if there is an issue as to whether the employer's retaliatory conduct was sufficiently substantial to create liability.

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

If there are multiple causes of action, users may wish to combine the individual forms into one form. This form may be modified if the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest on specific losses that occurred prior to judgment.

~~*(New September 2003)*~~

3013. Supervisor Liability (42 U.S.C. § 1983)

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

1. **That [***name of supervisor defendant***] knew, or in the exercise of reasonable diligence should have known, of [***name of employee defendant***]'s wrongful conduct;**
2. **That [***name of supervisor defendant***]'s response was so inadequate that it showed deliberate indifference to, or tacit authorization of, [***name of employee defendant***]'s conduct; and**
3. **That [***name of supervisor defendant***]'s inaction was a substantial factor in causing [***name of plaintiff***]'s harm.**

Instructional History

(*New April 2007*)

Directions for Use

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

Sources and Authority

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

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

Secondary Sources

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

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

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

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

1. **That [***name of defendant***] had care or custody of [***name of plaintiff/decedent***];**

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

3. **That [***name of defendant***] failed to use the degree of care that a reasonable person in the same situation would have used by [***insert one or more of the following:***]**

   [failing to assist in personal hygiene or in the provision of food, clothing, or shelter;]

   [failing to provide medical care for physical and mental health needs;]

   [failing to protect [*name of plaintiff/decedent***] from health and safety hazards;]**

   [failing to prevent malnutrition or dehydration;]

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

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

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

Instructional History

(Revised June 2006)

Directions for Use

This instruction is intended for plaintiffs who are not seeking survival damages for pain and suffering or attorney fees and costs. Plaintiffs who are seeking such damages should use CACI No. 3104, *Neglect—Essential Factual Elements—Enhanced Remedies Sought—Individual or Individual and Employer Defendants (Welf. & Inst. Code, §§ 15657, 15610.57),* or CACI No. 3105, *Neglect—Essential Factual Elements—Enhanced Remedies Sought—Employer Defendant (Welf. & Inst. Code, §§ 15657, 15610.57).* The instructions in this series are not intended to cover every circumstance in which a plaintiff can bring a cause of action under the Elder Abuse and Dependent Adult Civil Protection Act.

This instruction is not intended for cases involving professional negligence against health-care providers

as defined by the California Medical Injury Compensation Reform Act of 1975 (MICRA) (see Welf. & Inst. Code, § 15657.2 and Civ. Code, § 3333.2(c)(2)).

Sources and Authority

- Welfare and Institutions Code section 15610.07 provides:

  "Abuse of an elder or a dependent adult" means either of the following:
  (a) Physical abuse, neglect, financial abuse, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering.
  (b) The deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering.

- Welfare and Institutions Code section 15610.57 provides:

  (a) "Neglect" means either of the following:

  (1) The negligent failure of any person having the care or custody of an elder or a dependent adult to exercise that degree of care that a reasonable person in a like position would exercise.
  (2) The negligent failure of an elder or dependent adult to exercise that degree of self care that a reasonable person in a like position would exercise.

  (b) Neglect includes, but is not limited to, all of the following:

  (1) Failure to assist in personal hygiene, or in the provision of food, clothing, or shelter.
  (2) Failure to provide medical care for physical and mental health needs. No person shall be deemed neglected or abused for the sole reason that he or she voluntarily relies on treatment by spiritual means through prayer alone in lieu of medical treatment.
  (3) Failure to protect from health and safety hazards.
  (4) Failure to prevent malnutrition or dehydration.
  (5) Failure of an elder or dependent adult to satisfy the needs specified in paragraphs (1) to (4), inclusive, for himself or herself as a result of poor cognitive functioning, mental limitation, substance abuse, or chronic poor health.

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

- Welfare and Institutions Code section 15657.2 provides: "Notwithstanding this article, any cause of action for injury or damage against a health care provider, as defined in Section 340.5 of the Code of Civil Procedure, based on the health care provider's alleged professional negligence, shall be governed by those laws which specifically apply to those professional negligence causes of action."

- Civil Code section 3333.2(c)(2) provides: "'Professional negligence' means a negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that such services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital."

- Welfare and Institutions Code section 15610.27 provides: "'Elder' means any person residing in this state, 65 years of age or older."

- Welfare and Institutions Code section 15610.23 provides:

  (a) "Dependent adult" means any person residing in this state between the ages of 18 and 64 years who has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights, including, but not limited to, persons who have physical or developmental disabilities, or whose physical or mental abilities have diminished because of age.

  (b) "Dependent adult" includes any person between the ages of 18 and 64 years who is admitted as an inpatient to a 24-hour health facility, as defined in Sections 1250, 1250.2, and 1250.3 of the Health and Safety Code.

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

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

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

- "The Act was expressly designed to protect elders and other dependent adults who 'may be subjected to abuse, neglect, or abandonment ....' Within the Act, two groups of persons who ordinarily assume responsibility for the 'care and custody' of the elderly are identified and defined: health practitioners and care custodians. A 'health practitioner' is defined in section 15610.37 as a 'physician and surgeon, psychiatrist, psychologist, dentist, ...' etc., who 'treats an elder ... for any condition.' 'Care custodians,' on the other hand, are administrators and employees of public and private institutions that provide 'care or services for elders or dependent adults,' including nursing homes, clinics, home

health agencies, and similar facilities which house the elderly. The Legislature thus recognized that both classes of professionals—health practitioners as well as care custodians—should be charged with responsibility for the health, safety and welfare of elderly and dependent adults." (*Mack v. Soung* (2000) 80 Cal.App.4th 966, 974 [95 Cal.Rptr.2d 830], internal citations omitted.)

Secondary Sources

California Elder Law Litigation (Cont.Ed.Bar 2003–2005) §§ 2.70–2.72

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

~~*(Revised June 2006)*~~

3200. ~~Violation of Civil Code Section 1793.2(d)~~Breach of Express Warranty—Consumer Goods—Essential Factual Elements (Civ. Code, § 1793.2(d))

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

1. **That [***name of plaintiff***] bought a[n] [***consumer good***] [from/distributed by/manufactured by] [***name of defendant***];**

2. **That [***name of defendant***] gave [***name of plaintiff***] a warranty by [***insert at least one of the following:***]**

[making a written statement that [*describe alleged express warranty***];] [or]**

[showing [him/her] a sample or model of the [*consumer good***] and representing, by words or conduct, that [his/her] [***consumer good***] would match the quality of the sample or model;]**

3. **That the [***consumer good***] [***insert at least one of the following:***]**

[did not perform as stated for the time specified;] [or]

[did not match the quality [of the [sample/model]] [or] [as set forth in the written statement];]

4. **[That [***name of plaintiff***] delivered the [***consumer good***] to [***name of defendant***] or its authorized repair facilities for repair;]**

[That [*name of plaintiff***] notified [***name of defendant***] in writing of the need for repair because [he/she] reasonably could not deliver the [***consumer good***] to [***name of defendant***] or its authorized repair facilities due to the [size and weight/method of attachment/method of installation] [or] [the nature of the defect] of the [***consumer good***]]; [and]**

5. **That [***name of defendant***] or its representative failed to repair the [***consumer good***] to match the [written statement/represented quality] after a reasonable number of opportunities; [and]**

6. **[That [***name of defendant***] did not replace the [***consumer good***] or reimburse [***name of plaintiff***] an amount of money equal to the purchase price of the [***consumer good***], less the value of its use by [***name of plaintiff***] before discovering the defect[s].]**

[A written statement need not include the words "warranty" or "guarantee," but if those words are used, a warranty is created. It is also not necessary for [*name of defendant***] to have specifically intended to create a warranty. A warranty is not created if [***name of defendant***] simply stated the value of the [***consumer good***] or gave an opinion about the [***consumer good***].**

General statements concerning customer satisfaction do not create a warranty.]

Instructional History

(New September 2003)

(Revised April 2007)

Directions for Use

An instruction on the definition of "consumer good" may be necessary if that issue is disputed. Civil Code section 1791(a) provides: "'Consumer goods' means any new product or part thereof that is used, bought, or leased for use primarily for personal, family, or household purposes, except for clothing and consumables. 'Consumer goods' shall include new and used assistive devices sold at retail."

Select the alternative in element 4 that is appropriate to the facts of the case.

Regarding element 4, ~~where~~ if the plaintiff claims that the consumer goods could not be delivered for repair, the judge should decide whether written notice of nonconformity is required. The statute-see Civil Code section 1793.2(c)-is unclear on this point.

Depending on the circumstances of the case, further instruction may be warranted regarding element 6 to clarify how the jury should calculate "the value of its use" during the time before discovery of the defect.

If remedies are sought under the Commercial Code, the plaintiff may be required to prove reasonable notification within a reasonable time. (Cal. U. Com. Code, § 2607(3).) If the court determines ~~such~~ proof is necessary, add the following element to this instruction:

> That [*name of plaintiff*] took reasonable steps to notify [*name of defendant*] within a reasonable time That the [*consumer good*] [did not match the quality [of the [sample/model]]/as set forth in the written statement];

See also CACI No. 1243, *Notification/Reasonable Time*.

If appropriate to the facts, add: "It is not necessary for [*name of plaintiff*] to prove the cause of a defect in the [*consumer good*]." The Song-Beverly Consumer Warranty Act does not require a consumer to prove the cause of the defect or failure, only that the consumer good "did not conform to the express warranty." (See *Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1102, fn. 8 [109 Cal.Rptr.2d 583].)

In addition to sales of consumer goods, the Consumer Warranty Act applies to leases. (Civ. Code, §§ 1791(g)-(i), 1795.4.) This instruction may be modified for use in cases involving an express warranty in a lease of consumer goods.

See also CACI Nos, 3202, *"Repair Opportunities" Explained*

~~Where the warranty period has been extended, it cannot expire any sooner than 60 days after the last repair of a claimed defect. (Civ. Code, § 1793.1(a)(2).)~~

Sources and Authority

- "Broadly speaking, the Act regulates warranty terms; imposes service and repair obligations on manufacturers, distributors and retailers who make express warranties; requires disclosure of specified information in express warranties; and broadens a buyer's remedies to include costs, attorney fees and civil penalties. ... [T]he purpose of the Act has been to provide broad relief to purchasers of consumer goods with respect to warranties." (*National R.V., Inc. v. Foreman* (1995) 34 Cal.App.4th 1072, 1080 [40 Cal.Rptr.2d 672].)

- Civil Code section 1794(a) provides, in part: "Any buyer of consumer goods who is damaged by a failure to comply with any obligation under this [Act] or under an ... express warranty ... may bring an action for the recovery of damages and other legal and equitable relief."

- Civil Code section 1791.2 provides:

    (a) "Express warranty" means:

        (1) A written statement arising out of a sale to the consumer of a consumer good pursuant to which the manufacturer, distributor, or retailer undertakes to preserve or maintain the utility or performance of the consumer good or provide compensation if there is a failure in utility or performance; or

        (2) In the event of any sample or model, that the whole of the goods conforms to such sample or model.

    (b) It is not necessary to the creation of an express warranty that formal words such as "warrant" or "guarantee" be used, but if such words are used then an express warranty is created. An affirmation merely of the value of the goods or a statement purporting to be merely an opinion or commendation of the goods does not create a warranty.

    (c) Statements or representations such as expressions of general policy concerning customer satisfaction which are not subject to any limitation do not create an express warranty.

- Civil Code section 1795 provides, in part: "If express warranties are made by persons other than the manufacturer of the goods, the obligation of the person making such warranties shall be the same as that imposed on the manufacturer."

- Civil Code section 1793.2(d) provides, in part:

    (1) Except as provided in paragraph (2), if the manufacturer or its representative in this

state does not service or repair the goods to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either replace the goods or reimburse the buyer in an amount equal to the purchase price paid by the buyer, less that amount directly attributable to use by the buyer prior to discovery of the nonconformity.

(2) If the manufacturer or its representative in this state is unable to service or repair a new motor vehicle ... to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either promptly replace the new motor vehicle ... or promptly make restitution to the buyer ... . However, the buyer shall be free to elect restitution in lieu of replacement, and in no event shall the buyer be required to accept a replacement vehicle.

- "[S]ection 1793.2, subdivision (d)(2), differs from section 1793.2, subdivision (d)(1), in that it gives the new motor vehicle consumer the right to elect restitution in lieu of replacement; provides specific procedures for the motor vehicle manufacturer to follow in the case of replacement and in the case of restitution; and sets forth rules for offsetting the amount attributed to the consumer's use of the motor vehicle. These 'Lemon Law' provisions clearly provide greater consumer protections to those who purchase new motor vehicles than are afforded under the general provisions of the Act to those who purchase other consumer goods under warranty." (*National R.V., Inc., supra*, 34 Cal.App.4th at p. 1079, internal citations and footnotes omitted.)

- Under Civil Code section 1793.1(a)(2), if the warranty period has been extended, it cannot expire any sooner than 60 days after the last repair of a claimed defect.

- Civil Code section 1793.2(c) provides, in part: "The buyer shall deliver nonconforming goods to the manufacturer's service and repair facility within this state, unless, due to reasons of size and weight, or method of attachment, or method of installation, or nature of the nonconformity, delivery cannot reasonably be accomplished. If the buyer cannot return the nonconforming goods for any of these reasons, he or she shall notify the manufacturer or its nearest service and repair facility within the state. Written notice of nonconformity to the manufacturer or its service and repair facility shall constitute return of the goods for purposes of this section."

- The act does not require a consumer to give a manufacturer, in addition to its local representative, at least one opportunity to fix a problem. Regarding previous repair efforts entitling an automobile buyer to reimbursement, "[t]he legislative history of [Civil Code section 1793.2] demonstrates beyond any question that ... a differentiation between manufacturer and local representative is unwarranted." (*Ibrahim v. Ford Motor Co.* (1989) 214 Cal.App.3d 878, 888 [263 Cal.Rptr. 64].)

- Civil Code section 1795.5 provides, in part: "Notwithstanding the provisions ... defining consumer goods to mean 'new' goods, the obligation of a distributor or retail seller of used consumer goods in a sale in which an express warranty is given shall be the same as that imposed on manufacturers," with limited exceptions provided by statute.

- Civil Code section 1790.3 provides: "The provisions of [the Song-Beverly Consumer Warranty Act] shall not affect the rights and obligations of parties determined by reference to the Commercial Code

except that, where the provisions of the Commercial Code conflict with the rights guaranteed to buyers of consumer goods under the provisions of [the act], the provisions of [the act] shall prevail."

- Civil Code section 1793.1(a)(2) provides, in part: "The warranty period will be extended for the number of whole days that the product has been out of the buyer's hands for warranty repairs. If a defect exists within the warranty period, the warranty will not expire until the defect has been fixed. The warranty period will also be extended if the warranty repairs have not been performed due to delays caused by circumstances beyond the control of the buyer, or if the warranty repairs did not remedy the defect and the buyer notifies the manufacturer or seller of the failure of the repairs within 60 days after they were completed."

- Civil Code section 1795.6 provides, in part:

  (a) Every warranty period relating to an ... express warranty accompanying a sale or consignment for sale of consumer goods selling for fifty dollars ($50) or more shall automatically be tolled for the period from the date upon which the buyer either (1) delivers nonconforming goods to the manufacturer or seller for warranty repairs or service or (2), pursuant to [sections 1793.2(c) or 1793.22], notifies the manufacturer or seller of the nonconformity of the goods up to, and including, the date upon which (1) the repaired or serviced goods are delivered to the buyer, (2) the buyer is notified the goods are repaired or serviced and are available for the buyer's possession or (3) the buyer is notified that repairs or service is completed, if repairs or service is made at the buyer's residence.

  (b) Notwithstanding the date or conditions set for the expiration of the warranty period, such warranty period shall not be deemed expired if ... : (1) after the buyer has satisfied the requirements of subdivision (a), the warranty repairs or service has not been performed due to delays caused by circumstances beyond the control of the buyer or (2) the warranty repairs or service performed upon the nonconforming goods did not remedy the nonconformity for which such repairs or service was performed and the buyer notified the manufacturer or seller of this failure within 60 days after the repairs or service was completed. When the warranty repairs or service has been performed so as to remedy the nonconformity, the warranty period shall expire in accordance with its terms, including any extension to the warranty period for warranty repairs or service.

Secondary Sources

4 Witkin, Summary of California Law (10th ed. 2005) Sales, §§ 52, 56, 314–324
~~3 Witkin, Summary of California Law (9th ed. 1987) Sales, §§ 51, 55, 306-308~~

1 California UCC Sales & Leases (Cont.Ed.Bar 2002) Warranties, §§ 3.4, 3.8, 3.15, 3.87

2 California UCC Sales & Leases (Cont.Ed.Bar 2002) Prelitigation Remedies, § 17.70; *id.*, Litigation Remedies, § 18.25; *id.*, Leasing of Goods, § 19.38

~~California Products Liability Actions, Ch. 2, *Liability for Defective Products*, §§ 2.30[3], 2.31, Ch. 8, *Defenses*, § 8.07[3][b] (Matthew Bender)~~

44 California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties*, §§ 502.42, 502.53 (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales* (Matthew Bender)

5 California Civil Practice (Thomson West 2006) Business Litigation, §§ 53:1, 53:3–53:4, 53:10–53:11, 53:14–53:17, 53:22–53:23, 53:26–53:27

~~5 Bancroft-Whitney's California Civil Practice: Business Litigation (1993) Consumer Warranties, §§ 53:1, 53:3-53:4, 53:10-53:11, 53:14-53:17, 53:22-53:23, 53:26-53:27, pp. 6, 8-10, 14-15, 18-23, 27-29, 31-34; *id.* (2001 supp.) at §§ 53:3-53:4, 53:10, 53:14, 53:16, 53:26-53:27, pp. 29-33, 36-37~~

~~*(New September 2003)*~~

3201. ~~Violation of Civil Code Section 1793.2(d)~~Breach of Express Warranty—New Motor Vehicle—Essential Factual Elements (Civ. Code, § 1793.2(d))

[*Name of plaintiff***] claims that [***name of defendant***] breached a warranty. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [bought/leased] a[n] [***new motor vehicle***] [from/ distributed by/manufactured by] [***name of defendant***];**

2. **That [***name of defendant***] gave [***name of plaintiff***] a written warranty that [***describe alleged express warranty***];**

3. **That the vehicle had [a] defect[s] that [was/were] covered by the warranty and that substantially impaired its use, value, or safety to a reasonable person in [***name of plaintiff***]'s situation;**

4. **[That [***name of plaintiff***] delivered the vehicle to [***name of defendant***] or its authorized repair facility for repair of the defect[s];]**

   [That [*name of plaintiff***] notified [***name of defendant***] in writing of the need for repair of the defect[s] because [he/she] reasonably could not deliver the vehicle to [***name of defendant***] or its authorized repair facility because of the nature of the defect[s];]**

5. **That [***name of defendant***] or its authorized repair facility failed to repair the vehicle to match the written warranty after a reasonable number of opportunities to do so; and**

6. **That [***name of defendant***] did not promptly replace or buy back the vehicle.**

[It is not necessary for [*name of plaintiff***] to prove the cause of a defect in the [***new motor vehicle***].]**

[A written warranty need not include the words "warranty" or "guarantee," but if those words are used, a warranty is created. It is also not necessary for [*name of defendant***] to have specifically intended to create a warranty. A warranty is not created if [***name of defendant***] simply stated the value of the vehicle or gave an opinion about the vehicle. General statements concerning customer satisfaction do not create a warranty.]**

Instructional History

(Revised December 2005)

(Revised April 2007)

Directions for Use

If remedies are sought under the Commercial Code, the plaintiff may be required to prove reasonable notification within a reasonable time. (Cal. U. Com. Code, § 2607(3).) If the court determines that ~~such~~ proof is necessary, add the following element to this instruction:

> That [*name of plaintiff*] took reasonable steps to notify [*name of defendant*] within a reasonable time that the [*new motor vehicle*] had a defect covered by the warranty;

See also CACI No. 1243, *Notification/Reasonable Time*.

Regarding element 4, ~~where~~ if the plaintiff claims that the consumer goods could not be delivered for repair, the judge should decide whether written notice of nonconformity is required. The statute-see Civil Code section 1793.2(c)-is unclear on this point.

Include the bracketed sentence preceding the final bracketed paragraph if appropriate to the facts. The Song-Beverly Consumer Warranty Act does not require a consumer to prove the cause of the defect or failure, only that the consumer good "did not conform to the express warranty." (See *Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1102, fn. 8 [109 Cal.Rptr.2d 583].)

In addition to sales of consumer goods, the Consumer Warranty Act applies to leases. (Civ. Code, §§ 1791(g)-(i), 1795.4.) This instruction may be modified for use in cases involving an express warranty in a lease of a motor vehicle.

~~Where the warranty period has been extended, it cannot expire any sooner than 60 days after the last repair of a claimed defect. (Civ. Code, § 1793.1(a)(2).)~~

See also CACI Nos, 3202, *"Repair Opportunities" Explained*, 3203, *Reasonable Number of Repair Opportunities—Rebuttable Presumption—(Civ. Code, § 1793.22(b))*, and 3204, *"Substantially Impaired" Explained*.

Sources and Authority

- "Broadly speaking, the Act regulates warranty terms; imposes service and repair obligations on manufacturers, distributors and retailers who make express warranties; requires disclosure of specified information in express warranties; and broadens a buyer's remedies to include costs, attorney fees and civil penalties. ... [T]he purpose of the Act has been to provide broad relief to purchasers of consumer goods with respect to warranties." (*National R.V., Inc. v. Foreman* (1995) 34 Cal.App.4th 1072, 1080 [40 Cal.Rptr.2d 672].)

- "A plaintiff pursuing an action under the Act has the burden to prove that (1) the vehicle had a nonconformity covered by the express warranty that substantially impaired the use, value or safety of the vehicle (the nonconformity element); (2) the vehicle was presented to an authorized representative of the manufacturer of the vehicle for repair (the presentation element); and (3) the manufacturer or his representative did not repair the nonconformity after a reasonable number of repair attempts (the failure to repair element)." (*Oregel, supra*, 90 Cal.App.4th at p. 1101.)

- The Song-Beverly Act does not apply unless the vehicle was purchased in California. (*Cummins, Inc.*

v. Superior Court (2005) 36 Cal.4th 478 [30 Cal.Rptr.3d 823, 115 P.3d 98].)

- Under Civil Code section 1793.1(a)(2), if the warranty period has been extended, it cannot expire any sooner than 60 days after the last repair of a claimed defect.

- Civil Code section 1794(a) provides, in part: "Any buyer of consumer goods who is damaged by a failure to comply with any obligation under this [Act] or under an ... express warranty ... may bring an action for the recovery of damages and other legal and equitable relief."

- Civil Code section 1790.3 provides: "The provisions of [the Song-Beverly Consumer Warranty Act] shall not affect the rights and obligations of parties determined by reference to the Commercial Code except that, where the provisions of the Commercial Code conflict with the rights guaranteed to buyers of consumer goods under the provisions of [the act], the provisions of [the act] shall prevail."

- Civil Code section 1791.2 provides:

  (a) "Express warranty" means:

    (1) A written statement arising out of a sale to the consumer of a consumer good pursuant to which the manufacturer, distributor, or retailer undertakes to preserve or maintain the utility or performance of the consumer good or provide compensation if there is a failure in utility or performance; or

    (2) In the event of any sample or model, that the whole of the goods conforms to such sample or model.

  (b) It is not necessary to the creation of an express warranty that formal words such as "warrant" or "guarantee" be used, but if such words are used then an express warranty is created. An affirmation merely of the value of the goods or a statement purporting to be merely an opinion or commendation of the goods does not create a warranty.

  (c) Statements or representations such as expressions of general policy concerning customer satisfaction which are not subject to any limitation do not create an express warranty.

- Civil Code section 1795 provides, in part: "If express warranties are made by persons other than the manufacturer of the goods, the obligation of the person making such warranties shall be the same as that imposed on the manufacturer."

- Civil Code section 1793.22(e)(2) provides, in part: "'New motor vehicle' means a new motor vehicle that is bought or used primarily for personal, family, or household purposes. 'New motor vehicle' also means a new motor vehicle ... that is bought or used primarily for business purposes by a person ... or any ... legal entity, to which not more than five motor vehicles are registered in this state. 'New motor vehicle' includes the chassis, chassis cab, and that portion of a motor home devoted to its propulsion ..., a dealer-owned vehicle and a 'demonstrator' or other motor vehicle sold with a

manufacturer's new car warranty."

- "Under well-recognized rules of statutory construction, the more specific definition [of "new motor vehicle"] found in the current section 1793.22 governs the more general definition [of "consumer goods"] found in section 1791." (*Jensen v. BMW of North America, Inc.* (1995) 35 Cal.App.4th 112, 126 [41 Cal.Rptr.2d 295].)

- "'Nonconformity' is defined as 'a nonconformity which substantially impairs the use, value, or safety of the new motor vehicle to the buyer or lessee.' The term is similar to what the average person would understand to be a 'defect.'" (*Schreidel v. American Honda Motor Co.* (1995) 34 Cal.App.4th 1242, 1249 [40 Cal.Rptr.2d 576], internal citation omitted; see also *Robertson v. Fleetwood Travel Trailers of California, Inc.* (2006) 144 Cal. App. 4th 785, 801 n.11 [50 Cal.Rptr.3d 731] (nonconformity can include entire complex of related conditions).)

- "The issue of whether the problems constituted substantial impairment is one for the trier of fact." (*Schreidel, supra*, 34 Cal.App.4th at p. 1250.)

- Civil Code section 1793.2(d)(2) provides, in part: "If the manufacturer or its representative in this state is unable to service or repair a new motor vehicle ... to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either promptly replace the new motor vehicle ... or promptly make restitution to the buyer. ... However, the buyer shall be free to elect restitution in lieu of replacement, and in no event shall the buyer be required to accept a replacement vehicle."

- "[S]ection 1793.2, subdivision (d)(2), differs from section 1793.2, subdivision (d)(1), in that it gives the new motor vehicle consumer the right to elect restitution in lieu of replacement; provides specific procedures for the motor vehicle manufacturer to follow in the case of replacement and in the case of restitution; and sets forth rules for offsetting the amount attributed to the consumer's use of the motor vehicle. These 'Lemon Law' provisions clearly provide greater consumer protections to those who purchase new motor vehicles than are afforded under the general provisions of the Act to those who purchase other consumer goods under warranty." (*National R.V., Inc., supra*, 34 Cal.App.4th at p. 1079, internal citations and footnotes omitted.)

- Civil Code section 1793.2(c) provides, in part: "The buyer shall deliver nonconforming goods to the manufacturer's service and repair facility within this state, unless, due to reasons of size and weight, or method of attachment, or method of installation, or nature of the nonconformity, delivery cannot reasonably be accomplished. If the buyer cannot return the nonconforming goods for any of these reasons, he or she shall notify the manufacturer or its nearest service and repair facility within the state. Written notice of nonconformity to the manufacturer or its service and repair facility shall constitute return of the goods for purposes of this section."

- The act does not require a consumer to give a manufacturer, in addition to its local representative, at least one opportunity to fix a problem. Regarding previous repair efforts entitling an automobile buyer to reimbursement, "[t]he legislative history of [Civil Code section 1793.2] demonstrates beyond any question that ... a differentiation between manufacturer and local representative is unwarranted." (*Ibrahim v. Ford Motor Co.* (1989) 214 Cal.App.3d 878, 888 [263 Cal.Rptr. 64].)

- "[T]he only affirmative step the Act imposes on consumers is to 'permit[] the manufacturer a reasonable *opportunity* to repair the vehicle.'" (*Oregel, supra,* 90 Cal.App.4th at p. 1103, internal citation omitted.)

- "[T]he Act does not *require* consumers to take any affirmative steps to secure relief for the failure of a manufacturer to service or repair a vehicle to conform to applicable warranties-other than, of course, permitting the manufacturer a reasonable opportunity to repair the vehicle. ... [A]s a practical matter, the consumer will likely request replacement or restitution. But the consumer's request is not mandated by any provision in the Act. Rather, the consumer's request for replacement or restitution is often prompted by the manufacturer's unforthright approach and stonewalling of fundamental warranty problems." (*Krotin v. Porsche Cars North America, Inc.* (1995) 38 Cal.App.4th 294, 302-303 [45 Cal.Rptr.2d 10], emphasis in original.)

- Civil Code section 1793.1(a)(2) provides, in part: "The warranty period will be extended for the number of whole days that the product has been out of the buyer's hands for warranty repairs. If a defect exists within the warranty period, the warranty will not expire until the defect has been fixed. The warranty period will also be extended if the warranty repairs have not been performed due to delays caused by circumstances beyond the control of the buyer, or if the warranty repairs did not remedy the defect and the buyer notifies the manufacturer or seller of the failure of the repairs within 60 days after they were completed."

- Civil Code section 1795.6 provides, in part:

    (a) Every warranty period relating to an ... express warranty accompanying a sale or consignment for sale of consumer goods selling for fifty dollars ($50) or more shall automatically be tolled for the period from the date upon which the buyer either (1) delivers nonconforming goods to the manufacturer or seller for warranty repairs or service or (2), pursuant to [sections 1793.2(c) or 1793.22], notifies the manufacturer or seller of the nonconformity of the goods up to, and including, the date upon which (1) the repaired or serviced goods are delivered to the buyer, (2) the buyer is notified the goods are repaired or serviced and are available for the buyer's possession or (3) the buyer is notified that repairs or service is completed, if repairs or service is made at the buyer's residence.

    (b) Notwithstanding the date or conditions set for the expiration of the warranty period, such warranty period shall not be deemed expired if ... : (1) after the buyer has satisfied the requirements of subdivision (a), the warranty repairs or service has not been performed due to delays caused by circumstances beyond the control of the buyer or (2) the warranty repairs or service performed upon the nonconforming goods did not remedy the nonconformity for which such repairs or service was performed and the buyer notified the manufacturer or seller of this failure within 60 days after the repairs or service was completed. When the warranty repairs or service has been performed so as to remedy the nonconformity, the warranty period shall expire in accordance with its terms, including any extension to the warranty period for warranty repairs or service.

Secondary Sources

4 Witkin, Summary of California Law (10th ed. 2005) Sales, §§ 52, 56, 314–324
~~3 Witkin, Summary of California Law (9th ed. 1987) Sales, §§ 51, 55, 306-308, pp. 47-48, 50-51, 240-243; *id.* (2002 supp.) at §§ 51, 55, 306-308, pp. 14-15, 94-103~~

1 Sales & Leases (Cont.Ed.Bar 2001) Warranties, §§ 7.4, 7.8, 7.15, 7.87~~, pp. 233-234, 239, 245-246, 293-294~~; *id.*, Prelitigation Remedies, at § 13.68~~, pp. 619-620~~; *id.*, Litigation Remedies, at § 14.25,~~ pp. 658-659;~~ *id.*, Division 10: Leasing of Goods, at § 17.31~~, p. 807~~

~~California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.31 (Matthew Bender)~~

44 California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties*, § 502.43[5][b] (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales* (Matthew Bender)

5 California Civil Practice (Thomson West 2006) Business Litigation, §§ 53:1, 53:3–53:4, 53:10–53:11, 53:14–53:17, 53:22–53:23, 53:26–53:27
~~5 Bancroft-Whitney's California Civil Practice: Business Litigation (1993) Consumer Warranties, §§ 53:1, 53:3-53:4, 53:10-53:11, 53:14-53:17, 53:22-53:23, 53:26-53:27, pp. 6, 8-10, 14-15, 18-23, 27-29, 31-34; *id.* (2001 supp.) at §§ 53:3-53:4, 53:10, 53:14, 53:16, 53:26-53:27, pp. 29-33, 36-37~~

~~*(Revised December 2005)*~~

3903A. Medical Expenses—Past and Future (Economic Damage)

[*Insert number, e.g.,* "1."**] [Past] [and] [future] medical expenses.**

[To recover damages for past medical expenses, [*name of plaintiff***] must prove the reasonable cost of reasonably necessary medical care that [he/she] has received.]**

[To recover damages for future medical expenses, [*name of plaintiff***] must prove the reasonable cost of reasonably necessary medical care that [he/she] is reasonably certain to need in the future.]**

Instructional History

(New September 2003)

Sources and Authority

- "[A] person injured by another's tortuous conduct is entitled to recover the reasonable value of medical care and services reasonably required and attributable to the tort." (*Hanif v. Housing Authority of Yolo County* (1988) 200 Cal.App.3d 635, 640 [246 Cal.Rptr. 192], internal citations omitted; see also. *Helfend v. Southern Cal Rapid Transit Dist.* (1970) 2 Cal.3d 1, 6 [84 Cal.Rptr. 173; 465 P.2d 61 (collateral source rule).)

- "It is established that 'the reasonable value of nursing services required by the defendant's tortious conduct may be recovered from the defendant even though the services were rendered by members of the injured person's family and without an agreement or expectation of payment. Where services in the way of attendance and nursing are rendered by a member of the plaintiff's family, the amount for which the defendant is liable is the amount for which reasonably competent nursing and attendance by others could have been obtained. The fact that the injured party had a legal right to the nursing services (as in the case of a spouse) does not, as a general rule, prevent recovery of their value ...." (*Hanif, supra,* 200 Cal.App.3d at pp. 644-645, internal citations omitted.)

- "Nor is it necessary that the amount of the award equal the alleged medical expenses for it has long been the rule that the costs alone of medical treatment and hospitalization do not govern the recovery of such expenses. It must be shown additionally that the services were attributable to the accident, that they were necessary, and that the charges for such services were reasonable." (*Dimmick v. Alvarez* (1961) 196 Cal.App.2d 211, 216 [16 Cal.Rptr. 308].)

- "*Nishihama* [*Nishihama v. City and County of San Francisco* (2001)93 Cal.App.4th 298 [112 Cal.Rptr.2d 861]] and *Hanif* [*supra*] stand for the principle that it is error for the plaintiff to *recover* medical expenses in excess of the amount paid or incurred. Neither case, however, holds that *evidence* of the reasonable cost of medical care may not be admitted. Indeed, *Nishihama* suggests just the opposite: Such evidence gives the jury a more complete picture of the extent of a plaintiff's injuries. Thus, the trial court did not abuse its discretion in allowing evidence of the reasonable cost of plaintiff's care while reserving the propriety of a *Hanif/Nishihama* reduction until after the verdict.

(*Greer v. Buzgheia* (2006) 141 Cal.App.4th 1150, 1157 [46 Cal.Rptr.3d 780], emphasis the court's.)

- ~~Implicit in the ... cases is the notion that a plaintiff is entitled to recover up to, and no more than, the actual amount expended or incurred for past medical services so long as that amount is reasonable." (*Hanif, supra*, 200 Cal.App.3d at p. 643.)~~

- "Because the provider may no longer assert a lien for the full cost of its services, the Medicaid beneficiary may only recover the amount payable under Medicaid as his or her medical expenses in an action against a third party tortfeasor." (*Olszewski v. Scripps Health* (2003) 30 Cal. 4th 798, 827 [135 Cal.Rptr.2d 1; 69 P.3d 927], internal citation omitted.)

- "'To entitle a plaintiff to recover present damages for apprehended future consequences, there must be evidence to show such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury.'" (*Bellman v. San Francisco High School Dist.* (1938) 11 Cal.2d 576, 588 [81 P.2d 894], internal citation omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1670
~~6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 1408~~

4 Levy et al., California Torts, Ch. 52, *Medical Expenses and Economic Loss*, §§ 52.01, 52.03 (Matthew Bender)

California Tort Damages (Cont.Ed.Bar 1988) Bodily Injury, §§ 1.19-1.31

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

6 California Points and Authorities, Ch. 65, *Damages* (Matthew Bender)

1 California Civil Practice (Thomson West 2006) Torts, § 5:12
~~1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 5:12~~

~~*(New September 2003)*~~

4106. Affirmative Defense--Statute of Limitations

[*Name defendant***] contends that [***name of plaintiff***]'s lawsuit was not filed within the time set by law. To succeed on this defense, [***name of defendant***] must prove that [***name of plaintiff***]'s claimed harm occurred before [***insert date four years before complaint was filed***] unless [***name plaintiff***] proves that before [***insert date four years before complaint was filed***], [he/she/it] did not discover, and did not know of facts that would have caused a reasonable person to suspect, [***name of defendant***]'s wrongful act or omission.**

Instructional History

(*New April 2007*)

Directions for Use

Read this instruction only for a cause of action for breach of fiduciary duty. For a statute-of-limitations defense to a cause of action for personal injury or wrongful death due to wrongful or negligent conduct, see CACI Nos. 454 (*Affirmative Defense--Statute of Limitations*) and 455, (*Affirmative Defense--Statute of Limitations--Delayed Discovery*).

Do not use this instruction in an action against an attorney. For a statute-of-limitations defense to a cause of action, other than actual fraud, against an attorney acting in the capacity of an attorney, see CACI Nos. 610 (*Affirmative Defense--Statute of Limitations—Attorney Malpractice—One-Year Limit*) and 611 (*Affirmative Defense--Statute of Limitations—Attorney Malpractice—Four-Year Limit*). One cannot avoid a shorter limitation period for attorney malpractice (see Code Civ. Proc., § 340.6) by pleading the facts as a breach of fiduciary duty. (*Stoll v. Superior Court,* (1992) 9 Cal.App.4th 1362, 1368 [12 Cal.Rptr.2d 354].)

Sources and Authority

- Code of Civil Procedure section 343 provides: "An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued."

- "The statute of limitations for breach of fiduciary duty is four years. (§ 343.)" (*Stalberg v. Western Title Ins. Co.* (1991) 230 Cal.App.3d 1223, 1230 [282 Cal. Rptr. 43], internal citation omitted.)

- "A breach of fiduciary duty claim is based on concealment of facts, and the statute begins to run when plaintiffs discovered, or in the exercise of reasonable diligence could have discovered, that facts had been concealed." (*Stalberg, supra,* 230 Cal.App.3d at p. 1230, internal citation omitted.)

- "Where a fiduciary relationship exists, facts which ordinarily require investigation may not incite suspicion and do not give rise to a duty of inquiry. Where there is a fiduciary relationship, the usual duty of diligence to discover facts does not exist." (*Hobbs v. Bateman Eichler, Hill Richards, Inc.* (1985) 164 Cal.App.3d 174, 202 [210 Cal.Rptr. 387], internal citations omitted.)

- "[A] plaintiff need not establish that she exercised due diligence to discover the facts within the limitations period unless she is under a duty to inquire and the circumstances are such that failure to inquire would be negligent. Where the plaintiff is not under such duty to inquire, the limitations period does not begin to run until she actually discovers the facts constituting the cause of action, even though the means for obtaining the information are available." (*Hobbs, supra,* 164 Cal.App.3d at p. 202, internal citations omitted.)

- "The distinction between the rules excusing a late discovery of fraud and those allowing late discovery in cases in the confidential relationship category is that in the latter situation, the duty to investigate may arise later because the plaintiff is entitled to rely upon the assumption that his fiduciary is acting on his behalf. However, once a plaintiff becomes aware of facts which would make a reasonably prudent person suspicious, the duty to investigate arises and the plaintiff may then be charged with knowledge of the facts which would have been discovered by such an investigation." (*Hobbs, supra,* 164 Cal.App.3d at p. 202, internal citations omitted.)

- " '[R]esolution of the statute of limitations issue is normally a question of fact … .' " (*Romano v. Rockwell Internat., Inc.* (1996) 14 Cal. 4th 479, 487 [59 Cal. Rptr. 2d 20, 926 P.2d 1114].)

Secondary Sources

3 Witkin, California Procedure (4th ed. 1996) Actions, §§ 6177-619

5003. Witnesses

A witness is a person who has knowledge related to this case. You will have to decide whether you believe each witness and how important each witness's testimony is to the case. You may believe all, part, or none of a witness's testimony.

In deciding whether to believe a witness's testimony, you may consider, among other factors, the following:

(a) How well did the witness see, hear, or otherwise sense what he or she described in court?

(b) How well did the witness remember and describe what happened?

(c) How did the witness look, act, and speak while testifying?

(d) Did the witness have any reason to say something that was not true? Did the witness show any bias or prejudice? Did the witness have a personal relationship with any of the parties involved in the case? Does the witness have a personal stake in how this case is decided?

(e) What was the witness's attitude toward this case or about giving testimony?

Sometimes a witness may say something that is not consistent with something else he or she said. Sometimes different witnesses will give different versions of what happened. People often forget things or make mistakes in what they remember. Also, two people may see the same event but remember it differently. You may consider these differences, but do not decide that testimony is untrue just because it differs from other testimony.

However, if you decide that a witness deliberately testified untruthfully about something important, you may choose not to believe anything that witness said. On the other hand, if you think the witness testified untruthfully about some things but told the truth about others, you may accept the part you think is true and ignore the rest.

Do not make any decision simply because there were more witnesses on one side than on the other. If you believe it is true, the testimony of a single witness is enough to prove a fact.

You must not be biased against any witness because of his or her disability, gender, race, ~~sex,~~ religion, ~~occupation,~~ ethnicity, sexual orientation, age, national origin, [or] socioeconomic status [or [*insert any other impermissible form of bias***].**

Instructional History

(Revised April 2004)

(*Revised April 2007*)

Directions for Use

This instruction may be given as either an introductory instruction before trial (See CACI No. 107) or as a concluding instruction.

The Advisory Committee recommends that this instruction be read to the jury before reading instructions on the substantive law.

In the last paragraph, the court may delete inapplicable categories of potential jury bias.

Sources and Authority

- Evidence Code section 312 provides:

  Except as otherwise provided by law, where the trial is by jury:

  (a) All questions of fact are to be decided by the jury.

  (b) Subject to the control of the court, the jury is to determine the effect and value of the evidence addressed to it, including the credibility of witnesses and hearsay declarants.

- Considerations for evaluating the credibility of witnesses are contained in Evidence Code section 780:

  Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following:

  (a) His demeanor while testifying and the manner in which he testifies.

  (b) The character of his testimony.

  (c) The extent of his capacity to perceive, to recollect, or to communicate any matter about which he testifies.

  (d) The extent of his opportunity to perceive any matter about which he testifies.

  (e) His character for honesty or veracity or their opposites.

  (f) The existence or nonexistence of a bias, interest, or other motive.

  (g) A statement previously made by him that is consistent with his testimony at the hearing.

(h) A statement made by him that is inconsistent with any part of his testimony at the hearing.

(i) The existence or nonexistence of any fact testified to by him.

(j) His attitude toward the action in which he testifies or toward the giving of testimony.

(k) His admission of untruthfulness.

- Evidence Code section 411 provides that "[e]xcept where additional evidence is required by statute, the direct evidence of one witness who is entitled to full credit is sufficient proof of any fact." According to former Code of Civil Procedure section 2061, the jury should be instructed that "they are not bound to decide in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a less number or against a presumption or other evidence satisfying their minds."

- The willfully false witness instruction was formerly codified at Code of Civil Procedure section 2061. This statute was repealed in 1965 to avoid giving undue emphasis to this rule compared to other common-law rules. Refusal to give an instruction on this point is not error: "It should certainly not be deemed of vital importance to tell the ordinary man of the world that he should distrust the statements of a witness whom he believes to be a liar." (*Wallace v. Pacific Electric Ry. Co.* (1930) 105 Cal.App. 664, 671 [288 P. 834].)

- The Standards for Judicial Administration, Standard 10.20(a)(2) provides: "In all courtroom proceedings, refrain from engaging in conduct and prohibit others from engaging in conduct that exhibits bias, including but not limited to bias based on disability, gender, race, religion, ethnicity, and sexual orientation, whether that bias is directed toward counsel, court personnel, witnesses, parties, jurors, or any other participants."

- The Code of Judicial Ethics, Canon 3(b)(5) provides: "A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, engage in speech, gestures, or other conduct that would reasonably be perceived as (1) bias or prejudice, including but not limited to bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, or (2) sexual harassment." Canon 3(b)(6) requires the judge to impose these standards on attorneys also.

Secondary Sources

14 California Forms of Pleading and Practice, Ch. 160, *Corporations* (Matthew Bender)

5 California Points and Authorities, Ch. 52, *Corporations* (Matthew Bender)

~~*(Revised April 2004)*~~

5010. Taking Notes During the Trial

If you have taken notes during the trial you may take your notebooks with you into the jury room.

You may use your notes only to help you remember what happened during the trial. Your independent recollection of the evidence should govern your verdict. You should not allow yourself to be influenced by the notes of other jurors if those notes differ from what you remember.

Instructional History

(*Revised February 2005*)

(*Revised April 2007*)

Directions for Use

If CACI No. 102, *Taking Notes During the Trial*, is given as an introductory instruction, the court may also give this instruction as a concluding instruction.

Sources and Authority

- California Rules of Court, Rule 2.1031 provides: "Jurors must be permitted to take written notes in all civil and criminal trials. At the beginning of a trial, a trial judge must inform jurors that they may take written notes during the trial. The court must provide materials suitable for this purpose."

- "Because of [the risks of note-taking], a number of courts have held that a cautionary instruction is required. For example, [one court] held that the instruction should include 'an explanation ... that [jurors] should not permit their note-taking to distract them from the ongoing proceedings; that their notes are only an aid to their memory and should not take precedence over their independent recollection; that those jurors who do not take notes should rely on their independent recollection of the evidence and not be influenced by the fact that another juror has taken notes; and that the notes are for the note taker's own personal use in refreshing his recollection of the evidence. The jury must be reminded that should any discrepancy exist between their recollection of the evidence and their notes, they should request that the record of the proceedings be read back and that it is the transcript that must prevail over their notes.'" (*People v. Whitt* (1984) 36 Cal.3d 724, 747 [205 Cal.Rptr. 810, 685 P.2d 1161], internal citations and footnote omitted.)

- "In *People v. Whitt*, we recognized the risks inherent in juror note-taking and observed that it is 'the better practice' for courts to give, sua sponte, a cautionary instruction on note-taking. Although the ideal instruction would advert specifically to all the dangers of note-taking, we found the less complete instruction given in *Whitt* to be adequate: 'Be careful as to the amount of notes that you take. I'd rather that you observe the witness, observe the demeanor of that witness, listen to how that person testifies rather than taking copious notes. ... [I]f you do not recall exactly as to what a witness might have said or you disagree, for instance, during the deliberation [*sic*] as to what a witness may

have said, we can reread that transcript back ... .'" (*People v. Silbertson* (1985) 41 Cal.3d 296, 303 [221 Cal.Rptr. 152, 709 P.2d 1321], internal citations and footnote omitted.)

~~*(Revised February 2005)*~~

5013. Deadlocked Jury Admonition

You should reach a verdict if you reasonably can. You have spent time trying to reach a verdict and this case is important to the parties.

Please carefully consider the opinions of all the jurors, including those with whom you disagree. Keep an open mind and feel free to change your opinion if you become convinced that it is wrong.

You should not, however, surrender your beliefs concerning the truth and the weight of the evidence. Each of you must decide the case for yourself and not merely go along with the conclusions of your fellow jurors.

Instructional History

(*Revised April 2004*)

Sources and Authority

- California Rules of Court, Rule 2.1036 provides:

  (a) Determination

  After a jury reports that it has reached an impasse in its deliberations, the trial judge may, in the presence of counsel, advise the jury of its duty to decide the case based on the evidence while keeping an open mind and talking about the evidence with each other. The judge should ask the jury if it has specific concerns which, if resolved, might assist the jury in reaching a verdict.

  (b) Possible further action

  If the trial judge determines that further action might assist the jury in reaching a verdict, the judge may:

  (1) Give additional instructions;
  (2) Clarify previous instructions;
  (3) Permit attorneys to make additional closing arguments; or
  (4) Employ any combination of these measures.

- "The court told the jury they should reach a verdict if they reasonably could; they should not surrender their conscious convictions of the truth and the weight of the evidence; each juror must decide the case for himself and not merely acquiesce in the conclusion of his fellows; the verdict should represent the opinion of each individual juror; and in reaching a verdict each juror should not violate his individual judgment and conscience. These remarks clearly outweighed any offensive portions of the charge. The court did not err in giving the challenged instruction." (*Inouye v. Pacific Southwest Airlines* (1981) 126 Cal.App.3d 648, 652 [179 Cal.Rptr. 13].)

- "A trial court may properly advise a jury of the importance of arriving at a verdict and of the duty of individual jurors to hear and consider each other's arguments with open minds, rather than to prevent agreement by obstinate adherence to first impressions. But, as the exclusive right to agree or not to agree rests with the jury, the judge may not tell them that they must agree nor may he harry their deliberations by coercive threats or disparaging remarks." (*Cook v. Los Angeles Ry. Corp.* (1939) 13 Cal.2d 591, 594 [91 P.2d 118], internal citations omitted.)

- "Only when the instruction has coerced the jurors into surrendering their conscientious convictions in order to reach agreement should the verdict be overturned." (*Inouye v. Pacific Southwest Airlines, supra,* 126 Cal.App.3d at p. 651.)

- "The instruction says if the jury did not reach a verdict, the case would have to be retried. It also says the jurors should listen with deference to the arguments and distrust their own judgment if they find a large majority taking a different view of the case. In a criminal case the mere presence of these remarks in a jury instruction is error. However, civil cases are subject to different considerations; the special protections given criminal defendants are absent." (*Inouye v. Pacific Southwest Airlines, supra,* 126 Cal.App.3d at p. 651, internal citation omitted.)

~~*(Revised April 2004)*~~

5016. Judge's Commenting on Evidence

In this case, I have exercised my right to comment on the evidence. However, you the jury are the exclusive judges of all questions of fact and of the credibility of the witnesses. You are free to completely ignore my comments on the evidence and to reach whatever verdict you believe to be correct, even if it is contrary to any or all of those comments.

Instructional History

(*New April 2007*)

Directions for Use

Read this instruction before deliberations if the judge has exercised the right under Article VI, section 10 of the California Constitution to comment on the evidence. This instruction should also be given if after deliberations have begun, the jury asks for additional guidance and the judge then comments on the evidence. (See *People v. Rodriguez* (1986) 42 Cal.3d 730 [230 Cal.Rptr. 667, 726 P.2d 113].)

Sources and Authority

- Article VI, section 10, of the California Constitution permits the court to "make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the cause."

- "[T]he decisions admonish that judicial comment on the evidence must be accurate, temperate, nonargumentative, and scrupulously fair. The trial court may not, in the guise of privileged comment, withdraw material evidence from the jury's consideration, distort the record, expressly or impliedly direct a verdict, or otherwise usurp the jury's ultimate factfinding power." (*People v. Rodriguez, supra,* 42 Cal.3d at p. 766, internal citations omitted.)

- "[A] trial court has "broad latitude in fair commentary, so long as it does not effectively control the verdict. For example, it is settled that the court need not confine itself to neutral, bland, and colorless summaries, but *may focus critically on particular evidence,* expressing views about its persuasiveness. … [A] judge may restrict his comments to portions of the evidence or to the *credibility of a single witness* and need not sum up all the testimony, both favorable and unfavorable." (*People v. Proctor* (1992) 4 Cal.4th 499, 542 [15 Cal.Rptr.2d 340, 842 P.2d 1100], emphasis the court's.)

- "[A] judge's power to comment on the evidence is not unlimited. He cannot withdraw material evidence from the jury or distort the testimony, and he must inform the jurors that they are the exclusive judges of all questions of fact and of the credibility of the witnesses. In civil cases, the court's powers of comment are less limited than in criminal cases, but they still must be kept within certain bounds. The court may express an opinion on negligence, but the court's remarks must be appropriate and fair." (*Lewis v. Bill Robertson & Sons Inc.* (1984) 162 Cal.App.3d 650, 654 [208 Cal.Rptr. 699], internal citation omitted.)

Secondary Sources

7 Witkin, California Procedure (4th ed. 1997) Trial, § 265