CACI07-03

Invitation to Comment

Title	Civil Jury Instructions (CACI) Revisions
Summary	New, revised, and revoked instructions reflecting recent developments in the law.
Source	Advisory Committee on Civil Jury Instructions Hon. H. Walter Croskey, Chair
Staff	Bruce Greenlee, Attorney, 415-865-7698 bruce.greenlee @jud.ca.gov
	Attachment

CACI 07-03
Civil Jury Instruction (CACI) Comment Form
We Recommend Submitting Comments by the Internet to:

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

_____

Agree ☐ Agree as Modified ☐ Disagree ☐

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Name:_____ **Title:**_____

On Behalf of (organization):_____

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Fax: (415) 865-7664

DEADLINE FOR COMMENT: 5:00 P.M. Friday, September 7, 2007.

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

PRETRIAL SERIES

100. Preliminary Admonitions (*revised*) …… 1-3

102 Taking Notes During the Trial (*revised*)…… 4-5

CONTRACTS SERIES

300. Breach of Contract—Introduction (*revised)*…… 6-7

338. Affirmative Defense—Breach of Contract—Statute of Limitations (*new*)… 8-9

NEGLIGENCE SERIES

406. Apportionment of Responsibility (*revised*)…… 10-12

430. Causation: Substantial Factor (*revised*) 13-15

435. Causation for Asbestos-Related Cancer Claims (*revised*) …… 16-17

450. Good Samaritan (*revised*)…… 18-19

455. Statute of Limitations—Delayed Discovery (*revised*)……. 20-23

VF-410 Statute of Limitations—Delayed Discovery—Reasonable Investigation Would Not Have Disclosed Pertinent Facts (*new*)……. 24-25

PROFESSIONAL NEGLIGENCE SERIES

600. Standard of Care (*revised*)…….…….... 26-28

602. Success Not Required (*revised*)…….. 29-30

RIGHT OF PRIVACY SERIES

1806. Constitutional Right of Privacy (*revoked*)……..……..…….. 31-32

VF-1805. Privacy—Constitutional Right of Privacy (*revoked*)……..……..….. 33-34

VF-1806. Privacy—Constitutional Right of Privacy—Affirmative Defense (*revoked*) 35-37

TRESPASS SERIES

2020. Public Nuisance—Essential Factual Elements (*revised*) …… 38-41

VF-2005. Public Nuisance (*revised*) ….……..……..…….. 42-44

VF-2006. Private Nuisance (*revised*) ……..…….. 45-47

INSURANCE LITIGATION SERIES

2330. Implied Obligation of Good Faith and Fair Dealing Explained (*revised*) ..…….. 48-50

2331. Breach of the Implied Obligation of Good Faith and Fair Dealing—Failure or Delay in Payment (First Party)—Essential Factual Elements (*revised*) ……..…….….. 51-54

2332. Bad Faith (First Party)—Failure to Properly Investigate Claim—Essential Factual Elements (*revised*) ……..... 55-57

2334. Bad Faith (Third Party)— Refusal to Accept Reasonable Settlement Within Liability Policy Limits—Essential Factual Elements (*revised*) ..…..…..... 58-61

2336. Bad Faith (Third Party)—Unreasonable Failure to Defend—Essential Factual Elements (*revised*) ……... 62-64

VF-2301. Breach of the Implied Obligation of Good Faith and Fair Dealing—Failure or Delay in Payment (*revised*) ……..…..……. 65-67

VF-2302. Bad Faith (First Party)—Failure to Properly Investigate Claim (*revised*) …… 68-70

FAIR EMPLOYMENT AND HOUSING ACT SERIES

2507 "Motivating Reason" Explained (*new*) ……..……..……..….... 71-72

2521A. Hostile Work Environment Harassment—Conduct Directed at Plaintiff — Essential Factual Elements—Employer or Entity Defendant (Gov. Code, § 12940(j)) (*derived from former CACI No. 2521*)…….……..….... 73-77

2521B. Hostile Work Environment Harassment—Conduct Directed at Others — Essential Factual Elements—Employer or Entity Defendant (Gov. Code, § 12940(j)) (*derived from former CACI No. 2521*)…….……..….... 78-82

2521C. Hostile Work Environment Harassment—Widespread Sexual Favoritism — Essential Factual Elements—Employer or Entity Defendant (Gov. Code, § 12940(j)) (*derived from former CACI No. 2521*)…….……..….... 83-86

2522A. Hostile Work Environment Harassment—Conduct Directed at Plaintiff — Essential Factual Elements—Individual Defendant (Gov. Code, § 12940(j)) (*derived from former CACI No. 2522)*…….……..….... 87-90

2522B. Hostile Work Environment Harassment—Conduct Directed at Others — Essential Factual Elements—Individual Defendant (Gov. Code, § 12940(j)) (*derived from former CACI No. 2522*)…….……..….... 91-94

2522C. Hostile Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Individual Defendant (Gov. Code, § 12940(j)) (*derived from former CACI No. 2522*)……..…….. 95-98

2523. "Harassing Conduct" Explained (*revised*) …..……..……..….. 99-100

2524. "Severe or Pervasive" Explained (*revised*) ...……..….. 101-103

2546. Disability Discrimination—Reasonable Accommodation—Failure to Engage in Interactive Process (Gov. Code § 12940(n)) (*new*)…… 104-106

VF-2506A. Hostile Work Environment Harassment—Conduct Directed at Plaintiff ——Employer or Entity Defendant (Gov. Code, § 12940(j)) (*derived from former CACI No.VF-2506*)……..……..…... 107-109

VF-2506B. Hostile Work Environment Harassment—Conduct Directed at Others ——Employer or Entity Defendant (Gov. Code, § 12940(j)) (*derived from former CACI No.VF-2506*)……..……..…... 110-112

VF-2506C. Hostile Work Environment Harassment—Widespread Sexual Favoritism——Employer or Entity Defendant (Gov. Code, § 12940(j)) (*derived from former CACI No.VF-2506*)……..……..…... 113-115

VF-2507A. Hostile Work Environment Harassment—Conduct Directed at Plaintiff ——Individual (Gov. Code, § 12940(j)) (*derived from former CACI No.VF-2507*) ……. 116-118

VF-2507B. Hostile Work Environment Harassment—Conduct Directed at Others ——Individual Defendant (Gov. Code, § 12940(j)) (*derived from former CACI No.VF-2507)*……..……..…... 119-121

VF-2507C. Hostile Work Environment Harassment—Widespread Sexual Favoritism——Individual Defendant (Gov. Code, § 12940(j)) (*derived from former CACI No.VF-2507*)……..……..…... 122-124

VF-2508. Disability Discrimination—Disparate Treatment (*revised*)……..……..…... 125-127

SONG-BEVERLY CONSUMER WARRANTY ACT SERIES

3200. Failure to Purchase or Replace Consumer Good After Reasonable Number of Repair Opportunities—Essential Factual Elements (Civ. Code, § 1793.2(d)) (*revised*) ……..…….. 128-132

3201. Failure to Promptly Purchase or Replace New Motor Vehicle After Reasonable Number of Repair Opportunities —Essential Factual Elements (Civ. Code, § 1793.2(d)) (*revised*) ……..….. 133-138

EMINENT DOMAIN SERIES
VF-3500. Fair Market Value Plus Goodwill (*revised*) …….. 139-140

VF-3502. Fair Market Value Plus Loss of Inventory/Personal Property (revised)…… 141-142

EQUITABLE INDEMNITY SERIES
3801. Implied Contractual Indemnity (*revised*)……..…….. 143-145

DAMAGES SERIES
3929 Subsequent Medical Treatment or Aid (*revised*) ..……..…….. 146-147

BREACH OF FIDUCIARY DUTY SERIES
4106. Breach of Fiduciary Duty by Attorney—Essential Factual Elements (*renumbered from CACI No. 605*) …….…….……. 148-149

4120. Affirmative Defense--Statute of Limitations (*renumbered from CACI No. 4106*)…….. 150-151

UNLAWFUL DETAINER SERIES
VF-4300. Termination Due to Failure to Pay Rent (*new*) ….……..…….. 152-153

VF-4301. Termination Due to Failure to Pay Rent—Affirmative Defense—Breach of Implied Warranty of Habitability (*new*) ….……..…….. 154-155

VF-4302. Termination Due to Violation of Terms of Lease/Agreement (*new*) ….…… 156-157

TRADE SECRETS SERIES (*new*)
4400 Misappropriation of Trade Secrets—Introduction (*new*)……..…….. 158-159

4401 Misappropriation of Trade Secrets--Essential Factual Elements (*new*)…..…….. 160-161

4402 "Trade Secrets" Defined (*new*)……..…….. 162-163

4403 Secrecy Requirement (*new*)……..…….. 164-165

4404 Reasonable Efforts to Protect Secrecy (*new*)…….……..…….. 166-167

4405 Misappropriation by Acquisition (*new*)……..…….. 168-169

4406 Misappropriation by Disclosure (*new*)……..…….. 170-172

4407 Misappropriation by Use (*new*)…….…….. 173-175

4408 Improper and Proper Means of Acquiring Trade Secret (*new*)…….…….. 176-177

4409 Remedies for Misappropriation of Trade Secret (*new*)……..…….. 178-179

4410 Unjust Enrichment (*new*)……..…..…….. 180-181

4411 Punitive Damages for Willful and Malicious Misappropriation (*new*)…… 182-183

4420 Affirmative Defense--Information Was Readily Ascertainable by Proper Means (*new*) …… 184-185

CONCLUDING SERIES

5010. Taking Notes During the Trial (*revised*) ……..……. 186-187

100. Preliminary Admonitions

You have now been sworn as jurors in this case. I want to impress on you the seriousness and importance of serving on a jury. Trial by jury is a fundamental right in California. The parties have a right to a jury that is selected fairly, that comes to the case without bias, and that will attempt to reach a verdict based on the evidence presented. Before we begin, I need to explain how you must conduct yourselves during the trial.

Do not allow anything that happens outside this courtroom to affect your decision. During the trial do not talk about this case or the people involved in it with anyone, including family and persons living in your household, friends and coworkers, spiritual leaders, advisors, or therapists. Do not post any information about the trial or your jury service on the internet in any form. Do not send or accept any messages, including e-mail or text messages, to or from anyone concerning the trial or your service. You may say you are on a jury and how long the trial may take, but that is all. You must not even talk about the case with the other jurors until after I tell you that it is time for you to decide the case.

During the trial you must not listen to anyone else talk about the case or the people involved in the case. You must avoid any contact with the parties, the lawyers, the witnesses, and anyone else who may have a connection to the case. If anyone tries to talk to you about this case, tell that person that you cannot discuss it because you are a juror. If he or she keeps talking to you, simply walk away and report the incident to the court [attendant/bailiff] as soon as you can.

After the trial is over and I have released you from jury duty, you may discuss the case with anyone, but you are not required to do so.

During the trial, do not read, listen to, or watch any news reports about this case. [I have no information that there will be news reports concerning this case.] You must decide this case based only on the evidence presented in this trial and the instructions of law that I will provide. Nothing that you see, hear, or learn outside this courtroom is evidence unless I specifically tell you it is. If you receive any information about this case from any source outside of the courtroom, promptly report it to the court [attendant/bailiff].

Do not do any research on your own or as a group. Do not use dictionaries, the ~~Internet~~internet, or other reference materials. Do not investigate the case or conduct any experiments. Do not contact anyone to assist you, such as a family accountant, doctor, or lawyer. Do not visit or view the scene of any event involved in this case. If you happen to pass by the scene, do not stop or investigate. All jurors must see or hear the same evidence at the same time. If you do need to view the scene during the trial, you will be taken there as a group under proper supervision.

It is important that you keep an open mind throughout this trial. Evidence can only be presented a piece at a time. Do not form or express an opinion about this case while the trial is going on. You must not decide on a verdict until after you have heard all the evidence and have discussed it thoroughly with your fellow jurors in your deliberations.

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Do not concern yourselves with the reasons for the rulings I will make during the course of the trial. Do not guess what I may think your verdict should be from anything I might say or do.

When you begin your deliberations, you may discuss the case only in the jury room and only when all the jurors are present.

You must decide what the facts are in this case. And, I repeat, your verdict must be based only on the evidence that you hear or see in this courtroom. Do not let bias, sympathy, prejudice, or public opinion influence your verdict.

At the end of the trial, I will explain the law that you must follow to reach your verdict. You must follow the law as I explain it to you, even if you do not agree with the law.

New September 2003; Revised April 2004, October 2004, February 2005, June 2005, [month] 2007

Directions for Use

This instruction should be given at the outset of every case.

If the jury is allowed to separate, Code of Civil Procedure section 611 requires the judge to admonish the jury that "it is their duty not to converse with, or suffer themselves to be addressed by any other person, on any subject of the trial, and that it is their duty not to form or express an opinion thereon until the case is finally submitted to them."

Sources and Authority

- Article I, section 16 of the California Constitution provides that "trial by jury is an inviolate right and shall be secured to all."

- Code of Civil Procedure section 608 provides, in part: "In charging the jury the court may state to them all matters of law which it thinks necessary for their information in giving their verdict; and, if it state the testimony of the case, it must inform the jury that they are the exclusive judges of all questions of fact." (See also Evid. Code, § 312; Code Civ. Proc., § 592.)

- Under Code of Civil Procedure section 611, jurors may not "form or express an opinion" prior to deliberations. (See also *City of Pleasant Hill v. First Baptist Church of Pleasant Hill* (1969) 1 Cal.App.3d 384, 429 [82 Cal.Rptr. 1]. It is misconduct for a juror to prejudge the case. (*Deward v. Clough* (1966) 245 Cal.App.2d 439, 443-444 [54 Cal.Rptr. 68].)

- Jurors must not undertake independent investigations of the facts in a case. (*Kritzer v. Citron* (1950) 101 Cal.App.2d 33, 36 [224 P.2d 808]; *Walter v. Ayvazian* (1933) 134 Cal.App. 360, 365 [25 P.2d 526].)

- Jurors are required to avoid discussions with parties, counsel, or witnesses. (*Wright v. Eastlick* (1899) 125 Cal. 517, 520-521 [58 P. 87]; *Garden Grove School Dist. v. Hendler* (1965) 63 Cal.2d 141, 144

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[45 Cal.Rptr. 313, 403 P.2d 721].)

- It is misconduct for jurors to engage in experiments that produce new evidence. (*Smoketree-Lake Murray, Ltd. v. Mills Concrete Construction Co.* (1991) 234 Cal.App.3d 1724, 1746 [286 Cal.Rptr. 435].)

- Unauthorized visits to the scene of matters involved in the case are improper. (*Anderson v. Pacific Gas & Electric Co.* (1963) 218 Cal.App.2d 276, 280 [32 Cal.Rptr. 328].)

- It is improper for jurors to receive information from the news media about the case. (*Province v. Center for Women's Health & Family Birth* (1993) 20 Cal.App.4th 1673, 1679 [25 Cal.Rptr.2d 667], disapproved on other grounds in *Heller v. Norcal Mutual Ins. Co.* (1994) 8 Cal.4th 30, 41 [32 Cal.Rptr.2d 200, 876 P.2d 999]; *Hilliard v. A. H. Robins Co.* (1983) 148 Cal.App.3d 374, 408 [196 Cal.Rptr. 117].)

- Jurors must avoid bias: " 'The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to trial by jury guaranteed by the Constitution.' " (*Weathers v. Kaiser Foundation Hospitals* (1971) 5 Cal.3d 98, 110 [95 Cal.Rptr. 516, 485 P.2d 1132], internal citations omitted.) Evidence of racial prejudice and bias on the part of jurors amounts to misconduct and may constitute grounds for ordering a new trial. (*Ibid*.)

- An instruction to disregard any appearance of bias on the part of the judge is proper and may cure any error in a judge's comments. (*Gist v. French* (1955) 136 Cal.App.2d 247, 257–259 [288 P.2d 1003], disapproved on other grounds in *Deshotel v. Atchinson, Topeka & Santa Fe Ry. Co.* (1958) 50 Cal.2d 664, 667 [328 P.2d 449] and *West v. City of San Diego* (1960) 54 Cal.2d 469, 478 [6 Cal.Rptr. 289, 353 P.2d 929].) "It is well understood by most trial judges that it is of the utmost importance that the trial judge not communicate in any manner to the jury the judge's opinions on the case submitted to the jury, because juries tend to attach inflated importance to any such communication, even when the judge has no intention whatever of influencing a jury's determination." (*Dorshkind v. Harry N. Koff Agency, Inc.* (1976) 64 Cal.App.3d 302, 307 [134 Cal.Rptr. 344].)

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102. Taking Notes During the Trial

You have been given notebooks and may take notes during the trial. Do not ~~remove~~ take the notebooks ~~from~~ out of the ~~jury box~~courtroom or jury room 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.]

At the end of the trial, your notes will be [collected and destroyed/collected and retained by the court but not as a part of the case record/returned to you/[*specify other disposition*]].

New September 2003; Revised April 2007, [month] 2007

Directions for Use

This instruction may be given as an introductory instruction or as a concluding instruction after trial. (See CACI No. 5010, *Taking Notes During the Trial*).

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

In the last paragraph, specify the court's disposition of the notes after trial. No statute or rule of court requires any particular disposition.

Sources and Authority

- Rule 2.1031 of the California Rules of Court 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

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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.)

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300. ~~Essential Factual Elements~~Breach of Contract--Introduction

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

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

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

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

New September 2003

Directions for Use

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

Sources and Authority

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

- "The differences between contract and tort give rise to distinctions in assessing damages and in evaluating underlying motives for particular courses of conduct. Contract damages seek to approximate the agreed-upon performance ... and are generally limited to those within the contemplation of the parties when the contract was entered into or at least reasonably foreseeable by them at that time; consequential damages beyond the expectations of the parties are not recoverable." (*Applied Equipment Corp., supra,* 7 Cal.4th at p. 515, internal citations omitted.)

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

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

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

Secondary Sources

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

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

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

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

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338. Affirmative Defense—Statute of Limitations—Breach of Contract

[*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 two or four years before date of filing***].**

New [Month] 2007

Directions for Use

This instruction is for use if the defendant claims that the plaintiff's action was not filed within the applicable four-year period for breach of a written contract (see Code Civ. Proc., § 337(1).) or two-year period for breach of an oral contract. (See Code Civ. Proc., § 339(1).) Do not use this instruction for breach of a Uniform Commercial Code sales contract. (See Comm. Code, § 2725.)

If the contract either shortens or extends the limitation period, use the applicable period from the contract instead of two years or four years.

If the plaintiff alleges that the delayed-discovery rule applies to avoid the limitation defense, CACI No. 455, *Statute of Limitations—Delayed Discovery,* may be adapted for use.

Sources and Authority

- Code of Civil Procedure section 337(1) provides:
  Within four years: 1. An action upon any contract, obligation or liability founded upon an instrument in writing, except as provided in Section 336a of this code; provided, that the time within which any action for a money judgment for the balance due upon an obligation for the payment of which a deed of trust or mortgage with power of sale upon real property or any interest therein was given as security, following the exercise of the power of sale in such deed of trust or mortgage, may be brought shall not extend beyond three months after the time of sale under such deed of trust or mortgage.

- Code of Civil Procedure section 339(1) provides:
  Within two years: 1. An action upon a contract, obligation or liability not founded upon an instrument of writing, except as provided in Section 2725 of the Commercial Code or subdivision 2 of Section 337 of this code; or an action founded upon a contract, obligation or liability, evidenced by a certificate, or abstract or guaranty of title of real property, or by a policy of title insurance; provided, that the cause of action upon a contract, obligation or liability evidenced by a certificate, or abstract or guaranty of title of real property or policy of title insurance shall not be deemed to have accrued until the discovery of the loss or damage suffered by the aggrieved party thereunder.

- "In general, California courts have permitted contracting parties to modify the length of the otherwise applicable California statute of limitations, whether the contract has extended or shortened the limitations period." (*Hambrecht & Quist Venture Partners v. Am. Medical Internat.*

(1995) 38 Cal.App.4th 1532, 1547 [46 Cal.Rptr.2d 33].)

- "A contract cause of action does not accrue until the contract has been breached." (*Spear v. California State Automobile Assn.* (1992) 2 Cal. 4th 1035, 1042 [9 Cal.Rptr.2d 381, 831 P.2d 821].)

- "The claim accrues when the plaintiff discovers, or could have discovered through reasonable diligence, the injury and its cause." (*Angeles Chem. Co. v. Spencer & Jones* (1996) 44 Cal.App.4th 112, 119 [51 Cal.Rptr.2d 594].)

- "[T]he discovery rule may be applied to breaches [of contract] which can be, and are, committed in secret and, moreover, where the harm flowing from those breaches will not be reasonably discoverable by plaintiffs until a future time." (*Gryczman v. 4550 Pico Partners, Ltd.* (2003) 107 Cal.App.4th 1, 4-5 [131 CalRptr.2d 680],)

Secondary Sources

3 Witkin, California Procedure (4th ed. 1996) Actions, §§ 474–509

Matthew Bender Practice Guide: California Contract Litigation, Ch. 4, *Determining Applicable Statute of Limitations and Effect on Potential Action*

406. Apportionment of Responsibility

[Name of defendant] claims that the [negligence/fault] of [*insert name(s) or description(s) of nonparties***] was a substantial factor in causing [***name of plaintiff***]'s harm. To succeed on this claim, [***name of defendant***] must prove both of the following:**

1. That [*insert name(s) or description(s) of nonparties***] [was/were] [negligent/at fault]; and**

2. That the [negligence/fault] of [*insert name(s) or description(s) of nonparties***] was a substantial factor in causing [name of plaintiff]'s harm.**

~~**More than one person's [negligence/fault], [including [***name of plaintiff***]'s], may have been a substantial factor in causing [***name of plaintiff***]'s harm.**~~ **If you find that the [negligence/fault] of [***insert name(s) or description(s) of nonparties***] was a substantial factor in causing [***name of plaintiff***]'s harm~~so~~, you must decide how much responsibility each person has by assigning percentages of responsibility to any person listed on the verdict form[, including [***name of plaintiff***]]** ~~**whose negligence or other fault was a substantial factor in causing [***name of plaintiff***]'s harm**~~**. The percentages** ~~**of responsibility**~~ **must total 100 percent.**

You will make a separate finding of [*name of plaintiff***]'s total damages, if any. In determining an amount of damages,** ~~**When you make this finding**~~ **you should not consider any person's assigned percentage of responsibility.**

["Person" can mean an individual or a business entity.]

New September 2003; Revised June 2006, [month] 2007

Directions for Use

In the first paragraph, select ~~Use~~ "fault" if there is a need to allocate ~~harm~~ responsibility between ~~defendants~~ tortfeasors who are ~~sued for~~charged with conduct other than negligence, e.g., strict products liability.

Do not give the bracketed phrase "[, including [*name of plaintiff*]]" if plaintiff's contributory negligence is not at issue.

Include the last paragraph if any of the defendants or others alleged to have contributed to the plaintiff's harm are not individuals.

See CACI No. VF-402, *Negligence—Fault of Plaintiff and Others at Issue,* for an example of how to draft a verdict form for a case involving multiple parties, including nonparty tortfeasors, and their comparative fault.

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Sources and Authority

- The Supreme Court has held that the doctrine of joint and several liability survived the adoption of comparative negligence: "[W]e hold that after *Li*, a concurrent tortfeasor whose negligence is a proximate cause of an indivisible injury remains liable for the total amount of damages, diminished only 'in proportion to the amount of negligence attributable to the person recovering.' " (*American Motorcycle Assn. v. Superior Court* (1978) 20 Cal.3d 578, 590 [146 Cal.Rptr. 182, 578 P.2d 899], citing *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, 829 [119 Cal.Rptr. 858, 532 P.2d 1226].)

- The Supreme Court in *American Motorcycle Assn.* also modified the equitable indemnity rule "to permit a concurrent tortfeasor to obtain partial indemnity from other concurrent tortfeasors on a comparative fault basis." (*American Motorcycle Assn., supra,* 20 Cal.3d at p. 591.)

- Proposition 51 modified the doctrine of joint and several liability to limit each defendant's liability for noneconomic damages to the proportion of each defendant's percentage of fault.

- Restatement Third of Torts: Apportionment Liability ~~(Proposed Final Draft [Revised] Mar 22, 1999)~~, section 7, comment (g), provides, in part: "Percentages of responsibility are assigned by special verdict to any plaintiff, defendant, settlor, immune person, or other relevant person … whose negligence or other legally culpable conduct was a legal cause of the plaintiff's injury. The percentages of responsibility must total 100 percent. The factfinder makes a separate finding of the plaintiff's total damages. Those damages are reduced by the percentage of responsibility the factfinder assigns to the plaintiff. The resulting amount constitutes the plaintiff's 'recoverable damages.' "

- Restatement Third of Torts: Apportionment Liability, section 26, comment (h), provides, in part: "A more attractive solution is to place the burden of proof on the party seeking to avoid responsibility for the entire injury, along with relaxing the burden of production. This allows the factfinder to divide damages based on the available evidence. Ultimately, however, the sufficiency of the evidence is determined by applicable procedural rules.

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 50, 52–56, 59, 60, 63, 64, 68

California Tort Guide (Cont.Ed.Bar) §§ 1.52–1.59

1 Levy et al., California Torts, Ch. 4, *Comparative Negligence, Assumption of the Risk, and Related Defenses*, §§ 4.04–4.03, 4.07–4.08 (Matthew Bender)

5 Levy et al., California Torts, Ch. 74, *Resolving Multiparty Tort Litigation*, § 74.03 (Matthew Bender)

4 California Trial Guide, Unit 90, *Closing Argument*, § 90.91 (Matthew Bender)

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.14A, Ch. 9, Damages, § 9.01 (Matthew Bender)

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27 California Forms of Pleading and Practice, Ch. 300, *Indemnity and Contribution* (Matthew Bender)

11 California Points and Authorities, Ch. 115, *Indemnity and Contribution* (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence*, §§ 165.284, 165.380 (Matthew Bender)

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430. Causation: Substantial Factor

A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm.

[Conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct.]

New September 2003; Revised October 2004, June 2005, December 2005, [month] 2007

Directions for Use

As phrased, this definition of "substantial factor" subsumes the "but for" test of causation—e.g., plaintiff must prove that but for defendant's conduct, the same harm would not have occurred. (See *Viner v. Sweet* (2003) 30 Cal.4th 1232, 1239–1240 [135 Cal.Rptr.2d 629, 70 P.3d 1046].) The first sentence of the instruction accounts for the "but for" concept. Conduct does not "contribute" to harm if the same harm would have occurred without such conduct. "Conduct," in this context, refers to the culpable acts or omissions on which a claim of legal fault is based, e.g., negligence, product defect, breach of contract, or dangerous condition of public property. This is in contrast to an event that is not a culpable act but that happens to occur in the chain of causation, e.g., that the plaintiff's alarm clock failed to go off, causing her to be at the location of the accident at a time when she otherwise would not have been there. The "but for" test does not apply to concurrent independent causes, which are multiple forces operating at the same time and independently, each of which would have been sufficient by itself to bring about the same harm. (*Mitchell v. Gonzales* (1991) 54 Cal.3d 1041, 1049 [1 Cal.Rptr.2d 913, 819 P.2d 872].) Accordingly, do not use this instruction in a case involving concurrent independent causes.

The court should consider whether the bracketed language is appropriate under *Viner, supra*. The bracketed language may be used in addition to the substantial factor instruction except in cases of concurrent independent causes. (Rest.2d Torts, § 432(1); *Viner, supra,* 30 Cal.4th at p. 1240; *Barton v. Owen* (1977) 71 Cal.App.3d 484, 503–504 [139 Cal.Rptr. 494].) The reference to "conduct" may be changed as appropriate to the facts of the case. In cases of multiple (concurrent dependent) causes, CACI No. 431 would also be used.

In asbestos-related cancer cases, *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 977 [67 Cal.Rptr.2d 16, 941 P.2d 1203] requires a different~~n additional~~ instruction regarding exposure to a particular product. ~~See~~ Give CACI No. 435, *Causation for Asbestos-Related Cancer Claims,*~~.~~ and do not give this instruction.

The Restatement Third of Torts, section 29 (Tent. Draft No. 3, Apr. 7, 2003), on basic principles of liability for physical harm, proposes a "scope of liability" approach that de-emphasizes causation and focuses on (1) the nature of the harms that are within the scope of the risk created by the actor's conduct and (2) whether those harms resulted from the risk. This Restatement is not final, and it has not been subject to California judicial review.

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Sources and Authority

- "California has definitively adopted the substantial factor test of the Restatement Second of Torts for cause-in-fact determinations. Under that standard, a cause in fact is something that is a substantial factor in bringing about the injury. The substantial factor standard generally produces the same results as does the 'but for' rule of causation which states that a defendant's conduct is a cause of the injury if the injury would not have occurred "but for" that conduct. The substantial factor standard, however, has been embraced as a clearer rule of causation--one which subsumes the 'but for' test while reaching beyond it to satisfactorily address other situations, such as those involving independent or concurrent causes in fact." (*Rutherford, supra,* 16 Cal.4th at 968-969, internal citations omitted.)

- "The term 'substantial factor' has not been judicially defined with specificity, and indeed it has been observed that it is 'neither possible nor desirable to reduce it to any lower terms.' This court has suggested that a force which plays only an "infinitesimal" or "theoretical" part in bringing about injury, damage, or loss is not a substantial factor. Undue emphasis should not be placed on the term "substantial." For example, the substantial factor standard, formulated to aid plaintiffs as a broader rule of causality than the "but for" test, has been invoked by defendants whose conduct is clearly a "but for" cause of plaintiff's injury but is nevertheless urged as an insubstantial contribution to the injury. Misused in this way, the substantial factor test 'undermines the principles of comparative negligence, under which a party is responsible for his or her share of negligence and the harm caused thereby.'" (*Rutherford, supra,* 16 Cal.4th at 968-969, internal citations omitted.)

- "The substantial factor standard is a relatively broad one, requiring only that the contribution of the individual cause be more than negligible or theoretical. Thus, 'a force which plays only an 'infinitesimal' or 'theoretical' part in bringing about injury, damage, or loss is not a substantial factor', but a very minor force that does cause harm is a substantial factor. This rule honors the principle of comparative fault." (*Bockrath v. Aldrich Chemical Co.* (1999) 21 Cal.4th 71, 79 [86 Cal.Rptr.2d 846, 980 P.2d 398], internal citations omitted.)

- This instruction incorporates Restatement Second of Torts, section 431, comment a, which provides, in part: "The word 'substantial' is used to denote the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense, in which there always lurks the idea of responsibility, rather than in the so-called 'philosophic sense' which includes every one of the great number of events without which any happening would not have occurred."

- "The first element of legal cause is cause in fact .... The 'but for' rule has traditionally been applied to determine cause in fact. The Restatement formula uses the term *substantial factor* 'to denote the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause.'" (*Mayes v. Bryan* (2006) 139 Cal. App. 4th 1075, 1095 [44 Cal.Rptr.3d 14], internal citations omitted.)

- "However the test is phrased, causation in fact is ultimately a matter of probability and common sense." (*Osborn v. Irwin Memorial Blood Bank* (1992) 5 Cal.App.4th 234, 253 [7 Cal.Rptr.2d 101], relying on Rest.2d Torts, § 433B, com. b.)

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- Restatement Second of Torts, section 431, provides: "The actor's negligent conduct is a legal cause of harm to another if (a) his conduct is a substantial factor in bringing about the harm, and, (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm." This section "correctly states California law as to the issue of causation in tort cases." (*Wilson v. Blue Cross of Southern California* (1990) 222 Cal.App.3d 660, 673 [271 Cal.Rptr. 876].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1185–1189, 1191

California Tort Guide (Cont.Ed.Bar) §§ 1.13–1.15

1 Levy et al., California Torts, Ch. 2, *Causation,* § 2.02 (Matthew Bender)

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

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

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

16 California Points and Authorities, Ch. 165, *Negligence,* §§ 165.260–165.263 (Matthew Bender)

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435. Causation for Asbestos-Related Cancer Claims

A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It does not have to be the only cause of the harm.

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

New September 2003; Revised [month] 2007

Directions for Use

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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, i~~If necessary, CACI No. 431, *Causation: Multiple Causes*. ~~may also be given. Do not give CACI No. 430, *Causation—Substantial Factor*.~~

Sources and Authority

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

- "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.)

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- "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)

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450. Good Samaritan

[*Name of defendant***] claims that [he/she] is not responsible for [***name of plaintiff***]'s harm because [he/she] was voluntarily trying to protect [***name of plaintiff***] from harm. If you decide that [***name of defendant***] was negligent, [he/she] is not responsible unless [***name of plaintiff***] proves both of the following:**

1. [(a) That [*name of defendant***]'s failure to use reasonable care added to the risk of harm;]**

[or]

[(b) That [*name of defendant***]'s conduct caused [***name of plaintiff***] to reasonably rely on [his/her] protection;]**

AND

2. That the [additional risk/reliance] ~~resulted~~was a substantial factor in causing harm to [*name of plaintiff***].**

New September 2003; Revised [month] 2007

Directions for Use

This issue would most likely come up in an emergency situation, but not always. For this instruction to be appropriate, the harm must result from either 1(a) or (b) or both. Either or both 1(a) or (b) should be selected, depending on the facts.

Sources and Authority

- "[O]ne who, having no initial duty to do so, undertakes to come to the aid of another is under a duty to exercise due care in performance and is liable if (a) his failure to exercise such care increases the risk of harm, or (b) the harm is suffered because of the other's reliance upon the undertaking." (*Westbrooks v. State of California* (1985) 173 Cal.App.3d 1203, 1208 [219 Cal.Rptr. 674].)

- "As a rule, one has no duty to come to the aid of another. A person who has not created a peril is not liable in tort merely for failure to take affirmative action to assist or protect another unless there is some relationship between them which gives rise to a duty to act. Also pertinent to our discussion is the role of "the volunteer who, having no initial duty to do so, undertakes to come to the aid of another-the 'good Samaritan' ... who is under a duty to exercise due care in performance and is liable if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking." (Williams v. State of California (1983) 34 Cal.3d 18, 23 [192 Cal.Rptr. 233, 664 P.2d 137], internal citations omitted.)

- Restatement Second of Torts, section 323, provides: "One who undertakes, gratuitously or for

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consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if: his failure to exercise such care increases the risk of such harm, or the harm is suffered because of the other's reliance upon the undertaking."

- Cases involving police officers who render assistance in non-law enforcement situations involve "no more than the application of the duty of care attaching to any volunteered assistance." (*Williams, supra,* 34 Cal.3d at pp. 25-26.)

- "An employer generally owes no duty to his prospective employees to ascertain whether they are physically fit for the job they seek, but where he assumes such duty, he is liable if he performs it negligently. The obligation assumed by an employer is derived from the general principle expressed in section 323 of the Restatement Second of Torts, that one who voluntarily undertakes to perform an action must do so with due care." (*Coffee v. McDonnell-Douglas Corp*. (1972) 8 Cal.3d 551, 557 [105 Cal.Rptr. 358, 503 P.2d 1366], internal citations omitted.)

- Statutory exceptions to Good Samaritan liability include immunities under certain circumstances for medical licensees (Bus. & Prof. Code, §§ 2395-2398), nurses (Bus. & Prof. Code, §§ 2727.5, 2861.5), dentists (Bus. & Prof. Code, § 1627.5), rescue teams (Health & Saf. Code, § 1317(f)), paramedics (Health & Saf. Code, § 1799.104), and first-aid volunteers (Gov. Code, § 50086).

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1060–1065

1 Levy et al., California Torts, Ch. 1, *Negligence: Duty and Breach*, § 1.11 (Matthew Bender)

4 California Trial Guide, Unit 90, *Closing Argument*, § 90.90 (Matthew Bender)

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

16 California Points and Authorities, Ch. 165, *Negligence*, § 165.150 (Matthew Bender)

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455. Statute of Limitations—Delayed Discovery

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

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

[*or*]

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

New April 2007; Revised [month] 2007

Directions for Use

Read this instruction with the first option after CACI No. 454, *Affirmative Defense—Statute of Limitations*, if the plaintiff seeks to overcome the statute-of-limitations defense by asserting the "delayed-discovery rule" or "discovery rule." The discovery rule provides that the accrual date of a cause of action is delayed until the plaintiff is aware of his or her injury and its negligent cause. (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1109 [245 Cal.Rptr. 658, 751 P.2d 923].) The date to be inserted is the applicable limitation period before the filing date. For example, if the limitation period is two years and the filing date is August 31, 2007, the date is August 31, 2005.

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

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

Do not use this instruction for attorney malpractice. (See CACI No. 610, *Affirmative Defense—Statute of Limitations—Attorney Malpractice—One-Year Limit,* and CACI No. 611, *Affirmative Defense—Statute of Limitations—Attorney Malpractice—Four-Year Limit.*)

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

Sources and Authority

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

- "[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

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until a plaintiff discovers or has reason to discover the cause of action." (*Glue-Fold, Inc, supra,* 82 Cal.App.4th at p. 1029, internal citations omitted.)

- "[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., supra,* 21 Cal.4th at p. 399, internal citations and footnote omitted.)

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

- "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. Boeing North Am. Inc.* (1999) 74 Cal.App.4th 151, 160 [86 Cal.Rptr. 2d 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

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

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

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

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14 California Points and Authorities, Ch. 143, *Limitation of Actions*, §§ 143.47, 143.52–143.64 (Matthew Bender)

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VF-410. Statute of Limitations—Delayed Discovery—Reasonable Investigation Would Not Have Disclosed Pertinent Facts

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We answer the questions submitted to us as follows:

1. **Did [***name of plaintiff***]'s claimed harm occur before [***insert date from applicable statute of limitation***]?**
____ 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. **Before [***insert date from applicable statute of limitation***], did [***name of plaintiff***] 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?**
____ Yes ____ No

[*or*]

2. **Would a reasonable and diligent investigation have disclosed before [***insert date from applicable statute of limitations***] that [***specify factual basis for cause of action, e.g., "a medical device" or "inadequate medical treatment"***] contributed to [***name of plaintiff***]'s harm.?**
____ Yes ____ No

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].

New [Month] 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. 454, *Affirmative Defense—Statute of Limitations,* and CACI No. 455, *Statute of Limitations—Delayed Discovery*. If the only issue is whether the plaintiff's harm occurred

before or after the limitation date, omit question 2. If the plaintiff claims that the delayed-discovery rule applies to save the action, include the first option for question 2. If the plaintiff claims that a reasonable investigation would not have disclosed the pertinent information before the limitation date, include the second option for question 2.

The date to be inserted throughout is the applicable limitation period before the filing date. For example, if the limitation period is two years and the filing date is August 31, 2007, the date is August 31, 2005.

In question 1, "claimed harm" refers to all of the elements of the cause of action, which must have occurred before the cause of action accrues and the limitation period begins. (*Glue-Fold, Inc. v. Slautterback Corp.* (2000) 82 Cal.App.4th 1018, 1029 [98 Cal.Rptr.2d 661].) In some cases, it may be necessary to modify this term to refer to specific facts that give rise to the cause of action.

The first option for question 2 may be modified to refer to specific facts that the plaintiff may have known.

600. Standard of Care

[A/An] [*insert type of professional*] is negligent if [he/she] fails to use the skill and care that a reasonably careful [*insert type of professional*] would have used in similar circumstances. This level of skill, knowledge, and care is sometimes referred to as "the standard of care."

[You must determine the level of skill and care that ~~other~~ a reasonably careful [*insert type of professional~~s~~*] would use in similar circumstances based only on the testimony of the expert witnesses [including [*name of defendant*]] who have testified in this case.]

New September 2003; Revised October 2004, [month] 2007

Directions for Use

Use this instruction for all professional negligence cases other than professional medical negligence. See CACI No. 400, *Essential Factual Elements (Negligence)* for an instruction on the plaintiff's burden of proof. ~~In legal or other nonmedical professional malpractice cases, t~~The word "legal" or "professional" should be added before the word "negligence" in the first paragraph of CACI No. 400. (See *Sources and Authority* following CACI No. 500, *Essential Factual Elements (Medical Negligence)*.)

Read the second paragraph if the standard of care must be established by expert testimony.
~~The second paragraph should be used except in cases where the court determines that expert testimony is not necessary.~~

See CACI Nos. 219-221 on evaluating the credibility of expert witnesses.

If the defendant is a specialist in his or her field, this instruction should be modified to reflect that the defendant is held to the standard of care of a specialist. (*Wright v. Williams* (1975) 47 Cal.App.3d 802, 810 [121 Cal.Rptr. 194].) The standard of care for claims related to a specialist's expertise is determined by expert testimony. (*Id*. at pp. 810-811.)

Whether an attorney-client relationship exists is a question of law. (*Responsible Citizens v. Superior Court* (1993) 16 Cal.App.4th 1717, 1733 [20 Cal.Rptr.2d 756].) If the evidence bearing upon this decision is in conflict, preliminary factual determinations are necessary. (*Ibid*.) Special instructions may need to be crafted for that purpose.

Sources and Authority

- The elements of a cause of action in tort for professional negligence are: "(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." (*Budd v. Nixen* (1971) 6 Cal.3d 195, 200 [98 Cal.Rptr. 849, 491 P.2d 433]; *Carlton v. Quint* (2000) 77 Cal.App.4th 690, 699 [91 Cal.Rptr.2d 844].)

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- "It is well settled that an attorney is liable for malpractice when his negligent investigation, advice, or conduct of the client's affairs results in loss of the client's meritorious claim." (*Gutierrez v. Mofid* (1985) 39 Cal.3d 892, 900 [218 Cal.Rptr. 313, 705 P.2d 886].)

- Attorneys fall below the standard of care for attorney malpractice if "their advice and actions were so legally deficient when given that it demonstrates a failure to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in performing the tasks they undertake." (*Unigard Insurance Group v. O'Flaherty & Belgum* (1995) 38 Cal.App.4th 1229, 1237 [45 Cal.Rptr.2d 565]; see also *Lucas v. Hamm* (1961) 56 Cal.2d 583, 591-592 [15 Cal.Rptr. 821, 364 P.2d 685], cert. denied, 368 U.S. 987.)

- Rules of Professional Conduct, Rule 3-110 (Failing to Act Competently) provides:

  (A) A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.

  (B) For purposes of this rule, "competence" in any legal service shall mean to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service.

  (C) If a member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by 1) associating with or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before performance is required.

- Lawyers who hold themselves out as specialists "must exercise the skill, prudence, and diligence exercised by other specialists of ordinary skill and capacity specializing in the same field." (*Wright, supra,* 47 Cal.App.3d at p. 810.) The standard of care for claims related to a specialist's expertise is determined by expert testimony. (*Id*. at pp. 810-811.)

- If the failure to exercise due care is so clear that a trier of fact may find professional negligence without expert assistance, then expert testimony is not required: "'In other words, if the attorney's negligence is readily apparent from the facts of the case, then the testimony of an expert may not be necessary.'" (*Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1093 [41 Cal.Rptr.2d 768], internal citations omitted.)

Secondary Sources

1 Witkin, California Procedure (4th ed. 1996) Attorneys, §§ 315-318, pp. 385-387

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 990, 991, 994–997

1 Levy et al., California Torts, Ch. 1, *Negligence: Duty and Breach*, § 1.31 (Matthew Bender)

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3 Levy et al., California Torts, Ch. 30, *General Principles of Liability of Professionals,* §§ 30.12, 30.13, Ch. 32, *Liability of Attorneys*, § 32.13 (Matthew Bender)

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

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

2A California Points and Authorities, Ch. 24A, *Attorneys at Law: Malpractice* (Matthew Bender)

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602. Success Not Required

[A/An] [*insert type of professional*]~~An attorney~~ is not necessarily negligent just because [his/her] efforts are unsuccessful or [he/she] makes an error that was reasonable under the circumstances. [A/An] [*insert type of professional*]~~An attorney~~ is negligent only if [he/she] was not as skillful, knowledgeable, or careful as other reasonable [*insert type of professional*]~~attorneys~~ would have been in similar circumstances.

New September 2003; Revised [month] 2007

Directions for Use

Use this instruction for all professional negligence cases other than professional medical negligence.

Sources and Authority

- "The services of experts are sought because of their special skill. They have a duty to exercise the ordinary skill and competence of members of their profession, and a failure to discharge that duty will subject them to liability for negligence. Those who hire such persons are not justified in expecting infallibility, but can expect only reasonable care and competence. They purchase service, not insurance." (*Gagne v. Bertran* (1954) 43 Cal.2d 481, 489 [275 P.2d 15].)

- "This rule [of *Gagne v. Bertran*, *supra*] has been consistently followed in this state with respect to professional services (*Roberts v. Karr*, 178 Cal.App.2d 535 [3 Cal.Rptr. 98] (surveyor); *Gautier v. General Telephone Co.*, 234 Cal.App.2d 302 [44 Cal.Rptr. 404] (communications services); *Bonadiman-McCain, Inc. v. Snow,* 183 Cal.App.2d 58 [6 Cal.Rptr. 52] (engineer); *Lindner v. Barlow, Davis & Wood,* 210 Cal.App.2d 660 [27 Cal.Rptr. 101] (accountant); *Pancoast v. Russell,* 148 Cal.App.2d 909 [307 P.2d 719] (architect))." (*Allied Properties v. John A. Blume & Associates* (1972) 25 Cal.App.3d 848, 856 [102 Cal.Rptr. 259].)

- "The attorney is not liable for every mistake he may make in his practice; he is not, in the absence of an express agreement, an insurer of the soundness of his opinions or of the validity of an instrument that he is engaged to draft; and he is not liable for being in error as to a question of law on which reasonable doubt may be entertained by well-informed lawyers." (*Lucas v. Hamm* (1961) 56 Cal.2d 583, 591 [15 Cal.Rptr. 821, 364 P.2d 685], cert. denied, 368 U.S. 987, internal citations omitted.)

- Jury instructions stating this principle are proper: "[A]n attorney does not ordinarily guarantee the soundness of his opinions and, accordingly, is not liable for every mistake he may make in his practice. He is expected, however, to possess knowledge of those plain and elementary principles of law which are commonly known by well informed attorneys, and to discover those additional rules of law which, although not commonly known, may readily be found by standard research techniques." (*Smith v. Lewis* (1975) 13 Cal.3d 349, 358 [118 Cal.Rptr. 621, 530 P.2d 589], overruled in part on other grounds in *In re Marriage of Brown* (1976) 15 Cal.3d 838, 851 [126 Cal.Rptr. 633, 544 P.2d 561].)

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Secondary Sources

1 Witkin, California Procedure (4th ed. 1996) Attorneys, §§ 342-345, pp. 418-424

3 Levy et al., California Torts, Ch. 32, *Liability of Attorneys*, §§ 32.11, 32.62 (Matthew Bender)

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

2A California Points and Authorities, Ch. 24A, *Attorneys at Law: Malpractice* (Matthew Bender)

1 California Legal Forms, Ch. 1A, *Role of Counsel in Starting a New Business*, § 1A.30 (Matthew Bender)

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1806. Constitutional Right of Privacy

California law recognizes a right to privacy in [*insert legally protected privacy interest***]. [***Name of plaintiff***] claims that [***name of defendant***] violated that right. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] had a reasonable expectation of privacy in [***insert legally protected privacy interest***] under the circumstances;**

2. **That [***name of defendant***] invaded [***name of plaintiff***]'s privacy in [***insert legally protected privacy interest***];**

3. **That [***name of defendant***]'s conduct was a serious invasion of [***name of plaintiff***]'s privacy;**

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

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

New September 2003

Directions for Use

If the plaintiff is asserting more than one privacy right, give an introductory instruction stating that a person's right to privacy can be violated in more than one way and listing the legal theories under which the plaintiff is suing.

"Legally recognized privacy interests are generally of two classes: (1) interests in precluding the dissemination or misuse of sensitive and confidential information ('informational privacy'); and (2) interests in making intimate personal decisions or conducting personal activities without observation, intrusion, or interference ('autonomy privacy')." (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 35 [26 Cal.Rptr.2d 834, 865 P.2d 633].) "Whether a legally recognized privacy interest is present in a given case is a question of law to be decided by the court." (*Hill, supra,* 7 Cal.4th at p. 40.)

For an affirmative defense instruction, see CACI No. 1807, *Affirmative Defense to Constitutional Right.* Other affirmative defenses may be available.

Sources and Authority

- "[T]he Privacy Initiative in article I, section 1 of the California Constitution creates a right of action against private as well as government entities." (*Hill, supra,* 7 Cal.4th at p. 20.)

- The California Constitution expressly provides that all people have the "inalienable" right to privacy. (Cal. Const., art. I, § 1; see also *American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307,

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325-326 [66 Cal.Rptr.2d 210, 940 P.2d 797], observing that the California Constitution expressly recognizes a right of privacy and is considered broader than the implied federal right to privacy.)

- "Based on our review of the Privacy Initiative, we hold that a plaintiff alleging an invasion of privacy in violation of the state constitutional right to privacy must establish each of the following: (1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy." (*Hill, supra,* 7 Cal. 4th at pp. 39-40.)

- Note that subsequent Supreme Court opinions have referred to the three elements stated in *Hill* as "threshold elements" that a plaintiff must meet before he or she can maintain a cause of action. (See *Loder v. City of Glendale* (1997) 14 Cal.4th 846, 893 [59 Cal.Rptr.2d 696, 927 P.2d 1200].)

- It has been observed that "[o]utside the right to privacy and eminent domain contexts, only a couple of California appellate court opinions have held that there is a right to damages for violations of state constitutional provisions ... ." (*Bonner v. City of Santa Ana* (1996) 45 Cal.App.4th 1465, 1471 [53 Cal.Rptr.2d 671], internal citations omitted.)

- "Whether plaintiff has a reasonable expectation of privacy in the circumstances and whether defendant's conduct constitutes a serious invasion of privacy are mixed questions of law and fact. If the undisputed material facts show no reasonable expectation of privacy or an insubstantial impact on privacy interests, the question of invasion may be adjudicated as a matter of law." (*Hill, supra,* 7 Cal.4th at p. 40.)

Secondary Sources

7 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 575–603

4 Levy et al., California Torts, Ch. 46, *Invasion of Privacy*, § 46.06 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 429, *Privacy* (Matthew Bender)

18 California Points and Authorities, Ch. 185, *Privacy* (Matthew Bender)

1 California Civil Practice (Thomson West) Torts, §§ 20:18–20:20

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VF-1805. Privacy—Constitutional Right of Privacy

We answer the questions submitted to us as follows:

1. Did [*name of plaintiff***] have a reasonable expectation of privacy in [***insert legally protected privacy interest***] under the circumstances?**

____ 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***] invade [***name of plaintiff***]'s [***insert legally protected privacy interest***]?**

____ 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 defendant***]'s conduct a serious invasion of [***name of plaintiff***]'s privacy?**

____ 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 [*name of defendant***]'s conduct 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. 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

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[lost earnings $ _____]
[lost profits $ _____]
[medical expenses $ _____]
[other future economic loss $ _____]

Total Future Economic Damages: $ _____]

[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].

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. 1806, *Constitutional Right of Privacy*.

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.

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

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VF-1806. Privacy—Constitutional Right of Privacy—Affirmative Defense

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We answer the questions submitted to us as follows:

1. Did [*name of plaintiff*] have a reasonable expectation of privacy in [*insert legally protected privacy interest*] under the circumstances?

____ 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*] invade [*name of plaintiff*]'s [*insert legally protected privacy interest*]?

____ 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 defendant*]'s conduct a serious invasion of [*name of plaintiff*]'s privacy?

____ 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 [*name of defendant*]'s conduct justified because of [*insert relevant legitimate competing interest*]?

____ Yes ____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, skip question 5 and answer question 6.

5. Was there a practical, effective, and less invasive method of achieving [*name of defendant*]'s purpose?

____ 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. Was [*name of defendant*]'s conduct a substantial factor in causing harm to [*name of plaintiff*]?

____ Yes ____ No

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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: $ _____]

[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].

New September 2003; Revised April 2007

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~~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. 1806, *Constitutional Right of Privacy*, and CACI No. 1807, *Affirmative Defense to Constitutional Right*.~~

~~If specificity is not required, users do not have to itemize all the damages listed in question 7 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.~~

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

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2020. Public Nuisance—Essential Factual Elements

[*Name of plaintiff***] claims that [he/she] suffered harm because [***name of defendant***] created a nuisance. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***], by acting or failing to act, created a condition that [***insert one or more of the following:***]**

   [was harmful to health;] [or]

   [was indecent or offensive to the senses;] [or]

   [was an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property;] [or]

   [unlawfully obstructed the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway;]

2. **That the condition affected a substantial number of people at the same time;**

3. **That an ordinary person would be reasonably annoyed or disturbed by the condition;**

4. **That the seriousness of the harm outweighs the social utility of [***name of defendant***]'s conduct;**

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

6. **That [***name of plaintiff***] suffered harm that was different from the type of harm suffered by the general public; and**

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

New September 2003; Revised [month] 2007

Directions for Use

Private nuisance concerns injury to a property interest. Public nuisance is not dependent on an interference with rights of land: "[A] private nuisance is a civil wrong based on disturbance of rights in land while a public nuisance is not dependent upon a disturbance of rights in land but upon an interference with the rights of the community at large." (*Venuto v. Owens-Corning Fiberglas Corp.* (1971) 22 Cal.App.3d 116, 124 [99 Cal.Rptr. 350], internal citation omitted.)

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Sources and Authority

- Civil Code section 3479 provides: "Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance."

- Civil Code section 3480 provides: "A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal."

- Civil Code section 3493 provides: "A private person may maintain an action for a public nuisance, if it is specially injurious to himself, but not otherwise."

- Civil Code section 3482 provides: "Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance."

- "[T]he exculpatory effect of Civil Code section 3482 has been circumscribed by decisions of this court. ..."'A statutory sanction cannot be pleaded in justification of acts which by the general rules of law constitute a nuisance, unless the acts complained of are authorized by the express terms of the statute under which the justification is made, or by the plainest and most necessary implication from the powers expressly conferred, so that it can be fairly stated that the Legislature contemplated the doing of the very act which occasions the injury.'"" (*Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, 291 [142 Cal.Rptr. 429, 572 P.2d 43], internal citation omitted.)

- "The damage suffered [by a private person] must be different in kind and not merely in degree from that suffered by other members of the public." (*Koll-Irvine Center Property Owners Assn. v. County of Orange* (1994) 24 Cal.App.4th 1036, 1040 [29 Cal.Rptr.2d 664], internal citations omitted.)

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

- "Unlike the private nuisance-tied to and designed to vindicate individual ownership interests in land-the 'common' or public nuisance emerged from distinctly different historical origins. The public nuisance doctrine is aimed at the protection and redress of community interests and, at least in theory, embodies a kind of collective ideal of civil life which the courts have vindicated by equitable remedies since the beginning of the 16th century." (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1103 [60 Cal.Rptr.2d 277, 929 P.2d 596].)

- "Where ... the nuisance is a private as well as a public one, there is no requirement that the plaintiff suffer damage different in kind from that suffered by the general public and he 'does not lose his rights as a landowner merely because others suffer damage of the same kind, or even of the same

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degree ... .'" (*Venuto, supra*, 22 Cal.App.3d at p. 124, internal citations omitted.)

- "Of course, not every interference with collective social interests constitutes a public nuisance. To qualify ... the interference must be both substantial and unreasonable." (*People ex rel. Gallo, supra*, 14 Cal.4th at p. 1105.)

- "The fact that the defendants' alleged misconduct consists of omission rather than affirmative actions does not preclude nuisance liability. [¶] A nuisance may be either a negligent or an intentional tort." (*Stoiber v. Honeychuck* (1980) 101 Cal.App.3d 903, 920 [162 Cal.Rptr. 194], internal citation omitted.)

- "An essential element of a cause of action for nuisance is damage or injury." (*Helix Land Co., Inc. v. City of San Diego* (1978) 82 Cal.App.3d 932, 950 [147 Cal.Rptr. 683].)

- "By analogy to the rules governing tort liability, courts apply the same elements to determine liability for a public nuisance." (*People ex rel. Gallo, supra,* 14 Cal.4th at p. 1105, fn. 3, internal citation omitted.)

- Restatement Second of Torts, section 821B provides:

  (1) A public nuisance is an unreasonable interference with a right common to the general public.

  (2) Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:

  (a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or

  (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or

  (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

- Restatement Second of Torts, section 826 provides:

  An intentional invasion of another's interest in the use and enjoyment of land is unreasonable if

  (a) the gravity of the harm outweighs the utility of the actor's conduct, or

  (b) the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible.

- Restatement Second of Torts, section 827 provides:

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In determining the gravity of the harm from an intentional invasion of another's interest in the use and enjoyment of land, the following factors are important:

(a) The extent of the harm involved;

(b) the character of the harm involved;

(c) the social value that the law attaches to the type of use or enjoyment invaded;

(d) the suitability of the particular use or enjoyment invaded to the character of the locality; and

(e) the burden on the person harmed of avoiding the harm.

- Restatement Second of Torts, section 828 provides:

  In determining the utility of conduct that causes an intentional invasion of another's interest in the use and enjoyment of land, the following factors are important:

  (a) the social value that the law attaches to the primary purpose of the conduct;

  (b) the suitability of the conduct to the character of the locality; and

  (c) the impracticability of preventing or avoiding the invasion.

Secondary Sources

2 Levy et al., California Torts, Ch. 17, *Nuisance and Trespass*, §§ 17.01-17.04, 17.06 (Matthew Bender)

34 California Forms of Pleading and Practice, Ch. 391, *Nuisance* (Matthew Bender)

16 California Points and Authorities, Ch. 167, *Nuisance* (Matthew Bender)

1 California Civil Practice (Thomson West) Torts, §§ 17:1–17:3

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VF-2005. Public Nuisance

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***], by acting or failing to act, create a condition that was harmful to health?**
   ____ 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 the condition affect a substantial number of people at the same time?**
   ____ 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. **Would an ordinary person have been reasonably annoyed or disturbed by the condition?**
   ____ 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 seriousness of the harm outweigh the social utility of [***name of defendant***]'s conduct?**
   ____ 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 [***name of plaintiff***] consent to [***name of defendant***]'s conduct?**
   ____ 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. **Did [***name of plaintiff***] suffer harm that was different from the type of harm suffered by the general public?**
   ____ Yes ____ No

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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. Was [*name of defendant***]'s conduct a substantial factor in causing [***name of plaintiff***]'s harm?**

____ Yes ____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. 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: $ _____]

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

$ _____]

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

$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

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Dated: _____

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

New September 2003; Revised April 2007, [month] 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 form is based on CACI No. 2020, *Public Nuisance—Essential Factual Elements*.

Other factual situations may be substituted in question 1 as in element 1 of CACI No. 2020.

If specificity is not required, users do not have to itemize all the damages listed in question 8 and do not have to categorize "economic" and "non-economic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

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

Depending on the facts of the case, question 1 can be modified, as in element 1 in CACI No. 2020.

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.

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VF-2006. Private Nuisance

We answer the questions submitted to us as follows:

1. **Did [*name of plaintiff*] [own/lease/occupy/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. **Did [*name of defendant*], by acting or failing to act, create a condition that was harmful to health?**
   ____ 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 this condition interfere with [*name of plaintiff*]'s use or enjoyment of [his/her] land?**
   ____ 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 plaintiff*] consent to [*name of defendant*]'s conduct?**
   ____ Yes ____ No

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

5. **Would an ordinary person have been reasonably annoyed or disturbed by [*name of defendant*]'s conduct?**
   ____ 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. **Was [*name of defendant*]'s conduct a substantial factor in causing harm to [*name of plaintiff*]?**
   ____ Yes ____ No

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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. Did the seriousness of the harm outweigh the public benefit of [*name of defendant***]'s conduct?**

____ Yes ____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. 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: $ _____]

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

$ _____]

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

$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

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Dated: _____

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

New September 2003; Revised April 2007, [month] 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 form is based on CACI No. 2021, *Private Nuisance—Essential Factual Elements*.

Depending on the facts of the case, question 1 can be modified, as in element 1 in CACI No. 2021.

If specificity is not required, users do not have to itemize all the damages listed in question 8 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.

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.

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2330. Implied Obligation of Good Faith and Fair Dealing Explained

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

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

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

New September 2003; Revised [month] 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].)

- "Bad faith may involve negligence, or negligence may be indicative of bad faith, but negligence alone is insufficient to render the insurer liable." *Brown v. Guarantee Ins. Co.* (1957) 155 Cal. App. 2d 679, 688-689 [319 P.2d 69].)

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

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

- "By itself, of course, an insurer's refusal to defend the insured against a third party claim covered by the policy is only a breach of contract. If, however, the insurer's refusal also constituted a breach of the implied covenant of good faith and fair dealing, then the insurer is also liable in tort. In order to demonstrate such a breach it must be shown that the insurer, in refusing to provide a defense, was acting unreasonably (i.e., with no reasonable basis for its action) or without proper cause. If the insurer declines to perform a contractual duty owed under the policy with proper cause, it may still be liable for breach of contract, but it cannot be held liable for a breach of the implied covenant." (*Delgado v. Interinsurance Exchange of the Automobile Club of Southern California* (2007) 152 Cal. App. 4th 671, 691 [__ Cal.Rptr.3d __], internal citations omitted.)

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

- "[A]n insurer is not required to pay every claim presented to it. Besides the duty to deal fairly with the insured, the insurer also has a duty to its other policyholders and to the stockholders (if it is such a company) not to dissipate its reserves through the payment of meritless claims. Such a practice inevitably would prejudice the insurance seeking public because of the necessity to increase rates, and would finally drive the insurer out of business." (*Austero v. National Cas. Co.* (1978) 84 Cal.App.3d 1, 30 [148 Cal.Rptr. 653], overruled on other grounds in *Egan, supra,* 24 Cal.3d 809 at p. 824 fn. 7.)

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

Secondary Sources

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

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1 California Liability Insurance Practice: Claims and Litigation (Cont.Ed.Bar), Ch. 2, *Overview of Rights and Obligations of Policy*, §§ 2.9-2.15

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

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

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

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

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

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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] benefits due under the insurance ~~benefits.~~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 or without proper cause, [failed to pay/delayed payment of] policy benefits;**

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***] did not act "unreasonably or without proper cause" if it [failed to pay/delayed payment of] policy benefits because of a genuine dispute or issue as to coverage or the amount due under the policy for [***name of plaintiff***]'s claim, even if it later was determined that [***name of defendant***] owed policy benefits.]**

New September 2003; Revised [month] 2007

Directions for Use

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

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

Read the optional last paragraph if the insurer asserts that its failure to pay or delay in payment was due to a genuine dispute over liability under the policy, and the existence or absence of a genuine dispute requires resolution of factual issues by the jury. (See *Chateau Chamberay Homeowners Assn. v. Associated International Insurance Co.* (2001) 90 Cal.App.4th 335, 347-349 [108 Cal.Rptr.2d 776].)

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

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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 italics.)

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

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

- ~~"[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)., supra,* 90 Cal.App.4th ~~335,~~at p. 347~~ [108 Cal.Rptr.2d 776]~~.)

- "We evaluate the reasonableness of the insurer's actions and decision to deny benefits as of the time they were made rather than with the benefit of hindsight. (*Century Surety Co. v. Polisso* (2006) 139 Cal.App.4th 922, 949 [43 Cal.Rptr.3d 468].)

  - "[I]f the insurer denies benefits unreasonably (i.e., without any reasonable basis for such denial), it may be exposed to the full array of tort remedies, including possible punitive damages." (*Jordan v.*

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Allstate Ins. Co. (2007) 148 Cal.App.4th 1062, 1073 [56Cal.Rptr.3d 312].)

- "By itself, of course, an insurer's refusal to defend the insured against a third party claim covered by the policy is only a breach of contract. If, however, the insurer's refusal also constituted a breach of the implied covenant of good faith and fair dealing, then the insurer is also liable in tort. In order to demonstrate such a breach it must be shown that the insurer, in refusing to provide a defense, was acting unreasonably (i.e., with no reasonable basis for its action) or without proper cause. If the insurer declines to perform a contractual duty owed under the policy with proper cause, it may still be liable for breach of contract, but it cannot be held liable for a breach of the implied covenant." (*Delgado v. Interinsurance Exchange of the Automobile Club of Southern California* (2007) 152 Cal.App. 4th 671, 691 [__Cal.Rptr.3d __], internal citations omitted.)

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

- "[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]; cf. *Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.* (1992) 2 Cal. 4th 342, 372 [6 Cal.Rptr.2d 467, 826 P.2d 710] ["[I]t has been suggested the covenant has both a subjective and objective aspect--subjective good faith and objective fair dealing. A party violates the covenant if it subjectively lacks belief in the validity of its act or if its conduct is objectively unreasonable."].)

- "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) ¶¶ 12:822-12:1016

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

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

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

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

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

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

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

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

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

[*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 ~~properly investigate the loss~~conduct a fair and ~~[denied coverage/failed to pay insurance benefits/delayed payment~~thorough investigation of ~~insurance benefits]~~the loss;**

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

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

~~To properly investigate a~~ When investigating the claim, ~~an insurance company must~~ [*name of defendant***] had a duty to diligently search for and consider evidence that ~~supports an insured~~supported [***name of plaintiff***]'s claimed loss.**

New September 2003; Revised December 2005, [month] 2007

Directions for Use

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

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

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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) ¶¶ 12:848-12:904

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

2 California Insurance Law and Practice, Ch. 13, *Claims Handling and the Duty of Good Faith*, §

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13.04[1]-[3] (Matthew Bender)

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

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

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

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2334. Bad Faith~~—Unreasonable~~ (Third Party)— Refusal to ~~Settle~~Accept Reasonable Settlement Within Liability Policy Limits—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 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 [*name of plaintiff in underlying case*] brought 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; and**

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 ~~in light of the claimed injuries or loss and [*name of plaintiff*]'s probable liability, the~~[*name of defendant*] knew or should have known at the time the settlement demand was rejected, that the potential judgment ~~in the lawsuit~~ was likely to exceed the amount of the settlement demand~~.~~ based on [*name of plaintiff in underlying case*]'s injuries or loss and [*name of plaintiff*]'s probable liability.

New September 2003; Revised [month] 2007

Directions for Use

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

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

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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

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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) 146 Cal.App.4th 831, 836 [53 Cal.Rptr.3d 245], internal citations omitted.)

- "Determination of the reasonableness of a settlement offer for purposes of a reimbursement action is based on the information available to [the insurer] at the time of the proposed settlement." (*Isaacson v. California Ins. Guarantee Assn.* (1988) 44 Cal.3d 775, 793 [244 Cal.Rptr. 655, 750 P.2d 297].)

- ~~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~~workers'] 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

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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) ¶¶ 12:201-12:686

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

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

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)

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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*], unreasonably or without proper cause, failed to defend [*name of plaintiff*] against the lawsuit;**

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

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

(New October 2004; Revised [month] 2007

Directions for Use

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

This instruction also assumes that 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.

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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.)

- "By itself, of course, an insurer's refusal to defend the insured against a third party claim covered by the policy is only a breach of contract. If, however, the insurer's refusal also constituted a breach of the implied covenant of good faith and fair dealing, then the insurer is also liable in tort. In order to demonstrate such a breach it must be shown that the insurer, in refusing to provide a defense, was acting unreasonably (i.e., with no reasonable basis for its action) or without proper cause. If the insurer declines to perform a contractual duty owed under the policy with proper cause, it may still be liable for breach of contract, but it cannot be held liable for a breach of the implied covenant." (*Delgado v. Interinsurance Exchange of the Automobile Club of Southern California* (2007) 152 Cal.App.4th 671, 691 [__ Cal.Rptr.3d __], 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

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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.)

- "The insurer's duty to defend must be determined on the basis of facts available to the insurer at the time the insured tenders the defense. 'If the insurer is obliged to take up the defense of its insured, it must do so as soon as possible, both to protect the interests of the insured, and to limit its own exposure to loss. . . . [T]he duty to defend must be assessed at the outset of the case.' It follows that a belated offer to pay the costs of defense may mitigate damages but will not cure the initial breach of duty." (*Shade Foods, supra,* 78 Cal.App.4th at p. 881, 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) ¶¶ 12:598-12:650.5

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

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

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

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

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VF-2301. Breach of the Implied Obligation of Good Faith and Fair Dealing—Failure or Delay in Payment

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We answer the questions submitted to us as follows:

1. **Did [***name of plaintiff***] suffer a loss covered under an insurance policy with [***name of defendant***]?**
   ____ Yes ____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Was [***name of defendant***] notified of the loss?**
   ____ Yes ____ No

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [***name of defendant***], unreasonably or without proper cause, [fail to pay/delay payment of] policy benefits?**
   ____ 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 [***name of defendant***]'s [failure to pay/delay in payment of] policy benefits 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. **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: $ _____]

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

[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].

New September 2003; Revised April 2004, April 2007, [month] 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. 2331, *Breach of the Implied Obligation of Good Faith and Fair Dealing—Failure or Delay in Payment-Essential Factual Elements*.

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.

If punitive damages are claimed, combine this form with the appropriate verdict form numbering from

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VF-3900 to VF-3904.

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

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VF-2302. Bad Faith (First Party)—Failure to Properly Investigate Claim

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We answer the questions submitted to us as follows:

1. **Did [*name of plaintiff*] suffer a loss covered under an insurance policy with [*name of defendant*]?**
   ____ Yes ____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [*name of plaintiff*] notify [*name of defendant*] of the loss?**
   ____ Yes ____ No

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [*name of defendant*] ~~unreasonably~~ fail to ~~properly~~ fairly and thoroughly investigate the loss and [deny coverage/fail to pay insurance benefits/delay payment of insurance benefits]?**
   ____ 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 [*name of defendant*]'s ~~unreasonable~~ failure to properly investigate the loss 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. **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: $ _____]

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

[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].

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

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to include the categorizations of "economic" and "noneconomic" damages, especially if it is not a Prop. 51 case. The breakdown of damages is optional depending on the circumstances.

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

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2507. "Motivating Reason" Explained

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

New [month] 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 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."

- "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 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 [96 S.Ct. 2574, 49 L.Ed.2d 493, 502] and *Mixon*, *supra*, 192 Cal.App.3d at p. 1317.)

- But see *Horsford v. Board of Trustees* (2005) 132 Cal.App.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."), italics added.

Secondary Sources

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

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

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

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2521A. Hostile Work Environment Harassment—Conduct Directed at Plaintiff—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~~, e.g, race, gender, or age] ~~in [his/her] workplace~~ at [***name of defendant***], causing a hostile or abusive work environment. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] ~~[~~was [an employee of ~~[***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***];**

3. **That the harassing conduct was ~~so~~ severe~~, widespread,~~ or ~~persistent that~~ pervasive;**

4. **That a reasonable ~~[***describe member of protected group***]~~person in [***name of plaintiff***]'s circumstances would have considered the work environment to be hostile or abusive;**

~~4~~5. **That [***name of plaintiff***] considered the work environment to be hostile or abusive;**

~~5~~6. **[***Select applicable basis of defendant's liability:***]**

[That a supervisor engaged in the conduct;]

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

~~6~~7. **That [***name of plaintiff***] was harmed; and**

~~7~~8. **That the conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

~~*New September 2003; Revised June 2006*~~*Derived from former CACI No. 2521 [month] 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. 2522A, *Hostile Work Environment Harassment—Essential Factual Elements—Individual Defendant* ~~*(Gov. Code, § 12940(j))*~~. For a case in which the plaintiff is not the target of the harassment, see CACI No. 2521B, *Hostile Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Employer or Entity Defendant.* For an instruction for

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use if the hostile environment is due to sexual favoritism, see CACI No. 2521C, *Hostile Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Employer or Entity Defendant.* Also read CACI No. 2523, *"Harassing Conduct" Explained*, and CACI No. 2524, *"Severe or Pervasive" Explained*.

~~Element 5 must be modified to~~In element 6, 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)(1) 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.

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(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.~~

- 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."

- Under the FEHA, an employer is strictly liable for all acts of sexual harassment by a supervisor. (*State Dep't of Health Servs. v. Superior Court* (2003) 31 Cal.4th 1026, 1042 [6 Cal.Rptr.3d 441, 79 P.3d 556].)

- Employers may be liable for the conduct of certain agents. (See Gov. Code, §§ 12925(d), 12926(d), and 12940(j)(~~4)(C).~~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].)

- "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.)

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- "[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), supra,* 524 U.S. 775~~,~~ at p. 790 ~~[118 S.Ct. 2275, 141 L.Ed.2d 662]~~.)

- ~~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."~~
- "To be actionable, 'a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.' That means a plaintiff who subjectively perceives the workplace as hostile or abusive will not prevail under the FEHA, if a reasonable person in the plaintiff's position, considering all the circumstances, would not share the same perception. Likewise, a plaintiff who does not perceive the workplace as hostile or abusive will not prevail, even if it objectively is so." (*Lyle v. Warner Bros. TV Prods.* (2006) 38 Cal.4th 264, 284 [42 Cal.Rptr.3d 2, 132 P.3d 211], 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."~~"[A]llegations of a racially hostile work-place must be assessed from the perspective of a reasonable person belonging to the racial or ethnic group of the plaintiff." (*McGinest v. GTE Serv. Corp.* (9th Cir. 2004) 360 F.3d 1103, 1115.)

Secondary Sources

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3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 340, 346

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

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75~~,~~; Sexual and Other Harassment, §§ 3.1, 3.14, 3.17, 3.21, 3.36, 3.45

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

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

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

California Civil Practice (Thomson West) Employment Litigation, § 2:56

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

[*Name of plaintiff***] claims that [he/she] was subjected to a hostile or abusive work environment because coworkers at [***name of defendant***] were subjected to harassment based on [***describe protected status, e.g., race, gender, or age***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was [an employee of/a person providing services under a contract with] [***name of defendant***];**

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

3. **That the harassing conduct was severe or pervasive;**

4. **That a reasonable person in [***name of plaintiff***]'s circumstances would have considered the work environment to be hostile or abusive;**

5. **That [***name of plaintiff***] considered the work environment to be hostile or abusive;**

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

   [That a supervisor engaged in the conduct;]

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

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

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

Derived from former CACI No. 2521 [month] 2007

Directions for Use

This instruction is for use in a hostile work environment case if the plaintiff was not the target of the harassing conduct and the defendant is an employer or other entity covered by the FEHA. For an individual defendant, such as the alleged harasser or plaintiff's coworker, see CACI No. 2522B, *Hostile Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual Defendant.* For a case in which the plaintiff is the target of the harassment, see CACI No. 2521A, *Hostile Work Environment Harassment—Essential Factual Elements—Employer or Entity Defendant.* For an instruction for use if the hostile environment is due to widespread sexual favoritism, see CACI No.

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2521C, *Hostile Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Employer or Entity Defendant*. Also read CACI No. 2523, *"Harassing Conduct" Explained*, and CACI No. 2524, *"Severe or Pervasive" Explained*.

In element 6, select the applicable basis of employer liability: (a) vicarious liability for a supervisor's harassing conduct, or (b) the employer's ratification of the conduct. For a definition of "supervisor," see CACI No. 2525, *Harassment—"Supervisor" Defined.*

Sources and Authority

- Government Code section 12940(j)(1) 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."

- 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

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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 plaintiff's work environment is affected not only by conduct directed at herself but also by the treatment of others. A woman's perception that her work environment is hostile to women will obviously be reinforced if she witnesses the harassment of other female workers." (*Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 519 [76 Cal.Rptr.2d 547], internal citations omitted.)

- "Harassment against others in the workplace is only relevant to the plaintiff's case if she has personal knowledge of it. Unless plaintiff witnesses the conduct against others, or is otherwise aware of it, that conduct cannot alter the conditions of her employment and create an abusive working environment. Stated another way, a reasonable person in plaintiff's position would not find the environment hostile or abusive unless that person had knowledge of the objectionable conduct toward others." (*Beyda, supra,* 65 Cal.App.4th at p. 520.)

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

- Under the FEHA, an employer is strictly liable for all acts of sexual harassment by a supervisor. (*State Dep't of Health Servs. v. Superior Court* (2003) 31 Cal.4th 1026, 1042 [6 Cal.Rptr.3d 441, 79 P.3d 556].)

- 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].)

- "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.)

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- "[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, supra,* 524 U.S.at p. 790

- "To be actionable, 'a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.' That means a plaintiff who subjectively perceives the workplace as hostile or abusive will not prevail under the FEHA, if a reasonable person in the plaintiff's position, considering all the circumstances, would not share the same perception. Likewise, a plaintiff who does not perceive the workplace as hostile or abusive will not prevail, even if it objectively is so." (*Lyle, supra,* 38 Cal.4th at p. 284, internal citations omitted.)

- "[A]llegations of a racially hostile work-place must be assessed from the perspective of a reasonable person belonging to the racial or ethnic group of the plaintiff." (*McGinest v. GTE Serv. Corp.* (9th Cir. 2004) 360 F.3d 1103, 1115.)

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Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 340, 346

Chin et al., California Practice Guide: Employment Litigation (The Rutter Group) ¶¶ 10:40, 10:110-10:260
1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75; Sexual and Other Harassment, §§ 3.1, 3.14, 3.17, 3.21, 3.36, 3.45

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

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

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

California Civil Practice (Thomson West) Employment Litigation, § 2:56

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

[*Name of plaintiff***] claims that widespread sexual favoritism at [***name of defendant***] created a hostile or abusive work environment. "Sexual favoritism" means that another employee has received preferential treatment with regard to promotion, work hours, assignments, or other significant employment benefits or opportunities due to a sexual relationship with an individual representative of the employer who is in a position to grant these preferences. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was [an employee of/a person providing services under a contract with] [***name of defendant***];**

2. **That there was sexual favoritism in the work environment;**

3. **That the sexual favoritism was widespread and also severe or pervasive;**

4. **That a reasonable person in [***name of plaintiff***]'s circumstances would have considered the work environment to be hostile or abusive;**

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

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

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

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

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

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

Derived from former CACI No. 2521 [month] 2007

Directions for Use

This instruction is for use in a hostile work environment case involving widespread sexual favoritism when the defendant is an employer or other entity covered by the FEHA. For an individual defendant, such as the alleged harasser or plaintiff's coworker, see CACI No. 2522C, *Hostile Work Environment*

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Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Individual Defendant. For a case in which the plaintiff is the target of harassment based on a protected status such as gender, race, or sexual orientation, see CACI No. 2521A, *Hostile Work Environment Harassment—Essential Factual Elements—Employer or Entity Defendant.* For an instruction for use if the plaintiff is not the target of the harassment, see CACI No. 2521B, *Hostile Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Employer or Entity Defendant.* Also read CACI No. 2523, *"Harassing Conduct" Explained*, and CACI No. 2524, *"Severe or Pervasive" Explained*.

In element 6, select the applicable basis of employer liability: (a) vicarious liability for a supervisor's harassing conduct, or (b) the employer's ratification of the conduct. For a definition of "supervisor," see CACI No. 2525, *Harassment—"Supervisor" Defined.*

Sources and Authority

- Government Code section 12940(j)(1) 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."

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- 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."

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

- "[S]exual favoritism by a manager may be actionable when it leads employees to believe that 'they [can] obtain favorable treatment from [the manager] if they became romantically involved with him', the affair is conducted in a manner 'so indiscreet as to create a hostile work environment,' or the manager has engaged in 'other pervasive conduct…which created a hostile work environment.' " (*Miller, supra,* 36 Cal. 4th at p. 465, internal citations omitted.)

- "[A] romantic relationship between a supervisor and an employee does not, without more, give rise to a sexual discrimination or sexual harassment claim either under the FEHA or the public policy of the state." (*Proksel v. Gattis* (1996) 41 Cal.App.4th 1626, 1631 [49 Cal.Rptr.2d 322].)

- Under the FEHA, an employer is strictly liable for all acts of sexual harassment by a supervisor. (*State Dep't of Health Servs. v. Superior Court* (2003) 31 Cal.4th 1026, 1042 [6 Cal.Rptr.3d 441, 79 P.3d 556].)

- 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].)

- "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.)

- " '[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

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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, supra,* 524 U.S.at p. 790

- "To be actionable, 'a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.' That means a plaintiff who subjectively perceives the workplace as hostile or abusive will not prevail under the FEHA, if a reasonable person in the plaintiff's position, considering all the circumstances, would not share the same perception. Likewise, a plaintiff who does not perceive the workplace as hostile or abusive will not prevail, even if it objectively is so." (*Lyle v. Warner Bros. TV Prods.* (2006) 38 Cal.4th 264, 284 [42 Cal.Rptr.3d 2, 132 P.3d 211], internal citations omitted.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 340, 346

Chin et al., California Practice Guide: Employment Litigation (The Rutter Group) ¶¶ 10:40, 10:110-10:260
1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75; Sexual and Other Harassment, §§ 3.1, 3.14, 3.17, 3.21, 3.36, 3.45

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

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

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

California Civil Practice (Thomson West) Employment Litigation, § 2:56

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2522A. Hostile Work Environment Harassment—Conduct Directed at Plaintiff--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, e.g., race, gender, or age], causing a hostile or abusive work environment. To establish this claim, [***name of plaintiff***] must prove all of the following:**

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

3. **That the harassing conduct was so severe, widespread, or persistent that pervasive;**

4. **That a reasonable [***describe member of protected group***]person in [***name of plaintiff***]'s circumstances would have considered the work environment to be hostile or abusive;**

45. **That [***name of plaintiff***] considered the work environment to be hostile or abusive;**

56. **That [***name of defendant***] [participated in/assisted/ [or] encouraged] the harassing conduct [or assisted or encouraged it];**

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

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

New September 2003 Derived from Former CACI No. 2522 [month] 2007

Sources and Authority

- Government Code section 12940(j)(1) 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

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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

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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.)

- ~~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."~~
- "To be actionable, 'a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.' That means a plaintiff who subjectively perceives the workplace as hostile or abusive will not prevail under the FEHA, if a reasonable person in the plaintiff's position, considering all the circumstances, would not share the same perception. Likewise, a plaintiff who does not perceive the workplace as hostile or abusive will not prevail, even if it objectively is so." (*Lyle v. Warner Bros. TV Prods.* (2006) 38 Cal.4th 264, 284 [42 Cal.Rptr.3d 2, 132 P.3d 211], internal citations omitted.)

- "[A]llegations of a racially hostile work-place must be assessed from the perspective of a reasonable person belonging to the racial or ethnic group of the plaintiff." (*McGinest v. GTE Serv. Corp.* (9th Cir. 2004) 360 F.3d 1103, 1115.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 340, 346

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

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68,

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2.75, Sexual and Other Harassment, §§ 3.1, 3.14, 3.17, 3.36–3.45

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

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

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

California Civil Practice (Thomson West 2006) Employment Litigation, §§ 2:56–2:56.1

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

[*Name of plaintiff***] claims that [he/she] was subjected to a hostile or abusive work environment because coworkers at [***name of defendant***] were subjected to harassment based on [***describe protected status, e.g., race, gender, or age***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was [an employee of/a person providing services under a contract with] [***name of employer***];**

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

3. **That the harassing conduct was severe or pervasive;**

4. **That a reasonable person in [***name of plaintiff***]'s circumstances would have considered the work environment to be hostile or abusive;**

5. **That [***name of plaintiff***] considered the work environment to be hostile or abusive;**

6. **That [***name of defendant***] [participated in/assisted/ [or] encouraged] the harassing conduct;**

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

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

Derived from former CACI No. 2522 [Month] 2007

Directions for Use

This instruction is for use in a hostile work environment case if the plaintiff was not the target of the harassing conduct and the defendant is an individual such as the alleged harasser or plaintiff's coworker. For an employer defendant, see CACI No. 2521B, *Hostile Work Environment Harassment—Essential Factual Elements—Employer or Entity Defendant.* For a case in which the plaintiff is the target of the harassment, see CACI No. 2522A, *Hostile Work Environment Harassment—Essential Factual Elements—Individual Defendant.* For an instruction for use if the hostile environment is due to sexual favoritism, see CACI No. 2522C, *Hostile Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Individual Defendant.* Also read CACI No. 2523, *"Harassing Conduct" Explained*, and CACI No. 2524, *"Severe or Pervasive" Explained*.

Sources and Authority

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- Government Code section 12940(j)(1) 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 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

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obviously be reinforced if she witnesses the harassment of other female workers." (*Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 519 [76 Cal.Rptr.2d 547], internal citations omitted.)

- "Harassment against others in the workplace is only relevant to the plaintiff's case if she has personal knowledge of it. Unless plaintiff witnesses the conduct against others, or is otherwise aware of it, that conduct cannot alter the conditions of her employment and create an abusive working environment. Stated another way, a reasonable person in plaintiff's position would not find the environment hostile or abusive unless that person had knowledge of the objectionable conduct toward others." (*Beyda, supra,* 65 Cal.App.4th at p. 520.)

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

- "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.)

- "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].)

- "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

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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.)

- "To be actionable, 'a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.' That means a plaintiff who subjectively perceives the workplace as hostile or abusive will not prevail under the FEHA, if a reasonable person in the plaintiff's position, considering all the circumstances, would not share the same perception. Likewise, a plaintiff who does not perceive the workplace as hostile or abusive will not prevail, even if it objectively is so." (*Lyle, supra,* 38 Cal.4th at p. 284, internal citations omitted.)

- "[A]llegations of a racially hostile work-place must be assessed from the perspective of a reasonable person belonging to the racial or ethnic group of the plaintiff." (*McGinest v. GTE Serv. Corp.* (9th Cir. 2004) 360 F.3d 1103, 1115.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 340, 346

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

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75, Sexual and Other Harassment, §§ 3.1, 3.14, 3.17, 3.36-3.45

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

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

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

California Civil Practice (Thomson West 2006) Employment Litigation, §§ 2:56–2:56.1

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

[*Name of plaintiff***] claims that widespread sexual favoritism by [***name of defendant***] created a hostile or abusive work environment. "Sexual favoritism" means that another employee has received preferential treatment with regard to promotion, work hours, assignments, or other significant employment benefits or opportunities due to a sexual relationship with an individual representative of the employer who is in a position to grant these preferences. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was [an employee of/ a person providing services under a contract with] [***name of employer***];**

2. **That there was sexual favoritism in the work environment;**

3. **That the sexual favoritism was widespread and also severe or pervasive;**

4. **That a reasonable person in [***name of plaintiff***]'s circumstances would have considered the work environment to be hostile or abusive because of the widespread sexual favoritism;**

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

6. **That [***name of defendant***] [participated in/assisted/ [or] encouraged] the harassing conduct;**

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

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

Derived from former CACI No. 2522 [Month] 2007

Directions for Use

This instruction is for use in a hostile work environment case involving widespread sexual favoritism when the defendant is an individual such as the alleged harasser or plaintiff's coworker. For an employer defendant, see CACI No. 2521C, *Hostile Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Employer or Entity Defendant.* For a case in which the plaintiff is the target of harassment based on a protected status such as gender, race, or sexual orientation,, see CACI No. 2522A, *Hostile Work Environment Harassment—Essential Factual Elements—Individual Defendant.* For an instruction for use if the plaintiff is not the target of the harassment, see CACI No. 2522B, *Hostile Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual Defendant.* Also read CACI No. 2523, *"Harassing Conduct" Explained*, and CACI No. 2524, *"Severe or Pervasive" Explained*.

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Sources and Authority

- Government Code section 12940(j)(1) 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."

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

- "[S]exual favoritism by a manager may be actionable when it leads employees to believe that 'they [can] obtain favorable treatment from [the manager] if they became romantically involved with him', the affair is conducted in a manner 'so indiscreet as to create a hostile work environment,' or the manager has engaged in 'other pervasive conduct…which created a hostile work environment.' " (*Miller, supra,* 36 Cal. 4th at p. 465, internal citations omitted.)

- "[A] romantic relationship between a supervisor and an employee does not, without more, give rise to a sexual discrimination or sexual harassment claim either under the FEHA or the public policy of the state." (*Proksel v. Gattis* (1996) 41 Cal.App.4th 1626, 1631 [49 Cal.Rptr.2d 322].)

- "The 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.)

- "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].)

- "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.)

- "To be actionable, 'a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.' That means a plaintiff who subjectively perceives the workplace as hostile or abusive will not prevail under the FEHA, if a reasonable person in the plaintiff's position, considering

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all the circumstances, would not share the same perception. Likewise, a plaintiff who does not perceive the workplace as hostile or abusive will not prevail, even if it objectively is so." (*Lyle v. Warner Bros. TV Prods.* (2006) 38 Cal.4th 264, 284 [42 Cal.Rptr.3d 2, 132 P.3d 211], internal citations omitted.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 340, 346

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

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75, Sexual and Other Harassment, §§ 3.1, 3.14, 3.17, 3.36-3.45

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

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

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

California Civil Practice (Thomson West 2006) Employment Litigation, §§ 2:56–2:56.1

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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*].]

New September 2003; Revised [month] 2007

Directions for Use

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

Sources and Authority

- Government Code section 12940(j)(1) 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

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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." (*Reno v. Baird* (1998) 18 4th 640, 645-646 [76 Cal.Rptr.2d 499, 957 P.2d 1333], internal citations omitted.)

- "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. This significant distinction underlies the differential treatment of harassment and discrimination in the FEHA." (*Reno v. Baird, supra,* 18 Cal.4th at pp. 646-647, internal citation omitted.)

Secondary Sources

Chin, et al., California Practice Guide: Employment Litigation (The Rutter Group) ¶¶ 10:125–10:155

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Sexual and Other Harassment, §§ 3.13–, 3.36

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) Employment Litigation, §§ 2:56–2:56.1

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2524. ~~"Hostile Work Environment~~"Severe or Pervasive" Explained

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~~**Harassing conduct does not create a hostile work environment if it is only occasional, isolated, or trivial.**~~
"Severe or pervasive" means conduct that alters the conditions of employment and creates a hostile or abusive work environment.

In determining whether the ~~work environment was hostile or abusive~~conduct was severe or pervasive, you should consider all the circumstances~~, including~~. You may consider any or all of 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~~.~~;

(d) Whether the conduct was physically threatening or humiliating;

(e) The extent to which the conduct unreasonably interfered with an employee's work performance.

New September 2003; Revised [month] 2007

Directions for Use

Read this instruction with any of the Hostile Work Environment Harassment instructions (CACI Nos. 2521A, 2521B, 2521C, 2522A, 2522B, and 2522C) Read also CACI No. 2523 (*"Harassing Conduct" Explained*).

Sources and Authority

- "We have agreed with the United States Supreme Court that, to prevail, an employee claiming harassment based upon a hostile work environment must demonstrate that the conduct complained of was severe enough or sufficiently pervasive to alter the conditions of employment and create a work environment that qualifies as hostile or abusive to employees because of their sex. The working environment must be evaluated in light of the totality of the circumstances: '[W]hether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'" (*Miller v. Dept. of Corrections* (2005) 36 Cal. 4th 446, 462 [30 Cal.Rptr.3d 797, 115 P.3d 77], internal citations omitted.)

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- "'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

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instruction given here ... . [T]he law requires the plaintiff to meet a threshold standard of severity or pervasiveness. We hold that the statement within the instruction that severe or pervasive conduct requires more than 'occasional, isolated, sporadic, or trivial' acts was an accurate statement of that threshold standard." (*Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 465-467 [79 Cal.Rptr.2d 33].)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 340, 346

Chin, et al., California Practice Guide: Employment Litigation (The Rutter Group) ¶¶ 10:160–10:249

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75; *id.*, Sexual and Other Harassment, §§ 3.1, 3.17, 3.36–3.41

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

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

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

California Civil Practice (Thomson West) Employment Litigation, § 2:56

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2546. Disability Discrimination—Reasonable Accommodation—Failure to Engage in Interactive Process (Gov. Code § 12940(n))

[*Name of plaintiff***] contends that [***name of defendant***] failed to engage in a good faith, interactive process with [him/her] to determine whether it would be possible to implement effective reasonable accommodations so that [***name of plaintiff***] [***insert job requirements requiring accommodation***]. In order to establish this claim, [***name of plaintiff***] must prove the following:**

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

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

3. **That [***name of plaintiff***] had a [physical disability/mental disability/medical condition] that was known to [***name of defendant***];**

4. **That [***name of plaintiff***] was unable to perform the essential requirements of [***specify position***] without reasonable accommodation because [***specify reason***];**

5. **That [***name of plaintiff***] requested that [***name of defendant***] make reasonable accommodation for [his/her] [disability/condition] so that [he/she] would be able to perform the essential job requirements;**

6. **That [***name of plaintiff***] was at all times ready and willing to participate in an interactive process to determine whether reasonable accommodation could be made so that [he/she] would be able to perform the essential job requirements;**

7. **That [***name of defendant***] failed to participate in a good-faith interactive process with [***name of plaintiff***] to determine whether reasonable accommodation could be made;**

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

9. **That [***name of defendant***]'s failure to engage in a good-faith interactive process was a substantial factor in causing [***name of plaintiff***]'s harm.**

New [Month] 2007

Directions for Use

Modify elements 3 and 4, as necessary, if the employer perceives the employee to have a disability. (See *Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 61, fn. 21 [43 Cal.Rptr.3d 874], internal citations omitted.)

In element 4, specify the position at issue and the reason why some reasonable accommodation was needed. In element 5, you may add the specific accommodation requested, though the focus of this cause

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of action is on the failure to discuss, not the failure to provide.

For an instruction on a cause of action for failure to make reasonable accommodation, see CACI No. 2541, *Disability Discrimination—Reasonable Accommodation—Essential Factual Elements*. For an instruction defining "Reasonable Accommodation," see CACI No. 2542, *Disability Discrimination—"Reasonable Accommodation" Explained*.

Sources and Authority

- Government Code section 12940(n) provides that it is an unlawful employment practice, unless based on a bona fide occupational qualification or on applicable security regulations established by the United States or the State of California, for an employer or other entity covered by [the FEHA] 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.

- An employee may file a civil action based on the employer's failure to engage in the interactive process. (*Claudio v. Regents of the University of California* (2005) 134 Cal.App.4th 224, 243 [35 Cal.Rptr.3d 837].)

- "Two principles underlie a cause of action for failure to provide a reasonable accommodation. First, the employee must request an accommodation. Second, the parties must engage in an interactive process regarding the requested accommodation and, if the process fails, responsibility for the failure rests with the party who failed to participate in good faith. While a claim of failure to accommodate is independent of a cause of action for failure to engage in an interactive dialogue, each necessarily implicates the other." (*Gelfo, supra,* 140 Cal.App.4th at p. 55, internal citations omitted.)

- "FEHA's reference to a 'known' disability is read to mean a disability of which the employer has become aware, whether because it is obvious, the employee has brought it to the employer's attention, it is based on the employer's own perception--mistaken or not--of the existence of a disabling condition or, perhaps as here, the employer has come upon information indicating the presence of a disability. (*Gelfo, supra,* 140 Cal.App.4th at p. 61 fn.21.)

- "[Employer] asserts that, if it had a duty to engage in the interactive process, the duty was discharged. 'If anything,' it argues, 'it was [employee] who failed to engage in a good faith interactive process.' [Employee] counters [employer] made up its mind before July 2002 that it would not accommodate [employee]'s limitations, and nothing could cause it reconsider that decision. Because the evidence is conflicting and the issue of the parties' efforts and good faith is factual, the claim is properly left for the jury's consideration." (*Gelfo, supra,* 140 Cal.App.4th at 62 n.23.)

Secondary Sources

Chin, et al., California. Practice Guide: Employment Litigation (The Rutter Group) ¶¶ 9:2280-9:2285

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

1 California Civil Practice: Employment Litigation (Thomson-West) Discrimination in Employment, § 2:50

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VF-2506A. Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Employer or Entity Defendant (Gov. Code, § 12940(j))

We answer the questions submitted to us as follows:

1. **Was [*name of plaintiff*] an employee of [*name of defendant*]?**
____ Yes ____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Was [*name of plaintiff*] 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*]?**
____ 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. ~~3.~~ Was the harassment ~~so~~ severe or pervasive?

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.
Yes No

4. **Would ~~, widespread, or persistent that~~ a reasonable person in [*name of plaintiff*]'s circumstances ~~would~~ have considered the work environment to be hostile or abusive?**
____ Yes ____ No

If your answer to question ~~3~~ 4 is yes, then answer question ~~4~~5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

~~4~~5. Did [*name of plaintiff*] consider the work environment to be hostile or abusive?
____ 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. Did [*name of defendant*] [or [his/her/its] supervisors or agents] know or should [he/she/it/they] have known of the harassing conduct?

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____ Yes ____ No

If your answer to question ~~5~~ 6 is yes, then answer question ~~6~~7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

~~6~~7. Did [*name of defendant*] [or [his/her/its] supervisors or agents] fail to take immediate and appropriate corrective action?
____ Yes ____ No

If your answer to question ~~6~~ 7 is yes, then answer question ~~7~~8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

~~7~~8. Was the harassing conduct a substantial factor in causing harm to [*name of plaintiff*]?
____ Yes ____ No

If your answer to question ~~7~~ 8 is yes, then answer question ~~8~~9. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

~~8~~9. 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: $ _____]

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

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

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$ _____]

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].

~~*New September 2003*~~*Derived from former CACI No. VF-2506 [month] 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. 2521A, *Hostile Work Environment Harassment—Essential Factual Elements—Employer or Entity Defendant* ~~*(Gov. Code, § 12940(j))*~~.

Relationships other than employer/employee can be substituted in question number 1, as in element 1 in CACI No. 2521A~~, *Hostile Work Environment Harassment—Essential Factual Elements—Employer or Entity Defendant (Gov. Code, § 12940(j))*~~. Depending on the facts of the case, other factual scenarios for employer liability can be substituted in questions ~~5~~ 6 and ~~6~~ 7 as in element 6 in the instruction.

If specificity is not required, users do not have to itemize all the damages listed in question ~~8~~ 9 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~~before judgment.

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VF-2506B. Hostile Work Environment Harassment—Conduct Directed at Others—Employer or Entity Defendant (Gov. Code, § 12940(j))

We answer the questions submitted to us as follows:

1. **Was [*name of plaintiff*] [an employee of/a person providing services under a contract with] [*name of defendant*]?**
   ____ Yes ____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [*name of plaintiff*] personally witness harassing conduct that took place in [his/her] immediate work environment?**
   ____ 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 harassment severe or pervasive?**
   ____ 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. **Would a reasonable person in [*name of plaintiff*]'s circumstances have considered the work environment to be hostile or abusive?**
   ____ 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 [*name of plaintiff*] consider the work environment to be hostile or abusive?**
   ____ 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. **Did [*name of defendant*] [or [his/her/its] supervisors or agents] know or should [he/she/it/they] have known of the harassing conduct?**

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____ 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. Did [*name of defendant***] [or [his/her/its] supervisors or agents] fail to take immediate and appropriate corrective action?**
____ Yes ____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. Was the harassing conduct a substantial factor in causing harm to [*name of plaintiff***]?**
____ Yes ____ No

If your answer to question 8 is yes, then answer question 9. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

9. 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: $ _____]

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

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

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$ _____]

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].

Derived from former CACI No. VF-2506 [month] 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. 2521B, *Hostile Work Environment Harassment—Conduct Directed at Others--Essential Factual Elements—Employer or Entity Defendant*.

Relationships other than employer/employee can be substituted in question number 1, as in element 1 in CACI No. 2521B. Depending on the facts of the case, other factual scenarios for employer liability can be substituted in questions 6 and 7 as in element 6 in the instruction.

If specificity is not required, users do not have to itemize all the damages listed in question 9 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 before judgment.

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VF-2506C. Hostile Work Environment Harassment—Widespread Sexual Favoritism--Employer or Entity Defendant (Gov. Code, § 12940(j))

We answer the questions submitted to us as follows:

1. **Was [***name of plaintiff***] an employee of [***name of defendant***]?**
   ____ 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 there sexual favoritism in the work environment?**
   ____ 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 sexual favoritism widespread, and also severe or pervasive?**
   ____ 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. **Would a reasonable person in [***name of plaintiff***]'s circumstances have considered the work environment to be hostile or abusive?**
   ____ 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 [***name of plaintiff***] consider the work environment to be hostile or abusive?**
   ____ 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. **Did [***name of defendant***] [or [his/her/its] supervisors or agents] know or should [he/she/it/they] have known of the sexual favoritism?**
   ____ Yes ____ No

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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. Did [*name of defendant***] [or [his/her/its] supervisors or agents] fail to take immediate and appropriate corrective action?**
____ Yes ____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. Was the sexual favoritism a substantial factor in causing harm to [*name of plaintiff***]?**
____ Yes ____ No

If your answer to question 8 is yes, then answer question 9. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

9. 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: $ _____]

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

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

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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].

Derived from former CACI No. VF-2506 [month] 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. 2521C, *Hostile Work Environment Harassment—Widespread Sexual Favoritism--Essential Factual Elements—Employer or Entity Defendant*.

Relationships other than employer/employee can be substituted in question number 1, as in element 1 in CACI No. 2521C. Depending on the facts of the case, other factual scenarios for employer liability can be substituted in questions 6 and 7 as in element 6 in the instruction.

If specificity is not required, users do not have to itemize all the damages listed in question 9 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 before judgment.

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VF-2507A. Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Individual Defendant (Gov. Code, § 12940(j))

We answer the questions submitted to us as follows:

1. Was [*name of plaintiff*] an employee of [*name of employer*]?
____ Yes ____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was [*name of plaintiff*] 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*]?
____ 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 harassment ~~so~~ severe or pervasive?

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.
Yes No

4. Would~~, widespread, or persistent that~~ a reasonable ~~[*describe member of protected group*]~~person in [*name of plaintiff*]'s circumstances ~~would~~ have considered the work environment to be hostile or abusive?
____ Yes ____ No

If your answer to question ~~3~~ 4 is yes, then answer question ~~4~~5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form

~~4~~5. Did [*name of plaintiff*] consider the work environment to be hostile or abusive?
____ 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. Did [*name of defendant*] participate in the harassing conduct [*or assist or encourage*

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it]?
____ Yes ____ No

If your answer to question ~~5~~ 6 is yes, then answer question ~~6~~7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

~~6~~7. Was the harassing conduct a substantial factor in causing harm to [*name of plaintiff*]?
____ Yes ____ No

If your answer to question ~~6~~ 7 is yes, then answer question ~~7~~8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

~~7~~8. 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: $ _____]

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

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

TOTAL $ _____

Signed: _____

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Presiding Juror

Dated: _____

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

~~*New September 2003*~~*Derived from former CACI No. VF-2507 [month] 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. 2522A, *Hostile Work Environment Harassment—Essential Factual Elements—Individual Defendant* ~~*(Gov. Code, § 12940(j))*~~.

Relationships other than employer/employee can be substituted in question number 1, as in element 1 in CACI No. 2522.

If specificity is not required, users do not have to itemize all the damages listed in question 7 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~~before judgment.

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VF-2507B. Hostile Work Environment Harassment—Conduct Directed at Others—Individual Defendant (Gov. Code, § 12940(j))

We answer the questions submitted to us as follows:

1. **Was [*name of plaintiff*] [an employee of/a person providing services under a contract with] [*name of defendant*]?**
   ____ Yes ____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [*name of plaintiff*] personally witness harassing conduct that took place in [his/her] immediate work environment?**
   ____ 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 harassment severe or pervasive?**
   ____ 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. **Would a reasonable person in [*name of plaintiff*]'s circumstances have considered the work environment to be hostile or abusive?**
   ____ 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 [*name of plaintiff*] consider the work environment to be hostile or abusive?**
   ____ Yes ____ No

6. **Did [*name of defendant*] participate in the harassing conduct [*or assist or encourage it*]?**
   ____ 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

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form.

7. Was the harassing conduct a substantial factor in causing harm to [*name of plaintiff***]?**
____ Yes ____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. 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: $ _____]

[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

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to the [clerk/bailiff/judge].

Derived from former CACI No. VF-2507 [month] 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. 2522B, *Hostile Work Environment Harassment—Conduct Directed at Others--Essential Factual Elements—Individual Defendant*.

Relationships other than employer/employee can be substituted in question number 1, as in element 1 in CACI No. 2522B.

If specificity is not required, users do not have to itemize all the damages listed in question 8 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 before judgment.

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VF-2507C. Hostile Work Environment Harassment—Widespread Sexual Favoritism--Individual Defendant (Gov. Code, § 12940(j))

We answer the questions submitted to us as follows:

1. **Was [***name of plaintiff***] an employee of [***name of defendant***]?**
   ____ 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 there sexual favoritism in the work environment?**
   ____ 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 sexual favoritism widespread, and also severe or pervasive?**
   ____ 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. **Would a reasonable person in [***name of plaintiff***]'s circumstances have considered the work environment to be hostile or abusive?**
   ____ 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 [***name of plaintiff***] consider the work environment to be hostile or abusive?**
   ____ 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. **Did [***name of defendant***] participate in the sexual favoritism [***or assist or encourage it***]?**
   ____ Yes ____ No

   If your answer to question 6 is yes, then answer question 7. If you answered no, stop

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here, answer no further questions, and have the presiding juror sign and date this form.

7. Was the sexual favoritism a substantial factor in causing harm to [*name of plaintiff***]?**
____ Yes ____ No

If your answer to question 8 is yes, then answer question 9. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. 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: $ _____]

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

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

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

Derived from former CACI No. VF-2507 [month] 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. 2522C, *Hostile Work Environment Harassment—Widespread Sexual Favoritism--Essential Factual Elements—Individual Defendant*.

Relationships other than employer/employee can be substituted in question number 1, as in element 1 in CACI No. 2521C. Depending on the facts of the case, other factual scenarios for employer liability can be substituted in questions 6 and 7 as in element 6 in the instruction.

If specificity is not required, users do not have to itemize all the damages listed in question 8 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 before judgment.

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We answer the questions submitted to us as follows:

1. **Was [***name of defendant***] [an employer/[***other covered entity***]]?**
   ____ Yes ____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Was [***name of plaintiff***] [an employee of [***name of defendant***]/an applicant to [***name of defendant***] for a job/[***other covered relationship to defendant***]]?**
   ____ Yes ____ No

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [***name of defendant***] know that [***name of plaintiff***] had a [physical/mental] [condition/disease/disorder/[***describe health condition***]] that limited [***insert major life activity***]?**
   ____ 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 [***name of plaintiff***] able to perform the essential job duties [with reasonable accommodation for [his/her] condition]?**
   ____ 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 [***name of defendant***] [discharge/refuse to hire/[***other adverse employment action***]] [***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. **Was [***name of plaintiff***]'s [physical/mental] [condition/disease/disorder/[***describe health***]**

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condition]][~~[describe physical disability, mental disability, or medical condition]~~] **a motivating reason for [***name of defendant***]'s decision to [discharge/refuse to hire/[***other adverse employment action***]] [***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. Was [*name of defendant***]'s [decision/conduct] a substantial factor in causing harm to [***name of plaintiff***]?**

____ Yes ____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. 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: $ _____]

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

$ _____]

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

$ _____]

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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].

New September 2003; Revised April 2007, [month] 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. 2540, *Disability Discrimination—Disparate Treatment—Essential Factual Elements.*

Relationships other than employer/employee can be substituted in question number 1, as in element 1 in CACI No. 2540. Depending on the facts of the case, other factual scenarios can be substituted in questions 3 and 6, as in elements 3 and 6 in the instruction.

If specificity is not required, users do not have to itemize all the damages listed in question 8 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.

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.

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3200. Failure to Purchase or Replace Consumer Good After Reasonable Number of Repair Opportunities—Essential Factual Elements (Civ. Code, § 1793.2(d))

[*Name of plaintiff***] claims that [he/she] was harmed by [***name of defendant***]'s failure to purchase or replace [a/an] [***consumer good***] after a reasonable number of repair opportunities~~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/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***]**

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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.]

New September 2003; Revised April 2007, [month] 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, 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, 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 that 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 No. 3202, "*Repair Opportunities" Explained.*

Sources and Authority

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- "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.

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> (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.

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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

1 California UCC Sales and Leases (Cont.Ed.Bar) Warranties, §§ 3.4, 3.8, 3.15, 3.87

2 California UCC Sales and Leases (Cont.Ed.Bar) Prelitigation Remedies, § 17.70; *id.*, Litigation Remedies, § 18.25; *id.*, Leasing of Goods, § 19.38

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) Business Litigation, §§ 53:1, 53:3–53:4, 53:10–53:11, 53:14–53:17, 53:22–53:23, 53:26–53:27

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3201. Failure to Promptly Purchase or Replace New Motor Vehicle After Reasonable Number of Repair Opportunities—Essential Factual Elements (Civ. Code, § 1793.2(d))

[*Name of plaintiff***] claims that [***name of defendant***] ~~breached a warranty~~failed to promptly purchase or replace [a/an] [***new motor vehicle***] after a reasonable number of repair opportunities. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [bought/leased] [a/a~~l~~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.]**

New September 2003; Revised February 2005, December 2005, April 2007, [month 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 proof is necessary, add the following element to this instruction:

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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, 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, 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.

See also CACI No. 3202, "*Repair Opportunities" Explained*, CACI No. 3203, *Reasonable Number of Repair Opportunities—Rebuttable Presumption (Civ. Code, § 1793.22(b))*, and CACI No. 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.

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- 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,

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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.)

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- "[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], original italics.)

- 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

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1 Sales and Leases (Cont.Ed.Bar) Warranties, §§ 7.4, 7.8, 7.15, 7.87; *id.,* Prelitigation Remedies, § 13.68; *id.*, Litigation Remedies, § 14.25, *id.*, Division 10: Leasing of Goods, § 17.31

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) Business Litigation, §§ 53:1, 53:3–53:4, 53:10–53:11, 53:14–53:17, 53:22–53:23, 53:26–53:27

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VF-3500. Fair Market Value Plus Goodwill

We answer the questions submitted to us as follows:

1. What was the fair market value of the property on [*insert date of valuation***]?**
$_____

Answer question 2.

~~**2. Did [*name of property owner*] conduct a business on the property that was taken [or on the property remaining after the taking]?**~~
~~**_____ Yes _____ No**~~

~~**If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.**~~

~~**3. Did [*name of property owner*]'s business lose goodwill as a result of the taking?**~~
~~**_____ 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. Could the loss reasonably have been prevented by a relocation of the business or by taking other action that a reasonably careful person would take to preserve goodwill?**~~
~~**_____ Yes _____ No**~~

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

~~**5. Will compensation for the loss be duplicated in other compensation that is awarded to [*insert name of property owner*]?**~~
~~**_____ 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.**~~

2~~6.~~ What was~~is~~ the value of the loss of goodwill on [*insert date of valuation*]? $_____

Signed: _____
Presiding Juror

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Dated: _____

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

New September 2003; Revised [month] 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. 3501, *"Fair Market Value" Explained,* and CACI No. 3513, *Goodwill*.

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VF-3502. Fair Market Value Plus Loss of Inventory/Personal Property

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We answer the questions submitted to us as follows:

1. What was the fair market value of the property taken on [*insert date of valuation***]?**
$_____

[Answer question 2.

~~**2. Did [*name of property owner*] lose inventory or personal property as a result of the taking?**~~
~~**____ 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 any portion of the inventory or personal property readily replaceable and not unique?**~~
~~**____ Yes ____ No**~~

~~**If your answer to question 3 is yes, then answer question 4. If you answered no, then skip question 4 and answer question 5.**~~

2~~4.~~ What was~~is~~ the retail value on [*insert date of valuation*] of the portion of the lost inventory or personal property that was unique and not readily replaceable?
$_____]

[Answer question 3~~5~~.

3~~5~~. What ~~is~~ was the wholesale value on [*insert date of valuation*] of the portion of the lost inventory or personal property that was readily replaceable and not unique?
$_____]

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].

New September 2003; Revised [month] 2007

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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. 3501, *"Fair Market Value" Explained,* and CACI No. 3507, *Personal Property and Inventory.*

In an eminent domain action, the jury finds only the amount of compensation. (*Emeryville Redevelopment Agency v. Harcros Pigments* (2002) 101 Cal. App. 4th 1083, 1116 [125 Cal.Rptr. 2d 12].) The court should determine whether there is inventory or personal property that is unique and not readily replaceable. The jury should then determine the value of that property.

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3801. Implied Contractual Indemnity

[*Name of indemnitee***] claims that [he/she] [is/was] required to pay [***describe liability, e.g., "a court judgment in favor of plaintiff John Jones~~[name of plaintiff]~~"***] because ~~of~~ [***name of indemnitor***]~~'s~~ [failed~~ure~~ to use reasonable care in performing work under an agreement with [***name of indemnitee***]/[***specify other basis of responsibility***]]. In order for [***name of indemnitee***] to recover from [***name of indemnitor***], [***name of indemnitee***] must prove both of the following:**

1. **That [***name of indemnitor***] [failed to use reasonable care in [performing the work/[***describe work or services***]~~]~~ under an agreement with [***name of indemnitee***]/[***specify other basis of responsibility***]]; and**

2. **That [***name of indemnitor***]'s ~~failure contributed as~~ conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

[[*Name of indemnitor***] claims that [[***name of indemnitee***] [and] [***insert identification of others***]] contributed as [a] substantial factor[s] in causing [***name of plaintiff***]'s harm. To succeed, [***name of indemnitor***] must prove both of the following:**

1. **That [[***name of indemnitee***] [and] [***insert identification of others***]] [was/were] [negligent/[***specify other basis of responsibility***]]; and**

2. **That [[***name of indemnitee***] [and] [***insert identification of others***]] contributed as [a] substantial factor[s] in causing [***name of plaintiff***]'s harm.**

You will be asked to determine the percentages of responsibility of [*name of indemnitor***] [and] [[***name of indemnitee***],~~[name of indemnitor]~~ [, [and] all other persons responsible] for [***name of plaintiff***]'s harm.]**

New September 2003; Revised [month] 2007

Directions for Use

The party identifications in this instruction assume a cross-complaint between indemnitor and indemnitee defendants. In a direct action by the indemnitee against the indemnitor, "*name of plaintiff*" will refer to the person to whom the indemnitee has incurred liability.

Implied contractual indemnity may arise for reasons other than the indemnitor's negligent performance under the contract. If the basis of the claim is other than negligence, specify the conduct involved. (See *Garlock Sealing Technologies, LLC v. NAK Sealing Technologies Corp.* (2007) 148 Cal.App.4th 937, 974 [56 Cal.Rptr.3d 177] [breach of warranty].)~~A special finding that an agreement existed may create a need for instructions, but it is a question of law whether an agreement implies a duty to indemnify.~~

Read the last bracketed portion ~~when~~ if the indemnitor claims he or she was not the sole cause of the

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indemnitee's liability or loss. Select options depending on whether the indemnitor alleges contributory conduct of the indemnitee, of others, or of both. Element 1 will have to be modified if there are different contributing acts alleged against the indemnitee and others; for example, if the indemnitee is alleged to have been negligent and another party is alleged to be strictly liable.

A special finding that an agreement existed may create a need for instructions, but it is a question of law whether an agreement implies a duty to indemnify.

Sources and Authority

- "The right to implied contractual indemnity is predicated upon the indemnitor's breach of contract, 'the rationale ... being that a contract under which the indemnitor undertook to do work or perform services necessarily implied an obligation to do the work involved in a proper manner and to discharge foreseeable damages resulting from improper performance absent any participation by the indemnitee in the wrongful act precluding recovery.' ... 'An action for implied contractual indemnity is not a claim for contribution from a joint tortfeasor; it is not founded upon a tort or upon any duty which the indemnitor owes to the injured third party. It is grounded upon the indemnitor's breach of duty *owing to the indemnitee* to properly perform its contractual duties.'" (*West v. Superior Court* (1994) 27 Cal.App.4th 1625, 1633 [34 Cal.Rptr.2d 409], internal citations omitted, italics in original.)

- "When parties have not entered into an express indemnification agreement specifying that one party will bear all of the liability for a loss for which both parties may be partially responsible, the principles of *American Motorcycle* support an apportionment of the loss under comparative indemnity principles." (*Bay Development, Ltd. v. Superior Court* (1990) 50 Cal.3d 1012, 1029, fn. 10 [269 Cal.Rptr. 720, 791 P.2d 290].)

- "Indemnity may be defined as the obligation resting on one party to make good a loss or damage another party has incurred. This obligation may be expressly provided for by contract, it may be implied from a contract not specifically mentioning indemnity, or it may arise from the equities of particular circumstances. Where ... the parties have expressly contracted with respect to the duty to indemnify, the extent of that duty must be determined from the contract and not by reliance on the independent doctrine of equitable indemnity." (*Rossmoor Sanitation, Inc. v. Pylon, Inc.* (1975) 13 Cal.3d 622, 628 [119 Cal.Rptr. 449, 532 P.2d 97], internal citations omitted.)

- "[U]nder [Code of Civil Procedure] section 877.6, subsection (c), ... an [implied contractual] indemnity claim, like other equitable indemnity claims, may not be pursued against a party who has entered into a good faith settlement." (*Bay Development, Ltd., supra*, 50 Cal.3d at p. 1031.)

- "[C]omparative equitable apportionment of loss under *American Motorcycle*, is applicable to a claim of implied contractual indemnity. 'Contracting parties **share** loss relative to their breach.' [¶]We conclude the trial court erred in denying [the indemnitee's] implied contractual indemnity based on [indemnitee's] failure to prove [the indemnitor's] breach of warranty was the product of [indemnitor's] failure to use reasonable care in performing its contractual duties. [Indemnitee] does not need to prove a negligent breach of contract to be entitled to implied contractual indemnity.(*Garlock Sealing Technologies, supra,* 148 Cal.App.4th at p. 974, original bold and italics, internal citations omitted.)

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Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, § 118

5 Levy et al., California Torts, Ch. 74, *Resolving Multiparty Tort Litigation*~~*Comparative Negligence*~~, § 74.03[6] (Matthew Bender)

32 California Forms of Pleading and Practice, Ch. 362, *Mental Suffering and Emotional Distress* (Matthew Bender)

15 California Points and Authorities, Ch. 153, *Mental Suffering and Emotional Distress* (Matthew Bender)

1 California Civil Practice (Thomson West) Torts, § 4:13

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3929. Subsequent Medical Treatment or Aid

If you decide that [*name of defendant*] is legally responsible for [*name of plaintiff*]'s harm, [he/she/it] is also responsible for any additional harm resulting from the acts of others in providing medical treatment or other aid that [*name of plaintiff*]'s injury reasonably required, even if those acts were negligently performed.

New September 2003; Revised [month] 2007

Directions for Use

A physician is entitled to have the jury allocate fault among other negligent physicians who subsequently treat the plaintiff and is not barred by Proposition 51 from presenting evidence regarding the negligence of those other physicians. (*Marina Emergency Medical Group v. Superior Court* (2000) 84 Cal.App.4th 435 [100 Cal.Rptr.2d 866].)

Sources and Authority

- "It has long been the rule that a tortfeasor responsible for the original accident is also liable for injuries or death occurring during the course of medical treatment to treat injuries suffered in that accident. In *Ash v. Mortensen* (1944) 24 Cal.2d 654 [150 P.2d 876], the Supreme Court stated: 'It is settled that where one who has suffered personal injuries by reason of the tortious act of another exercises due care in securing the services of a doctor and his injuries are aggravated by the negligence of such doctor, the law regards the act of the original wrongdoer as a proximate cause of the damages flowing from the subsequent negligent medical treatment and holds him liable therefor.'" (*Anaya v. Superior Court* (2000) 78 Cal.App.4th 971, 974 [93 Cal.Rptr.2d 228].)

- "Obviously, if the original tortfeasor is liable for injuries or death suffered during the course of the treatment of injuries suffered in the accident, the original tortfeasor is liable for injuries or death suffered during transportation of the victim to a medical facility for treatment of the injuries resulting from the accident." (*Anaya, supra,* 78 Cal.App.4th at p. 975.)

- "While it is true the original tortfeasor is liable for additional harm (even death) resulting from the negligent care and treatment of the original injury by physicians and hospitals, such liability is not limited to negligently caused additional harm or that caused by malpractice." (*Hastie v. Handeland* (1969) 274 Cal.App.2d 599, 604-605 [79 Cal.Rptr. 268], internal citations and footnote omitted.)

- This rule applies to the first doctor who treats a patient who subsequently is treated by other doctors. (*Maxwell v. Powers* (1994) 22 Cal.App.4th 1596, 1607-1608 [28 Cal.Rptr.2d 62].)

- Restatement Second of Torts section 457 states: "If the negligent actor is liable for another's bodily injury, he is also subject to liability for any additional bodily harm resulting from normal efforts of third persons in rendering aid which the other's injury reasonably requires, irrespective of whether such acts are done in a proper or a negligent manner."

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Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1676

California Tort Damages (Cont.Ed.Bar) Bodily Injury, § 1.85

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

6 California Points and Authorities, Ch. 65, *Damages* (Matthew Bender)

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4106~~605~~. Breach of Fiduciary Duty by Attorney—Essential Factual Elements

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[*Name of plaintiff***] claims that [he/she/it] was harmed because [***name of defendant***] breached an attorney's duty [***describe duty, e.g., "not to represent clients with conflicting interests"***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] breached the duty of an attorney [***describe duty***];**

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

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

New September 2003; Revised April 2004; Renumbered from CACI No. 605 [month] 2007

Directions for Use

The existence of a fiduciary relationship is a question of law. Whether an attorney has breached that fiduciary duty is a question of fact. (*David Welch Co. v. Erskine & Tulley* (1988) 203 Cal.App.3d 884, 890 [250 Cal.Rptr. 339].)

Sources and Authority

- "The elements of a cause of action for breach of fiduciary duty are: (1) existence of a fiduciary duty; (2) the breach of that duty; and (3) damage proximately caused by that breach. [Citation.]" (*Mosier v. Southern California Physicians Insurance Exchange* (1998) 63 Cal.App.4th 1022, 1044 [74 Cal.Rptr.2d 550].)

- "'The relation between attorney and client is a fiduciary relation of the very highest character.'" (*Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 189 [98 Cal.Rptr. 837, 491 P.2d 421].)

- Breach of fiduciary duty is a concept that is separate and distinct from traditional professional negligence but which still comprises legal malpractice. (*Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1086 [41 Cal.Rptr.2d 768].)

- "Expert testimony is not required, but is admissible to establish the duty and breach elements of a cause of action for breach of fiduciary duty where the attorney conduct is a matter beyond common knowledge." (*Stanley, supra,* 35 Cal.App.4th at p. 1087, internal citations omitted.)

- "The scope of an attorney's fiduciary duty may be determined as a matter of law based on the Rules of Professional Conduct which, 'together with statutes and general principles relating to other fiduciary relationships, all help define the duty component of the fiduciary duty which an attorney owes to his [or her] client.'" (*Stanley, supra,* 35 Cal.App.4th at p. 1087, quoting *Mirabito v. Liccardo*

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(1992) 4 Cal.App.4th 41, 45 [5 Cal.Rptr.2d 571]; *David Welch Co., supra,* 203 Cal.App.3d at p. 890.)

Secondary Sources

1 Witkin, California Procedure (4th ed. 1996) Attorneys, § 118, pp. 155-157

3 Levy et al., California Torts, Ch. 32, *Liability of Attorneys*, § 32.02 (Matthew Bender)

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

2A California Points and Authorities, Ch. 24A, *Attorneys at Law: Malpractice* (Matthew Bender)

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~~4106~~4120. 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 four years before complaint was filed***] unless [***name of 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.**

New April 2007; Renumbered from CACI No. 4106 [month] 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 No. 454, *Affirmative Defense—Statute of Limitations*, and CACI No. 455, *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 No. 610, *Affirmative Defense—Statute of Limitations—Attorney Malpractice—One-Year Limit*, and CACI No. 611, *Affirmative Defense—Statute of Limitations—Attorney Malpractice—Four-Year Limit*. 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.)

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- "[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, original italics, 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, original italics, 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, §§ 617-619

30 California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions*, § 345.19[4] (Matthew Bender)

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VF-4300. Termination Due to Failure to Pay Rent

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] fail to make rental payments to [***name of plaintiff***] as required by the [lease/rental agreement/sublease]?**
____ Yes ____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [***name of plaintiff***] properly give [***name of defendant***] a three-day written notice to pay the rent or vacate the property?**
____ Yes ____ No

If your answer to question 2 is no, then answer question 3. If you answered yes, skip to question 4.

3. **Did [***name of defendant***] actually receive the notice at least three days before [***date on which action was filed***]?**
____ Yes ____ No

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

4. **Was the amount due stated in the notice, no more than the amount that [***name of defendant***] actually owed?**

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 [***name of defendant***] pay [or attempt to pay] the amount stated in the notice within three days after service or receipt of the notice?**
____ Yes ____ No

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].

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New [Month] Year

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. 4302, *Termination Due to Failure to Pay Rent—Essential Factual Elements*. See also the Directions for Use for that instruction. Questions 2 and 3 incorporate the notice requirements set forth in CACI No. 4303, *Sufficiency and Service of Notice of Termination for Failure to Pay Rent*.

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VF-4301. Termination Due to Failure to Pay Rent—Affirmative Defense--Breach of Implied Warranty of Habitability

---

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] fail to make rental payments to [***name of plaintiff***] as required by the [lease/rental agreement/sublease]?**
   ____ Yes ____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [***name of plaintiff***] maintain the property in a habitable condition during the period for which rent was not paid?**
   ____ Yes ____ No

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [***name of plaintiff***] properly give [***name of defendant***] a three-day written notice to pay the rent or vacate the property?**
   ____ Yes ____ No

   If your answer to question 3 is no, then answer question 4. If you answered yes, skip to question 5.

4. **Did [***name of defendant***] actually receive the notice at least three days before [***date on which action was filed***]?**
   ____ 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 amount due stated in the notice, no more than the amount that [***name of defendant***] actually owed?**

   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. **Did [***name of defendant***] pay [or attempt to pay] the amount stated in the notice within three days after service or receipt of the notice?**
   ____ Yes ____ No

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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].

New [Month] Year

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. 4302, *Termination Due to Failure to Pay Rent—Essential Factual Elements* and CACI No. 4308, Affirmative Defense—Implied Warranty of Habitability. See also the Directions for Use for those instructions. Questions 3 and 4 incorporate the notice requirements set forth in CACI No. 4303, *Sufficiency and Service of Notice of Termination for Failure to Pay Rent*.

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VF-4302. Termination Due to Violation of Terms of Lease/Agreement

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We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] fail to [***insert description of alleged failure to perform***] as required by the [lease/rental agreement/sublease]?**
____ Yes ____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Was [***name of defendant***]'s failure to [***insert description of alleged failure to perform***] a substantial breach of [an] important obligation[s] under the [lease/rental agreement/sublease]?**
____ Yes ____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [***name of plaintiff***] properly give [***name of defendant***] a three-day written notice to [either [***describe action to correct failure to perform***] or] vacate the property?**
____ Yes ____ No

If your answer to question 3 is no, then answer question 4. [If you answered yes, skip to question 5.]

4. **Did [***name of defendant***] actually receive the notice at least three days before [***date on which action was filed***]?**
____ 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 [***name of defendant***] [***describe action to correct failure to perform***] within three days after service or receipt of the notice?]**
____ Yes ____ No

Signed: _____
Presiding Juror

Dated: _____

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

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to the [clerk/bailiff/judge].

New [Month] Year

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. 4304, *Termination Due to Violation of Terms of Lease/Agreement—Essential Factual Elements*. See also the Directions for Use for that instruction. Questions 3 and 4 incorporate the notice requirements set forth in CACI No. 4305, *Sufficiency and Service of Notice of Termination for Violation of Terms of Agreement*.

Include question 5, and the bracketed reference to corrective action in question 3, if the breach is one that is capable of being cured.

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4400. Misappropriation of Trade Secrets—Introduction

[*Name of plaintiff***] claims that [he/she/it] is the [owner/licensee] of [***insert general description of alleged trade secrets***].**

[*Name of plaintiff***] claims that this information is a trade secret and that [***name of defendant***] "misappropriated" the information. Misappropriation means the improper [acquisition/use/ [or] disclosure] of the trade secret.**

[*Name of plaintiff***] also claims that [***name of defendant***]'s misappropriation caused [[him/her/it] harm/ [and] defendant to be unjustly enriched].**

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

[[*Name of defendant***] also claims [***insert affirmative defenses***].]**

New [Month] Year

Directions for Use

This instruction is designed to introduce the jury to the issues involved in a case involving the misappropriation of trade secrets under the California Uniform Trade Secrets Act. (See Civ. Code, § 3426.1 et seq.). It should be read before the instructions on the substantive law.

In the first sentence, provide only a general description of the alleged trade secrets.

Select the appropriate term "owner" or "licensee" to indicate the plaintiff's interest in the alleged trade secrets. No reported California state court decision has addressed whether a licensee has a sufficient interest to assert a claim of trade secret misappropriation. These instructions take no position on the standing issue. The court should make a determination whether the plaintiff has standing if that issue is disputed.

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

To avoid confusion, the jury should be instructed only on the particular theory of misappropriation applicable under the facts of each case. For example, the jury should not be instructed on misappropriation through "use" if the plaintiff does not assert that the defendant improperly used the trade secrets, or on a particular type of "use" if that type of "use" is not asserted and supported by the evidence.

In the third paragraph, select the nature of the recovery sought, either damages for harm to the plaintiff or for the defendant's unjust enrichment, or both.

Include the last paragraph if the defendant asserts any affirmative defenses.

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Sources and Authority

- Civ. Code, § 3426.1 provides:

As used in this title, unless the context requires otherwise:

(a) "Improper means" includes theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means. Reverse engineering or independent derivation alone shall not be considered improper means.

(b) "Misappropriation" means:

(1) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or

(2) Disclosure or use of a trade secret of another without express or implied consent by a person who:

(A) Used improper means to acquire knowledge of the trade secret; or

(B) At the time of disclosure or use, knew or had reason to know that his or her knowledge of the trade secret was:

(i) Derived from or through a person who had utilized improper means to acquire it;

(ii) Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or

(iii) Derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or

(C) Before a material change of his or her position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

(c) "Person" means a natural person, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision or agency, or any other legal or commercial entity.

(d) "Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

(1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and

(2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Secondary Sources

Edelson & Kay, eds., Trade Secret Litigation and Protection in California (State Bar of California 2005), Chs. 1, 2, 6, 12

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4401. Misappropriation of Trade Secrets--Essential Factual Elements

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

1. **That [***name of plaintiff***] [owned/was a licensee of] [***describe subject(s) of trade secret***];**
2. **That the [***describe subject(s) of trade secret***] [was/were] [a] trade secret[s] at the time of the misappropriation;**
3. **That [***name of defendant***] improperly [acquired/used/ [or] disclosed] the trade secret;**
4. **That [[***name of plaintiff***] was harmed/ [or] [***name defendant***] was unjustly enriched]; and**
5. **That [***name of defendant***]'s [acquisition/use/ [or] disclosure] was a substantial factor in causing [[***name of plaintiff***]'s harm/ [or] [***name defendant***] to be unjustly enriched].**

New [Month] Year

Directions for Use

Read also CACI No. 4402, *"Trade Secret" Defined,* to give the jury guidance on element 1.

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

In element 2, select the appropriate term "owned" or "was a licensee of" to indicate the plaintiff's interest in the alleged trade secrets. No reported California state court decision has addressed whether a licensee has a sufficient interest to assert a claim of trade secret misappropriation. These instructions take no position on the standing issue. The court should make a determination whether the plaintiff has standing if that issue is disputed.

Civil Code section 3426.1(b)(1) defines "misappropriation" as improper "[a]cquisition" of a trade secret, and subsection (b)(2), as improper "[d]isclosure or use" of a trade secret. In some cases, the mere acquisition of a trade secret, as distinguished from a related disclosure or use, will not result in damages and will only be relevant to injunctive relief. Because generally the jury should only be instructed on matters relevant to damage claims, do not select "acquired" in element 3 or "acquisition" in element 4 unless there is evidence that the acquisition resulted in damages, other than damages from related disclosure or use.

To avoid confusion, the jury should be instructed only on the particular theory of misappropriation applicable under the facts of each case. For example, the jury should not be instructed on misappropriation through "use" if the plaintiff does not assert that the defendant improperly used the trade secrets, or on a particular type of "use" if that type of "use" is not asserted and supported by the evidence.

Sources and Authority

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- "A trade secret is misappropriated if a person (1) acquires a trade secret knowing or having reason to know that the trade secret has been acquired by 'improper means,' (2) discloses or uses a trade secret the person has acquired by 'improper means' or in violation of a nondisclosure obligation, (3) discloses or uses a trade secret the person knew or should have known was derived from another who had acquired it by improper means or who had a nondisclosure obligation or (4) discloses or uses a trade secret after learning that it is a trade secret but before a material change of position." (*Ajaxo Inc. v. E*Trade Group Inc.* (2005) 135 Cal.App.4th 21, 66 [37 Cal.Rptr.3d 221].)

- "We find the trade secret situation more analogous to employment discrimination cases. In those cases, as we have seen, information of the employer's intent is in the hands of the employer, but discovery affords the employee the means to present sufficient evidence to raise an inference of discriminatory intent. The burden of proof remains with the plaintiff, but the defendant must then bear the burden of producing evidence once [***27] a prima facie case for the plaintiff is made. [¶] We conclude that the trial court correctly refused the proposed instruction that would have shifted the burden of proof." (*Sargent Fletcher, Inc. v. Able Corp.* (2003) 110 Cal.App.4th 1658, 1674 [3 Cal.Rptr.3d 279], internal citation omitted.)

Secondary Sources

Edelson & Kay, eds., Trade Secret Litigation and Protection in California (State Bar of California 2005), Chs. 1, 2, 6, 10, 11, 12

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4402. "Trade Secret" Defined

To prove that the [*describe subject(s) of trade secret***] [was/were] [a] trade secret[s], [***name of plaintiff***] must prove all of the following:**

1. **That the [***describe subject(s) of trade secret***] [was/were] secret;**

2. **That the [***describe subject(s) of trade secret***] [was/were] actually or potentially valuable, giving [***name of plaintiff***] a substantial business advantage over [his/her/its] competitors, because [it was/they were] secret; and**

3. **That [***name of plaintiff***] made reasonable efforts to keep the [***describe subject(s) of trade secret***] secret.**

New [Month] Year

Directions for Use

Give also CACI No. 4403, *Secrecy Requirement,* and CACI No. 4404, *Reasonable Efforts to Protect, Secrecy*, if more explanation of element 3 is needed.

Sources and Authority

- Civil Code section 3426.1(d) provides:

  (d) "Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

  (1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and

  (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

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

- "[T]he test for a trade secret is whether the matter sought to be protected is information (1) that is valuable because it is unknown to others and (2) that the owner has attempted to keep secret. … [I}n order to qualify as a trade secret, the information 'must be secret, and must not be of public

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knowledge or of a general knowledge in the trade or business.' " (*DVD Copy Control Assn., Inc. v. Bunner* (2004) 116 Cal.App.4th 241, 251 [10 Cal.Rptr.3d 1085], internal citations omitted.)

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

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

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

Secondary Sources

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

1 Milgrim on Trade Secrets (Matthew Bender) Ch. 1

Edelson & Kay, eds., Trade Secret Litigation and Protection in California (State Bar of California 2005) Ch. 1

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4403. Secrecy Requirement

The secrecy required to prove that something is a trade secret does not have to be absolute in the sense that no one else in the world possesses the information. It may be disclosed to employees involved in [*name of plaintiff*]'s use of the trade secret, or to nonemployees if they are obligated to keep the information secret. However, it must not have been generally known to the public or to people who could obtain value from knowing it.

New [Month] Year

Directions for Use

Read this instruction with CACI No. 4402, *"Trade Secret" Defined,* to give the jury additional guidance on the secrecy requirement of element 3 of that instruction.

Sources and Authority

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

- "[T]he test for a trade secret is whether the matter sought to be protected is information (1) that is valuable because it is unknown to others and (2) that the owner has attempted to keep secret. … [I}n order to qualify as a trade secret, the information 'must be secret, and must not be of public knowledge or of a general knowledge in the trade or business.' " (*DVD Copy Control Assn., Inc. v. Bunner* (2004) 116 Cal.App.4th 241, 251 [10 Cal.Rptr.3d 1085], internal citations omitted.)

- "The secrecy requirement is generally treated as a relative concept and requires a fact-intensive analysis. Widespread, anonymous publication of the information over the Internet may destroy its status as a trade secret. The concern is whether the information has retained its value to the creator in spite of the publication." (*DVD Copy Control Assn., Inc., supra,* 116 Cal.App.4th at p. 251, internal citations omitted.)

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

- " '[A] trade secret . . . has an intrinsic value which is based upon, or at least preserved by, being safeguarded from disclosure.' Public disclosure, that is the absence of secrecy, is fatal to the existence of a trade secret. 'If an individual discloses his trade secret to others who are under no obligation to protect the confidentiality of the information, or otherwise publicly discloses the secret, his property right is extinguished.' A person or entity claiming a trade secret is also

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required to make 'efforts that are reasonable under the circumstances to maintain its secrecy.' " (*In re Providian Credit Card Cases* (2002) 96 Cal.App.4th 292, 304 [116 Cal.Rptr. 2d 833], internal citations omitted.)

- " '[R]easonable efforts to maintain secrecy have been held to include advising employees of the existence of a trade secret, limiting access to a trade secret on 'need to know basis,' and controlling plant access.' " (*Courtesy Temporary Service, Inc. v. Camacho* (1990) 222 Cal.App.3d 1278, 1288 [272 Cal.Rptr. 352].)

Secondary Sources

Trade Secrets Practice in California (Cont.Ed.Bar 2d ed.) §§ 4.2-4.10

1 Milgrim on Trade Secrets (Matthew Bender) Ch. 1

Edelson & Kay, eds., Trade Secret Litigation and Protection in California (State Bar of California 2005), §§ 1.03(3), (4)

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4404. Reasonable Efforts to Protect Secrecy

To establish that the [*describe subject(s) of trade secret***] [is/are] [a] trade secret[s], [***name of plaintiff***] must prove that [he/she/it] made reasonable efforts under the circumstances to maintain its secrecy. Reasonable efforts are the efforts that would be made by a reasonable [person/business] in the same situation and having the same knowledge and resources as [***name of plaintiff***], exercising due care to protect important information of the same kind. [This requirement applies separately to each item that [***name of plaintiff***] claims to be a trade secret.]**

In determining whether or not [*name of plaintiff***] made reasonable efforts to maintain secrecy, you should consider all of the facts and circumstances. Among the factors you may consider are the following:**

[a. Whether documents or computer files containing the information were marked with confidentiality warnings;]

[b. Whether [*name of plaintiff***] instructed its employees to treat the information as confidential information;]**

[c. Whether [*name of plaintiff***] restricted access to the information to persons who had a business reason to know the information;]**

[d. Whether [*name of plaintiff***] kept the information in a restricted or secured area;]**

[e. Whether [*name of plaintiff***] required employees or others with access to the information to sign confidentiality or nondisclosure agreements;]**

[f. Whether [*name of plaintiff***] took any action to protect the specific information, or whether it relied on general measures taken to protect its business information or assets;]**

[g. The extent to which any general measures taken by [*name of plaintiff***] would prevent the unauthorized disclosure of the information;]**

[h. Whether there were other reasonable measures available to [*name of plaintiff***] that [he/she/it] did not take;]**

[i. *Specify other factor(s).***]**

The presence or absence of any one or more of these factors is not necessarily determinative.

New [Month] Year

Directions for Use

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Give this instruction with CACI No. 4302, "*Trade Secret" Defined*, to guide the jury with regard to element 4 of that instruction, that the plaintiff made reasonable efforts to keep the information secret. Read only the factors supported by the evidence in the case. Use factor j to present additional factors.

Sources and Authority

- "[R]easonable efforts to maintain secrecy have been held to include advising employees of the existence of a trade secret, limiting access to a trade secret on 'need to know basis,' and controlling plant access. On the other hand, public disclosure of information through display, trade journal publications, advertising, or other carelessness can preclude protection." (Legis. Comm. Comment (Senate) to Civ. Code, 3426.1, 1984 Addition.)

- "A person or entity claiming a trade secret is also required to make 'efforts that are reasonable under the circumstances to maintain its secrecy.' A leading treatise has collected the cases of successful and unsuccessful claims of secrecy protection; among the factors repeatedly noted are restricting access and physical segregation of the information, confidentiality agreements with employees, and marking documents with warnings or reminders of confidentiality." (*In re Providian Credit Card Cases* (2002) 96 Cal.App.4th 292, 304 [116 Cal.Rptr.2d 833], referring to Trade Secrets Practice in California (Cont.Ed.Bar 2d ed.) §§ 4.9-4.10.)

- "In addition to possessing actual or potential economic value, the other part of the definition of a trade secret is that the information must have been protected by 'efforts that are reasonable under the circumstances to maintain its secrecy.' [W]hether a party claiming a trade secret undertook reasonable efforts to maintain secrecy is a question of fact, and it may be implicit in a determination that the information does not qualify as a trade secret, also a question of fact." (*In re Providian Credit Card Cases, supra,* 96 Cal.App.4th at p. 306, internal citations omitted.)

Secondary Sources

Trade Secrets Practice in California (Cont.Ed.Bar 2d ed.) §§ 4.9-4.10

1 Milgrim on Trade Secrets (Matthew Bender) Ch. 1

Edelson & Kay, eds., Trade Secret Litigation and Protection in California (State Bar of California 2005), §§ 1.03 (4)

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4405. Misappropriation by Acquisition

[*Name of defendant***] misappropriated [***name of plaintiff***]'s trade secret by acquisition if [***name of defendant***] knew or had reason to know that [he/she/it/[***name of third party***]] used improper means to acquire it.]**

New [Month] Year

Directions for Use

Read this instruction with CACI No. 4401*, Misappropriation of Trade Secrets--Essential Factual Elements,* if the plaintiff claims that the defendant's acquisition of the information alleged to be a trade secret is a misappropriation. Give also CACI No. 4408, *Improper and Proper Means of Acquiring Trade Secret*.

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

Sources and Authority

- Civil Code section 3426.1(b)(1) provides:
  (b) "Misappropriation" means:

  > (1) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means;

- "Defendants … obtained these secrets improperly. Their tortious acts resulted from a breach of confidence by Van Den Berg in copying or stealing plans, designs and other documents related to [plaintiff]'s products which defendants themselves wanted to produce in competition with [plaintiff]. The protection which is extended to trade secrets fundamentally rests upon the theory that they are improperly acquired by a defendant, usually through theft or a breach of confidence." (*Vacco Indus. v. Van Den Berg* (1992) 5 Cal.App.4th 34, 50 [6 Cal.Rptr.2d 602].)

- "Under the plain terms of the Uniform Trade Secrets Act, defendants may be personally liable if: they used, through the corporation, [plaintiff]'s trade secrets; at the time of the use of the confidential information they knew or had reason to know that knowledge of the trade secrets was derived from or through a person who had improperly acquired the knowledge, or the secrets were obtained by a person who owed a duty to plaintiffs to maintain the secrecy. (*Pmc, Inc. v. Kadisha* (2000) 78 Cal.App.4th 1368, 1383 [93 Cal.Rptr. 2d 663].)

- Other means that are not specifically identified in Civil Code section 3624.1(a) may be improper

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means. (See, e.g., *S.O.S., Inc. v. Payday, Inc.* (9th Cir. 1989) 886 F.2d 1081, 1090 [question of fact whether licensee acquired information in violation of license agreement].)

Secondary Sources

Edelson & Kay, eds., Trade Secret Litigation and Protection in California (State Bar of California 2005) Chs. 2, 6, 12

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4406. Misappropriation by Disclosure

[*Name of defendant***] misappropriated [***name of plaintiff***]'s trade secret by disclosure if [***name of defendant***]**

1. **Disclosed it without [***name of plaintiff***]'s consent, and**

2. **[did any of the following:]**

   [*insert one or more of the following:***]**

   [Acquired knowledge of the trade secret by improper means[./; **or]**

   [At the time of disclosure, knew or had reason to know that [his/her/its] knowledge of [*name of plaintiff***]'s trade secret came from or through [***name of third party***], and that [***name of third party***] had previously acquired the trade secret by improper means[.**/; **or]**

   [At the time of disclosure, knew or had reason to know that [his/her/its] knowledge of [*name of plaintiff***]'s trade secret was acquired [***insert circumstances giving rise to duty to maintain secrecy***], which created a duty to keep the information secret[.**/; **or]**

   [At the time of disclosure, knew or had reason to know that [his/her/its] knowledge of [*name of plaintiff***]'s trade secret came from or through [***name of third party***], and that [***name of third party***] had a duty to [***name of plaintiff***] to keep the information secret[.**/; **or]**

   [Before a material change of [his/her/its] position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.]

New [Month] Year

Directions for Use

Read this instruction with CACI No. 4401*, Misappropriation of Trade Secrets--Essential Factual Elements,* if the plaintiff claims that the defendant's disclosure of the information alleged to be a trade secret is a misappropriation.

If consent is at issue, CACI No. 1302, *Consent Explained,* and CACI No. 1303, *Invalid Consent,* may also be given.

In element 2, select the applicable statutory act(s) alleged to constitute misappropriation by disclosure. (See Civ. Code, § 3624.1(b)(2).) If only one act is selected, omit the words "did any of the following;."

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If either of the first two acts constituting misappropriation by disclosure is alleged, give also CACI No. 4408, *Improper and Proper Means of Acquiring Trade Secret*.

Each act of misappropriation based on improper disclosure requires that the defendant have "knowledge of the trade secret." (See Civ. Code, § 3426.1(b)(2).). No reported California state court decision has interpreted the meaning of "knowledge of the trade secret."

Sources and Authority

- Civil Code section 3426.1(b)(2) provides:

  (b) "Misappropriation" means:

  (2) Disclosure or use of a trade secret of another without express or implied consent by a person who:

  (A) Used improper means to acquire knowledge of the trade secret; or

  (B) At the time of disclosure or use, knew or had reason to know that his or her knowledge of the trade secret was:

  (i) Derived from or through a person who had utilized improper means to acquire it;

  (ii) Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or

  (iii) Derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or

  (C) Before a material change of his or her position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

- Civil Code section 19 provides: "Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact."

- "The fact that [defendant]'s postings were not of the 'entire secret,' and included only portions of courses, does not mean that [defendant]'s disclosures are not misappropriations. While previous partial disclosures arguably made public only those parts disclosed, [defendant]'s partial disclosures of non-public portions of the secrets may themselves be actionable because they constitute 'disclosure ... without ... consent by a person who ... knew or had reason to know that his ... knowledge of the trade secret was ... [either] derived from or through a person who had utilized improper means to acquire it [or] acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use.' " (*Religious Tech. Ctr. v. Netcom On-Line Commun. Servs.* (N.D.Cal. 1995) 923 F. Supp. 1231, 1257 fn. 31.)

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- "Under the UTSA, simple disclosure or use may suffice to create liability. It is no longer necessary, if it ever was, to prove that the purpose to which the acquired information is put is outweighed by the interests of the trade secret holder or that use of a trade secret cannot be prohibited if it is infeasible to do so." (*Morlife, Inc. v. Perry* (1997) 56 Cal. App. 4th 1514, 1527 [66 Cal.Rptr. 2d 731].)

- "[N]othing in the UTSA requires that the defendant gain any advantage from the disclosure; it is sufficient to show 'use' by disclosure of a trade secret with actual or constructive knowledge that the secret was acquired under circumstances giving rise to a duty to maintain its secrecy." (*Religious Tech. Ctr., supra,* 923 F.Supp. p. 1257 fn. 31.)

- "When a competitor hires a former employee of plaintiff who is likely to disclose trade secrets, '[i]t is a question of fact whether the competitor had constructive notice of the plaintiff's right in the secret.' " (*Ralph Andrews Productions, Inc. v. Paramount Pictures Corp.* (1990) 222 Cal.App.3d 676, 682-683 [271 Cal.Rptr. 797], internal citation omitted.)

Secondary Sources

Edelson & Kay, eds., Trade Secret Litigation and Protection in California (State Bar of California 2005) Chs. 2, 6, 12

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4407. Misappropriation by Use

[*Name of defendant***] misappropriated [***name of plaintiff***]'s trade secret by use if [***name of defendant***]**

1. **Used it without [***name of plaintiff***]'s consent, and**

2. **[did any of the following:]**

   [*insert one or more of the following:***]**

   [Acquired knowledge of the trade secret by improper means[./; **or]**

   [At the time of use, knew or had reason to know that [his/her/its] knowledge of [*name of plaintiff***]'s trade secret came from or through [***name of third party***], and that [***name of third party***] had previously acquired the trade secret by improper means[.**/; **or]**

   [At the time of use, knew or had reason to know that [his/her/its] knowledge of [*name of plaintiff***]'s trade secret was acquired under circumstances creating a legal obligation to limit use of the information[.**/; **or]**

   [At the time of use, knew or had reason to know that [his/her/its] knowledge of [*name of plaintiff***]'s trade secret came from or through [***name of third party***], and that [***name of third party***] had a duty to [***name of plaintiff***] to limit use of the information[.**/; **or]**

   [Before a material change of [his/her/its] position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.]

New [Month] Year

Directions for Use

Read this instruction with CACI No. 4401*, Misappropriation of Trade Secrets--Essential Factual Elements,* if the plaintiff claims that the defendant's use of the information alleged to be a trade secret is a misappropriation.

If consent is at issue, CACI No. 1302, *Consent Explained,* and CACI No. 1303, *Invalid Consent,* may also be given.

In element 2, select the applicable statutory act(s) alleged to constitute misappropriation by use. (See Civ. Code, § 3624.1(b)(2).) If only one act is selected, omit the words "did any of the following;."

If either of the first two acts constituting misappropriation by disclosure is alleged, give also CACI No. 4408, *Improper and Proper Means of Acquiring Trade Secret*.

Each act of misappropriation based on improper use requires that the defendant have "knowledge of the

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trade secret." (See Civ. Code, § 3426.1(b)(2).). No reported California state court decision has interpreted the meaning of "knowledge of the trade secret."

Sources and Authority

- Civil Code section 3426.1(b)(2) provides:
(b) "Misappropriation" means:

(2) Disclosure or use of a trade secret of another without express or implied consent by a person who:

(A) Used improper means to acquire knowledge of the trade secret; or

(B) At the time of disclosure or use, knew or had reason to know that his or her knowledge of the trade secret was:

(i) Derived from or through a person who had utilized improper means to acquire it;

(ii) Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or

(iii) Derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or

(C) Before a material change of his or her position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

- Civil Code section 19 provides: "Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact."

- "Under the plain terms of the Uniform Trade Secrets Act, defendants may be personally liable if: they used, through the corporation, [plaintiff]'s trade secrets; at the time of the use of the confidential information they knew or had reason to know that knowledge of the trade secrets was derived from or through a person who had improperly acquired the knowledge, or the secrets were obtained by a person who owed a duty to plaintiffs to maintain the secrecy. Employing the confidential information in manufacturing, production, research or development, marketing goods that embody the trade secret, or soliciting customers through the use of trade secret information, all constitute use. Use of a trade secret without knowledge it was acquired by improper means does not subject a person to liability unless the person receives notice that its use of the information is wrongful." (*Pmc, Inc. v. Kadisha* (2000) 78 Cal.App.4th 1368, 1383 [93 Cal.Rptr. 2d 663], internal citations omitted.)

- "Under the UTSA, simple disclosure or use may suffice to create liability. It is no longer necessary, if it ever was, to prove that the purpose to which the acquired information is put is outweighed by the interests of the trade secret holder or that use of a trade secret cannot be prohibited if it is infeasible to do so." (*Morlife, Inc. v. Perry* (1997) 56 Cal. App. 4th 1514, 1527 [66 Cal.Rptr. 2d 731].)

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- "When a competitor hires a former employee of plaintiff who is likely to disclose trade secrets, '[i]t is a question of fact whether the competitor had constructive notice of the plaintiff's right in the secret.' " (*Ralph Andrews Productions, Inc. v. Paramount Pictures Corp.* (1990) 222 Cal.App.3d 676, 682-683 [271 Cal.Rptr. 797], internal citation omitted.)

- "Our Supreme Court has previously distinguished solicitation--which is actionable--from announcing a job change--which is not: 'Merely informing customers of one's former employer of a change of employment, without more, is not solicitation. Neither does the willingness to discuss business upon invitation of another party constitute solicitation on the part of the invitee. Equity will not enjoin a former employee from receiving business from the customers of his former employer, even though the circumstances be such that he should be prohibited from soliciting such business.' " (*Hilb v. Robb* (1995) 33 Cal.App.4th 1812, 1821 [39 Cal.Rptr. 2d 887], internal citation omitted.); but see *Morlife, Inc., supra,* 56 Cal.App.4th at p. 1527 fn. 8 ["we need not decide whether the 'professional announcement' exception … has continued vitality in light of the expansive definition of misappropriation under the UTSA"].)

- "[T]o prove misappropriation of a trade secret under the UTSA, a plaintiff must establish (among other things) that the defendant improperly 'used' the plaintiff's trade secret. Thus, under Evidence Code sections 500 and 520, the plaintiff bears the burden of proof on that issue, both at the outset and during trial." (*Sargent Fletcher, Inc. v. Able Corp.* (2003) 110 Cal.App.4th 1658, 1668 [3 Cal.Rptr. 3d 279], internal citation omitted.)

- "[I]nformation relative to customers (e.g., their identities, locations, and individual preferences), obtained by a former employee in his contacts with them during his employment, may amount to 'trade secrets' which will warrant his being enjoined from exploitation or disclosure after leaving the employment. [¶] It is equally clear, however, that the proscriptions inhibiting the ex-employee reach only his use of such information, not to his mere possession or knowledge of it." (*Golden State Linen Service, Inc. v. Vidalin* (1977) 69 Cal.App.3d 1, 7-8 [137 Cal.Rptr. 807], internal citations omitted.)

- "Since these 'Marks' likely encompass any trade secrets, it is reasonable to conclude that one party's use of the trade secrets that affects the other party's rights in the mark would constitute the misappropriation of the trade secrets 'of another.' " (*Morton v. Rank Am., Inc.* (C.D.Cal. 1993), 812 F. Supp. 1062, 1074 [one can misappropriate trade secret jointly owned with another].)

Secondary Sources

Edelson & Kay, eds., Trade Secret Litigation and Protection in California (State Bar of California 2005) Chs. 2, 6, 12

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4408. Improper and Proper Means of Acquiring Trade Secret

Improper means of acquiring a trade secret or knowledge of a trade secret include, but are not limited to, [theft/bribery/misrepresentation/breach or inducing a breach of a duty to maintain secrecy/ [or] wiretapping, electronic eavesdropping, [or] [*insert other means of espionage***]].**

[Proper means of acquiring a trade secret or knowledge of the trade secret include, but are not limited to:

[1. Independent efforts to invent or discover the information;]

[2. Reverse engineering; that is, examining or testing a product to determine how it works, by a person who has a right to possess the product;]

[3. Obtaining the information as a result of a license agreement with the owner of the information;]

[4. Observing the information in public use or on public display;] [or]

[5. Obtaining the information from published literature, such as trade journals, reference books, the internet, or other publicly-available sources.]]

New [Month] Year

Directions for Use

In the first paragraph, include only those statutory examples of "improper means" supported by the evidence. (See Civ. Code, § 3426.1(a).) The option for "wiretapping, eavesdropping, [or] [*insert other means of espionage*]" expresses the statutory term "espionage."

Include the optional last paragraph on proper means if any of those methods of obtaining the information are supported by the evidence. Omit any methods that are not at issue.

Sources and Authority

- Civil Code section 3426.1(a) provides that " 'Improper means' includes theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means. Reverse engineering or independent derivation alone shall not be considered improper means."

- "The Restatement of Torts, Section 757, Comment (f), notes: 'A complete catalogue of improper means is not possible,' but Section 1(1) includes a partial listing. Proper means include: 1. Discovery by independent invention; 2. Discovery by "reverse engineering," that is, by starting with the known product and working backward to find the method by which it was developed. The acquisition of the known product must of course, also be by a fair and honest means, such as purchase of the item on the open market for reverse engineering to be lawful; 3. Discovery under a license from the owner of the trade secret; 4. Observation of the item in public use or on public

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display; 5. Obtaining the trade secret from published literature. . . . [T]he assertion that a matter is readily ascertainable by proper means remains available as a defense to a claim of misappropriation. Information is readily ascertainable if it is available in trade journals, reference books, or published materials." (Civ. Code, § 3426.1, Legis. Comm. Comment (Senate), 1984 Addition.)

- Penal Code section 630 provides in part:

> The Legislature hereby declares that advances in science and technology have led to the development of new devices and techniques for the purpose of eavesdropping upon private communications and that the invasion of privacy resulting from the continual and increasing use of such devices and techniques has created a serious threat to the free exercise of personal liberties and cannot be tolerated in a free and civilized society.
>
> The Legislature by this chapter intends to protect the right of privacy of the people of this state.

Secondary Sources

Edelson & Kay, eds., Trade Secret Litigation and Protection in California (State Bar of California 2005) § 2.01(D).

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4409. Remedies for Misappropriation of Trade Secret

If [*name of plaintiff*] proves that [*name of defendant*] misappropriated [his/her/its] trade secret, then [*name of plaintiff*] is entitled to recover damages if the misappropriation caused [[*name of plaintiff*] to suffer an actual loss/ [or] [*name of defendant*] to be unjustly enriched].

[If [*name of defendant*]'s misappropriation did not cause [[*name of plaintiff*] to suffer an actual loss/ [or] [*name of defendant*] to be unjustly enriched], [*name of plaintiff*] may still be entitled to a reasonable royalty for no longer than the period of time the use could have been prohibited. However, I will calculate the amount of any royalty.]

New [Month] Year

Directions for Use

Give this instruction with CACI No. 4401, *Misappropriation of Trade Secrets--Essential Factual Elements,* in all cases.

Select the nature of the recovery sought, either for the plaintiff's actual loss or for the defendant's unjust enrichment, or both. If unjust enrichment is alleged, give CACI No. 4410, *Unjust Enrichment*.

If neither actual loss nor unjust enrichment is provable, Civil Code section 3426.3(b) provides for a third, alternate remedy, a reasonable royalty for no longer than the period of time the use could have been prohibited. Both the statute and case law indicate that the question of a reasonable royalty should not be presented to the jury. (See Civ. Code, § 3426.3(b) [*the court* may order the payment of a reasonable royalty]; *Unilogic, Inc. v. Burroughs Corp.* (1992) 10 Cal.App.4th 612, 628 [12 Cal.Rptr. 2d 741]; see also Civ. Code, § 3426.2(b) [court may issue an injunction that conditions future of a trade secret on payment of a reasonable royalty].) However, no reported California state court case has directly held that "reasonable royalty" issues should not be presented to the jury. (But see *Unilogic, Inc. v. Burroughs Corp.* (1992) 10 Cal. App. 4th 612, 627 [12 Cal.Rptr. 2d 741].) Include the optional second paragraph if the court wants to advise the jury that even if it finds that the plaintiff suffered no actual loss and that the defendant was not unjustly enriched, the plaintiff may still be entitled to some recovery.

If the plaintiff's claim of actual injury or loss is based on lost profits, CACI No. 3903N, *Lost Profits (Economic Damage)*, may also be given.

For simplicity, this instruction uses the term "damages" to refer to both actual loss and unjust enrichment, even though, strictly speaking, unjust enrichment may be considered a form of restitution rather than damages.

Sources and Authority

- Civ. Code, § 3426.3 provides:

  (a) A complainant may recover damages for the actual loss caused by misappropriation. A complainant also may recover for the unjust enrichment caused by misappropriation that is

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not taken into account in computing damages for actual loss.

(b) If neither damages nor unjust enrichment caused by misappropriation are provable, the court may order payment of a reasonable royalty for no longer than the period of time the use could have been prohibited.

(c) If willful and malicious misappropriation exists, the court may award exemplary damages in an amount not exceeding twice any award made under subdivision (a) or (b).

- "Under subdivision (a), a complainant may recover damages for the actual loss caused by misappropriation, as well as for any unjust enrichment not taken into account in computing actual loss damages. Subdivision (b) provides for an alternative remedy of the payment of royalties from future profits where 'neither damages nor unjust enrichment caused by misappropriation [is] provable.' " (*Ajaxo Inc., supra,* 135 Cal. App. 4th at p. 61.)

- "[B]ased on the plain language of the statute, the Court -- not the jury -- determines if and in what amount a royalty should be awarded. See Cal. Civ. Code section 3416.3(b) ('the Court may order payment of a reasonable royalty')." (*FAS Techs. v. Dainippon Screen Mfg.* (2001) 2001 U.S. Dist. LEXIS 15444, 9-10.)

- "Nor was it necessary to submit the liability issue to the jury in order to allow the trial court thereafter to determine a reasonable royalty or to impose an injunction. Just as [cross complainant] presented no evidence of the degree of [cross defendant]'s enrichment, [cross complainant] likewise presented no evidence that would allow the court to determine what royalty, if any, would be reasonable under the circumstances. (*Unilogic, Inc. supra,* 10 Cal.App.4th at p. 628.)

- "[T]he imposition of a reasonable royalty is reserved for those instances where the court finds that neither actual damages to the holder of the trade secret nor unjust enrichment to the user are provable." (*Morlife, Inc. v. Perry* (1997) 56 Cal.App.4th 1514, 1529 [66 Cal.Rptr. 2d 731].)

- "California law is clear, however. [Plaintiff] is entitled to a reasonable royalty only if neither actual damages nor unjust enrichment are provable. ... California law differs on this point from both the UTSA and Federal patent law, neither of which require actual damages and unjust enrichment to be unprovable before a reasonable royalty may be imposed." (*Cacique, Inc. v. Robert Reiser & Co*. (9th Cir. 1999) 169 F.3d 619, 623.)

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Edelson & Kay, eds., Trade Secret Litigation and Protection in California (State Bar of California 2005) Ch. 11

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4410. Unjust Enrichment

[*Name of defendant***] was unjustly enriched if [his/her/its] misappropriation of [***name of plaintiff***]'s trade secret caused [***name of defendant***] to receive a benefit that [he/she/it] otherwise would not have achieved.**

To decide the amount of any unjust enrichment, first determine the value of [*name of defendant***]'s benefit that would not have been achieved except for [his/her/its] misappropriation. Then subtract from that amount [***name of defendant***]'s reasonable expenses[, including the value of the [***specify categories of expenses in evidence, such as labor, materials, rents, interest on invested capital***]]. [In calculating the amount of any unjust enrichment, do not take into account any amount that you included in determining any amount of damages for [***name of plaintiff***]'s actual loss.]**

New [Month] Year

Directions for Use

Give this instruction with CACI No. 4409, *Remedies for Misappropriation of Trade Secrets*, if unjust enrichment is alleged and supported by the evidence. Specify the categories of expenses to be allowed to the defendant if it would be helpful to the jury. Include the last sentence if both actual loss and unjust enrichment are alleged.

Sources and Authority

- Civ. Code, § 3426.3 provides:

  (a) A complainant may recover damages for the actual loss caused by misappropriation. A complainant also may recover for the unjust enrichment caused by misappropriation that is not taken into account in computing damages for actual loss.

  (b) If neither damages nor unjust enrichment caused by misappropriation are provable, the court may order payment of a reasonable royalty for no longer than the period of time the use could have been prohibited.

  (c) If willful and malicious misappropriation exists, the court may award exemplary damages in an amount not exceeding twice any award made under subdivision (a) or (b).

- "In general, '[a] person who has been unjustly enriched at the expense of another is required to make restitution to the other.' (Rest., Restitution, § 1.) 'Ordinarily the benefit to the one and the loss to the other are co-extensive, and the result ... is to compel the one to surrender the benefit which he has received and thereby to make restitution to the other for the loss which he has suffered.' [¶] 'In other situations, a benefit has been received by the defendant but the plaintiff has not suffered a corresponding loss or, in some cases, any loss, but nevertheless the enrichment of the defendant would be unjust. In such cases, the defendant may be under a duty to give to the plaintiff the amount by which he has been enriched.' " (*Unilogic, Inc. v. Burroughs Corp.* (1992) 10 Cal. App. 4th 612, 627 [12 Cal.Rptr. 2d 741].)

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- "A person is enriched if he has received a benefit (see Comment b). A person is unjustly enriched if the retention of the benefit would be unjust (see Comment c)." (Restatement (First) of Restitution § 1, cmt. a.)

- "What constitutes a benefit. A person confers a benefit upon another if he gives to the other possession of or some other interest in money, land, chattels, or choses in action, performs services beneficial to or at the request of the other, satisfies a debt or a duty of the other, or in any way adds to the other's security or advantage. He confers a benefit not only where he adds to the property of another, but also where he saves the other from expense or loss. The word 'benefit,' therefore, denotes any form of advantage. The advantage for which a person ordinarily must pay is pecuniary advantage; it is not, however, necessarily so limited, as where a physician attends an insensible person who is saved subsequent pain or who receives thereby a greater chance of living." (Restatement (First) of Restitution § 1, cmt. b.)

- "Unjust retention of benefit. Even where a person has received a benefit from another, he is liable to pay therefor only if the circumstances of its receipt or retention are such that, as between the two persons, it is unjust for him to retain it. The mere fact that a person benefits another is not of itself sufficient to require the other to make restitution therefor. Thus, one who improves his own land ordinarily benefits his neighbors to some extent, and one who makes a gift or voluntarily pays money which he knows he does not owe confers a benefit; in neither case is he entitled to restitution. The Restatement of this Subject states the rules by which it is determined whether or not it is considered to be just to require restitution." (Restatement (First) of Restitution § 1, cmt. c.)

Secondary Sources

Edelson & Kay, eds., Trade Secret Litigation and Protection in California (State Bar of California 2005) § 11.03

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4411. Punitive Damages for Willful and Malicious Misappropriation

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If you decide that [*name of defendant*]'s misappropriation caused [*name of plaintiff*] harm, you must decide whether that conduct justifies an award of punitive damages. The purposes of punitive damages are to punish a wrongdoer for the conduct that harmed the plaintiff and to discourage similar conduct in the future.

You may award punitive damages only if [*name of plaintiff*] proves [by clear and convincing evidence] that [*name of defendant*] acted willfully and maliciously. I will calculate the amount of any punitive damages later.

"Willfully" means that [*name of defendant*] acted with a purpose or willingness to commit the act or engage in the conduct in question, and the conduct was not reasonable under the circumstances at the time, and was not undertaken in good faith.

"Maliciously" means that [*name of defendant*] acted with an intent to cause injury, or that [*name of defendant*]'s conduct was despicable and was done with a willful and knowing disregard for the rights of others. [*Name of defendant*] acted with knowing disregard if [he/she/it] was aware of the probable consequences of [his/her/its] conduct and deliberately failed to avoid those consequences.

"Despicable conduct" is conduct so vile, base, or wretched that it would be looked down on and despised by ordinary decent people.

New [Month] Year

Directions for Use

Give this instruction if there is evidence that the defendant acted willfully and maliciously, so as to support an award of punitive damages. (See Civ. Code, § 3426.3(c).)

No reported California state court case has addressed whether the jury or the court should decide whether any misappropriation was "willful and malicious," and if so, whether the finding must be made by clear and convincing evidence rather than a preponderance of the evidence. In *Ajaxo Inc. v. E*TRADE Group, Inc.,* the court affirmed a jury's finding by clear and convincing evidence that the defendant's misappropriation was willful and malicious. (*Ajaxo Inc. v. E*TRADE Group, Inc.* (2005) 135 Cal.App.4th 21, 66 [37 Cal.Rptr. 3d 221].). If the court decides to require the "clear and convincing" standard, include the bracketed language in the first paragraph and also give CACI No. 201, *More Likely True—Clear and Convincing Proof.*

Once the jury finds "willful and malicious" conduct, it appears that the court should decide the amount of punitive damages. (See *Robert L. Cloud & Assocs. v. Mikesell* (1999), 69 Cal. App. 4th 1141, 1151 fn. 8 [82 Cal.Rptr. 2d 143].). This would be consistent with the Uniform Trade Secrets Act, on which the California Uniform Trade Secrets Act is based. (See Uniform Trade Secrets Act § 3, 2005 cmt. ["This provision follows federal patent law in leaving discretionary trebling to the judge even though there may be a jury, compare 35 U.S.C. Section 284 (1976)."].)

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Sources and Authority

- Civ. Code, § 3426.3(c) provides: "If willful and malicious misappropriation exists, the court may award exemplary damages in an amount not exceeding twice any award made under subdivision (a) or (b)."

- Civil Code section 3426.4 provides: "If a claim of misappropriation is made in bad faith, a motion to terminate an injunction is made or resisted in bad faith, or willful and malicious misappropriation exists, the court may award reasonable attorney's fees and costs to the prevailing party."

- "The court instructed the jury that 'willful' means 'a purpose or willingness to commit the act or engage in the conduct in question, and the conduct was not reasonable under the circumstances then present and was not undertaken in good faith.' Further, the court instructed the jury that 'malice' means 'conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard for the rights of others when the defendant is aware [of] the probable consequences of its conduct and willfully and deliberately fails to avoid those consequences. Despicable conduct is conduct which is so vile and wretched that it would be looked down upon and despised by ordinary decent people.' In addition, the court instructed the jury that a finding of willful and malicious misappropriation must be supported by clear and convincing evidence. [¶] Our Supreme Court has recognized that malice may be proven either expressly by direct evidence probative of the existence of hatred or ill-will, or by implication from indirect evidence from which the jury may draw inferences."(*Ajaxo Inc., supra,* 135 Cal.App.4th at pp. 66-67, internal citations and footnote omitted.)

- "The limitation on punitive damages under the UTSA to twice the compensatory damages does not create an equivalency between an award of punitive damages under the UTSA and an award of treble damages under another statutory scheme. … While an award of treble damages is equally punitive in its effect, the computation of the penalty is strictly mechanical. In contrast, an award of punitive damages under the UTSA is subject to no fixed standard; the statute merely sets a cap on the amount of the award. The trial court retains wide discretion to set the amount anywhere between zero and two times the actual loss. (§ 3426.3, subd. (c).) Thus, evidence of the defendant's financial condition remains essential for evaluating whether the amount of punitive damages actually awarded is appropriate." (*Robert L. Cloud & Assocs. Supra,* 69 Cal. App. 4th at p. 1151 fn. 8.)

- "In order to justify [attorney] fees under Civil Code section 3426.4, the court must find that a 'willful and malicious misappropriation' occurred. That requirement is satisfied, in our view, by the jury's determination, upon clear and convincing evidence, that defendants' acts of misappropriation were done with malice. This finding was necessary to the award of punitive damages which was made by the jury." (*Vacco Industries, Inc. v. Van Den Berg* (1992) 5 Cal. App. 4th 34, 54 [6 Cal.Rptr. 2d 602].)

Secondary Sources

Edelson & Kay, eds., Trade Secret Litigation and Protection in California (State Bar of California 2005) § 11.05

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4420. Affirmative Defense--Information Was Readily Ascertainable by Proper Means

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[*Name of defendant*] did not misappropriate [*name of plaintiff*]'s trade secrets if [*name of defendant*] proves that the information was readily ascertainable by proper means at the time of the alleged [acquisition/use/ [or] disclosure].

There is no fixed standard for determining what is "readily ascertainable by proper means." In general, information is readily ascertainable if it can be obtained, discovered, developed, or compiled without significant difficulty, effort, or expense.

New [Month] Year

Directions for Use

Give also CACI No. 4408, *Improper and Proper Means of Acquiring Trade Secret*.

Sources and Authority

- Civil Code section 3426.1(d)(1) provides:

  (d) "Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

  (1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; …

- "The Legislative Committee Comment [to Civ. Code, § 3426.1] further explains the original draft defined a trade secret in part as 'not being readily ascertainable by proper means' and that 'the assertion that a matter is readily ascertainable by proper means remains available as a defense to a claim of misappropriation. Information is readily ascertainable if it is available in trade journals, reference books, or published materials.' " *DVD Copy Control Ass'n, Inc. v. Bunner* (2003) 31 Cal.4th 864, 899 [4 Cal.Rptr.3d 69, 75 P.3d 1], Moreno, J., concurring; see , Legis. Comm. Comment (Senate), 1984 Addition.)

- "The focus of the first part of the statutory definition is on whether the information is generally known to or readily ascertainable by business competitors or others to whom the information would have some economic value. Information that is readily ascertainable by a business competitor derives no independent value from not being generally known." (*Syngenta Crop Protection, Inc. v. Helliker* (2006) 138 Cal.App.4th 1135, 1172 [42 Cal.Rptr.3d 191], internal citations omitted.)

- "With respect to the general availability of customer information, courts are reluctant to protect customer lists to the extent they embody information which is 'readily ascertainable' through public sources, such as business directories. On the other hand, where the employer has expended time and effort identifying customers with particular needs or characteristics, courts will prohibit

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former employees from using this information to capture a share of the market. Such lists are to be distinguished from mere identities and locations of customers where anyone could easily identify the entities as potential customers. As a general principle, the more difficult information is to obtain, and the more time and resources expended by an employer in gathering it, the more likely a court will find such information constitutes a trade secret. (*Morlife, Inc. v. Perry* (1997) 56 Cal.App.4th 1514, 1521-1522 [66 Cal.Rptr. 2d 731], internal citations omitted.)

- "While ease of ascertainability is irrelevant to the definition of a trade secret, 'the assertion that a matter is readily ascertainable by proper means remains available as a defense to a claim of misappropriation.' Therefore, if the defendants can convince the finder of fact at trial (1) that 'it is a virtual certainty that anyone who manufactures' certain types of products uses rubber rollers, (2) that the manufacturers of those products are easily identifiable, and (3) that the defendants' knowledge of the plaintiff's customers resulted from that identification process and not from the plaintiff's records, then the defendants may establish a defense to the misappropriation claim. That defense, however, will be based upon an absence of misappropriation, rather than the absence of a trade secret." (*Abba Rubber Co. v. Seaquist* (1991) 235 Cal.App.3d 1, 21-22 fn.9 [286 Cal.Rptr. 518], internal citations omitted.)

- "[T]he evidence established that [plaintiff] 's customer list and related information was the product of a substantial amount of time, expense and effort on the part of [plaintiff]. Moreover, the nature and character of the subject customer information, i.e., billing rates, key contacts, specialized requirements and markup rates, is sophisticated information and irrefutably of commercial value and not readily ascertainable to other competitors. Thus, Courtesy's customer list and related proprietary information satisfy the first prong of the definition of 'trade secret' under section 3426.1." (*Courtesy Temporary Serv., Inc. v. Camacho* (1990) 222 Cal.App.3d 1278, 1288 [272 Cal.Rptr. 352].)

- "In viewing the evidence presented in the light most favorable to the prevailing party, it is difficult to find a protectable trade secret as that term exists under Civil Code section 3426.1, subdivision (d). While the information sought to be protected here, that is lists of customers who operate manufacturing concerns and who need shipping supplies to ship their products to market, may not be generally known to the public, they certainly would be known or readily ascertainable to other persons in the shipping business. The compilation process in this case is neither sophisticated nor difficult nor particularly time consuming. The evidence presented shows that the shipping business is very competitive and that manufacturers will often deal with more than one company at a time. There is no evidence that all of appellant's competition comes from respondents' new employer. Obviously, all the competitors have secured the same information that appellant claims and, in all likelihood, did so in the same manner as appellant -- a process described herein by respondents." (*American Paper & Packaging Prods., Inc. v. Kirgan* (1986) 183 Cal.App.3d 1318, 1326 [228 Cal.Rptr. 713].)

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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.

At the end of the trial, your notes will be [collected and destroyed/collected and retained by the court but not as a part of the case record/returned to you/[*specify other disposition*]].

New April 2004; Revised February 2005, April 2007, [month] 2007

Directions for Use

If CACI No. 102, *Taking Notes During the Trial,* is given as a ~~n introductory~~pretrial instruction, the court may also give this instruction as a concluding instruction.

In the last paragraph, specify the court's disposition of the notes after trial. No statute or rule of court requires any particular disposition.

Sources and Authority

- Rule 2.1031 of the California Rules of Court 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

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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.)

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