CIVIL JURY INSTRUCTIONS

Judicial Council of California

Task Force on Jury Instructions

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Judicial Council Task Force on Jury Instructions
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CIVIL SUBCOMMITTEE

Preface

Introduction

The California Judicial Council Task Force on Jury Instructions has been charged by Chief Justice Ronald George with writing "jury instructions that both accurately state the law and are more easily understandable to jurors."[i] In May of 2000, the Task Force Subcommittee on Civil Instructions released its first set of draft jury instructions. That release stimulated public critique and enabled the drafters to refine both the particular instructions and the more global choices about format and approach as the drafting effort has continued. A second set of civil instructions was released in April of 2001.

The Task Force has based the instructions on a de novo review of relevant decisional precedent and statutory materials because a license to use the copyrighted BAJI materials was not available. These materials are circulated under the Copyright of the California Judicial Council. They have not yet been officially approved for use.

Background: Creation of the Task Force

In December of 1995, the Judicial Council established a Blue Ribbon Commission on Jury System Improvement. The Commission's mission was to "conduct a comprehensive evaluation of the jury system and [make] timely recommendations for improvement."[ii] After extensive study, the commission made a number of recommendations to the Chief Justice and the Judicial Council, one of which was that the Council create a Task Force on Jury Instructions to draft more understandable instructions. The recommendation stemmed from the Commission's conclusion that "jury instructions are presently given in California and elsewhere are, on occasion, simply impenetrable to the ordinary juror."[iii]

In light of the Commission's view that jurors could be accurately instructed on the law in language more easily absorbed and understood, the Judicial Council acted on the recommendation, creating the current Task Force. The Chief Justice noted the two principal goals underlying the creation of more intelligible instructions are "1) making juror's experiences more meaningful and rewarding and 2) providing clear instructions that will improve the quality of justice by insuring that jurors understand and apply the law correctly in their deliberations."[iv]

Purpose of this Release for Comment

The Chief Justice has encouraged the Task Force to solicit broad input from those representing a wide rage of views and experience. This second set of jury instructions is

being released to obtain the benefit of such input. The Task Force is interested in reactions to style, format, legal accuracy, clarity, and usefulness of accompanying bench notes and commentary. The Task Force is not a law revision commission. Our goal is to produce instructions that accurately explain the existing law in a manner the average juror can readily understand and that the trial bench and bar will find helpful. We appreciate your willingness to assist in this effort.

Drafting Policies

The members of the task force carefully considered, and sometimes extensively debated, many issues about how the instructions should be drafted. The decisions of the task force on the most significant of those issues are discussed and explained below.

Drafting Guidelines

The task force reviewed the literature addressing jury instructions and considered the recommendations for improving instructional clarity and comprehensibility. (See, e.g., Lind and Partridge, Federal Judicial Center, Pattern Criminal Jury Instructions (1987), Appendix A, *Suggestions for Improving Juror Understanding of Instructions*; Schwarzer, *Communicating with Juries: Problems and Remedies*, 69 Cal.L.Rev. 731 (1981); Charrow and Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 Columbia L.Rev. 1306 (1979); and Tiersma, *Reforming the Language of Jury Instructions*, 22 Hofstra L.Rev. 37 (1993).) When drafting the instructions, we applied many of the specific techniques suggested by the literature, including the following:

- Avoid using nominalizations.
- Use "modal" verbs (must, should, may) to clarify the jury's task.
- Avoid redundancy or unnecessary words.
- Use the active voice.
- Use short sentences.
- Keep the subject close to the verb; move interrupting phrases to the beginning or end of the sentence.
- Avoid omitting relative pronouns and auxiliary verbs.
- Avoid double negatives.
- Be concrete rather than abstract.
- Avoid instructing the jurors about things they do not need to know.
- Adopt a structure that is logical and easy to follow.

In addition to these general principles, the task force adopted the following specific guidelines.

References to the parties

The task force chose to refer to the parties by name whenever possible, allowing users to insert the parties' names in the text of the instructions. It was felt this would make the instructions less abstract to the jury than if the parties were designated as "plaintiff" and "defendant." At some point in the future, the instructions will undoubtedly be available in

an electronic format and the substitution of names or other specific words within the instructions will be possible with a simple keystroke.

Burden of Proof

The task force decided to include the allocation of the burden of proof within the instructions themselves, as appropriate. It was felt that this would give the jurors a better understanding of how the law relates to their decision-making process.

Tone

The task force's mandate is to produce instructions that are accurate and comprehensible to jurors. In setting a tone, the task force attempted to balance the need for clarity of language and 'plain English' choices with the formality necessary given the importance of the instructions.

Notes

In some instructions, the first item to appear in the notes following each instruction (under "Directions for Use") is a statement indicating how the instruction should be used. We concluded that this information would be useful to judges and practitioners and would also help avoid instructional error.

The next section ("Sources and Authority") describes the authority relied on for the instructional language and other definitions. We have also occasionally included a "Commentary" section where specific drafting choices are explained, or other issues are addressed by the task force.

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[i] *Videotape*, Address of Chief Justice Ronald George to Task Force on Jury Instructions (Judicial Council of California, Administrative Office of the Courts 2/18/97).
[ii] Final Report of the Blue Ribbon Commission on Jury System Improvement (Judicial Council of California, Administrative Office of the Courts 5/6/1996) p.1.
[iii] *Id.* at p. 93
[iv] See, *supra*, note 1.

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1250
Intrusion Into Private Affairs

[*Name of plaintiff***] claims that [***name of defendant***] violated [***name of plaintiff***]'s right to privacy. 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 facts regarding the place, conversation, or other circumstance***];**

2. **That [***name of defendant***] intruded in [***insert facts regarding the place, conversation, or other circumstance***];**

3. **That [***name of defendant***]'s intrusion would be highly offensive to a reasonable person;**

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.**

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.

SOURCES AND AUTHORITY

- The four types of privacy torts are (1) intrusion upon one's physical solitude or seclusion, (2) public disclosure of private facts, (3) false light in the public eye, and (4) appropriation of the plaintiff's name or likeness. (*Forsher v. Bugliosi* (1980) 26 Cal.3d 792, 808 [163 Cal.Rptr. 628].)

- The tort of intrusion "encompasses unconsented-to physical intrusion into the home, hospital room or other place the privacy of which is legally recognized, as well as unwarranted sensory intrusions such as eavesdropping, wiretapping, and visual or

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photographic spying." (*Shulman v. Group W Productions, Inc.* (1998) 18 Cal.4th 200, 230 [74 Cal.Rptr.2d 843], internal citation omitted.)

- The right of privacy was first recognized in California in the case of *Melvin v. Reid* (1931) 112 Cal.App. 285, 291 [297 P. 91]. The court found a legal foundation for the tort in the right to pursue and obtain happiness found in article 1, section 1 of the California Constitution.

- Restatement Second of Torts, section 652B provides: "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person."

- "California common law has generally followed Prosser's classification of privacy interests as embodied in the Restatement." (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 24 [26 Cal.Rptr.2d 834], internal citation omitted.)

- The element of intrusion "is not met when the plaintiff has merely been observed, or even photographed or recorded, in a public place. Rather, 'the plaintiff must show the defendant penetrated some zone of physical or sensory privacy surrounding, or obtained unwanted access to data about, the plaintiff.' " (*Sanders v. American Broadcasting Co.* (1999) 20 Cal.4th 907, 914–915 [85 Cal.Rptr.2d 909], internal citations omitted.)

- The plaintiff does not have to prove that he or she had a "complete expectation of privacy": "Privacy for purposes of the intrusion tort must be evaluated with respect to the identity of the alleged intruder and the nature of the intrusion." (*Sanders, supra,* 20 Cal.4th at p. 918.)

- "While what is 'highly offensive to a reasonable person' suggests a standard upon which a jury would properly be instructed, there is a preliminary determination of 'offensiveness' which must be made by the court in discerning the existence of a cause of action for intrusion. … A court determining the existence of 'offensiveness' would consider the degree of intrusion, the context, conduct and circumstances surrounding the intrusion as well as the intruder's motives and objectives, the setting into which he intrudes, and the expectations of those whose privacy is invaded." (*Miller v. National Broadcasting Co.* (1986) 187 Cal.App.3d 1463, 1483–1484 [232 Cal.Rptr. 668].)

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- "[L]iability under the intrusion tort requires that the invasion be highly offensive to a reasonable person, considering, among other factors, the motive of the alleged intruder." (*Sanders, supra,* 20 Cal.4th at p. 911, internal citations omitted.)

- Damages flowing from an invasion of privacy "logically would include an award for mental suffering and anguish." (*Miller, supra,* 187 Cal.App.3d at p. 1484, citing *Fairfield v. American Photocopy Equipment Co.* (1955) 138 Cal.App.2d 82 [291 P.2d 194].)

- Related statutory actions can be brought for stalking (Civ. Code, § 1708.7), physical invasion of privacy, (Civ. Code, § 1708.8), and eavesdropping and wiretapping (Pen. Code, § 637.2). Civil Code section 1708.8 was enacted in 1998 as an anti-paparazzi measure. To date there are no reported cases based on this statute.

Secondary Sources

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 577–580
- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 1438
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 20:8
- 4 Levy et al., California Torts (1985–2000) Privacy, § 46.02

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1251
Public Disclosure of Private Facts

[*Name of plaintiff***] claims that [***name of defendant***] violated [***name of plaintiff***]'s right to privacy. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] publicized private information concerning [***name of plaintiff***];**

2. **That a reasonable person in [***name of plaintiff***]'s position would consider the publicity highly offensive;**

3. **That [***name of defendant***] knew, or acted with reckless disregard of the fact, that a reasonable person in [***name of plaintiff***]'s position would consider the publicity highly offensive;**

4. **That the private information was not of legitimate public concern [or did not have a substantial connection to a matter of legitimate public concern];**

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.**

In deciding if the information was a matter of legitimate public concern, you should consider, among other things, the social value of the information, the depth of the intrusion into [*name of plaintiff***]'s privacy, and whether [***name of plaintiff***] consented to the publicity.**

[In deciding if [*name of defendant***] publicized the information, you should determine if it was made public either by communicating it to the public at large or to so many people that the information was substantially certain to become public knowledge.]**

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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.

SOURCES AND AUTHORITY

- The public disclosure tort has the following elements: "(1) public disclosure (2) of a private fact (3) which would be offensive and objectionable to the reasonable person and (4) which is not of legitimate public concern." (*Diaz v. Oakland Tribune, Inc.* (1983) 139 Cal.App.3d 118, 126 [188 Cal.Rptr. 762], internal citations omitted.)

- Restatement Second of Torts, section 652D provides:

  > One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that
  > (a) would be highly offensive to a reasonable person, and
  > (b) is not of legitimate concern to the public.

- "California common law has generally followed Prosser's classification of privacy interests as embodied in the Restatement." (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 24 [26 Cal.Rptr.2d 834], internal citation omitted.)

- "Generally speaking, matter which is already in the public domain is not private, and its publication is protected." (*Diaz, supra*, 139 Cal.App.3d at p. 131, internal citations omitted.) However, "matter which was once of public record may be protected as private facts where disclosure of that information would not be newsworthy." (*Id.* at p. 132.)

- Because of the right to freedom of speech, the Supreme Court has stated: "[W]e find it reasonable to require a plaintiff to prove, in each case, that the publisher invaded his privacy with reckless disregard for the fact that reasonable men would find the invasion highly offensive." (*Briscoe v. Reader's Digest Assn., Inc.* (1971) 4 Cal.3d 529, 542–543 [93 Cal.Rptr. 866].)

- In *Johnson v. Harcourt, Brace, Jovanovich, Inc.* (1974) 43 Cal.App.3d 880, 891, fn. 11 [118 Cal.Rptr. 370], the court observed: "If a jury finds that a publication discloses private facts which are 'highly offensive and injurious to the reasonable man' [citation] then it would *inter alia* also satisfy the reckless disregard requirement."

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- "*Diaz* … expressly makes the lack of newsworthiness part of the plaintiff's case in a private facts action. … We therefore agree with defendants that under California common law the dissemination of truthful, newsworthy material is not actionable as a publication of private facts." (*Shulman v. Group W Productions, Inc.* (1998) 18 Cal.4th 200, 215 [74 Cal.Rptr.2d 843], internal citations omitted.)

- "[T]he newsworthy privilege is not without limitation. Where the publicity is so offensive as to constitute a 'morbid and sensational prying into private lives for its own sake, …' it serves no legitimate public interest and is not deserving of protection." (*Diaz, supra,* 139 Cal.App.3d at p. 126, internal citation omitted.)

- "Almost any truthful commentary on public officials or public affairs, no matter how serious the invasion of privacy, will be privileged."(*Briscoe, supra,* 4 Cal.3d at p. 535, fn. 5.)

- Courts have devised a three-part test for evaluating newsworthiness: "the social value of the facts published, the depth of the article's intrusion into ostensibly private affairs, and the extent to which the party voluntarily acceded to a position of public notoriety." (*Briscoe, supra,* 4 Cal.3d at p. 541, internal citations omitted.)

- "Whether a publication is or is not newsworthy depends upon the contemporary community mores and standards of decency. This is largely a question of fact, which a jury is uniquely well-suited to decide." (*Diaz, supra,* 139 Cal.App.3d at p. 133.)

- Comment (a) to Restatement Second of Torts, section 652D states that "publicity" "means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge." The definition is in brackets because it may not be an issue in every case.

<u>Secondary Sources</u>

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 582–583
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 20.10
- 4 Levy et al., California Torts (1985–2000) Privacy, § 46.03

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1252
False Light

[*Name of plaintiff***] claims that [***name of defendant***] violated [***name of plaintiff***]'s right to privacy. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] publicized information or material that showed [***name of plaintiff***] in a false light;**
2. **That the false light created by the publication would be highly offensive to a reasonable person in [***name of plaintiff***]'s position;**
3. **[That there is clear and convincing evidence that [***name of defendant***] knew the publication would create a false impression about [***name of plaintiff***] or acted with reckless disregard for the truth;]**

   [or]

   [That [*name of defendant***] was negligent in determining the truth of the information or whether a false impression would be created by its publication;]**

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

   [or]
   [That [*name of plaintiff***] sustained harm to [his/her] property, business, profession, or occupation [including money spent as a result of the statement(s)]; and]**

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

[In deciding if [*name of defendant***] publicized the information or material, you should determine if it was made public either by communicating it to the public at large or to so many people that the information or material was substantially certain to become public knowledge.**

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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.

The bracketed options for element 3 should be used in the alternative, depending on whether the conduct involves a matter of public concern.

SOURCES AND AUTHORITY

- Restatement Second of Torts, section 652E provides:

  > One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if
  > (a) the false light in which the other was placed would be highly offensive to a reasonable person, and
  > (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

- "California common law has generally followed Prosser's classification of privacy interests as embodied in the Restatement." (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 24 [26 Cal.Rptr.2d 834], internal citation omitted.)

- "In order to be actionable, the false light in which the plaintiff is placed must be highly offensive to a reasonable person. Although it is not necessary that the plaintiff be defamed, publicity placing one in a highly offensive false light will in most cases be defamatory as well." (*Fellows v. National Enquirer* (1986) 42 Cal.3d 234, 238–239 [228 Cal.Rptr. 215], internal citation omitted.)

- "When a false light claim is coupled with a defamation claim, the false light claim is essentially superfluous, and stands or falls on whether it meets the same requirements as the defamation cause of action." (*Eisenberg v. Alameda Newspapers, Inc.* (1999) 74 Cal.App.4th 1359, 1385, fn. 13 [88 Cal.Rptr.2d 802], internal citations omitted.)

- "[A] 'false light' cause of action 'is in substance equivalent to … (a) libel claim, and should meet the same requirements of the libel claim … including proof of malice." (*Briscoe v. Reader's Digest Assn.* (1971) 4 Cal.3d 529, 543 [93 Cal.Rptr. 866], internal citation omitted.)

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- "The *New York Times* decision defined a zone of constitutional protection within which one could publish concerning a public figure without fear of liability. That constitutional protection does not depend on the label given the stated cause of action; it bars not only actions for defamation, but also claims for invasion of privacy." (*Reader's Digest Assn. v. Superior Court* (1984) 37 Cal.3d 244, 265 [208 Cal.Rptr. 137], internal citations omitted.)

- In *Time, Inc. v. Hill* (1967) 385 U.S. 374 [17 L.Ed.2d 456; 87 S.Ct. 534], the Court held that the *New York Times v. Sullivan* malice standard applied to a privacy action that was based on a "false light" statute where the matter involved a public figure. Given the similarities between defamation and false light actions, it appears likely that the negligence standard for private figure defamation plaintiffs announced in *Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323 [41 L.Ed.2d 789; 94 S.Ct. 2997] should apply to private figure false light plaintiffs.

- Plaintiffs must comply with the retraction statute (Civ. Code, § 48a) to recover more than special damages in a false light cause of action. (*Briscoe, supra,* 4 Cal.3d at p. 543.)

- "We hold that whenever a claim for false light invasion of privacy is based on language that is defamatory within the meaning of section 45a, pleading and proof of special damages are required." (*Fellows, supra,* 42 Cal.3d at p. 251.)

Secondary Sources

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 584–586
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, §§ 20:12–20:15
- 4 Levy et al., California Torts (1985–2000) Privacy, § 46.04

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1253
Appropriation of Name or Likeness

[*Name of plaintiff*] claims that [*name of defendant*] violated [*name of plaintiff*]'s right to privacy. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] used [*name of plaintiff*]'s name, likeness, or identity without [*name of plaintiff*]'s permission;**

2. **That [*name of defendant*] gained a commercial benefit [or some other advantage] by using [*name of plaintiff*]'s name, likeness, or identity;**

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

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

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.

If the alleged "benefit" is not commercial, the judge will need to determine whether the advantage gained by the defendant qualifies as "some other advantage."

If suing under both the common law and Civil Code section 3344, the judge may need to explain that a person's voice, for example, may qualify as "identity" if the voice is sufficient to cause listeners to identify the plaintiff. The two causes of action overlap, and the same conduct should be covered by both.

SOURCES AND AUTHORITY

- "A common law cause of action for appropriation of name or likeness may be pleaded by alleging (1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise;

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(3) lack of consent; and (4) resulting injury." (*Eastwood v. Superior Court* (1983) 149 Cal.App.3d 409, 417 [198 Cal.Rptr. 342], internal citations omitted.)

- Section 652C of the Restatement Second of Torts provides: "One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy."

- "California common law has generally followed Prosser's classification of privacy interests as embodied in the Restatement." (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 24 [26 Cal.Rptr.2d 834], internal citation omitted.)

- "[T]he appearance of an 'endorsement' is not the *sine qua non* of a claim for commercial appropriation." (*Eastwood, supra,* at p. 419.)

- "[N]o cause of action will lie for the '[p]ublication of matters in the public interest, which rests on the right of the public to know and the freedom of the press to tell it.' " (*Montana v. San Jose Mercury News* (1995) 34 Cal.App.4th 790, 793 [40 Cal.Rptr.2d 639], internal citation omitted.)

- "Public interest attaches to people who by their accomplishments or mode of living create a bona fide attention to their activities." (*Dora v. Frontline Video, Inc.* (1993) 15 Cal.App.4th 536, 542 [18 Cal.Rptr.2d 790], internal citation omitted.)

- Civil Code section 3344 complements the common law tort of appropriation. (*Eastwood, supra,* 149 Cal.App.3d at pp. 416–417.)

<u>Secondary Sources</u>

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 587–588
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 20:16
- 4 Levy et al., California Torts (1985–2000) Privacy, § 46.05

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1254
Use of Name or Likeness (Civ. Code, §§ 3344, 3344.1)

[*Name of plaintiff*] claims that [*name of defendant*] violated [*name of plaintiff*]'s right to privacy. To succeed on this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] knowingly used [*name of plaintiff*]'s [name/voice/signature/photograph/likeness] on merchandise or to advertise or sell products or services;**

2. **That [*name of defendant*] did not have [*name of plaintiff*]'s consent;**

3. **That [*name of defendant*]'s use of [*name of plaintiff*]'s [name/voice/signature/photograph/likeness] was directly connected to [*name of defendant*]'s commercial purpose;**

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.**

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.

Depending on the facts, the jury may need to be instructed on the affirmative defense of Civil Code section 3344(d) (quoted below), with the limitation on recklessness that is found in the *Eastwood v. Superior Court* (1983) 149 Cal.App.3d 409, 425 [198 Cal.Rptr. 342]. In that case, the court held that subdivision (d), as it pertains to news, "does not provide an exemption for a knowing or reckless falsehood." If subdivision (d) is implicated by the facts, the burden of proof is on the plaintiff to demonstrate that the news account was false and that the defendant acted with knowledge or in reckless disregard of its falsity. (*Id.* at p. 426.)

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Note that a plaintiff is entitled to the sum of $750 under Civil Code section 3344(a) even if actual damages are not proven.

SOURCES AND AUTHORITY

- Civil Code section 3344 is "a commercial appropriation statute which complements the common law tort of appropriation." (*KNB Enterprises v. Matthews* (2000) 78 Cal.App.4th 362, 366–367 [92 Cal.Rptr.2d 713].)

- Civil Code section 3344(a) provides: "Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent, or, in the case of a minor, the prior consent of his parent or legal guardian, shall be liable for any damages sustained by the person or persons injured as a result thereof. In addition, in any action brought under this section, the person who violated the section shall be liable to the injured party or parties in an amount equal to the greater of seven hundred fifty dollars ($750) or the actual damages suffered by him or her as a result of the unauthorized use, and any profits from the unauthorized use that are attributable to the use and are not taken into account in computing the actual damages. In establishing such profits, the injured party or parties are required to present proof only of the gross revenue attributable to such use, and the person who violated this section is required to prove his or her deductible expenses. Punitive damages may also be awarded to the injured party or parties. The prevailing party in any action under this section shall also be entitled to attorney's fees and costs."

- Civil Code section 3344(d) provides: "For purposes of this section, a use of a name, voice, signature, photograph, or likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign, shall not constitute a use for which consent is required under subdivision (a)."

- "[C]alifornia's appropriation statute is not limited to celebrity plaintiffs." (*KNB Enterprises, supra,* 78 Cal.App.4th at p. 367.)

- "The differences between the common law and statutory actions are: (1) Section 3344, subdivision (a) requires a knowing use whereas under case law, mistake and inadvertence are not a defense against commercial appropriation; and (2) Section 3344, subdivision (g) expressly provides that its remedies are cumulative and in addition to any provided for by law." (*Eastwood v. Superior Court* (1983) 149 Cal.App.3d 409, 417, fn. 6 [198 Cal.Rptr. 342], internal citation omitted.)

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- In addition to the common law elements, a party seeking the statutory remedy provided in section 3344 must also allege "a knowing use of the plaintiff's name, photograph or likeness" and "a 'direct' connection must be alleged between the use and the commercial purpose." (*Eastwood, supra,* 149 Cal.App.3d at pp. 417–418, internal citation omitted; see *Johnson v. Harcourt, Brace, Jovanovich, Inc.* (1974) 43 Cal.App.3d 880, 895 [118 Cal.Rptr. 370].)

- In *Eastwood, supra*, the court held that subdivision (d), as it pertains to news, "does not provide an exemption for a knowing or reckless falsehood." (*Eastwood, supra*, 149 Cal.App.3d at p. 425.) If subdivision (d) is implicated by the facts, the burden of proof is on the plaintiff to demonstrate that the news account was false and that the defendant acted with knowledge or in reckless disregard of its falsity. (*Id.* at p. 426.)

- A documentary on surfing was held to fall within the category of "public affairs." (*Dora v. Frontline Video* (1993) 15 Cal.App.4th 536, 546 [18 Cal.Rptr.2d 790].)
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- "[N]o cause of action will lie for the 'publication of matters in the public interest, which rests on the right of the public to know and the freedom of the press to tell it.' " (*Montana v. San Jose Mercury News* (1995) 34 Cal.App.4th 790, 793 [40 Cal.Rptr.2d 639], internal citations omitted.)

<u>Secondary Sources</u>

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 589–591
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 20:17
- 4 Levy et al., California Torts (1985–2000) Privacy, § 46.05

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1255
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 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 reasonable expectation of 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.**

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, 20 [26 Cal.Rptr.2d 834].) "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 instruction 1256, *Affirmative Defense to Constitutional Right.* Other affirmative defenses may be available.

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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, 325–326 [66 Cal.Rptr.2d 210], 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 p. 39.)

- 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].)

- 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.)

<u>Secondary Sources</u>

- 7 Witkin, Summary of California Law (9th ed. 1988) Const. Law, §§ 454–471
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, §§ 20:18–20:20
- 4 Levy et al., California Torts (1985–2000) Privacy, § 46.06

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1256
Affirmative Defense to Constitutional Right

[*Name of defendant***] claims that even if [***name of plaintiff***] has proven all of the above, [his/her/its] conduct was justified. [***Name of defendant***] must prove that the circumstances justified the invasion of privacy because [***insert relevant legitimate or compelling competing interest***].**

If [*name of defendant***] proves that [his/her/its] conduct was justified, then you must find for [***name of defendant***] unless [***name of plaintiff***] proves that there was a practical, effective, and less invasive method of achieving [***name of defendant***]'s purpose.**

DIRECTIONS FOR USE

Note that whether the countervailing interest needs to be "compelling" or "legitimate" depends on the status of the defendant: "In general, where the privacy violation is alleged against a private entity, the defendant is not required to establish a 'compelling interest' but, rather, one that is 'legitimate' or 'important.' " (*Pettus v. Cole* (1996) 49 Cal.App.4th 402, 440 [57 Cal.Rptr.2d 46].)

SOURCES AND AUTHORITY

- "A defendant may prevail in a state constitutional privacy case by negating any of the three elements just discussed or by pleading and proving, as an affirmative defense, that the invasion of privacy is justified because it substantively furthers one or more countervailing interests. The plaintiff, in turn, may rebut a defendant's assertion of countervailing interests by showing there are feasible and effective alternatives to defendant's conduct which have a lesser impact on privacy interests. Of course, a defendant may also plead and prove other available defenses, e.g., consent, unclean hands, etc., that may be appropriate in view of the nature of the claim and the relief requested." (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 40 [26 Cal.Rptr.2d 834].)

- "The existence of a sufficient countervailing interest or an alternative course of conduct present threshold questions of law for the court. The relative strength of

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countervailing interests and the feasibility of alternatives present mixed questions of law and fact. Again, in cases where material facts are undisputed, adjudication as a matter of law may be appropriate." (*Hill, supra*, 7 Cal.4th at p. 39.)

- "In general, where the privacy violation is alleged against a private entity, the defendant is not required to establish a 'compelling interest' but, rather, one that is 'legitimate' or 'important.' " (*Pettus v. Cole* (1996) 49 Cal.App.4th 402, 440 [57 Cal.Rptr.2d 46].)

Secondary Sources

- 7 Witkin, Summary of California Law (9th ed. 1988) Const. Law, §§ 454–471
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, §§ 20:18–20:20
- 4 Levy et al., California Torts (1985–2000) Privacy, § 46.06

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1257
Stalking (Civ. Code, § 1708.7)

[*Name of plaintiff***] claims that [***name of defendant***] violated [***name of plaintiff***]'s right to privacy. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] engaged in a pattern of conduct with the intent to [follow/alarm/harass] [***name of plaintiff***]. The pattern of conduct must be supported by evidence in addition to [***name of plaintiff***]'s testimony;**

2. **That as a result of this conduct [***name of plaintiff***] reasonably feared for [his/her] own safety [or for the safety of an immediate family member]; and**

3. **(a) That [***name of defendant***], by words or actions, made a believable threat with the intent to place [***name of plaintiff***] in reasonable fear for [his/her] safety [or the safety of an immediate family member]; and**

   (b) That [*name of plaintiff***] clearly demanded at least once that [***name of defendant***] stop; and**

   (c) That [*name of defendant***] persisted in [his/her] pattern of conduct;**

   [or]

   That [*name of defendant***] violated a restraining order prohibiting the pattern of conduct;**

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.**

["Harass" means a knowing and willful course of conduct directed at [*name of plaintiff***] that seriously alarms, annoys, torments, or terrorizes [him/her], and which serves no legitimate purpose. The course of conduct must be**

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such as would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to [*name of plaintiff***]].**

SOURCES AND AUTHORITY

- Civil Code section 1708.7 provides:

(a) A person is liable for the tort of stalking when the plaintiff proves all of the following elements of the tort:
  (1) The defendant engaged in a pattern of conduct the intent of which was to follow, alarm, or harass the plaintiff. In order to establish this element, the plaintiff shall be required to support his or her allegations with independent corroborating evidence.
  (2) As a result of that pattern of conduct, the plaintiff reasonably feared for his or her safety, or the safety of an immediate family member. For purposes of this paragraph, "immediate family" means a spouse, parent, child, any person related by consanguinity or affinity within the second degree, or any person who regularly resides, or, within the six months preceding any portion of the pattern of conduct, regularly resided, in the plaintiff's household.
  (3) One of the following:
    (A) The defendant, as a part of the pattern of conduct specified in paragraph (1), made a credible threat with the intent to place the plaintiff in reasonable fear for his or her safety, or the safety of an immediate family member and, on at least one occasion, the plaintiff clearly and definitively demanded that the defendant cease and abate his or her pattern of conduct and the defendant persisted in his or her pattern of conduct.
    (B) The defendant violated a restraining order, including, but not limited to, any order issued pursuant to Section 527.6 of the Code of Civil Procedure, prohibiting any act described in subdivision (a).

(b) For the purposes of this section:
  (1) "Pattern of conduct" means conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose. Constitutionally protected activity is not included within the meaning of "pattern of conduct."
  (2) "Credible threat" means a verbal or written threat, including that communicated by means of an electronic communication device, or a threat implied by a pattern of conduct or a combination of verbal,

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written, or electronically communicated statements and conduct, made with the intent and apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety or the safety of his or her immediate family.

(3) "Electronic communication device" includes, but is not limited to, telephones, cellular telephones, computers, video recorders, fax machines, or pagers. "Electronic communication" has the same meaning as the term defined in Subsection 12 of Section 2510 of Title 18 of the United States Code.

(4) "Harass" means a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, torments, or terrorizes the person, and which serves no legitimate purpose. The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the person.

(c) A person who commits the tort of stalking upon another is liable to that person for damages, including, but not limited to, general damages, special damages, and punitive damages pursuant to Section 3294.

(d) In an action pursuant to this section, the court may grant equitable relief, including, but not limited to, an injunction.

(e) The rights and remedies provided in this section are cumulative and in addition to any other rights and remedies provided by law.

(f) This section shall not be construed to impair any constitutionally protected activity, including, but not limited to, speech, protest, and assembly.

Secondary Sources

- 5 Witkin, Summary of California Law (Supp. 2000) Torts, § 581A

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1258
Recording of Confidential Information (Pen. Code, §§ 632, 637.2)

[*Name of plaintiff*] claims that [*name of defendant*] violated [*name of plaintiff*]'s right to privacy. To succeed on this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] [eavesdropped on/recorded] [*name of plaintiff*]'s conversation with an electronic device;**

2. **That [*name of plaintiff*] had a reasonable expectation that the conversation was confidential; [and]**

3. **That [*name of defendant*] did not have the consent of all parties to the conversation to [eavesdrop on/record] it;**

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.]**

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.

Elements #4 and #5 are in brackets because if there is no actual harm, plaintiff can recover the statutory penalty. If plaintiff is seeking actual damages, such damages must be proven along with causation.

SOURCES AND AUTHORITY

- Penal Code section 632(a) provides: "Every person who, intentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device, eavesdrops upon or records the confidential communication, whether the communication is carried on among the parties in the

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presence of one another or by means of a telegraph, telephone, or other device, except a radio, shall be punished by a fine not exceeding two thousand five hundred dollars ($2,500), or imprisonment in the county jail not exceeding one year, or in the state prison, or by both that fine and imprisonment. If the person has previously been convicted of a violation of this section or Section 631, 632.5, 632.6, 632.7, or 636, the person shall be punished by a fine not exceeding ten thousand dollars ($10,000), by imprisonment in the county jail not exceeding one year, or in the state prison, or by both that fine and imprisonment."

- Penal Code, section 637.2 provides:

  (a) Any person who has been injured by a violation of this chapter may bring an action against the person who committed the violation for the greater of the following amounts:
  (1) Five thousand dollars ($5,000).
  (2) Three times the amount of actual damages, if any, sustained by the plaintiff.
  (b) Any person may, in accordance with Chapter 3 (commencing with Section 525) of Title 7 of Part 2 of the Code of Civil Procedure, bring an action to enjoin and restrain any violation of this chapter, and may in the same action seek damages as provided by subdivision (a). It is not a necessary prerequisite to an action pursuant to this section that the plaintiff has suffered, or be threatened with, actual damages.

- "Application of the statutory definition of 'confidential communication' turns on the reasonable expectations of the parties judged by an objective standard and not by the subjective assumptions of the parties." (*O'Laskey v. Sortino* (1990) 224 Cal.App.3d 241, 248 [273 Cal.Rptr. 674].)

- " 'A communication must be protected if either party reasonably expects the communication to be confined to the parties.' " (*Coulter v. Bank of America* (1994) 28 Cal.App.4th 923, 929 [33 Cal.Rptr.2d 766], internal citation omitted.)

- "While one who imparts private information risks the betrayal of his confidence by the other party, a substantial distinction has been recognized between the secondhand repetition of the contents of a conversation and its simultaneous dissemination to an unannounced second auditor, whether that auditor be a person or a mechanical device." (*Ribas v. Clark* (1985) 38 Cal.3d 355, 360–361 [212 Cal.Rptr. 143].)

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- "We hold that an actionable violation of section 632 does not require disclosure of a confidential communication to a third party." (*Friddle v. Epstein* (1993) 16 Cal.App.4th 1649, 1660 [21 Cal.Rptr.2d 85].)

- "The right to recover [the] statutory minimum accrue[s] at the moment the Privacy Act [is] violated." (*Friddle, supra,* 16 Cal.App.4th at p. 1661.)

- "If the plaintiff has suffered injuries akin to those for emotional distress, 'i.e., anxiety, embarrassment, humiliation, shame, depression, feelings of powerlessness, anguish, etc.,' these are 'actual' damages which shall be trebled." (*Friddle, supra,* 16 Cal.App.4th at p. 1660.)

- "Because the right to [the statutory] award accrues at the moment of the violation, it is not barred by the judicial privilege. … Section 637.2 therefore permits him to pursue his statutory remedy of a civil lawsuit for $3,000, even though the judicial privilege bars his recovery for the only actual damage he claims to have suffered." (*Ribas, supra,* 38 Cal.3d at p. 365.)

<u>Secondary Sources</u>

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, § 581
- 4 Levy et al., California Torts (1985–2000) Privacy, § 46.07 [8]

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1320
Essential Factual Elements
No Arrest Involved

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

1. **That [*name of defendant*] intentionally deprived [*name of plaintiff*] of [his/her] freedom of movement by use of [physical barriers/force/ threats of force/menace/fraud/deceit/unreasonable duress];**

2. **That [*name of plaintiff*] did not consent;**

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

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

DIRECTIONS FOR USE

Element #2 should be either eliminated or modified by inserting the words "knowingly" or "voluntarily" before the word "consent" if it is alleged that fraud was involved: "Because '[t]here is no real or free consent when it is obtained through fraud' the girls' confinement on the aircraft was nonconsensual and therefore actionable as a false imprisonment." (*Scofield v. Critical Air Medicine, Inc.* (1996) 45 Cal.App.4th 990, 1006, fn. 16 [52 Cal.Rptr.2d 915], internal citations omitted.)

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

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

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

If the defendant alleges that he or she had a lawful privilege, the judge should read the applicable affirmative defense instructions immediately following this one.

For definitions of "menace," "fraud," "deceit," and "duress," see other instructions [to be cross-referenced].

The confinement must be for "an appreciable amount of time, no matter how short." (*City of Newport Beach v. Sasse* (1970) 97 Cal.App.3d 803, 810 [88 Cal.Rptr. 476].) If this is an issue, the judge can instruct on this point as follows: "There is no requirement that the confinement last for a particular period of time."

Insert the following at the end of the instruction if applicable: "At the time, [*name of plaintiff*] need not have been aware that [he/she] was being [restrained/confined/ detained]." (See *Scofield, supra,* 45 Cal.App.4th at pp. 1006–1007.)

SOURCES AND AUTHORITY

- Penal Code section 236 provides: "False imprisonment is the unlawful violation of the personal liberty of another." Courts have held that this statutory definition applies whether the offense is treated as a tort or a crime. (See *Fermino v. Fedco, Inc* (1994) 7 Cal.4th 701, 715 [30 Cal.Rptr.2d 18]; *Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1123 [252 Cal.Rptr. 122]; see also *Wilson v. Houston Funeral Home* (1996) 42 Cal.App.4th 1124, 1135 [50 Cal.Rptr.2d 169] [the tort of false imprisonment is "a willful and wrongful interference with the freedom of movement of another against his will"].)

- "[T]he tort [of false imprisonment] consists of the "nonconsensual, intentional confinement of a person, without lawful privilege, for an appreciable length of time, however short." (*Scofield, supra,* 45 Cal.App.4th at p. 1001, internal citations omitted.)

- "The only mental state required to be shown to prove false imprisonment is the intent to confine, or to create a similar intrusion." (*Fermino, supra,* 7 Cal.4th at p. 716.)

- There is no requirement that the restraint last for any particular period of time. (See *Alterauge v. Los Angeles Turf Club* (1950) 97 Cal.App.2d 735, 736 [218 P.2d 802] [15 minutes was sufficient for false imprisonment]; see also *City of Newport Beach,*

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supra, 9 Cal.App.3d at p. 810 [restraint must be for an "appreciable length of time, however short"].)

- False imprisonment "requires some restraint of the person and that he be deprived of his liberty or compelled to stay where he does not want to remain, or compelled to go where he does not wish to go; and that the person be restrained of his liberty without sufficient complaint or authority." (*Collins v. County of Los Angeles* (1966) 241 Cal.App.2d 451, 459–460 [50 Cal.Rptr. 586], internal citations omitted.)

- "[I]t is clear that force or the threat of force are not the only means by which the tort of false imprisonment can be achieved. Fraud or deceit or any unreasonable duress are alternative methods of accomplishing the tort." (*Scofield, supra,* 45 Cal.App.4th at p. 1002, internal citations omitted.)

- "[C]ontemporaneous awareness of the false imprisonment is not, and need not be, an essential element of the tort." (*Scofield, supra,* 45 Cal.App.4th at p. 1006.)

- "The critical question as to causation in intentional torts is whether the actor's conduct is a substantial factor in bringing about the type of harm which he intended from his original act." (*Null v. City of Los Angeles* (1988) 206 Cal.App.3d 1528, 1536, fn. 6 [254 Cal.Rptr. 492], internal citations omitted.)

- "[T]he law of this state clearly allows a cause of action for false imprisonment notwithstanding the fact a plaintiff suffered merely nominal damage." (*Scofield, supra,* 45 Cal.App.4th at p. 1007.)

- "In addition to recovery for emotional suffering and humiliation, one subjected to false imprisonment is entitled to compensation for other resultant harm, such as loss of time, physical discomfort or inconvenience, any resulting physical illness or injury to health, business interruption, and damage to reputation, as well as punitive damages in appropriate cases." (*Scofield, supra,* 45 Cal.App.4th at p. 1009, internal citation omitted.)

<u>Secondary Sources</u>

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 378–383
- 3 Levy et al., California Torts (1985–2000) False Imprisonment, § 42.01
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, §§ 13:8–13:10

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1321
Essential Factual Elements
False Arrest Without Warrant by Peace Officer

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

1. **That [***name of defendant***] arrested [***name of plaintiff***] without a warrant;**

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

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

DIRECTIONS FOR USE

Give instruction 1322, *False Arrest Without Warrant: Affirmative Defense—Peace Officer—Probable Cause to Arrest*, if applicable, immediately after this instruction.

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

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

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

SOURCES AND AUTHORITY

- Penal Code section 834 provides: "An arrest is taking a person into custody, in a case and in the manner authorized by law. An arrest may be made by a peace officer or by a private person."

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- " '[F]alse arrest' and 'false imprisonment' are not separate torts. False arrest is but one way to committing a false imprisonment, and they are distinguishable only in terminology." (*Collins v. City and County of San Francisco* (1975) 50 Cal.App.3d 671, 673 [123 Cal.Rptr. 525].)

- Government Code section 820.4 provides: "A public employee is not liable for his act or omission, exercising due care, in the execution or enforcement of any law. Nothing in this section exonerates a public employee from liability for false arrest or false imprisonment."

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

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

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

<u>Secondary Sources</u>

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 384–388
- 3 Levy et al., California Torts (1985–2000) False Imprisonment, § 42.23
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 13:20

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1322
False Arrest Without Warrant
Affirmative Defense–Peace Officer–Probable Cause to Arrest

[*Name of defendant***] claims the arrest was not wrongful because [he/she] had the authority to arrest [***name of plaintiff***] without a warrant.**

> **[If [***name of defendant***] proves that [***insert facts that, if proved, would constitute reasonable cause to believe that plaintiff had committed a crime in defendant's presence***], then [***name of defendant***] had the authority to arrest [***name of plaintiff***] without a warrant.]**
>
> *[OR]*
>
> **[If [***name of defendant***] proves that [***insert facts that, if proved, would establish that defendant had reasonable cause to believe that plaintiff had committed a felony, whether or not a felony had actually been committed***], then [***name of defendant***] had the authority to arrest [***name of plaintiff***] without a warrant.**

DIRECTIONS FOR USE

In the brackets, the judge must insert the fact or facts that are actually controverted and that may be necessary to arrive at the probable cause determination. There may be one or more facts or combinations of facts that are necessary to make this determination, in which case they can be phrased in the alternative.

If a criminal act is alleged as justification, it may be necessary to instruct whether the crime is a felony, misdemeanor, or public offense.

Penal Code section 836 provides, in part, that a warrantless arrest may be made if a person has committed a felony, although not in the officer's presence. While the requirement of probable cause is not explicitly stated, it would seem that the officer must always have probable cause at the time of the arrest and that subsequent conviction of a felony does not sanitize an improper arrest.

If the first bracketed paragraph is used, the judge should include "in the officer's presence" as part of the facts that the jury needs to find if there is a factual dispute on this point.

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SOURCES AND AUTHORITY

- Penal Code section 836(a) provides, in part:

  A peace officer … without a warrant, may arrest a person whenever any of the following circumstances occur:
  (1) The officer has probable cause to believe that the person to be arrested has committed a public offense in the officer's presence.
  (2) The person arrested has committed a felony, although not in the officer's presence.
  (3) The officer has probable cause to believe that the person to be arrested has committed a felony, whether or not a felony, in fact, has been committed.

- Penal Code section 15 provides: "A crime or public offense is an act committed or omitted in violation of a law forbidding or commanding it, and to which is annexed, upon conviction, either of the following punishments: Death; imprisonment; fine; removal from office; or disqualification to hold and enjoy any office of honor, trust, or profit in this State."

- Penal Code section 17(a) provides: "A felony is a crime which is punishable with death or by imprisonment in the state prison. Every other crime or public offense is a misdemeanor except those offenses that are classified as infractions."

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

- "An officer is not liable for false imprisonment for the arrest without a warrant of a person whom he has reasonable grounds to believe is guilty of a crime. The question of the existence of probable cause to believe that one is guilty of a crime must be determined as a matter of law from the facts and circumstances of the case." (*Allen v. McCoy* (1933) 135 Cal.App. 500, 507–508 [27 P.2d 423].)

- "The existence of probable cause depends upon facts known by the arresting officer at the time of the arrest." (*Hamilton v. City of San Diego* (1990) 217 Cal.App.3d 838, 844 [266 Cal.Rptr. 215], internal citations omitted.)

- "It is well settled that the presence or absence of probable cause is to be determined by the court as a matter of law and not by the jury as a question of fact." (*Gibson v. J.C. Penney Co., Inc.* (1958) 165 Cal.App.2d 640, 644–645 [331 P.2d 1057], internal citations omitted.) But where the evidence is in conflict, " 'it [is] the duty of the court

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to instruct the jury as to what facts, if established, would constitute probable cause.' " (*Id.* at p. 645, internal citation omitted.)

- " 'Presence' is not mere physical proximity but is determined by whether the offense is apparent to the officer's senses." (*People v. Sjosten* (1968) 262 Cal.App.2d 539, 543–544 [68 Cal.Rptr. 832], internal citations omitted.)

Secondary Sources

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, § 389
- 3 Levy et al., California Torts (1985–2000) False Imprisonment, § 42.23
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, §§ 13:22–13:24

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1323
Essential Factual Elements
False Arrest Without Warrant by Private Citizen

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

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

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

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

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

DIRECTIONS FOR USE

Give instruction 1324, *False Arrest Without Warrant: Affirmative Defense—Private Citizen—Probable Cause to Arrest*, if applicable, immediately after this instruction.

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

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

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

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SOURCES AND AUTHORITY

- Penal Code section 834 provides: "An arrest is taking a person into custody, in a case and in the manner authorized by law. An arrest may be made by a peace officer or by a private person."

- " '[F]alse arrest' and 'false imprisonment' are not separate torts. False arrest is but one way to committing a false imprisonment, and they are distinguishable only in terminology." (*Collins v. City and County of San Francisco* (1975) 50 Cal.App.3d 671, 673 [123 Cal.Rptr. 525].)

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

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

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

<u>Secondary Sources</u>

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 390–392
- 3 Levy et al., California Torts (1985–2000) False Imprisonment, § 42.22
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, §§ 13:8–13:10

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1324
False Arrest Without Warrant: Affirmative Defense
Private Citizen—Probable Cause to Arrest

[*Name of defendant***] claims the citizen's arrest was not wrongful because [he/she] had the authority to cause [***name of plaintiff***] to be arrested without a warrant.**

[If [*name of defendant***] proves that [***name of plaintiff***] committed or attempted to commit a crime in [***name of defendant***]'s presence, then the arrest was lawful.]**

[OR]

[If [*name of defendant***] proves that a felony was committed and that [***insert facts, that if proved, would establish that defendant had reasonable cause to believe that plaintiff had committed a felony***], then the arrest was lawful.]**

DIRECTIONS FOR USE

The judge must insert in the brackets the fact or facts that are actually controverted and that may be necessary to arrive at the probable cause determination. There may be one or more facts or combinations of facts that are necessary to make this determination, in which case they can be phrased in the alternative.

If a criminal act is alleged as justification, it may be necessary to instruct whether the crime is a felony, misdemeanor, or public offense.

Penal Code section 837 provides, in part, that a warrantless arrest may be made if a person has committed a felony, although not in the citizen's presence. While the requirement of probable cause is not explicitly stated, it would seem that the citizen must always have probable cause at the time of the arrest and that subsequent conviction of a felony does not sanitize an improper arrest.

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SOURCES AND AUTHORITY

- Penal Code section 837 provides:

  A private person may arrest another:
  1. For a public offense committed or attempted in his presence.
  2. When the person arrested has committed a felony, although not in his presence.
  3. When a felony has been in fact committed, and he has reasonable cause for believing the person arrested to have committed it.

- Penal Code section 15 provides: "A crime or public offense is an act committed or omitted in violation of a law forbidding or commanding it, and to which is annexed, upon conviction, either of the following punishments: Death; imprisonment; fine; removal from office; or disqualification to hold and enjoy any office of honor, trust, or profit in this State."

- Penal Code section 17(a) provides: "A felony is a crime which is punishable with death or by imprisonment in the state prison. Every other crime or public offense is a misdemeanor except those offenses that are classified as infractions."

- "What is probable cause, as has been often announced, is not a question of fact for the jury, but one of law for the court, to be decided in accordance with the circumstances at the time of the detention, unhampered by the outcome of the charge against the plaintiff of the public offense or by the conclusions of the trial court." (*Collyer v. S.H. Kress Co.* (1950) 5 Cal.2d 175, 181 [54 P.2d 20], internal citations omitted.)

- " 'Presence' is not mere physical proximity but is determined by whether the offense is apparent to the [person]'s senses." (*People v. Sjosten* (1968) 262 Cal.App.2d 539, 543–544 [68 Cal.Rptr. 832], internal citations omitted.)

<u>Secondary Sources</u>

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 390–392
- 3 Levy et al., California Torts (1985–2000) False Imprisonment, § 42.22
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 13:11

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1325
Essential Factual Elements
False Arrest With Warrant

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

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

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

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

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

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

DIRECTIONS FOR USE

Instruction 1326, *False Arrest With Warrant—Peace Officer: Affirmative Defense "Good-Faith" Exception*, should be given after this instruction if that defense is asserted.

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

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

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

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SOURCES AND AUTHORITY

- Penal Code section 834 provides: "An arrest is taking a person into custody, in a case and in the manner authorized by law. An arrest may be made by a peace officer or by a private person."

- " '[F]alse arrest' and 'false imprisonment' are not separate torts. False arrest is but one way to committing a false imprisonment, and they are distinguishable only in terminology." (*Collins v. City and County of San Francisco* (1975) 50 Cal.App.3d 671, 673 [123 Cal.Rptr. 525].)

- Government Code section 820.4 provides: "A public employee is not liable for his act or omission, exercising due care, in the execution or enforcement of any law. Nothing in this section exonerates a public employee from liability for false arrest or false imprisonment."

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

- Where an arrest is made without process, plaintiff does not need to allege that such arrest was unlawful. However, "if process was employed, the facts constituting the invalidity thereof must be set forth." (*Peters v. Bigelow* (1934) 137 Cal.App. 135, 138 [30 P.2d 450].)

<u>Secondary Sources</u>

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 394–396
- 3 Levy et al., California Torts (1985–2000) False Imprisonment, § 42.25
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, §§ 13:26–13:30

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1326
False Arrest With Warrant—Peace Officer
Affirmative Defense—"Good-Faith" Exception

[*Name of defendant*] claims that the arrest was not wrongful. To succeed, [*name of defendant*] must prove all of the following:

1. **That the arrest warrant would have appeared valid to a reasonably intelligent and informed person;**

2. **That [*name of defendant*] believed the warrant was valid; and**

3. **That [*name of defendant*] had a reasonable belief that the person arrested was the person referred to in the warrant.**

If [*name of defendant*] has proven all of the above, then the arrest was not wrongful.

DIRECTIONS FOR USE

The absence-of-malice requirement is satisfied if the officer believes the warrant is valid and the warrant is valid on its face, notwithstanding any personal hostility or ill will.

SOURCES AND AUTHORITY

- Civil Code section 43.55 provides: "There shall be no liability on the part of, and no cause of action shall arise against, any peace officer who makes an arrest pursuant to a warrant of arrest regular upon its face if the peace officer in making the arrest acts without malice and in the reasonable belief that the person arrested is the one referred to in the warrant."

- "With regard to Civil Code section 43.55, the immunity set forth therein for arrests made pursuant to a regular warrant is only conditional. A failure of any condition prevents the immunity from attaching to a public entity or employee." (*Harding v. Bay Area Rapid Transit Dist.* (1989) 215 Cal.App.3d 7, 14 [263 Cal.Rptr. 549].)

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- " 'Malice,' as that term is used in section 43.55, refers not to the actual physical execution of the warrant, but to the officer's state of mind in procuring or executing the warrant. For instance, malice for purposes of section 43.55 has been found in situations where the officer purposefully withheld exculpatory evidence from the magistrate issuing the arrest warrant, where the officer knowingly used false information in order to obtain the warrant, or where the officer executes the warrant with knowledge that it has been recalled or is no longer valid." (*Ting v. U.S.* (9th Cir. 1991) 927 F.2d 1504, 1514, internal citations omitted.)

- Courts have described the meaning of a warrant "regular on its face" as follows: "Unless there is a clear absence of jurisdiction on the part of the court or magistrate issuing the process, it is sufficient if upon its face it [the warrant] appears to be valid in the judgment of an ordinarily intelligent and informed layman." (*Allison v. County of Ventura* (1977) 68 Cal.App.3d 689, 697 [137 Cal.Rptr. 542].)

- "Peace officers are not required to investigate the supportive legal proceedings from which a warrant issues. However, they are required to exercise the judgment of an 'ordinarily intelligent and informed layman' to observe the blatant and patent inadequacy of a warrant emanating from a civil action which directs arrest and neither sets bail nor informs the arrestee of the offense charged for which arrest is ordered." (*Allison, supra,* 68 Cal.App.3d at p. 703.)

- "A police officer must use reasonable prudence and diligence to determine whether a party being arrested is the one described in the warrant. The officer may not refuse to act upon information offered him which discloses the warrant is being served on the wrong person. But, the prudence and diligence required of an arresting officer in determining whether to make an arrest must be balanced against the need to act swiftly and to make on-the-spot evaluations, often under chaotic conditions." (*Lopez v. City of Oxnard* (1989) 207 Cal.App.3d 1, 7 [254 Cal.Rptr. 556].)

<u>Secondary Sources</u>

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 394–396
- 3 Levy et al., California Torts (1985–2000) False Imprisonment, § 42.25
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, §§ 13:26–13:30

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1327
Essential Factual Elements
Unnecessary Delay in Processing/Releasing

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

1. **That [***name of defendant***] held [***name of plaintiff***] in custody;**

2. **That there was an unnecessary delay [***insert facts, e.g., "in taking [*name of plaintiff*] before a judge" or "in releasing [*name of plaintiff*]"***];**

3. **That [***name of plaintiff***] did not consent to the delay;**

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

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

DIRECTIONS FOR USE

If the plaintiff is seeking nominal damages as an alternative to actual damages, insert the following paragraph above element #4:

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

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

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SOURCES AND AUTHORITY

- Penal Code section 834 provides: "An arrest is taking a person into custody, in a case and in the manner authorized by law. An arrest may be made by a peace officer or by a private person."

- Penal Code section 825(a) provides, in part: "[T]he defendant shall in all cases be taken before the magistrate without unnecessary delay, and, in any event, within 48 hours after his or her arrest, excluding Sundays and holidays."

- "The critical factor is the necessity for any delay in arraignment. These provisions do not authorize a two-day detention in all cases. Instead, 'a limit [is placed] upon what may be considered a necessary delay, and a detention of less than two days, if unreasonable under the circumstances, is in violation of the statute and of the Constitution.' " (*People v. Thompson* (1980) 27 Cal.3d 303, 329 [165 Cal.Rptr. 289].)

- Government Code section 820.4 provides: "A public employee is not liable for his act or omission, exercising due care, in the execution or enforcement of any law. Nothing in this section exonerates a public employee from liability for false arrest or false imprisonment."

- " '[F]alse arrest' and 'false imprisonment' are not separate torts. False arrest is but one way to committing a false imprisonment, and they are distinguishable only in terminology." (*Collins v. City and County of San Francisco* (1975) 50 Cal.App.3d 671, 673 [123 Cal.Rptr. 525].)

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

- "In determining which delays are necessary, this court has rejected arguments that the delay was 'not unusual' or made 'the work of the police and the district attorney easier.' As the Court of Appeal recently observed, '[t]here is no authority to delay for the purpose of investigating the case. Subject to obvious health considerations the only permissible delay between the time of arrest and bringing the accused before a magistrate is the time necessary: to complete the arrest; to book the accused; to

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transport the accused to court; or the district attorney to evaluate the evidence for the limited purpose of determining what charge, if any, is to be filed; and to complete the necessary clerical and administrative tasks to prepare a formal pleading.' " (*Youngblood v. Gates* (1988) 200 Cal.App.3d 1302, 1319 [246 Cal.Rptr. 775], internal citations omitted.)

- "Although both false imprisonment and malicious prosecution may cause a person to be restrained or confined, under [*Asgari v. City of Los Angeles* (1997) 15 Cal.4th 744 (63 Cal.Rptr.2d 842)] only damages attributable to injuries arising from false arrest and false imprisonment are compensable in an action under state law against a public entity and its employees. False imprisonment ends at the point malicious prosecution begins which, under *Asgari*, is the point at which the person is arraigned." (*County of Los Angeles v. Superior Court* (2000) 78 Cal.App.4th 212, pp. 220–221 [92 Cal.Rptr.2d 668].)

- "Where the arrest is lawful, subsequent unreasonable delay in taking the person before a magistrate will not affect the legality of the arrest, although it will subject the offending person to liability for so much of the imprisonment as occurs after the period of necessary or reasonable delay." (*Dragna v. White* (1955) 45 Cal.2d 469, 473 [289 Cal.Rptr. 428].)

Secondary Sources

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, § 398
- 3 Levy et al., California Torts (1985–2000) False Imprisonment, § 42.26
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, §§ 13:31–13:34

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1328
Affirmative Defense
Police Officer's Lawful Authority to Detain

[*Name of defendant***] claims that the detention was not wrongful because [he/she] had a right to detain [***name of plaintiff***] for questioning or other limited investigation.**

If [*name of defendant***] has proven that [***insert facts, that if established, would constitute a reasonable suspicion***], then [***name of defendant***] had a right to detain [***name of plaintiff***] for questioning or other limited investigation.**

DIRECTIONS FOR USE

This instruction is intended to apply to false imprisonment actions not involving an arrest. The inserted facts must support a finding of reasonable suspicion as a matter of law.

If the factual issues are too complicated, consider bifurcating the trial.

SOURCES AND AUTHORITY

- "In an action for false arrest and imprisonment, the question of reasonable or probable cause is ordinarily one for the court, and not for the jury. When the facts are admitted or are beyond controversy, the question is to be determined by the court alone. When the facts are controverted or the evidence conflicting, the determination of their legal effect by the court is necessarily hypothetical and the jury is to be told that if it finds the facts in a designated way such facts do or do not amount to probable cause." (*Whaley v. Jansen* (1962) 208 Cal.App.2d 222, 227 [25 Cal.Rptr. 184].)

- "Although the line may at times be a fine one, there is a well-settled distinction in law between an arrest and a detention. A detention is a lesser intrusion upon a person's liberty requiring less cause and consisting of briefly stopping a person for questioning or other limited investigation." (*Cervantez v. J.C. Penney Co.* (1979) 24 Cal.3d 579, 591, fn. 5 [156 Cal.Rptr. 198].)

- Government Code section 820.4 provides: "A public employee is not liable for his act or omission, exercising due care, in the execution or enforcement of any law. Nothing

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in this section exonerates a public employee from liability for false arrest or false imprisonment."

- "The Fourth Amendment to the United States Constitution prohibits seizures of persons, including brief investigative stops, when they are 'unreasonable.' Our state Constitution has a similar provision. A seizure occurs whenever a police officer 'by means of physical force or show of authority' restrains the liberty of a person to walk away." (*People v. Souza* (1994) 9 Cal.4th 224, 229 [36 Cal.Rptr.2d 569], internal citations omitted.)

- A detention "has been said to occur 'if the suspect is not free to leave at will—if he is kept in the officer's presence by physical restraint, threat of force, or assertion of authority.' " (*Evans v. City of Bakersfield* (1994) 22 Cal.App.4th 321, 330 [27 Cal.Rptr.2d 406], internal citation omitted.)

- "It is settled that circumstances short of probable cause to make an arrest may justify a police officer stopping and briefly detaining a person for questioning or other limited investigation." (*In re Tony C.* (1978) 21 Cal.3d 888, 892 [148 Cal.Rptr. 366].)

- "A detention is reasonable under the Fourth Amendment when the detaining officer can point to specific articulable facts that, considered in light of the totality of the circumstances, provide some objective manifestation that the person detained may be involved in criminal activity." (*Souza, supra,* 9 Cal.4th at p. 231.)

- "The state bears the burden of justifying a detention, as with all warrantless intrusions." (*People v. Wilkins* (1986) 186 Cal.App.3d 804, 809 [231 Cal.Rptr. 1], internal citation omitted.)

<u>Secondary Sources</u>:

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, § 381
- 3 Levy et al., California Torts (1985–2000) False Imprisonment, § 42.20

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1329
Common Law Right to Detain for Investigation

[*Name of defendant***] claims that the detention was not wrongful because [he/she] had a right to detain [***name of plaintiff***]. To succeed, [***name of defendant***] must prove all of the following:**

1. **That [***name of defendant***] was the [owner/employer/employee/agent] of a business;**

2. **That [***name of defendant***] had reasonable grounds to believe that [***name of plaintiff***] had wrongfully [taken or damaged merchandise or other personal property] [secured services] from the business. If you find that [***insert facts, that if established, would constitute reasonable grounds***], then [***name of defendant***] had reasonable grounds to detain [***name of plaintiff***];**

3. **That [***name of defendant***] detained [***name of plaintiff***] for a reasonable amount of time; and**

4. **That [***name of defendant***] detained [***name of plaintiff***] in a reasonable manner.**

SOURCES AND AUTHORITY

- "[W]e conclude that the merchant's probable cause defense is limited to suits based upon a detention and does not extend to suits based upon an arrest." (*Cervantez v. J.C. Penney Co.* (1979) 24 Cal.3d 579, 591 [156 Cal.Rptr. 198].)

- "Ordinarily, the owner of property, in the exercise of his inherent right to protect the same, is justified in restraining another who seeks to interfere with or injure it." (*Collyer v. S.H. Kress Co.* (1936) 5 Cal.2d 175, 180 [54 P.2d 20], internal citation omitted.)

- "Merchants who detain individuals whom they have probable cause to believe are about to injure their property are privileged against a false imprisonment action. The

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detention itself must be carried out for a reasonable time and in a reasonable manner." (*Fermino v. Fedco, Inc.* (1994) 7 Cal.4th 701, 716 [30 Cal.Rptr.2d 18].)

- "We note that the merchant's privilege is a defense to a false imprisonment action. As such, the lack of that privilege on defendant's part need not be specifically pleaded by plaintiff. Although a false imprisonment must involve an 'unlawful' restraint on an individual, Fermino's allegations sufficiently plead that her confinement was unlawful. Moreover, the question of whether a detainment was reasonable is generally a question of fact." (*Fermino, supra,* 7 Cal.4th at p. 724, fn. 8, internal citations omitted.)

- Penal Code section 490.5(f) provides, in part: "A merchant may detain a person for a reasonable time for the purpose of conducting an investigation in a reasonable manner whenever the merchant has probable cause to believe the person to be detained is attempting to unlawfully take or has unlawfully taken merchandise from the merchant's premises."

Secondary Sources

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 381–382
- 3 Levy et al., California Torts (1985–2000) False Imprisonment, § 42.20
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 13:11

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1500
Intentional Infliction of Emotional Distress
Essential Factual Elements

[*Name of plaintiff*] claims that [*name of defendant*]'s conduct caused [him/her] to suffer severe emotional distress. To succeed on this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*]'s conduct was outrageous;**

2. **[That [*name of defendant*] intended to cause [*name of plaintiff*] emotional distress;]**

   [or]

   [That [*name of defendant*] acted with reckless disregard of the probability that [*name of plaintiff*] would suffer emotional distress, knowing that [*name of plaintiff*] was present when the conduct occurred;]

3. **That [*name of plaintiff*] suffered severe emotional distress; and**

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

DIRECTIONS FOR USE

Instructions 1502–1504, regarding the elements of intentional infliction of emotional distress, should be given with the above instruction.

Depending on the facts of the case, a plaintiff could choose one or both of the bracketed choices in element #2.

SOURCES AND AUTHORITY

- "The elements of the tort of intentional infliction of emotional distress are: '(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plain-

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tiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct.' " (*Christensen v. Superior Court* (1991) 54 Cal.3d 868, 903 [2 Cal.Rptr.2d 79], internal citation omitted.)

- " Conduct to be outrageous must be so extreme as to exceed all bounds of that usually tolerated in a civilized community." (*Davidson v. City of Westminster* (1982) 32 Cal.3d 197, 209 [185 Cal.Rptr. 252].)

- " '[I]t is generally held that there can be no recovery for mere profanity, obscenity, or abuse, without circumstances of aggravation, or for insults, indignities or threats which are considered to amount to nothing more than mere annoyances.' " (*Yurick v. Superior Court* (1989) 209 Cal.App.3d 1116, 1128 [257 Cal.Rptr. 665], internal citations omitted.)

- "It is not enough that the conduct be intentional and outrageous. It must be conduct directed at the plaintiff, or occur in the presence of a plaintiff of whom the defendant is aware." (*Christensen, supra,* 54 Cal.3d at pp. 903–904.)

- "Severe" emotional distress is "emotional distress of such substantial quantity or enduring quality that no reasonable man in a civilized society should be expected to endure it." (*Fletcher v. Western Life Insurance Co*. (1970) 10 Cal.App.3d 376, 397 [89 Cal.Rptr. 78].)

- " 'It is for the court to determine whether on the evidence severe emotional distress can be found; it is for the jury to determine whether, on the evidence, it has in fact existed.' " (*Fletcher, supra,* 10 Cal.App.3d at p. 397, internal citation omitted.)

- " 'The law limits claims of intentional infliction of emotional distress to egregious conduct toward plaintiff proximately caused by defendant.' The only exception to this rule is that recognized when the defendant is aware of, but acts with reckless disregard of, the plaintiff and the probability that his conduct will cause severe emotional distress to that plaintiff. Where reckless disregard of the plaintiff's interests is the theory of recovery, the presence of the plaintiff at the time the outrageous conduct occurs is recognized as the element establishing a higher degree of culpability which, in turn, justifies recovery of greater damages by a broader group of plaintiffs than allowed on a negligent infliction of emotional distress theory." (*Christensen, supra*, 54 Cal.3d at pp. 905–906, internal citations omitted.)

<u>Secondary Sources</u>

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 404–417

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1501
Intentional Infliction of Emotional Distress
Fear of Cancer, HIV, or AIDS

[*Name of plaintiff***] claims that [***name of defendant***]'s conduct caused [him/her] to suffer severe emotional distress by exposing [***name of plaintiff***] to [***insert applicable carcinogen, toxic substance, HIV, or AIDS***]. To succeed on this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***]'s conduct was outrageous;**

2. **That [***name of defendant***]'s conduct exposed [***name of plaintiff***] to [***insert applicable carcinogen, toxic substance, HIV, or AIDS***];**

3. **[That [***name of defendant***] intended to cause [***name of plaintiff***] emotional distress;] [or]**

   [That [*name of defendant***] acted with reckless disregard of the probability that [[***name of plaintiff***]/the group of individuals including [***name of plaintiff***]] would suffer emotional distress, knowing that [he/she/they] [was/were] present when the conduct occurred;] and**

4. **That [***name of plaintiff***] suffered severe emotional distress from a reasonable fear of developing [***insert applicable cancer, HIV, or AIDS***]; and**

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

A fear of developing [*insert applicable cancer, HIV, or AIDS***] is "reasonable" if the fear stems from the knowledge, confirmed by reliable medical or scientific opinion, that a person's risk of [***insert applicable cancer, HIV, or AIDS***] has significantly increased and that the resulting risk is significant.**

DIRECTIONS FOR USE

Instructions 1502–1504, regarding the elements of intentional infliction of emotional distress, should be given with the above instruction.

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Depending on the facts of the case, a plaintiff could choose one or both of the bracketed choices in element #3.

There may be other harmful agents and medical conditions that could support this cause of action.

See instructions 1508 and 1509 for claims of negligent infliction of emotional distress involving fear of cancer, HIV, or AIDS.

SOURCES AND AUTHORITY

- "The elements of the tort of intentional infliction of emotional distress are: '(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct.' " (*Christensen v. Superior Court* (1991) 54 Cal.3d 868, 903 [2 Cal.Rptr.2d 79], internal citation omitted; *Potter v. Firestone Tire and Rubber Co.* (1993) 6 Cal.4th 965, 1001 [25 Cal.Rptr.2d 550].)

- " 'The law limits claims of intentional infliction of emotional distress to egregious conduct toward plaintiff proximately caused by defendant.' The only exception to this rule is that recognized when the defendant is aware of, but acts with reckless disregard of, the plaintiff and the probability that his conduct will cause severe emotional distress to that plaintiff. Where reckless disregard of the plaintiff's interests is the theory of recovery, the presence of the plaintiff at the time the outrageous conduct occurs is recognized as the element establishing a higher degree of culpability which, in turn, justifies recovery of greater damages by a broader group of plaintiffs than allowed on a negligent infliction of emotional distress theory." (*Christensen, supra*, 54 Cal.3d at pp. 905–906, internal citations omitted.)

- "Severe" emotional distress is "emotional distress of such substantial quantity or enduring quality that no reasonable man in a civilized society should be expected to endure it." (*Fletcher v. Western Life Insurance Co*. (1970) 10 Cal.App.3d 376, 397 [89 Cal.Rptr. 78]; *Potter, supra*, 6 Cal.4th at p. 1004.)

- "[I]t must … be established that plaintiff's fear of cancer is reasonable, that is, that the fear is based upon medically or scientifically corroborated knowledge that the defendant's conduct has significantly increased the plaintiff's risk of cancer and that the plaintiff's actual risk of the threatened cancer is significant." (*Potter, supra*, 6 Cal.4th at p. 1004.)

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- The court in *Herbert v. Regents of University of California* (1994) 26 Cal.App.4th 782, 787–788 [31 Cal.Rptr.2d 709] held that the rules relating to recovery of damages for fear of cancer apply to fear of AIDS. See also *Kerins v. Hartley* (1994) 27 Cal.App.4th 1062 [33 Cal.Rptr.2d 172].

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1502
Intentional Infliction of Emotional Distress
"Outrageous Conduct" Defined

"Outrageous conduct" is conduct so extreme that it goes beyond all possible bounds of decency. Conduct is outrageous if a reasonable person would regard the conduct as intolerable in a civilized community. Outrageous conduct does not include trivialities such as indignities, annoyances, hurt feelings, or bad manners that a reasonable person is expected to endure.

In deciding if [*name of defendant*]'s conduct was outrageous, you must consider, among other things, the following questions:

(a) Did [*name of defendant*] abuse a position of authority or a relationship that gave [him/her] real or apparent power to affect [*name of plaintiff*]'s interests?

(b) Did [*name of defendant*] know that [*name of plaintiff*] was particularly vulnerable to emotional distress? and

(c) Did [*name of defendant*] know that [his/her] conduct would likely result in harm due to mental distress?

SOURCES AND AUTHORITY

- "Conduct to be outrageous must be so extreme as to exceed all bounds of that usually tolerated in a civilized community." (*Davidson v. City of Westminster* (1982) 32 Cal.3d 197, 209 [185 Cal.Rptr. 252].)

- "[L]iability 'does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. … There is no occasion for the law to intervene … where someone's feelings are hurt.' " (*Agarwal v. Johnson* (1979) 25 Cal.3d 932, 946 [160 Cal.Rptr. 141], quoting Rest.2d Torts, § 46, com. d, overruled on other grounds in *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563 [88 Cal.Rptr.2d 19].)

- " 'Behavior may be considered outrageous if a defendant (1) abuses a relation or position that gives him power to damage the plaintiff's interests; (2) knows the

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plaintiff is susceptible to injuries through mental distress; or (3) acts intentionally or unreasonably with the recognition that the acts are likely to result in illness through mental distress. …' " (*Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1122 [252 Cal.Rptr. 122], internal citation omitted.)

- Relationships that have been recognized as significantly contributing to the conclusion that particular conduct was outrageous include: employer-employee (*Alcorn v. Anbro Engineering, Inc.* (1993) 2 Cal.3d 493, 498, fn.2 [86 Cal.Rptr. 88]), insurer-insured (*Fletcher v. Western National Life Insurance Co.* (1970) 10 Cal.App.3d 376, 403–404 [89 Cal.Rptr. 78]), landlord-tenant (*Aweeka v. Bonds* (1971) 20 Cal.App.3d 278, 281–282 [97 Cal.Rptr. 650]), hospital-patient (*Bundren v. Superior Court* (1983) 145 Cal.App.3d 784, 791–792 [193 Cal.Rptr. 671]), attorney-client (*McDaniel v. Gile* (1991) 230 Cal.App.3d 363, 371 [281 Cal.Rptr. 242]), collecting creditors (*Bundren, supra,* at p. 791, fn. 8), and religious institutions (*Molko, supra,* 46 Cal.3d at pp. 1122–1123).

Secondary Sources

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 404–417

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1503
Intentional Infliction of Emotional Distress
"Reckless Disregard" Defined

[*Name of defendant***] acted with reckless disregard in causing [***name of plaintiff***] emotional distress if:**

1. **[***Name of defendant***] knew that emotional distress would probably result from [his/her] conduct; or**

2. **[***Name of defendant***] gave little or no thought to the probable effects of [his/her] conduct.**

SOURCES AND AUTHORITY

- "[I]t is not essential to liability that a trier of fact find a malicious or evil purpose. It is enough that defendant 'devoted little or no thought' to probable consequences of his conduct." (*KOVR-TV v. Superior Court* (1995) 31 Cal.App.4th 1023, 1031 [37 Cal.Rptr.2d 431], internal citation omitted.)

- The requirement of reckless conduct is satisfied by a showing that the defendant acted in reckless disregard of the probability that the plaintiff would suffer emotional distress. (*Little v. Stuyvesant Life Insurance Co.* (1977) 67 Cal.App.3d 451, 462 [136 Cal.Rptr. 653]; *Cervantez v. J.C. Penney Co.* (1979) 24 Cal.3d 579, 593 [156 Cal.Rptr. 198].)

- "Where reckless disregard is the theory, the presence of the plaintiff at the time the outrageous conduct occurs is recognized as the element establishing a higher degree of culpability which, in turn, justifies recovery of greater damages by a broader group of plaintiffs than allowed on a negligent infliction of emotional distress theory." (*Christensen v. Superior Court* (1991) 54 Cal.3d 868, 905–906 [2 Cal.Rptr.2d 79].)

<u>Secondary Sources</u>

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, § 405

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1504
Intentional Infliction of Emotional Distress
"Severe Emotional Distress" Defined

Emotional distress includes suffering, anguish, fright, horror, nervousness, grief, anxiety, worry, shock, humiliation, and shame.

"Severe emotional distress" is not mild or brief; it must be so substantial or long lasting that no reasonable person in a civilized society should be expected to bear it. [*Name of plaintiff***] is not required to prove physical injury to recover damages for severe emotional distress.**

SOURCES AND AUTHORITY

- " 'It is for the court to determine whether on the evidence severe emotional distress can be found; it is for the jury to determine whether, on the evidence, it has in fact existed.' " (*Fletcher v. Western National Life Insurance Co.* (1970) 10 Cal.App.3d 376, 397 [89 Cal.Rptr. 78], internal citation omitted.)

- "Emotional distress" includes any "highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, or worry." (*Fletcher, supra,* 10 Cal.App.3d at p. 397.)

- "Severe emotional distress means" " 'emotional distress of such substantial quality or enduring quality that no reasonable [person] in civilized society should be expected to endure it.' " (*Girard v. Ball* (1981) 125 Cal.App.3d 772, 787–788 [178 Cal.Rptr. 406], internal citation omitted; *Schild v. Rubin* (1991) 232 Cal.App.3d 755, 762–763 [283 Cal.Rptr. 533].)

- One who has wrongfully and intentionally suffered severe emotional distress may recover compensatory damages even though he or she has suffered no physical injury, and the right to compensation exists even though no monetary loss has been sustained. (*Grimes v. Carter* (1966) 241 Cal.App.2d 694, 699 [50 Cal.Rptr. 808].)

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1505
Intentional Infliction of Emotional Distress
Affirmative Defense—Privileged Conduct

[*Name of defendant***] claims that [he/she] is not responsible for [***name of plaintiff***]'s harm, if any, because [***name of defendant***]'s conduct was permissible. To succeed, [***name of defendant***] must prove all of the following:**

1. **That [***name of defendant***] was exercising [his/her] legal rights or protecting [his/her] economic interests;**

2. **That [***name of defendant***]'s conduct was lawful and consistent with community standards; and**

3. **That [***name of defendant***] had a good-faith belief that [he/she] had a legal right to engage in the conduct.**

If you find all of the above, then [*name of defendant***]'s conduct was permissible.**

DIRECTIONS FOR USE

Whether a given communication is within the privileges afforded by Civil Code section 47 is a legal question for the judge.

SOURCES AND AUTHORITY

- "Whether treated as an element of the prima facie case or as a matter of defense, it must also appear that the defendants' conduct was unprivileged." (*Fletcher v. Western National Life Insurance Co.* (1970) 10 Cal.App.3d 376, 394 [89 Cal.Rptr. 78].)

- The statutory privileges that Civil Code section 47 affords to certain oral and written communications are applicable to claims for intentional infliction of emotional distress. (*Agostini v. Strycula* (1965) 231 Cal.App.2d 804, 808 [42 Cal.Rptr. 314].)

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- "The usual formulation is that the [litigation] privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action." (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 212 [266 Cal.Rptr. 638].)

- "Where an employer seeks to protect his own self-interest and that of his employees in good faith and without abusing the privilege afforded him, the privilege obtains even though it is substantially certain that emotional distress will result from uttered statements." (*Deaile v. General Telephone Co. of California* (1974) 40 Cal.App.3d 841, 849–850 [115 Cal.Rptr. 582].)

- "Nevertheless, the exercise of the privilege to assert one's legal rights must be done in a permissible way and with a good faith belief in the existence of the rights asserted. It is well established that one who, in exercising the privilege of asserting his own economic interests, acts in an outrageous manner may be held liable for intentional infliction of emotional distress." (*Fletcher, supra,* 10 Cal.App.3d at p. 395, internal citations omitted.)

- "While it is recognized that the creditor possesses a qualified privilege to protect its economic interest, the privilege may be lost should the creditor use outrageous and unreasonable means in seeking payment." (*Bundren v. Superior Court* (1983) 145 Cal.App.3d 784, 789 [193 Cal.Rptr. 671].)

- "In determining whether the conduct is sufficiently outrageous or unreasonable to become actionable, it is not enough that the creditor's behavior is rude or insolent. However, such conduct may rise to the level of outrageous conduct where the creditor knows the debtor is susceptible to emotional distress because of her physical or mental condition." (*Symonds v. Mercury Savings & Loan Assn.* (1990) 225 Cal.App.3d 1458, 1469 [275 Cal.Rptr. 871], internal citations omitted.)

<u>Secondary Sources</u>

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, § 407

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1506
Negligent Infliction of Emotional Distress
Direct Victim—Essential Factual Elements

[*Name of plaintiff*] claims that [*name of defendant*]'s conduct caused [him/her] to suffer serious emotional distress. To succeed on this claim, [*name of plaintiff*] must prove all of the following:

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

2. **That [*name of plaintiff*] suffered serious emotional distress; and**

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

Emotional distress includes suffering, anguish, fright, horror, nervousness, grief, anxiety, worry, shock, humiliation, and shame. Serious emotional distress exists if an ordinary, reasonable person would be unable to cope with it.

DIRECTIONS FOR USE

The California Supreme Court has allowed plaintiffs to bring negligent infliction of emotional distress actions as "direct victims" in only three types of factual situations: (1) the negligent mishandling of corpses (*Christensen v. Superior Court* (1991) 54 Cal.3d 868 [2 Cal.Rptr.2d 79]); (2) the negligent misdiagnosis of a disease that could potentially harm another (*Molien v. Kaiser Foundation Hospitals* (1980) 27 Cal.3d 916 [167 Cal.Rptr. 831]; and (3) the negligent breach of a duty arising out of a preexisting relationship (*Burgess v. Superior Court* (1992) 2 Cal.4th 1064 [9 Cal.Rptr.2d 615].)

The judge will normally decide if duty was owed to the plaintiff as a direct victim. If the issue of whether the plaintiff is a direct victim is contested, a special instruction with the factual dispute laid out for the jury will need to be drafted.

This instruction should be read in conjunction with either instruction 301, *Basic Standard of Care*, or instruction 330, *Presumption of Negligence per se*.

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This instruction is for use where the plaintiff is a "direct victim" of defendant's negligent conduct. Where the plaintiff witnesses the injury of another, use instruction 1507, *Negligent Infliction of Emotional Distress: Bystander.*

Elements #1 and #3 of this instruction could be modified for use in a strict products liability case. A plaintiff may seek damages for the emotional shock of viewing the injuries of another when the incident is caused by defendant's defective product. (*Kately v. Wilkinson* (1983) 148 Cal.App.3d 576, 587 [195 Cal.Rptr. 902].)

SOURCES AND AUTHORITY

- " '[The] negligent causing of emotional distress is not an independent tort but the tort of negligence … .' 'The traditional elements of duty, breach of duty, causation, and damages apply. Whether a defendant owes a duty of care is a question of law. Its existence depends upon the foreseeability of the risk and upon a weighing of policy considerations for and against imposition of liability.' " (*Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc.* (1989) 48 Cal.3d 583, 588 [257 Cal.Rptr. 98], internal citations omitted.)

- " 'Direct victim' cases are cases in which the plaintiff's claim of emotional distress is not based upon witnessing an injury to someone else, but rather is based upon the violation of a duty owed directly to the plaintiff. '[T]he label "direct victim" arose to distinguish cases in which damages for serious emotional distress are sought as a result of a breach of duty owed the plaintiff that is "assumed by the defendant or imposed on the defendant as a matter of law, or that arises out of a relationship between the two." ' " (*Wooden v. Raveling* (1998) 61 Cal.App.4th 1035, 1038 [71 Cal.Rptr.2d 891], internal citations omitted.)

- In a negligence action, damages may be recovered for serious emotional distress unaccompanied by physical injury: "We agree that the unqualified requirement of physical injury is no longer justifiable." (*Molien, supra*, 27 Cal.3d at p. 928.)

- The California Supreme Court has acknowledged the Hawaii Supreme Court's definition of "serious emotional distress": "[S]erious mental distress may be found where a reasonable man, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case." (*Molien, supra*, 27 Cal.3d at pp. 927–928, quoting *Rodrigues v. State* (1970) 472 P.2d 509, 520.)

<u>Secondary Sources:</u>

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 838

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1507
Negligent Infliction of Emotional Distress
Bystander—Essential Elements

[*Name of plaintiff*] claims that [he/she] suffered serious emotional distress as a result of perceiving [an injury to/the death of] [*name of injury victim*]. To succeed on this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] negligently caused [injury to/the death of] [*name of injury victim*];**

2. **That [*name of plaintiff*] was present at the scene of the injury when it occurred and was aware that [*name of injury victim*] was being injured;**

3. **That [*name of plaintiff*] suffered serious emotional distress; and**

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

Emotional distress includes suffering, anguish, fright, horror, nervousness, grief, anxiety, worry, shock, humiliation, and shame. Serious emotional distress exists if an ordinary, reasonable person would be unable to cope with it.

DIRECTIONS FOR USE

This instruction is for use in bystander cases, where a plaintiff seeks recovery for damages suffered as a percipient witness of injury to others. If the plaintiff is a direct victim of tortious conduct, use instruction 1506, *Negligent Infliction of Emotional Distress: Direct Victim.*

This instruction should be read in conjunction with either instruction 301, *Basic Standard of Care*, or instruction 330, *Presumption of Negligence per se*.

In element #2, the phrase "was being injured" is intended to reflect contemporaneous awareness of injury.

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Whether the plaintiff had a sufficiently close relationship with the victim should be determined as an issue of law because it is integral to the determination of whether a duty was owed to the plaintiff.

SOURCES AND AUTHORITY

- A bystander who witnesses the negligent infliction of death or injury of another may recover for resulting emotional trauma even though he or she did not fear imminent physical harm. (*Dillon v. Legg* (1968) 68 Cal.2d 728 [69 Cal.Rptr. 72].)

- "In the absence of physical injury or impact to the plaintiff himself, damages for emotional distress should be recoverable only if the plaintiff: (1) is closely related to the injury victim, (2) is present at the scene of the injury-producing event at the time it occurs and is then aware that it is causing injury to the victim and, (3) as a result suffers emotional distress—a reaction beyond that which would be anticipated in a disinterested witness and which is not an abnormal response to the circumstances." (*Thing v. La Chusa* (1989) 48 Cal.3d 644, 647 [257 Cal.Rptr. 865].)

- "Absent exceptional circumstances, recovery should be limited to relatives residing in the same household, or parents, siblings, children, and grandparents of the victim." (*Thing, supra*, 48 Cal.3d at p. 668, fn. 10.)

- The close relationship required between the plaintiff and the injury victim does not include the relationship found between unmarried cohabitants. (*Elden v. Sheldon* (1988) 46 Cal.3d 267, 273 [250 Cal.Rptr.254].)

- "[W]e interpret *Thing*'s policy statement as a requirement that *Dillon* plaintiffs experience a contemporaneous sensory awareness of the causal connection between the negligent conduct and the resulting injury." (*Golstein v. Superior Court* (1990) 223 Cal.App.3d 1415, 1427 [273 Cal.Rptr. 270].)

- The California Supreme Court has acknowledged the Hawaii Supreme Court's definition of "serious emotional distress": " '[S]erious mental distress may be found where a reasonable man, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case.' " (*Molien v. Kaiser Foundation Hospitals* (1980) 27 Cal.3d 916, 927–928 [167 Cal.Rptr. 831], quoting *Rodrigues v. State* (1970) 472 P.2d 509, 520.)

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1508
Negligent Infliction of Emotional Distress
Fear of Cancer, HIV, or AIDS

[*Name of plaintiff***] claims that [***name of defendant***]'s conduct caused [him/her] to suffer serious emotional distress by exposing [***name of plaintiff***] to [***insert applicable carcinogen, toxic substance, HIV, or AIDS***]. To succeed on this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was exposed to [***insert applicable carcinogen, toxic substance, HIV, or AIDS***] as a result of [***name of defendant***]'s negligence;**

2. **That [***name of plaintiff***] suffered serious emotional distress from a fear, confirmed by reliable medical or scientific opinion, that it is more likely than not that [***he/she***] will develop [***insert applicable cancer, HIV, or AIDS***] as a result of the exposure; and**

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

Emotional distress includes suffering, anguish, fright, horror, nervousness, grief, anxiety, worry, shock, humiliation, and shame. Serious emotional distress exists if an ordinary, reasonable person would be unable to cope with it.

DIRECTIONS FOR USE

There may be other harmful agents and medical conditions that could support this cause of action.

This instruction should be read in conjunction with either instruction 301, *Basic Standard of Care*, or instruction 330, *Presumption of Negligence per se*.

If plaintiff alleges that defendant's conduct constituted oppression, fraud, or malice, then instruction 1509, *Negligent Infliction of Emotional Distress: Fear of Cancer, HIV, AIDS—Malicious, Oppressive or Fraudulent Conduct*, should be read.

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SOURCES AND AUTHORITY

- " '[D]amages for negligently inflicted emotional distress may be recovered in the absence of physical injury or impact … .' " (*Potter v. Firestone Tire and Rubber Co.* (1993) 6 Cal.4th 965, 986 [25 Cal.Rptr.2d 550], internal citation omitted.)

- "[T]he way to avoid damage awards for unreasonable fear, i.e., in those cases where the feared cancer is at best only remotely possible, is to require a showing of the actual likelihood of the feared cancer to establish its significance." (*Potter, supra,* 6 Cal.4th at p. 990.)

- "[D]amages for fear of cancer may be recovered only if the plaintiff pleads and proves that (1) as a result of the defendant's negligent breach of a duty owed to the plaintiff, the plaintiff is exposed to a toxic substance which threatens cancer; and (2) the plaintiff's fear stems from a knowledge, corroborated by reliable medical or scientific opinion, that it is more likely than not that the plaintiff will develop the cancer in the future due to the toxic exposure." (*Potter, supra,* 6 Cal.4th at p. 997.)

- The California Supreme Court has acknowledged the Hawaii Supreme Court's definition of "serious emotional distress": " '[S]erious mental distress may be found where a reasonable man, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case.' "(*Molien v. Kaiser Foundation Hospitals* (1980) 27 Cal.3d 916, 927–928 [167 Cal.Rptr. 831], quoting *Rodrigues v. State* (1970) 472 P.2d 509, 520.)

- "[W]e hold that the cost of medical monitoring is a compensable item of damages where the proofs demonstrate, through reliable medical expert testimony, that the need for future monitoring is a reasonably certain consequence of a plaintiff's toxic exposure and that the recommended monitoring is reasonable." (*Potter, supra,* 6 Cal.4th at p. 1009.)

- Courts have applied the reasoning of *Potter, supra,* to cases alleging that defendant's conduct caused plaintiff emotional distress based on fear of contracting AIDS. (See *Kerins v. Hartley* (1994) 27 Cal.App.4th 1062, 1073–1075 [33 Cal.Rptr.2d 172]; *Herbert v. Regents of University of California* (1994) 26 Cal.App.4th 782, 785–788 [31 Cal.Rptr.2d 709].)

- "Comparative fault principles may be applied to reduce amount of recovery for emotional distress based on fear of developing cancer when plaintiff's smoking is negligent and a portion of the fear of cancer is attributable to the smoking." (*Potter, supra,* 6 Cal.4th at p. 965.)

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1509
Negligent Infliction of Emotional Distress
Fear of Cancer, HIV, AIDS—Malicious, Oppressive, or Fraudulent Conduct

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[*Name of plaintiff***] claims that [***name of defendant***] acted with [malice/ oppression/fraudulent intent] in exposing [***name of plaintiff***] to [***insert applicable carcinogen, toxic substance, HIV, or AIDS***] and that this conduct caused [***name of plaintiff***] to suffer serious emotional distress. To succeed on this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was exposed to [***insert applicable carcinogen, toxic substance, HIV, or AIDS***] as a result of [***name of defendant***]'s negligent conduct;**

2. **That [***name of defendant***] acted with [malice/oppression/fraudulent intent] because [***insert one or more of the following, as applicable***]:**

   [[*Name of defendant***] intended to cause injury to [***name of plaintiff***];] [or]**

   [[*Name of defendant***]'s conduct was despicable and was carried out with a willful or conscious disregard of [***name of plaintiff***]'s rights or safety;] [or]**

   [[*Name of defendant***]'s conduct was despicable and subjected [***name of plaintiff***] to cruel and unjust hardship in conscious disregard of [***name of plaintiff***]'s rights;] [or]**

   [[*Name of defendant***] intentionally misrepresented or concealed a material fact known to [***name of defendant***], intending to cause [***name of plaintiff***] harm;]**

3. **That [***name of plaintiff***] suffered serious emotional distress from a fear, confirmed by reliable medical or scientific opinion, that [***name of plaintiff***]'s risk of developing [***insert applicable cancer, HIV, or AIDS***] was significantly increased by the exposure and has resulted in an actual risk that is significant; and**

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

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Emotional distress includes suffering, anguish, fright, horror, nervousness, grief, anxiety, worry, shock, humiliation, and shame. Serious emotional distress exists if an ordinary, reasonable person would be unable to cope with it.

"Despicable conduct" is conduct that is so mean, vile, base, or contemptible that it would be looked down on and despised by reasonable people.

DIRECTIONS FOR USE

Use instruction 1508, *Negligent Infliction of Emotional Distress: Fear of Cancer, HIV, or AIDS*, if plaintiff alleges the same tort without punitive conduct.

This instruction should be read in conjunction with either instruction 301, *Basic Standard of Care*, or instruction 330, *Presumption of Negligence per se*.

"Oppression, fraud, or malice" is used here as defined by Civil Code section 3294, except that the higher "clear and convincing" burden of proof is not required in this context.

In some cases the judge should make clear that the defendant does not need to have known of the individual plaintiff where there is a broad exposure and plaintiff is a member of the class that was exposed.

SOURCES AND AUTHORITY

- " '[D]amages for negligently inflicted emotional distress may be recovered in the absence of physical injury or impact … .' " (*Potter v. Firestone Tire and Rubber Co.* (1993) 6 Cal.4th 965, 986 [25 Cal.Rptr.2d 550], quoting *Burgess v. Superior Court* (1992) 2 Cal.4th 1064, 1074 [9 Cal.Rptr.2d 615].)

- "[A] toxic exposure plaintiff need not meet the more likely than not threshold for fear of cancer recovery in a negligence action if the plaintiff pleads and proves that the defendant's conduct in causing the exposure amounts to 'oppression, fraud, or malice' as defined in Civil Code section 3294." (*Potter, supra,* 6 Cal.4th at p. 998.)

- The California Supreme Court has acknowledged the Hawaii Supreme Court's definition of "serious emotional distress": " '[S]erious mental distress may be found where a reasonable man, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case.' "(*Molien v.*

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Kaiser Foundation Hospitals (1980) 27 Cal.3d 916, 927–928 [167 Cal.Rptr. 831], quoting *Rodrigues v. State* (1970) 472 P.2d 509, 520.)

- Courts have applied the reasoning of *Potter, supra,* to cases alleging that defendant's conduct caused plaintiff emotional distress based on fear of contracting AIDS. (See *Kerins v. Hartley* (1994) 27 Cal.App.4th 1062, 1073–1075 [33 Cal.Rptr.2d 172]; *Herbert v. Regents of University of California* (1994) 26 Cal.App.4th 782, 785–788 [31 Cal.Rptr.2d 709].)

- Civil Code section 3294(c) provides:

  As used in this section, the following definitions apply:
  (1) "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 of the rights or safety of others.
  (2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.
  (3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

- "Despicable conduct is conduct which is so vile, base, contemptible, miserable, wretched or loathsome that it would be looked down upon and despised by ordinary decent people." (*Mock v. Michigan Millers Mutual Insurance Co.* (1992) 4 Cal.App.4th 306, 331 [5 Cal.Rptr.2d 594].)

- "Used in its ordinary sense, the adjective 'despicable' is a powerful term that refers to circumstances that are 'base,' 'vile,' or 'contemptible.' " (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 724 [34 Cal.Rptr.2d 898], quoting 4 Oxford English Dist. (2d ed. 1989) p. 529.)

- Although Civil Code section 3294 requires a plaintiff to prove oppression, fraud, or malice by "clear and convincing evidence" for purposes of punitive damages, this higher burden of proof has not been applied to fear-of-cancer cases. (*Potter, supra,* 6 Cal.4th at p. 1000, fn. 20.)

- "Comparative fault principles may be applied to reduce amount of recovery for emotional distress based on fear of developing cancer when plaintiff's smoking is negligent and a portion of the fear of cancer is attributable to the smoking." (*Potter, supra,* 6 Cal.4th at p. 965.)

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1600
Former Criminal Proceeding

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

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

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

3. **That [*name of defendant*] did not reasonably believe [*insert disputed fact necessary to determine probable cause*];**

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

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

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

DIRECTIONS FOR USE

Do not read element #3 if the court has determined from undisputed facts that there was no probable cause. If the jury must determine facts in dispute before the judge can determine probable cause, it may be easier to give a separate instruction listing all the factual issues that the jury must determine (see instruction 1603, *Reasonable Grounds*.)

Do not read element #2 if the court has determined that there was a favorable termination. If the jury must decide a factual dispute on favorable termination, use instruction 1604, *Favorable Termination*.

Note that acquittal does not necessarily reflect lack of reasonable grounds to have brought the prosecution.

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Government Code section 821.6 provides: "A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause."

SOURCES AND AUTHORITY

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

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

- "The test is whether the defendant was actively instrumental in causing the prosecution." (*Cedars-Sinai Medical Center, supra,* 206 Cal.App.3d at p. 417, quoting 5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 418, p. 503.)

- In *Lujan v. Gordon* (1977) 70 Cal.App.3d 260 [138 Cal.Rptr. 654], the court observed that the Supreme Court in an 1861 case had approved a jury instruction whose effect "was to impose liability upon one who had not taken part until after the commencement of the prosecution." (*Id.* at p. 263.)

- "Originally the common law tort of malicious prosecution was limited to criminal cases, but the tort was extended to afford a remedy for the malicious prosecution of a civil action." (*Merlot v. Rizzo* (1998) 64 Cal.App.4th 53, 58 [75 Cal.Rptr.2d 83], internal citation omitted.)

- Restatement Second of Torts, section 653 provides:

> A private person who initiates or procures the institution of criminal proceedings against another who is not guilty of the offense charged is subject to liability for malicious prosecution if
>
> (a) he initiates or procures the proceedings without probable cause and primarily for a purpose other than that of bringing an offender to justice, and
>
> (b) the proceedings have terminated in favor of the accused.

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- Restatement Second of Torts, section 673 provides:

  (1) In an action for malicious prosecution the court determines whether
  - (a) the proceedings of which the plaintiff complains were criminal in character;
  - (b) the proceedings were terminated in favor of the plaintiff;
  - (c) the defendant had probable cause for initiating or continuing the proceedings;
  - (d) the harm suffered by the plaintiff is a proper element for the jury to consider in assessing damages.

  (2) In an action for malicious prosecution, subject to the control of the court, the jury determines
  - (a) the circumstances under which the proceedings were initiated in so far as this determination may be necessary to enable the court to determine whether the defendant had probable cause for initiating or continuing the proceedings;
  - (b) whether the defendant acted primarily for a purpose other than that of bringing an offender to justice;
  - (c) the circumstances under which the proceedings were terminated;
  - (d) the amount that the plaintiff is entitled to recover as damages;
  - (e) whether punitive damages are to be awarded, and if so, their amount.

- "Probable cause" is defined as " 'a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true.' " (*Clary v. Hale* (1959) 175 Cal.App.2d 880, 886 [1 Cal.Rptr. 91], internal citation omitted.)

- "The burden of proving that there was no probable cause for defendant's prosecution of plaintiff upon which an action for malicious prosecution is based rests upon the plaintiff." (*Singleton v. Singleton* (1945) 68 Cal.App.2d 681, 691 [157 P.2d 886], internal citations omitted.)

- Proof that the defendant was innocent does not necessarily establish lack of probable cause: " 'While it is not necessary to show that the crime has in fact been committed, it is necessary to show, not only that the defendant had reasonable ground to believe, but that he did in fact believe, that the crime had been committed, and that the plaintiff had committed the crime.' " (*Singleton, supra*, 68 Cal.App.2d at p. 693, quoting *Ball v. Rawles* (1892) 93 Cal. 222, 234 [28 P. 937].)

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

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

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

- "In a malicious prosecution case the plaintiff is not required to show that the prosecution was inspired by personal hostility, a grudge or ill will. What is required is evidence which establishes bad faith, or the absence of an honest and sincere belief that the prosecution was justified by the existent facts and circumstances." (*Singleton, supra,* 68 Cal.App.2d at p. 696, internal citation omitted.)

- Restatement Second of Torts, section 657 provides: "The fact that the person against whom criminal proceedings are instituted is guilty of the crime charged against him, is a complete defense against liability for malicious prosecution."

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

<u>Secondary Sources</u>

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 418–430

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1601
Wrongful Use of Civil Proceedings

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

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

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

3. **That [***name of defendant***] did not reasonably believe [***insert disputed fact necessary to establish probable cause***];**

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

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

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

DIRECTIONS FOR USE

Do not read element #3 if the court has determined from undisputed facts that there was no probable cause. If the jury must determine facts in dispute before the judge can determine probable cause, it may be easier to give a separate instruction listing all the factual issues that the jury must determine (see instruction 1603, *Reasonable Grounds*.)

Do not read element #2 if the court has determined that there was a favorable termination. If the jury must decide a factual dispute on favorable termination, use instruction 1604, *Favorable Termination*.

Government Code section 821.6 provides: "A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause."

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SOURCES AND AUTHORITY

- "Although the tort is usually called 'malicious prosecution,' the word 'prosecution' is not a particularly apt description of the underlying civil action. … The Restatement refers to 'wrongful use of civil proceedings,' and the phrase used in the text ('malicious institution of a civil proceeding') has been approved." (5 Witkin, Summary of Cal. Law (9th ed. 1988) § 431, p. 513, internal citations omitted.)

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

- Restatement Second of Torts section 674 provides:

  > One who takes an active part in the initiation, continuation or procurement of civil proceedings against another is subject to liability to the other for wrongful civil proceedings if
  > (a) he acts without probable cause, and primarily for a purpose other than that of securing the proper adjudication of the claim in which the proceedings are based, and
  > (b) except when they are ex parte, the proceedings have terminated in favor of the person against whom they are brought.

- "The malicious commencement of a civil proceeding is actionable because it harms the individual against whom the claim is made, and also because it threatens the efficient administration of justice. The individual is harmed because he is compelled to defend against a fabricated claim which not only subjects him to the panoply of psychological pressures most civil defendants suffer, but also the additional stress of attempting to resist a suit commenced out of spite or ill will, often magnified by slanderous allegations in the pleading." (*Merlot v. Rizzo* (1998) 64 Cal.App.4th 53, 58 [75 Cal.Rptr.2d 83], internal citation omitted.)

- A person who had no part in the commencement of the action but who participated in it at a later time may be held liable for malicious prosecution: "There does not appear to be any good reason not to impose liability upon a person who inflicts harm by aiding or abetting a malicious prosecution which someone else has instituted." (*Lujan v. Gordon* (1977) 70 Cal.App.3d. 260, 264 [138 Cal.Rptr. 654].)

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- "One who did not file the complaint may nevertheless be liable if he instigated or was actively instrumental in 'putting the law in motion.' " (5 Witkin, Summary of Cal. Law (9th ed. 1988) § 431, p. 514, citing *Jacques Interiors v. Petrak* (1987) 188 Cal.App.3d 1363, 1371 [234 Cal.Rptr. 44].)

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

- In *Bertero,* the court approved a jury instruction stating that liability can be found if the prior action asserts a legal theory that is brought without probable cause, even if alternate theories are brought with probable cause. (*Bertero, supra,* 13 Cal.3d at p. 55–57.) This holding was reaffirmed in *Crowley v. Katleman* (1994) 8 Cal.4th 666, 695 [34 Cal.Rptr.2d 386].)

- "[A] malicious prosecution plaintiff is not precluded from establishing favorable termination where severable claims are adjudicated in his or her favor." (*Sierra Club Foundation v. Graham* (1999) 72 Cal.App.4th 1135, 1153 [85 Cal.Rptr.2d 726], internal citation omitted.)

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

- Restatement Second of Torts, section 681A provides:

> In an action for wrongful civil proceedings the plaintiff has the burden of proving, when the issue is properly raised, that
> (a) the defendant has initiated, continued or procured the civil proceedings against him;
> (b) the proceedings were terminated in his favor;
> (c) the defendant did not have probable cause for his action;
> (d) the primary purpose for which the proceedings were brought was not that of securing the proper adjudication of the claim on which the proceedings were based;
> (e) he suffered special harm, and the extent of the harm;
> (f) the circumstances make the recovery of punitive damages appropriate.

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- Restatement Second of Torts, section 681B provides:

  (1) In an action for wrongful civil proceedings, the court determines whether
  - (a) a civil proceeding has been initiated;
  - (b) the proceeding was terminated in favor of the plaintiff;
  - (c) the defendant had probable cause for his action;
  - (d) the harm suffered by the plaintiff is a proper element for the jury to consider in assessing damages.

  (2) In an action for wrongful civil proceedings, subject to the control of the court, the jury determines
  - (a) the circumstances under which the proceedings were initiated in so far as may be necessary to enable the court to determine whether the defendant had probable cause for initiating them;
  - (b) whether the defendant acted primarily for a purpose other than that of securing the proper adjudication of the claim on which the proceeding was based;
  - (c) the circumstances under which the proceedings were terminated;
  - (d) the amount that the plaintiff is entitled to recover as general and special damages;
  - (e) whether punitive damages are to be awarded, and if so, in what amount.

- " '[P]laintiff in a malicious prosecution action must plead and prove that the prior judicial proceedings of which he complains terminated in his favor.' " (*Sagonowsky v. More* (1998) 64 Cal.App.4th 122, 128 [75 Cal.Rptr.2d 118], internal citation omitted.)

- "The element of favorable termination is for the court to decide … ." (*Sierra Club Foundation, supra,* 72 Cal.App.4th at p. 1149.)

- "Favorable termination can occur short of a trial on the merits, but it must bear on the merits. Thus, a plaintiff does not establish favorable termination merely by showing that he or she prevailed in the underlying action." (*Sierra Club Foundation, supra,* 72 Cal.App.4th at p. 1149, internal citation omitted.)

- "[T]he termination must relate to the merits of the action by reflecting either on the innocence of or lack of responsibility for the misconduct alleged against him." (*Sagonowsky, supra,* 64 Cal.App.4th at p. 128, internal citation omitted.)

- Establishing the lack of probable cause on a set of facts is traditionally "a question of law to be determined by the court, rather than a question of fact for the jury" because

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it "requires a sensitive evaluation of legal principles and precedents, a task generally beyond the ken of lay jurors ... ." (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 875 [254 Cal.Rptr. 336].)

- "The question of probable cause is one of law, but if there is a dispute concerning the defendant's knowledge of facts on which his or her claim is based, the jury must resolve that threshold question. It is then for the court to decide whether the state of defendant's knowledge constitutes an absence of probable cause." (*Sierra Club Foundation, supra,* 72 Cal.App.4th at p. 1154.)

- " 'The facts to be analyzed for probable cause are those known to the defendant [in the malicious prosecution action] at the time the underlying action was filed.' … If the facts are controverted, they must be passed upon by the jury before the court can determine the issue of probable cause; but the question of probable cause can never be left to the determination of the jury." (*Walsh v. Bronson* (1988) 200 Cal.App.3d 259, 264 [245 Cal.Rptr. 888], internal citations omitted.)

- "A litigant will lack probable cause for his action either if he relies upon facts which he has no reasonable cause to believe to be true, or if he seeks recovery upon a legal theory which is untenable under the facts known to him." (*Sierra Club Foundation, supra,* 72 Cal.App.4th at p. 1154, internal citation omitted.)

- "Probable cause may be present even where a suit lacks merit. … Suits which all reasonable lawyers agree totally lack merit—that is, those which lack probable cause—are the least meritorious of all meritless suits. Only this subgroup of meritless suits present[s] no probable cause." (*Roberts v. Sentry Life Insurance* (1999) 76 Cal.App.4th 375, 382 [90 Cal.Rptr.2d 408].)

- "California courts have held that victory at trial, though reversed on appeal, conclusively establishes probable cause." (*Roberts, supra,* 76 Cal.App.4th at p. 382.)

- "Without actual malice, there can be no action for malicious prosecution. Negligence does not equate with malice. Nor does the negligent filing of a case necessarily constitute the malicious prosecution of that case." (*Grindle v. Lorbeer* (1987) 196 Cal.App.3d 1461, 1467 [242 Cal.Rptr. 562].)

- "The motive of the defendant must have been something other than that of bringing a perceived guilty person to justice or the satisfaction in a civil action of some personal or financial purpose. The plaintiff must plead and prove actual ill will or some improper ulterior motive. It may range anywhere from open hostility to indifference."

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(*Downey Venture v. LMI Insurance Co.* (1998) 66 Cal.App.4th 478, 494 [78 Cal.Rptr.2d 142], internal citations omitted.)

- "The malice element of the malicious prosecution tort goes to the defendant's subjective intent in initiating the prior action. It is not limited to actual hostility or ill will toward the plaintiff. Rather, malice is present when proceedings are instituted primarily for an improper purpose. Suits with the hallmark of an improper purpose are those in which: ' "... (1) the person initiating them does not believe that his claim may be held valid; (2) the proceedings are begun primarily because of hostility or ill will; (3) the proceedings are initiated solely for the purpose of depriving the person against whom they are initiated of a beneficial use of his property; (4) the proceedings are initiated for the purpose of forcing a settlement which has no relation to the merits of the claim." ' " (*Sierra Club Foundation, supra,* 72 Cal.App.4th at pp. 1156–1157, citing *Albertson v. Raboff* (1956) 46 Cal.2d 375, 383 [295 P.2d 405].)

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

- The litigation privilege of Civil Code section 47 does not preclude malicious prosecution actions. See *Kimmel v. Goland* (1990) 51 Cal.3d 202, 209 [271 Cal.Rptr. 191 (litigation privilege "has been interpreted to apply to virtually all torts except malicious prosecution"); *Silberg v. Anderson* (1990) 50 Cal.3d 205, 216 [266 Cal.Rptr. 638] ("The only exception ... has been for malicious prosecution actions."); *Mattco Forge, Inc. v. Arthur Young & Co.* (1992) 5 Cal.App.4th 392, 406 [6 Cal.Rptr.2d 781] ("The privilege applies only to tort causes of action, and not to the tort of malicious prosecution").

<u>Secondary Sources</u>

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 431–454

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1602
Wrongful Use of Administrative Proceedings

[*Name of plaintiff***] claims that [***name of defendant***] wrongfully brought an administrative proceeding against [him/her]. To succeed on this claim, [***name of plaintiff***] must prove all of the following:**

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

2. **[That [***name of administrative body***] did not conduct an independent investigation;]**

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

4. **That [***name of defendant***] did not reasonably believe [***insert disputed fact necessary to establish probable cause***];**

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

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

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

DIRECTIONS FOR USE

Do not read element #4 if the court has determined from undisputed facts that there was no probable cause. If the jury must determine facts in dispute before the judge can determine probable cause, it may be easier to give a separate instruction listing all the factual issues that the jury must determine (see instruction 1603, *Reasonable Grounds*.)

Do not read element #3 if the court has determined that there was a favorable termination. If the jury must decide a factual dispute on favorable termination, use instruction 1604, *Favorable Termination*.

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Government Code section 821.6 provides: "A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause."

SOURCES AND AUTHORITY

- " 'Where the prosecuting officer acts on an independent investigation of his own instead of on the statement of facts by the party making the complaint, the latter has not caused the prosecution and cannot be held liable in an action for malicious prosecution.' " (*Werner v. Hearst Publications, Inc.* (1944) 65 Cal.App.2d 667, 673 [151 P.2d 308], internal citation omitted.)

- Restatement Second of Torts, section 680 provides:

  > One who takes an active part in the initiation, continuation or procurement of civil proceedings against another before an administrative board that has power to take action adversely affecting the legally protected interests of the other, is subject to liability for any special harm caused thereby, if
  > (a) he acts without probable cause to believe that the charge or claim on which the proceedings are based may be well founded, and primarily for a purpose other than that of securing appropriate action by the board, and
  > (b) except where they are ex parte, the proceedings have terminated in favor of the person against whom they are brought.

- "We adopt the rule set forth in section 680 of the Restatement of Torts and hold that an action for malicious prosecution may be founded upon the institution of a proceeding before an administrative agency." (*Hardy v. Vail* (1957) 48 Cal.2d 577, 581 [311 P.2d 494].)

- "[W]e hold that the State Bar, not respondents, initiated, procured or continued the disciplinary proceedings of [plaintiff]. Therefore, [plaintiff] failed to allege the elements required for a malicious prosecution of an administrative proceeding against respondents." (*Stanwyck v. Horne* (1983) 146 Cal.App.3d 450, 459 [194 Cal.Rptr. 228].)

- "The Board of Medical Quality Assurance is similar to the State Bar Association. Each is empowered and directed to conduct an independent investigation of all complaints from the public prior to the filing of an accusation." (*Hogen v. Valley Hospital* (1983) 147 Cal.App.3d 119, 125 [195 Cal.Rptr. 5], internal citation omitted.)

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- "*Hogen* and *Stanwyck* placed an additional pleading burden upon the plaintiff in a malicious prosecution case based upon the favorable termination of an administrative proceeding. Those cases held that since it is the administrative body, and not the individual initiating the complaint, which actually files the disciplinary proceeding, a cause of action for malicious prosecution will not lie if the administrative body conducts an independent preliminary investigation prior to initiating disciplinary proceedings." (*Johnson v. Superior Court* (1994) 25 Cal.App.4th 1564, 1568 [31 Cal.Rptr.2d 199.)

- The same rules for determining probable cause in the wrongful institution of civil proceedings apply to cases alleging the wrongful institution of administrative proceedings. (*Nicolson v. Lucas* (1994) 21 Cal.App.4th 1657, 1666, fn. 4 [26 Cal.Rptr.2d 778].)

Secondary Sources

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 455–458

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1603
Reasonable Grounds

I will decide whether [*name of defendant***] had reasonable grounds for [causing [***name of plaintiff***] to be arrested or prosecuted] [bringing the [lawsuit/administrative proceeding] against [***name of plaintiff***]]. But before I can do so, you must decide whether [***name of plaintiff***] has proven the following:**

[*List all factual disputes regarding the state of defendant's factual knowledge when the prior action was instituted***.]**

SOURCES AND AUTHORITY

- "A plaintiff has probable cause to bring a civil suit if his claim is legally tenable. This question is addressed objectively, without regard to the mental state of plaintiff or his attorney. The court determines as a question of law whether there was probable cause to bring the maliciously-prosecuted suit. Probable cause is present unless any reasonable attorney would agree that the action is totally and completely without merit." (*Roberts v. Sentry Life Insurance* (1999) 76 Cal.App.4th 375, 382 [90 Cal.Rptr.2d 408], internal citations omitted.)

- In the criminal context, "probable cause" is defined as " 'a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true.' " (*Clary v. Hale* (1959) 175 Cal.App.2d 880, 886 [1 Cal.Rptr. 91], internal citation omitted.)

- "The question of probable cause is one of law, but if there is a dispute concerning the defendant's knowledge of facts on which his or her claim is based, the jury must resolve that threshold question. It is then for the court to decide whether the state of defendant's knowledge constitutes an absence of probable cause." (*Sierra Club Foundation v. Graham* (1999) 72 Cal.App.4th 1135, 1154 [85 Cal.Rptr.2d 726], internal citations omitted.)

- " 'The facts to be analyzed for probable cause are those known to the defendant [in the malicious prosecution action] at the time the underlying action was filed.' … If the facts are controverted, they must be passed upon by the jury before the court can

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determine the issue of probable cause; but the question of probable cause can never be left to the determination of the jury." (*Walsh v. Bronson* (1988) 200 Cal.App.3d 259, 264 [245 Cal.Rptr. 888], internal citations omitted.)

- Establishing the lack of probable cause on a set of facts is traditionally "a question of law to be determined by the court, rather than a question of fact for the jury" because it "requires a sensitive evaluation of legal principles and precedents, a task generally beyond the ken of lay jurors ... ." (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 875 [254 Cal.Rptr. 336], internal citations omitted.)

- "When there is a dispute as to the state of the defendant's knowledge and the existence of probable cause turns on resolution of that dispute, … the jury must resolve the threshold question of the defendant's factual knowledge or belief." (*Sheldon Appel Co*., supra, 47 Cal.3d at p. 881, internal citation omitted.)

- "A litigant will lack probable cause for his action either if he relies upon facts which he has no reasonable cause to believe to be true, or if he seeks recovery upon a legal theory which is untenable under the facts known to him." (*Sierra Club Foundation, supra,* 72 Cal.App.4th at p. 1154, internal citation omitted.)

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

<u>Secondary Sources</u>

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 424–428

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1604
Favorable Termination

I will decide if the earlier [prosecution/lawsuit/proceeding] ended in [*name of plaintiff***]'s favor. But before I can do so, you must decide whether [***name of plaintiff***] has proven the following:**

[*List all factual disputes regarding the posture of the prior proceeding upon its termination***.]**

SOURCES AND AUTHORITY

- "[P]laintiff in a malicious prosecution action must plead and prove that the prior judicial proceedings of which he complains terminated in his favor." (*Sagonowsky v. More* (1998) 64 Cal.App.4th 122, 128 [75 Cal.Rptr.2d 118], internal citation omitted.)

- "[W]hen a dismissal results from negotiation, settlement, or consent, a favorable termination is normally not recognized. Under these latter circumstances, the dismissal reflects ambiguously on the merits of the action." (*Weaver v. Superior Court* (1979) 95 Cal.App.3d 166, 184–185 [156 Cal.Rptr. 745], internal citations omitted, disapproved of on other grounds by *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 882 [254 Cal.Rptr. 336].)

- " 'Should a conflict arise as to the circumstances explaining the failure to prosecute, the trier of fact must exercise its traditional role in deciding the conflict.' " (*Weaver, supra*, 95 Cal.App.3d at p. 185, internal citations omitted.)

- "Favorable termination can occur short of a trial on the merits, but it must bear on the merits. Thus, a plaintiff does not establish favorable termination merely by showing that he or she prevailed in the underlying action." (*Sierra Club Foundation v. Graham* (1999) 72 Cal.App.4th 1135, 1153 [85 Cal.Rptr.2d 726], internal citation omitted.)

- "[T]he termination must relate to the merits of the action by reflecting either on the innocence of or lack of responsibility for the misconduct alleged against him." (*Sagonowsky, supra,* 64 Cal.App.4th at p. 128, internal citation omitted.)

<u>Secondary Sources</u>

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 421–423

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1605
Affirmative Defense—Reliance on Counsel

[*Name of defendant*] claims that [he/she] had reasonable grounds for [causing or continuing the criminal proceeding/bringing or continuing a [lawsuit/administrative proceeding]] because [he/she] was relying on the advice of an attorney. To succeed, [*name of defendant*] must prove both of the following:

1. **That [*name of defendant*] made a full and honest disclosure of all the important facts known to [him/her] to the [district attorney/attorney]; and**

2. **That [he/she] reasonably relied on the [district attorney/attorney]'s advice.**

SOURCES AND AUTHORITY

- " 'Probable cause may be established by the defendants in a malicious institution proceeding when they prove that they have in good faith consulted a lawyer, have stated all the facts to him, have been advised by the lawyer that they have a good cause of action and have honestly acted upon the advice of the lawyer.' " (*Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548, 1556 [8 Cal.Rptr.2d 552], internal citation omitted.)

- "[I]f the initiator acts in bad faith or withholds from counsel facts he knew or should have known would defeat a cause of action otherwise appearing from the information supplied, [the] defense fails." (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 53–54 [118 Cal.Rptr. 184.)

- "[T]he defense that a criminal prosecution was commenced upon the advice of counsel is unavailing in an action for malicious prosecution if it appears … that the defendant did not believe that the accused was guilty of the crime charged." (*Singleton v. Singleton* (1945) 68 Cal.App.2d 681, 695 [157 P.2d 886].)

<u>Secondary Sources</u>

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, § 449

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1606
Public Entities and Employees (Gov. Code, § 821.6)

[*Name of defendant*] claims that [he/she] cannot be held responsible for [*name of plaintiff*]'s harm, if any, because [he/she] was a public employee acting within the scope of [his/her] employment. To establish this defense, [*name of defendant*] must prove that [he/she] was acting within the scope of [his/her] employment.

DIRECTIONS FOR USE

For an instruction on scope of employment, see instruction 913, *Vicarious Responsibility: Scope of Employment.*

SOURCES AND AUTHORITY

- Government Code section 821.6 provides: "A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause."

- In *Tur v. City of Los Angeles* (1996) 51 Cal.App.4th 897, 904 [59 Cal.Rptr.2d 470], the court concluded that "the failure to instruct under section 821.6 was prejudicial error." The court observed that "[d]efendants did not enjoy an unqualified immunity from suit. Their immunity would have depended on their proving by a preponderance of the evidence [that] they were acting within the scope of their employment in doing the acts alleged to constitute malicious prosecution." (*Ibid.*)

<u>Secondary Sources</u>

- 5 Witkin, Summary of California Law (9th ed. 2000 supp.) Torts, § 246

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1620
Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] wrongfully [***insert legal procedure, e.g., "took a deposition"***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] [***insert legal procedure, e.g., "took the deposition of* [name of deponent]*"***] ;**

2. **That [***name of defendant***] intentionally used this legal procedure to [***insert alleged improper purpose that procedure was not designed to achieve***];**

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

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

SOURCES AND AUTHORITY

- "To establish a cause of action for abuse of process, a plaintiff must plead two essential elements: that the defendant (1) entertained an ulterior motive in using the process and (2) committed a wilful act in a wrongful manner." (*Coleman v. Gulf Insurance Group* (1986) 41 Cal.3d 782, 792 [226 Cal.Rptr. 90], internal citations omitted.)

- This tort has been "long recognized at common law but infrequently utilized." (*Kappel v. Bartlett* (1988) 200 Cal.App.3d 1457, 1463 [246 Cal.Rptr. 815], internal citation omitted.)

- Restatement Second of Torts, section 682 provides: "One who uses legal process, whether criminal or civil, against another to accomplish a purpose for which it is not designed is liable to the other for the pecuniary loss caused thereby."

- "Malicious prosecution and abuse of process are distinct. The former concerns a meritless lawsuit (and all the damage it inflicted). The latter concerns the misuse of

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the tools the law affords litigants once they are in a lawsuit (regardless of whether there was probable cause to commence that lawsuit in the first place). Hence, abuse of process claims typically arise for improper or excessive attachments or improper use of discovery." (*Bidna v. Rosen* (1993) 19 Cal.App.4th 27, 40 [23 Cal.Rptr.2d 251], internal citations omitted.)

- "The gist of the tort is the misuse of the power of the court: It is an act done under the authority of the court for the purpose of perpetrating an injustice, i.e., a perversion of the judicial process to the accomplishment of an improper purpose. Some definite act or threat not authorized by the process or aimed at an objective not legitimate in the use of the process is required. And, generally, an action lies only where the process is used to obtain an unjustifiable collateral advantage. For this reason, mere vexation [and] harassment are not recognized as objectives sufficient to give rise to the tort." (*Younger v. Solomon* (1974) 38 Cal.App.3d 289, 297 [113 Cal.Rptr. 113], internal citations omitted.)

- "Process is action taken pursuant to judicial authority. It is not action taken without reference to the power of the court." (*Adams v. Superior Court* (1992) 2 Cal.App.4th 521, 530 [3 Cal.Rptr.2d 49].)

- "The term 'process' as used in the tort of abuse of process has been broadly interpreted to encompass the entire range of procedures incident to litigation. … This broad reach of the 'abuse of process' tort can be explained historically, since the tort evolved as a 'catch-all category to cover improper uses of the judicial machinery that did not fit within the earlier established, but narrowly circumscribed, action of malicious prosecution." (*Younger, supra,* 38 Cal.App.3d at p. 296, internal citations omitted.)

- " 'The improper purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money, by the use of the process as a threat or a club.' " (*Spellens v. Spellens* (1957) 49 Cal.2d 210, 232–233 [317 P.2d 613], internal citation omitted.)

- "[A]n improper purpose may consist in achievement of a benefit totally extraneous to or of a result not within its legitimate scope. Mere ill will against the adverse party in the proceedings does not constitute an ulterior or improper motive." (*Ion Equipment Corp. v. Nelson* (1980) 110 Cal.App.3d 868, 876 [168 Cal.Rptr. 361], internal citations omitted.)

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- "Merely obtaining or seeking process is not enough; there must be subsequent abuse, by a misuse of the judicial process for a purpose other than that which it was intended to serve. The gist of the tort is the improper use of the process after it is issued." (*Adams, supra,* 2 Cal.App.4th at pp. 530–531, internal citations omitted.)

- " ' "Some definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process, is required; and there is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions." ' " (*Clark Equipment Co. v. Wheat* (1979) 92 Cal.App.3d 503, 524 [154 Cal.Rptr. 874], internal citations omitted.)

- Civil Code section 47(b) provides, in part: "a privileged publication or broadcast is one made ... in any judicial proceeding." The privilege applies to statements that are (1) made in judicial or quasi-judicial proceedings, (2) by litigants or other participants authorized by law, (3) to achieve the objects of the litigation, and (4) have some connection or logical relation to the action. (*Kimmel v. Goland* (1990) 51 Cal.3d 202, 209 [271 Cal.Rptr. 191].)

- "[I]t is consistent with the purpose of section 47, subdivision (2) to exempt malicious prosecution while still applying the privilege to abuse of process causes of action." (*Abraham v. Lancaster Community Hospital* (1990) 217 Cal.App.3d 796, 824 [266 Cal.Rptr. 360].)

- "[T]he scope of 'publication or broadcast' includes noncommunicative conduct like the filing of a motion for a writ of sale, the filing of assessment liens, or the filing of a mechanic's lien. The privilege also applies to conduct or publications occurring outside the courtroom, to conduct or publications which are legally deficient for one reason or another, and even to malicious or fraudulent conduct or publications." (*O'Keefe v. Kompa* (2000) 84 Cal.App.4th 130, 134 [100 Cal.Rptr.2d 602], internal citations omitted.)

- Litigation privilege can defeat an abuse-of-process claim. (*Merlet v. Rizzo* (1998) 64 Cal.App.4th 53, 65 [75 Cal.Rptr.2d 83].)

- "The use of the machinery of the legal system for an ulterior motive is a classic indicia of the tort of abuse of process. However, the tort requires abuse of legal process, not just filing suit. Simply filing a lawsuit for an improper purpose is not abuse of process." (*Trear v. Sills* (1999) 69 Cal.App.4th 1341, 1359 [82 Cal.Rptr.2d 281], internal citations omitted.)

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- " '[T]he essence of the tort "abuse of process" lies in the misuse of the power of the court; it is an act done in the name of the court and under its authority for the purpose of perpetrating an injustice.' We have located no authority extending the tort of abuse of process to administrative proceedings. Application of the tort to administrative proceedings would not serve the purpose of the tort, which is to preserve the integrity of the court." (*Stoltz v. Wong Communications Ltd. Partnership* (1994) 25 Cal.App.4th 1811, 1822–1823 [31 Cal.Rptr.2d 229], internal citations omitted.)

Secondary Sources

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 459–470

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1700
Breach of Employment Contract—Unspecified Term
"At-Will" Presumption

An employment relationship may be ended at the will of either the employer or the employee, at any time, for any lawful reason, or for no reason at all, unless an employee proves that the parties, by words or conduct, agreed that the employee would be discharged only for good cause.

DIRECTIONS FOR USE

Give this instruction only if the term of employment is unspecified.

SOURCES AND AUTHORITY

- Labor Code section 2922 provides in pertinent part: "An employment, having no specified term, may be terminated at the will of either party on notice to the other."

- "Labor Code section 2922 has been recognized as creating a presumption. The statute creates a presumption of at-will employment which may be overcome 'by evidence that despite the absence of a specified term, the parties agreed that the employer's power to terminate would be limited in some way, e.g., by a requirement that termination be based only on "good cause." ' " (*Haycock v. Hughes Aircraft Co.* (1994) 22 Cal.App.4th 1473, 1488 [28 Cal.Rptr.2d 248], internal citations omitted.)

- Labor Code section 2750 provides: "The contract of employment is a contract by which one, who is called the employer, engages another, who is called the employee, to do something for the benefit of the employer or a third person."

- "Where there is no express agreement, the issue is whether other evidence of the parties' conduct has a 'tendency in reason' to demonstrate the existence of an actual mutual understanding on particular terms and conditions of employment. If such evidence logically permits conflicting inferences, a question of fact is presented. But where the undisputed facts negate the existence or the breach of the contract claimed, summary judgment is proper." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 337 [100 Cal.Rptr.2d 352] internal citations omitted.)

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- "Because the presumption of at-will employment is premised upon public policy considerations, it is one affecting the burden of proof. Therefore, even if no substantial evidence was presented by defendants that plaintiff's employment was at-will, the presumption of Labor Code section 2922 required the issue to be submitted to the jury." (*Alexander v. Nextel Communications, Inc*. (1997) 52 Cal.App.4th 1376, 1381–1382 [61 Cal.Rptr.2d 293], internal citations omitted.)

- "The presumption that an employment relationship of indefinite duration is intended to be terminable at will is therefore 'subject, like any presumption, to contrary evidence. This may take the form of an agreement, express or implied, that ... the employment relationship will continue indefinitely, pending the occurrence of some event such as the employer's dissatisfaction with the employee's services or the existence of some "cause" for termination.' " (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 680 [254 Cal.Rptr. 211], internal citation omitted.)

Secondary Sources

- 4 Wilcox, California Employment Law (1989) Wrongful Termination, § 60.02
- 2 Witkin, Summary of California Law (9th ed. 1987) Agency and Employment, §§ 165–166
- 1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 1997) Contract Actions, § 8.13

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1701
Breach of Employment Contract—Unspecified Term
Essential Factual Elements

[*Name of plaintiff*] claims that [*name of defendant*] breached an employment contract between [*name of plaintiff*] and [*name of defendant*]. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of plaintiff*] and [*name of defendant*] entered into an employment relationship. [An employment contract or a provision in an employment contract may be [written or oral/partly written and partly oral/created by the conduct of the parties]];**

2. **That [*name of defendant*] promised, by words or conduct, to [discharge/demote] [*name of plaintiff*] only for good cause;**

3. **That [*name of plaintiff*] substantially performed [his/her] job duties [unless [*name of plaintiff*]'s performance was excused [or prevented];**

4. **That [*name of defendant*] [discharged/demoted] [*name of plaintiff*] without good cause; and**

5. **That [*name of plaintiff*] was harmed by the [discharge/demotion].**

DIRECTIONS FOR USE

The element of substantial performance should not be confused with the "good cause" defense: "The action is primarily for breach of contract. It was therefore incumbent upon plaintiff to prove that he was able and offered to fulfill all obligations imposed upon him by the contract. Plaintiff failed to meet this requirement; by voluntarily withdrawing from the contract he excused further performance by defendant." (*Kane v. Sklar* (1954) 122 Cal.App.2d 480, 482 [265 P.2d 29], internal citation omitted.) Element number 3 may be deleted if substantial performance is not a disputed issue.

See also instruction 804, *Oral or Written Contract Terms*, and instruction 805, *Implied-in-Fact Contract.*

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The California Supreme Court has extended the implied contract theory to encompass demotions or other similar employment decisions that violate the terms of an implied contract. (See *Scott v. Pacific Gas & Electric Co.* (1995) 11 Cal.4th 454 [46 Cal.Rptr.2d 427].) As a result, the bracketed language regarding an alleged wrongful demotion may be given, or other appropriate language for other similar employment decisions, depending on the facts of the case.

SOURCES AND AUTHORITY

- Labor Code section 2922 provides: "An employment, having no specified term, may be terminated at the will of either party on notice to the other. Employment for a specified term means an employment for a period greater than one month."

- Civil Code section 1439 provides, in part: "Before any party to an obligation can require another party to perform any act under it, he must fulfill all conditions precedent thereto imposed upon himself; and must be able and offer to fulfill all conditions concurrent so imposed upon him on the like fulfillment by the other party."

- "Where there is no express agreement, the issue is whether other evidence of the parties' conduct has a 'tendency in reason' to demonstrate the existence of an actual mutual understanding on particular terms and conditions of employment. If such evidence logically permits conflicting inferences, a question of fact is presented. But where the undisputed facts negate the existence or the breach of the contract claimed, summary judgment is proper." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 337 [100 Cal.Rptr.2d 352] internal citations omitted.)

- The employee bears the ultimate burden of proving that he or she was wrongfully terminated. (*Pugh v. See's Candies, Inc.* (*Pugh I*) (1981) 116 Cal.App.3d 311, 330 [171 Cal.Rptr. 917].)

- "The presumption that an employment relationship of indefinite duration is intended to be terminable at will is therefore 'subject, like any presumption, to contrary evidence. This may take the form of an agreement, express or implied, that ... the employment relationship will continue indefinitely, pending the occurrence of some event such as the employer's dissatisfaction with the employee's services or the existence of some "cause" for termination.' " (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 680 [254 Cal.Rptr. 211], internal citation omitted.)

- "In *Foley*, we identified several factors, apart from express terms, that may bear upon 'the existence and content of an ... [implied-in-fact] agreement' placing limits on the employer's right to discharge an employee. These factors might include ' "the

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personnel policies or practices of the employer, the employee's longevity of service, actions or communications by the employer reflecting assurances of continued employment, and the practices of the industry in which the employee is engaged." ' " (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 336–337 [100 Cal.Rptr.2d 352] internal citations omitted.)

- Civil Code sections 1619–1621 together provide as follows: "A contract is either express or implied. An express contract is one, the terms of which are stated in words. An implied contract is one, the existence and terms of which are manifested by conduct."

- " 'Good cause' or 'just cause' for termination connotes ' "a fair and honest cause or reason,"'' regulated by the good faith of the employer. The term is relative. Whether good cause exists is dependent upon the particular circumstances of each case. In deciding whether good cause exists, there must be a balance between the employer's interest in operating its business efficiently and profitably and the employee's interest in continued employment. Care must be exercised so as not to interfere with the employer's legitimate exercise of managerial discretion. While the scope of such discretion is substantial, it is not unrestricted. Good cause is not properly found where the asserted reasons for discharge are 'trivial, capricious, unrelated to business needs or goals, or pretextual.' Where there is a contract to terminate only for good cause, the employer has no right to terminate for an arbitrary or unreasonable decision." (*Walker v. Blue Cross of California* (1992) 4 Cal.App.4th 985, 994 [6 Cal.Rptr.2d 184], internal citations omitted, abrogated on another ground in *Guz, supra,* 24 Cal.4th at p. 351.)

- "The general rule is that the measure of recovery by a wrongfully discharged employee is the amount of salary agreed upon for the period of service, less the amount which the employer affirmatively proves the employee has earned or with reasonable effort might have earned from other employment." (*Parker v. Twentieth Century Fox-Film Corp.* (1970) 3 Cal.3d 176, 181 [89 Cal.Rptr. 737], internal citations omitted.)

<u>Secondary Sources</u>

- Bancroft-Whitney's Cal. Civil Practice: Employment Litigation (1993) Termination of Employment, §§ 6:11–6:13, 6:18
- 4 Wilcox, California Employment Law (1989) Wrongful Termination, §§ 60.05, 60.07
- 1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 1997) Contract Actions, §§ 8.1–8.21

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1702
Breach of Employment Contract—Unspecified Term Constructive Discharge—Essential Factual Elements

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[*Name of plaintiff*] claims that [*name of defendant*] breached an employment contract between [*name of plaintiff*] and [*name of defendant*] by forcing [*name of plaintiff*] to resign. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of plaintiff*] and [*name of defendant*] entered into an employment relationship. [An employment contract or a provision in an employment contract may be [written or oral/partly written and partly oral/created by the conduct of the parties]];**

2. **That [*name of defendant*] promised, by words or conduct, to discharge [*name of plaintiff*] only for good cause;**

3. **That [*name of plaintiff*] substantially performed [his/her] job duties [unless [*name of plaintiff*]'s performance was excused [or prevented]];**

4. **That [*name of defendant*] knowingly created or permitted working conditions to exist that were so intolerable that a reasonable person in [*name of plaintiff*]'s position would have had no reasonable alternative except to resign;**

5. **That [*name of plaintiff*] resigned because of the intolerable conditions; and**

6. **That [*name of plaintiff*] was harmed by the loss of employment.**

To be intolerable, the adverse working conditions must be unusually or repeatedly offensive to a reasonable person in [name of plaintiff]'s position.

DIRECTIONS FOR USE

The element of substantial performance should not be confused with the "good cause" defense: "The action is primarily for breach of contract. It was therefore incumbent upon

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plaintiff to prove that he was able and offered to fulfill all obligations imposed upon him by the contract. Plaintiff failed to meet this requirement; by voluntarily withdrawing from the contract he excused further performance by defendant." (*Kane v. Sklar* (1954) 122 Cal.App.2d 480, 482 [265 P.2d 29], internal citation omitted.) Element number 3 may be deleted if substantial performance is not a disputed issue.

SOURCES AND AUTHORITY

- Labor Code section 2922 provides: "An employment, having no specified term, may be terminated at the will of either party on notice to the other. Employment for a specified term means an employment for a period greater than one month."

- Civil Code section 1439 provides, in part: "Before any party to an obligation can require another party to perform any act under it, he must fulfill all conditions precedent thereto imposed upon himself; and must be able and offer to fulfill all conditions concurrent so imposed upon him on the like fulfillment by the other party."

- "Where there is no express agreement, the issue is whether other evidence of the parties' conduct has a 'tendency in reason' to demonstrate the existence of an actual mutual understanding on particular terms and conditions of employment. If such evidence logically permits conflicting inferences, a question of fact is presented. But where the undisputed facts negate the existence or the breach of the contract claimed, summary judgment is proper." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 337 [100 Cal.Rptr.2d 352] internal citations omitted.)

- The employee bears the ultimate burden of proving that he or she was wrongfully terminated. (*Pugh v. See's Candies, Inc.* (*Pugh I*) (1981) 116 Cal.App.3d 311, 330 [171 Cal.Rptr. 917].)

- "Standing alone, constructive discharge is neither a tort nor a breach of contact, but a doctrine that transforms what is ostensibly a resignation into a firing. Even after establishing constructive discharge, an employee must independently prove a breach of contract or tort in connection with the termination of employment to obtain damages for wrongful discharge." (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1251 [32 Cal.Rptr.2d 223], internal citation omitted.)

- "The presumption that an employment relationship of indefinite duration is intended to be terminable at will is therefore 'subject, like any presumption, to contrary evidence. This may take the form of an agreement, express or implied, that ... the employment relationship will continue indefinitely, pending the occurrence of some event such as the employer's dissatisfaction with the employee's services or the

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existence of some "cause" for termination.' " (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 680 [254 Cal.Rptr. 211], internal citation omitted.)

- "In *Foley*, we identified several factors, apart from express terms, that may bear upon 'the existence and content of an ... [implied-in-fact] agreement' placing limits on the employer's right to discharge an employee. These factors might include ' "the personnel policies or practices of the employer, the employee's longevity of service, actions or communications by the employer reflecting assurances of continued employment, and the practices of the industry in which the employee is engaged." ' " (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 336–337 [100 Cal.Rptr.2d 352] internal citations omitted.)

- Civil Code sections 1619–1621 together provide as follows: "A contract is either express or implied. An express contract is one, the terms of which are stated in words. An implied contract is one, the existence and terms of which are manifested by conduct."

- " 'Good cause' or 'just cause' for termination connotes ' "a fair and honest cause or reason,"'' regulated by the good faith of the employer. The term is relative. Whether good cause exists is dependent upon the particular circumstances of each case. In deciding whether good cause exists, there must be a balance between the employer's interest in operating its business efficiently and profitably and the employee's interest in continued employment. Care must be exercised so as not to interfere with the employer's legitimate exercise of managerial discretion. While the scope of such discretion is substantial, it is not unrestricted. Good cause is not properly found where the asserted reasons for discharge are 'trivial, capricious, unrelated to business needs or goals, or pretextual.' Where there is a contract to terminate only for good cause, the employer has no right to terminate for an arbitrary or unreasonable decision." (*Walker v. Blue Cross of California* (1992) 4 Cal.App.4th 985, 994 [6 Cal.Rptr.2d 184], internal citations omitted, abrogated on another ground in *Guz, supra*, 24 Cal.4th at p. 351.)

- "Constructive discharge occurs when the employer's conduct effectively forces an employee to resign. Although the employee may say, 'I quit,' the employment relationship is actually severed involuntarily by the employer's acts, against the employee's will. As a result, a constructive discharge is legally regarded as a firing rather than a resignation." (*Turner, supra*, 7 Cal.4th at pp. 1245–1246, internal citation omitted.)

- "In order to amount to constructive discharge, adverse working conditions must be unusually 'aggravated' or amount to a 'continuous pattern' before the situation will be

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deemed intolerable. In general, '[s]ingle, trivial, or isolated acts of [misconduct] are insufficient' to support a constructive discharge claim. Moreover, a poor performance rating or a demotion, even when accompanied by reduction in pay, does not by itself trigger a constructive discharge." (*Turner, supra,* 7 Cal.4th at p. 1247, internal citation and fns. omitted.)

- "Whether conditions were so intolerable as to justify a reasonable employee's decision to resign is normally a question of fact." (*Valdez v. City of Los* Angeles (1991) 231 Cal.App.3d 1043, 1056 [282 Cal.Rptr. 726].)

- "In some circumstances, a single intolerable incident, such as a crime of violence against an employee by an employer, or an employer's ultimatum that an employee commit a crime, may constitute a constructive discharge. Such misconduct potentially could be found 'aggravated.' " (*Turner, supra,* 7 Cal.4th at p. 1247, fn. 3.)

- "[T]he standard by which a constructive discharge is determined is an objective one-the question is 'whether a reasonable person faced with the allegedly intolerable employer actions or conditions of employment would have no reasonable alternative except to quit.' " (*Turner, supra,* 7 Cal.4th at p. 1248, internal citations omitted.)

- "In order to establish a constructive discharge, an employee must plead and prove, by the usual preponderance of the evidence standard, that the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign. For purposes of this standard, the requisite knowledge or intent must exist on the part of either the employer or those persons who effectively represent the employer, i.e., its officers, directors, managing agents, or supervisory employees." (*Turner, supra,* 7 Cal.4th at p. 1251.)

- "The length of time the plaintiff remained on the job may be one relevant factor in determining the intolerability of employment conditions from the standpoint of a reasonable person. Neither logic nor precedent suggests it should always be dispositive." (*Turner, supra,* 7 Cal.4th at p. 1254.)

- "The general rule is that the measure of recovery by a wrongfully discharged employee is the amount of salary agreed upon for the period of service, less the amount which the employer affirmatively proves the employee has earned or with reasonable effort might have earned from other employment." (*Parker v. Twentieth Century Fox-Film Corp.* (1970) 3 Cal.3d 176, 181 [89 Cal.Rptr. 737], internal citations omitted.)

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Secondary Sources

- Bancroft-Whitney's Cal. Civil Practice: Employment Litigation (1993) Termination of Employment, §§ 6:11–6:13, 6:18
- 4 Wilcox, California Employment Law (1989) Wrongful Termination, §§ 60.05, 60.07
- 2 Witkin, Summary of California Law (2000 supp.) Agency and Employment, §§ 184 M–184 O
- 1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 1997) Contract Actions, §§ 8.1–8.21

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1703
Breach of Employment Contract—Unspecified Term
Implied-in-Fact Promise Not to Discharge Without Good Cause

An employer's promise to [discharge/demote] an employee only for good cause is implied when, from all of the circumstances surrounding the employment, it is reasonable for an employee to conclude that the employer promised that [he/she] will be [discharged/demoted] only for good cause.

In deciding if [*name of defendant***] promised to [discharge/demote] [***name of plaintiff***] only for good cause, you should consider, among other factors, the following:**

1. **[***Name of defendant***]'s personnel policies [and/or] practices;**

2. **[***Name of plaintiff***]'s length of service;**

3. **Any raises and promotions received by [***name of plaintiff***]; [and]**

4. **Whether [***name of defendant***] said or did anything to assure [***name of plaintiff***] of continued employment; [and]**

5. **[Insert other relevant factor(s).]**

Length of service, raises, and promotions by themselves are not enough to imply such a promise, although they are factors for you to consider.

DIRECTIONS FOR USE

This instruction should be read when an employee is basing his or her claim of wrongful discharge on an implied covenant not to terminate except for good cause. Only those factors that apply to the facts of the particular case should be read.

"[A]n employee's *mere* passage of time in the employer's service, even where marked with tangible indicia that the employer approves the employee's work, cannot *alone* form an implied-in-fact contract that the employee is no longer at will. Absent other evidence of the employer's intent, longevity, raises and promotions are their own rewards for the

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employee's continuing valued service; they do not, *in and of themselves*, additionally constitute a contractual guarantee of future employment security." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 341–342 [100 Cal.Rptr.2d 352].)

SOURCES AND AUTHORITY

- Civil Code sections 1619–1621 together provide as follows: "A contract is either express or implied. An express contract is one, the terms of which are stated in words. An implied contract is one, the existence and terms of which are manifested by conduct."

- "Where there is no express agreement, the issue is whether other evidence of the parties' conduct has a 'tendency in reason' to demonstrate the existence of an actual mutual understanding on particular terms and conditions of employment. If such evidence logically permits conflicting inferences, a question of fact is presented." (*Guz, supra*, 24 Cal.4th at p. 337, internal citations omitted.)

- "In the employment context, factors apart from consideration and express terms may be used to ascertain the existence and content of an employment agreement, including 'the personnel policies or practices of the employer, the employee's longevity of service, actions or communications by the employer reflecting assurances of continued employment, and the practices of the industry in which the employee is engaged.' " (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 680, internal citation omitted.)

- "We agree that disclaimer language in an employee handbook or policy manual does not necessarily mean an employee is employed at will. But even if a handbook disclaimer is not controlling in every case, neither can such a provision be ignored in determining whether the parties' conduct was intended, and reasonably understood, to create binding limits on an employer's statutory right to terminate the relationship at will. Like any direct expression of employer intent, communicated to employees and intended to apply to them, such language must be taken into account, along with all other pertinent evidence, in ascertaining the terms on which a worker was employed." (*Guz, supra*, 24 Cal.4th at p. 340, internal citations omitted.)

- "Conceptually, there is no rational reason why an employer's policy that its employees will not be demoted except for good cause, like a policy restricting termination or providing for severance pay, cannot become an implied term of an employment contract. In each of these instances, an employer promises to confer a significant benefit on the employee, and it is a question of fact whether that promise was

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reasonably understood by the employee to create a contractual obligation." (*Scott v. Pacific Gas & Electric Co.* (1995) 11 Cal. 4th 454, 464 [46 Cal.Rptr.2d 427].)

Secondary Sources

- Bancroft-Whitney's Cal. Civil Practice: Employment Litigation (2001 supp.) Termination of Employment, §§ 6:13–6:14
- 4 Wilcox, California Employment Law (1989) Wrongful Termination, § 60.05[2][a]–[e]
- 2 Witkin, Summary of California Law (2000 supp.) Agency and Employment, § 184 E
- 1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 1997) Contract Actions, §§ 8.6–8.16

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1704
Breach of Employment Contract—Unspecified Term
"Good Cause" Defined

Good cause exists when an employer's decision to [discharge/demote] an employee is made in good faith and based on a fair and honest reason. Good cause does not exist if the employer's stated reasons for the [discharge/demotion] are trivial, arbitrary, inconsistent with usual practices, [or] unrelated to business needs or goals [or if they conceal the employer's true reasons.]

In deciding whether [*name of defendant***] had good cause to [discharge/demote] [***name of plaintiff***], you must balance [***name of defendant***]'s interest in operating the business efficiently and profitably against the interest of [***name of plaintiff***] in maintaining employment. [If [***name of plaintiff***] had a sensitive managerial position, then [***name of defendant***] had substantial, though not unlimited, discretion in [discharging/demoting] [***name of plaintiff***].]**

DIRECTIONS FOR USE

This instruction may not be appropriate in the context of an implied employment contract where the parties have agreed to a particular meaning of "good cause" (e.g., a written employment agreement specifically defining "good cause" for discharge). If so, the instruction should be modified accordingly.

Only read last bracketed phrase in the first paragraph in cases where there is an issue involving pretext.

The last bracketed sentence in the second paragraph should be given when the employee is in such a position that the employer would be allowed greater discretion in its decision to discharge the employee: "[W]here, as here, the employee occupies a sensitive managerial or confidential position, the employer must of necessity be allowed substantial scope for the exercise of subjective judgment." (*Pugh v. See's Candies, Inc.* (*Pugh I*) (1981) 116 Cal.App.3d 311, 330 [171 Cal.Rptr. 917].) Note that the term "confidential position" has not been defined by California case law.

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When the reason given for the discharge is misconduct, and there is a factual dispute whether the misconduct occurred, then the court should give instruction 1705, *"Good Cause" Defined—Misconduct*, instead of this instruction. (See *Cotran v. Rollins Hudig Hall International, Inc.* (1998) 17 Cal.4th 93 [69 Cal.Rptr.2d 900].)

SOURCES AND AUTHORITY

- Whether good cause exists is usually a matter to be determined by the trier of fact. (*Wallis v. Farmers Group, Inc.* (1990) 220 Cal.App.3d 718, 733 [269 Cal.Rptr. 299].)

- " 'Good cause' or 'just cause' for termination connotes ' " 'a fair and honest cause or reason,' " ' regulated by the good faith of the employer. The term is relative. Whether good cause exists is dependent upon the particular circumstances of each case. In deciding whether good cause exists, there must be a balance between the employer's interest in operating its business efficiently and profitably and the employee's interest in continued employment. Care must be exercised so as not to interfere with the employer's legitimate exercise of managerial discretion. While the scope of such discretion is substantial, it is not unrestricted. Good cause is not properly found where the asserted reasons for discharge are 'trivial, capricious, unrelated to business needs or goals, or pretextual.' Where there is a contract to terminate only for good cause, the employer has no right to terminate for an arbitrary or unreasonable decision." (*Walker v. Blue Cross of California* (1992) 4 Cal.App.4th 985, 994 [6 Cal.Rptr.2d 184], internal citations omitted, abrogated on another ground in *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 351 [10 Cal.Rptr.2d 376].)

- The Court of Appeal in *Pugh I* observed that "good cause" in the context of wrongful termination based on an implied contract "is quite different from the standard applicable in determining the propriety of an employee's termination under a contract for a specified term." (*Pugh, supra,* 116 Cal.App.3d at p. 330.)

- "We have held that appellant has demonstrated a prima facie case of wrongful termination in violation of his contract of employment. The burden of coming forward with evidence as to the reason for appellant's termination now shifts to the employer. Appellant may attack the employer's offered explanation, either on the ground that it is pretextual (and that the real reason is one prohibited by contract or public policy, or on the ground that it is insufficient to meet the employer's obligations under contract or applicable legal principles. Appellant bears, however, the ultimate burden of proving that he was terminated wrongfully." (*Pugh, supra,* 116 Cal.App.3d at pp. 330–331.)

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Secondary Sources

- Bancroft-Whitney's Cal. Civil Practice: Employment Litigation (2001 supp.) Termination of Employment, § 6:18
- 4 Wilcox, California Employment Law (1989) Wrongful Termination, § 60.09[5][b]
- 2 Witkin, Summary of California Law (2000 supp.) Agency and Employment, § 156 165–166
- 1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 1997) Contract Actions, §§ 8.22–8.25

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1705
Breach of Employment Contract—Unspecified Term "Good Cause" Defined—Misconduct

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[*Name of plaintiff*] claims that [*name of defendant*] did not have good cause to [discharge/demote] [him/her] for misconduct. [*Name of defendant*] had good cause to [discharge/demote] [*name of plaintiff*] for misconduct if, [*name of defendant*], acting in good faith, conducted an adequate investigation giving [him/her/it] reasonable grounds to believe that [*name of plaintiff*] engaged in misconduct.

An adequate investigation is one that is reasonable under the circumstances and includes notice to the employee of the claimed misconduct and an opportunity for the employee to answer the charge of misconduct before the decision to discharge is made. A good faith decision to [discharge/demote] must be supported by substantial evidence. You need not decide if [*name of plaintiff*] actually engaged in misconduct.

DIRECTIONS FOR USE

This instruction should be given when there is a dispute as to whether misconduct, in fact, occurred. (*Cotran v. Rollins Hudig Hall International, Inc.* (1998) 17 Cal.4th 93 [69 Cal.Rptr.2d 900].)

SOURCES AND AUTHORITY

- "The proper inquiry for the jury … is not, 'Did the employee *in fact* commit the act leading to dismissal?' It is 'Was the factual basis on which the employer concluded a dischargeable act had been committed reached honestly, after an appropriate investigation and for reasons that that are not arbitrary or pretextual?' The jury conducts a factual inquiry in both cases, but the questions are not the same. In the first, the jury decides the ultimate truth of the employee's alleged misconduct. In the second, it focuses on the *employer's response* to allegations of misconduct." (*Cotran, supra,* 17 Cal.4th at p. 107.)

- "We give operative meaning to the term 'good cause' in the context of implied employment contracts by defining it … as fair and honest reasons, regulated by good

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faith on the part of the employer, that are not trivial, arbitrary or capricious, unrelated to business needs or goals, or pretextual. A reasoned conclusion, in short, supported by substantial evidence gathered through an adequate investigation that includes notice of the claimed misconduct and a chance for the employee to respond." (*Cotran, supra*, 17 Cal.4th at pp. 107–108, internal citations omitted.)

- "*Cotran* set forth a new standard for good cause in termination decisions. Three factual determinations are relevant to the question of employer liability: (1) did the employer act with good faith in making the decision to terminate; (2) did the decision follow an investigation that was appropriate under the circumstances; and (3) did the employer have reasonable grounds for believing the employee had engaged in the misconduct." (*Silva v. Lucky Stores, Inc.* (1998) 65 Cal.App.4th 256, [76 Cal.Rptr.2d 382], internal citation omitted.)

- "We have held that appellant has demonstrated a prima facie case of wrongful termination in violation of his contract of employment. The burden of coming forward with evidence as to the reason for appellant's termination now shifts to the employer. Appellant may attack the employer's offered explanation, either on the ground that it is pretextual and that the real reason is one prohibited by contract or public policy, or on the ground that it is insufficient to meet the employer's obligations under contract or applicable legal principles. Appellant bears, however, the ultimate burden of proving that he was terminated wrongfully." (*Pugh, supra*, 116 Cal.App.3d at pp. 330–331.)

<u>Secondary Sources</u>

- Bancroft-Whitney's Cal. Civil Practice: Employment Litigation (1993) Termination of Employment, §§ 6:18–6.19
- 4 Wilcox, California Employment Law (1989) Wrongful Termination, § 60.09[5][b]
- 2 Witkin, Summary of California Law (2000 supp.) Agency and Employment, § 156
- 1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 1997) Contract Actions, § 8.26

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1706
Breach of Employment Contract—Unspecified Term
Damages

If you find that [*name of defendant*] [discharged/demoted] [*name of plaintiff*] in breach of an employment contract, then you must decide the amount of damages, if any, that [*name of plaintiff*] has proved [he/she] is entitled to recover. To make that decision, you must:

1. **Decide the amount that [*name of plaintiff*] would have earned up to today, including any benefits and pay increases; [and]**

2. **Add the present cash value of any future wages and benefits that [he/she] would have earned for the length of time the employment with [*name of defendant*] was reasonably certain to continue; [and]**

3. **[Add any other monetary damages that were caused by [*name of defendant*]'s conduct.]**

From the above amount, subtract any amount that [*name of defendant*] proves [*name of plaintiff*] earned, or with reasonable efforts could have earned from other substantially similar employment, [whichever is greater].

In determining the period that [*name of plaintiff*]'s employment was reasonably certain to have continued, you should consider, among other factors, the following:

a. **[*Name of plaintiff*]'s age, work performance, and intent regarding continuing employment with [*name of defendant*];**

b. **[*Name of defendant*]'s prospects for continuing the operations involving [*name of plaintiff*]; and**

c. **Any other factor that bears on how long [*name of plaintiff*] would have continued to work.**

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DIRECTIONS FOR USE

For an instruction on mitigation see instruction 1707, *Employee's Duty to Mitigate Damages*. This instruction should be given when plaintiff claims loss of employment from a wrongful discharge or demotion or a breach of the covenant of good faith and fair dealing.

For an instruction on present cash value see instruction 2005, *Present Cash Value*.

SOURCES AND AUTHORITY

- Civil Code section 3300 provides: "For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom."

- "[I]t is our view that in an action for wrongful discharge, and pursuant to the present day concept of employer-employee relations, the term 'wages' should be deemed to include not only the periodic monetary earnings of the employee but also the other benefits to which he is entitled as a part of his compensation." (*Wise v. Southern Pac. Co.* (1970) 1 Cal.3d 600, 607 [83 Cal.Rptr. 202].)

- In determining the period that plaintiff's employment was reasonably certain to have continued, the trial court took into consideration plaintiff's " 'physical condition, his age, his propensity for hard work, his expertise in managing defendants' offices, the profit history of his operation, the foreseeability of the continued future demand for tax return service to small taxpayers.' " (*Drzewiecki v. H & R Block, Inc.* (1972) 24 Cal.App.3d 695, 705 [101 Cal.Rptr. 169].)

- In cases for wrongful demotion, the measure of damages is "the difference in compensation before and after the demotion." (*Scott v. Pacific Gas & Electric Company* (1995) 11 Cal.4th 454, 468 [46 Cal.Rptr.2d 427].)

<u>Secondary Sources</u>

- 4 Wilcox, California Employment Law (1989) Wrongful Termination, § 60.08[3]
- 2 Witkin, Summary of California Law (9th ed. 1987) Agency and Employment, §§ 179, 180

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1707
Breach of Employment Contract—Unspecified Term
Employee's Duty to Mitigate Damages

[*Name of defendant***] claims that if [***name of plaintiff***] is entitled to any damages, they should be reduced by the amount that [***name of plaintiff***] could have earned from other employment. To succeed, [***name of defendant***] must prove all of the following:**

1. **That employment substantially similar to [***name of plaintiff***]'s former job was available to [***name of plaintiff***];**

2. **That [***name of plaintiff***] failed to make a reasonable effort to seek [and retain] such employment; and**

3. **The amount that [***name of plaintiff***] could have earned from such employment.**

In deciding if the employment was substantially similar, you should consider, among other factors, whether:

a. The nature of the work was different from [*name of plaintiff***]'s employment with [***name of defendant***];**

b. The new position was inferior to [*name of plaintiff***]'s former position;**

c. The salary, benefits, and hours of the job were similar to [*name of plaintiff***]'s former job;**

d. The new position required similar skills, background and experience;

e. The job responsibilities were similar; [and]

f. The job was in the same locality; [and]

g. [*insert other relevant factor(s)***].**

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DIRECTIONS FOR USE

This instruction should be given when there is evidence that the employee's damages could have been mitigated. The bracketed language regarding plaintiff's failure to retain a new job is based on the holding in *Stanchfield v. Hamer Toyota, Inc.* (1995) 37 Cal.App.4th 1495, 1502–1503 [44 Cal.Rptr.2d 565].

Only read factors that have been shown by the evidence.

This instruction should not be used for wrongful demotion cases.

SOURCES AND AUTHORITY

- "The general rule is that the measure of recovery by a wrongfully discharged employee is the amount of salary agreed upon for the period of service, less the amount which the employer affirmatively proves the employee has earned or with reasonable effort might have earned from other employment. However, before projected earnings from other employment opportunities not sought or accepted by the discharged employee can be applied mitigation, the employer must show that the other employment was comparable, or substantially similar, to that of which the employee has been deprived; the employee's rejection of or failure to seek other available employment of a different or inferior kind may not be resorted to in order to mitigate damages." (*Parker v. Twentieth Century-Fox Film Corp.* (1970) 3 Cal.3d 176, 181–182, [89 Cal.Rptr. 737], internal citations omitted.)

- "The burden is on the employer to prove that substantially similar employment was available which the wrongfully discharged employee could have obtained with reasonable effort." (*Chyten v. Lawrence & Howell Investments* (1993) 23 Cal.App.4th 607, 616, 46 Cal.Rptr.2d 459.)

- "[W]e conclude that the trial court should not have deducted from plaintiff's recovery against defendant the amount that the court found she might have earned in employment which was substantially inferior to her position with defendant." (*Rabago-Alvarez v. Dart Industries, Inc.* (1976) 55 Cal.App.3d 91, 99.)

- "[I]n those instances where the jury determines the employee was fired from a substantially similar position for cause, any amount the employee with reasonable effort could have earned by retaining that employment should be deducted from the amount of damages which otherwise would have been awarded to the employee under the terms of the original employment agreement." (*Stanchfield, supra,* 37 Cal.App.4th at pp. 1502–1503.)

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- In deciding whether a school bus driver could have obtained a substantially similar job in other nearby school districts, the court looked at several factors, including salary, benefits, hours of work per day, hours of work per year, locality, and availability of a merit-based system. (*California School Employees Assn. v. Personnel Commission* (1973) 30 Cal.App.3d 241, 250–255 [106 Cal.Rptr. 283].)

Secondary Sources

- 4 Wilcox, California Employment Law (1989) Wrongful Termination, § 60.08[4]
- 1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 1997) Contract Actions, § 8.41

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1710
Breach of Employment Contract—Specified Term
Essential Factual Elements

[*Name of plaintiff*] claims that [*name of defendant*] breached an employment contract for a specified term. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of plaintiff*] and [*name of defendant*] entered into an employment contract that specified a length of time that [*name of plaintiff*] would remain employed;**

2. **That [*name of plaintiff*] substantially performed [his/her] job duties [unless [*name of plaintiff*]'s performance was excused [or prevented]];**

3. **That [*name of defendant*] breached the employment contract by [discharging/demoting] [*name of plaintiff*] before the end of the term of the contract; and**

4. **That [*name of plaintiff*] was harmed by the [discharge/demotion].**

DIRECTIONS FOR USE

The element of substantial performance should not be confused with the "good cause" defense: "The action is primarily for breach of contract. It was therefore incumbent upon plaintiff to prove that he was able and offered to fulfill all obligations imposed upon him by the contract. Plaintiff failed to meet this requirement; by voluntarily withdrawing from the contract he excused further performance by defendant." (*Kane v. Sklar* (1954) 122 Cal.App.2d 480, 482 [265 P.2d 29], internal citation omitted.) Element number 2 may be deleted if substantial performance is not an issue.

See also instruction 804, *Oral or Written Contract Terms*, and instruction 805, *Implied-in-Fact Contract.*

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SOURCES AND AUTHORITY

- Labor Code section 2922 provides: "An employment, having no specified term, may be terminated at the will of either party on notice to the other. Employment for a specified term means employment for a period of greater than one month."

- Labor Code section 2924 provides: "An employment for a specified term may be terminated at any time by the employer in case of any willful breach of duty by the employee in the course of his employment, or in case of his habitual neglect of his duty or continued incapacity to perform it."

- Civil Code section 1439 provides, in part: "Before any party to an obligation can require another party to perform any act under it, he must fulfill all conditions precedent thereto imposed upon himself; and must be able and offer to fulfill all conditions concurrent so imposed upon him on the like fulfillment by the other party."

- "Labor Code section 2924 has traditionally been interpreted to 'inhibit[] the termination of employment for a specified term except in case of a wilful breach of duty, of habitual neglect of, or continued incapacity to perform, a duty.' " (*Khajavi v. Feather River Anesthesia Medical Group* (2000) 84 Cal.App.4th 32, 57 [100 Cal.Rptr.2d 627], internal citations omitted.)

- "Stated simply, the contract compensation for the unexpired period of the contract affords a prima facie measure of damages; the actual measured damage, however, is the contract amount reduced by compensation received during the unexpired term; if, however, such other compensation has not been received, the contract amount may still be reduced or eliminated by a showing that the employee, by the exercise of reasonable diligence and effort, could have procured comparable employment and thus mitigated the damages." (*Erler v. Five Points Motors, Inc.* (1967) 249 Cal.App.2d 560, 562 [57 Cal.Rptr. 516].)

<u>Secondary Sources</u>

- 1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 1997) Contract Actions, § 8.20

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1711
Breach of Employment Contract—Specified Term Good Cause Defense

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[*Name of defendant*] claims that [he/she/it] did not breach the employment contract because [he/she/it] [discharged/demoted] [*name of plaintiff*] for good cause. Good cause existed if [*name of defendant*] proves:

[that [*name of plaintiff*] willfully breached a job duty] [or]

[that [*name of plaintiff*] continually neglected one or more of [his/her] job duties] [or]

[that a continued incapacity prevented [*name of plaintiff*] from performing [his/her] job duties .]

DIRECTIONS FOR USE

This instruction should be given when the employee alleges wrongful discharge in breach of an employment contract for a specified term and the employer defends by asserting plaintiff was justifiably discharged.

This instruction may not be appropriate in the context of an employment contract where the parties have agreed to a particular meaning of "good cause" (e.g., a written employment agreement specifically defining "good cause" for discharge). If so, the instruction should be modified accordingly.

Modification of the third element may be necessary where the plaintiff has a statutory right to be absent for work (for example, for family and medical leave or to accommodate a disability).

SOURCES AND AUTHORITIES

- Labor Code section 2922 provides: "An employment, having no specified term, may be terminated at the will of either party on notice to the other. Employment for a specified term means employment for a period of greater than one month."

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- Labor Code section 2924 provides: "An employment for a specified term may be terminated at any time by the employer in case of any willful breach of duty by the employee in the course of his employment, or in case of his habitual neglect of his duty or continued incapacity to perform it."

- "Labor Code section 2924 has traditionally been interpreted to 'inhibit[] the termination of employment for a specified term except in case of a wilful breach of duty, of habitual neglect of, or continued incapacity to perform, a duty.' " (*Khajavi v. Feather River Anesthesia Medical Group* (2000) 84 Cal.App.4th 32, 57 [100 Cal.Rptr.2d 627], internal citations omitted.)

- Labor Code section 2924 "does not grant a right to terminate prior to the end of the employee's term on the basis of a mistaken belief of a breach." (*Khajavi, supra,* 84 Cal.App.4th at pp. 58–59.)

- Good cause in the context of wrongful termination based on an implied contract " 'is quite different from the standard applicable in determining the propriety of an employee's termination under a contract for a specified term.' " (*Khajavi, supra,* 84 Cal.App.4th at p. 58, internal citations omitted.)

- "An employer is justified in discharging his employee, when the latter fails to perform his duty, even though injury does not result to the employer as a result of the employee's failure to do his duty." (*Bank of America National Trust & Savings Assn. v. Republic Productions, Inc.* (1941) 44 Cal.App.2d 651, 653 [112 P.2d 972], internal citation omitted.)

- "It is therefore not every deviation of the employee from the standard of performance sought by his employer that will justify a discharge. There must be some 'wilful act or wilful misconduct ...' when the employee uses his best efforts to serve the interests of his employer. (*Holtzendorff v. Housing Authority of City of Los Angeles* (1967) 250 Cal.App.2d 596, 610 [58 Cal.Rptr. 886], internal citation omitted.)

- " 'Willful' disobedience of a specific, peremptory instruction of the master, if the instruction be reasonable and consistent with the contract, is a breach of duty–a breach of the contract of service; and, like any other breach of the contract, of itself entitles the master to renounce the contract of employment". (*May v. New York Motion Picture Corp.* (1920) 45 Cal.App. 396, 403 [187 P. 785].)

<u>Secondary Sources</u>

- 1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 1997) Contract Actions, § 8.20

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1712
Breach of Employment Contract—Specified Term Damages

If you find that [*name of defendant*] [discharged/demoted] [*name of plaintiff*] in breach of an employment contract for a specified term, then you must decide the damages, if any, that [*name of plaintiff*] has proved [he/she] is entitled to recover. To make that decision, you must:

1. **Decide the amount that [*name of plaintiff*] would have earned up to today, including any benefits and pay increases; [and]**

2. **Add the present cash value of any future wages and benefits that [he/she] would have earned up to the end of the term of the contract; [and]**

3. **[Add any other monetary damages that were caused by [*name of defendant*]'s conduct.]**

From the above amount, subtract any amount that [*name of defendant*] proves [*name of plaintiff*] earned, or with reasonable efforts could have earned from other substantially similar employment, [whichever is greater].

[If you find that [*name of plaintiff*] would have exercised [his/her] option to extend the term of the employment contract, then you may consider the total term of [*name of plaintiff*]'s employment contract to be [*specify length of original contract term plus option term*].]

SOURCES AND AUTHORITY

- Civil Code section 3300 provides: "For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom."

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- "Stated simply, the contract compensation for the unexpired period of the contract affords a prima facie measure of damages; the actual measured damage, however, is the contract amount reduced by compensation received during the unexpired term; if, however, such other compensation has not been received, the contract amount may still be reduced or eliminated by a showing that the employee, by the exercise of reasonable diligence and effort, could have procured comparable employment and thus mitigated the damages." (*Erler v. Five Points Motors, Inc.* (1967) 249 Cal.App.2d 560, 562 [57 Cal.Rptr. 516].)

- In appropriate circumstances, the court may authorize the trier of fact to consider "the probability the employee would exercise the option in determining the length of the unexpired term of employment when applying the applicable measure of damages." (*Oldenkott v. American Electric, Inc.* (1971) 14 Cal.App.3d 198, 204 [92 Cal.Rptr. 127].)

- "The trial court correctly found that defendants wrongfully terminated the employment contract and that the measure of damages was the difference between the amount Silva would have received under the contract and that amount which Silva actually received from his other employment." (*Silva v. McCoy* (1968) 259 Cal.App.2d 256, 260 [66 Cal.Rptr. 364].)

- "The plaintiff has the burden of proving his damage. The law is settled that he has the duty of minimizing that damage. While the contract wages are prima facie his damage, his actual damage is the amount of money he was out of pocket by reason of the wrongful discharge." (*Erler v. Five Points Motors, Inc., supra,* 249 Cal.App.2d 560 at pp. 567–568.)

- "The burden of proof is on the party whose breach caused damage, to establish matters relied on to mitigate damage." (*Steelduct Co. v. Henger-Seltzer Co.* (1945) 26 Cal.2d 634, 654 [160 P.2d 804], internal citations omitted.)

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1720
Breach of the Implied Covenant of Good Faith and Fair Dealing
Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] violated the duty to act fairly and in good faith. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] and [***name of defendant***] entered into an employment contract;**

2. **That [***name of plaintiff***] substantially performed [his/her] job duties [unless [***name of plaintiff***]'s performance was excused [or prevented]];**

3. **That [***name of defendant***] [***specify conduct that plaintiff claims prevented him/her from receiving the benefits that he/she was entitled to have received under the contract***];**

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

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

The law implies in every contract a duty to act fairly and in good faith. This duty requires that neither party do anything that prevents the other party from receiving the benefits of their agreement. Good faith means honesty of purpose without any intention to mislead or to take unfair advantage of another. Generally speaking, it means being faithful to one's duty or obligation.

DIRECTIONS FOR USE

If the existence of a contract is at issue see instructions on contract formation in the 800 series.

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

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The element of substantial performance should not be confused with the "good cause" defense: "The action is primarily for breach of contract. It was therefore incumbent upon plaintiff to prove that he was able and offered to fulfill all obligations imposed upon him by the contract. Plaintiff failed to meet this requirement; by voluntarily withdrawing from the contract he excused further performance by defendant." (*Kane v. Sklar* (1954) 122 Cal.App.2d 480, 482 [265 P.2d 29], internal citation omitted.) Element number 3 may be deleted if substantial performance is not an issue.

Do not give this instruction if the alleged breach is only the termination of an at-will contract. (See *Eisenberg v. Alameda Newspapers, Inc.* (1999) 74 Cal.App.4th 1359, 1391 [88 Cal.Rptr.2d 802].)

SOURCES AND AUTHORITY

- Restatement Second of Contracts section 205 provides: "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." Comment (a) to this section provides, in part: "The phrase 'good faith' is used in a variety of contexts, and its meaning varies somewhat with the context. Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving 'bad faith' because they violate community standards of decency, fairness or reasonableness. The appropriate remedy for a breach of the duty of good faith also varies with the circumstances."

- Civil Code section 1439 provides, in part: "Before any party to an obligation can require another party to perform any act under it, he must fulfill all conditions precedent thereto imposed upon himself; and must be able and offer to fulfill all conditions concurrent so imposed upon him on the like fulfillment by the other party."

- "We therefore conclude that the employment relationship is not sufficiently similar to that of insurer and insured to warrant judicial extension of the proposed additional tort remedies in view of the countervailing concerns about economic policy and stability, the traditional separation of tort and contract law, and finally, the numerous protections against improper terminations already afforded employees." (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 693 [254 Cal.Rptr. 211].)

- "The covenant of good faith and fair dealing, implied by law in every contract, exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive the benefits of the agreement actually made. The covenant thus cannot " 'be endowed with an existence independent of its contractual underpinnings.' " It

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cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 350–351 [100 Cal.Rptr.2d 352.], internal citations omitted.)

- "A breach of the contract may also constitute a breach of the implied covenant of good faith and fair dealing. But insofar as the employer's acts are directly actionable as a breach of an implied-in-fact contract term, a claim that merely realleges that breach as a violation of the covenant is superfluous. This is because, as we explained at length in *Foley*, the remedy for breach of an employment agreement, including the covenant of good faith and fair dealing implied by law therein, is solely contractual. In the employment context, an implied covenant theory affords no separate measure of recovery, such as tort damages." (*Guz, supra,* 24 Cal.4th at p. 352, internal citation omitted.)

- "Where there is no underlying contract there can be no duty of good faith arising from the implied covenant." (*Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 819 [85 Cal.Rptr.2d 459].)

- "We do not suggest the covenant of good faith and fair dealing has no function whatever in the interpretation and enforcement of employment contracts. As indicated above, the covenant prevents a party from acting in bad faith to frustrate the contract's actual benefits. Thus, for example, the covenant might be violated if termination of an at-will employee was a mere pretext to cheat the worker out of another contract benefit to which the employee was clearly entitled, such as compensation already earned." (*Guz, supra,* 24 Cal.4th at p. 353, fn. 18.)

- "The reason for an employee's dismissal and whether that reason constitutes bad faith are evidentiary questions most properly resolved by the trier of fact." (*Luck v. Southern Pacific Transportation Co.* (1990) 218 Cal.App.3d 1, 26 [267 Cal.Rptr. 618], internal citations omitted.)

Secondary Sources

- Bancroft-Whitney's Cal. Civil Practice: Employment Litigation (1993) Termination of Employment, §§ 6.20–6.21
- 4 Wilcox, California Employment Law (1989) Wrongful Termination, §§ 60.02[2][c], 60.06
- 21 California Forms of Pleading and Practice (LEXIS Publishing, 2000), § 249.14
- 1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 1997) Contract Actions, §§ 8.27–8.28

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1721
Breach of the Implied Covenant of Good Faith and Fair Dealing
Good Faith Mistaken Belief Defense

[*Name of defendant***] claims that [he/she/it] did not breach the duty to act fairly and in good faith because [he/she/it] believed that there was a lawful and reasonable business purpose for the conduct.**

To succeed, [*name of defendant***] must prove both of the following:**

1. **That [his/her/its] conduct was based on an honest belief that [***insert alleged mistake***]; and**

2. **That, if true, [***insert alleged mistake***] would have been a lawful and reasonable business purpose for the conduct.**

SOURCES AND AUTHORITY

- "[B]ecause the implied covenant of good faith and fair dealing requires the employer to act fairly and in good faith, an employer's honest though mistaken belief that legitimate business reasons provided good cause for discharge, will negate a claim it sought in bad faith to deprive the employee of the benefits of the contract. (*Wilkerson v. Wells Fargo Bank* (1989) 212 Cal.App.3d 1217, 1231 [261 Cal.Rptr. 185], internal citation omitted, disapproved on other grounds in *Cotran v. Rollins Hudig Hall International, Inc.* (1998) 17 Cal.4th 93, 96 [69 Cal.Rptr.2d 900]

- "The jury was instructed that the neglect or refusal to fulfill a contractual obligation based on an honest, mistaken belief did not constitute a breach of the implied covenant." (*Luck v. Southern Pacific Transportation Co.* (1990) 218 Cal.App.3d 1, 26 [267 Cal.Rptr. 618].)

- "… *Foley* does not preclude inquiry into an employer's motive for discharging an employee … . " (*Seubert v. McKesson Corp.* (1990) 223 Cal.App.3d 1514, 1521 [273 Cal.Rptr. 296].)

- "[T]he jury was asked to determine in its special verdict whether appellants had a legitimate reason to terminate [plaintiff]'s employment and whether appellants acted

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in good faith on an honest but mistaken belief that they had a legitimate business reason to terminate [plaintiff]'s employment." (*Seubert v. McKesson Corp.* (1990) 223 Cal.App.3d 1514, 1521 [273 Cal.Rptr. 296] [upholding jury instruction].)

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1730
Wrongful Discharge/Demotion in Violation of Public Policy
Essential Factual Elements

[*Name of plaintiff***] claims [he/she] was [discharged/demoted] from employment for reasons that violate a public policy. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was employed by [***name of defendant***];**

2. **That [***name of plaintiff***] was [discharged/demoted];**

3. **That one of the reasons [***name of defendant***] [discharged/demoted] [***name of plaintiff***] was [***insert alleged violation of public policy, e.g., "because [name of plaintiff] refused to engage in price fixing"***]; and**

4. **That the [discharge/demotion] caused [***name of plaintiff***] harm.**

DIRECTIONS FOR USE

The judge should determine whether the purported reason for firing the plaintiff would amount to a violation of public policy.

This instruction must be supplemented with instruction 1733, *Wrongful Discharge in Violation of Public Policy—Damages.* If plaintiff alleges he or she was forced or coerced to resign, then instruction 1731, *Constructive Discharge in Violation of Public Policy—Plaintiff Required to Violate Public Policy*, or instruction 1732, *Constructive Discharge in Violation of Public—Policy Plaintiff Required to Endure Intolerable Conditions for Improper Purpose that Violates Public Policy*, should be given instead.

The California Supreme Court has extended employment claims to encompass demotions or other similar employment decisions. (See *Scott v. Pacific Gas & Electric Co.* (1995) 11 Cal.4th 454 [46 Cal.Rptr.2d 427].) The bracketed language regarding an alleged wrongful demotion may be given, depending on the facts of the case, or other appropriate language for other similar employment decisions.

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SOURCES AND AUTHORITY

- "[W]hen an employer's discharge of an employee violates fundamental principles of public policy, the discharged employee may maintain a tort action and recover damages traditionally available in such actions." (*Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 170 [164 Cal.Rptr. 839].)

- "[T]his court established a set of requirements that a policy must satisfy to support a tortious discharge claim. First, the policy must be supported by either constitutional or statutory provisions. Second, the policy must be 'public' in the sense that it 'inures to the benefit of the public' rather than serving merely the interests of the individual. Third, the policy must have been articulated at the time of the discharge. Fourth, the policy must be 'fundamental' and 'substantial.' " (*Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 889–890 [66 Cal.Rptr.2d 888], fn. omitted.)

- "[T]he cases in which violations of public policy are found generally fall into four categories: (1) refusing to violate a statute; (2) performing a statutory obligation (3) exercising a statutory right or privilege; and (4) reporting an alleged violation of a statute of public importance." (*Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1090–1091 [4 Cal.Rptr.2d 874], internal citations and fn. omitted, overruled on other grounds in *Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 80, fn. 6 [78 Cal.Rptr.2d 16]; accord *Stevenson, supra,* 16 Cal.4th at p. 889.)

- "In addition to statutes and constitutional provisions, valid administrative regulations may also serve as a source of fundamental public policy that impacts on an employer's right to discharge employees when such regulations implement fundamental public policy found in their enabling statutes." (*D'sa v. Playhut, Inc.* (2000) 85 Cal.App.4th 927, 933 [102 Cal.Rptr.2d 495], internal citation omitted.)

- "In the context of a tort claim for wrongful discharge, tethering public policy to specific constitutional or statutory provisions serves not only to avoid judicial interference with the legislative domain, but also to ensure that employers have adequate notice of the conduct that will subject them to tort liability to the employees they discharge … ."(*Stevenson, supra,* 16 Cal.4th at p. 889.)

- "[A]n employee need not prove an actual violation of law; it suffices if the employer fired him for reporting his 'reasonably based suspicions' of illegal activity." (*Green, supra,* 19 Cal.4th at p. 87, internal citation omitted.)

- "[A]n employer's authority over its employee does not include the right to demand that the employee commit a criminal act to further its interests, and an employer may

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not coerce compliance with such unlawful directions by discharging an employee who refuses to follow such an order. . ." (*Tameny, supra*, 27 Cal.3d at p. 178.)

- Employees in both the private and public sector may assert this claim. (*See Shoemaker v. Myers* (1992) 2 Cal.App.4th 1407, 4 Cal.Rptr.2d 203.)

Secondary Sources

- Bancroft-Whitney's Cal. Civil Practice: Employment Litigation (1993) §§ 6:22–6:24
- 4 Wilcox, California Employment Law (1989) Wrongful Termination, § 60.04
- 1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 1997) Public Policy Violations, §§ 5.5–5.70

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1731
Constructive Discharge in Violation of Public Policy
Plaintiff Required to Violate Public Policy

[*Name of plaintiff*] claims that [he/she] was forced to resign rather than commit a violation of public policy. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of plaintiff*] was employed by [*name of defendant*];**

2. **That, as a condition of [*name of plaintiff*]'s employment, [*name of defendant*] required [*name of plaintiff*] to [*specify alleged conduct in violation of public policy, e.g., "engage in price fixing"*];**

3. **That this condition was so intolerable that a reasonable person in [*name of plaintiff*]'s position would have had no reasonable alternative except to resign;**

4. **That [*name of plaintiff*] resigned because of this condition;**

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

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

To be intolerable, the adverse working conditions must be unusually or repeatedly offensive to a reasonable person in [*name of plaintiff*]'s position.

DIRECTIONS FOR USE

The judge should determine whether the purported reason for plaintiff's resignation would amount to a violation of public policy.

This instruction should be given when a plaintiff claims his or her constructive termination was wrongful because the defendant required the plaintiff to commit an act in violation of public policy. In cases where the plaintiff alleges he or she was subjected to working conditions that violate public policy see instruction 1732, *Constructive*

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Discharge in Violation of Public—Policy Plaintiff Required to Endure Intolerable Conditions for Improper Purpose that Violates Public Policy.

This instruction must be supplemented with instruction 1733, *Wrongful Discharge in Violation of Public Policy—Damages.*

SOURCES OF AUTHORITY

- "[W]hen an employer's discharge of an employee violates fundamental principles of public policy, the discharged employee may maintain a tort action and recover damages traditionally available in such actions." (*Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 170 [164 Cal.Rptr. 839].)

- "[A]n employer's authority over its employees does not include the right to demand that the employee commit a criminal act to further its interests, and an employer may not coerce compliance with such unlawful directions by discharging an employee who refuses to follow such an order. An employer engaging in such conduct violates a basic duty imposed by law upon all employers, and thus an employee who has suffered damages as a result of such discharge may maintain a tort action for wrongful discharge against the employer." (*Tameny, supra,* 27 Cal.3d at p. 178.)

- "[T]his court established a set of requirements that a policy must satisfy to support a tortious discharge claim. First, the policy must be supported by either constitutional or statutory provisions. Second, the policy must be 'public' in the sense that it 'inures to the benefit of the public' rather than serving merely the interests of the individual. Third, the policy must have been articulated at the time of the discharge. Fourth, the policy must be 'fundamental' and 'substantial.' " (*Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 889–890 [66 Cal.Rptr.2d 888], fn. omitted.)

- "[T]he cases in which violations of public policy are found generally fall into four categories: (1) refusing to violate a statute; (2) performing a statutory obligation (3) exercising a statutory right or privilege; and (4) reporting an alleged violation of a statute of public importance." (*Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1090–1091 [4 Cal.Rptr.2d 874], internal citations and fn. omitted, overruled on other grounds in *Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 80, fn. 6 [78 Cal.Rptr.2d 16]; accord *Stevenson, supra,* 16 Cal.4th at p. 889.)

- "In addition to statutes and constitutional provisions, valid administrative regulations may also serve as a source of fundamental public policy that impacts on an employer's right to discharge employees when such regulations implement fundamental public

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policy found in their enabling statutes." (*D'sa v. Playhut, Inc.* (2000) 85 Cal.App.4th 927, 933 [102 Cal.Rptr.2d 495], internal citation omitted.)

- "Constructive discharge occurs when the employer's conduct effectively forces an employee to resign. Although the employee may say, 'I quit,' the employment relationship is actually severed involuntarily by the employer's acts, against the employee's will. As a result, a constructive discharge is legally regarded as a firing rather than a resignation." (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1244–1245, internal citation omitted.)

- "Whether conditions were so intolerable as to justify a reasonable employee's decision to resign is normally a question of fact." (*Valdez v. City of Los* Angeles (1991) 231 Cal.App.3d 1043, 1056 [282 Cal.Rptr. 726], internal citation omitted.)

- "In order to establish a constructive discharge, an employee must plead and prove … that the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign." (*Turner, supra,* 7 Cal.4th at p. 1251.)

- "The conditions giving rise to the resignation must be sufficiently extraordinary and egregious to overcome the normal motivation of a competent, diligent, and reasonable employee to remain on the job to earn a livelihood and to serve his or her employer. The proper focus is on whether the resignation was coerced, not whether it was simply one rational option for the employee." (*Turner, supra,* 7 Cal.4th at p. 1246.)

- "In some circumstances, a single intolerable incident, such as a crime of violence against an employee by an employer, or an employer's ultimatum that an employee commit a crime, may constitute a constructive discharge. Such misconduct potentially could be found 'aggravated.' " (*Turner, supra,* 7 Cal.4th at p. 1247, fn. 3.)

- "The mere existence of illegal conduct in a workplace does not, without more, render employment conditions intolerable to a reasonable employee." (*Turner, supra,* 7 Cal.4th at p. 1254.)

- "[T]he standard by which a constructive discharge is determined is an objective one—the question is 'whether a reasonable person faced with the allegedly intolerable employer actions or conditions of employment would have no reasonable alternative except to quit.' " (*Turner, supra,* 7 Cal.4th at p. 1248, internal citations omitted.)

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- "The length of time the plaintiff remained on the job may be one relevant factor in determining the intolerability of employment conditions from the standpoint of a reasonable person." (*Turner*, *supra*, 7 Cal.4th at p. 1254.)

Secondary Sources

- Bancroft-Whitney's Cal. Civil Practice: Employment Litigation (1993) §§ 6:22–6:24
- 4 Wilcox, California Employment Law (1989) Wrongful Termination, § 60.04
- 1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 1997) Public Policy Violations, §§ 5.45–5.46

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1732
Constructive Discharge in Violation of Public Policy Plaintiff Required to Endure Intolerable Conditions for Improper Purpose that Violates Public Policy

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[*Name of plaintiff***] claims that [***name of defendant***] forced [him/her] to resign for reasons that violate public policy. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was employed by [***name of defendant***];**

2. **That [***name of plaintiff***] was subjected to working conditions that violated public policy, in that [***describe conditions imposed on the employee that constitute the violation, e.g. "plaintiff was treated intolerably in retaliation for filing a workers' compensation claim"***];**

3. **That [***name of defendant***] created or knew of these conditions;**

4. **That these conditions at were so intolerable that a reasonable person in [***name of plaintiff***]'s position would have had no reasonable alternative except to resign;**

5. **That [***name of plaintiff***] resigned because of these working conditions;**

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

7. **That the working conditions were a substantial factor in causing [***name of plaintiff***]'s harm.**

To be intolerable, the adverse working conditions must be unusually or repeatedly offensive to a reasonable person in [*name of plaintiff***]'s position.**

DIRECTIONS FOR USE

The judge should determine whether the purported reason for plaintiff's resignation would amount to a violation of public policy.

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This instruction should be given when plaintiff claims his/her constructive termination was wrongful because defendant subjected plaintiff to intolerable working conditions in violation of public policy. The instruction must be supplemented with instruction 1733, *Wrongful Discharge in Violation of Public Policy—Damages.*

SOURCES OF AUTHORITY

- "[W]hen an employer's discharge of an employee violates fundamental principles of public policy, the discharged employee may maintain a tort action and recover damages traditionally available in such actions." (*Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 170 [164 Cal.Rptr. 839].)

- "[T]his court established a set of requirements that a policy must satisfy to support a tortious discharge claim. First, the policy must be supported by either constitutional or statutory provisions. Second, the policy must be 'public' in the sense that it 'inures to the benefit of the public' rather than serving merely the interests of the individual. Third, the policy must have been articulated at the time of the discharge. Fourth, the policy must be 'fundamental' and 'substantial.' " (*Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 889–890 [66 Cal.Rptr.2d 888], fn. omitted.)

- "In addition to statutes and constitutional provisions, valid administrative regulations may also serve as a source of fundamental public policy that impacts on an employer's right to discharge employees when such regulations implement fundamental public policy found in their enabling statutes." (*D'sa v. Playhut, Inc.* (2000) 85 Cal.App.4th 927, 933 [102 Cal.Rptr.2d 495], internal citation omitted.)

- In *Rojo v. Kliger* (1990) 52 Cal.3d 65,88–91 [276 Cal.Rptr. 130], the court held that an employee terminated in retaliation for refusing her employer's sexual advances may state a wrongful termination cause of action in tort.

- "Constructive discharge occurs when the employer's conduct effectively forces an employee to resign. Although the employee may say, 'I quit,' the employment relationship is actually severed involuntarily by the employer's acts, against the employee's will. As a result, a constructive discharge is legally regarded as a firing rather than a resignation." (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1244–1245, internal citation omitted.)

- "Whether conditions were so intolerable as to justify a reasonable employee's decision to resign is normally a question of fact." (*Valdez v. City of Los* Angeles (1991) 231 Cal.App.3d 1043, 1056 [282 Cal.Rptr. 726], internal citation omitted.)

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- "In order to establish a constructive discharge, an employee must plead and prove … that the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign." (*Turner, supra,* 7 Cal.4th at p. 1251.)

- "The conditions giving rise to the resignation must be sufficiently extraordinary and egregious to overcome the normal motivation of a competent, diligent, and reasonable employee to remain on the job to earn a livelihood and to serve his or her employer. The proper focus is on whether the resignation was coerced, not whether it was simply one rational option for the employee." (*Turner, supra,* 7 Cal.4th at p. 1246.)

- "In some circumstances, a single intolerable incident, such as a crime of violence against an employee by an employer, or an employer's ultimatum that an employee commit a crime, may constitute a constructive discharge. Such misconduct potentially could be found 'aggravated.' " (*Turner, supra,* 7 Cal.4th at p. 1247, fn. 3.)

- "The mere existence of illegal conduct in a workplace does not, without more, render employment conditions intolerable to a reasonable employee." (*Turner, supra,* 7 Cal.4th at p. 1254.)

- "[T]he standard by which a constructive discharge is determined is an objective one—the question is 'whether a reasonable person faced with the allegedly intolerable employer actions or conditions of employment would have no reasonable alternative except to quit.' " (*Turner, supra,* 7 Cal.4th at p. 1248, internal citations omitted.)

- "The length of time the plaintiff remained on the job may be one relevant factor in determining the intolerability of employment conditions from the standpoint of a reasonable person." (*Turner, supra,* 7 Cal.4th at p. 1254.)

<u>Secondary Sources</u>

- Bancroft-Whitney's Cal. Civil Practice: Employment Litigation (1993) §§ 6:22–6:24
- 4 Wilcox, California Employment Law (1989) Wrongful Termination, § 60.04
- 1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 1997) Public Policy Violations, §§ 5.45–5.46

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1733
Wrongful Discharge in Violation of Public Policy
Damages

If you find that [*name of defendant*] [discharged/constructively discharged] [*name of plaintiff*] in violation of public policy, then you must decide the amount of damages that [*name of plaintiff*] has proven [he/she] is entitled to recover, if any. To make that decision, you must:

1. **Decide the amount that [*name of plaintiff*] would have earned up to today, including any benefits and pay increases; [and]**

2. **Add the present cash value of any future wages and benefits that [he/she] would have earned for the length of time the employment with [*name of defendant*] was reasonably certain to continue; [and]**

3. **[Add any other monetary damages that were caused by [*name of defendant*]'s conduct.]**

From the above amount, subtract any amount that [*name of defendant*] proves [*name of plaintiff*] earned, or with reasonable efforts could have earned from other substantially similar employment, [whichever is greater].

In determining the period that [*name of plaintiff*]'s employment was reasonably certain to have continued, you should consider such things as:

a. **[*Name of plaintiff*]'s age, work performance, and intent regarding continuing employment with [*name of defendant*];**

b. **[*Name of defendant*]'s prospects for continuing the operations involving [*name of plaintiff*]; and**

c. **Any other factor that bears on how long [*name of plaintiff*] would have continued to work.**

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DIRECTIONS FOR USE

This instruction should be followed by instruction 1707 in cases where the employee's duty to mitigate damages is at issue.

Other types of tort damages may be available to a plaintiff. See punitive damages instructions in the damages section (instructions 2020, et seq.)

SOURCES AND AUTHORITY

- A tortious termination subjects the employer to " 'liability for compensatory and punitive damages under normal tort principles.' " (*Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1101 [4 Cal.Rptr.2d 874], internal citation omitted.)

- "The general rule is that the measure of recovery by a wrongfully discharged employee is the amount of salary agreed upon for the period of service, less the amount which the employer affirmatively proves the employee has earned or with reasonable effort might have earned from other employment." (*Parker v. Twentieth Century Fox-Film Corp.* (1970) 3 Cal.3d 176, 181 [89 Cal.Rptr. 737], internal citations omitted; *Smith v. Brown-Forman Distillers Corp.* (1987) 196 Cal.App.3d 503, 518 [241 Cal.Rptr. 916].)

- "A plaintiff may recover for detriment reasonably certain to result in the future. While there is no clearly established definition of 'reasonable certainty,' evidence of future detriment has been held sufficient based on expert medical opinion which considered the plaintiff's particular circumstances and the expert's experience with similar cases." (*Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 995 [16 Cal.Rptr.2d 787], internal citations omitted, disapproved of on another ground in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664 [25 Cal.Rptr.2d 109].)

- "[I]t is our view that in an action for wrongful discharge, and pursuant to the present day concept of employer-employee relations, the term 'wages' should be deemed to include not only the periodic monetary earnings of the employee but also the other benefits to which he is entitled as a part of his compensation." (*Wise v. Southern Pac. Co.* (1970) 1 Cal.3d 600, 607 [83 Cal.Rptr. 202].)

- In determining the period that plaintiff's employment was reasonably certain to have continued, the trial court took into consideration plaintiff's " 'physical condition, his age, his propensity for hard work, his expertise in managing defendants' offices, the profit history of his operation, the foreseeability of the continued future demand for

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tax return service to small taxpayers.' " (*Drzewiecki v. H & R Block, Inc.* (1972) 24 Cal.App.3d 695, 705 [101 Cal.Rptr. 169].)

- Civil Code section 3294(a) allows a plaintiff to seek punitive damages "for the breach of an obligation not arising from contract" when the plaintiff can show by "clear and convincing evidence" that a defendant "has been guilty of oppression, fraud, or malice."

- Civil Code section 3294, subdivision (b) provides: "An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights and safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation."

- In adding subdivision (b) to section 3294 in 1980, "[t]he drafters' goals were to avoid imposing punitive damages on employers who were merely negligent or reckless and to distinguish ordinary respondeat superior liability from corporate liability for punitive damages." (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572 [88 Cal.Rptr.2d 19], citing *Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1150–1151 [74 Cal.Rptr.2d 510].)

<u>Secondary Sources</u>

- 4 Wilcox, California Employment Law (1989) Wrongful Termination, § 60.08[2]
- 1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 1997) Public Policy Violations, §§ 5.64–5.67

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1740
Fair Employment and Housing Act
Disparate Treatment—Essential Factual Elements
(Gov. Code, § 12940(a))

[*Name of plaintiff***] claims that [***name of defendant***] wrongfully discriminated against [him/her]. 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 defendant***] [discharged/refused to hire/[***other adverse employment action***]] [***name of plaintiff***];**

4. That [*name of plaintiff***]'s [***protected status—for example, race, gender, or age***] was a reason for [***name of defendant***]'s [decision/conduct];**

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

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

DIRECTIONS FOR USE

This instruction is intended for use when a plaintiff alleges disparate treatment discrimination under the FEHA against an employer or other covered entity. Disparate treatment occurs when an employer treats an individual less favorably than others because of the individual's protected status. In contrast, disparate impact (the other general theory of discrimination) occurs when an employer has an employment practice that appears neutral but has an adverse impact on members of a protected group. For disparate impact claims, see Instruction 1742, *Disparate Impact—Essential Factual Elements.*

Elements that are uncontested should be deleted from this instruction.

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If element 1 is given, the court may need to instruct the jury on the statutory definition of "employer" under the FEHA. Other covered entities under the FEHA include labor organizations, employment agencies, and apprenticeship training programs. (See Gov. Code, § 12940(a)–(d).)

For damages instructions, see applicable instructions on tort damages.

SOURCES AND AUTHORITY

- Government Code section 12940(a) provides that it is an unlawful employment practice "[f]or an employer, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, or sexual orientation of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment."

- Government Code section 12941(a) provides, in part: "It is an unlawful employment practice for an employer to refuse to hire or employ, or to discharge, dismiss, reduce, suspend, or demote, any individual over the age of 40 on the ground of age, except in cases where the law compels or provides for such action."

- 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."

- "[C]onceptually the theory of 'disparate treatment' … is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin.' " (*Mixon v. Fair Employment and Housing Com.* (1987) 192 Cal.App.3d 1306, 1317 [237 Cal.Rptr. 884], quoting *Teamsters v. United States* (1977) 431 U.S. 324, 335–336, fn. 15 [97 S.Ct. 1843, 52 L.Ed.2d 396].)

- "[W]hether or not a plaintiff has met his or her prima facie burden [under *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 [93 S.Ct. 1817, 36 L.Ed.2d 668]], and whether or not the defendant has rebutted the plaintiff's prima facie showing, are questions of law for the trial court, not questions of fact for the jury." (*Caldwell v.*

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Paramount Unified School Dist. (1995) 41 Cal.App.4th 189, 201 [48 Cal.Rptr.2d 448].)

- "[If] the case is submitted to the trier of fact, the intermediate burdens set forth in *McDonnell Douglas* will fall away, and the fact finder will have only to decide the ultimate issue of whether the employer's discriminatory intent was a motivating factor in the adverse employment decision." (*Caldwell, supra*, 41 Cal.App.4th at p. 205.)

- "The ultimate burden of persuasion on the issue of actual discrimination remains with the plaintiff." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 356 [100 Cal.Rptr.2d 352].)

- "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, supra*, 192 Cal.App.3d at p. 1319.)

- "Because of the similarity between state and federal employment discrimination laws, California courts look to pertinent federal precedent when applying our own statutes." (*Guz, supra*, 24 Cal.4th at p. 354.)

- "We have held 'that, in a civil action under the FEHA, all relief generally available in noncontractual actions … may be obtained.' This includes injunctive relief." (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 132 [87 Cal.Rptr.2d 132], internal citations omitted.)

- "The FEHA does not itself authorize punitive damages. It is, however, settled that California's punitive damages statute, Civil Code section 3294, applies to actions brought under the FEHA … ." (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1147–1148 [74 Cal.Rptr.2d 510], internal citations omitted.)

<u>Secondary Sources</u>

- Bancroft-Whitney's California Civil Practice: Employment Litigation (2000 supp.) Discrimination in Employment, §§ 2.2, 2.20, pp. 20–21, 39–40
- 3 Wilcox, California Employment Law (1989) Civil Actions, §§ 43.01, 43.01[2][b], p. 43-16 (rel. 23-3/01), pp. 43-18–43-22 (rel. 21-3/00)
- 8 Witkin, Summary of California Law (9th ed. 1988) Constitutional Law, §§ 756–757, pp. 252–254; *id.* (2001 supp.) at §§ 756–757, pp. 124–128

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- 1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 2000) Discrimination Claims, §§ 2.61, 2.63, 2.66, pp. 50–51, 53, 55

COMMENTARY

In element 4, the subcommittee used the words "a reason" rather than "a motivating factor." Some California courts have used the term "motivating factor," which is derived from statutory language in title VII (see 42 U.S.C. § 2000e-2(m)) and federal caselaw, although the term is not used in the FEHA. The subcommittee believes that "a reason" is more understandable to a lay jury than "a motivating factor."

The subcommittee notes that under federal Title VII, limited remedies are available to a plaintiff in a mixed motive case. A mixed motive case is one where the plaintiff employee proves that a discriminatory motive existed, but the defendant employer proves that it would have taken the same adverse employment action absent the discriminatory reason. The Civil Rights Act of 1991, superseding the United States Supreme Court's holding in *Price Waterhouse v. Hopkins* (1989) 490 U.S. 228 [104 L.Ed.2d 268, 109 S.Ct. 1775], proscribes a plaintiff's available remedies in mixed motive cases. (See 42 U.S.C. § 2000e-5(g)(2)(B).) There is no comparable provision under California law.

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1741
Fair Employment and Housing Act
Affirmative Defense—Bona fide Occupational Qualification

[*Name of defendant***] claims that [his/her/its] decision to [discharge/[***other adverse employment action***]] [***name of plaintiff***] was lawful because [he/she/it] was entitled to consider [***protected status—for example, race, gender, or age***] as a job requirement. To succeed, [***name of defendant***] must prove the following:**

1. **That the job requirement was reasonably necessary for the operation of [***name of defendant***]'s business;**

2. **That [***name of defendant***] had a reasonable basis for believing that substantially all [***members of protected group***] are unable to safely and efficiently perform the job;**

3. **That it was impossible or highly impractical to consider whether each [applicant/employee] was able to safely and efficiently perform the job; and**

4. **That it was impossible or highly impractical for [***name of defendant***] to rearrange job responsibilities to avoid using [***protected status***] as a job requirement.**

DIRECTIONS FOR USE

An employer may assert the bona fide occupational qualification (BFOQ) defense where the employer has a practice that on its face excludes an entire group of individuals because of their protected status.

SOURCES AND AUTHORITY

- Government Code section 12940 provides that certain discriminatory employment practices are unlawful "unless based upon a bona fide occupational qualification."

- The Fair Employment and Housing Commission's regulations provide: "Where an employer … has a practice which on its face excludes an entire group of individuals

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on a basis enumerated in the [FEHA], … the employer … must prove that the practice is justified because all or substantially all of the excluded individuals are unable to safely and efficiently perform the job in question and because the essence of the business operation would otherwise be undermined." (Cal. Code Regs., tit. 2, § 7286.7(a).)

- Federal title VII provides that "a bona fide occupational qualification [is] reasonably necessary to the normal operation of [the] particular business or enterprise." (42 U.S.C. § 2000e-2(e)(1).)

- The BFOQ defense is a narrow exception to the general prohibition on discrimination. (*Bohemian Club v. Fair Employment & Housing Com.* (1986) 187 Cal.App.3d 1, 19 [231 Cal.Rptr. 769]; *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW v. Johnson Controls, Inc.* (1991) 499 U.S. 187, 201 [111 S.Ct. 1196, 113 L.Ed.2d 158].)

- " '[I]n order to rely on the bona fide occupational qualification exception an employer has the burden of proving that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved.' " (*Bohemian Club*, *supra*, 187 Cal.App.3d at p. 19, quoting *Weeks v. Southern Bell Telephone & Telegraph Co.* (5th Cir. 1969) 408 F.2d 228, 235.)

- "First, the employer must demonstrate that the occupational qualification is 'reasonably necessary to the normal operation of [the] particular business.' Secondly, the employer must show that the categorical exclusion based on [the] protected class characteristic is justified, i.e., that 'all or substantially all' of the persons with subject class characteristic fail to satisfy the occupational qualification." (*Johnson Controls, Inc. v. Fair Employment & Housing Com.* (1990) 218 Cal.App.3d 517, 540 [267 Cal.Rptr. 769], quoting *Weeks*, *supra*, 408 F.2d at p. 235.)

- "Even if an employer can demonstrate that certain jobs require members of one sex, the employer must also 'bear the burden of proving that because of the nature of the operation of the business they could not rearrange job responsibilities …' in order to reduce the BFOQ necessity." (*Johnson Controls, Inc.*, *supra*, 218 Cal.App.3d at p. 541, quoting *Hardin v. Stinchcomb* (11th Cir. 1982) 691 F.2d 1364, 1370–1371.)

- "Alternatively, the employer could establish that age was a legitimate proxy for the safety-related job qualifications by proving that it is 'impossible or highly impractical' to deal with the older employees on an individualized basis." (*Western*

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Airlines, Inc. v. Criswell (1985) 472 U.S. 400, 414–415, internal citation and footnote omitted.)

- "The Fair Employment and Housing Commission has interpreted the BFOQ defense in a manner incorporating all of the federal requirements necessary for its establishment. … The standards of the Commission are … in harmony with federal law regarding the availability of a BFOQ defense." (*Bohemian Club, supra*, 187 Cal.App.3d at p. 19.)

- "By modifying 'qualification' with 'occupational,' Congress narrowed the term to qualifications that affect an employee's ability to do the job." (*International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, supra*, 499 U.S. at p. 201.)

Secondary Sources

- Bancroft-Whitney's California Civil Practice: Employment Litigation (1993) Discrimination in Employment, § 2:80, pp. 100–101 (rel. 12/93)
- 2 Wilcox, California Employment Law (1989) Civil Actions, §§ 41.94[3], 41.108, pp. 41-305–41-307 (rel. 21-3/00), 41-330 (rel. 22-9/00)
- 8 Witkin, Summary of California Law (9th ed. 1988) Constitutional Law, § 760, pp. 260–261; *id.* (2001 supp.) at § 760A, pp. 135–137
- 1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 2000) Sexual Harassment, §§ 3.27–3.28, pp. 133–135; Discrimination Claims, § 2.108, p. 83

COMMENTARY

Element 1 is based on language used in section 703(e)(1) of title VII (42 U.S.C. § 2000e-2(e)(1)) and the Age Discrimination in Employment Act (29 U.S.C. § 623(f)(1)). In contrast, California Code of Regulations, title 2, section 7286.7(a) provides as an element of the BFOQ defense that "the essence of the business operation would otherwise be undermined." The language derived from federal statutes has been cited by California courts and may be easier for a lay juror to understand.

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1742
Fair Employment and Housing Act
Disparate Impact—Essential Factual Elements
(Gov. Code, § 12940(a))

[*Name of plaintiff***] claims that [***name of defendant***] had [an employment practice/a selection policy] that wrongfully discriminated against [him/her]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

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

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

3. That [*name of defendant***] had [an employment practice of [***describe practice***]/a selection policy of [***describe policy***]] that had an adverse impact on [***describe protected group—for example, persons over the age of 40***];**

4. That [*name of plaintiff***] is [***protected status***];**

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

6. That [*name of defendant***]'s [employment practice/selection policy] was a substantial factor in causing [***name of plaintiff***]'s harm.**

DIRECTIONS FOR USE

This instruction is intended for disparate impact employment discrimination claims. Disparate impact occurs when an employer has an employment practice that appears neutral but has an adverse impact on members of a protected group and cannot be justified by business necessity.

Uncontested elements should be deleted from this instruction.

If element 1 is given, the court may need to instruct the jury on the statutory definition of "employer" under the FEHA. Other covered entities under the FEHA include labor

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organizations, employment agencies, and apprenticeship training programs. (See Gov. Code, § 12940(a)–(d).)

The court should consider instructing the jury on the meaning of "adverse impact," tailored to the facts of the case and the applicable law.

SOURCES AND AUTHORITY

- Government Code section 12940(a) provides that it is an unlawful employment practice "[f]or an employer, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, or sexual orientation of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment."

- Government Code section 12941.1 expresses the Legislature's rejection of the opinion in *Marks v. Loral Corp.* (1997) 57 Cal.App.4th 30 [68 Cal.Rptr.2d 1] and states, in part: "The Legislature declares its intent that the use of salary as the basis for differentiating between employees when terminating employment may be found to constitute age discrimination if use of that criterion adversely impacts older workers as a group, and further declares its intent that the disparate impact theory of proof may be used in claims of age discrimination."

- The California Fair Employment and Housing Commission's regulations state: "Where an employer or other covered entity has a facially neutral practice which has an adverse impact (i.e., is discriminatory in effect), the employer or other covered entity must prove that there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business and that the challenged practice effectively fulfills the business purpose it is supposed to serve. The practice may still be impermissible where it is shown that there exists an alternative practice which would accomplish the business purpose equally well with a lesser discriminatory impact." (Cal. Code Regs., tit. 2, § 7286.7(b).)

- The California Fair Employment and Housing Commission's regulations state: "Any policy or practice of an employer or other covered entity which has an adverse impact on employment opportunities of individuals on a basis enumerated in the Act is unlawful unless the policy or practice is job-related. … A testing device or other means of selection which is facially neutral, but which has an adverse impact (as described in the Uniform Guidelines on Employee Selection Procedures (29 CFR

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1607 (1978)) upon persons on a basis enumerated in the Act, is permissible only upon a showing that the selection practice is sufficiently related to an essential function of the job in question to warrant its use." (Cal. Code Regs., tit. 2, § 7287.4(a) and (e).)

- "Prohibited discrimination may … be found on a theory of disparate impact, i.e., that regardless of motive, a *facially neutral* employer practice or policy, bearing no manifest relationship to job requirements, *in fact* had a disproportionate adverse effect on members of the protected class." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354, fn. 20 [100 Cal.Rptr.2d 352], internal citations omitted.)

- "A 'disparate impact' plaintiff … may prevail without proving intentional discrimination. … [However, a] disparate impact plaintiff 'must not merely prove circumstances raising an inference of discriminatory impact; he must prove the discriminatory impact at issue.' " (*Ibarbia v. Regents of the University of California* (1987) 191 Cal.App.3d 1318, 1329–1330 [237 Cal.Rptr. 92], quoting *Lowe v. City of Monrovia* (9th Cir. 1985) 775 F.2d 998, 1004.)

- " 'To establish a prima facie case of discrimination, a plaintiff must show that the facially neutral employment practice had a significantly discriminatory impact. If that showing is made, the employer must then demonstrate that "any given requirement [has] a manifest relationship to the employment in question," in order to avoid a finding of discrimination. … Even in such a case, however, the plaintiff may prevail, if he shows that the employer was using the practice as a mere pretext for discrimination.' " (*City and County of San Francisco v. Fair Employment and Housing Com.* (1987) 191 Cal.App.3d 976, 985 [236 Cal.Rptr. 716], quoting *Connecticut v. Teal* (1982) 457 U.S. 440, 446–447 [102 S.Ct. 2525, 73 L.Ed.2d 130], internal citations omitted.)

- Under federal title VII, a plaintiff may establish an unlawful employment practice based on disparate impact in one of two ways: (1) the plaintiff demonstrates that a defendant uses a particular employment practice that causes a disparate impact on the basis of a protected status, and the defendant "fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity"; or (2) the plaintiff demonstrates that there is an alternative employment practice with less adverse impact, and the defendant "refuses to adopt such alternative employment practice." (42 U.S.C. § 2000e-2(k)(1)(A).)

<u>Secondary Sources</u>

- Bancroft-Whitney's California Civil Practice: Employment Litigation (1993) Discrimination in Employment, § 2.23, pp. 35–37

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- 3 Wilcox, California Employment Law (1989) Civil Actions, § 43.01[2][c], pp. 43-22–43-24 (rel. 21-3/00); *id*,. Substantive Requirements Under Equal Employment Opportunity Laws, at § 41.21, pp. 41-50–41-53 (rel. 19-3/99)
- 1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 2000) Discrimination Claims, § 2.65, pp. 54–55

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1743
Fair Employment and Housing Act
Affirmative Defense—Business Necessity/Job Relatedness

[*Name of defendant*] claims that the [employment practice/selection policy] is lawful because it is necessary to [his/her/its] business. To succeed, [*name of defendant*] must prove the following:

1. **That the purpose of the [employment practice/selection policy] is to operate the business safely and efficiently; and**

2. **That the [employment practice/selection policy] substantially accomplishes this business purpose.**

DIRECTIONS FOR USE

The defense of business necessity is available for disparate impact claims but may not be used as a defense against a claim of intentional discrimination.

Instruction 1744, *Disparate Impact—Rebuttal to Business Necessity/Job Relatedness Defense*, must be given if defendant asserts the defense of business necessity to a disparate impact employment discrimination claim.

SOURCES AND AUTHORITY

- The California Fair Employment and Housing Commission's regulations provide: "Where an employer or other covered entity has a facially neutral practice which has an adverse impact (i.e., is discriminatory in effect), the employer or other covered entity must prove that there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business and that the challenged practice effectively fulfills the business purpose it is supposed to serve. The practice may still be impermissible where it is shown that there exists an alternative practice which would accomplish the business purpose equally well with a lesser discriminatory impact." (Cal. Code Regs., tit. 2, § 7286.7(b).)

- The California Fair Employment and Housing Commission's regulations provide: "Any policy or practice of an employer or other covered entity which has an adverse impact on employment opportunities of individuals on a basis enumerated in the Act

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is unlawful unless the policy or practice is job-related. … A testing device or other means of selection which is facially neutral, but which has an adverse impact (as described in the Uniform Guidelines on Employee Selection Procedures (29 CFR 1607 (1978)) upon persons on a basis enumerated in the Act, is permissible only upon a showing that the selection practice is sufficiently related to an essential function of the job in question to warrant its use." (Cal. Code Regs., tit. 2, § 7287.4(a) and (e).)

- "In order to meet its burden the [employer] must demonstrate a business necessity for use of the [discriminatory employment practice]. … 'The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any [discriminatory] impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact.' " (*City and County of San Francisco v. Fair Employment and Housing Com.* (1987) 191 Cal.App.3d 976, 989–990 [236 Cal.Rptr. 716], quoting *Robinson v. Lorillard Corp.* (4th Cir. 1971) 444 F.2d 791, 798.)

- The federal Civil Rights Act of 1991 states that one of its purposes is "to codify the concepts of 'business necessity' and 'job related' enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) [91 S.Ct. 849, 28 L.Ed.2d 158], and in other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) [109 S.Ct. 2115, 104 L.Ed.2d 733]." (Civil Rights Act of 1991, Pub.L. No. 102-166, § 3(2) (Nov. 21, 1991) 105 Stat. 1071, 1071.)

- Federal title VII provides that while business necessity is a defense to a claim of disparate impact discrimination, "[a] demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination." (42 U.S.C. § 2000e-2(k)(2).)

- "The touchstone is business necessity. If an employment practice which operates to exclude [a protected group] cannot be shown to be related to job performance, the practice is prohibited. … Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question." (*Griggs, supra,* 401 U.S. at pp. 431, 432.)

- "[T]he employer may defend its policy or practice by proving that it is 'job related for the position in question and consistent with business necessity.' Though the key terms have been used since *Griggs,* their meaning remains unclear." (1 Lindemann and

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Grossman, Employment Discrimination Law (3d ed. 1996) Adverse Impact, p. 106, footnotes omitted.)

- "[T]here is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business for it to pass muster: this degree of scrutiny would be almost impossible for most employers to meet." (*Wards Cove Packing Co., Inc., supra,* 490 U.S. at p. 659.) [Note: This portion of *Wards Cove* may have been superseded by the Civil Rights Act of 1991.]

Secondary Sources

- Bancroft-Whitney's California Civil Practice: Employment Litigation (1993) Discrimination in Employment, § 2.25, pp. 38–40
- 1 Lindemann and Grossman, Employment Discrimination Law (3d ed. 1996) Adverse Impact, pp. 106–110; *id.* (2000 supp.) at pp. 62–64
- 3 Wilcox, California Employment Law (1989) Civil Actions, § 43.01[2][c], pp. 43-23–43-24 (rel. 21-3/00); *id.* Substantive Requirements Under Equal Employment Opportunity Laws, §§ 41.21[4], 41.95[1], pp. 41-57–41-61 (rel. 14-9/96), 41-309–41-310 (rel. 21-3/00)
- 1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 2000) Discrimination Claims, § 2.65, pp. 54–55

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1744
Fair Employment and Housing Act
Disparate Impact—Rebuttal to Business Necessity/Job Relatedness Defense

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If [*name of defendant*] proves that the [employment practice/selection policy] is necessary to [his/her/its] business, then the [employment practice/selection policy] is lawful unless [*name of plaintiff*] proves the following:

1. **That there was an alternative [employment practice/selection policy] that would have accomplished the business purpose equally well; and**

2. **That the alternative [employment practice/selection policy] would have had less adverse impact on [*describe members of protected group—for example, persons over the age of 40*].**

DIRECTIONS FOR USE

Federal title VII requires a plaintiff to demonstrate that the employer refused to adopt the alternative employment practice (see 42 U.S.C. § 2000e-2(K)(1)(A)(ii)). There are no published court opinions determining if a similar requirement exists under California law.

This instruction must be given if defendant asserts the defense of business necessity to a disparate impact employment discrimination claim. (See Instruction 1743, *Affirmative Defense—Business Necessity/Job Relatedness*.)

SOURCES AND AUTHORITY

- " 'The test [of the business necessity defense] is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any [discriminatory] impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential [discriminatory] impact.' " (*City and County of San Francisco v. Fair Employment*

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and Housing Com. (1987) 191 Cal.App.3d 976, 989–990 [236 Cal.Rptr. 716internal citation omitted.)

- The California Fair Employment and Housing Commission's regulations provide: "Where an employer or other covered entity has a facially neutral practice which has an adverse impact (i.e., is discriminatory in effect), the employer or other covered entity must prove that there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business and that the challenged practice effectively fulfills the business purpose it is supposed to serve. The practice may still be impermissible where it is shown that there exists an alternative practice which would accomplish the business purpose equally well with a lesser discriminatory impact." (Cal. Code Regs., tit. 2, § 7286.7(b).)

- "[T]he standards established by the FEHC for evaluating a facially neutral selection criterion which has a discriminatory impact on a protected group are identical to federal standards under Title VII." (*City and County of San Francisco, supra,* 191 Cal.App.3d at pp. 985–986.)

- Under federal title VII, a plaintiff may establish an unlawful employment practice based on disparate impact in one of two ways: (1) the plaintiff demonstrates that a defendant uses a particular employment practice that causes a disparate impact on the basis of a protected status, and the defendant "fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity"; or (2) the plaintiff demonstrates that there is an alternative employment practice with less adverse impact, and the defendant "refuses to adopt such alternative employment practice." (42 U.S.C. § 2000e-2(k)(1)(A).)

- "If an employer does then meet the burden of proving that its tests are 'job related,' it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable [discriminatory] effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.' " (*Albermarle Paper Co. v. Moody* (1975) 422 U.S. 405, 425 [95 S.Ct. 2362, 45 L.Ed.2d 280], internal citation omitted.)

<u>Secondary Sources</u>

- Bancroft-Whitney's California Civil Practice: Employment Litigation (1993) Discrimination in Employment, § 2.26, p. 40
- 3 Wilcox, California Employment Law (1989) Civil Actions, § 43.01[2][d], p. 43-24 (rel. 21-3/00); *id.*, Substantive Requirements Under Equal Employment Opportunity Laws, at § 41.21[2], p. 41-51 (rel. 14-9/96)

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1745
Fair Employment and Housing Act
Retaliation (Gov. Code, § 12940(h))

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

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

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

3. **That [***name of plaintiff***]'s [***describe protected activity***] was a reason for [discharging/demoting/[***other adverse employment action***]] [***name of plaintiff***];**

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

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

DIRECTIONS FOR USE

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

SOURCES AND AUTHORITY

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

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

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

- "To establish a prima facie case of retaliation, 'the plaintiff must show that he engaged in a protected activity, his employer subjected him to adverse employment action, and there is a causal link between the protected activity and the employer's action.' " (*Iwekaogwu v. City of Los Angeles* (1999) 75 Cal.App.4th 803, 814 [89 Cal.Rptr.2d 505], quoting *Flait v. North American Watch Corp*. (1992) 3 Cal.App.4th 467, 476 [4 Cal.Rptr.2d 522].)

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

- "The retaliatory motive is 'proved by showing that plaintiff engaged in protected activities, that his employer was aware of the protected activities, and that the adverse action followed within a relatively short time thereafter.' 'The causal link may be established by an inference derived from circumstantial evidence, "such as the employer's knowledge that the [employee] engaged in protected activities and the proximity in time between the protected action and allegedly retaliatory employment decision [citation]." ' " (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 609–610 [262 Cal.Rptr. 842], internal citations omitted.)

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

Secondary Sources

- Bancroft-Whitney's California Civil Practice: Employment Litigation (1993) Discrimination in Employment, §§ 2:70–2:71, pp. 90–92 (rel. 12/93); *id.* (2001 supp.) at §§ 2:70–2:71, pp. 78–81
- 2 Wilcox, California Employment Law (1989) Substantive Requirements Under Equal Employment Opportunity Laws, § 43131, pp. 41-342–41-132 (rel. 23-3/01)
- 8 Witkin, Summary of California Law (9th ed. 1988) Constitutional Law, § 763, p. 265; *id.* (2000 supp.) at § 763, pp. 160–161
- 1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 1993) Discrimination Claims, §§ 2.83–2.88, pp. 68–72; *id.* (2001 supp.) at §§ 2:84–2:88, pp. 89–96

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1746
Fair Employment and Housing Act
Affirmative Defense—After-Acquired Evidence

[*Name of defendant***] claims that [he/she/it] would have discharged [***name of plaintiff***] anyway if [he/she/it] had known that [***name of plaintiff***] [***describe misconduct***]. You must decide whether [***name of defendant***] has proved the following:**

1. **That [***name of plaintiff***] [***describe misconduct***];**

2. **That [***name of plaintiff***]'s misconduct was sufficiently severe that [***name of defendant***] would have discharged [him/her] because of that misconduct alone had [***name of defendant***] known of it; and**

3. **That [***name of defendant***] would have discharged [***name of plaintiff***] for [his/her] misconduct as a matter of settled company policy.**

DIRECTIONS FOR USE

The after-acquired-evidence doctrine is an equitable defense that is determined by the court based on the facts of the case. This instruction assists the judge where the facts are in dispute. (See, *e.g.*, *Thompson v. Tracor Flight Systems, Inc.* (2001) 86 Cal.App.4th 1156, 1173 [104 Cal.Rptr.2d 95].)

SOURCES AND AUTHORITY

- "In general, the after-acquired-evidence doctrine shields an employer from liability or limits available relief where, after a termination, the employer learns for the first time about employee wrongdoing that would have led to the discharge in any event. Employee wrongdoing in after-acquired-evidence cases generally falls into one of two categories: (1) misrepresentations on a resume or job application; or (2) posthire, on-the-job misconduct." (*Camp v. Jeffer, Mangels, Butler & Marmaro* (1995) 35 Cal.App.4th 620, 632 [41 Cal.Rptr.2d 329].)

- "The after-acquired-evidence doctrine serves as a complete or partial defense to an employee's claim of wrongful discharge. … To invoke this doctrine, '… the employer must establish "that the wrongdoing was of such severity that the employee in fact

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would have been terminated on those grounds alone if the employer had known of it." … [T]he employer … must show that such a firing would have taken place as a matter of "settled" company policy.' " (*Murillo v. Rite Stuff Foods, Inc.* (1998) 65 Cal.App.4th 833, 842, 845–846 [77 Cal.Rptr.2d 12], internal citations omitted.)

- "Where an employer seeks to rely upon after-acquired evidence of wrongdoing, it must first establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge." (*McKennon v. Nashville Banner Publishing Co.* (1995) 513 U.S. 352, 362–363 [115 S.Ct. 879, 130 L.Ed.2d 852].)

- "Courts must tread carefully in applying the after-acquired-evidence doctrine to discrimination claims. … Where, as here, the discriminatory conduct was pervasive during the term of employment, therefore, it would not be sound public policy to bar recovery for injuries suffered while employed. In applying the after-acquired-evidence doctrine, the equities between employer and employee can be balanced by barring all portions of the employment discrimination claim tied to the employee's discharge." (*Murillo, supra*, 65 Cal.App.4th at pp. 849–850.)

- "As the Supreme Court recognized in *McKennon*, the use of after-acquired evidence must 'take due account of the lawful prerogatives of the employer in the usual course of its business and the corresponding equities that it has arising from the employee's wrongdoing.' We appreciate that the facts in *McKennon* … presented a situation where balancing the equities should permit a finding of employer liability—to reinforce the importance of antidiscrimination laws—while limiting an employee's damages—to take account of an employer's business prerogatives. However, the equities compel a different result where an employee who is disqualified from employment by government-imposed requirements nevertheless obtains a job by misrepresenting the pertinent qualifications. In such a situation, the employee should have no recourse for an alleged wrongful termination of employment." (*Camp, supra*, 35 Cal.App.4th at pp. 637–638, internal citation omitted.)

- "We decline to adopt a blanket rule that material falsification of an employment application is a complete defense to a claim that the employer, while still unaware of the falsification, terminated the employment in violation of the employee's legal rights." (*Cooper v. Rykoff-Sexton, Inc.* (1994) 24 Cal.App.4th 614, 617 [29 Cal.Rptr.2d 642].)

- "The doctrine [of after-acquired evidence] is the basis for an equitable defense related to the traditional defense of 'unclean hands. …' [¶] In the present case, there were conflicts in the evidence concerning respondent's actions, her motivations, and the

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possible consequences of her actions within appellant's disciplinary system. The trial court submitted those factual questions to the jury for resolution and then used the resulting special verdict as the basis for concluding appellant was not entitled to equitable reduction of the damages award." (*Thompson, supra,* 86 Cal.App.4th at p. 1173.)

Secondary Sources

- Bancroft-Whitney's California Civil Practice: Employment Litigation (2001 supp.) Discrimination in Employment, § 2.82.2, pp. 87–89
- 2 Wilcox, California Employment Law (1989) Substantive Requirements Under Equal Employment Opportunity Laws, § 41.92, pp. 41-292.2–41-292.5 (rel. 23-3/01)
- 2 Witkin, Summary of California Law (2001 supp.) Agency and Employment, § 164A, pp. 59–61
- 1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 2000) Discrimination Claims, § 2.107, pp. 82–83; *id.*, Defending the Action, at § 10.88, pp. 604–605

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1747
Fair Employment and Housing Act
Quid pro quo Sexual Harassment—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] subjected [him/her] to sexual harassment. To establish this claim, [***name of plaintiff***] must prove the following:**

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

2. That [*name of alleged harasser***] made unwanted sexual advances to [***name of plaintiff***] or engaged in other unwanted verbal or physical conduct of a sexual nature;**

3. [That job benefits were conditioned, by words or conduct, on [*name of plaintiff***]'s acceptance of [***name of alleged harasser***]'s sexual advances or conduct;]**

[or]

[That employment decisions affecting [*name of plaintiff***] were made based on [his/her] acceptance or rejection of [***name of alleged harasser***]'s sexual advances or conduct;]**

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

[That at the time of [his/her] conduct, [*name of alleged harasser***] was a supervisor or agent for [***name of defendant***];]**

[That [*name of defendant (employer)***] [or [his/her/its] supervisors or agents] knew or should have known of [***name of alleged harasser***]'s conduct and failed to take immediate and appropriate corrective action;]**

[That [*name of defendant (individual)***] substantially assisted or encouraged [***name of alleged harasser***]'s conduct;]**

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

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

DIRECTIONS FOR USE

If the defendant is the alleged harasser delete element 4 because a harasser is directly liable for his or her conduct. For a defendant other than the alleged harasser, element 4 must be modified to select the applicable basis of liability: (a) vicarious liability for a supervisor's harassing conduct, (b) ratification by the employer/respondeat superior, or (c) aiding and abetting.

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] [California Supreme Court declined to express opinion whether "agent" language in the FEHA merely incorporates respondeat superior principles or has some other meaning]).

SOURCES AND AUTHORITY

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

- Government Code section 12940(j)(4)(A) provides that for purposes of claims of harassment under the FEHA, " '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." (Gov. Code, § 12940(j)(4)(A).)

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- 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.

- The Fair Employment and Housing Commission's regulations provide: "Sexual harassment is unlawful as defined in Section 7287.6(b), and includes verbal, physical, and visual harassment, as well as unwanted sexual advances." (Cal. Code Regs, tit. 1, § 7291.1(f)(1).)

- "Courts have generally recognized two distinct categories of sexual harassment claims: quid pro quo and hostile work environment. Quid pro quo harassment occurs when submission to sexual conduct is made a condition of concrete employment benefits." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], internal citation omitted.)

- "A cause of action for quid pro quo harassment involves the behavior most commonly regarded as sexual harassment, including, e.g., sexual propositions, unwarranted graphic discussion of sexual acts, and commentary on the employee's body and the sexual uses to which it could be put. To state a cause of action on this theory, it is sufficient to allege that a term of employment was expressly or impliedly conditioned upon acceptance of a supervisor's unwelcome sexual advances." (*Mogilefsky v. Superior Court* (1993) 20 Cal.App.4th 1409, 1414 [26 Cal.Rptr.2d 116], internal citations omitted.)

- "Cases based on threats which are carried out are referred to often as quid pro quo cases, as distinct from bothersome attentions or sexual remarks that are sufficiently severe or pervasive to create a hostile work environment. The terms quid pro quo and hostile work environment are helpful, perhaps, in making a rough demarcation between cases in which threats are carried out and those where they are not or are absent altogether, but beyond this are of limited utility. … We do not suggest the terms quid pro quo and hostile work environment are irrelevant to Title VII litigation. To the extent they illustrate the distinction between cases involving a threat which is carried out and offensive conduct in general, the terms are relevant when there is a

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threshold question whether a plaintiff can prove discrimination in violation of Title VII. When a plaintiff proves that a tangible employment action resulted from a refusal to submit to a supervisor's sexual demands, he or she establishes that the employment decision itself constitutes a change in the terms and conditions of employment that is actionable under Title VII. For any sexual harassment preceding the employment decision to be actionable, however, the conduct must be severe or pervasive." (*Burlington Industries, Inc. v. Ellerth* (1998) 524 U.S. 742, 751, 753–754 [118 S.Ct. 2257, 141 L.Ed.2d 633].)

Secondary Sources

- Bancroft-Whitney's California Civil Practice: Employment Litigation (1993) Discrimination in Employment, § 2.52, pp. 71–72 (rel. 12/93); *id.* (2001 supp.) at § 2.52, pp. 67–69
- 2 Wilcox, California Employment Law (1989) Substantive Requirements Under Equal Employment Opportunity Laws, §§ 41.81[1][a], 41.81[6], pp. 41-260–41-263, 41-274–41-283 (rel. 23-3/01)
- 1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 2000) Sexual Harassment, §§ 3.14, 3.31–3.35, pp. 123–124, 136–140

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1748
Fair Employment and Housing Act
Hostile Work Environment Harassment—Essential Factual Elements
Employer or Entity Defendant (Gov. Code, § 12940(j))

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

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

2. **That [***name of plaintiff***] [is/is perceived to be/is associated with a person who is/is associated with a person who is perceived to be] [***protected status***];**

3. **That [***name of plaintiff***] was subjected to harassing conduct based on [***protected status***] that was unwanted;**

4. **That the harassing conduct was so severe, widespread, or persistent that it created a hostile or an abusive work environment;**

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

   [That a supervisor of [*name of defendant***] 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. **That [***name of plaintiff***] was harmed; and**

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

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DIRECTIONS FOR USE

This instruction is intended for use 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 Instruction 1749, *Hostile Work Environment Harassment—Essential Factual Elements—Individual Defendant*.

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

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; 1312 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] [California Supreme Court declined to express opinion whether "agent" language in the FEHA merely incorporates respondeat superior principles or has some other meaning]).

SOURCES AND AUTHORITY

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

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

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- Government Code section 12940(j)(5) provides that for purposes of claims of harassment under the FEHA, "a person providing services pursuant to a contract" means a person who meets all of the following criteria:

  (A) The person has the right to control the performance of the contract for services and discretion as to the manner of performance.
  (B) The person is customarily engaged in an independently established business.
  (C) The person has control over the time and place the work is performed, supplies the tools and instruments used in the work, and performs work that requires a particular skill not ordinarily used in the course of the employer's work.

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

- "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 courts 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"

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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], 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], called into doubt on other grounds by statute.)

- Under Federal Title VII, an employer's liability may be based on the conduct of an official "within the class of an employer organization's officials who may be treated as the organization's proxy." (*Faragher v. City of Boca Raton* (1998) 524 U.S. 775, 790 [118 S.Ct. 2275; 1312 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."

- 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."

<u>Secondary Sources</u>

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

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- 2 Wilcox, California Employment Law (1989) Substantive Requirements Under Equal Employment Opportunity Laws, §§ 41.80[1][a], 41.81[1][b], pp. 41-253–41-254, 41-263–41-268.2 (rel. 23-3/01); *id.*, Civil Actions Under Equal Employment Opportunity Laws, at § 43.01[10][g][i], pp. 43-68–43-69 (rel. 21-3/00)
- 2 Witkin, Summary of California Law (9th ed. 1988) Agency and Employment, § 310, pp. 304–305; *id.* (2001 supp.) at § 310, pp. 296–297
- 1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 2000) Discrimination Claims, §§ 2.68, 2.75, pp. 56, 60; *id.*, Sexual Harassment, at §§ 3.1, 3.17, 3.36, pp. 116, 125–126, 140–141

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1749
Fair Employment and Housing Act
Hostile Work Environment Harassment—Essential Factual Elements
Individual Defendant (Gov. Code, § 12940(j))

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

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

2. **That [***name of plaintiff***] [is/is perceived to be/is associated with a person who is/is associated with a person who is perceived to be] [***protected status***];**

3. **That [***name of plaintiff***] was subjected to harassing conduct based on [***protected status***] that was unwanted;**

4. **That the harassing conduct was so severe, widespread, or persistent that it created a hostile or an abusive work environment;**

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

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

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

SOURCES AND AUTHORITY

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

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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, 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.

- "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."

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

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

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

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

- "[A]lthough no California courts 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."

<u>Secondary Sources</u>

- Bancroft-Whitney's California Civil Practice: Employment Litigation (1993) Discrimination in Employment, §§ 2.51, 2.53, pp. 68–70, 72–75 (rel. 12/93); *id.* (2001 supp.) at §§ 2.51, 2.53, pp. 61–66, 69–73
- 2 Wilcox, California Employment Law (1989) Substantive Requirements Under Equal Employment Opportunity Laws, §§ 41.80[1][a], 41.81[1][b], pp. 41-253–41-

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254, 41-263–41-268.2 (rel. 23-3/01); *id.*, Civil Actions Under Equal Employment Opportunity Laws, at § 43.01[10][g][i], pp. 43-68–43-69 (rel. 21-3/00)

- 2 Witkin, Summary of California Law (9th ed. 1988) Agency and Employment, § 310, pp. 304–305; *id.* (2001 supp.) at § 310, pp. 296–297
- 1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 2000) Discrimination Claims, §§ 2.68, 2.75, pp. 56, 60; *id.*, Sexual Harassment, at §§ 3.1, 3.17, 3.36, pp. 116, 125–126, 140–141

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1750
Fair Employment and Housing Act
"Harassing Conduct" Explained

Harassing conduct may include the following:

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

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***].]**

SOURCES AND AUTHORITY

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

- The Fair Employment and Housing Commission's regulations provide:

  "Harassment" includes but is not limited to:
  (A) Verbal harassment, e.g., epithets, derogatory comments or slurs on a basis enumerated in the Act;
  (B) Physical harassment, e.g., assault, impeding or blocking movement, or any physical interference with normal work or movement, when directed at an individual on a basis enumerated in the Act;
  (C) Visual forms of harassment, e.g., derogatory posters, cartoons, or drawings on a basis enumerated in the Act; or

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(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).)

Secondary Sources

- Bancroft-Whitney's California Civil Practice: Employment Litigation (2001 supp.) Discrimination in Employment, § 2.51, pp. 61–62
- 2 Wilcox, California Employment Law (1989) Substantive Requirements Under Equal Employment Opportunity Laws, § 41.80[1][a][i], p. 41-253 (rel. 23-3/01)
- 1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 2000) Sexual Harassment, § 3.13, p. 123

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1751
Fair Employment and Housing Act
"Hostile Work Environment" Explained

A work environment is hostile or abusive if:

1. **A reasonable [***describe member of protected group—for example, person over the age of 40***] in [***name of plaintiff***]'s circumstances would have considered the work environment to be hostile or abusive; and**

2. **[***Name of plaintiff***] considered the work environment to be hostile or abusive.**

Harassing conduct does not create a hostile work environment if it is only occasional, isolated, or trivial. In determining whether the work environment was hostile or abusive, you should consider all the circumstances, including the following:

a. **The nature and severity of the conduct;**

b. **How often, and over what period of time, the conduct occurred; and**

c. **The context in which the conduct occurred.**

SOURCES AND AUTHORITY

- " '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], internal citations omitted.)

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- "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

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be occasional, isolated, sporadic, or trivial.' … [W]e find no error in the jury instruction given here. … [T]he law requires the plaintiff to meet a threshold standard of severity or pervasiveness. We hold that the statement within the instruction that severe or pervasive conduct requires more than 'occasional, isolated, sporadic, or trivial' acts was an accurate statement of that threshold standard." (*Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 465–467 [79 Cal.Rptr.2d 33].)

Secondary Sources

- Bancroft-Whitney's California Civil Practice: Employment Litigation (1993) Discrimination in Employment, §§ 2.51, 2.53, pp. 68–70, 72–75 (rel. 12/93); *id.* (2001 supp.) at §§ 2.51, 2.53, pp. 61–66, 69–73
- 2 Wilcox, California Employment Law (1989) Substantive Requirements Under Equal Employment Opportunity Laws, §§ 41.80[1][a], 41.81[1][b], pp. 41-253–41-254, 41-263–41-268.2 (rel. 23-3/01); *id.*, Civil Actions Under Equal Employment Opportunity Laws, at § 43.01[10][g][i], pp. 43-68–43-69 (rel. 21-3/00)
- 2 Witkin, Summary of California Law (9th ed. 1988) Agency and Employment, § 310, pp. 304–305; *id.* (2001 supp.) at § 310, pp. 296–297
- 1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 2000) Discrimination Claims, §§ 2.68 and 2.75, pp. 56, 60; *id.*, Sexual Harassment, at §§ 3.1, 3.17, 3.36, pp. 116, 125–126, 140–141

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1752
Fair Employment and Housing Act
Harassment—"Supervisor" Defined

[*Name of alleged harasser***] was a supervisor for [***name of defendant***] if [he/she] had the discretion and authority:**

[a. To hire, direct, transfer, promote, assign, reward, discipline, [or] discharge [or] [*insert other employment action***] other employees [or to recommend any of these actions];] [or]**

[b. To act on the grievances of other employees or to recommend action on grievances.]

SOURCES AND AUTHORITY

- Government Code section 12940(j) provides that it is an unlawful employment practice for "an employer … or any other person, because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation, to harass an employee, an applicant, or a person providing services pursuant to a contract. Harassment of an employee, an applicant, or a person providing services pursuant to a contract by an employee other than an agent or supervisor shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action."

- Government Code section 12926(r) provides: " 'Supervisor' means any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend that action, if, in connection with the foregoing, the exercise of that authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

- "This section has been interpreted to mean that the employer is strictly liable for the harassing actions of its supervisors and agents, but that the employer is only liable for harassment by a coworker if the employer knew or should have known of the conduct

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and failed to take immediate corrective action. Thus, characterizing the employment status of the harasser is very significant." (*Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 1046 [58 Cal.Rptr.2d 122], internal citations omitted.)

- "The case and statutory authority set forth three clear rules. First, … a supervisor who personally engages in sexually harassing conduct is personally liable under the FEHA. Second, … if the supervisor participates in the sexual harassment or substantially assists or encourages continued harassment, the supervisor is personally liable under the FEHA as an aider and abettor of the harasser. Third, under the FEHA, the employer is vicariously and strictly liable for sexual harassment by a supervisor." (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1327 [58 Cal.Rptr.2d 308].)

- "[W]hile an employer's liability under the [FEHA] for an act of sexual harassment committed by a supervisor or agent is broader than the liability created by the common law principle of respondeat superior, respondeat superior principles are nonetheless relevant in determining liability when, as here, the sexual harassment occurred away from the workplace and not during work hours." (*Doe*, *supra*, 50 Cal.App.4th at pp. 1048–1049.)

- "The FEHA does not define 'agent.' Therefore, it is appropriate to consider general principles of agency law. An agent is one who represents a principal in dealings with third persons. An agent is a person authorized by the principal to conduct one or more transactions with one or more third persons and to exercise a degree of discretion in effecting the purpose of the principal. A supervising employee is an agent of the employer." (*Fiol*, *supra*, 50 Cal.App.4th at p. 1328, internal citations omitted.)

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

Secondary Sources

- Bancroft-Whitney's California Civil Practice: Employment Litigation (1993) Discrimination in Employment, § 2.51, p. 69 (rel. 12/93); *id.* (2001 supp.) at § 2.51, pp. 62–63
- 2 Wilcox, California Employment Law (1989) Substantive Requirements Under Equal Employment Opportunity Laws, § 41.81[6][b], pp. 41-278–41-279 (rel. 23-3/01)
- 1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 2000) Sexual Harassment, § 3.21, pp. 128–129

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1753
Fair Employment and Housing Act
Disability or Medical Condition Discrimination—Disparate Treatment
Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] wrongfully discriminated against [him/her] based on [his/her] [physical disability/mental disability/ medical condition]. 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/[***other covered relationship to defendant***]];**

3. **[That [***name of defendant***] knew [***name of plaintiff***] had [***describe physical disability, mental disability, or medical condition***];] [or]**

   [That [*name of defendant***] thought [***name of plaintiff***] had [***describe physical disability, mental disability, or medical condition***];]**

4. **That [***name of plaintiff***] was able to perform the essential job duties [with reasonable accommodation for [his/her] condition];**

5. **That [***name of defendant***] [discharged/refused to hire/[***other adverse employment action***]] [***name of plaintiff***];**

6. **[That [***name of plaintiff***]'s [***describe physical disability, mental disability, or medical condition***] was a reason for [***name of defendant***]'s [decision/conduct];] [or]**

   [That [*name of defendant***]'s belief that [***name of plaintiff***] had [***describe physical disability, mental disability, or medical condition***] was a reason for [***name of defendant***]'s [decision/conduct];]**

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

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

DIRECTIONS FOR USE

Ordinarily, the court decides whether the described disability or condition meets the statutory definition of a physical disability, mental disability, or medical condition. The jury decides whether, in fact, the plaintiff had the disability or condition or whether the employer so thought. However, in some situations the jury may be required to decide whether a particular physical or mental condition is a qualifying disability, in other words, whether the condition limits a major life activity. In such cases, an instruction will need to be tailored to those circumstances.

If element 1 is given, the court may need to instruct the jury on the statutory definition of "employer" under the FEHA. Other covered entities under the FEHA include labor organizations, employment agencies, and apprenticeship training programs. (See Gov. Code, § 12940(a)–(d).)

If plaintiff claims that the defendant mistakenly regarded him or her as disabled or the need for reasonable accommodation is not an issue in the case, bracketed language concerning reasonable accommodation may be deleted as appropriate from element 4.

This instruction may be modified for use in cases where plaintiff claims that an employer denied him or her specific employment benefits because of his or her disability or medical condition.

SOURCES AND AUTHORITY

- Government Code section 12940(a) provides that it is an unlawful employment practice "[f]or an employer, because of the … physical disability, mental disability, [or] medical condition … of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment."

- Government Code section 12940(a)(1) also provides that the FEHA "does not prohibit an employer from refusing to hire or discharging an employee with a physical or mental disability … where the employee, because of his or her physical or mental disability, is unable to perform his or her essential duties even with reasonable

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accommodations, or cannot perform those duties in a manner that would not endanger his or her health or safety or the health or safety of others even with reasonable accommodations."

- Government Code section 12940(a)(2) also provides that the FEHA "does not prohibit an employer from refusing to hire or discharging an employee who, because of the employee's medical condition, is unable to perform his or her essential duties even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger the employee's health or safety or the health or safety of others even with reasonable accommodations."

- Government Code section 12926(n) provides:

  "Reasonable accommodation" may include either of the following:
  (1) Making existing facilities used by employees readily accessible to, and usable by, individuals with disabilities.
  (2) Job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

- The California Fair Employment and Housing Commission's regulations provide: "Disability discrimination is established by showing that an employment practice denies, in whole or in part, an employment benefit to an individual because he or she is an individual with a disability." (Cal. Code Regs., tit. 2, § 7293.7.)

- "The Equal Employment Opportunity Commission's interpretive statement [interpreting the federal Americans with Disabilities Act] explains that '[t]here are three categories of reasonable accommodation. These are (1) accommodations that are required to ensure equal opportunity in the application process; (2) accommodations that enable the employer's employees with disabilities to perform the essential functions of the position held or desired; and (3) accommodations that enable the employer's employees with disabilities to enjoy equal benefits and privileges of employment as are enjoyed by employees without disabilities.' " (*Brundage v. Hahn* (1997) 57 Cal.App.4th 228, 236, 239 [66 Cal.Rptr.2d 830], internal citation omitted.)

- "The plaintiff can establish a prima facie case by proving that: (1) plaintiff suffers from a disability; (2) plaintiff is a qualified individual; (3) plaintiff was subjected to an adverse employment action because of the disability." (*Brundage*, *supra*, 57

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Cal.App.4th at p. 236, internal citation omitted; accord *Deschene v. Pinole Point Steel Co.* (1999) 76 Cal.App.4th 33, 44 [90 Cal.Rptr.2d 15] [medical condition discrimination].)

- "[T]he courts agree that it is the plaintiff's responsibility to prove that he or she is a member of a protected class set forth in FEHA (such as a person with a disability); that he or she is qualified to perform the duties of the position (with or without reasonable accommodation in the case of a disability claim); and that he or she was subject to adverse employment action or not hired because of the disability or membership in another class described in FEHA." (*Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 255 [102 Cal.Rptr.2d 55], internal citations omitted.)

- "[T]he FEHA does not follow [the ADA's] definition of disability verbatim, so that a 'qualified individual' for purposes of the FEHA can be different from a 'qualified individual' for purposes of the ADA." (*Jensen*, *supra*, 85 Cal.App.4th at p. 255, fn.5.)

- Government Code section 12926(k)(5) provides that a physical or mental disability includes "[b]eing regarded or treated by the employer or other entity … as having, or having had, any [physical or mental] condition that makes achievement of a major life activity difficult." (Gov. Code, § 12926(i)(4), and (k)(4).) A physical disability also includes "[b]eing regarded or treated by the employer or other entity … as having, or having had, a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment that has no present disabling effect but may become a physical disability."

- "[T]he purpose of the 'regarded-as' prong is to protect individuals rejected from a job because of the 'myths, fears and stereotypes' associated with disabilities. In other words, to find a perceived disability, the perception must stem from a false idea about the existence of or the limiting effect of a disability." (*Diffey v. Riverside County Sheriff's Dept.* (2000) 84 Cal.App.4th 1031, 1037 [101 Cal.Rptr.2d 353], internal citation omitted.)

- "An adverse employment decision cannot be made 'because of' a disability when the disability is not known to the employer. … [A] plaintiff must prove the employer had knowledge of the employee's disability when the adverse employment decision was made." (*Brundage*, *supra*, 57 Cal.App.4th at pp. 236–237.)

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Secondary Sources

- Bancroft-Whitney's California Civil Practice: Employment Litigation (1993) Discrimination in Employment, §§ 2:45–2:46, pp. 59–61; *id.* (2001 supp.) at § 2:46, pp. 50–52
- 2 Wilcox, California Employment Law (1989) Substantive Requirements Under Equal Employment Opportunity Laws, § 41.32[2][c], pp. 41-79–41-82 (rel. 23-3/01)
- 8 Witkin, Summary of California Law (9th ed. 1988) Constitutional Law, § 762, pp. 262–263; *id.* (2001 supp.) at §§ 762, 762A, pp. 152–156
- 1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 2000) Discrimination Claims, § 2.78, pp. 61–63

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1754
Fair Employment and Housing Act
Disability Discrimination—Reasonable Accommodation
Essential Factual Elements (Gov. Code, § 12940(m))

[*Name of plaintiff***] claims that [***name of defendant***] failed to reasonably accommodate [his/her] [***describe physical or mental disability***]. To establish this claim, [***name of plaintiff***] must prove the following:**

1. **That [***name of defendant***] was a[n] [employer] [***other covered entity***];**

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

3. **That [***name of plaintiff***] had [***describe physical or mental disability***];**

4. **That [***name of defendant***] knew of [***name of plaintiff***]'s [disability/ condition];**

5. **That [***name of plaintiff***] was able to perform the essential duties of [his/her] job [or another vacant position sought by [***name of plaintiff***]] [with reasonable accommodation of [his/her] [disability/condition]];**

6. **That [***name of defendant***] failed to provide reasonable accommodation for [***name of plaintiff***]'s [disability/condition];**

7. **That [***name of plaintiff***] was harmed by [***name of defendant***]'s conduct; and**

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

DIRECTIONS FOR USE

Ordinarily, the court decides whether the described disability or condition meets the statutory definition of a physical disability, mental disability, or medical condition. The jury decides whether, in fact, the plaintiff had the disability or condition or whether the

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employer so thought. However, in some situations the jury may be required to decide whether a particular physical or mental condition is a qualifying disability, in other words, whether the condition limits a major life activity. In such cases, an instruction will need to be tailored to those circumstances.

If element 1 is given, the court may need to instruct the jury on the statutory definition of "employer" under the FEHA. Other covered entities under the FEHA include labor organizations, employment agencies, and apprenticeship training programs. (See Gov. Code, § 12940(a)–(d).)

SOURCES AND AUTHORITY

- Government Code section 12940(m) provides that it is an unlawful employment practice "[f]or an employer or other entity covered by this part to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee. Nothing in this subdivision or in … subdivision (a) shall be construed to require an accommodation that is demonstrated by the employer or other covered entity to produce undue hardship to its operation."

- Government Code section 12926(n) provides:

  "Reasonable accommodation" may include either of the following:
  (1) Making existing facilities used by employees readily accessible to, and usable by, individuals with disabilities.
  (2) Job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

- Government Code section 12940(n) provides that it is an unlawful employment practice "[f]or an employer or other entity covered by this part to fail to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition."

- "Employers must make reasonable accommodations to the disability of an individual unless the employer can demonstrate that doing so would impose an 'undue

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hardship.' " (*Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 947 [62 Cal.Rptr.2d 142].)

- "[A]n employer who knows of the disability of an employee has an affirmative duty to make known to the employee other suitable job opportunities with the employer and to determine whether the employee is interested in, and qualified for, those positions, if the employer can do so without undue hardship or if the employer offers similar assistance or benefit to other disabled or nondisabled employees or has a policy of offering such assistance or benefit to any other employees." (*Prilliman*, *supra*, 53 Cal.App.4th at pp. 950–951.)

- "The elements of a failure to accommodate claim are similar to the elements of a Government Code section 12940, subdivision (a) discrimination claim but there are important differences. … For purposes of a section 12940, subdivision (k) claim, the plaintiff proves he or she is a qualified individual by establishing that he or she can perform the essential functions of the position to which reassignment is sought, rather than the essential functions of the existing position. More significantly, the third element discussed in *Brundage*—establishing that an 'adverse employment action' was caused by the employee's disability—is irrelevant to this type of claim. Under the express provisions of the FEHA, the employer's failure to reasonably accommodate a disabled individual is a violation of the statute in and of itself." (*Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 256 [102 Cal.Rptr.2d 55], internal citations omitted.)

- "[T]he FEHA does not follow [the Americans with Disabilities Act's] definition of disability verbatim, so that a 'qualified individual' for purposes of the FEHA can be different from a 'qualified individual' for purposes of the ADA." (*Jensen*, *supra*, 85 Cal.App.4th at p. 256, fn.5.)

- "The Equal Employment Opportunity Commission's interpretive statement explains that '[t]here are three categories of reasonable accommodation. These are (1) accommodations that are required to ensure equal opportunity in the application process; (2) accommodations that enable the employer's employees with disabilities to perform the essential functions of the position held or desired; and (3) accommodations that enable the employer's employees with disabilities to enjoy equal benefits and privileges of employment as are enjoyed by employees without disabilities.' " (*Brundage v. Hahn* (1997) 57 Cal.App.4th 228, 236, 239 [66 Cal.Rptr.2d 830], internal citation omitted.)

- " 'Ordinarily the reasonableness of an accommodation is an issue for the jury.' " (*Prilliman*, *supra*, 53 Cal.App.4th at p. 954, internal citation omitted.)

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- "Under the FEHA … an employer is relieved of the duty to reassign a disabled employee whose limitations cannot be reasonably accommodated in his or her current job only if reassignment would impose an 'undue hardship' on its operations or if there is no vacant position for which the employee is qualified." (*Spitzer v. Good Guys, Inc.* (2000) 80 Cal.App.4th 1376, 1389 [96 Cal.Rptr.2d 236].)

Secondary Sources

- Bancroft-Whitney's California Civil Practice: Employment Litigation (1993) Discrimination in Employment, § 2:49, pp. 64–66
- 2 Wilcox, California Employment Law (1989) Substantive Requirements Under Equal Employment Opportunity Laws, §§ 41.32[2][c], 41.51[3][a]–[b], pp. 41-79–41-82, 41-178.5–41-178.8 (rel. 23-3/01)
- 2 Witkin, Summary of California Law (9th ed. 1987) Agency and Employment, § 306, p. 301; *id.* (2001 supp.) at § 306, pp. 288–290
- 8 Witkin, Summary of California Law (9th ed. 1988) Constitutional Law, § 762, pp. 262–263; *id.* (2001 supp.) at §§ 762, 762A, pp. 152–156
- 1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 2000) Discrimination Claims, § 2.79, pp. 64–65

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1755
Fair Employment and Housing Act
Disability Discrimination—"Reasonable Accommodation" Explained

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A reasonable accommodation is any change to the workplace that [*choose one or more of the following***]**

[gives a qualified applicant with a disability an equal opportunity in the job application process;]

[allows an employee with a disability to perform the essential duties of the job;] [or]

[allows an employee with a disability to enjoy the same benefits and privileges of employment that are available to employees without disabilities.]

Reasonable accommodations may include the following:

a. Making the workplace readily accessible to and usable by employees with disabilities;

b. Changing job responsibilities or work schedules;

c. Reassigning the employee to a vacant position;

d. Modifying or providing equipment or devices;

e. Modifying tests or training materials;

f. Providing qualified interpreters or readers; or

g. Providing other similar accommodations for an individual with a disability.

If more than one accommodation is reasonable, an employer satisfies its obligation to make a reasonable accommodation if it selects one of those accommodations in good faith.

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SOURCES AND AUTHORITY

- Government Code section 12926(n) provides:

  "Reasonable accommodation" may include either of the following:
  (1) Making existing facilities used by employees readily accessible to, and usable by, individuals with disabilities.
  (2) Job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

- The California Fair Employment and Housing Commission's regulations provide:

  Reasonable accommodation may, but does not necessarily, include, nor is it limited to, such measures as:
  (1) Accessibility. Making existing facilities used by employees readily accessible to and usable by individuals with disabilities;
  (2) Job Restructuring. Job restructuring, reassignment to a vacant position, part-time or modified work schedules, acquisition or modification of equipment or devices, adjustment or modification of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar actions." (Cal. Code Regs., tit. 2, § 7293.9(a).)

- Federal regulations interpreting the Americans with Disabilities Act provide:

  The term reasonable accommodation means:
  (i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or
  (ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or
  (iii) Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities. (29 C.F.R. § 1630.2(o) (2001).)

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- "The Equal Employment Opportunity Commission's interpretive statement explains that '[t]here are three categories of reasonable accommodation. These are (1) accommodations that are required to ensure equal opportunity in the application process; (2) accommodations that enable the employer's employees with disabilities to perform the essential functions of the position held or desired; and (3) accommodations that enable the employer's employees with disabilities to enjoy equal benefits and privileges of employment as are enjoyed by employees without disabilities.' " (*Brundage v. Hahn* (1997) 57 Cal.App.4th 228, 236, 239 [66 Cal.Rptr.2d 830], internal citation omitted.)

Secondary Sources

- Bancroft-Whitney's California Civil Practice: Employment Litigation (1993) Discrimination in Employment, § 2:49, pp. 64–65
- 2 Wilcox, California Employment Law (1989) Substantive Requirements Under Equal Employment Opportunity Laws, § 41.51[3][a]–[b], pp. 41-178.5–41-178.8 (rel. 23-3/01)
- 1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 2000) Discrimination Claims, § 2.79, pp. 64–65

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1756
Fair Employment and Housing Act
Disability Discrimination
Affirmative Defense—Inability to Perform Essential Job Duties

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[*Name of defendant*] claims that [his/her/its] conduct was lawful because [*name of plaintiff*] was unable to perform an essential job duty even with reasonable accommodations. To succeed, [*name of defendant*] must prove the following:

1. **That [*describe job duty*] was an essential job duty; and**

2. **That [*name of plaintiff*] could not perform it, even with reasonable accommodations.**

In deciding if a job duty is essential, you may consider, among other factors, the following:

a. **Whether the reason the job exists is to perform that duty;**

b. **The number of employees available who can perform that duty; and**

c. **Whether the job duty is highly specialized.**

DIRECTIONS FOR USE

There is some question as to whether the inability to perform essential job duties is an affirmative defense or is instead an essential element of the plaintiff's case that the defendant may refute.

SOURCES AND AUTHORITY

- Government Code section 12940(a)(1) provides that the FEHA "does not prohibit an employer from refusing to hire or discharging an employee with a physical or mental disability, or subject an employer to any legal liability resulting from the refusal to employ or the discharge of an employee with a physical or mental disability, where the employee, because of his or her physical or mental disability, is unable to perform his or her essential duties even with reasonable accommodations."

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- Government Code section 12940(a)(2) provides that the FEHA "does not prohibit an employer from refusing to hire or discharging an employee who, because of the employee's medical condition, is unable to perform his or her essential duties even with reasonable accommodations."

- Government Code section 12926(f) provides that " 'essential functions' means the fundamental job duties of the employment position the individual with a disability holds or desires. 'Essential functions' does not include the marginal functions of the position."

- Government Code section 12926(f) also provides:

  (1) A job function may be considered essential for any of several reasons, including, but not limited to, any one or more of the following:
  (A) The function may be essential because the reason the position exists is to perform that function.
  (B) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed.
  (C) The function may be highly specialized, so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

- "[H]ad [defendant] undertaken to investigate the possibility of other job positions for [plaintiff] upon learning of his [medical condition] …, it is undisputed that he would not have been able to perform any of those positions. Accordingly, any purported violation of the duty to reasonably accommodate [plaintiff] by [defendant] would not have caused him any damages." (*Prilliman v. United Air Lines, Inc* (1997) 53 Cal.App.4th 935, 947 [62 Cal.Rptr.2d 142].)

<u>Secondary Sources</u>

- Bancroft-Whitney's California Civil Practice: Employment Litigation (1993) Discrimination in Employment, § 2:82, pp. 102–103; *id.* (2001 supp.) at § 2:46, pp. 50–52
- 2 Wilcox, California Employment Law (1989) Substantive Requirements Under Equal Employment Opportunity Laws, § 41.97[1], pp. 41-313–41-316 (rel. 23-3/01)
- 8 Witkin, Summary of California Law (9th ed. 1988) Constitutional Law, § 762, p. 263; *id.* (2001 supp.) at § 762A, pp. 154–156
- 1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 2000) Discrimination Claims, § 2.79, p. 64

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1757
Fair Employment and Housing Act
Disability Discrimination
Affirmative Defense—Health or Safety Risk

[*Name of defendant***] claims that [his/her/its] conduct was lawful because, even with reasonable accommodations, [***name of plaintiff***] was unable to perform an essential job duty without endangering [[his/her] health or safety] [or] [the health or safety of others]. To succeed, [***name of defendant***] must prove the following:**

1. **That [***describe job duty***] was an essential job duty; and**

2. **That even with reasonable accommodations, [***name of plaintiff***] could not perform [***describe job duty***] without endangering [[his/her] health or safety] [or] [the health or safety of others].**

[In determining whether the job duty would endanger [*name of plaintiff***]'s health or safety, you must decide whether the job duty presents an immediate and substantial degree of risk to [him/her].]**

In deciding if a job duty is essential, you may consider, among other factors, the following:

a. **Whether the reason the job exists is to perform that duty;**

b. **The number of employees available who can perform that duty; and**

c. **Whether the job duty is highly specialized.**

DIRECTIONS FOR USE

Include the bracketed paragraph only if the defendant asserts the defense of endangerment to the plaintiff's own health or safety.

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SOURCES AND AUTHORITY

- Government Code section 12940(a)(1) provides that the FEHA "does not prohibit an employer from refusing to hire or discharging an employee with a physical or mental disability … where the employee, because of his or her physical or mental disability … cannot perform those [essential] duties in a manner that would not endanger his or her health or safety or the health or safety of others even with reasonable accommodations."

- Government Code section 12940(a)(2) provides that the FEHA "does not prohibit an employer from refusing to hire or discharging an employee who, because of the employee's medical condition … cannot perform those [essential] duties in a manner that would not endanger the employee's health or safety or the health or safety of others even with reasonable accommodations."

- The California Fair Employment and Housing Commission's regulations provide: "It is a permissible defense for an employer … to demonstrate that after reasonable accommodation the applicant or employee cannot perform the essential functions of the position in question in a manner which would not endanger his or her health or safety because the job imposes an imminent and substantial degree of risk to the applicant or employee. … It is a permissible defense for an employer … to demonstrate that after reasonable accommodation has been made, the applicant or employee cannot perform the essential functions of the position in question in a manner which would not endanger the health or safety of others to a greater extent than if an individual without a disability performed the job. … However, it is no defense to assert that an individual with a disability has a condition or a disease with a future risk, so long as the condition or disease does not presently interfere with his or her ability to perform the job in a manner that will not immediately endanger the individual with a disability or others, and the individual is able to safely perform the job over a reasonable length of time." (Cal. Code Regs., tit. 2, § 7293.8(c)–(e).)

- "FEHA's 'danger to self' defense has a narrow scope; an employer must offer more than mere conclusions or speculation in order to prevail on the defense. … As one court said, '[t]he defense requires that the employee face an "imminent and substantial degree of risk" in performing the essential functions of the job.' An employer may not terminate an employee for harm that is merely potential. … In addition, in cases in which the employer is able to establish the 'danger to self' defense, it must also show that there are 'no "available reasonable means of accommodation which could, without undue hardship to [the employer], have allowed [the plaintiff] to perform the essential job functions … without danger to himself." ' "

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(*Wittkopf v. County of Los Angeles* (2001) 90 Cal.App.4th 1205, 1218–1219 [109 Cal.Rptr.2d 543], internal citations omitted.)

- "An employer may refuse to hire persons whose physical handicap prevents them from performing their duties in a manner which does not endanger their health. Unlike the BFOQ defense, this exception must be tailored to the individual characteristics of each applicant … in relation to specific, legitimate job requirements. … [Defendant's] evidence, at best, shows a possibility [plaintiff] might endanger his health sometime in the future. In the light of the strong policy for providing equal employment opportunity, such conjecture will not justify a refusal to employ a handicapped person." (*Sterling Transit Co. v. Fair Employment Practice Com.* (1981) 121 Cal.App.3d 791, 798, 799 [175 Cal.Rptr. 548], internal citations and footnote omitted.)

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

- "Under state law, an employee's inability to perform a particular job efficiently and safely due to a physical handicap or impairment is recognized as a legitimate basis for job discrimination. Employee height and weight limitations may be prescribed by an employer where there is a rational basis for such limitations, as shown by supportive analytical factual data rather than stereotypical generalizations. (*McMillen v. Civil Service Com.* (1992) 6 Cal.App.4th 125, 130 [8 Cal.Rptr.2d 548], internal citations omitted.)

- Government Code section 12926(f) provides that " 'essential functions' means the fundamental job duties of the employment position the individual with a disability holds or desires. 'Essential functions' does not include the marginal functions of the position."

- Government Code section 12926(f) also provides:

  (1) A job function may be considered essential for any of several reasons, including, but not limited to, any one or more of the following:
  (A) The function may be essential because the reason the position exists is to perform that function.
  (B) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed.

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(C) The function may be highly specialized, so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

Secondary Sources

- Bancroft-Whitney's California Civil Practice: Employment Litigation (1993) Discrimination in Employment, § 2:82, pp. 102–103
- 2 Wilcox, California Employment Law (1989) Substantive Requirements Under Equal Employment Opportunity Laws, § 41.97[1], pp. 41-313–41-316 (rel. 23-3/01)
- 8 Witkin, Summary of California Law (9th ed. 1988) Constitutional Law, § 762, p. 263; *id*. (2001 supp.) at § 762A, pp. 154–156
- 1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 2000) Discrimination Claims, § 2.111, p. 84

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1758
Fair Employment and Housing Act
Disability Discrimination
Affirmative Defense—Undue Hardship

[*Name of defendant***] claims that [***name of plaintiff***]'s proposed accommodations would create an undue hardship to the operation of [his/her/its] business. To succeed, [***name of defendant***] must prove that the accommodations would be significantly difficult or expensive to make. In deciding if an accommodation would create an undue hardship, you may consider the following factors:**

a. The nature and cost of the accommodation;

b. [*Name of defendant***]'s ability to pay for the accommodation;**

c. The type of operations conducted at the facility;

d. The impact on the operations of the facility;

e. The number of [*name of defendant***]'s employees and the relationship of the employees' duties to one another;**

f. The number, type, and location of [*name of defendant***]'s facilities; and**

g. The administrative and financial relationship of the facilities to one another.

DIRECTIONS FOR USE

The subcommittee is divided on the issue of whether undue hardship is a true affirmative defense or whether the defendant only has the burden of coming forward with the evidence of hardship as a way of negating the element of plaintiff's case concerning the reasonableness of an accommodation.

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SOURCES AND AUTHORITY

- Government Code section 12940(m) provides that it is an unlawful employment practice "[f]or an employer or other entity covered by this part to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee. Nothing in this subdivision or in … subdivision (a) shall be construed to require an accommodation that is demonstrated by the employer or other covered entity to produce undue hardship to its operation."

- Government Code section 12926(s) provides:

> "Undue hardship" means an action requiring significant difficulty or expense, when considered in light of the following factors:
> (1) the nature and cost of the accommodation needed,
> (2) the overall financial resources of the facilities involved in the provision of the reasonable accommodations, the number of persons employed at the facility, and the effect on expenses and resources or the impact otherwise of these accommodations upon the operation of the facility,
> (3) the overall financial resources of the covered entity, the overall size of the business of a covered entity with respect to the number of employees, and the number, type, and location of its facilities,
> (4) the type of operations, including the composition, structure, and functions of the workforce of the entity, and
> (5) the geographic separateness, administrative, or fiscal relationship of the facility or facilities.

<u>Secondary Sources</u>

- 1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 2000) Discrimination Claims, § 2.80, p. 65
- 2 Wilcox, California Employment Law (1989) Substantive Requirements Under Equal Employment Opportunity Laws, § 41.51[4][b], p. 41-178.13 (rel. 23-3/00)

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1759
Fair Employment and Housing Act
Religious Creed Discrimination—Failure to Accommodate
Essential Factual Elements (Gov. Code, § 12940(l))

[*Name of plaintiff***] claims that [***name of defendant***] wrongfully discriminated against him by failing to reasonably accommodate his religious [belief/observance]. 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/[***other covered relationship to defendant***]];**

3. **That [***name of plaintiff***] has a sincerely held religious belief that [***describe religious belief, observance, or practice***];**

4. **That [***name of plaintiff***]'s religious [belief/observance] conflicted with a job requirement;**

5. **That [***name of defendant***] knew of the conflict between [***name of plaintiff***]'s religious [belief/observance] and the job requirement;**

6. **That [***name of defendant***] did not reasonably accommodate [***name of plaintiff***]'s religious [belief/observance];**

7. **That [***name of defendant***] [discharged/refused to hire/[***other adverse employment action***]] [***name of plaintiff***] for failing to comply with the conflicting job requirement;**

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

9. **That [***name of defendant***]'s failure to reasonably accommodate [***name of plaintiff***]'s religious [belief/observance] was a substantial factor in causing [his/her] harm.**

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If more than one accommodation is reasonable, an employer satisfies its obligation to make a reasonable accommodation if it selects one of those accommodations in good faith.

DIRECTIONS FOR USE

If element 1 is given, the court may need to instruct the jury on the statutory definition of "employer" under the FEHA. Other covered entities under the FEHA include labor organizations, employment agencies, and apprenticeship training programs. (See Gov. Code, § 12940(a)–(d).)

SOURCES AND AUTHORITY

- Government Code section 12940(l) provides that it is an unlawful employment practice "[f]or an employer … to refuse to hire or employ a person, … or to discharge a person from employment, … or to discriminate against a person in compensation or in terms, conditions, or privileges of employment because of a conflict between the person's religious belief or observance and any employment requirement, unless the employer … demonstrates that it has explored any available reasonable alternative means of accommodating the religious belief or observance … but is unable to reasonably accommodate the religious belief or observance without undue hardship on the conduct of the business of the employer. Religious belief or observance … includes, but is not limited to, observance of a Sabbath or other religious holy day or days, and reasonable time necessary for travel prior and subsequent to a religious observance."

- Government Code section 12926(o) provides: " 'Religious creed,' 'religion,' 'religious observance,' 'religious belief,' and 'creed' include all aspects of religious belief, observance, and practice."

- The Fair Employment and Housing Commission's regulations provide: " 'Religious creed' includes any traditionally recognized religion as well as beliefs, observances, or practices which an individual sincerely holds and which occupy in his or her life a place of importance parallel to that of traditionally recognized religions. Religious creed discrimination may be established by showing: … [t]he employer or other covered entity has failed to reasonably accommodate the applicant's or employee's religious creed despite being informed by the applicant or employee or otherwise having become aware of the need for reasonable accommodation." (Cal. Code Regs., tit. 2, § 7293.1(b).)

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- The Fair Employment and Housing Commission's regulations provide: "An employer or other covered entity shall make accommodation to the known religious creed of an applicant or employee unless the employer or other covered entity can demonstrate that the accommodation is unreasonable because it would impose an undue hardship." (Cal. Code Regs., tit. 2, § 7293.3.)

- "In evaluating an argument the employer failed to accommodate an employee's religious beliefs, the employee must establish a prima facie case that he or she had a bona fide religious belief, of which the employer was aware, that conflicts with an employment requirement. … Once the employee establishes a prima facie case, then the employer must establish it initiated good faith efforts to accommodate or no accommodation was possible without producing undue hardship." (*Soldinger v. Northwest Airlines, Inc.* (1996) 51 Cal.App.4th 345, 370 [58 Cal.Rptr.2d 747], internal citation omitted.)

- "Any reasonable accommodation is sufficient to meet an employer's obligations. However, the employer need not adopt the most reasonable accommodation nor must the employer accept the remedy preferred by the employee. The reasonableness of the employer's efforts to accommodate is determined on a case by case basis. … '[O]nce it is determined that the employer has offered a reasonable accommodation, the employer need not show that each of the employee's proposed accommodations would result in undue hardship.' '[W]here the employer has already reasonably accommodated the employee's religious needs, the … inquiry [ends].' " (*Soldinger, supra*, 51 Cal.App.4th at p. 370, internal citations omitted.)

<u>Secondary Sources</u>

- Bancroft-Whitney's California Civil Practice: Employment Litigation (1993) Discrimination in Employment, § 2.68, pp. 87–88
- 1 Lindemann and Grossman, Employment Discrimination Law (3d ed. 1996) Religion, pp. 219–224, 226–227; *id.* (2000 supp.) at pp. 100–101
- 2 Wilcox, California Employment Law (1989) Substantive Requirements Under Equal Employment Opportunity Laws, § 41.52[3], p. 41-181 (rel. 22-9/00)
- 8 Witkin, Summary of California Law (9th ed. 1988) Constitutional Law, §§ 739 and 763, pp. 224–225, 264–265; *id.* (2001 supp.) at § 763, p. 160

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1760
Fair Employment and Housing Act
Religious Creed Discrimination—Reasonable Accommodation
Affirmative Defense—Undue Hardship

[*Name of defendant***] claims that its failure, if any, to accommodate [***name of plaintiff***]'s religious [belief/observance] was justified because any accommodation would have caused undue hardship. To succeed, [***name of defendant***] must prove the following:**

1. **That [***name of defendant***] explored available ways to accommodate [***name of plaintiff***]'s religious [belief/observance], including excusing [him/her] from duties that conflict with [his/her] religious [belief/observance] or permitting those duties to be performed at another time or by another person; and**

2. **That [***name of defendant***] was unable to accommodate [***name of plaintiff***]'s religious [belief/observance] without causing undue hardship on the conduct of [***name of defendant***]'s business.**

An accommodation causes an "undue hardship" when it would have more than an insignificant effect on the business.

DIRECTIONS FOR USE

Note that the terms "reasonable accommodation" and "undue hardship" do not have the same meanings under religious discrimination and disability discrimination laws as interpreted by California and federal courts. Because an employer has a competing duty to avoid religious preferences, the duty to accommodate an employee's religious beliefs presents a lesser burden than the duty to accommodate an employee's disability.

SOURCES AND AUTHORITY

- Government Code section 12940(l) provides that it is an unlawful employment practice "[f]or an employer … to [1] refuse to hire or employ a person, … or [2] to discharge a person from employment, … or [3] to discriminate against a person in compensation or in terms, conditions, or privileges of employment because of a conflict between the person's religious belief or observance and any employment

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requirement, unless the employer … demonstrates that it has explored any available reasonable alternative means of accommodating the religious belief or observance … but is unable to reasonably accommodate the religious belief or observance without undue hardship on the conduct of the business of the employer. Religious belief or observance … includes, but is not limited to, observance of a Sabbath or other religious holy day or days, and reasonable time necessary for travel prior and subsequent to a religious observance."

- "If the employee proves a prima facie case and the employer fails to initiate an accommodation for the religious practices, the burden is then on the employer to prove it will incur an undue hardship if it accommodates that belief. '[T]he extent of undue hardship on the employer's business is at issue only where the employer claims that it is unable to offer any reasonable accommodation without such hardship.' … '[A]n accommodation causes "undue hardship" whenever that accommodation results in "more than a de minimis cost" to the employer.' " (*Soldinger v. Northwest Airlines, Inc.* (1996) 51 Cal.App.4th 345, 371 [58 Cal.Rptr.2d 747], internal citations omitted.)

- "It would be anomalous to conclude that by 'reasonable accommodation' Congress meant that an employer must deny the shift and job preference of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others, and we conclude that Title VII does not require an employer to go that far. … Alternatively, the Court of Appeals suggested that [the employer] could have replaced [plaintiff] on his Saturday shift with other employees through the payment of premium wages. … To require [the employer] to bear more than a de minimus cost … is an undue hardship. Like abandonment of the seniority system, to require [the employer] to bear additional costs when no such costs are incurred to give other employees the days off that they want would involve unequal treatment of employees on the basis of their religion." (*Trans World Airlines, Inc. v. Hardison* (1977) 432 U.S. 63, 81, 84 [97 S.Ct. 2264, 53 L.Ed.2d 113], footnote omitted.)

<u>Secondary Sources</u>

- Bancroft-Whitney's California Civil Practice: Employment Litigation (1993) Discrimination in Employment, § 2.68, pp. 87–88
- 1 Lindemann and Grossman, Employment Discrimination Law (3d ed. 1996) Religion, pp. 227–234; *id.* (2000 supp.) at pp. 100–105
- 2 Wilcox, California Employment Law (1989) Substantive Requirements Under Equal Employment Opportunity Laws, § 41.52[4], p. 41-184 (rel. 14-9/96)

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1761
California Family Rights Act
Violation of CFRA Rights—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] [refused to grant [him/her] [family care/medical] leave] [refused to return [him/her] to the same or a comparable job when [his/her] [family care/medical] leave ended] [***other violation of CFRA rights***]. To establish this claim, [***name of plaintiff***] must prove the following:**

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

2. **That [***name of defendant***] employed 50 or more employees within 75 miles of [***name of plaintiff***]'s workplace;**

3. **That [***name of plaintiff***] [***describe reason for family care or medical leave***];**

4. **That at the time [***name of plaintiff***] needed leave, [he/she] had more than 12 months of service with [***name of defendant***] and had worked at least 1,250 hours for [***name of defendant***] during the previous 12 months;**

5. **That [***name of plaintiff***] provided reasonable notice to [***name of defendant***] of [his/her] need for [family care/medical] leave, including its expected timing and length. [If [***name of defendant***] notified [his/her/its] employees that 30 days' advance notice was required before the leave was to begin, then [***name of plaintiff***] must show that [he/she] gave that notice or, if 30 days' notice was not reasonably possible under the circumstances, that [he/she] gave notice as soon as possible];**

6. **That [***name of defendant***] [refused to grant [***name of plaintiff***]'s request for [family care/medical] leave] [refused to return [***name of plaintiff***] to the same or a comparable job when [his/her] [family care/medical] leave ended] [***other violation of CFRA rights***];**

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

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

DIRECTIONS FOR USE

This instruction is intended for use when an employee claims violation of the CFRA (Gov. Code, § 12945.1 et seq.). In addition to a qualifying employer's refusal to grant CFRA leave, CFRA violations include failure to provide benefits as required by CFRA and loss of seniority.

Statutory requirements that are uncontested, such as elements 2 and 4, may be deleted.

Give the bracketed sentence under element 5 only if the facts involve an expected birth, placement for adoption, or planned medical treatment, and there is evidence that the employer required 30 days' advance notice of leave. (See Cal. Code Regs, tit. 2, § 7297.4(a).)

The subcommittee believes that the court decides whether the condition or reason described in element 3 meets the statutory definition of a serious health condition or other qualifying reason for CFRA leave. The jury decides whether the qualifying reason for CFRA leave in fact existed.

SOURCES AND AUTHORITY

- Government Code section 12945.2(a) provides, in part, that "it shall be an unlawful employment practice for any employer … to refuse to grant a request by any employee with more than 12 months of service with the employer, and who has at least 1,250 hours of service with the employer during the previous 12-month period, to take up to a total of 12 workweeks in any 12-month period for family care and medical leave. Family care and medical leave … shall not be deemed to have been granted unless the employer provides the employee, upon granting the leave request, a guarantee of employment in the same or a comparable position upon the termination of the leave."

- Government Code section 12945.2(l) provides:

  > It shall be an unlawful employment practice for an employer to refuse to hire, or to discharge, fine, suspend, expel, or discriminate against, any individual because of any of the following:

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(1) An individual's exercise of the right to family care and medical leave. …
(2) An individual's giving information or testimony as to his or her own family care and medical leave, or another person's family care and medical leave, in any inquiry or proceeding related to rights guaranteed under this section.

- Government Code section 12945.2(c) provides, in part:

  "Employer" means either of the following:
  (A) Any person who directly employs 50 or more persons to perform services for a wage or salary.
  (B) The state, and any political or civil subdivision of the state and cities.

- Government Code section 12945.2(b) provides: "It shall not be an unlawful employment practice for an employer to refuse to grant a request for family care and medical leave by an employee if the employer employs less than 50 employees within 75 miles of the worksite where that employee is employed."

- Government Code section 12945.2(c)(3) provides:

  "Family care and medical leave" means any of the following:
  (A) Leave for reason of the birth of a child of the employee, the placement of a child with an employee in connection with the adoption or foster care of the child by the employee, or the serious health condition of a child of the employee.
  (B) Leave to care for a parent or a spouse who has a serious health condition.
  (C) Leave because of an employee's own serious health condition that makes the employee unable to perform the functions of the position of that employee, except for leave taken for disability on account of pregnancy, childbirth, or related medical conditions."

- Government Code section 12945.2(c)(8) provides:

  "Serious health condition" means an illness, injury, impairment, or physical or mental condition that involves either of the following:
  (A) Inpatient care in a hospital, hospice, or residential health care facility.
  (B) Continuing treatment or continuing supervision by a health care provider.

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- Government Code section 12945.2(a) provides, in part: "Family care and medical leave … shall not be deemed to have been granted unless the employer provides the employee, upon granting the leave request, a guarantee of employment in the same or a comparable position upon the termination of the leave."

- Government Code section 12945.2(a) provides, in part, that "it shall be an unlawful employment practice for any employer … to refuse to grant a request by any employee … to take up to a total of 12 workweeks in any 12-month period for family care and medical leave. … The commission shall adopt a regulation specifying the elements of a reasonable request."

- Government Code section 12945.2(h) provides: "If the employee's need for a leave … is foreseeable, the employee shall provide the employer with reasonable advance notice of the need for the leave."

- Government Code section 12945.2(i) provides: "If the employee's need for leave … is foreseeable due to a planned medical treatment or supervision, the employee shall make a reasonable effort to schedule the treatment or supervision to avoid disruption to the operations of the employer, subject to the approval of the health care provider of the individual requiring the treatment or supervision."

- "It is not enough that [plaintiff's] mother had a serious health condition. [Plaintiff's] participation to provide care for her mother had to be 'warranted' during a 'period of treatment or supervision … .' " (*Pang v. Beverly Hospital, Inc.* (2000) 79 Cal.App.4th 986, 995 [94 Cal.Rptr.2d 643], internal citation and footnote omitted.)

- "An employee 'shall provide the employer with reasonable advance notice of the need for the leave.' … 'An employee shall provide at least verbal notice sufficient to make the employer aware that the employee needs CFRA-qualifying leave, and the anticipated timing and duration of the leave. The employee need not expressly assert rights under CFRA … or even mention CFRA … to meet the notice requirement; however, the employee must state the reason the leave is needed, such as, for example, the expected birth of a child or for medical treatment. The employer should inquire further of the employee if it is necessary to have more information about whether CFRA leave is being sought by the employee and obtain the necessary details of the leave to be taken.'" (*Gibbs v. American Airlines, Inc.* (1999) 74 Cal.App.4th 1, 6–7 [87 Cal.Rptr.2d 554], internal citation omitted.)

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Secondary Sources

- Bancroft-Whitney's California Civil Practice: Employment Litigation (1993) Working Conditions, § 5:39, pp. 34–35; *id.* (2001 supp.) at § 5:39, pp. 167–170
- 1 Wilcox, California Employment Law (1989) Leaves of Absence, §§ 8.25[2], pp. 8-32–8-34.1, 8.30[1]–[2], 8.31[2], 8.32, pp. 8-46–8-47, 8-51–8-52 (rel. 17-3/98)
- 8 Witkin, Summary of California Law (9th ed. 2001 supp.) Constitutional Law, §§ 763A, 763B, 763C, 763D, pp. 161–166
- 1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 2000) Other Employee Rights Statutes, §§ 4.18–4.20, pp. 174–176

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1762
California Family Rights Act
"Comparable Job" Explained

"Comparable job" means a job that is virtually identical to the employee's original position in terms of pay, benefits, working conditions, and privileges. It must involve the same or substantially similar worksite, duties, responsibilities, and work schedule.

DIRECTIONS FOR USE

Give this instruction only if comparable job is an issue under the plaintiff's CFRA claim.

SOURCES AND AUTHORITY

- Government Code section 12945.2(c)(4) provides: " 'Employment in the same or a comparable position' means employment in a position that has the same or similar duties and pay that can be performed at the same or similar geographic location as the position held prior to the leave."

- The Fair Employment and Housing Commission's regulations provide: " 'Employment in a comparable position' means employment in a position which is virtually identical to the employee's original position in terms of pay, benefits, and working conditions, including privileges, perquisites and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority. It must be performed at the same or geographically proximate worksite from where the employee was previously employed. It ordinarily means the same shift or the same or an equivalent work schedule. It has the same meaning as the term 'equivalent position' in [the Family Medical Leave Act] and its implementing regulations." (Cal. Code Regs., tit. 2, § 7297.0(g).)

- "[W]hile we will accord great weight and respect to the [Fair Employment and Housing Commission]'s regulations that apply to the necessity for leave, along with any applicable federal FMLA regulations that the Commission incorporated by reference, we still retain ultimate responsibility for construing [CFRA]." (*Pang v. Beverly Hospital, Inc.* (2000) 79 Cal.App.4th 986, 994–995 [94 Cal.Rptr.2d 643].)

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Secondary Sources

- 1 Wilcox, California Employment Law (1989) Leaves of Absence, §§ 8.30[1]–[2], pp. 8-46–8-47 (rel. 17-3/98)

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1763
California Family Rights Act
Affirmative Defense—No Certification from Health-Care Provider

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[*Name of defendant***] claims that [he/she/it] [***insert one of the following***]**

[denied [*name of plaintiff***]'s request for leave because [he/she] did not provide a health-care provider's certification of [his/her] need for leave.]**

[refused to return [*name of plaintiff***] to work because [he/she] did not provide a health-care provider's certification of [his/her] fitness to resume work.]**

To succeed, [*name of defendant***] must prove the following:**

1. **That [***name of defendant***] told [***name of plaintiff***] that [he/she/it] required written certification from [***name of plaintiff***]'s health-care provider [to grant leave/to extend leave/as a condition of resuming work]; [and]**

[2. That [*name of defendant***] has a practice or policy that requires employees to provide written certification from their health-care providers that they are able to resume work; and]**

3. **That [***name of plaintiff***] did not provide [***name of defendant***] with the required certification from a health-care provider within a reasonable period of time.**

DIRECTIONS FOR USE

Element 2 is applicable only when the employer asserts that the employee failed to provide a health-care provider's required certification of the employee's fitness to resume work following a CFRA leave. (See Gov. Code, § 12945.2(k)(4).)

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SOURCES AND AUTHORITY

- Government Code section 12945.2(k) provides, in part:

  (1) An employer may require that an employee's request for leave because of the employee's own serious health condition be supported by a certification issued by his or her health care provider. That certification shall be sufficient if it includes all of the following:
  (A) The date on which the serious health condition commenced.
  (B) The probable duration of the condition.
  (C) A statement that, due to the serious health condition, the employee is unable to perform the function of his or her position.
  (2) The employer may require that the employee obtain subsequent recertification regarding the employee's serious health condition on a reasonable basis, in accordance with the procedure provided in paragraph (1), if additional leave is required.

- Government Code section 12945.2(j) provides, in part:

  (1) An employer may require that an employee's request for leave to care for a child, a spouse, or a parent who has a serious health condition be supported by a certification issued by the health care provider of the individual requiring care. That certification shall be sufficient if it includes all of the following:
  (A) The date on which the serious health condition commenced.
  (B) The probable duration of the condition.
  (C) An estimate of the amount of time that the health care provider believes the employee needs to care for the individual requiring the care.
  (D) A statement that the serious health condition warrants the participation of a family member to provide care during a period of the treatment or supervision of the individual requiring care.
  (2) Upon expiration of the time estimated by the health care provider in subparagraph (C) of paragraph (1), the employer may require the employee to obtain recertification, in accordance with the procedure provided in paragraph (1), if additional leave is required.

- Government Code section 12945.2(k)(4) provides, in part: "As a condition of an employee's return from leave taken because of the employee's own serious health condition, the employer may have a uniformly applied practice or policy that requires

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the employee to obtain certification from his or her health care provider that the employee is able to resume work."

- Government Code section 12945.2(c)(6) defines "health care provider" as meaning any of the following:

  (A) An individual holding either a physician's and surgeon's certificate issued pursuant to … the Business and Professions Code, an osteopathic physician's and surgeon's certificate issued pursuant to … the Business and Professions Code, or an individual duly licensed as a physician, surgeon, or osteopathic physician or surgeon in another state or jurisdiction, who directly treats or supervises the treatment of the serious health condition.
  (B) Any other person determined by the United States Secretary of Labor to be capable of providing health care services under the FMLA.

- The Fair Employment and Housing Commission's regulations provide: "A request to take a CFRA leave is reasonable if it complies with any applicable notice requirements … and if it is accompanied, where required, by a certification." (Cal. Code Regs., tit. 2, § 7297.1(b).)

<u>Secondary Sources</u>

- 1 Wilcox, California Employment Law (1989) Leaves of Absence, § 8.26, pp. 8-34.1–8-39 (rel. 21-3/00)
- 8 Witkin, Summary of California Law (9th ed. 2001 supp.) Constitutional Law, §§ 763B, 763C, pp. 163–166

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1764
California Family Rights Act
Affirmative Defense—Employment Would Have Ceased

[*Name of defendant*] claims that [he/she/it] was not required to allow [*name of plaintiff*] to return to work when [his/her] [family care/medical] leave was over because [his/her] employment would have ended for other reasons. To succeed, [*name of defendant*] must prove the following:

1. **That [*name of defendant*] would have [discharged/laid off] [*name of plaintiff*] if [he/she] had continued to work during the leave period; and**

2. **That [*name of plaintiff*]'s [family care/medical] leave was not a reason for [discharging [him/her]/laying [him/her] off].**

An employee on [family care/medical] leave has no greater right to his or her job or to other employment benefits than if he or she had continued working during the leave.

SOURCES AND AUTHORITY

- The Fair Employment and Housing Commission's regulations provide: "An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the CFRA leave period. An employer has the burden of proving, by a preponderance of the evidence, that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny reinstatement. … [¶] … If an employee is laid off during the course of taking CFRA leave and employment is terminated, the employer's responsibility to continue CFRA leave, maintain group health plan benefits and reinstate the employee ceases at the time the employee is laid off, provided the employer has no continuing obligations under a collective bargaining agreement or otherwise." (Cal. Code Regs., tit. 2, § 7297.2(c)(1).)

<u>Secondary Sources</u>

- 1 Wilcox, California Employment Law (1989) Leaves of Absence, § 8.30[4], pp. 8-47–8-48 (rel. 17-3/98)

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1765
California Family Rights Act
Affirmative Defense—Key Employee

[*Name of defendant***] claims that [he/she/it] was not required to return [***name of plaintiff***] to work in the same or a comparable job following [family care/medical] leave because [he/she] was employed in a highly paid, essential position. To succeed on this claim, [***name of defendant***] must prove the following:**

1. **That [***name of plaintiff***] was a salaried employee and among the highest paid 10 percent of [***name of defendant***]'s employees [employed within 75 miles of [his/her] workplace];**

2. **That [***name of defendant***]'s refusal to return [***name of plaintiff***] to work in the same or a comparable job was necessary to prevent severe economic injury to [***name of defendant***]'s [business] operations; [and]**

3. **That when [***name of defendant***] decided that [***name of plaintiff***] would not be allowed to return to [his/her] job or a comparable position, [***name of defendant***] notified [***name of plaintiff***] of that decision; [and]**

[4. That [*name of defendant***] gave [***name of plaintiff***] a reasonable opportunity to return to work after notifying [***name of plaintiff***] of [his/her/its] decision.]**

DIRECTIONS FOR USE

Element 4 is applicable only when the employer notifies the employee of its decision to refuse to reinstate plaintiff after family care or medical leave has commenced.

SOURCES AND AUTHORITY

- Government Code section 12945.2(r) provides, in part:

  (1) [A]n employer may refuse to reinstate an employee returning from leave to the same or a comparable position if all of the following apply:

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(A) The employee is a salaried employee who is among the highest paid 10 percent of the employer's employees who are employed within 75 miles of the worksite at which that employee is employed.

(B) The refusal is necessary to prevent substantial and grievous economic injury to the operations of the employer.

(C) The employer notifies the employee of the intent to refuse reinstatement at the time the employer determines the refusal is necessary under subparagraph (B).

(2) In any case in which the leave has already commenced, the employer shall give the employee a reasonable opportunity to return to work following the notice prescribed by subparagraph (C).

Secondary Sources

- 1 Wilcox, California Employment Law (1989) Leaves of Absence, § 8.30[5], pp. 8-48–8-51 (rel. 17-3/98)

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1766
California Family Rights Act
CFRA Rights Retaliation–Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] retaliated against [him/her] for [[requesting/taking] [family care/medical] leave]/[***other protected activity***]]. To establish this claim, [***name of plaintiff***] must prove the following:**

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

2. **That [***name of defendant***] employed 50 or more employees within 75 miles of [***name of plaintiff***]'s workplace;**

3. **That [***name of plaintiff***] [***describe qualifying reason for family care or medical leave***];**

4. **That [***name of plaintiff***] had more than 12 months of service with [***name of defendant***] and had worked at least 1,250 hours for [***name of defendant***] during the previous 12 months;**

5. **That [***name of plaintiff***] [[requested/took] [family care/medical] leave/ [***other protected activity***]];**

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

7. **That [***name of plaintiff***]'s [[request for/taking] [family care/ medical] leave/[***other protected activity***]] was a reason for [discharging/***other adverse employment action***] [him/her];**

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

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

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DIRECTIONS FOR USE

The instruction assumes that the defendant is plaintiff's present or former employer, and therefore it must be modified if the defendant is a prospective employer or other person.

Statutory requirements that are uncontested, such as elements 2 and 4, may be deleted.

The subcommittee believes that the court decides whether the condition or reason described in element 3 meets the statutory definition of a serious health condition or other qualifying reason for CFRA leave. The jury decides whether the qualifying reason for CFRA leave in fact existed.

SOURCES AND AUTHORITY

- Government Code section 12945.2(l) provides:

  > It shall be an unlawful employment practice for an employer to refuse to hire, or to discharge, fine, suspend, expel, or discriminate against, any individual because of any of the following:
  > (1) An individual's exercise of the right to family care and medical leave. …
  > (2) An individual's giving information or testimony as to his or her own family care and medical leave, or another person's family care and medical leave, in any inquiry or proceeding related to rights guaranteed under this section.

- Government Code section 12940(h) provides that it is an unlawful employment practice "[f]or any employer, labor organization, employment agency, or person to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under [Government Code sections 12900 through 12996] or because the person has filed a complaint, testified, or assisted in any proceeding under this part."

- "Guided by … cases under the analogous federal statute, we conclude the elements of a cause of action for retaliation in violation of CFRA under the circumstances of this case are as follows: (1) the defendant was an employer covered by CFRA; (2) the plaintiff was an employee eligible to take CFRA leave; (3) the plaintiff exercised her right to take leave for a qualifying CFRA purpose; and (4) the plaintiff suffered an adverse employment action, such as termination, fine, or suspension, because of her exercise of her right to CFRA leave." (*Dudley v. Department of Transportation* (2001) 90 Cal.App.4th 255, 261 [108 Cal.Rptr.2d 739].)

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Secondary Sources

- 1 Wilcox, California Employment Law (1989) Leaves of Absence, § 8.32, pp. 8-51–8-52 (rel. 17-3/98)
- 8 Witkin, Summary of California Law (9th ed. 2001 supp.) Constitutional Law, §§ 763C, 763D, pp. 164–166
- 1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 2000) Other Employee Rights Statutes, §§ 4.18–4.20, pp. 174–176

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1767
Nonpayment of Wages—Essential Factual Elements
(Lab. Code, §§ 201, 202, 218)

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

1. **That [*name of plaintiff*] was [*name of defendant*]'s employee;**

2. **That [[*name of defendant*] discharged [*name of plaintiff*]]/[[*name of plaintiff*] quit [his/her] job];**

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

4. **The amount of unpaid wages.**

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

DIRECTIONS FOR USE

This instruction is intended for use in a civil action for payment of wages due an employee who has been discharged or who has quit employment. (See Lab. Code, §§ 201, 202, and 218.)

If the defendant disputes the existence of an employment relationship, the court may consider modifying and giving Instruction 904, *Existence of "Employee" Status Disputed*, in the Vicarious Liability series.

SOURCES AND AUTHORITY

- Labor Code section 218 provides, in part: "Nothing in this article shall limit the right of any wage claimant to sue directly or through an assignee for any wages or penalty due. …"

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- Labor Code section 218.5 provides, in part: "In any action brought for the nonpayment of wages, … the court shall award reasonable attorney's fees and costs to the prevailing party."

- Labor Code section 201 provides, in part: "If an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately."

- Labor Code section 202 provides, in part: "If an employee not having a written contract for a definite period quits his or her employment, his or her wages shall become due and payable not later than 72 hours thereafter, unless the employee has given 72 hours previous notice of his or her intention to quit, in which case the employee is entitled to his or her wages at the time of quitting."

- Labor Code section 200 defines "wages" as including "all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation. … 'Labor' includes labor, work, or service whether rendered or performed under contract, subcontract, partnership, station plan, or other agreement if the labor to be paid for is performed personally by the person demanding payment."

- Labor Code section 206(a) provides: "In case of a dispute over wages, the employer shall pay, without condition and within the time set by this article, all wages, or parts thereof, conceded by him to be due, leaving to the employee all remedies he might otherwise be entitled to as to any balance claimed."

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

Secondary Sources

- Bancroft-Whitney's California Civil Practice: Employment Litigation (1993) Wage and Hour, §§ 4:67, 4:76, pp. 51, 55–56
- 1 Wilcox, California Employment Law (1989) Administrative and Judicial Remedies Under Wage and Hour Laws, § 5.40, pp. 5-63–5-68.1 (rel. 23-3/01)
- 2 Witkin, Summary of California Law (9th ed. 1987) Agency and Employment, § 335, pp. 327–329; *id*. (2001 supp.) at § 335, pp. 335–336

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1768
Nonpayment of Minimum Wage
Essential Factual Elements (Lab. Code, § 1194)

[*Name of plaintiff*] claims that [*name of defendant*] owes [him/her] the difference between the wages paid by [*name of defendant*] and the wages [*name of plaintiff*] should have been paid according to the minimum wage rate required by state law. To establish this claim, [*name of plaintiff*] must prove the following:

1. **That [*name of plaintiff*] [is/was] [*name of defendant*]'s employee;**

2. **That [*name of plaintiff*] was paid at a rate less than the legal minimum wage rate for a period of time that [he/she] worked for [*name of defendant*]; and**

3. **The amount of wages owed.**

The legal minimum wage rate for labor performed after [*date*] is [*minimum wage rate*] per hour.

An employee is entitled to be paid the legal minimum wage rate even if he or she agrees to work for a lower wage.

DIRECTIONS FOR USE

The court must determine the applicable prevailing minimum wage rate from the wage orders of the California Industrial Wage Commission (IWC). (See Lab. Code, §§ 1173, 1182; 8 Cal. Code Regs., tit. 8, §§ 11000, ¶ 2 and §§ 11010–11150, ¶ 4(A).)

The subcommittee has chosen not to write model instructions for the numerous fact-specific affirmative defenses to minimum wage claims. The California Labor Code and the IWC's wage orders provide that certain employees are exempt from minimum wage requirements (for example, outside salespersons; see Lab. Code, § 1171), and that under certain circumstances employers may claim credits for meals and lodging against minimum wage pay (see Cal. Code Regs., tit. 8, §§ 11000, ¶ 3 and §§ 11010–11150, ¶ 10(B)). The assertion of an exemption from wage and hour laws is an affirmative

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defense. (See generally *Ramirez v. Yosemite Water Co., Inc.* (1999) 20 Cal.4th 785, 794 [85 Cal.Rptr.2d 844].)

SOURCES AND AUTHORITY

- Labor Code section 1194(a) provides: "Notwithstanding any agreement to work for a lesser wage, any employee receiving less than the legal minimum wage or the legal overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount of this minimum wage or overtime compensation, including interest thereon, reasonable attorney's fees, and costs of suit."

- Labor Code section 1194.2 provides, in part:

  (a) In any action under … Section 1194 to recover wages because of the payment of a wage less than the minimum wage, … an employee shall be entitled to recover liquidated damages in an amount equal to the wages unlawfully unpaid and interest thereon. Nothing in this subdivision shall be construed to authorize the recovery of liquidated damages for failure to pay overtime compensation.
  (b) Notwithstanding subdivision (a), if the employer demonstrates to the satisfaction of the court that the act or omission giving rise to the action was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of any provision of the Labor Code relating to minimum wage, or an order of the commission, the court may, in its discretion, refuse to award liquidated damages or award any amount of liquidated damages not exceeding the amount specified in subdivision (a).

- Labor Code section 200 defines "wages" as including "all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation. … [¶] 'Labor' includes labor, work, or service whether rendered or performed under contract, subcontract, partnership, station plan, or other agreement if the labor to be paid for is performed personally by the person demanding payment."

- Labor Code section 206(a) provides: "In case of a dispute over wages, the employer shall pay, without condition and within the time set by this article, all wages, or parts thereof, conceded by him to be due, leaving to the employee all remedies he might otherwise be entitled to as to any balance claimed."

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- Labor Code section 1193.6(a) provides, in part: "The department or division may, with or without the consent of the employee or employees affected, commence and prosecute a civil action to recover unpaid minimum wages or unpaid overtime compensation. … The consent of any employee to the bringing of this action shall constitute a waiver on the part of the employee of his or her cause of action under Section 1194 unless the action is dismissed without prejudice by the department or the division."

- Labor Code section 1173 provides, in part: "It is the continuing duty of the Industrial Welfare Commission … to ascertain the wages paid to all employees in this state, [and] to ascertain the hours and conditions of labor and employment in the various occupations, trades, and industries in which employees are employed in this state. … The commission shall conduct a full review of the adequacy of the minimum wage at least once every two years."

Secondary Sources

- Bancroft-Whitney's California Civil Practice: Employment Litigation (1993) Wage and Hour, §§ 4:67, 4:77, pp. 51, 56
- 1 Wilcox, California Employment Law (1989) Minimum Wages, §§ 2.02[1], 2.03[1], 2.04[1], 2.05[1], 2.20[1], 2.21[1], pp. 2-7–2-10, 2-12, 2-14–2-30, 2-42–2-47, 2-60–2-64; Administrative and Judicial Remedies Under Wage and Hour Laws, § 5.72, pp. 5-98–5-103 (rel. 23-3/01)
- 2 Witkin, Summary of California Law (9th ed. 1987) Agency and Employment, §§ 330, 335, pp. 321–322, 327–329; *id*. (2001 supp.) at §§ 330, 335, pp. 318–320, 335–336

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1769
Nonpayment of Overtime Compensation
Essential Factual Elements (Lab. Code, § 1194)

[*Name of plaintiff***] claims that [***name of defendant***] owes [him/her] the difference between the wages paid by [***name of defendant***] and the wages [***name of plaintiff***] should have been paid according to the overtime compensation rate required by state law. To establish this claim, [***name of plaintiff***] must prove the following:**

1. **That [***name of plaintiff***] [is/was] [***name of defendant***]'s employee;**

2. **That [***name of defendant***] was required to pay [***name of plaintiff***] overtime;**

3. **That [***name of plaintiff***] was paid at a rate lower than the legal overtime compensation rate for a period of time that [he/she] worked overtime for [***name of defendant***]; and**

4. **The amount of wages owed.**

The legal overtime compensation rate for workers in [*name of plaintiff***]'s industry and job is [one and one-half times an employee's hourly rate for work performed after 8 hours in a day or in excess of 40 hours in a workweek/[***insert other overtime compensation rate***]].**

An employee is entitled to be paid the legal overtime compensation rate even if he or she agrees to work for a lower wage.

DIRECTIONS FOR USE

The court must determine the applicable overtime compensation rate from the wage orders of the California Industrial Wage Commission. (See Lab. Code, §§ 1173, 1182; 8 Cal. Code Regs., tit. 8, §§ 11000, ¶ 2 and §§ 11010–11150, ¶ 4(A).)

The assertion of an employee's exemption from overtime laws is an affirmative defense. (*Ramirez v. Yosemite Water Co., Inc.* (1999) 20 Cal.4th 785, 794 [85 Cal.Rptr.2d 844].)

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For example, outside salespersons are exempt from overtime requirements (see Lab. Code, § 1171). An employee's exemption from overtime laws presents a mixed question of law and fact. (*Id.*) Because of the case-specific nature of exemptions to overtime laws, the subcommittee has chosen not to write model instructions for these affirmative defenses.

SOURCES AND AUTHORITY

- Labor Code section 1194(a) provides: "Notwithstanding any agreement to work for a lesser wage, any employee receiving less than the legal minimum wage or the legal overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount of this minimum wage or overtime compensation, including interest thereon, reasonable attorney's fees, and costs of suit."

- Labor Code section 1194.2 provides, in part:

  (a) In any action under … Section 1194 to recover wages because of the payment of a wage less than the minimum wage, … an employee shall be entitled to recover liquidated damages in an amount equal to the wages unlawfully unpaid and interest thereon. Nothing in this subdivision shall be construed to authorize the recovery of liquidated damages for failure to pay overtime compensation.
  (b) Notwithstanding subdivision (a), if the employer demonstrates to the satisfaction of the court that the act or omission giving rise to the action was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of any provision of the Labor Code relating to minimum wage, or an order of the commission, the court may, in its discretion, refuse to award liquidated damages or award any amount of liquidated damages not exceeding the amount specified in subdivision (a).

- Labor Code section 200 defines "wages" as including "all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation. … 'Labor' includes labor, work, or service whether rendered or performed under contract, subcontract, partnership, station plan, or other agreement if the labor to be paid for is performed personally by the person demanding payment."

- "Absent an *explicit*, *mutual* wage agreement, a fixed salary does not serve to compensate an employee for the number of hours worked under statutory overtime

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requirements. … Since there was no evidence of a wage agreement between the parties that appellant's … per week compensation represented the payment of minimum wage or included remuneration for hours worked in excess of 40 hours per week, … appellant incurred damages of uncompensated overtime." (*Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721, 725–726 [245 Cal.Rptr. 36].)

- "[T]he assertion of an exemption from the overtime laws is considered to be an affirmative defense, and therefore the employer bears the burden of proving the employee's exemption." (*Ramirez v. Yosemite Water Co., Inc.* (1999) 20 Cal.4th 785, 794–795 [85 Cal.Rptr.2d 844].)

- "The question whether [plaintiff] was an outside salesperson within the meaning of applicable statutes and regulations … is a mixed question of law and fact." (*Ramirez, supra,* 20 Cal.4th at p. 794.)

- Labor Code section 206(a) provides: "In case of a dispute over wages, the employer shall pay, without condition and within the time set by this article, all wages, or parts thereof, conceded by him to be due, leaving to the employee all remedies he might otherwise be entitled to as to any balance claimed."

- Labor Code section 1193.6(a) provides, in part: "The department or division may, with or without the consent of the employee or employees affected, commence and prosecute a civil action to recover unpaid minimum wages or unpaid overtime compensation. … The consent of any employee to the bringing of this action shall constitute a waiver on the part of the employee of his or her cause of action under Section 1194 unless the action is dismissed without prejudice by the department or the division."

<u>Secondary Sources</u>

- Bancroft-Whitney's California Civil Practice: Employment Litigation (1993) Wage and Hour, §§ 4:67, 4:77, pp. 51, 56
- 1 Wilcox, California Employment Law (1989) Overtime Compensation and Regulation of Hours Worked, §§ 3.03[1], 3.04[1], 3.07[1], 3.08[1], 3.09[1], pp. 3-11–16, 3-22.1–3-32, 3-56–3-69, 3-87–3-90, 3-108–3-112; Administrative and Judicial Remedies Under Wage and Hour Laws, § 5.72, pp. 5-98–5-103 (rel. 23-3/01)
- 2 Witkin, Summary of California Law (9th ed. 1987) Agency and Employment, §§ 330, 335, pp. 321–322, 327–329; *id*. (2001 supp.) at §§ 330, 335, pp. 318–320, 335–336

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1770
Nonpayment of Overtime Compensation—Proof of Overtime Hours Worked

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State law requires California employers to keep payroll records showing the hours worked by and wages paid to employees. If [*name of defendant*] has not kept accurate information about the hours worked by [*name of plaintiff*], then you must make a reasonable estimate of the hours worked by [him/her] based on the evidence presented.

DIRECTIONS FOR USE

This instruction is intended for use when the plaintiff is unable to provide evidence of the precise number of overtime hours worked because of the employer's failure to keep accurate payroll records. (See *Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721, 727–728 [245 Cal.Rptr. 36].)

SOURCES AND AUTHORITY

- Labor Code section 1194(a) provides: "Notwithstanding any agreement to work for a lesser wage, any employee receiving less than … the legal overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount of this … overtime compensation, including interest thereon, reasonable attorney's fees, and costs of suit."

- "Although the employee has the burden of proving that he performed work for which he was not compensated, public policy prohibits making that burden an impossible hurdle for the employee. … 'In such situation … an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate.' " (*Hernandez, supra*, 199 Cal.App.3d at p. 727, internal citation omitted.)

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- "It is the trier of fact's duty to draw whatever reasonable inferences it can from the employee's evidence where the employer cannot provide accurate information." (*Hernandez*, *supra*, 199 Cal.App.3d at p. 728, internal citation omitted.)

- Labor Code section 1174(d) provides: "Every person employing labor in this state shall … [k]eep … payroll records showing the hours worked daily by and the wages paid to, and the number of piece-rate units earned by and any applicable piece rate paid to, employees employed at the respective plants or establishments. These records shall be kept in accordance with rules established for this purpose by the commission, but in any case shall be kept on file for not less than two years."

- "Absent an *explicit*, *mutual* wage agreement, a fixed salary does not serve to compensate an employee for the number of hours worked under statutory overtime requirements. … Since there was no evidence of a wage agreement between the parties that appellant's . . . per week compensation represented the payment of minimum wage or included remuneration for hours worked in excess of 40 hours per week, … appellant incurred damages of uncompensated overtime." (*Hernandez*, *supra*, 199 Cal.App.3d at pp. 725–726, internal citations omitted.)

Secondary Sources

- 1 Wilcox, California Employment Law (1989) Administrative and Judicial Remedies Under Wage and Hour Laws, § 5.72[1], p. 5-99 (rel. 23-3/01)

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1771
Waiting-Time Penalty for Nonpayment of Wages
Essential Factual Elements (Lab. Code, §§ 203, 218)

[*Name of plaintiff***] claims that [***name of defendant***] owes [him/her] money as a penalty under state law for not paying [his/her] wages when due. To establish this claim, [***name of plaintiff***] must prove the following:**

1. **That [***name of plaintiff***] was [***name of defendant***]'s employee;**

2. **That [[***name of defendant***] discharged [***name of plaintiff***]]/[[***name of plaintiff***] quit [his/her] job];**

3. **That [***name of defendant***] knowingly failed to [pay/tender payment of] the full amount of wages earned by [***name of plaintiff***] [***insert one of the following***]**

   [on [his/her] last day of employment;] [or]

   [within 72 hours of [his/her] giving notice of [his/her] intent to quit;]

4. **The number of calendar days, up to a maximum of 30 days, that [***name of defendant***] knowingly failed to [pay/tender payment of] the full amount of wages earned by [***name of plaintiff***] [***insert one of the following***]**

   [following [his/her] last day of employment;] [or]

   [following 72 hours of [his/her] giving notice of [his/her] intent to quit;] and

5. **[***Name of plaintiff***]'s daily wage rate at the time [his/her] employment ended.**

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

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DIRECTIONS FOR USE

This instruction is intended for use when a plaintiff seeks to recover a waiting-time penalty pursuant to Labor Code section 203. Element 3 must be modified to reflect when wages are due and payable under the circumstances of the case; final wages generally are due on the day an employee is discharged by the employer but are not due for 72 hours if an employee quits without notice (see Lab. Code, §§ 201, 201.5, 201.7, 202, 205.5).

In the event that plaintiff commenced an action to recover the waiting-time penalty fewer than 30 days after the wages became due, element 4 must be modified because commencement of the action ends further accrual of the penalty (see Lab. Code, § 203.)

The definition of "wages" may be deleted as redundant if Instruction 1767, *Nonpayment of Wages—Essential Factual Elements,* also is given.

SOURCES AND AUTHORITY

- Labor Code section 203 provides: "If an employer willfully fails to pay, without abatement or reduction, in accordance with Sections 201, 201.5, 202, and 205.5, any wages of an employee who is discharged or who quits, the wages of the employee shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced; but the wages shall not continue for more than 30 days. An employee who secretes or absents himself or herself to avoid payment to him or her, or who refuses to receive the payment when fully tendered to him or her, including any penalty then accrued under this section, is not entitled to any benefit under this section for the time during which he or she so avoids payment. Suit may be filed for these penalties at any time before the expiration of the statute of limitations on an action for the wages from which the penalties arise."

- Labor Code section 218 provides, in part: "Nothing in this article shall limit the right of any wage claimant to sue directly or through an assignee for any wages or penalty due him under this article."

- Labor Code section 201 provides, in part: "If an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately."

- Labor Code section 202 provides: "If an employee not having a written contract for a definite period quits his or her employment, his or her wages shall become due and payable not later than 72 hours thereafter, unless the employee has given 72 hours previous notice of his or her intention to quit, in which case the employee is entitled

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to his or her wages at the time of quitting. Notwithstanding any other provision of law, an employee who quits without providing a 72-hour notice shall be entitled to receive payment by mail if he or she so requests and designates a mailing address. The date of the mailing shall constitute the date of payment for purposes of the requirement to provide payment within 72 hours of the notice of quitting."

- Labor Code section 200 defines "wages" as including "all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation. … 'Labor' includes labor, work, or service whether rendered or performed under contract, subcontract, partnership, station plan, or other agreement if the labor to be paid for is performed personally by the person demanding payment."

- Labor Code section 206(a) provides: "In case of a dispute over wages, the employer shall pay, without condition and within the time set by this article, all wages, or parts thereof, conceded by him to be due, leaving to the employee all remedies he might otherwise be entitled to as to any balance claimed."

- "The purpose of section 203 is to compel the prompt payment of wages; the section is to be given a reasonable but strict interpretation. … [T]o be at fault within the meaning of the statute, the employer's refusal to pay need not be based on a deliberate evil purpose to defraud workmen of wages which the employer knows to be due. As used in section 203, 'willful' merely means that the employer intentionally failed or refused to perform an act which was required to be done." (*Barnhill v. Robert Saunders & Co*. (1981) 125 Cal.App.3d 1, 7 [177 Cal.Rptr. 803].)

- "A proper reading of section 203 mandates a penalty equivalent to the employee's daily wages for each day he or she remained unpaid up to a total of 30 days. … [T]he critical computation required by section 203 is the calculation of a daily wage rate, which can then be multiplied by the number of days of nonpayment, up to 30 days." (*Mamika v. Barca* (1998) 68 Cal.App.4th 487, 493 [80 Cal.Rptr.2d 175].)

- " 'A tender of the wages due at the time of the discharge, if properly made and in the proper amount, terminates the further accumulation of penalty, but it does not preclude the employee from recovering the penalty already accrued. …' " (*Oppenheimer v. Sunkist Growers, Inc.* (1957) 153 Cal.App.2d Supp. 897, 899 [315 P.2d 116], internal citation omitted.)

- "[A]n employer is not entitled to a setoff of debts owing it by an employee against any wages due that employee." (*Barnhill, supra*, 125 Cal.App.3d at p. 6.)

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Secondary Sources

- Bancroft-Whitney's California Civil Practice: Employment Litigation (1993) Wage and Hour, §§ 4:67, 4:76, pp. 51, 55–56
- 1 Wilcox, California Employment Law (1989) Administrative and Judicial Remedies Under Wage and Hour Laws, § 5.40, pp. 5-63–5-68.1 (rel. 23-3/01)
- 2 Witkin, Summary of California Law (9th ed. 1987) Agency and Employment, § 335, pp. 327–329; *id*. (2001 supp.) at § 335, pp. 335–336

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1772
Solicitation of Employee by Misrepresentation
Essential Factual Elements (Lab. Code, § 970)

[*Name of plaintiff***] claims that [***name of defendant***] made false representations about work to persuade [him/her] to move or change [his/her] residence. To establish this claim, [***name of plaintiff***] must prove the following:**

1. **That [***name of defendant***] made [a] representation(s) to [***name of plaintiff***] about [***insert one or more of the following***]**

   [the kind, character, or existence of work;]

   [the length of time work would last;]

   [the compensation for work;]

   [the sanitary or housing conditions relating to work;] [or]

   [the existence or nonexistence of any pending strike, lockout, or other labor dispute affecting work;]

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

3. **That [***name of defendant***] knew the representation(s) [was/were] not true when made;**

4. **That [***name of defendant***] intended that [***name of plaintiff***] rely on the representation(s);**

5. **That [***name of plaintiff***] reasonably relied on [***name of defendant***]'s representation(s) and moved or changed [his/her] residence for the purpose of working for [***name of defendant***];**

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

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

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DIRECTIONS FOR USE

If statutory action under Labor Code section 970 is applicable, do not give the common-law fraud instruction. For other jury instructions regarding opinions as statements of fact, misrepresentations to third parties, reliance, and reasonable reliance, see Instructions 1104 through 1108 in the Fraud or Deceit series.

SOURCES AND AUTHORITY

- Labor Code section 970 provides:

  > No person, or agent or officer thereof, directly or indirectly, shall influence, persuade, or engage any person to change from one place to another in this State or from any place outside to any place within the State, or from any place within the State to any place outside, for the purpose of working in any branch of labor, through or by means of knowingly false representations, whether spoken, written, or advertised in printed form, concerning either:
  > (a) The kind, character, or existence of such work;
  > (b) The length of time such work will last, or the compensation therefor;
  > (c) The sanitary or housing conditions relating to or surrounding the work;
  > (d) The existence or nonexistence of any strike, lockout, or other labor dispute affecting it and pending between the proposed employer and the persons then or last engaged in the performance of the labor for which the employee is sought.

- Labor Code section 971 provides: "Any person, or agent or officer thereof, who violates Section 970 is guilty of a misdemeanor punishable by a fine of not less than fifty dollars ($50) nor more than one thousand dollars ($1,000) or imprisonment for not more than six months or both."

- Labor Code section 972 provides, in part: "[A]ny person, or agent or officer thereof who violates any provision of Section 970 is liable to the party aggrieved, in a civil action, for double damages resulting from such misrepresentations. Such civil action may be brought by an aggrieved person or his assigns or successors in interest, without first establishing any criminal liability."

- "[S]ection 970, although applied … to other employment situations, was enacted to protect migrant workers from the abuses heaped upon them by unscrupulous employers and potential employers, especially involving false promises made to induce them to move in the first instance." (*Tyco Industries, Inc. v. Superior Court*

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(1985) 164 Cal.App.3d 148, 155 [211 Cal.Rptr. 540], internal citation and italics omitted.)

- "To establish … a claim [for violation of section 970], [plaintiff] had to prove that defendants made a knowingly false representation regarding the length of her employment … with the intent to persuade her to move there from another place to take the position." (*Finch v. Brenda Raceway Corp.* (1994) 22 Cal.App.4th 547, 553 [27 Cal.Rptr.2d 531].)

- "[Section 970] requires the employee to demonstrate that his or her employer made 'knowingly false representations' concerning the nature, duration or conditions of employment. … Moreover, under the statute an employee must establish that the employer induced him or her to relocate or change residences." (*Eisenberg v. Alameda Newspapers, Inc.* (1999) 74 Cal.App.4th 1359, 1392 [88 Cal.Rptr.2d 802].)

- "The words 'to change from one place to another' import temporary as well as permanent relocation of residence, as contrasted with a mere change in the site of employment. The quantitative fact that the change of residence was to be only for two weeks rather than for a longer period would not appear to affect the qualitative misrepresentations, nor does it render the statute inapplicable." (*Collins v. Rocha* (1972) 7 Cal.3d 232, 239–240 [102 Cal.Rptr. 1].)

- "The construction of a statute and whether it is applicable to a factual situation present solely questions of law. Although the trial court erred in determining that the Labor Code sections 970 and 972 were not applicable and hence the issue of double damages was not submitted to the jury, the record reflects that the jury specifically found that [defendant] made false representations to induce [plaintiff] to accept the position in California. Given the express findings by the jury, it is unnecessary to remand this case for a retrial on the limited issue of damages. … We therefore modify the judgment to reflect double damages in accordance with Labor Code section 972." (*Seubert v. McKesson Corp.* (1990) 223 Cal.App.3d 1514, 1522–1523 [273 Cal.Rptr. 296], internal citation omitted.)

- "Labor Code sections 970–972 were not intended to create and should not be construed as creating a general exception to the statute of frauds. … [B]ecause a representation is either 'knowingly false'… or not at the time it is made, the one-year statute of limitations applicable to both sections 971 and 972 … suggests the remedies provided in these sections were not intended to apply to representations as to the duration of employment not susceptible to performance within one year. (*Munoz v. Kaiser Steel Corp.* (1984) 156 Cal.App.3d 965, 980 [203 Cal.Rptr. 345], internal citations omitted.)

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- "… Labor Code section 970 creates a tort cause of action. … The statutory scheme is … a statutory tort cause of action which, by its nature, is subject to the Tort Claims Act." (*Burden v. County of Santa Clara* (2000) 81 Cal.App.4th 244, 253 [96 Cal.Rptr.2d 587].)

Secondary Sources

- Bancroft-Whitney's California Civil Practice: Employment Litigation (1993) Termination of Employment, § 6:26, pp. 42–43; *id.* (2001 supp.) at § 6:26, pp. 249–250
- 4 Wilcox, California Employment Law (1989) Related Causes of Action, § 63.06[1], pp. 63-26–63-28 (rel. 17-3/98)
- 2 Witkin, Summary of California Law (9th ed. 1987) Agency and Employment, § 344, pp. 335–336; *id.*(2001 supp.) at § 344, pp. 348–349
- 1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 2000) Other Employee Rights Statutes, § 4.51, pp. 188–189

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1773
Preventing Subsequent Employment by Misrepresentation Essential Factual Elements (Lab. Code, § 1050)

[*Name of plaintiff*] claims that [*name of defendant*] made [a] false representation(s) to prevent [him/her] from obtaining employment. To establish this claim, [*name of plaintiff*] must prove the following:

1. **That after [*name of plaintiff*]'s employment with [*name of defendant*] ended, [*name of defendant*] made [a] representation(s) to [*name of prospective employer*] about [*name of plaintiff*];**

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

3. **That [*name of defendant*] knew the representation(s) [was/were] not true when [he/she/it] made [it/them];**

4. **That [*name of defendant*] made the representation(s) with the intent of preventing [*name of plaintiff*] from obtaining employment;**

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.**

DIRECTIONS FOR USE

For jury instructions regarding opinions as statements of fact and the definition of an important fact, see Instructions 1104 and 1105 in the Fraud or Deceit series. For an instruction on the qualified privilege pursuant to Civil Code section 47(c), see Instruction 1212 in the Defamation series.

SOURCES AND AUTHORITY

- Labor Code section 1050 provides: "Any person, or agent or officer thereof, who, after having discharged an employee from the service of such person or after an employee has voluntarily left such service, by any misrepresentation prevents or

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attempts to prevent the former employee from obtaining employment, is guilty of a misdemeanor."

- Labor Code section 1052 provides: "Any person who knowingly causes, suffers, or permits an agent, superintendent, manager, or employee in his employ to commit a violation of section[] 1050 … or who fails to take all reasonable steps within his power to prevent such violation is guilty of a misdemeanor."

- Labor Code section 1054 provides, in part: "[A]ny person or agent or officer thereof, who violates any provision of sections 1050 to 1052, inclusive, is liable to the party aggrieved, in a civil action, for treble damages. Such civil action may be brought by such aggrieved person or his assigns, or successors in interest, without first establishing any criminal liability under this article."

- Labor Code section 1053 provides: "Nothing in this chapter shall prevent an employer or an agent, employee, superintendent or manager thereof from furnishing, upon special request therefor, a truthful statement concerning the reason for the discharge of an employee or why an employee voluntarily left the service of the employer. If such statement furnishes any mark, sign, or other means conveying information different from that expressed by words therein, such fact, or the fact that such statement or other means of furnishing information was given without a special request therefor is prima facie evidence of a violation of sections 1050 to 1053."

- "Section 1054 provides for a damage remedy for the party aggrieved by a violation of the section 1050 prohibition against an employer blacklisting a former employee. It is patent that the aggrieved party must be the blacklisted employee, not a union, since the latter can neither be fired nor quit." (*Service Employees Internat. Union, Local 193, AFL-CIO v. Hollywood Park, Inc.* (1983) 149 Cal.App.3d 745, 765 [197 Cal.Rptr. 316].)

- "Labor Code section 1050 applies only to misrepresentations made to prospective employers other than the defendant. … [T]he Legislature intended that Labor Code section 1050 would apply only to misstatements to other potential employers, not to misstatements made internally by employees of the party to be charged." (*Kelly v. General Telephone Co.* (1982) 136 Cal.App.3d 278, 288–289 [186 Cal.Rptr. 184].)

- A communication without malice solicited by a prospective employer from a former employer would be privileged in accordance with Civil Code section 47(c). (See *O'Shea v. General Telephone Co.* (1987) 193 Cal.App.3d 1040, 1047 [238 Cal.Rptr. 715].)

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- Civil Code section 47(c) provides, in part, that a privileged publication is one made "[i]n a communication, without malice, to a person interested therein. … This … includes a communication concerning the job performance or qualifications of an applicant for employment, based upon credible evidence, made without malice, by a current or former employer of the applicant to, and upon request of, the prospective employer. This subdivision shall not apply to a communication concerning the speech or activities of an applicant for employment if the speech or activities are constitutionally protected, or otherwise protected by Section 527.3 of the Code of Civil Procedure or any other provision of law."

- "We … recognize that '[t]he primary purpose of punitive damages is to punish the defendant and make an example of him.' … Since this purpose is the same as the treble damages authorized by Labor Code section 1054, we do not sanction a double recovery for the plaintiff. In the new trial on damages, the jury should be instructed on the subject of punitive damages based on malice or oppression. … Any verdict finding compensatory damages must be trebled by the court. Plaintiff may then elect to have judgment entered in an amount which reflects either the statutory trebling, or the compensatory and punitive damages." (*Marshall v. Brown* (1983) 141 Cal.App.3d 408, 419 [190 Cal.Rptr. 392].)

Secondary Sources

- Bancroft-Whitney's California Civil Practice: Employment Litigation (1993) Termination of Employment, § 6:27, p. 45; *id.* (2001 supp.) at § 6:27, pp. 252–253
- 4 Wilcox, California Employment Law (1989) Related Causes of Action, § 63.06[2], pp. 63-28–63-29 (rel. 17-3/98)
- 2 Witkin, Summary of California Law (9th ed. 1987) Agency and Employment, § 313, p. 306

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1800
Trespass

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

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

2. **That [***name of defendant***] [intentionally or negligently entered [***name of plaintiff***]'s property] [or] [intentionally or negligently caused [another person/[***insert name of thing***]] to enter [***name of plaintiff***]'s property];**

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

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

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

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

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

DIRECTIONS FOR USE

Read the last bracketed sentence in cases involving intangible intrusions such as noise and vibrations, where actual damage to the property is required: "[T]he rule is that actionable trespass may not be predicated upon nondamaging noise, odor, or light intrusion." (*San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 936 [55 Cal.Rptr.2d 724], internal citation omitted.)

If plaintiff is seeking nominal damages as an alternative to actual damages, insert the following paragraph above element #4:

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

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

For an instruction on control of property, see Premises Liability instruction 602, *Extent of Control Over Premises Area*.

The word "reckless" has been omitted from element #2 because it is redundant. Once negligence is shown, then that element is satisfied. There appears to be no need to prove recklessness once negligence has been shown.

Intent to commit the act is necessary, but intent to damage is not necessary. (*Meyer v. Pacific Employers Insurance Co.* (1965) 233 Cal.App.2d 321 [43 Cal.Rptr. 542].)

SOURCES AND AUTHORITY

- "As a general rule, landowners and tenants have a right to exclude persons from trespassing on private property; the right to exclude persons is a fundamental aspect of private property ownership." (*Allred v. Harris* (1993) 14 Cal.App.4th 1386, 1390 [18 Cal.Rptr.2d 530], internal citation omitted.)

- "Trespass is an unlawful interference with possession of property. The emission of sound waves which cause actual physical damage to property constitutes a trespass. Liability for trespass may be imposed for conduct which is intentional, reckless, negligent or the result of an extra-hazardous activity." (*Staples v. Hoefke* (1987) 189 Cal.App.3d 1397, 1406 [235 Cal.Rptr. 165], internal citations omitted.)

- "California's definition of trespass is considerably narrower than its definition of nuisance. ' "A trespass is an invasion of the interest in the exclusive possession of land, as by entry upon it ... . A nuisance is an interference with the interest in the private use and enjoyment of the land and does not require interference with the possession." ' California has adhered firmly to the view that '[t]he cause of action for trespass is designed to protect possessory—not necessarily ownership—interests in land from unlawful interference.' " (*Capogeannis v. Superior Court* (1992) 12 Cal.App.4th 668, 674 [15 Cal.Rptr.2d 796], internal citations omitted.)

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

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

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

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

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

- "Where one has permission to use land for a particular purpose and proceeds to abuse the privilege, or commits any act hostile to the interests of the lessor, he becomes a trespasser. 'A good faith belief that entry has been authorized or permitted provides no excuse for infringement of property rights if consent was not in fact given by the property owner whose rights are at issue. Accordingly, by showing they gave no authorization, [plaintiffs] established the lack of consent necessary to support their action for injury to their ownership interests.' " (*Cassinos v. Union Oil Co.* (1993) 14 Cal.App.4th 1770, 1780 [18 Cal.Rptr.2d 574], internal citations omitted.)

- " 'The intent required as a basis for liability as a trespasser is simply an intent to be at the place on the land where the trespass allegedly occurred. ... The defendant is liable for an intentional entry although he has acted in good faith, under the mistaken belief, however reasonable, that he is committing no wrong.' " (*Miller v. National Broadcasting Corp.* (1987) 187 Cal.App.3d 1463, 1480–1481 [232 Cal.Rptr. 668], internal citation omitted.)

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

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

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

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

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

<u>Secondary Sources</u>

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 604–606
- 2 Levy et al., California Torts (1985–2000) Nuisance and Trespass, § 17.20
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, §§ 18:1, 18:4–18:8, 18:10

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1801
Trespass—Extra Hazardous Activities

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

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

2. **That [***name of defendant***] was engaged in [***insert extra hazardous activity***];**

3. **That [***insert extra hazardous activity***] caused [***insert thing***] to enter [***name of plaintiff***]'s property;**

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

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.**

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

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

DIRECTIONS FOR USE

Read the last bracketed sentence in cases involving intangible intrusions such as noise or vibrations, where actual damage to the property is required: "[T]he rule is that actionable trespass may not be predicated upon nondamaging noise, odor, or light intrusion." (*San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 936 [55 Cal.Rptr.2d 724], internal citation omitted.)

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SOURCES AND AUTHORITY

- "[W]e conclude that the rule of the Restatement is sound, and that in this state there is no liability for a trespass unless the trespass is intentional, the result of recklessness or negligence, or the result of engaging in an extra-hazardous activity." (*Gallin v. Poulou* (1956) 140 Cal.App.2d 638, 645 [295 P.2d 958].)

- "Section 520 of the Restatement of Torts defines ultrahazardous activity as follows: 'An activity is ultrahazardous if it (a) necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of the utmost care, and (b) is not a matter of common usage.' California has apparently accepted the Restatement definition." (*Smith v. Lockheed Propulsion Co.* (1967) 247 Cal.App.2d 774, 785 [56 Cal.Rptr. 128], internal citations omitted.)

- "Whether an activity is ultrahazardous is a question of law to be determined by the court." (*Smith, supra,* 247 Cal.App.2d at p. 785.)

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

<u>Secondary Sources</u>

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 604–606
- 2 Levy et al., California Torts (1985–2000) Nuisance and Trespass, § 17.20
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, §§ 18:1, 18:4–18:8, 18:10

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1802
Trespass to Timber (Civ. Code, § 3346; Code Civ. Proc., § 733)

[*Name of plaintiff***] claims that [***name of defendant***] trespassed on [***name of plaintiff***]'s property and [cut down or damaged trees/took timber]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

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

2. **That [***name of defendant***] intentionally or negligently entered [***name of plaintiff***]'s property and [cut down or damaged trees/took timber] located on the property;**

3. **That [***name of plaintiff***] did not give permission to [cut down or damage the trees/take timber] [or that [***name of defendant***] exceeded [***name of plaintiff***]'s permission];**

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.**

DIRECTIONS FOR USE

Note that the affirmative defense of reliance on a survey could be raised by defendant.

"Although an award of double the actual damages is mandatory under section 3346, the court retains discretion whether to triple them under that statute or Code of Civil Procedure section 733. 'So, the effect of section 3346 as amended, read together with section 733, is that the Legislature intended, insofar as wilful and malicious trespass is concerned under either section, to leave the imposition of treble damages discretion-ary with the court, but to place a floor upon that discretion at double damages which must be applied whether the trespass be wilful and malicious or casual and involun-tary, etc. There are now three measures of damages applicable to the pertinent types of trespass: (1) for wilful and malicious trespass the court may impose treble damages but must impose double damages; (2) for casual and involuntary trespass, etc., the court must impose double damages; and (3) for trespass under authority actual damages.' " (*Ostling*

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v. Loring (1994) 27 Cal.App.4th 1731, 1742 [33 Cal.Rptr.2d 391], internal citation omitted.)

SOURCES AND AUTHORITY

- Civil Code section 3346 provides, in part: "For wrongful injuries to timber, trees, or underwood upon the land of another, or removal thereof, the measure of damages is three times such sum as would compensate for the actual detriment ... ."

- Code of Civil Procedure section 733 provides: "Any person who cuts down or carries off any wood or underwood, tree, or timber, ... or otherwise injures any tree or timber on the land of another person, ... is liable to the owner of such land, ... for treble the amount of damages which may be assessed therefor, in a civil action, in any Court having jurisdiction."

- The damages provisions in these two sections must be "treated as penal and punitive." (*Baker v. Ramirez* (1987) 190 Cal.App.3d 1123, 1138 [235 Cal.Rptr. 857], internal citation omitted.)

- " 'However, due to the penal nature of these provisions, the damages should be neither doubled nor tripled under section 3346 if punitive damages are awarded under section 3294. That would amount to punishing the defendant twice and is not necessary to further the policy behind section 3294 of educating blunderers (persons who mistake location of boundary lines) and discouraging rogues (persons who ignore boundary lines).' " (*Hassoldt v. Patrick Media Group, Inc.* (2000) 84 Cal.App.4th 153, 169 [100 Cal.Rptr.2d 662], internal citations omitted.)

- "Treble damages could only be awarded under [section 3346] where the wrongdoer intentionally acted wilfully or maliciously. The required intent is one to vex, harass or annoy, and the existence of such intent is a question of fact for the trial court." (*Sills v. Siller* (1963) 218 Cal.App.2d 735, 743 [32 Cal.Rptr. 621], internal citation omitted.)

- "Although neither section [3346 or 733] expressly so provides, it is now settled that to warrant such an award of treble damages it must be established that the wrongful act was willful and malicious." (*Caldwell v. Walker* (1963) 211 Cal.App.2d 758, 762 [27 Cal.Rptr. 675], internal citations omitted.)

- "A proper and helpful analogue here is the award of exemplary damages under section 3294 of the Civil Code when a defendant has been guilty, inter alia, of 'malice, express or implied.' " (*Caldwell, supra*, 211 Cal.App.2d at pp. 763–764.)

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- "It is well established that an adjoining landowner who is injured by limbs and roots of trees on another's property may cut off the offending parts, or may sue for damages and to abate the nuisance, but may not enter the other's land and cut down the trees." (*Fick v. Nilson* (1950) 98 Cal.App.2d 683, 685 [220 P.2d 752], internal citations omitted.)

- "Diminution in market value … is not an absolute limitation; several other theories are available to fix appropriate compensation for the plaintiff's loss. … One alternative measure of damages is the cost of restoring the property to its condition prior to the injury. Courts will normally not award costs of restoration if they exceed the diminution in the value of the property; the plaintiff may be awarded the lesser of the two amounts." (*Henniger v. Dunn* (1980) 101 Cal.App.3d 858, 862 [162 Cal.Rptr. 104], internal citations omitted.)

- "The rule precluding recovery of restoration costs in excess of diminution in value is, however, not of invariable application. Restoration costs may be awarded even though they exceed the decrease in market value if 'there is a reason personal to the owner for restoring the original condition,' or 'where there is reason to believe that the plaintiff will, if fact, make the repairs." (*Henniger, supra*, 101 Cal.App.3d at p. 863, internal citations omitted.)

- "Courts have stressed that only reasonable costs of replacing destroyed trees with identical or substantially similar trees may be recovered." (*Henniger, supra,* 101 Cal.App.3d at p. 865.)

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1803
Treble Damages—Timber

[*Name of plaintiff*] also claims that [*name of defendant*]'s conduct in cutting down, damaging, or harvesting [*name of plaintiff*]'s trees was intentional and despicable.

To establish this claim, [*name of plaintiff*] must prove that [*name of defendant*] intended to harm [*name of plaintiff*] and engaged in conduct that was so mean, vile, base, or contemptible that it would be looked down on and despised by reasonable people.

DIRECTIONS FOR USE

Read this instruction only if plaintiff is seeking treble damages. The judge should ensure that this finding is on the special verdict form.

SOURCES AND AUTHORITY

- Civil Code section 3346 provides, in part: "For wrongful injuries to timber, trees, or underwood upon the land of another, or removal thereof, the measure of damages is three times such sum as would compensate for the actual detriment ... ."

- Code of Civil Procedure section 733 provides, in part: "Any person who cuts down or carries off any wood or underwood, tree, or timber, ... or otherwise injures any tree or timber on the land of another person, ... is liable to the owner of such land, ... for treble the amount of damages which may be assessed therefor, in a civil action, in any Court having jurisdiction."

- The damages provisions in these two sections must be "treated as penal and punitive." (*Baker v. Ramirez* (1987) 190 Cal.App.3d 1123, 1138 [235 Cal.Rptr. 857], internal citation omitted.)

- " 'However, due to the penal nature of these provisions, the damages should be neither doubled nor tripled under section 3346 if punitive damages are awarded under section 3294. That would amount to punishing the defendant twice and is not necessary to further the policy behind section 3294 of educating blunderers (persons

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who mistake location of boundary lines) and discouraging rogues (persons who ignore boundary lines).' " (*Hassoldt v. Patrick Media Group, Inc.* (2000) 84 Cal.App.4th 153, 169 [100 Cal.Rptr.2d 662], internal citations omitted.)

- "Although an award of double the actual damages is mandatory under section 3346, the court retains discretion whether to triple them under that statute or Code of Civil Procedure section 733. 'So, the effect of section 3346 as amended, read together with section 733, is that the Legislature intended, insofar as wilful and malicious trespass is concerned under either section, to leave the imposition of treble damages discretionary with the court, but to place a floor upon that discretion at double damages which must be applied whether the trespass be wilful and malicious or casual and involuntary, etc. There are now three measures of damages applicable to the pertinent types of trespass: (1) for wilful and malicious trespass the court may impose treble damages but must impose double damages; (2) for casual and involuntary trespass, etc., the court must impose double damages; and (3) for trespass under authority actual damages.' " (*Ostling v. Loring* (1994) 27 Cal.App.4th 1731, 1742 [33 Cal.Rptr.2d 391], internal citation omitted.)

- "Treble damages could only be awarded under [section 3346] where the wrongdoer intentionally acted wilfully or maliciously. The required intent is one to vex, harass or annoy, and the existence of such intent is a question of fact for the trial court." (*Sills v. Siller* (1963) 218 Cal.App.2d 735, 743 [32 Cal.Rptr. 621], internal citation omitted.)

- "Although neither section [3346 or 733] expressly so provides, it is now settled that to warrant such an award of treble damages it must be established that the wrongful act was willful and malicious." (*Caldwell v. Walker* (1963) 211 Cal.App.2d 758, 762 [27 Cal.Rptr. 675], internal citations omitted.)

- "A proper and helpful analogue here is the award of exemplary damages under section 3294 of the Civil Code when a defendant has been guilty, inter alia, of 'malice, express or implied.' " (*Caldwell, supra*, 211 Cal.App.2d at pp. 763–764.)

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1804
Intentional Entry Explained

[An entry is intentional if a person knowingly goes onto the property of another or knowingly causes something to go onto that property.]

[An entry is also intentional if a person engages in conduct that is substantially certain to cause something to go onto that property.]

[An entry is intentional even if a person mistakenly thinks he or she has a right to come onto that property.]

DIRECTIONS FOR USE

This instruction is not intended for general use in every case. Read a bracketed sentence or sentences only in unusual cases where an issue regarding the entry is raised and further explanation is required.

SOURCES AND AUTHORITY

- "The doing of an act which will to a substantial certainty result in the entry of foreign matter upon another's land suffices for an intentional trespass to land upon which liability may be based. It was error to instruct the jury that an 'intent to harm' was required." (*Roberts v. Permanente Corp*. (1961) 188 Cal.App.2d 526, 530–531 [10 Cal.Rptr. 519], internal citation omitted.)

- An instruction on the definition of intentional trespass is considered a proper statement of law. Failure to give this instruction on request where appropriate is error. (*Staples v. Hoefke* (1987) 189 Cal.App.3d 1397, 1407 [235 Cal.Rptr. 165].)

- "As Prosser and Keeton on Torts explained, '[t]he intent required as a basis for liability as a trespasser is simply an intent to be at the place on the land where the trespass allegedly occurred ... . The defendant is liable for an intentional entry although he has acted in good faith, under the mistaken belief, however reasonable, that he is committing no wrong.' " (*Miller v. National Broadcasting Corp.* (1987) 187 Cal.App.3d 1463, 1480–1481 [232 Cal.Rptr. 668].)

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Secondary Sources

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, § 604
- 2 Levy et al., California Torts (1985–2000) Nuisance and Trespass, § 17.20[3]
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 18:4

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1805
Defense of Necessity

[*Name of defendant*] claims that [he/she/it] is not responsible for [name of plaintiff]'s harm, if any, because the entry on to [*name of plaintiff*]'s property was lawful. To succeed, [*name of defendant*] must prove that it was necessary, or reasonably appeared to [*name of defendant*] to be necessary, to enter the land to prevent serious harm to a person or property.

SOURCES AND AUTHORITY

- "[I]t has long recognized that '[n]ecessity often justifies an action which would otherwise constitute a trespass, as where the act is prompted by the motive of preserving life or property and reasonably appears to the actor to be necessary for that purpose.' " (*People v. Ray* (1999) 21 Cal.4th 464, 473 [88 Cal.Rptr.2d 1], internal citations omitted.)

- Restatement Second of Torts, section 167 provides:

  (1) One is privileged to enter or remain on land in the possession of another if it is or reasonably appears to be necessary to prevent serious harm to
  (a) the actor, or his land or chattels, or
  (b) the other or a third person, or the land or chattels of either, unless the actor knows or has reason to know that the one for whose benefit he enters is unwilling that he shall take such action.
  (2) Where the entry is for the benefit of the actor or a third person, he is subject to liability for any harm done in the exercise of the privilege stated in Subsection (1) to any legally protected interest of the possessor in the land or connected with it, except where the threat of harm to avert which the entry is made is caused by the tortious conduct or contributory negligence of the possessor.

- This Restatement section was approved in *Ray, supra,* 21 Cal.4th at p. 474.

<u>Secondary Sources</u>

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, § 608
- 2 Levy et al., California Torts (1985–2000) Nuisance and Trespass, § 17.22[2]
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 18:11

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1850
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***] 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 greatly 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.**

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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 Fiberglass Corp.* (1971) 22 Cal.App.3d 116, 124 [99 Cal.Rptr. 350], internal citation omitted.)

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."

- "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, 1039 [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

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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].)

- "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 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.)

- "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 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:

  > 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;

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(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 (1985–2000) Nuisance and Trespass, §§ 17.01–17:04, 17:06
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, §§ 17:1–17:3

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1851
Private Nuisance—Essential Factual Elements

[*Name of plaintiff*] claims that [*name of defendant*] interfered with [*name of plaintiff*]'s use and enjoyment of [his/her] land. To establish this claim, [*name of plaintiff*] must prove all of the following:

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

2. **That [*name of defendant*] interfered with [*name of plaintiff*]'s use or enjoyment of [his/her] land;**

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

4. **That an ordinary person would be greatly annoyed or disturbed by [*name of defendant*]'s conduct; and**

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

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

7. **That the seriousness of the harm outweighs the public benefit of [*name of defendant*]'s conduct;**

DIRECTIONS FOR USE

For instruction on control of property see Premises Liability instruction 602, *Extent of Control Over Premises Area*.

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

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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."

- "In distinction to trespass, liability for nuisance does not require proof of damage to the plaintiff's property; proof of interference with the plaintiff's use and enjoyment of that property is sufficient." (*San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 937 [55 Cal.Rptr.2d 724].)

- "[T]he essence of a private nuisance is its interference with the use and enjoyment of land. The activity in issue must 'disturb or prevent the comfortable enjoyment of property', such as smoke from an asphalt mixing plant, noise and odors from the operation of a refreshment stand, or the noise and vibration of machinery." (*Oliver v. AT&T Wireless Services* (1999) 76 Cal.App.4th 521, 534 [90 Cal.Rptr.2d 491], internal citations omitted.)

- "Unlike public nuisance, which is an interference with the rights of the community at large, private nuisance is a civil wrong based on disturbance of rights in land. A nuisance may be both public and private, but to proceed on a private nuisance theory the plaintiff must prove an injury specifically referable to the use and enjoyment of his or her land. The injury, however, need not be different in kind from that suffered by the general public." (*Koll-Irvine Center Property Owners Assn. v. County of Orange* (1994) 24 Cal.App.4th 1036, 1041 [29 Cal.Rptr.2d 664].)

- "Examples of interferences with the use and enjoyment of land actionable under a private nuisance theory are legion. 'So long as the interference is substantial and unreasonable, and such as would be offensive or inconvenient to the normal person, virtually any disturbance of the enjoyment of the property may amount to a nuisance.'" (*Koll-Irvine Center Property Owners Assn., supra,* 24 Cal.App.4th at p. 1041, internal citation omitted.)

- "The first additional requirement for recovery of damages on a nuisance theory is proof that the invasion of the plaintiff's interest in the use and enjoyment of the land was substantial, i.e., that it caused the plaintiff to suffer 'substantial actual damage.' The Restatement recognizes the same requirement as the need for proof of 'significant harm,' which it variously defines as 'harm of importance' and a 'real and appreciable invasion of the plaintiff's interests' and an invasion that is 'definitely offensive, seriously annoying or intolerable.' The degree of harm is to be judged by an objective standard, i.e., what effect would the invasion have on persons of normal health and sensibilities living in the same community? 'If normal persons in that locality would not be substantially annoyed or disturbed by the situation, then the invasion is not a significant one, even though the idiosyncrasies of the particular plaintiff may make it

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unendurable to him.' This is, of course, a question of fact that turns on the circumstances of each case." (*San Diego Gas & Electric Co., supra,* 13 Cal.4th at p. 938, internal citations omitted.)

- "The second additional requirement for nuisance is superficially similar but analytically distinct: 'The interference with the protected interest must not only be substantial, but it must also be unreasonable', i.e., it must be 'of such a nature, duration or amount as to constitute unreasonable interference with the use and enjoyment of the land.' The primary test for determining whether the invasion is unreasonable is whether the gravity of the harm outweighs the social utility of the defendant's conduct, taking a number of factors into account. Again the standard is objective: the question is not whether the particular plaintiff found the invasion unreasonable, but 'whether reasonable persons generally, looking at the whole situation impartially and objectively, would consider it unreasonable.' And again this is a question of fact: 'Fundamentally, the unreasonableness of intentional invasions is a problem of relative values to be determined by the trier of fact in each case in the light of all the circumstances of that case.' (*San Diego Gas & Electric Co., supra,* 13 Cal.4th at pp. 938–939, internal citations omitted.)

- 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:

  > 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.

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- 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 (1985–2000) Nuisance and Trespass, §§ 17.01–17:05
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, §§ 17:1–17:2, 17:4

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1900
Introductory Instruction

Public agencies such as the [*insert name of entity*] have the right to take private property for public use if they pay the owner the fair market value of the property. You must determine the fair market value of the property.

SOURCES AND AUTHORITY

- Article I, section 19 of the California Constitution provides: "Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner. The Legislature may provide for possession by the condemnor following commencement of eminent domain proceedings upon deposit in court and prompt release to the owner of money determined by the court to be the probable amount of just compensation."

- The Fifth Amendment of the U.S. Constitution provides, in part: "[N]or shall private property be taken for public use, without just compensation."

- Code of Civil Procedure section 1240.010 provides: "The power of eminent domain may be exercised to acquire property only for a public use. Where the Legislature provides by statute that a use, purpose, object, or function is one for which the power of eminent domain may be exercised, such action is deemed to be a declaration by the Legislature that such use, purpose, object, or function is a public use."

- "The power of eminent domain arises as an inherent attribute of sovereignty that is necessary for government to exist. Properly exercised, the eminent domain power effects a compromise between the public good for which private land is taken, and the protection and indemnification of private citizens whose property is taken to advance that public good. The Fifth Amendment of the United States Constitution, made applicable to the states by the Fourteenth Amendment, and California Constitution, article I, section 19 require this protection of private citizens' property." (*Burbank-Glendale-Pasadena Airport Authority v. Hensler* (2000) 83 Cal.App.4th 556, 561 [99 Cal.Rptr.2d 729], internal citation omitted.)

- " 'An inverse condemnation action is an eminent domain proceeding initiated by the property owner rather than the condemnor. The principles which affect the parties'

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rights in an inverse condemnation suit are the same as those in an eminent domain action.' " (*Customer Co. v. City of Sacramento* (1995) 10 Cal.4th 368, 377, fn. 4 [41 Cal.Rptr.2d 658], internal citations omitted.)

- "The principle sought to be achieved by this concept 'is to reimburse the owner for the property interest taken and to place the owner in as good a position pecuniarily as if the property had not been taken.' " (*Redevelopment Agency of the City of Long Beach v. First Christian Church of Long Beach* (1983) 140 Cal.App.3d 690, 705 [189 Cal.Rptr. 749], internal citation omitted, disapproved on other grounds in *Los Angeles County Metropolitan Transportation Authority v. Continental Development Corp*. (1997) 16 Cal.4th 694, 720–721 [66 Cal.Rptr.2d 630].)

- The only issue for the jury is valuation; all others are tried by the court. (*People v. Ricciardi* (1943) 23 Cal.2d 390, 402 [144 P.2d 799].)

- "While Article I, section 14 [now 19], of the California Constitution guarantees a jury trial in condemnation cases on the issue of the defendant's damages, this is the only issue to be decided by the jury; all other issues of law or fact must be decided by the court. " (*Pacific Gas & Electric Co. v. Peterson* (1969) 270 Cal.App.2d 434, 438 [75 Cal.Rptr. 673], internal citations omitted.)

<u>Secondary Sources</u>

- 8 Witkin, Summary of California Law (9th ed. 1988) Constitutional Law, §§ 1009, 1015
- Condemnation Practice in California (Cont.Ed.Bar 1995) § 4.1

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1901
"Fair Market Value" Explained

You must determine the fair market value of the property as of [*insert date of valuation*]. Fair market value is the highest price for the property that a willing buyer would have paid to a willing seller, assuming that:

1. **There is no pressure on either one to buy or sell; and**

2. **The buyer and seller know all the uses and purposes for which the property is reasonably capable of being used.**

SOURCES AND AUTHORITY

- Code of Civil Procedure section 1263.320 provides:

  (a) The fair market value of the property taken is the highest price on the date of valuation that would be agreed to by a seller, being willing to sell but under no particular or urgent necessity for so doing, nor obliged to sell, and a buyer, being ready, willing, and able to buy but under no particular necessity for so doing, each dealing with the other with full knowledge of all the uses and purposes for which the property is reasonably adaptable and available.
  (b) The fair market value of property taken for which there is no relevant, comparable market is its value on the date of valuation as determined by any method of valuation that is just and equitable.

- " 'Market value,' in turn, traditionally has been defined as 'the highest price estimated in terms of money which the land would bring if exposed for sale in the open market, with reasonable time allowed in which to find a purchaser, buying with knowledge of all of the uses and purposes to which it was adapted and for which it was capable.' " (*Klopping v. City of Whittier* (1972) 8 Cal.3d 39, 43 [104 Cal.Rptr. 1], internal citation omitted.)

- "Recognized alternatives to the market data approach to valuation are reproduction or replacement costs less depreciation or obsolescence." (*Redevelopment Agency of the City of Long Beach v. First Christian Church of Long Beach* (1983) 140 Cal.App.3d

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690, 705 [189 Cal.Rptr. 749], internal citation omitted, disapproved on other grounds in *Los Angeles County Metropolitan Transportation Authority v. Continental Development Corp*. (1997) 16 Cal.4th 694, 720–721 [66 Cal.Rptr.2d 630].)

- Alternative methods of valuation particularly apply to properties such as schools, churches, cemeteries, parks, and utilities for which there is no relevant market; therefore these properties may be valued on any basis that is just and equitable. (*County of San Diego v. Rancho Vista Del Mar, Inc.* (1993) 16 Cal.App.4th 1046, 1060 [20 Cal.Rptr.2d 675].)

- "Fair market value is not limited to the value of the property as used at the time of the taking, but has long taken into account the 'highest and most profitable use to which the property might be put in the reasonable near future, to the extent that the probability of such a prospective use affects the market value.' " (*City of San Diego v. Neuman* (1993) 6 Cal.4th 738, 744 [25 Cal.Rptr.2d 480], internal citations omitted.)

- "In condemnation actions, California courts have long recognized what has been referred to as the 'appraisal trinity.' This term encompasses three methods or approaches used by appraisers to determine the fair market value of real estate: (1) the current cost of reproducing (or replacing) the property less depreciation from all sources; (2) the 'market data' value as indicated by recent sale of comparable properties; and (3) the 'income approach,' or the value of which the property's net earning power will support based upon the capitalization of net income. In 1965, the state Legislature codified these three approaches in Evidence Code section 815–820. A qualified appraiser in an eminent domain proceeding may use one or more of these valuation techniques to ascertain the fair market value of the condemned property." (*Redevelopment Agency of the City of Long Beach, supra,* 140 Cal.App.3d at p. 705, internal citations omitted.)

<u>Secondary Sources</u>

- 8 Witkin, Summary of California Law (9th ed. 1988) Constitutional Law, § 1016
- Condemnation Practice in California (Cont.Ed.Bar 1995) §§ 4.1–4.2

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1902
"Highest and Best Use" Explained

Fair market value is based on the property's highest and best use. The highest and best use is the most profitable use for which the property is physically, geographically, and economically adaptable.

Do not consider any unique value of the property to [*insert name of property owner***] or [his/her/its] need for the property. Also, do not consider the particular need of [***insert name of entity***] for the property.**

SOURCES AND AUTHORITY

- "The property taken is valued based on the highest and best use for which it is geographically and economically adaptable." (*County of San Diego v. Rancho Vista Del Mar, Inc.* (1993) 16 Cal.App.4th 1046, 1058 [20 Cal.Rptr.2d 675], internal citation omitted.)

- "It is long settled that the condemned property may not be valued based on its special value to the property owner. … Thus, the cases have generally held that a property owner may not value his property based upon its use for a projected special purpose or for a hypothetical business." (*County of San Diego, supra*, 16 Cal.App.4th at pp. 1058–1059.)

- "Just as the property may not be valued based on its special value to the owner, the property may not be valued on the basis of its special value to the government." (*County of San Diego, supra*, 16 Cal.App.4th at p. 1061, internal citation omitted.)

- "Simply stated, purchasers of property that is known to be condemned are prevented from inflating the value of the property by conjecturing what the condemner will actually pay for the property." (*People ex rel. Dept. of Water Resources v. Andresen* (1987) 193 Cal.App.3d 1144, 1156 [238 Cal.Rptr. 826], internal citation omitted.)

- "In condemnation cases it is a firmly established principle that the compensation payable is to be based upon the loss to the owner rather than upon the benefit received by the taker. The California Supreme Court early stated that 'it seems monstrous to say that the benefit arising from the proposed improvement is to be taken into

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consideration as an element of the value of the land.' This has been construed to mean that '[t]he beneficial purpose to be derived by the condemnor's use of the property is not to be taken into consideration in determining market values, for it is wholly irrelevant.' This rule, however, does not mean that evidence of the highest and best use of the property must be excluded simply because that is the use that the condemnor intends to make of the property. … [I]n *City of Los Angeles v. Decker,* the court reiterated that it is improper to award compensation based upon the value to the condemnor, but held that it was proper in that case to consider the value of the property for parking purposes (the highest and best use) despite the fact that the city intended to use it for such purposes." (*Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1127–1128 [234 Cal.Rptr. 630], internal citations omitted.)

- "Once the highest and best use of the property is determined, one of several approaches to valuation must be selected. Evidence Code sections 815–820 set forth various methodologies sanctioned for use by valuation experts, including considering sales contracts of comparable properties and capitalizing income from the subject land and its existing improvements." (*San Diego Metropolitan Transit Development Bd. v. Cushman* (1997) 53 Cal.App.4th 918, 926 [62 Cal.Rptr.2d 121], internal citations omitted.)

<u>Secondary Sources</u>

- 8 Witkin, Summary of California Law (9th ed. 1988) Constitutional Law, § 1016
- Condemnation Practice in California (Cont.Ed.Bar 1995) § 4.9–4.21

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1903
Change in Zoning or Land Use Restriction

A determination of the property's highest and best use is not necessarily limited by current zoning or land use restrictions. If [*insert name of property owner***] proves that as of [***insert date of valuation***] there was a reasonable probability of a change in zoning or other use restrictions in the near future, [he/she] may prove the highest and best use of the property based on that change.**

SOURCES AND AUTHORITY

"Where due to zoning restrictions the condemned property is not presently available for use to which it is otherwise geographically and economically adaptable, the condemnee is entitled to show a reasonable probability of a zoning change in the near future and thus to establish such use as the highest and best use of the property. … 'The general rule is that present market value must be determined only by uses for which land is adaptable and available. However, where land sought to be condemned is not presently available for a particular use by reason of a zoning ordinance or other restriction imposed by law, but the evidence tends to show a "reasonable probability" of a change in the near future, the effect of such probability on the minds of purchasers generally may be taken into consideration in fixing present market value. … .' " (*City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 867–868 [135 Cal.Rptr. 647], internal citations omitted.)

"A determination of the property's highest and best use is not necessarily limited to the current zoning or land use restrictions imposed on the property; the property owner 'is entitled to show a reasonable probability of a zoning [or other change] in the near future and thus to establish such use as the highest and best use of the property.' The property owner has the burden of showing a reasonable probability of a change in the restrictions on the property." (*County of San Diego v. Rancho Vista Del Mar, Inc.* (1993) 16 Cal.App.4th 1046, 1058 [20 Cal.Rptr.2d 675], internal citations omitted.)

<u>Secondary Sources</u>

- 8 Witkin, Summary of California Law (9th ed. 1988) Constitutional Law, § 1017
- Condemnation Practice in California (Cont.Ed.Bar 1995) §§ 4.12–4.17

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1904
Project Enhanced Value

You may consider any increase in the property's value caused by public knowledge of [*insert entity's purpose for condemning the property***] until [***insert date of property's probable inclusion***]. You may not consider any increase in value caused by [***insert entity's purpose for condemning the property***] after that date. You may, however, consider other factors that increased the property's value after [***insert date of property's probable inclusion***], but before [***insert date of valuation***].**

SOURCES AND AUTHORITY

- "A legitimate element of just compensation lies in the increase in value resulting from a reasonable expectation that a particular piece of property will be outside a proposed public improvement, and thus will reap the benefits of that improvement." (*Merced Irrigation Dist. v. Woolstenhulme* (1971) 4 Cal.3d 478, 488 [93 Cal.Rptr. 833].)

- "The 'market value' of a given piece of property, of course, reflects a great variety of factors independent of the size, nature, or condition of the property itself. The general character of the neighborhood, the quality of the public and private services, and the availability of public facilities all play important roles in establishing market value. Thus, widespread knowledge of a proposed public improvement, planned for an indefinite location within a given region or neighborhood, will frequently cause the market value of land in the region or neighborhood to rise." (*Merced Irrigation Dist., supra,* 4 Cal.3d at p. 488.)

- "[W]e now hold that increases in value, attributable to a project but reflecting a reasonable expectation that property will not be taken for the improvement, should properly be considered in determining 'just compensation.' " (*Merced Irrigation Dist., supra,* 4 Cal.3d at p. 495.)

- "[I]n computing 'just compensation' in such a case, a jury should only consider the increase in value attributable to the project up until the time when it became probable that the land would be needed for the improvement." (*Merced Irrigation Dist., supra,* 4 Cal.3d at p. 498.)

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Secondary Sources

- 8 Witkin, Summary of California Law (9th ed. 1988) Constitutional Law, § 1020
- Condemnation Practice in California (Cont.Ed.Bar 1995) §§ 4.3–4.8

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1905
Information Discovered after Date of Valuation

A condition of the property that existed on [*insert date of valuation*] but that was discovered after [*insert date of valuation*] must be considered when you determine fair market value. The condition may increase or decrease the value of the property.

SOURCES AND AUTHORITY

- "[W]hile evidence of a change in the condition of the property after the date of valuation may not be admissible …, information about the condition of the property on the date of valuation which happens to be discovered after that date must be considered. In effect, the parties are presumed to know all relevant information available at the time of trial, even if it could not reasonably have been discovered until after the date of valuation." (*San Diego Water Authority v. Mireiter* (1993) 18 Cal.App.4th 1808, 1814 [23 Cal.Rptr.2d 455].)

- "The California statutory scheme and the overwhelming weight of authority supports the conclusion that relevant factual discoveries up to and including the date of trial must be taken into account, regardless of whether they inflate or deflate the value of the property. Accordingly, the trial court erred in failing to instruct the jury it was required to consider the newly discovered information in determining the compensation due defendants, and reversal is therefore required." (*San Diego County Water Authority, supra,* 18 Cal.App.4th at pp. 1817–1818 [23 Cal.Rptr.2d 455].)

Secondary Sources

- 8 Witkin, Summary of California Law (9th ed. 1988) Constitutional Law, § 1017
- Condemnation Practice in California (Cont.Ed.Bar 1995) § 4.23

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1906
Compensation for Improvements

In determining the fair market value of the property, you must consider not only the value of the land but also the value of [*insert list of improvements pertaining to the realty***]. These improvements may increase or decrease the value of the property.**

DIRECTIONS FOR USE

The court decides as a legal issue whether an improvement is a fixture "pertaining to the realty." (Code Civ. Pro., § 1260.030.)

SOURCES AND AUTHORITY

- Code of Civil Procedure section 1263.210(a) provides: "Except as otherwise provided by statute, all improvements pertaining to the realty shall be taken into account in determining compensation."

- Code of Civil Procedure section 1263.205(a) defines "improvements pertaining to the realty" as including "any machinery or equipment installed for use on property taken by eminent domain, or on the remainder if such property is part of a larger parcel, that cannot be removed without a substantial economic loss or without substantial damage to the property on which it is installed, regardless of the method of installation."

- Code of Civil Procedure section 1263.205(b) provides: "In determining whether particular property can be removed 'without substantial economic loss' within the meaning of this section, the value of the property in place considered as a part of the realty should be compared with its value if it were removed and sold."

- "[T]he market value of land and the improvements thereon is the market value thereof viewed as a whole and not separately." (*South Bay Irrigation Dist., v. California-American Water Co.* (1976) 61 Cal.App.3d 944, 986 [133 Cal.Rptr. 166], internal citation omitted.)

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Secondary Sources

- 8 Witkin, Summary of California Law (9th ed. 1988) Constitutional Law, § 1011
- Condemnation Practice in California (Cont.Ed.Bar 1995) § 4.54

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1907
Personal Property and Inventory

[*Name of property owner***] also may recover for the loss of any inventory or personal property caused by the taking. [***Name of property owner***] is entitled to the wholesale value if the inventory or personal property is not unique and is readily replaceable. Otherwise, [***name of property owner***] is entitled to the retail value of the inventory or personal property.**

SOURCES AND AUTHORITY

- "The Fifth Amendment of the United States Constitution, as applied to the states by the Fourteenth Amendment, conditions the power of eminent domain upon the payment of 'just compensation.' That constitutional requirement makes no distinction between real property and personal property. If personal property is taken by the government in the exercise of its eminent domain power, it must compensate the owner." (*Baldwin Park Redevelopment Agency v. Irving* (1984) 156 Cal.App.3d 428, 435 [202 Cal.Rptr. 792].)

- "We further acknowledge that where a condemner takes certain real property and the removal or relocation of either tangible or intangible personal property is impossible due to the condemnatory act, the owner is entitled to be justly compensated for the loss of property, regardless of its nature." (*San Diego Metropolitan Transit Development Bd. v. Handlery Hotel, Inc.* (1999) 73 Cal.App.4th 517, 533 [86 Cal.Rptr.2d 473], internal citations omitted.)

- "The general rule is that the constitution does not require compensation for personal property not affixed to the condemned realty. Movable items of personal property are not 'taken' by the public entity when it condemns real property or a business; instead, under the Relocation Assistance Act, the public entity compensates the owner for the cost of moving the personal property to a new site." (*County of San Diego v. Cabrillo Lanes, Inc.* (1992) 10 Cal.App.4th 576, 583 [12 Cal.Rptr.2d 613].)

- "Business inventory may be compensable under limited circumstances, i.e., where the loss results from the condemnatory act itself (e.g., the inventory cannot be relocated) rather than the personal circumstances of the condemnee (e.g., the owner has decided

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that he will not relocate." (*Chhour v. Community Redevelopment Agency of Buena Park* (1996) 46 Cal.App.4th 273, 283 [53 Cal.Rptr.2d 585].)

- If a merchant's inventory is not unique and is readily replaceable, then the measure of damages is the wholesale, not retail, value. (*McMahan's of Santa Monica v. City of Santa Monica* (1983) 146 Cal.App.3d 683 [194 Cal.Rptr. 582].)

Secondary Sources

- 8 Witkin, Summary of California Law (9th ed. 1988) Constitutional Law, § 1032
- Condemnation Practice in California (Cont.Ed.Bar 1995) § 4.55

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1908
Bonus Value of Leasehold Interest

[Some/All] of the property taken was rented to [*name of lessee*]. You must determine the amount of compensation, if any, that [*name of lessee*] can recover from the [*name of entity*].

To do this, you must determine:

1. **The present value of the total rent that [*name of lessee*] agreed to pay during the time remaining on the lease after [*insert date of valuation*]; and**

2. **The present value of the total fair market rent for the leased property for this same time period.**

If the present value of the total rent due under the lease is less than the present value of the total fair market rent, then [*name of lessee*] is entitled to the difference.

DIRECTIONS FOR USE

Do not give this instruction if bonus value is allocated under the lease to the owner.

SOURCES AND AUTHORITY

- Code of Civil Procedure section 1265.150 provides: "Nothing in this article affects or impairs any right a lessee may have to compensation for the taking of his lease in whole or in part or for the taking of any other property in which he has an interest."

- Code of Civil Procedure section 1265.160 provides: "Nothing in this article affects or impairs the rights and obligations of the parties to a lease to the extent that the lease provides for such rights and obligations in the event of the acquisition of all or a portion of the property for public use."

- "Under the Eminent Domain Law, a provision of a lease that declares that the lease terminates if all the property subject thereto is acquired for public use does not

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deprive the lessee of any right he may have to compensation for the taking of his leasehold or other property. The Eminent Domain Law itself declares the generally applicable rules that the lease terminates if all the property subject thereto is acquired for public use, and that such termination does not affect any right of the lessee to compensation related thereto." (*City of Vista v. W.O. Fielder* (1996) 13 Cal.4th 612, 618 [55 Cal.Rptr.2d 861].)

- "Usually the rental value of the property is measured in terms of existing tenancies. Tenants, like owners in fee, are also entitled to compensation in condemnation." (*People ex rel. Dept. of Water Resources v. Andresen* (1987) 193 Cal.App.3d 1144, 1163 [238 Cal.Rptr. 826].)

- "The bonus value can be more precisely defined as the present value of the difference between economic rent, i.e., the value of market rental, and the contract rent through the remaining lease term. The bonus value usually assumes importance only in long-term commercial leases." (*New Haven Unified School Dist. v. Taco Bell Corp.* (1994) 24 Cal.App.4th 1473, 1478–1479 [30 Cal.Rptr.2d 469], internal citations omitted.)

- "Whether or not the lessor and lessee are joined in a single proceeding, these rules will ordinarily result in an aggregate award to both lessor and lessee equal to market value of the property. Where the lease rental falls below market value, the lessor will have a claim to less than the full market value of the property, since he is restricted to the present value of actual contract rental; but the lessee will have a right to recover the balance of the market value, above that recovered by the lessor, as lease bonus value." (*New Haven, supra*, 24 Cal.App.4th at p. 1479, internal citation omitted.)

- "Although generally a tenant is entitled to all compensation attributable to the tenant's interest in a lease, it is well recognized that the parties to a lease may contractually agree to allocate a condemnation award to the landlord rather than the tenant." (*City of South San Francisco v. Mayer* (1998) 67 Cal.App.4th 1350, 1354 [79 Cal.Rptr.2d 704], internal citations omitted.)

- "A lessee's option to renew a lease should be considered to the extent that the option enhances the value of the leasehold." (*San Francisco Bay Area Rapid Transit Dist. v. McKeegan* (1968) 265 Cal.App.2d 263, 272 [71 Cal.Rptr. 204].)

<u>Secondary Sources</u>

- 8 Witkin, Summary of California Law (9th ed. 1988) Constitutional Law, § 1035
- Condemnation Practice in California (Cont.Ed.Bar 1995) §§ 4.56–4.62

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1909
Precondemnation Damages (*Klopping* Damages)

I have determined that there was an unreasonable delay between [*date of announcement of intent to condemn***], when the [***name of entity***] announced its intent to condemn [***name of property owner***]'s property, and [***date of filing***], when this case was filed. You must award damages, if any, that [***name of property owner***] has proved [he/she/it] suffered as a result of the [***name of entity***]'s delay. Such damages may include [***insert damages appropriate to the facts, e.g., the cost of repairs, the loss of use of the property, loss of rent, loss of profits, or increased operating expenses pending repairs, and diminution of market value***].**

DIRECTIONS FOR USE

This instruction will need to be modified in cases where the entity does not ultimately proceed with the condemnation or where there has been another type of unreasonable conduct.

SOURCES AND AUTHORITY

- The Supreme Court in *Klopping v. City of Whittier* (1972) 8 Cal.3d 39, 52, held that "a condemnee must be provided with an opportunity to demonstrate that (1) the public authority acted improperly either by unreasonably delaying eminent domain action following an announcement of intent to condemn or by other unreasonable conduct prior to condemnation; and (2) as a result of such action the property in question suffered a diminution in market value."

- "The measure of damages may be the cost of repairs, the loss of use of the property, loss of rent, loss of profits, or increased operating expenses pending repairs." (*City of Los Angeles v. Tilem* (1983) 142 Cal.App.3d 694, 703 [191 Cal.Rptr. 229], internal citations omitted.)

- "[A]bsent a formal resolution of condemnation, recovery under *Klopping* requires that the public entity's conduct 'directly and specially affect the landowner to his injury.' This requirement mandates that the plaintiff demonstrate conduct on the part of the public entity 'which significantly invaded or appropriated the use or enjoyment' of the

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property." (*Barthelemy v. Orange County Flood Control Dist.* (1998) 65 Cal.App.4th 558, 570 [76 Cal.Rptr.2d 575], internal citations omitted.)

- "[S]ince *Klopping* damages compensate a landowner for a public entity's unreasonable precondemnation conduct, their recovery 'is permitted irrespective of whether condemnation proceedings are abandoned or whether they are instituted at all.' " (*Barthelemy, supra,* 65 Cal.App.4th at p. 569, internal citation omitted.)

- "Whether there has been unreasonable delay by the condemnor and whether the condemnor has engaged in unreasonable conduct are both questions of fact. What constitutes a direct and substantial impairment of property rights for purposes of compensation is also a factual question. In deciding factual matters on conflicting testimony and inferences, it is for the trier of fact to determine which evidence and inferences it finds more reasonable." (*Contra Costa County Water Dist. v. Vaquero Farms, Inc.* (1997) 58 Cal.App.4th 883, 897 [68 Cal.Rptr.2d 272], internal citations omitted.)

- "[T]he threshold question of liability for unreasonable precondemnation conduct is to be determined by the court, with the issue of the amount of damages to be thereafter submitted to the jury only upon a sufficient showing of liability by the condemnee. If liability for unlawful precondemnation conduct is not established, the trial court may exclude proffered evidence of alleged resulting damages from the jury." (*Redevelopment Agency v. Contra Costa Theatre, Inc.* (1982) 135 Cal.App.3d 73, 79–80 [185 Cal.Rptr. 159], internal citations omitted.)

<u>Secondary Sources</u>

- 8 Witkin, Summary of California Law (9th ed. 1988) Constitutional Law, § 1021
- Condemnation Practice in California (Cont.Ed.Bar 1995) § 4.7–4.8

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1910
Value of Easement

The [*name of public entity*] has taken the right to use a portion of [*name of property owner*]'s land for a specific purpose. That right is called an "easement." After an easement has been taken, the property owner has the right to use the land for any purpose that does not conflict with the easement.

You must determine the fair market value of the easement on [*insert date of valuation*]. The fair market value of the easement is determined by subtracting the fair market value of the land after the easement was taken from the fair market value of the land before the easement was taken.

SOURCES AND AUTHORITY

- "The holder of an easement is entitled to damages when the easement is taken or damaged for public use." (*County Sanitation Dist. No. 8 of Los Angeles County v. Watson Land Co.* (1993) 17 Cal.App.4th 1268, 1279, internal citation omitted.)

- "The value of an easement in gross … is the difference in the before and after value of the strip of land taken, and not what has been gained by the public agency." (*County Sanitation Dist., supra,* 17 Cal.App.4th at p. 1279, internal citations omitted.)

- "Ordinarily, the value of an easement is the diminution in market value of the dominant tenement caused by its loss. When a second easement is sought on land already burdened, the owner of the servient land is entitled to the difference in value of the land before and after the imposition of the second easement; and, if no substantial difference in value is shown, only nominal damages will be awarded." (8 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 1019, p. 582, internal citations omitted.)

- " 'An easement is an incorporeal interest in the land of another that gives its owner the right to use the land of another or to prevent the property owner from using his land.' " (*County Sanitation Dist., supra,* 17 Cal.App.4th at p. 1278, internal citations omitted.)

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Secondary Sources

- 8 Witkin, Summary of California Law (9th ed. 1988) Constitutional Law, § 1019
- Condemnation Practice in California (Cont.Ed.Bar 1995) §§ 4.64–4.66

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1911
Severance Damages

The [*name of public entity*] has taken only a part of [*name of property owner*]'s property. [*Name of property owner*] claims that [his/her/its] remaining property has lost value as a result of the taking. This loss in value is called "severance damages."

Severance damages are the damages to [*name of property owner*]'s remaining property caused by the taking, or by the construction and use of the [*name of public entity*]'s proposed project, or by both.

Severance damages are determined as follows:

1. **Determine the fair market value of the remaining property on [*date of valuation*] by subtracting the fair market value of the part taken from the fair market value of the entire property;**

2. **Determine the fair market value of the remaining property after the [*name of public entity*]'s proposed project is completed; [and]**

3. **Subtract the fair market value of the remaining property after the [*name of public entity*]'s proposed project is completed from the fair market value of the remaining property on [*date of valuation*]; [and]**

[4. Subtract from that amount any reasonably certain increase in the fair market value of the remaining property caused by the project.]

[If the project's benefit to the remaining property is equal to or greater than the loss caused by the taking, you may not award any severance damages.]

DIRECTIONS FOR USE

Item number 4 and the final sentence are bracketed because benefit may not be relevant in every case.

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SOURCES AND AUTHORITY

- Code of Civil Procedure section 1263.410 provides:

  (a) Where the property acquired is part of a larger parcel, in addition to the compensation awarded pursuant to Article 4 (commencing with Section 1263.310) for the part taken, compensation shall be awarded for the injury, if any, to the remainder.
  (b) Compensation for injury to the remainder is the amount of the damage to the remainder reduced by the amount of the benefit to the remainder. If the amount of the benefit to the remainder equals or exceeds the amount of the damage to the remainder, no compensation shall be awarded under this article. If the amount of the benefit to the remainder exceeds the amount of damage to the remainder, such excess shall be deducted from the compensation provided in Section 1263.510, if any, but shall not be deducted from the compensation required to be awarded for the property taken or from the other compensation required by this chapter.

- Code of Civil Procedure section 1263.420 provides:

  Damage to the remainder is the damage, if any, caused to the remainder by either or both of the following:
  (a) The severance of the remainder from the part taken.
  (b) The construction and use of the project for which the property is taken in the manner proposed by the plaintiff whether or not the damage is caused by a portion of the project located on the part taken.

- Code of Civil Procedure section 1263.430 provides: "Benefit to the remainder is the benefit, if any, caused by the construction and use of the project for which the property is taken in the manner proposed by the plaintiff whether or not the benefit is caused by a portion of the project located on the part taken."

- "When property acquired by eminent domain is part of a larger parcel, compensation must be awarded for the injury, if any, to the remainder. Such compensation is commonly called severance damages. When the property taken is but part of a single legal parcel, the property owner need only demonstrate injury to the portion that remains to recover severance damages." (*City of San Diego v. Neumann* (1993) 6 Cal.4th 738, 741 [25 Cal.Rptr.2d 480], internal citations omitted.)

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- "Severance damages must be based upon real physical disturbance of a property right and a decrease in market value of the property rather than upon remote possibilities which are highly speculative and conjectural." (*County Sanitation Dist. No. 8 of Los Angeles County v. Watson Land Co.* (1993) 17 Cal.App.4th 1268, 1282, internal citation omitted.)

- "The court determines as a matter of law what constitutes the 'larger parcel' for which severance damages may be obtained: 'The Legislature has framed the question of whether property should be viewed as an integrated whole in terms of whether the land remaining after the taking forms part of a "larger parcel".' " (*City of San Diego, supra*, 6 Cal.4th at p. 745, internal citations omitted.)

- "As we said in *Pierpont Inn*, 'Where the property taken constitutes only a part of a larger parcel, the owner is entitled to recover, inter alia, the difference in the fair market value of his property in its "before" condition and the fair market value of the remaining portion thereof after the construction of the improvement on the portion taken. Items such as view, access to beach property, freedom from noise, etc. are unquestionably matters which a willing buyer in the open market would consider in determining the price he would pay for any given piece of real property.' Severance damages are not limited to special and direct damages, but can be based on any factor, resulting from the project, that causes a decline in the fair market value of the property." (*Los Angeles County Metropolitan Transportation Authority v. Continental Development Corp.* (1999) 16 Cal.4th 694, 712 [66 Cal.Rptr.2d 630], internal citations omitted.)

- "We hold that in determining a landowner's entitlement to severance damages, the factfinder henceforth shall consider competent evidence relevant to any conditions caused by the project that affect the remainder property's fair market value, insofar as such evidence is neither conjectural nor speculative." (*Los Angeles County Metropolitan Transportation Authority, supra*, 16 Cal.4th at p. 718.)

- "In determining severance damage, the jury must assume 'the most serious damage' which will be caused to the remainder by the taking of the easement and construction of the property. The value of the remainder after the condemnation has occurred is referred to as the 'after' value of the property. The diminution in fair market value is determined by comparing the before and after values. This is the amount of the severance damage." (*San Diego Gas & Electric Co.* (1988) 205 Cal.App.3d 1334, 1345 [253 Cal.Rptr. 144], internal citations omitted, disapproved on other grounds in *Los Angeles County Metropolitan Transportation Authority, supra*, 16 Cal.4th at p. 720.)

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- "[S]everance damages are not limited to specific direct damages but can be based on any indirect factors that cause a decline in the market value of the property. California decisions have indicated the following are compensable as direct damages under section 1263.410: (1) impairment of view, (2) restriction of access, (3) increased noise, (4) invasion of privacy, (5) unsightliness of the project, (6) lack of maintenance of the easement and (7) nuisances in general such as trespassers and safety risks. Several courts have recognized that the condemnee should be compensated for any characteristic of the project which causes 'an adverse impact on the fair market value of the remainder.' " (*San Diego Gas & Electric Co., supra,* 205 Cal.App.3d at p. 1345.)

- "When 'the property acquired [by eminent domain] is part of a larger parcel,' in addition to compensation for the property actually taken, the property owner must be compensated for the injury, if any, to the land that he retains. Once it is determined that the owner is entitled to severance damages, they, too, normally are measured by comparing the fair market value of the remainder before and after the taking." (*City of San Diego, supra,* 6 Cal.4th at p. 745, internal citations and footnote omitted.)

<u>Secondary Sources</u>

- 8 Witkin, Summary of California Law (9th ed. 1988) Constitutional Law, §§ 1022–1030
- Condemnation Practice in California (Cont.Ed.Bar 1995) §§ 5.1–5.37

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1912
Goodwill

[*Name of property owner***] claims that [he/she/it] is entitled to compensation for loss of goodwill. "Goodwill" is the benefit that a business gains as a result of its location, reputation for dependability, skill or quality, and any other circumstances that cause a business to keep old customers or gain new customers. To succeed on this claim, [***name of property owner***] must prove all of the following:**

1. **That [***name of property owner***] conducted a business on the property that was taken [or on the property remaining after the taking];**

2. **That [***name of property owner***]'s business lost goodwill as a result of the taking;**

3. **That the loss cannot reasonably be prevented by a relocation of the business or by taking other action that a reasonably careful person would take to preserve goodwill; and**

4. **That compensation for the loss will not be duplicated in other compensation that is awarded to [***insert name of property owner***].**

[If the benefit received by the remaining property exceeds the amount of severance damages, then you must deduct the excess benefit received from your award for loss of goodwill.]

SOURCES AND AUTHORITY

- Code of Civil Procedure section 1263.510 provides:

  (a) The owner of a business conducted on the property taken, or on the remainder if such property is part of a larger parcel, shall be compensated for loss of goodwill if the owner proves all of the following:

  (1) The loss is caused by the taking of the property or the injury to the remainder.

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(2) The loss cannot reasonably be prevented by a relocation of the business or by taking steps and adopting procedures that a reasonably prudent person would take and adopt in preserving the goodwill.
(3) Compensation for the loss will not be included in payments under Section 7262 of the Government Code.
(4) Compensation for the loss will not be duplicated in the compensation otherwise awarded to the owner.

(b) Within the meaning of this article, "goodwill" consists of the benefits that accrue to a business as a result of its location, reputation for dependability, skill or quality, and any other circumstances resulting in probable retention of old or acquisition of new patronage.

- "Historically, business goodwill was not an element of damages under eminent domain law. As recently as 1975, the California Supreme Court reaffirmed the principle that damage to a business conducted on property condemned for public use was not compensable as a property right under the just compensation clause of the California Constitution. But in 1975, the Legislature enacted a comprehensive revision of California's eminent domain law, which, among other things, authorizes compensation for the loss of business goodwill." (*Community Development Com. v. Asaro* (1989) 212 Cal.App.3d 1297, 1301–1302 [261 Cal.Rptr. 231], internal citation and footnote omitted.)

- "As to entitlement of goodwill, the landowner bears the burden of proof." (*Metropolitan Transit Development Bd. v. Handlery Hotel* (1999) 73 Cal.App.4th 517, 537 [86 Cal.Rptr.2d 473], internal citations omitted.)

- "After entitlement to goodwill is shown (which includes a showing that compensation for the loss will not be duplicated) neither party has the burden of proof with regard to valuation." (*Redevelopment Agency of the City of Pomona v. Thrifty Oil Co.* (1992) 4 Cal.App.4th 469, 475 [5 Cal.Rptr.2d 687], internal citations omitted.)

- "Only an owner of a business conducted on the real property taken may claim compensation for loss of goodwill." (*Metropolitan Transit Development Bd., supra,* 73 Cal.App.4th at p. 537, internal citation omitted.)

- "The underlying purpose of this statute is to provide compensation for the kind of losses which typically occur when an ongoing business is forced to move and give up the benefits of its former location. It includes not only compensation for lost patronage itself, but also for expenses reasonably incurred in an effort to prevent a

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loss of patronage." (*Metropolitan Transit Development Bd., supra,* 73 Cal.App.4th at p. 537, internal citations omitted.)

- "Goodwill must, of course, be measured by a method which excludes the value of tangible assets or the normal return on those assets. However, the courts have wisely maintained that there is no single acceptable method of valuing goodwill. Valuation methods will differ with the nature of the business or practice and with the purpose for which the evaluation is conducted." (*People ex rel. Dept. of Transportation v. Muller* (1984) 36 Cal.3d 263, 271, fn. 7 [203 Cal.Rptr. 772], internal citations omitted.)

- "Although the statutory scheme applies only to eminent domain proceedings, the right to recover lost goodwill has been extended to the indirect condemnee. Thus, 'goodwill is compensable in an inverse condemnation action to the same extent and with the same limitations on recovery found in ... section 1263.510.' " (*Metropolitan Transit Development Bd., supra,* 73 Cal.App.4th at p. 537, internal citations omitted.)

- "Goodwill may be measured by the capitalized value of the net income or profits of a business or some similar method of calculating present value of anticipated profits. Valuation methods differ with the nature of the business and the purpose for which the evaluation is conducted. There is no single method to evaluate goodwill." (*People ex rel. Dept. of Transportation v. Leslie* (1997) 55 Cal.App.4th 918, 922–923 [64 Cal.Rptr.2d 252], internal citations omitted.)

<u>Secondary Sources</u>

- 8 Witkin, Summary of California Law (9th ed. 1988) Constitutional Law, § 1031
- Condemnation Practice in California (Cont.Ed.Bar 1995) § 4.63

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1913
Burden of Proof

Neither the [*name of public entity*] nor [*name of property owner*] has the burden of proving the amount of compensation. [[*Name of property owner*] has the burden of proving a loss of goodwill but does not have the burden of proving the amount of compensation for loss of goodwill.]

SOURCES AND AUTHORITY

- Code of Civil Procedure, section 1260.210 provides:

  (a) The defendant shall present his evidence on the issue of compensation first and shall commence and conclude the argument.
  (b) Except as otherwise provided by statute, neither the plaintiff nor the defendant has the burden of proof on the issue of compensation.

Secondary Sources

- 8 Witkin, Summary of California Law (9th ed. 1988) Constitutional Law, § 1007
- Condemnation Practice in California (Cont.Ed.Bar 1995) § 9.21

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1914
Valuation Testimony

You must decide the value of property based only on the testimony of the witnesses who have given their opinion of fair market value. You may consider other evidence to help you understand and weigh the witnesses' testimony.

You may not choose a value that is more or less than the value shown by the witnesses' testimony. You may choose a value given by a witness, or you may choose a value between the values stated by the witnesses.

If the witnesses disagreed with one another, you should weigh each opinion against the others based on the reasons given for each opinion, the facts or other matters that each witness relied on, and the witnesses' qualifications.

SOURCES AND AUTHORITY

- Evidence Code section 813(a) provides:

  > The value of property may be shown only by the opinions of any of the following:
  > (1) Witnesses qualified to express such opinions.
  > (2) The owner or the spouse of the owner of the property or property interest being valued.
  > (3) An officer, regular employee, or partner designated by a corporation, partnership, or unincorporated association that is the owner of the property or property interest being valued, if the designee is knowledgeable as to the value of the property or property interest.

- "The only type of evidence which can be used to establish value in eminent domain cases is the opinion of qualified experts and the property owners." (*Aetna Life and Casualty Co. v. City of Los Angeles* (1985) 170 Cal.App.3d 865, 877 [216 Cal.Rptr. 831], internal citations omitted.)

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- "A jury hearing a condemnation action may not disregard the evidence as to value and render a verdict which either exceeds or falls below the limits established by the testimony of the witnesses. The trier of fact in an eminent domain action is not an appraiser, and does not make a determination of market value based on its opinion thereof. Instead it determines the market value of the property, based on the opinions of the valuation witnesses." (*Aetna Life and Casualty Co., supra,* 170 Cal.App.3d at p. 877, internal citations omitted.)

- " 'The trier of fact may accept the evidence of any one expert or choose a figure between them based on all of the evidence.' There is insufficient evidence to support a verdict 'only when "no reasonable interpretation of the record" supports the figure ... .' " (*San Diego Metropolitan Transit Development Bd. v. Cushman* (1997) 53 Cal.App.4th 918, 931 [62 Cal.Rptr.2d 121], internal citations omitted.)

<u>Secondary Sources</u>

- 1 Witkin, California Evidence (4th ed. 2000) Opinion Evidence, § 102
- Condemnation Practice in California (Cont.Ed.Bar 1995) § 9.74

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1915
View

You have viewed the property and its surrounding area. The purpose of this view was to help you understand and weigh the testimony of the witnesses.

SOURCES AND AUTHORITY

- Evidence Code section 813(b) provides: "Nothing in this section prohibits a view of the property being valued or the admission of any other admissible evidence (including but not limited to evidence as to the nature and condition of the property and, in an eminent domain proceeding, the character of the improvement proposed to be constructed by the plaintiff) for the limited purpose of enabling the court, jury, or referee to understand and weigh the testimony … and such evidence, except evidence of the character of the improvement proposed to be constructed by the plaintiff in an eminent domain proceeding, is subject to impeachment and rebuttal."

Secondary Sources

- 2 Witkin, California Evidence (4th ed. 2000) Demonstrative, Experimental, and Scientific Evidence, § 31
- Condemnation Practice in California (Cont.Ed.Bar 1995) § 9.68

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2000
Introduction to Tort Damages—Liability Contested

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

The amount of damages must include an award for each item of harm that was caused by [*name of defendant*], even if the harm could not have been anticipated.

[*Name of plaintiff*] does not have to prove the exact amount of the harm or the exact amount of damages that will provide reasonable compensation for the harm. However, you must not speculate or guess in awarding damages.

[The following are the specific items of damages claimed by [*name of plaintiff*]:]

DIRECTIONS FOR USE

Read last bracketed sentence only if Instruction 2003, *Economic and Noneconomic Damages*, is not being read.

If there is a danger that a jury may award damages for a defendant's conduct that was not the basis of liability, the court may wish to modify the second paragraph of this instruction to clarify that only wrongful conduct can support an award of damages.

SOURCES AND AUTHORITY

- Civil Code section 3333 provides: "For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not."

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- Civil Code section 3281 provides: "Every person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation in money, which is called damages."

- Civil Code section 3283 provides: "Damages may be awarded, in a judicial proceeding, for detriment resulting after the commencement thereof, or certain to result in the future."

- Civil Code section 3359 provides: "Damages must, in all cases, be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered."

- Under Civil Code section 3333 "[t]ort damages are awarded to compensate a plaintiff for all of the damages suffered as a legal result of the defendant's wrongful conduct." (*North American Chemical Co. v. Superior Court* (1997) 59 Cal.App.4th 764, 786 [69 Cal.Rptr.2d 466], italics omitted.)

- "Whatever its measure in a given case, it is fundamental that 'damages which are speculative, remote, imaginary, contingent, or merely possible cannot serve as a legal basis for recovery.' However, recovery is allowed if claimed benefits are reasonably certain to have been realized but for the wrongful act of the opposing party." (*Piscitelli v. Friedenberg* (2001) 87 Cal.App.4th 953, 989 [105 Cal.Rptr.2d 88], internal citations omitted.)

- "In general, one who has been tortiously injured is entitled to be compensated for the harm and the injured party must establish 'by proof the extent of the harm and the amount of money representing adequate compensation with as much certainty as the nature of the tort and the circumstances permit.' However, '[t]here is no general requirement that the injured person should prove with like definiteness the extent of the harm that he has suffered as a result of the tortfeasor's conduct. It is desirable that responsibility for harm should not be imposed until it has been proved with reasonable certainty that the harm resulted from the wrongful conduct of the person charged. It is desirable, also, that there be definiteness of proof of the amount of damage as far as is reasonably possible. It is even more desirable, however, that an injured person not be deprived of substantial compensation merely because he cannot prove with complete certainty the extent of harm he has suffered.' " (*Clemente v. State of California* (1985) 40 Cal.3d 202, 219 [219 Cal.Rptr. 445], internal citations omitted.)

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- "If plaintiff's inability to prove his damages with certainty is due to defendant's actions, the law does not generally require such proof." (*Clemente, supra,* 40 Cal.3d at p. 219, internal citations omitted.)

- "While a defendant is liable for all the damage that his tortuous act proximately causes to the plaintiff, regardless of whether or not it could have been anticipated, nevertheless a proximate causal connection must still exist between the damage sustained by the plaintiff and the defendant's wrongful act or omission, and the detriment inflicted on the plaintiff must still be the natural and probable result of the defendant's conduct." (*Chaparkas v. Webb* (1960) 178 Cal.App.2d 257, 260 [2 Cal.Rptr. 897], internal citations omitted.)

Secondary Sources

- California Tort Damages (Cont.Ed.Bar 1988) Bodily Injury, §§ 1.2–1.6
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 5:1
- 4 Levy et al., California Torts (1985–2000) Damages, § 50.02
- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1319–1326

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2001
Introduction to Tort Damages—Liability Established

[*Name of defendant***]'s responsibility for [***name of plaintiff***]'s claimed harm is not an issue for you to decide in this case. You must decide how much money will reasonably compensate [***name of plaintiff***] for the harm. This compensation is called "damages."**

The amount of damages must include an award for each item of harm that was caused by [*name of defendant***], even if the harm could not have been anticipated.**

[*Name of plaintiff***] does not have to prove the exact amount of the harm or the exact amount of damages that will provide reasonable compensation for the harm. However, you must not speculate or guess in awarding damages.**

[The following are the specific items of damages claimed by [*name of plaintiff***]:]**

DIRECTIONS FOR USE

Read last bracketed sentence only if Instruction 2003, *Economic and Noneconomic Damages*, is not being read.

If there is a danger that a jury may award damages for a defendant's conduct that was not the basis of liability, the court may wish to modify the second paragraph of this instruction to clarify that only wrongful conduct can support an award of damages.

SOURCES AND AUTHORITY

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- Under Civil Code section 3333 "[t]ort damages are awarded to compensate a plaintiff for all of the damages suffered as a legal result of the defendant's wrongful conduct." (*North American Chemical Co. v. Superior Court* (1997) 59 Cal.App.4th 764, 786 [69 Cal.Rptr.2d 466], italics omitted.)

- "Whatever its measure in a given case, it is fundamental that 'damages which are speculative, remote, imaginary, contingent, or merely possible cannot serve as a legal basis for recovery.' However, recovery is allowed if claimed benefits are reasonably certain to have been realized but for the wrongful act of the opposing party." (*Piscitelli v. Friedenberg* (2001) 87 Cal.App.4th 953, 989 [105 Cal.Rptr.2d 88], internal citations omitted.)

- "In general, one who has been tortiously injured is entitled to be compensated for the harm and the injured party must establish 'by proof the extent of the harm and the amount of money representing adequate compensation with as much certainty as the nature of the tort and the circumstances permit.' However, '[t]here is no general requirement that the injured person should prove with like definiteness the extent of the harm that he has suffered as a result of the tortfeasor's conduct. It is desirable that responsibility for harm should not be imposed until it has been proved with reasonable certainty that the harm resulted from the wrongful conduct of the person charged. It is desirable, also, that there be definiteness of proof of the amount of damage as far as is reasonably possible. It is even more desirable, however, that an injured person not be deprived of substantial compensation merely because he cannot prove with complete certainty the extent of harm he has suffered.' " (*Clemente v. State of California* (1985) 40 Cal.3d 202, 219 [219 Cal.Rptr. 445], internal citations omitted.)

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- "If plaintiff's inability to prove his damages with certainty is due to defendant's actions, the law does not generally require such proof." (*Clemente, supra,* 40 Cal.3d at p. 219, internal citations omitted.)

- "While a defendant is liable for all the damage that his tortuous act proximately causes to the plaintiff, regardless of whether or not it could have been anticipated, nevertheless a proximate causal connection must still exist between the damage sustained by the plaintiff and the defendant's wrongful act or omission, and the detriment inflicted on the plaintiff must still be the natural and probable result of the defendant's conduct." (*Chaparkas v. Webb* (1960) 178 Cal.App.2d 257, 260 [2 Cal.Rptr. 897], internal citations omitted.)

Secondary Sources

- California Tort Damages (Cont.Ed.Bar 1988) Bodily Injury, §§ 1.2–1.6
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 5:1
- 4 Levy et al., California Torts (1985–2000) Damages, § 50.02
- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1319–1326

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2003
Economic and Noneconomic Damages

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

DIRECTIONS FOR USE

This instruction may not be necessary in every case.

SOURCES AND AUTHORITY

- Civil Code section 1431.2 (Prop. 51) provides:

  (a) In any action for personal injury, property damage, or wrongful death, based upon principles of comparative fault, the liability of each defendant for non-economic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be rendered against that defendant for that amount.

  (b) (1) For purposes of this section, the term "economic damages" means objectively verifiable monetary losses including medical expenses, loss of earnings, burial costs, loss of use of property, costs of repair or replacement, costs of obtaining substitute domestic services, loss of employment and loss of business or employment opportunities.

  (2) For the purposes of this section, the term "non-economic damages" means subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation.

- Civil Code section 3333.2 provides, in part: "In any action for injury against a health care provider based on professional negligence, the injured plaintiff shall be entitled to recover noneconomic losses to compensate for pain, suffering, inconvenience,

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physical impairment, disfigurement and other nonpecuniary damage." The statute sets the limit for such damages at $250,000.

- The Supreme Court has noted that section 1431.2 "carefully" defines the "important distinction" between economic and noneconomic damages. (*DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 600 [7 Cal.Rptr.2d 238].) The court stated: "Proposition 51 … retains the joint liability of all tortfeasors, regardless of their respective shares of fault, with respect to all objectively provable expenses and monetary losses. On the other hand, the more intangible and subjective categories of damages were limited by Proposition 51 to a rule of strict proportionate liability. With respect to these noneconomic damages, the plaintiff alone now assumes the risk that a proportionate contribution cannot be obtained from each person responsible for the injury." (*Ibid.*, internal citation omitted.)

- "Proposition 51 … allows an injured plaintiff to recover the full amount of economic damages suffered, regardless of which tortfeaser or tortfeasors are named as defendants. The tortfeasors are left to sort out payment in proportion to fault amongst themselves, and they must bear the risk of nonrecovery from impecunious tortfeasors. As to noneconomic damages, however, the plaintiff must sue all the tortfeasors to enable a full recovery. Failure to name a defendant will preclude recovery of that defendant's proportional share of damages, and the plaintiff will bear the risk of nonrecovery from an impecunious tortfeasor." (*Aetna Health Plans of California, Inc. v. Yucaipa-Calimesa Joint Unified School Dist.* (1999) 72 Cal.App.4th 1175, 1190 [85 Cal.Rptr.2d 672].)

Secondary Sources

- California Tort Damages (Cont.Ed.Bar 1988) Bodily Injury, § 1.5
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 5:4
- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, § 53

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2004
Items of Economic Damage

The following are the specific items of economic damages claimed by [*name of plaintiff***]:**

[*Insert applicable instructions on items of economic damage.***]**

DIRECTIONS FOR USE

This instruction may not be necessary in every case. For example, if the plaintiff is not claiming any noneconomic damages, there would be no need to define the claimed damages as "economic." If this instruction is used, it should be followed by applicable instructions (see Instructions 2004A through 2004N) concerning the items of economic damage claimed by the plaintiff. These instructions should be inserted into this instruction as sequentially numbered items.

Secondary Sources

- California Tort Damages (Cont.Ed.Bar 1988) Bodily Injury, § 1.5
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 5:4
- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, § 53

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2004A
Medical Expenses—Past and Future (Economic Damage)

[*Insert number, e.g.,* **"1."] [Past] [and] [future] medical expenses.**

[To recover damages for past medical expenses, [*name of plaintiff***] must prove the reasonable cost of reasonably necessary medical care that [he/she] has received.]**

[To recover damages for future medical expenses, [*name of plaintiff***] must prove the reasonable cost of reasonably necessary medical care that [he/she] is reasonably certain to need in the future.]**

SOURCES AND AUTHORITY

- "[A] person injured by another's tortuous conduct is entitled to recover the reasonable value of medical care and services reasonably required and attributable to the tort." (*Hanif v. Housing Authority of Yolo County* (1988) 200 Cal.App.3d 635, 640 [246 Cal.Rptr. 192], internal citations omitted.)

- "It is established that 'the reasonable value of nursing services required by the defendant's tortious conduct may be recovered from the defendant even though the services were rendered by members of the injured person's family and without an agreement or expectation of payment. Where services in the way of attendance and nursing are rendered by a member of the plaintiff's family, the amount for which the defendant is liable is the amount for which reasonably competent nursing and attendance by others could have been obtained. The fact that the injured party had a legal right to the nursing services (as in the case of a spouse) does not, as a general rule, prevent recovery of their value ... ." (*Hanif, supra,* 200 Cal.App.3d at pp. 644–645, internal citations omitted.)

- "Nor is it necessary that the amount of the award equal the alleged medical expenses for it has long been the rule that the costs alone of medical treatment and hospitalization do not govern the recovery of such expenses. It must be shown additionally that the services were attributable to the accident, that they were necessary, and that the charges for such services were reasonable." (*Dimmick v. Alvarez* (1961) 196 Cal.App.2d 211, 216 [16 Cal.Rptr. 308].)

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- "Implicit in the … cases is the notion that a plaintiff is entitled to recover up to, and no more than, the actual amount expended or incurred for past medical services so long as that amount is reasonable." (*Hanif, supra,* 200 Cal.App.3d at p 643.)

- " 'To entitle a plaintiff to recover present damages for apprehended future consequences, there must be evidence to show such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury.' " (*Bellman v. San Francisco High School Dist.* (1938) 11 Cal.2d 576, 588 [81 P.2d 894], internal citation omitted.)

Secondary Sources

- California Tort Damages (Cont.Ed.Bar 1988) Bodily Injury, §§ 1.19–1.31
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 5:12
- 4 Levy et al., California Torts (1985–2000) Medical Expenses and Economic Loss, §§ 52.01, 52.03
- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 1408

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2004B
Medical Monitoring—Toxic Exposure (Economic Damage)

[*Insert number, e.g.,* **"2."] The cost of future medical monitoring. To recover damages for this item, [***name of plaintiff***] must prove:**

1. **That as a result of the toxic exposure, the need for future monitoring is reasonably certain; and**

2. **That the monitoring is reasonable.**

In deciding these issues, you should consider the following:

(a) The significance and extent of [*name of plaintiff***]'s exposure to the chemical(s);**

(b) The toxicity of the chemical(s);

(c) The relative increase in [*name of plaintiff***]'s chance of getting the disease as a result of the exposure, when compared to:**
- **(i) [his/her] chances of developing the disease had [he/she] not been exposed, and**
- **(ii) the chances that members of the public at large will develop the disease;**

(d) The seriousness of the disease that may result from the exposure; [and]

(e) The medical benefit of early detection and diagnosis; [and]

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

[[*Name of defendant***] is not required to pay for medical monitoring that is required for reasons other than [***name of plaintiff***]'s exposure to toxic chemicals.]**

[[*Name of defendant***] is only required to pay for additional or different monitoring that is required because of the toxic exposure.]**

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SOURCES AND AUTHORITY

- "In the context of a toxic exposure action, a claim for medical monitoring seeks to recover the cost of future periodic medical examinations intended to facilitate early detection and treatment of disease caused by a plaintiff's exposure to toxic substances." (*Potter v. Firestone Tire and Rubber Co.* (1993) 6 Cal.4th 965, 1004–1005 [25 Cal.Rptr.2d 550], internal citation omitted.)

- "[W]e hold that the cost of medical monitoring is a compensable item of damages where the proofs demonstrate, through reliable medical expert testimony, that the need for future monitoring is a reasonably certain consequence of a plaintiff's toxic exposure and that the recommended monitoring is reasonable. In determining the reasonableness and necessity of monitoring, the following factors are relevant: (1) the significance and extent of the plaintiff's exposure to chemicals; (2) the toxicity of the chemicals; (3) the relative increase in the chance of onset of disease in the exposed plaintiff as a result of the exposure, when compared to (a) the plaintiff's chances of developing the disease had he or she not been exposed, and (b) the chances of the members of the public at large of developing the disease; (4) the seriousness of the disease for which the plaintiff is at risk; and (5) the clinical value of early detection and diagnosis. Under this holding, it is for the trier of fact to decide, on the basis of competent medical testimony, whether and to what extent the particular plaintiff's exposure to toxic chemicals in a given situation justifies future periodic medical monitoring." (*Potter, supra*, 6 Cal.4th at p. 1009.)

- "The crucial distinction, in other words, is in the nature of the monitoring, not the nature of the harm. '[E]ven if a defendant negligently exposes a smoker to toxins that significantly increase the smoker's risk of cancer, that defendant is not liable for reasonably certain future medical monitoring costs unless the recommended monitoring calls for tests or examinations that are in addition to or different from the type of monitoring that the smoker should prudently undertake regardless of the subsequent toxic exposure.' This accords with the policy concern being addressed in that part of [*Potter*], which was to avoid 'open[ing] the floodgates of litigation.' If 'the plaintiff already remains responsible for any monitoring that is shown to be medically advisable due solely to his or her smoking or other preexisting condition,' he or she will have no incentive to sue for contribution from a subsequent tortfeasor who has caused no need for additional or different monitoring." (*Gutierrez v. Cassiar Mining Corp.* (1998) 64 Cal.App.4th 148, 156 [75 Cal.Rptr.2d 132], internal citations omitted.)

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Secondary Sources

- California Tort Damages (Cont.Ed.Bar 2001 supp.) Bodily Injury, § 1.20A
- 4 Levy et al., California Torts (1985–2000) Medical Expenses and Economic Loss, § 52.01[3][b]
- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 1408

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2004C
Past and Future Lost Earnings (Economic Damage)

[*Insert number, e.g.,* **"3."] [Past] [and] [future] lost earnings.**

[To recover damages for past lost earnings, [*name of plaintiff***] must prove the amount of [***insert one or more of the following:* **income/earnings/salary/wages] that [he/she] has lost to date.]**

[To recover damages for future lost earnings, [*name of plaintiff***] must prove the amount of [***insert one or more of the following:* **income/earnings/salary/ wages] [he/she] will be reasonably certain to lose in the future as a result of the injury.]**

DIRECTIONS FOR USE

This instruction is not intended for use in employment cases.

SOURCES AND AUTHORITY

- "We know of no rule of law that requires that a plaintiff establish the amount of his actual earnings at the time of the injury in order to obtain recovery for loss of wages although, obviously, the amount of such earnings would be helpful to the jury in particular situations." (*Rodriguez v. McDonnell Douglas Corp.* (1979) 87 Cal.App.3d 626, 656 [151 Cal.Rptr. 399].)

- " 'To entitle a plaintiff to recover present damages for apprehended future consequences, there must be evidence to show such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury.' " (*Bellman v. San Francisco High School Dist.* (1938) 11 Cal.2d 576, 588 [81 P.2d 894], internal citation omitted.)

- The Supreme Court has stated: " 'Under the prevailing American rule, a tort victim suing for damages for permanent injuries is permitted to base his recovery "on his prospective earnings for the balance of his life expectancy at the time of his injury undiminished by any shortening of that expectancy as a result of the injury." ' " (*Fein*

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v. Permanente Medical Group (1985) 38 Cal.3d 137, 153 [211 Cal.Rptr. 368], internal citations omitted.)

- "[T]he majority view is that no deduction is made for the injured party's expected living expenses during the lost years." (*Overly v. Ingalls Shipbuilding, Inc.* (1999) 74 Cal.App.4th 164, 171 [87 Cal.Rptr.2d 626], internal citations omitted.)

Secondary Sources

- California Tort Damages (Cont.Ed.Bar 1988) Bodily Injury, §§ 1.39–1.41
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 5:15
- 4 Levy et al., California Torts (1985–2000) Medical Expenses and Economic Loss, §§ 52.10–52.11
- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1404–1405

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2004D
Lost Earning Capacity (Economic Damage)

[*Insert number, e.g.,* **"4."] The loss of [***name of plaintiff***]'s ability to earn money.**

To recover damages for the loss of the ability to earn money, [*name of plaintiff***] must prove the amount of money [he/she] could have been reasonably certain to earn if the injury had not occurred. It does not matter if [he/she] has no work history.**

DIRECTIONS FOR USE

This instruction is not intended for use in employment cases.

If lost profits are asserted as an element of damages, see Instruction 2004N, *Lost Profits (Economic Damage).*

SOURCES AND AUTHORITY

- "Damages may be awarded for lost earning capacity without any proof of actual loss of earnings." (*Heiner v. Kmart Corp.* (2000) 84 Cal.App.4th 335, 348, fn. 6 [100 Cal.Rptr.2d 854], internal citations omitted.)

- "Loss of earning power is an element of general damages which can be inferred from the nature of the injury, without proof of actual earnings or income either before or after the injury, and damages in this respect are awarded for the loss of ability thereafter to earn money." (*Connelly v. Pre-Mixed Concrete Co.* (1957) 49 Cal.2d 483, 489 [319 P.2d 343].)

- " 'To entitle a plaintiff to recover present damages for apprehended future consequences, there must be evidence to show such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury.' " (*Bellman v. San Francisco High School Dist.* (1938) 11 Cal.2d 576, 588 [81 P.2d 894], internal citation omitted.)

- "[I]t is not necessary for a party to produce expert testimony on future earning ability although some plaintiff's attorneys may choose as a matter of trial tactics to present

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such evidence." (*Gargir v. B'Nei Akiva* (1998) 66 Cal.App.4th 1269, 1282 [78 Cal.Rptr.2d 557], internal citations omitted.)

- The Supreme Court has stated: " 'Under the prevailing American rule, a tort victim suing for damages for permanent injuries is permitted to base his recovery "on his prospective earnings for the balance of his life expectancy at the time of his injury undiminished by any shortening of that expectancy as a result of the injury." ' " (*Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137, 153 [211 Cal.Rptr. 368], internal citations omitted.)

- "[T]he majority view is that no deduction is made for the injured party's expected living expenses during the lost years." (*Overly v. Ingalls Shipbuilding, Inc.* (1999) 74 Cal.App.4th 164, 171 [87 Cal.Rptr.2d 626], internal citations omitted.)

Secondary Sources

- California Tort Damages (Cont.Ed.Bar 1988) Bodily Injury, § 1.42
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 5:15
- 4 Levy et al., California Torts (1985–2000) Medical Expenses and Economic Loss, §§ 52.10–52.11
- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1404–1405

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2004E
Loss of Ability to Provide Household Services (Economic Damage)

[*Insert number, e.g.,* **"5."] The loss of [***name of plaintiff***]'s ability to provide household services.**

To recover damages for the loss of the ability to provide household services, [*name of plaintiff***] must prove the reasonable value of the services [he/she] would have been reasonably certain to provide to [his/her] household if the injury had not occurred.**

SOURCES AND AUTHORITY

- "Although the parties do not distinguish between the different types of lost years damages that were awarded, we note that lost household services damages are different than the other types of future earnings included in this category. Generally, household services damages represent the detriment suffered when injury prevents a person from contributing some or all of his or her customary services to the family unit. The justification for awarding this type of damage as part of the loss of future earnings award is that the plaintiff should be compensated for the value of the services he would have performed during the lost years which, because of the injury, will now have to be performed by someone else. (*Overly v. Ingalls Shipbuilding, Inc.* (1999) 74 Cal.App.4th 164, 170, fn. 5 [87 Cal.Rptr.2d 626], internal citation omitted.)

- " 'To entitle a plaintiff to recover present damages for apprehended future consequences, there must be evidence to show such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury.' " (*Bellman v. San Francisco High School Dist.* (1938) 11 Cal.2d 576, 588 [81 P.2d 894], internal citation omitted.)

<u>Secondary Sources</u>

- California Tort Damages (Cont.Ed.Bar 1988) Bodily Injury, §§ 1.64–1.66

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2004F
Damage to Real Property (Economic Damage)

[*Insert number, e.g.,* **"6."] The harm to [***name of plaintiff***]'s property.**

To recover damages for harm to property, [*name of plaintiff***] must prove the reduction in the property's value or the reasonable cost of repairing the harm. [If there is evidence of both, [***name of plaintiff***] is entitled to the lesser of the two amounts.]**

To determine the reduction in value, you must determine the fair market value of the property before the harm occurred and then subtract the fair market value of the property immediately after the harm occurred.

"Fair market value" is the highest price for the property that a willing buyer would have paid to a willing seller, assuming:

1. **That there is no pressure on either one to buy or sell; and**

2. **That the buyer and seller know all the uses and purposes for which the property is reasonably capable of being used.**

[If [*name of plaintiff***] has a genuine desire to repair the property for personal reasons, and if the costs of repair are reasonable given the damage to the property and the value after repair, then the costs of repair may be awarded even if they exceed the property's loss of value.]**

DIRECTIONS FOR USE

Before the last bracketed sentence is given, the judge should decide whether the claimed personal reasons are legally sufficient to justify the costs of repair.

SOURCES AND AUTHORITY

- "The measure applicable to ordinary cases involving tortious injury to real property is 'diminution in value' or 'cost of repair,' whichever is less." (*Housley v. City of Poway* (1993) 20 Cal.App.4th 801, 810 [24 Cal.Rptr.2d 554], internal citations omitted.)

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- "Diminution in market value …, is not an absolute limitation; several other theories are available to fix appropriate compensation for the plaintiff's loss. 'There is no fixed, inflexible rule for determining the measure of damages for injury to, or destruction of, property; whatever formula is most appropriate to compensate the injured party for the loss sustained in the particular case will be adopted.' " (*Henninger v. Dunn* (1980) 101 Cal.App.3d 858, 862 [162 Cal.Rptr. 104].)

- "Courts will normally not award costs of restoration if they exceed the diminution in the value of the property; the plaintiff may be awarded the lesser of the two amounts." (*Henninger, supra*, 101 Cal.App.3d at p. 862.)

- "Defendant … contends that the trial court awarded excessive damages, on the ground that when the cost of restoration is less than the depreciation in value, the former is the measure of damages. This contention cannot be sustained. Plaintiffs established their damages by showing the depreciation in value. It was then incumbent upon defendants to come forward with proof that the cost of restoration would be less." (*Herzog v. Grosso* (1953) 41 Cal.2d 219, 226 [259 P.2d 429], internal citations omitted.)

- "Where a plaintiff establishes damages by showing depreciation in the value of real property, courts have held defendants to the burden of coming forward with proof that cost of restoration would be less. It follows that when a plaintiff proves damages by showing the cost of repairs it should be incumbent on the defendant to introduce evidence that the repair costs exceed the value of the property." (*Armitage v. Decker* (1990) 218 Cal.App.3d 887, 905 [267 Cal.Rptr. 399], internal citations omitted.)

- "The 'fair market value' of real property is 'the best price obtainable from a purchaser on a cash sale.' It 'is measured by the highest price the property would command if offered for sale in the open market with a reasonable time allowed to the seller to find a purchaser who will buy with a knowledge of all the uses to which it may be put.' " (*CMSH Co. v. Antelope Development, Inc.* (1990) 223 Cal.App.3d 174, 182 [272 Cal.Rptr. 605], internal citations omitted.)

- "Where, as here, the plaintiffs have a personal reason to repair and the costs of repair are not unreasonable in light of the damage to the property and the value after repair, costs of repair which exceed the diminution in value may be awarded." (*Orndorff v. Christiana Community Builders* (1990) 217 Cal.App.3d 683, 687 [266 Cal.Rptr. 193], internal citations omitted.)

- "Contrary to the defendants' argument, the 'personal reason' exception does not require that the [plaintiffs] own a 'unique' home. Rather, all that is required is some

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personal use by them and a bona fide desire to repair or restore." (*Orndorff, supra*, 217 Cal.App.3d at p. 688.)

Secondary Sources

- California Real Property Remedies Practice (Cont.Ed.Bar 1982) Damages for Injury to Real Property, § 11.5
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 5:19
- 4 Levy et al., California Torts (1985–2000) Medical Expenses and Economic Loss, § 52.35
- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1461–1462

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2004G
Loss of Use of Real Property (Economic Damage)

[*Insert number, e.g.,* **"7."] The loss of use of [***name of plaintiff***]'s [***insert identification of real property***].**

To recover damages for the loss of use, [*name of plaintiff***] must prove the reasonable cost to rent similar property for the time when [he/she/it] could not use [his/her/its] own property.**

DIRECTIONS FOR USE

This instruction is not intended for cases in which the plaintiff is a landlord seeking to recover compensation for lost rents. A more appropriate instruction for that situation is Instruction 2004N, *Lost Profits (Economic Damage)*.

SOURCES AND AUTHORITY

- "[T]he general measure of damages where injury to property is capable of being repaired is the reasonable cost of repair together with the value of lost use during the period of injury." (*Erlich v. Menezes* (1999) 21 Cal.4th 543, 555 [87 Cal.Rptr.2d 886], internal citation omitted.)

- "There is no question that when cost of restoration is the correct measure of damages for injury to real property, compensation for loss of use … would be appropriate." (*Ferraro v. Southern California Gas Co.* (1980) 102 Cal.App.3d 33, 51 [162 Cal.Rptr. 238].)

- When real property has been damaged so that it cannot be restored, damages for loss of use may not be recovered. (*Ferraro, supra,* 102 Cal.App.3d at pp. 50–51.)

- Restatement Second of Torts section 931 provides:

  > If one is entitled to a judgment for the detention of, or for preventing the use of, land or chattels, the damages include compensation for
  > (a) the value of the use during the period of detention or prevention or the value of the use of or the amount paid for a substitute, and

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(b) harm to the subject matter or other harm of which the detention is the legal cause.

Secondary Sources

- California Real Property Remedies Practice (Cont.Ed.Bar 1982) Damages for Injury to Real Property, § 11.5
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 5:19
- 4 Levy et al., California Torts (1985–2000) Medical Expenses and Economic Loss, § 52.36
- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 1462

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2004H
Damage to Annual Crop (Economic Damage)

[*Insert number, e.g.,* **"8."] The harm to [***name of plaintiff***]'s crop.**

[Damages for the destruction of an entire annual crop are determined as follows:

1. **Determine the expected market value of the crop before the harm occurred; and**

2. **Subtract from this amount the estimated costs of producing and marketing the crop, excluding costs that have already been paid by [***name of plaintiff***].]**

[Damages for the destruction of part of an annual crop are determined as follows:

1. **Determine the expected market value of the crop before the harm occurred;**

2. **Subtract from this amount the estimated costs of producing and marketing the crop. This is the expected net profit.**

3. **Next, subtract the actual cost of producing and marketing the surviving crop from the actual receipts. This is actual net profit.**

4. **Subtract number 3 from number 2. This amount is [***name of plaintiff***]'s damages for this loss.]**

DIRECTIONS FOR USE

Select one of the bracketed options depending on whether the plaintiff is seeking damages for the destruction of all or part of a crop.

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SOURCES AND AUTHORITY

- "They rely on the distinction drawn between the wrongful destruction of perennial crops, such as volunteer grass for grazing purposes, and annually planted crops. Thus, in the former case the proper measure of damages is the difference in the rental value of the property with and without the crops, while in the latter case the proper measure of damages is the market value of the estimated product at the time of destruction, less the cost of producing and marketing the same." (*Wolfsen v. Hathaway* (1948) 32 Cal.2d 632, 644 [198 P.2d 1], internal citations omitted, overruled on other grounds in *Flores v. Arroyo* (1961) 56 Cal.2d 492 [15 Cal.Rptr. 87].)

- "We concede that the proper method is to show what the crop would have been and to deduct the probable cost of producing and selling such crop with the difference between market value and costs constituting the amount of damages. We have so held in [cited cases]. The rule is clearly set forth also in other California cases and authorities." (*Spinelli v. Tallcott* (1969) 272 Cal.App.2d 589, 592 [77 Cal.Rptr. 481], internal citations omitted.)

- "The proper measure of damages is the market value of the estimated product at the time of destruction, less the cost of producing and marketing the same." (*Parks v. Atwood Crop Dusters, Inc.* (1953) 118 Cal.App.2d 368, 373 [257 P.2d 653], internal citation omitted.)

- "The correct rule for the measurement of damages for the partial destruction of a growing crop was discussed in *Rystrom v. Sutter Butte Canal Co.*, 72 Cal.App. 518, 522-523 [249 P. 53]. In that case a growing crop of rice had been damaged. The court pointed out that estimated costs of production must first be deducted from expected gross receipts to arrive at the expected net profit. Next, the court said, actual cost of production must be deducted from actual receipts to arrive at actual net profit. Finally, deducting actual net profit from expected net profit fixes the actual damage." (*Solis v. County of Contra Costa* (1967) 251 Cal.App.2d 844, 847–848 [60 Cal.Rptr. 99].)

<u>Secondary Sources</u>

- California Real Property Remedies Practice (Cont.Ed.Bar 1982) Damages for Injury to Real Property, § 11.14
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 5:19
- 4 Levy et al., California Torts (1985–2000) Medical Expenses and Economic Loss, § 52.34[1]
- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 1469

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2004I
Damage to Perennial Crop (Economic Damage)

[*Insert number, e.g.,* **"9."] The harm to [***name of plaintiff***]'s crop.**

[Damages for destruction of [*describe perennial crop***] are determined as follows. For the time period from the destruction of the crop until the crop can be restored you must:**

1. **Determine the rental value of the land with the crop; and**

2. **Subtract from this amount the rental value of the land without the crop.]**

[Damages for destruction of [*describe perennial crop***], which can be harvested and sold, are determined as follows:**

1. **Determine the expected market value of the crop before the harm occurred; and**

2. **Subtract from this amount the estimated costs of producing and marketing the crop, excluding costs that have already been paid by [***name of plaintiff***].]**

[If the [plants/roots/seeds] responsible for producing the crop are destroyed, the measure of damages may also include the costs of [reseeding/replanting].]

DIRECTIONS FOR USE

If the plaintiff claims damages for multiple crops, damages must be calculated for each crop that would have been produced until the land was restored.

SOURCES AND AUTHORITY

- "They rely on the distinction drawn between the wrongful destruction of perennial crops, such as volunteer grass for grazing purposes, and annually planted crops. Thus, in the former case the proper measure of damages is the difference in the rental value of the property with and without the crops, while in the latter case the proper measure

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of damages is the market value of the estimated product at the time of destruction, less the cost of producing and marketing the same." (*Wolfsen v. Hathaway* (1948) 32 Cal.2d 632, 644 [198 P.2d 1], internal citations omitted, overruled on other grounds in *Flores v. Arroyo* (1961) 56 Cal.2d 492 [15 Cal.Rptr. 87].)

- "Where the roots of the grass in a pasture have been destroyed by water or fire so as to prevent the matured stocks from automatically reseeding the field, the measure of damages includes not only the rental value of the pasture, but also the additional cost of reseeding the field." (*Miller & Lux, Inc. v. Pinelli* (1927) 84 Cal.App. 42, 49 [257 P. 573].)

- "Upon the foregoing authorities, and upon good reason, we conclude that the measure of damages for the appropriation or destruction of pasturage, which is used for grazing purposes, where the grass cannot be reasonably severed and marketed separate from the land, is the reasonable rental value thereof in that vicinity for pasture purposes." (*Miller & Lux, Inc., supra*, 84 Cal.App. at p. 51.)

- "The measure of damages for the destruction of or injury to fruit, nut, or other productive trees is generally the difference in the value of the land before and after the destruction or injury. Damages may be additionally measured by the value of the trees on the premises in their growing state. Some courts have also awarded damages for the resulting crop loss. Where annual crops are damaged each year for several years, a grower may recover for loss of the crops during those years, the increased labor in the care of the land, and damages for injury to the trees themselves. [¶] More recently, the measure of damages for the destruction of fruit trees has included the costs of replacing the trees or restoring the property to its condition prior to the injury. In *Baker v. Ramirez*, the court held that the cost of restoring an orange grove was the most appropriate measure of damages, where there was no impediment to replacing the orange trees and it was reasonable to replace the trees because only a small portion of the grove was damaged. The court noted that the difference between the value of the property before and after the injury was only one possible measure of damages." (*Santa Barbara Pistachio Ranch v. Chowchilla Water Dist.* (2001) 88 Cal.App.4th 439, 447 [105 Cal.Rptr.2d 856, 861], internal citations omitted.)

<u>Secondary Sources</u>

- California Real Property Remedies Practice (Cont.Ed.Bar 1982) Damages for Injury to Real Property, § 11.14
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 5:19
- 4 Levy et al., California Torts (1985–2000) Medical Expenses and Economic Loss, § 52.34[1]
- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 1469

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2004J
Damage to Personal Property (Economic Damage)

[*Insert number, e.g.,* **"10."] The harm to [***name of plaintiff***]'s [***item of personal property***].**

To recover damages for harm to personal property, [*name of plaintiff***] must prove the reduction in the [***item of personal property***]'s value or the reasonable cost of repairing it, whichever is less. [If there is evidence of both, [***name of plaintiff***] is entitled to the lesser of the two amounts.]**

To determine the reduction in value, you must determine the fair market value of the [*item of personal property***] before the harm occurred and then subtract the fair market value of the [***item of personal property***] immediately after the harm occurred.**

"Fair market value" is the highest price that a willing buyer would have paid to a willing seller, assuming:

1. **That there is no pressure on either one to buy or sell; and**

2. **That the buyer and seller are fully informed of the condition and quality of the [***item of personal property***].**

[If you find that [*name of plaintiff***]'s [***item of personal property***] cannot be completely repaired, the damages are the difference between its value before the harm and its value after the repairs have been made, plus the reasonable cost of making the repairs. The total amount awarded must not exceed the [***item of personal property***]'s value before the harm occurred.]**

SOURCES AND AUTHORITY

- " 'The general rule is that the measure of damages for tortious injury to personal property is the difference between the market value of the property immediately before and immediately after the injury, or the reasonable cost of repair if that cost be less than the diminution in value. This rule stems from the basic code section fixing the measure of tort damage as "the amount which will compensate for all the

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detriment proximately caused thereby." ' " (*Pacific Gas & Electric Co. v. Mounteer* (1977) 66 Cal.App.3d 809, 812 [136 Cal.Rptr. 280], internal citations omitted.)

- "It has also been held that the price at which a thing can be sold at public sale, or in the open market, is some evidence of its market value. In *San Diego Water Co. v. San Diego,* the rule is announced that the judicial test of market value depends upon the fact that the property in question is marketable at a given price, which in turn depends upon the fact that sales of similar property have been, and are being, made at ascertainable prices. In *Quint v. Dimond,* it was held competent to prove market value in the nearest market." (*Tatone v. Chin Bing* (1936) 12 Cal.App.2d 543, 545–546 [55 P.2d 933], internal citations omitted.)

- " 'Where personal property is injured but not wholly destroyed, one rule is that the plaintiff may recover the depreciation in value (the measure being the difference between the value immediately before and after the injury), and compensation for the loss of use.' In the alternative, the plaintiff may recover the reasonable cost of repairs as well as compensation for the loss of use while the repairs are being accomplished. If the cost of repairs exceeds the depreciation in value, the plaintiff may only recover the lesser sum. Similarly, if depreciation is greater than the cost of repairs, the plaintiff may only recover the reasonable cost of repairs. If the property is wholly destroyed, the usual measure of damages is the market value of the property." (*Hand Electronics, Inc. v. Snowline Joint Unified School Dist.* (1994) 21 Cal.App.4th 862, 870 [26 Cal.Rptr.2d 446], internal citations omitted.)

- The cost of replacement is not a proper measure of damages for injury to personal property. (*Hand Electronics, supra,* 21 Cal.App.4th at p. 871.)

- "When conduct complained of consists of intermeddling with personal property 'the owner has a cause of action for trespass or case, and may recover only the actual damages suffered by reason of the impairment of the property or the loss of its use.' " (*Itano v. Colonial Yatch Anchorage* (1968) 267 Cal.App.2d 84, 90 [72 Cal.Rptr. 823], internal citations omitted.)

- "The measure of damage for wrongful injury to personal property is that difference between the market value of the property immediately before and immediately after the injury, or the reasonable cost of repair if such cost be less than the depreciation in value." (*Smith v. Hill* (1965) 237 Cal.App.2d 374, 388 [47 Cal.Rptr. 49], internal citations omitted.)

- "[I]t is said that 'if the damaged property cannot be completely repaired, the measure of damages is the difference between its value before the injury and its value after the

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repairs have been made, plus the reasonable cost of making the repairs. The foregoing rule gives the plaintiff the difference between the value of the machine before the injury and its value after such injury, the amount thereof being made up of the cost of repairs and the depreciation notwithstanding such repairs.' The rule urged by defendant, which limits the recovery to the cost of repairs, is applicable only in those cases in which the injured property 'can be entirely repaired.' This latter rule presupposes that the damaged property can be restored to its former state with no depreciation in its former value." (*Merchant Shippers Association v. Kellogg Express And Draying Co.* (1946) 28 Cal.2d 594, 600 [170 P.2d 923], internal citations omitted.)

Secondary Sources

- California Tort Damages (Cont.Ed.Bar 1988) Vehicles and Other Personal Property, §§ 13.8–13.11
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 5:16
- 4 Levy et al., California Torts (1985–2000) Medical Expenses and Economic Loss, § 52.31
- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1449–1452

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2004K
Loss or Destruction of Personal Property (Economic Damage)

[*Insert number, e.g.,* **"11."] The [loss/destruction] of [***name of plaintiff***]'s [***item of personal property***].**

To recover damages for the [loss/destruction], [*name of plaintiff***] must prove the fair market value of the [***item of personal property***] just before the harm occurred.**

"Fair market value" is the highest price that a willing buyer would have paid to a willing seller, assuming:

1. **That there is no pressure on either one to buy or sell; and**

2. **That the buyer and seller are fully informed of the condition and quality of the [***item of personal property***].**

SOURCES AND AUTHORITY

- " 'As a general rule the measure of damage for the loss or destruction of personal property is the value of the property at the time of such loss or destruction.' " (*Hand Electronics, Inc. v. Snowline Joint Unified School Dist.* (1994) 21 Cal.App.4th 862, 870 [26 Cal.Rptr.2d 446], internal citation omitted.)

- "It is well established that under [Civil Code] section 3333, the measure of damages for the loss or destruction of personal property is generally determined by the value of the property at the time of such loss or destruction." (*Pelletier v. Eisenberg* (1986) 177 Cal.App.3d 558, 567 [233 Cal.Rptr. 84].)

Secondary Sources

- California Tort Damages (Cont.Ed.Bar 1988) Vehicles & Other Personal Property, § 13.6
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 5:17
- 4 Levy et al., California Torts (1985–2000) Medical Expenses and Economic Loss, § 52.32
- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 1453

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2004L
Damage to Personal Property Having Special Value (Civ. Code, § 3355) (Economic Damage)

[*Insert number, e.g.,* **"12."] The unique value of [***name of plaintiff***]'s [***item of personal property***].**

To recover damages for the unique value, [*name of plaintiff***] must prove:**

1. **That the [***item of personal property***] had some market value;**

2. **That the [***item of personal property***] had unique value to [***name of plaintiff***]; and**

3. **[That [***name of defendant***] had notice of this unique value before the harm;]**

   [or]

   [That [*name of defendant***]'s conduct was intentional and wrongful.]**

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

DIRECTIONS FOR USE

The subcommittee recommends that the judge determine whether the peculiar value claimed by the plaintiff is legally sufficient. While the subcommittee been unable to locate cases that state this rule explicitly, cases have upheld the giving of this type of instruction where there is substantial evidence of peculiar value.

SOURCES AND AUTHORITY

- Civil Code section 3355 provides: "Where certain property has a peculiar value to a person recovering damages for deprivation thereof, or injury thereto, that may be deemed to be its value against one who had notice thereof before incurring a liability to damages in respect thereof, or against a willful wrongdoer."

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- "[T]his section deals with property which has a market value and also a peculiar value to the owner, and not with property having no market value." (*Zvolanek v. Bodger Seeds* (1935) 5 Cal.App.2d 106 [42 P.2d 92], internal citation omitted.)

- "[T]he question of whether plaintiff proved 'peculiar value' was a factual question for the determination of the jury and that question was properly submitted to it for decision." (*King v. Karpe* (1959) 170 Cal.App.2d 344, 349 [338 P.2d 979].)

Secondary Sources

- California Tort Damages (Cont.Ed.Bar 1988) Vehicles and Other Personal Property, § 13.7
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 5:17
- 4 Levy et al., California Torts (1985–2000) Medical Expenses and Economic Loss, § 52.33

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2004M
Loss of Use of Personal Property (Economic Damage)

[*Insert number, e.g.,* **"13."] The loss of use of [***name of plaintiff***]'s [***item of personal property***].**

To recover damages for loss of use, [*name of plaintiff***] must prove the reasonable cost to rent a similar [***item of personal property***] for the amount of time reasonably necessary to repair or replace the [***item of personal property***].**

SOURCES AND AUTHORITY

- "An owner's recovery for being deprived of the use of a damaged vehicle is generally to be determined with reference to the period of time reasonably required for the making of repairs." (*Valencia v. Shell Oil Co*. (1944) 23 Cal.2d 840, 844 [147 P.2d 558].)

- "There appears to be no logical or practical reason why a distinction should be drawn between cases in which the property is totally destroyed and those in which it has been injured but is repairable, and we have concluded that when the owner of a negligently destroyed commercial vehicle has suffered injury by being deprived of the use of the vehicle during the period required for replacement, he is entitled, upon proper pleading and proof, to recover for loss of use in order to 'compensate for all the detriment proximately caused' by the wrongful destruction." (*Reynolds v. Bank of America National Trust & Savings Assn.* (1959) 53 Cal.2d 49, 50–51 [345 P.2d 926].)

- " 'Loss of use' of property is different from 'loss' of property. To take a simple example, assume that an automobile is stolen from its owner. The value of the 'loss of use' of the car is the rental value of a substitute vehicle; the value of the 'loss' of the car is its replacement cost. The nature of 'loss of use' damages is described in California Jurisprudence Third as: 'The measure of damages for the loss of use of personal property may be determined with reference to the rental value of similar property which the plaintiff can hire for use during the period when he is deprived of the use of his own property.' " (*Collin v. American Empire Insurance Co.* (1994) 21 Cal.App.4th 787, 818 [26 Cal.Rptr.2d 391], internal citations omitted.)

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Secondary Sources

- California Tort Damages (Cont.Ed.Bar 1988) Vehicles and Other Personal Property, § 13.6
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 5:17
- 4 Levy et al., California Torts (1985–2000) Medical Expenses and Economic Loss, § 52.32
- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 1454

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2004N
Lost Profits (Economic Damage)

[*Insert number, e.g.,* **"13."] Lost profits.**

To recover damages for lost profits, [*name of plaintiff***] must prove it is reasonably certain [he/she/it] would have earned profits but for [***name of defendant***]'s conduct.**

To decide the amount of damages for lost profits, you must determine the gross amount [*name of plaintiff***] was reasonably certain to have received and then subtract [his/her/its] [estimated/actual] costs [including the value of the [labor/materials/rents/all expenses/interest of the capital employed]].**

The amount of the lost profits need not be calculated with mathematical precision, but there must be a reasonable basis for computing the loss.

DIRECTIONS FOR USE

This instruction is not intended for personal injury cases. Instead, use Instruction 2004C, *Past and Future Lost Earnings (Economic Damage)*. (See *Pretzer v. California Transit Co.* (1930) 211 Cal. 202, 207–208 [294 P. 382].)

Insertion of specified types of costs to be deducted from gross earnings is optional, depending on the facts of the case. Other types of costs may be inserted as appropriate.

SOURCES AND AUTHORITY

- "The measure of damages in this state for the commission of a tort, as provided by statute, is that amount which will compensate the plaintiff for all detriment sustained by him as the proximate result of the defendant's wrong, regardless of whether or not such detriment could have been anticipated by the defendant. It is well established in California, moreover, that such damages may include loss of anticipated profits where an established business has been injured." (*Fibreboard Paper Products Corp. v. East Bay Union of Machinists, Local 1304, United Steelworkers of America, AFL-CIO* (1964) 227 Cal.App.2d 675, 702 [39 Cal.Rptr. 64], internal citations omitted.)

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- "[E]vidence of lost profits must be unspeculative and in order to support a lost profits award the evidence must show 'with reasonable certainty both their occurrence and the extent thereof.' " (*Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 907 [215 Cal.Rptr. 679], internal citation omitted.)

- "It is enough to demonstrate a reasonable probability that profits would have been earned except for the defendant's conduct. The plaintiff has the burden to produce the best evidence available in the circumstances to attempt to establish a claim for loss of profits." (*S. C. Anderson, Inc. v. Bank of America* (1994) 24 Cal.App.4th 529, 535 [30 Cal.Rptr.2d 286], internal citations omitted.)

- "Damages for loss of profits may be denied to an 'unestablished' or new business as being too uncertain and speculative if they cannot be calculated with reasonable certainty. 'The ultimate test is whether there has been "operating experience sufficient to permit a reasonable estimate of probable income and expense" … or, … "anticipated profits dependent upon future events are allowed where their nature and occurrence can be shown by evidence of reasonable reliability." ' " (*Maggio, Inc. v. United Farm Workers* (1991) 227 Cal.App.3d 847, 870 [278 Cal.Rptr. 250], internal citations omitted.)

- The rule denying profits to an unestablished business "is, however, 'not a hard and fast one.' The issue is, rather, whether the damages can be calculated with reasonable certainty." (*S. Jon Kreedman & Co. v. Meyers Bros. Parking-Western Corp.* (1976) 58 Cal.App.3d 173, 184–185 [130 Cal.Rptr. 41], internal citations omitted.)

- "Lost profits to an established business may be recovered if their extent and occurrence can be ascertained with reasonable certainty; once their existence has been so established, recovery will not be denied because the amount cannot be shown with mathematical precision. Historical data, such as past business volume, supply an acceptable basis for ascertaining lost future profits. In some instances, lost profits may be recovered where plaintiff introduces evidence of the profits lost by similar businesses operating under similar conditions. In either case, recovery is limited to net profits." (*Berge v. International Harvester Co.* (1983) 142 Cal.App.3d 152, 161–162 [190 Cal.Rptr. 815], internal citations omitted.)

- "If the occurrence and extent of anticipated profits is shown by evidence of reasonable reliability damages are recoverable; uncertainty as to the amount of damages is not fatal; uncertainties are to be resolved against [defendant]." (*Aronowicz v. Nalley's, Inc.* (1972) 30 Cal.App.3d 27, 40, fn. 11 [106 Cal.Rptr. 424], internal citations omitted.)

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Secondary Sources

- 4 Levy et al., California Torts (1985–2000) Medical Expenses and Economic Loss, §§ 52.12, 52.37
- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 1463

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2005
Present Cash Value

If you decide that [*name of plaintiff*]'s harm includes future [economic] damages for [loss of earnings/future medical expenses/lost profits/ [*insert other damages*]], then the amount of those future damages must be reduced to their present cash value. This is necessary because money received now will, through investment, grow to a larger amount in the future.

To find present cash value, you must determine the amount of money that, if reasonably invested today, will provide [*name of plaintiff*] with the amount of [his/her/its] future damages.

[You may consider expert testimony in determining the present cash value of future [economic] damages.]

[You will be provided with a table to help you calculate the present cash value.]

DIRECTIONS FOR USE

Give the second bracketed option if parties have stipulated to a discount rate or if evidence from which the jury can determine an appropriate discount rate has been presented. A table appropriate to this calculation should be provided. (See *Schiernbeck v. Haight* (1992) 7 Cal.App.4th 869, 877 [9 Cal.Rptr.2d 716].)

Tables [that will be] included in the appendix have limited application. In order to use the tables, the discount rate must be established by stipulation or by the evidence. Care must be taken that the table selected fits the circumstances in the case. Not all situations will be covered by the supplied tables. Expert testimony will usually be required to accurately establish present values for future economic losses. However, the tables may be helpful in many cases.

SOURCES AND AUTHORITY

- "The present value of a gross award of future damages is that sum of money prudently invested at the time of judgment which will return, over the period the future damages are incurred, the gross amount of the award. 'The concept of present value recognizes

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that money received after a given period is worth less than the same amount received today. This is the case in part because money received today can be used to generate additional value in the interim.' The present value of an award of future damages will vary depending on the gross amount of the award, and the timing and amount of the individual payments." (*Holt v. Regents of the University of California* (1999) 73 Cal.App.4th 871, 878 [86 Cal.Rptr.2d 752], internal citations omitted.)

- "Exact actuarial computation should result in a lump-sum, present-value award which if prudently invested will provide the beneficiaries with an investment return allowing them to regularly withdraw matching support money so that, by reinvesting the surplus earnings during the earlier years of the expected support period, they may maintain the anticipated future support level throughout the period and, upon the last withdrawal, have depleted both principal and interest." (*Canavin v. Pacific Southwest Airlines* (1983) 148 Cal.App.3d 512, 521 [196 Cal.Rptr. 82].)

- The Supreme Court has held that "it is not a violation of the plaintiff's jury trial right for the court to submit only the issue of the gross amount of future economic damages to the jury, with the timing of periodic payments—and hence their present value—to be set by the court in the exercise of its sound discretion." (*Salgado v. County of Los Angeles* (1999) 19 Cal.4th 629, 649 [80 Cal.Rptr.2d 46], internal citation omitted.)

- "Neither party introduced any evidence of compounding or discounting factors, including how to calculate an appropriate rate of return throughout the relevant years. Under such circumstances, the 'jury would have been put to sheer speculation in determining … "the present sum of money which … will pay to the plaintiff … the equivalent of his [future economic] loss … ." ' " (*Schiernbeck v. Haight* (1992) 7 Cal.App.4th 869, 877 [9 Cal.Rptr.2d 716], internal citations omitted.)

<u>Secondary Sources</u>

- California Tort Damages (Cont.Ed.Bar 1988) Bodily Injury, § 1.96
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 5:22
- 4 Levy et al., California Torts (1985–2000) Medical Expenses and Economic Loss, §§ 52.21–52.22
- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 1326

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2006
Items of Noneconomic Damage

The following are the specific items of noneconomic damages claimed by [*name of plaintiff*]:

[*Insert applicable instructions on items of noneconomic damage.*]

DIRECTIONS FOR USE

This instruction may not be needed in every case. For example, if the plaintiff is not claiming any economic damages, there is no need to define the claimed damages as "noneconomic." If this instruction is used, it should be followed by applicable instructions concerning the items of noneconomic damage claimed by the plaintiff. These instructions should be inserted into this instruction as sequentially numbered items.

Secondary Sources

- California Tort Damages (Cont.Ed.Bar 1988) Bodily Injury, § 1.5
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 5:4
- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, § 53

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2006A
Physical Pain and Mental Suffering
(Noneconomic Damage)

[*Insert number, e.g.,* **"1."] [Past] [and] [future] [physical pain/mental suffering/loss of enjoyment of life/disfigurement/physical impairment/ inconvenience/grief/anxiety/humiliation/emotional distress [***insert other damages***]].**

[To recover for future [*insert item of pain and suffering***], [***name of plaintiff***] must prove that [he/she] is reasonably certain to suffer that harm.]**

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

[Your award for noneconomic damages should not be reduced to present cash value.]

DIRECTIONS FOR USE

Insert the bracketed terms that best describe the damages claimed by the plaintiff.

SOURCES AND AUTHORITY

- "In general, courts have not attempted to draw distinctions between the elements of 'pain' on the one hand, and 'suffering' on the other; rather, the unitary concept of 'pain and suffering' has served as a convenient label under which a plaintiff may recover not only for physical pain but for fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation, indignity, embarrassment, apprehension, terror or ordeal. Admittedly these terms refer to subjective states, representing a detriment which can be translated into monetary loss only with great difficulty. But the detriment, nevertheless, is a genuine one that requires compensation, and the issue generally must be resolved by the 'impartial conscience and judgment of jurors who may be expected to act reasonably, intelligently and in harmony with the evidence.' " (*Capelouto v. Kaiser Foundation Hospitals* (1972) 7 Cal.3d 889, 892–893 [103 Cal.Rptr. 856], internal citations and footnote omitted.)

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- "Compensatory damages may be awarded for bodily harm without proof of pecuniary loss. The fact that there is no market price calculus available to measure the amount of appropriate compensation does not render such a tortious injury noncompensable. 'For harm to body, feelings or reputation, compensatory damages reasonably proportioned to the intensity and duration of the harm can be awarded without proof of amount other than evidence of the nature of the harm. There is no direct correspondence between money and harm to the body, feelings or reputation. There is no market price for a scar or for loss of hearing since the damages are not measured by the amount for which one would be willing to suffer the harm. The discretion of the judge or jury determines the amount of recovery, the only standard being such an amount as a reasonable person would estimate as fair compensation.' " (*Duarte v. Zachariah* (1994) 22 Cal.App.4th 1652, 1664–1665 [28 Cal.Rptr.2d 88], internal citations omitted.)

- "The general rule of damages in tort is that the injured party may recover for all detriment caused whether it could have been anticipated or not. In accordance with the general rule, it is settled in this state that mental suffering constitutes an aggravation of damages when it naturally ensues from the act complained of, and in this connection mental suffering includes nervousness, grief, anxiety, worry, shock, humiliation and indignity as well as physical pain." (*Crisci v. The Security Insurance Co. of New Haven* (1967) 66 Cal.2d 425, 433 [58 Cal.Rptr. 13], internal citations omitted.)

- " 'To entitle a plaintiff to recover present damages for apprehended future consequences, there must be evidence to show such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury.' " (*Bellman v. San Francisco High School Dist.* (1938) 11 Cal.2d 576, 588 [81 P.2d 894], internal citation omitted.)

- "To avoid confusion regarding the jury's task in future cases, we conclude that when future noneconomic damages are sought, the jury should be instructed expressly that they are to assume that an award of future damages is a present value sum, i.e., they are to determine the amount in current dollars paid at the time of judgment that will compensate a plaintiff for future pain and suffering. In the absence of such instruction, unless the record clearly establishes otherwise, awards of future damages will be considered to be stated in terms of their present or current value." (*Salgado v. County of Los Angeles* (1998) 19 Cal 4th 629, 646–647 [80 Cal.Rptr.2d 46].)

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Secondary Sources

- California Tort Damages (Cont.Ed.Bar 1988) Bodily Injury, §§ 1.68–1.74
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 5:10
- 4 Levy et al., California Torts (1985–2000) Pain and Suffering, §§ 51.01–51.14
- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1409–1413

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2007
Loss of Consortium (Noneconomic Damage)

[*Name of plaintiff*] claims that [he/she] has been harmed by the injury to [his/her] [husband/wife]. If you decide that [*name of injured spouse*] has proved [his/her] claim against [*name of defendant*], you also must decide how much money, if any, will reasonably compensate [*name of plaintiff*] for loss of [his/her] [husband/wife]'s companionship and services, including:

1. **The loss of love, companionship, comfort, care, assistance, protection, affection, society, moral support; and**

2. **The loss of the enjoyment of sexual relations or the ability to have children.**

[*Name of plaintiff*] may recover for harm [he/she] proves [he/she] has suffered to date and for harm [he/she] is reasonably certain to suffer in the future. No fixed standard exists for deciding the amount of these damages. You must use your judgment to decide a reasonable amount based on the evidence and your common sense.

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

1. **The loss of financial support from [*name of injured spouse*];**

2. **Personal services, such as nursing, that [*name of plaintiff*] has provided or will provide to [*name of injured spouse*]; or**

3. **Any loss of earnings that [*name of plaintiff*] has suffered by giving up employment to take care of [*name of injured spouse*].**

DIRECTIONS FOR USE

Depending on the circumstances of the case, it may be appropriate to add after "to be suffered in the future" either "during the period of [*name of injured spouse*]'s disability" or "as measured by the life expectancy that [*name of injured spouse*] had before [his/her] injury or by the life expectancy of [*name of plaintiff*], whichever is shorter."

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Insofar as this instruction addresses the loss of a spouse's assistance in operating the household, it is not intended to include the cost of obtaining household services. (See *Kellogg v. Asbestos Corp. Ltd.* (1996) 41 Cal.App.4th 1397, 1408 [49 Cal.Rptr.2d 256]: "Although the trial court labeled the damages awarded Mrs. Kellogg as being for 'loss of consortium' (a noneconomic damages item under Proposition 51), much of the testimony at trial actually involved the 'costs of obtaining substitute domestic services' on her behalf (an economic damage item in the statute). (See Civ. Code, § 1431.2, subd. (b)(1), (2).)"

SOURCES AND AUTHORITY

- Civil Code section 1431.2(b)(2) provides, in part: "For purposes of this section, the term 'non-economic damages' means subjective, non-monetary losses including … loss of consortium … ."

- "We … declare that in California each spouse has a cause of action for loss of consortium, as defined herein, caused by a negligent or intentional injury to the other spouse by a third party. (*Rodriguez v. Bethlehem Steel Corp.* (1974) 12 Cal.3d 382, 408 [115 Cal.Rptr. 765].)

- "The concept of consortium includes not only loss of support or services; it also embraces such elements as love, companionship, comfort, affection, society, sexual relations, the moral support each spouse gives the other through the triumph and despair of life, and the deprivation of a spouse's physical assistance in operating and maintaining the family home." (*Ledger v. Tippitt* (1985) 164 Cal.App.3d 625, 633 [210 Cal.Rptr. 814], disapproved of on other grounds in *Elden v. Sheldon* (1988) 46 Cal.3d 267, 277 [250 Cal.Rptr. 254].)

- "Since he has no cause of action in tort his spouse has no cause of action for loss of consortium." (*Blain v. The Doctor's Co.* (1990) 222 Cal.App.3d 1048, 1067 [272 Cal.Rptr. 250].)

- "*Rodriguez* never mentions the concept of a complete loss of consortium. To the contrary, the opinion speaks of 'loss or impairment of her rights of consortium.' This dichotomy suggests that a diminution of a wife's rights are compensible, and we so hold." (*Carlson v. Wald* (1984) 151 Cal.App.3d 598, 602 [199 Cal.Rptr. 10], internal citation omitted.)

- "[S]hould [husband] prevail in his own cause of action against these defendants, he will be entitled to recover, among his medical expenses, the full cost of whatever home nursing is necessary. To allow [wife] also to recover the value of her nursing

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services, however personalized, would therefore constitute double recovery." (*Rodriguez, supra,* 112 Cal.3d at p. 409, internal citations omitted.)

- "For the same reason, [wife] cannot recover for the loss of her earnings and earning capacity assertedly incurred when she quit her job in order to furnish [husband] these same nursing services. To do so would be to allow her to accomplish indirectly that which we have just held she cannot do directly." (*Rodriguez, supra,* 112 Cal.3d at p. 409.)

- "The deprivation of a husband's physical assistance in operating and maintaining the home is a compensable item of loss of consortium." (*Rodriguez, supra,* 112 Cal.3d at p. 409, fn. 31, internal citations omitted.)

- "Whether the degree of harm suffered by the plaintiff's spouse is sufficiently severe to give rise to a cause of action for loss of consortium is a matter of proof. When the injury is emotional rather than physical, the plaintiff may have a more difficult task in proving negligence, causation, and the requisite degree of harm; but these are questions for the jury, as in all litigation for loss of consortium. In *Rodriguez* we acknowledged that the loss is 'principally a form of mental suffering,' but nevertheless declared our faith in the ability of the jury to exercise sound judgment in fixing compensation. We reaffirm that faith today." (*Molien v. Kaiser Foundation Hospitals* (1980) 27 Cal.3d 916, 933 [167 Cal.Rptr. 831], internal citations omitted.)

- "We … conclude that we should not recognize a cause of action by a child for loss of parental consortium." (*Borer v. American Airlines, Inc.* (1977) 19 Cal.3d 441, 451 [138 Cal.Rptr. 302].)

- A parent may not recover loss of consortium damages for injury to his or her child. (*Baxter v. American Airlines, Inc.* (1977) 19 Cal.3d 461 [138 Cal.Rptr. 315].)

- Unmarried cohabitants may not recover damages for loss of consortium. (*Elden, supra,* 46 Cal.3d at p. 277.)

- Under Proposition 51, damages for loss of consortium may be reduced by the negligence of the injured spouse. (*Craddock v. Kmart Corp.* (2001) 89 Cal.App.4th 1300, 1309–1310 [107 Cal.Rptr.2d 881]; *Hernandez v. Badger Construction Equipment Co.* (1994) 28 Cal.App.4th 1791, 1810–1811 [34 Cal.Rptr.2d 732].)

- " 'To entitle a plaintiff to recover present damages for apprehended future consequences, there must be evidence to show such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original

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injury.' " (*Bellman v. San Francisco High School Dist.* (1938) 11 Cal.2d 576, 588 [81 P.2d 894], internal citation omitted.)

Secondary Sources

- California Tort Damages (Cont.Ed.Bar 1988) Loss of Consortium, §§ 2.6–2.7
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, §§ 10:10–10:16
- 4 Levy et al., California Torts (1985–2000) Loss of Consortium, § 56.08
- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1416–1422

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2008
Wrongful Death (Death of an Adult)

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

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

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

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

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

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

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

4. **The amount paid, and reasonably certain to be paid in the future, to obtain household services that [*name of decedent*] would have provided.**

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

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

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

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[2. The loss of the enjoyment of sexual relations.]

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

No fixed standard exists for deciding the amount of noneconomic damages. You must use your judgment to decide a reasonable amount based on the evidence and your common sense. [Your award for noneconomic damages should not be reduced to present cash value.]

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

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

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

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

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

SOURCES AND AUTHORITY

- Code of Civil Procedure section 377.60 provides:

  A cause of action for the death of a person caused by the wrongful act or neglect of another may be asserted by any of the following persons or by the decedent's personal representative on their behalf:

  (a) The decedent's surviving spouse, children, and issue of deceased children, or, if there is no surviving issue of the decedent, the persons, including the surviving spouse, who would be entitled to the property of the decedent by intestate succession.

  (b) Whether or not qualified under subdivision (a), if they were dependent on the decedent, the putative spouse, children of the putative spouse, stepchildren, or parents. As used in this subdivision, 'putative spouse' means the surviving spouse of a void or voidable marriage who is found

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by the court to have believed in good faith that the marriage to the decedent was valid.

(c) A minor, whether or not qualified under subdivision (a) or (b), if, at the time of the decedent's death, the minor resided for the previous 180 days in the decedent's household and was dependent on the decedent for one-half or more of the minor's support.

(d) This section applies to any cause of action arising on or after January 1, 1993.

(e) The addition of this section by Chapter 178 of the Statutes of 1992 was not intended to adversely affect the standing of any party having standing under prior law, and the standing of parties governed by that version of this section as added by Chapter 178 of the Statutes of 1992 shall be the same as specified herein as amended by Chapter 563 of the Statutes of 1996.

- Code of Civil Procedure section 377.61 provides: "In an action under this article, damages may be awarded that, under all the circumstances of the case, may be just, but may not include damages recoverable under Section 377.34. The court shall determine the respective rights in an award of the persons entitled to assert the cause of action."

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

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

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

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

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

- "The death of a father may also cause a special loss to the children." (*Syah v. Johnson* (1966) 247 Cal.App.2d 534, 547 [55 Cal.Rptr. 741], internal citation omitted.)

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

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

- "Thus, the rule remains and we hold damages for wrongful death must be reduced to present value." (*Fox v. Pacific Southwest Airlines* (1982) 133 Cal.App.3d 565, 569 [184 Cal.Rptr. 87].)

- "Where, as here, decedent was a husband and father, a significant element of damages is the loss of financial benefits he was contributing to his family by way of support at the time of his death and that support reasonably expected in the future. The total future lost support must be reduced by appropriate formula to a present lump sum which, when invested to yield the highest rate of return consistent with reasonable security, will pay the equivalent of lost future benefits at the times, in the amounts and for the period such future benefits would have been received." (*Canavin v. Pacific Southwest Airlines* (1984) 148 Cal.App.3d 512, 520–521 [196 Cal.Rptr. 82], internal citations omitted.)

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

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

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

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

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

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

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

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

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

Secondary Sources

- California Tort Damages (Cont.Ed.Bar 1988) Wrongful Death, §§ 3.1–3.52
- 2 Bancroft-Whitney's California Civil Practice (1992) Torts, § 23:8
- 4 Levy et al., California Torts (1985–2000) Death and Survival Actions, §§ 55.10–55.13
- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1423–1430

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2009
Wrongful Death (Parents' Recovery for Death of a Minor Child)

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

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

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

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

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

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

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

4. **The amount paid, and reasonably certain to be paid in the future, to obtain household services that [*name of minor*] would have provided.**

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

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

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

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evidence and your common sense. [Your award for noneconomic damages should not be reduced to present cash value.]

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

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

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

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

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

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

SOURCES AND AUTHORITY

- Code of Civil Procedure section 377.60 provides:

  A cause of action for the death of a person caused by the wrongful act or neglect of another may be asserted by any of the following persons or by the decedent's personal representative on their behalf:

  (a) The decedent's surviving spouse, children, and issue of deceased children, or, if there is no surviving issue of the decedent, the persons, including the surviving spouse, who would be entitled to the property of the decedent by intestate succession.

  (b) Whether or not qualified under subdivision (a), if they were dependent on the decedent, the putative spouse, children of the putative spouse, stepchildren, or parents. As used in this subdivision, 'putative spouse' means the surviving spouse of a void or voidable marriage who is found by the court to have believed in good faith that the marriage to the decedent was valid.

  (c) A minor, whether or not qualified under subdivision (a) or (b), if, at the time of the decedent's death, the minor resided for the previous 180

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days in the decedent's household and was dependent on the decedent for one-half or more of the minor's support.

(d) This section applies to any cause of action arising on or after January 1, 1993.

(e) The addition of this section by Chapter 178 of the Statutes of 1992 was not intended to adversely affect the standing of any party having standing under prior law, and the standing of parties governed by that version of this section as added by Chapter 178 of the Statutes of 1992 shall be the same as specified herein as amended by Chapter 563 of the Statutes of 1996.

- Code of Civil Procedure section 377.61 provides: "In an action under this article, damages may be awarded that, under all the circumstances of the case, may be just, but may not include damages recoverable under Section 377.34. The court shall determine the respective rights in an award of the persons entitled to assert the cause of action."

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

- "Where the deceased was a minor child, recovery is based on the present value of reasonably probable future services and contributions, deducting the probable cost of rearing the child." (6 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 1428, p. 908.)

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

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

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

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

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

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

- "Thus, the rule remains and we hold damages for wrongful death must be reduced to present value." (*Fox v. Pacific Southwest Airlines* (1982) 133 Cal.App.3d 565, 569 [184 Cal.Rptr. 87].)

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

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

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

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

- "[T]he competing and conflicting interests of the respective heirs, the difficulty in ascertaining individual shares of lost economic support when dealing with minors, the lack of any reason under most circumstances to apportion the lump-sum award attributable to loss of monetary support where minors are involved, the irrelevance of the heirs' respective interests in that portion of the award pertaining to lost economic support in determining the aggregate award, and the more efficient nature of court proceedings without a jury, cumulatively establish [that] apportionment by the court, rather than the jury, is consistent with the efficient administration of justice." (*Canavin v. Pacific Southwest Airlines* (1984) 148 Cal.App.3d 512, 535–536 [196 Cal.Rptr. 82].)

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

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

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

- "The life expectancy of the deceased is a question of fact for the jury to decide, considering all relevant factors including the deceased's health, lifestyle and occupation. Life expectancy figures from mortality tables are admissible but are not conclusive." (*Allen v. Toledo* (1980) 109 Cal.App.3d 415, 424 [167 Cal.Rptr. 270], internal citations omitted.)

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Secondary Sources

- California Tort Damages (Cont.Ed.Bar 1988) Wrongful Death, §§ 3.1–3.52
- 2 Bancroft-Whitney's California Civil Practice (1992) Torts, § 23:8
- 4 Levy et al., California Torts (1985–2000) Death and Survival Actions, §§ 55.10–55.13
- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 1428

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2010
Public Entities—Collateral Source Payments (Gov. Code, § 985)

You shall award damages in an amount that fully compensates plaintiff for damages in accordance with instructions from the court. You shall not speculate or consider any other possible sources of benefit the plaintiff may have received. After you have returned your verdict the court will make whatever adjustments are necessary in this regard.

DIRECTIONS FOR USE

Per Government Code section 985, this language is mandatory.

SOURCES AND AUTHORITY

- Government Code section 985(b) provides, in part: "Any collateral source payment paid or owed to or on behalf of a plaintiff shall be inadmissible in any action for personal injuries or wrongful death where a public entity is a defendant."

- Government Code section 985(j) provides: "In all actions affected by this section, the court shall instruct the jury with the following language: 'You shall award damages in an amount that fully compensates plaintiff for damages in accordance with instructions from the court. You shall not speculate or consider any other possible sources of benefit the plaintiff may have received. After you have returned your verdict the court will make whatever adjustments are necessary in this regard.' "

<u>Secondary Sources</u>

- California Tort Damages (Cont.Ed.Bar 1988) Restrictions on Recovery, § 15.21
- 2 Bancroft-Whitney's California Civil Practice (1992) Torts, § 31:47
- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 1392

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2011
No Punitive Damages

You must not include in your award any damages to punish or make an example of [*name of defendant*]. Such damages would be punitive damages, and they cannot be a part of your verdict. You must award only the damages that fairly compensate [*name of plaintiff*] for [his/her/its] loss.

DIRECTIONS FOR USE

Do not use this instruction if punitive damages are being sought in this case or in the phase of the trial in which these instructions are given.

SOURCES AND AUTHORITY

- "Punitive damages are not permitted in wrongful death actions." (*Cortez v. Macias* (1980) 110 Cal.App.3d 640, 657 [167 Cal.Rptr. 905].)
- "The punitive damages theory cannot be predicated on the breach of contract cause of action without an underlying tort." (*Palmer v. Ted Stevens Honda, Inc.* (1987) 193 Cal.App.3d 530, 536 [238 Cal.Rptr. 363], internal citations omitted.)
- "An award of punitive damages is not supported by a verdict based on breach of contract, even where the defendant's conduct in breaching the contract was wilful, fraudulent, or malicious. Even in those cases in which a separate tort action is alleged, if there is 'but one verdict based upon contract' a punitive damage award is improper." (*Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 960 [17 Cal.Rptr.2d 242], internal citations omitted.)
- Government Code section 818 provides: "Notwithstanding any other provision of law, a public entity is not liable for damages awarded under Section 3294 of the Civil Code or other damages imposed primarily for the sake of example and by way of punishing the defendant."

Secondary Sources

- California Tort Damages (Cont.Ed.Bar 1988) Punitive Damages, § 14.3
- 4 Levy et al., California Torts (1985–2000) Punitive Damages, §§ 54.05, 54.08
- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 1343

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2012
Arguments of Counsel Not Evidence of Damages

The arguments of the attorneys are not evidence of damages. Your award must be based on your reasoned judgment applied to the testimony of the witnesses and the other evidence that has been admitted during trial.

DIRECTIONS FOR USE

If a pleading is admitted into evidence, the following may be added: "The amount of damages that [*name of plaintiff*] has claimed in [his/her] written pleadings is not evidence of [*name of plaintiff*]'s damages."

SOURCES AND AUTHORITY

- "[T]he trial court can and should instruct the jury that the argument of counsel as to the amount of damages claimed by the plaintiff is not evidence and that its duty is only to award such damages as will reasonably compensate the plaintiff for his pain and suffering." (*Beagle v. Vasold* (1966) 65 Cal.2d 166, 180–181 [53 Cal.Rptr. 129], internal citation omitted.)

- Courts have held that "attempts to suggest matters of an evidentiary nature to a jury other than by the legitimate introduction into evidence is misconduct whether by questions on cross-examination, argument or other means." (*Smith v. Covell* (1980) 100 Cal.App.3d 947, 960 [161 Cal.Rptr. 377].)

<u>Secondary Sources</u>

- California Tort Damages (Cont.Ed.Bar 1988) Bodily Injury, § 1.74
- 4 Levy et al., California Torts (1985–2000) Pain and Suffering, §§ 51.50–51.51
- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 1413

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2013
Settlement Deduction

You have heard evidence that [*name of plaintiff*] has settled [his/her/its] claim against [*name of defendant*]. Your award of damages to [*name of plaintiff*] should be made without considering any amount that [he/she/it] may have received under this settlement. After you have returned your verdict, I will make the proper deduction from your award of damages.

SOURCES AND AUTHORITY

- Code of Civil Procedure section 877 provides, in pertinent part: "Where a release, dismissal with or without prejudice, or a covenant not to sue or not to enforce judgment is given in good faith before verdict or judgment to one or more of a number of tortfeasors claimed to be liable for the same tort ... it shall have the following effect: … It shall not discharge any other such party from liability unless its terms so provide, but it shall reduce the claims against the others in the amount stipulated by the release, the dismissal or the covenant, or in the amount of the consideration paid for it whichever is the greater."

- "When the plaintiff stipulates to the fact and amount of settlement before the court, an approved procedure is for the court to reduce the verdict award by the amount paid in settlement before entering judgment on the verdict." (*Syverson v. Heitmann* (1985) 171 Cal.App.3d 106, 111 [214 Cal.Rptr. 581], internal citations omitted.)

- Courts have held that it is "proper to exclude evidence of the pretrial settlement by one joint tortfeasor from the jury's consideration, leaving it to the court to apply Code of Civil Procedure section 877 to reduce the verdict." (*Knox v. County of Los Angeles* (1980) 109 Cal.App.3d 825, 834–835 [167 Cal.Rptr. 463], internal citation omitted.)

- "[W]here there is an admission 'that a settlement has been made with one or more joint tortfeasors in a certain amount there is no factual question to be resolved by the jury respecting the settlement.' " (*Albrecht v. Braughtan* (1970) 6 Cal.App.3d 173, 177 [85 Cal.Rptr. 659], internal citation omitted.)

- "Where the purpose of introducing evidence of a settlement is to reduce any recovery that might be awarded pro tanto, this result can be achieved by a simple calculation

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made by the court after the verdict has been rendered." (*Shepherd v. Walley* (1972) 28 Cal.App.3d 1079, 1082 [105 Cal.Rptr. 387].)

- "The presentation of evidence concerning the amount or fact of settlement to the jury ... is not only confusing, but also can lead to abuse in argument as it did here." (*Shepherd, supra,* 28 Cal.App.3d at p. 1083.)

- "[E]vidence of the fact and amount of settlement made by [plaintiff] with [settling witness] might be admissible under proper limiting instructions for the purpose of showing bias since he was a witness." (*Shepherd, supra,* 28 Cal.App.3d at p. 1082, fn. 2, internal citation omitted.)

- "Under Civil Code section 1431.2, a defendant is only responsible for its share of noneconomic damages as that share has been determined by the jury. 'Therefore, a nonsettling defendant may not receive any setoff under [Code of Civil Procedure] section 877 for the portion of a settlement by another defendant that is attributable to noneconomic damages.' After application of Civil Code section 1431.2, '... there is no amount that represents a common claim for noneconomic damages against the settling and nonsettling defendants' and thus Code of Civil Procedure section 877 has no applicability to noneconomic damages." (*Ehret v. Congoleum Corp.* (1999) 73 Cal.App.4th 1308, 1319 [87 Cal.Rptr.2d 363], internal citations omitted.)

- "[A]n undifferentiated settlement must be apportioned between economic and noneconomic damages so that the setoff applies only to economic damages." (*Ehret, supra,* 73 Cal.App.4th at p. 1320, internal citation omitted.)

- It has been held that, "[i]n the absence of any other allocation … the percentage of economic damages reflected in the jury verdict [should] be applied to determine the percentage of the settlements to be offset." (*Ehret, supra,* 73 Cal.App.4th at p. 1320, internal citation omitted.)

- "Where there is a complete dismissal of a defendant, and a plaintiff seeks an allocation of the settlement with that defendant for purposes of limiting the setoff against another defendant's liability, the burden is on the plaintiff to establish facts to justify the allocation." (*Ehret, supra,* 73 Cal.App.4th at p. 1322, internal citation omitted.)

<u>Secondary Sources</u>

- California Tort Damages (Cont.Ed.Bar 1988) Restrictions on Recovery, § 15.12
- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, § 76

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2014
Aggravation of Preexisting Condition or Disability

[*Name of plaintiff*] is not entitled to damages for any physical or emotional condition that [he/she] had before [*name of defendant*]'s conduct occurred. However, if [*name of plaintiff*] had a physical or emotional condition that was made worse by [*name of defendant*]'s wrongful conduct, you must award damages that will reasonably and fairly compensate [*name of plaintiff*] for the effect on that condition.

SOURCES AND AUTHORITY

- "A tortfeasor may be held responsible where the effect of his negligence is to aggravate a preexisting condition or disease." (*Hastie v. Handeland* (1969) 274 Cal.App.2d 599, 604 [79 Cal.Rptr. 268], internal citations omitted.)

- "Plaintiff may recover to the full extent that his condition has worsened as a result of defendant's tortious act." (*Ng v. Hudson* (1977) 75 Cal.App.3d 250, 255 [142 Cal.Rptr. 69], internal citations omitted, overruled on another ground in *Soule v. General Motors* (1994) 8 Cal.4th 548, 575 [34 Cal.Rptr.2d 607].)

- "It is by no means self-evident that an act which precipitates a flare-up of a pre-existing condition should be considered a 'cause which, in natural and continuous sequence, produces the injury.' Thus, general instructions on proximate cause were not sufficient to inform the jury on the more specific issue of aggravation of pre-existing conditions." (*Ng, supra,* 75 Cal.App.3d at p. 256.)

- "[An instruction on preexisting condition] is proper only where the injured is the claimant seeking compensation for his injuries. That is not the case here in a wrongful death action." (*Vecchione v. Carlin* (1980) 111 Cal.App.3d 351, 358 [168 Cal.Rptr. 571].)

<u>Secondary Sources</u>

- California Tort Damages (Cont.Ed.Bar 1988) Bodily Injury, § 1.86
- 2 Bancroft-Whitney's California Civil Practice (1992) Torts, § 5:11
- 4 Levy et al., California Torts (1985–2000) Pain and Suffering, § 51.23[3]
- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 1414

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2015
Unusually Susceptible Plaintiff

You must decide the full amount of money that will reasonably and fairly compensate [*name of plaintiff*] for all damages caused by the wrongful conduct of [*name of defendant*], even if [*name of plaintiff*] was more susceptible to injury than a normally healthy person would have been, and even if a normally healthy person would not have suffered similar injury.

SOURCES AND AUTHORITY

- "That a plaintiff without such a [preexisting] condition would probably have suffered less injury or no injury does not exonerate a defendant from liability." (*Ng v. Hudson* (1977) 75 Cal.App.3d 250, 255 [142 Cal.Rptr. 69], internal citations omitted, overruled on another ground in *Soule v. General Motors* (1994) 8 Cal.4th 548, 575 [34 Cal.Rptr.2d 607].)

- "The tortfeasor takes the person he injures as he finds him. If, by reason of some preexisting condition, his victim is more susceptible to injury, the tortfeasor is not thereby exonerated from liability." (*Rideau v. Los Angeles Transit Lines* (1954) 124 Cal.App.2d 466, 471 [268 P.2d 772], internal citations omitted.)

Secondary Sources

- California Tort Damages (Cont.Ed.Bar 1988) Bodily Injury, § 1.86
- 2 Bancroft-Whitney's California Civil Practice (1992) Torts, § 5:11
- 4 Levy et al., California Torts (1985–2000) Pain and Suffering, § 51.23[3]
- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 1414

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2016
Increased Susceptibility to Future Disease or Injury

If [*name of defendant*]'s wrongful conduct increased the risk that [*name of plaintiff*] would suffer [disease/injury], [*name of plaintiff*] may recover damages for any [disease/injury] resulting from that increased risk.

SOURCES AND AUTHORITY

- "The plaintiff may also recover from the original defendant tortfeasor where, as a result of a weakened condition after the injury, he becomes more susceptible to and suffers a subsequent disease or injury." (6 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 1415, p. 886.)

- "If, on account of the depleted and weakened condition of a person caused by an injury, he is rendered more susceptible to germs than if he had not been injured, or if, because of his debilitated condition, he is unable to resist the attack of germs present in his system, then the disease resulting from the germs is a natural sequence to his condition resulting from the injury, and the injury is the proximate cause of his death, and the disease is but one of the links in the chain of causation." (*Ensign v. Southern Pacific Co.* (1924) 193 Cal. 311, 318 [223 P. 953], internal citations omitted.)

- Restatement Second of Torts section 458 provides: "If the negligent actor is liable for another's injury which so lowers the other's vitality as to render him peculiarly susceptible to a disease, the actor is also liable for the disease which is contracted because of the lowered vitality."

- Restatement Second of Torts section 460 provides: "If the negligent actor is liable for an injury which impairs the physical condition of another's body, the actor is also liable for harm sustained in a subsequent accident which would not have occurred had the other's condition not been impaired, and which is a normal consequence of such impairment."

<u>Secondary Sources</u>

- California Tort Damages (Cont.Ed.Bar 1988) Bodily Injury, § 1.85
- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 1415

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2017
Subsequent Medical Treatment

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 aid that [*name of plaintiff*]'s injury reasonably required, even if those acts were negligently performed.

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

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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."

Secondary Sources

- California Tort Damages (Cont.Ed.Bar 1988) Bodily Injury, § 1.85
- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 1414

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2018
Mitigation of Damages (Personal Injury)

If you decide [*name of defendant*] is responsible for the original harm, [*name of plaintiff*] is not entitled to recover damages for harm that [*name of defendant*] proves [he/she] could have avoided with reasonable efforts or expenditures. You should consider the reasonableness of [*name of plaintiff*]'s efforts in light of the circumstances facing [him/her] at the time, including [his/her] ability to make the efforts or expenditures without undue risk or hardship.

If [*name of plaintiff*] made reasonable efforts to avoid harm, then your award should include reasonable amounts that [he/she] spent for this purpose.

SOURCES AND AUTHORITY

- "It has been the policy of the courts to promote the mitigation of damages. The doctrine applies in tort, wilful as well as negligent. A plaintiff cannot be compensated for damages which he could have avoided by reasonable effort or expenditures." (*Green v. Smith* (1968) 261 Cal.App.2d 392, 396 [67 Cal.Rptr. 796], internal citations omitted.)

- "The frequent statement of the principle in the terms of a 'duty' imposed on the injured party has been criticized on the theory that a breach of the 'duty' does not give rise to a correlative right of action. It is perhaps more accurate to say that the wrongdoer is not required to compensate the injured party for damages which are avoidable by reasonable effort on the latter's part." (*Green, supra,* 261 Cal.App.2d at p. 396, internal citations omitted.)

- "The reasonableness of the efforts of the injured party must be judged in the light of the situation confronting him at the time the loss was threatened and not by the judgment of hindsight. The fact that reasonable measures other than the one taken would have avoided damage is not, in and of itself, proof of the fact that the one taken, though unsuccessful, was unreasonable. 'If a choice of two reasonable courses presents itself, the person whose wrong forced the choice cannot complain that one rather than the other is chosen.' The standard by which the reasonableness of the injured party's efforts is to be measured is not as high as the standard required in other

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areas of law. It is sufficient if he acts reasonably and with due diligence, in good faith." (*Green, supra,* 261 Cal.App.2d at pp. 396–397, internal citations omitted.)

- "The correct rule is that an injured person must use reasonable diligence in caring for his injuries. What is reasonable diligence depends upon all the facts and circumstances of each case. There is no hard and fast rule that the injured person must seek medical care of a particular type. Self-care may be reasonable under the circumstances, and the jury should be so instructed where that factor is relevant." (*Christiansen v. Hollings* (1941) 44 Cal.App.2d 332, 346 [112 P.2d 723], internal citations omitted.)

- " 'The rule of mitigation of damages has no application where its effect would be to require the innocent party to sacrifice and surrender important and valuable rights.' " (*Valle de Oro Bank v. Gamboa* (1994) 26 Cal.App.4th 1686, 1691 [32 Cal.Rptr.2d 329], internal citations omitted.)

- "The duty to minimize damages does not require an injured person to do what is unreasonable or impracticable, and, consequently, when expenditures are necessary for minimization of damages, the duty does not run to a person who is financially unable to make such expenditures." (*Valencia v. Shell Oil Co.* (1944) 23 Cal.2d 840, 846 [147 P.2d 558], internal citations omitted.)

- "Contributory negligence was closely allied and easily confused with the rule of mitigation of damages, on which the jury was also instructed. Both doctrines involved the plaintiff's duty to act reasonably. Contributory negligence was concerned with the plaintiff's negligence before being injured, while the mitigation rule was concerned with a lack of due care after the injury. The effect of contributory negligence was to bar all recovery by the plaintiff. In contrast, a plaintiff's failure to mitigate barred recovery of only the portion of damages which could have been avoided by ordinary care after the injury." (*Lemons v. Regents of University of California* (1978) 21 Cal.3d 869, 874–875 [148 Cal.Rptr. 355], internal citations omitted.)

- " 'The rule of [mitigation of damages] comes into play after a legal wrong has occurred, but while some damages may still be averted ... .' " (*Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1066 [232 Cal.Rptr. 528], internal citations omitted.)

- "Generally, '[a] person injured by the wrongful act of another is bound … to exercise reasonable care and diligence to avoid loss or minimize the resulting damages and cannot recover for losses which might have been prevented by reasonable efforts and expenditures on his part.' The burden of proving facts in mitigation of damages rests

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upon the defendant." (*Hunter v. Croysdill* (1959) 169 Cal.App.2d 307, 318 [337 P.2d 174], internal citations omitted.)

- "One who contributes to damage cannot escape liability because the proportionate contribution may not be accurately measured. It is incumbent upon the party alleging injury to prove the amount of damages. Respondent sustained that burden in this case. If the damages proven could be reduced proportionately, that burden rested upon appellant." (*City of Oakland v. Pacific Gas & Electric Co.* (1941) 47 Cal.App.2d 444, 450 [118 P.2d 328], internal citations omitted.)

- "It is true that plaintiff is in duty bound to minimize his damage in any way that he reasonably can, and if he negligently refuses to do so he cannot recover for that which he might have prevented. It is for appellant to establish that the steps taken by plaintiff to so minimize his loss or damage falls short of the obligation so fixed. In other words, the burden is on defendant to establish matters asserted by him in mitigation or reduction of the amount of plaintiff's damage, and defendant here has not met that burden." (*McNary v. Hanley* (1933) 131 Cal.App. 188, 189–190 [20 P.2d 966].)

- Restatement of Torts Second section 918 provides:

  (1) Except as stated in Subsection (2), one injured by the tort of another is not entitled to recover damages for any harm that he could have avoided by the use of reasonable effort or expenditure after the commission of the tort.
  (2) One is not prevented from recovering damages for a particular harm resulting from a tort if the tortfeasor intended the harm or was aware of it and was recklessly disregardful of it, unless the injured person with knowledge of the danger of the harm intentionally or heedlessly failed to protect his own interests.

<u>Secondary Sources</u>

- California Tort Damages (Cont.Ed.Bar 1988) Restrictions on Recovery, §§ 15.22–15.23
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, §§ 6:1–6:6
- 4 Levy et al., California Torts (1985–2000) Mitigation and Collateral Source Rule, §§ 53.01–53.04
- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1382–1385

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2019
Mitigation of Damages (Property Damage)

If you decide [*name of defendant*] is responsible for the original harm, [*name of plaintiff*] is not entitled to recover damages for harm to [his/her] property that [*name of defendant*] proves [he/she] could have avoided with reasonable efforts or expenditures. You should consider the reasonableness of [*name of plaintiff*]'s efforts in light of the circumstances facing [him/her] at the time, including [his/her] ability to make the efforts or expenditures without undue risk or hardship.

If [*name of plaintiff*] made reasonable efforts to avoid harm, then your award should include reasonable amounts that [he/she] spent for this purpose.

SOURCES AND AUTHORITY

- "It has been the policy of the courts to promote the mitigation of damages. The doctrine applies in tort, wilful as well as negligent. A plaintiff cannot be compensated for damages which he could have avoided by reasonable effort or expenditures." (*Green v. Smith* (1968) 261 Cal.App.2d 392, 396 [67 Cal.Rptr. 796], internal citations omitted.)

- "The frequent statement of the principle in the terms of a 'duty' imposed on the injured party has been criticized on the theory that a breach of the 'duty' does not give rise to a correlative right of action. It is perhaps more accurate to say that the wrongdoer is not required to compensate the injured party for damages which are avoidable by reasonable effort on the latter's part." (*Green, supra,* 261 Cal.App.2d at p. 396, internal citations omitted.)

- "The reasonableness of the efforts of the injured party must be judged in the light of the situation confronting him at the time the loss was threatened and not by the judgment of hindsight. The fact that reasonable measures other than the one taken would have avoided damage is not, in and of itself, proof of the fact that the one taken, though unsuccessful, was unreasonable. 'If a choice of two reasonable courses presents itself, the person whose wrong forced the choice cannot complain that one rather than the other is chosen.' The standard by which the reasonableness of the injured party's efforts is to be measured is not as high as the standard required in other

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areas of law. It is sufficient if he acts reasonably and with due diligence, in good faith." (*Green, supra,* 261 Cal.App.2d at pp. 396–397, internal citations omitted.)

- "A plaintiff who suffers damage as a result of either a breach of contract or a tort has a duty to take reasonable steps to mitigate those damages and will not be able to recover for any losses which could have been thus avoided. Here the jury determined that 25 percent of the 'property damage to the house' could have been avoided. That damage was measured by the cost of repair, i.e., $130,000. The court was obligated to give effect to the jury's finding and reduce this aspect of the award to $97,500." (*Shaffer v. Debbas* (1993) 17 Cal.App.4th 33, 41 [21 Cal.Rptr.2d 110], internal citations omitted.)

- "A plaintiff has a duty to mitigate damages and cannot recover losses it could have avoided through reasonable efforts. Thrifty-Tel's only response is that mitigation does not ' "require a complex series of doubtful acts and expenditures." ' Picking up the telephone to reach out and touch the Bezeneks or sending them a letter was complex, doubtful, or expensive? Based on Myron Bezenek's unchallenged testimony, we must presume that simple expedient would have averted the second hacking episode. Accordingly, Thrifty-Tel is not entitled to recover damages for the February 1992 event." (*Thrifty-Tel, Inc. v. Bezenek* (1996) 46 Cal.App.4th 1559, 1568–1569 [54 Cal.Rptr.2d 468], internal citations omitted.)

- "Contributory negligence was closely allied and easily confused with the rule of mitigation of damages, on which the jury was also instructed. Both doctrines involved the plaintiff's duty to act reasonably. Contributory negligence was concerned with the plaintiff's negligence before being injured, while the mitigation rule was concerned with a lack of due care after the injury. The effect of contributory negligence was to bar all recovery by the plaintiff. In contrast, a plaintiff's failure to mitigate barred recovery of only the portion of damages which could have been avoided by ordinary care after the injury." (*Lemons v. Regents of University of California* (1978) 21 Cal.3d 869, 874–875 [148 Cal.Rptr. 355], internal citations omitted.)

- " 'The rule of [mitigation of damages] comes into play after a legal wrong has occurred, but while some damages may still be averted ... .' " (*Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1066 [232 Cal.Rptr. 528], internal citations omitted.)

- "Generally, '[a] person injured by the wrongful act of another is bound … to exercise reasonable care and diligence to avoid loss or minimize the resulting damages and cannot recover for losses which might have been prevented by reasonable efforts and expenditures on his part.' The burden of proving facts in mitigation of damages rests

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upon the defendant." (*Hunter v. Croysdill* (1959) 169 Cal.App.2d 307, 318 [337 P.2d 174], internal citations omitted.)

- "One who contributes to damage cannot escape liability because the proportionate contribution may not be accurately measured. It is incumbent upon the party alleging injury to prove the amount of damages. Respondent sustained that burden in this case. If the damages proven could be reduced proportionately, that burden rested upon appellant." (*City of Oakland v. Pacific Gas & Elec. Co.* (1941) 47 Cal.App.2d 444, 450 [118 P.2d 328], internal citations omitted.)

- Restatement Second of Torts section 918 provides:

  (1) Except as stated in Subsection (2), one injured by the tort of another is not entitled to recover damages for any harm that he could have avoided by the use of reasonable effort or expenditure after the commission of the tort.
  (2) One is not prevented from recovering damages for a particular harm resulting from a tort if the tortfeasor intended the harm or was aware of it and was recklessly disregardful of it, unless the injured person with knowledge of the danger of the harm intentionally or heedlessly failed to protect his own interests.

<u>Secondary Sources</u>

- California Tort Damages (Cont.Ed.Bar 1988) Restrictions on Recovery, §§ 15.22–15.23
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, §§ 6:1–6:6
- 4 Levy et al., California Torts (1985–2000) Mitigation and Collateral Source Rule, §§ 53.01–53.04
- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1382–1385

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2020
Life Expectancy

If you decide [*name of plaintiff*] has suffered damages that will continue for the rest of [his/her] life, you must determine how long [he/she] will probably live. According to [*insert source of information*], a [*insert number*]-year-old [male/female] is expected to live another [*insert number*] years. This is the average life expectancy. Some people live longer and others die sooner.

This published information is evidence of how long a person is likely to live but is not conclusive. In deciding a person's life expectancy, you should also consider, among other factors, that person's health, habits, activities, lifestyle, and occupation.

DIRECTIONS FOR USE

Use of the life tables in *Vital Statistics of the United States*, published by the National Center for Health Statistics, is recommended.

SOURCES AND AUTHORITY

- "The life expectancy of the deceased is a question of fact for the jury to decide, considering all relevant factors including the deceased's health, lifestyle and occupation. Life expectancy figures from mortality tables are admissible but are not conclusive. Here the jury was correctly told the figure given was not conclusive evidence of Charlene's life expectancy. It was merely 'a factor which you may consider,' along with the evidence of Charlene's health, habits, occupation and activities." (*Allen v. Toledo* (1980) 109 Cal.App.3d 415, 424 [167 Cal.Rptr. 270], internal citations omitted.)

- "Mortality tables are admissible to assist the jury but they are not indispensable. It has been held, for example, that, absent mortality tables, the trier of fact may still approximate the life expectancy of a statutory beneficiary who appeared in court." (*Francis v. Sauve* (1963) 222 Cal.App.3d 102, 121 [34 Cal.Rptr. 754], internal citations omitted.)

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- "It is a matter of common knowledge that many persons live beyond the period of life allotted them by the mortality roles." (*Temple v. De Mirjian* (1942) 51 Cal.App.2d 559, 566 [125 P.2d 544], internal citation omitted.)

Secondary Sources

- 4 Levy et al., California Torts (1985–2000) Pain and Suffering, § 51.42[2][c], Medical Expenses and Economic Loss, § 52.20
- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 1405

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2021
Punitive Damages—Individual Defendant
Trial Not Bifurcated

If you decide that [*name of defendant*]'s conduct caused [*name of plaintiff*] harm, you must decide if that conduct justifies an award of punitive damages. The purposes of punitive damages are to punish a wrongdoer and to discourage him or her and others from 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 with malice, oppression, or fraud.

"Malice" means that [*name of defendant*] acted with intent to cause injury or that [*name of defendant*]'s conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A person acts with knowing disregard when he or she is aware of the probable dangerous consequences of his or her conduct and deliberately fails to avoid those consequences.

"Oppression" means that [*name of defendant*]'s conduct was despicable and subjected [*name of plaintiff*] to cruel and unjust hardship in knowing disregard of [his/her] rights.

"Despicable conduct" is conduct that is so mean, vile, base, or contemptible that it would be looked down on and despised by reasonable people.

"Fraud" means that [*name of defendant*] intentionally misrepresented or concealed a material fact and did so intending to deprive [*name of plaintiff*] of property or of a legal right or otherwise to cause [*name of plaintiff*] injury.

There is no fixed standard for determining the amount of punitive damages, and you are not required to award any punitive damages. In deciding the amount of punitive damages, if any, you should consider all of the following:

(a) How reprehensible was [*name of defendant*]'s conduct?

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(b) Does the amount of punitive damages have a reasonable relationship to [*name of plaintiff*]'s harm?

(c) In view of [*name of defendant*]'s financial condition, what amount will punish [him/her] and discourage future wrongful conduct?

DIRECTIONS FOR USE

This instruction is intended to apply to individual persons only. When the plaintiff is seeking punitive damages against corporate defendants, use Instruction 2024, *Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee—Trial Not Bifurcated*, or Instruction 2026, *Punitive Damages—Entity Defendant—Trial Not Bifurcated*. When plaintiff is seeking punitive damages against both an individual person and a corporate defendant, use Instruction 2028, *Punitive Damages—Individual and Corporate Defendants—Trial Not Bifurcated*.

Courts have stated that "[p]unitive damages previously imposed for the same conduct are relevant in determining the amount of punitive damages required to sufficiently punish and deter. The likelihood of future punitive damage awards may also be considered, although it is entitled to considerably less weight." (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661 [57 Cal.Rptr.2d 525], internal citations omitted.) The court in *Stevens* suggested that the following instruction be given if evidence of other punitive damage awards is introduced into evidence:

> If you determine that a defendant has already been assessed with punitive damages based on the same conduct for which punitive damages are requested in this case, you may consider whether punitive damages awarded in other cases have sufficiently punished and made an example of the defendant. You must not use the amount of punitive damages awarded in other cases to determine the amount of the punitive damage award in this case, except to the extent you determine that a lesser award, or no award at all, is justified in light of the penalties already imposed. (*Stevens, supra,* 49 Cal.App.4th at p. 1663, fn. 7.)

Regarding the relationship between punitive damages and compensatory damages, case law suggests that a jury may consider harm that could have been caused by the defendant's conduct, even if that harm did not come to pass: "The high court in *TXO* [*TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443 [113 S.Ct. 2711, 125 L.Ed.2d 366]] and *BMW* [*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559 [116 S.Ct. 1589, 134 L.Ed.2d 809]] has refined the disparity analysis to take

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into account the *potential* loss to the plaintiffs, as where a scheme worthy of punitive damages does not fully succeed. In such cases, the proper ratio would be the ratio of punitive damages to the potential harm to plaintiff." (*Sierra Club Foundation v. Graham* (1999) 72 Cal.App.4th 1135, 1162, fn. 15 [85 Cal.Rptr.2d 726], internal citations omitted.) The court in *Sierra Club Foundation* also noted the statement of the U.S. Supreme Court that applicable civil and criminal penalties should be considered in determining the amount of punitive damages. (*Id.* at p. 1162, citing *BMW of North America, Inc., supra,* 517 U.S. at pp. 565, 574–575.) It is unclear whether these factors should be considered by the jury or only by a court in reviewing the amount of a jury's award.

SOURCES AND AUTHORITY

- Civil Code section 3294 provides, in part:

  (a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

  (b) An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.

  (c) As used in this section, the following definitions shall apply:

    (1) "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 of the rights or safety of others.

    (2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.

    (3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the

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intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

- "An award of punitive damages is not supported by a verdict based on breach of contract, even where the defendant's conduct in breaching the contract was wilful, fraudulent, or malicious. Even in those cases in which a separate tort action is alleged, if there is 'but one verdict based upon contract' a punitive damage award is improper." (*Myers Building Industries v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 959 [17 Cal.Rptr.2d 242], internal citations omitted.)

- "The purpose of punitive damages is to punish wrongdoers and thereby deter the commission of wrongful acts." (*Neal v. Farmers Insurance Exchange* (1978) 21 Cal.3d 910, 928, fn. 13 [148 Cal.Rptr. 389].)

- "Punitive damages are to be assessed in an amount which, depending upon the defendant's financial worth and other factors, will deter him and others from committing similar misdeeds. Because compensatory damages are designed to make the plaintiff 'whole,' punitive damages are a 'windfall' form of recovery." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 712 [34 Cal.Rptr2d 898], internal citations omitted.)

- "It follows that the wealthier the wrongdoing defendant, the larger the award of exemplary damages need be in order to accomplish the statutory objective." (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 65 [118 Cal.Rptr. 184].)

- " 'A plaintiff, upon establishing his case, is always entitled of right to compensatory damages. But even after establishing a case where punitive damages are permissible, he is never entitled to them. The granting or withholding of the award of punitive damages is wholly within the control of the jury, and may not legally be influenced by any direction of the court that in any case a plaintiff is entitled to them. Upon the clearest proof of malice in fact, it is still the exclusive province of the jury to say whether or not punitive damages shall be awarded. A plaintiff is entitled to such damages only after the jury, in the exercise of its untrammeled discretion, has made the award.' " (*Brewster v. Second Baptist Church of Los Angeles* (1948) 32 Cal.2d 791, 801 [197 P.2d 713], internal citation omitted.)

- "In light of our holding that evidence of a defendant's financial condition is essential to support an award of punitive damages, Evidence Code section 500 mandates that the plaintiff bear the burden of proof on the issue. A plaintiff seeking punitive damages is not seeking a mere declaration by the jury that he is entitled to punitive damages in the abstract. The plaintiff is seeking an award of real money in a specific

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amount to be set by the jury. Because the award, whatever its amount, cannot be sustained absent evidence of the defendant's financial condition, such evidence is 'essential to the claim for relief.' " (*Adams v. Murakami* (1991) 54 Cal. 3d 105, 119 [284 Cal.Rptr. 318], internal citation omitted.)

- "[W]e are afforded guidance by certain established principles, all of which are grounded in the purpose and function of punitive damages. One factor is the particular nature of the defendant's acts in light of the whole record; clearly, different acts may be of varying degrees of reprehensibility, and the more reprehensible the act, the greater the appropriate punishment, assuming all other factors are equal. Another relevant yardstick is the amount of compensatory damages awarded; in general, even an act of considerable reprehensibility will not be seen to justify a proportionally high amount of punitive damages if the actual harm suffered thereby is small. Also to be considered is the wealth of the particular defendant; obviously, the function of deterrence will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort. By the same token, of course, the function of punitive damages is not served by an award which, in light of the defendant's wealth and the gravity of the particular act, exceeds the level necessary to properly punish and deter." (*Neal, supra,* 21 Cal.3d at p. 928, internal citations and footnote omitted.)

- "The decision to award punitive damages is exclusively the function of the trier of fact. So too is the amount of any punitive damage award. The relevant considerations are the nature of the defendant's conduct, the defendant's wealth, and the plaintiff's actual damages." (*Gagnon v. Continental Casualty Co.* (1989) 211 Cal.App.3d 1598, 1602 [260 Cal.Rptr. 305], internal citations omitted.)

- "It has been recognized that punitive damages awards generally are not permitted to exceed 10 percent of the defendant's net worth." (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1166 [74 Cal.Rptr.2d 510].)

- "In light of our discussion, we conclude that even where, as here, punitive but not compensatory damages are available to the plaintiff, the defendant is entitled to an instruction that punitive damages must bear a reasonable relation to the injury, harm, or damage actually suffered by the plaintiff and proved at trial. Consequently, the trial court erred in failing to so instruct the jury." (*Gagnon, supra,* 211 Cal.App.3d at p. 1605.)

- "Malice, for purposes of awarding exemplary damages, includes 'despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.' To establish conscious disregard, the plaintiff must show 'that the defendant was aware of the probable dangerous consequences of his conduct,

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and that he wilfully and deliberately failed to avoid those consequences.' " (*Hoch v. Allied-Signal, Inc.* (1994) 24 Cal.App.4th 48, 61 [29 Cal.Rptr.2d 615], internal citations omitted.)

- "Used in its ordinary sense, the adjective 'despicable' is a powerful term that refers to circumstances that are 'base,' 'vile,' or 'contemptible.' As amended to include this word, the statute plainly indicates that absent an intent to injure the plaintiff, 'malice' requires more than a 'willful and conscious' disregard of the plaintiffs' interests. The additional component of 'despicable conduct' must be found." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 725, internal citations omitted.)

- "We conclude that the rule … that an award of exemplary damages must be accompanied by an award of compensatory damages [or its equivalent] is still sound. That rule cannot be deemed satisfied where the jury has made an express determination not to award compensatory damages." (*Cheung v. Daley* (1995) 35 Cal.App.4th 1673, 1677 [42 Cal.Rptr.2d 164], footnote omitted.)

- "With the focus on the plaintiff's injury rather than the amount of compensatory damages, the ["reasonable relation"] rule can be applied even in cases where only equitable relief is obtained or where nominal damages are awarded or, as here, where compensatory damages are unavailable." (*Gagnon, supra,* 211 Cal.App.3d at p. 1605.)

Secondary Sources

- California Tort Damages (Cont.Ed.Bar 1988) Punitive Damages, §§ 14.1–14.8, 14.15–14.18
- 4 Levy et al., California Torts (1985–2000) Punitive Damages, §§ 54.01–54.06, 54.20–54.25
- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1327, 1335–1341, 1369–1381

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2022
Punitive Damages—Individual Defendant
Bifurcated Trial (First Phase)

If you decide that [*name of defendant*]'s conduct caused [*name of plaintiff*] harm, you must decide if that conduct justifies an award of punitive damages. At this time, you must decide whether [*name of plaintiff*] has proved by clear and convincing evidence that [*name of defendant*] acted with malice, oppression, or fraud. The amount of punitive damages, if any, will be an issue for you to decide at a later time.

"Malice" means that [*name of defendant*] acted with intent to cause injury or that [*name of defendant*]'s conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A person acts with knowing disregard when he or she is aware of the probable dangerous consequences of his or her conduct and deliberately fails to avoid those consequences.

"Oppression" means that [*name of defendant*]'s conduct was despicable and subjected [*name of plaintiff*] to cruel and unjust hardship in knowing disregard of [his/her] rights.

"Despicable conduct" is conduct that is so mean, vile, base, or contemptible that it would be looked down on and despised by reasonable people.

"Fraud" means that [*name of defendant*] intentionally misrepresented or concealed a material fact and did so intending to deprive [*name of plaintiff*] of property or of a legal right or otherwise to cause [*name of plaintiff*] injury.

SOURCES AND AUTHORITY

- Civil Code section 3294 provides, in part:

  (a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition

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to the actual damages, may recover damages for the sake of example and by way of punishing the defendant. …

(c) As used in this section, the following definitions shall apply:

(1) "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 of the rights or safety of others.

(2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.

(3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

- Civil Code section 3295(d) provides: "The court shall, on application of any defendant, preclude the admission of evidence of that defendant's profits or financial condition until after the trier of fact returns a verdict for plaintiff awarding actual damages and finds that a defendant is guilty of malice, oppression, or fraud in accordance with Section 3294. Evidence of profit and financial condition shall be admissible only as to the defendant or defendants found to be liable to the plaintiff and to be guilty of malice, oppression, or fraud. Evidence of profit and financial condition shall be presented to the same trier of fact that found for the plaintiff and found one or more defendants guilty of malice, oppression, or fraud."

- "[Section 3295(d)] affects the order of proof at trial, precluding the admission of evidence of defendants' financial condition until after the jury has returned a verdict for plaintiffs awarding actual damages and found that one or more defendants were guilty of 'oppression, fraud or malice,' in accordance with Civil Code section 3294." (*City of El Monte v. Superior Court* (1994) 29 Cal.App.4th 272, 274–275 [34 Cal.Rptr.2d 490], internal citations omitted.)

- "Evidence of the defendant's financial condition is a prerequisite to an award of punitive damages. In order to protect defendants from the premature disclosure of their financial position when punitive damages are sought, the Legislature enacted Civil Code section 3295." (*City of El Monte, supra*, 29 Cal.App.4th at p. 276, internal citations omitted.)

- "[C]ourts have held it is reversible error to try the punitive damages issue to a new jury after the jury which found liability has been excused." (*Rivera v. Sassoon* (1995) 39 Cal.App.4th 1045, 1048 [46 Cal.Rptr.2d 144], internal citations omitted.)

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- "Malice, for purposes of awarding exemplary damages, includes 'despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.' To establish conscious disregard, the plaintiff must show 'that the defendant was aware of the probable dangerous consequences of his conduct, and that he wilfully and deliberately failed to avoid those consequences.' " (*Hoch v. Allied-Signal, Inc.* (1994) 24 Cal.App.4th 48, 61 [29 Cal.Rptr.2d 615], internal citations omitted.)

- "Used in its ordinary sense, the adjective 'despicable' is a powerful term that refers to circumstances that are 'base,' 'vile,' or 'contemptible.' As amended to include this word, the statute plainly indicates that absent an intent to injure the plaintiff, 'malice' requires more than a 'willful and conscious' disregard of the plaintiffs' interests. The additional component of 'despicable conduct' must be found." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 725 [34 Cal.Rptr2d 898], internal citations omitted.)

Secondary Sources

- California Tort Damages (Cont.Ed.Bar 1988) Punitive Damages, §§ 14.1–14.8, 14.15–14.18, 14.23
- 4 Levy et al., California Torts (1985–2000) Punitive Damages, §§ 54.01–54.06, 54.24[4][d]
- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1327, 1335–1341, 1369–1381

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2023
Punitive Damages—Individual Defendant
Bifurcated Trial (Second Phase)

You must now decide the amount, if any, that you should award [*name of plaintiff*] in punitive damages. The purposes of punitive damages are to punish a wrongdoer and to discourage him or her and others from similar conduct in the future.

There is no fixed standard for determining the amount of punitive damages and you are not required to award any punitive damages. In deciding the amount of punitive damages, if any, you should consider all of the following:

(a) How reprehensible was [*name of defendant*]'s conduct?

(b) Does the amount of punitive damages have a reasonable relationship to [*name of plaintiff*]'s harm?

(c) In view of [*name of defendant*]'s financial condition, what amount will punish [him/her] and discourage future wrongful conduct?

DIRECTIONS FOR USE

Courts have stated that "[p]unitive damages previously imposed for the same conduct are relevant in determining the amount of punitive damages required to sufficiently punish and deter. The likelihood of future punitive damage awards may also be considered, although it is entitled to considerably less weight." (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661 [57 Cal.Rptr.2d 525], internal citations omitted.) The court in *Stevens* suggested that the following instruction be given if evidence of other punitive damage awards is introduced into evidence:

> If you determine that a defendant has already been assessed with punitive damages based on the same conduct for which punitive damages are requested in this case, you may consider whether punitive damages awarded in other cases have sufficiently punished and made an example of the defendant. You must not use the amount of punitive damages awarded in other cases to determine the amount of the punitive damage award in this

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> case, except to the extent you determine that a lesser award, or no award at all, is justified in light of the penalties already imposed. (*Stevens, supra,* 49 Cal.App.4th at p. 1663, fn. 7.)

Regarding the relationship between punitive and compensatory damages, case law suggests that a jury may consider harm that could have been caused by the defendant's conduct, even if that harm did not come to pass: "The high court in *TXO* [*TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443 [113 S.Ct. 2711, 125 L.Ed.2d 366]] and *BMW* [*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559 [116 S.Ct. 1589, 134 L.Ed.2d 809]] has refined the disparity analysis to take into account the *potential* loss to the plaintiffs, as where a scheme worthy of punitive damages does not fully succeed. In such cases, the proper ratio would be the ratio of punitive damages to the potential harm to plaintiff." (*Sierra Club Foundation v. Graham* (1999) 72 Cal.App.4th 1135, 1162, fn. 15 [85 Cal.Rptr.2d 726], internal citations omitted.) The court in *Sierra Club Foundation* also noted the statement of the U.S. Supreme Court that applicable civil and criminal penalties should be considered in determining the amount of punitive damages. (*Id.* at p. 1162, citing *BMW of North America, Inc., supra,* 517 U.S. at pp. 565, 574–575.) It is unclear whether these factors should be considered by the jury or only by a court in reviewing the amount of a jury's award.

SOURCES AND AUTHORITY

- Civil Code section 3294 provides, in part: "In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant."

- Civil Code section 3295(d) provides: "The court shall, on application of any defendant, preclude the admission of evidence of that defendant's profits or financial condition until after the trier of fact returns a verdict for plaintiff awarding actual damages and finds that a defendant is guilty of malice, oppression, or fraud in accordance with Section 3294. Evidence of profit and financial condition shall be admissible only as to the defendant or defendants found to be liable to the plaintiff and to be guilty of malice, oppression, or fraud. Evidence of profit and financial condition shall be presented to the same trier of fact that found for the plaintiff and found one or more defendants guilty of malice, oppression, or fraud."

- "[Section 3295(d)] affects the order of proof at trial, precluding the admission of evidence of defendants' financial condition until after the jury has returned a verdict for plaintiffs awarding actual damages and found that one or more defendants were

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guilty of 'oppression, fraud or malice,' in accordance with Civil Code section 3294." (*City of El Monte v. Superior Court* (1994) 29 Cal.App.4th 272, 274–275 [34 Cal.Rptr.2d 490], internal citations omitted.)

- "Evidence of the defendant's financial condition is a prerequisite to an award of punitive damages. In order to protect defendants from the premature disclosure of their financial position when punitive damages are sought, the Legislature enacted Civil Code section 3295." (*City of El Monte, supra*, 29 Cal.App.4th at p. 276, internal citations omitted.)

- "[C]ourts have held it is reversible error to try the punitive damages issue to a new jury after the jury which found liability has been excused." (*Rivera v. Sassoon* (1995) 39 Cal.App.4th 1045, 1048 [46 Cal.Rptr.2d 144], internal citations omitted.)

- "The purpose of punitive damages is to punish wrongdoers and thereby deter the commission of wrongful acts." (*Neal v. Farmers Insurance Exchange* (1978) 21 Cal.3d 910, 928, fn. 13 [148 Cal.Rptr. 389].)

- "Punitive damages are to be assessed in an amount which, depending upon the defendant's financial worth and other factors, will deter him and others from committing similar misdeeds. Because compensatory damages are designed to make the plaintiff 'whole,' punitive damages are a 'windfall' form of recovery." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 712 [34 Cal.Rptr.2d 898], internal citations omitted.)

- "It follows that the wealthier the wrongdoing defendant, the larger the award of exemplary damages need be in order to accomplish the statutory objective." (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 65 [118 Cal.Rptr. 184].)

- " 'A plaintiff, upon establishing his case, is always entitled of right to compensatory damages. But even after establishing a case where punitive damages are permissible, he is never entitled to them. The granting or withholding of the award of punitive damages is wholly within the control of the jury, and may not legally be influenced by any direction of the court that in any case a plaintiff is entitled to them. Upon the clearest proof of malice in fact, it is still the exclusive province of the jury to say whether or not punitive damages shall be awarded. A plaintiff is entitled to such damages only after the jury, in the exercise of its untrammeled discretion, has made the award.' " (*Brewster v. Second Baptist Church of Los Angeles* (1948) 32 Cal.2d 791, 801 [197 P.2d 713], internal citation omitted.)

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- "In light of our holding that evidence of a defendant's financial condition is essential to support an award of punitive damages, Evidence Code section 500 mandates that the plaintiff bear the burden of proof on the issue. A plaintiff seeking punitive damages is not seeking a mere declaration by the jury that he is entitled to punitive damages in the abstract. The plaintiff is seeking an award of real money in a specific amount to be set by the jury. Because the award, whatever its amount, cannot be sustained absent evidence of the defendant's financial condition, such evidence is 'essential to the claim for relief.' " (*Adams v. Murakami* (1991) 54 Cal. 3d 105, 119 [284 Cal. Rptr. 318], internal citation omitted.)

- "[W]e are afforded guidance by certain established principles, all of which are grounded in the purpose and function of punitive damages. One factor is the particular nature of the defendant's acts in light of the whole record; clearly, different acts may be of varying degrees of reprehensibility, and the more reprehensible the act, the greater the appropriate punishment, assuming all other factors are equal. Another relevant yardstick is the amount of compensatory damages awarded; in general, even an act of considerable reprehensibility will not be seen to justify a proportionally high amount of punitive damages if the actual harm suffered thereby is small. Also to be considered is the wealth of the particular defendant; obviously, the function of deterrence will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort. By the same token, of course, the function of punitive damages is not served by an award which, in light of the defendant's wealth and the gravity of the particular act, exceeds the level necessary to properly punish and deter." (*Neal, supra,* 21 Cal.3d at p 928, internal citations and footnote omitted.)

- "The decision to award punitive damages is exclusively the function of the trier of fact. So too is the amount of any punitive damage award. The relevant considerations are the nature of the defendant's conduct, the defendant's wealth, and the plaintiff's actual damages." (*Gagnon v. Continental Casualty Co.* (1989) 211 Cal.App.3d 1598, 1602 [260 Cal.Rptr. 305], internal citations omitted.)

- "It has been recognized that punitive damages awards generally are not permitted to exceed 10 percent of the defendant's net worth." (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1166 [74 Cal.Rptr.2d 510].)

- "In light of our discussion, we conclude that even where, as here, punitive but not compensatory damages are available to the plaintiff, the defendant is entitled to an instruction that punitive damages must bear a reasonable relation to the injury, harm, or damage actually suffered by the plaintiff and proved at trial. Consequently, the trial court erred in failing to so instruct the jury." (*Gagnon, supra,* 211 Cal.App.3d at p. 1605.)

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- "We conclude that the rule … that an award of exemplary damages must be accompanied by an award of compensatory damages [or its equivalent] is still sound. That rule cannot be deemed satisfied where the jury has made an express determination not to award compensatory damages." (*Cheung v. Daley* (1995) 35 Cal.App.4th 1673, 1677 [42 Cal.Rptr.2d 164], footnote omitted.)

- "With the focus on the plaintiff's injury rather than the amount of compensatory damages, the ["reasonable relation"] rule can be applied even in cases where only equitable relief is obtained or where nominal damages are awarded or, as here, where compensatory damages are unavailable." (*Gagnon, supra*, 211 Cal.App.3d at p. 1605.)

Secondary Sources

- California Tort Damages (Cont.Ed.Bar 1988) Punitive Damages, §§ 14.1–14.8, 14.23
- 4 Levy et al., California Torts (1985–2000) Punitive Damages, §§ 54.20–54.25, 54.24[4][d]
- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1327, 1369–1381

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2024
Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee Trial Not Bifurcated

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If you decide [*name of employee/agent***]'s conduct caused [***name of plaintiff***] harm, you must decide if that conduct justifies an award of punitive damages against [***name of defendant***] for [***name of employee/ agent***]'s conduct. The purposes of punitive damages are to punish a wrongdoer and to discourage him or her and others from similar conduct in the future.**

You may award punitive damages against [*name of defendant***] for [***name of employee/agent***]'s conduct only if [***name of plaintiff***] proves by clear and convincing evidence that [***name of employee/agent***] acted with malice, oppression, or fraud.**

"Malice" means that [*name of employee/agent***] acted with intent to cause injury, or that [***name of employee/agent***]'s conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A person acts with knowing disregard when he or she is aware of the probable dangerous consequences of his or her conduct and deliberately fails to avoid those consequences.**

"Oppression" means that [*name of employee/agent***]'s conduct was despicable and subjected [***name of plaintiff***] to cruel and unjust hardship in knowing disregard of [his/her] rights.**

"Despicable conduct" is conduct that is so mean, vile, base, or contemptible that it would be looked down on and despised by reasonable people.

"Fraud" means that [*name of employee/agent***] intentionally misrepresented or concealed a material fact and did so intending to deprive [***name of plaintiff***] of property or of a legal right or otherwise to cause [***name of plaintiff***] injury.**

[*Name of plaintiff***] must also prove [one of] the following:**

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1. **[That [*name of employee/agent*] was an officer, director, or managing agent of [*name of defendant*] acting in a [corporate/ employment] capacity; [or]]**

2. **[That an officer, a director, or a managing agent of [*name of defendant*] had advance knowledge of the unfitness of [*name of employee/agent*] and employed [him/her] with a knowing disregard of the rights or safety of others; [or]]**

3. **[That an officer, a director, or a managing agent of [*name of defendant*] authorized [*name of employee/agent*]'s conduct; [or]]**

4. **[That an officer, a director, or a managing agent of [*name of defendant*] knew of [*name of employee/agent*]'s wrongful conduct and adopted or approved the conduct after it occurred.]**

An employee is a "managing agent" if he or she exercises substantial independent authority and judgment in his or her corporate decision making so that his or her decisions ultimately determine corporate policy.

There is no fixed standard for determining the amount of punitive damages, and you are not required to award any punitive damages. In deciding the amount of punitive damages, if any, you should consider all of the following:

(a) How reprehensible was [*name of defendant*]'s conduct?

(b) Does the amount of punitive damages have a reasonable relationship to [*name of plaintiff*]'s harm?

(c) In view of [*name of defendant*]'s financial condition, what amount will punish and discourage future wrongful conduct?

DIRECTIONS FOR USE

This instruction is intended for use when the plaintiff is seeking to hold only an employer or principal liable for punitive damages based on the conduct of a specific employee or agent. When the plaintiff is seeking punitive damages from both the employer/principal and the employee/agent, use Instruction 2028, *Punitive Damages—Individual and Corporate Defendants—Trial Not Bifurcated.* When punitive damages are sought against

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a corporation or other entity for the conduct of its directors, officers, and managing agents, use Instruction 2026, *Punitive Damages—Entity Defendant—Trial Not Bifurcated.*

If any of the alternative grounds for seeking punitive damages are inapplicable to the facts of the case, they may be omitted.

See Instruction 2021, *Punitive Damages—Individual Defendant—Trial Not Bifurcated* for additional sources and authority.

Courts have stated that "[p]unitive damages previously imposed for the same conduct are relevant in determining the amount of punitive damages required to sufficiently punish and deter. The likelihood of future punitive damage awards may also be considered, although it is entitled to considerably less weight." (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661 [57 Cal.Rptr.2d 525], internal citations omitted.) The court in *Stevens* suggested that the following instruction be given if evidence of other punitive damage awards is introduced into evidence:

> If you determine that a defendant has already been assessed with punitive damages based on the same conduct for which punitive damages are requested in this case, you may consider whether punitive damages awarded in other cases have sufficiently punished and made an example of the defendant. You must not use the amount of punitive damages awarded in other cases to determine the amount of the punitive damage award in this case, except to the extent you determine that a lesser award, or no award at all, is justified in light of the penalties already imposed. (*Stevens, supra,* 49 Cal.App.4th at p. 1663, fn. 7.)

Regarding the relationship between punitive and compensatory damages, case law suggests that a jury may consider harm that could have been caused by the defendant's conduct, even if that harm did not come to pass: "The high court in *TXO* [*TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443 [113 S.Ct. 2711, 125 L.Ed.2d 366]] and *BMW* [*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559 [116 S.Ct. 1589, 134 L.Ed.2d 809]] has refined the disparity analysis to take into account the *potential* loss to the plaintiffs, as where a scheme worthy of punitive damages does not fully succeed. In such cases, the proper ratio would be the ratio of punitive damages to the potential harm to plaintiff." (*Sierra Club Foundation v. Graham* (1999) 72 Cal.App.4th 1135, 1162, fn. 15 [85 Cal.Rptr.2d 726], internal citations omitted.) The court in *Sierra Club Foundation* also noted the statement of the U.S. Supreme Court that applicable civil and criminal penalties should be considered in determining the amount of punitive damages. (*Id.* at p. 1162, citing *BMW of North America, Inc., supra,* 517 U.S. at

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pp. 565, 574–575.) It is unclear whether these factors should be considered by the jury or only by a court in reviewing the amount of a jury's award.

SOURCES AND AUTHORITY

- Civil Code section 3294 provides, in part:

  (a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.
  (b) An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.
  (c) As used in this section, the following definitions shall apply:
    (1) "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 of the rights or safety of others.
    (2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.
    (3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

- "Subdivision (b) is not a model of clarity, but in light of California's history of employer liability for punitive damages and of the Legislature's reasons for enacting subdivision (b), we have no doubt that it does no more than codify and refine existing law. Subdivision (b) thus authorizes the imposition of punitive damages on an employer in three situations: (1) when an employee was guilty of oppression, fraud or malice, and the employer with advance knowledge of the unfitness of the employee

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employed him or her with a conscious disregard of the rights or safety of others, (2) when an employee was guilty of oppression, fraud or malice, and the employer authorized or ratified the wrongful conduct, or (3) when the employer was itself guilty of the oppression, fraud or malice." (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1151 [74 Cal.Rptr.2d 510].)

- " 'California has traditionally allowed punitive damages to be assessed against an employer (or principal) for the acts of an employee (or agent) only where the circumstances indicate that the employer himself was guilty of fraud, oppression, or malice. Thus, even before section 3294, subdivision (b) was added to the Civil Code in 1980, the courts required evidence that the employer authorized or ratified a malicious act, personally committed such an act, or wrongfully hired or retained an unfit employee.' The 'additional' burden on a plaintiff seeking punitive damages from an employer is to show not only that an employee acted with oppression, fraud or malice, but that the employer engaged in conduct defined in subdivision (b)." (*Weeks, supra,* 63 Cal.App.4th at p. 1154, internal citation omitted.)

- "Civil Code section 3294, subdivision (b) does not authorize an award of punitive damages against an employer for the employee's wrongful conduct. It authorizes an award of punitive damages against an employer for the employer's own wrongful conduct. Liability under subdivision (b) is vicarious only to the extent that the employer is liable for the actions of its officer, director or managing agent in hiring or controlling the offending employee, in ratifying the offense or in acting with oppression, fraud or malice. It is not vicarious in the sense that the employer is liable for the wrongful conduct of the offending employee." (*Weeks, supra,* 63 Cal.App.4th at pp. 1154–1155.)

- "An award of punitive damages is not supported by a verdict based on breach of contract, even where the defendant's conduct in breaching the contract was wilful, fraudulent, or malicious. Even in those cases in which a separate tort action is alleged, if there is 'but one verdict based upon contract' a punitive damage award is improper." (*Myers Building Industries v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 959 [17 Cal.Rptr.2d 242], internal citations omitted.)

- "[P]unitive damages are not assessed against employers on a pure respondeat superior basis. Some evidence of fault by the employer itself is also required." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 724, fn. 11 [34 Cal.Rptr.2d 898].)

- "Subdivision (b) … governs awards of punitive damages against employers, and permits an award for the conduct described there without an additional finding that

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the employer engaged in oppression, fraud or malice." (*Weeks, supra,* 63 Cal.App.4th at p. 1137.)

- "Section 3294 is no longer silent on who may be responsible for imputing punitive damages to a corporate employer. For corporate punitive damages liability, section 3294, subdivision (b), requires that the wrongful act giving rise to the exemplary damages be committed by an 'officer, director, or managing agent.' " (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572 [88 Cal.Rptr.2d 19].)

- "[I]n performing, ratifying, or approving the malicious conduct, the agent must be acting as the organization's representative, not in some other capacity." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 723.)

- The concept of "managing agent" "assumes that such individual was acting in a corporate or employment capacity when the conduct giving rise to the punitive damages claim against the employer occurred." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 723.)

- "No purpose would be served by punishing the employer for an employee's conduct that is wholly unrelated to its business or to the employee's duties therein." (*College Hospital, Inc., supra,* 8 Cal.4th at pp. 723–724.)

- " 'The determination whether employees act in a managerial capacity [i.e., are managing agents] does not necessarily hinge on their "level" in the corporate hierarchy. Rather, the critical inquiry is the degree of discretion the employees possess in making decisions that will ultimately determine corporate policy.' " (*Kelly-Zurian v. Wohl Shoe Co.* (1994) 22 Cal.App.4th 397, 421 [27 Cal.Rptr.2d 457], internal citation omitted.)

- "[W]e conclude the Legislature intended the term 'managing agent' to include only those corporate employees who exercise substantial independent authority and judgment in their corporate decisionmaking so that their decisions ultimately determine corporate policy. The scope of a corporate employee's discretion and authority under our test is therefore a question of fact for decision on a case-by-case basis." (*White, supra,* 21 Cal.4th at pp. 566–567.)

- "In order to demonstrate that an employee is a true managing agent under section 3294, subdivision (b), a plaintiff seeking punitive damages would have to show that the employee exercised substantial discretionary authority over significant aspects of a corporation's business." (*White, supra,* 21 Cal.4th at p. 577.)

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- " '[C]orporate policy' is the general principles which guide a corporation, or rules intended to be followed consistently over time in corporate operations. A 'managing agent' is one with substantial authority over decisions that set these general principles and rules." (*Cruz v. Homebase* (2000) 83 Cal.App.4th 160, 167–168 [99 Cal.Rptr.2d 435].)

- " '[R]atification' is the '[c]onfirmation and acceptance of a previous act.' A corporation cannot confirm and accept that which it does not actually know about." (*Cruz, supra,* 83 Cal.App.4th at p. 168.)

- "For purposes of determining an employer's liability for punitive damages, ratification generally occurs where, under the particular circumstances, the employer demonstrates an intent to adopt or approve oppressive, fraudulent, or malicious behavior by an employee in the performance of his job duties." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 726.)

- "Corporate ratification in the punitive damages context requires actual knowledge of the conduct and its outrageous nature." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 726.)

Secondary Sources

- California Tort Damages (Cont.Ed.Bar 1988) Punitive Damages, §§ 14.13–14.14
- 4 Levy et al., California Torts (1985–2000) Punitive Damages, § 54.07
- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1344–1348

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2025
Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee Bifurcated Trial (First Phase)

If you decide that [*name of employee/agent***]'s conduct caused [***name of plaintiff***] harm, you must decide if that conduct justifies an award of punitive damages against [***name of defendant***] for [***name of employee/ agent***]'s conduct. At this time, you must decide whether [***name of plaintiff***] has proved by clear and convincing evidence that [***name of employee/agent***] acted with malice, oppression, or fraud. The amount of punitive damages, if any, will be an issue for you to decide at a later time.**

"Malice" means that [*name of employee/agent***] acted with intent to cause injury or that [***name of employee/agent***]'s conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A person acts with knowing disregard when he or she is aware of the probable dangerous consequences of his or her conduct and deliberately fails to avoid those consequences.**

"Oppression" means that [*name of employee/agent***]'s conduct was despicable and subjected [***name of plaintiff***] to cruel and unjust hardship in knowing disregard of [his/her] rights.**

"Despicable conduct" is conduct that is so mean, vile, base, or contemptible that it would be looked down on and despised by reasonable people.

"Fraud" means that [*name of employee/agent***] intentionally misrepresented or concealed a material fact and did so intending to deprive [***name of plaintiff***] of property or of a legal right or otherwise to cause [***name of plaintiff***] injury.**

[*Name of plaintiff***] must also prove [one of] the following:**

1. **[That [***name of employee/agent***] was an officer, a director, or a managing agent of [***name of defendant***] acting in a [corporate/ employment] capacity; [or]]**

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2. [That an officer, a director, or a managing agent of [*name of defendant*] had advance knowledge of the unfitness of [*name of employee/agent*] and employed [him/her] with a knowing disregard of the rights or safety of others; [or]]

3. [That an officer, a director, or a managing agent of [*name of defendant*] authorized [*name of employee/agent*]'s conduct; [or]]

4. [That an officer, a director, or a managing agent of [*name of defendant*] knew of [*name of employee/agent*]'s wrongful conduct and adopted or approved the conduct after it occurred.]

An employee is a "managing agent" if he or she exercises substantial independent authority and judgment in his or her corporate decision making so that his or her decisions ultimately determine corporate policy.

DIRECTIONS FOR USE

Instruction 2023, *Bifurcated Trial—Individual Defendant (Second Phase)* may be used for the second phase of a bifurcated trial.

This instruction is intended for use when the plaintiff is seeking to hold only an employer or principal liable for punitive damages based on the conduct of a specific employee or agent. When the plaintiff is seeking punitive damages from both the employer/principal and the employee/agent, use Instruction 2029, *Punitive Damages—Individual and Corporate Defendants—Bifurcated Trial (First Phase)*. When punitive damages are sought against a corporation or other entity for the conduct of its directors, officers, and managing agents, use Instruction 2027, *Punitive Damages—Entity Defendant—Bifurcated Trial (First Phase).*

If any of the alternative grounds for seeking punitive damages are inapplicable to the facts of the case, they may be omitted.

SOURCES AND AUTHORITY

- Civil Code section 3294 provides, in part:

  (a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition

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to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

(b) An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.

(c) As used in this section, the following definitions shall apply:

(1) "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 of the rights or safety of others.

(2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.

(3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

- Civil Code section 3295(d) provides: "The court shall, on application of any defendant, preclude the admission of evidence of that defendant's profits or financial condition until after the trier of fact returns a verdict for plaintiff awarding actual damages and finds that a defendant is guilty of malice, oppression, or fraud in accordance with Section 3294. Evidence of profit and financial condition shall be admissible only as to the defendant or defendants found to be liable to the plaintiff and to be guilty of malice, oppression, or fraud. Evidence of profit and financial condition shall be presented to the same trier of fact that found for the plaintiff and found one or more defendants guilty of malice, oppression, or fraud."

- "[Section 3295(d)] affects the order of proof at trial, precluding the admission of evidence of defendants' financial condition until after the jury has returned a verdict for plaintiffs awarding actual damages and found that one or more defendants were guilty of 'oppression, fraud or malice,' in accordance with Civil Code section 3294." (*City of El Monte v. Superior Court* (1994) 29 Cal.App.4th 272, 274–275 [34 Cal.Rptr.2d 490], internal citations omitted.)

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- "Evidence of the defendant's financial condition is a prerequisite to an award of punitive damages. In order to protect defendants from the premature disclosure of their financial position when punitive damages are sought, the Legislature enacted Civil Code section 3295." (*City of El Monte, supra,* 29 Cal.App.4th at p. 276, internal citations omitted.)

- "[C]ourts have held it is reversible error to try the punitive damages issue to a new jury after the jury which found liability has been excused." (*Rivera v. Sassoon* (1995) 39 Cal.App.4th 1045, 1048 [46 Cal.Rptr.2d 144], internal citations omitted.)

- "Malice, for purposes of awarding exemplary damages, includes 'despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.' To establish conscious disregard, the plaintiff must show 'that the defendant was aware of the probable dangerous consequences of his conduct, and that he wilfully and deliberately failed to avoid those consequences.' " (*Hoch v. Allied-Signal, Inc.* (1994) 24 Cal.App.4th 48, 61 [29 Cal.Rptr.2d 615], internal citations omitted.)

- "Used in its ordinary sense, the adjective 'despicable' is a powerful term that refers to circumstances that are 'base,' 'vile,' or 'contemptible.' As amended to include this word, the statute plainly indicates that absent an intent to injure the plaintiff, 'malice' requires more than a 'willful and conscious' disregard of the plaintiffs' interests. The additional component of 'despicable conduct' must be found." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 725 [34 Cal.Rptr2d 898], internal citations omitted.)

- "Section 3294 is no longer silent on who may be responsible for imputing punitive damages to a corporate employer. For corporate punitive damages liability, section 3294, subdivision (b), requires that the wrongful act giving rise to the exemplary damages be committed by an 'officer, director, or managing agent.' " (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572 [88 Cal.Rptr.2d 19].)

- "[I]n performing, ratifying, or approving the malicious conduct, the agent must be acting as the organization's representative, not in some other capacity." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 723.)

- The concept of "managing agent" "assumes that such individual was acting in a corporate or employment capacity when the conduct giving rise to the punitive damages claim against the employer occurred." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 723.)

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- "No purpose would be served by punishing the employer for an employee's conduct that is wholly unrelated to its business or to the employee's duties therein." (*College Hospital, Inc., supra,* 8 Cal.4th at pp. 723–724.)

- " 'The determination whether employees act in a managerial capacity [i.e., are managing agents] does not necessarily hinge on their "level" in the corporate hierarchy. Rather, the critical inquiry is the degree of discretion the employees possess in making decisions that will ultimately determine corporate policy.' " (*Kelly-Zurian v. Wohl Shoe Co.* (1994) 22 Cal.App.4th 397, 421 [27 Cal.Rptr.2d 457], internal citation omitted.)

- "[W]e conclude the Legislature intended the term 'managing agent' to include only those corporate employees who exercise substantial independent authority and judgment in their corporate decisionmaking so that their decisions ultimately determine corporate policy. The scope of a corporate employee's discretion and authority under our test is therefore a question of fact for decision on a case-by-case basis." (*White, supra,* 21 Cal.4th at pp. 566–567.)

- "In order to demonstrate that an employee is a true managing agent under section 3294, subdivision (b), a plaintiff seeking punitive damages would have to show that the employee exercised substantial discretionary authority over significant aspects of a corporation's business." (*White, supra,* 21 Cal.4th at p. 577.)

- " '[C]orporate policy' is the general principles which guide a corporation, or rules intended to be followed consistently over time in corporate operations. A 'managing agent' is one with substantial authority over decisions that set these general principles and rules." (*Cruz v. Homebase* (2000) 83 Cal.App.4th 160, 167–168 [99 Cal.Rptr.2d 435].)

- " '[R]atification' is the '[c]onfirmation and acceptance of a previous act' A corporation cannot confirm and accept that which it does not actually know about." (*Cruz, supra,* 83 Cal.App.4th at p. 168.)

- "For purposes of determining an employer's liability for punitive damages, ratification generally occurs where, under the particular circumstances, the employer demonstrates an intent to adopt or approve oppressive, fraudulent, or malicious behavior by an employee in the performance of his job duties." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 726.)

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- "Corporate ratification in the punitive damages context requires actual knowledge of the conduct and its outrageous nature." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 726.)

Secondary Sources

- California Tort Damages (Cont.Ed.Bar 1988) Punitive Damages, §§ 14.13–14.14, 14.23
- 4 Levy et al., California Torts (1985–2000) Punitive Damages, §§ 54.07, 54.24[4][d]
- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1344–1348

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2026
Punitive Damages—Entity Defendant
Trial Not Bifurcated

If you decide that [*name of defendant*]'s conduct caused [*name of plaintiff*] harm, you must decide if that conduct justifies an award of punitive damages. The purposes of punitive damages are to punish a wrongdoer and to discourage him or her and others from 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 with malice, oppression, or fraud.

"Malice" means that [*name of defendant*] acted with intent to cause injury or that [*name of defendant*]'s conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A person acts with knowing disregard when he or she is aware of the probable dangerous consequences of his or her conduct and deliberately fails to avoid those consequences.

"Oppression" means that [*name of defendant*]'s conduct was despicable and subjected [*name of plaintiff*] to cruel and unjust hardship in knowing disregard of [his/her] rights.

"Despicable conduct" is conduct that is so mean, vile, base, or contemptible that it would be looked down on and despised by reasonable people.

"Fraud" means that [*name of defendant*] intentionally misrepresented or concealed a material fact and did so intending to deprive [*name of plaintiff*] of property or of a legal right or otherwise to cause [*name of plaintiff*] injury.

[*Name of plaintiff*] also must prove [one of] the following:

1. **[That the malice, oppression, or fraud was conduct of one or more officers, directors, or managing agents of [*name of defendant*] acting in a corporate capacity; [or]]**

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2. [That the conduct constituting malice, oppression, or fraud was authorized by one or more officers, directors, or managing agents of [*name of defendant*]; [or]]

3. [That one or more officers, directors, or managing agents of [*name of defendant*] knew of the conduct constituting malice, oppression, or fraud and adopted or approved that conduct after it occurred.]

An employee is a "managing agent" if he or she exercises substantial independent authority and judgment in his or her corporate decision making so that his or her decisions ultimately determine corporate policy.

There is no fixed standard for determining the amount of punitive damages, and you are not required to award any punitive damages. In deciding the amount of punitive damages, if any, you should consider all of the following:

(a) How reprehensible was [*name of defendant*]'s conduct?

(b) Does the amount of punitive damages have a reasonable relationship to [*name of plaintiff*]'s harm?

(c) In view of [*name of defendant*]'s financial condition, what amount will punish and discourage future wrongful conduct?

DIRECTIONS FOR USE

This instruction is intended for use when the plaintiff is seeking punitive damages against a corporation or other entity for the conduct of its directors, officers, and managing agents. When the plaintiff seeks to hold an employer or principal liable for the conduct of a specific employee or agent, use Instruction 2024, *Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee—Trial Not Bifurcated.* When the plaintiff is seeking punitive damages from both the employer/principal and the employee/agent, use Instruction 2028, *Punitive Damages—Individual and Corporate Defendants—Trial not Bifurcated*.

If any of the alternative grounds for seeking punitive damages are inapplicable to the facts of the case, they may be omitted.

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See Instruction 2021, *Punitive Damages—Individual Defendant—Trial Not Bifurcated*, for additional sources and authority.

Courts have stated that "[p]unitive damages previously imposed for the same conduct are relevant in determining the amount of punitive damages required to sufficiently punish and deter. The likelihood of future punitive damage awards may also be considered, although it is entitled to considerably less weight." (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661 [57 Cal.Rptr.2d 525], internal citations omitted.) The court in *Stevens* suggested that the following instruction be given if evidence of other punitive damage awards is introduced into evidence:

> If you determine that a defendant has already been assessed with punitive damages based on the same conduct for which punitive damages are requested in this case, you may consider whether punitive damages awarded in other cases have sufficiently punished and made an example of the defendant. You must not use the amount of punitive damages awarded in other cases to determine the amount of the punitive damage award in this case, except to the extent you determine that a lesser award, or no award at all, is justified in light of the penalties already imposed. (*Stevens, supra,* 49 Cal.App.4th at p. 1663, fn. 7.)

Regarding the relationship between punitive and compensatory damages, case law suggests that a jury may consider harm that could have been caused by the defendant's conduct, even if that harm did not come to pass: "The high court in *TXO* [*TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443 [113 S.Ct. 2711, 125 L.Ed.2d 366]] and *BMW* [*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559 [116 S.Ct. 1589, 134 L.Ed.2d 809]] has refined the disparity analysis to take into account the *potential* loss to the plaintiffs, as where a scheme worthy of punitive damages does not fully succeed. In such cases, the proper ratio would be the ratio of punitive damages to the potential harm to plaintiff." (*Sierra Club Foundation v. Graham* (1999) 72 Cal.App.4th 1135, 1162, fn. 15 [85 Cal.Rptr.2d 726], internal citations omitted.) The court in *Sierra Club Foundation* also noted the statement of the U.S. Supreme Court that applicable civil and criminal penalties should be considered in determining the amount of punitive damages. (*Id.* at p. 1162, citing *BMW of North America, Inc., supra,* 517 U.S. at pp. 565, 574–575.) It is unclear whether these factors should be considered by the jury or only by a court in reviewing the amount of a jury's award.

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SOURCES AND AUTHORITY

- Civil Code section 3294 provides, in part:

  (a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.
  (b) An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.
  (c) As used in this section, the following definitions shall apply:
    (1) "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 of the rights or safety of others.
    (2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.
    (3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

- "Section 3294 is no longer silent on who may be responsible for imputing punitive damages to a corporate employer. For corporate punitive damages liability, section 3294, subdivision (b), requires that the wrongful act giving rise to the exemplary damages be committed by an 'officer, director, or managing agent.' " (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572 [88 Cal.Rptr.2d 19].)

- "An award of punitive damages is not supported by a verdict based on breach of contract, even where the defendant's conduct in breaching the contract was wilful, fraudulent, or malicious. Even in those cases in which a separate tort action is alleged,

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if there is 'but one verdict based upon contract' a punitive damage award is improper." (*Myers Building Industries v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 959 [17 Cal.Rptr.2d 242], internal citations omitted.)

- "[I]n performing, ratifying, or approving the malicious conduct, the agent must be acting as the organization's representative, not in some other capacity." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 723 [34 Cal.Rptr.2d 898].)

- The concept of "managing agent" "assumes that such individual was acting in a corporate or employment capacity when the conduct giving rise to the punitive damages claim against the employer occurred." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 723.)

- "No purpose would be served by punishing the employer for an employee's conduct that is wholly unrelated to its business or to the employee's duties therein." (*College Hospital, Inc., supra,* 8 Cal.4th at pp. 723–724.)

- " 'The determination whether employees act in a managerial capacity [i.e., are managing agents] does not necessarily hinge on their "level" in the corporate hierarchy. Rather, the critical inquiry is the degree of discretion the employees possess in making decisions that will ultimately determine corporate policy.' " (*Kelly-Zurian v. Wohl Shoe Co.* (1994) 22 Cal.App.4th 397, 421 [27 Cal.Rptr.2d 457], internal citation omitted.)

- "[W]e conclude the Legislature intended the term 'managing agent' to include only those corporate employees who exercise substantial independent authority and judgment in their corporate decisionmaking so that their decisions ultimately determine corporate policy. The scope of a corporate employee's discretion and authority under our test is therefore a question of fact for decision on a case-by-case basis." (*White, supra,* 21 Cal.4th at pp. 566–567.)

<u>Secondary Sources</u>

- California Tort Damages (Cont.Ed.Bar 1988) Punitive Damages, §§ 14.13–14.14
- 4 Levy et al., California Torts (1985–2000) Punitive Damages, §§ 54.07
- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1344–1348

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2027
Punitive Damages—Entity Defendant
Bifurcated Trial (First Phase)

If you decide that [*name of defendant*]'s conduct caused [*name of plaintiff*] harm, you must decide if that conduct justifies an award of punitive damages. At this time, you must decide whether [*name of plaintiff*] has proved by clear and convincing evidence that [*name of defendant*] acted with malice, oppression, or fraud. The amount, if any, of punitive damages will be an issue for you to decide at a later time.

"Malice" means that [*name of defendant*] acted with intent to cause injury or that [*name of defendant*]'s conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A person acts with knowing disregard when he or she is aware of the probable dangerous consequences of his or her conduct and deliberately fails to avoid those consequences.

"Oppression" means that [*name of defendant*]'s conduct was despicable and subjected [*name of plaintiff*] to cruel and unjust hardship in knowing disregard of [his/her] rights.

"Despicable conduct" is conduct that is so mean, vile, base, or contemptible that it would be looked down on and despised by reasonable people.

"Fraud" means that [*name of defendant*] intentionally misrepresented or concealed a material fact and did so intending to deprive [*name of plaintiff*] of property or of a legal right or otherwise to cause [*name of plaintiff*] injury.

[*Name of plaintiff*] also must prove [one of] the following:

1. **[That the malice, oppression, or fraud was conduct of one or more officers, directors, or managing agents of [*name of defendant*] acting in a corporate capacity; [or]]**

2. **[That the conduct constituting malice, oppression, or fraud was authorized by an officer, a director, or a managing agent of [*name of defendant*]; [or]]**

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3. [That an officer, a director, or a managing agent of [*name of defendant*] knew of the conduct constituting malice, oppression, or fraud and adopted or approved that conduct after it occurred.]

An employee is a "managing agent" if he or she exercises substantial independent authority and judgment in his or her corporate decision making so that his or her decisions ultimately determine corporate policy.

DIRECTIONS FOR USE

Instruction 2023, *Punitive Damages—Individual Defendant—Bifurcated Trial (Second Phase)* may be used for the second phase of a bifurcated trial.

This instruction is intended for use when the plaintiff is seeking punitive damages against a corporation or other entity for the conduct of its directors, officers, and managing agents. When the plaintiff is seeking to hold an employer or principal liable for the conduct of a specific employee or agent, use Instruction 2025, *Punitive Damages Against Employer or Principal For Conduct of a Specific Agent or Employee—Bifurcated Trial (First Phase).* When the plaintiff is seeking punitive damages from both the employer/principal and the employee/agent, use Instruction 2029, *Punitive Damages—Individual and Corporate Defendants—Bifurcated Trial (First Phase).*

If any of the alternative grounds for seeking punitive damages are inapplicable to the facts of the case, they may be omitted.

SOURCES AND AUTHORITY

- Civil Code section 3294 provides, in part:

  (a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.
  (b) An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are

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awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.

(c) As used in this section, the following definitions shall apply:

(1) "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 of the rights or safety of others.

(2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.

(3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

- Civil Code section 3295(d) provides: "The court shall, on application of any defendant, preclude the admission of evidence of that defendant's profits or financial condition until after the trier of fact returns a verdict for plaintiff awarding actual damages and finds that a defendant is guilty of malice, oppression, or fraud in accordance with Section 3294. Evidence of profit and financial condition shall be admissible only as to the defendant or defendants found to be liable to the plaintiff and to be guilty of malice, oppression, or fraud. Evidence of profit and financial condition shall be presented to the same trier of fact that found for the plaintiff and found one or more defendants guilty of malice, oppression, or fraud."

- "[Section 3295(d)] affects the order of proof at trial, precluding the admission of evidence of defendants' financial condition until after the jury has returned a verdict for plaintiffs awarding actual damages and found that one or more defendants were guilty of 'oppression, fraud or malice,' in accordance with Civil Code section 3294." (*City of El Monte v. Superior Court* (1994) 29 Cal.App.4th 272, 274–275 [34 Cal.Rptr.2d 490], internal citations omitted.)

- "Evidence of the defendant's financial condition is a prerequisite to an award of punitive damages. In order to protect defendants from the premature disclosure of their financial position when punitive damages are sought, the Legislature enacted Civil Code section 3295." (*City of El Monte, supra,* 29 Cal.App.4th at p. 276, internal citations omitted.)

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- "[C]ourts have held it is reversible error to try the punitive damages issue to a new jury after the jury which found liability has been excused." (*Rivera v. Sassoon* (1995) 39 Cal.App.4th 1045, 1048 [46 Cal.Rptr.2d 144], internal citations omitted.)

- "Malice, for purposes of awarding exemplary damages, includes 'despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.' To establish conscious disregard, the plaintiff must show 'that the defendant was aware of the probable dangerous consequences of his conduct, and that he wilfully and deliberately failed to avoid those consequences.' " (*Hoch v. Allied-Signal, Inc.* (1994) 24 Cal.App.4th 48, 61 [29 Cal.Rptr.2d 615], internal citations omitted.)

- "Used in its ordinary sense, the adjective 'despicable' is a powerful term that refers to circumstances that are 'base,' 'vile,' or 'contemptible.' As amended to include this word, the statute plainly indicates that absent an intent to injure the plaintiff, 'malice' requires more than a 'willful and conscious' disregard of the plaintiffs' interests. The additional component of 'despicable conduct' must be found." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 725 [34 Cal.Rptr2d 898], internal citations omitted.)

- "Section 3294 is no longer silent on who may be responsible for imputing punitive damages to a corporate employer. For corporate punitive damages liability, section 3294, subdivision (b), requires that the wrongful act giving rise to the exemplary damages be committed by an 'officer, director, or managing agent.' " (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572 [88 Cal.Rptr.2d 19].)

- "[I]n performing, ratifying, or approving the malicious conduct, the agent must be acting as the organization's representative, not in some other capacity." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 723.)

- The concept of "managing agent" "assumes that such individual was acting in a corporate or employment capacity when the conduct giving rise to the punitive damages claim against the employer occurred." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 723.)

- "No purpose would be served by punishing the employer for an employee's conduct that is wholly unrelated to its business or to the employee's duties therein." (*College Hospital, Inc., supra,* 8 Cal.4th at pp. 723–724.)

- " 'The determination whether employees act in a managerial capacity [i.e., are managing agents] does not necessarily hinge on their "level" in the corporate hierarchy. Rather, the critical inquiry is the degree of discretion the employees

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possess in making decisions that will ultimately determine corporate policy.' " (*Kelly-Zurian v. Wohl Shoe Co.* (1994) 22 Cal.App.4th 397, 421 [27 Cal.Rptr.2d 457], internal citation omitted.)

- "[W]e conclude the Legislature intended the term 'managing agent' to include only those corporate employees who exercise substantial independent authority and judgment in their corporate decisionmaking so that their decisions ultimately determine corporate policy. The scope of a corporate employee's discretion and authority under our test is therefore a question of fact for decision on a case-by-case basis." (*White, supra,* 21 Cal.4th at pp. 566–567.)

- "In order to demonstrate that an employee is a true managing agent under section 3294, subdivision (b), a plaintiff seeking punitive damages would have to show that the employee exercised substantial discretionary authority over significant aspects of a corporation's business." (*White, supra,* 21 Cal.4th at p. 577.)

- " '[C]orporate policy' is the general principles which guide a corporation, or rules intended to be followed consistently over time in corporate operations. A 'managing agent' is one with substantial authority over decisions that set these general principles and rules." (*Cruz v. Homebase* (2000) 83 Cal.App.4th 160, 167–168 [99 Cal.Rptr.2d 435].)

- " '[R]atification' is the '[c]onfirmation and acceptance of a previous act.' A corporation cannot confirm and accept that which it does not actually know about." (*Cruz, supra,* 83 Cal.App.4th at p. 168.)

- "For purposes of determining an employer's liability for punitive damages, ratification generally occurs where, under the particular circumstances, the employer demonstrates an intent to adopt or approve oppressive, fraudulent, or malicious behavior by an employee in the performance of his job duties." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 726.)

- "Corporate ratification in the punitive damages context requires actual knowledge of the conduct and its outrageous nature." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 726.)

<u>Secondary Sources</u>

- California Tort Damages (Cont.Ed.Bar 1988) Punitive Damages, §§ 14.13–14.14, 14.23
- 4 Levy et al., California Torts (1985–2000) Punitive Damages, §§ 54.07, 54.24[4][d]
- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1344–1348

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2028
Punitive Damages—Individual and Entity Defendants
Trial Not Bifurcated

If you decide that [*name of individual defendant***]'s or [***name of entity defendant***]'s conduct caused [***name of plaintiff***] harm, you must decide if that conduct justifies an award of punitive damages. The purposes of punitive damages are to punish a wrongdoer and to discourage him or her and others from similar conduct in the future.**

You may award punitive damages against [*name of individual defendant***] only if [***name of plaintiff***] proves by clear and convincing evidence that [***name of individual defendant***] acted with malice, oppression, or fraud.**

You may award punitive damages against [*name of entity defendant***] only if [***name of plaintiff***] proves by clear and convincing evidence that [***name of entity defendant***] acted with malice, oppression, or fraud.**

"Malice" means that a defendant acted with intent to cause injury or that a defendant's conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A defendant acts with knowing disregard when the defendant is aware of the probable dangerous consequences of his, her, or its conduct and deliberately fails to avoid those consequences.

"Oppression" means that a defendant's conduct was despicable and subjected [*name of plaintiff***] to cruel and unjust hardship in knowing disregard of [his/her] rights.**

"Despicable conduct" is conduct that is so mean, vile, base, or contemptible that it would be looked down on and despised by reasonable people.

"Fraud" means that a defendant intentionally misrepresented or concealed a material fact and did so intending to deprive [*name of plaintiff***] of property or of a legal right or otherwise to cause [***name of plaintiff***] injury.**

You may award punitive damages against [*name of entity defendant***] only if [***name of plaintiff***] also proves [one of] the following:**

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1. **[That the malice, oppression, or fraud was conduct of one or more officers, directors, or managing agents of [***name of entity defendant***] acting in a corporate capacity; [or]]**

2. **[That an officer, a director, or a managing agent of [***name of entity defendant***] had advance knowledge of the unfitness of [***name of individual defendant***] and employed [him/her] with a knowing disregard of the rights or safety of others; [or]]**

3. **[That the conduct constituting malice, oppression, or fraud was authorized by one or more officers, directors, or managing agents of [***name of entity defendant***]; [or]]**

4. **[That one or more officers, directors, or managing agents of [***name of entity defendant***] knew of the conduct constituting malice, oppression, or fraud and adopted or approved that conduct after it occurred.]**

An employee is a "managing agent" if he or she exercises substantial independent authority and judgment in his or her corporate decision making so that his or her decisions ultimately determine corporate policy.

There is no fixed standard for determining the amount of punitive damages, and you are not required to award any punitive damages. In deciding the amount of punitive damages, if any, you should consider all of the following separately for each defendant:

(a) How reprehensible was that defendant's conduct?

(b) Does the amount of punitive damages you award against each defendant have a reasonable relationship to [*name of plaintiff***]'s harm?**

(c) In view of that defendant's financial condition, what amount will punish and discourage future wrongful conduct?

DIRECTIONS FOR USE

This instruction is intended to apply to cases where punitive damages are sought against both an individual person and a corporate defendant. When punitive damages are sought

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only against corporate defendants, use Instructions 2024, *Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee—Trial Not Bifurcated* or Instruction 2026, *Punitive Damages—Entity Defendant—Trial Not Bifurcated*. When punitive damages are sought against an individual defendant, use Instruction 2021, *Punitive Damages—Individual Defendant—Trial Not Bifurcated*.

If any of the alternative grounds for seeking punitive damages are inapplicable to the facts of the case, they may be omitted.

See Instruction 2021, *Punitive Damages—Individual Defendant*, for additional sources and authority.

Courts have stated that "[p]unitive damages previously imposed for the same conduct are relevant in determining the amount of punitive damages required to sufficiently punish and deter. The likelihood of future punitive damage awards may also be considered, although it is entitled to considerably less weight." (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661 [57 Cal.Rptr.2d 525], internal citations omitted.) The court in *Stevens* suggested that the following instruction be given if evidence of other punitive damage awards is introduced into evidence:

> If you determine that a defendant has already been assessed with punitive damages based on the same conduct for which punitive damages are requested in this case, you may consider whether punitive damages awarded in other cases have sufficiently punished and made an example of the defendant. You must not use the amount of punitive damages awarded in other cases to determine the amount of the punitive damage award in this case, except to the extent you determine that a lesser award, or no award at all, is justified in light of the penalties already imposed. (*Stevens, supra,* 49 Cal.App.4th at p. 1663, fn. 7.)

Regarding the relationship between punitive and compensatory damages, case law suggests that a jury may consider harm that could have been caused by the defendant's conduct, even if that harm did not come to pass: "The high court in *TXO* [*TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443 [113 S.Ct. 2711, 125 L.Ed.2d 366]] and *BMW* [*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559 [116 S.Ct. 1589, 134 L.Ed.2d 809]] has refined the disparity analysis to take into account the *potential* loss to the plaintiffs, as where a scheme worthy of punitive damages does not fully succeed. In such cases, the proper ratio would be the ratio of punitive damages to the potential harm to plaintiff." (*Sierra Club Foundation v. Graham* (1999) 72 Cal.App.4th 1135, 1162, fn. 15 [85 Cal.Rptr.2d 726], internal citations omitted.) The court in *Sierra Club Foundation* also noted the statement of the U.S. Supreme Court that

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applicable civil and criminal penalties should be considered in determining the amount of punitive damages. (*Id.* at p. 1162, citing *BMW of North America, Inc., supra,* 517 U.S. at pp. 565, 574–575.) It is unclear whether these factors should be considered by the jury or only by a court in reviewing the amount of a jury's award.

SOURCES AND AUTHORITY

- Civil Code section 3294 provides, in part:

  (a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.
  (b) An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.
  (c) As used in this section, the following definitions shall apply:
    (1) "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 of the rights or safety of others.
    (2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.
    (3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

- "Subdivision (b) is not a model of clarity, but in light of California's history of employer liability for punitive damages and of the Legislature's reasons for enacting subdivision (b), we have no doubt that it does no more than codify and refine existing law. Subdivision (b) thus authorizes the imposition of punitive damages on an

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employer in three situations: (1) when an employee was guilty of oppression, fraud or malice, and the employer with advance knowledge of the unfitness of the employee employed him or her with a conscious disregard of the rights or safety of others, (2) when an employee was guilty of oppression, fraud or malice, and the employer authorized or ratified the wrongful conduct, or (3) when the employer was itself guilty of the oppression, fraud or malice." (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1151 [74 Cal.Rptr.2d 510].)

- " 'California has traditionally allowed punitive damages to be assessed against an employer (or principal) for the acts of an employee (or agent) only where the circumstances indicate that the employer himself was guilty of fraud, oppression, or malice. Thus, even before section 3294, subdivision (b) was added to the Civil Code in 1980, the courts required evidence that the employer authorized or ratified a malicious act, personally committed such an act, or wrongfully hired or retained an unfit employee.' The 'additional' burden on a plaintiff seeking punitive damages from an employer is to show not only that an employee acted with oppression, fraud or malice, but that the employer engaged in conduct defined in subdivision (b)." (*Weeks, supra,* 63 Cal.App.4th at p. 1154, internal citation omitted.)

- "Civil Code section 3294, subdivision (b) does not authorize an award of punitive damages against an employer for the employee's wrongful conduct. It authorizes an award of punitive damages against an employer for the employer's own wrongful conduct. Liability under subdivision (b) is vicarious only to the extent that the employer is liable for the actions of its officer, director or managing agent in hiring or controlling the offending employee, in ratifying the offense or in acting with oppression, fraud or malice. It is not vicarious in the sense that the employer is liable for the wrongful conduct of the offending employee." (*Weeks, supra,* 63 Cal.App.4th at pp. 1154–1155.)

- "An award of punitive damages is not supported by a verdict based on breach of contract, even where the defendant's conduct in breaching the contract was wilful, fraudulent, or malicious. Even in those cases in which a separate tort action is alleged, if there is 'but one verdict based upon contract' a punitive damage award is improper." (*Myers Building Industries v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 959 [17 Cal.Rptr.2d 242], internal citations omitted.)

- "[P]unitive damages are not assessed against employers on a pure respondeat superior basis. Some evidence of fault by the employer itself is also required." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 724, fn. 11 [34 Cal.Rptr.2d 898].)

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- "Subdivision (b) … governs awards of punitive damages against employers, and permits an award for the conduct described there without an additional finding that the employer engaged in oppression, fraud or malice." (*Weeks, supra,* 63 Cal.App.4th at p. 1137.)

- "Section 3294 is no longer silent on who may be responsible for imputing punitive damages to a corporate employer. For corporate punitive damages liability, section 3294, subdivision (b), requires that the wrongful act giving rise to the exemplary damages be committed by an 'officer, director, or managing agent.' " (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572 [88 Cal.Rptr.2d 19].)

- "[I]n performing, ratifying, or approving the malicious conduct, the agent must be acting as the organization's representative, not in some other capacity." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 723.)

- The concept of "managing agent" "assumes that such individual was acting in a corporate or employment capacity when the conduct giving rise to the punitive damages claim against the employer occurred." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 723.)

- "No purpose would be served by punishing the employer for an employee's conduct that is wholly unrelated to its business or to the employee's duties therein." (*College Hospital, Inc., supra,* 8 Cal.4th at pp. 723–724.)

- " 'The determination whether employees act in a managerial capacity [i.e., are managing agents] does not necessarily hinge on their "level" in the corporate hierarchy. Rather, the critical inquiry is the degree of discretion the employees possess in making decisions that will ultimately determine corporate policy.' " (*Kelly-Zurian v. Wohl Shoe Co.* (1994) 22 Cal.App.4th 397, 421 [27 Cal.Rptr.2d 457], internal citation omitted.)

- "[W]e conclude the Legislature intended the term 'managing agent' to include only those corporate employees who exercise substantial independent authority and judgment in their corporate decisionmaking so that their decisions ultimately determine corporate policy. The scope of a corporate employee's discretion and authority under our test is therefore a question of fact for decision on a case-by-case basis." (*White, supra,* 21 Cal.4th at pp. 566–567.)

- "In order to demonstrate that an employee is a true managing agent under section 3294, subdivision (b), a plaintiff seeking punitive damages would have to show that

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the employee exercised substantial discretionary authority over significant aspects of a corporation's business." (*White, supra,* 21 Cal.4th at p. 577.)

- " '[C]orporate policy' is the general principles which guide a corporation, or rules intended to be followed consistently over time in corporate operations. A 'managing agent' is one with substantial authority over decisions that set these general principles and rules." (*Cruz v. Homebase* (2000) 83 Cal.App.4th 160, 167–168 [99 Cal.Rptr.2d 435].)

- " '[R]atification' is the '[c]onfirmation and acceptance of a previous act.' A corporation cannot confirm and accept that which it does not actually know about." (*Cruz, supra,* 83 Cal.App.4th at p. 168.)

- "For purposes of determining an employer's liability for punitive damages, ratification generally occurs where, under the particular circumstances, the employer demonstrates an intent to adopt or approve oppressive, fraudulent, or malicious behavior by an employee in the performance of his job duties." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 726.)

- "Corporate ratification in the punitive damages context requires actual knowledge of the conduct and its outrageous nature." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 726.)

Secondary Sources

- California Tort Damages (Cont.Ed.Bar 1988) Punitive Damages, §§ 14.13–14.14
- 4 Levy et al., California Torts (1985–2000) Punitive Damages, § 54.07
- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1344–1348

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2029
Punitive Damages—Individual and Corporate Defendants Bifurcated Trial (First Phase)

If you decide that [*name of individual defendant***]'s or [***name of corporate defendant***]'s conduct caused [***name of plaintiff***] harm, you must decide if that conduct justifies an award of punitive damages. At this time, you must decide whether [***name of plaintiff***] has proved by clear and convincing evidence that the defendants acted with malice, oppression, or fraud. The amount, if any, of punitive damages will be an issue for you to decide at a later time.**

You may award punitive damages against [*name of individual defendant***] only if [***name of plaintiff***] proves by clear and convincing evidence that [***name of individual defendant***] acted with malice, oppression, or fraud.**

"Malice" means that a defendant acted with intent to cause injury or that a defendant's conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A defendant acts with knowing disregard when the defendant is aware of the probable dangerous consequences of his, her, or its conduct and deliberately fails to avoid those consequences.

"Oppression" means that a defendant's conduct was despicable and subjected [*name of plaintiff***] to cruel and unjust hardship in knowing disregard of [his/her] rights.**

"Despicable conduct" is conduct that is so mean, vile, base, or contemptible that it would be looked down on and despised by reasonable people.

"Fraud" means that a defendant intentionally misrepresented or concealed a material fact and did so intending to deprive [*name of plaintiff***] of property or of a legal right or otherwise to cause [***name of plaintiff***] injury.**

You may award punitive damages against [*name of corporate defendant***] only if [***name of plaintiff***] proves [one of] the following:**

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1. **[That the malice, oppression, or fraud was conduct of one or more officers, directors, or managing agents of [***name of corporate defendant***] acting in a corporate capacity; [or]]**

2. **[That an officer, a director, or a managing agent of [***name of corporate defendant***] had advance knowledge of the unfitness of [***name of individual defendant***] and employed [him/her] with a knowing disregard of the rights or safety of others; [or]]**

3. **[That the conduct constituting malice, oppression, or fraud was authorized by an officer, a director, or a managing agent of [***name of corporate defendant***]; [or]]**

4. **[That an officer, a director, or a managing agent of [***name of corporate defendant***] knew of the conduct constituting malice, oppression, or fraud and adopted or approved that conduct after it occurred.]**

An employee is a "managing agent" if he or she exercises substantial independent authority and judgment in his or her corporate decision making so that his or her decisions ultimately determine corporate policy.

DIRECTIONS FOR USE

Use Instruction 2030, *Punitive Damages—Individual and Corporate Defendants—Bifurcated Trial (Second Phase),* for the second phase of a bifurcated trial

This instruction is intended to apply to cases where punitive damages are sought against both an individual person and a corporate defendant. When damages are sought only against a corporate defendant, use Instructions 2025, *Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee—Bifurcated Trial (First Phase)*, or Instruction 2027, *Punitive Damages—Entity Defendant—Bifurcated Trial (First Phase)*. When damages are sought against individual defendants, use Instruction 2022, *Punitive Damages—Individual Defendant—Bifurcated Trial (First Phase).*

If any of the alternative grounds for seeking punitive damages are inapplicable to the facts of the case, they may be omitted.

See Instruction 2021, *Punitive Damages—Individual Defendant—Trial Not Bifurcated*, for additional sources and authority.

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SOURCES AND AUTHORITY

- Civil Code section 3294 provides, in part:

  (a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant. …

  (c) As used in this section, the following definitions shall apply:

  (1) "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 of the rights or safety of others.

  (2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.

  (3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

- Civil Code section 3295(d) provides: "The court shall, on application of any defendant, preclude the admission of evidence of that defendant's profits or financial condition until after the trier of fact returns a verdict for plaintiff awarding actual damages and finds that a defendant is guilty of malice, oppression, or fraud in accordance with Section 3294. Evidence of profit and financial condition shall be admissible only as to the defendant or defendants found to be liable to the plaintiff and to be guilty of malice, oppression, or fraud. Evidence of profit and financial condition shall be presented to the same trier of fact that found for the plaintiff and found one or more defendants guilty of malice, oppression, or fraud."

- "[Section 3295(d)] affects the order of proof at trial, precluding the admission of evidence of defendants' financial condition until after the jury has returned a verdict for plaintiffs awarding actual damages and found that one or more defendants were guilty of 'oppression, fraud or malice,' in accordance with Civil Code section 3294." (*City of El Monte v. Superior Court* (1994) 29 Cal.App.4th 272, 274–275 [34 Cal.Rptr.2d 490], internal citations omitted.)

- "Evidence of the defendant's financial condition is a prerequisite to an award of punitive damages. In order to protect defendants from the premature disclosure of

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their financial position when punitive damages are sought, the Legislature enacted Civil Code section 3295." (*City of El Monte, supra,* 29 Cal.App.4th at p. 276, internal citations omitted.)

- "[C]ourts have held it is reversible error to try the punitive damages issue to a new jury after the jury which found liability has been excused." (*Rivera v. Sassoon* (1995) 39 Cal.App.4th 1045, 1048 [46 Cal.Rptr.2d 144], internal citations omitted.)

- "Malice, for purposes of awarding exemplary damages, includes 'despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.' To establish conscious disregard, the plaintiff must show 'that the defendant was aware of the probable dangerous consequences of his conduct, and that he wilfully and deliberately failed to avoid those consequences.' " (*Hoch v. Allied-Signal, Inc.* (1994) 24 Cal.App.4th 48, 61 [29 Cal.Rptr.2d 615], internal citations omitted.)

- "Used in its ordinary sense, the adjective 'despicable' is a powerful term that refers to circumstances that are 'base,' 'vile,' or 'contemptible.' As amended to include this word, the statute plainly indicates that absent an intent to injure the plaintiff, 'malice' requires more than a 'willful and conscious' disregard of the plaintiffs' interests. The additional component of 'despicable conduct' must be found." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 725 [34 Cal.Rptr2d 898], internal citations omitted.)

- "Section 3294 is no longer silent on who may be responsible for imputing punitive damages to a corporate employer. For corporate punitive damages liability, section 3294, subdivision (b), requires that the wrongful act giving rise to the exemplary damages be committed by an 'officer, director, or managing agent.' " (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572 [88 Cal.Rptr.2d 19].)

- "[I]n performing, ratifying, or approving the malicious conduct, the agent must be acting as the organization's representative, not in some other capacity." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 723.)

- The concept of "managing agent" "assumes that such individual was acting in a corporate or employment capacity when the conduct giving rise to the punitive damages claim against the employer occurred." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 723.)

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- "No purpose would be served by punishing the employer for an employee's conduct that is wholly unrelated to its business or to the employee's duties therein." (*College Hospital, Inc., supra,* 8 Cal.4th at pp. 723–724.)

- " 'The determination whether employees act in a managerial capacity [i.e., are managing agents] does not necessarily hinge on their "level" in the corporate hierarchy. Rather, the critical inquiry is the degree of discretion the employees possess in making decisions that will ultimately determine corporate policy.' " (*Kelly-Zurian v. Wohl Shoe Co.* (1994) 22 Cal.App.4th 397, 421 [27 Cal.Rptr.2d 457], internal citation omitted.)

- "[W]e conclude the Legislature intended the term 'managing agent' to include only those corporate employees who exercise substantial independent authority and judgment in their corporate decisionmaking so that their decisions ultimately determine corporate policy. The scope of a corporate employee's discretion and authority under our test is therefore a question of fact for decision on a case-by-case basis." (*White, supra,* 21 Cal.4th at pp. 566–567.)

- "In order to demonstrate that an employee is a true managing agent under section 3294, subdivision (b), a plaintiff seeking punitive damages would have to show that the employee exercised substantial discretionary authority over significant aspects of a corporation's business." (*White, supra,* 21 Cal.4th at p. 577.)

- " '[C]orporate policy' is the general principles which guide a corporation, or rules intended to be followed consistently over time in corporate operations. A 'managing agent' is one with substantial authority over decisions that set these general principles and rules." (*Cruz v. Homebase* (2000) 83 Cal.App.4th 160, 167–168 [99 Cal.Rptr.2d 435].)

- " '[R]atification' is the '[c]onfirmation and acceptance of a previous act.' A corporation cannot confirm and accept that which it does not actually know about." (*Cruz, supra,* 83 Cal.App.4th at p. 168.)

- "For purposes of determining an employer's liability for punitive damages, ratification generally occurs where, under the particular circumstances, the employer demonstrates an intent to adopt or approve oppressive, fraudulent, or malicious behavior by an employee in the performance of his job duties." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 726.)

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- "Corporate ratification in the punitive damages context requires actual knowledge of the conduct and its outrageous nature." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 726.)

Secondary Sources

- California Tort Damages (Cont.Ed.Bar 1988) Punitive Damages, §§ 14.13–14.14, 14.23
- 4 Levy et al., California Torts (1985–2000) Punitive Damages, §§ 54.07, 54.24[4][d]
- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1344–1348

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2030
Punitive Damages—Individual and Corporate Defendants Bifurcated Trial (Second Phase)

You must now decide the amount, if any, that you should award [*name of plaintiff*] in punitive damages. The purposes of punitive damages are to punish a wrongdoer and to discourage him or her and others from similar conduct in the future.

There is no fixed standard for determining the amount of punitive damages and you are not required to award any punitive damages. In deciding the amount of punitive damages, if any, you should consider all of the following separately for each defendant:

(a) How reprehensible was that defendant's conduct?

(b) Does the amount of punitive damages you award against each defendant have a reasonable relationship to [*name of plaintiff*]'s harm?

(c) In view of that defendant's financial condition, what amount will punish and discourage future wrongful conduct?

DIRECTIONS FOR USE

Courts have stated that "[p]unitive damages previously imposed for the same conduct are relevant in determining the amount of punitive damages required to sufficiently punish and deter. The likelihood of future punitive damage awards may also be considered, although it is entitled to considerably less weight." (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661 [57 Cal.Rptr.2d 525], internal citations omitted.) The court in *Stevens* suggested that the following instruction be given if evidence of other punitive damage awards is introduced into evidence:

> If you determine that a defendant has already been assessed with punitive damages based on the same conduct for which punitive damages are requested in this case, you may consider whether punitive damages awarded in other cases have sufficiently punished and made an example of the defendant. You must not use the amount of punitive damages awarded in other cases to determine the amount of the punitive damage award in this

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> case, except to the extent you determine that a lesser award, or no award at all, is justified in light of the penalties already imposed. (*Stevens, supra,* 49 Cal.App.4th at p. 1663, fn. 7.)

Regarding the relationship between punitive and compensatory damages, case law suggests that a jury may consider harm that could have been caused by the defendant's conduct, even if that harm did not come to pass: "The high court in *TXO* [*TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443 [113 S.Ct. 2711, 125 L.Ed.2d 366]] and *BMW* [*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559 [116 S.Ct. 1589, 134 L.Ed.2d 809]] has refined the disparity analysis to take into account the *potential* loss to the plaintiffs, as where a scheme worthy of punitive damages does not fully succeed. In such cases, the proper ratio would be the ratio of punitive damages to the potential harm to plaintiff." (*Sierra Club Foundation v. Graham* (1999) 72 Cal.App.4th 1135, 1162, fn. 15 [85 Cal.Rptr.2d 726], internal citations omitted.) The court in *Sierra Club Foundation* also noted the statement of the U.S. Supreme Court that applicable civil and criminal penalties should be considered in determining the amount of punitive damages. (*Id.* at p. 1162, citing *BMW of North America, Inc., supra,* 517 U.S. at pp. 565, 574–575.) It is unclear whether these factors should be considered by the jury or only by a court in reviewing the amount of a jury's award.

SOURCES AND AUTHORITY

- Civil Code section 3294 provides, in part: "In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant."

- Civil Code section 3295(d) provides: "The court shall, on application of any defendant, preclude the admission of evidence of that defendant's profits or financial condition until after the trier of fact returns a verdict for plaintiff awarding actual damages and finds that a defendant is guilty of malice, oppression, or fraud in accordance with Section 3294. Evidence of profit and financial condition shall be admissible only as to the defendant or defendants found to be liable to the plaintiff and to be guilty of malice, oppression, or fraud. Evidence of profit and financial condition shall be presented to the same trier of fact that found for the plaintiff and found one or more defendants guilty of malice, oppression, or fraud."

- "[Section 3295(d)] affects the order of proof at trial, precluding the admission of evidence of defendants' financial condition until after the jury has returned a verdict for plaintiffs awarding actual damages and found that one or more defendants were

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guilty of 'oppression, fraud or malice,' in accordance with Civil Code section 3294." (*City of El Monte v. Superior Court* (1994) 29 Cal.App.4th 272, 274–275 [34 Cal.Rptr.2d 490], internal citations omitted.)

- "Evidence of the defendant's financial condition is a prerequisite to an award of punitive damages. In order to protect defendants from the premature disclosure of their financial position when punitive damages are sought, the Legislature enacted Civil Code section 3295." (*City of El Monte, supra*, 29 Cal.App.4th at p. 276, internal citations omitted.)

- "[C]ourts have held it is reversible error to try the punitive damages issue to a new jury after the jury which found liability has been excused." (*Rivera v. Sassoon* (1995) 39 Cal.App.4th 1045, 1048 [46 Cal.Rptr.2d 144], internal citations omitted.)

- "The purpose of punitive damages is to punish wrongdoers and thereby deter the commission of wrongful acts." (*Neal v. Farmers Insurance Exchange* (1978) 21 Cal.3d 910, 928, fn. 13 [148 Cal.Rptr. 389].)

- "Punitive damages are to be assessed in an amount which, depending upon the defendant's financial worth and other factors, will deter him and others from committing similar misdeeds. Because compensatory damages are designed to make the plaintiff 'whole,' punitive damages are a 'windfall' form of recovery." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 712 [34 Cal.Rptr2d 898], internal citations omitted.)

- "It follows that the wealthier the wrongdoing defendant, the larger the award of exemplary damages need be in order to accomplish the statutory objective." (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 65 [118 Cal.Rptr. 184].)

- " 'A plaintiff, upon establishing his case, is always entitled of right to compensatory damages. But even after establishing a case where punitive damages are permissible, he is never entitled to them. The granting or withholding of the award of punitive damages is wholly within the control of the jury, and may not legally be influenced by any direction of the court that in any case a plaintiff is entitled to them. Upon the clearest proof of malice in fact, it is still the exclusive province of the jury to say whether or not punitive damages shall be awarded. A plaintiff is entitled to such damages only after the jury, in the exercise of its untrammeled discretion, has made the award.' " (*Brewster v. Second Baptist Church of Los Angeles* (1948) 32 Cal.2d 791, 801 [197 P.2d 713], internal citation omitted.)

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- "In light of our holding that evidence of a defendant's financial condition is essential to support an award of punitive damages, Evidence Code section 500 mandates that the plaintiff bear the burden of proof on the issue. A plaintiff seeking punitive damages is not seeking a mere declaration by the jury that he is entitled to punitive damages in the abstract. The plaintiff is seeking an award of real money in a specific amount to be set by the jury. Because the award, whatever its amount, cannot be sustained absent evidence of the defendant's financial condition, such evidence is 'essential to the claim for relief.' " (*Adams v. Murakami* (1991) 54 Cal. 3d 105, 119 [284 Cal.Rptr. 318], internal citation omitted.)

- "[W]e are afforded guidance by certain established principles, all of which are grounded in the purpose and function of punitive damages. One factor is the particular nature of the defendant's acts in light of the whole record; clearly, different acts may be of varying degrees of reprehensibility, and the more reprehensible the act, the greater the appropriate punishment, assuming all other factors are equal. Another relevant yardstick is the amount of compensatory damages awarded; in general, even an act of considerable reprehensibility will not be seen to justify a proportionally high amount of punitive damages if the actual harm suffered thereby is small. Also to be considered is the wealth of the particular defendant; obviously, the function of deterrence will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort. By the same token, of course, the function of punitive damages is not served by an award which, in light of the defendant's wealth and the gravity of the particular act, exceeds the level necessary to properly punish and deter." (*Neal, supra,* 21 Cal.3d at p. 928, internal citations and footnote omitted.)

- "The decision to award punitive damages is exclusively the function of the trier of fact. So too is the amount of any punitive damage award. The relevant considerations are the nature of the defendant's conduct, the defendant's wealth, and the plaintiff's actual damages." (*Gagnon v. Continental Casualty Co.* (1989) 211 Cal.App.3d 1598, 1602 [260 Cal.Rptr. 305], internal citations omitted.)

- "It has been recognized that punitive damages awards generally are not permitted to exceed 10 percent of the defendant's net worth." (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1166 [74 Cal.Rptr.2d 510].)

- "In light of our discussion, we conclude that even where, as here, punitive but not compensatory damages are available to the plaintiff, the defendant is entitled to an instruction that punitive damages must bear a reasonable relation to the injury, harm, or damage actually suffered by the plaintiff and proved at trial. Consequently, the trial court erred in failing to so instruct the jury." (*Gagnon, supra,* 211 Cal.App.3d at p. 1605.)

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- "We conclude that the rule … that an award of exemplary damages must be accompanied by an award of compensatory damages [or its equivalent] is still sound. That rule cannot be deemed satisfied where the jury has made an express determination not to award compensatory damages." (*Cheung v. Daley* (1995) 35 Cal.App.4th 1673, 1677 [42 Cal.Rptr.2d 164], footnote omitted.)

- "With the focus on the plaintiff's injury rather than the amount of compensatory damages, the ["reasonable relation"] rule can be applied even in cases where only equitable relief is obtained or where nominal damages are awarded or, as here, where compensatory damages are unavailable." (*Gagnon, supra*, 211 Cal.App.3d at p. 1605.)

Secondary Sources

- California Tort Damages (Cont.Ed.Bar 1988) Punitive Damages, §§ 14.13–14.14, 14.23
- 4 Levy et al., California Torts (1985–2000) Punitive Damages, §§ 54.07, 54.24[4][d]
- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1344–1348

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2031
Contributory Negligence—General Verdict

If you decide that [*name of plaintiff*]'s negligence combined with [*name of defendant*]'s [negligence/conduct/product] in causing [*name of plaintiff*]'s harm, then you must decide the percentage of responsibility for the harm that you attribute to each of them.

First, decide the total amount of [*name of plaintiff*]'s damages. Then decide the percentage of responsibility that [*name of plaintiff*] and [*name of defendant*] have for the damages. Then reduce the total damages by the percentage of responsibility that you attribute to [*name of plaintiff*].

After you make these calculations, state the resulting damage award in your verdict.

SOURCES AND AUTHORITY

- "In determining to what degree the injury was due to the fault of the plaintiff, it is logically essential that the plaintiff's negligence be weighed against the combined total of all other causative negligence; moreover, inasmuch as a plaintiff's actual damages do not vary by virtue of the particular defendants who happen to be before the court, we do not think that the damages which a plaintiff may recover against defendants who are joint and severally liable should fluctuate in such a manner." (*American Motorcycle Assn.* (1978) 20 Cal.3d 578, 590, fn. 2 [146 Cal.Rptr. 182].)

- "Proposition 51 … retains the joint liability of all tortfeasors, regardless of their respective shares of fault, with respect to all objectively provable expenses and monetary losses. On the other hand, the more intangible and subjective categories of damage were limited by Proposition 51 to a rule of strict proportionate liability. With respect to these noneconomic damages, the plaintiff alone now assumes the risk that a proportionate contribution cannot be obtained from each person responsible for the injury." (*DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 600 [7 Cal.Rptr.2d 238].)

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2100
Essential Factual Elements

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

1. **That [***name of plaintiff/decedent]***] was employed by [***name of defendant***];**

2. **That [***name of defendant***] was a common carrier by railroad;**

3. **That [***name of defendant***] was engaged in interstate commerce;**

4. **That [***name of plaintiff/decedent***]'s job duties furthered, or in any way substantially affected, interstate commerce;**

5. **That [***name of plaintiff/decedent***] was acting within the scope of [his/her] employment at the time of the incident;**

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

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

8. **That [***name of defendant***]'s negligence was a cause of [***name of plaintiff/decedent***]'s [harm/death].**

["Interstate commerce" is commercial activity that crosses more than one country or state, such as the movement of goods from one state to another.]

DIRECTIONS FOR USE

In many case, some of the elements itemized above may not be contested or may be decided by the judge as a matter of law in advance of trial. Such elements may be deleted from this instruction.

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If the plaintiff is bringing a negligence claim under the Federal Employer Liability Act (FELA) and a claim under the Federal Safety Appliance Act (SAA) or the Boiler Inspection Act (BIA), the court may wish to add an introductory instruction that would alert the jury to the difference between the two claims.

SOURCES AND AUTHORITY

- Title 45 United States Code section 51 provides:

  > Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.
  >
  > Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

- The FELA is "liberally construed" to further Congress's remedial goal of protecting railroad workers. (*Consolidated Rail Corp. v. Gottshall* (1994) 512 U.S. 532, 543 [114 S.Ct. 2396, 129 L.Ed.2d 427].)

- The elements of a FELA case are: "(1) the injury occurred while the plaintiff was working within the scope of his or her employment with the railroad; (2) the employment was in furtherance of the railroad's interstate transportation business; (3) the employer railroad was negligent; and (4) the employer's negligence played some part in causing the injury for which compensation is sought under the Act." (*Monarch*

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v. Southern Pacific Transportation Co. (1999) 70 Cal.App.4th 1197, 1210, fn. 10 [83 Cal.Rptr.2d 247], internal citations omitted.)

- "That FELA is to be liberally construed … does not mean that it is a workers' compensation statute. We have insisted that FELA 'does not make the employer the insurer of the safety of his employees while they are on duty. The basis of his liability is his negligence, not the fact that injuries occur.' " (*Consolidated Rail Corp., supra,* 512 U.S. at p. 543, internal citations omitted.)

- "We note that under the Federal Employers' Liability Act of 1908 an injured railroad employee may bring a cause of action without proof of negligence based on failure of the SAA-mandated safety appliances to function. When such strict liability does not apply, i.e., the injury does not result from defective equipment covered by the SAA, the employee must establish common law negligence." (*Carrillo v. ACF Industries, Inc.* (1999) 20 Cal.4th 1158, 1170 [86 Cal.Rptr.2d 832], fn. 4, internal citations omitted.)

- "Under the FELA, liability is established if the employer's negligence played any part in causing the employee's injury." (*McDonald v. Southern Pacific Transportation Co.* (1999) 71 Cal.App.4th 256, 260, fn. 4 [83 Cal.Rptr.2d 734], internal citation omitted.)

- "The test for coverage under the amendment is not whether the employee is engaged in transportation, but rather whether what he does in any way furthers or substantially affects transportation." (*Reed v. Pennsylvania Railroad Co.* (1956) 351 U.S. 502, 505 [76 S.Ct. 958, 100 L.Ed.2d 1366].)

- "Where more than one inference can be drawn from the evidence, the question whether an employee was, at the time of receiving the injury sued for, engaged in interstate commerce, is for the jury." (*Sullivan v. Matt* (1955) 130 Cal.App.2d 134, 139 [278 P.2d 499], internal citations omitted.)

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2101
Negligence—Duty of Railroad

A railroad must use reasonable care under the circumstances to provide its employees with a reasonably safe place to work and with reasonably safe and suitable tools, machinery, and appliances. The reasonableness of care depends on the danger associated with the workplace or the equipment. The failure to use reasonable care is negligence. A railroad is not negligent if, using reasonable care, it could not have reasonably foreseen that the particular condition could cause injury.

[*Name of defendant***] is responsible for the negligence of any of its officers, agents, or employees.**

DIRECTIONS FOR USE

For a definition of the term "negligence" see Instruction 301, *Basic Standard of Care*.

SOURCES AND AUTHORITY

- "The plaintiff must make out a prima facie case of negligence on the part of the employer, including the element of reasonable foreseeability. … 'To recover, the plaintiff must prove that the railroad, with the exercise of due care, could have reasonably foreseen that a particular condition could cause injury. The defendant's duty is measured by what a reasonably prudent person should or could have reasonably anticipated as occurring under like circumstances.' " (*Albert v. Southern Pacific Transportation Co.* (1994) 30 Cal.App.4th 529, 534 [35 Cal.Rptr.2d 777], internal citations omitted.)

- "Absent foreseeability, negligence is not established under FELA and without a showing of negligence, recovery is not permitted." (*Albert, supra,* 30 Cal.App.4th at p. 536, internal citation omitted.) But note that foreseeability is not required for claims arising from the Federal Safety Appliance Act (49 USC § 20301, et seq.), or the Boiler Inspection Act (49 USC § 20701).

- "Although a railroad's duty to use reasonable care in furnishing employees a safe place to work is not stated explicitly in the statute, it has become an integral part of

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the FELA. Under the FELA, that duty becomes 'more imperative' as the risk to an employee increases. The duty is a 'continuing one' and requires a jury to weigh a myriad of factors—including the nature of a task, its hazards and efforts—in determining whether an employer furnished an employee with a reasonably safe place to work. This continuous duty to provide a safe place to work is broader than the general duty to use reasonable care. Other courts in FELA actions have held that failure to instruct a jury regarding an employer's duty to provide a reasonably safe place to work is reversible error. We agree that when the issue is properly raised and an instruction is requested, the FELA requires jury instructions on the duty to provide a reasonably safe place to work." (*Ragsdell v. Southern Pacific Transportation Co.* (9th Cir. 1982) 688 F.2d 1281, 1283, internal citations omitted.)

- "The test of negligence in supplying the employee a safe place to work is 'whether reasonable men, examining the circumstances and the likelihood of injury, would have taken those steps necessary to remove the danger.' " (*Mortensen v. Southern Pacific Co.* (1966) 245 Cal.App.2d 241, 244 [53 Cal.Rptr. 851], internal citations omitted.)

- The duty to use reasonable care "is a duty which becomes 'more imperative' as the risk increases. 'Reasonable care' becomes, then, a demand of higher supremacy, and yet, in all cases it is a question of the reasonableness of the care, reasonableness depending upon the danger attending the place or the machinery." (*Bailey v. Central Vermont Ry., Inc.* (1943) 319 U.S. 350, 353 [63 S.Ct. 1062, 87 L.Ed. 1444], internal citation omitted.)

- "The employer is not the insurer of the safety of its employees and the test of the employer's liability to an injured employee is whether ordinary care was used by the employer in regard to the risk." (*Baez v. Southern Pacific Co.* (1963) 210 Cal.App.2d 714, 717 [26 Cal.Rptr. 899], internal citation omitted.)

- The U.S. Supreme Court has held that an independent contractor is an "agent" for purposes of establishing an employer's liability under the FELA if the contractor performs "operational activities" of the employer. (*Sinkler v. Missouri Pacific Railroad Co.* (1958) 356 U.S. 326, 331–332 [78 S.Ct. 758, 2 L.Ed.2d 799].)

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2102
Negligence—Assignment of Employees

[*Name of defendant***] was negligent if**

[it assigned [*name of plaintiff/decedent***] to a task that it knew or should have known [***name of plaintiff/decedent***] was not medically fit to perform.]**

[it failed to assign a sufficient number of employees to safely perform the task.]

DIRECTIONS FOR USE

Read only the alternative that applies to the facts of the case.

SOURCES AND AUTHORITY

- "The court correctly instructed the jury as to defendant's liability for assigning an employee to a job for which he is medically unfit. In this regard the jury was told that 'Under the Federal Employers' Liability Act, the word "injury" may include sickness, and it is negligence for a railroad company to assign a sick employee, of whose illness it knew or should have known, to tasks for which he is, by reason of his condition, unfitted, and the employee may recover damages from the railroad if such assignment plays any part in proximately worsening or aggravating such condition.' " (*Waller v. Southern Pacific Co.* (1967) 66 Cal.2d 201, 214 [57 Cal.Rptr. 353].)

- It is not necessary to include as an element that the defendant must have "forced" the plaintiff to perform the injurious task. (*Waller, supra,* 66 Cal.2d at p. 214.)

- "The employer is under the nondelegable obligation of providing sufficient help for the particular task." (*Southern Ry. Co. v. Welch* (6th Cir. 1957) 247 F.2d 340, 341, internal citation omitted.)

- "As a corollary to this duty to maintain safe working conditions, the carrier is required to provide its employee with sufficient help in the performance of the work assigned to him. Where the failure to provide sufficient help proximately causes injury to the employee, the carrier is liable for negligence under the provisions of the FELA." (*Yawn v. Southern Ry. Co.* (5th Cir. 1979) 591 F.2d 312, 315, internal citations omitted.)

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2103
Causation—Negligence

[*Name of defendant*]'s negligence, if any, was a cause of [[*name of plaintiff*]'s harm/[*name of decedent*]'s death] if it played any part, no matter how small, in bringing about the [harm/death], even if other factors also contributed to the [harm/death].

DIRECTIONS FOR USE

For an instruction on concurrent cause, see Instruction 341, *Multiple Causes.*

SOURCES AND AUTHORITY

- "Under this statute … the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." (*Rogers v. Missouri Pacific Railroad Co.* (1957) 352 U.S. 500, 506 [77 S.Ct. 443, 1 L.Ed.2d 493].)

- "The common law concept of proximate cause … has not been adopted as the causation test in FELA cases. Causation in an FELA case exists even if there is a plurality of causes, including the negligence of the defendant or of a third person. The negligence of the employer need not be the sole cause or even a substantial cause of the ensuing injury." (*Parker v. Atchison, Topeka and Santa Fe Ry. Co.* (1968) 263 Cal.App.2d 675, 678 [70 Cal.Rptr. 8].)

- "Although the burden upon the plaintiff in proving causation in an F.E.L.A. case can be weighed neither in pounds nor ounces, it is a substantially lighter burden that that imposed upon him by [the common-law jury instruction]." (*Parker, supra,* 263 Cal.App.2d at p. 678.)

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2104
Contributory Negligence

[*Name of defendant***] claims that [***name of plaintiff/decedent***] was negligent and that [his/her] negligence contributed to [his/her] own [harm/death]. To succeed, [***name of defendant***] must prove both of the following:**

1. **That [***name of plaintiff/decedent***] was negligent; and**

2. **That [***name of plaintiff/decedent***]'s negligence was a cause of [his/her] [harm/death].**

***Name of plaintiff*]/decedent]'s negligence, if any, was a cause of [his/her] own harm if it played any part, no matter how small, in bringing about the harm, even if other factors also contributed to the harm.**

If you decide that [*name of defendant***] was negligent but also decide that [***name of plaintiff/decedent***]'s negligence contributed to the harm, then you must determine the percentage of negligence that you attribute to [***name of plaintiff/decedent***].**

DIRECTIONS FOR USE

This instruction does not apply in cases where the claim is based on a violation of the Federal Safety Appliance Act or the Boiler Inspection Act.

For a definition of the term "negligence" see Instruction 301, *Basic Standard of Care*.

SOURCES AND AUTHORITY

- Title 45 United States Code section 53 provides, in part: "[T]he fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

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- "The FELA provides that defense of contributory negligence is not available to an employer to defeat an employee's claim for injury, but only to diminish the amount of damages in proportion to the amount of negligence attributable to the employee. The burden of proving contributory negligence is on the defendant." (*Torres v. Southern Pacific Co.* (1968) 260 Cal.App.2d 757, 763 [67 Cal.Rptr. 428], internal citations omitted.)

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2105
Compliance With Employer's Requests or Directions

[*Name of plaintiff/decedent*] was not negligent simply because [he/she], at the request or direction of [*name of defendant*], worked at a dangerous job, or in a dangerous place, or under dangerous conditions.

SOURCES AND AUTHORITY

- "In *Joyce v. Atlantic Richfield Co*., this court held that when the evidence could support either contributory negligence or assumption of the risk, instructions which only define contributory negligence are not sufficient to prevent the jury from applying assumption of the risk. The court held the jury instructions should also include the following admonition: 'You may not find contributory negligence on the part of the plaintiff, however, simply because he acceded to the request or direction of the responsible representatives of his employer that he work at a dangerous job, or in a dangerous place, or under unsafe conditions.' The same instruction has been held sufficient by other circuits." (*Sauer v. Burlington Northern Railroad Co.* (10th Cir. 1996) 106 F.3d 1490, 1493, internal citation omitted.)

- "[I]f no evidence of impermissible assumption of risk has reached the jury, a correct instruction on contributory negligence will do. However, if, either because of evidence introduced at trial or because of statements made by counsel in opening or closing arguments, there is a risk that the implied consent theory of assumption of the risk seeped its way into the case, the jury should be instructed that it 'may not find contributory negligence on the part of the plaintiff ... simply because he acceded to the request or direction of the responsible representatives of his employer that he work at a dangerous job, or in a dangerous place, or under unsafe conditions.' " (*Fashauer v. New Jersey Transit Rail Operations, Inc.* (3rd Cir. 1995) 57 F.3d 1269, 1280.)

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2106
Essential Factual Elements
Federal Safety Appliance Act or Boiler Inspection Act

[*Name of plaintiff***] [also] claims that while [he/she[***name of decedent***]] was employed by [***name of defendant***], [[he/she] was harmed by/[his/her] death was caused by] [***name of defendant***]'s [***describe violation of Federal Safety Appliance Act/Boiler Inspection Act***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff/decedent***] was employed by [***name of defendant***];**

2. **That [***name of defendant***] was a common carrier by railroad;**

3. **That [***name of plaintiff/decedent***] was acting within the scope of [his/her] employment at the time of the incident;**

4. **That [***name of defendant***] was engaged in interstate commerce;**

5. **That [***name of plaintiff/decedent***]'s job duties furthered, or in any way substantially affected, interstate commerce;**

6. **That [***name of defendant***] [***describe violation of Federal Safety Appliance Act/Boiler Inspection Act***];**

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

8. **That [***name of defendant***]'s conduct was a cause of [[***name of plaintiff***]'s harm/[***name of decedent***]'s death].**

[Interstate commerce is commercial activity that crosses more than one country or state, such as the movement of goods from one state to another.]

[*Name of defendant***] is responsible for harm caused by [***describe conduct that violated the FSA/BIA***] even if it was not negligent. If you find that [***name of defendant***] is responsible for [***name of plaintiff/decedent***]'s [harm/death], [***name of plaintiff***]'s recovery, if any, must not be reduced because of [***name of plaintiff/decedent***]'s own conduct.**

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DIRECTIONS FOR USE

The statutory violation should be paraphrased in this instruction where indicated. Separate instructions may need to be drafted detailing the statutory requirements of the specific violation as alleged and any applicable defenses. (See 49 USC §§ 20301, *et seq*, and 20701.)

In many case, some of the elements itemized above may not be contested or may be decided by the judge as a matter of law in advance of trial. Such elements may be deleted from this instruction.

If the plaintiff is bringing a negligence claim under the Federal Employer Liability Act (FELA) and a claim under the Federal Safety Appliance Act (SAA) or the Boiler Inspection Act (BIA), the court may wish to add an introductory instruction that would alert the jury to the difference between the two claims.

Do not give a contributory negligence instruction if the case is brought under this theory.

SOURCES AND AUTHORITY

- Title 45 United States Code section 53 provides, in part: "[T]he fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

- Title 45 United States Code section 54 provides: "In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."
- Title 45 United States Code section 54a provides: "A regulation, standard, or requirement in force, or prescribed by the Secretary of Transportation under chapter 201 of Title 49, or by a State agency that is participating in investigative and

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surveillance activities under section 20105 of Title 49, is deemed to be a statute under sections 53 and 54 of this title."

- "We note that under the Federal Employers' Liability Act of 1908 an injured railroad employee may bring a cause of action without proof of negligence based on failure of the SAA-mandated safety appliances to function. When such strict liability does not apply, i.e., the injury does not result from defective equipment covered by the SAA, the employee must establish common law negligence. The Supreme Court has also recognized that the SAA imposes a duty on railroads extending to nonemployee travelers at railway/highway crossings, who must bring a common law tort action in state court (absent diversity) and must prove negligence." (*Carrillo v. ACF Industries, Inc.* (1999) 20 Cal.4th 1158, 1170, fn. 4 [86 Cal.Rptr.2d 832], internal citations omitted.)

- "[An] FSAA violation is per se negligence in a FELA suit. In other words, the injured employee has to show only that the railroad violated the FSAA, and the railroad is strictly liable for any injury resulting from the violation." (*Phillips v. CSX Transportation Co.* (4th Cir. 1999) 190 F.3d 285, 288.)

- Title 49 United States Code section 20701 provides:

  A railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances—
  (1) are in proper condition and safe to operate without unnecessary danger of personal injury;
  (2) have been inspected as required under this chapter and regulations prescribed by the Secretary of Transportation under this chapter; and
  (3) can withstand every test prescribed by the Secretary under this chapter.

- " 'The BIA and the SAA are regarded as amendments to the FELA. The BIA supplements the FELA to provide additional public protection and facilitate employee recovery. … [T]he BIA imposes on the carrier an absolute duty to maintain the locomotive, and all its parts and appurtenances, in proper condition, and safe to operate without unnecessary peril to life or limb.' " (*Fontaine v. National Railroad Passenger Corp.* (1997) 54 Cal.App.4th 1519, 1525 [63 Cal.Rptr.2d 644], internal citation omitted.)
- "[N]either contributory negligence nor assumption of the risk is a defense to a BIA violation which has contributed to the cause of an injury." (*Fontaine, supra,* 54 Cal.App.4th at p. 1525.)

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- "Where an inefficient brake causes an injury the carrier in interstate commerce under the Safety Appliance Act cannot escape liability, and proof of negligence on the part of the railroad is unnecessary." (*Leet v. Union Pacific Railroad Co.* (1943) 60 Cal.App.2d 814, 817 [142 P.2d 37].)

- "Proof of a BIA violation is enough to establish negligence as a matter of law, and neither contributory negligence nor assumption of risk can be raised as a defense." (*Law v. General Motors Corp.* (9th Cir. 1997) 114 F.3d 908, 912, internal citations omitted.)

- "The purpose in enacting the BIA was to protect train service employees and the traveling public from defective locomotive boilers and equipment. '[I]t has been held consistently that the [BIA] supplements the [FELA] by imposing on interstate railroads "an absolute and continuing duty" to provide safe equipment.' In addition to the civil penalty, a person harmed by violation of the BIA is given recourse to sue under FELA, which applies only to railroad employees injured while engaged in interstate commerce. FELA provides the exclusive remedy for recovery of damages against a railroad by its employees. FELA liability is expressly limited to common carriers." (*Viad Corp. v. Superior Court* (1997) 55 Cal.App.4th 330, 335 [64 Cal.Rptr.2d 136], internal citations omitted, disapproved on other grounds in *Scheiding v. General Motors Corp.* (2000) 22 Cal.4th 471, 484, fn. 6 [93 Cal.Rptr.2d 342].)

- Title 45 United States Code section 51 provides, in part: "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

- "The test for coverage under the amendment is not whether the employee is engaged in transportation, but rather whether what he does in any way furthers or substantially affects transportation." (*Reed v. Pennsylvania Railroad Co.* (1956) 351 U.S. 502, 505 [76 S.Ct. 958, 100 L.Ed.2d 1366].)

- "Where more than one inference can be drawn from the evidence, the question whether an employee was, at the time of receiving the injury sued for, engaged in interstate commerce, is for the jury." (*Sullivan v. Matt* (1955) 130 Cal.App.2d 134, 139 [278 P.2d 499], internal citations omitted.)

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2107
Causation Under FSAA or BIA

If you decide that [*name of defendant***] [***describe violation of the Federal Safety Appliance Act/Boiler Inspection Act***], then this is a cause of harm if it played any part, no matter how small, in bringing about the [harm/death], even if other factors also contributed to the [harm/death].**

SOURCES AND AUTHORITY

- "Actions alleging a violation of the BIA are brought under the FELA. The standard of causation required in a BIA case is the same as the standard of causation required in a FELA negligence case." (*Summers v. Missouri Pacific Railroad System* (10th Cir. 1997) 132 F.3d 599, 606, internal citations omitted.)

- "Proximate cause, as traditionally understood, is not required to establish causation under either the FELA or the BIA. 'Under the FELA, an employee is entitled to recover damages if the employer's negligence played any part in producing the injury, no matter how slight.' " (*Fontaine v. National Railroad Passenger Corp.* (1997) 54 Cal.App.4th 1519, 1525 [63 Cal.Rptr.2d 644], internal citations omitted.)

- Liability under the BIA is established if defendant's violation of the BIA "played any part, no matter how small, in bringing about or actually causing injury to the plaintiff … without any requirement of a showing of negligence on the part of the defendant." (*Oglesby v. Southern Pacific Transportation Co.* (9th Cir. 1993) 6 F.3d 603, 606–609.)

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2108
Statute of Limitations/Special Verdict Form or Interrogatory

[*Name of plaintiff***] must prove that [he/she] did not know, and could not reasonably have known, before [***date three years before action was commenced***],**

1. **That [he/she] had been harmed; and**

2. **That the harm was potentially caused by [his/her] work with [***name of defendant***].**

You will be asked a question about this on a special [verdict form/ interrogatory].

SOURCES AND AUTHORITY

- Title 45 United States Code section 56 provides: "No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued."

- "Compliance with the three-year statute of limitations is a condition precedent for recovery in a FELA action. In cases of latent or progressive injuries … the 'discovery rule' directs that the cause of action does not commence to run until the plaintiff knew or should have known of the injury and its cause." (*Monarch v. Southern Pacific Transportation Co.* (1999) 70 Cal.App.4th 1197, 1203 [83 Cal.Rptr.2d 247], internal citations omitted.)

- "The burden is therefore on the claimant to allege and to prove that his cause of action was commenced within the three-year period." (*Emmons v. Southern Pacific Transportation Co.* (5th Cir. 1983) 701 F.2d 1112, 1118, internal citations omitted.)

- "Under the discovery rule, the test is an objective inquiry into whether the plaintiff knew or should have known, in the exercise of reasonable diligence, the essential facts of injury and cause. Constructive rather than actual knowledge of the fact of causation triggers a duty to investigate the possible causes of injury. Thus, in accordance with the objective test, 'definite knowledge' that the injury is work related is not necessary in order for the cause of action to accrue. Once the plaintiff believes or suspects that the 'potential cause of his injury' is work related, an affirmative duty to investigate is imposed." (*Monarch, supra,* 70 Cal.App.4th at p. 1203.)

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2109
Effect of Workers' Compensation Law Explained

The rights and duties of [*name of plaintiff*] and of [*name of defendant*] are governed solely by the instructions that I have given you. The workers' compensation laws of the State of California do not apply to [his/her] claim and [he/she] is not entitled to any workers' compensation benefits from [*name of defendant*].

SOURCES AND AUTHORITY

- In approving an instruction on the subject of the inapplicability of workers' compensation, the court observed: "It is reasonable to assume … that the men and women who sit on our juries are aware of the Workmen's Compensation Act, and are aware generally that it affords protection to employees who suffer personal injury arising out of, and which is connected with their employment, and that claims for damages for such injury, as against the employer, are heard before the Industrial Accident Commission, and not in a court of law of general jurisdiction. In these circumstances, the jurors being so informed, it would seem only normal for them to ask why, in a case such as the one before us, the employee is suing his employer in a court of general jurisdiction, rather than pursuing his remedy before the Industrial Accident Commission." (*Bohme v. Southern Pacific Co.* (1970) 8 Cal.App.3d 291, 298 [87 Cal.Rptr. 286].)

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2110
Borrowed Servant/Dual Employee

[[*Name of plaintiff***] claims [he/she[***name of decedent***]] was [***name of defendant***]'s employee at the time of the incident even though [he/she] was primarily employed by [***name of primary employer***].]**

[[*Name of plaintiff***] claims [he/she[***name of decedent***]] was employed by both [***name of defendant***] and [***name of primary employer***] at the time of the incident.]**

In determining whether [*name of plaintiff/decedent***] was [***name of defendant***]'s employee, you need to answer this question: Did [***name of defendant***] have the right to control the work of [***name of plaintiff/decedent***]?**

In deciding this, you should first consider whether [*name of defendant***] had the right to supervise the details of [***name of plaintiff/decedent***]'s work. If so, then [***name of plaintiff/decedent***] was [***name of defendant***]'s employee. However, if [***name of defendant***] had only the right to specify the end result, then [***name of defendant***] did not have the right to control the work of [***name of plaintiff/decedent***], and [***name of plaintiff/decedent***] was not [***name of defendant***]'s employee. Sharing information or coordinating efforts between employees of two companies, by itself, is not enough to establish the right to control.**

If the right to control is not clear, you should consider the following factors:

(a) Did [*name of defendant***] and [***name of primary employer***] agree that [***name of defendant***] had the right to supervise the details of the work, even if [***name of defendant***] did not exercise that right?**

(b) Did [*name of defendant***] supply the equipment, tools, and place of work?**

(c) Was [*name of plaintiff/decedent***] paid by the hour rather than by the job?**

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(d) Was the work being done by [*name of plaintiff/decedent*] part of the regular business of [*name of defendant*]?

(e) Did [*name of defendant*] have the right to end its relationship with [*name of plaintiff/decedent*]?

(f) Was the work being done by [*name of plaintiff/decedent*] the only occupation or business of [*name of plaintiff/decedent*]?

(g) Is the kind of work performed by [*name of plaintiff/decedent*] usually done under the direction of a supervisor rather than by a specialist working without supervision?

(h) Did the kind of work performed by [*name of plaintiff/decedent*] require no specialized or professional skill?

(i) Were the services performed by [*name of plaintiff/decedent*] to be performed over a long period of time?

(j) Did [*name of defendant*] and [*name of plaintiff/decedent*] act as if they had an employer-employee relationship?

(k) Were [*name of plaintiff/decedent*]'s duties to [*name of defendant*] only for the benefit of [*name of defendant*]?

(l) Did [*name of plaintiff/decedent*] consent to the employment with [*name of defendant*]?

A "yes" answer to one or more of these questions suggests that the right to control exists. "No" answers suggest that the right to control does not exist. You should consider the relative importance of each factor and not simply count the number of "yes" and "no" answers. Remember that the ultimate test is the right to control.

DIRECTIONS FOR USE

Read the first bracketed paragraph for cases raising the borrowed-servant theory. Read the second bracketed paragraph for cases involving dual employment.

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It may not be necessary to read all of the listed factors. Read only the factors for which evidence exists.

SOURCES AND AUTHORITY

- "Under common-law principles, there are basically three methods by which a plaintiff can establish his 'employment' with a rail carrier for FELA purposes even while he is nominally employed by another. First, the employee could be serving as the borrowed servant of the railroad at the time of his injury. Second, he could be deemed to be acting for two masters simultaneously. Finally, he could be a subservant of a company that was in turn a servant of the railroad." (*Kelley v. Southern Pacific Co.* (1974) 419 U.S. 318, 324 [95 S.Ct. 472, 42 L.Ed.2d 498], internal citations omitted.)

- "[A] finding of agency is not tantamount to a finding of a master-servant relationship." (*Kelley, supra*, 419 U.S. at p. 325.)

- "In this case … the evidence of contacts between Southern Pacific employees and PMT employees may indicate, not direction or control, but rather the passing of information and the accommodation that is obviously required in a large and necessarily coordinated operation. … The informal contacts between the two groups must assume a supervisory character before the PMT employees can be deemed *pro hac vice* employees of the railroad." (*Kelley, supra*, 419 U.S. at p. 330.)

- " 'Employee' status is established by 'proof of a master-servant relationship' under principles of common law." (*Dixon v. CSX Transportation Co.* (4th Cir. 1993) 990 F.2d 1440, citing *Kelley, supra*, 419 U.S. at p. 323.)

- "The special employment relationship and its consequent imposition of liability upon the special employer flows from the borrower's power to supervise the details of the employee's work. Mere instruction by the borrower on the result to be achieved will not suffice." (*Marsh v. Tilley Steel Co.* (1980) 26 Cal.3d 486, 492 [162 Cal.Rptr. 320].)

- Contract terms are not conclusive evidence of the existence of the right to control. (*Kowalski v. Shell Oil Co.* (1979) 23 Cal.3d 168, 176 [151 Cal.Rptr. 671].)

- "With respect to the dual servant doctrine, the Second Restatement of Agency says: 'A person may be the servant of two masters, not joint employers, at one time as to one act, if the service to one does not involve abandonment of the service to the other.' The borrowed servant doctrine states: 'A servant directed or permitted by his master to perform services for another may become the servant of such other in performing such services. He may become the other's servant as to some acts and not

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as to others.' " (*Williamson v. Consolidated Rail Corp.* (3rd Cir. 1991) 926 F.2d 1344, 1349, internal citations omitted.)

- Restatement Second of Agency, section 220(1) defines a servant as "a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control." Section 220(2) lists various factors that are helpful in applying this definition:

  (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
  (b) whether or not the one employed is engaged in a distinct occupation or business;
  (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
  (d) the skill required in the particular occupation;
  (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
  (f) the length of time for which the person is employed;
  (g) the method of payment, whether by the time or by the job;
  (h) whether or not the work is a part of the regular business of the employer;
  (i) whether or not the parties believe they are creating the relation of master and servant; and
  (j) whether the principal is or is not in business.

- "While [section 220] is directed primarily at determining whether a particular bilateral arrangement is properly characterized as a master-servant or independent contractor relationship, it can also be instructive in analyzing the three-party relationship between two employers and a worker." (*Kelley, supra*, 419 U.S. at p. 324.)

- "The Supreme Court has held that a person falls within FELA if that worker can be classified as a joint employee of the railroad even though it is not his formal employer." (*Bradsher v. Missouri Pacific Railroad* (8th Cir. 1982) 679 F.2d 1253, 1257.)

- "[U]nder the FELA a worker can be the 'employee' of a railroad even though carried on the employment rolls of another company and paid by that other company. The test of employment is the established test in workers' compensation cases. It is whether the railroad has control of the employee or the right to control the employee. The law does not require that the railroad have full supervisory control. It requires only that the railroad, through its employees, plays 'a significant supervisory role' as to the work of the injured employee. (*Lindsey v. Louisville & Nashville Railroad Co.* (5th Cir.1985) 775 F.2d 1322, 1324, internal citation omitted.)

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2111
Status as Defendant's Employee: Subservant Company

[*Name of plaintiff***] claims [he/she/[***name of decedent***]] was [***name of defendant***]'s employee because [he/she] was employed by [***name of primary employer***], a company that was controlled by [***name of defendant***]. To succeed, [***name of plaintiff***] must prove that [***name of defendant***] controlled or had the right to control the daily operations of [***name of primary employer***]. Sharing information or coordinating efforts between two companies, by itself, is not enough to establish the right to control.**

In deciding whether [*name of defendant***] controlled [***name of primary employer***], you should consider the following:**

(a) Did the two companies share directors or management-level officers?

(b) Did the two companies share strategies, policies, sales, administrative, and operating staffs?

(c) Did the two companies share payroll and personnel records?

(d) Did [*name of defendant***] have a right to participate in the [***name of primary employer***]'s day-to-day operations?**

(e) Did [*name of defendant***] establish [***name of primary employer***]'s work procedures?**

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

A "yes" answer to one or more of these questions suggests that the right to control exists. "No" answers suggest that the right to control does not exist. You should consider the relative importance of each factor and not simply count the number of "yes" and "no" answers. Remember that the ultimate test is the right to control.

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SOURCES AND AUTHORITY

- "In the *Kelley* case, the Supreme Court recognized that if a second company could be shown to be a conventional common-law servant, the 'control or right to control' test would be met." (*Bradsher v. Missouri Pacific Railroad* (8th Cir. 1982) 679 F.2d 1253, 1257–1258, internal citation omitted.)

- "Under the FELA the test of employee status is whether [defendant railroad] had control or the right to control [plaintiff] in the performance of his job. Where the evidence of control is in dispute, the case should go to the jury." (*Vanskike v. ACF Industries, Inc.* (8th Cir. 1981) 665 F.2d 188, 198, internal citations omitted.)

- "In this case … the evidence of contacts between Southern Pacific employees and PMT employees may indicate, not direction or control, but rather the passing of information and the accommodation that is obviously required in a large and necessarily coordinated operation. … The informal contacts between the two groups must assume a supervisory character before the PMT employees can be deemed pro hac vice employees of the railroad." (*Kelley v. Southern Pacific Co.* (1974) 419 U.S. 318, 330 [95 S.Ct. 472, 42 L.Ed.2d 498].)

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2112
Status of Defendant as Common Carrier

[*Name of plaintiff*] claims that [*name of defendant*] was a common carrier by railroad. To prove this, [*name of plaintiff*] must show that [*name of defendant*] was in the business of transporting [the property of] the general public by rail.

SOURCES AND AUTHORITY

- Title 45 United States Code Annotated section 57 provides: "The term 'common carrier' as used in this chapter shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier."

- "A common carrier has been defined generally as one who holds himself out to the public as engaged in the business of transportation of persons or property from place to place for compensation, offering his services to the public generally. The distinctive characteristic of a common carrier is that he undertakes to carry for all people indifferently, and hence is regarded in some respects as a public servant. The dominant and controlling factor in determining the status of one as a common carrier is his public profession as to the service offered or performed." (*Kelly v. General Electric Co.* (D.C.Pa. 1953) 110 F.Supp 4, 6.)

- "According to these cases various considerations are of prime importance in determining whether a particular entity is a common carrier. First—actual performance of rail service, second—the service being performed is part of the total rail service contracted for by a member of the public, third—the entity is performing as part of a system of interstate rail transportation by virtue of common ownership between itself and a railroad or by a contractual relationship with a railroad, and hence such entity is deemed to be holding itself out to the public, and fourth—remuneration for the services performed is received in some manner, such as a fixed charge from a railroad or by a percent of the profits from a railroad." (*Lone Star Steel Co. v. McGee* (5th Cir. 1957) 380 F.2d 640, 647.)

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2113
Scope of Employment

[*Name of plaintiff*] must prove that [he/she[*name of decedent*]] was acting within the scope of [his/her] employment at the time of the incident.

Conduct is within the scope of employment if the conduct:

(a) Is the kind of conduct the employee was hired to perform; or

(b) Is reasonably foreseeable in light of the employer's business or the employee's job responsibilities.

DIRECTIONS FOR USE

See other instructions that further define the concept of scope of employment in the vicarious liability instructions (Instruction 913, et seq.)

SOURCES AND AUTHORITY

- "FELA's limitation of a railroad's liability to injuries occurring 'while [the person] is employed by' the railroad means that it must generally be determined whether the employee was injured while she was acting within the scope of her employment. 'Normally, whether an employee is acting within the scope of employment is a question to be resolved by the jury from all the surrounding circumstances,' for 'in negligence actions brought under the FELA, ... the role of the jury is significantly greater ... than in common law negligence actions ... .' Indeed, ' "trial by jury is part of the remedy." ' " (*Goldwater v. Metro-North Commuter Railroad* (2nd Cir. 1996) 101 F.3d 296, 298, internal citations omitted.)

- "The scope of employment under FELA is broadly construed by the federal courts—and has been for more than 80 years. In the seminal FELA case of *Erie Railroad Company v. Winfield*, the Supreme Court held that an employee who leaves the railroad carrier's yard 'at the close of his day's work' is engaged in a 'necessary incident of his day's work,' and thus is 'but discharging a duty of his employment.' " (*Ponce v. Northeast Illinois Regional Commuter Railroad Corp.* (N.D.Ill. 2000) 103 F.Supp.2d 1051, 1056, internal citations omitted.)

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- "Railroad employment has been broadly interpreted to extend not only to acts required by the employer, but also to those acts necessarily incidental to the employment. [¶] This circuit and others have nevertheless held that even 'given its most liberal interpretation, the Act cannot be extended to cover activities not necessarily incident to or an integral part of employment in interstate commerce. It obviously does not cover activities undertaken by an employee for a private purpose and having no causal relationship with his employment.' " (*Feichko v. Denver & Rio Grande Western Railroad Co.* (10th Cir. 2000) 213 F.3d 586, 592, internal citations omitted.)

- Restatement Second of Agency, section 229 provides:

  (1) To be within the scope of the employment, conduct must be of the same general nature as that authorized, or incidental to the conduct authorized.
  (2) In determining whether or not the conduct, although not authorized, is nevertheless so similar to or incidental to the conduct authorized as to be within the scope of employment, the following matters of fact are to be considered:
  (a) whether or not the act is one commonly done by such servants;
  (b) the time, place and purpose of the act;
  (c) the previous relations between the master and the servant;
  (d) the extent to which the business of the master is apportioned between different servants;
  (e) whether or not the act is outside the enterprise of the master or, if within the enterprise, has not been entrusted to any servant;
  (f) whether or not the master has reason to expect that such an act will be done;
  (g) the similarity in quality of the act done to the act authorized;
  (h) whether or not the instrumentality by which the harm is done has been furnished by the master to the servant;
  (i) the extent of departure from the normal method of accomplishing an authorized result; and
  (j) whether or not the act is seriously criminal.

- "The Restatement at § 229 sets forth intelligent factors for a factfinder to consider in determining whether this has happened. We emphasize that no one factor is dispositive; establishing one or more factors is not equivalent to establishing scope of employment." (*Wilson v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co.* (7th Cir. 1988) 841 F.2d 1347, 1355.)

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- "[A]s a general rule, courts have held that an employee injured while commuting to and from work is not covered by FELA." (*Ponce, supra,* 103 F.Supp.2d at p. 1057.) However, FELA may apply if the injury occurs on the employer's work site "while the employee is attempting to report to or leave the job within a reasonable time of his or her shift, and is exposed to risks not confronted by the public generally." (*Ibid*.)

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2114
Income Tax Effects of Award

[*Name of plaintiff*] will not be required to pay any federal or state income taxes on any amount that you award.

[When calculating lost earnings, if any, you should use after-tax earnings.]

DIRECTIONS FOR USE

The Eight Circuit Model Jury Instructions state that the bracketed sentence should be given if there is evidence of both gross and net earnings and there is any danger that the jury may be confused as to the proper measure of damages.

SOURCES AND AUTHORITY

- If requested, the jury must be instructed that the verdict will not be subject to income taxes. (*Norfolk & Western Ry. Co. v. Liepelt* (1980) 444 U.S. 490, 498 [100 S.Ct. 755, 62 L.Ed.2d 689].) Further, the Supreme Court in the *Liepelt* case stated that the jury should base its award on the "after-tax" value of lost earnings in determining lost earnings. (*Id.* at p. 493.)

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316A
Co-participant in a Sports Activity

[*Name of plaintiff*] claims [he/she] was harmed while participating in a sporting activity and that [*name of defendant*] is responsible for that harm. To establish this claim, [*name of plaintiff*] must prove the following:

1. **That [*name of defendant*] either intentionally injured [*name of plaintiff*] or acted so recklessly that [his/her] conduct was outside the range of ordinary activity involved in the sport;**

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.**

Even if you find all of the above to be true, [*name of defendant*] is not responsible for [*name of plaintiff*]'s harm if [*name of plaintiff*] was injured as a result of a risk that is a normal part of the sport.

SOURCES AND AUTHORITY

- "Primary assumption of risk arises where a plaintiff voluntarily participates in an activity or sport involving certain inherent risks; primary assumption of risk ... bar[s] recovery because no duty of care is owed as to such risks." (*Connelly v. Mammoth Mountain Ski Area* (1995) 39 Cal.App.4th 8, 11 [45 Cal.Rptr.2d 855], internal citations omitted.)

- "A coparticipant in an active sport ordinarily bears no liability for an injury resulting from conduct in the course of the sport that is merely careless or negligent." (*Ford v. Gouin* (1992) 3 Cal.4th 339, 342 [11 Cal.Rptr.2d 30].)

- "[W]e conclude that a participant in an active sport breaches a legal duty of care to other participants—i.e., engages in conduct that properly may subject him or her to financial liability—only if the participant intentionally injures another player or engages in conduct that is so reckless as to be totally outside the range of the ordinary

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activity involved in the sport." (*Knight v. Jewitt* (1992) 3 Cal.4th 296, 320 [11 Cal.Rptr.2d 2].)

- "The *Knight* rule, however, 'does not grant unbridled legal immunity to all defendants participating in sporting activity. The Supreme Court has stated that 'it is well established that defendants generally do have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport.' Thus, even though 'defendants generally have no legal duty to eliminate (or protect a plaintiff against) risks inherent in the sport itself,' they may not increase the likelihood of injury above that which is inherent." (*Distefano v. Forester* (2001) 85 Cal.App.4th 1249, 1261 [102 Cal.Rptr.2d 813], internal citations omitted.)

- "In *Freeman v. Hale,* the Court of Appeal advanced a test … for determining what risks are inherent in a sport: '[C]onduct is totally outside the range of ordinary activity involved in the sport (and thus any risks resulting from that conduct are not inherent to the sport) if the prohibition of that conduct would neither deter vigorous participation in the sport nor otherwise fundamentally alter the nature of the sport.' " (*Distefano, supra,* 85 Cal.App.4th at p. 1261.)

- " '[T]he existence and scope of a defendant's duty of care is a legal question which depends on the nature of the sport or activity in question and on the parties' general relationship to the activity, and is an issue to be decided by the court, rather than the jury.' Thus, when the injury occurs in a sports setting the court must decide whether the nature of the sport and the relationship of the defendant and the plaintiff to the sport as coparticipant, coach, premises owner or spectator support the legal conclusion of duty." (*Mastro v. Petrick* (2001) 93 Cal.App.4th 83, 88 [112 Cal.Rptr.2d 185], internal citations omitted.)

- "The existence of a duty of care is a separate issue from the question whether (on the basis of forseeability among other factors) a particular defendant breached that duty of care, which is an essentially factual matter." (*Kockelman v. Segal* (1998) 61 Cal.App.4th 491, 498 [71 Cal.Rptr.2d 552].)

- "A jury could find that, by using a snowboard without the retention strap, in violation of the rules of the ski resort and a county ordinance, defendant unnecessarily increased the danger that his snowboard might escape his control and injure other participants such as plaintiff. The absence of a retention strap could therefore constitute conduct not inherent to the sport which increased the risk of injury." (*Campbell v. Derylo* (1999) 75 Cal.App.4th 823, 829 [89 Cal.Rptr.2d 519].)

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Secondary sources

- 6 Witkin, Summary of California Law (9th ed. 2001 supp.) Torts, §§ 1090A–1090C, pp. 293–312

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316B
Liability of Instructors, Trainers, or Coaches

[*Name of plaintiff*] claims [he/she] was harmed by [*name of defendant*]'s [coaching/training/instruction]. To succeed on this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] was [*name of plaintiff*]'s [coach/trainer/instructor];**

2. **That [*name of defendant*] increased the risk of harm beyond those risks that are a normal part of the sport in which [*name of plaintiff*] was participating;**

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

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

SOURCES AND AUTHORITY

- "Primary assumption of risk arises where a plaintiff voluntarily participates in an activity or sport involving certain inherent risks; primary assumption of risk ... bar[s] recovery because no duty of care is owed as to such risks." (*Connelly v. Mammoth Mountain Ski Area* (1995) 39 Cal.App.4th 8, 11 [45 Cal.Rptr.2d 855], internal citations omitted.)

- "A coparticipant in an active sport ordinarily bears no liability for an injury resulting from conduct in the course of the sport that is merely careless or negligent." (*Ford v. Gouin* (1992) 3 Cal.4th 339, 342 [11 Cal.Rptr.2d 30].)

- "[W]e conclude that a participant in an active sport breaches a legal duty of care to other participants—i.e., engages in conduct that properly may subject him or her to financial liability—only if the participant intentionally injures another player or engages in conduct that is so reckless as to be totally outside the range of the ordinary

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activity involved in the sport." (*Knight v. Jewitt* (1992) 3 Cal.4th 296, 320 [11 Cal.Rptr.2d 2].)

- "[T]he mere existence of an instructor/pupil relationship does not necessarily preclude application of 'primary assumption of the risk.' Learning any sport inevitably involves attempting new skills. A coach or instructor will often urge the student to go beyond what the student has already mastered; that is the nature of (inherent in) sports instruction." (*Allan v. Snow Summit, Inc.* (1996) 51 Cal.App.4th 1358, 1368–1369 [59 Cal.Rptr.2d 813].)

- "Instructors, like commercial operators of recreational activities, 'have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport. Thus, although a ski resort has no duty to remove moguls from a ski run, it clearly does have a duty to use due care to maintain its towropes in a safe, working condition so as not to expose skiers to an increased risk of harm. The cases establish that the latter type of risk, posed by a ski resort's negligence, clearly is not a risk (inherent in the sport) that is assumed by a participant.' " (*Fortier v. Los Rios Community College Dist.* (1996) 45 Cal.App.4th 430, 435 [52 Cal.Rptr.2d 812], internal citations omitted.)

- " 'Primary assumption of the risk' applies to injuries from risks 'inherent in the sport'; the risks are not any the less 'inherent' simply because an instructor encourages a student to keep trying when attempting a new skill." (*Allan, supra,* 51 Cal.App.4th at p. 1369.)

- Coaches and sports instructors "owe students a duty 'not to increase the risks inherent in the learning process undertaken by the student.' But this does not require them to 'fundamentally alter the nature of the sport and, in some instances, effectively preclude participation altogether. ...' Instead, '[b]y choosing to participate in a sport that poses the obvious possibility of injury, the student athlete must learn to accept an adverse result of the risks inherent in the sport.' " (*Lupash v. City of Seal Beach* (1999) 75 Cal.App.4th 1428, 1436–1437 [89 Cal.Rptr.2d 920], internal citations omitted.)

- " '[T]he existence and scope of a defendant's duty of care is a legal question which depends on the nature of the sport or activity in question and on the parties' general relationship to the activity, and is an issue to be decided by the court, rather than the jury.' Thus, when the injury occurs in a sports setting the court must decide whether the nature of the sport and the relationship of the defendant and the plaintiff to the sport as coparticipant, coach, premises owner or spectator support the legal conclusion

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of duty." (*Mastro v. Petrick* (2001) 93 Cal.App.4th 83, 88 [112 Cal.Rptr.2d 185], internal citations omitted.)

- "The existence of a duty of care is a separate issue from the question whether (on the basis of forseeability among other factors) a particular defendant breached that duty of care, which is an essentially factual matter." (*Kockelman v. Segal* (1998) 61 Cal.App.4th 491, 498 [71 Cal.Rptr.2d 552].)

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 2001 supp.) Torts, §§ 1090A–1090C, pp. 293–312

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500
Special Doctrines: Res ipsa loquitur

In this case, [*name of plaintiff***] may prove that [***name of defendant***]'s negligence caused [***name of plaintiff***]'s harm if [***name of plaintiff***] proves all of the following:**

1. **That [***name of plaintiff***]'s harm ordinarily would not have happened unless someone was negligent;**

2. **That the harm was caused by something that only [***name of defendant***] controlled; and**

3. **That [***name of plaintiff***]'s voluntary actions did not cause or contribute to the occurrence.**

If you decide that [*name of plaintiff***] did not prove one or more of these three things, then [***insert one of the following***]**

> **[your verdict must be for [***name of defendant***].]**
>
> *[or]*
>
> **[you must decide whether [***name of defendant***] was negligent based on the other instructions I have read.]**

If you decide that [*name of plaintiff***] proved all of these three things, you may, but are not required to, find either that [***name of defendant***] was negligent or that [***name of defendant***]'s negligence was a substantial factor in causing [***name of plaintiff***]'s harm.**

You must carefully consider the evidence presented by both [*name of plaintiff***] and [***name of defendant***] before you make your decision. You should not decide in favor of [***name of plaintiff***] unless you believe, after weighing all of the evidence, that it is more probable than not that [***name of defendant***] was negligent and that [his/her] negligence was a substantial factor in harming [***name of plaintiff***].**

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DIRECTIONS FOR USE

In the second paragraph, the first bracketed option is to be used when plaintiff is relying solely on a res ipsa loquitur theory and has introduced no other evidence of defendant's negligence. The second option is to be used when plaintiff has introduced other evidence of defendant's negligence.

"It follows that where part of the facts basic to the application of the doctrine of res ipsa loquitur is established as a matter of law but that others are not, the court should instruct that application of the doctrine by the jury depends only upon the existence of the basic facts not conclusively established." (*Rimmele v. Northridge Hospital Foundation* (1975) 46 Cal.App.3d 123, 130 [120 Cal.Rptr. 39].)

SOURCES AND AUTHORITY

- "In California, the doctrine of res ipsa loquitur is defined by statute as 'a presumption affecting the burden of producing evidence.' The presumption arises when the evidence satisfies three conditions: '(1) the accident must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff.' A presumption affecting the burden of producing evidence 'require[s] the trier of fact to assume the existence of the presumed fact' unless the defendant introduces evidence to the contrary. The presumed fact, in this context, is that 'a proximate cause of the occurrence was some negligent conduct on the part of the defendant ... .' If the defendant introduces 'evidence which would support a finding that he was not negligent or that any negligence on his part was not a proximate cause of the occurrence,' the trier of fact determines whether defendant was negligent without regard to the presumption, simply by weighing the evidence." (*Brown v. Poway Unified School Dist.* (1993) 4 Cal.4th 820, 825–826 [15 Cal.Rptr.2d 679], internal citations omitted.)

- "Stated less mechanically, a plaintiff suing in a personal injury action is entitled to the benefit of res ipsa loquitur when: 'the accident is of such a nature that it can be said, in the light of past experience, that it probably was the result of negligence by someone and that the defendant is probably the person who is responsible.' " (*Rimmele, supra,* 46 Cal.App.3d at p. 129, internal citations omitted.)

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- Evidence Code section 646(c) provides:

  > If the evidence, or facts otherwise established, would support a res ipsa loquitur presumption and the defendant has introduced evidence which would support a finding that he was not negligent or that any negligence on his part was not a proximate cause of the occurrence, the court may, and upon request shall, instruct the jury to the effect that:
  > (1) If the facts which would give rise to a res ipsa loquitur presumption are found or otherwise established, the jury may draw the inference from such facts that a proximate cause of the occurrence was some negligent conduct on the part of the defendant; and
  > (2) The jury shall not find that a proximate cause of the occurrence was some negligent conduct on the part of the defendant unless the jury believes, after weighing all the evidence in the case and drawing such inferences therefrom as the jury believes are warranted, that it is more probable than not that the occurrence was caused by some negligent conduct on the part of the defendant.

- Under Evidence Code section 604, a presumption affecting the burden of producing evidence "require[s] the trier of fact to assume the existence of the presumed fact" unless the defendant introduces evidence to the contrary. Here, the presumed fact is that "a proximate cause of the occurrence was some negligent conduct on the part of the defendant." (Evid. Code, § 646(c)(1); *Brown, supra,* 4 Cal.4th at p. 826.)

- "The doctrine of res ipsa loquitur is fundamentally a doctrine predicated upon inference deducible from circumstantial evidence." (*Hale v. Venuto* (1982) 137 Cal.App.3d 910, 918 [187 Cal.Rptr. 357].)

- The doctrine "is based on a theory of 'probability' where there is no direct evidence of defendant's conduct, permitting a common sense inference of negligence from the happening of the accident." (*Gicking v. Kimberlin* (1985) 170 Cal.App.3d 73, 75 [215 Cal.Rptr. 834].)

- "All of the cases hold, in effect, that it must appear, either as a matter of common experience or from evidence in the case, that the accident is of a type which probably would not happen unless someone was negligent." (*Zentz v. Coca Cola Bottling Co. of Fresno* (1952) 39 Cal.2d 436, 442–443 [247 P.2d 344].)

- The purpose of the second "control" requirement is to "link the defendant with the probability, already established, that the accident was negligently caused." (*Newing v.*

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Cheatham (1975) 15 Cal.3d 351, 362 [124 Cal.Rptr. 193].) The control requirement is not absolute. (*Zentz, supra,* 39 Cal.2d at p. 443.)

- "The purpose of [the third] requirement, like that of control by the defendant is to establish that the defendant is the one probably responsible for the accident. The plaintiff need not show that he was entirely inactive at the time of the accident in order to satisfy this requirement, so long as the evidence is such as to eliminate his conduct as a factor contributing to the occurrence. (*Newing, supra,* 15 Cal.3d at p. 363, internal citations omitted.)

- The third condition "should not be confused with the problem of contributory negligence, as to which defendant has the burden of proof. … [Its] purpose, like that of control by the defendant, is merely to assist the court in determining whether it is more probable than not that the defendant was responsible for the accident." (*Zentz, supra,* 39 Cal.2d at p. 444.)

Secondary Sources

- 1 Witkin, California Evidence (4th ed. 2000) Burden of Proof and Presumptions, §§ 114–118

COMMENTARY

The subcommittee used the word "occurrence" instead of the word "harm" in element 3 because of the potential for confusion with the issue of contributory negligence.

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617
Medical Malpractice: Res ipsa loquitur

In this case, [*name of plaintiff*] may prove that [*name of defendant*]'s negligence caused [*name of plaintiff*]'s harm if [*name of plaintiff*] proves all of the following:

1. **That [*name of plaintiff*]'s harm ordinarily would not have occurred unless someone was negligent [In deciding this issue, you must consider [only] the testimony of the expert witnesses];**

2. **That the harm occurred while [*name of plaintiff*] was under the care and control of [*name of defendant*]; and**

3. **That [*name of plaintiff*]'s voluntary actions did not cause or contribute to the harm.**

If you decide that [*name of plaintiff*] did not prove one or more of these three things, then [*insert one of the following*]

[your verdict must be for [*name of defendant*].]

[you must decide whether [*name of defendant*] was negligent based on the other instructions I have read.]

If you decide that [*name of plaintiff*] proved all of these three things, you may, but are not required to, find either that [*name of defendant*] was negligent or that [*name of defendant*]'s negligence was a substantial factor in causing [*name of plaintiff*]'s harm.

You must carefully consider the evidence presented by both [*name of plaintiff*] and [*name of defendant*] before you make your decision. You should not decide in favor of [*name of plaintiff*] unless you believe, after weighing all of the evidence, that it is more likely than not that [*name of defendant*] was negligent and that [his/her] negligence was a substantial factor in harming [*name of plaintiff*].

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DIRECTIONS FOR USE

The bracketed sentence in element 1 should be read only if expert testimony is introduced. The word "only" within that sentence is to be used only in those cases where the court has determined that the issue of the defendant's negligence involves matters beyond common knowledge.

In the second paragraph, the first bracketed option is to be used when plaintiff is relying solely on a res ipsa loquitur theory and has introduced no other evidence of defendant's negligence. The second option is to be used when plaintiff has introduced other evidence of defendant's negligence.

"It follows that where part of the facts basic to the application of the doctrine of res ipsa loquitur is established as a matter of law but that others are not, the court should instruct that application of the doctrine by the jury depends only upon the existence of the basic facts not conclusively established." (*Rimmele v. Northridge Hospital Foundation* (1975) 46 Cal.App.3d 123, 130 [120 Cal.Rptr. 39].)

SOURCES AND AUTHORITY

- "In California, the doctrine of res ipsa loquitur is defined by statute as 'a presumption affecting the burden of producing evidence.' The presumption arises when the evidence satisfies three conditions: '(1) the accident must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff.' A presumption affecting the burden of producing evidence 'require[s] the trier of fact to assume the existence of the presumed fact' unless the defendant introduces evidence to the contrary. The presumed fact, in this context, is that 'a proximate cause of the occurrence was some negligent conduct on the part of the defendant ... .' If the defendant introduces 'evidence which would support a finding that he was not negligent or that any negligence on his part was not a proximate cause of the occurrence,' the trier of fact determines whether defendant was negligent without regard to the presumption, simply by weighing the evidence." (*Brown v. Poway Unified School Dist.* (1993) 4 Cal.4th 820, 825–826 [15 Cal.Rptr.2d 679], internal citations omitted.)

- "Stated less mechanically, a plaintiff suing in a personal injury action is entitled to the benefit of res ipsa loquitur when: 'the accident is of such a nature that it can be said, in the light of past experience, that it probably was the result of negligence by

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someone and that the defendant is probably the person who is responsible.' " (*Rimmele, supra,* 46 Cal.App.3d at p. 129, internal citations omitted.)

- Evidence Code section 646(c) provides:

  > If the evidence, or facts otherwise established, would support a res ipsa loquitur presumption and the defendant has introduced evidence which would support a finding that he was not negligent or that any negligence on his part was not a proximate cause of the occurrence, the court may, and upon request shall, instruct the jury to the effect that:
  > (1) If the facts which would give rise to a res ipsa loquitur presumption are found or otherwise established, the jury may draw the inference from such facts that a proximate cause of the occurrence was some negligent conduct on the part of the defendant; and
  > (2) The jury shall not find that a proximate cause of the occurrence was some negligent conduct on the part of the defendant unless the jury believes, after weighing all the evidence in the case and drawing such inferences therefrom as the jury believes are warranted, that it is more probable than not that the occurrence was caused by some negligent conduct on the part of the defendant.

- Under Evidence Code section 604, a presumption affecting the burden of producing evidence "require[s] the trier of fact to assume the existence of the presumed fact" unless the defendant introduces evidence to the contrary. Here, the presumed fact is that "a proximate cause of the occurrence was some negligent conduct on the part of the defendant." (Evid. Code, § 646(c)(1); *Brown, supra,* 4 Cal.4th at p. 826.)

- "The doctrine of res ipsa loquitur is fundamentally a doctrine predicated upon inference deducible from circumstantial evidence." (*Hale v. Venuto* (1982) 137 Cal.App.3d 910, 918 [187 Cal.Rptr. 357].)

- The doctrine "is based on a theory of 'probability' where there is no direct evidence of defendant's conduct, permitting a common sense inference of negligence from the happening of the accident." (*Gicking v. Kimberlin* (1985) 170 Cal.App.3d 73, 75 [215 Cal.Rptr. 834].)

- "All of the cases hold, in effect, that it must appear, either as a matter of common experience or from evidence in the case, that the accident is of a type which probably would not happen unless someone was negligent." (*Zentz v. Coca Cola Bottling Co. of Fresno* (1952) 39 Cal.2d 436, 442–443 [247 P.2d 344].)

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- "In determining the applicability of res ipsa loquitur, courts have relied on both expert testimony and common knowledge. The standard of care in a professional negligence case can be proved only by expert testimony unless the conduct required by the particular circumstances is within the common knowledge of the layperson." (*Blackwell v. Hurst* (1996) 46 Cal.App.4th 939, 943 [54 Cal.Rptr.2d 209], internal citations omitted.)

- "Under the doctrine of res ipsa loquitur and this common knowledge exception, it is proper to instruct the jury that it can infer negligence from the happening of the accident itself, if it finds based on common knowledge, the testimony of physicians called as expert witnesses, and all the circumstances, that the injury was more likely than not the result of negligence." (*Gannon v. Elliot* (1994) 19 Cal.App.4th 1, 6 [23 Cal.Rptr.2d 86], internal citation omitted.)

- "The fact that a particular injury rarely occurs does not in itself justify an inference of negligence unless some other evidence indicates negligence. To justify res ipsa instructions, appellant must have produced sufficient evidence to permit the jury to make the necessary decision. He must have presented 'some substantial evidence which, if believed by the jury, would entitle it to draw an inference of negligence from the happening of the accident itself.' " (*Blackwell, supra,* 46 Cal.App.4th at p. 944, internal citations omitted.)

- The purpose of the second "control" requirement is to "link the defendant with the probability, already established, that the accident was negligently caused." (*Newing v. Cheatham* (1975) 15 Cal.3d 351, 362 [124 Cal.Rptr. 193].) The control requirement is not absolute. (*Zentz, supra,* 39 Cal.2d at p. 443.)

- "The purpose of [the third] requirement, like that of control by the defendant is to establish that the defendant is the one probably responsible for the accident. The plaintiff need not show that he was entirely inactive at the time of the accident in order to satisfy this requirement, so long as the evidence is such as to eliminate his conduct as a factor contributing to the occurrence. (*Newing, supra,* 15 Cal.3d at p. 363, internal citations omitted.)

- The third condition "should not be confused with the problem of contributory negligence, as to which defendant has the burden of proof. … [I]t's purpose, like that of control by the defendant, is merely to assist the court in determining whether it is more probable than not that the defendant was responsible for the accident." (*Zentz, supra,* 39 Cal.2d at p. 444.)

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Secondary Sources

- 1 Witkin, California Evidence (4th ed. 2000) Burden of Proof and Presumptions, §§ 114–118

COMMENTARY

The subcommittee used the word "occurrence" instead of the word "harm" in element 3 because of the potential for confusion with the issue of contributory negligence.

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714
Emergency Vehicle Exemption (Veh. Code, § 21055)

[*Name of defendant***] claims that [***name of public employee***] was not required to comply with Vehicle Code section [***insert section number***] because [he/she] was operating an authorized emergency vehicle and was responding to an emergency at the time of the accident.**

To establish that [*name of public employee***] was not required to comply with section [***insert section number***], [***name of defendant***] must prove all of the following:**

1. **That [***name of public employee***] was operating an authorized emergency vehicle;**

2. **That [***name of public employee***] was responding to an emergency situation at the time of the accident; and**

3. **That [***name of public employee***] sounded a siren when reasonably necessary and displayed front red warning lights.**

If you decide that [*name of defendant***] proved all of these things, then you cannot find [***name of defendant***] negligent for a violation of section [***insert section number***]. However, you may find [***name of defendant***] negligent if [***name of public employee***] failed to operate [his/her] vehicle with reasonable care, taking into account the emergency situation.**

If you decide that [*name of defendant***] did not prove one or more of these things, then [***name of public employee***] was under the same duty as all drivers to comply with section [***insert section number***].**

DIRECTIONS FOR USE

For a definition of "emergency," see Instruction 715, *Definition of "Emergency" (Veh. Code, § 21055).*

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For a definition of "authorized emergency vehicle," see Vehicle Code section 165.

Note that Vehicle Code section 17004 provides: "A public employee is not liable for civil damages on account of personal injury to or death of any person or damage to property resulting from the operation, in the line of duty, of an authorized emergency vehicle while responding to an emergency call or when in the immediate pursuit of an actual or suspected violator of the law, or when responding to but not upon returning from a fire alarm or other emergency call."

SOURCES AND AUTHORITY

- Vehicle Code section 21055 provides, in part:

  > The driver of an authorized emergency vehicle is exempt from [specified Vehicle Code sections] under all of the following conditions:
  > (a) If the vehicle is being driven in response to an emergency call or while engaged in rescue operations or is being used in the immediate pursuit of an actual or suspected violator of the law or is responding to, but not returning from, a fire alarm, except that fire department vehicles are exempt whether directly responding to an emergency call or operated from one place to another as rendered desirable or necessary by reason of an emergency call and operated to the scene of the emergency or operated from one fire station to another or to some other location by reason of the emergency call.
  > (b) If the driver of the vehicle sounds a siren as may be reasonably necessary and the vehicle displays a lighted red lamp visible from the front as a warning to other drivers and pedestrians.

- "The purpose of the statute is to provide a 'clear and speedy pathway' for these municipal vehicles on their flights to emergencies in which the entire public are necessarily concerned." (*Peerless Laundry Services v. City of Los Angeles* (1952) 109 Cal.App.2d 703, 707 [241 P.2d 269].)

- Vehicle Code section 21056 provides: "Section 21055 does not relieve the driver of a vehicle from the duty to drive with due regard for the safety of all persons using the highway, nor protect him from the consequences of an arbitrary exercise of the privileges granted in that section."

- "The effect of Vehicle Code sections 21055 and 21056 is: where the driver of an authorized emergency vehicle is engaged in a specified emergency function he may

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violate certain rules of the road, such as speed and right of way laws, if he activates his red light and where necessary his siren in order to alert other users of the road to the situation. In such circumstances the driver may not be held to be negligent solely upon the violation of specified rules of the road, but may be held to be negligent if he fails to exercise due regard for the safety of others under the circumstances. Where the driver of an emergency vehicle fails to activate his red light, and where necessary his siren, he is not exempt from the rules of the road even though he may be engaged in a proper emergency function, and negligence may be based upon the violation of the rules of the road." (*City of Sacramento v. Superior Court* (1982) 131 Cal.App.3d 395, 402–403 [182 Cal.Rptr. 443], internal citations omitted.)

- "Notwithstanding [Vehicle Code section 17004], a public entity is liable for injuries proximately caused by negligent acts or omissions in the operation of any motor vehicle by an employee of the public entity, acting within the scope of his or her employment." (*City of San Jose v. Superior Court* (1985) 166 Cal.App.3d 695, 698 [212 Cal.Rptr. 661], internal citations omitted.)

- "If the driver of an authorized emergency vehicle is responding to an emergency call and gives the prescribed warnings by red light and siren, a charge of negligence against him may not be predicated on his violation of the designated Vehicle Code sections; but if he does not give the warnings, the contrary is true; and in the event the charged negligence is premised on conduct without the scope of the exemption a common-law standard of care is applicable." (*Grant v. Petronella* (1975) 50 Cal.App.3d 281, 286 [123 Cal.Rptr. 399], internal citations omitted.)

- "Where the driver of an emergency vehicle responding to an emergency call does not give the warnings prescribed by section 21055, the legislative warning policy expressed in that section dictates the conclusion [that] the common-law standard of care governing his conduct does not include a consideration of the emergency circumstances attendant upon his response to an emergency call." (*Grant, supra,* 50 Cal.App.3d at p. 289, footnote omitted.)

- The exemption created by section 21055 is an affirmative defense, and the defendant must prove compliance with the conditions. (*Washington v. City and County of San Francisco* (1954) 123 Cal.App.2d 235, 242 [266 P.2d 828].)

- "In short the statute exempts the employer of such a driver from liability for negligence attributable to his failure to comply with specified statutory provisions, but it does not in any manner purport to exempt the employer from liability due to negligence attributable to the driver's failure to maintain that standard of care imposed

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by the common law." (*Torres v. City of Los Angeles* (1962) 58 Cal.2d 35, 47 [22 Cal.Rptr. 866].)

Secondary Sources

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 227–231
- 2 Government Tort Liability Practice (Cont.Ed.Bar 4th ed. 1999), §§ 11.140–11.144

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715
Definition of "Emergency" (Veh. Code, § 21055)

An "emergency" exists if the driver of an authorized emergency vehicle is [*insert one of the following***]**

[responding to an emergency call.]

[involved in rescue operations.]

[in the immediate pursuit of an actual or suspected violator of the law.]

[responding to, but not returning from, a fire alarm.]

[operating a fire department vehicle while traveling from one place to another place because of an emergency call.]

DIRECTIONS FOR USE

This instruction is based on the language of Vehicle Code section 21055(a) and is only intended for cases in which there is a factual issue regarding whether the defendant was acting in response to an emergency at the time of the accident. (*Washington v. City and County of San Francisco* (1954) 123 Cal.App.2d 235, 241 [266 P.2d 828].)

SOURCES AND AUTHORITY

- Vehicle Code section 21055(a) provides: "The driver of an authorized emergency vehicle is exempt from [specified Vehicle Code sections] under all of the following conditions: If the vehicle is being driven in response to an emergency call or while engaged in rescue operations or is being used in the immediate pursuit of an actual or suspected violator of the law or is responding to, but not returning from, a fire alarm, except that fire department vehicles are exempt whether directly responding to an emergency call or operated from one place to another as rendered desirable or necessary by reason of an emergency call and operated to the scene of the emergency

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or operated from one fire station to another or to some other location by reason of the emergency call."

- "Whether a vehicle is driven in response to an emergency call depends on the nature of the call received and the situation as presented to the mind of the driver and not upon whether there is an emergency in fact. The driver, of course, should have reasonable grounds to believe that there is an emergency." (*Gallup v. Sparks-Mundo Engineering Co.* (1954) 43 Cal.2d 1, 5 [271 P.2d 34], internal citations omitted.)

Secondary Sources

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 227–231
- 2 Government Tort Liability Practice (Cont.Ed.Bar 4th ed. 1999), §§ 11.140–11.144

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2200
General-Verdict Form
Single Plaintiff—Single Defendant—Single Cause of Action

Select one of the following two options:

___ **We find in favor of [***name of plaintiff***] and against [***name of defendant***] and award damages to [***name of plaintiff***] in the amount of $_____.**

___ **We find in favor of [***name of defendant***] and against [***name of plaintiff***].**

Signed: _____
Foreperson

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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2201
General-Verdict Form
Single Plaintiff—Single Defendant—Multiple Causes of Action

For each claim, select one of the two options listed.

On [*name of plaintiff***]'s claim for [***insert first cause of action***]**

___ **we find in favor of [***name of plaintiff***] and against [***name of defendant***].**

___ **we find in favor of [***name of defendant***] and against [***name of plaintiff***].**

On [*name of plaintiff***]'s claim for [***insert second cause of action***]**

___ **we find in favor of [***name of plaintiff***] and against [***name of defendant***].**

___ **we find in favor of [***name of defendant***] and against [***name of plaintiff***].**

Complete the section below only if you find in favor of [name of plaintiff] on at least one of [his/her/its] claims.

We award [*name of plaintiff***] the following damages: $ _____.**

Signed: _____
Foreperson

Dated: _____

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

DIRECTIONS FOR USE

Use of a special-verdict form is recommended when there are different measures of damages for the different causes of action

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2202
Introduction to Special-Verdict Form

I will give you [a] verdict form[s] with questions you must answer. I have already instructed you on the law that you are to use in answering these questions. You must follow my instructions and the form[s] carefully. You must consider each question separately. Please answer the questions in the order they appear. After you answer a question, the form tells you what to do next. At least nine of you must agree on an answer before you can move on to the next question. However, the same nine or more people do not have to agree on each answer.

When you are finished filling out the form[s], your foreperson must write the date and sign it at the bottom. Return the form[s] to [me/the bailiff/the clerk] when you have finished.

SOURCES AND AUTHORITY

- Code of Civil Procedure section 624 provides: "The verdict of a jury is either general or special. A general verdict is that by which they pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant; a special verdict is that by which the jury find the facts only, leaving the judgment to the Court. The special verdict must present the conclusions of fact as established by the evidence, and not the evidence to prove them; and those conclusions of fact must be so presented as that nothing shall remain to the Court but to draw from them conclusions of law."

- Code of Civil Procedure section 625 provides: "In all cases the court may direct the jury to find a special verdict in writing, upon all, or any of the issues, and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon. In all cases in which the issue of punitive damages is presented to the jury the court shall direct the jury to find a special verdict in writing separating punitive damages from compensatory damages. The special verdict or finding must be filed with the clerk and entered upon the minutes. Where a special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court must give judgment accordingly."

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- "A special verdict presents to the jury each ultimate fact in the case, so that 'nothing shall remain to the Court but to draw from them conclusions of law.' This procedure presents certain problems: ' " The requirement that the jury must resolve every controverted issue is one of the recognized pitfalls of special verdicts. '[T]he possibility of a defective or incomplete special verdict, or possibly no verdict at all, is much greater than with a general verdict that is tested by special findings....' " ' With a special verdict, we do not imply findings on all issues in favor of the prevailing party, as with a general verdict. The verdict's correctness must be analyzed as a matter of law." (*Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 285 [73 Cal.Rptr.2d 596], internal citations omitted.)

- "Appellate courts differ concerning the use of special verdicts. In one case the court said, 'we should utilize opportunities to force counsel into requesting special verdicts.' In contrast, a more recent decision included the negative view: 'Toward this end we advise that special findings be requested of juries only when there is a compelling need to do so. Absent strong reason to the contrary their use should be discouraged.' Obviously, it is easier to tell after the fact, rather than before, whether the special verdict is helpful in disclosing the jury conclusions leading to the end result." (*All-West Design, Inc. v. Boozer* (1986) 183 Cal.App.3d 1212, 1221 [228 Cal.Rptr. 736], internal citations omitted.)

- "[A] juror who dissented from a special verdict finding negligence should not be disqualified from fully participating in the jury's further deliberations, including the determination of proximate cause. The jury is to determine all questions submitted to it, and when the jury is composed of twelve persons, each should participate as to each verdict submitted to it. To hold that a juror may be disqualified by a special verdict on negligence from participation in the next special verdict would deny the parties of 'the right to a jury of 12 persons deliberating on all issues.' Permitting any nine jurors to arrive at each special verdict best serves the purpose of less-than-unanimous verdicts, overcoming minor disagreements and avoiding costly mistrials. Once nine jurors have found a party negligent, dissenting jurors can accept the finding and participate in determining proximate cause just as they may participate in apportioning liability, and we may not assume that the dissenting jurors will violate their oaths to deliberate honestly and conscientiously on the proximate cause issue." (*Resch v. Volkswagen of America, Inc.* (1984) 36 Cal.3d 676, 682 [205 Cal.Rptr. 827], internal citations omitted.)

<u>Secondary Sources</u>

- 7 Witkin, California Procedure (4th ed. 1997) Trial, §§ 352–355

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2203
Negligence—Single Defendant
Plaintiff's Negligence Not at Issue/Fault of Others Not at Issue

---

We answer the questions submitted to us as follows:

1. Was [*name of defendant***] negligent?**

___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 foreperson sign and date this form.

2. Was [*name of plaintiff***] harmed?**

___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 foreperson sign and date this form.

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

___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 foreperson sign and date this form.

4. What are [*name of plaintiff***]'s damages? [$_____]**

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

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

TOTAL $_____]

Signed: _____
Foreperson

Dated: _____

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

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 Instruction 300, *Negligence—Issues in the Case*.

If specificity is not required, users do not have to itemize all the damages listed in question 4. The breakdown is optional; depending on the circumstances, users may wish to break down the damages even further.

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

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

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2204
Negligence—Single Defendant
Plaintiff's Negligence at Issue/Fault of Others Not at Issue

We answer the questions submitted to us as follows:

1. Was [*name of defendant***] negligent?**

___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 foreperson sign and date this form.

2. Was [*name of plaintiff***] harmed?**

___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 foreperson sign and date this form.

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

___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 foreperson sign and date this form.

4. What are [*name of plaintiff***]'s total damages? Do not reduce the damages based on the fault, if any, of [***name of plaintiff***].**

[$_____]

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

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[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] $_____]
[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]
[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]
TOTAL $_____]

If [*name of plaintiff*] has proved any damages, then answer question 5. If [*name of plaintiff*] has not proved any damages, then stop here, answer no further questions, and have the foreperson sign and date this form.

5. Was [*name of plaintiff*] negligent?

___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 foreperson sign and date this form.

6. Was [*name of plaintiff*]'s negligence a substantial factor in causing [his/her] harm?

___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 foreperson sign and date this form.

7. What percentage of responsibility for [*name of plaintiff*]'s harm do you assign to:

[*Name of defendant*]: _____%
[*Name of plaintiff*]: _____%
TOTAL 100 %

Signed: _____
Foreperson
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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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 Instruction 300, *Negligence—Issues in the Case*, and Instruction 310, *Plaintiff's Contributory Negligence*.

If specificity is not required, users do not have to itemize all the damages listed in question 4. The breakdown is optional; depending on the circumstances, users may wish to break down the damages even further.

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

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

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2205
Negligence—Fault of Plaintiff and Others at Issue

We answer the questions submitted to us as follows:

1. Was [*name of first defendant***] negligent?**

___Yes ___No

Was [*name of second defendant***] negligent?**

___Yes ___No

[*repeat as necessary for other defendants.***]**

If you answered yes in any part of question 1, then answer question 2. If you answered no to all parts of question 1, stop here, answer no further questions, and have the foreperson sign and date this form.

2. Was [*name of plaintiff***] harmed?**

___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 foreperson sign and date this form.

3. For each defendant that received a "yes" answer in question 1, answer the following:

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

___Yes ___No

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

___Yes ___No

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[*repeat as necessary for other defendants.***]**

If you answered yes in any part of question 3 is yes, then answer question 4. If you answered no to all parts of question 1, stop here, answer no further questions, and have the foreperson sign and date this form.

4. What are [*name of plaintiff***]'s total damages? Do not reduce the damages based on the fault, if any, of [***name of plaintiff***] or others.**

[$_____]

[[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:] $_____]
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] $_____]
[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]
[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____]

If [*name of plaintiff***] has proved any damages, then answer question 5. If [***name of plaintiff***] has not proved any damages, then stop here, answer no further questions, and have the foreperson sign and date this form.**

5. Was [*name of plaintiff***] negligent?**

___Yes ___No

If your answer to question 5 is yes, then answer question 6. If you answered no, answer question 7.

6. Was [*name of plaintiff***]'s negligence a substantial factor in causing [his/her] harm?**

___Yes ___No

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If your answer to question 6 is yes, then answer question 7. If you answered no, insert the number zero next to [*name of plaintiff*]'s name in question 9 and answer question 7.

7. Was [*name/description of first nonparty*] negligent?

___Yes ___No

Was [*name/description of second nonparty*] negligent?

___Yes ___No

If you answered yes in any part of 7, then answer question 8. If you answered no to all parts of question 7, answer question 9.

8. For each person who received a "yes" answer in question 7, answer the following:

Was [*name/description of first nonparty*]'s negligence a substantial factor in causing [*name of plaintiff*]'s harm?

___Yes ___No

Was [*name/description of second nonparty*]'s negligence a substantial factor in causing [*name of plaintiff*]'s harm?

___Yes ___No

If you answered yes in any part of question 8, then answer question 9. If you answered no regarding all persons in question 8, then insert the number zero next to their names in question 9 and answer question 9.

9. What percentage of responsibility for [*name of plaintiff*]'s harm do you assign to the following? Insert a percentage for only those who received "yes" answers in questions 3, 6, or 8:

[*Name of first defendant*]:	**_____%**
[*Name of second defendant*]:	**_____%**
[*Name of plaintiff*]:	**_____%**
[*Name/description of first nonparty*]	**_____%**
[*Name/description of second nonparty*]	**_____%**
TOTAL	**_100_%**

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Signed: _____
Foreperson

Dated: _____

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

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 Instruction 300, *Negligence—Issues in the Case*, Instruction 310, *Plaintiff's Contributory Negligence*; and Instruction 311, *Apportionment of Responsibility*.

If specificity is not required, users do not have to itemize all the damages listed in question 4. The breakdown is optional; depending on the circumstances, users may wish to break down the damages even further.

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

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

Users may wish to have the jury specify the liability and causation of each nonparty actor.

If a second plaintiff is contributorily negligent, add his or her name to the list of possible contributing persons, notwithstanding the fact that the bracket is currently designated as "nonparty."

If superseding cause is an issue, insert a question on that issue after question 5.

If a nonparty is a product manufacturer, see verdict form [*to be drafted*].

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2206
Negligence—Sale of Alcoholic Beverages to Obviously Intoxicated Minor

---

We answer the questions submitted to us as follows:

1. Was [*name of defendant***] [licensed] [authorized] [required to be licensed or authorized] to sell alcoholic beverages?**

___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 foreperson sign and date this form.

2. Did [*name of defendant***] sell or give alcoholic beverages to [***name of alleged minor***]?**

___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 foreperson sign and date this form.

3. Was [*name of alleged minor***] less than 21 years old at the time?**

___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 foreperson sign and date this form.

4. Did [*name of alleged minor***] display symptoms that would lead a reasonable person to conclude that [***name of alleged minor***] was intoxicated?**

___Yes ___No

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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 foreperson sign and date this form.

5. Did [*name of alleged minor***] harm [himself/herself/[***name of plaintiff***]] while [***name of alleged minor***] was intoxicated?**

___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 foreperson sign and date this form.

6. Was [*name of defendant***]'s selling or giving alcoholic beverages to [***name of alleged minor***] a substantial factor in causing [his/her/[***name of plaintiff***]]'s harm?**

___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 foreperson sign and date this form.

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

[[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:] $_____]
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] $_____]
[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]
[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____]

Signed: _____
Foreperson
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].

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 Instruction 335, *Sale of Alcoholic Beverages to Obviously Intoxicated Minor (Bus. & Prof. Code, § 25602.1).*

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

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

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

If contributory negligence is an issue, this form should be modified. See Verdict Form 2204, *Plaintiff's Negligence at Issue/Fault of Others Not at Issue*, for a model form involving the issue of contributory negligence.

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2207
Negligence—Single Defendant—Ultrahazardous Activities

We answer the questions submitted to us as follows:

1. Was [*name of defendant***] engaged in [***insert ultrahazardous activity***]?**

___Yes ___No

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

2. Was [*name of plaintiff***] harmed?**

___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 foreperson sign and date this form.

3. Was [*name of plaintiff***]'s harm the kind of harm that would be anticipated as a result of the risk created by [***insert ultrahazardous 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 foreperson sign and date this form.

4. Was [*name of defendant***]'s [***insert ultrahazardous activity***] a substantial factor in causing [***name of plaintiff***]'s harm?**

___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 foreperson sign and date this form.

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5. What are [*name of plaintiff*]'s damages? [$_____]

[[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:] $_____]
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] $_____]
[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]
[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____]

Signed: _____
Foreperson

Dated: _____

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

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 Instruction 370, *Ultrahazardous Activities—Essential Factual Elements.*

If specificity is not required, users do not have to itemize all the damages listed in question 5. The breakdown is optional; depending on the circumstances, users may wish to break down the damages even further.

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

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

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2208
Strict Liability—Single Defendant
Strict Liability for Domestic Animal With Dangerous Propensities

---

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] own, keep, or control a [***insert type of animal***]?**

___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 foreperson sign and date this form.

2. Did the [*insert type of animal***] have an unusually dangerous nature or tendency?**

___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 foreperson sign and date this form.

3. Did [*name of defendant***] know, or should [he/she] have known, that the [***insert type of animal***] had this nature or tendency?**

___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 foreperson sign and date this form.

4. Was [*name of plaintiff***] harmed?**

___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 foreperson sign and date this form.

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5. Was the [*insert type of animal*]'s unusually dangerous nature or tendency a substantial factor in causing [*name of plaintiff*]'s harm?

___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 foreperson sign and date this form.

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

[[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:] $_____]
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] $_____]
[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]
[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____]

Signed: _____
Foreperson

Dated: _____

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

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 Instruction 372, *Strict Liability for Injury Caused by Domestic Animal With Dangerous Propensities.*

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

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

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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2209
Negligence—Single Defendant—Dog Bite Statute (Civ. Code, § 3342)

We answer the questions submitted to us as follows:

1. Did [*name of defendant*]'s dog bite [*name of plaintiff*]?

___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 foreperson sign and date this form.

2. Was [*name of plaintiff*] [in a public place/lawfully on private property] when [he/she] was bitten?

___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 foreperson sign and date this form.

3. Was [*name of plaintiff*] harmed?

___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 foreperson sign and date this form.

4. Was the dog a substantial factor in causing [*name of plaintiff*]'s harm?

___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 foreperson sign and date this form.

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5. What are the damages, if any, that [*name of plaintiff*] suffered as a result of the dog bite? [$_____]

[[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:] $_____]
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] $_____]
[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]
[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____]

Signed: _____
Foreperson
Dated: _____

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

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 Instruction 373, *Dog Bite Statute (Civ. Code, § 3342).*

If specificity is not required, users do not have to itemize all the damages listed in question 5. The breakdown is optional; depending on the circumstances, users may wish to break down the damages even further.

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

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

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2210
Medical Negligence—Single Defendant
Comparative Negligence of Plaintiff and Others Not at Issue

We answer the questions submitted to us as follows:

1. Was [*name of defendant***] negligent in the diagnosis or treatment of [***name of plaintiff***]?**

___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 foreperson sign and date this form.

2. Was [*name of plaintiff***] harmed?**

___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 foreperson sign and date this form.

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

___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 foreperson sign and date this form.

4. What are [*name of plaintiff***]'s damages? [$_____]**

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

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

TOTAL $_____]

Signed: _____
Foreperson

Dated: _____

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

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 Instruction 400, *Medical Negligence, Issues in the Case.*

If specificity is not required, users do not have to itemize all the damages listed in question 4. The breakdown is optional; depending on the circumstances, users may wish to break down the damages even further.

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

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

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2211
Medical Negligence—Informed Consent
Affirmative Defense That Plaintiff Would Have Consented Even If Informed

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We answer the questions submitted to us as follows:

1. Did [*name of defendant***] perform a [***insert medical procedure***] on [***name of plaintiff***]?**

___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 foreperson sign and date this form.

2. Did [*name of plaintiff***] give [his/her] informed consent for the [***insert medical procedure***]?**

___Yes ___No

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

3. Would a reasonable person in [*name of plaintiff***]'s position have refused the [***insert medical procedure***] if he or she had been fully informed of the possible results and risks of [and alternatives to] the [***insert medical procedure***]?**

___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 foreperson sign and date this form.

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4. Would [*name of plaintiff***] have consented to the [***insert medical procedure***] even if [he/she] had been given enough information about the risks of the [***insert medical procedure***]?**

___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 foreperson sign and date this form.

5. Was [*name of plaintiff***]'s harm the consequence of a result or risk that [***name of defendant***] should have explained before the [***insert medical procedure***] was performed?**

___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 foreperson sign and date this form.

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

[[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:] $_____]
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] $_____]
[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]
[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]
TOTAL $_____]

Signed: _____
Foreperson

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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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 Instruction 433, *Failure to Obtain Informed Consent—Essential Factual Elements,* and Instruction 436, *Defenses—Plaintiff Would Have Consented.*

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

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

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.

If the affirmative defense, which is contained in question 4, is not an issue in the case, question 4 should be omitted and the remaining questions renumbered accordingly.

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2212
Medical Negligence
Informed Consent—Defense of Emergency

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] perform a [***insert medical procedure***] on [***name of plaintiff***]?**

___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 foreperson sign and date this form.

2. Did [*name of plaintiff***] give [his/her] informed consent to the [***insert medical procedure***]?**

___Yes ___No

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

3. Would a reasonable person in [*name of plaintiff***]'s position have agreed to the [***insert medical procedure***] if he or she had been fully informed of the possible results and risks of [and alternatives to] the [***insert medical procedure***]?**

___Yes ___No

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

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4. Was [*name of plaintiff***] harm the consequence of a result or risk that [***name of defendant***] should have explained before the [***insert medical procedure***] was performed?**

___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 foreperson sign and date this form.

5. Did [*name of defendant***] reasonably believe the [***insert medical procedure***] had to be done immediately in order to preserve the life or health of [***name of plaintiff***]?**

___Yes ___No

If your answer to question 5 is no, then answer question 7. If you answered yes to this question, answer question 6.

6. Was it impossible or impractical to obtain [*name of plaintiff/other authorized person***]'s consent to the [***insert medical procedure***]?**

___Yes ___No

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

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

[[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:] $_____]
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] $_____]
[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]
[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____]

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Signed: _____
Foreperson
Dated: _____

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

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 Instruction 433, *Failure to Obtain Informed Consent—Essential Factual Elements,* and Instruction 440, *Defenses—Emergency.*

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

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

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

If the affirmative defense, which is contained in questions 5 and 6, is not an issue in the case, then questions 5 and 6 should be omitted and the remaining questions renumbered accordingly.

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2213
Premises Liability—Single Defendant
Comparative Negligence of Others Not at Issue

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] [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 foreperson sign and date this form.

2. Was [*name of defendant***] negligent in the [use/maintenance] of the property?**

___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 foreperson sign and date this form.

3. Was [*name of plaintiff***] harmed?**

___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 foreperson sign and date this form.

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

___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 foreperson sign and date this form.

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5. What are [*name of plaintiff*]'s damages? [$_____]

[[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:] $_____]
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] $_____]
[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]
[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____]

Signed: _____
Foreperson

Dated: _____

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

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 Instruction 600, *Premises Liability—Issues in the Case*.

If specificity is not required, users do not have to itemize all the damages listed in question 5. The breakdown is optional; depending on the circumstances, users may wish to break down the damages even further.

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

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

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2214
Premises Liability—Single Defendant
Affirmative Defense of Recreation Immunity
Comparative Negligence of Others Not at Issue

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] [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 foreperson sign and date this form.

2. Was [*name of defendant***] negligent in the [use/maintenance] of the property?**

___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 foreperson sign and date this form.

3. Was [*name of plaintiff***] harmed?**

___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 foreperson sign and date this form.

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

___Yes ___No

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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 foreperson sign and date this form.

5. Did [*name of plaintiff***] enter on or use [***name of defendant***]'s property for a recreational purpose?**

___Yes ___No

If your answer to question 5 is yes, then answer question 6. If you answered no, skip the next three questions and answer question 9.

6. Did [*name of defendant***] know or should [he/she/it] have known of a [condition/use/structure/activity on the property] that created an unreasonable risk of serious injury?**

___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 foreperson sign and date this form.

7. Did [*name of defendant***] know or should [he/she/it] have known that someone would probably be seriously injured by the dangerous [condition/use/structure/activity]?**

___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 foreperson sign and date this form.

8. Did [*name of defendant***] knowingly fail to protect others from the dangerous [condition/use/structure/activity]?**

___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 foreperson sign and date this form.

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9. What are [*name of plaintiff*]'s damages? [$_____]

[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:] $_____]
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] $_____]
[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]
[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]
TOTAL $_____]

Signed: _____
Foreperson
Dated: _____

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

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 Instruction 600, *Premises Liability—Issues in the Case,* and Instruction 610, *Recreation Immunity (Civ. Code, § 846).*

If specificity is not required, users do not have to itemize all the damages listed in question 9. The breakdown is optional; depending on the circumstances, users may wish to break down the damages even further.

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

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

This verdict form should be modified (see Instruction 610, *Recreation Immunity (Civ. Code, § 846)*) if either of the two other grounds for countering this defense is at issue.

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2215
Strict Products Liability—Single Defendant
Manufacturing Defect—Comparative Negligence at Issue

We answer the questions submitted to us as follows:

1. Did [*name of defendant*] [manufacture/distribute/sell] the [*product*]?

___Yes ___No

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

2. Did the [*product*] contain a manufacturing defect when it left [*name of defendant*]'s possession?

___Yes ___No

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

3. Was the manufacturing defect a substantial factor in causing [*name of plaintiff*]'s harm?

___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 foreperson sign and date this form.

4. Was the [*product*] used [or misused] in a way that was reasonably foreseeable to [*name of defendant*]?

___Yes ___No

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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 foreperson sign and date this form.

5. What are [*name of plaintiff***]'s damages? Do not reduce the damages based on the fault, if any, of [***name of plaintiff***] or [***name/description of other person***].**

[$_____]

[[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:] $_____]
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] $_____]
[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]
[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]
TOTAL $_____]

If [*name of plaintiff***] has proved any damages, answer question 6. If [***name of plaintiff***] has not proved any damages, then stop here, answer no further questions, and have the foreperson sign and date this form.**

6. Was [*name of plaintiff***] negligent?**

___Yes ___No

If your answer to question 6 is yes, then answer question 7. If you answered no, insert the number zero next to [*name of plaintiff***]'s name in question 10 and answer question 8.**

7. Was [*name of plaintiff***]'s negligence a substantial factor in causing [his/her] harm?**

___Yes ___No

If your answer to question 7 is yes, then answer question 8. If you answered no, insert the number zero next to [*name of plaintiff***]'s name in question 10 and answer question 8.**

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8. Was [*name/description of other person***] negligent?**

___Yes ___No

If your answer to question 8 is yes, then answer question 9. If you answered no, insert the number zero next to [*name/description of other person***]'s name in question 10 and answer question 10.**

9. Was [*name/description of other person***]'s negligence a substantial factor in causing [***name of plaintiff***]'s harm?**

___Yes ___No

If your answer to question 9 is yes, then answer question 10. If you answered no, insert the number zero next to [*name/description of other person***]'s name in question 10 and answer question 10.**

10. What percentage of responsibility for [*name of plaintiff***]'s harm do you assign to:**

[*Name of defendant***]:**	**_____%**
[*Name of plaintiff***]:**	**_____%**
[*Name/description of other person***]:**	**_____%**
TOTAL	**100 %**

Signed: _____
Foreperson

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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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 Instruction 701, *Strict Liability—Manufacturing Defect—Necessary Factual Elements,* and Instruction 710, *Strict Liability Comparative Fault—Contributory Negligence.*

If specificity is not required, users do not have to itemize all the damages listed in question 4. The breakdown is optional; depending on the circumstances, users may wish to break down the damages even further.

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

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

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2216
Strict Products Liability—Single Defendant
Design Defect—Consumer Expectation Test

We answer the questions submitted to us as follows:

1. Did [*name of defendant*] [manufacture/distribute/sell] the [*product*]?

___Yes ___No

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

2. At the time the [*product*] was used, was it substantially the same as when it left [*name of defendant*]'s possession?

___Yes ___No

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

3. Did the [*product*] perform as safely as an ordinary consumer would have expected?

___Yes ___No

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

4. Was the [*product*] used [or misused] in a way that was reasonably foreseeable to [*name of defendant*]?

___Yes ___No

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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 foreperson sign and date this form.

5. Was the [*product*]'s design a substantial factor in causing [*name of plaintiff*]'s harm?

___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 foreperson sign and date this form.

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

[[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:] $_____]
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] $_____]
[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]
[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]
TOTAL $_____]

Signed: _____
Foreperson
Dated: _____

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

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.

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This verdict form is based on Instruction 703, *Strict Liability Design Defect—Consumer Expectation Test—Necessary Factual Elements.*

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

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

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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2217
Strict Products Liability—Single Defendant
Design Defect—Risk-Benefit Test

We answer the questions submitted to us as follows:

1. Did [*name of defendant*] [manufacture/distribute/sell] the [*product*]?

___Yes ___No

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

2. At the time the [*product*] was used, was it substantially the same as when it left [*name of defendant*]'s possession?

___Yes ___No

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

3. Was the [*product*] used [or misused] in a way that was reasonably foreseeable to [*name of defendant*]?

___Yes ___No

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

4. Was the [*product*] a substantial factor in causing [*name of plaintiff*]'s harm?

___Yes ___No

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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 foreperson sign and date this form.

5. Did the benefits of the [*product*]'s design outweigh the risks of the design?

___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 foreperson sign and date this form.

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

[[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:] $_____]
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] $_____]
[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]
[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]
TOTAL $_____]

Signed: _____
Foreperson
Dated: _____

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

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 Instruction 704, *Strict Liability Design Defect—Risk-Benefit Test—Necessary Factual Elements—Shifting Burden of Proof.*

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

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

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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2218
Strict Products Liability—Single Defendant
Failure to Warn

We answer the questions submitted to us as follows:

1. Did [*name of defendant*] [manufacture/distribute/sell] the [*product*]?

___Yes ___No

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

2. Did the [*product*] have potential [risks/side effects/allergic reactions] that were [known] [or] [knowable through the use of scientific knowledge available] at the time of [manufacture/distribution/ sale]?

___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 foreperson sign and date this form.

3. Did the potential [risks/side effects/allergic reactions] present a substantial danger to users of the [*product*]?

___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 foreperson sign and date this form.

4. Would ordinary consumers have recognized the potential [risks/ side effects/allergic reactions]?

___Yes ___No

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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 foreperson sign and date this form.

5. Did [*name of defendant***] fail to adequately warn [or instruct] of the potential [risks/side effects/allergic reactions]?**

___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 foreperson sign and date this form.

6. Was the [*product***] used [or misused] in a way that was reasonably foreseeable to [***name of defendant***]?**

___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 foreperson sign and date this form.

7. Was the lack of sufficient [instructions] [or] [warnings] 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 foreperson sign and date this form.

8. What are [*name of plaintiff***]'s damages? [$_____]**

[[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:] $_____]
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] $_____]
[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

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

TOTAL $_____]

Signed: _____
Foreperson
Dated: _____

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

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 Instruction 705, *Strict Liability Failure to Warn—Necessary Factual Elements.*

If specificity is not required, users do not have to itemize all the damages listed in question 8. The breakdown is optional; depending on the circumstances, users may wish to break down the damages even further.

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

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

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2219
Products Liability—Negligence—Single Defendant
Plaintiff's Contributory Negligence at Issue

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] [design/manufacture/supply/install/inspect/repair/rent] the [***product***]?**

___Yes ___No

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

2. Was [*name of defendant***] negligent in [designing/manufacturing/supplying/installing/inspecting/repairing/renting] the [***product***]?**

___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 foreperson sign and date this form.

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

___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 foreperson sign and date this form.

4. What are [*name of plaintiff***]'s total damages? Do not reduce the damages based on the fault, if any, of [***name of plaintiff***]. [$_____]**

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

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

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

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

TOTAL $_____]

If [*name of plaintiff*] has proved any damages, answer question 5. If [*name of plaintiff*] has not proved any damages, then stop here, answer no further questions, and have the foreperson sign and date this form.

5. Was [*name of plaintiff*] negligent?

___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 foreperson sign and date this form.

6. Was [*name of plaintiff*]'s negligence a substantial factor in causing [his/her] harm?

___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 foreperson sign and date this form.

7. What percentage of responsibility for [*name of plaintiff*]'s harm do you assign to:

[*Name of defendant*]:	**_____%**
[*Name of plaintiff*]:	**_____%**
TOTAL	**100 %**

Signed: _____
Foreperson
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].

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 Instruction 730, *Negligence—Necessary Factual Elements,* and Instruction 310, *Plaintiff's Contributory Negligence.*

If specificity is not required, users do not have to itemize all the damages listed in question 4. The breakdown is optional; depending on the circumstances, users may wish to break down the damages even further.

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

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

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2220
Products Liability—Single Defendant
Negligent Failure to Warn

We answer the questions submitted to us as follows:

1. Did [*name of defendant*] [manufacture/distribute/sell] the [*product*]?

___Yes ___No

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

2. Did [*name of defendant*] know or should [he/she/it] reasonably have known that the [*product*] was dangerous or was likely to be dangerous when used in a reasonably foreseeable manner?

___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 foreperson sign and date this form.

3. Did [*name of defendant*] know or should [he/she/it] reasonably have known that users would not realize the danger?

___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 foreperson sign and date this form.

4. Did [*name of defendant*] fail to adequately warn of the danger [or instruct on the safe use of] the [*product*]?

___Yes ___No

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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 foreperson sign and date this form.

5. Would a reasonable [manufacturer/distributor/seller] under the same or similar circumstances have warned of the danger [or instructed on the safe use of] the [*product*]?

___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 foreperson sign and date this form.

6. Was [*name of defendant*]'s negligence a cause of harm to [*name of plaintiff*]?

___Yes ___No

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

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

[[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:] $_____]
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] $_____]
[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]
[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]
TOTAL $_____]

Signed: _____
Foreperson

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].

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 Instruction 735, *Negligence—Manufacturer or Supplier—Duty to Warn.*

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

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

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

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2221
Products Liability—Express Warranty—Single Defendant Affirmative Defense—Not "Basis of Bargain"

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] represent by a [statement of fact/promise/ description/sample/model] that the [***product***] [***insert description of alleged express warranty***]?**

___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 foreperson sign and date this form.

2. Did [*name of plaintiff***] rely on [***name of defendant***]'s [statement of fact/ promise/description/sample/model] in deciding to [purchase/use] the [***product***]?**

___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 foreperson sign and date this form.

3. Did the [*product***] [perform] [or] [have the same quality] as represented?**

___Yes ___No

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

4. Was the failure of the [*product***] to [perform] [or] [meet the quality] as represented a cause of harm to [***name of plaintiff***]?**

___Yes ___No

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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 foreperson sign and date this form.

5. What are [*name of plaintiff*]'s damages? [$_____]

[[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:] $_____]
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] $_____]
[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]
[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]
TOTAL $_____]

Signed: _____
Foreperson

Dated: _____

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

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 Instruction 750, *Express Warranty,* and Instruction 754, *Affirmative Defense to Express Warranty—Not "Basis of Bargain."*

If specificity is not required, users do not have to itemize all the damages listed in question 5. The breakdown is optional; depending on the circumstances, users may wish to break down the damages even further.

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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.

Question 1 should be modified (see Instruction 750, *Express Warranty*) if the defendant made the representation by supplying either a description of the product or a sample or model of the product. Question 3 should be modified to refer to the quality of the description, sample, or model if it is at issue, as specified by element 2 of instruction 750. The form should also be modified if notification is an issue.

Do not include question 2 if the affirmative defense is not at issue.

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2222
Products Liability—Single Defendant
Implied Warranty of Merchantability
Affirmative Defense—Exclusion of Implied Warranties

We answer the questions submitted to us as follows:

1. Did [*name of plaintiff*] buy the [*product*] from [*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 foreperson sign and date this form.

2. Was [*name of defendant*] in the business of selling these goods?

___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 foreperson sign and date this form.

3. Did the sale of the [*product*] include notice that would have made a buyer aware that it was being sold without any implied warranties?

___Yes ___No

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

4. Was the [*product*] fit for the ordinary purposes for which such goods are used?

___Yes ___No

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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 foreperson sign and date this form.

5. Was the failure of the [*product*] to have the expected quality a cause of harm to [*name of plaintiff*]?

___Yes ___No

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

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

[[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:] $_____]
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] $_____]
[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]
[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]
TOTAL $_____]

Signed: _____
Foreperson
Dated: _____

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

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.

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This verdict form is based on Instruction 751, *Implied Warranty of Merchantability*, and Instruction 756, *Affirmative Defense—Exclusion of Implied Warranties.*

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

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

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.

Question 2 should be modified if the defendant held himself or herself out as having special knowledge or skill regarding the goods. Question 3 should be modified if a different ground of liability is asserted under Commercial Code section 2314(2). Question 6 should be modified if the defendant is asserting other grounds under Commercial Code section 2316(3). This form should also be modified if notification is an issue.

Do not include question 3 if the affirmative defense is not at issue.

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2223
Products Liability—Single Defendant
Implied Warranty of Fitness for a Particular Purpose

We answer the questions submitted to us as follows:

1. Did [*name of plaintiff***] buy the [***product***] from [***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 foreperson sign and date this form.

2. At the time of purchase, did [*name of defendant***] know or have reason to know that [***name of plaintiff***] intended to use the [***product***] for a particular purpose?**

___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 foreperson sign and date this form.

3. At the time of purchase, did [*name of defendant***] know that [***name of plaintiff***] was relying on [***name of defendant***]'s skill and judgment to select or furnish a product that was suitable for the particular purpose?**

___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 foreperson sign and date this form.

4. Did [*name of plaintiff***] justifiably rely on [***name of defendant***]'s skill and judgment?**

___Yes ___No

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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 foreperson sign and date this form.

5. Was the [*product*] suitable for the particular purpose?

___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 foreperson sign and date this form.

6. Was the failure of the [*product*] to be suitable a substantial factor in causing [*name of plaintiff*]'s harm?

___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 foreperson sign and date this form.

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

[[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:] $_____]
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] $_____]
[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]
[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]
TOTAL $_____]

Signed: _____
Foreperson
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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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 Instruction 752, *Implied Warranty of Fitness for a Particular Purpose.*

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

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

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

Question 2 of this form should be modified if the defendant held himself or herself out as having special knowledge or skill regarding the goods. Question 3 should be modified if a different ground of liability is asserted under Commercial Code section 2314(2). This form should also be modified if notification is an issue.

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2224
Negligence—Vicarious Liability
Plaintiff's Negligence Not at Issue/Fault of Others Not at Issue

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We answer the questions submitted to us as follows:

1. Was [*name of agent***] negligent?**

___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 foreperson sign and date this form.

2. Was [*name of plaintiff***] harmed?**

___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 foreperson sign and date this form.

3. Was [*name of agent***]'s negligence a substantial factor in causing [***name of plaintiff***]'s harm?**

___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 foreperson sign and date this form.

4. Was [*name of agent***] [***name of defendant***]'s [agent/employee/[***insert other relationship***]]?**

___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 foreperson sign and date this form.

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5. Was [*name of agent*] acting within the scope of [his/her] [agency/ employment/[*insert other relationship*]] when [he/she] harmed [*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 foreperson sign and date this form.

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

[[a. Past economic loss, including] [lost earnings/ lost profits/medical expenses:] $_____]
[b. Future economic loss, including][lost earnings/lost profits/lost earning capacity/ medical expenses:] $_____]
[c. Past noneconomic loss, including] [physical pain/mental suffering:] $_____]
[d. Future noneconomic loss, including] [physical pain/mental suffering:] $_____]

TOTAL $_____]

Signed: _____
Foreperson

Dated: _____

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

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.

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This verdict form is based on Instruction 901, *Tort Liability Asserted Against Principal.*

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

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

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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2225
Dangerous Condition of Public Property
Plaintiff's Negligence Not at Issue/Fault of Others Not at Issue

---

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] own [or control] the property?**

___Yes ___No

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

2. Was the property in a dangerous condition at the time of the incident?

___Yes ___No

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

3. Did the dangerous condition create a reasonably foreseeable risk that this kind of incident would occur?

___Yes ___No

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

4. [Did the negligent or wrongful conduct of [*name of defendant***]'s employee acting within the scope of [his/her] employment create the dangerous condition?]**

[or]

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[Did [*name of defendant*] have notice of the dangerous condition for a long enough time for [*name of defendant*] to have protected against it?]

___Yes ___No

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

5. Was [*name of plaintiff*] harmed?

___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 foreperson sign and date this form.

6. Was the dangerous condition a substantial factor in causing [*name of plaintiff*]'s harm?

___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 foreperson sign and date this form.

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

[[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:] $_____]
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] $_____]
[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]
[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____]

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Signed: _____
Foreperson

Dated: _____

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

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 Instruction 1000, *Essential Factual Elements (Gov. Code, § 835).*

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

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

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

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2226
Dangerous Condition of Public Property
Affirmative Defense of Reasonable Act or Omission (Gov. Code, § 835.4)

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] own [or control] the property?**

___Yes ___No

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

2. Was the property in a dangerous condition at the time of the incident?

___Yes ___No

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

3. Did the dangerous condition create a reasonably foreseeable risk that this kind of incident would occur?

___Yes ___No

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

4. [Did the negligent or wrongful conduct of [*name of defendant***]'s employee acting within the scope of [his/her] employment create the dangerous condition?]**

[or]

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[Did [*name of defendant*] have notice of the dangerous condition for a long enough time to have protected against it?]

___Yes ___No

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

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

[or]

[Was [*name of defendant*] acting reasonably in failing to take sufficient steps to protect against the risk of injury?]

___Yes ___No

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

6. Was [*name of plaintiff*] harmed?

___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 foreperson sign and date this form.

7. Was the dangerous condition 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 foreperson sign and date this form.

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8. What are [*name of plaintiff*]'s damages? [$_____]

[[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:] $_____]
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] $_____]
[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]
[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____]

Signed: _____
Foreperson

Dated: _____

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

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 Instruction 1000, *Essential Factual Elements (Gov. Code, § 835);* Instruction 1006, *Affirmative Defenses—Condition Created by Reasonable Act or Omission (Gov. Code, § 835.4(a));* and Instruction 1007, *Affirmative Defenses—Reasonable Act or Omission to Correct (Gov. Code, § 835.4(b)).*

If specificity is not required, users do not have to itemize all the damages listed in question 8. The breakdown is optional; depending on the circumstances, users may wish to break down the damages even further.

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

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

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2227
Fraud or Deceit—Intentional Misrepresentation

We answer the questions submitted to us as follows:

1. Did [*name of defendant*] make a false representation of an important fact to [*name of plaintiff*]?

___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 foreperson sign and date this form.

2. Did [*name of defendant*] know that the representation was false, or did [he/she] make the representation recklessly and without regard for its truth?

___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 foreperson sign and date this form.

3. Did [*name of defendant*] intend that [*name of plaintiff*] rely on the representation?

___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 foreperson sign and date this form.

4. Did [*name of plaintiff*] reasonably rely on the representation?

___Yes ___No

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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 foreperson sign and date this form.

5. Was [*name of plaintiff*] harmed?

___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 foreperson sign and date this form.

6. Was [*name of plaintiff*]'s reliance on [*name of defendant*]'s representation a substantial factor in causing [*name of plaintiff*]'s harm?

___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 foreperson sign and date this form.

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

[a. [Past economic loss, including [lost earnings/ lost profits/medical expenses:] $_____]
b. [Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] $_____]
c. [Past noneconomic loss, including [physical pain/mental suffering:] $_____]
d. [Future noneconomic loss, including [physical pain/mental suffering:] $_____]
TOTAL $_____]

Signed: _____
Foreperson
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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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 Instruction 1100, *Intentional Misrepresentation.*

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

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

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

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2228
Fraud or Deceit—Concealment

We answer the questions submitted to us as follows:

1. Did [*name of defendant*] intentionally conceal an important fact that [*name of plaintiff*] did not know and could not reasonably have discovered?

___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 foreperson sign and date this form.

2. Did [*name of defendant*] intend to deceive [*name of plaintiff*] by concealing the fact?

___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 foreperson sign and date this form.

3. Would [*name of plaintiff*] have acted differently if [he/she] had known of the concealed fact?

___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 foreperson sign and date this form.

4. Was [*name of plaintiff*] harmed?

___Yes ___No

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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 foreperson sign and date this form.

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

___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 foreperson sign and date this form.

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

[[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:] $_____]
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] $_____]
[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]
[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]
TOTAL $_____]

Signed: _____
Foreperson

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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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 Instruction 1101, *Concealment.*

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

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

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.

Modify question 1 by referring to one of the other three grounds for concealment listed in element 1 of Instruction 1101, *Concealment*, depending on which ground is applicable to the facts of the case.

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2229
Fraud or Deceit—False Promise

We answer the questions submitted to us as follows:

1. Did [*name of defendant*] make a promise to [*name of plaintiff*] that was important to the transaction?

___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 foreperson sign and date this form.

2. Did [*name of defendant*] intend to perform this promise when [he/she] made it?

___Yes ___No

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

3. Did [*name of defendant*] intend that [*name of plaintiff*] rely on this promise?

___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 foreperson sign and date this form.

4. Did [*name of plaintiff*] reasonably rely on this promise?

___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 foreperson sign and date this form.

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5. Did [*name of defendant*] perform the promised act?

___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 foreperson sign and date this form.

6. Was [*name of plaintiff*] harmed?

___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 foreperson sign and date this form.

7. Was [*name of plaintiff*]'s reliance on [*name of defendant*]'s promise 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 foreperson sign and date this form.

8. What are [*name of plaintiff*]'s damages? [$_____]

[[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:] $_____]
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] $_____]
[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]
[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____]

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Signed: _____
Foreperson

Dated: _____

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

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 Instruction 1102, *False Promise.*

If specificity is not required, users do not have to itemize all the damages listed in question 8. The breakdown is optional; depending on the circumstances, users may wish to break down the damages even further.

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

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

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2230
Fraud or Deceit—Negligent Misrepresentation

We answer the questions submitted to us as follows:

1. Did [*name of defendant*] make a false representation of an important fact to [*name of plaintiff*]?

___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 foreperson sign and date this form.

2. Did [*name of defendant*] have reasonable grounds for believing the representation was true when [he/she] made it?

___Yes ___No

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

3. Did [*name of defendant*] intend that [*name of plaintiff*] rely on the representation?

___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 foreperson sign and date this form.

4. Did [*name of plaintiff*] reasonably rely on the representation?

___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 foreperson sign and date this form.

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5. Was [*name of plaintiff*] harmed?

___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 foreperson sign and date this form.

6. Was [*name of plaintiff*]'s reliance on [*name of defendant*]'s representation a substantial factor in causing [*name of plaintiff*]'s harm?

___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 foreperson sign and date this form.

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

[[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:] $_____]
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] $_____]
[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]
[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]
TOTAL $_____]

Signed: _____
Foreperson

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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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 Instruction 1103, *Negligent Misrepresentation.*

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

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

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

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2231
Defamation per se—Essential Factual Elements (Public Officer/Figure and Limited Public Figure)

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] make [one or more of] the following statement(s) to [a person/persons] other than [***name of plaintiff***]? [***List all claimed per se defamatory statements.***]**

___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 foreperson sign and date this form.

2. Did the [person/people] to whom the statements were made reasonably understand that the statement(s) [was/were] about [*name of plaintiff***]?**

___Yes ___No

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

3. Did [this person/these people] reasonably understand the statement(s) to mean that [*insert ground(s) for defamation per se, e.g., "[name of plaintiff] had committed a crime"***]?**

___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 foreperson sign and date this form.

4. [Was/Were] the statement(s) false?

___Yes ___No

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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 foreperson sign and date this form.

5. Did [*name of defendant*] know the statement(s) [was/were] false or have serious doubts about the truth of the statement(s)?

___Yes ___No

If your answer to question 5 is yes, then answer questions 6, 7, and 8. If you answered no, stop here, answer no further questions, and have the foreperson sign and date this form.

ASSUMED DAMAGES TO REPUTATION

6. What are the damages you award [*name of plaintiff*] for the assumed harm to [his/her] reputation? $_____

ACTUAL DAMAGES

7. In addition to the amount awarded in question 6, what are [*name of plaintiff*]'s actual damages? [$_____]

[[a. Past economic loss, including harm to [*name of plaintiff*]'s property, business, trade, profession, or occupation, and expenses that [*name of plaintiff*] had to pay as a result of the defamatory statements] $_____]

[b. Future economic loss, including harm to [*name of plaintiff*]'s property, business, trade, profession, or occupation, and expenses that [*name of plaintiff*] will have to pay as a result of the defamatory statements] $_____]

[c. Past noneconomic loss including shame, mortification, hurt feelings, and harm to [*name of plaintiff*]'s reputation in addition to that assumed by the law] $_____]

[d. Future noneconomic loss including harm to [*name of plaintiff*]'s reputation in addition to that assumed by the law, and shame, mortification, or hurt feelings] $_____]

TOTAL $_____]

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PUNITIVE DAMAGES

8. Did [*name of defendant*] act with malice, oppression, or fraud?

___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 foreperson sign and date this form.

9. What is your award of punitive damages, if any, against [*name of defendant*]?

$_____

Signed: _____
Foreperson

Dated: _____

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

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 Instruction 1200, *Defamation Per Se—Essential Factual Elements (Public Officer/Figure and Limited Public Figure).*

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

Give the jury question 3 only if the statement is not defamatory on its face.

Omit question 9 if the issue of punitive damages has been bifurcated.

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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.

Some of the answers to the questions on this form must be found by clear and convincing evidence and some by preponderance. These differences are covered in the instructions, and therefore the committee has elected not to include them in the verdict form.

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2232
Defamation per quod—Essential Factual Elements (Public Officer/Figure and Limited Public Figure)

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] make [one or more of] the following statement(s) to [a person/persons] other than [***name of plaintiff***]? [***List all claimed per se defamatory statements.***]**

___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 foreperson sign and date this form.

2. Did the [person/people] to whom the statements were made reasonably understand that the statement(s) [was/were] about [*name of plaintiff***]?**

___Yes ___No

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

3. [Was/Were] the statement(s) false?

___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 foreperson sign and date this form.

4. Did [*name of defendant***] know the statement(s) [was/were] false or have serious doubts about the truth of the statement(s)?**

___Yes ___No

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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 foreperson sign and date this form.

5. [Is/Are] the statement(s), under the facts of this case, the kind of statement(s) that would tend to injure [*name of plaintiff*] in [his/her] occupation?

___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 foreperson sign and date this form.

6. Did [*name of plaintiff*] suffer harm to [his/her] property, business, profession, or occupation [including money spent as a result of the statement(s)]?

___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 foreperson sign and date this form.

ACTUAL DAMAGES

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

[[a. Past economic loss, including harm to [*name of plaintiff*]'s property, business, trade, profession, or occupation, and expenses [*name of plaintiff*] had to pay as a result of the defamatory statements] $_____]

[b. Future economic loss, including harm to [*name of plaintiff*]'s property, business, trade, profession, or occupation, and expenses [*name of plaintiff*] will have to pay as a result of the defamatory statements] $_____]

[c. Past noneconomic loss, including shame, mortification, hurt feelings, and harm to [*name of plaintiff*]'s reputation] $_____]

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[d. Future noneconomic loss, including shame, mortification, hurt feelings, and harm to [*name of plaintiff*]'s reputation] $_____]

TOTAL $_____]

PUNITIVE DAMAGES

8. Did [*name of defendant*] act with malice, oppression, or fraud?

___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 foreperson sign and date this form.

9. What is your award of punitive damages, if any, against [*name of defendant*]?

$_____

Signed: _____
Foreperson
Dated: _____

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

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 Instruction 1201, *Defamation Per Quod—Essential Factual Elements (Public Officer/Figure and Limited Public Figure).*

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

Question 3 may be modified by referring to one of the other two grounds listed in element 3 of Instruction 1201, *Defamation Per Quod—Essential Factual Elements (Public Officer/Figure and Limited Public Figure),* depending on which ground is applicable in the case.

Additional questions may be needed on the issue of punitive damages if the defendant is a corporate or other entity.

Omit question 9 if the issue of punitive damages has been bifurcated.

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.

Some of the answers to the questions on this form must be found by clear and convincing evidence and some by preponderance. These differences are covered in the instructions, and therefore the committee has elected not to include them in the verdict form.

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2233
Defamation per se—Essential Factual Elements
(Private Figure—Matter of Public Concern)

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] make [one or more of] the following statement(s) to [a person/persons] other than [***name of plaintiff***]? [***List all claimed per se defamatory statements.***]**

   ___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 foreperson sign and date this form.

2. **Did the [person/people] to whom the statements were made reasonably understand that the statement(s) [was/were] about [***name of plaintiff***]?**

   ___Yes ___No

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

3. **Did [this person/these people] reasonably understand the statement(s) to mean that [***insert ground(s) for defamation per se, e.g., "[name of plaintiff] had committed a crime"***]?**

   ___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 foreperson sign and date this form.

4. **[Was/Were] the statement(s) false?**

   ___Yes ___No

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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 foreperson sign and date this form.

5. Did [*name of defendant*] fail to use reasonable care to determine the truth or falsity of the statement(s)?

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 foreperson sign and date this form.

ACTUAL DAMAGES

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

[[a. Past economic loss, including harm to [*name of plaintiff*]'s property, business, trade, profession, or occupation, and expenses [*name of plaintiff*] had to pay as a result of the defamatory statements] $_____]

[b. Future economic loss, including harm to [*name of plaintiff*]'s property, business, trade, profession, or occupation, and expenses [*name of plaintiff*] will have to pay as a result of the defamatory statements] $_____]

[c. Past noneconomic loss including shame, mortification, or hurt feelings, and harm to [*name of plaintiff*]'s reputation] $_____]

[d. Future noneconomic loss including shame, mortification, or hurt feelings, and harm to [*name of plaintiff*]'s reputation] $_____]

TOTAL $_____]

If [*name of plaintiff*] has not proved any actual damages, answer question 7. If [*name of plaintiff*] has proved any actual damages, skip questions 7 and 8 and answer question 9.

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ASSUMED DAMAGES TO REPUTATION

7. Did [*name of defendant*] know the statement(s) [was/were] false or have serious doubts about the truth of the statement(s)?

___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 foreperson sign and date this form.

8. What are the damages you award [*name of plaintiff*] for the assumed harm to [his/her] reputation? You must award at least a nominal sum.

$_____

Regardless of your answer to question 8, skip question 9 and answer question 10.

PUNITIVE DAMAGES

9. Did [*name of defendant*] know the statement(s) [was/were] false or have serious doubts about the truth of the statement(s)?

___Yes ___No

If your answer to question 9 is yes, then answer question 10. If you answered no, stop here, answer no further questions, and have the foreperson sign and date this form.

10. Did [*name of defendant*] act with malice, oppression, or fraud?

___Yes ___No

If your answer to question 10 is yes, then answer question 11. If you answered no, stop here, answer no further questions, and have the foreperson sign and date this form.

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11. What amount, if any, do you award as punitive damages against [*name of defendant*]?

$_____

Signed: _____
Foreperson
Dated: _____

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

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 Instruction 1202, *Defamation Per Se—Essential Factual Elements (Private Figure—Matter of Public Concern).*

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

Give the jury question 3 only if the statement is not defamatory on its face.

Additional questions may be needed on the issue of punitive damages if the defendant is a corporate or other entity.

Omit question 11 if the issue of punitive damages has been bifurcated.

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.

Some of the answers to the questions on this form must be found by clear and convincing evidence and some by preponderance. These differences are covered in the instructions, and therefore the committee has elected not to include them in the verdict form.

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2234
Defamation per quod—Essential Factual Elements
(Private Figure—Matter of Public Concern)

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] make [one or more of] the following statement(s) to [a person/persons] other than [***name of plaintiff***]? [***List all claimed per se defamatory statements.***]**

___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 foreperson sign and date this form.

2. Did the [person/people] to whom the statements were made reasonably understand that the statement(s) [was/were] about [*name of plaintiff***]?**

___Yes ___No

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

3. [Was/Were] the statement(s) false?

___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 foreperson sign and date this form.

4. Did [*name of defendant***] fail to use reasonable care to determine the truth or falsity of the statements?**

___Yes ___No

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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 foreperson sign and date this form.

5. Did the statement(s) tend to injure [*name of plaintiff*] in [his/her] occupation?

___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 foreperson sign and date this form.

6. Did [*name of plaintiff*] suffer harm to [his/her] property, business, profession, or occupation [including money spent as a result of the statement(s)]?

___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 foreperson sign and date this form.

7. [Were/Was] the statement(s) 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 foreperson sign and date this form.

ACTUAL DAMAGES

8. What are [*name of plaintiff*]'s actual damages? [$_____]

[[a. Past economic loss, including harm to [*name of plaintiff*]'s property, business, trade, profession, or occupation, and expenses [*name of plaintiff*] had to pay as a result of the defamatory statements] $_____]

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b. [Future economic loss, including harm to [*name of plaintiff*]'s property, business, trade, profession, or occupation, and expenses [*name of plaintiff*] will have to pay as a result of the defamatory statements] $_____]

[c. Past noneconomic loss including shame, mortification, or hurt feelings, and harm to [*name of plaintiff*]'s reputation] $_____]

[d. Future noneconomic loss including shame, mortification, or hurt feelings, and harm to [*name of plaintiff*]'s reputation] $_____]

TOTAL $_____]

If [*name of plaintiff*] has not proved any actual damages, stop here, answer no further questions, and have the foreperson sign and date this form. If you awarded actual damages, answer question 9.

PUNITIVE DAMAGES

9. Did [*name of defendant*] know the statement(s) [was/were] false or have serious doubts about the truth of the statement(s)?

___Yes ___No

If your answer to question 9 is yes, then answer question 10. If you answered no, stop here, answer no further questions, and have the foreperson sign and date this form.

10. Has [*name of plaintiff*] proved that [*name of defendant*] acted with malice, oppression, or fraud?

___Yes ___No

If your answer to question 10 is yes, then answer question 11. If you answered no, stop here, answer no further questions, and have the foreperson sign and date this form.

11. What amount, if any, do you award as punitive damages against [*name of defendant*]?

$_____

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Signed: _____
Foreperson
Dated: _____

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

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 Instruction 1203, *Defamation Per Quod—Essential Factual Elements (Private Figure—Matter of Public Concern).*

If specificity is not required, users do not have to itemize all the damages listed in question 8. The breakdown is optional; depending on the circumstances, users may wish to break down the damages even further.

Question 5 may be modified by referring to one of the other two grounds listed in element 3 of Instruction 1203, *Defamation Per Quod—Essential Factual Elements (Private Figure—Matter of Public Concern),* depending on which ground is applicable in the case.

Additional questions may be needed on the issue of punitive damages if the defendant is a corporate or other entity.

Omit question 11 if the issue of punitive damages has been bifurcated.

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.

Some of the answers to the questions on this form must be found by clear and convincing evidence and some by preponderance. These differences are covered in the instructions, and therefore the committee has elected not to include them in the verdict form.

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2235
Defamation per se—Essential Factual Elements
(Private Figure—Matter of Private Concern)

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] make [one or more of] the following statement(s) to [a person/persons] other than [***name of plaintiff***]? [***List all claimed per se defamatory statements.***]**

___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 foreperson sign and date this form.

2. Did the [person/people] to whom the statements were made reasonably understand that the statement(s) [was/were] about [*name of plaintiff***]?**

___Yes ___No

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

3. Did [this person/these people] reasonably understand the statement(s) to mean that [*insert ground(s) for defamation per se, e.g., "[name of plaintiff] had committed a crime"***]?**

___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 foreperson sign and date this form.

4. Did [*name of defendant***] fail to use reasonable care to determine the truth or falsity of the statement(s)?**

___Yes ___No

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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 foreperson sign and date this form.

ACTUAL DAMAGES

5. What are [*name of plaintiff*]'s actual damages? [$_____]

[[a. Past economic loss, including harm to [*name of plaintiff*]'s property, business, trade, profession, or occupation, and expenses [*name of plaintiff*] had to pay as a result of the defamatory statements] $_____]

[b. Future economic loss, including harm to [*name of plaintiff*]'s property, business, trade, profession, or occupation, and expenses [*name of plaintiff*] will have to pay as a result of the defamatory statements] $_____]

[c. Past noneconomic loss including shame, mortification, or hurt feelings, and harm to [*name of plaintiff*]'s reputation] $_____]

[d. Future noneconomic loss including shame, mortification, or hurt feelings, and harm to [*name of plaintiff*]'s reputation] $_____]

TOTAL $_____]

If [*name of plaintiff*] has not proved any actual damages, then answer question 6. If [*name of plaintiff*] has proved any actual damages, skip question 6 and answer question 7.

ASSUMED DAMAGES TO REPUTATION

6. What are the damages you award [*name of plaintiff*] for the assumed harm to [his/her] reputation? You must award at least a nominal sum.

$_____

Regardless of your answer to question 6, answer question 7.

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PUNITIVE DAMAGES

7. Has [*name of plaintiff*] proven that [*name of defendant*] acted with malice, oppression, or fraud?

___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 foreperson sign and date this form.

8. What amount, if any, do you award as punitive damages against [*name of defendant*]?

$_____

Signed: _____
Foreperson

Dated: _____

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

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 Instruction 1204, *Defamation Per Se—Essential Factual Elements (Private Figure—Matter of Private Concern).*

If specificity is not required, users do not have to itemize all the damages listed in question 5. The breakdown is optional; depending on the circumstances, users may wish to break down the damages even further.

Give the jury question 3 only if the statement is not defamatory on its face.

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Additional questions may be needed on the issue of punitive damages if the defendant is a corporate or other entity.

Omit question 8 if the issue of punitive damages has been bifurcated.

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.

Some of the answers to the questions on this form must be found by clear and convincing evidence and some by preponderance. These differences are covered in the instructions, and therefore the committee has elected not to include them in the verdict form.

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2236
Defamation per quod—Essential Factual Elements
(Private Figure—Matter of Private Concern)

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] make [one or more of] the following statement(s) to [a person/persons] other than [***name of plaintiff***]? [***List all claimed per quod defamatory statements.***]**

___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 foreperson sign and date this form.

2. Did the [person/people] to whom the statements were made reasonably understand that the statement(s) [was/were] about [*name of plaintiff***]?**

___Yes ___No

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

3. Did [*name of defendant***] fail to use reasonable care to determine the truth or falsity of the statements?**

___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 foreperson sign and date this form.

4. Did the statement(s) tend to injure [*name of plaintiff***] in [his/her] occupation?**

___Yes ___No

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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 foreperson sign and date this form.

5. Did [*name of plaintiff*] suffer harm to [his/her] property, business, profession, or occupation [including money spent as a result of the statement(s)]?

___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 foreperson sign and date this form.

6. [Were/Was] the statement(s) a substantial factor in causing [*name of plaintiff*]'s harm?

___Yes ___No

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

ACTUAL DAMAGES

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

[a. [Past economic loss, including harm to [*name of plaintiff*]'s property, business, trade, profession, or occupation, and expenses [*name of plaintiff*] had to pay as a result of the defamatory statements] $_____]

b. [Future economic loss, including harm to [*name of plaintiff*]'s property, business, trade, profession, or occupation, and expenses [*name of plaintiff*] will have to pay as a result of the defamatory statements] $_____]

[c. Past noneconomic loss including shame, mortification, or hurt feelings, and harm to [*name of plaintiff*]'s reputation] $_____]

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[d. Future noneconomic loss including shame, mortification, or hurt feelings, and harm to [*name of plaintiff*]'s reputation] $_____]

TOTAL $_____]

If [*name of plaintiff*] has not proved any actual damages, stop here, answer no further questions, and have the foreperson sign and date this form. If you awarded actual damages, answer question 8.

PUNITIVE DAMAGES

8. Has [*name of plaintiff*] proven that [*name of defendant*] acted with malice, oppression, or fraud?

___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 foreperson sign and date this form.

9. What amount, if any, do you award as punitive damages against [*name of defendant*]?

$_____

Signed: _____
Foreperson
Dated: _____

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

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.

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This verdict form is based on Instruction 1203, *Defamation Per Quod—Essential Factual Elements (Private Figure—Matter of Public Concern).*

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

Question 4 may be modified by referring to one of the other two grounds listed in element 3 of Instruction 1205, *Defamation Per Quod—Essential Factual Elements (Private Figure—Matter of Private Concern)*, depending on which ground is applicable in the case.

Additional questions may be needed on the issue of punitive damages if the defendant is a corporate or other entity.

Omit question 9 if the issue of punitive damages has been bifurcated.

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.

Some of the answers to the questions on this form must be found by clear and convincing evidence and some by preponderance. These differences are covered in the instructions, and therefore the committee has elected not to include them in the verdict form.

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