CIVIL JURY INSTRUCTIONS

Judicial Council of California

Task Force on Jury Instructions

Circulated for Public Comment

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Judicial Council Task Force on Jury Instructions
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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 and a third set was released in April of 2002. This is the fourth—and final—set of instructions released for public comment.

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 fourth 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.

CIVIL JURY INSTRUCTIONS—Volume 1
TABLE OF CONTENTS

INTRODUCTORY INSTRUCTIONS SERIES

106. Duty to Abide by Translation Provided in Court ….....……... 1
107. Taking Notes During the Trial …...……... 2
108. Removal of Claims or Parties …...……..... 4
109. Service Provider for Juror With Disability ……...……..... 5

EVIDENCE SERIES

215A. Privilege Against Self-Incrimination …...…….…… 7

NEGLIGENCE SERIES

318. Parental Liability (Nonstatutory) ...……... 10
346. Causation for Asbestos-Related Cancer Claims ...…… 13
354. Public Entity Liability for Failure to Perform Mandatory Duty ...……..... 15

MOTOR VEHICLES AND HIGHWAY SAFETY SERIES

513. Motor Vehicle Owner Liability—Permissive Use of Vehicle .....……. 17
514. Motor Vehicle Owner Liability—Affirmative Defense—Use Beyond Scope of Permission …….……. 22
515. Adult's Liability for Minor's Permissive Use of Motor Vehicle ..……..... 24
516. Liability of Cosigner of Minor's Application for Driver's License ……. 26
517. Negligent Entrustment of Motor Vehicle ……..…... 29

PREMISES LIABILITY SERIES

612. Constructive Notice of Store Owner Regarding Dangerous Conditions ….. 33

CONTRACTS SERIES

850. Introduction to Contract Damages ……...……..... 35
851. Special Damages ……..……..... 40
852. Loss of Profits—No Profits Earned ….……..... 43
853. Loss of Profits—Some Profits Earned …….…… 46
854. Owner's/Lessor's Damages for Breach of Contract to Construct Improvements on Real Property ……..……..... 49
855. Obligation to Pay Money Only ……. 51
856. Buyer's Damages for Breach of Contract for Sale of Real Property …… 53
857. Seller's Damages for Breach of Contract to Purchase Real Property …….. 56
858. Mitigation of Damages …….…… 59
859. Present Cash Value of Future Damages ……...……..... 61
860. Nominal Damages ……. 63
861. Plaintiff May Not Recover Duplicate Contract and Tort Damages …….…. 64

DANGEROUS CONDITIONS OF PUBLIC PROPERTY SERIES

1012. Loss of Design Immunity (*Cornette*) ……..….. 65

RIGHT OF PRIVACY SERIES

1254A. First Amendment Defense to Use or Appropriation of Name or Likeness (*Comedy III*) …….. 67

CONVERSION SERIES

1830. Conversion—Essential Factual Elements …..……... 69
1831. Trespass to Chattels—Essential Factual Elements …..…….…… 73
1832. Presumed Measure of Damages for Conversion (Civ. Code, § 3336) …….. 76

MISCELLANEOUS DAMAGES SERIES

1259. Damages ….……... 81
1260. Damages Under Civil Code Section 3344 ……... 84
1109. Buyer's Damages for Purchase or Acquisition of Property …….…… 86
1110. Buyer's Damages for Purchase or Acquisition of Property Lost Profits 89
1111. Seller's Damages for Sale or Exchange of Property …… 91
1112. Damages—"Out of Pocket" Rule ……..... 95
1113. Damages—Benefit-of-the-Bargain Rule …….…… 98
2115. Introduction to Damages for Personal Injury ……...……..…. 101
2116. Damages for Death of Employee ……..... 105
2032. Duty to Mitigate Damages for Past Lost Earnings ……...…...……...…. 110
2033. Duty to Mitigate Damages for Future Lost Earnings ……...…….. 112
2034. No Deduction for Workers' Compensation Benefits Paid …….…….. 114

CONCLUDING INSTRUCTIONS SERIES

1902. Service Provider for Juror With Disability ……... 116
1903. Written Copies of Jury Instructions ...……... 118
1904. Deadlocked Jury Admonition ...…… 119
1905. Substitution of Alternate Juror ...…….…….. 121

SONG-BEVERLY CONSUMER WARRANTY ACT SERIES

2400. Breach of Express Warranty—Consumer Goods—Essential Factual Elements (Civ. Code, § 1794) ……... 122
2401. Breach of Express Warranty—New Motor Vehicle—Essential Factual Elements (Civ. Code, § 1794) ……... 127
2402. Duration of Express Written Warranty …….…… 133
2403. "Repair Attempts" Explained ……...…… 135
2404. Reasonable Number of Repair Attempts—Rebuttable Presumption (Civ. Code, § 1793.22(b)) ……. 136

2405. Breach of Implied Warranty of Merchantability—Essential Factual Elements …… 139
2406. Breach of Implied Warranty of Fitness for a Particular Purpose—Essential Factual Elements ……... 143
2407. Duration of Implied Warranty …….. 147
2408. Affirmative Defense—Unauthorized or Unreasonable Use ……. 149
2409. Affirmative Defense—Disclaimer of Implied Warranties …… 150
2410. Breach of Disclosure Obligations—Essential Factual Elements …….. 153
2411. Reimbursement Damages—Consumer Goods ……. 156
2412. Restitution From Manufacturer—New Motor Vehicle …… 158
2413. Incidental Damages ……... 161
2414. Consequential Damages …… 163
2415. Civil Penalty–Willful Violation (Civ. Code, § 1794(c)) …….. 165
2416. Civil Penalty—New Motor Vehicle (Civ. Code, § 1794(e)) …… 167

EQUITABLE INDEMNITY SERIES

2500. Comparative Fault Between Tortfeasors ...……...…...…… 171
2501. Implied Contractual Indemnity ….……....…...…… 174

INSURANCE LITIGATION SERIES

2600. Breach of Contractual Duty to Indemnify Insured—Essential Factual Elements ……...……. 176
2601. Breach of Insurance Binder—Essential Factual Elements ...…… 177
2602. Breach of Contract for Temporary Life Insurance—Essential Factual Elements ……..……. 180
2603. Insurance Policy Exclusion—Burden of Proof ……. 182
2604. Exception to Insurance Policy Exclusion—Burden of Proof …...…… 183
2605. Lost or Destroyed Insurance Policy …….. 184
2606. Covered and Excluded Risks—Predominant Cause of Loss …… 187
2607. Insurance Agency Relationship Disputed …….… 190
2608. Rescission for Misrepresentation or Concealment in Insurance Application—Essential Factual Elements ……... 193
2609. Termination of Insurance Policy for Fraudulent Claim …..…….…… 197
2610. Affirmative Defense—Failure to Provide Timely Notice ……...…… 199
2611. Affirmative Defense—Insured's Breach of Duty to Cooperate in Defense 201
2612. Implied Obligation of Good Faith and Fair Dealing Explained ……... 203
2613. Breach of the Implied Obligation of Good Faith and Fair Dealing—Essential Factual Elements ……...…… 204
2614. Bad Faith (First Party)—Failure to Properly Investigate Claim—Essential Factual Elements …...…… 207
2615. Bad Faith (First Party)—Breach of Duty to Inform Insured of Rights—Essential Factual Elements ……...…… 210

2616. Bad Faith—Unreasonable Refusal to Settle Within Liability Policy Limits—Essential Factual Elements ……. 212
2617. Bad Faith—Advice of Counsel ……. 216
2618. Damages for Bad Faith ……. 219
2619. Judgment Creditor's Action Against Insurer—Essential Factual Elements 221
2620. Negligent Failure to Obtain Insurance Coverage—Essential Factual Elements …… 225

CONSPIRACY SERIES

2700. Conspiracy—Essential Factual Elements ……...…… 227
2701. Ongoing Conspiracy ……...…..……... 231
2702. Affirmative Defense—Agent and Employee Immunity Rule .....…… 232

CIVIL RIGHTS SERIES

2800. Violation of Federal Civil Rights (42 U.S.C. § 1983)—In General—Essential Factual Elements ……...…...…… 234
2801. Excessive Use of Force—Unreasonable Arrest or Other Seizure—Essential Factual Elements (42 U.S.C. § 1983) .....…… 237
2802. Unreasonable Search—Search With a Warrant—Essential Factual Elements (42 U.S.C. § 1983) ……..…… 240
2803. Unreasonable Search—Search Without a Warrant—Essential Factual Elements (42 U.S.C. § 1983) ……...……...……. 243
2804. Affirmative Defense—Search Incident to Lawful Arrest ….…… 246
2805. Affirmative Defense—Consent to Search ….……...…… 248
2806. Affirmative Defense—Exigent Circumstances ….……... 250
2807. Municipal Liability (42 U.S.C. § 1983) ……...….…… 252
2808. "Official Policy" Explained (42 U.S.C. § 1983) ……..…… 255
2809. Public Entity Liability—Failure to Train (42 U.S.C. § 1983)— Essential Factual Elements ….……..…… 257
2810. Violation of Prisoner's Federal Civil Rights (42 U.S.C. § 1983)— Eighth Amendment—Excessive Force ….…… 259
2811. Violation of Prisoner's Federal Civil Rights (42 U.S.C. § 1983)— Eighth Amendment—General Conditions of Confinement Claim …….. 263
2812. Violation of Prisoner's Federal Civil Rights (42 U.S.C. § 1983)— Eighth Amendment—Medical Care …….…… 266
2813. Unruh Civil Rights Act (Civ. Code, §§ 51, 52)—Essential Factual Elements ……...…… 270
2814. Unruh Civil Rights Act—Boycott Etc. (Civ. Code, § 51.5)— Essential Factual Elements ….……..…… 275
2815. Gender Price Discrimination (Civ. Code, § 51.6)—Essential Factual Elements ……...……. 278
2816. Ralph Act (Civ. Code, § 51.7)—Essential Factual Elements …...…… 280

2817. Sexual Harassment in Defined Relationship (Civ. Code, § 51.9)—Essential Factual Elements ……...…… 283
2818. Bane Act (Civ. Code, § 52.1)—Essential Factual Elements …….. 285
2819. Unruh Civil Rights Act—Damages (Civ. Code, §§ 51, 51.5, 51.6) ……. 288
2820. Unruh Civil Rights Act—Civil Penalty (Civ. Code, §§ 51.7, 51.9) ……. 289

CIVIL JURY INSTRUCTIONS—Volume 2
TABLE OF CONTENTS

ELDER ABUSE AND DEPENDENT ADULT CIVIL PROTECTION ACT SERIES

2900. Financial Abuse—Essential Factual Elements—Individual or Individual and Employer Defendants (Welf. & Inst. Code, §§ 15657, 15610.30) …… 291
2901. Financial Abuse—Essential Factual Elements—Employer Defendant (Welf. & Inst. Code, §§ 15657, 15610.30) …… 296
2902. Neglect—Essential Factual Elements—Individual or Individual and Employer Defendants (Welf. & Inst. Code, §§ 15657, 15610.57) …… 301
2903. Neglect—Essential Factual Elements—Employer Defendant (Welf. & Inst. Code, §§ 15657, 15610.57) …… 307
2904. Physical Abuse—Essential Factual Elements—Individual or Individual and Employer Defendants (Welf. & Inst. Code, §§ 15657, 15610.63) …… 313
2905. Physical Abuse—Essential Factual Elements—Employer Defendant (Welf. & Inst. Code, §§ 15657, 15610.63) …… 317
2906. Abduction—Essential Factual Elements—Individual or Individual and Employer Defendants (Welf. & Inst. Code, §§ 15657.05, 15610.06) …… 321
2907. Abduction—Essential Factual Elements—Employer Defendant (Welf. & Inst. Code, §§ 15657.05, 15610.06) …… 324
2908. "Dependent Adult" Explained (Welf. & Inst. Code, § 15610.23) …… 327
2909. "Recklessness" Explained …… 328
2910. "Malice" Explained …… 329
2911. "Oppression" Explained …… 330
2912. "Fraud" Explained …… 331

UNFAIR PRACTICES ACT SERIES

3000. Locality Discrimination—Essential Factual Elements …… 332
3001. Below Cost Sales—Essential Factual Elements …… 335
3002. Loss Leader Sales—Essential Factual Elements …… 338
3003. Definition of "Cost" …… 342
3004. Presumptions Concerning Costs—Manufacturer …… 346
3005. Presumptions Concerning Costs—Distributor …… 348
3006. Methods of Allocating Costs to an Individual Product …… 350
3007. Secret Rebates—Essential Factual Elements …… 352
3008. Secret Rebates—Definition of "Secret" …… 355
3009. Affirmative Defense to Locality Discrimination Claim—Cost Justification 356
3010. Affirmative Defense to Locality Discrimination, Below Cost Sales, and Loss Leader Sales Claims—Closed-out, Discontinued, Damaged, or Perishable Items …… 358

3011. Affirmative Defense to Locality Discrimination, Sales Below Cost, Loss Leader Sales, and Secret Rebates—Functional Classifications …… 360
3012. Affirmative Defense Locality Discrimination, Sales Below Cost, and Loss Leader Sales Claims—Meeting Competition ……... 362
3013. Affirmative Defense to Locality Discrimination Claim— Manufacturer Meeting Downstream Competition …….. 364
3014. Affirmative Defenses—"Good Faith" Explained …… 366

CARTWRIGHT ACT SERIES

3100. Horizontal and Vertical Restraints (Use for Direct Competitors) —Price Fixing—Essential Factual Elements ……. 368
3101. Horizontal Restraints (Use for Direct Competitors)—Allocation of Trade or Commerce—Essential Factual Elements ……..…….. 373
3102. Horizontal Restraints—Dual Distributor Restraints—Essential Factual Elements …… 376
3103. Horizontal Restraints (Use for Direct Competitors)—Group Boycott—Per Se Violation—Essential Factual Elements …….…….. 379
3104. Horizontal Restraints—Group Boycott—Rule of Reason— Essential Factual Elements …….. 382
3105. Horizontal and Vertical Restraints (Use for Direct Competitors or Supplier/Reseller Relations)—Other Unreasonable Restraint of Trade—Rule of Reason—Essential Factual Elements ….…… 386
3106. Horizontal and Vertical Restraints—"Agreement" Explained ….…… 389
3107. Horizontal and Vertical Restraints—Agreement Between Company and Its Employee …..…….…….. 391
3108. Horizontal and Vertical Restraints—"Coercion" Explained …..…….. 393
3109. Vertical Restraints—Termination of Reseller …….. 395
3110. Vertical Restraints—Agreement Between Seller and Reseller's Competitor …….…….. 397
3111. Rule of Reason—Anticompetitive Versus Beneficial Effects ...…….. 398
3112. Rule of Reason—"Market Power" Explained ….……...…….. 400
3113. Rule of Reason—"Product Market" Explained ……..…….. 402
3114. Rule of Reason—"Geographic Market" Explained …….. 404
3115. Tying—Per Se Violation—Essential Factual Elements (Bus. & Prof. Code, § 16720) ..…….…….. 406
3116. Tying—Essential Factual Elements (Bus. & Prof. Code, § 16727)…….. 410
3117. Tying—"Separate Products" Explained …….…….. 413
3118. Tying—"Economic Power" Explained ……..…….…….. 415
3119. "Noerr-Pennington" Doctrine …….…….. 417
3120. Affirmative Defense—*In Pari Delicto* ……...…….. 419
3121. Damages …….…….…….. 420

WORKERS' COMPENSATION SERIES

3200. Employer's Affirmative Defense—Injury Covered by Workers' Compensation 422
3201. Employer's Willful Physical Assault (Lab. Code, § 3602(b)(1))—Essential Factual Elements 429
3202. Fraudulent Concealment of Injury (Lab. Code, § 3602(b)(2))— Essential Factual Elements 432
3203. Employer's Defective Product (Lab. Code, § 3602(b)(3))— Essential Factual Elements 435
3204. Removal or Noninstallation of Power Press Guards (Lab. Code, § 4558)—Essential Factual Elements 437
3205. Co-Employee's Affirmative Defense—Injury Covered by Workers' Compensation 441
3206. Co-Employee's Willful and Unprovoked Physical Act of Aggression (Lab. Code, § 3601(a)(1))—Essential Factual Elements 444
3207. Injury Caused by Co-Employee's Intoxication (Lab. Code, § 3601(a)(2))—Essential Factual Elements 447

VERDICT FORMS SERIES

2237. Battery 449
2238. Battery—Self-Defense/Defense of Others at Issue 451
2239. Assault 454
2240. Battery by Peace Officer 457
2241. Inducing Breach of Contract 459
2242. Intentional Interference With Contractual Relations 461
2243. Intentional Interference With Prospective Economic Relations 463
2244. Negligent Interference With Prospective Economic Relations 466
2245. Privacy—Intrusion Into Private Affairs 469
2246. Privacy—Public Disclosure of Private Facts 471
2247. Privacy—False Light 474
2248. Privacy—Appropriation of Name or Likeness 476
2249. Privacy—Use of Name or Likeness (Civ. Code, §§ 3344, 3344.1) 478
2250. Privacy—Constitutional Right of Privacy 480
2251. Privacy—Constitutional Right of Privacy—Affirmative Defense 482
2252. Privacy—Recording of Confidential Information (Pen. Code, §§ 632, 637.2) 485
2253. Intentional Infliction of Emotional Distress 487
2254. Intentional Infliction of Emotional Distress—Affirmative Defense of Privileged Conduct 489
2255. Intentional Infliction of Emotional—Distress Fear of Cancer, HIV, or AIDS 492
2256. Negligent Infliction of Emotional Distress—Direct Victim 495
2257. Negligent Infliction of Emotional Distress—Bystander 497

2258. Negligent Infliction of Emotional Distress—Fear of Cancer, HIV, or AIDS ……..……...…….. 499
2259. Negligent Infliction of Emotional Distress—Fear of Cancer, HIV, AIDS—Malicious, Oppressive, or Fraudulent Conduct …….……..……. 501
2260. Malicious Prosecution—Former Criminal Proceeding …..…...……. 504
2261. Malicious Prosecution—Wrongful Use of Civil Proceedings ..…..……. 506
2262. Malicious Prosecution—Wrongful Use of Civil Proceedings—Affirmative Defense of Reliance on Counsel ……...…….…….. 508
2263. Malicious Prosecution—Wrongful Use of Administrative Proceedings ….. 511
2264. Abuse of Process ……..…….…… 514
2265. False Imprisonment—No Arrest Involved …….…..……. 516
2266. False Imprisonment—No Arrest Involved Affirmative Defense—Right to Detain for Investigation ..…….…..…….…….. 518
2267. False Arrest Without Warrant …….…. 520
2268. False Arrest Without Warrant by Peace Officer—Affirmative Defense—Probable Cause to Arrest ...……..…….…..……. 522
2269. False Arrest Without Warrant by Private Citizen—Affirmative Defense—Probable Cause to Arrest ...……..….……..…….. 524
2270. False Arrest With Warrant ……...……...…. 526
2271. False Arrest With Warrant—Peace Officer Affirmative Defense—"Good-Faith" Exception ...……...……. 528
2272. False Imprisonment—Unnecessary Delay in Processing/ Releasing …….. 531
2273. Breach of Employment Contract—Unspecified Term ……....…….. 533
2274. Breach of Employment Contract—Unspecified Term—Constructive Discharge ……..……..…….……. 535
2275. Breach of Employment Contract—Specified Term …..…...…..…… 538
2276. Breach of Employment Contract—Specified Term—Good Cause Defense 540
2277. Employment—Breach of the Implied Covenant of Good Faith and Fair Dealing …….. 542
2278. Breach of the Implied Covenant of Good Faith and Fair Dealing—Affirmative Defense—Good Faith Mistaken Belief ……. 544
2279. Wrongful Discharge/Demotion in Violation of Public Policy …….. 547
2280. Constructive Discharge in Violation of Public Policy—Plaintiff Required to Violate Public Policy …… 549
2281. Constructive Discharge in Violation of Public Policy—Plaintiff Required to Endure Intolerable Conditions For Improper Purpose that Violates Public Policy ……. 552
2282. FEHA—Disparate Treatment—(Gov. Code, § 12940(a)) …… 555
2283. FEHA—Disparate Treatment (Gov. Code, § 12940(a))—Affirmative Defense—Bona fide Occupational Qualification ……. 558
2284. FEHA—Disparate Impact (Gov. Code, § 12940(a)) …… 561

2285. FEHA—Disparate Impact (Gov. Code, § 12940(a))—Affirmative Defense—Business Necessity/Job Relatedness—Rebuttal to Business Necessity/Job Relatedness Defense …….. 564
2286. Retaliation (Gov. Code, § 12940(h)) …… 568
2287. FEHA—Quid pro quo Sexual Harassment ……... 570
2288. FEHA—Hostile Work Environment Harassment—Employer or Entity Defendant (Gov. Code, § 12940(j)) …….. 573
2289. FEHA—Hostile Work Environment Harassment—Individual Defendant (Gov. Code, § 12940(j)) …… 576
2290. FEHA—Disability or Medical Condition Discrimination—Disparate Treatment …….. 579
2291. FEHA—Disability Discrimination—Reasonable Accommodation (Gov. Code, § 12940(m)) …… 582
2292. FEHA—Disability Discrimination—Reasonable Accommodation (Gov. Code, § 12940(m))—Affirmative Defense—Undue Hardship ……. 585
2293. FEHA—Religious Creed Discrimination—Failure to Accommodate (Gov. Code, § 12940(l)) …….. 588
2294. FEHA—Religious Creed Discrimination—Failure to Accommodate (Gov. Code, § 12940(l))—Affirmative Defense—Undue Hardship ……... 591

CIVIL JURY INSTRUCTIONS—Volume 3
TABLE OF CONTENTS

VERDICT FORMS SERIES (cont'd)

2295. Violation of CFRA Rights …… 595
2296. Violation of CFRA Rights—Affirmative Defense—Employment Would Have Ceased ……. 598
2297. CFRA Rights Retaliation …….. 601
2298. Nonpayment of Wages (Lab. Code, §§ 201, 202, 218) …… 604
2299. Nonpayment of Minimum Wage (Lab. Code, § 1194) ……. 606
2300. Nonpayment of Overtime Compensation (Lab. Code, § 1194) …… 607
2301. Waiting-Time Penalty for Nonpayment of Wages—(Lab. Code, §§ 203, 218) ……... 609
2302. Solicitation of Employee by Misrepresentation—(Lab. Code, § 970) ……. 611
2303. Preventing Subsequent Employment by Misrepresentation (Lab. Code, § 1050) …….. 614
2304. Fair Market Value plus Goodwill ……. 617
2305. Fair Market Value plus Severance Damages …… 619
2306. Fair Market Value plus Loss of Inventory/Personal Property …….. 620
2307. Trespass …… 622
2308. Trespass—Affirmative Defense Of Necessity …….. 624
2309. Trespass—Extra Hazardous Activities ……. 627
2310. Trespass to Timber (Civ. Code, § 3346; Code Civ. Proc., § 733) …… 629
2311. Trespass to Timber (Civ. Code, § 3346; Code Civ. Proc., § 733)—Treble Damages Sought ……... 631
2312. Public Nuisance …… 634
2313. Private Nuisance ……... 637
2314. FELA—Negligence—Plaintiff's Negligence at Issue …….. 640
2315. Federal Safety Appliance Act or Boiler Inspection Act ……... 644
2316. Punitive Damages—Trial Not Bifurcated ……. 647
2317. Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee—Trial Not Bifurcated …… 648
2318. Punitive Damages—Entity Defendant—Trial Not Bifurcated ……. 650
2319. Punitive Damages—Entity Defendant—Ratification—Trial Not Bifurcated …….. 651
2320. Punitive Damages—Entity Defendant—Authorization—Trial Not Bifurcated …….. 653
2321. Co-participant in a Sports Activity ……... 655
2322. Liability of Instructors, Trainers, or Coaches ……... 657
2323. Song-Beverly Consumer Warranty Act—Breach of Express Warranty—Consumer Goods ……... 659

2324. Song-Beverly Consumer Warranty Act—Breach of Express Warranty—Consumer Goods—Affirmative Defense—Unauthorized or Unreasonable Use …… 662
2325. Song-Beverly Consumer Warranty Act—Breach of Express Warranty—New Motor Vehicle—Civil Penalty Sought ……. 665
2326. Song-Beverly Consumer Warranty Act—Breach of Implied Warranty of Merchantability ……. 668
2327. Song-Beverly Consumer Warranty Act—Breach of Implied Warranty of Merchantability—Affirmative Defense—Disclaimer of Implied Warranties ……. 670
2328. Song-Beverly Consumer Warranty Act—Breach of Disclosure Obligations …… 672
2329. Violation of Federal Civil Rights (42 U.S.C. § 1983)—In General ……. 674
2330. Excessive Use of Force—Unreasonable Arrest or Other Seizure (42 U.S.C. § 1983) …….. 676
2331. Unreasonable Search—Search With a Warrant (42 U.S.C. § 1983) …… 678
2332. Unreasonable Search—Search Without a Warrant (42 U.S.C. § 1983) …... 680
2333. Unreasonable Search—Search Without a Warrant (42 U.S.C. § 1983)—Affirmative Defense—Search Incident to Lawful Arrest ……. 682
2334. Municipal Liability (42 U.S.C. § 1983) …… 685
2335. Public Entity Liability—Failure To Train (42 U.S.C. § 1983) ……. 687
2336. Violation Of Prisoner's Federal Civil Rights (42 U.S.C. § 1983)—Eighth Amendment—Excessive Force ……. 689
2337. Violation Of Prisoner's Federal Civil Rights (42 U.S.C. § 1983)—Eighth Amendment—General Conditions Of Confinement Claim ……. 691
2338. Violation Of Prisoner's Federal Civil Rights (42 U.S.C. § 1983)—Eighth Amendment—Medical Care ……. 693
2339. Unruh Civil Rights Act (Civ. Code, §§ 51, 52) …… 695
2340. Unruh Civil Rights Act—Boycott, etc. (Civ. Code, § 51.5) ……. 697
2341. Gender Price Discrimination (Civ. Code, § 51.6) ……. 699
2342. Ralph Act (Civ. Code, § 51.7) …….. 701
2343. Sexual Harassment in Defined Relationship (Civ. Code, § 51.9) ……. 703
2344. Bane Act (Civ. Code, § 52.1) …… 705
2345. Financial Abuse—Individual or Individual and Employer Defendant (Welf. & Inst. Code, §§ 15657, 15610.30) ……... 707
2346. Financial Abuse—Employer Defendant (Welf. & Inst. Code, §§ 15657, 15610.30) …….. 710
2347. Neglect—Individual or Individual and Employer Defendant (Welf. & Inst. Code, §§ 15657, 15610.57) ……... 713
2348. Neglect—Employer Defendant (Welf. & Inst. Code, §§ 15657, 15610.57) 716
2349. Physical Abuse—Individual or Individual and Employer Defendant (Welf. & Inst. Code, §§ 15657, 15610.63) ……... 719

2350. Physical Abuse—Employer Defendant (Welf. & Inst. Code, §§ 15657, 15610.63) …….. 722
2351. Abduction—Individual or Individual and Employer Defendant (Welf. & Inst. Code, §§ 15657.05, 15610.06) …….. 725
2352. Abduction—Employer Defendant (Welf. & Inst. Code, §§ 15657.05, 15610.06) …….. 728
2353. Parental Liability (Nonstatutory) …….. 731
2354. Motor Vehicle Owner Liability—Permissive Use of Vehicle …….. 733
2355. Motor Vehicle Owner Liability—Permissive Use of Vehicle—Affirmative Defense—Use Beyond Scope of Permission …… 734
2356. Parent's, Guardian's, or Custodian's Liability for Minor's Permissive Use of Motor Vehicle ……... 737
2357. Liability of Cosigner of Minor's Application for Driver's License ……. 739
2358. Negligent Entrustment of Motor Vehicle ……. 741
2359. Employer's Willful Physical Assault (Lab. Code, § 3602(b)(1)) ……. 744
2360. Fraudulent Concealment of Injury (Lab. Code, § 3602(b)(2)) ……. 746
2361. Employer's Defective Product (Lab. Code, § 3602(b)(3)) ……... 749
2362. Removal or Noninstallation of Power Press Guards (Lab. Code, § 4558) ... 751
2363. Co-Employee's Willful and Unprovoked Physical Act of Aggression (Lab. Code, § 3601(a)(1)) ……...……... 754
2364. Injury Caused by Co-Employee's Intoxication (Lab. Code, § 3601(a)(2)) 756
2365. Breach of Contractual Duty to Indemnify Insured ……... 758
2366. Bad Faith (First Party)—Unreasonable Denial or Delay of Policy Benefits 760
2367. Bad Faith (First Party)—Failure to Properly Investigate Claim ……... 762
2368. Bad Faith (First Party)—Breach of Duty to Inform Insured of Rights ……. 764
2369. Unfair Practices Act—Locality Discrimination ……... 767
2370. Unfair Practices Act—Locality Discrimination Claim—Affirmative Defense of Cost Justification ……...…..…… 769
2371. Unfair Practices Act—Below Cost Sales …….....…… 771
2372. Unfair Practices Act—Below Cost Sales Claim—Affirmative Defense—Closed-out, Discontinued, Damaged, or Perishable Items ……... 773
2373. Unfair Practices Act—Loss Leader Sales ……...…….…… 775
2374. Unfair Practices Act—Loss Leader Sales Claim—Affirmative Defense of Meeting Competition ……..…….. 777
2375. Unfair Practices Act—Secret Rebates ……...……..…….…… 779
2376. Unfair Practices Act—Secret Rebates Claim—Affirmative Defense of Functional Classifications ……..……...…….…….. 781
2377. Cartwright Act—Horizontal and Vertical Restraints (Use for Direct Competitors)—Price Fixing ……...……....……. 784
2378. Cartwright Act—Horizontal Restraints (Use for Direct Competitors)—Allocation of Trade or Commerce …...…...…….……. 786
2379. Cartwright Act—Horizontal Restraints (Use for Direct Competitors)—Allocation of Trade or Commerce—Affirmative Defense—*In Pari Delicto* 788

2380. Cartwright Act—Horizontal Restraints—Dual Distributor Restraints…….. 790
2381. Cartwright Act—Horizontal Restraints (Use for Direct Competitors)—Group Boycott—Per Se Violation ..……..……..…….. 792
2382. Cartwright Act—Horizontal Restraints—Group Boycott—Rule of Reason 794
2383. Cartwright Act—Horizontal and Vertical Restraints (Use for Direct Competitors or Supplier/Reseller Relations)—Other Unreasonable Restraint of Trade—Rule of Reason …….…….…….. 796
2384. Cartwright Act—Horizontal and Vertical Restraints (Use for Direct Competitors or Supplier/Reseller Relations)—Other Unreasonable Restraint of Trade—Rule of Reason Affirmative Defense—"Noerr-Pennington" Doctrine ……..….……...……. 798
2385. Cartwright Act—Tying—Per se Violation (Bus. & Prof. Code, § 16720 … 801
2386. Cartwright Act—Tying (Bus. & Prof. Code, § 16727) …...…....…….. 803

106
Duty to Abide by Translation Provided in Court

Some testimony will be given in [*insert language other than English*]. An interpreter will provide a translation for you at the time that the testimony is given. You must rely on the translation provided by the interpreter, even if you understand the language spoken by the witness. Do not retranslate any testimony for other jurors. If you believe the court interpreter translated testimony incorrectly, let me know immediately by writing a note and giving it to the [clerk/bailiff].

SOURCES AND AUTHORITY

- It is misconduct for a juror to retranslate for other jurors testimony that has been translated by the court-appointed interpreter. (*People v. Cabrera* (1991) 230 Cal.App.3d 300, 303 [281 Cal.Rptr. 238].)

- "It is well-settled a juror may not conduct an independent investigation into the facts of the case or gather evidence from outside sources and bring it into the jury room. It is also misconduct for a juror to inject his or her own expertise into the jury's deliberation." (*Cabrera, supra,* 230 Cal.App.3d at p. 303.)

- "If [the juror] believed the court interpreter was translating incorrectly, the proper action would have been to call the matter to the trial court's attention, not take it upon herself to provide her fellow jurors with the 'correct' translation." (*Cabrera, supra,* 230 Cal.App.3d at p. 304.)

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107
Taking Notes During the Trial

You have been given notebooks and may take notes during the trial. Do not remove the notebooks from the jury box at any time during the trial. You may take your notes into the jury room during deliberations. [At the end of the trial you may take your notes with you. If you leave them here they will be destroyed.]

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

The court reporter is making a record of everything that is said. If you have a question about the testimony, you may ask that the court reporter's notes be read to you. You must accept the court reporter's notes as accurate.

SOURCES AND AUTHORITY

- "Because of [the risks of note-taking], a number of courts have held that a cautionary instruction is required. For example, [one court] held that the instruction should include 'an explanation ... that [jurors] should not permit their note-taking to distract them from the ongoing proceedings; that their notes are only an aid to their memory and should not take precedence over their independent recollection; that those jurors who do not take notes should rely on their independent recollection of the evidence and not be influenced by the fact that another juror has taken notes; and that the notes are for the note taker's own personal use in refreshing his recollection of the evidence. The jury must be reminded that should any discrepancy exist between their recollection of the evidence and their notes, they should request that the record of the proceedings be read back and that it is the transcript that must prevail over their notes.' " (*People v. Whitt* (1984) 36 Cal.3d 724, 747 [205 Cal.Rptr. 810], internal citations and footnote omitted.)

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

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108
Removal of Claims or Parties

[[*Name of plaintiff***]'s claim for [***insert claim***] is no longer an issue in this case.]**

[[*Name of party***] is no longer a party to this case.]**

Do not speculate as to why this [claim/person] is no longer involved in this case. You should not consider this during your deliberations.

DIRECTIONS FOR USE

This instruction may be read during trial as appropriate.

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109
Service Provider for Juror With Disability

During trial, [*name of juror*] will be assisted by a [*insert service provider*]. The [*insert service provider*] is not a member of the jury and you may not discuss this case with [him/her] at any time.

DIRECTIONS FOR USE

This instruction should be read along with other introductory instructions at the beginning of the trial if appropriate.

SOURCES AND AUTHORITY

- Code of Civil Procedure section 203(a)(6) provides: "All persons are eligible and qualified to be prospective trial jurors, except the following: … Persons who are not possessed of sufficient knowledge of the English language, provided that no person shall be deemed incompetent solely because of the loss of sight or hearing in any degree or other disability which impedes the person's ability to communicate or which impairs or interferes with the person's mobility."

- Code of Civil Procedure section 224 provides:

  (a) If a party does not cause the removal by challenge of an individual juror who is deaf, hearing impaired, blind, visually impaired, or speech impaired and who requires auxiliary services to facilitate communication, the party shall (1) stipulate to the presence of a service provider in the jury room during jury deliberations, and (2) prepare and deliver to the court proposed jury instructions to the service provider.
  (b) As used in this section, "service provider" includes, but is not limited to, a person who is a sign language interpreter, oral interpreter, deaf-blind interpreter, reader, or speech interpreter. If auxiliary services are required during the course of jury deliberations, the court shall instruct the jury and the service provider that the service provider for the juror with a disability is not to participate in the jury's deliberations in any manner except to facilitate communication between the juror with a disability and other jurors.
  (c) The court shall appoint a service provider whose services are needed by a juror with a disability to facilitate communication or participation. A sign language

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interpreter, oral interpreter, or deaf-blind interpreter appointed pursuant to this section shall be a qualified interpreter, as defined in subdivision (f) of Section 754 of the Evidence Code. Service providers appointed by the court under this subdivision shall be compensated in the same manner as provided in subdivision (i) of Section 754 of the Evidence Code.

Secondary Sources

- 7 Witkin, California Procedure (4th ed. 1997) Trial, §§ 331, 340

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215A
Privilege Against Self-Incrimination

[*Name of party/witness*] has exercised [his/her] legal right not to testify concerning certain matters. Do not let the exercise of this right affect any of your decisions in this case. A [party/ witness] may exercise this right freely and without fear of penalty.

DIRECTIONS FOR USE

Citing *Fross v. Wotton* (1935) 3 Cal.2d 384 [44 P.2d 350], courts have stated the following: "When a claim of privilege made on this ground in a civil proceeding logically gives rise to an inference which is relevant to the issues involved, the trier of fact may properly draw that inference." (*Shepherd v. Superior Court* (1976) [130 Cal.Rptr. 257], internal citation omitted.) However, Assembly Committee on the Judiciary's comment to Evidence Code section 913 states: "There is some language in *Fross v. Wotton* …that indicates that unfavorable inferences may be drawn in a civil case from a party's claim of the privilege against self-incrimination during the case itself. Such language was unnecessary to that decision; but, if it does indicate California law, that law is changed by Evidence Code Sections 413 and 913. Under these sections, it is clear that, in civil cases as well as criminal cases, inferences may be drawn only from the evidence in the case, not from the claim of privilege."

SOURCES AND AUTHORITY

- Evidence Code section 913 provides:

  (a) If in the instant proceeding or on a prior occasion a privilege is or was exercised not to testify with respect to any matter, or to refuse to disclose or to prevent another from disclosing any matter, neither the presiding officer nor counsel may comment thereon, no presumption shall arise because of the exercise of the privilege, and the trier of fact may not draw any inference therefrom as to the credibility of the witness or as to any matter at issue in the proceeding.

  (b) The court, at the request of a party who may be adversely affected because an unfavorable inference may be drawn by the jury because a privilege has been exercised, shall instruct the jury that no presumption arises because of the exercise of the privilege and that the jury may not draw any inference therefrom as to the credibility of the witness or as to any matter at issue in the proceeding.

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- Evidence Code section 940 provides: "To the extent that such privilege exists under the Constitution of the United States or the State of California, a person has a privilege to refuse to disclose any matter that may tend to incriminate him."

- Evidence Code section 930 provides: "To the extent that such privilege exists under the Constitution of the United States or the State of California, a defendant in a criminal case has a privilege not to be called as a witness and not to testify."

- Evidence Code section 413 provides: "In determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, the party's failure to explain or to deny by his testimony such evidence or facts in the case against him, or his willful suppression of evidence relating thereto, if such be the case."

- "[I]n any proceeding, civil or criminal, a witness has the right to decline to answer questions which may tend to incriminate him in criminal activity." (*Cramer v. Tyars* (1979) 23 Cal.3d 131, 137 [151 Cal.Rptr. 653], internal citation omitted.)

- "[T]he privilege may not be asserted by merely declaring that an answer will incriminate; it must be 'evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.' " (*Troy v. Superior Court* (1986) 186 Cal.App.3d 1006, 1010–1011 [231 Cal.Rptr. 108], internal citations omitted.)

- "The Fifth Amendment of the United States Constitution includes a provision that '[n]o person ... shall be compelled in any criminal case to be a witness against himself, ...' Although the specific reference is to criminal cases, the Fifth Amendment protection 'has been broadly extended to a point where now it is available even to a person appearing only as a *witness* in *any* kind of proceeding where testimony can be compelled.' " (*Brown v. Superior Court* (1986) 180 Cal.App.3d 701, 708 [226 Cal.Rptr. 10], internal citation and footnote omitted.)

- "There is no question that the privilege against self-incrimination may be asserted by civil defendants who face possible criminal prosecution based on the same facts as the civil action. 'All matters which are privileged against disclosure upon the trial under the law of this state are privileged against disclosure through any discovery procedure.' " (*Brown, supra,* 180 Cal.App.3d at p. 708, internal citations omitted.)

- "It is well settled that the privilege against self-incrimination may be invoked not only by a criminal defendant, but also by parties or witnesses in a civil action. However,

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while the privilege of a criminal defendant is absolute, in a civil case a witness or party may be required either to waive the privilege or accept the civil consequences of silence if he or she does exercise it." (*Alvarez v. Sanchez* (1984) 158 Cal.App.3d 709, 712 [204 Cal.Rptr. 864], internal citations omitted.)

- "The privilege against self-incrimination is guaranteed by both the federal and state Constitutions. As pointed out by the California Supreme Court, 'two separate and distinct testimonial privileges' exist under this guarantee. First, a defendant in a criminal case 'has an absolute right not to be called as a witness and not to testify.' Second, 'in any proceeding, civil or criminal, a witness has the right to decline to answer questions which may tend to incriminate him [or her] in criminal activity.' " (*People v. Merfeld* (1997) 57 Cal.App.4th 1440, 1443 [67 Cal.Rptr.2d 759], internal citations omitted.)

Secondary Sources

- 2 Witkin, California Evidence (4th ed. 2000) Witnesses, § 96, p. 347

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318
Parental Liability (Nonstatutory)

[Name of plaintiff] claims that [he/she] was harmed because of [name of defendant]'s negligent supervision of [name of minor]. To establish this claim, [name of plaintiff] must prove the following:

1. **That [name of defendant] [insert one or both of the following:]**

   [observed [name of minor]'s dangerous behavior that led to [name of plaintiff]'s injury;] [or]

   [was aware of [name of minor]'s habits or tendencies that created an unreasonable risk of harm to other persons;]

2. **That [name of defendant] had the opportunity and ability to control the conduct of [name of minor];**

3. **That [name of defendant] was negligent because [he/she] failed to [insert one or both of the following:]**

   [exercise reasonable care to prevent [name of minor]'s conduct;] [or]

   [take reasonable precautions to prevent harm to others;]

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

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

DIRECTIONS FOR USE

This instruction is not intended for use for claims of statutory liability against parents or guardians based on a minor's willful conduct, e.g., Civil Code section 1714.1 (willful misconduct), section 1714.3 (discharging firearm), or Education Code section 48904(a)(1) (willful misconduct).

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SOURCES AND AUTHORITY

- "While it is the rule in California … that there is no vicarious liability on a parent for the torts of a child there is 'another rule of the law relating to the torts of minors, which is somewhat in the nature of an exception, and that is that a parent may become liable for an injury caused by the child where the parent's negligence made it possible for the child to cause the injury complained of, and probable that it would do so.' " (*Ellis v. D'Angelo* (1953) 116 Cal.App.2d 310, 317 [253 P.2d 675], internal citations omitted.)

- "Parents are responsible for harm caused by their children only when it has been shown that 'the parents as reasonable persons previously became aware of habits or tendencies of the infant which made it likely that the child would misbehave so that they should have restrained him in apposite conduct and actions.' " (*Reida v. Lund* (1971) 18 Cal.App.3d 698, 702 [96 Cal.Rptr. 102], internal citation omitted.)

- "In cases where the parent did not observe the child's conduct which led to the injury, the parent has been held liable where he had been aware of the child's dangerous propensity or habit and negligently failed to exercise proper control or negligently failed to give appropriate warning. In other cases, where the parent did not observe and was not in a position to control the conduct which endangered the plaintiff, recovery was denied on the ground that there was no showing that the parent knew of any dangerous tendency. What is said about 'propensity' or 'habit' in those cases has no applicability where the parent is present and observes the dangerous behavior and has an opportunity to exercise control but neglects to do so." (*Costello v. Hart* (1972) 23 Cal.App.3d 898, 900–901 [100 Cal.Rptr. 554], internal citations omitted.)

- " 'The ability to control the child, rather than the relationship as such, is the basis for a finding of liability on the part of a parent. … [T]he absence of such ability is fatal to a claim of legal responsibility.' The ability to control is inferred from the relationship of parent to minor child, as it is from the relationship of custodian to charge; yet it may be disproved by the circumstances surrounding the particular situation." (*Robertson v. Wentz* (1986) 187 Cal.App.3d 1281, 1290 [232 Cal.Rptr. 634], internal citations omitted.)

<u>Secondary Sources</u>

- 1 Bancroft-Whitney's California Civil Practice: Torts (1992) Liability for Acts of Others, §§ 3.32–3.5, pp. 48–51
- California Tort Guide (Cont.Ed.Bar 3d ed. 1996) General Principles, § 1.25, pp. 27–28 (rel. 4/00)

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- 1 Levy et al., California Torts (1993) Vicarious Liability, § 8.08, pp. 8-59–8-63
- 6 Witkin, Summary of California Law (9th ed. 1987) Torts, §§ 1001–1007, pp. 391–399; *id.* (2001 supp.) at §§ 1003–1006, pp. 259–262

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346
Causation for Asbestos-Related Cancer Claims

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

DIRECTIONS FOR USE

This instruction is intended to be given along with Instruction 340, *Causation: Substantial Factor,* and, if necessary, Instruction 341, *Causation: Multiple Causes.*

SOURCES AND AUTHORITY

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

- "A threshold issue in asbestos litigation is exposure to the defendant's product. The plaintiff bears the burden of proof on this issue. If there has been no exposure, there is no causation. Plaintiffs may prove causation in an asbestos case by demonstrating that the plaintiff's or decedent's exposure to defendant's asbestos-containing product in reasonable medical probability was a substantial factor in contributing to the aggregate dose of asbestos the plaintiff or decedent inhaled or ingested, and hence to the risk of developing asbestos-related cancer." (*McGonnell v. Kaiser Gypsum Co.,*

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Inc. (2002) 98 Cal.App.4th 1098, 1103 [120 Cal.Rptr.2d 23], internal citations omitted.)

- "Many factors are relevant in assessing the medical probability that an exposure contributed to plaintiff's asbestos disease. Frequency of exposure, regularity of exposure, and proximity of the asbestos product to plaintiff are certainly relevant, although these considerations should not be determinative in every case. Additional factors may also be significant in individual cases, such as the type of asbestos product to which plaintiff was exposed, the type of injury suffered by plaintiff, and other possible sources of plaintiff's injury. 'Ultimately, the sufficiency of the evidence of causation will depend on the unique circumstances of each case.' " (*Lineaweaver v. Plant Insulation Co.* (1995) 31 Cal.App.4th 1406, 1416–1417 [37 Cal.Rptr.2d 902], internal citations omitted.)

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354
Public Entity Liability for Failure to Perform Mandatory Duty

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[*Name of plaintiff***] claims that [he/she] was harmed because [***name of defendant***] violated [***insert reference to statute, regulation, or ordinance***] which states: _____ [***insert relevant language***]. To establish this claim, [***name of plaintiff***] must prove the following:**

1. **That [***name of defendant***] violated [***insert reference to statute, regulation, or ordinance***];**

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

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

[*Name of defendant***], however, is not responsible for [***name of plaintiff***]'s harm if [***name of defendant***] proves that it made reasonable efforts to perform its duties under the [statute/regulation/ordinance].**

DIRECTIONS FOR USE

The judge decides the issues of whether the statute imposes a mandatory duty and whether it was designed to protect against the type of harm suffered. (*Haggis v. City of Los Angeles* (2000) 22 Cal.4th 490, 499 [93 Cal.Rptr.2d 327].)

SOURCES AND AUTHORITY

- Government Code section 815.6 provides: "Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty."

- "Before the state will be required to confront a rebuttable presumption of negligence, plaintiff must demonstrate that: (1) the statute which was violated imposes a mandatory duty, (2) the statute was intended to protect against the type of harm suffered, and (3) breach of the statute's mandatory duty was a proximate cause of the

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injury suffered." (*Braman v. State of California* (1994) 28 Cal.App.4th 344, 349 [33 Cal.Rptr.2d 608], internal citations omitted.)

- " 'Government Code section 815.6 contains a three-pronged test for determining whether liability may be imposed on a public entity: (1) an enactment must impose a mandatory, not discretionary, duty ...; (2) the enactment must intend to protect against the kind of risk of injury suffered by the party asserting section 815.6 as a basis for liability ...; and (3) breach of the mandatory duty must be a proximate cause of the injury suffered.' All three elements must be met before a government entity is required to confront the rebuttable presumption of negligence." (*Walt Rankin & Associates, Inc. v. City of Murrieta* (2000) 84 Cal.App.4th 605, 614 [101 Cal.Rptr.2d 48], internal citation omitted.)

- "In order to recover plaintiffs have to show that there is some specific statutory mandate that was violated by the County, which violation was a proximate cause of the accident." (*Washington v. County of Contra Costa* (1995) 38 Cal.App.4th 890, 896–897 [45 Cal.Rptr.2d 646], internal citations omitted.)

- "Courts have recognized that as a practical matter the standard for determining whether a mandatory duty exists is 'virtually identical' to the test for an implied statutory duty of care under Evidence Code section 669." (*Alejo v. City of Alhambra* (1999) 75 Cal.App.4th 1180, 1185, fn. 3 [89 Cal.Rptr.2d 768], internal citations omitted.)

- "Financial limitations of governments have never been, and cannot be, deemed an excuse for a public employee's failure to comply with mandatory duties imposed by law." (*Scott v. County of Los Angeles* (1994) [32 Cal.Rptr.2d 643], internal citations omitted.)

- "Questions of statutory immunity do not become relevant until it has been determined that the defendant otherwise owes a duty of care to the plaintiff and thus would be liable in the absence of such immunity. However, a defendant may not be held liable for the breach of a duty if such an immunity in fact exists." (*Washington, supra,* 38 Cal.App.4th at p. 896, internal citations omitted.)

<u>Secondary Sources</u>

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 159–162

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513
Motor Vehicle Owner Liability—Permissive Use of Vehicle

[*Name of plaintiff***] claims that [he/she] was harmed and that [***name of defendant***] is responsible for the harm because [he/she] gave [***name of driver***] permission to operate the vehicle. To establish this claim, [***name of plaintiff***] must prove the following:**

1. **That [***name of driver***] was negligent in operating the vehicle;**

2. **That [***name of defendant***] was an owner of the vehicle at the time of the injury to [***name of plaintiff***]; and**

3. **That [***name of defendant***], by words or conduct, gave permission to [***name of driver***] to use the vehicle.**

In determining whether permission was given, you may consider the relationship between the owner and the operator. [For example, if the parties are related or the owner and the operator are employer and employee, such a relationship may support a finding that there was implied permission to use the vehicle.]

[If the vehicle owner has given a person permission to use the vehicle, and that person authorizes a third person to operate the vehicle, the third person may be considered to have used the vehicle with the permission of the owner.]

DIRECTIONS FOR USE

Separate instructions will be necessary regarding the negligence of the driver and that it caused harm to the plaintiff. Read bracketed language if appropriate to the facts. If ownership of the vehicle is uncontested, element 2 may be deleted.

SOURCES AND AUTHORITY

- Vehicle Code section 17150 provides: “Every owner of a motor vehicle is liable and responsible for death or injury to person or property resulting from a negligent or wrongful act or omission in the operation of the motor vehicle, in the business of the

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owner or otherwise, by any person using or operating the same with the permission, express or implied, of the owner."

- Vehicle Code section 17151(a) provides in part: "The liability of an owner … is limited to the amount of fifteen thousand dollars ($15,000) for the death of or injury to one person … and … to the amount of thirty thousand dollars ($30,000) for the death of or injury to more than one person … and is limited to the amount of five thousand dollars ($5,000) for damage to property."

- The statutory limitation under section 17151(a) " does not apply … to a vehicle owner's own common law negligence, as distinguished from the owner's statutory vicarious liability for the operator's negligence." (*Fremont Compensation Insurance Co. v. Hartnett* (1993) 19 Cal.App.4th 669, 675–676 [23 Cal.Rptr.2d 567].)

- "[U]nless the evidence points to one conclusion only, the question of the existence of the requisite permission under [section 17150] is one to be determined by the trier of fact, 'upon the facts and circumstances in evidence and the inferences reasonably to be drawn therefrom.' " (*Peterson v. Grieger, Inc.* (1961) 57 Cal.2d 43, 51 [17 Cal.Rptr. 828], internal citations omitted.)

- "[P]ermission cannot be left to speculation or conjecture nor be assumed, but must be affirmatively proved, and the fact of permission is just as important to sustain the imposition of liability as is the fact of ownership." (*Scheff v. Roberts* (1950) 35 Cal.2d 10, 12 [215 P.2d 925], internal citations omitted.)

- "Where the issue of implied permissive use is involved, the general relationship existing between the owner and the operator, is of paramount importance. Where, for example, the parties are related by blood, or marriage, or where the relationship between the owner and the operator is that of principal and agent, weaker direct evidence will support a finding of such use than where the parties are only acquaintances or strangers." (*Elkinton v. California State Automobile Assn., Interstate Insurance. Bureau* (1959) 173 Cal.App.2d 338, 344 [343 P.2d 396], internal citations omitted.)

- "There is no doubt that the word 'owner' as used in [the predecessor to Vehicle Code section 17150] for the purpose of creating a liability thereunder, is not synonymous with that word as used in the ordinary sense of referring to a person or persons whose title is good as against all others. Under the Vehicle Code there may be several such 'owners' at any one time. One or more persons may be an 'owner,' and thus liable for the injuries of a third party, even though no such 'owner' possesses all of the normal

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incidents of ownership." (*Stoddart v. Peirce* (1959) 53 Cal.2d 105, 115 [346 P.2d 774], internal citation omitted.)

- "The question whether the [defendant] was an owner for purposes of imposition of liability for negligence [under Vehicle Code section 17150] was one of fact." (*Campbell v. Security Pacific Nat. Bank* (1976) 62 Cal.App.3d 379, 385 [133 Cal.Rptr. 77].)

- "Strict compliance with Vehicle Code section 5602 [regarding the sale or transfer of a vehicle] is required to enable a transferring owner to escape the liability imposed by section 17150 on account of an accident occurring before notice of the transfer is received by the Motor Vehicle Department." (*Laureano v. Christensen* (1971) 18 Cal.App.3d 515, 520–521 [95 Cal.Rptr. 872].)

- "[T]he true and actual owner of an automobile [is not] relieved from liability by the expedient of registration in the name of another. … It is clear that it was the legislative intent to make the actual owners of automobiles liable for the negligence of those to whom permission is given to drive them. According to the allegations of the complaint defendants … were in fact the true owners of the car and had control of it, the registration being in the name of defendant [driver] for the purpose of avoiding liability." (*McCalla v. Grosse* (1941) 42 Cal.App.2d 546, 549–550 [109 P.2d 358].)

- "[I]t is a question of fact in cases of co-ownership, as it is in cases of single ownership, whether the operation of an automobile is with or without the consent, express or implied, of an owner who is not personally participating in such operation. The mere fact of co-ownership does not necessarily or conclusively establish that the common owners have consented to any usage or possession among themselves of a type for which permission is essential." (*Krum v. Malloy* (1943) 22 Cal.2d 132, 136 [137 P.2d 18].)

- "The immunity of the negligent operator under the [Workers' Compensation] Act does not insulate a vehicle owner who is neither the plaintiff's employer nor co-employee from liability under section 17150. [¶] Since the owner's liability does not arise from the status or liability of the operator, the defenses applicable to the operator are not available to the owner." (*Galvos v. Petito* (1993) 13 Cal.App.4th 551, 554 [16 Cal.Rptr.2d 560].)

- "The doctrine of 'negligent entrustment' is clearly distinguishable from the theory of 'vicarious liability.' Negligent entrustment is a common law liability doctrine. Conversely, the obligation of a lending owner of an automobile is one of statutory liability. An owner of an automobile may be independently negligent in entrusting it

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to an incompetent driver. California is one of several states which recognizes the liability of an automobile owner who has entrusted a car to an incompetent, reckless, or inexperienced driver, and has supplemented the common law doctrine of negligent entrustment by enactment of a specific consent statute." (*Syah v. Johnson* (1966) 247 Cal.App.2d 534, 538 [55 Cal.Rptr. 741], internal citations omitted.)

- For purposes of liability under the permissive use statute, "[s]ince defendant [car owner] had the opportunity of making such investigation as he deemed necessary to satisfy himself as to the identity of the [renter] to whom he intrusted his automobile, he should not be permitted to escape liability to a third party because of any fraudulent misrepresentation made by the renter of the car to him." (*Tuderios v. Hertz Drivurself Stations, Inc.* (1945) 70 Cal.App.2d 192, 198 [160 P.2d 554].)

- "[T]he provisions of Proposition 51 do not operate to reduce the liability of vehicle owners imposed by Vehicle Code section 17150." (*Rashtian v. Brach-BH, Inc.* (1992) 9 Cal.App.4th 1847, 1849 [12 Cal.Rptr.2d 411].)

- "[I]f the evidence shows that an automobile was being driven by an employee of the owner at the time of an accident, the jury may infer that the employee was operating the automobile with the permission of the owner." (*Hicks v. Reis* (1943) 21 Cal.2d 654, 659 [134 P.2d 788], internal quotation marks and citations omitted.)

- "The mere fact that at the time of an accident one is driving an automobile belonging to another is not, of itself, sufficient to establish that the former was driving the car with the permission of the owner." (*Di Rebaylio v. Herndon* (1935) 6 Cal.App.2d 567, 568–569 [44 P.2d 581].)

- "[I]mplied permission to use an automobile may be found even where the owner and permittee expressly deny that permission was given." (*Anderson v. Wagnon* (1952) 110 Cal.App.2d 362, 366 [242 P.2d 915].)

- "[I]n determining whether there has been an implied permission, it is not necessary that the owner have prior knowledge that the driver intends to use the car, but it must be 'under circumstances from which consent to use the car is necessarily implied.' " (*Mucci v. Winter* (1951) 103 Cal.App.2d 627, 631 [230 P.2d 22], internal citation omitted.)

- For purposes of statutory vicarious liability, "if the owner entrusts his car to another he invests him with the same authority to select an operator which the owner has in the first instance. … [¶] … The owner is thus liable for negligent acts by a subpermittee even though the subpermittee operated the owner's vehicle with

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authorization only from the permittee, since the foundation of the statutory liability is the permission given to another to use an instrumentality which if improperly used is a danger and menace to the public." (*Peterson, supra*, 57 Cal.2d at p. 54, internal quotation marks and citations omitted.)

Secondary Sources

- 2 Bancroft-Whitney's California Civil Practice: Torts (1992) Motor Vehicles, §§ 25:44–25:45, pp. 68–71
- California Tort Guide (Cont.Ed.Bar 3d ed. 1996) Automobiles, §§ 4.28–4.32, 4.37, pp. 110–114, 116 (rel. 4/00)
- 2 Levy et al., California Torts (1985) Motor Vehicles, § 20.20, pp. 20-110–20-132 (rel.16-3/94)
- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1028–1031, 1039, pp. 421–424, 431–433; *id.* (2001 supp.) at §§ 1028–1031, pp. 273–275

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514
Motor Vehicle Owner Liability
Affirmative Defense—Use Beyond Scope of Permission

[*Name of defendant*] claims that [he/she] is not responsible for the harm because [*name of driver*]'s use of the vehicle exceeded the scope of the permission given. To succeed, [*name of defendant*] must prove the following:

1. **That [*name of defendant*], by words or conduct, gave permission to [*name of driver*] to use the vehicle for a limited time, place, or purpose; and**

2. **That [*name of driver*]'s use of the vehicle substantially violated the time, place, or purpose specified.**

DIRECTIONS FOR USE

This instruction is intended for use when the vehicle owner contends that the use of the vehicle exceeded the scope of the permission, thereby terminating the permission.

SOURCES AND AUTHORITY

- Vehicle Code section 17150 provides: "Every owner of a motor vehicle is liable and responsible for death or injury to person or property resulting from a negligent or wrongful act or omission in the operation of the motor vehicle, in the business of the owner or otherwise, by any person using or operating the same with the permission, express or implied, of the owner."

- "[W]here the permission is granted for a limited time, any use after the expiration of the period is without consent, and the owner is not liable, unless the circumstances justify an inference of implied consent to further use. [¶] … On principle, there is no fundamental ground of distinction between a limitation of time and one of purpose or place, insofar as permission is concerned; and it would seem clear that a substantial violation of either limitation terminates the original express consent and makes the subsequent use without permission. … [¶] … [T]he substantial violation of limitations as to locality or purpose of use operate in the same manner as violation of time

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limitations, absolving the owner from liability." (*Henrietta v. Evans* (1938) 10 Cal.2d 526, 528–529 [75 P.2d 1051], internal citations omitted.)

- "[W]here restrictions by the owner as to time, purpose, or area are involved, the owner's permission is considered terminated only where there has been a substantial violation of such restrictions, and it is a question of fact whether under all the circumstances presented, such restrictions as to time, purpose, or area have been substantially violated prior to the occurrence of the accident so as to vitiate the owner's permission and thus absolve him from the vicarious liability imposed under [the predecessor to section 17150]." (*Peterson v. Grieger, Inc.* (1961) 57 Cal.2d 43, 52 [17 Cal.Rptr. 828], internal citations omitted.)

- "What is a substantial deviation from a permitted use is a question of fact under the circumstances of each case." (*Garmon v. Sebastian* (1960) 181 Cal.App.2d 254, 260 [5 Cal.Rptr. 101].)

Secondary Sources

- California Tort Guide (Cont.Ed.Bar 3d ed. 1996) Automobiles, §§ 4.35–4.36, pp. 115–116 (rel. 4/00)
- 2 Levy et al., California Torts (1985) Motor Vehicles, § 20.20[5][c], pp. 20-127–20-129 (rel. 16-3/94)
- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 1040, pp. 433–434; *id.* (2001 supp.) at § 1040, p. 276

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515
Adult's Liability for Minor's Permissive Use of Motor Vehicle

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[*Name of plaintiff***] claims that [he/she] was harmed and that [***name of defendant***] is responsible for the harm because [he/she] gave [***name of minor***] permission to operate the vehicle. To establish this claim, [***name of plaintiff***] must prove the following:**

1. **That [***name of minor***] was negligent in operating the vehicle;**

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

3. **That [***name of minor***]'s negligence was a substantial factor in causing the harm;**

4. **That at the time of the collision [***name of defendant***] had the right to control [***name of minor***]; and**

5. **That [***name of defendant***], by words or conduct, gave [***name of minor***] permission to use the vehicle.**

SOURCES AND AUTHORITY

- Vehicle Code section 17708 provides: "Any civil liability of a minor, whether licensed or not under this code, arising out of his driving a motor vehicle upon a highway with the express or implied permission of the parents or the person or guardian having custody of the minor is hereby imposed upon the parents, person, or guardian and the parents, person, or guardian shall be jointly and severally liable with the minor for any damages proximately resulting from the negligent or wrongful act or omission of the minor in driving a motor vehicle."

- "[I]t was incumbent upon [plaintiffs], in order to fasten liability upon [the parents] for the minor's negligence, to establish two necessary facts. These facts were, first, that at the time the collision occurred respondents had custody of the minor and, second, that they had given to the minor their permission, either express or implied, to his driving the automobile by the negligent operation of which the injuries were caused." (*Sommers v. Van Der Linden* (1938) 24 Cal.App.2d 375, 380 [75 P.2d 83].)

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- "Whether or not a sufficient custody existed, within the meaning of the statute, might well depend upon evidence of specific facts showing the nature, kind and extent of the custody and right of control which the respondent [grandfather] actually had." (*Hughes v. Wardwell* (1953) 117 Cal.App.2d 406, 409 [255 P.2d 881].)

- "In the absence of statute, ordinarily a parent is not liable for the torts of his minor child. A parent, however, becomes liable for the torts of his minor child if that child in committing a tort is his agent and acting within the child's authority." (*Van Den Eikhof v. Hocker* (1978) 87 Cal.App.3d 900, 904–905 [151 Cal.Rptr. 456], internal citations omitted.)

Secondary Sources

- 1 Bancroft-Whitney's California Civil Practice: Torts (1992) Motor Vehicles, § 25.52, pp. 77–78
- California Tort Guide (Cont.Ed.Bar 3d ed. 1996) Automobiles, §§ 4.42– 4.43, pp. 120–121
- 2 Levy et al., California Torts (1993) Motor Vehicles, § 20.30[1], pp. 20-136.1–20-138
- 6 Witkin, Summary of California Law (9th ed. 1987) Torts, §§ 1025–1027, pp. 418–421; *id.* (2001 supp.) at §§ 1025–1026, pp. 272–273

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516
Liability of Cosigner of Minor's Application for Driver's License

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[*Name of plaintiff***] claims that [he/she] was harmed by [***name of minor***]'s negligence in operating the vehicle and that [***name of defendant***] is responsible for the harm because [he/she] signed [***name of minor***]'s application for a driver's license. To establish this claim, [***name of plaintiff***] must prove the following:**

1. **That [***name of minor***] was negligent in operating the vehicle;**

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

3. **That [***name of minor***]'s negligence was a substantial factor in causing the harm;**

4. **That [***name of defendant***] signed [***name of minor***]'s application for a driver's license; and**

5. **That at the time of the collision [***name of minor***]'s driver's license had not been canceled or revoked by the Department of Motor Vehicles.**

SOURCES AND AUTHORITY

- Vehicle Code section 17707 provides in part: "Any civil liability of a minor arising out of his driving a motor vehicle upon a highway during his minority is hereby imposed upon the person who signed and verified the application of the minor for a license and the person shall be jointly and severally liable with the minor for any damages proximately resulting from the negligent or wrongful act or omission of the minor in driving a motor vehicle, except that an employer signing the application shall be subject to the provisions of this section only if an unrestricted driver's license has been issued to the minor pursuant to the employer's written authorization."

- Vehicle Code section 17710 provides: "The person signing a minor's application for a license is not liable under this chapter for a negligent or wrongful act or omission of the minor committed when the minor is acting as the agent or servant of any person."

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- Vehicle Code section 17711 provides: "Any person who has signed and verified the application of a minor for a driver's license or any employer who has authorized the issuance of a license to a minor and who desires to be relieved from the joint and several liability imposed by reason of having signed and verified such application, may file a verified application with the department requesting that the license of the minor be canceled. The department shall cancel the license, except as provided in subdivision (e) of Section 17712. Thereafter, the person shall be relieved from the liability imposed under this chapter by reason of having signed and verified the original application on account of any subsequent willful misconduct or negligent operation of a motor vehicle by the minor."

- "Cancellation accomplishes voluntarily what revocation [of minor's driver's license] accomplishes involuntarily. If termination is accomplished by the latter method, resort to the former becomes superfluous. Once revocation occurs, the driving privilege is at an end. Thereafter there is no reason and no necessity for a voluntary application to terminate that which has already been terminated involuntarily. Both means are equally effective to terminate the driving privilege and to terminate the signer's liability." (*Hamilton v. Dick* (1967) 254 Cal.App.2d 123, 125 [61 Cal.Rptr. 894].)

- "[T]he negligence of the minor son of the [parents] is imputed to them … by virtue of their having signed his application for an operator's license, which was not revoked or cancelled at the time of the accident in question, notwithstanding the fact that the license was then temporarily suspended" and even though the parents specifically forbade the minor from operating the vehicle. (*Sleeper v. Woodmanse* (1936) 11 Cal.App.2d 595, 598 [54 P.2d 519].)

- "It seems quite evident that, in adopting [the predecessors to sections 17150 and 17707] of the Vehicle Code, the legislature intended to create a limited liability for imputed negligence against both the owner of an automobile and the signer of a driver's license. … We must assume the legislature intended to fix a limited liability … for imputed negligence against the owner of an automobile and the signer of a driver's license or either of them and that it did not intend to double that limited liability when the same individual was both the owner of the machine and the signer of the license." (*Rogers v. Foppiano* (1937) 23 Cal.App.2d 87, 92–93 [72 P.2d 239].)

<u>Secondary Sources</u>

- 1 Bancroft-Whitney's California Civil Practice: Torts (1992) Motor Vehicles, § 25.52, pp. 77–78
- California Tort Guide (Cont.Ed.Bar 3d ed. 1996) Automobiles, §§ 4.41, 4.43, pp. 119–121

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- 2 Levy et al., California Torts (1993) Motor Vehicles, § 20.30[2], pp. 20-139–20-143
- 6 Witkin, Summary of California Law (9th ed. 1987) Torts, §§ 1025–1027, pp. 418–421; *id.* (2001 supp.) at §§ 1025–1026, pp. 272–273

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517
Negligent Entrustment of Motor Vehicle

[*Name of plaintiff***] claims that [he/she] was harmed because [***name of defendant***] negligently permitted [***name of driver***] to use [his/her] vehicle. To establish this claim, [***name of plaintiff***] must prove the following:**

1. **That [***name of driver***] was negligent in operating the vehicle;**

2. **That [***name of defendant***] was an owner of the vehicle operated by [***name of driver***];**

3. **That [***name of defendant***] knew, or should have known, that [***name of driver***] was incompetent or unfit to drive;**

4. **That [***name of defendant***] permitted [***name of driver***] to use the vehicle;**

5. **That [***name of defendant***] was negligent in permitting [***name of driver***] to drive; and**

6. **That [***name of driver***]'s incompetence or unfitness to drive was a substantial factor in causing [***name of plaintiff***]'s harm.**

DIRECTIONS FOR USE

For a definition of "negligence" see instruction 301, *Basic Standard of Care.*

SOURCES AND AUTHORITY

- Vehicle Code section 14606(a) provides: "No person shall employ or hire any person to drive a motor vehicle nor shall he knowingly permit or authorize the driving of a motor vehicle, owned by him or her or under his or her control, upon the highways by any person unless the person is then licensed for the appropriate class of vehicle to be driven."

- Vehicle Code section 14607 provides: "No person shall cause or knowingly permit his child, ward, or employee under the age of 18 years to drive a motor vehicle upon the highways unless such child, ward, or employee is then licensed under this code."

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- Vehicle Code section 14608(a) provides in part: "No person shall rent a motor vehicle to another unless: [¶] … [t]he person to whom the vehicle is rented is licensed under this code or is a nonresident who is licensed under the laws of the state or country of his or her residence."

- "A rental car company may be held liable for negligently entrusting one of its cars to a customer. … In determining whether defendant was negligent in entrusting its car to [the driver], defendant's conduct is to be measured by what an ordinarily prudent person would do in similar circumstances." (*Osborn v. Hertz Corp.* (1988) 205 Cal.App.3d 703, 709 [252 Cal.Rptr. 613], internal citations omitted.)

- Vehicle Code section 14606(a) and its predecessors "make a motor vehicle owner who knowingly entrusts his vehicle to an unlicensed driver liable for a third party's injuries caused by the driver's negligence. … The cause of action parallels that at common law for negligent entrustment, resting on a demonstration of knowing entrustment to an incompetent or dangerous driver with actual or constructive knowledge of his incompetence." (*Dodge Center v. Superior Court* (1988) 199 Cal.App.3d 332, 338 [244 Cal.Rptr. 789], internal citations omitted.)

- "Liability for negligent entrustment is determined by applying general principles of negligence, and ordinarily it is for the jury to determine whether the owner has exercised the required degree of care." (*Allen v. Toledo* (1980) 109 Cal.App.3d 415, 421 [167 Cal.Rptr. 270], internal citations omitted.)

- " 'It is generally recognized that one who places or entrusts his motor vehicle in the hands of one whom he knows, or from the circumstances is charged with knowing, is incompetent or unfit to drive, may be held liable for an injury inflicted by the use made thereof by that driver, provided the plaintiff can establish that the injury complained of was proximately caused by the driver's disqualification, incompetency, inexperience or recklessness … .' [¶] … Under the theory of 'negligent entrustment,' liability is imposed on vehicle owner or permitter because of his own independent negligence and not the negligence of the driver, in the event plaintiff can prove that the injury or death resulting therefrom was proximately caused by the driver's incompetency." (*Syah v. Johnson* (1966) 247 Cal.App.2d 534, 539 [55 Cal.Rptr. 741], internal citations omitted.)

- "[O]rdinarily, in the absence of a special relationship between the parties, there is no duty to control the conduct of a third person so as to prevent him from causing harm to another and … this rule applies even where the third person's conduct is made possible only because the defendant has relinquished control of his property to the

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third person, unless the defendant has reason to believe that the third person is incompetent to manage it." (*Grafton v. Mollica* (1965) 231 Cal.App.2d 860, 863 [42 Cal.Rptr. 306].)

- "In its simplest form the question is whether the owner when he permits an incompetent or reckless person, who he knows to be incompetent or reckless, to take and operate his car, acts as an ordinarily prudent person would be expected to act under the circumstances. … [C]onsideration for the safety of others requires him to withhold his consent and thereby refrain from participating in any accident that is liable to happen from the careless and reckless driving of such a dangerous instrumentality." (*Rocca v. Steinmetz* (1923) 61 Cal.App. 102, 109 [214 P. 257].)

- "[T]he tort requires demonstration of actual knowledge of facts showing or suggesting the driver's incompetence — not merely his lack of a license. … For liability to exist, knowledge must be shown of the user's incompetence or inability safely to use the [vehicle]." (*Dodge Center, supra,* 199 Cal.App.3d at p. 341, internal citations omitted.)

- "Knowledge of possession of a temporary permit allowing a person to drive only if accompanied by a licensed driver is sufficient to put the entrustor 'upon inquiry as to the competency of' the unlicensed driver. … It is then for the jury to determine under the circumstances whether the entrustor is negligent in permitting the unlicensed driver to operate the vehicle." (*Nault v. Smith* (1961) 194 Cal.App.2d 257, 267–268 [14 Cal.Rptr. 889], internal citations omitted.)

- "[E]ntrustment of a vehicle to an intoxicated person is not negligence per se. A plaintiff must prove defendant had knowledge of plaintiff's incompetence when entrusting the vehicle." (*Blake v. Moore* (1984) 162 Cal.App.3d 700, 706 [208 Cal.Rptr. 703].)

- "[T]he mere sale of an automobile to an unlicensed and inexperienced person does not constitute negligence per se." (*Perez v. G & W Chevrolet, Inc.* (1969) 274 Cal.App.2d 766, 768 [79 Cal.Rptr. 287].)

- "One who supplies an automobile for the use of another whom the supplier (1) knows, or (2) from facts known to him should know, to be likely, because of his inexperience (or incompetency), to use it in a manner involving unreasonable risk of bodily harm to others whom the supplier should expect to be in the vicinity of its use is subject to liability for bodily harm caused thereby to them." (*Johnson v. Casetta* (1961) 197 Cal.App.2d 272, 274 [17 Cal.Rptr. 81], internal quotation marks omitted.)

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- "It is well-settled that where a company knows that an employee has no operator's license that such knowledge is sufficient to put the employer on inquiry as to his competency; it is for the jury to determine under such circumstances whether the employer was negligent in permitting the employee to drive a vehicle." (*Syah, supra,* 247 Cal.App.2d at p. 545.)

- "[I]t has generally been held that the owner of an automobile is under no duty to persons who may be injured by its use to keep it out of the hands of a third person in the absence of facts putting the owner on notice that the third person is incompetent to handle it." (*Richards v. Stanley* (1954) 43 Cal.2d 60, 63 [271 P.2d 23], internal citations omitted.)

- "[T]he mere fact of co-ownership does not prevent one co-owner from controlling use of the vehicle by the other co-owner. Thus, where … plaintiff alleges that one co-owner had power over the use of the vehicle by the other and that the negligent co-owner drove with the express or implied consent of such controlling co-owner, who knew of the driver's incompetence, the basis for a cause of action for negligent entrustment has been stated." (*Mettelka v. Superior Court* (1985) 173 Cal.App.3d 1245, 1250 [219 Cal.Rptr. 697].)

<u>Secondary Sources</u>

- 2 Bancroft-Whitney's California Civil Practice: Torts (1992) Motor Vehicles, § 25:47, pp. 71–73
- California Tort Guide (Cont.Ed.Bar 3d ed. 1996) Automobiles, § 4.38, pp. 116.1–117 (rel. 4/97)
- 2 Levy et al., California Torts (1986) Motor Vehicles, § 20.21, pp. 20-132–20-136 (rel. 1-8/86)
- 6 Witkin, Summary of California Law (9th ed. 1987) Torts, §§ 998–1000, pp. 389–391; *id.* (2001 supp.) at §§ 999–999C, pp. 256–259

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612
Constructive Notice of Store Owner Regarding Dangerous Conditions

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In determining whether [*name of defendant*] knew or should have known of the condition that created the risk of harm you must decide whether, under all the circumstances, the condition existed long enough so that it would have been discovered and corrected by an owner using reasonable care.

The fact that an inspection had not been made within a particular period of time before an accident may itself show that the condition existed long enough so that a storeowner using reasonable care would have discovered it.

DIRECTIONS FOR USE

This instruction is intended for use where there is an issue concerning the presence or absence of a store owner's actual knowledge of a dangerous condition.

SOURCES AND AUTHORITY

- "It is well established in California that although a store owner is not an insurer of the safety of its patrons, the owner does owe them a duty to exercise reasonable care in keeping the premises reasonably safe." (*Ortega v. Kmart* (2001) 26 Cal.4th 1200, 1205 [114 Cal.Rptr.2d 470], internal citation omitted.)

- "We conclude that a plaintiff may prove a dangerous condition existed for an unreasonable time with circumstantial evidence, and that … 'evidence that an inspection had not been made within a particular period of time prior to an accident may warrant an inference that the defective condition existed long enough so that a person exercising reasonable care would have discovered it.' " (*Ortega, supra,* 26 Cal.4th at p. 1210 internal citation omitted.)

- "A store owner exercises ordinary care by making reasonable inspections of the portions of the premises open to customers, and the care required is commensurate with the risks involved." (*Ortega, supra,* 26 Cal.4th at p. 1205, internal citation omitted.)

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- "Because the owner is not the insurer of the visitor's personal safety, the owner's actual or constructive knowledge of the dangerous condition is a key to establishing its liability." (*Ortega, supra,* 26 Cal.4th at p. 1206, internal citations omitted.)

- "Courts have also held that where the plaintiff relies on the failure to correct a dangerous condition to prove the owner's negligence, the plaintiff has the burden of showing that the owner had notice of the defect in sufficient time to correct it." (*Ortega, supra,* 26 Cal.4th at p. 1206, internal citations omitted.)

- "The plaintiff need not show actual knowledge where evidence suggests that the dangerous condition was present for a sufficient period of time to charge the owner with constructive knowledge of its existence." (*Ortega, supra,* 26 Cal.4th at p. 1206, internal citations omitted.)

- "We emphasize that allowing the inference does not change the rule that if a store owner has taken care in the discharge of its duty, by inspecting its premises in a reasonable manner, then no breach will be found even if a plaintiff does suffer injury." (*Ortega, supra,* 26 Cal.4th at p. 1211, internal citations omitted.)

- "We conclude that plaintiffs still have the burden of producing evidence that the dangerous condition existed for at least a sufficient time to support a finding that the defendant had constructive notice of the hazardous condition. We also conclude, however, that plaintiffs may demonstrate the storekeeper had constructive notice of the dangerous condition if they can show that the site had not been inspected within a reasonable period of time so that a person exercising due care would have discovered and corrected the hazard. In other words, if the plaintiffs can show an inspection was not made within a particular period of time prior to an accident, they may raise an inference the condition did exist long enough for the owner to have discovered it. It remains a question of fact for the jury whether, under all the circumstances, the defective condition existed long enough so that it would have been discovered and remedied by an owner in the exercise of reasonable care." (*Ortega, supra,* at pp. 1212–1213, internal citations omitted.)

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850
Introduction to Contract Damages

If you decide that [*name of plaintiff*] has proved [his/her/its] claim against [*name of defendant*] for breach of contract, you also must decide how much money will reasonably compensate [*name of plaintiff*] for the harm. This compensation is called "damages." The purpose of such damages is to put [*name of plaintiff*] in as good a position as [he/she/it] would have been if [*name of defendant*] had performed as promised.

To recover damages for any harm, [*name of plaintiff*] must prove:

1. **That the harm was likely to arise in the ordinary course of events from the breach of the contract; or**

2. **That when the contract was made, both parties could have reasonably foreseen the harm as the probable result of the breach.**

[*Name of plaintiff*] also must prove the amount of [his/her/its] damages to a reasonable certainty. However, [he/she/it] does not have to prove the exact amount of damages. You must not speculate or guess in awarding damages.

[*Name of plaintiff*] claims damages for [*identify general damages claimed*].

DIRECTIONS FOR USE

This instruction should be always be read before any of the following specific damages instructions.

SOURCES AND AUTHORITY

- 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 therefor in money, which is called damages."

- Civil Code section 3282 provides: "Detriment is a loss or harm suffered in person or property."

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- 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."

- "The detriment that is 'likely to result therefrom' is that which is foreseeable to the breaching party at the time the contract is entered into." (*Wallis v. Farmers Group, Inc.* (1990) 220 Cal.App.3d 718, 737 [269 Cal.Rptr. 299], internal citation omitted.)

- Civil Code section 3301 provides: "No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin."

- Civil Code section 3358 provides: "Except as expressly provided by statute, no person can recover a greater amount in damages for the breach of an obligation, than he could have gained by the full performance thereof on both sides."

- 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."

- Restatement Second of Contracts, section 351 provides:

  (1) Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made.
  (2) Loss may be foreseeable as a probable result of a breach because it follows from the breach
      (a) in the ordinary course of events, or
      (b) as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know.
  (3) A court may limit damages for foreseeable loss by excluding recovery for loss of profits, by allowing recovery only for loss incurred in reliance, or otherwise if it concludes that in the circumstances justice so requires in order to avoid disproportionate compensation.

- "The basic object of damages is compensation, and in the law of contracts the theory is that the party injured by a breach should receive as nearly as possible the equivalent of the benefits of performance. The aim is to put the injured party in as good a

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position as he would have been had performance been rendered as promised. This aim can never be exactly attained yet that is the problem the trial court is required to resolve." (*Brandon & Tibbs v. George Kevorkian Accountancy Corp.* (1990) 226 Cal.App.3d 442, 455 [277 Cal.Rptr. 40], internal citations omitted.)

- "The damages awarded should, insofar as possible, place the injured party in the same position it would have held had the contract properly been performed, but such damage may not exceed the benefit which it would have received had the promisor performed." (*Brandon & Tibbs, supra,* 226 Cal.App.3d at p. 468, internal citations omitted.)

- " 'The rules of law governing the recovery of damages for breach of contract are very flexible. Their application in the infinite number of situations that arise is beyond question variable and uncertain. Even more than in the case of other rules of law, they must be regarded merely as guides to the court, leaving much to the individual feeling of the court created by the special circumstances of the particular case.' " (*Brandon & Tibbs, supra,* 226 Cal.App.3d at p. 455, internal citation omitted.)

- " 'Contract damages are generally limited to those within the contemplation of the parties when the contract was entered into or at least reasonably foreseeable by them at that time; consequential damages beyond the expectation of the parties are not recoverable. This limitation on available damages serves to encourage contractual relations and commercial activity by enabling parties to estimate in advance the financial risks of their enterprise.' 'In contrast, tort damages are awarded to [fully] compensate the victim for [all] injury suffered.' " (*Erlich v. Menezes* (1999) 21 Cal.4th 543, 550 [87 Cal.Rptr.2d 886], internal citations omitted.)

- "California case law has long held the correct measure of damages to be as follows: 'Damages are awarded in an action for breach of contract to give the injured party the benefit of his bargain and insofar as possible to place him in the same position he would have been in had the promisor performed the contract. Damages must be reasonable, however, and the promisor is not required to compensate the injured party for injuries that he had no reason to foresee as the probable result of his breach when he made the contract.' " (*Martin v. U-Haul Co. of Fresno* (1988) 204 Cal.App.3d 396, 409 [251 Cal.Rptr. 17], internal citations omitted.)

- " 'It is often said that damages must be "foreseeable" to be recoverable for breach of contract. The seminal case announcing this doctrine, still generally accepted as a limitation on damages recoverable for breach of contract, is *Hadley v. Baxendale.* First, general damages are ordinarily confined to those which would naturally arise from the breach, or which might have been reasonably contemplated or foreseen by

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both parties, at the time they made the contract, as the probable result of the breach. Second, if special circumstances caused some unusual injury, special damages are not recoverable therefor unless the circumstances were known or should have been known to the breaching party at the time he entered into the contract.' " (*Resort Video, Ltd. v. Laser Video, Inc.* (1995) 35 Cal.App.4th 1679, 1697 [42 Cal.Rptr.2d 136], internal citations omitted.)

- "Where the fact of damages is certain, as here, the amount of damages need not be calculated with absolute certainty. The law requires only that some reasonable basis of computation be used, and the result reached can be a reasonable approximation." (*Acree v. General Motors Acceptance Corp.* (2001) 92 Cal.App.4th 385, 398 [112 Cal.Rptr.2d 99], footnotes and internal citations omitted.)

- "It is well settled that the party claiming the damage must prove that he has suffered damage and prove the elements thereof with reasonable certainty." (*Mendoyoma, Inc. v. County of Mendocino* (1970) 8 Cal.App.3d 873, 880–881 [87 Cal.Rptr. 740], internal citation omitted.)

- "Whether the theory of recovery is breach of contract or tort, damages are limited to those proximately caused by their wrong." (*State Farm Mutual Automobile Insurance Co. v. Allstate Insurance Co.* (1970) 9 Cal.App.3d 508, 528 [88 Cal.Rptr. 246], internal citation omitted.)

- "Under contract principles, the nonbreaching party is entitled to recover only those damages, including lost future profits, which are 'proximately caused' by the specific breach. Or, to put it another way, the breaching party is only liable to place the nonbreaching party in the same position as if the specific breach had not occurred. Or, to phrase it still a third way, the breaching party is only responsible to give the nonbreaching party the benefit of the bargain to the extent the specific breach deprived that party of its bargain." (*Postal Instant Press, Inc. v. Sealy* (1996) 43 Cal.App.4th 1704, 1709 [51 Cal.Rptr.2d 365], internal citations omitted.)

- "[D]amages for mental suffering and emotional distress are generally not recoverable in an action for breach of an ordinary commercial contract in California." (*Erlich, supra,* 21 Cal.4th 543 at p. 558, internal citations omitted.)

- "Cases permitting recovery for emotional distress typically involve mental anguish stemming from more personal undertakings the traumatic results of which were unavoidable. Thus, when the express object of the contract is the mental and emotional well-being of one of the contracting parties, the breach of the contract may

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give rise to damages for mental suffering or emotional distress." (*Erlich, supra,* 21 Cal.4th at p. 559, internal citations omitted.)

- "The right to recover damages for emotional distress for breach of mortuary and crematorium contracts has been well established in California for many years." (*Saari v. Jongordon Corp*. (1992) 5 Cal.App.4th 797, 803 [7 Cal.Rptr.2d 82], internal citation omitted.)

Secondary Sources

- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, § 815 et seq.
- California Breach of Contract Remedies (Cont.Ed.Bar 1980; 2001 supp.) Recovery of Money Damages, §§ 4.1–4.9

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851
Special Damages

[*Name of plaintiff***] [also] claims damages for [***identify special damages***].**

To recover for this harm, [*name of plaintiff***] must prove that when the parties made the contract, [***name of defendant***] knew or reasonably should have known of the circumstances leading to such harm.**

DIRECTIONS FOR USE

Before giving this instruction, the judge should determine whether a particular item of damage qualifies as "special."

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."

- "The detriment that is 'likely to result therefrom' is that which is foreseeable to the breaching party at the time the contract is entered into." (*Wallis v. Farmers Group, Inc.* (1990) 220 Cal.App.3d 718, 737 [269 Cal.Rptr. 299], internal citation omitted.)

- Restatement Second of Contracts, section 351 provides:

  (1) Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made.
  (2) Loss may be foreseeable as a probable result of a breach because it follows from the breach
  (a) in the ordinary course of events, or
  (b) as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know.

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(3) A court may limit damages for foreseeable loss by excluding recovery for loss of profits, by allowing recovery only for loss incurred in reliance, or otherwise if it concludes that in the circumstances justice so requires in order to avoid disproportionate compensation.

- "Special damages must fall within the rule of *Hadley v. Baxendale*, … that is, they must reasonably be supposed to have been contemplated or foreseeable by the parties when making the contract as the probable result of a breach. If special circumstances cause an unusual injury, special damages cannot be recovered unless the circumstances were known or should have been known to the party at fault at the time the contract was made." (*Sabraw v. Kaplan* (1962) 211 Cal.App.2d 224, 227 [27 Cal.Rptr. 81], internal citations omitted.)

- "When reference is made to the terms of the contract alone, there is ordinarily little difficulty in determining what damages arise from its breach in the usual course of things, and the parties will be presumed to have contemplated such damages only. But where it is claimed the circumstances show that a special purpose was intended to be accomplished by one of the parties (a failure to accomplish which by means of the contract would cause him greater damage than would ordinarily follow from a breach by the other party), and such purpose was known to the other party, the facts showing the special purpose and the knowledge of the other party must be averred. This rule has frequently been applied to the breach of a contract for the sale of goods to be delivered at a certain time. In such cases the general rule of damages is fixed by reference to the market value of the goods at the time they were to have been delivered, because in the usual course of events the purchaser could have supplied himself with like commodities at the market price. And if special circumstances existed entitling the purchaser to greater damages for the defeat of a special purpose known to the contracting parties (as, for example, if the purchaser had already contracted to furnish the goods at a profit, and they could not be obtained in the market), such circumstances must be stated in the declaration with the facts which, under the circumstances, enhanced the injury." (*Mitchell v. Clarke* (1886) 71 Cal. 163, 164–165 [11 P. 882], internal citation omitted.)

- " 'The requirement of knowledge or notice as a prerequisite to the recovery of special damages is based on the theory that a party does not and cannot assume limitless responsibility for all consequences of a breach, and that at the time of contracting he must be advised of the facts concerning special harm which might result therefrom, in order that he may determine whether or not to accept the risk of contracting.' " (*Martin v. U-Haul Co. of Fresno* (1988) 204 Cal.App.3d 396, 409, internal citation omitted.)

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- "[I]f special circumstances caused some unusual injury, special damages are not recoverable therefor unless the circumstances were known or should have been known to the breaching party at the time he entered into the contract. The requirement of knowledge or notice as a prerequisite to the recovery of special damages is based on the theory that a party does not and cannot assume limitless responsibility for all consequences of a breach, and that at the time of contracting he must be advised of the facts concerning special harm which might result therefrom, in order that he may determine whether or not to accept the risk of contracting." (*Brandon & Tibbs v. George Kevorkian Accountancy Corp.* (1990) 226 Cal.App.3d 442, 455 [277 Cal.Rptr. 40], internal citations omitted.)

- "Contract damages must be clearly ascertainable in both nature and origin. A contracting party cannot be required to assume limitless responsibility for all consequences of a breach and must be advised of any special harm that might result in order to determine whether or not to accept the risk of contracting." (*Erlich v. Menezes* (1999) 21 Cal.4th 543, 560 [87 Cal.Rptr.2d 886], internal citations omitted.)

- "When the facts show that a special purpose is intended to be accomplished by one of the parties (a failure to accomplish which by means of the contract would cause him greater damage than would ordinarily flow from a breach by the other party), and this special circumstance is brought to the attention of the other party, damages normally flowing from a breach of the contract in view of such special circumstances are said to be within the contemplation of the parties." (*Christensen v. Slawter* (1959) 173 Cal.App.2d 325, 334 [343 P.2d 341], internal citations omitted.)

<u>Secondary Sources</u>

- 1 Witkin, Summary of California Law, (9th ed. 1987) § 815

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852
Loss of Profits—No Profits Earned

To recover damages for lost profits, [*name of plaintiff*] must prove that it is reasonably certain [he/she/it] would have earned profits but for [*name of defendant*]'s breach of the contract.

To decide the amount of damages for lost profits, you must determine the gross, or total, 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 on loans invested in the business]].

You do not have to calculate the amount of the lost profits with mathematical precision, but there must be a reasonable basis for computing the loss.

DIRECTIONS FOR USE

This instruction applies to both past and future lost profit claims. Read this instruction in conjunction with Instruction 850, *Introduction to Contract Damages*, or Instruction 851, *Special Damages.*

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

- Civil Code section 3301 provides: "No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin."

- Restatement Second of Contracts, section 351(3) provides: "A court may limit damages for foreseeable loss by excluding recovery for loss of profits, by allowing recovery only for loss incurred in reliance, or otherwise if it concludes that in the circumstances justice so requires in order to avoid disproportionate compensation."

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- "Where the *fact* of damages is certain, the amount of damages need not be calculated with absolute certainty. The law requires only that some reasonable basis of computation of damages be used, and the damages may be computed even if the result reached is an approximation. This is especially true where, as here, it is the wrongful acts of the defendant that have created the difficulty in proving the amount of loss of profits or where it is the wrongful acts of the defendant that have caused the other party to not realize a profit to which that party is entitled." (*GHK Associates v. Mayer Group* (1990) 224 Cal.App.3d 856, 873–874 [274 Cal.Rptr. 168], internal citations omitted.)

- "The extent of such damages may be measured by 'the past volume of business and other provable data relevant to the probable future sales.' " (*Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 890 [93 Cal.Rptr.2d 364], internal citation 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.' However, '[i]t has been frequently stated that if a business is new, it is improper to award damages for loss of profits because absence of income and expense experience renders anticipated profits too speculative to meet the legal standard of reasonable certainty necessary to support an award of such damage. However, the rule is not a hard and fast one and loss of prospective profits may nevertheless be recovered if the evidence shows with reasonable certainty both their occurrence and the extent thereof. In the present case the question is whether the evidence of loss of prospective profits meets that standard.' " Unestablished businesses have been permitted to claim lost profit damages in situations where owners have experience in the business they are seeking to establish, and where the business is in an established market." (*Resort Video, Ltd. v. Laser Video, Inc.* (1995) 35 Cal.App.4th 1679, 1698–1699 [42 Cal.Rptr.2d 136], internal citations omitted.)

- "Even if [plaintiff] was able to provide credible evidence of lost profits, it must be remembered that '[w]hen loss of anticipated profits is an element of damages, it means net and not gross profits. Net profits are the gains made from sales 'after deducting the value of the labor, materials, rents, and all expenses, together with the interest of the capital employed.' " (*Resort Video, Ltd., supra*, 35 Cal.App.4th at p. 1700, internal citations omitted.)

- "Under general contract principles, when one party breaches a contract the other party ordinarily is entitled to damages sufficient to make that party 'whole,' that is, enough to place the nonbreaching party in the same position as if the breach had not occurred.

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This includes future profits the breach prevented the nonbreaching party from earning at least to the extent those future profits can be estimated with reasonable certainty." (*Postal Instant Press v. Sealy* (1996) 43 Cal.App.4th 1704, 1708–1709 [51 Cal.Rptr.2d 365], internal citations omitted.)

- "It is the generally accepted rule, in order to recover damages projected into the future, that a plaintiff must show with reasonable certainty that detriment from the breach of contract will accrue to him in the future. Damages which are remote, contingent, or merely possible cannot serve as a legal basis for recovery." (*California Shoppers, Inc. v. Royal Globe Insurance Co.* (1985) 175 Cal.App.3d 1, 62 [221 Cal.Rptr. 171], internal citations omitted.)

- "Where the injured party shows that, as a reasonable probability, profits would have been earned on the contract except for its breach, the loss of the anticipated profits is compensable. Where business activity has been interrupted by a breach of contract, damages for the loss of prospective profits that otherwise might have been made from its operation are generally recoverable where such damages are shown to have been foreseeable and reasonably certain." (*Brandon & Tibbs v. George Kevorkian Accountancy Corp.* (1990) 226 Cal.App.3d 442, 468 [277 Cal.Rptr. 40], internal citations omitted.)

Secondary Sources

- 1 Witkin, Summary of California Law (1987 9th ed.) Contracts, §§ 823–827
- California Breach of Contract Remedies (Cont.Ed.Bar 1980; 2001 supp.) Recovery of Money Damages, §§ 4.11–4.17

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853
Loss of Profits—Some Profits Earned

To recover damages for lost profits, [*name of plaintiff*] must prove that it is reasonably certain [he/she/it] would have earned profits but for [*name of defendant*]'s breach of the contract.

To decide the amount of damages for lost profits, you must:

1. **Calculate [*name of plaintiff*]'s estimated profit by determining the gross, or total, amount [*name of plaintiff*] was reasonably certain to have received if the contract had been performed, and then subtracting the expenses [including the value of the [labor/materials/rents/all expenses/interest on loans invested in the business]] [*name of plaintiff*] was reasonably certain to have had if the contract had been performed;**

2. **Calculate [*name of plaintiff*]'s actual profit by determining the gross amount [*name of plaintiff*] received, and then subtracting [*name of plaintiff*]'s expenses [including the value of the [labor/materials/rents/ all expenses/interest on loans invested in the business]]; and**

3. **Subtract [*name of plaintiff*]'s actual profit from [*name of plaintiff*]'s estimated profit. The resulting amount is [*name of plaintiff*]'s lost profit.**

You do not have to calculate the amount of the lost profits with mathematical precision, but there must be a reasonable basis for computing the loss.

DIRECTIONS FOR USE

Read this instruction in conjunction with Instruction 850, *Introduction to Contract Damages*, or Instruction 851, *Special Damages.*

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.

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SOURCES AND AUTHORITY

- Civil Code section 3301 provides: "No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin."

- Restatement Second of Contracts, section 351(3) provides: "A court may limit damages for foreseeable loss by excluding recovery for loss of profits, by allowing recovery only for loss incurred in reliance, or otherwise if it concludes that in the circumstances justice so requires in order to avoid disproportionate compensation."

- "Where the *fact* of damages is certain, the amount of damages need not be calculated with absolute certainty. The law requires only that some reasonable basis of computation of damages be used, and the damages may be computed even if the result reached is an approximation. This is especially true where, as here, it is the wrongful acts of the defendant that have created the difficulty in proving the amount of loss of profits or where it is the wrongful acts of the defendant that have caused the other party to not realize a profit to which that party is entitled." (*GHK Associates v. Mayer Group* (1990) 224 Cal.App.3d 856, 873–874 [274 Cal.Rptr. 168], internal citations omitted.)

- "The extent of such damages may be measured by 'the past volume of business and other provable data relevant to the probable future sales.' " (*Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 890 [93 Cal.Rptr.2d 364], internal citation 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.' However, '[i]t has been frequently stated that if a business is new, it is improper to award damages for loss of profits because absence of income and expense experience renders anticipated profits too speculative to meet the legal standard of reasonable certainty necessary to support an award of such damage. However, the rule is not a hard and fast one and loss of prospective profits may nevertheless be recovered if the evidence shows with reasonable certainty both their occurrence and the extent thereof. In the present case the question is whether the evidence of loss of prospective profits meets that standard.' " Unestablished businesses have been permitted to claim lost profit damages in situations where owners have experience in the business they are seeking to establish, and where the business is in an established market." (*Resort Video, Ltd. v. Laser Video, Inc.* (1995) 35 Cal.App.4th 1679, 1698–1699 [42 Cal.Rptr.2d 136], internal citations omitted.)

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- "Even if [plaintiff] was able to provide credible evidence of lost profits, it must be remembered that '[w]hen loss of anticipated profits is an element of damages, it means net and not gross profits. Net profits are the gains made from sales 'after deducting the value of the labor, materials, rents, and all expenses, together with the interest of the capital employed.' " (*Resort Video, Ltd., supra,* 35 Cal.App.4th at p. 1700, internal citations omitted.)

- "Under general contract principles, when one party breaches a contract the other party ordinarily is entitled to damages sufficient to make that party 'whole,' that is, enough to place the nonbreaching party in the same position as if the breach had not occurred. This includes future profits the breach prevented the nonbreaching party from earning at least to the extent those future profits can be estimated with reasonable certainty." (*Postal Instant Press v. Sealy* (1996) 43 Cal.App.4th 1704, 1708–1709 [51 Cal.Rptr.2d 365], internal citations omitted.)

- "It is the generally accepted rule, in order to recover damages projected into the future, that a plaintiff must show with reasonable certainty that detriment from the breach of contract will accrue to him in the future. Damages which are remote, contingent, or merely possible cannot serve as a legal basis for recovery." (*California Shoppers, Inc. v. Royal Globe Insurance Co.* (1985) 175 Cal.App.3d 1, 62 [221 Cal.Rptr. 171], internal citations omitted.)

- "Where the injured party shows that, as a reasonable probability, profits would have been earned on the contract except for its breach, the loss of the anticipated profits is compensable. Where business activity has been interrupted by a breach of contract, damages for the loss of prospective profits that otherwise might have been made from its operation are generally recoverable where such damages are shown to have been foreseeable and reasonably certain." (*Brandon & Tibbs v. George Kevorkian Accountancy Corp.* (1990) 226 Cal.App.3d 442, 468 [277 Cal.Rptr. 40], internal citations omitted.)

<u>Secondary Sources</u>

- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 823–827
- California Breach of Contract Remedies (Cont.Ed.Bar 1980; 2001 supp.) Recovery of Money Damages, §§ 4.11–4.17

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854
Owner's/Lessor's Damages for Breach of Contract to Construct Improvements on Real Property

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To recover damages for breach of a contract to construct improvements on real property [*name of plaintiff*] must prove:

[[The reasonable cost to [*name of plaintiff*] of completing the work;]

[And the value of loss of use of the property;]

[And the reasonable cost of alternative housing from the date the work was to have been completed until the date the work was completed;]

[Less any amounts unpaid under the contract with [*name of defendant*];]]

[or]

[The difference between the fair market value of the property and its fair market value had the improvements been constructed.]

DIRECTIONS FOR USE

Read this instruction in conjunction with Instruction 850, *Introduction to Contract Damages.* The first bracketed alternative is for use in cases where the plaintiff owns the land. The second is for cases in which the plaintiff does not own the land. For a definition of "fair market value" see Instruction 1901, *"Fair Market Value" Explained*.

SOURCES AND AUTHORITY

- "The proper measure of damages for breach of a contract to construct improvements on real property where the work is to be done on plaintiff's property is ordinarily the reasonable cost to the plaintiff of completing the work and not the difference between the value of the property and its value had the improvements been constructed. A different rule applies, however, where improvements are to be made on property not owned by the injured party. 'In that event the injured party is unable to complete the work himself and, subject to the restrictions of sections 3300 and 3359 of the Civil Code, the proper measure of damages is the difference in value of the property with

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and without the promised performance, since that is the contractual benefit of which the injured party is deprived.' " (*Glendale Federal Savings & Loan Assn. v. Marina View Heights Development Co., Inc.* (1977) 66 Cal.App.3d 101, 123–124 [135 Cal.Rptr. 802], internal citations omitted.)

- "If the work were to be done on plaintiffs' property the proper measure of damages would ordinarily be the reasonable cost to plaintiffs of completing the work. A different rule applies, however, when the improvements are to be made on property that is not owned by the injured party." (*Coughlin v. Blair* (1953) 41 Cal.2d 587, 600 [262 P.2d 305], internal citations omitted.)

- "It is settled … that the measure of damages for the breach of a building construction contract is ordinarily such sum as is required to make the building conform to the contract. In such situations, the diminution of value rule cannot be invoked and the measure of damages is not the difference between the actual value of the property and its value had it been constructed in accordance with the plans and specifications." (*Kitchel v. Acree* (1963) 216 Cal.App.2d 119, 124 [30 Cal.Rptr. 714], internal citations omitted.)

- "The available damages for defective construction are limited to the cost of repairing the home, including lost use or relocation expenses, or the diminution in value." (*Erlich v. Menezes* (1999) 21 Cal.4th 543, 561 [87 Cal.Rptr.2d 886], internal citations omitted.)

- "Where the measure of damages turns on the value of property, whether liability sounds in tort or breach of contract, the normal standard is market value. The definition of market value and the principles governing its ascertainment are the same as those applicable to the valuation of property in eminent domain proceedings and in ad valorem taxation of property. [¶] In *Sacramento etc. R. R. Co. v. Heilbron*, market value was 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.' That classic exposition with subsequent refinements has always been the accepted definition of market value in California." (*Glendale Federal Savings & Loan Assn., supra,* 66 Cal.App.3d 101, 141–142, internal citations and footnote omitted.)

<u>Secondary Sources</u>

- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, § 854

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855
Obligation to Pay Money Only

To recover damages for the breach of a contract to pay money, [*name of plaintiff***] must prove the amount due under the contract.**

DIRECTIONS FOR USE

Read this instruction in conjunction with Instruction 850, *Introduction to Contract Damages.* If there is a dispute as to the appropriate rate of interest, the jury should be instructed to determine the rate. Otherwise, the judge should calculate the interest and add the appropriate amount of interest to the verdict.

SOURCES AND AUTHORITY

- Civil Code section 3302 provides: "The detriment caused by the breach of an obligation to pay money only, is deemed to be the amount due by the terms of the obligation, with interest thereon."

- Civil Code section 3289 provides:

  (a) Any legal rate of interest stipulated by a contract remains chargeable after a breach thereof, as before, until the contract is superseded by a verdict or other new obligation.
  (b) If a contract entered into after January 1, 1986, does not stipulate a legal rate of interest, the obligation shall bear interest at a rate of 10 percent per annum after a breach.
  For the purposes of this subdivision, the term contract shall not include a note secured by a deed of trust on real property.

- "The section is part of the original Civil Code and was intended to codify a common-law rule of damages for breach of a contract to pay a liquidated sum. In *Siminoff v. Jas. H. Goodman & Co. Bank, supra,* the court after careful and extensive analysis concluded that section 3302 was not intended to abolish the common-law measure of damages for dishonor of a check. *Hartford,* in reaching the opposite conclusion, failed even to note the common-law rule or the California cases which had followed it, and did not discuss the strong arguments in its favor advanced in the *Siminoff* opinion.

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The *Hartford* holding on section 3302 no longer applies to the instant problem since section 3320 clearly constitutes 'a legislative recognition that a depositor whose check is wrongfully dishonored may thereby sustain "actual damage" beyond the amount of the check' and thus supersedes the *Hartford* holding on the measure of damages." (*Weaver v. Bank of America National Trust & Savings Assn.* (1963) 59 Cal.2d 428, 436, fn. 11 [30 Cal.Rptr. 4], internal citations omitted.)

Secondary Sources

- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, § 853

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856
Buyer's Damages for Breach of Contract for Sale of Real Property

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To recover damages for the breach of a contract to sell real property, [*name of plaintiff***] must prove:**

1. **The difference between the fair market value of the property on the date of the breach and the contract price;**

2. **The amount of any payment made by [***name of plaintiff***] toward the purchase;**

3. **The amount of any reasonable expenses for examining title and preparing documents for the sale;**

4. **The amount of any reasonable expenses in preparing to occupy the property; and**

5. **[***Insert item(s) of claimed consequential damages***].**

DIRECTIONS FOR USE

Read this instruction in conjunction with Instruction 850, *Introduction to Contract Damages.* If the appropriate rate of interest is in dispute, the jury should be instructed to determine the rate. Otherwise, the judge should calculate the interest and add the appropriate amount of interest to the verdict.

For a definition of "fair market value" see Instruction 1901, *"Fair Market Value" Explained*.

SOURCES AND AUTHORITY

- Civil Code section 3306 provides: "The detriment caused by the breach of an agreement to convey an estate in real property, is deemed to be the price paid, and the expenses properly incurred in examining the title and preparing the necessary papers, the difference between the price agreed to be paid and the value of the estate agreed to be conveyed at the time of the breach, the expenses properly incurred in preparing to enter upon the land, consequential damages according to proof, and interest."

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- "Said Civil Code Section 3306, 'relating to detriment caused by breach of agreement to convey an estate in real property being a special provision, prevails over general statutes on damages.' " (*Gorges v. Johnson* (1959) 167 Cal.App.2d 349, 353 [334 P.2d 621], internal citations omitted.)

- Civil Code section 3289 provides:

  (a) Any legal rate of interest stipulated by a contract remains chargeable after a breach thereof, as before, until the contract is superseded by a verdict or other new obligation.
  (b) If a contract entered into after January 1, 1986, does not stipulate a legal rate of interest, the obligation shall bear interest at a rate of 10 percent per annum after a breach.

  For the purposes of this subdivision, the term contract shall not include a note secured by a deed of trust on real property.

- "A simple reading of the statute discloses that by its explicit terms it is adaptable only to a failure to convey, and not to a delay in conveying." (*Christensen v. Slawter* (1959) 173 Cal.App.2d 325, 330 [343 P.2d 341].)

- "This court itself has recently described section 3306 as providing for 'loss-of-bargain damages' measured by the difference between the contract price and the fair market value on the date of the breach." (*Reese v. Wong* (2001) 93 Cal.App.4th 51, 56 [112 Cal.Rptr.2d 669], internal citation omitted.)

- "It is settled that when a seller of real property fails or refuses to convey, a buyer who has made advance payments toward the purchase price may recover interest on those payments as damages for breach of contract. This rule is not limited to sales of real property; it applies to sales in general." (*Al-Husry v. Nilsen Farms Mini-Market, Inc.* (1994) 25 Cal.App.4th 641 [31 Cal.Rptr.2d 28], internal citations omitted.)

- Section 3306 does not ordinarily apply to breach of an unexercised option to buy property. (*Schmidt v. Beckelman* (1960) 187 Cal.App.2d 462, 470 [9 Cal.Rptr. 736].)

- " 'Generally, [consequential] damages are those which, in view of all facts known by the parties at the time of the making of the contract, may reasonably be supposed to have been considered as a likely consequence of a breach in the ordinary course of events. This provision would conform the measure of damages in real property conveyance breaches to the general contract measure of damages which is specified in Civil Code 3300: "... all the detriment proximately caused (by the breach), or which,

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in the ordinary course of things, would be likely to result therefrom." ' " (*Stevens Group Fund IV v. Sobrato Development Co.* (1991) 1 Cal.App.4th 886, 892 [2 Cal.Rptr.2d 460], quoting the Assembly Committee on Judiciary.)

- "Rents received from the lease of the property in this case are not properly an item of consequential damages. Here, plaintiff introduced evidence as to the fair market value of the property which included these profits. To allow these as consequential damages under these circumstances would have permitted a double recovery for plaintiff." (*Stevens Group Fund IV, supra,* 1 Cal.App.4th at p. 892.)

- "The phrase 'to enter upon the land' refers to the taking of possession rather than to things done to put the land to general use." (*Crag Lumber Co. v. Crofoot* (1956) 144 Cal.App.2d 755, 779 [301 P.2d 952].)

- "We think the phrase 'and interest' should continue to be read as referring to the generally applicable provisions of [Civil Code] section 3287 regarding prejudgment interest. As amended in 1967, subdivision (a) of section 3287 establishes a right to recover prejudgment interest on damages 'capable of being made certain by calculation' and subdivision (b) gives the court general discretionary authority to award prejudgment interest where damages are 'based upon a cause of action in contract ....' The discretionary authority conferred by subdivision (b) will ordinarily apply to loss-of-bargain damages measured by the contract price/market value differential." (*Rifkin v. Achermann* (1996) 43 Cal.App.4th 391, 397 [50 Cal.Rptr.2d 661].)

<u>Secondary Sources</u>

- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 843–844
- California Real Property Remedies Practice (Cont.Ed.Bar 1980; 1999 supp.) Breach of Seller-Buyer Agreements, §§ 4.11–4.14

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857
Seller's Damages for Breach of Contract to Purchase Real Property

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To recover damages for the breach of a contract to buy real property, [*name of plaintiff***] must prove:**

1. **The difference between the amount that was due to [***name of plaintiff***] under the contract and the fair market value of the property at the time of the breach; [and]**

2. **[***Insert item(s) of claimed consequential damages, e.g., resale expenses***].**

DIRECTIONS FOR USE

Read this instruction in conjunction with Instruction 850, *Introduction to Contract Damages.* If there is a dispute regarding the appropriate rate of interest, the jury should be instructed to determine the rate. Otherwise, the judge should calculate the interest and add the appropriate amount of interest to the verdict.

For a definition of "fair market value" see Instruction 1901, *"Fair Market Value" Explained*.

SOURCES AND AUTHORITY

- Civil Code section 3307 provides: "The detriment caused by the breach of an agreement to purchase an estate in real property is deemed to be the excess, if any, of the amount which would have been due to the seller under the contract over the value of the property to him or her, consequential damages according to proof, and interest."

- "It is generally accepted that the equivalent of value to the seller is fair market value. Fair market value is reckoned 'in terms of money.' " (*Abrams v. Motter* (1970) 3 Cal.App.3d 828, 840–841 [83 Cal.Rptr. 855], internal citations omitted.)

- "The "value of the property" to [plaintiff] is to be determined as of the date of the breach of the agreement by [defendant]." (*Allen v. Enomoto* (1964) 228 Cal.App.2d 798, 803 [39 Cal.Rptr. 815], internal citation omitted.)

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- There can be no damages where the value to the owner equals or exceeds the contract price. (*Newhart v. Pierce* (1967) 254 Cal.App.2d 783, 792 [62 Cal.Rptr. 553], internal citation omitted.)

- "[T]he view that this section is exclusive, and precludes other consequential damages occasioned by the breach, was rejected in *Royer v. Carter*. Under Civil Code, section 3300, other damages are recoverable, usually embracing the out-of-pocket expenses lost by failure of the transaction." (*Wade v. Lake County Title Co.* (1970) 6 Cal.App.3d 824, 830 [86 Cal.Rptr. 182], internal citation omitted.)

- "[C]ourts have permitted consequential damages, only where the seller has diligently attempted resale after the buyer has breached the contract." (*Askari v. R & R Land Co.* (1986) 179 Cal.App.3d 1101, 1107 [225 Cal.Rptr. 285], internal citation omitted.)

- "[I]f the property increases in value before trial and the vendor resells the property at a price higher than the value of the contract, there are no longer any loss of bargain damages." (*Spurgeon v. Drumheller* (1985) 174 Cal.App.3d 659, 664 [220 Cal.Rptr. 195].)

- "The same rule of no loss of bargain damages to the vendor applies where the resale is for the same price as the contract price." (*Spurgeon, supra,* 174 Cal.App.3d at p. 664, internal citations omitted.)

- "For the reason that no loss of bargain damages are available to a seller if there is a resale at the same or a higher price than the contract price, the law imposes on the seller of the property the duty to exercise diligence and to make a resale within the shortest time possible. In discussing the duty to mitigate where the vendee seeks return of a deposit, the *Sutter* court states the requirement that resales be made with reasonable diligence 'states a policy applicable to resales of real property. Whether the resale is made one, two or three months later, or whether it be a year or more, it should be made with reasonable diligence to qualify the vendor to an allowance of an off-set against the vendee's claim for restitution of money paid.' " (*Spurgeon, supra,* 174 Cal.App.3d at p. 665, internal citations omitted.)

- "Although it is well settled in the foregoing authorities that damages under Civil Code section 3307 for the difference between the contract price and property value may be insufficient to give the vendor the benefit of his bargain and he is entitled also to resale expenses and some costs of continued ownership, he should not be permitted to receive a windfall at the purchaser's expense." (*Smith v. Mady* (1983) 146 Cal.App.3d 129, 133 [194 Cal.Rptr. 42].)

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- "Inasmuch as under *Abrams* and *Sutter* the vendor has an obligation to resell promptly in order to obtain consequential damages and the resale price may fix the property value as a basis for Civil Code section 3307 damages, we are impelled to conclude that there is no inherent separateness in the original sale and subsequent resale transactions. The increased resale price should not be disregarded in considering an offset to consequential damages awarded to a vendor against a defaulting purchaser of real property." (*Smith, supra,* 146 Cal.App.3d at p. 133.)

- "The owner of real or personal property may competently testify to its value." (*Newhart, supra,* 254 Cal.App.2d at p. 789, internal citations omitted.)

Secondary sources

- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 846–848
- California Real Property Remedies Practice (Cont.Ed.Bar 1980; 1999 supp.), Breach of Seller-Buyer Agreements, §§ 4.37–4.43
- California Practice Guide: Real Property Transactions (The Rutter Group 2000), 11-C, § C., Seller's Remedies Upon Buyer's Breach—Damages and Specific Performance

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858
Mitigation of Damages

If [*name of defendant*] breached the contract and the breach caused harm, [*name of plaintiff*] is not entitled to recover damages for harm that [*name of defendant*] proves [*name of plaintiff*] 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/it] at the time, including [his/her/its] 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/it] spent for this purpose.

SOURCES AND AUTHORITY

- "The doctrine of mitigation of damages holds that '[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.' A plaintiff may not recover for damages avoidable through ordinary care and reasonable exertion. The duty to mitigate damages does not require an injured party to do what is unreasonable or impracticable. '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.)

- "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." (*Shaffer v. Debbas*, (1993) 17 Cal.App.4th 33, 41 [21 Cal.Rptr. 2d 110], internal citation omitted.)

- "A party injured by a breach of contract is required to do everything reasonably possible to negate his own loss and thus reduce the damages for which the other party has become liable. The plaintiff cannot recover for harm he could have foreseen and avoided by such reasonable efforts and without undue expense. However, the injured party is not precluded from recovery to the extent that he has made reasonable but

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unsuccessful efforts to avoid loss." (*Brandon & Tibbs v. George Kevorkian Accountancy Corp.* (1990) 226 Cal.App.3d 442, 460 [277 Cal.Rptr. 40], internal citations omitted.)

- "The burden of proving that losses could have been avoided by reasonable effort and expense must always be borne by the party who has broken the contract. Inasmuch as the law denies recovery for losses that can be avoided by reasonable effort and expense, justice requires that the risks incident to such effort should be carried by the party whose wrongful conduct makes them necessary. Therefore, special losses that a party incurs in a reasonable effort to avoid losses resulting from a breach are recoverable as damages." (*Brandon & Tibbs, supra,* 226 Cal.App.3d at pp. 460–461, internal citations omitted.)

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859
Present Cash Value of Future Damages

To recover for future harm, [*name of plaintiff*] must prove that such harm is reasonably certain to occur.

The amount of damages for future harm must be reduced to 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 which, 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 damages.]

[You will be provided with a table to help you calculate the present cash value.]

DIRECTIONS FOR USE

Present cash value tables have limited application. In order to use the tables, the discount rate to be used must be established by stipulation or by the evidence. Care must be taken that the table selected fits the circumstances of the case. Expert testimony will usually be required to accurately establish present values for future economic losses. However, tables may be helpful in many cases.

Give the second bracketed option if parties have stipulated to a discount rate or evidence has been presented from which the jury can determine an appropriate discount rate. 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].)

SOURCES AND AUTHORITY

- 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.”

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- "In an action for damages for such a breach, the plaintiff in that one action recovers all his damages, past and prospective. A judgment for the plaintiff in such an action absolves the defendant from any duty, continuing or otherwise, to perform the contract. The judgment for damages is substituted for the wrongdoer's duty to perform the contract." (*Coughlin v. Blair* (1953) 41 Cal.2d 587, 598 [262 P.2d 305], internal citations omitted.)

- "If the breach is partial only, the injured party may recover damages for non-performance only to the time of trial and may not recover damages for anticipated future non-performance. Furthermore, even if a breach is total, the injured party may treat it as partial, unless the wrongdoer has repudiated the contract. The circumstances of each case determine whether an injured party may treat a breach of contract as total." (*Coughlin*, *supra*, 41 Cal.2d at pp. 598–599, internal citations omitted.)

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860
Nominal Damages

If you decide that [*name of defendant*] breached the contract but also that [*name of plaintiff*] was not harmed by the breach, you must still award [*name of plaintiff*] nominal damages such as one dollar.

SOURCES AND AUTHORITY

- Civil Code section 3360 provides: "When a breach of duty has caused no appreciable detriment to the party affected, he may yet recover nominal damages."

- "A plaintiff is entitled to recover nominal damages for the breach of a contract, despite inability to show that actual damage was inflicted upon him, since the defendant's failure to perform a contractual duty is, in itself, a legal wrong that is fully distinct from the actual damages. The maxim that the law will not be concerned with trifles does not, ordinarily, apply to violation of a contractual right. Accordingly, nominal damages, which are presumed as a matter of law to stem merely from the breach of a contract may properly be awarded for the violation of such a right. And, by statute, such is also the rule in California." (*Sweet v. Johnson* (1959) 169 Cal.App.2d 630, 632–633 [337 P.2d 499], internal citations omitted.)

- "With one exception … an unbroken line of cases holds that nominal damages are limited to an amount of a few cents or a dollar." (*Avina v. Spurlock* (1972) 28 Cal.App.3d 1086, 1089 [105 Cal.Rptr. 198], internal citations omitted.)

Secondary Sources

- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, § 822

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861
Plaintiff May Not Recover Duplicate Contract and Tort Damages

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[*Name of plaintiff*] has made claims against [*name of defendant*] for breach of contract and [*insert tort action*]. If you decide that [*name of plaintiff*] has proved both claims, the same damages that resulted from both claims can be awarded only once.

DIRECTIONS FOR USE

If the issue of punitive damages is not bifurcated, read the following instruction: "You may consider awarding punitive damages only if [*name of plaintiff*] proves [his/her/its] claim for [*insert tort action*]."

SOURCES AND AUTHORITY

- "Here the jury was properly instructed that it could not award damages under both contract and tort theories, but must select which theory, if either, was substantiated by the evidence, and that punitive damages could be assessed if defendant committed a tort with malice or intent to oppress plaintiffs, but that such damages could not be allowed in an action based on breach of contract, even though the breach was wilful." (*Acadia, California, Ltd. v. Herbert* (1960) 54 Cal.2d 328, 336–337 [5 Cal.Rptr. 686].)

- "Ordinarily, a plaintiff asserting both a contract and tort theory arising from the same factual setting cannot recover damages under both theories, and the jury should be so instructed. Here, the court did not specifically instruct that damages could be awarded on only one theory, but did direct that punitive damages could be awarded only if the jury first determined that appellant had proved his tort action." (*Pugh v. See's Candies, Inc.* (1988) 203 Cal.App.3d 743, 760, fn. 13 [250 Cal.Rptr. 195], internal citation omitted.)

- "The trial court would have been better advised to make an explicit instruction that duplicate damages could not be awarded. Indeed, it had a duty to do so." (*Dubarry International, Inc. v. Southwest Forest Industries, Inc.* (1991) 231 Cal.App.3d 552, 565, fn. 16 [282 Cal.Rptr. 181], internal citation omitted.)

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1012
Loss of Design Immunity (*Cornette*)

[*Name of defendant***] is not responsible for harm caused to [***name of plaintiff***] based on the plan or design of the [***insert type of property, e.g., "highway"***] unless [***name of plaintiff***] proves the following:**

1. **That the [***insert type of property, e.g., "highway"***]'s original plan or design had become dangerous because of a change in physical conditions;**

2. **That [***name of defendant***] knew or should have known of the dangerous condition created because of the change in physical conditions; and**

3. **[That [***name of defendant***] had a reasonable time to obtain the funds and carry out the necessary corrective work to conform the property to a reasonable design or plan;] [or]**

   [That [*name of defendant***], unable to correct the condition due to practical impossibility or lack of funds, had not reasonably attempted to provide adequate warnings.]**

DIRECTIONS FOR USE

The judge should make the initial determination establishing design immunity. Two of the elements involved in that determination could potentially become jury issues, but, as a practical matter, these elements are unusually stipulated to or otherwise established.

SOURCES AND AUTHORITY

- Government Code section 830.6 provides, in part: "Neither a public entity nor a public employee is liable under this chapter for an injury caused by the plan or design of a construction of, or an improvement to, public property where such plan or design has been approved in advance of the construction or improvement by the legislative body of the public entity or by some other body or employee exercising discretionary authority to give such approval or where such plan or design is prepared in conformity with standards previously so approved, if the trial or appellate court determines that

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there is any substantial evidence upon the basis of which (a) a reasonable public employee could have adopted the plan or design or the standards therefor or (b) a reasonable legislative body or other body or employee could have approved the plan or design or the standards therefor."

- "A public entity claiming design immunity must establish three elements: (1) a causal relationship between the plan or design and the accident; (2) discretionary approval of the plan or design prior to construction; and (3) substantial evidence supporting the reasonableness of the plan or design." (*Cornette v. Dept. of Transportation* (2001) 26 Cal.4th 63, 66 [109 Cal.Rptr.2d 1], internal citations omitted.)

- "Design immunity does not necessarily continue in perpetuity. To demonstrate loss of design immunity a plaintiff must also establish three elements: (1) the plan or design has become dangerous because of a change in physical conditions; (2) the public entity had actual or constructive notice of the dangerous condition thus created; and (3) the public entity had a reasonable time to obtain the funds and carry out the necessary remedial work to bring the property back into conformity with a reasonable design or plan, or the public entity, unable to remedy the condition due to practical impossibility or lack of funds, had not reasonably attempted to provide adequate warnings." (*Cornette, supra,* 26 Cal.4th at p. 66, internal citations omitted.)

- "The rationale for design immunity is to prevent a jury from second-guessing the decision of a public entity by reviewing the identical questions of risk that had previously been considered by the government officers who adopted or approved the plan or design." (*Cornette, supra,* 26 Cal.4th at p. 69, internal citation omitted.)

- "The third element of design immunity, the existence of substantial evidence supporting the reasonableness of the adoption of the plan or design, must be tried by the court, not the jury. Section 830.6 makes it quite clear that 'the trial or appellate court' is to determine whether 'there is any substantial evidence upon the basis of which (a) a reasonable public employee could have adopted the plan or design or the standards therefor or (b) a reasonable legislative body or other body or employee could have approved the plan or design or the standards therefor.' The question presented by this case is whether the Legislature intended that the three issues involved in determining whether a public entity has lost its design immunity should also be tried by the court. Our examination of the text of section 830.6, the legislative history of that section, and our prior decisions leads us to the conclusion that, where triable issues of material fact are presented, as they were here, a plaintiff has a right to a jury trial as to the issues involved in loss of design immunity." (*Cornette, supra,* 26 Cal.4th at pp. 66–67.)

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1254A
First Amendment Defense to Use or Appropriation of Name or Likeness (*Comedy III*)

[*Name of defendant***] claims that [he/she] has not violated [***name of plaintiff***]'s right of privacy because the [***insert type of work, e.g. "picture"***] is protected by the First Amendment's guarantee of freedom of speech and expression. To succeed, [***name of defendant***] must prove either of the following:**

1. **That the [***insert type of work, e.g. "picture"***] adds something new to [***name of plaintiff***]'s likeness, giving it a new expression, meaning, or message; or**

2. **That the marketability and economic value of the [***insert type of work, e.g. "picture"***] does not derive primarily from [***name of plaintiff***]'s fame.**

SOURCES AND AUTHORITY

- "In sum, when an artist is faced with a right of publicity challenge to his or her work, he or she may raise as affirmative defense that the work is protected by the First Amendment inasmuch as it contains significant transformative elements or that the value of the work does not derive primarily from the celebrity's fame." (*Comedy III Productions, Inc. v. Gary Saderup, Inc.* (2001) 25 Cal.4th 387, 407 [106 Cal.Rptr.2d 126].)

- "Although surprisingly few courts have considered in any depth the means of reconciling the right of publicity and the First Amendment, we follow those that have in concluding that depictions of celebrities amounting to little more than the appropriation of the celebrity's economic value are not protected expression under the First Amendment." (*Comedy III Productions, Inc., supra,* at p. 400.)

- "Furthermore, in determining whether a work is sufficiently transformative, courts may find useful a subsidiary inquiry, particularly in close cases: does the marketability and economic value of the challenged work derive primarily from the fame of the celebrity depicted? If this question is answered in the negative, then there would generally be no actionable right of publicity. When the value of the work comes principally from some source other than the fame of the celebrity—from the

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creativity, skill, and reputation of the artist—it may be presumed that sufficient transformative elements are present to warrant First Amendment protection. If the question is answered in the affirmative, however, it does not necessarily follow that the work is without First Amendment protection —it may still be a transformative work." (*Comedy III Productions, Inc., supra,* at p. 407.)

- "As the Supreme Court has stated, the central purpose of the inquiry into this fair use factor 'is to see … whether the new work merely "supersede[s] the objects" of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is "transformative."' " (*Comedy III Productions, Inc., supra,* at p. 404, internal citations omitted.)

- "We emphasize that the transformative elements or creative contributions that require First Amendment protection are not confined to parody and can take many forms, from factual reporting to fictionalized portrayal, form heavy-handed lampooning to subtle social criticism." (*Comedy III Productions, Inc., supra,* at p. 406.)

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1830
Conversion—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] wrongfully exercised control over [***name of plaintiff***]'s personal property. To establish this claim, [***name of plaintiff***] must prove the following:**

1. **That [***name of plaintiff***] [owned/possessed/had a right to possess] the [***insert item of personal property***];**

2. **That [***name of defendant***] intentionally [***insert one of the following:***]**

   [took possession of the [*insert item of personal property***] for a significant period of time;]**

   [prevented [*name of plaintiff***] from having access to the [***insert item of personal property***] for a significant period of time;]**

   [destroyed the [*insert item of personal property***];]**

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

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.**

SOURCES AND AUTHORITY

- "Conversion is the wrongful exercise of dominion over the property of another. The elements of a conversion claim are: (1) the plaintiff's ownership or right to possession of the property; (2) the defendant's conversion by a wrongful act or disposition of property rights; and (3) damages. Conversion is a strict liability tort. The foundation of the action rests neither in the knowledge nor the intent of the defendant. Instead, the tort consists in the breach of an absolute duty; the act of conversion itself is tortious. Therefore, questions of the defendant's good faith, lack of knowledge, and motive are ordinarily immaterial." (*Burlesci v. Petersen* (1998) 68 Cal.App.4th 1062, 1066 [80 Cal.Rptr.2d 704], internal citations omitted.)

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- "The first element of that cause of action is his ownership or right to possession of the property at the time of the conversion. Once it is determined that [plaintiff] has a right to reinstate the contract, he has a right to possession of the vehicle and standing to bring conversion. Unjustified refusal to turn over possession on demand constitutes conversion even where possession by the withholder was originally obtained lawfully and of course so does an unauthorized sale." (*Cerra v. Blackstone* (1985) 172 Cal.App.3d 604, 609 [218 Cal.Rptr. 15], internal citations omitted.)

- " 'To establish a conversion, plaintiff must establish an actual interference with his ownership or right of possession. ... Where plaintiff neither has title to the property alleged to have been converted, nor possession thereof, he cannot maintain an action for conversion.' " (*Moore v. Regents of the University of California* (1990) 51 Cal.3d 120, 136 [271 Cal.Rptr. 146], internal citations omitted.)

- "In a conversion action the plaintiff need show only that he was entitled to possession at the time of conversion; the fact that plaintiff regained possession of the converted property does not prevent him from suing for damages for the conversion." (*Enterprise Leasing Corp. v. Shugart Corp*. (1991) 231 Cal.App.3d 737, 748 [282 Cal.Rptr. 620], internal citation omitted.)

- "It is clear that legal title to property is not a requisite to maintain an action for damages in conversion. To mandate a conversion action 'it is not essential that plaintiff shall be the absolute owner of the property converted but she must show that she was entitled to immediate possession at the time of conversion.' " (*Hartford Financial Corp. v. Burns* (1979) 96 Cal.App.3d 591, 598 [158 Cal.Rptr. 169], internal citation omitted.)

- "[T]he law is well settled that there can be no conversion where an owner either expressly or impliedly assents to or ratifies the taking, use or disposition of his property." (*Farrington v. A. Teichert & Son, Inc.* (1943) 59 Cal.App.2d 468, 474 [139 P.2d 80], internal citations omitted.)

- "As to intentional invasions of the plaintiff's interests, his consent negatives the wrongful element of the defendant's act, and prevents the existence of a tort. 'The absence of lawful consent,' said Mr. Justice Holmes, 'is part of the definition of an assault.' The same is true of false imprisonment, conversion, and trespass." (*Tavernier v. Maes* (1966) 242 Cal.App.2d 532, 552 [51 Cal.Rptr. 575], internal citations omitted.)

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- "Money can be the subject of an action for conversion if a specific sum capable of identification is involved. [¶] Neither legal title nor absolute ownership of the property is necessary. A party need only allege it is 'entitled to immediate possession at the time of conversion.' However, a mere contractual right of payment, without more, will not suffice." (*Farmers Insurance Exchange v. Zerin* (1997) 53 Cal.App.4th 445, 451–452 [61 Cal.Rptr.2d 707], internal citations omitted.)

- " 'Conversion is any act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein.' One who buys property in good faith from a party lacking title and the right to sell may be liable for conversion. The remedies for conversion include specific recovery of the property, damages, and a quieting of title." (*Farmers Insurance Exchange, supra*, 53 Cal.App.4th at pp. 1081–1082, internal citations omitted.)

- "Conversion is the wrongful exercise of dominion over the personal property of another. The act must be knowingly or intentionally done, but a wrongful intent is not necessary. Because the act must be knowingly done, 'neither negligence, active or passive, nor a breach of contract, even though it result in injury to, or loss of, specific property, constitutes a conversion.' It follows therefore that mistake, good faith, and due care are ordinarily immaterial, and cannot be set up as defenses in an action for conversion." (*Taylor v. Forte Hotels International* (1991) 235 Cal.App.3d 1119, 1124 [1 Cal.Rptr.2d 189], internal citations omitted.)

- "In order to establish a conversion, the plaintiff must show an intention or purpose to convert the goods and to exercise ownership over them, or to prevent the owner from taking possession of his property." (*Oakes v. Suelynn Corp.* (1972) 24 Cal.App.3d 271, 278 [100 Cal.Rptr. 838], internal citations omitted.)

- "It is not necessary that there be a manual taking of the property; it is only necessary to show an assumption of control or ownership over the property, or that the alleged converter has applied the property to his own use." (*Oakdale Village Group v. Fong* (1996) 43 Cal.App.4th 539, 544 [50 Cal.Rptr.2d 810], internal citations omitted.)

- "In order to establish a conversion, the plaintiff 'must show an intention or purpose to convert the goods and to exercise ownership over them, or to prevent the owner from taking possession of his property.' Thus, a necessary element of the tort is an intent to exercise ownership over property which belongs to another. For this reason, conversion is considered an intentional tort." (*Collin v. American Empire Insurance Co.* (1994) 21 Cal.App.4th 787, 812 [26 Cal.Rptr.2d 391], internal citations omitted.)

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- "A conversion can occur when a willful failure to return property deprives the owner of possession." (*Fearon v. Department of Corrections* (1984) 162 Cal.App.3d 1254, 1257 [209 Cal.Rptr. 309], internal citation omitted.)

- " 'Negligence in caring for the goods is not an act of dominion over them such as is necessary to make the bailee liable as a converter.' Thus a warehouseman's negligence in causing a fire which destroyed the plaintiffs' goods will not support a conversion claim." (*Gonzales v. Personal Storage Inc.* (1997) 56 Cal.App.4th 464, 477 [65 Cal.Rptr.2d 473], internal citations omitted.)

- "Although damages for conversion are frequently the equivalent to the damages for negligence, i.e., specific recovery of the property or damages based on the value of the property, negligence is no part of an action for conversion." (*Taylor, supra*, 235 Cal.App.3d at p. 1123, internal citation omitted.)

- "A person without legal title to property may recover from a converter if the plaintiff is responsible to the true owner, such as in the case of a bailee or pledgee of the property." (*Department of Industrial Relations v. UI Video Stores, Inc.* (1997) 55 Cal.App.4th 1084, 1096 [64 Cal.Rptr.2d 457], internal citation omitted.)

Secondary Sources

- 5 Witkin, Summary of California Law (9th ed. 1990) Torts, § 610 et seq.

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1831
Trespass to Chattels—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] wrongfully trespassed on [***name of plaintiff***]'s personal property. To establish this claim, [***name of plaintiff***] must prove the following:**

1. That [*name of plaintiff***] [owned/possessed/had a right to possess] the [***insert item of personal property***];**

2. That [*name of defendant***] intentionally [***insert one of the following:***]**

[interfered with [*name of plaintiff***]'s use or possession of the [***insert item of personal property***];]**

[damaged the [*insert item of personal property***];]**

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

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.**

SOURCES AND AUTHORITY

- "Trespass to chattel, although seldom employed as a tort theory in California …, lies where an intentional interference with the possession of personal property has proximately caused injury. Prosser notes trespass to chattel has evolved considerably from its original common law application—concerning the asportation of another's tangible property—to include even the unauthorized use of personal property: 'Its chief importance now,' according to Prosser, 'is that there may be recovery ... for interferences with the possession of chattels which are not sufficiently important to be classed as conversion, and so to compel the defendant to pay the full value of the thing with which he has interfered. Trespass to chattels survives today, in other words, largely as a little brother of conversion.' " (*Thrifty-Tel, Inc. v. Bezenek* (1996) 46 Cal.App.4th 1559, 1566–1567 [54 Cal.Rptr.2d 468], footnotes and internal citations omitted.)

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- "Where the conduct complained of does not amount to a substantial interference with possession or the right thereto, but consists of intermeddling with or use of or damages to the 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." (*Zaslow v. Kroenert* (1946) 29 Cal.2d 541, 551 [176 P.2d 1], internal citations omitted.)

- Restatement Second of Torts, section 218 provides:

  One who commits a trespass to a chattel is subject to liability to the possessor of the chattel if, but only if,
  (a) he dispossesses the other of the chattel, or
  (b) the chattel is impaired as to its condition, quality, or value, or
  (c) the possessor is deprived of the use of the chattel for a substantial time, or
  (d) bodily harm is caused to the possessor, or harm is caused to some person or thing in which the possessor has a legally protected interest.

- Restatement Second of Torts, section 222, comment (a), states: "Normally any dispossession is so clearly a serious interference with the right of control that it amounts to a conversion; and it is frequently said that any dispossession is a conversion. There may, however, be minor and unimportant dispossessions, such as taking another man's hat by mistake and returning it within two minutes upon discovery of the mistake, which do not seriously interfere with the other's right of control, and so do not amount to conversion. In such a case the remedy of the action of trespass remains, and will allow recovery of damages for the interference with the possession."

- "It is well settled that a person having neither the possession nor the right to the possession of personal chattels, cannot maintain trespass or trover for an injury done to the property." (*Triscony v. Orr* (1875) 49 Cal. 612, 617, internal citations omitted.)

- "In order to prevail on a claim for trespass based on accessing a computer system, the plaintiff must establish: (1) defendant intentionally and without authorization interfered with plaintiff's possessory interest in the computer system; and (2) defendant's unauthorized use proximately resulted in damage to plaintiff." (*eBay, Inc. v. Bidder's Edge, Inc.* (2000) 100 F.Supp.2d 1058, 1069–1070, internal citations omitted.)

- "The measure of damages in trespass is not the whole value of the property interfered with, but rather the actual diminution in its value caused by the interference. More

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important for this case, a judgment for conversion can be obtained with only nominal damages, whereas liability for trespass to chattels exists only on a showing of actual damage to the property interfered with." (*Pearson v. Dodd* (C.A.D.C 1969) 410 F.2d 701, 707, footnotes omitted.)

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1832
Presumed Measure of Damages for Conversion (Civ. Code, § 3336)

If you decide that [*name of plaintiff***] has proved [his/her/its] 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."**

[*Name of plaintiff***] must prove the amount of [his/her/its] damages. However, [***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. You must not speculate or guess in awarding damages.**

The following are the specific items of damages claimed by [*name of plaintiff***]:**

1. **[The fair market value of the [***insert item of personal property***] at the time [***name of defendant***] wrongfully exercised control over it;]**

   [or]

   [Special damages resulting from [*name of defendant***]'s conduct.]**

2. **Reasonable compensation for the time and money spent by [***name of plaintiff***] in attempting to recover the [***insert item of personal property***].**

3. **[Any emotional distress suffered by [***name of plaintiff***] as a result of [***name of defendant***]'s conduct.]**

[In order to recover special damages, [*name of plaintiff***] must prove:**

(a) That [*describe special circumstances that require a measure of damages other than value***];**

(b) That it was reasonably foreseeable that special injury or harm would result from the conversion; and

(c) That reasonable care on [*name of plaintiff***]'s part would not have prevented the loss.]**

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[“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 know all the uses and purposes for which the [*insert item*] is reasonably capable of being used.]**

DIRECTIONS FOR USE

The third element of listed damages, emotional distress, is bracketed because it appears that such damages are recoverable only if the second alternative measure of damages stated in the first paragraph of Civil Code section 3336 applies. (See *Gonzales v. Personal Storage, Inc.* (1997) 56 Cal.App.4th 464 [65 Cal.Rptr.2d 473].)

SOURCES AND AUTHORITY

- Civil Code section 3336 provides:

  The detriment caused by the wrongful conversion of personal property is presumed to be:

  First—The value of the property at the time of the conversion, with the interest from that time, or, an amount sufficient to indemnify the party injured for the loss which is the natural, reasonable and proximate result of the wrongful act complained of and which a proper degree of prudence on his part would not have averted; and

  Second—A fair compensation for the time and money properly expended in pursuit of the property.

- Civil Code section 3337 provides: “The presumption declared by the last section cannot be repelled, in favor of one whose possession was wrongful from the beginning, by his subsequent application of the property to the benefit of the owner, without his consent.”

- “[W]e are of the opinion that section 3337 can only be held to apply to a situation where the property was voluntarily applied by the party guilty of conversion to the benefit of the injured party, and can have no application to a situation such as here where the application was compelled by a legal duty.” (*Goldberg v. List* (1938) 11 Cal.2d 389, 393 [79 P.2d 1087].)

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- "Although the first part of section 3336 appears to provide for alternative measures of recovery, the first of the two measures, namely the value of the property converted at the time and place of conversion with interest from that time, is generally considered to be the appropriate measure of damages in a conversion action. The determination of damages under the alternative provision is resorted to only where the determination on the basis of value at the time of conversion would be manifestly unjust." (*Myers v. Stephens* (1965) 233 Cal.App.2d 104, 116 [43 Cal.Rptr. 420], internal citations omitted.)

- "As a general rule, the value of the converted property is the appropriate measure of damages, and resort to the alternative occurs only where a determination of damages on the basis of value would be manifestly unjust. Accordingly, a person claiming damages under the alternative provision must plead and prove special circumstances that require a measure of damages other than value, and the jury must determine whether it was reasonably foreseeable that special injury or damage would result from the conversion." (*Lueter v. State of California* (2002) 94 Cal.App.4th 1285, 1302 [115 Cal.Rptr.2d 68], internal citations omitted.)

- "The damage measures set forth in the first paragraph of section 3336 are in the alternative. The first alternative is to compensate for the value of the property at the time of conversion with interest from the time of the taking. The second alternative is compensation in a sum equal to the amount of loss legally caused by the conversion and which could have been avoided with a proper degree of prudence. Both of these alternatives are in addition to the damage element for the time spent pursuing the converted property set forth in the second paragraph of section 3336." (*Moreno v. Greenwood Auto Center* (2001) 91 Cal.App.4th 201, 209 [110 Cal.Rptr.2d 177], internal citations omitted.)

- "Civil Code section 3336 sets out the presumptive measure of damages in conversion, which is rebuttable, save and except when section 3337 applies. Under Civil Code section 3337, a defendant cannot rebut the presumption by claiming that he applied the converted property to plaintiff's benefit when he took unlawful possession of the property from the beginning. Consequently, the effect of section 3337 is to prevent mitigation when property is stolen from the plaintiff and subsequently applied to his benefit. In this situation, the defendant will not be able to claim that his conversion benefited plaintiff; he will thereby be prevented from claiming an offset derived from his original wrong. In contrast to this situation, if the particular facts of a case indicate, as in the instant case, that the possession was lawful before the conversion occurred … Civil Code section 3337 is inapplicable, and a converter is not precluded

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from claiming mitigation of damages." (*Dakota Gardens Apartment Investors "B" v. Pudwill* (1977) 75 Cal.App.3d 346, 351–352 [142 Cal.Rptr. 126].)

- "[W]e conclude that notwithstanding further developments in the law of negligence, damages for emotional distress growing out of a defendant's conversion of personal property are recoverable." (*Gonzales, supra,* 56 Cal.App.4th at p. 477, internal citations omitted.)

- "In the absence of special circumstances the appropriate measure of damages for conversion of personal property is the fair market value of that property plus interest from the date of conversion, the standard first listed in section 3336, Civil Code. However, where proof establishes an injury beyond that which would be adequately compensated by the value of the property and interest, the court may award such amounts as will indemnify for all proximate reasonable loss caused by the wrongful act. Where damages for loss of use exceeds the legal rate of interest, it is appropriate to award the former, but not both." (*Lint v. Chisholm* (1981) 121 Cal.App.3d 615, 624–625 [177 Cal.Rptr. 314], internal citations omitted.)

- " 'To entitle a party to such compensation the [evidence] should tend to show that money was properly paid out and time properly lost in pursuit of the property, and how much.' Such evidence should be definite and certain. Expenses 'incurred in preparation for litigation and not in pursuit of property' cannot be allowed as damages under Civil Code section 3336. Additionally, any such compensation must be fair, i.e., reasonable." (*Haines v. Parra* (1987) 193 Cal.App.3d 1553, 1559 [239 Cal.Rptr. 178], internal citations omitted.)

- "[A]lthough good faith and mistake are not defenses to an action for conversion, the plaintiff's damages will be reduced if the defendant returns the property or the plaintiff otherwise recovers the property." (*Krusi v. Bear, Stearns & Co.* (1983) 144 Cal.App.3d 664, 673 [192 Cal.Rptr. 793], 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.)

- "Ordinarily 'value of the property' at the time of the conversion is determined by its market value at that time. However, '[w]here 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 a willful wrongdoer.' " (*In re Brian S.* (1982) 130 Cal.App.3d 523, 530 [181 Cal.Rptr. 778], internal citations omitted.)

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- "In an action for damages for conversion, it is the rule that the plaintiff, although owning but a limited or qualified interest in the property, may, as against a stranger who has no ownership therein, recover the full value of the property converted." (*Camp v. Ortega* (1963) 209 Cal.App.2d 275, 286 [25 Cal.Rptr. 873], internal citations omitted.)

- "A plaintiff seeking recovery under the alternative provision of the statute must therefore plead and prove the existence of 'special circumstances which require a different measure of damages to be applied.' Having done so, the trier of fact must then determine 'whether it was reasonably forseeable to a prudent person, having regard for the accompanying circumstances, that injury or damage would likely result from his wrongful act.' " (*Krueger v. Bank of America* (1983) 145 Cal.App.3d 204, 215 [193 Cal.Rptr. 322], internal citations omitted.)

- "Defendants contend that the anticipated loss of profits is not 'the natural, reasonable and proximate result of the wrongful act complained of,' within the meaning of section 3336. Although no California case which has applied the alternative measure of damages in a conversion case has specifically defined this language, we are satisfied that its meaning is synonymous with the term 'proximate cause' or 'legal cause.' These terms mean, in essence, 'that there be some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered.' In determining whether this connection exists, the question is whether it was reasonably foreseeable to a prudent person, having regard for the accompanying circumstances, that injury or damage would likely result from his wrongful act. This question being one of fact to be determined." (*Myers, supra,* 233 Cal.App.2d at p. 119–120, internal citations omitted.)

- "In exceptional circumstances, to avoid injustice, loss of profits may be the measure." (*Newhart v. Pierce* (1967) 254 Cal.App.2d 783, 794 [62 Cal.Rptr. 553], internal citation omitted.)

<u>Secondary Sources</u>

6 Witkin, Summary of California Law (9th ed. 1990) Torts, § 1455

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1259
Damages

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 all harm that was caused by [*name of defendant***], even if the harm could not have been anticipated.**

[*Name of plaintiff***] must prove the amount of [his/her] damages. However, [***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. You must not speculate or guess in awarding damages.**

The following are the specific items of damages claimed by [*name of plaintiff***]:**

1. **[Mental suffering/anxiety/humiliation/emotional distress;]**

2. **[Harm to reputation and loss of standing in the community;]**

3. **[The commercial value of [***name of plaintiff***]'s name or likeness;]**

4. **[***Insert other applicable item of damage.***]**

No fixed standard exists for deciding the amount of damages for [*insert item of mental or emotional distress***]. You must use your judgment to decide a reasonable amount based on the evidence and your common sense.**

[To recover for future [*insert item of mental or emotional distress***], [***name of plaintiff***] must prove that [he/she] is reasonably certain to suffer that harm.]**

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DIRECTIONS FOR USE

This instruction is not intended for cases involving invasion of privacy by false light. Damages for false light are similar to the damages available in defamation. (See Instructions 1200 to 1205).

Item 2 will probably not be relevant in all cases. It will have particular application to the aspect of this tort involving the publication of private facts. (See *Diaz v. Oakland Tribune, Inc.* (1983) 139 Cal.App.3d 118, 137 [188 Cal.Rptr. 762].)

Item 3 is intended only for cases involving violation of privacy by appropriation.

SOURCES AND AUTHORITY

- Restatement Second of Torts, section 652H provides:

  One who has established a cause of action for invasion of his privacy is entitled to recover damages for
  (a) the harm to his interest in privacy resulting from the invasion;
  (b) his mental distress proved to have been suffered if it is of a kind that normally results from such an invasion; and
  (c) special damage of which the invasion is a legal cause.

  Note that this Restatement section has not been cited by any published California cases.

- "Damages recoverable in California for invasion of a privacy right were discussed in detail in *Fairfield v. American Photocopy Equipment Co.* The Court of Appeal declared that because the interest involved privacy, the damages flowing from its invasion logically would include an award for mental suffering and anguish. *Fairfield* was an appropriation case, but the principles it laid down concerning damage awards in privacy cases relied on a body of California law which had already recognized violation of the right of privacy as a tort." (*Miller v. National Broadcasting Corp.* (1986) 187 Cal.App.3d 1463, 1484 [232 Cal.Rptr. 668], internal citation omitted.)

- "The elements of emotional distress damages, i.e., anxiety, embarrassment, humiliation, shame, depression, feelings of powerlessness, anguish, etc. would thus be subjects of legitimate inquiry by a jury in the action before us, taking into account all of the consequences and events which flowed from the actionable wrong." (*Miller, supra,* 187 Cal.App.3d at p. 1485.)

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- "The actual injury involved herein is not limited to out-of-pocket loss. It generally includes 'impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering.' " (*Diaz, supra,* 139 Cal.App.3d at p. 137, internal citation omitted.)

- In *Time, Inc. v. Hill* (1967) 385 U.S. 374, 384, footnote 9 [87 S.Ct. 534, 541, 17 L.Ed.2d 456], the court stated: "In the 'right of privacy' cases the primary damage is the mental distress from having been exposed to public view, although injury to reputation may be an element bearing upon such damage."

- "There is a distinction between causes of action for invasion of privacy and defamation with regard to the respective interests protected and compensated by each. 'The gist of a cause of action in a privacy case is not injury to the character or reputation but a direct wrong of a personal character resulting in injury to the feelings without regard to any effect which the publication may have on the property, business, pecuniary interest, or the standing of the individual in the community. The right of privacy concerns one's own peace of mind, while the right of freedom from defamation concerns primarily one's reputation. The injury is mental and subjective.'" (*Selleck v. Globe International, Inc.* (1985) 166 Cal.App.3d 1123, 1135 [212 Cal.Rptr. 838], internal citations omitted.)

- "California recognizes the right to profit from the commercial value of one's identity as an aspect of the right of publicity." (*Gionfriddo v. Major League Baseball* (2001) 94 Cal.App.4th 400, 409 [114 Cal.Rptr.2d 307], internal citations omitted.)

- "What may have originated as a concern for the right to be left alone has become a tool to control the commercial use and, thus, protect the economic value of one's name, voice, signature, photograph, or likeness." (*KNB Enterprises v. Matthews* (2000) 78 Cal.App.4th 362, 366 [92 Cal.Rptr.2d 713].)

- "The first type of appropriation is the right of publicity … which is 'in essence that the reaction of the public to name and likeness, which may be fortuitous or which may be managed or planned, endows the name and likeness of the person involved with commercially exploitable opportunities.' The other is the appropriation of the name and likeness that brings injury to the feelings, that concerns one's own peace of mind, and that is mental and subjective." (*Dora v. Frontline Video, Inc.* (1993) 15 Cal.App.4th 536, 541–542 [18 Cal.Rptr.2d 790], internal citations omitted.)

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1260
Damages Under Civil Code Section 3344

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."

[*Name of plaintiff*] must prove the amount of [his/her] damages. However, [*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. You must not speculate or guess in awarding damages.

The following are the specific items of damages claimed by [*name of plaintiff*]:

1. **Humiliation, embarrassment, and mental distress;**

2. **Harm to [*name of plaintiff*]'s reputation; [and]**

3. **[*Insert other item(s) of claimed harm*].**

If [*name of plaintiff*] has not proved the above damages, or has proved an amount of damages less than $750, then you must award [him/her] $750.

In addition, [*name of plaintiff*] may recover any profits that [*name of defendant*] received from the use of [*name of plaintiff*]'s [name/voice/signature/photograph/likeness] [that have not already been taken into account in computing the above damages]. To establish the amount of such profits you must:

1. **Determine the gross, or total, revenue that [*name of defendant*] received from such use;**

2. **Determine the expenses that [*name of defendant*] had in obtaining the gross revenue; and**

3. **Deduct [*name of defendant*]'s expenses from the gross revenue.**

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[*Name of plaintiff*] must prove the amount of gross revenue, and [*name of defendant*] must prove the amount of expenses

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DIRECTIONS FOR USE

Give the bracketed phrase in the last full paragraph only if profits have been included in the calculation of actual damages.

The task force recognizes some ambiguity in Civil Code section 3344 regarding whether the minimum measure of damages is $750 plus profits or just $750. If the court decides that $750 is to be awarded as an alternative to all other damages, including profits, then the sentence regarding $750 should be moved to the end of the instruction.

SOURCES AND AUTHORITY

- 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."

- "[Plaintiff] alleges, and submits evidence to show, that he was injured economically because the ad will make it difficult for him to endorse other automobiles, and emotionally because people may be led to believe he has abandoned his current name and assume he has renounced his religion. These allegations suffice to support his action. Injury to a plaintiff's right of publicity is not limited to present or future economic loss, but 'may induce humiliation, embarrassment, and mental distress.' " (*Abdul-Jabbar v. General Motors Corp.* (9th Cir. 1996) 85 F.3d 407, 416, internal citation omitted.)

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1109
Buyer's Damages for Purchase or Acquisition of Property

If you decide that [*name of plaintiff*] has proved [his/her/its] 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."

[*Name of plaintiff*] must prove the amount of [his/her/its] damages. However, [*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. You must not speculate or guess in awarding damages.

The following are the specific items of damages claimed by [*name of plaintiff*]:

1. **The difference between [the amount that [*name of plaintiff*] paid] [or] [the fair market value of what [*name of plaintiff*] exchanged for the property] and the fair market value of the property at the time of sale;**

2. **Amounts that [*name of plaintiff*] reasonably spent in reliance on [*name of defendant*]'s [false representation/failure to disclose/promise]; [and]**

3. **[*Insert additional harm arising from the transaction*] caused by [*name of defendant*]'s [false representation/failure to disclose/promise]; [and]**

4. **[Lost profits [or other gains].]**

DIRECTIONS FOR USE

For an instruction on damages for loss of use see Instruction 2004G, *Loss of Use of Real Property (Economic Damage).*

The first element of this instruction should be modified in cases involving promissory fraud: "In cases of promissory fraud, the damages are measured by market value as of the date the promise was breached because that is the date when the damage occurred." (*Glendale Federal Savings & Loan Assn. v. Marina View Heights Development Co.* (1977) 66 Cal.App.3d 101, 145–146 [135 Cal.Rptr. 802].)

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SOURCES AND AUTHORITY

- Civil Code section 3343 provides:

(a) One defrauded in the purchase, sale or exchange of property is entitled to recover the difference between the actual value of that with which the defrauded person parted and the actual value of that which he received, together with any additional damage arising from the particular transaction, including any of the following:
(1) Amounts actually and reasonably expended in reliance upon the fraud.
(2) An amount which would compensate the defrauded party for loss of use and enjoyment of the property to the extent that any such loss was proximately caused by the fraud.
(3) Where the defrauded party has been induced by reason of the fraud to sell or otherwise part with the property in question, an amount which will compensate him for profits or other gains which might reasonably have been earned by use of the property had he retained it.
(4) Where the defrauded party has been induced by reason of the fraud to purchase or otherwise acquire the property in question, an amount which will compensate him for any loss of profits or other gains which were reasonably anticipated and would have been earned by him from the use or sale of the property had it possessed the characteristics fraudulently attributed to it by the party committing the fraud, provided that lost profits from the use or sale of the property shall be recoverable only if and only to the extent that all of the following apply:
(i) The defrauded party acquired the property for the purpose of using or reselling it for a profit.
(ii) The defrauded party reasonably relied on the fraud in entering into the transaction and in anticipating profits from the subsequent use or sale of the property.
(iii) Any loss of profits for which damages are sought under this paragraph have been proximately caused by the fraud and the defrauded party's reliance on it.
(b) Nothing in this section shall do either of the following:
(1) Permit the defrauded person to recover any amount measured by the difference between the value of property as represented and the actual value thereof.
(2) Deny to any person having a cause of action for fraud or deceit any legal or equitable remedies to which such person may be entitled.

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- "As they apply to damages for fraud, subdivisions (a)(2) and (a)(3) of Section 3343 are limited to recovery of damages by sellers of real property, while subdivision (a)(4) deals with purchasers of real property." (*Channell v. Anthony* (1976) 58 Cal.App.3d 290, 309 [129 Cal.Rptr. 704], footnote omitted.)

- "Before 1935 the California courts had no statutory mandate on the measure of damages for fraud. While the 'benefit of the bargain' measure of damages was generally employed, on occasion California courts sometimes applied the 'out of pocket' rule when the 'loss of bargain' rule was difficult to apply or would work a hardship on plaintiff or defendant." (*Channell, supra,* 58 Cal.App.3d at p. 309.)

- "We find nothing in section 3343 as amended which requires that a plaintiff show 'out-of-pocket' loss (i.e., an amount by which the consideration paid exceeded the value of the property received) in order to be entitled to any recovery for fraud in a property transaction." (*Stout v. Turney* (1978) 22 Cal.3d 718, 730 [150 Cal.Rptr. 637].)

- "All doubt concerning this matter was set at rest, however, in the carefully considered opinion in *Bagdasarian v. Gragnon* … where it was definitely and finally determined that the term 'actual value,' as used in the statute, was that same market value so frequently defined in actions for condemnation." (*Nece v. Bennett* (1963) 212 Cal.App.2d 494, 497 [28 Cal.Rptr. 117], internal citation omitted.)

- "[P]ursuant to Civil Code section 3343, amounts paid for escrow fees, moving to and from the property, building permits, telephone connections, fences, yard cleaning, garage materials, door locks, shrubbery, taxes, rent and labor are examples of recoverable damages when reasonably expended in reliance on the fraud." (*Cory v. Villa Properties* (1968) 180 Cal.App.3d 592, 603 [225 Cal.Rptr. 628], internal citations omitted.)

- "To recover damages for fraud, a plaintiff must have sustained damages proximately caused by the misrepresentation. A damage award for fraud will be reversed where the injury is not related to the misrepresentation." (*Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1252 [1 Cal.Rptr.2d 301], internal citations omitted.)

<u>Secondary Sources</u>

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1445–1447
- 3 Levy et al., California Torts (1985–2000) Remedies for Fraud, § 40.23

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1110
Buyer's Damages for Purchase or Acquisition of Property
Lost Profits

[*Name of plaintiff*] may recover damages for profits [or other gains] [he/she/it] would have made if the property had been as represented. [*Name of plaintiff*] can recover these profits [or other gains] only if [he/she/it] has proved the following:

1. **That [*name of plaintiff*] acquired the property for the purpose of using or reselling it for a [profit/gain];**

2. **That [*name of plaintiff*] reasonably relied on [*name of defendant*]'s [false representation/failure to disclose/promise] in entering into the transaction and in anticipating [profits/gains] from the use or sale of the property; and**

3. **That [*name of defendant*]'s [false representation/failure to disclose/promise] and [*name of plaintiff*]'s reliance on it were both substantial factors in causing the lost profits.**

You do not have to calculate the amount of the lost profits with mathematical precision, but there must be a reasonable basis for computing the loss.

DIRECTIONS FOR USE

This instruction should be read immediately after Instruction 1109, *Buyer's Damages for Purchase or Acquisition of Property*, if the plaintiff is claiming lost profits.

SOURCES AND AUTHORITY

- Civil Code section 3343(a)(4) provides:

  Where the defrauded party has been induced by reason of the fraud to purchase or otherwise acquire the property in question, an amount which will compensate him for any loss of profits or other gains which were reasonably anticipated and would have been earned by him from the use or sale of the

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property had it possessed the characteristics fraudulently attributed to it by the party committing the fraud, provided that lost profits from the use or sale of the property shall be recoverable only if and only to the extent that all of the following apply:

(i) The defrauded party acquired the property for the purpose of using or reselling it for a profit.

(ii) The defrauded party reasonably relied on the fraud in entering into the transaction and in anticipating profits from the subsequent use or sale of the property.

(iii) Any loss of profits for which damages are sought under this paragraph have been proximately caused by the fraud and the defrauded party's reliance on it.

- "With glaring inconsistency, California's statutory structure before 1971 permitted recovery of lost profits and earnings under Civil Code section 3333 in fraud cases which did not concern the 'purchase, sale or exchange of property,' and even in simple negligence cases and breach of contract cases the injured parties could recover lost profits and earnings, while the 'out of pocket' rule barred the fraud victim in property transaction cases from recovering more than the difference between the amount he paid for the property and its actual value." (*Channell v. Anthony* (1976) 58 Cal.App.3d 290, 312 [129 Cal.Rptr. 704], internal citations omitted.)

- "The Legislature removed all doubt concerning the recovery of loss of profits resulting from the fraudulently induced property acquisition. Clearly and specifically, lost profits proximately caused are recoverable. The cases cited, the arguments made concerning Civil Code section 3343 limitations are simply not relevant to post-1971 proceedings, where profits are the claimed loss. Civil Code section 3343 as amended, in so many words, authorizes recovery of lost profits." (*Hartman v. Shell Oil Co.* (1977) 68 Cal.App.3d 240, 247 [137 Cal.Rptr. 244].)

<u>Secondary Sources</u>

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1445–1447
- 3 Levy et al., California Torts (1985–2000) Remedies for Fraud, § 40.23

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1111
Seller's Damages for Sale or Exchange of Property

If you decide that [*name of plaintiff***] has proved [his/her/its] 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."**

[*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***]:**

1. **The difference between the fair market value of the property at the time of sale and [the amount that [***name of plaintiff***] received] [or] [the fair market value of what [***name of plaintiff***] received in exchange for the property];**

2. **Amounts that [***name of plaintiff***] reasonably spent in reliance on [***name of defendant***]'s [false representation/failure to disclose/promise];**

3. **Loss of use and enjoyment of the property from [***insert beginning date***] to [***insert end date***], to the extent that any such loss was caused by [***name of defendant***]'s [false representation/failure to disclose/ promise];**

4. **Profits or other gains from [***insert beginning date***] to [***insert end date***], that [***name of plaintiff***] might reasonably have earned by use of the property if [he/she] had kept it; and**

5. **Any additional damage arising from the particular transaction.**

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DIRECTIONS FOR USE

This instruction should be tailored to fit the facts and evidence in the particular case: "If the seller parts with title and elects to forego his right of rescission and sue for damages only, then of course subdivisions (a)(2) and (a)(3) of section 3343 do not apply and should not be given by the trial court (unless, as here, the contract itself creates such rights). In each case in which a seller of property is defrauded by a buyer, the trial court will have to examine the circumstances of the particular case and decide whether the questioned portions of section 3343 do or do not apply." (*Channell v. Anthony* (1976) 58 Cal.App.3d 290, 317 [129 Cal.Rptr. 704].)

The first element of this instruction should be modified in cases involving promissory fraud: "In cases of promissory fraud, the damages are measured by market value as of the date the promise was breached because that is the date when the damage occurred." (*Glendale Federal Savings & Loan Assn. v. Marina View Heights Development Co.* (1977) 66 Cal.App.3d 101, 145–146 [135 Cal.Rptr. 802].)

For an instruction on lost profits see Instruction 2004N, *Lost Profits (Economic Damage).*

SOURCES AND AUTHORITY

- Civil Code section 3343 provides:

  (a) One defrauded in the purchase, sale or exchange of property is entitled to recover the difference between the actual value of that with which the defrauded person parted and the actual value of that which he received, together with any additional damage arising from the particular transaction, including any of the following:
  (1) Amounts actually and reasonably expended in reliance upon the fraud.
  (2) An amount which would compensate the defrauded party for loss of use and enjoyment of the property to the extent that any such loss was proximately caused by the fraud.
  (3) Where the defrauded party has been induced by reason of the fraud to sell or otherwise part with the property in question, an amount which will compensate him for profits or other gains which might reasonably have been earned by use of the property had he retained it.
  (4) Where the defrauded party has been induced by reason of the fraud to purchase or otherwise acquire the property in question, an amount which will compensate him for any loss of profits or other gains which were reasonably anticipated and would have been earned by him from the use or sale of the property had it possessed the characteristics

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fraudulently attributed to it by the party committing the fraud, provided that lost profits from the use or sale of the property shall be recoverable only if and only to the extent that all of the following apply:

(i) The defrauded party acquired the property for the purpose of using or reselling it for a profit.

(ii) The defrauded party reasonably relied on the fraud in entering into the transaction and in anticipating profits from the subsequent use or sale of the property.

(iii) Any loss of profits for which damages are sought under this paragraph have been proximately caused by the fraud and the defrauded party's reliance on it.

(b) Nothing in this section shall do either of the following:

(1) Permit the defrauded person to recover any amount measured by the difference between the value of property as represented and the actual value thereof.

(2) Deny to any person having a cause of action for fraud or deceit any legal or equitable remedies to which such person may be entitled.

- "As they apply to damages for fraud, subdivisions (a)(2) and (a)(3) of Section 3343 are limited to recovery of damages by sellers of real property, while subdivision (a)(4) deals with purchasers of real property." (*Channell, supra,* 58 Cal.App.3d at p. 309, footnote omitted.)

- "Before 1935 the California courts had no statutory mandate on the measure of damages for fraud. While the 'benefit of the bargain' measure of damages was generally employed, on occasion California courts sometimes applied the 'out of pocket' rule when the 'loss of bargain' rule was difficult to apply or would work a hardship on plaintiff or defendant." (*Channell, supra,* 58 Cal.App.3d at p. 309.)

- "The 1971 amendment to section 3343 took the form of an addition to the 'out of pocket' rule. The statute had previously permitted recovery of 'additional damages,' but the 1971 amendment enumerated specific types of consequential damages which are included within the term 'additional damages.' " (*Channell, supra,* 58 Cal.App.3d at p. 312, footnote omitted.)

- "[T]he legislature clearly ruled out by the 1971 amendment any recovery of damages for fraud measured by the traditional 'loss of bargain' formula." (*Channell, supra,* 58 Cal.App.3d at p. 313, internal citation omitted.)

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- "Out of pocket" loss under section 3343 is "the difference between what [plaintiffs] received for their property and the fair market value of the same at the time of the transfer." (*Channell, supra,* 58 Cal.App.3d at p. 314.)

- "[N]othing in section 3343 as amended … requires that a plaintiff show 'out-of-pocket' loss (i.e., an amount by which the consideration paid exceeded the value of the property received) in order to be entitled to any recovery for fraud in a property transaction." (*Stout v. Turney* (1978) 22 Cal.3d 718, 730 [150 Cal.Rptr. 637].)

- "In the absence of a fiduciary relationship, section 3343 governs the measure of damages in fraudulent property transactions." (*Croeni v. Goldstein* (1994) 21 Cal.App.4th 754, 759 [26 Cal.Rptr.2d 412].)

- "In the case of a seller … the defrauded victim is entitled to recover not only the difference between the actual value of that with which he parted and the actual value of that which he received (out-of-pocket) but also any additional damage arising from the particular transaction including any of the following: 1. amounts expended in reliance upon the fraud; 2. amounts compensating for loss of use and enjoyment of the property due to the fraud; and 3. an amount which would compensate him for the profits or other gains by the use of the property had he retained it." (*Channell, supra,* 58 Cal.App.3d at p. 312, internal citation omitted.)

- "What that time span [for damages for lost use and lost profits] should be would be determined by the peculiar circumstances of the particular case before the court and should present no insurmountable difficulty for a court in fixing a reasonable period contemplated by the statute." (*Channell, supra,* 58 Cal.App.3d at p. 317.)

- "To recover damages for fraud, a plaintiff must have sustained damages proximately caused by the misrepresentation. A damage award for fraud will be reversed where the injury is not related to the misrepresentation." (*Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1252 [1 Cal.Rptr.2d 301], internal citations omitted.)

- "Mental distress is not an element of damages allowable under Civil Code section 3343." (*Channell, supra,* 58 Cal.App.3d at p. 315, internal citations omitted.)

<u>Secondary Sources</u>

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1445–1447
- 3 Levy et al., California Torts (1985–2000) Remedies for Fraud, § 40.23

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1112
Damages—"Out of Pocket" Rule

If you decide that [*name of plaintiff*] has proved [his/her/its] 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 all harm that was caused by [*name of defendant*], even if the harm could not have been anticipated.

[*Name of plaintiff*] must prove the amount of [his/her/its] damages. However, [*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. You must not speculate or guess in awarding damages.

To decide the amount of damages you must determine the [fair market] value of what [*name of plaintiff*] gave and subtract from that amount the [fair market] value of what [he/she/it] received.

["Fair market value" is the highest price that a willing buyer would have paid on the date of the transaction 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 [*insert item*] is reasonably capable of being used.]**

[*Name of plaintiff*] may also recover amounts that he reasonably spent in reliance on [*name of defendant*]'s [false representation/failure to disclose/ false promise].

SOURCES AND AUTHORITY

- Civil Code section 1709 provides: "One who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers."

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- 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."

- This instruction should be modified in cases involving promissory fraud: "In cases of promissory fraud, the damages are measured by market value as of the date the promise was breached because that is the date when the damage occurred." (*Glendale Federal Savings & Loan Assn. v. Marina View Heights Development Co.* (1977) 66 Cal.App.3d 101, 145–146 [135 Cal.Rptr. 802].)

- "There are two measures of damages for fraud: out of pocket and benefit of the bargain. The 'out-of-pocket' measure of damages 'is directed to restoring the plaintiff to the financial position enjoyed by him prior to the fraudulent transaction, and thus awards the difference in actual value at the time of the transaction between what the plaintiff gave and what he received. The "benefit-of-the-bargain" measure, on the other hand, is concerned with satisfying the expectancy interest of the defrauded plaintiff by putting him in the position he would have enjoyed if the false representation relied upon had been true; it awards the difference in value between what the plaintiff actually received and what he was fraudulently led to believe he would receive.' 'In California, a defrauded party is ordinarily limited to recovering his "out-of-pocket" loss ... .' " (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1240 [44 Cal.Rptr.2d 352], internal citations omitted.)

- "Of the two measures the 'out-of-pocket' rule has been termed more consistent with the logic and purpose of the tort form of action (i. e., compensation for loss sustained rather than satisfaction of contractual expectations) while the 'benefit-of-the-bargain' rule has been observed to be a more effective deterrent (in that it contemplates an award even when the property received has a value equal to what was given for it)." (*Stout v. Turney* (1978) 22 Cal.3d 718, 725 [150 Cal.Rptr. 637].)

- "We have previously held that a plaintiff is only entitled to its actual or 'out-of-pocket' losses suffered because of fiduciary's negligent misrepresentation under section 3333. While the measure of damages under section 3333 might be greater for a fiduciary's intentional misrepresentation, we need not address that issue here." (*Alliance Mortgage Co., supra*, 10 Cal.4th at pp. 1249–1250.)

- "To recover damages for fraud, a plaintiff must have sustained damages proximately caused by the misrepresentation. A damage award for fraud will be reversed where the injury is not related to the misrepresentation." (*Las Palmas Associates v. Las*

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Palmas Center Associates (1991) 235 Cal.App.3d 1220, 1252 [1 Cal.Rptr.2d 301], internal citations omitted.)

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1441–1448
- 3 Levy et al., California Torts (1985–2000) Remedies for Fraud, § 40.23

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1113
Damages—Benefit-of-the-Bargain Rule

If you decide that [*name of plaintiff*] has proved [his/her/its] 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 all harm that was caused by [*name of defendant*], even if the harm could not have been anticipated.

[*Name of plaintiff*] must prove the amount of [his/her/its] damages. However, [*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. You must not speculate or guess in awarding damages.

To determine the amount of damages, you must:

1. **Determine the fair market value that [*name of plaintiff*] would have received if the representations made by [*name of defendant*] had been true; and**

2. **Subtract the fair market value of what [he/she/it] did receive.**

The resulting amount is [*name of plaintiff*]'s damages. "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 know all the uses and purposes for which the [*insert item*] is reasonably capable of being used.**

Fair market value must be determined as of the date that [*name of plaintiff*] discovered [*name of defendant*]'s [false representation/failure to disclose].

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[*Name of plaintiff*] may also recover amounts that [he/she/it] reasonably spent in reliance on [*name of defendant*]'s [false representation/failure to disclose/ false promise].

DIRECTIONS FOR USE

There is a split of authority regarding whether benefit-of-the-bargain damages are ever appropriate in a fraud case: "The cases are not consistent in their treatment of the measure of damages for breach of fiduciary duties." (*Salahutdin v. Valley of California, Inc.* (1994) 24 Cal.App.4th 555, 564 [29 Cal.Rptr.2d 463].) The rule is as follows in the Fifth Appellate District: "[W]e conclude that the appropriate measure of damages on the fiduciary tort actions is the out of pocket measure, not the benefit of the bargain measure." (*Hensley v. McSweeney* (2001) 90 Cal.App.4th 1081, 1086 [109 Cal.Rptr.2d 489].) In the First Appellate District, the rule is: "Recognizing a split of authority on the matter, we follow those cases adopting the broader measure of damages under sections 1709 and 3333, a course that is not only consonant with the position we have taken in the past but just." (*Salahutdin, supra,* 24 Cal.App.4th at p. 566.)

This instruction should be modified in cases involving promissory fraud: "In cases of promissory fraud, the damages are measured by market value as of the date the promise was breached because that is the date when the damage occurred." (*Glendale Federal Savings & Loan Assn. v. Marina View Heights Development Co.* (1977) 66 Cal.App.3d 101, 145–146 [135 Cal.Rptr. 802].)

SOURCES AND AUTHORITY

- Civil Code section 1709 provides: "One who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers."

- 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."

- "There are two measures of damages for fraud: out of pocket and benefit of the bargain. The 'out-of-pocket' measure of damages 'is directed to restoring the plaintiff to the financial position enjoyed by him prior to the fraudulent transaction, and thus awards the difference in actual value at the time of the transaction between what the plaintiff gave and what he received. The "benefit-of-the-bargain" measure, on the

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other hand, is concerned with satisfying the expectancy interest of the defrauded plaintiff by putting him in the position he would have enjoyed if the false representation relied upon had been true; it awards the difference in value between what the plaintiff actually received and what he was fraudulently led to believe he would receive.' 'In California, a defrauded party is ordinarily limited to recovering his "out-of-pocket" loss ... .' " (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1240 [44 Cal.Rptr.2d 352], internal citations omitted.)

- "Of the two measures the 'out-of-pocket' rule has been termed more consistent with the logic and purpose of the tort form of action (i. e., compensation for loss sustained rather than satisfaction of contractual expectations) while the 'benefit-of-the-bargain' rule has been observed to be a more effective deterrent (in that it contemplates an award even when the property received has a value equal to what was given for it.)" (*Stout v. Turney* (1978) 22 Cal.3d 718, 725 [150 Cal.Rptr. 637].)

- "We have previously held that a plaintiff is only entitled to its actual or 'out-of-pocket' losses suffered because of fiduciary's negligent misrepresentation under section 3333. While the measure of damages under section 3333 might be greater for a fiduciary's intentional misrepresentation, we need not address that issue here." (*Alliance Mortgage Co., supra*, 10 Cal.4th at pp. 1249–1250.)

- "Unlike the 'out of pocket' measure of damages, which are usually calculated at the time of the transaction, 'benefit of the bargain' damages may appropriately be calculated as of the date of discovery of the fraud." (*Salahutdin, supra*, 24 Cal.App.4th at p. 568.)

- "To recover damages for fraud, a plaintiff must have sustained damages proximately caused by the misrepresentation. A damage award for fraud will be reversed where the injury is not related to the misrepresentation." (*Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1252 [1 Cal.Rptr.2d 301], internal citations omitted.)

- "[O]ne may recover compensation for time and effort expended in reliance on a defendant's misrepresentation." (*Block v. Tobin* (1975) 45 Cal.App.3d 214, 220 [119 Cal.Rptr. 288], internal citations omitted.)

<u>Secondary Sources</u>

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1441–1448
- 3 Levy et al., California Torts (1985–2000) Remedies for Fraud, § 40.23

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2115
Introduction to Damages for Personal Injury

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."

[*Name of plaintiff*] must prove the amount of [his/her] damages. However, [*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. 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

See the Damages series (2000 et seq.) for instructions on specific items of damages and other topics involving damages, such as the concept of present cash value, mitigation of damages, and the effect of preexisting conditions. Care should be taken to verify that the wording of these instructions is consistent with federal law regarding damages under FELA.

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,

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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."

- "[I]t is settled that the propriety of jury instructions concerning the measure of damages in an FELA action is an issue of 'substance' determined by federal law." (*St. Louis Southwestern Railway Co. v. Dickerson* (1985) 470 U.S. 409, 411 [105 S.Ct. 1347, 84 L.Ed.2d 303], internal citation omitted.)

- "A FELA plaintiff is entitled to recover for all past, present and probable future harm attributable to the defendant's tortious conduct, including pain and suffering and mental anguish." (*Marchica v. Long Island Railroad Co.* (2nd Cir. 1994) 31 F.3d 1197, 1207.)

- "A FELA plaintiff, upon proof of employer liability, may recover damages for loss of earnings, medical expenses and pain and suffering. The burden rests upon the plaintiff to establish by sufficient evidence a factual basis for the amount of damages sought." (*Williams v. Missouri Pacific Railroad Co.* (10th Cir. 1993) 11 F.3d 132, 135, internal citations omitted.)

- "The Act was not intended to supersede or pre-empt the common law in railroad employee injury cases, but merely to modify it in … specific particulars. Thus, the Act contains no provisions regulating the measure of damages recoverable in an action to which the FELA applies, and courts have since held that the absence in the Act of specific provisions governing the measure of damages in FELA actions does not affect their availability as before the Act." (*Hall v. Minnesota Transfer Railway Co.* (D.C.Minn. 1971) 322 F.Supp. 92, 94.)

- "The seaman may thus recover for all of his pecuniary damages including such damages as the cost of employing someone else to perform those domestic services that he would otherwise have been able to render but is now incapable of doing." (*Cruz v. Hendy International Co.* (5th Cir. 1981) 638 F.2d 719, 723 [Jones Act case], overruled on other grounds in *Miles v. Apex Marine Corp.* (1990) 498 U.S. 19, 32–33 [111 S.Ct. 317, 112 L.Ed.2d 275].)

- "Although our decision in *Jones & Laughlin* makes clear that no single method for determining present value is mandated by federal law and that the method of calculating present value should take into account inflation and other sources of wage

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increases as well as the rate of interest, it is equally clear that an utter failure to instruct the jury that present value is the proper measure of a damages award is error." (*St. Louis Southwestern Railway, supra,* 470 U.S. at p. 412.)

- "Damages for the injury of loss of earning capacity may be recovered in a FELA action. 'Earning capacity means the potential for earning money in the future... .' The appropriate measure is the present value of the total amount of future earnings." (*Bissett v. Burlington Northern Railroad Co.* (8th Cir. 1992) 969 F.2d 727, 731, internal citations omitted.)

- "[W]e see no reason, and defendant has presented us with no reason, to create in FELA cases an exception to the general rule that the defendant has the burden of proving that the plaintiff could, with reasonable effort, have mitigated his damages." (*Jones v. Consolidated Rail Corp.* (6th Cir. 1986) 800 F.2d 590, 594.)

- "The federal and state courts have held with virtual unanimity over more than seven decades that prejudgment interest is not available under the FELA." (*Monessen Southwestern Railway Co. v. Morgan* (1988) 486 U.S. 330, 338 [108 S.Ct. 1837, 100 L.Ed.2d 349].)

- "We therefore reaffirm the conclusion … that punitive damages are unavailable under the FELA." (*Wildman v. Burlington Northern Railroad Co.* (9th Cir. 1987) 825 F.2d 1392, 1395, internal citation omitted.)

- "We have held specifically that the spouse of an injured railroad employee may not sue for loss of consortium under FELA." (*Kelsaw v. Union Pacific Railroad Co.* (9th Cir. 1982) 686 F.2d 819, 820, internal citation omitted.)

- Title 45 United States Code section 55 provides: "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: Provided, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought."

- "While at first glance the language of this provision seems broad enough to completely abrogate the common law collateral source rule, courts have limited the scope of the provision by focusing on the requirement that the covered payments be made 'on account of the injury.' Thus, the cases draw a distinction between payments

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emanating from a fringe benefit such as a retirement fund or a general hospital and medical insurance plan, and payments which the employer has undertaken voluntarily to indemnify itself against possible liabilities under the FELA." (*Clark v. Burlington Northern, Inc.* (8th Cir. 1984) 726 F.2d 448, 450, internal citation omitted.)

- "A benefit may be exempt from setoff under the collateral source rule even though the employer is the sole source of the fund. The important consideration is the character of the benefits received, rather than whether the source is actually independent of the employer. Medical expenses paid for by insurance are exempt from setoff regardless of whether the employer paid one hundred percent of the insurance premiums. Courts have also ruled private disability retirement plans established by a collective bargaining agreement and covering both job-related and non-job-related illness and injury are exempt from setoff." (*Clark, supra,* 726 F.2d at pp. 450–451, footnote and internal citations omitted.)

- "Generally, a tortfeasor need not pay twice for the damage caused, but he should not be allowed to set off compensation from a 'collateral source' against the amount he owes on account of his tort." (*Russo v. Matson Navigation Co.* (9th Cir. 1973) 486 F.2d 1018, 1020.)

- "It is well established in this circuit that the purpose and nature of the insurance benefits are controlling. Here, the purpose of the insurance coverage, as expressly described in the collective bargaining agreement, is to indemnify the employer against FELA liability. It follows that setoff should be allowed and that the benefits in this case should not be regarded as a collateral source." (*Folkestad v. Burlington Northern Inc.* (9th Cir. 1987) 813 F.2d 1377, 1383.)

- "The mechanics of handling the setoff provided by the plan may be dealt with either by the Court instructing the jury that the amount of benefits provided by the GA-23000 contract must be set off against any damages awarded or by the Court as a matter of law reducing damages awarded by the jury." (*Brice v. National Railroad Passenger Corp.* (D.Md. 1987) 664 F.Supp. 220, 224.)

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2116
Damages for Death of Employee

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 this loss. This compensation is called "damages."

[*Name of plaintiff*] must prove the amount of [his/her] damages. However, [*name of plaintiff*] does not have to prove the exact amount of these damages. You must not speculate or guess in awarding damages.

The following are the specific items of damages claimed by [*name of plaintiff*]:

1. **The reasonable value of money, goods, and services that [*name of decedent*] would have provided [*name of plaintiff*] 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 monetary value of [*name of minor child*]'s loss of any care, attention, instruction, training, advice, and guidance from [*name of decedent*];]**

3. **Any pain and suffering that [*name of decedent*] experienced as a result of [his/her] injuries; and**

4. **The reasonable expense of medical care and supplies reasonably needed by and actually provided to [*name of decedent*].**

Do not include in your award any compensation for [*name of plaintiff*]'s grief, sorrow, or mental anguish or the loss of [*name of decedent*]'s society or companionship.

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.

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Any award you make for the value of any money and services that you decide [*name of decedent*] would have provided [*name of plaintiff*] in the future should be reduced to present value. Any award you make for the value of any money and services you decide [*name of decedent*] would have provided [*name of plaintiff*] between the date of [his/her] death on [*date of death*] and the present should not be reduced to present value.

[In computing 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.]

DIRECTIONS FOR USE

The list of damages is optional and is intended to include those items of damage for which recovery is commonly sought in the ordinary FELA case. This list is not intended to exclude any item of damages that is supported in evidence and the authorities. There must be evidence to support each item listed.

The items of damage set forth in items number 3 and 4 are recoverable by the personal representative on behalf of the spouse, children, or parents of the decedent, if supported by the evidence.

See also Instruction 2005, *Present Cash Value*, and Instruction 2020, *Life Expectancy*.

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

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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."

- Title 45 United States Code section 59 provides: "Any right of action given by this chapter to a person suffering injury shall survive 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, but in such cases there shall be only one recovery for the same injury."

- "[I]t is settled that the propriety of jury instructions concerning the measure of damages in an FELA action is an issue of 'substance' determined by federal law." (*St. Louis Southwestern Railway Co. v. Dickerson* (1985) 470 U.S. 409, 411 [105 S.Ct. 1347, 84 L.Ed.2d 303], internal citation omitted.)

- "The elements which make up the total damage resulting to a minor child from a parent's death may be materially different from those demanding examination where the beneficiary is a spouse or collateral dependent relative; but in every instance the award must be based upon money values, the amount of which can be ascertained only upon a view of the peculiar facts presented." (*Norfolk & Western Railroad Co. v. Holbrook* (1915) 235 U.S. 625, 629 [35 S.Ct. 143, 59 L.Ed. 392], internal citations omitted.)

- "In the present case there was testimony concerning the personal qualities of the deceased and the interest which he took in his family. It was proper, therefore, to charge that the jury might take into consideration the care, attention, instruction, training, advice, and guidance which the evidence showed he reasonably might have been expected to give his children during their minority, and to include the pecuniary value thereof in the damages assessed." (*Holbrook, supra,* 235 U.S. at p. 629.)

- " 'In the absence of evidence that an adult child is either dependent upon or had any reasonable grounds for expecting any pecuniary benefit from a continuance of the decedent's life, a recovery on behalf of such child is excluded.' " (*Kozar v. Chesapeake & Ohio Railway Co.* (6th Cir. 1971) 449 F.2d 1238, 1243, internal citation omitted.)

- "[T]he conclusion is unavoidable that the personal representative is to recover on behalf of the designated beneficiaries, not only such damages as will compensate them for their own pecuniary loss, but also such damages as will be reasonably

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compensatory for the loss and suffering of the injured person while he lived." (*St. Louis, I.M. & S. Railway Co. v. Craft* (1915) 237 U.S. 648, 658 [35 S.Ct. 704, 59 L.Ed. 1160].)

- "Funeral expenses … may not be included in damages awarded in FELA actions." (*Dubose v. Kansas City Southern Railway Co.* (5th Cir. 1984) 729 F.2d 1026, 1033.)

- "In a wrongful-death action under the FELA, the measure of recovery is 'the damages … [that] flow from the deprivation of the pecuniary benefits which the beneficiaries might have reasonably received … .' The amount of money that a wage earner is able to contribute to the support of his family is unquestionably affected by the amount of the tax he must pay to the Federal Government. It is his after-tax income, rather than his gross income before taxes, that provides the only realistic measure of his ability to support his family. It follows inexorably that the wage earner's income tax is a relevant factor in calculating the monetary loss suffered by his dependents when he dies." (*Norfolk & Western Railway Co. v. Liepelt* (1980) 444 U.S. 490, 493–494 [100 S.Ct. 755, 62 L.Ed.2d 689], internal citation omitted.)

- "[T]he damages are such as flow from the deprivation of the pecuniary benefits which the beneficiaries might have reasonably received if the deceased had not died from his injuries." (*Michigan Central Railroad Co. v. Vreeland* (1913) 227 U.S. 59, 70 [33 S.Ct. 192, 57 L.Ed. 417].)

- "The seaman may thus recover for all of his pecuniary damages including such damages as the cost of employing someone else to perform those domestic services that he would otherwise have been able to render but is now incapable of doing." (*Cruz v. Hendy International Co.* (5th Cir. 1981) 638 F.2d 719, 723 [Jones Act case] overruled on other grounds in *Miles v. Apex Marine Corp.* (1990) 498 U.S. 19, 32–33 [111 S.Ct. 317, 112 L.Ed.2d 275].)

- Title 45 United States Code Section 55 provides: "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: Provided, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought."

- "While at first glance the language of this provision seems broad enough to completely abrogate the common law collateral source rule, courts have limited the

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scope of the provision by focusing on the requirement that the covered payments be made 'on account of the injury.' Thus, the cases draw a distinction between payments emanating from a fringe benefit such as a retirement fund or a general hospital and medical insurance plan, and payments which the employer has undertaken voluntarily to indemnify itself against possible liabilities under the FELA." (*Clark v. Burlington Northern, Inc.* (8th Cir. 1984) 726 F.2d 448, 450, internal citation omitted.)

- "A benefit may be exempt from setoff under the collateral source rule even though the employer is the sole source of the fund. The important consideration is the character of the benefits received, rather than whether the source is actually independent of the employer. Medical expenses paid for by insurance are exempt from setoff regardless of whether the employer paid one hundred percent of the insurance premiums. Courts have also ruled private disability retirement plans established by a collective bargaining agreement and covering both job-related and non-job-related illness and injury are exempt from setoff." (*Clark, supra,* 726 F.2d at pp. 450–451, footnote and internal citations omitted.)

- "Generally, a tortfeasor need not pay twice for the damage caused, but he should not be allowed to set off compensation from a 'collateral source' against the amount he owes on account of his tort." (*Russo v. Matson Navigation Co.* (9th Cir. 1973) 486 F.2d 1018, 1020.)

- "It is well established in this circuit that the purpose and nature of the insurance benefits are controlling. Here, the purpose of the insurance coverage, as expressly described in the collective bargaining agreement, is to indemnify the employer against FELA liability. It follows that setoff should be allowed and that the benefits in this case should not be regarded as a collateral source." (*Folkestad v. Burlington Northern Inc.* (9th Cir. 1987) 813 F.2d 1377, 1383.)

- "The mechanics of handling the setoff provided by the plan may be dealt with either by the Court instructing the jury that the amount of benefits provided by the GA-23000 contract must be set off against any damages awarded or by the Court as a matter of law reducing damages awarded by the jury." (*Brice v. National Railroad Passenger Corp.* (D.Md. 1987) 664 F.Supp. 220, 224.)

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2032
Duty to Mitigate Damages for Past Lost Earnings

[*Name of plaintiff*] is not entitled to recover damages for economic losses that [*name of defendant*] proves [*name of plaintiff*] could have avoided by returning to gainful employment as soon as it was reasonable for [him/her] to do so.

To calculate the amount of damages you must:

1. **Determine the amount [*name of plaintiff*] would have earned from the job [he/she] held at the time [he/she] was injured; and**

2. **Subtract the amount [*name of plaintiff*] earned or could have earned by obtaining alternate employment.**

The resulting amount is [*name of plaintiff*]'s damages for lost earnings.

DIRECTIONS FOR USE

For an instruction on mitigation of damages involving personal injury see Instruction 2018, *Mitigation of Damages (Personal Injury).*

SOURCES AND AUTHORITY

- "A plaintiff has a duty to mitigate damages and cannot recover losses it could have avoided through reasonable efforts." (*Thrifty-Tel, Inc. v. Bezenek* (1996) 46 Cal.App.4th 1559, 1568 [54 Cal.Rptr.2d 468], internal citations omitted.)

- "The doctrine of mitigation of damages holds that '[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.' A plaintiff may not recover for damages avoidable through ordinary care and reasonable exertion. The duty to mitigate damages does not require an injured party to do what is unreasonable or impracticable. '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.*

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Gamboa (1994) 26 Cal.App.4th 1686, 1691 [32 Cal.Rptr.2d 329], internal citations omitted.)

- "We also acknowledge the well-established rule that an injured plaintiff has a duty to mitigate his damages. However, once it is established that a duty to mitigate is present, the burden nevertheless falls on the wrongdoer to show that the damages were lessened or might have been lessened by the plaintiff." (*Jones v. Consolidated Rail Corp.* (6th Cir. 1986) 800 F.2d 590, 593, internal citation omitted.)

- "Normally, in a FELA action a plaintiff is entitled to recover the difference between what he was able to earn before injury and what he earned or could have earned thereafter." (*Trejo v. Denver & R. G. R. Co.* (10th Cir. 1977) 568 F.2d 181, 184.)

- "An unemployed plaintiff who is able to look for work does not satisfy his duty to mitigate by waiting passively for employment to be offered. The opportunity to mitigate is not merely the opportunity to accept a job, but the opportunity to seek appropriate work when one is able to do so. If that opportunity is shown to have existed, the issue of mitigation should not normally be prevented from reaching a properly instructed jury." (*Wilson v. Union Pacific Railroad Co.* (10th Cir. 1995) 56 F.3d 1226, 1232, internal citation omitted.)

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2033
Duty to Mitigate Damages for Future Lost Earnings

[*Name of plaintiff*] is not entitled to recover damages for future economic losses that [*name of defendant*] proves [*name of plaintiff*] will be able to avoid by returning to gainful employment as soon as it is reasonable for [him/her] to do so.

If you decide that [*name of plaintiff*] will be able to return to work, then you must not award [him/her] any damages for the amount [he/she] will be able to earn from future gainful employment. To calculate the amount of damages you must:

1. **Determine the amount [*name of plaintiff*] would have earned from the job [he/she] held at the time [he/she] was injured; and**

2. **Subtract the amount [*name of plaintiff*] is reasonably able to earn from alternate employment.**

The resulting amount is [*name of plaintiff*]'s damages for future lost earnings.

DIRECTIONS FOR USE

For an instruction on mitigation of damages involving personal injury see Instruction 2018, *Mitigation of Damages (Personal Injury).*

SOURCES AND AUTHORITY

- "A plaintiff has a duty to mitigate damages and cannot recover losses it could have avoided through reasonable efforts." (*Thrifty-Tel, Inc. v. Bezenek* (1996) 46 Cal.App.4th 1559, 1568 [54 Cal.Rptr.2d 468], internal citations omitted.)

- "The doctrine of mitigation of damages holds that '[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.' A plaintiff may not recover for damages avoidable through ordinary care and reasonable exertion. The duty to mitigate damages does not require

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an injured party to do what is unreasonable or impracticable. '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.)

- "We also acknowledge the well-established rule that an injured plaintiff has a duty to mitigate his damages. However, once it is established that a duty to mitigate is present, the burden nevertheless falls on the wrongdoer to show that the damages were lessened or might have been lessened by the plaintiff." (*Jones v. Consolidated Rail Corp.* (6th Cir. 1986) 800 F.2d 590, 593, internal citation omitted.)

- "Normally, in a FELA action a plaintiff is entitled to recover the difference between what he was able to earn before injury and what he earned or could have earned thereafter." (*Trejo v. Denver & R. G. R. Co.* (10th Cir. 1977) 568 F.2d 181, 184.)

- "An unemployed plaintiff who is able to look for work does not satisfy his duty to mitigate by waiting passively for employment to be offered. The opportunity to mitigate is not merely the opportunity to accept a job, but the opportunity to seek appropriate work when one is able to do so. If that opportunity is shown to have existed, the issue of mitigation should not normally be prevented from reaching a properly instructed jury." (*Wilson v. Union Pacific Railroad Co.* (10th Cir. 1995) 56 F.3d 1226, 1232, internal citation omitted.)

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2034
No Deduction for Workers' Compensation Benefits Paid

Do not consider whether or not [*name of plaintiff*] received workers' compensation benefits for [his/her] injuries. If you decide in favor of [*name of plaintiff*], you should determine the amount of your verdict according to my instructions concerning damages.

DIRECTIONS FOR USE

This instruction is intended for use in conjunction with a special verdict form, in which case the judge can make any necessary deductions if double recovery is an issue. It may also be read in cases where there are no allegations regarding the employer's contributory negligence.

SOURCES AND AUTHORITY

- "If the employer has not been negligent, the workers' compensation benefits do not constitute an impermissible double recovery, but rather a payment from a source wholly independent of the wrongdoer." (*Curtis v. State of California ex rel. Department of Transportation* (1982) 128 Cal.App.3d 668, 683 [180 Cal.Rptr. 843].)

- " 'The average reasonably well-informed person who may be called to serve upon a jury knows that a workman injured in his employment receives compensation. It is a delusion to think that this aspect of the case can be kept from the minds of the jurors simply by not alluding to it in the course of the trial.' " (*Berryman v. Bayshore Construction Co.* (1962) 207 Cal.App.2d 331, 336 [24 Cal.Rptr. 380], internal citations omitted.)

- "To prevent a double recovery, the court may instruct the jury to segregate types of damage as between the employee and employer, awarding to the employee only those tort damages not recoverable by the employer." (*Demkowski v. Lee* (1991) 233 Cal.App.3d 1251, 1259 [284 Cal.Rptr. 919], footnote omitted.)

- "Alternatively, the jury may generally be instructed on the types of tort damages to which the employee may be entitled and then given a special verdict form that requires the jury to find whether the defendant was negligent, whether the negligence

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was the proximate cause of the employee's injuries, what the employee's total tort damages are, without taking into account his or her receipt of workers' compensation benefits, and what the reasonable amount of benefits paid by the employer were. Thereafter, the court enters individual judgments on the special verdict for the amounts to which the employee and employer are entitled." (*Demkowski, supra,* 233 Cal.App.3d at p. 1259, footnote omitted.)

- "Prior to Proposition 51, a negligent third party was allowed an offset for the workers' compensation benefits paid to the plaintiff. This prevented double recovery under the then-existing joint and several liability rule. Proposition 51, however, limited joint and several liability to plaintiff's economic damages." (*Rosales v. Thermex-Thermatron, Inc.* (1998) 67 Cal.App.4th 187, 197 [78 Cal.Rptr.2d 861], internal citations omitted.)

- "The *Espinoza* approach has provided an effective solution for pre-verdict settlements, and we believe that it is also the most suitable means of dealing with workers' compensation benefits." (*Torres v. Xomox Corp.* (1996) 49 Cal.App.4th 1, 37 [56 Cal.Rptr.2d 455].)

Secondary Sources

- 2 Witkin, Summary of California Law (9th ed. 1987) Workers' Compensation, §§ 25–29
- 1 Levy, California Torts, Workers' Compensation, § 10.10

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1902
Service Provider for Juror With Disability

[*Name of juror***] has been assisted by [a/an] [***insert type of service provider***] to communicate and receive information. The [***service provider***] will be with you during your deliberations. You may not discuss the case with the [***service provider***] or in any way involve the [***service provider***] in your deliberations. The [***service provider***] is not a member of the jury and [he/she] may not participate in any manner with any of you about the case except to assist [***name of juror***].**

SOURCES AND AUTHORITY

- Code of Civil Procedure section 203(a)(6) provides: "All persons are eligible and qualified to be prospective trial jurors, except the following: … Persons who are not possessed of sufficient knowledge of the English language, provided that no person shall be deemed incompetent solely because of the loss of sight or hearing in any degree or other disability which impedes the person's ability to communicate or which impairs or interferes with the person's mobility."

- Code of Civil Procedure section 224 provides:

  (a) If a party does not cause the removal by challenge of an individual juror who is deaf, hearing impaired, blind, visually impaired, or speech impaired and who requires auxiliary services to facilitate communication, the party shall (1) stipulate to the presence of a service provider in the jury room during jury deliberations, and (2) prepare and deliver to the court proposed jury instructions to the service provider.

  (b) As used in this section, "service provider" includes, but is not limited to, a person who is a sign language interpreter, oral interpreter, deaf-blind interpreter, reader, or speech interpreter. If auxiliary services are required during the course of jury deliberations, the court shall instruct the jury and the service provider that the service provider for the juror with a disability is not to participate in the jury's deliberations in any manner except to facilitate communication between the juror with a disability and other jurors.

  (c) The court shall appoint a service provider whose services are needed by a juror with a disability to facilitate communication or participation. A sign language interpreter, oral interpreter, or deaf-blind interpreter appointed pursuant to this

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section shall be a qualified interpreter, as defined in subdivision (f) of Section 754 of the Evidence Code. Service providers appointed by the court under this subdivision shall be compensated in the same manner as provided in subdivision (i) of Section 754 of the Evidence Code.

Secondary Sources

- 7 Witkin, California Procedure (4th ed. 1997) Trial, §§ 331, 340

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1903
Written Copies of Jury Instructions

Copies of the jury instructions will be provided to each of you [if you request them].

DIRECTIONS FOR USE

Select the bracketed phrase if the judge has elected to provide written copies of the instructions only upon request.

SOURCES AND AUTHORITY

- Code of Civil Procedure section 612.5 provides: Upon the jury retiring for deliberation, the court shall advise the jury of the availability of a written copy of the jury instructions. The court may, at its discretion, provide the jury with a copy of the written instructions given. However, if the jury requests the court to supply a copy of the written instructions, the court shall supply the jury with a copy.

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1904
Deadlocked Jury Admonition

You should reach a verdict if you reasonably can. You have spent time trying to reach a verdict and this case is important to the parties.

Please carefully consider the opinions of all the jurors, including those with whom you disagree. Keep an open mind and feel free to change your opinion if you become convinced that you are wrong.

You should not, however, surrender your beliefs concerning the truth and the weight of the evidence. Each of you must decide the case for yourself and not merely go along with the conclusions of your fellow jurors.

SOURCES AND AUTHORITY

- "The court told the jury they should reach a verdict if they reasonably could; they should not surrender their conscious convictions of the truth and the weight of the evidence; each juror must decide the case for himself and not merely acquiesce in the conclusion of his fellows; the verdict should represent the opinion of each individual juror; and in reaching a verdict each juror should not violate his individual judgment and conscience. These remarks clearly outweighed any offensive portions of the charge. The court did not err in giving the challenged instruction." (*Inouye v. Pacific Southwest Airlines* (1981) 126 Cal.App.3d 648, 652 [179 Cal.Rptr. 13].)

- "A trial court may properly advise a jury of the importance of arriving at a verdict and of the duty of individual jurors to hear and consider each other's arguments with open minds, rather than to prevent agreement by obstinate adherence to first impressions. But, as the exclusive right to agree or not to agree rests with the jury, the judge may not tell them that they must agree nor may he harry their deliberations by coercive threats or disparaging remarks." (*Cook v. Los Angeles Ry. Corp.* (1939) 13 Cal.2d 591, 594 [91 P.2d 118], internal citations omitted.)

- "Only when the instruction has coerced the jurors into surrendering their conscientious convictions in order to reach agreement should the verdict be overturned." (*Inouye, supra,* 126 Cal.App.3d at p. 651.)

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- "The instruction says if the jury did not reach a verdict, the case would have to be retried. It also says the jurors should listen with deference to the arguments and distrust their own judgment if they find a large majority taking a different view of the case. In a criminal case the mere presence of these remarks in a jury instruction is error. However, civil cases are subject to different considerations; the special protections given criminal defendants are absent." (*Inouye, supra*, 126 Cal.App.3d at p. 651, internal citation omitted.)

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1905
Substitution of Alternate Juror

One of your fellow jurors has been excused and an alternate juror has been selected to take [his/her] place. The alternate juror must be given the opportunity to participate fully in your deliberations. Therefore, you must set aside and disregard all past deliberations and begin your deliberations all over again.

SOURCES AND AUTHORITY

- "Deliberations provide the jury with the opportunity to review the evidence in light of the perception and memory of each member. Equally important in shaping a member's viewpoint are the personal reactions and interactions as any individual juror attempts to persuade others to accept his or her viewpoint. The result is a balance easily upset if a new juror enters the decision-making process after the 11 others have commenced deliberations." (*People v. Collins* (1976) 17 Cal.3d 687, 693 [131 Cal.Rptr. 782].)

- "We agree with plaintiff that the principles set forth in *Collins* apply to civil as well as criminal cases. The right to a jury trial in civil cases is also guaranteed by article I, section 16 of the California Constitution, and the provisions of the statute governing the substitution of jurors in civil cases are the same as the ones governing criminal cases. The same considerations require that each juror engage in all of the jury's deliberations in both criminal and civil cases. The requirement that at least nine persons reach a verdict is not met unless those nine reach their consensus through deliberations which are the common experience of all of them. Accordingly, we construe section 605 [now 234] of the Code of Civil Procedure to require that the court instruct the jury to disregard all past deliberations and begin deliberating anew when an alternate juror is substituted after jury deliberations have begun." (*Griesel v. Dart Industries, Inc.* (1979) 23 Cal.3d 578, 584–585 [153 Cal.Rptr. 213], overruled on other grounds in *Privette v. Superior Court* (1993) 5 Cal.4th 689, 702, fn. 4 [21 Cal.Rptr.2d 72], internal citations and footnote omitted.)

<u>Secondary Sources</u>

- 7 Witkin, California Procedure (4th ed. 1997) Trial, § 160

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2400
Breach of Express Warranty—Consumer Goods
Essential Factual Elements (Civ. Code, § 1794)

[*Name of plaintiff***] claims that [he/she] was harmed by [***name of defendant***]'s breach of a warranty that [***describe alleged express warranty***]. To establish this claim, [***name of plaintiff***] must prove the following:**

1. **That [***name of plaintiff***] bought a[n] [***consumer product***] [from/distributed by/manufactured by] [***name of defendant***];**

2. **That [***name of defendant***] gave [***name of plaintiff***] a warranty by [***insert at least one of the following:***]**

   [making a written statement that [*describe alleged express warranty***];] [or]**

   [showing [*name of plaintiff***] a sample or model of the [***consumer product***] and representing, by words or conduct, that [his/her] [***consumer product***] would match the quality of the sample or model;]**

3. **That the [***consumer product***] [***insert at least one of the following:***]**

   [did not perform as stated for the time specified;] [or]

   [did not match the quality [of the [sample/model]] [as set forth in the written statement];]

4. **That [***name of plaintiff***] delivered the [***consumer product***] to [***name of defendant***] or its authorized repair facilities for repair [unless [***name of plaintiff***] reasonably could not deliver the [***consumer product***] because of its [size and weight/method of attachment/method of installation] [or] [the nature of the defect] and notified [***name of defendant***] in writing of the need for repair];**

5. **That [***name of defendant***] or its representative failed to repair the [***consumer product***] to match the [written statement/represented quality] after a reasonable number of attempts; [and]**

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6. **[That [*name of defendant*] did not replace the [*consumer product*] or reimburse [*name of plaintiff*] an amount of money equal to the purchase price of the [*consumer product*], less the value of its use by [*name of plaintiff*] before discovering the defect[s];]**

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

8. **That [*name of defendant*]'s failure to [repair/replace/reimburse [*name of plaintiff*] for] the [*consumer product*] was a substantial factor in causing [*name of plaintiff*]'s harm.**

[A written statement need not include the words "warranty" or "guarantee," but if those words are used, a warranty is created. It is also not necessary for [*name of defendant*] to have specifically intended to create a warranty. A warranty is not created if [*name of defendant*] simply stated the value of the [*consumer product*] or gave an opinion about the [*consumer product*]. General statements concerning customer satisfaction do not create a warranty.]

DIRECTIONS FOR USE

An instruction on the definition of "consumer product" may be necessary if that issue is disputed. Civil Code section 1791(a) provides: "'Consumer goods' means any new product or part thereof that is used, bought, or leased for use primarily for personal, family, or household purposes, except for clothing and consumables. 'Consumer goods' shall include new and used assistive devices sold at retail."

Regarding element 4, where the plaintiff claims that the consumer goods could not be delivered for repair, the judge should decide whether written notice of nonconformity is required. The statute—see Civil Code section 1793.2(c)—is unclear on this point.

If remedies are sought under the Commercial Code, the plaintiff may be required to prove reasonable notification within a reasonable time. (Cal. U. Com. Code, § 2607(3).) If so, add the following element to this instruction:

> That [*name of plaintiff*] took reasonable steps to notify [*name of defendant*] within a reasonable time that the [*consumer product*] [did not match the quality [of the [sample/model]]/as set forth in the written statement];

See also instruction 758, *Notification/Reasonable Time*.

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Elements 7 and 8 should be included only if plaintiff is claiming consequential damages. (see Civ. Code, § 1794.) Delete elements 7 and 8 if the plaintiff seeks to recover only reimbursement or restitution under the statute.

If appropriate to the facts, add: "It is not necessary for [*name of plaintiff*] to prove the cause of a defect in the [*consumer product*]." The Song-Beverly Consumer Warranty Act does not require a consumer to prove the cause of the defect or failure, only that the consumer good "did not conform to the express warranty." (See *Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1102, fn. 8 [109 Cal.Rptr.2d 583].)

In addition to sales of consumer goods, the Consumer Warranty Act applies to leases. (Civ. Code, §§ 1791(g)–(i), 1795.4.) This instruction may be modified for use in cases involving an express warranty in a lease of consumer goods.

SOURCES AND AUTHORITY

- "Broadly speaking, the Act regulates warranty terms; imposes service and repair obligations on manufacturers, distributors and retailers who make express warranties; requires disclosure of specified information in express warranties; and broadens a buyer's remedies to include costs, attorney fees and civil penalties. … [T]he purpose of the Act has been to provide broad relief to purchasers of consumer goods with respect to warranties." (*National R.V., Inc. v. Foreman* (1995) 34 Cal.App.4th 1072, 1080 [40 Cal.Rptr.2d 672].)

- Civil Code section 1794(a) provides, in part: "Any buyer of consumer goods who is damaged by a failure to comply with any obligation under this [Act] or under an … express warranty … may bring an action for the recovery of damages and other legal and equitable relief."

- Civil Code section 1791.2 provides:

  (a) "Express warranty" means:
  - (1) A written statement arising out of a sale to the consumer of a consumer good pursuant to which the manufacturer, distributor, or retailer undertakes to preserve or maintain the utility or performance of the consumer good or provide compensation if there is a failure in utility or performance; or
  - (2) In the event of any sample or model, that the whole of the goods conforms to such sample or model.

  (b) It is not necessary to the creation of an express warranty that formal words such as "warrant" or "guarantee" be used, but if such words are used then an express warranty is created. An affirmation merely of the value of the goods or

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a statement purporting to be merely an opinion or commendation of the goods does not create a warranty.

(c) Statements or representations such as expressions of general policy concerning customer satisfaction which are not subject to any limitation do not create an express warranty.

- Civil Code section 1795 provides, in part: "If express warranties are made by persons other than the manufacturer of the goods, the obligation of the person making such warranties shall be the same as that imposed on the manufacturer."

- Civil Code section 1793.2(d) provides, in part:

  (1) Except as provided in paragraph (2), if the manufacturer or its representative in this state does not service or repair the goods to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either replace the goods or reimburse the buyer in an amount equal to the purchase price paid by the buyer, less that amount directly attributable to use by the buyer prior to discovery of the nonconformity.

  (2) If the manufacturer or its representative in this state is unable to service or repair a new motor vehicle … to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either promptly replace the new motor vehicle … or promptly make restitution to the buyer … . However, the buyer shall be free to elect restitution in lieu of replacement, and in no event shall the buyer be required to accept a replacement vehicle.

- "[S]ection 1793.2, subdivision (d)(2), differs from section 1793.2, subdivision (d)(1), in that it gives the new motor vehicle consumer the right to elect restitution in lieu of replacement; provides specific procedures for the motor vehicle manufacturer to follow in the case of replacement and in the case of restitution; and sets forth rules for offsetting the amount attributed to the consumer's use of the motor vehicle. These 'Lemon Law' provisions clearly provide greater consumer protections to those who purchase new motor vehicles than are afforded under the general provisions of the Act to those who purchase other consumer goods under warranty." (*National R.V., Inc.*, *supra*, 34 Cal.App.4th at p. 1079, internal citations and footnotes omitted.)

- Civil Code section 1793.2(c) provides, in part: "The buyer shall deliver nonconforming goods to the manufacturer's service and repair facility within this state, unless, due to reasons of size and weight, or method of attachment, or method of installation, or nature of the nonconformity, delivery cannot reasonably be accomplished. If the buyer cannot return the nonconforming goods for any of these reasons, he or she shall notify the manufacturer or its nearest service and repair

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facility within the state. Written notice of nonconformity to the manufacturer or its service and repair facility shall constitute return of the goods for purposes of this section."

- The act does not require a consumer to give a manufacturer, in addition to its local representative, at least one opportunity to fix a problem. Regarding previous repair efforts entitling an automobile buyer to reimbursement, "[t]he legislative history of [Civil Code section 1793.2] demonstrates beyond any question that . . . a differentiation between manufacturer and local representative is unwarranted." (*Ibrahim v. Ford Motor Co.* (1989) 214 Cal.App.3d 878, 888 [263 Cal.Rptr. 64].)

- Civil Code section 1795.5 provides, in part: Notwithstanding the provisions … defining consumer goods to mean 'new' goods, the obligation of a distributor or retail seller of used consumer goods in a sale in which an express warranty is given shall be the same as that imposed on manufacturers," with limited exceptions provided by statute.

- Civil Code section 1790.3 provides: "The provisions of [the Song-Beverly Consumer Warranty Act] shall not affect the rights and obligations of parties determined by reference to the Commercial Code except that, where the provisions of the Commercial Code conflict with the rights guaranteed to buyers of consumer goods under the provisions of [the act], the provisions of [the act] shall prevail."

Secondary Sources

- 5 Bancroft-Whitney's California Civil Practice: Business Litigation (1993) Consumer Warranties, §§ 53:1, 53:3–53:4, 53:10–53:11, 53:14–53:17, 53:22–53:23, 53:26–53:27, pp. 6, 8–10, 14–15, 18–23, 27–29, 31–34; *id*. (2001 supp.) at §§ 53:3–53:4, 53:10, 53:14, 53:16, 53:26–53:27, pp. 29–33, 36–37
- 1 Sales & Leases (Cont.Ed.Bar 2001) Warranties, §§ 7.4, 7.8, 7.15, 7.87, pp. 233–234, 239, 245–246, 293–294; *id.*, Prelitigation Remedies, at § 13.68, pp. 619–620; *id.*, Litigation Remedies, at § 14.25, pp. 658–659; *id.*, Division 10: Leasing of Goods, at § 17.31, p. 807
- 3 Witkin, Summary of California Law (9th ed. 1987) Sales, §§ 51, 55, 306–308, pp. 47, 51, 240–242; *id.* (2001 supp.) at §§ 51, 55, 306–308, pp. 14–15, 92–101

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2401
Breach of Express Warranty—New Motor Vehicle
Essential Factual Elements (Civ. Code, § 1794)

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

1. **That [***name of plaintiff***] bought a[n] [***new motor vehicle***] [from/distributed by/manufactured by] [***name of defendant***];**

2. **That [***name of defendant***] gave [***name of plaintiff***] a written warranty that [***describe alleged express warranty***];**

3. **That the vehicle had a defect covered by the warranty that substantially impaired its use, value, or safety to [***name of plaintiff***];**

4. **That [***name of plaintiff***] delivered the vehicle to [***name of defendant***] or its authorized repair facilities for repair [unless [***name of plaintiff***] reasonably could not deliver the [***new motor vehicle***] because of the nature of the defect, and notified [***name of defendant***] in writing of the need for repair];**

5. **That [***name of defendant***] or its representative failed to service or repair it to match the written warranty after a reasonable number of attempts;**

6. **That [***name of defendant***] did not promptly replace or buy back the vehicle as requested by [***name of plaintiff***];**

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

8. **That [***name of defendant***]'s breach of the written warranty was a substantial factor in causing [***name of plaintiff***]'s harm.**

[A written warranty need not include the words "warranty" or "guarantee," but if those words are used, a warranty is created. It is also not necessary for [*name of defendant***] to have specifically intended to create a warranty. A warranty is not created if [***name of defendant***] simply stated the value of the**

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vehicle or gave an opinion about the vehicle. General statements concerning customer satisfaction do not create a warranty.]

DIRECTIONS FOR USE

If remedies are sought under the Commercial Code, the plaintiff may be required to prove reasonable notification within a reasonable time. (Cal. U. Com. Code, § 2607(3).) If so, add the following element to this instruction:

> That [*name of plaintiff*] took reasonable steps to notify [*name of defendant*] within a reasonable time that the [*consumer product*] [did not meet the quality [of the [sample/model]]/as set forth in the written statement];

See also instruction 758, *Notification/Reasonable Time*.

Regarding element 4, where the plaintiff claims that the consumer goods could not be delivered for repair, the judge should decide whether written notice of nonconformity is required. The statute—see Civil Code section 1793.2(c)—is unclear on this point.

Elements 7 and 8 should be included only if plaintiff is claiming consequential damages. (see Civ. Code, § 1794.) Delete elements 7 and 8 if the plaintiff seeks to recover only reimbursement or restitution under the statute.

If appropriate to the facts, add: "It is not necessary for [*name of plaintiff*] to prove the cause of a defect in the [*new motor vehicle*]." The Song-Beverly Consumer Warranty Act does not require a consumer to prove the cause of the defect or failure, only that the consumer good "did not conform to the express warranty." (See *Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1102, fn. 8 [109 Cal.Rptr.2d 583].)

In addition to sales of consumer goods, the Consumer Warranty Act applies to leases. (Civ. Code, §§ 1791(g)–(i), 1795.4.) This instruction may be modified for use in cases involving an express warranty in a lease of a motor vehicle.

SOURCES AND AUTHORITY

- "Broadly speaking, the Act regulates warranty terms; imposes service and repair obligations on manufacturers, distributors and retailers who make express warranties; requires disclosure of specified information in express warranties; and broadens a buyer's remedies to include costs, attorney fees and civil penalties. … [T]he purpose of the Act has been to provide broad relief to purchasers of consumer goods with

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respect to warranties." (*National R.V., Inc. v. Foreman* (1995) 34 Cal.App.4th 1072, 1080 [40 Cal.Rptr.2d 672].)

- "A plaintiff pursuing an action under the Act has the burden to prove that (1) the vehicle had a nonconformity covered by the express warranty that substantially impaired the use, value or safety of the vehicle (the nonconformity element); (2) the vehicle was presented to an authorized representative of the manufacturer of the vehicle for repair (the presentation element); and (3) the manufacturer or his representative did not repair the nonconformity after a reasonable number of repair attempts (the failure to repair element)." (*Oregel, supra,* 90 Cal.App.4th at p. 1101.)

- Civil Code section 1794(a) provides, in part: "Any buyer of consumer goods who is damaged by a failure to comply with any obligation under this [Act] or under an … express warranty … may bring an action for the recovery of damages and other legal and equitable relief."

- Civil Code section 1790.3 provides: "The provisions of [the Song-Beverly Consumer Warranty Act] shall not affect the rights and obligations of parties determined by reference to the Commercial Code except that, where the provisions of the Commercial Code conflict with the rights guaranteed to buyers of consumer goods under the provisions of [the act], the provisions of [the act] shall prevail."

- Civil Code section 1791.2 provides:

  (a) "Express warranty" means:
    (1) A written statement arising out of a sale to the consumer of a consumer good pursuant to which the manufacturer, distributor, or retailer undertakes to preserve or maintain the utility or performance of the consumer good or provide compensation if there is a failure in utility or performance; or
    (2) In the event of any sample or model, that the whole of the goods conforms to such sample or model.
  (b) It is not necessary to the creation of an express warranty that formal words such as "warrant" or "guarantee" be used, but if such words are used then an express warranty is created. An affirmation merely of the value of the goods or a statement purporting to be merely an opinion or commendation of the goods does not create a warranty.
  (c) Statements or representations such as expressions of general policy concerning customer satisfaction which are not subject to any limitation do not create an express warranty.

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- Civil Code section 1795 provides, in part: "If express warranties are made by persons other than the manufacturer of the goods, the obligation of the person making such warranties shall be the same as that imposed on the manufacturer."

- Civil Code section 1793.22(e)(2) provides, in part: "'New motor vehicle' means a new motor vehicle that is bought or used primarily for personal, family, or household purposes. 'New motor vehicle' also means a new motor vehicle … that is bought or used primarily for business purposes by a person … or any … legal entity, to which not more than five motor vehicles are registered in this state. 'New motor vehicle' includes the chassis, chassis cab, and that portion of a motor home devoted to its propulsion …, a dealer-owned vehicle and a 'demonstrator' or other motor vehicle sold with a manufacturer's new car warranty. "

- "Under well-recognized rules of statutory construction, the more specific definition [of "new motor vehicle"] found in the current section 1793.22 governs the more general definition [of "consumer goods"] found in section 1791." (*Jensen v. BMW of North America, Inc.* (1995) 35 Cal.App.4th 112, 126 [41 Cal.Rptr.2d 295].)

- "'Nonconformity' is defined as 'a nonconformity which substantially impairs the use, value, or safety of the new motor vehicle to the buyer or lessee.' The term is similar to what the average person would understand to be a 'defect.'" (*Schreidel v. American Honda Motor Co.* (1995) 34 Cal.App.4th 1242, 1249 [40 Cal.Rptr.2d 576], internal citation omitted.)

- "The issue of whether the problems constituted substantial impairment is one for the trier of fact." (*Schreidel, supra*, 34 Cal.App.4th at p. 1250.)

- Civil Code section 1793.2(d)(2) provides, in part: "If the manufacturer or its representative in this state is unable to service or repair a new motor vehicle … to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either promptly replace the new motor vehicle … or promptly make restitution to the buyer . … However, the buyer shall be free to elect restitution in lieu of replacement, and in no event shall the buyer be required to accept a replacement vehicle."

- "[S]ection 1793.2, subdivision (d)(2), differs from section 1793.2, subdivision (d)(1), in that it gives the new motor vehicle consumer the right to elect restitution in lieu of replacement; provides specific procedures for the motor vehicle manufacturer to follow in the case of replacement and in the case of restitution; and sets forth rules for offsetting the amount attributed to the consumer's use of the motor vehicle. These 'Lemon Law' provisions clearly provide greater consumer protections to those who

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purchase new motor vehicles than are afforded under the general provisions of the Act to those who purchase other consumer goods under warranty." (*National R.V., Inc., supra*, 34 Cal.App.4th at p. 1079, internal citations and footnotes omitted.)

- Civil Code section 1793.2(c) provides, in part: "The buyer shall deliver nonconforming goods to the manufacturer's service and repair facility within this state, unless, due to reasons of size and weight, or method of attachment, or method of installation, or nature of the nonconformity, delivery cannot reasonably be accomplished. If the buyer cannot return the nonconforming goods for any of these reasons, he or she shall notify the manufacturer or its nearest service and repair facility within the state. Written notice of nonconformity to the manufacturer or its service and repair facility shall constitute return of the goods for purposes of this section."

- The act does not require a consumer to give a manufacturer, in addition to its local representative, at least one opportunity to fix a problem. Regarding previous repair efforts entitling an automobile buyer to reimbursement, "[t]he legislative history of [Civil Code section 1793.2] demonstrates beyond any question that . . . a differentiation between manufacturer and local representative is unwarranted." (*Ibrahim v. Ford Motor Co.* (1989) 214 Cal.App.3d 878, 888 [263 Cal.Rptr. 64].)

- "[T]he only affirmative step the Act imposes on consumers is to 'permit[] the manufacturer a reasonable *opportunity* to repair the vehicle.' " (*Oregel, supra*, 90 Cal.App.4th at p. 1103, internal citation omitted.)

- "[A] written service contract covering a used vehicle, under which the dealer 'undertakes to preserve or maintain the utility or performance' of the vehicle, is an 'express warranty' " covered by the Song-Beverly Consumer Warranty Act. (*Reveles v. Toyota by the Bay* (1997) 57 Cal.App.4th 1139, 1158 [67 Cal.Rptr.2d 543], disapproved on other grounds by *Snukal v. Flightways Manufacturing, Inc.* (2000) 23 Cal.4th 754, 775, fn. 6 [98 Cal.Rptr.2d 1].)

<u>Secondary Sources</u>

- 5 Bancroft-Whitney's California Civil Practice: Business Litigation (1993) Consumer Warranties, §§ 53:1, 53:3–53:4, 53:10–53:11, 53:14–53:17, 53:22–53:23, 53:26–53:27, pp. 6, 8–10, 14–15, 18–23, 27–29, 31–34; *id*. (2001 supp.) at §§ 53:3–53:4, 53:10, 53:14, 53:16, 53:26–53:27, pp. 29–33, 36–37
- 1 Sales & Leases (Cont.Ed.Bar 2001) Warranties, §§ 7.4, 7.8, 7.15, 7.87, pp. 233–234, 239, 245–246, 293–294; *id.*, Prelitigation Remedies, at § 13.68, pp. 619–620; *id.*,

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Litigation Remedies, § at 14.25, pp. 658–659; *id.*, Division 10: Leasing of Goods, at § 17.31, p. 807

- 3 Witkin, Summary of California Law (9th ed. 1987) Sales, §§ 51, 55, 306–308, pp. 47, 51, 240–242; *id.* (2001 supp.) at §§ 51, 55, 306–308, pp. 14–15, 92–101

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2402
Duration of Express Written Warranty

The stated time period for a written warranty is lengthened by the number of days that the [*consumer product*] was made available by [*name of plaintiff*] for repairs under the warranty, including any delays caused by circumstances beyond [*name of plaintiff*]'s control.

DIRECTIONS FOR USE

Where the warranty period has been extended, it cannot expire any sooner than 60 days after the last repair of a claimed defect. (Civ. Code, § 1793.1(a)(2).)

SOURCES AND AUTHORITY

- Civil Code section 1793.1(a)(2) provides, in part: "The warranty period will be extended for the number of whole days that the product has been out of the buyer's hands for warranty repairs. If a defect exists within the warranty period, the warranty will not expire until the defect has been fixed. The warranty period will also be extended if the warranty repairs have not been performed due to delays caused by circumstances beyond the control of the buyer, or if the warranty repairs did not remedy the defect and the buyer notifies the manufacturer or seller of the failure of the repairs within 60 days after they were completed."

- Civil Code section 1795.6 provides, in part:

  (a) Every warranty period relating to an … express warranty accompanying a sale or consignment for sale of consumer goods selling for fifty dollars ($50) or more shall automatically be tolled for the period from the date upon which the buyer either (1) delivers nonconforming goods to the manufacturer or seller for warranty repairs or service or (2), pursuant to [sections 1793.2(c) or 1793.22], notifies the manufacturer or seller of the nonconformity of the goods up to, and including, the date upon which (1) the repaired or serviced goods are delivered to the buyer, (2) the buyer is notified the goods are repaired or serviced and are available for the buyer's possession or (3) the buyer is notified that repairs or service is completed, if repairs or service is made at the buyer's residence.

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(b) Notwithstanding the date or conditions set for the expiration of the warranty period, such warranty period shall not be deemed expired if … : (1) after the buyer has satisfied the requirements of subdivision (a), the warranty repairs or service has not been performed due to delays caused by circumstances beyond the control of the buyer or (2) the warranty repairs or service performed upon the nonconforming goods did not remedy the nonconformity for which such repairs or service was performed and the buyer notified the manufacturer or seller of this failure within 60 days after the repairs or service was completed. When the warranty repairs or service has been performed so as to remedy the nonconformity, the warranty period shall expire in accordance with its terms, including any extension to the warranty period for warranty repairs or service.

Secondary Sources

- 5 Bancroft-Whitney's California Civil Practice: Business Litigation (1993) Consumer Warranties, §§ 53:24–53:25, pp. 29–31
- 1 Sales & Leases (Cont.Ed.Bar 2001) Warranties, § 7.15, pp. 245–246
- 3 Witkin, Summary of California Law (9th ed. 1987) Sales, § 309, p. 243

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2403
"Repair Attempts" Explained

Each time the [*consumer product*] was given to [*name of defendant*] [or its representatives] for repair must be considered as an attempt to repair, even if [*name of defendant*] [or its representatives] did not do any repair work.

SOURCES AND AUTHORITY

- Civil Code section 1793.2(d) provides, in part:

  (1) Except as provided in paragraph (2), if the manufacturer or its representative in this state does not service or repair the goods to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either replace the goods or reimburse the buyer. …
  (2) If the manufacturer or its representative in this state is unable to service or repair a new motor vehicle … to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either promptly replace the new motor vehicle … or promptly make restitution to the buyer.

- "[T]he only affirmative step the Act imposes on consumers is to 'permit[] the manufacturer a reasonable *opportunity* to repair the vehicle.' Whether or not the manufacturer's agents choose to take advantage of the opportunity, or are unable despite that opportunity to isolate and make an effort to repair the problem, are matters for which the consumer is not responsible." (*Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1103–1104 [109 Cal.Rptr.2d 583], internal citation omitted.)

<u>Secondary Sources</u>

- 2 Sales & Leases (Cont.Ed.Bar 2001) Prelitigation Remedies, § 13.68, pp. 619–621

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2404
Reasonable Number of Repair Attempts—Rebuttable Presumption
(Civ. Code, § 1793.22(b))

The number of attempts to make repairs was reasonable if [*name of plaintiff***] proves that within [18 months from delivery of the [***new motor vehicle***] to [him/her/it]/the first 18,000 miles] [***insert option A, B, and/or C:***]**

[A. 1. That the vehicle was made available to [*name of defendant***] [or its agent] for repair of the same defect two or more times; [and]**

2. That the defect resulted in a condition that was likely to cause death or serious bodily injury if the vehicle was driven; [and]

3. [That [*name of plaintiff***] directly told [***name of manufacturer***] about the need to repair the defect;] [or]]**

[B. 1. That the vehicle was made available to [*name of defendant***] [or its agent] for repair of the same defect four or more times; [and]**

2. [That [*name of plaintiff***] directly told [***name of manufacturer***] about the need to repair the defect;] [or]]**

[C. That the vehicle was out of service for repair of defects by [*name of defendant***] [or its agent] for more than 30 days.]**

If [*name of plaintiff***] has proved these facts, then the number of attempts to make repairs was reasonable unless [***name of defendant***] proves that under all the circumstances [[***name of defendant***]/its agent] was not given a reasonable opportunity to repair the defect.**

[The 30-day limit for repairing defects will be lengthened if [*name of defendant***] proves that repairs could not be made due to conditions beyond the control of [***name of defendant***] or its agent.]**

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DIRECTIONS FOR USE

The rebuttable presumption concerning the number of repair attempts applies only to new motor vehicles—see the Tanner Consumer Protection Act (Civ. Code, § 1793.22(b)).

The bracketed language in the first two optional paragraphs concerning notice directly to the manufacturer are applicable only if "the manufacturer has clearly and conspicuously disclosed to the buyer, with the warranty or the owner's manual, the provisions of [the Tanner Consumer Protection Act] and that of [Civil Code section 1793.2(d)], including the requirement that the buyer must notify the manufacturer directly." (See Civ. Code, § 1793.22(b)(3).) This is a matter that the judge should determine ahead of time as an issue of law.

SOURCES AND AUTHORITY

- Civil Code section 1793.2(d)(2) provides, in part: "If the manufacturer or its representative in this state is unable to service or repair a new motor vehicle … to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either promptly replace the new motor vehicle … or promptly make restitution to the buyer."

- Civil Code section 1793.22(b) provides, in part:

  It shall be presumed that a reasonable number of attempts have been made to conform a new motor vehicle to the applicable express warranties if, within 18 months from delivery to the buyer or 18,000 miles on the odometer of the vehicle, whichever occurs first, one or more of the following occurs:

  (1) The same nonconformity results in a condition that is likely to cause death or serious bodily injury if the vehicle is driven and the nonconformity has been subject to repair two or more times by the manufacturer or its agents, and the buyer or lessee has at least once directly notified the manufacturer of the need for the repair of the nonconformity.
  (2) The same nonconformity has been subject to repair four or more times by the manufacturer or its agents and the buyer has at least once directly notified the manufacturer of the need for the repair of the nonconformity.
  (3) The vehicle is out of service by reason of repair of nonconformities by the manufacturer or its agents for a cumulative total of more than 30 calendar days since delivery of the vehicle to the buyer. The 30-day limit shall be extended only if repairs cannot be performed due to conditions beyond the control of the manufacturer or its agents. The buyer shall be required to directly notify the

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> manufacturer pursuant to paragraphs (1) and (2) only if the manufacturer has clearly and conspicuously disclosed to the buyer, with the warranty or the owner's manual, the provisions of this section and that of subdivision (d) of Section 1793.2, including the requirement that the buyer must notify the manufacturer directly pursuant to paragraphs (1) and (2). The notification, if required, shall be sent to the address, if any, specified clearly and conspicuously by the manufacturer in the warranty or owner's manual.

This presumption shall be a rebuttable presumption affecting the burden of proof, and it may be asserted by the buyer in any civil action."

Secondary Sources

- 5 Bancroft-Whitney's California Civil Practice: Business Litigation (1993) Consumer Warranties, § 53:27, pp. 33–34
- 2 Sales & Leases (Cont.Ed.Bar 2001) Prelitigation Remedies, § 13.68, pp. 619–621

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2405
Breach of Implied Warranty of Merchantability
Essential Factual Elements

[*Name of plaintiff***] claims that [he/she] was harmed because the [***consumer product***] did not have the quality that a buyer would reasonably expect. This is known as "breach of an implied warranty." To establish this claim, [***name of plaintiff***] must prove the following:**

1. **That [***name of plaintiff***] bought a[n] [***consumer product***] [from/ manufactured by] [***name of defendant***];**

2. **That at the time of purchase [***name of defendant***] was in the business of [selling [***consumer products***] to retail buyers] [manufacturing [***consumer product***s]]; [and]**

3. **That the [***consumer product***] [***insert one or more of the following:***]**

   [was not of the same quality as those generally acceptable in the trade]; [or]

   [was not fit for the ordinary purposes for which such goods are used;] [or]

   [was not adequately contained, packaged, and labeled;] [or]

   [did not measure up to the promises or facts stated on the container or label;]

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

5. **That the [***describe alleged defect***] was a substantial factor in causing [***name of plaintiff***]'s harm.**

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DIRECTIONS FOR USE

If remedies are sought under the Commercial Code, the plaintiff may be required to prove reasonable notification within a reasonable time. (Cal. U. Com. Code, § 2607(3).) If so, add the following element to this instruction:

> That [*name of plaintiff*] took reasonable steps to notify [*name of defendant*] within a reasonable time that the [*consumer product*] [did not meet the quality [of the [sample/ model]]/as set forth in the written statement];

See also instruction 758, *Notification/Reasonable Time*.

Delete element 2 if the defendant is the manufacturer of the consumer product in question or if it is uncontested that the defendant was a retail seller within the meaning of the act.

Elements 4 and 5 should be included only if plaintiff is claiming consequential damages. (Civ. Code, § 1794.)

If appropriate to the facts, add: "It is not necessary for [*name of plaintiff*] to prove the cause of a defect of the [*consumer product*]." The Song-Beverly Consumer Warranty Act does not require a consumer to prove the cause of the defect or failure, only that the consumer good "did not conform to the express warranty." (See *Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1102, fn. 8 [109 Cal.Rptr.2d 583].)

In addition to sales of consumer goods, the Consumer Warranty Act applies to leases—see Civil Code sections 1791(g)–(i) and 1795.4. This instruction may be modified for use in cases involving the implied warranty of merchantability in a lease of consumer goods.

SOURCES AND AUTHORITY

- Civil Code section 1794(a) provides: "Any buyer of consumer goods who is damaged by a failure to comply with any obligation … under an implied … warranty … may bring an action for the recovery of damages and other legal and equitable relief."

- Civil Code section 1791.1(a) provides:

  "Implied warranty of merchantability" … means that the consumer goods meet each of the following:
  (1) Pass without objection in the trade under the contract description.
  (2) Are fit for the ordinary purposes for which such goods are used.
  (3) Are adequately contained, packaged, and labeled.

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(4) Conform to the promises or affirmations of fact made on the container or label.

- Civil Code section 1792 provides, in part: "Unless disclaimed in the manner prescribed by [the act], every sale of consumer goods that are sold at retail in this state shall be accompanied by the manufacturer's and the retail seller's implied warranty that the goods are merchantable. The retail seller shall have a right of indemnity against the manufacturer in the amount of any liability under this section."

- "Unlike express warranties, which are basically contractual in nature, the implied warranty of merchantability arises by operation of law. … [D]efendants' liability for an implied warranty does not depend upon any specific conduct or promise on their part, but instead turns upon whether their product is merchantable under the code." (*Hauter v. Zogarts* (1975) 14 Cal.3d 104, 117 [120 Cal.Rptr. 681], internal citations omitted.)

- "Unless specific disclaimer methods are followed, an implied warranty of merchantability accompanies every retail sale of consumer goods in the state." (*Music Acceptance Corp. v. Lofing* (1995) 32 Cal.App.4th 610, 619 [39 Cal.Rptr.2d 159].)

- The implied warranty of merchantability "does not 'impose a general requirement that goods precisely fulfill the expectation of the buyer. Instead, it provides for a minimum level of quality.' " (*American Suzuki Motor Corp. v. Superior Court* (1995) 37 Cal.App.4th 1291, 1295–1296 [44 Cal.Rptr.2d 526], internal citation omitted.)

- "The question of reimbursement or replacement is relevant only under [Civil Code] section 1793.2. … [T]his section applies only when goods cannot be made to conform to the 'applicable *express* warranties.' It has no relevance to the implied warranty of merchantability." (*Music Acceptance Corp.*, *supra*, 32 Cal.App.4th at p. 620.)

- Civil Code section 1791.1(d) provides, in part: "Any buyer of consumer goods injured by a breach of the implied warranty of merchantability … has the remedies provided in Chapter 6 (commencing with Section 2601) and Chapter 7 (commencing with Section 2701) of Division 2 of the Commercial Code, and, in any action brought under such provisions, [Civil Code] Section 1794 … shall apply."

- "The Song-Beverly Act incorporates the provisions of [Commercial Code] sections 2314 and 2315. It 'supplements, rather than supersedes, the provisions of the California Uniform Commercial Code' by broadening a consumer's remedies to include costs, attorney's fees, and civil penalties." (*American Suzuki Motor Corp.*, *supra*, 37 Cal.App.4th at 1294, fn. 2, internal citation omitted.)

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- Civil Code section 1794(b) provides, in part:

  The measure of the buyer's damages in an action under this section shall include … the following:
  (1) Where the buyer has rightfully rejected or justifiably revoked acceptance of the goods or has exercised any right to cancel the sale, Sections 2711, 2712, and 2713 of the Commercial Code shall apply.
  (2) Where the buyer has accepted the goods, Sections 2714 and 2715 of the Commercial Code shall apply, and the measure of damages shall include the cost of repairs necessary to make the goods conform.

- Commercial Code section 2714(1) provides: "Where the buyer has accepted goods and given notification (subdivision (3) of Section 2607) he or she may recover, as damages for any nonconformity of tender, the loss resulting in the ordinary course of events from the seller's breach as determined in any manner that is reasonable."

- "The notice requirement of [former Civil Code] section 1769 … is not an appropriate one for the court to adopt in actions by injured consumers against manufacturers with whom they have not dealt. … 'As between the immediate parties to the sale [the notice requirement[is a sound commercial rule, designed to protect the seller against unduly delayed claims for damages. As applied to personal injuries, and notice to a remote seller, it becomes a booby-trap for the unwary.' " (*Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, 61 [27 Cal.Rptr. 697], internal citations omitted.)

<u>Secondary Sources</u>

- 5 Bancroft-Whitney's California Civil Practice: Business Litigation (1993) Consumer Warranties, § 53:5–53:7, 53:31, pp. 11–13, 38–39
- 1 Sales & Leases (Cont.Ed.Bar 2001) Warranties, §§ 7.21–7.23, 7.25–7.26, pp. 250–254; *id.* Division 10: Leasing of Goods, at §§ 17.31–17.32, pp. 807–811
- 3 Witkin, Summary of California Law (9th ed. 1987) Sales, §§ 67–68, pp. 61–62; *id.* (2001 supp.) at § 68, p. 18

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2406
Breach of Implied Warranty of Fitness for a Particular Purpose
Essential Factual Elements

[*Name of plaintiff***] claims that [he/she] was harmed because the [***consumer product***] was not suitable for [***name of plaintiff***]'s intended use. This is known as an "breach of an implied warranty." To establish this claim, [***name of plaintiff***] must prove the following:**

1. **That [***name of plaintiff***] bought a[n] [***consumer product***] [from/ manufactured by/distributed by] [***name of defendant***];**

2. **That, at the time of purchase, [***name of defendant***] knew or had reason to know that [***name of plaintiff***] intended to use the [***consumer product***] for a particular purpose;**

3. **That, at the time of purchase, [***name of defendant***] knew or had reason to know that [***name of plaintiff***] was relying on [***name of defendant***]'s skill and judgment to select or provide a [***consumer product***] that was suitable for that particular purpose;**

4. **That [***name of plaintiff***] justifiably relied on [***name of defendant***]'s skill and judgment; [and]**

5. **That the [***consumer product***] was not suitable for the particular purpose;**

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

7. **That the failure of the [***consumer product***] to be suitable was a substantial factor in causing [***name of plaintiff***]'s harm.**

DIRECTIONS FOR USE

If remedies are sought under the Commercial Code, the plaintiff may be required to prove reasonable notification within a reasonable time. (Cal. U. Com. Code, § 2607(3).) If so, add the following element to this instruction:

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That [*name of plaintiff*] took reasonable steps to notify [*name of defendant*] within a reasonable time that the [*consumer product*] [did not meet the quality [of the [sample/ model]]/as set forth in the written statement];

See also instruction 758, *Notification/Reasonable Time*.

Elements 6 and 7 should be included only if plaintiff is claiming consequential damages. (Civ. Code, § 1794.)

If appropriate to the facts, add: "It is not necessary for [*name of plaintiff*] to prove the cause of a defect of the [*consumer product*]." The Song-Beverly Consumer Warranty Act does not require a consumer to prove the cause of the defect or failure, only that the consumer good "did not conform to the express warranty." (See *Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1102, fn. 8 [109 Cal.Rptr.2d 583].)

In addition to sales of consumer goods, the Consumer Warranty Act applies to leases of consumer goods—see Civil Code sections 1791(g)–(i) and 1795.4. This instruction may be modified for use in cases involving the implied warranty of fitness in a lease of consumer goods.

SOURCES AND AUTHORITY

- Civil Code section 1791.1(b) provides, in part: " 'Implied warranty of fitness' means … that when the retailer, distributor, or manufacturer has reason to know any particular purpose for which the consumer goods are required, and further, that the buyer is relying on the skill and judgment of the seller to select and furnish suitable goods, then there is an implied warranty that the goods shall be fit for such purpose."

- Civil Code section 1792.1 provides: "Every sale of consumer goods that are sold at retail in this state by a manufacturer who has reason to know at the time of the retail sale that the goods are required for a particular purpose and that the buyer is relying on the manufacturer's skill or judgment to select or furnish suitable goods shall be accompanied by such manufacturer's implied warranty of fitness."

- Civil Code section 1792.2(a) provides: "Every sale of consumer goods that are sold at retail in this state by a retailer or distributor who has reason to know at the time of the retail sale that the goods are required for a particular purpose, and that the buyer is relying on the retailer's or distributor's skill or judgment to select or furnish suitable goods shall be accompanied by such retailer's or distributor's implied warranty that the goods are fit for that purpose."

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- "The Consumer Warranty Act makes … an implied warranty [of fitness for a particular purpose] applicable to retailers, distributors, and manufacturers. … An implied warranty of fitness for a particular purpose arises only where (1) the purchaser at the time of contracting intends to use the goods for a particular purpose, (2) the seller at the time of contracting has reason to know of this particular purpose, (3) the buyer relies on the seller's skill or judgment to select or furnish goods suitable for the particular purpose, and (4) the seller at the time of contracting has reason to know that the buyer is relying on such skill and judgment." (*Keith v. Buchanan* (1985) 173 Cal.App.3d 13, 25 [220 Cal.Rptr. 392], internal citations omitted.)

- " 'A "particular purpose" differs from the ordinary purpose for which the goods are used in that it envisages a specific use by the buyer which is peculiar to the nature of his business whereas the ordinary purposes for which goods are used are those envisaged in the concept of merchantability and go to uses which are customarily made of the goods in question.' " (*American Suzuki Motor Corp. v. Superior Court* (1995) 37 Cal.App.4th 1291, 1295, fn. 2 [44 Cal.Rptr.2d 526], internal citation omitted.)

- "The reliance elements are important to the consideration of whether an implied warranty of fitness for a particular purpose exists. … The major question in determining the existence of an implied warranty of fitness for a particular purpose is the reliance by the buyer upon the skill and judgment of the seller to select an article suitable for his needs." (*Keith*, *supra*, 173 Cal.App.3d at p. 25, internal citations omitted.)

- Civil Code section 1792.3 provides, in part: "[N]o implied warranty of fitness shall be waived, except in the case of a sale of consumer goods on an 'as is' or 'with all faults' basis where the provisions of this [act] affecting 'as is' or 'with all faults' sales are strictly complied with."

- "The question of reimbursement or replacement is relevant only under [Civil Code] section 1793.2. … [T]his section applies only when goods cannot be made to conform to the 'applicable *express* warranties.' It has no relevance to the implied warranty of merchantability." (*Music Acceptance Corp. v. Lofing* (1995) 32 Cal.App.4th 610, 620 [39 Cal.Rptr.2d 159].)

- Civil Code section 1791.1(d) provides, in part: "Any buyer of consumer goods injured by a breach of … the implied warranty of fitness has the remedies provided in Chapter 6 (commencing with Section 2601) and Chapter 7 (commencing with Section 2701) of Division 2 of the Commercial Code, and, in any action brought under such provisions, [Civil Code] Section 1794 … shall apply."

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- "The Song-Beverly Act incorporates the provisions of [Commercial Code] sections 2314 and 2315. It 'supplements, rather than supersedes, the provisions of the California Uniform Commercial Code' by broadening a consumer's remedies to include costs, attorney's fees, and civil penalties." (*American Suzuki Motor Corp.*, *supra*, 37 Cal.App.4th at p. 1294, fn. 2, internal citation omitted.)

- Civil Code section 1794(b) provides, in part:

  The measure of the buyer's damages in an action under this section shall include … the following:
  (1) Where the buyer has rightfully rejected or justifiably revoked acceptance of the goods or has exercised any right to cancel the sale, Sections 2711, 2712, and 2713 of the Commercial Code shall apply.
  (2) Where the buyer has accepted the goods, Sections 2714 and 2715 of the Commercial Code shall apply, and the measure of damages shall include the cost of repairs necessary to make the goods conform.

- Commercial Code section 2714(1) provides: "Where the buyer has accepted goods and given notification (subdivision (3) of Section 2607) he or she may recover, as damages for any nonconformity of tender, the loss resulting in the ordinary course of events from the seller's breach as determined in any manner that is reasonable."

- "The notice requirement of [former Civil Code] section 1769 … is not an appropriate one for the court to adopt in actions by injured consumers against manufacturers with whom they have not dealt. … 'As between the immediate parties to the sale [the notice requirement] is a sound commercial rule, designed to protect the seller against unduly delayed claims for damages. As applied to personal injuries, and notice to a remote seller, it becomes a booby-trap for the unwary.' " (*Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, 61 [27 Cal.Rptr. 697], internal citations omitted.)

<u>Secondary Sources</u>

- 5 Bancroft-Whitney's California Civil Practice: Business Litigation (1993) Consumer Warranties, §§ 53:5–53:7, 53:31, pp. 11–13, 38–39
- 1 Sales & Leases (Cont.Ed.Bar 2001) Warranties, §§ 7.31–7.37, pp. 256–259; *id.*, at Division 10: Leasing of Goods, §§ 17.31–17.32, pp. 807–811
- 3 Witkin, Summary of California Law (9th ed. 1987) Sales, §§ 69–70, 72–74, pp. 63–67; *id.* (2001 supp.) at §§ 69–70, 72–74, p. 19

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2407
Duration of Implied Warranty

An implied warranty is in effect for one year after the sale of the [*consumer product*], unless a shorter period is stated in a writing that comes with the [*consumer product*], provided that the shorter period is reasonable. In no event will an implied warranty be in effect for less than 60 days.

[The time period of an implied warranty is lengthened by the number of days that the [*consumer product*] was made available by [*name of plaintiff*] for repairs under the warranty, including any delays caused by circumstances beyond [*name of plaintiff*]'s control].

DIRECTIONS FOR USE

If the consumer goods at issue are not new, the instruction must be modified to reflect the shorter implied warranty period provided in Civil Code section 1795.5(c) (*i.e.*, no less than 30 days but no more than three months).

SOURCES AND AUTHORITY

- Civil Code section 1791.1 (c) provides: "The duration of the implied warranty of merchantability and where present the implied warranty of fitness shall be coextensive in duration with an express warranty which accompanies the consumer goods, provided the duration of the express warranty is reasonable; but in no event shall such implied warranty have a duration of less than 60 days nor more than one year following the sale of new consumer goods to a retail buyer. Where no duration for an express warranty is stated with respect to consumer goods, or parts thereof, the duration of the implied warranty shall be the maximum period prescribed above."

- Civil Code section 1795.6 provides, in part:

  (a) Every warranty period relating to an implied … warranty accompanying a sale or consignment for sale of consumer goods selling for fifty dollars ($50) or more shall automatically be tolled for the period from the date upon which the buyer either (1) delivers nonconforming goods to the manufacturer or seller for warranty repairs or service or (2), pursuant to subdivision (c) of Section 1793.2

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or Section 1793.22, notifies the manufacturer or seller of the nonconformity of the goods up to, and including, the date upon which (1) the repaired or serviced goods are delivered to the buyer, (2) the buyer is notified the goods are repaired or serviced and are available for the buyer's possession or (3) the buyer is notified that repairs or service is completed, if repairs or service is made at the buyer's residence.

(b) Notwithstanding the date or conditions set for the expiration of the warranty period, such warranty period shall not be deemed expired if … : (1) after the buyer has satisfied the requirements of subdivision (a), the warranty repairs or service has not been performed due to delays caused by circumstances beyond the control of the buyer or (2) the warranty repairs or service performed upon the nonconforming goods did not remedy the nonconformity for which such repairs or service was performed and the buyer notified the manufacturer or seller of this failure within 60 days after the repairs or service was completed. When the warranty repairs or service has been performed so as to remedy the nonconformity, the warranty period shall expire in accordance with its terms, including any extension to the warranty period for warranty repairs or service.

- Civil Code section 1795.5 provides, in part: "[T]he obligation of a distributor or retail seller of used consumer goods in a sale in which an express warranty is given shall be the same as that imposed on manufacturers under [the act] except: … [t]he duration of the implied warranty of merchantability and where present the implied warranty of fitness with respect to used consumer goods sold in this state, where the sale is accompanied by an express warranty, shall be coextensive in duration with an express warranty which accompanies the consumer goods, provided the duration of the express warranty is reasonable, but in no event shall such implied warranties have a duration of less than 30 days nor more than three months following the sale of used consumer goods to a retail buyer. Where no duration for an express warranty is stated with respect to such goods, or parts thereof, the duration of the implied warranties shall be the maximum period prescribed above."

Secondary Sources

- 5 Bancroft-Whitney's California Civil Practice: Business Litigation (1993) Consumer Warranties, § 53:7, pp. 12–13
- 1 Sales & Leases (Cont.Ed.Bar 2001) Warranties, § 7.15, pp. 245–246
- 3 Witkin, Summary of California Law (9th ed. 1987) Sales, § 309, p. 243

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2408
Affirmative Defense—Unauthorized or Unreasonable Use

[*Name of defendant*] is not responsible for any harm to [*name of plaintiff*] if [he/she/it] proves that any [defect[s] in the [*consumer product*]] [failure to match any [written/implied] warranty] [was/were] caused by unauthorized or unreasonable use of the [*consumer product*] after it was sold.

SOURCES AND AUTHORITY

- Civil Code section 1794.3 provides: "The provisions of this [act] shall not apply to any defect or nonconformity in consumer goods caused by the unauthorized or unreasonable use of the goods following sale."

Secondary Sources

- 5 Bancroft-Whitney's California Civil Practice: Business Litigation (1993) Consumer Warranties, § 53:55, p. 66
- 3 Witkin, Summary of California Law (9th ed. 1987) Sales, § 306, p. 240

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2409
Affirmative Defense—Disclaimer of Implied Warranties

[*Name of defendant*] claims that it did not breach any implied warranties because the [*consumer product*] was sold on an "as is" or "with all faults" basis. To succeed, [*name of defendant*] must prove the following:

1. **That at the time of sale a clearly visible written notice was attached to the [*consumer product*]; and**

2. **That the written notice, in clear and simple language, told the buyer each of the following:**

   a. **That the [*consumer product*] was being sold on an "as is" or "with all faults" basis;**

   b. **That the buyer accepted the entire risk of the quality and performance of the [*consumer product*]; and**

   c. **That if the [*consumer product*] were defective, the buyer would be responsible for the cost of all necessary servicing or repair.**

DIRECTIONS FOR USE

If the consumer goods in question were sold by means of a mail-order catalog, the instruction must be modified in accordance with Civil Code section 1792.4(b).

In addition to sales of consumer goods, the Consumer Warranty Act applies to leases–see Civil Code sections 1791(g)–(i) and 1795.4. This instruction may be modified for use in cases involving leases of consumer goods.

SOURCES AND AUTHORITY

- Civil Code section 1792.3 provides: "No implied warranty of merchantability and, where applicable, no implied warranty of fitness shall be waived, except in the case of a sale of consumer goods on an 'as is' or 'with all faults' basis where the provisions of this chapter affecting 'as is' or 'with all faults' sales are strictly complied with."

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- "Unless specific disclaimer methods are followed, an implied warranty of merchantability accompanies every retail sale of consumer goods in the state." (*Music Acceptance Corp. v. Lofing* (1995) 32 Cal.App.4th 610, 619 [39 Cal.Rptr.2d 159].)

- Civil Code section 1791.3 provides: "[A] sale 'as is' or 'with all faults' means that the manufacturer, distributor, and retailer disclaim all implied warranties that would otherwise attach to the sale of consumer goods under the provisions of this [act]."

- Civil Code section 1792.4 provides:

  (a) No sale of goods, governed by the provisions of this [act], on an "as is" or "with all faults" basis, shall be effective to disclaim the implied warranty of merchantability or, where applicable, the implied warranty of fitness, unless a conspicuous writing is attached to the goods which clearly informs the buyer, prior to the sale, in simple and concise language of each of the following:
  (1) The goods are being sold on an "as is" or "with all faults" basis.
  (2) The entire risk as to the quality and performance of the goods is with the buyer.
  (3) Should the goods prove defective following their purchase, the buyer and not the manufacturer, distributor, or retailer assumes the entire cost of all necessary servicing or repair.
  (b) In the event of sale of consumer goods by means of a mail order catalog, the catalog offering such goods shall contain the required writing as to each item so offered in lieu of the requirement of notification prior to the sale.

- Civil Code section 1793 provides, in part: "[A] manufacturer, distributor, or retailer, in transacting a sale in which express warranties are given, may not limit, modify, or disclaim the implied warranties guaranteed by this chapter to the sale of consumer goods."

- Civil Code section 1792.5 provides: "Every sale of goods that are governed by the provisions of this [act], on an 'as is' or 'with all faults' basis, made in compliance with the provisions of this [act], shall constitute a waiver by the buyer of the implied warranty of merchantability and, where applicable, of the implied warranty of fitness."

- Civil Code section 1795.4(e) provides: "A lessor who re-leases goods to a new lessee and does not retake possession of the goods prior to consummation of the re-lease may, notwithstanding the provisions of Section 1793, disclaim as to that lessee any

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and all warranties created by this chapter by conspicuously disclosing in the lease that these warranties are disclaimed."

Secondary Sources

- 5 Bancroft-Whitney's California Civil Practice: Business Litigation (1993) Consumer Warranties, §§ 53:8–53:9, pp. 13–14
- 1 Sales & Leases (Cont.Ed.Bar 2001) Warranties, § 7.57, p. 274
- 3 Witkin, Summary of California Law (9th ed. 1987) Sales, § 87, pp. 74–75

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2410
Breach of Disclosure Obligations—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] violated California's motor vehicle warranty laws. To establish this claim, [***name of plaintiff***] must prove the following:**

1. **That [***name of plaintiff***] [bought/leased] a [***motor vehicle***] from [***name of defendant***];**

2. **[That the vehicle was returned by a previous [buyer/lessee] to [***name of manufacturer***] under [California's/[***name of state***]'s] motor vehicle warranty laws;]**

   [That [*name of defendant***] knew or should have known that the vehicle had been returned to the manufacturer under [California's/[***name of state***]'s] motor vehicle warranty laws;]**

[4. That before the [sale/leasing], [*name of defendant***] failed to tell [***name of plaintiff***], in clear and simple language, about the nature of the defect experienced by the original [buyer/lessee] of the vehicle; [or]]**

[5. That before the [sale/leasing] to [*name of plaintiff***], the defect experienced by the vehicle's original [buyer/lessee] was not fixed; [or]]**

[6. That [*name of defendant***] did not provide a written warranty to [***name of plaintiff***] that the vehicle would be free for one year of the defect experienced by the vehicle's original [buyer/lessee];]**

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

8. **That [***name of defendant***]'s failure to [clearly tell [***name of plaintiff***] about the defect] [or] [fix the defect] [or] [provide the written warranty] was a substantial factor in causing [***name of plaintiff***]'s harm.**

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DIRECTIONS FOR USE

Use the first bracketed option in element 2 if the defendant is the manufacturer. Otherwise, use the second option.

This instruction is based on the disclosure and warranty obligations set forth in Civil Code section 1793.22(f). Uncontested elements should be deleted. The instruction may be modified for use with claims involving the additional disclosure obligations set forth in California's Automotive Consumer Notification Act (Civ. Code, §§ 1793.23, 1793.24).

SOURCES AND AUTHORITY

- Civil Code section 1793.22(f)(1) provides, in part: "[N]o person shall sell, either at wholesale or retail, lease, or transfer a motor vehicle transferred by a buyer or lessee to a manufacturer pursuant to paragraph (2) of subdivision (d) of Section 1793.2 or a similar statute of any other state [i.e., a "lemon law" buyback], unless the nature of the nonconformity experienced by the original buyer or lessee is clearly and conspicuously disclosed to the prospective buyer, lessee, or transferee, the nonconformity is corrected, and the manufacturer warrants to the new buyer, lessee, or transferee in writing for a period of one year that the motor vehicle is free of that nonconformity."

- Civil Code section 1794(a) provides, in part: "Any buyer of consumer goods who is damaged by a failure to comply with any obligation under this [act] … may bring an action for the recovery of damages and other legal and equitable relief."

- Civil Code section 1793.23 provides, in part:

  (b) This section and Section 1793.24 shall be known, and may be cited as, the Automotive Consumer Notification Act.
  (c) Any manufacturer who reacquires or assists a dealer or lienholder to reacquire a motor vehicle registered in this state, any other state, or a federally administered district shall, prior to any sale, lease, or transfer of the vehicle in this state, or prior to exporting the vehicle to another state for sale, lease, or transfer if the vehicle was registered in this state and reacquired pursuant to paragraph (2) of subdivision (d) of Section 1793.2, cause the vehicle to be retitled in the name of the manufacturer, request the Department of Motor Vehicles to inscribe the ownership certificate with the notation "Lemon Law Buyback," and affix a decal to the vehicle in accordance with Section 11713.12 of the Vehicle Code if the manufacturer knew or should have known that the vehicle is required by law to be replaced, accepted for restitution due to the

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failure of the manufacturer to conform the vehicle to applicable warranties pursuant to paragraph (2) of subdivision (d) of Section 1793.2, or accepted for restitution by the manufacturer due to the failure of the manufacturer to conform the vehicle to warranties required by any other applicable law of the state, any other state, or federal law.

(d) Any manufacturer who reacquires or assists a dealer or lienholder to reacquire a motor vehicle in response to a request by the buyer or lessee that the vehicle be either replaced or accepted for restitution because the vehicle did not conform to express warranties shall, prior to the sale, lease, or other transfer of the vehicle, execute and deliver to the subsequent transferee a notice and obtain the transferee's written acknowledgment of a notice, as prescribed by Section 1793.24.

(e) Any person, including any dealer, who acquires a motor vehicle for resale and knows or should have known that the vehicle was reacquired by the vehicle's manufacturer in response to a request by the last retail owner or lessee of the vehicle that it be replaced or accepted for restitution because the vehicle did not conform to express warranties shall, prior to the sale, lease, or other transfer, execute and deliver to the subsequent transferee a notice and obtain the transferee's written acknowledgment of a notice, as prescribed by Section 1793.24.

(f) Any person, including any manufacturer or dealer, who sells, leases, or transfers ownership of a motor vehicle when the vehicle's ownership certificate is inscribed with the notation "Lemon Law Buyback" shall, prior to the sale, lease, or ownership transfer of the vehicle, provide the transferee with a disclosure statement signed by the transferee that states:
"THIS VEHICLE WAS REPURCHASED BY ITS MANUFACTURER DUE TO A DEFECT IN THE VEHICLE PURSUANT TO CONSUMER WARRANTY LAWS. THE TITLE TO THIS VEHICLE HAS BEEN PERMANENTLY BRANDED WITH THE NOTATION 'LEMON LAW BUYBACK'."

(g) The disclosure requirements in subdivisions (d), (e), and (f) are cumulative with all other consumer notice requirements and do not relieve any person, including any dealer or manufacturer, from complying with any other applicable law, including any requirement of subdivision (f) of Section 1793.22.

Secondary Sources

- 5 Bancroft-Whitney's California Civil Practice: Business Litigation (1993) Consumer Warranties, § 53:29, pp. 36–37; *id.* (2001 supp.) at § 53:30, pp. 37–40

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2411
Reimbursement Damages—Consumer Goods

If you decide that [*name of defendant*] or its representative failed to repair or service the [*consumer product*] to match the [written warranty/represented quality] after a reasonable number of attempts, then [*name of plaintiff*] is entitled to be reimbursed for the purchase price of the [*consumer product*], less the value of its use by [*name of plaintiff*] before discovering the defect.

[*Name of plaintiff*] must prove the amount of the purchase price, and [*name of defendant*] must prove the value of the use of the [*consumer product*].

DIRECTIONS FOR USE

This instruction is intended with use for claims involving consumer goods under the Song-Beverly Consumer Warranty Act. For claims involving new motor vehicles, see instruction 2412, *Restitution From Manufacturer—New Motor Vehicle*.

SOURCES AND AUTHORITY

- Civil Code section 1793.2(d)(1) provides, in part: "[I]f the manufacturer or its representative in this state does not service or repair the goods to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either replace the goods or reimburse the buyer in an amount equal to the purchase price paid by the buyer, less that amount directly attributable to use by the buyer prior to the discovery of the nonconformity."

- Civil Code section 1794(b) provides:

  The measure of the buyer's damages in an action under this section shall include the rights of replacement or reimbursement as set forth in subdivision (d) of Section 1793.2, and the following:
  (1) Where the buyer has rightfully rejected or justifiably revoked acceptance of the goods or has exercised any right to cancel the sale, Sections 2711, 2712, and 2713 of the Commercial Code shall apply.

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(2) Where the buyer has accepted the goods, Sections 2714 and 2715 of the Commercial Code shall apply, and the measure of damages shall include the cost of repairs necessary to make the goods conform.

- "The clear mandate of section 1794 … is that the compensatory damages recoverable for breach of the [Song-Beverly Consumer Warranty] Act are those available to a buyer for a seller's breach of a sales contract." (*Kwan v. Mercedes-Benz of North. America, Inc.* (1994) 23 Cal.App.4th 174, 187–190 [28 Cal.Rptr.2d 371].)

- Civil Code section 1791.1(d) provides: "Any buyer of consumer goods injured by a breach of the implied warranty of merchantability and where applicable by a breach of the implied warranty of fitness has the remedies provided in Chapter 6 (commencing with Section 2601) and Chapter 7 (commencing with Section 2701) of Division 2 of the Commercial Code, and, in any action brought under such provisions, Section 1794 of this chapter shall apply."

- "[I]n the usual situation, emotional distress damages are *not* recoverable under the Song-Beverly Consumer Warranty Act." (*Music Acceptance Corp. v. Lofing* (1995) 32 Cal.App.4th 610, 625, fn. 15 [39 Cal.Rptr.2d 159]; see also *Kwan, supra,* 23 Cal.App.4th at pp. 187–190.)

<u>Secondary Sources</u>

- 5 Bancroft-Whitney's California Civil Practice: Business Litigation (1993) Consumer Warranties, § 53:31, pp. 38–39; *id.* (2001 supp.) at § 53:31, pp. 41–43
- 1 Sales & Leases (Cont.Ed.Bar 2001) Warranties, § 7.87, pp. 293–294
- 3 Witkin, Summary of California Law (9th ed. 1987) Sales, § 308, pp. 242–243; *id.* (2001 supp.) at § 308, pp. 96–101

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2412
Restitution From Manufacturer—New Motor Vehicle

If you decide that [*name of defendant*] or its representative did not repair or service the [*motor vehicle*] to match the [written warranty/represented quality] after a reasonable number of attempts, then [*name of plaintiff*] is entitled to recover the price [he/she] proves [he/she] paid for the car, including:

1. **Charges for transportation and manufacturer-installed options;**

2. **Finance charges actually paid by [*name of plaintiff*]; and**

3. **Sales tax, license fees, registration fees, and other official fees.**

You must subtract from the price any charges for items not supplied by [*name of defendant*].

[You must determine the vehicle's mileage between the time when [*name of plaintiff*] took possession of the vehicle and the time when [*name of plaintiff*] first delivered the vehicle to [*name of defendant*] or its authorized service and repair facility to fix the problem. [*Name of defendant*] must prove the vehicle's mileage. Using this mileage number, I will reduce [*name of plaintiff*]'s recovery based on a formula.]

DIRECTIONS FOR USE

This instruction is intended for use with claims involving new motor vehicles under the Song-Beverly Consumer Warranty Act. For claims involving other consumer goods, see instruction 2411, *Reimbursement Damages—Consumer Goods*.

SOURCES AND AUTHORITY

- Civil Code section 1794(b) provides:

  The measure of the buyer's damages in an action under this section shall include the rights of replacement or reimbursement as set forth in subdivision (d) of Section 1793.2, and the following:

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(1) Where the buyer has rightfully rejected or justifiably revoked acceptance of the goods or has exercised any right to cancel the sale, Sections 2711, 2712, and 2713 of the Commercial Code shall apply.
(2) Where the buyer has accepted the goods, Sections 2714 and 2715 of the Commercial Code shall apply, and the measure of damages shall include the cost of repairs necessary to make the goods conform.

- Civil Code section 1793.2(d)(2) provides, in part:

If the manufacturer or its representative in this state is unable to service or repair a new motor vehicle … to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either promptly replace the new motor vehicle in accordance with subparagraph (A) or promptly make restitution to the buyer in accordance with subparagraph (B). However, the buyer shall be free to elect restitution in lieu of replacement, and in no event shall the buyer be required by the manufacturer to accept a replacement vehicle.

(A) In the case of replacement, the manufacturer shall replace the buyer's vehicle with a new motor vehicle substantially identical to the vehicle replaced. The replacement vehicle shall be accompanied by all express and implied warranties that normally accompany new motor vehicles of that specific kind. The manufacturer also shall pay for, or to, the buyer the amount of any sales or use tax, license fees, registration fees, and other official fees which the buyer is obligated to pay in connection with the replacement, plus any incidental damages to which the buyer is entitled under Section 1794, including, but not limited to, reasonable repair, towing, and rental car costs actually incurred by the buyer.
(B) In the case of restitution, the manufacturer shall make restitution in an amount equal to the actual price paid or payable by the buyer, including any charges for transportation and manufacturer-installed options, but excluding nonmanufacturer items installed by a dealer or the buyer, and including any collateral charges such as sales tax, license fees, registration fees, and other official fees, plus any incidental damages to which the buyer is entitled under Section 1794, including, but not limited to, reasonable repair, towing, and rental car costs actually incurred by the buyer.
(C) When the manufacturer replaces the new motor vehicle pursuant to subparagraph (A), the buyer shall only be liable to pay the manufacturer an amount directly attributable to use by the buyer of the replaced vehicle prior to the time the buyer first delivered the vehicle to the manufacturer or distributor, or its authorized service and repair facility for correction of the problem that gave rise to the nonconformity. When restitution is made pursuant to subparagraph (B), the amount to be paid by the manufacturer to the buyer may be reduced by the manufacturer by that amount directly attributable to use by the buyer prior to the

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time the buyer first delivered the vehicle to the manufacturer or distributor, or its authorized service and repair facility for correction of the problem that gave rise to the nonconformity. The amount directly attributable to use by the buyer shall be determined by multiplying the actual price of the new motor vehicle paid or payable by the buyer, including any charges for transportation and manufacturer-installed options, by a fraction having as its denominator 120,000 and having as its numerator the number of miles traveled by the new motor vehicle prior to the time the buyer first delivered the vehicle to the manufacturer or distributor, or its authorized service and repair facility for correction of the problem that gave rise to the nonconformity. Nothing in this paragraph shall in any way limit the rights or remedies available to the buyer under any other law.

- "[A]s the conjunctive language in Civil Code section 1794 indicates, the statute itself provides an additional measure of damages beyond replacement or reimbursement and permits, at the option of the buyer, the Commercial Code measure of damages which includes 'the cost of repairs necessary to make the goods conform.' " (*Krotin v. Porsche Cars North America, Inc.* (1995) 38 Cal.App.4th 294, 302 [45 Cal.Rptr.2d 10], internal citation omitted.)

- "[I]n the usual situation, emotional distress damages are *not* recoverable under the Song-Beverly Consumer Warranty Act." (*Music Acceptance Corp. v. Lofing* (1995) 32 Cal.App.4th 610, 625, fn. 15 [39 Cal.Rptr.2d 159]; see also *Kwan v. Mercedes-Benz of North America, Inc.* (1994) 23 Cal.App.4th 174, 187–190 [28 Cal.Rptr.2d 371].)

- "[F]inding an implied prohibition on recovery of finance charges would be contrary to both the Song-Beverly Consumer Warranty Act's remedial purpose and section 1793.2(d)(2)(B)'s description of the refund remedy as restitution. A more reasonable construction is that the Legislature intended to allow a buyer to recover the entire amount actually expended for a new motor vehicle, including paid finance charges, less any of the expenses expressly excluded by the statute." (*Mitchell v. Blue Bird Body Co.* (2000) 80 Cal.App.4th 32, 37 [95 Cal.Rptr.2d 81].)

<u>Secondary Sources</u>

- 5 Bancroft-Whitney's California Civil Practice: Business Litigation (1993) Consumer Warranties, § 53:31, pp. 38–39; *id.* (2001 supp.) at § 53:31, pp. 41–43
- 1 Sales & Leases (Cont.Ed.Bar 2001) Warranties, § 7.87, pp. 293–294
- 3 Witkin, Summary of California Law (9th ed. 1987) Sales, § 308, pp. 242–243; *id.* (2001 supp.) at § 308, pp. 96–101

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2413
Incidental Damages

[*Name of plaintiff***] also claims additional reasonable expenses for [***list claimed incidental damages***].**

To recover these expenses, [*name of plaintiff***] must prove:**

1. **That the expense was actually charged;**

2. **That the expense was reasonable; and**

3. **That [***name of defendant***]'s [breach of warranty/***other violation of Song-Beverly Consumer Warranty Act***] was a substantial factor in causing the expense.**

SOURCES AND AUTHORITY

- Civil Code section 1794(b) provides, in part:

  The measure of the buyer's damages in an action under this section shall include the rights of replacement or reimbursement as set forth in subdivision (d) of Section 1793.2, and the following:
  (1) Where the buyer has rightfully rejected or justifiably revoked acceptance of the goods or has exercised any right to cancel the sale, Sections 2711, 2712, and 2713 of the Commercial Code shall apply.
  (2) Where the buyer has accepted the goods, Sections 2714 and 2715 of the Commercial Code shall apply.

- Civil Code section 1793.2(d)(2)(B) provides, in part: "In the case of restitution, the manufacturer shall make restitution in an amount equal to the actual price paid or payable by the buyer … plus any incidental damages to which the buyer is entitled under Section 1794, including, but not limited to, reasonable repair, towing, and rental car costs actually incurred by the buyer."

- Commercial Code section 2712(2) provides, in part: "The buyer may recover from the seller as damages the difference between the cost of cover and the contract price

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together with any incidental or consequential damages as hereinafter defined (Section 2715), but less expenses saved in consequence of the seller's breach."

- Commercial Code section 2715 provides, in part:

  (1) Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.
  (2) Consequential damages resulting from the seller's breach include
  (a) Any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and
  (b) Injury to person or property proximately resulting from any breach of warranty.

- "In light of the relevant legislative history and express language in the Act, we conclude California Uniform Commercial Code section 2715's reference to losses must be construed and applied in the context of monetary losses *actually* incurred." (*Bishop v. Hyundai Motor America* (1996) 44 Cal.App.4th 750, 756 [52 Cal.Rptr.2d 134].)

<u>Secondary Sources</u>

- 5 Bancroft-Whitney's California Civil Practice: Business Litigation (1993) Consumer Warranties, § 53:31, pp. 38–39; *id.* (2001 supp.) at § 53:31, pp. 41–43

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2414
Consequential Damages

[*Name of plaintiff***] also claims additional amounts for [***list claimed consequential damages***].**

To recover these damages, [*name of plaintiff***] must prove:**

1. **That the damages resulted from [***name of plaintiff***]'s requirements and needs;**

2. **That [***name of defendant***] had reason to know of those requirements and needs at the time of the [sale/lease] to [***name of plaintiff***]; and**

3. **That [***name of plaintiff***] could not have reasonably prevented the damages.**

DIRECTIONS FOR USE

This instruction is intended for use where the plaintiff claims consequential damages pursuant to Commercial Code section 2715(2)(a) based on the plaintiff's foreseeable needs or requirements.

SOURCES AND AUTHORITY

- Civil Code section 1794(b) provides, in part:

  The measure of the buyer's damages in an action under this section shall include the rights of replacement or reimbursement as set forth in subdivision (d) of Section 1793.2, and the following:
  (1) Where the buyer has rightfully rejected or justifiably revoked acceptance of the goods or has exercised any right to cancel the sale, Sections 2711, 2712, and 2713 of the Commercial Code shall apply.
  (2) Where the buyer has accepted the goods, Sections 2714 and 2715 of the Commercial Code shall apply.

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- Commercial Code section 2712(2) provides, in part: "The buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages as hereinafter defined (Section 2715), but less expenses saved in consequence of the seller's breach."

- Commercial Code section 2715 provides, in part:

  (2) Consequential damages resulting from the seller's breach include
  (a) Any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and
  (b) Injury to person or property proximately resulting from any breach of warranty.

- "In light of the relevant legislative history and express language in the Act, we conclude California Uniform Commercial Code section 2715's reference to losses must be construed and applied in the context of monetary losses *actually* incurred." (*Bishop v. Hyundai Motor America* (1996) 44 Cal.App.4th 750, 756 [52 Cal.Rptr.2d 134].)

<u>Secondary Sources</u>

- 5 Bancroft-Whitney's California Civil Practice: Business Litigation (1993) Consumer Warranties, § 53:31, pp. 38–39; *id.* (2001 supp.) at § 53:31, pp. 41–43

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2415
Civil Penalty–Willful Violation (Civ. Code, § 1794(c))

[*Name of plaintiff***] claims that [***name of defendant***]'s failure to [***describe violation of Song-Beverly Consumer Warranty Act***] was intentional and therefore asks that you impose a civil penalty against [***name of defendant***]. A civil penalty is an award of money in addition to a plaintiff's damages. The purpose of this civil penalty is to discourage or punish a defendant.**

If [*name of plaintiff***] has proved that [***name of defendant***]'s failure was intentional, you may impose a civil penalty against [***name of defendant***]. You may not impose a civil penalty if you find that [***name of defendant***] believed reasonably and in good faith that [***describe facts negating statutory obligation***].**

The penalty may be in any amount you find appropriate, up to a maximum of two times the amount of [*name of plaintiff***]'s actual damages.**

DIRECTIONS FOR USE

This instruction is intended for use when the plaintiff requests a civil penalty under Civil Code section 1794(c). For a civil penalty based on the defendant's violation of Civil Code section 1793.2(d)(2), see instruction 2416, *Civil Penalty—New Motor Vehicle (Civ. Code, § 1794(e))*.

SOURCES AND AUTHORITY

- Civil Code section 1794 provides, in part:

  (a) Any buyer of consumer goods who is damaged by a failure to comply with any obligation under this chapter or under an implied or express warranty or service contract may bring an action for the recovery of damages and other legal and equitable relief.

  ….

  (c) If the buyer establishes that the failure to comply was willful, the judgment may include, in addition to the amounts recovered under subdivision (a), a civil penalty which shall not exceed two times the amount of actual damages. This subdivision shall not apply in any class action … or with respect to a claim based solely on a breach of an implied warranty.

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- "[I]f the trier of fact finds the defendant willfully violated its legal obligations to plaintiff, it has discretion under [Civil Code section 1794,] subdivision (c) to award a penalty against the defendant. Subdivision (c) applies to suits concerning any type of 'consumer goods,' as that term is defined in section 1791 of the Act." (*Suman v. Superior Court* (1995) 39 Cal.App.4th 1309, 1315 [46 Cal.Rptr.2d 507].)

- " 'In civil cases, the word "willful," as ordinarily used in courts of law, does not necessarily imply anything blamable, or any malice or wrong toward the other party, or perverseness or moral delinquency, but merely that the thing done or omitted to be done was done or omitted intentionally. It amounts to nothing more than this: That the person knows what he is doing, intends to do what he is doing, and is a free agent.' " (*Ibrahim v. Ford Motor Co.* (1989) 214 Cal.App.3d 878, 894 [263 Cal.Rptr. 64], internal citations omitted.)

- "[A] violation is not willful if the defendant's failure to replace or refund was the result of a good faith and reasonable belief the facts imposing the statutory obligation were not present. This might be the case, for example, if the manufacturer reasonably believed the product *did* conform to the warranty, or a reasonable number of repair attempts had not been made, or the buyer desired further repair rather than replacement or refund. [¶] Our interpretation of section 1794(c) is consistent with the general policy against imposing forfeitures or penalties against parties for their good faith, reasonable actions. Unlike a standard requiring the plaintiff to prove the defendant actually knew of its obligation to refund or replace, which would allow manufacturers to escape the penalty by deliberately remaining ignorant of the facts, the interpretation we espouse will not vitiate the intended deterrent effect of the penalty. And unlike a simple equation of willfulness with volition, which would render 'willful' virtually all cases of refusal to replace or refund, our interpretation preserves the Act's distinction between willful and nonwillful violations." (*Kwan v. Mercedes-Benz of N. America* (1994) 23 Cal.App.4th 174, 185 [28 Cal.Rptr.2d 371].)

- "[T]he penalty under section 1794(c), like other civil penalties, is imposed as punishment or deterrence of the defendant, rather than to compensate the plaintiff. In this, it is akin to punitive damages." (*Kwan, supra,* 23 Cal.App.4th at p. 184.)

<u>Secondary Sources</u>

- 5 Bancroft-Whitney's California Civil Practice: Business Litigation (1993) Consumer Warranties, § 53:31, pp. 38–39; *id.* (2001 supp.) at § 53:31, p. 41
- 1 Sales & Leases (Cont.Ed.Bar 2001) Warranties, § 7.87, pp. 293–294
- 3 Witkin, Summary of California Law (9th ed. 1987) Sales, § 308, pp. 242–243; *id.* (2001 supp.) at § 308, pp. 96–98, 100–101

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2416
Civil Penalty—New Motor Vehicle (Civ. Code, § 1794(e))

If you decide that [*name of plaintiff*] has proved [his/her] claim against [*name of defendant*], you may impose a civil penalty if you find that [*name of defendant*] did not provide a qualified arbitration process for its customers. The purpose of this civil penalty is to encourage manufacturers to provide a dispute resolution process so that consumers do not have to file lawsuits.

The penalty may be in any amount you find appropriate, up to a maximum of two times the amount of [*name of plaintiff*]'s damages.

DIRECTIONS FOR USE

This instruction is intended for use when the plaintiff requests the jury to impose a civil penalty under Civil Code section 1794(e) based on defendant's failure to replace or provide restitution for a new motor vehicle pursuant to Civil Code section 1793.2(d)(2). For a civil penalty based on defendant's willful violation of another statutory obligation or an obligation under an applicable warranty, see instruction 2415, *Civil Penalty–Willful Violation (Civ. Code, § 1794(c))*.

Civil Code section 1793.22(d) defines a "qualified third-party dispute resolution process" as having nine elements. If the existence of a "qualified third-party resolution process" is a disputed issue, the jury may need further instructions based on the elements that are at issue.

SOURCES AND AUTHORITY

- Civil Code section 1794(e) provides:

  (1) Except as otherwise provided in this subdivision, if the buyer establishes a violation of paragraph (2) of subdivision (d) of Section 1793.2, the buyer shall recover damages and reasonable attorney's fees and costs, and may recover a civil penalty of up to two times the amount of damages.
  (2) If the manufacturer maintains a qualified third-party dispute resolution process which substantially complies with Section 1793.22, the manufacturer shall not be liable for any civil penalty pursuant to this subdivision.

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(3) After the occurrence of the events giving rise to the presumption established in subdivision (b) of Section 1793.22, the buyer may serve upon the manufacturer a written notice requesting that the manufacturer comply with paragraph (2) of subdivision (d) of Section 1793.2. If the buyer fails to serve the notice, the manufacturer shall not be liable for a civil penalty pursuant to this subdivision.
(4) If the buyer serves the notice described in paragraph (3) and the manufacturer complies with paragraph (2) of subdivision (d) of Section 1793.2 within 30 days of the service of that notice, the manufacturer shall not be liable for a civil penalty pursuant to this subdivision.
(5) If the buyer recovers a civil penalty under subdivision (c), the buyer may not also recover a civil penalty under this subdivision for the same violation.

- "[I]f the trier of fact finds the defendant willfully violated its legal obligations to plaintiff, it has discretion under [Civil Code section 1794,] subdivision (c) to award a penalty against the defendant. Subdivision (c) applies to suits concerning any type of 'consumer goods,' as that term is defined in section 1791 of the Act. [¶] Subdivision (e) of section 1794, which pertains only to suits involving violations of the 'replacement or reimbursement' provisions for new motor vehicles, also gives the trier of fact discretion to award civil penalties of up to two times the amount of the plaintiff's damages. However, subdivision (e) does not require a finding that the defendant's failure to live up to its legal obligations was willful." (*Suman v. Superior Court* (1995) 39 Cal.App.4th 1309, 1315 [46 Cal.Rptr.2d 507], footnotes omitted.)

- "Civil Code section 1794, subdivision (e) permits penalties when the consumer goods at issue are new motor vehicles and the buyer establishes a violation of the restitution or replacement provisions of section 1793.2, subdivision (d). It contains no willfulness requirement but does not apply if the manufacturer maintains a third party dispute resolution process which complies with section 1793.22. In such a case, a manufacturer may still be liable for a willful violation under section 1794, subdivision (c). [¶] A plaintiff cannot recover both types of penalties for the same violation." (*Schreidel v. American Honda Motor Co.* (1995) 34 Cal.App.4th 1242, 1250 [40 Cal.Rptr.2d 576], internal citations omitted.)

- "The jury should be informed of the purpose of the penalty which it is being asked to consider. It should be told that imposition of the penalty is authorized by law as a means of encouraging manufacturers to resolve their disputes with consumers outside of litigation; that is, if the defendant had maintained a third party dispute resolution process for its customers, it would not be subject to the penalty. [¶] … [¶] … Lastly, the jury should be instructed on the following matters. Whether a penalty should be imposed on defendant is a matter left to its sound discretion and its discretion should

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be exercised without prejudice or passion. The exercise of such discretion should be based on the facts of the case as the jurors have determined them. … If the jury chooses to impose a penalty, the amount may be up to two times the amount of damages which plaintiff was awarded in the earlier trial. Such penalty would be paid by defendant. There is no definite or required method of determining a penalty nor is the opinion of a witness required as to the amount of a penalty. It is not necessary for the plaintiff to prove that the defendant acted willfully. However, the jury may take into consideration the nature of the defendant's conduct, including the extent to which the defendant did or did not act reasonably or in good faith, in (1) failing to honor plaintiff's demand for replacement of the defective vehicle or restitution, and (2) failing to establish a third party dispute resolution process which could have resolved this matter without litigation." (*Suman*, *supra*, 39 Cal.App.4th at pp. 1322–1323.)

- Civil Code section 1793.22(d) provides, in part:

(d) A qualified third-party dispute resolution process shall be one that does all of the following:
  (1) Complies with the minimum requirements of the Federal Trade Commission for informal dispute settlement procedures as set forth in Part 703 of Title 16 of the Code of Federal Regulations, as those regulations read on January 1, 1987.
  (2) Renders decisions which are binding on the manufacturer if the buyer elects to accept the decision.
  (3) Prescribes a reasonable time, not to exceed 30 days after the decision is accepted by the buyer, within which the manufacturer or its agent must fulfill the terms of its decisions.
  (4) Provides arbitrators who are assigned to decide disputes with copies of, and instruction in, the provisions of the Federal Trade Commission's regulations in Part 703 of Title 16 of the Code of Federal Regulations as those regulations read on January 1, 1987, Division 2 (commencing with Section 2101) of the Commercial Code, and this chapter.
  (5) Requires the manufacturer, when the process orders, under the terms of this chapter, either that the nonconforming motor vehicle be replaced if the buyer consents to this remedy or that restitution be made to the buyer, to replace the motor vehicle or make restitution in accordance with paragraph (2) of subdivision (d) of Section 1793.2.
  (6) Provides, at the request of the arbitrator or a majority of the arbitration panel, for an inspection and written report on the condition of a nonconforming motor vehicle, at no cost to the buyer, by an automobile expert who is independent of the manufacturer.

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(7) Takes into account, in rendering decisions, all legal and equitable factors, including, but not limited to, the written warranty, the rights and remedies conferred in regulations of the Federal Trade Commission contained in Part 703 of Title 16 of the Code of Federal Regulations as those regulations read on January 1, 1987, Division 2 (commencing with Section 2101) of the Commercial Code, this chapter, and any other equitable considerations appropriate in the circumstances. Nothing in this chapter requires that, to be certified as a qualified third-party dispute resolution process pursuant to this section, decisions of the process must consider or provide remedies in the form of awards of punitive damages or multiple damages, under subdivision (c) of Section 1794, or of attorneys' fees under subdivision (d) of Section 1794, or of consequential damages other than as provided in subdivisions (a) and (b) of Section 1794, including, but not limited to, reasonable repair, towing, and rental car costs actually incurred by the buyer.

(8) Requires that no arbitrator deciding a dispute may be a party to the dispute and that no other person, including an employee, agent, or dealer for the manufacturer, may be allowed to participate substantively in the merits of any dispute with the arbitrator unless the buyer is allowed to participate also. Nothing in this subdivision prohibits any member of an arbitration board from deciding a dispute.

(9) Obtains and maintains certification by the Department of Consumer Affairs pursuant to Chapter 9 (commencing with Section 472) of Division 1 of the Business and Professions Code.

Secondary Sources

- 5 Bancroft-Whitney's California Civil Practice: Business Litigation (1993) Consumer Warranties, § 53:31, pp. 38–39; *id.* (2001 supp.) at § 53:31, p. 41
- 1 Sales & Leases (Cont.Ed.Bar 2001) Warranties, § 7.87, pp. 293–294
- 3 Witkin, Summary of California Law (9th ed. 1987) Sales, § 308, pp. 242–243; *id.* (2001 supp.) at § 308, pp. 96–98, 100–101

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2500
Comparative Fault Between Tortfeasors

[*Name of indemnitee***] claims that [he/she] [is/was] required to pay [***describe liability, e.g., "a court judgment in favor of [name of plaintiff]"***] and that [***name of indemnitor***] must reimburse [***name of indemnitee***] based on [***name of indemnitor***]'s share of responsibility. In order for [***name of indemnitee***] to recover from [***name of indemnitor***], [***name of indemnitee***] must prove the following:**

1. **That [***name of indemnitor***] [was negligent/[***describe underlying tort***]]; and**

2. **That [***name of indemnitor***]'s [negligence/[***describe tortious conduct***]] contributed as a substantial factor in causing [***name of plaintiff***]'s harm.**

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

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

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

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

DIRECTIONS FOR USE

Read the last bracketed portion when indemnitor claims he or she was not the sole cause.

This instruction is intended for use in cases where the plaintiff seeks equitable indemnity from another responsible tortfeasor who was not a party to the original action or

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proceeding from which the liability in question arose. For cases in which the indemnitee seeks equitable indemnity against a co-defendant or cross-defendant as part of the original tort action, see instruction 311, *Apportionment of Responsibility*.

SOURCES AND AUTHORITY

- "In order to attain … a system … in which liability for an indivisible injury caused by concurrent tortfeasors will be borne by each individual tortfeasor 'in direct proportion to [his] respective fault,' we conclude that the current equitable indemnity rule should be modified to permit a concurrent tortfeasor to obtain partial indemnity from other concurrent tortfeasors on a comparative fault basis." (*American Motorcycle Assn. v. Superior Court* (1978) 20 Cal.3d 578, 598 [146 Cal.Rptr. 182], internal citation omitted.)

- "[C]omparative equitable indemnity includes the entire range of possible apportionments, from no right to any indemnity to a right of complete indemnity. Total indemnification is just one end of the spectrum of comparative equitable indemnification." (*Far West Financial Corp. v. D & S Co., Inc.* (1988) 46 Cal.3d 796, 808 [251 Cal.Rptr. 202], internal quotation marks and citation omitted.)

- "[W]e conclude that a cause of action for equitable indemnity is a legal action seeking legal relief. As such, the [defendant] was entitled to a jury trial." (*Martin v. County of Los Angeles* (1997) 51 Cal.App.4th 688, 698 [59 Cal.Rptr.2d 303].)

- "[W]e hold that . . . the comparative indemnity doctrine may be utilized to allocate liability between a negligent and a strictly liable defendant." (*Safeway Stores, Inc. v. Nest-Kart* (1978) 21 Cal.3d 322, 332 [146 Cal.Rptr. 550].)

- For purposes of equitable indemnity, "it matters not whether the tortfeasors acted in concert to create a single injury, or successively, in creating distinct and divisible injury." (*Blecker v. Wolbart* (1985) 167 Cal.App.3d 1195, 1203 [213 Cal.Rptr. 781].)

- "[W]e conclude comparative fault principles should be applied to intentional torts, at least to the extent that comparative equitable indemnification can be applied between concurrent intentional tortfeasors." (*Baird v. Jones* (1993) 21 Cal.App.4th 684, 690 [27 Cal.Rptr.2d 232].)

- Where there is a fault-free plaintiff, "[a]n insolvent defendant's shortfall [in payment of the judgment] should be shared proportionately by the solvent defendants as though the insolvent or absent person had originally not participated." (*Paradise Valley Hospital v. Schlossman* (1983) 143 Cal.App.3d 87, 93 [191 Cal.Rptr. 531].)

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- Statutes may limit one's right to recover comparative indemnity. (See, e.g., *E.W. Bliss Co. v. Superior Court* (1989) 210 Cal.App.3d 1254, 1259 [258 Cal.Rptr. 783] (Labor Code section 4558(d) provides that there is no right of action for comparative indemnity against an employer for injuries resulting from the removal of an operation guard from a punch press).)

Secondary Sources

- 1 Bancroft-Whitney's California Civil Practice: Torts (1992) Indemnity, Contribution, and Setoff, §§ 4:14–4:18, pp. 18–22
- California Tort Guide (Cont.Ed.Bar 3d ed. 1996) General Principles, §§ 1.52–1.59, pp. 41–46 (rel. 4/00)
- 5 Levy et al., California Torts (1993) Comparative Negligence, §§ 74.01–74.13, pp. 74-6–74-54 (rel. 31-9/01)
- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, § 89, pp. 162–163; *id.* (2001 supp.) at §§ 89–90A, 95, pp. 77–80

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2501
Implied Contractual Indemnity

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

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

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

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

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

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

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

DIRECTIONS FOR USE

A special finding that an agreement existed may create a need for instructions, but it is a question of law whether an agreement implies a duty to indemnify. Read the last bracketed portion when indemnitor claims he or she was not the sole cause.

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SOURCES AND AUTHORITY

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

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

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

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

<u>Secondary Sources</u>

- 1 Bancroft-Whitney's California Civil Practice: Torts (1992) Indemnity, Contribution, and Setoff, § 4:13, p. 17
- 5 Levy et al., California Torts (1993) Comparative Negligence, §§ 74.03[6], pp. 74-15–74-18 (rel. 19-9/95)
- 5 Witkin, Summary of California Law (9th ed. 2001 supp.) Torts, § 98B, p. 85

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2600
Breach of Contractual Duty to Indemnify Insured
Essential Factual Elements

[*Name of plaintiff*] claims that [*name of defendant*] breached its duty to pay [him/her] for a loss covered under an insurance policy. To establish this claim, [*name of plaintiff*] must prove the following:

1. **That [*name of plaintiff*] suffered a loss;**

2. **That [*name of plaintiff*] reported the loss [as required by the policy];**

3. **That [all or part of] the loss was covered under an insurance policy with [*name of defendant*]; and**

4. **The amount of the covered loss that [*name of defendant*] failed to pay.**

DIRECTIONS FOR USE

This instruction is intended for first party coverage claims. Use bracketed language when needed. For a claim arising under an insurance binder rather than an issued policy, see Instruction 2601, *Breach of Insurance Binder—Essential Factual Elements*. If the policy at issue has been lost or destroyed, read Instruction 2605, *Lost or Destroyed Insurance Policy*. For instructions on general breach of contract issues, see the Contracts series.

SOURCES AND AUTHORITY

- "Wrongful failure to provide coverage or defend a claim is a breach of contract." (*Isaacson v. California Insurance Guarantee Assn.* (1988) 44 Cal.3d 775, 791 [244 Cal.Rptr. 655].)

Secondary Sources

- 2 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar 2001) General Principles of Contract and Bad Faith Actions, §§ 24.2, 24.23, pp. 885, 899–900
- Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group 2002) ¶¶ 15:52, 15:924, pp. 15-8–15-9, 15-163

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2601
Breach of Insurance Binder
Essential Factual Elements

[*Name of plaintiff*] claims that [*name of defendant*] breached its duty to pay [him/her] for a loss covered under a temporary insurance contract called an insurance binder. To establish this claim, [*name of plaintiff*] must prove the following:

1. **That [*name of defendant*] or its authorized agent agreed, orally or in writing, to provide [*name of plaintiff*] with an insurance binder;**

2. **That [*name of plaintiff*] paid [or was obligated to pay] for the insurance binder [or that payment was waived];**

3. **That [*name of plaintiff*] suffered a loss during the time the insurance binder was in effect;**

4. **That [*name of plaintiff*] reported the loss [as required by the insurance binder];**

5. **That [all or part of] the loss was covered under the [insurance binder] [terms of the insurance policy [*name of defendant*] would have issued to [*name of plaintiff*]]; and**

6. **The amount of the covered loss that [*name of defendant*] failed to pay.**

DIRECTIONS FOR USE

This instruction is intended for an alleged breach of a contract of temporary insurance coverage. The court must interpret as a matter of law whether an ordinary person in the applicant's circumstances would conclude, based on the language of the application, that coverage began immediately. Do not use this instruction unless the court has decided this issue.

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Element number 5 should be modified if there is an issue regarding whether the insurance company's agent made oral statements at variance with the policy language.

Use bracketed language when needed. Note that the statutory requirements for a "binder" under Insurance Code section 382.5 do not apply to life or disability insurance, for insurance of any kind in the amount of $1 million or more, or to an oral binder (see Ins. Code, § 382.5(a)).

SOURCES AND AUTHORITY

- Insurance Code section 382.5 provides, in part: "A binder which is issued in accordance with this section shall be deemed an insurance policy for the purpose of proving that the insured has the insurance coverage specified in the binder. … Except as superseded by the clear and express terms of the binder, a binder shall be deemed to include all of the usual terms of the policy as to which the binder was given, together with applicable endorsements as are designated in the binder."

- Insurance Code section 481.1 provides:

  (a) In the event any conditional receipt, binder, or other evidence of temporary or implied insurance [with specified exceptions] is canceled, rejected, or surrendered by the insurer, the coverage thereby extended shall terminate 10 days after written notice to the named insured is deposited, properly addressed with postage prepaid, with the United States Postal Service.
  (b) Any conditional receipt, binder, or other evidence of temporary or implied insurance described in subdivision (a) shall remain in force for a period of at least 30 days from the date of its issuance unless sooner canceled, rejected, or surrendered pursuant to the provisions of subdivision (a).

- "Under California law, a contract of temporary insurance may arise from completion of an application for insurance and payment of the first premium if the language of the application would lead an ordinary lay person to conclude that coverage was immediate." (*Ahern v. Dillenback* (1991) 1 Cal.App.4th 36, 47 [1 Cal.Rptr.2d 339].)

- "[A] binder is an independent contract, separate and distinct from the permanent insurance policy. It is intended to give temporary protection pending the investigation of the risk by the insurer and until issuance of a formal policy or rejection of the insurance application by the insurer." (*Ahern, supra,* 1 Cal.App.4th at p. 48.)

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- "[P]racticality dictates that a temporary insurance binder issued upon an application for insurance cannot contain all of the details and terms of the proposed insurance contract. … [I]nsurance binders are adequate if they indicate the subject matter, the coverage period, the rate and the amount of insurance. (*National Emblem Insurance Co. v. Rios* (1969) 275 Cal.App.2d 70, 76 [79 Cal.Rptr. 583], internal citations omitted.)

- "Whether or not a valid binder exists is a question of fact insofar as a finding comprehends issues relating to the credibility of witnesses or the weight of the evidence, but a question of law insofar as a finding embraces a conclusion that such factual elements do not constitute a valid oral binder." (*Spott Electrical Co. v. Industrial Indemnity Co.* (1973) 30 Cal.App.3d 797, 805 [106 Cal.Rptr. 710], internal citations omitted.)

- "For the sake of convenience, contracts of insurance sometimes exist in two forms: (1) A preliminary contract intended to protect the applicant pending investigation of the risk by the company or until the policy can be properly issued. (2) The final contract or policy itself. … An agent possessing authority to bind the company by contracts of insurance has authority to bind it by a preliminary or temporary contract of insurance. … This preliminary contract is sometimes called 'cover note' or 'binder.' … A valid temporary or preliminary contract of present insurance may be made orally, or it may be partly in parol and partly in writing." (*Parlier Fruit Co. v. Fireman's Fund Insurance Co.* (1957) 151 Cal.App.2d 6, 19–20 [311 P.2d 62], internal quotation marks and citation omitted.)

<u>Secondary Sources</u>

- 2 California Insurance Law & Practice (Matthew Bender 2002) Issuance of Insurance Policies, § 9.06[1]–[7], pp. 9-25–9-30.1 (rel. 30-6/97)
- 1 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar 2002) Determining Whether Enforceable Obligation Exists, §§ 5.17–5.20, pp. 196–199
- Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group 2002) ¶¶ 2:101–2:137, pp. 2-20–2-27
- 1 Witkin, Summary of California Law (9th ed. 2002 supp.) Contracts, § 141A, pp. 81–82

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2602
Breach of Contract for Temporary Life Insurance
Essential Factual Elements

[*Name of plaintiff*] claims that [*name of defendant*] breached an agreement to pay life insurance benefits. To establish this claim, [*name of plaintiff*] must prove the following:

1. **That [*name of defendant*] or its authorized agent received [*name of decedent*]'s application for life insurance;**

2. **That [*name of decedent*] paid the first insurance premium;**

3. **That [*name of decedent*] died [on/after/before] [*insert relevant date*]; and**

4. **The amount of the insurance benefits that [*name of defendant*] failed to pay.**

DIRECTIONS FOR USE

This instruction is intended for an alleged breach of a contract of temporary life insurance coverage. The court must interpret as a matter of law whether an ordinary person in the applicant's circumstances would conclude, based on the language of the application, that coverage began immediately. Do not use this instruction unless the court has decided this issue.

SOURCES AND AUTHORITY

- Insurance Code section 10115 provides, in pertinent part: "When a payment is made equal to the full first premium at the time an application for life insurance … is signed by the applicant and … the insurer … approves the application … and the person to be insured dies … before such policy is issued and delivered, the insurer shall pay such amount as would have been due under the terms of the policy in the same manner and subject to the same rights, conditions and defenses as if such policy had been issued and delivered on the date the application was signed by the applicant. The provisions of this section shall not prohibit an insurer from limiting the maximum amount … if a statement to this effect is included in the application."

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- "We are of the view that a contract of insurance arose upon defendant's receipt of the completed application and the first premium payment. … The understanding of an ordinary person is the standard [that] must be used in construing the contract, and such a person upon reading the application would believe that he would secure the benefit of immediate coverage by paying the premium in advance of delivery of the policy." (*Ransom v. Pennsylvania Mutual Life Insurance Co.* (1954) 43 Cal.2d 420, 425 [274 P.2d 633].)

- "[A]n insurance company is not precluded from imposing conditions precedent to the effectiveness of insurance coverage despite the advance payment of the first premium. However, … any such condition must be stated in conspicuous, unambiguous and unequivocal language which an ordinary layman can understand." (*Thompson v. Occidental Life Insurance Co.* (1973) 9 Cal.3d 904, 912 [109 Cal.Rptr. 473].)

- Temporary life insurance coverage "is not terminated until the applicant receives from the insurer both a notice of the rejection of his application and a refund of his premium." (*Smith Westland Life Insurance Co*. (1975) 15 Cal.3d 111, 120 [123 Cal.Rptr. 649].)

- "Under California law, a contract of temporary insurance may arise from completion of an application for insurance and payment of the first premium if the language of the application would lead an ordinary lay person to conclude that coverage was immediate." (*Ahern v. Dillenback* (1991) 1 Cal.App.4th 36, 47 [1 Cal.Rptr.2d 339] [automobile insurance].)

<u>Secondary Sources</u>

- 2 California Insurance Law & Practice (Matthew Bender 2002) Issuance of Insurance Policies, § 9.07, pp. 9-30.1–9-35 (rel. 30-6/97)
- Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group 2002) ¶¶ 2:134–2:137, 6:428–6:448, pp. 2-26–2-27, 6C-6–6C-10
- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, § 137, pp. 160–161

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2603
Insurance Policy Exclusion—Burden of Proof

[*Name of defendant***] claims that [***name of plaintiff***]'s [liability/loss] is not covered because it is specifically excluded under the policy. To succeed, [***name of defendant***] must prove that [***name of plaintiff***]'s [liability/loss] [arises out of/is based on/occurred because of] [***state exclusion under the policy***].**

DIRECTIONS FOR USE

This instruction can be used in cases involving either a third party liability or a first party loss policy.

SOURCES AND AUTHORITY

- "The burden of bringing itself within any exculpatory clause contained in the policy is on the insurer." (*Clemmer v. Hartford Insurance Co.* (1978) 22 Cal.3d 865, 880 [151 Cal.Rptr. 285], internal citation and quotation marks omitted.)

- "The burden is on an insured to establish that the occurrence forming the basis of its claim is within the basic scope of insurance coverage. And, once an insured has made this showing, the burden is on the insurer to prove the claim is specifically excluded." (*Aydin Corp. v. First State Insurance Co.* (1998) 18 Cal.4th 1183, 1188 [77 Cal.Rptr.2d 537], internal citations omitted.)

- Once the insurer proves that the specific exclusion applies, the insured "should bear the burden of *establishing* the exception because 'its effect is to reinstate coverage that the exclusionary language otherwise bars.' " (*Aydin Corp.*, *supra*, 18 Cal.4th at p. 1188.)

<u>Secondary Sources</u>

- Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group 2002) 15:911–15:912, p. 15-158
- 1 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar 2001) Analyzing Coverage: Reading and Interpreting Insurance Policies, § 3.63, pp. 120–121

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2604
Exception to Insurance Policy Exclusion—Burden of Proof

[*Name of plaintiff*] claims that his [liability/loss] is covered under an exception to a specific coverage exclusion under the policy. To establish this coverage, [*name of plaintiff*] must prove that his [liability/loss] [arises out of/is based on/occurred because of] [*state exception to policy exclusion*].

DIRECTIONS FOR USE

Use this instruction only if the insurer is asserting that the insured's claim is subject to an exclusion.

SOURCES AND AUTHORITY

- "The burden is on an insured to establish that the occurrence forming the basis of its claim is within the basic scope of insurance coverage. And, once an insured has made this showing, the burden is on the insurer to prove the claim is specifically excluded." (*Aydin Corp. v. First State Insurance Co.* (1998) 18 Cal.4th 1183, 1188 [77 Cal.Rptr.2d 537], internal citations omitted.)

- Once the insurer proves that the specific exclusion applies, the insured "should bear the burden of *establishing* the exception because 'its effect is to reinstate coverage that the exclusionary language otherwise bars.' " (*Aydin Corp.*, *supra*, 18 Cal.4th at p. 1188.)

Secondary Sources

- Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group 2002) 15:913–15:915.5, pp. 15-158–15-160
- 1 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar 2001) Analyzing Coverage: Reading and Interpreting Insurance Policies, § 3.63, pp. 120–121

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2605
Lost or Destroyed Insurance Policy

[*Name of plaintiff***] claims that [he/she] was covered under an insurance policy that was lost or destroyed. To establish coverage under a lost policy, [***name of plaintiff***] must prove the following:**

1. **That [***name of plaintiff***] was insured under the lost policy during the period in question; and**

2. **That the terms of the policy included the following:**

   a. **[***describe each policy provision essential to the claimed coverage***].**

[*Name of plaintiff***] is not required to prove the exact words of the lost policy, but only the substance of the policy's terms essential to [his/her] claim for insurance benefits.**

DIRECTIONS FOR USE

Whether the terms of a lost policy must be established by a heightened degree of proof appears to be an open issue. The Supreme Court in *Dart Industries, Inc. v. Commercial Union Insurance Co.* (2002) 28 Cal.4th 1059 [124 Cal.Rptr.2d 142], expressly declined to address the issue of the necessary degree of proof. (*Id* at p. 1072, fn. 4.)

This instruction is intended for use in cases where the plaintiff insured claims coverage for a loss under an insurance policy that was lost or destroyed without fraudulent intent on the part of the insured. The admission of oral testimony of the contents of a lost document requires the court to determine certain preliminary facts: (1) the proponent does not have possession or control of a copy of the policy; and (2) the policy was lost or destroyed without fraudulent intent on the part of the proponent. (Evid. Code, §§ 402(b), 1521, 1523(b).)

SOURCES AND AUTHORITY

- Evidence Code section 402(b) provides, in pertinent part: "The court may hear and determine the question of the admissibility of evidence out of the presence or hearing of the jury."

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- Evidence Code section 1521(a) provides:

  (a) The content of a writing may be proved by otherwise admissible secondary evidence. The court shall exclude secondary evidence of the content of writing if the court determines either of the following:
  (1) A genuine dispute exists concerning material terms of the writing and justice requires the exclusion.
  (2) Admission of the secondary evidence would be unfair.

- Evidence Code section 1523(b) provides, in pertinent part: "Oral testimony of the content of a writing is not … inadmissible … if the proponent does not have possession or control of a copy of the writing and the original is lost or has been destroyed without fraudulent intent on the part of the proponent of the evidence."

- "In an action on an insurance policy that has not been lost or destroyed, it is well settled that '[t]he burden is on an insured to establish that the occurrence forming the basis of its claim is within the basic scope of insurance coverage. And, once an insured has made this showing, the burden is on the insurer to prove the claim is specifically excluded.' … We see no reason not to apply this rule to a policy that has been lost or destroyed without fraudulent intent on the part of the insured. Thus, the claimant has the burden of proving (1) the fact that he or she was insured under the lost policy during the period in issue, and (2) the substance of each policy provision essential to the claim for relief, i.e., essential to the particular coverage that the insured claims. Which provisions those are will vary from case to case; the decisions often refer to them simply as the material terms of the lost policy. In turn, the insurer has the burden of proving the substance of any policy provision 'essential to the … defense,' i.e., any provision that functions to defeat the insured's claim. Those provisions, too, will be case specific." (*Dart Industries, Inc., supra,* 28 Cal.4th at p. 1068, internal citations and footnotes omitted.)

- "A corollary of the rule that the contents of lost documents may be proved by secondary evidence is that the law does not require the contents of such documents be proved verbatim." (*Dart Industries, Inc., supra*, 28 Cal.4th at p. 1069.)

- "The rule … for the admission of secondary evidence of a lost paper, requires 'that a bona fide and diligent search has been unsuccessfully made for it in the place where it was most likely to be found;' and further, 'the party is expected to show that he has in good faith exhausted in a reasonable degree all the sources of information and means of discovery which the nature of the case would naturally suggest, and which were

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accessible to him.' " (*Dart Industries, Inc., supra*, 28 Cal.4th at p. 1068, internal citation omitted.)

- "No fixed rule as to the necessary proof to establish loss [of a written instrument], or what constitutes reasonable search, can be formulated. … The sole object of such proof is to raise a reasonable presumption merely that the instrument is lost, and this is a preliminary inquiry addressed to the discretion of the judge." (*Kenniff v. Caulfield* (1903) 140 Cal. 34, 41 [73 P. 803].)

- "Preliminary proof of the loss or destruction is required and it is committed to the trial court's discretion to determine whether the evidence so offered is or is not sufficient." (*Guardianship of Levy* (1955) 137 Cal.App.2d 237, 249 [290 P.2d 320.)

Secondary Sources

- 1 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar 2002) Identifying Sources of Coverage, § 8.8, p. 273
- Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group 2002) ¶¶ 15:978–15:994, pp. 15-172–15-175
- 3 Witkin, California Evidence (4th ed. 2000) Presentation at Trial, §§ 48–50, 59–60, 63, 65, pp. 81–84, 91–97

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2606
Covered and Excluded Risks—Predominant Cause of Loss

You have heard evidence that the claimed loss was caused by a combination of covered and excluded risks under the insurance policy. When a loss is caused by a combination of covered and excluded risks under the policy, the loss is covered only if the most important or predominant cause is a covered risk.

[[*Name of defendant***] claims that [***name of plaintiff***]'s loss is not covered because the loss was caused by a risk excluded under the policy. To succeed, [***name of defendant***] must prove that the most important or predominant cause of the loss was [***describe excluded peril or event***], which is a risk excluded under the policy.]**

[or]

[[*Name of plaintiff***] claims that the loss was caused by a risk covered under the policy. To succeed, [***name of plaintiff***] must prove that the most important or predominant cause of the loss was [***describe covered peril or event***], which is a risk covered under the policy.]**

DIRECTIONS FOR USE

This instruction in intended for use in first party property insurance cases where there is evidence that a loss was caused by both covered and excluded perils. In most cases the court will determine as a question of law what perils are covered and excluded under the policy.

Depending on the type of insurance at issue, the court must select the bracketed paragraph that presents the correct burden of proof. For all-risk homeowner's policies, for example, once the insured establishes basic coverage, the insurer bears the burden of proving the loss was caused by an excluded peril. In contrast, for "named perils" policies (for example, fire insurance) the insured bears the burden of proving the loss was caused by the specified peril. (See *Strubble v. United Services Automobile Assn.* (1973) 35 Cal.App.3d 498, 504 [110 Cal.Rptr. 828].)

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SOURCES AND AUTHORITY

- Insurance Code section 530 provides: "An insurer is liable for a loss of which a peril insured against was the proximate cause, although a peril not contemplated by the contract may have been a remote cause of the loss; but he is not liable for a loss of which the peril insured against was only a remote cause."

- Insurance Code section 532 provides: "If a peril is specially excepted in a contract of insurance and there is a loss which would not have occurred but for such peril, such loss is thereby excepted even though the immediate cause of the loss was a peril which was not excepted."

- "In determining whether a loss is within an exception in a policy, where there is a concurrence of different causes, the efficient cause—the one that sets others in motion—is the cause to which the loss is to be attributed, though the other causes may follow it, and operate more immediately in producing the disaster." (*Sabella v. Wisler* (1963) 59 Cal.2d 21, 31–32 [27 Cal.Rptr. 689], internal quotation marks and citation omitted.)

- "*Sabella* defined 'efficient proximate cause' alternatively as the 'one that sets others in motion,' and as 'the predominating or moving efficient cause.' We use the term 'efficient proximate cause' (meaning predominating cause) when referring to the *Sabella* analysis because we believe the phrase 'moving cause' can be misconstrued to deny coverage erroneously, particularly when it is understood literally to mean the 'triggering' cause." (*Garvey v. State Farm Fire & Casualty Co.* (1989) 48 Cal.3d 395, 403 [257 Cal.Rptr. 292], internal citations omitted.)

- "[T]he 'cause' of loss in the context of a property insurance contract is totally different from that in a liability policy. This distinction is critical to the resolution of losses involving multiple causes. Frequently property losses occur which involve more than one peril that might be considered legally significant. … The task becomes one of identifying the most important cause of the loss and attributing the loss to that cause. … On the other hand, the right to coverage in the third party liability insurance context draws on traditional tort concepts of fault, proximate cause and duty." (*Garvey, supra,* 48 Cal.3d at pp. 406–407, internal quotation marks, italics, and citations omitted.)

- "[I]n an action upon an all-risks policy such as the one before us (unlike a specific peril policy), the insured does not have to prove that the peril proximately causing his loss was covered by the policy. This is because the policy covers all risks save for those risks specifically excluded by the policy. The insurer, though, since it is denying

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liability upon the policy, must prove the policy's noncoverage of the insured's loss." (*Strubble, supra,* 35 Cal.App.3d at p. 504.)

- "[T]he scope of coverage under an all-risk homeowner's policy includes all risks except those specifically excluded by the policy. When a loss is caused by a combination of a covered and specifically excluded risks, the loss is covered if the covered risk was the efficient proximate cause of the loss. … [T]he question of what caused the loss is generally a question of fact, and the loss is not covered if the covered risk was only a remote cause of the loss, or the excluded risk was the efficient proximate, or predominate, cause." (*State Farm Fire & Casualty Co. v. Von Der Lieth* (1991) 54 Cal.3d 1123, 1131–1132 [2 Cal.Rptr.2d 183], internal citation omitted.)

Secondary Sources

- 3 California Insurance Law & Practice (Matthew Bender 2002) Homeowners and Related Policies, §§ 36.42[1]–[6], pp. 36-42–36-50.1 (rel. 28-12/96)
- 1 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar 2001) Analyzing Coverage: Reading and Interpreting Insurance Policies, § 3.42, pp. 100–101
- Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group 2002) 6:134–6:143, 6:253, pp. 6A-29–6A-37, 6B-22

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2607
Insurance Agency Relationship Disputed

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

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

[In some circumstances, an individual can be the agent of both the insured and the insurance company. [*Name of plaintiff***] claims that [***name of agent***] was [[***name of defendant***]/[***name of plaintiff***]]'s agent for the purpose of [***describe limited agency; e.g., "collecting insurance payments"***] and therefore [***describe dispute; e.g., "the insurer received plaintiff's payment"***]. [***Name of defendant***] claims that [***name of agent***] was [[***name of defendant***]/[***name of plaintiff***]]'s agent for the purpose of [***describe limited agency***] and therefore [***describe dispute***].]**

DIRECTIONS FOR USE

This instruction must be modified based on the evidence presented and theories of liability in the case. The distinction between an agent and a broker relationship may be crucial in determining, for example, whether an insurance salesperson's representations bind the insurer, or whether the insurance salesperson has assumed a specific duty to the insured.

If ostensible agency is an issue, the court may modify and give Instruction 909, *Ostensible Agent*, in the Vicarious Liability series.

SOURCES AND AUTHORITY

- Insurance Code section 31 provides, in part: " 'Insurance agent' means a person authorized, by and on behalf of an insurer, to transact all classes of insurance other than life insurance." (See also Ins. Code, § 1621.)

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- Insurance Code section 33 provides: " 'Insurance broker' means a person who, for compensation and on behalf of another person, transacts insurance other than life insurance with, but not on behalf of, an insurer." (See also Ins. Code, § 1623.)

- Civil Code section 2315 provides: "An agent has such authority as the principal, actually or ostensibly, confers upon him."

- "An individual cannot act as an insurance agent in California without a valid license issued by the commissioner of insurance. In addition to possessing a license, an insurance agent must be authorized by an insurance carrier to transact insurance business on the carrier's behalf. This authorization must be evidenced by a notice of agency appointment on file with the Department of Insurance. An agent is generally not limited in the number of agency appointments that he or she may have; thus, an agent may solicit business on behalf of a variety of different insurance carriers, and still technically be an agent of each of those carriers." (*Loehr v. Great Republic Insurance Co.* (1990) 226 Cal.App.3d 727, 732–733 [276 Cal.Rptr. 667], internal citations omitted.)

- "[S]tatutes defining 'broker' are not determinative of the actual relationship in a particular case. The actual relationship is determined by what the parties do and say, not by the name they are called." (*Maloney v. Rhode Island Insurance Co.* (1953) 115 Cal.App.2d 238, 245 [251 P.2d 1027], internal citations omitted.)

- "While we note many similarities in the services performed and the monetary functions of agents and brokers, there is a more fundamental legal distinction between insurance agents and brokers. Put quite simply, insurance brokers, with no binding authority, are not agents of insurance companies, but are rather independent contractors … ." (*Marsh & McLennan of California, Inc. v. City of Los Angeles* (1976) 62 Cal.App.3d 108, 118 [132 Cal.Rptr. 796].)

- "Although an insurance broker is ordinarily the agent of the insured and not of the insurer, he may become the agent of the insurer as well as for the insured." (*Fraser-Yamor Agency, Inc. v. County of Del Norte* (1977) 68 Cal.App.3d 201, 213 [137 Cal.Rptr. 118], internal citations omitted.)

- "When the broker accepts the policy from the insurer and the premium from the assured, he has elected to act for the insurer to deliver the policy and to collect the premium." (*Maloney, supra,* 115 Cal.App.2d at p. 244.)

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- "Generally speaking, a person may do by agent any act which he might do himself. An agency is either actual or ostensible. 'An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him.' To establish ostensible authority in an agent, it must be shown the principal, intentionally or by want of ordinary care has caused or allowed a third person to believe the agent possesses such authority." (*Preis v. American Indemnity Co.* (1990) 220 Cal.App.3d 752, 761 [269 Cal.Rptr. 617], internal citations omitted.)

- Sending notice of an automobile accident to the insured's broker did not satisfy the insured's obligation under the policy to provide prompt notice of a claim to the insurer since the broker was the agent of the insured and not of the insurer. (*Arthur v. London Guarantee and Accident Co., Ltd.* (1947) 78 Cal.App.2d 198, 202–203 [177 P.2d 625].)

Secondary Sources

- 2 California Insurance Law & Practice (Matthew Bender 2002) Issuance of Insurance Policies, § 9.02, pp. 9-5–9-8 (rel. 20-2/94)
- 5 California Insurance Law & Practice (Matthew Bender 2002) Operating Requirements of Agents and Brokers, §§ 61.01[4], pp. 61-10–61-12 (rel. 38-2/00)
- 1 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar 2002) Determining Whether Enforceable Obligation Exists, §§ 5.4–5.8, pp. 186–191.
- 2 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar 2002) Actions Against Agents and Brokers, §§ 29.2–29.5, pp. 1067–1070
- Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group 2002) 2.12–2.24, 2.31–2.43, pp. 2-4–2-10

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2608
Rescission for Misrepresentation or Concealment in Insurance Application—Essential Factual Elements

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[*Name of insurer***] claims that no insurance contract was created because [***name of insured***] [concealed an important fact/made a false representation] in [his/her] application for insurance. To establish this claim, [***name of insurer***] must prove the following:**

1. **That [***name of insured***] submitted an application for insurance with [***name of insurer***];**

2. **That in the application for insurance [***name of insured***], intentionally or unintentionally, [failed to state/represented] that [***insert omission or alleged misrepresentation***];**

3. **[That the application asked for that information;]**

4. **That [***name of insured***] [***select one of the following:***]**

   [knew that [*insert omission***];]**

   [knew that this representation was not true;]

5. **That [***name of insurer***] would not have issued the insurance policy if [***name of insured***] had stated the true facts in the application;**

6. **That [***name of insurer***] gave [***name of insured***] notice that it was rescinding the insurance policy; and**

7. **That [***name of insurer***] [returned/offered to return] the insurance premiums paid by [***name of insured***].**

DIRECTIONS FOR USE

Element 3 applies only if plaintiff omitted information, not if he or she misrepresented information. Elements 5 and 6 may be resolved by the language of the complaint, in which case these could be decided as a matter of law. (Civ. Code, 1691.)

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If the insured's misrepresentation or concealment in the insurance application is raised as an affirmative defense by the insurer, this instruction may be modified for use. The elements of the defense would be the same as stated above.

SOURCES AND AUTHORITY

- Civil Code section 1689(b)(1) provides that a party may rescind a contract under the following circumstances: "If the consent of the party rescinding, or of any party jointly contracting with him, was given by mistake, or obtained through duress, menace, fraud, or undue influence, exercised by or with the connivance of the party as to whom he rescinds, or of any other party to the contract jointly interested with such party."

- Insurance Code section 650 provides: "Whenever a right to rescind a contract of insurance is given to the insurer by any provision of this part such right may be exercised at any time previous to the commencement of an action on the contract. The rescission shall apply to all insureds under the contract, including additional insureds, unless the contract provides otherwise."

- Insurance Code section 330 provides: "Neglect to communicate that which a party knows, and ought to communicate, is concealment."

- Insurance Code section 331 provides: "Concealment, whether intentional or unintentional, entitles the injured party to rescind insurance."

- Insurance Code section 334 provides: "Materiality is to be determined not by the event, but solely by the probable and reasonable influence of the facts upon the party to whom the communication is due, in forming his estimate of the disadvantages of the proposed contract, or in making his inquiries."

- Insurance Code section 338 provides: "An intentional and fraudulent omission, on the part of one insured, to communicate information of matters proving or tending to prove the falsity of a warranty, entitles the insurer to rescind."

- Insurance Code section 359 provides: "If a representation is false in a material point … the injured party is entitled to rescind the contract from the time the representation becomes false."

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- "When the [automobile] insurer fails … to conduct … a reasonable investigation [of insurability] it cannot assert … a right of rescission" under section 650 of the Insurance Code as an affirmative defense to an action by an injured third party. (*Barrera v. State Farm Mutual Automobile Insurance Co.* (1969) 71 Cal.2d 659, 678 [79 Cal.Rptr. 106].)

- "[A]n insurer has a right to know all that the applicant for insurance knows regarding the state of his health and medical history. Material misrepresentation or concealment of such facts [is] grounds for rescission of the policy, and an actual intent to deceive need not be shown. Materiality is determined solely by the probable and reasonable effect [that] truthful answers would have had upon the insurer. The fact that the insurer has demanded answers to specific questions in an application for insurance is in itself usually sufficient to establish materiality as a matter of law." (*Thompson v. Occidental Life Insurance Co.* (1973) 9 Cal.3d 904, 915–916 [109 Cal.Rptr. 473], internal citations omitted.)

- "[T]he burden of proving misrepresentation [for purposes of rescission] rests upon the insurer." (*Thompson, supra,* 9 Cal.3d at p. 919.)

- "The materiality of a representation made in an application for a contract of insurance is determined by a *subjective* standard (i.e., its effect on the *particular* insurer to whom it was made) and rescission will be allowed even though the misrepresentation was the result of negligence or the product of innocence. On the other hand, in order to void a policy based upon the insured's violation of the standard fraud and concealment clause …, the false statement must have been knowingly and wilfully made with the intent (express or implied) of deceiving the insurer. The materiality of the statement will be determined by the *objective* standard of its effect upon a *reasonable* insurer." (*Cummings v. Fire Insurance Exchange* (1988) 202 Cal.App.3d 1407, 1415 fn.7 [249 Cal.Rptr. 568], italics in original, internal citation omitted.)

- "Cancellation and rescission are not synonymous. One is prospective, while the other is retroactive." (*Fireman's Fund American Insurance Co. v. Escobedo* (1978) 80 Cal.App.3d 610, 619 [145 Cal.Rptr. 785].)

- "[U]pon a rescission of a policy of insurance, based upon a material concealment or misrepresentation, all rights of the insured thereunder (except the right to recover any consideration paid in the purchase of the policy) are extinguished … ." (*Imperial Casualty & Indemnity Co. v. Sogomonian* (1988) 198 Cal.App.3d 169, 184 [243 Cal.Rptr. 639].)

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- "The consequence of rescission is not only the termination of further liability, but also the restoration of the parties to their former positions by requiring each to return whatever consideration has been received. … [T]his would require the refund by [the insurer] of any premiums and the repayment by the defendants of any proceed advance which they may have received." (*Imperial Casualty & Indemnity Co., supra,* 198 Cal.App.3d at p. 184, internal citation omitted.)

Secondary Sources

- 2 California Insurance Law & Practice (Matthew Bender 2002) The Insurance Contract, § 8.10[1], pp. 8-44–8-46 (rel. 34-11/98)
- 2 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar 2002) Rescission and Reformation, §§ 21.2 – 21.12, 21.35–21.37, pp. 757–764, 785–786
- Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group 2002) ¶¶ 5:143–5:146, 5:153–5:159.1, 5:160–5:287, 15:241–15:256, pp. 5-27–5-28, 5-30–5-32, 5-32.1–5-54, 15-42–15-44

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2609
Termination of Insurance Policy for Fraudulent Claim

[*Name of insurer***] claims that [***name of insured***] [is not entitled to recover under/is not entitled to benefits under] the insurance policy because [he/she] made a false claim. To establish this claim, [***name of insurer***] must prove the following:**

1. **That [***name of insured***] made a claim for insurance benefits under a policy with [***name of insurer***];**

2. **That [***name of insured***] represented to [***name of insurer***] that [***insert allegedly false representation***];**

3. **That [***name of insured***]'s representation was not true;**

4. **That [***name of insured***] knew that the representation was not true;**

5. **That [***name of insured***] intended that [***name of insurer***] rely on this representation in [investigating/paying] [***name of insured***]'s claim for insurance benefits; and**

6. **That the representation that [***insert allegedly false representation***], if true, would affect a reasonable insurance company's [investigation of/decision to pay] a claim for insurance benefits.**

DIRECTIONS FOR USE

If the insured's misrepresentation or concealment in the insurance application is raised as an affirmative defense by the insurer, this instruction may be modified for use. The elements of the defense would be the same as stated above.

SOURCES AND AUTHORITY

- Civil Code section 1689(b)(1) provides that a party may rescind a contract "[i]f the consent of the party rescinding, or of any party jointly contracting with him, was given by mistake, or obtained through duress, menace, fraud, or undue influence,

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exercised by or with the connivance of the party as to whom he rescinds, or of any other party to the contract jointly interested with such party."

- Insurance Code section 338 provides: "An intentional and fraudulent omission, on the part of one insured, to communicate information of matters proving or tending to prove the falsity of a warranty, entitles the insurer to rescind."

- Insurance Code section 359 provides: "If a representation is false in a material point … the injured party is entitled to rescind the contract from the time the representation becomes false."

- "The materiality of a representation made in an application for a contract of insurance is determined by a *subjective* standard (i.e., its effect on the *particular* insurer to whom it was made) and rescission will be allowed even though the misrepresentation was the result of negligence or the product of innocence. On the other hand, in order to void a policy based upon the insured's violation of the standard fraud and concealment clause …, the false statement must have been knowingly and wilfully made with the intent (express or implied) of deceiving the insurer. The materiality of the statement will be determined by the *objective* standard of its effect upon a *reasonable* insurer." (*Cummings v. Fire Insurance Exchange* (1988) 202 Cal.App.3d 1407, 1415 fn.7 [249 Cal.Rptr. 568], italics in original, internal citation omitted.)

- "The consequence of rescission is not only the termination of further liability, but also the restoration of the parties to their former positions by requiring each to return whatever consideration has been received. … [T]his would require the refund by [the insurer] of any premiums and the repayment by the [insureds] of any proceed advance which they may have received." (*Imperial Casualty & Indemnity Co. v. Sogomonian* (1988) 198 Cal.App.3d 169, 184 [243 Cal.Rptr. 639], internal citation omitted.)

<u>Secondary Sources</u>

- 2 California Insurance Law & Practice (Matthew Bender 2002) The Insurance Contract, § 8.10[1], pp. 8-44–8-46 (rel. 34-11/98)
- 2 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar 2002) Rescission and Reformation, §§ 21.2 – 21.4, 21.35–21.37, pp. 757–759, 785–786
- Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group 2002) ¶¶ 5:143–5:146, 5:153–5:159.1, 5:160, 5:249–5:260.5, 15:241–15:256, pp. 5-27–5-28, 5-30–5-32.2, 5-47–5-50, 15-42–15-44

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2610
Affirmative Defense—Failure to Provide Timely Notice

[*Name of defendant***] claims that it does not have to pay the [judgment against/settlement by] [***name of plaintiff***] because [***name of plaintiff***] failed to give timely notice of the [lawsuit/[***insert other***]]. To succeed, [***name of defendant***] must prove the following:**

1. **That [***name of plaintiff***] did not give [***name of defendant***] notice [within the time specified in the policy/within a reasonable time] of the [lawsuit/[***insert other***]]; and**

2. **That [***name of defendant***] was prejudiced by [***name of plaintiff***]'s failure to give timely notice.**

To establish prejudice, [*name of defendant***] must show a substantial likelihood that, with timely notice, it would have [taken steps that would have substantially reduced or eliminated [***name of plaintiff***]'s liability] [or] [settled for a substantially smaller amount].**

DIRECTIONS FOR USE

This instruction is intended for use by an insurer as a defense to a breach of contract action based on a third party liability policy. The defense does not apply to "claims made" policies (see *Pacific Employers Insurance Co. v. Superior Court* (1990) 221 Cal.App.3d 1348, 1357–1359 [270 Cal.Rptr. 779]). This instruction also may be modified for use as a defense to a judgment creditor's action to recover on a liability policy.

SOURCES AND AUTHORITY

- "The right of an injured party to sue an insurer on the policy after obtaining judgment against the insured is established by statute. An insurer may assert defenses based upon a breach by the insured of a condition of the policy such as a cooperation clause, but the breach cannot be a valid defense unless the insurer was substantially prejudiced thereby. Similarly, it has been held that prejudice must be shown with respect to breach of a notice clause." (*Campbell v. Allstate Insurance Co.* (1963) 60 Cal.2d 303, 305–306 [32 Cal.Rptr 827], internal citations omitted.)

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- "[P]rejudice is not shown simply by displaying end results; the probability that such result could or would have been avoided absent the claimed default or error must also be explored." (*Clemmer v. Hartford Insurance Co.* (1978) 22 Cal.3d 865, 883, fn. 12 [151 Cal.Rptr. 285].)

- "In order to demonstrate actual, substantial prejudice from lack of timely notice, an insurer must show it lost something that would have changed the handling of the underlying claim. … To establish actual prejudice, the insurer must show a substantial likelihood that, with timely notice, and notwithstanding a denial of coverage or reservation of rights, it would have settled the claim for less or taken steps that would have reduced or eliminated the insured's liability." (*Shell Oil Co. v. Winterthur Swiss Insurance Co.* (1993) 12 Cal.App.4th 715, 763 [15 Cal.Rptr.2d 815].)

- "California's 'notice-prejudice' rule operates to bar insurance companies from disavowing coverage on the basis of lack of timely notice unless the insurance company can show actual prejudice from the delay. The rule was developed in the context of 'occurrence' policies." (*Pacific Employers Insurance Co., supra,* 221 Cal.App.3d at p. 1357.)

- "The 'general rule' is that an insurer is not bound by a judgment unless it had notice of the pendency of the action. … However, if an insurer denies coverage to the insured, the insured's contractual obligation to notify the insurer ceases." (*Samson v. Transamerica Insurance Co.* (1981) 30 Cal.3d 220, 238 [178 Cal.Rptr. 343], internal citations omitted.)

<u>Secondary Sources</u>

- 4 California Insurance Law & Practice (Matthew Bender 2002) Liability Insurance in General, §§ 41.65[1]–[9], pp. 41-146–41-156 (rel. 33-6/98)
- 1 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar 2002) Identifying Sources of Coverage, §§ 8.24–8.26, pp. 286–288
- Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group 2002) ¶¶ 15:917–15:920, pp. 15-160–15-161

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2611
Affirmative Defense—Insured's Breach of Duty to Cooperate in Defense

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[*Name of defendant***] claims that it does not have to pay the [judgment against/settlement by] [***name of plaintiff***] because [***name of plaintiff***] failed to cooperate in [his/her] defense. To succeed, [***name of defendant***] must prove the following:**

1. **That [***name of plaintiff***] failed to cooperate in the defense of the lawsuit against [him/her];**

2. **That [***name of defendant***] used reasonable efforts to obtain [***name of plaintiff***]'s cooperation; and**

3. **That [***name of defendant***] was prejudiced by [***name of plaintiff***]'s failure to cooperate in [his/her] defense.**

To establish prejudice, [*name of defendant***] must show a substantial likelihood that, if [***name of plaintiff***] had cooperated, [***name of defendant***] would have [taken steps that would have substantially reduced or eliminated [***name of plaintiff***]'s liability] [or] [settled for a substantially smaller amount].**

DIRECTIONS FOR USE

This instruction is intended for use by an insurer as a defense to a breach of contract action based on a third party liability policy. This instruction also may be modified for use as a defense to a judgment creditor's action to recover on a liability policy.

Depending on the facts of the case, the second element of this instruction may not always be necessary.

SOURCES AND AUTHORITY

- "The right of an injured party to sue an insurer on the policy after obtaining judgment against the insured is established by statute. An insurer may assert defenses based upon a breach by the insured of a condition of the policy such as a cooperation clause, but the breach cannot be a valid defense unless the insurer was substantially

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prejudiced thereby. … The burden of proving that a breach of a cooperation clause resulted in prejudice is on the insurer." (*Campbell v. Allstate Insurance Co.* (1963) 60 Cal.2d 303, 305–306 [32 Cal.Rptr 827, 384 P.2d 155], internal citations omitted.)

- "[W]e apprehend that *Campbell* stands for these propositions: (1) that breach by an insured of a cooperation . . . clause may not be asserted by an insurer unless the insurer was substantially prejudiced thereby; (2) that prejudice is not presumed as a matter of law from such breach; (3) that the burden of proving prejudicial breach is on the insurer; and (4) that, although the issue of prejudice is ordinarily one of fact, it may be established as a matter of law by the facts proved." (*Northwestern Title Security Co. v. Flack* (1970) 6 Cal.App.3d 134, 141 [85 Cal.Rptr. 693].)

- "[A]n insurer, in order to establish it was prejudiced by the failure of the insured to cooperate in his defense, must establish at the very least that if the cooperation clause had not been breached there was a substantial likelihood the trier of fact would have found in the insured's favor." (*Billington v. Interinsurance Exchange of Southern California* (1969) 71 Cal.2d 728, 737 [79 Cal.Rptr. 326, 456 P.2d 982].

- "[I]f the trial court finds … that the insurer failed to diligently seek its insured's presence a finding that he breached the cooperation clause would not be justified." (*Billington, supra*, 71 Cal.2d at p. 744.)

- "[P]rejudice is not shown simply by displaying end results; the probability that such results could or would have been avoided absent the claimed default or error must also be explored." (*Clemmer v. Hartford Insurance Co.* (1978) 22 Cal.3d 865, 883 fn. 12 [151 Cal.Rptr. 285].)

Secondary Sources

- 4 California Insurance Law & Practice (Matthew Bender 2002) Liability Insurance, §§ 41.64[1]–[11], pp. 41-137–41-146 (rel. 24-7/95)
- 1 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar 2002) Insured's Role in Defense, §§ 11.2–11.26, pp. 367–387
- Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group 2002) 15:917–15:919, p. 15-160

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2612
Implied Obligation of Good Faith and Fair Dealing Explained

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

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

DIRECTIONS FOR USE

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

SOURCES AND AUTHORITY

- "There is an implied covenant of good faith and fair dealing in every contract that neither party will do anything which will injure the right of the other to receive the benefits of the agreement." (*Communale v. Traders & General Insurance Co.* (1958) 50 Cal.2d 654, 658 [252 P.2d 495].)

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

Secondary Sources

- 2 California Insurance Law & Practice (Matthew Bender 2002) §§ 13.03[1][a]–[c], pp. 13-12–13-16 (rel. 40-11/00)
- 1 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar 2002) Overview of Rights and Obligations of Policy, §§ 2.9–2.14, pp. 43–48
- Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group 2002) 12:1–12:6, pp. 12A-1–12A-2

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2613
Breach of the Implied Obligation of Good Faith and Fair Dealing
Essential Factual Elements

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

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

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

3. **That [***name of defendant***] unreasonably [failed to pay/delayed payment of] policy benefits;**

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

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

DIRECTIONS FOR USE

For instructions regarding general breach of contract issues, refer to the Contracts series (Instruction 800, et seq).

SOURCES AND AUTHORITY

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

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

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

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

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

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

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

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

Secondary Sources

- 2 California Insurance Law & Practice (Matthew Bender 2002) Claims Handling and the Duty of Good Faith, §§ 13.03[2][a]–[c], 13.06, pp. 13-17–13-23, 13-42–13-42.1 (rel. 42-6/01)
- 2 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar 2001) General Principles of Contract and Bad Faith Actions, §§ 24.25–24.30, 24.32, pp. 901–908
- Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group 2002) 12:822–12:846.6, pp. 12C-7–12C-13

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2614
Bad Faith (First Party)—Failure to Properly Investigate Claim
Essential Factual Elements

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

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

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

3. **That [***name of defendant***] unreasonably failed to properly investigate the loss and [denied coverage/failed to pay insurance benefits/ delayed payment of insurance benefits];**

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

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

When investigating a claim, an insurance company has a duty to diligently search for, and to consider, evidence that supports an insured's claimed loss. An insurance company may not reasonably and in good faith deny payments to its insured without thoroughly investigating the grounds for its denial.

DIRECTIONS FOR USE

For instructions regarding general breach of contract issues, refer to the Contracts series (Instructions 800, et seq).

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SOURCES AND AUTHORITY

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

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

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

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

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

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

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

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

Secondary Sources

- 2 California Insurance Law & Practice (Matthew Bender 2002) Claims Handling and the Duty of Good Faith, §§ 13.04[1]–[3], pp. 13-38.4–13-40.1 (rel. 33-6/98)
- 1 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar 2002) Investigating the Claim, §§ 9.2, 9.14–9.22, pp. 302–303, 313–321
- Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group 2002) 12:848–12:874, pp. 12C-14–12C-21

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2615
Bad Faith (First Party)—Breach of Duty to Inform Insured of Rights Essential Factual Elements

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

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

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

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

4. **That [***name of defendant***] did not reasonably inform [***name of plaintiff***] of his [right/obligation] to [***describe right or obligation***];**

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

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

DIRECTIONS FOR USE

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

For instructions regarding general breach of contract issues, refer to the Contracts series (Instructions 800, et seq).

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SOURCES AND AUTHORITY

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

- "When a court is reviewing claims under an insurance policy, it must hold the insured bound by clear and conspicuous provisions in the policy even if evidence suggests that the insured did not read or understand them. Once it becomes clear to the insurer that its insured disputes its denial of coverage, however, the duty of good faith does not permit the insurer passively to assume that its insured is aware of his rights under the policy. The insurer must instead take affirmative steps to make sure that the insured is informed of his remedial rights." (*Sarchett v. Blue Shield of California* (1987) 43 Cal.3d 1, 14–15 [233 Cal.Rptr. 76, 726 P.2d 267]; but see *Chase v. Blue Cross of California* (1996) 42 Cal.App.4th 1142, 1155 [50 Cal.Rptr.2d 178].)

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

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

<u>Secondary Sources</u>

- 2 California Insurance Law & Practice (Matthew Bender 2002) Claims Handling and the Duty of Good Faith, § 13.05, pp. 13-40.1–13-42 (rel. 42-6/01)
- Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group 2002) 11:46–11:47, 12:956–12:961, pp. 11-12–11-13, 12C-42–12C-44

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2616
Bad Faith—Unreasonable Refusal to Settle Within Liability Policy Limits—Essential Factual Elements

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

1. **That [***name of defendant***] undertook the defense of [***name of plaintiff***] in a lawsuit brought against him by [***name of claimant***];**

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

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

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

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

A settlement demand is reasonable if in light of [*name of claimant***]'s injuries or loss and [***name of plaintiff***]'s probable liability, the judgment in the lawsuit was likely to exceed the amount of the settlement demand.**

DIRECTIONS FOR USE

This instruction is intended for use where the insurer assumed the duty to defend the insured, but failed to accept a reasonable settlement offer. For instructions regarding general breach of contract issues, refer to the Contracts series (Instruction 800, et seq).

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

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SOURCES AND AUTHORITY

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

- "Liability is imposed not for a bad faith breach of the contract but for failure to meet the duty to accept reasonable settlements, a duty included within the implied covenant of good faith and fair dealing." (*Crisci v. Security Insurance Co.* (1967) 66 Cal.2d 425, 429 [58 Cal.Rptr. 13].)

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

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

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

- An insurer's decision to contest or settle a claim " 'should be an honest and intelligent one. It must be honest and intelligent if it be a good-faith conclusion. In order that it be honest and intelligent it must be based upon a knowledge of the facts and circumstances upon which liability is predicated, and upon a knowledge of the nature and extent of the injuries so far as they reasonably can be ascertained. [¶] This requires the insurance company to make a diligent effort to ascertain the facts upon

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which only an intelligent and good-faith judgment may be predicated. If it exhausts the sources of information open to it to ascertain the facts, it has done all that is possible to secure the knowledge upon which a good-faith judgment may be exercised.' " (*Brown v. Guarantee Insurance Co.* (1957) 155 Cal.App.2d 679, 685–686 [319 P.2d 69], internal citation omitted.)

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

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

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

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

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

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

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Secondary Sources

- 2 California Insurance Law & Practice (Matthew Bender 2002) Claims Handling and the Duty of Good Faith, §§ 13.07[1]–[3], pp. 13-44–13-55 (rel. 40-11/00)
- 1 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar 2002) General Insurance Considerations in Settlement, §§ 14.35–14.37, 14.44–14.46, pp. 514–516, 520–522
- Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group 2002) ¶¶ 12:225–12:360, 12:375–12:458 pp. 12B-7–12B-38, 12B-42–12B-68

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2617
Bad Faith—Advice of Counsel

[*Name of defendant***] did not breach the obligation of good faith and fair dealing if it reasonably relied on the advice of its lawyer. [***Name of defendant***]'s reliance was reasonable if:**

1. **[***Name of defendant***] acted in reliance on the opinion and advice of its lawyer;**

2. **The lawyer's advice was based on full disclosure by [***name of defendant***] of all relevant facts that it knew, or could have discovered with reasonable effort;**

3. **[***Name of defendant***] reasonably believed the advice of the lawyer was correct; [and]**

4. **In relying on its lawyer's advice, [***name of defendant***] gave at least as much consideration to [***name of plaintiff***]'s interest as it gave its own interest; [and]**

[5. [*Name of defendant***] was willing to reconsider and act accordingly when it determined that the lawyer's advice was correct.]**

DIRECTIONS FOR USE

The "advice of counsel defense" is not a true affirmative defense, but rather negates an essential element of the insured's cause of action for bad faith. (See *State Farm Mutual Automobile Insurance Co. v. Superior Court* (1991) 228 Cal.App.3d 721, 725–726 [279 Cal.Rptr. 116].)

Advice of counsel is irrelevant, however, when an insurer denies coverage and for that reason refuses a reasonable settlement offer. (See, e.g., *Johansen v. California State Automobile Assn. Inter-Insurance Bureau* (1975) 15 Cal.3d 9, 16 [123 Cal.Rptr. 288] ["an insurer's 'good faith,' though erroneous, belief in noncoverage affords no defense to liability flowing from the insurer's refusal to accept a reasonable settlement offer"].)

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SOURCES AND AUTHORITY

- "An insurer may defend itself against allegations of bad faith and malice in claims handling with evidence the insurer relied on the advice of competent counsel. The defense of advice of counsel is offered to show the insurer had 'proper cause' for its actions even if the advice it received is ultimately unsound or erroneous." (*State Farm Mutual Automobile Insurance Co., supra,* 228 Cal.App.3d at p. 725, internal citations omitted.)

- "If the insurer has exercised good faith in all of its dealings under its policy, and if the settlement which it has rejected has been fully and fairly considered and has been based upon an honest belief that the insurer could defeat the action or keep any possible judgment within the limits of the policy, and its judgments are based on a fair review of the evidence after reasonable diligence in ascertaining the facts, and upon sound legal advice, a court should not subject the insurer to further liability if it ultimately turns out that its judgment is a mistaken judgment." (*State Farm Mutual Automobile Insurance Co., supra,* 228 Cal.App.3d at p. 725, internal citation omitted.)

- "[I]t is a complete defense to a claim of extreme and outrageous conduct when the evidence shows (1) the defendant acted on the opinion and advice of counsel; (2) counsel's advice was based on full disclosure of all the facts by defendant or the advice was initiated by counsel based on counsel's familiarity with the case; and (3) the defendant's reliance on the advice of counsel was in good faith." (*Melorich Builders, Inc. v. Superior Court* (1984) 160 Cal.App.3d 931, 936–937 [207 Cal.Rptr. 47] [intentional infliction of emotional distress action].)

- "Good faith reliance on counsel's advice simply negates allegations of bad faith and malice as it tends to show the insurer had proper cause for its actions. Because advice of counsel is directed to an essential element of a plaintiff's cause of action, it does not constitute new matter and need not be specifically alleged." (*State Farm Mutual Automobile Insurance Co., supra,* 228 Cal.App.3d at. pp. 725–726.)

- "An insurer's receipt of and reliance on [the written opinion of its legal counsel] is a relevant circumstance to be considered on the issue of its alleged bad faith." (*Mock v. Michigan Millers Mut. Insurance Co.* (1992) 4 Cal.App.4th 306, 329 fn. 20 [5 Cal.Rptr.2d 594].)

- "Exemplary damages are not recoverable against a defendant who acts in good faith and under the advice of counsel." (*Fox v. Aced* (1957) 49 Cal.2d 381, 385 [317 P.2d 608].)

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

Secondary Sources

- 2 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar 2002) General Principles of Contract and Bad Faith Actions, §§ 24.52–24.55, pp. 923–926
- Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group 2002) ¶¶ 12:1248–12:1260, pp. 12D-31–12D-34

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2618
Damages for Bad Faith

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 all harm that was caused by [*name of defendant***], even if the harm could not have been anticipated.**

[*Name of plaintiff***] must prove the amount of [his/her] damages. However, [***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. You must not speculate or guess in awarding damages.**

The following are the specific items of damages claimed by [*name of plaintiff***]:**

1. **[Mental suffering/anxiety/humiliation/emotional distress;] [and]**

2. **[The cost of attorney fees to recover the insurance policy benefits;] [and]**

3. **[***Insert other applicable item of damage.***]**

[No fixed standard exists for deciding the amount of damages for [*insert item of mental or emotional distress***]. You must use your judgment to decide a reasonable amount based on the evidence and your common sense.]**

[To recover for future [*insert item of mental or emotional distress***], [***name of plaintiff***] must prove that [he/she] is reasonably certain to suffer that harm.]**

[To recover attorney fees [*name of plaintiff***] must prove that because of [***name of defendant***]'s breach of the obligation of good faith and fair dealing it was reasonably necessary for [him/her] to hire an attorney to recover the policy benefits. [***Name of plaintiff***] may not recover attorney fees [he/she] incurred in attempting to obtain anything other than the policy benefits.]**

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DIRECTIONS FOR USE

For instructions on damages for pain and suffering, see Instructions 2006, *Items of Noneconomic Damage*, and Instruction 2006A, *Physical Pain and Mental Suffering*. For instructions on punitive damages, see other instructions in the Damages series.

SOURCES AND AUTHORITY

- "When an insurer's tortious conduct reasonably compels the insured to retain an attorney to obtain the benefits due under a policy, it follows that the insurer should be liable in a tort action for that expense. The attorney's fees are an economic loss—damages—proximately caused by the tort." (*Brandt v. Superior Court* (1985) 37 Cal.3d 813, 817 [210 Cal.Rtr. 211].)

- "The fees recoverable … may not exceed the amount attributable to the attorney's efforts to obtain the rejected payment due on the insurance contract. Fees attributable to obtaining any portion of the plaintiff's award which exceeds the amount due under the policy are not recoverable. [¶] Since the attorney's fees are recoverable as damages, the determination of the recoverable fees must be made by the trier of fact unless the parties stipulate otherwise." (*Brandt*, *supra*, 37 Cal.3d at p. 819.)

- "If … the matter is to be presented to the jury, the court should instruct along the following lines: 'If you find (1) that the plaintiff is entitled to recover on his cause of action for breach of the implied covenant of good faith and fair dealing, and (2) that because of such breach it was reasonably necessary for the plaintiff to employ the services of an attorney to collect the benefits due under the policy, then and only then is the plaintiff entitled to an award for attorney's fees incurred to obtain the policy benefits, which award must not include attorney's fees incurred to recover any other portion of the verdict.' " (*Brandt*, *supra*, 37 Cal.3d at p. 820.)

<u>Secondary Sources</u>

- 2 California Insurance Law & Practice (Matthew Bender 2002) Claims Handling and the Duty of Good Faith, § 13.03[5][c], pp. 13-34–13-35 (rel. 40-11/00)
- 2 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar 2002) General Principles of Contract and Bad Faith Actions, §§ 24.70–24.71, pp. 932–934
- Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group 2002) ¶¶ 13:120–13:144, pp. 13-25–13-32

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2619
Judgment Creditor's Action Against Insurer
Essential Factual Elements

[*Name of plaintiff*] claims that [*name of defendant*] must pay [all or part of] a judgment against [*name of insured*]. To establish this claim, [*name of plaintiff*] must prove the following:

1. **That [*name of plaintiff*] brought a lawsuit for [personal injury/wrongful death/property damage] against [*name of insured*] and a judgment was entered against [*name of insured*];**

2. **That [all or part of] [*name of insured*]'s liability under the judgment is covered by an insurance policy with [*name of defendant*]; and**

3. **The amount of the judgment [covered by the policy].**

DIRECTIONS FOR USE

This instruction is intended for a judgment creditor's action against an insurer to collect on an insurance policy pursuant to Insurance Code section 11580(b)(2). This instruction should be used only where there are factual issues on any of the above elements. This instruction may need to be augmented with instructions on specific factual findings.

SOURCES AND AUTHORITY

- Insurance Code section 11580(b)(2) provides, in pertinent part, that a liability policy must contain, and will be construed as containing if it does not: "[a] provision that whenever judgment is secured against the insured or the executor or administrator of a deceased insured in an action based upon bodily injury, death, or property damage, then an action may be brought against the insurer on the policy and subject to its terms and limitations, by such judgment creditor to recover on the judgment."

- "A direct action under section 11580 is a contractual action on the policy to satisfy a judgment up to policy limits." (*Wright v. Fireman's Fund Insurance Co.* (1992) 11 Cal.App.4th 998, 1015 [14 Cal.Rptr.2d 588].)

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- "[I]t is not necessary for property damage to be caused by a vehicle or draught animal in order to bring a direct action against an insurer under section 11580." (*People ex rel. City of Willits v. Certain Underwriters at Lloyd's of London* (2002) 97 Cal.App.4th 1125, 1131–1132 [118 Cal.Rptr.2d 868].)

- "Because the insurer's duties flow to its insured alone, a third party claimant may not bring a direct action against an insurance company. As a general rule, a third party may directly sue an insurer only when there has been an assignment of rights by, or a final judgment against, the insured." (*Shaolian v. Safeco Insurance Co.* (1999) 71 Cal.App.4th 268, 271 [83 Cal.Rptr.2d 702], internal citations omitted.)

- "Under section 11580 a third party claimant bringing a direct action against an insurer should … prove 1) it obtained a judgment for bodily injury, death, or property damage, 2) the judgment was against a person insured under a policy that insures against [the] loss or damage …, 3) the liability insurance policy was issued by the defendant insurer, 4) the policy covers the relief awarded in the judgment, 5) the policy either contains a clause that authorizes the claimant to bring an action directly against the insurer or the policy was issued or delivered in California and insures against [the] loss or damage … ." (*Wright, supra,*11 Cal.App.4th at p. 1015.)

- "Under Insurance Code section 11580, a third party creditor bringing a direct action against an insurer to recover the proceeds of an insurance policy must *plead and prove* not only that it obtained a judgment for bodily injury, but that 'the judgment was against a person insured under a policy …' and 'the policy covers the relief awarded in the judgment … .' " (*Miller v. American Home Assurance Co.* (1996) 47 Cal.App.4th 844, 847–848 [54 Cal.Rptr.2d 765], italics in original, internal citation omitted.)

- "[Insurance Code Section 11580(b)(2)] and the standard policy language permit an action against an insurer only when the underlying judgment is final and 'final,' for this purpose, means an appeal from the underlying judgment has been concluded or the time within which to appeal has passed." (*McKee v. National Union Fire Insurance Co. of Pittsburgh, PA.* (1993) 15 Cal.App.4th 282, 285 [19 Cal.Rptr.2d 286].)

- "[W]here the insurer may be subject to a direct action under Insurance Code section 11580 by a judgment creditor who has or will obtain a default judgment in a third party action against the insured, intervention is appropriate. … Where an insurer has failed to intervene in the underlying action or to move to set aside the default judgment, the insurer is bound by the default judgment." (*Reliance Insurance Co. v.*

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Superior Court (2000) 84 Cal.App.4th 383, 386–387 [100 Cal.Rptr.2d 807], internal citations omitted.)

- "The [standard] 'no action' clause gives the insurer the right to control the defense of the claim—to decide whether to settle or to adjudicate the claim on its merits. …When the insurer provides a defense to its insured, the insured has no right to interfere with the insurer's control of the defense, and a stipulated judgment between the insured and the injured claimant, without the consent of the insurer, is ineffective to impose liability upon the insurer." (*Safeco Insurance Co. of America v, Superior Court* (1999) 71 Cal.App.4th 782, 786–787 [84 Cal.Rptr.2d 43], internal citations omitted.)

- A standard "no action" clause in an indemnity insurance policy "provides that [the insurer] may be sued directly if the amount of the insured's obligation to pay was finally determined either by judgment against the insured after actual trial or by 'written agreement of the insured, the claimant and the company.' " (*Rose v. Royal Insurance Co. of America* (1991) 2 Cal.App.4th 709, 716–717 [3 Cal.Rptr.2d 483].)

- "[A] trial does not have to be adversarial to be considered an 'actual trial' under the 'no action' clause, or to be considered binding against the insurer in a section 11580 proceeding. … [W]e conclude that the term 'actual trial' in the standard 'no action' clause has two components: (1) an independent adjudication of facts based on an evidentiary showing; and (2) a process that does not create the potential for abuse, fraud or collusion." (*National Union Fire Insurance Co. v. Lynette C.* (1994) 27 Cal.App.4th 1434, 1449 [33 Cal.Rptr.2d 496].)

- "A defending insurer cannot be bound by a settlement made without its participation and without any actual commitment on its insured's part to pay the judgment, even where the settlement has been found to be in good faith for purposes of [Code of Civil Procedure] section 877.6." (*Hamilton v. Maryland Casualty Co.* (2002) 27 Cal.4th 718, 729 [177 Cal.Rptr.2d 318].)

- "[W]hen … a liability insurer wrongfully denies coverage or refuses to provide a defense, then the insured is free to negotiate the best possible settlement consistent with his or her interests, including a stipulated judgment accompanied by a covenant not to execute. Such a settlement will raise an evidentiary presumption in favor of the insured (or the insured's assignee) with respect to the existence and amount of the insured's liability. The effect of such presumption is to shift the burden of proof to the insurer to prove that the settlement was unreasonable or the product of fraud or collusion. If the insurer is unable to meet that burden of proof then the stipulated judgment will be binding on the insurer and the policy provision proscribing a direct

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action against an insurer except upon a judgment against the insured after an 'actual trial' will not bar enforcement of the judgment." (*Pruyn v. Agricultural Insurance Co.* (1995) 36 Cal.App.4th 500, 509 [42 Cal.Rptr.2d 295].)

Secondary Sources

- 4 California Insurance Law & Practice (Matthew Bender 2002) §§ 41.60–41.63, pp. 41-117– 41-137 (rel. 44-2/02)
- 2 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar 2002) Claimant's Direct Action for Recovery of Judgment, §§ 27.1–27.7, 27.17–27.27, pp. 1006–1014, 1017–1026.1
- Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group 2002) ¶¶ 15:1028–15:1077, 15:1123–15:1136, pp. 15-185–15-194, 15-200.1–15-200.2

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2620
Negligent Failure to Obtain Insurance Coverage—Essential Factual Elements

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[*Name of plaintiff*] claims that [he/she] was harmed by [*name of defendant*]'s negligent failure to obtain insurance requested by [*name of plaintiff*]. To establish this claim, [*name of plaintiff*] must prove the following:

1. **That [*name of plaintiff*] requested [*name of defendant*] to obtain [*describe requested insurance*] and [*name of defendant*] promised to obtain that insurance for [*name of plaintiff*];**

2. **That [*name of defendant*] was negligent in failing to obtain the promised insurance;**

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

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

DIRECTIONS FOR USE

For general tort instructions, including the definition of "substantial factor," see the Negligence series (Instruction 300, et seq).

SOURCES AND AUTHORITY

- "A 'failure to deliver the agreed-upon coverage' case is actionable … . An insurance agent has an 'obligation to use reasonable care, diligence, and judgment in procuring insurance requested by an insured.' A broker's failure to obtain the type of insurance requested by an insured may constitute actionable negligence and the proximate cause of injury." (*Desai v. Farmers Insurance Exchange* (1996) 47 Cal.App.4th 1110, 1119–1120 [55 Cal.Rptr.2d 276], internal citations omitted.)

- "Absent some notice or warning, an insured should be able to rely on an agent's representations of coverage without independently verifying the accuracy of those

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representations by examining the relevant policy provisions." (*Clement v. Smith* (1993) 16 Cal.App.4th 39, 45 [19 Cal.Rptr.2d 676].)

- "[W]hile an insurance agent who promises to procure insurance will indeed be liable for his negligent failure to do so, it does not follow that he can avoid liability for foreseeable harm caused by his silence or inaction merely because he has not expressly promised to assume responsibility." (*Westrick v. State Farm Insurance* (1982) 137 Cal.App.3d 685, 691 [187 Cal.Rptr. 214], internal citations omitted.)

Secondary Sources

- 5 California Insurance Law & Practice (Matthew Bender 2002) Operating Requirements of Agents and Brokers, § 61.04[3][a], pp. 61-23–61-24.1 (rel. 31-11/97)
- 2 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar 2002) Actions Against Agents and Brokers, §§ 29.7–29.8, pp. 1072–1074
- Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group 2002) ¶¶ 2:50–2:64.2, 11:246–11:249, pp. 2-12–2-18, 11-58–11-59

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2700
Conspiracy—Essential Factual Elements

[*Name of plaintiff***] claims that [he/she] was harmed by [***name of co-conspirator***]'s [***insert tort theory***] and that [***name of defendant***] is responsible for the harm because [***name of defendant***] was part of a conspiracy to commit [***insert tort theory***]. A conspiracy is an agreement by two or more persons to commit a wrongful act. Such an agreement may be made orally or in writing or may be implied by the conduct of the parties.**

If you find that [*name of co-conspirator***] committed a [***insert tort theory***] that harmed [***name of plaintiff***], then you must determine if [***name of defendant***] is also responsible for the harm. [***Name of defendant***] is responsible if [***name of plaintiff***] proves the following:**

1. **That [***name of defendant***] was aware that [***name of co-conspirator***] [and others] planned to [***insert wrongful act***]; and**

2. **That [***name of defendant***] agreed with [***name of co-conspirator***] [and others] and intended that the [***insert wrongful act***] be committed.**

Mere knowledge of a wrongful act without cooperation or an agreement to cooperate is insufficient to make [*name of defendant***] responsible for the harm.**

A conspiracy may be inferred from circumstances, including the nature of the acts done, the relationships between the parties, and the interests of the alleged co-conspirators. [*Name of plaintiff***] is not required to prove that [***name of defendant***] personally committed a wrongful act or that [he/she] knew all the details of the agreement or the identities of all the other participants.**

SOURCES AND AUTHORITY

- "Conspiracy is not a cause of action, but a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration. By participation in a civil conspiracy, a coconspirator effectively adopts as his or her own the torts of

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other coconspirators within the ambit of the conspiracy. In this way, a coconspirator incurs tort liability co-equal with the immediate tortfeasors." (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 510–511 [28 Cal.Rptr.2d 475], internal citations omitted.)

- "While criminal conspiracies involve distinct substantive wrongs, civil conspiracies do not involve separate torts. The doctrine provides a remedial measure for affixing liability to all persons who have 'agreed to a common design to commit a wrong.' " (*Choate v. County of Orange* (2000) 86 Cal.App.4th 312, 333 [103 Cal.Rptr.2d 339], internal citation omitted.)

- "As long as two or more persons agree to perform a wrongful act, the law places civil liability for the resulting damages on all of them, regardless of whether they actually commit the tort themselves. 'The effect of charging … conspiratorial conduct is to implicate all … who agree to the plan to commit the wrong as well as those who actually carry it out.' " (*Wyatt v. Union Mortgage Co.* (1979) 24 Cal.3d 773, 784 [157 Cal.Rptr. 392], internal citations omitted.)

- "The elements of a civil conspiracy are '(1) the formation and operation of the conspiracy; (2) the wrongful act or acts done pursuant thereto; and (3) the damage resulting.' " (*Mosier v. Southern California Physicians Insurance Exchange* (1988) 63 Cal.App.4th 1022, 1048 [74 Cal.Rptr.2d 550], internal citations omitted.)

- " '[T]he major significance of the conspiracy lies in the fact that it renders each participant in the wrongful act responsible as a joint tortfeasor for all damages ensuing from the wrong, irrespective of whether or not he was a direct actor and regardless of the degree of his activity.' " (*Applied Equipment Corp., supra,* 7 Cal.4th at p. 511, internal citations omitted.)

- "A complaint for civil conspiracy states a cause of action only when it alleges the commission of a civil wrong that causes damage. Though conspiracy may render additional parties liable for the wrong, the conspiracy itself is not actionable without a wrong." (*Okun v. Superior Court* (1981) 29 Cal.3d 442, 454 [175 Cal.Rptr. 157].)

- "Because civil conspiracy is so easy to allege, plaintiffs have a weighty burden to prove it. They must show that each member of the conspiracy acted in concert and came to a mutual understanding to accomplish a common and unlawful plan, and that one or more of them committed an overt act to further it. It is not enough that the conspiring officers knew of an intended wrongful act, they had to agree—expressly or tacitly—to achieve it. Unless there is such a meeting of the minds, 'the independent

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acts of two or more wrongdoers do not amount to a conspiracy.' " (*Choate, supra,* 86 Cal.App.4th at p. 333, internal citations omitted.)

- "A cause of action for civil conspiracy may not arise … if the alleged conspirator, though a participant in the agreement underlying the injury, was not personally bound by the duty violated by the wrongdoing ... . " (*Doctors' Co. v. Superior Court* (1989) 49 Cal.3d 39, 44 [260 Cal.Rptr. 183], internal citation omitted.)

- "Conspiracy is not an independent tort; it cannot create a duty or abrogate an immunity. It allows tort recovery only against a party who already owes the duty and is not immune from liability based on applicable substantive tort law principles." (*Applied Equipment Corp., supra,* 7 Cal.4th at p. 514, internal citations omitted.)

- "A conspiracy cannot be alleged as a tort separate from the underlying wrong it is organized to achieve. As long as the underlying wrongs are subject to privilege, defendants cannot be held liable for a conspiracy to commit those wrongs. Acting in concert with others does not destroy the immunity of defendants." (*McMartin v. Children's Institute International* (1989) 212 Cal.App.3d 1393, 1406 [261 Cal.Rptr. 437], internal citations omitted.)

- "We agree … that the general rule is that a party who is not personally bound by the duty violated may not be held liable for civil conspiracy even though it may have participated in the agreement underlying the injury. However, an exception to this rule exists when the participant acts in furtherance of its own financial gain." (*Mosier, supra,* 63 Cal.App.4th at p. 1048, internal citations omitted.)

- "Conspiracy liability may properly be imposed on nonfiduciary agents or attorneys for conduct which they carry out not simply as agents or employees of fiduciary defendants, but in furtherance of their own financial gain." (*Skarbrevik v. Cohen, England & Whitfield* (1991) 231 Cal.App.3d 692, 709 [282 Cal.Rptr. 627], internal citations omitted.)

- " 'The basis of a civil conspiracy is the formation of a group of two or more persons who have agreed to a common plan or design to commit a tortious act.' The conspiring defendants must also have actual knowledge that a tort is planned and concur in the tortious scheme with knowledge of its unlawful purpose." (*Kidron v. Movie Acquisition Corp.* (1995) 40 Cal.App.4th 1571, 1582 [47 Cal.Rptr.2d 752], internal citations omitted.)

- "Liability as a co-conspirator depends upon projected joint action. 'The mere knowledge, acquiescence, or approval of the act, without co-operation or agreement to

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cooperate is not enough ... .' But once the plan for joint action is shown, 'a defendant may be held liable who in fact committed no overt act and gained no benefit therefrom.' " (*Wetherton v. Growers Farm Labor Assn.* (1969) 275 Cal.App.2d 168, 176 [79 Cal.Rptr. 543], internal citations omitted, disapproved on another ground in *Applied Equipment Corp., supra,* 7 Cal.4th at p. 521, fn. 10.)

- "Furthermore, the requisite concurrence and knowledge 'may be inferred from the nature of the acts done, the relation of the parties, the interests of the alleged conspirators, and other circumstances.' Tacit consent as well as express approval will suffice to hold a person liable as a coconspirator." (*Wyatt, supra,* 24 Cal.3d at p. 785, internal citations omitted.)

- "It is a legal commonplace that the existence of a conspiracy may be inferred from circumstances, and that the conspiracy need not be the result of an express agreement but may rest upon tacit assent and acquiescence." (*Holder v. Home Savings & Loan Assn. of Los Angeles* (1968) 267 Cal.App.2d 91, 108 [72 Cal.Rptr. 704], internal citations omitted.)

- "Of course, the agreement between conspirators need not be proved by direct evidence, but may be shown by circumstantial evidence that tends to show a common intent. In fact, in the absence of a confession by one of the conspirators, it is usually very difficult to secure direct evidence of a conspiracy, so that in the usual case the ultimate fact of a conspiracy must be determined from those inferences naturally and properly to be drawn from those matters directly proved." (*Peterson v. Cruickshank* (1956) 144 Cal.App.2d 148, 163 [300 P.2d 915], internal citations omitted.)

- "[A]ctual knowledge of the planned tort, without more, is insufficient to serve as the basis for a conspiracy claim. Knowledge of the planned tort must be combined with intent to aid in its commission. 'The sine qua non of a conspiratorial agreement is the knowledge on the part of the alleged conspirators of its unlawful objective and their intent to aid in achieving that objective.' 'This rule derives from the principle that a person is generally under no duty to take affirmative action to aid or protect others.' " (*Kidron, supra,* 40 Cal.App.4th at p. 1583, internal citations omitted.)

- "While knowledge and intent 'may be inferred from the nature of the acts done, the relation of the parties, the interest of the alleged conspirators, and other circumstances,' '[c]onspiracies cannot be established by suspicions. There must be some evidence. Mere association does not make a conspiracy. There must be evidence of some participation or interest in the commission of the offense.' An inference must flow logically from other facts established in the action." (*Kidron, supra,* 40 Cal.App.4th at p. 1583, internal citations omitted.)

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2701
Ongoing Conspiracy

If you decide that [*name of defendant*] joined the conspiracy to commit [*insert tort theory*], then [*name of defendant*] is responsible for all acts done as part of the conspiracy, whether they occurred before or after [he/she] joined the conspiracy.

SOURCES AND AUTHORITY

- "It is the settled rule that 'to render a person civilly liable for injuries resulting from a conspiracy of which he was a member, it is not necessary that he should have joined the conspiracy at the time of its inception; everyone who enters into such a common design is in law a party to every act previously or subsequently done by any of the others in pursuance of it.' Having been found to have joined and actively participated in the continuing conspiracy to convert, appellant became liable for the previous acts of his coconspirators under the rules relating to civil liability, and the fact that some of the missing goods may never have come into his possession would not absolve him from liability." (*De Vries v. Brumback* (1960) 53 Cal.2d 643, 648 [2 Cal.Rptr. 764], internal citations omitted.)

- "It is well settled that a conspirator is liable for all the acts done in furtherance of a common scheme or plan even though he is not a direct actor. It is equally well settled that a party may be liable even if the intentional tort is commenced before he participates, if he, knowing the facts, then participates therein." (*Peterson v. Cruickshank* (1956) 144 Cal.App.2d 148, 168–169 [300 P.2d 915], internal citations omitted.)

- "[Defendant] could not join in a conspiracy that had been completed." (*Kidron v. Movie Acquisition Corp.* (1995) 40 Cal.App.4th 1571, 1595 [47 Cal.Rptr.2d 752], internal citations omitted.)

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2702
Affirmative Defense—Agent and Employee Immunity Rule

[*Name of defendant***] claims that [he/she] was not part of a conspiracy because [he/she] was acting as an [agent/employee] of [***name of defendant entity***]. To succeed, [***name of defendant***] must prove:**

1. **That [he/she] was acting in [his/her] official capacity on behalf of [***name of defendant corporation***]; and**

2. **That [he/she] was not acting to advance [his/her] own personal interests.**

DIRECTIONS FOR USE

This instruction is intended for situations where an individual defendant is alleged to have conspired with an entity. This instruction is not intended to apply in cases where an individual defendant is alleged to have conspired with a third party and there is no agency relationship between them.

SOURCES AND AUTHORITY

- "[A]gents or employees of a corporation cannot conspire with the corporation while acting in their official capacities on behalf of the corporation rather than as individuals acting for their individual advantage." (*Zumbrun v. University of Southern California* (1972) 25 Cal.App.3d 1, 12 [101 Cal.Rptr. 499], internal citations omitted.)

- "The rule 'derives from the principle that ordinarily corporate agents and employees acting for or on behalf of the corporation cannot be held liable for inducing a breach of the corporation's contract since being in a confidential relationship to the corporation their action in this respect is privileged.' " (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 512, fn. 4 [28 Cal.Rptr.2d 475], internal citations omitted.)

- "A corporation is, of course, a legal fiction that cannot act at all except through its employees and agents. When a corporate employee acts in the course of his or her employment, on behalf of the corporation, there is no entity apart from the employee

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with whom the employee can conspire. '[I]t is basic in the law of conspiracy that you must have two persons or entities to have a conspiracy. A corporation cannot conspire with itself any more than a private individual can, and it is the general rule that the acts of the agent are the acts of the corporation ... .' To hold that a subordinate employee of a corporation can be liable for conspiring with the corporate principal would destroy what has heretofore been the settled rule that a corporation cannot conspire with itself." (*Black v. Bank of America* (1994) 30 Cal.App.4th 1, 6 [35 Cal.Rptr.2d 725], internal citations and footnote omitted.)

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2800
Violation of Federal Civil Rights (42 U.S.C. § 1983)
In General—Essential Factual Elements

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

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

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

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

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

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

DIRECTIONS FOR USE

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

SOURCES AND AUTHORITY

- 42 U.S.C. section 1983 provides, in part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State … subjects, or causes to

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be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law … ."

- "As we have said many times, § 1983 'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.' " (*Graham v. Connor* (1989) 490 U.S. 386, 393–394 [109 S.Ct. 1865, 104 L.Ed.2d 443], internal citation omitted.)

- "42 U.S.C. § 1983 creates a cause of action against a person who, acting under color of state law, deprives another of rights guaranteed under the Constitution. Section 1983 does not create any substantive rights; rather it is the vehicle whereby plaintiffs can challenge actions by governmental officials. To prove a case under section 1983, the plaintiff must demonstrate that (1) the action occurred 'under color of state law' and (2) the action resulted in the deprivation of a constitutional right or federal statutory right." (*Jones v. Williams* (9th Cir. 2002) 286 F.3d 1159, 1162–1163, internal citations omitted.)

- "In order to state a cause of action for violation of federal civil rights a plaintiff is required to make two allegations. 'First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law.' If there is no violation of a federal right, there is no basis for a civil rights action." (*Rosales v. City of Los Angeles* (2000) 82 Cal.App.4th 419, 430–431 [98 Cal.Rptr.2d 144], internal citations omitted.)

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

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

- " 'Qualified immunity is an affirmative defense against section 1983 claims. Its purpose is to shield public officials "from undue interference with their duties and from potentially disabling threats of liability." The defense provides immunity from suit, not merely from liability. Its purpose is to spare defendants the burden of going forward with trial.' Because it is an immunity from suit, not just a mere defense to liability, it is important to resolve immunity questions at the earliest possible stage in

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litigation. Immunity should ordinarily be resolved by the court, not a jury." (*Martinez v. County of Los Angeles* (1996) 47 Cal.App.4th 334, 342 [54 Cal.Rptr.2d 772], internal citations omitted.)

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

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

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

- "Private parties act under color of state law if they willfully participate in joint action with state officials to deprive others of constitutional rights. Private parties involved in such a conspiracy may be liable under section 1983." (*United Steelworkers of America v. Phelps Dodge Corp.* (9th Cir.1989) 865 F.2d 1539, 1540, internal citations omitted.)

<u>Secondary Sources</u>

- 8 Witkin, Summary of California Law (9th ed. 1988) Constitutional Law, § 706 et seq.

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2801
Excessive Use of Force—Unreasonable Arrest or Other Seizure Essential Factual Elements (42 U.S.C. § 1983)

[*Name of plaintiff***] claims that [***name of defendant***] used excessive force in [arresting/detaining] [***name of plaintiff***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] used force in [arresting/detaining] [***name of plaintiff***];**

2. **That the force used by [***name of defendant***] was excessive;**

3. **That [***name of defendant***] was acting or pretending to act in the performance of official duties;**

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

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

Force is not excessive if it is reasonably necessary under the circumstances to [detain/make a lawful arrest]. In deciding whether force is reasonably necessary or excessive, you should determine what force a reasonable law enforcement officer would have used under the same or similar circumstances. You should consider, among other factors, the following:

(a) The seriousness of the crime at issue;

(b) Whether [*name of plaintiff***] reasonably appeared to pose an immediate threat to the safety of [***name of defendant***] or others; and**

(c) Whether [*name of plaintiff***] was actively [resisting [detention/arrest]] [attempting to avoid arrest].**

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DIRECTIONS FOR USE

The "official duties" referred to in element 3 must be duties created pursuant to any state, county, or municipal law, ordinance, or regulation. This aspect of color of law most likely will not be an issue for the jury, so it has been omitted to shorten the wording of element 3.

SOURCES AND AUTHORITY

- "In addressing an excessive force claim brought under § 1983, analysis begins by identifying the specific constitutional right allegedly infringed by the challenged application of force. In most instances, that will be either the Fourth Amendment's prohibition against unreasonable seizures of the person, or the Eighth Amendment's ban on cruel and unusual punishments, which are the two primary sources of constitutional protection against physically abusive governmental conduct." (*Graham v. Connor* (1989) 490 U.S. 386, 395 [109 S.Ct. 1865, 104 L.Ed.2d 443], internal citations and footnote omitted.)

- "Where, as here, the excessive force claim arises in the context of an arrest or investigatory stop of a free citizen, it is most properly characterized as one invoking the protections of the Fourth Amendment, which guarantees citizens the right 'to be secure in their persons ... against unreasonable ... seizures' of the person." (*Graham, supra,* 490 U.S. at p. 394.)

- "[A]ll claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." (*Graham, supra,* 490 U.S. at p. 395.)

- "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." (*Graham, supra,* 490 U.S. at p. 396.)

- "Because '[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application,' … its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." (*Graham, supra,* 490 U.S. at p. 396, internal citation omitted.)

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- "In *Forrester v. City of San Diego,* we noted that the three factors listed in *Graham* are not the sole considerations a fact finder should entertain in determining whether force is excessive under the Fourth Amendment. Instead, 'the [*Graham*] Court instructed that the jury should consider "whether the totality of the circumstance justifies a particular sort of seizure." ' In *Chew v. Gates,* we stated that the three factors listed in *Graham* should be taken into account in excessive force cases, but that they are not the exhaustive criteria for determining excessive force." (*Fikes v. Cleghorn* (9th Cir. 1995) 47 F.3d 1011, 1014, internal citations omitted.)

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

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

- "Private parties act under color of state law if they willfully participate in joint action with state officials to deprive others of constitutional rights. Private parties involved in such a conspiracy may be liable under section 1983." (*United Steelworkers of America v. Phelps Dodge Corp.* (9th Cir.1989) 865 F.2d 1539, 1540, internal citations omitted.)

<u>Secondary Sources</u>

- 8 Witkin, Summary of California Law (9th ed. 1988) Constitutional Law, § 706 et seq.

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2802
Unreasonable Search—Search With a Warrant
Essential Factual Elements (42 U.S.C. § 1983)

[*Name of plaintiff***] claims that [***name of defendant***] carried out an unreasonable search of [his/her] [person/home/automobile/office/[***insert other***]]. To establish this claim, [***name of plaintiff***] must prove the following:**

1. **That [***name of defendant***] searched [***name of plaintiff***]'s [person/home/automobile/office/[***insert other***]];**

2. **That [***name of defendant***]'s search was unreasonable;**

3. **That [***name of defendant***] was acting or pretending to act in the performance of official duties;**

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

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

In deciding if the search was unreasonable, you should consider, among other factors, the following:

(a) The scope of the warrant;

(b) The extent of the particular intrusion;

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

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

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

DIRECTIONS FOR USE

The "official duties" referred to in element 3 must be duties created pursuant to any state, county, or municipal law, ordinance, or regulation. This aspect of color of law most likely

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will not be an issue for the jury, so it has been omitted to shorten the wording of element 3.

SOURCES AND AUTHORITY

- "The Fourth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, provides: 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.' " (*Conway v. Pasadena Humane Society* (1996) 45 Cal.App.4th 163, 171 [52 Cal.Rptr.2d 777], internal citation omitted.)

- "Excessive or unnecessary destruction of property in the course of a search may violate the Fourth Amendment, even though the entry itself is lawful and the fruits of the search are not subject to suppression." (*U.S. v. Ramirez* (1998) 523 U.S. 65, 71 [118 S.Ct. 992, 140 L.Ed.2d 191.)

- " 'The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.' " (*Sacramento County Deputy Sheriffs' Assn. v. County of Sacramento* (1996) 51 Cal.App.4th 1468, 1477 [59 Cal.Rptr.2d 834], internal citation omitted.)

- "The Fourth Amendment proscribes only 'unreasonable' searches and seizures. However, the reasonableness of a search or a seizure depends 'not only on *when* it is made, but also on *how* it is carried out.' In other words, even when supported by probable cause, a search or seizure may be invalid if carried out in an *unreasonable* fashion." (*Franklin v. Foxworth* (9th Cir.1994) 31 F.3d 873, 875, internal citation omitted, italics in original.)

- "The Supreme Court has interpreted the phrase 'under "color" of law' to mean 'under "pretense" of law.' A police officer's actions are under pretense of law only if they are 'in some way "related to the performance of his official duties." ' By contrast, an officer who is ' "pursuing his own goals and [i]s not in any way subject to control by [his public employer]," ' does not act under color of law, unless he 'purport[s] or pretend[s]' to do so. Officers who engage in confrontations for personal reasons unrelated to law enforcement, and do not 'purport or pretend' to be officers, do not act

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under color of law." (*Huffman v. County of Los Angeles* (9th Cir. 1998) 147 F.3d 1054, 1058, internal citations omitted.)

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

- "Private parties act under color of state law if they willfully participate in joint action with state officials to deprive others of constitutional rights. Private parties involved in such a conspiracy may be liable under section 1983." (*United Steelworkers of America v. Phelps Dodge Corp.* (9th Cir.1989) 865 F.2d 1539, 1540, internal citations omitted.)

Secondary Sources

- 8 Witkin, Summary of California Law (9th ed. 1988) Constitutional Law, § 706 et seq.

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2803
Unreasonable Search—Search Without a Warrant
Essential Factual Elements (42 U.S.C. § 1983)

[*Name of plaintiff***] claims that [***name of defendant***] carried out an unreasonable search of [his/her] [person/home/automobile/office/ [***insert other***]] because [he/she] did not have a warrant. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] searched [***name of plaintiff***]'s [person/home/ automobile/office/[***insert other***]];**

2. **That [***name of defendant***] did not have a warrant;**

3. **That [***name of defendant***] was acting or pretending to act in the performance of official duties;**

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

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

DIRECTIONS FOR USE

The "official duties" referred to in element 3 must be duties created pursuant to any state, county, or municipal law, ordinance, or regulation. This aspect of color of law most likely will not be an issue for the jury, so it has been omitted to shorten the wording of element 3.

SOURCES AND AUTHORITY

- "The Fourth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, provides: 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.' " (*Conway v. Pasadena Humane Society* (1996) 45 Cal.App.4th 163, 171 [52 Cal.Rptr.2d 777], internal citation omitted.)

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- " 'The Fourth Amendment prohibits only unreasonable searches. ... [¶] The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.' " (*Sacramento County Deputy Sheriffs' Assn. v. County of Sacramento* (1996) 51 Cal.App.4th 1468, 1477 [59 Cal.Rptr.2d 834], internal citation omitted.)

- " 'It is settled doctrine that probable cause for belief that certain articles subject to seizure are in a dwelling cannot of itself justify a search without a warrant.' Thus, a warrantless entry into a residence is presumptively unreasonable and therefore unlawful. Government officials 'bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests.' " (*Conway, supra*, 45 Cal.App.4th at p. 172, internal citations omitted.)

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

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

- "Private parties act under color of state law if they willfully participate in joint action with state officials to deprive others of constitutional rights. Private parties involved in such a conspiracy may be liable under section 1983." (*United Steelworkers of America v. Phelps Dodge Corp.* (9th Cir.1989) 865 F.2d 1539, 1540, internal citations omitted.)

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- 8 Witkin, Summary of California Law (9th ed. 1988) Constitutional Law, § 706 et seq.

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2804
Affirmative Defense—Search Incident to Lawful Arrest

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

1. **That the search was conducted as part of a lawful arrest of [***name of plaintiff***];**

2. **That [***name of defendant***] searched only [***name of plaintiff***] and the area within which [***name of plaintiff***] might have gained possession of a weapon or might have destroyed or hidden evidence; and**

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

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

(a) The extent of the particular intrusion;

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

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

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

DIRECTIONS FOR USE

For instructions regarding whether an arrest is lawful see instructions in the False Imprisonment series (Instructions 1320–1329).

This instruction is not intended for use in cases involving automobile searches: "[W]e hold that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." (*New York v. Belton* (1981) 453 U.S. 454, 460 [101 S.Ct. 2860, 69 L.Ed.2d 768], footnotes omitted.)

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SOURCES AND AUTHORITY

- "Searches incident to lawful arrest constitute a well-established exception to the warrant requirement of the Fourth Amendment." (*Hallstrom v. City of Garden City* (9th Cir. 1993) 991 F.2d 1473, 1477, internal citations omitted.)

- "Under applicable federal law, a lawful custodial arrest creates a situation which justifies the full contemporaneous search without a warrant of the person arrested and of the immediately surrounding area. Such searches are considered valid because of the need to remove weapons and to prevent the concealment or destruction of evidence." (*People v. Gutierrez* (1984) 163 Cal.App.3d 332, 334–335 [209 Cal.Rptr. 376], internal citations omitted.)

- "Law enforcement officers are permitted to search the entire passenger compartment of a car, including the inside of containers, during a 'search incident to arrest.' " (*United States v. Tank* (2000) 200 F.3d 627, 631, fn. 6, internal citations omitted.)

- "In *New York v. Belton*, we determined that the lower courts 'have found no workable definition of "the area within the immediate control of the arrestee" when that area arguably includes the interior of an automobile and the arrestee is its recent occupant.' In order to provide a 'workable rule,' we held that 'articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within "the area into which an arrestee might reach in order to grab a weapon" ... .' We also held that the police may examine the contents of any open or closed container found within the passenger compartment, 'for if the passenger compartment is within the reach of the arrestee, so will containers in it be within his reach.' " (*Michigan v. Long* (1983) 463 U.S. 1032, 1048–1049, internal citations omitted.)

<u>Secondary Sources</u>

- 8 Witkin, Summary of California Law (9th ed. 1988) Constitutional Law, § 706 et seq.

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2805
Affirmative Defense—Consent to Search

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

1. **That [[***name of plaintiff***]/[a person who controlled or reasonably appeared to have control of the area]] knowingly and voluntarily consented to the search; and**

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

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

(a) The extent of the particular intrusion;

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

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

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

SOURCES AND AUTHORITY

- "The Fourth Amendment generally prohibits the warrantless entry of a person's home, whether to make an arrest or to search for specific objects. The prohibition does not apply, however, to situations in which voluntary consent has been obtained, either from the individual whose property is searched or from a third party who possesses common authority over the premises." (*Illinois v. Rodriguez* (1990) 497 U.S. 177, 181 [110 S.Ct. 2793, 111 L.Ed.2d 148], internal citations omitted.)

- " 'Common authority' rests 'on mutual use of the property by persons generally having joint access or control for most purposes ... .' The burden of establishing that common authority rests upon the State." (*Rodriguez, supra,* 497 U.S. at p. 181, internal citation omitted.)

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- "Where the subject property is a premises occupied by more than one person, a search will be reasonable if consent is given by one of the joint occupants 'who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected.' This is so, even where the defendant has not consented to the search. Further, even if the consenting cotenant, in fact, lacks authority, officers may rely on his or her apparent authority." (*People v. Oldham* (2000) 81 Cal.App.4th 1, 9–10 [96 Cal.Rptr.2d 343], internal citations omitted.)

- "Where consent is relied upon to justify the lawfulness of a search, the government 'has the burden of proving that the consent was, in fact, freely and voluntarily given.' 'The issue of whether or not consent to search was freely and voluntarily given is one of fact to be determined on the basis of the totality of the circumstances.' " (*U.S. v. Henry* (9th Cir 1980) 615 F.2d 1223, 1230, internal citations omitted.)

- "Whether consent was voluntarily given 'is to be determined from the totality of all the circumstances.' We consider the following factors to assess whether the consent was voluntary: (1) whether the person was in custody; (2) whether the officers had their guns drawn; (3) whether a Miranda warning had been given; (4) whether the person was told that he had the right not to consent; and (5) whether the person was told that a search warrant could be obtained. Although no one factor is determinative in the equation, 'many of this court's decisions upholding consent as voluntary are supported by at least several of the factors.' " (*U.S. v. Reid* (9th Cir. 2000) 226 F.3d 1020, 1026–1027, internal citations omitted.)

<u>Secondary Sources</u>

- 8 Witkin, Summary of California Law (9th ed. 1988) Constitutional Law, § 706 et seq.

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2806
Affirmative Defense—Exigent Circumstances

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

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

   [physical harm to the officer or other persons;]

   [the destruction or concealment of evidence;]

   [the escape of a suspect;] and

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

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

(a) The extent of the particular intrusion;

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

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

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

SOURCES AND AUTHORITY

- "Absent consent, exigent circumstances must exist for a warrantless entry into a home, despite probable cause to believe that a crime has been committed or that incriminating evidence may be found inside. Such circumstances are 'few in number and carefully delineated.' 'Exigent circumstances' means 'an emergency situation requiring swift action to prevent imminent danger to life or serious damage to property, or to forestall the imminent escape of a suspect or destruction of evidence.'"

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(*Conway v. Pasadena Humane Society* (1996) 45 Cal.App.4th 163, 172 [52 Cal.Rptr.2d 777], internal citation omitted.)

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

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

- " 'Exigent circumstances are those in which a substantial risk of harm to the persons involved or to the law enforcement process would arise if the police were to delay a search until a warrant could be obtained.' Mere speculation is not sufficient to show exigent circumstances. Rather, '[t]he government bears the burden of showing the existence of exigent circumstances by particularized evidence.' This is a heavy burden and can be satisfied 'only by demonstrating specific and articulable facts to justify the finding of exigent circumstances.' Furthermore, 'the presence of exigent circumstances necessarily implies that there is insufficient time to obtain a warrant; therefore, the government must show that a warrant could not have been obtained in time.' " (*U.S. v. Reid* (9th Cir. 2000) 226 F.3d 1020, 1027–1028, internal citations omitted.)

<u>Secondary Sources</u>

- 8 Witkin, Summary of California Law (9th ed. 1988) Constitutional Law, § 706 et seq.

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2807
Municipal Liability (42 U.S.C. § 1983)

[*Name of plaintiff***] claims that [he/she] was deprived of [his/her] civil rights as a result of the official [policy/custom] of the [***name of municipality***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of officer, employee, etc.***] [intentionally/[***insert other applicable state of mind***]] [***insert conduct allegedly violating plaintiff's civil rights***];**

2. **That [***insert conduct allegedly violating plaintiff's civil rights***] occurred as a result of the official [policy/custom] of the [***name of municipality***];**

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

4. **That [***name of officer, employee, etc.***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

DIRECTIONS FOR USE

In element 1, the standard is not always based on intentional conduct. Insert the appropriate level of scienter. For example, Eighth Amendment cases involve "deliberate indifference," and Fourth Amendment claims do not necessarily involve intentional conduct.

SOURCES AND AUTHORITY

- "[I]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." (*Monell v. Dept. of Social Services of New York* (1978) 436 U.S. 658, 694 [98 S.Ct. 2018, 56 L.Ed.2d 611].)

- "Local governmental entities 'can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where ... the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted ... .' Local governmental entities also can be sued 'for

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constitutional deprivations visited pursuant to governmental "custom".' In addition, '[t]he plaintiff must ... demonstrate that, through its deliberate conduct, the municipality was the "moving force" behind the injury alleged. That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights.' " (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1147 [119 Cal.Rptr.2d 709], internal citations omitted.)

- "Entity liability may arise in one of two forms. The municipality may itself have directed the deprivation of federal rights through an express government policy. This was the situation in *Monell*, where there was an explicit policy requiring pregnant government employees to take unpaid leaves of absence before such leaves were medically required. … Alternatively, the municipality may have in place a custom or practice so widespread in usage as to constitute the functional equivalent of an express policy." (*Choate v. County of Orange* (2000) 86 Cal.App.4th 312, 328 [103 Cal.Rptr.2d 339].)

- " 'In order to successfully maintain an action under 42 United States Code section 1983 against governmental defendants for the tortious conduct of employees under federal law, it is necessary to establish that the conduct occurred in execution of a government's policy or custom promulgated either by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy.' " (*Newton v. County of Napa* (1990) 217 Cal.App.3d 1551, 1565 [266 Cal.Rptr. 682], internal citations omitted.)

- "At most, *Monell* liability adds an additional defendant, a municipality, to the universe of actors who will be jointly and severally liable for the award." (*Choate, supra*, 86 Cal.App.4th at p. 328.)

- "Local governmental bodies such as cities and counties are considered 'persons' subject to suit under section 1983. States and their instrumentalities, on the other hand, are not." (*Kirchmann v. Lake Elsinore Unified School Dist.* (2000) 83 Cal.App.4th 1098, 1101 [100 Cal.Rptr.2d 289], internal citations omitted.)

- "A local governmental unit cannot be liable under this section for acts of its employees based solely on a respondeat superior theory. A local governmental unit is liable only if the alleged deprivation of rights 'implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers,' or when the injury is in 'execution of a [local] government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy.' " (*County of Los Angeles v. Superior*

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Court (1998) 68 Cal.App.4th 1166, 1171 [80 Cal.Rptr.2d 860], internal citations omitted.)

- "A municipality's policy or custom resulting in constitutional injury may be actionable even though the individual public servants are shielded by good faith immunity." (*Bach v. County of Butte* (1983) 147 Cal.App.3d 554, 568 [195 Cal.Rptr. 268], internal citations omitted.)

- "No punitive damages can be awarded against a public entity." (*Choate, supra,* 86 Cal.App.4th at p. 328, internal citation omitted.)

Secondary Sources

- 8 Witkin, Summary of California Law (9th ed. 1988) Constitutional Law, § 706 et seq.

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2808
"Official Policy" Explained (42 U.S.C. § 1983)

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

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

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

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

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

DIRECTIONS FOR USE

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

SOURCES AND AUTHORITY

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

- "While a rule or regulation promulgated, adopted, or ratified by a local governmental entity's legislative body unquestionably satisfies *Monell's* policy requirement, a 'policy' within the meaning of § 1983 is not limited to official legislative action. Indeed, a decision properly made by a local governmental entity's authorized decisionmaker—i.e., an official who 'possesses final authority to establish [local

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government] policy with respect to the [challenged] action'—may constitute official policy. 'Authority to make municipal policy may be granted directly by legislative enactment or may be delegated by an official who possesses such authority, and of course whether an official had final policymaking authority is a question of state law.'" (*Thompson v. City of Los Angeles* (9th Cir. 1989) 885 F.2d 1439, 1443, internal citations and footnote omitted.)

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

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

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

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

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

<u>Secondary Sources</u>

- 8 Witkin, Summary of California Law (9th ed. 1988) Constitutional Law, § 706 et seq.

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2809
Public Entity Liability—Failure to Train (42 U.S.C. § 1983)
Essential Factual Elements

[*Name of plaintiff***] claims that [he/she] was deprived of [his/her] civil rights as a result of [***name of public entity***]'s failure to train its [officers/employees]. To establish this claim, [***name of plaintiff***] must prove the following:**

1. **That [***name of public entity***]'s training program was not adequate to train its [officers/employees] to properly handle usual and recurring situations;**

2. **That [***name of public entity***] was deliberately indifferent to the need to train its [officers/employees] adequately;**

3. **That the failure to provide proper training was the cause of the deprivation of [***name of plaintiff***]'s right [***insert right, e.g., "of privacy"***];**

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

5. **That [***name of public entity***]'s failure to adequately train its [officers/employees] was a substantial factor in causing [***name of plaintiff***]'s harm.**

"Deliberate indifference" is the knowing or reckless disregard of the consequences of one's acts or omissions. To establish deliberate indifference, [*name of plaintiff***] must prove that [***name of public entity***] knew or should have known that its failure to provide reasonable training would likely result in a violation of the right [***e.g., "of privacy"***] of a person in [***name of plaintiff***]'s situation.**

SOURCES AND AUTHORITY

- 42 U.S.C. section 1983 provides, in part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State … subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law … ."

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

- "We hold today that the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact. This rule is most consistent with our admonition in *Monell* and *Polk County v. Dodson* that a municipality can be liable under § 1983 only where its policies are the 'moving force [behind] the constitutional violation.' Only where a municipality's failure to train its employees in a relevant respect evidences a 'deliberate indifference' to the rights of its inhabitants can such a shortcoming be properly thought of as a city 'policy or custom' that is actionable under § 1983." (*City of Canton v. Harris* (1989) 489 U.S. 378, 388–389 [109 S.Ct. 1197, 103 L.Ed.2d 412], internal citations and footnote omitted.)

- "It would be hard to describe the *Canton* understanding of deliberate indifference, permitting liability to be premised on obviousness or constructive notice, as anything but objective." (*Farmer v. Brennan* (1994) 511 U.S. 825, 841 [114 S.Ct. 1970, 128 L.Ed.2d 811].)

- "To prove deliberate indifference, the plaintiff must show that the municipality was on actual or constructive notice that its omission would likely result in a constitutional violation." (*Gibson v. County of Washoe* (2002) 290 F.3d 1175, 1186, internal citation omitted.)

- " 'The issue in a case like this one ... is whether that training program is adequate; and if it is not, the question becomes whether such inadequate training can justifiably be said to represent "city policy." ' Furthermore, the inadequacy in the city's training program must be closely related to the 'ultimate injury,' such that the injury would have been avoided had the employee been trained under a program that was not deficient in the identified respect." (*Irwin v. City of Hemet* (1994) 22 Cal.App.4th 507, 526 [27 Cal.Rptr.2d 433], internal citations omitted.)

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2810
Violation of Prisoner's Federal Civil Rights (42 U.S.C. § 1983)
Eighth Amendment—Excessive Force

[*Name of plaintiff***] claims that [***name of defendant***] used excessive force against [***name of plaintiff***]. To establish this claim, [***name of plaintiff***] must prove the following:**

1. **That [***name of defendant***] used force against [***name of plaintiff***];**

2. **That the force used was excessive;**

3. **That [***name of defendant***] was acting or pretending to act in the performance of official duties;**

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

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

Force is excessive if it is used maliciously and sadistically to cause harm. In deciding if excessive force was used, you should consider, among other factors, the following:

(a) The need for the use of force;

(b) The relationship between the need and the amount of force that was used;

(c) The extent of injury inflicted;

(d) The extent of the threat to the safety of staff and inmates, as reasonably perceived by the responsible officials on the basis of the facts known to them; [and]

(e) Any efforts made to temper the severity of a forceful response; [and]

(f) [*Insert other relevant factor.***]**

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Force is not excessive if it is used in a good-faith effort to protect the safety of inmates, staff, or others, or to maintain or restore discipline.

DIRECTIONS FOR USE

The "official duties" referred to in element 3 must be duties created pursuant to any state, county, or municipal law, ordinance, or regulation. This aspect of color of law most likely will not be an issue for the jury, so it has been omitted to shorten the wording of element 3.

There is law suggesting that the jury should give deference to prison officials in the adoption and execution of policies and practices that in their judgment are needed to preserve discipline and to maintain internal security in a prison. This principle is covered in the final sentence by the term "good faith."

De minimis harm is insufficient to satisfy the fourth element. (*Hudson v. McMillian* (1992) 503 U.S. 1, 10–11 [112 S.Ct. 995, 117 L.Ed.2d 156], internal citations omitted.) If there is conflicting evidence on the issue of harm, the court may need to instruct the jury on the severity of the harm that must be proved.

SOURCES AND AUTHORITY

- 42 U.S.C. section 1983 provides, in part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State … subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law … ."

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

- "The Constitution 'does not mandate comfortable prisons,' but neither does it permit inhumane ones, and it is now settled that 'the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment.' In its prohibition of 'cruel and unusual punishments,' the Eighth Amendment places restraints on prison officials, who may not, for example, use excessive physical force against prisoners. The Amendment also imposes duties on these officials, who must provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must 'take reasonable measures to guarantee the safety of the inmates.' " (*Farmer*

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v. Brennan (1994) 511 U.S. 825, 832 [114 S.Ct. 1970, 128 L.Ed.2d 811], internal citations omitted.)

- "[A]pplication of the deliberate indifference standard is inappropriate when authorities use force to put down a prison disturbance. Instead, 'the question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." ' " (*Hudson v. McMillian* (1992) 503 U.S. 1, 6 [112 S.Ct. 995, 117 L.Ed.2d 156], internal citations omitted.)

- "[W]e hold that whenever prison officials stand accused of using excessive physical force in violation of the Cruel and Unusual Punishments Clause, the core judicial inquiry is that set out in *Whitley:* whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." (*Hudson, supra,* 503 U.S. at pp. 6–7, internal citations omitted.)

- "Whether the prison disturbance is a riot or a lesser disruption, corrections officers must balance the need 'to maintain or restore discipline' through force against the risk of injury to inmates. Both situations may require prison officials to act quickly and decisively. Likewise, both implicate the principle that '[p]rison administrators ... should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.' " (*Hudson, supra,* 503 U.S. at p. 6, internal citations omitted.)

- " '[S]uch factors as the need for the application of force, the relationship between the need and the amount of force that was used, [and] the extent of injury inflicted,' are relevant to that ultimate determination. From such considerations inferences may be drawn as to whether the use of force could plausibly have been thought necessary, or instead evinced such wantonness with respect to the unjustified infliction of harm as is tantamount to a knowing willingness that it occur. But equally relevant are such factors as the extent of the threat to the safety of staff and inmates, as reasonably perceived by the responsible officials on the basis of the facts known to them, and any efforts made to temper the severity of a forceful response." (*Whitley v. Albers* (1986) 475 U.S. 312, 320 [106 S.Ct. 1078, 89 L.Ed.2d 251], internal citations omitted.)

- "The Eighth Amendment's prohibition of 'cruel and unusual' punishments necessarily excludes from constitutional recognition de minimis uses of physical force, provided that the use of force is not of a sort 'repugnant to the conscience of mankind.' " (*Hudson, supra,* 503 U.S. at pp. 10–11, internal citations omitted.)

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

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2811
Violation of Prisoner's Federal Civil Rights (42 U.S.C. § 1983) Eighth Amendment—General Conditions of Confinement Claim

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[*Name of plaintiff*] claims that [*name of defendant*] subjected [him/her] to prison conditions that violated [his/her] constitutional rights. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of plaintiff*] was imprisoned under conditions that exposed [him/her] to a substantial risk of serious harm;**

2. **That [*name of defendant*] knew the conditions created a substantial risk of serious harm and disregarded that risk by failing to take reasonable measures to correct it;**

3. **That [*name of defendant*] was acting or pretending to act in the performance of official duties;**

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

The "official duties" referred to in element 3 must be duties created pursuant to any state, county, or municipal law, ordinance, or regulation. This aspect of color of law most likely will not be an issue for the jury, so it has been omitted to shorten the wording of element 3.

De minimis harm is insufficient to satisfy the fourth element. (*Hudson v. McMillian* (1992) 503 U.S. 1, 10–11 [112 S.Ct. 995, 117 L.Ed.2d 156], internal citations omitted.) If there is conflicting evidence on the issue of harm, the court may need to instruct the jury on the severity of the harm that must be proved.

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SOURCES AND AUTHORITY

- 42 U.S.C. section 1983 provides, in part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State … subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law … ."

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

- "It is undisputed that the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment." (*Helling v. McKinney* (1993) 509 U.S. 25, 31 [113 S.Ct. 2475, 125 L.Ed.2d 22].)

- "Our cases have held that a prison official violates the Eighth Amendment only when two requirements are met. First, the deprivation alleged must be, objectively, 'sufficiently serious.' For a claim … based on a failure to prevent harm, the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm. The second requirement follows from the principle that 'only the unnecessary and wanton infliction of pain implicates the Eighth Amendment.' To violate the Cruel and Unusual Punishments Clause, a prison official must have a 'sufficiently culpable state of mind.' In prison-conditions cases that state of mind is one of 'deliberate indifference' to inmate health or safety … ." (*Farmer v. Brennan* (1994) 511 U.S. 825, 834 [114 S.Ct. 1970, 128 L.Ed.2d 811], internal citations omitted.)

- "We hold … that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." (*Farmer, supra,* 511 U.S. at p. 837.)

- "[E]xtreme deprivations are required to make out a conditions-of-confinement claim. Because routine discomfort is 'part of the penalty that criminal offenders pay for their offenses against society,' 'only those deprivations denying "the minimal civilized measure of life's necessities" are sufficiently grave to form the basis of an Eighth Amendment violation.' " (*Hudson, supra,* 503 U.S. at p. 9, internal citations omitted.)

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- "Prison officials have a duty to ensure that prisoners are provided adequate shelter, food, clothing, sanitation, medical care, and personal safety." (*Johnson v. Lewis* (9th Cir. 2000) 217 F.3d 726, 731, internal citations omitted.)

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

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2812
Violation of Prisoner's Federal Civil Rights (42 U.S.C. § 1983) Eighth Amendment—Medical Care

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[*Name of plaintiff*] claims that [*name of defendant*] provided [him/her] with inadequate medical care in violation of [his/her] constitutional rights. To establish this claim, [*name of plaintiff*] must prove the following:

1. **That [*name of defendant*] acted with deliberate indifference to a serious medical need of [*name of plaintiff*];**

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

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

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

A serious medical need exists if the failure to treat a prisoner's condition could result in further significant injury or the unnecessary and pointless infliction of pain.

To establish "deliberate indifference," [*name of plaintiff*] must prove that [*name of defendant*] knew [*name of plaintiff*] faced a substantial risk of serious harm and that [he/she] disregarded that risk by failing to take reasonable measures to correct it. Negligence is not enough to establish deliberate indifference.

DIRECTIONS FOR USE

The "official duties" referred to in element 2 must be duties created pursuant to any state, county, or municipal law, ordinance, or regulation. This aspect of color of law most likely will not be an issue for the jury, so it has been omitted to shorten the wording of element 2.

De minimis harm is insufficient to satisfy the third element. (*Hudson v. McMillian* (1992) 503 U.S. 1, 10–11 [112 S.Ct. 995, 117 L.Ed.2d 156], internal citations omitted.) If there

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is conflicting evidence on the issue of harm, the court may need to instruct the jury on the severity of the harm that must be proved.

SOURCES AND AUTHORITY

- 42 U.S.C. section 1983 provides, in part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State … subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law … ."

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

- "[D]eliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain,' proscribed by the Eighth Amendment. This is true whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed. Regardless of how evidenced, deliberate indifference to a prisoner's serious illness or injury states a cause of action under section 1983." (*Estelle v. Gamble* (1976) 429 U.S. 97, 104–105 [97 S.Ct. 285, 50 L.Ed.2d 251], internal citation and footnotes omitted.)

- "Our cases have held that a prison official violates the Eighth Amendment only when two requirements are met. First, the deprivation alleged must be, objectively, 'sufficiently serious.' For a claim … based on a failure to prevent harm, the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm. The second requirement follows from the principle that 'only the unnecessary and wanton infliction of pain implicates the Eighth Amendment.' To violate the Cruel and Unusual Punishments Clause, a prison official must have a 'sufficiently culpable state of mind.' In prison-conditions cases that state of mind is one of 'deliberate indifference' to inmate health or safety … ." (*Farmer v. Brennan* (1994) 511 U.S. 825, 834 [114 S.Ct. 1970, 128 L.Ed.2d 811], internal citations omitted.)

- "We hold … that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." (*Farmer, supra,* 511 U.S. at p. 837.)

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- "Prison officials are deliberately indifferent to a prisoner's serious medical needs when they 'deny, delay or intentionally interfere with medical treatment.' … " (*Wood v. Housewright* (9th Cir. 1990) 900 F.2d 1332, 1334, internal citation omitted.)

- "[A]llegations that a prison official has ignored the instructions of a prisoner's treating physician are sufficient to state a claim for deliberate indifference." (*Wakefield v. Thompson* (9th Cir. 1999) 177 F.3d 1160, 1165.)

- "[A] complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." (*Estelle, supra,* 429 U.S. at p. 106.)

- "While poor medical treatment will at a certain point rise to the level of constitutional violation, mere malpractice, or even gross negligence, does not suffice. Although Wood's treatment was not as prompt or efficient as a free citizen might hope to receive, Wood was given medical care at the prison that addressed his needs." (*Wood, supra,* 900 F.2d at p. 1334.)

- "It has been recognized … that inadequate medical treatment may, in some instances, constitute a violation of 42 United States Code section 1983. In *Sturts v. City of Philadelphia,* for example, the plaintiff alleged that defendants acted 'carelessly, recklessly and negligently' when they failed to remove sutures from his eye, neck and face. The court concluded that although plaintiff was alleging inadequate medical treatment, he had stated a cause of action under section 1983: '... where a prisoner has received some medical attention and the dispute is over the adequacy of the treatment, federal courts are generally reluctant to second guess medical judgments. In some cases, however, the medical attention rendered may be so woefully inadequate as to amount to no treatment at all, thereby rising to the level of a § 1983 claim. …' " (*Ochoa v. Superior Court* (1985) 39 Cal.3d 159, 176–177 [216 Cal.Rptr. 661], internal citations omitted.)

- "Because society does not expect that prisoners will have unqualified access to health care, deliberate indifference to medical needs amounts to an Eighth Amendment violation only if those needs are 'serious.' " (*Hudson, supra,* 503 U.S. at p. 9, internal citation omitted.)

- "A 'serious' medical need exists if the failure to treat a prisoner's condition could result in further significant injury or the 'unnecessary and wanton infliction of pain.'

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The ‘routine discomfort’ that results from incarceration and which is ‘part of the penalty that criminal offenders pay for their offenses against society’ does not constitute a ‘serious’ medical need.” (*Doty v. County of Lassen* (9th Cir. 1994) 37 F.3d 540, 546, internal citations and footnote omitted.)

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

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2813
Unruh Civil Rights Act (Civ. Code, §§ 51, 52)
Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] denied [***name of plaintiff***] full and equal [accommodations/advantages/facilities/privileges/services] because of [***name of plaintiff***]'s [sex/race/color/religion/ancestry/national origin/disability/medical condition/[***insert other actionable characteristic***]]. To establish this claim, [***name of plaintiff***] must prove the following:**

1. **That [***name of defendant***] [denied/aided or incited a denial of/ discriminated or made a distinction that denied] full and equal [accommodations/advantages/facilities/privileges/services] to [***name of plaintiff***];**

2. **[That a reason for [***name of defendant***]'s conduct was [its perception of] [***name of plaintiff***]'s [sex/race/color/religion/ancestry/national origin/ disability/medical condition/[***insert other actionable characteristic***];]**

   [That the [sex/race/color/religion/ancestry/national origin/disability/ medical condition/[*insert other actionable characteristic***]] of a person whom [***name of plaintiff***] was associated with was a reason for [***name of defendant***]'s conduct;]**

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

Note that this instruction uses the standard of "a reason." The causation standard is still an open issue under this statute.

The judge may decide the issue of whether the defendant is a business establishment as a matter of law. (*Rotary Club of Duarte v. Bd. of Directors* (1986) 178 Cal.App.3d 1035, 1050 [224 Cal.Rptr. 213].) Special interrogatories may be needed if there are factual

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issues. This element has been omitted from the instruction because it is unlikely to go to a jury.

"Legitimate business interests" may justify some degree of limitation on consumer access to public accommodations. (*Hankins v. El Torito Restaurants, Inc.* (1998) 63 Cal.App.4th 510, 520 [74 Cal.Rptr.2d 684].) This will commonly be an issue for the judge to decide. (*Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1165 [278 Cal.Rptr. 614].) If there are contested factual issues, additional instructions may be necessary.

SOURCES AND AUTHORITY

- Civil Code section 51 provides:

  (a) This section shall be known, and may be cited, as the Unruh Civil Rights Act.
  (b) All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, or medical condition are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.
  (c) This section shall not be construed to confer any right or privilege on a person that is conditioned or limited by law or that is applicable alike to persons of every sex, color, race, religion, ancestry, national origin, disability, or medical condition.
  (d) Nothing in this section shall be construed to require any construction, alteration, repair, structural or otherwise, or modification of any sort whatsoever, beyond that construction, alteration, repair, or modification that is otherwise required by other provisions of law, to any new or existing establishment, facility, building, improvement, or any other structure, nor shall anything in this section be construed to augment, restrict, or alter in any way the authority of the State Architect to require construction, alteration, repair, or modifications that the State Architect otherwise possesses pursuant to other laws.
  (e) For purposes of this section:
    (1) "Disability" means any mental or physical disability as defined in Section 12926 of the Government Code.
    (2) "Medical condition" has the same meaning as defined in subdivision (h) of Section 12926 of the Government Code.
  (f) A violation of the right of any individual under the Americans with Disabilities Act of 1990 (Public Law 101-336) shall also constitute a violation of this section.

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- Civil Code section 52 provides:

  (a) Whoever denies, aids or incites a denial, or makes any discrimination or distinction contrary to Section 51, 51.5, or 51.6, is liable for each and every offense for the actual damages, and any amount that may be determined by a jury, or a court sitting without a jury, up to a maximum of three times the amount of actual damage but in no case less than four thousand dollars ($4,000), and any attorney's fees that may be determined by the court in addition thereto, suffered by any person denied the rights provided in Section 51, 51.5, or 51.6.

  (b) Whoever denies the right provided by Section 51.7 or 51.9, or aids, incites, or conspires in that denial, is liable for each and every offense for the actual damages suffered by any person denied that right and, in addition, the following:

  (1) An amount to be determined by a jury, or a court sitting without a jury, for exemplary damages.

  (2) A civil penalty of twenty-five thousand dollars ($25,000) to be awarded to the person denied the right provided by Section 51.7 in any action brought by the person denied the right, or by the Attorney General, a district attorney, or a city attorney.

  (3) Attorney's fees as may be determined by the court.

  (c) Whenever there is reasonable cause to believe that any person or group of persons is engaged in conduct of resistance to the full enjoyment of any of the rights described in this section, and that conduct is of that nature and is intended to deny the full exercise of those rights, the Attorney General, any district attorney or city attorney, or any person aggrieved by the conduct may bring a civil action in the appropriate court by filing with it a complaint. The complaint shall contain the following:

  (1) The signature of the officer, or, in his or her absence, the individual acting on behalf of the officer, or the signature of the person aggrieved.

  (2) The facts pertaining to the conduct.

  (3) A request for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order against the person or persons responsible for the conduct, as the complainant deems necessary to ensure the full enjoyment of the rights described in this section.

  (d) Whenever an action has been commenced in any court seeking relief from the denial of equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States on account of race, color, religion, sex, national origin, or disability, the Attorney General or any district attorney or city attorney for or in the name of the people of the State of California may intervene in the action upon timely application if the Attorney General or any district attorney or city attorney certifies that the case is of general public importance. In that action,

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the people of the State of California shall be entitled to the same relief as if it had instituted the action.

(e) Actions brought pursuant to this section are independent of any other actions, remedies, or procedures that may be available to an aggrieved party pursuant to any other law.

(f) Any person claiming to be aggrieved by an alleged unlawful practice in violation of Section 51 or 51.7 may also file a verified complaint with the Department of Fair Employment and Housing pursuant to Section 12948 of the Government Code.

(g) This section does not require any construction, alteration, repair, structural or otherwise, or modification of any sort whatsoever, beyond that construction, alteration, repair, or modification that is otherwise required by other provisions of law, to any new or existing establishment, facility, building, improvement, or any other structure, nor does this section augment, restrict, or alter in any way the authority of the State Architect to require construction, alteration, repair, or modifications that the State Architect otherwise possesses pursuant to other laws.

(h) For the purposes of this section, "actual damages" means special and general damages. This subdivision is declaratory of existing law.

- " 'The Legislature used the words "all" and "of every kind whatsoever" in referring to business establishments covered by the Unruh Act, and the inclusion of these words without any exception and without specification of particular kinds of enterprises, leaves no doubt that the term "business establishments" was used in the broadest sense reasonably possible. The word "business" embraces everything about which one can be employed, and it is often synonymous with "calling, occupation, or trade, engaged in for the purpose of making a livelihood or gain." The word "establishment," as broadly defined, includes not only a fixed location, such as the "place where one is permanently fixed for residence or business," but also a permanent "commercial force or organization" or "a permanent settled position, as in life or business.' " (*O'Connor v. Village Green Owners Assn.* (1983) 33 Cal.3d 790, 795 [191 Cal.Rptr. 320], internal citations omitted.)

- Whether a defendant is a "business establishment" is decided as an issue of law. (*Rotary Club of Duarte, supra,* 178 Cal.App.3d at p. 1050.)

- "In addition to the particular forms of discrimination specifically outlawed by the Act (sex, race, color, etc.), courts have held the Act 'prohibit[s] discrimination based on several classifications which are not specifically enumerated in the statute.' These judicially-recognized classifications include unconventional dress or physical appearance, families with children, homosexuality, and persons under 18." (*Hessians*

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Motorcycle Club v. J.C. Flanagans (2001) 86 Cal.App.4th 833, 836 [103 Cal.Rptr.2d 552], internal citations omitted.)

- " 'Although the Unruh Civil Rights Act proscribes "any form of arbitrary discrimination," certain types of discrimination have been denominated "reasonable" and, therefore, not arbitrary.' Thus, for example, 'legitimate business interests may justify limitations on consumer access to public accommodations.' " (*Hankins v. El Torito Restaurants, Inc.* (1998) 63 Cal.App.4th 510, 520 [74 Cal.Rptr.2d 684], internal citations omitted.)

- "Unruh Act issues have often been decided as questions of law on demurrer or summary judgment when the policy or practice of a business establishment is valid on its face because it bears a reasonable relation to commercial objectives appropriate to an enterprise serving the public." (*Harris, supra,* 52 Cal.3d at p. 1165, internal citations omitted.)

- "It is thus manifested by section 51 that all persons are entitled to the full and equal privilege of associating with others in any business establishment. And section 52, liberally interpreted, makes clear that discrimination by such a business establishment against one's right of association on account of the associates' color, is violative of the Act. It follows … that discrimination by a business establishment against persons on account of their association with others of the black race is actionable under the Act." (*Winchell v. English* (1976) 62 Cal.App.3d 125, 129 [133 Cal.Rptr. 20].)

- "Section 51 by its express language applies only within California. It cannot (with its companion penalty provisions in § 52) be extended into the Hawaiian jurisdiction. A state cannot regulate or proscribe activities conducted in another state or supervise the internal affairs of another state in any way, even though the welfare or health of its citizens may be affected when they travel to that state." (*Archibald v. Cinerama Hawaiian Hotels, Inc.* (1977) 73 Cal.App.3d 152, 159 [140 Cal.Rptr. 599], internal citations omitted, disapproved on other grounds in *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24 [219 Cal.Rptr. 133].)

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2814
Unruh Civil Rights Act—Boycott Etc. (Civ. Code, § 51.5)
Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] denied [***name of plaintiff***] full and equal rights to conduct business because of [***name of plaintiff***]'s [sex/race/color/religion/ancestry/national origin/disability/medical condition/[***insert other actionable characteristic***]]. To establish this claim, [***name of plaintiff***] must prove the following:**

1. **That [***name of defendant***] [discriminated against/boycotted/blacklisted/refused to buy from/refused to contract with/refused to sell to/refused to trade with] [***name of plaintiff***];**

2. **[That a reason for [***name of defendant***]'s conduct was [its perception of] [***name of plaintiff***]'s [sex/race/color/religion/ancestry/national origin/disability/medical condition/[***insert other actionable characteristic***]];]**

   [That a reason for [*name of defendant***]'s conduct was [its perception of] the [sex/race/color/religion/ancestry/national origin/disability/medical condition/[***insert other actionable characteristic***]] of [***name of plaintiff***]'s [partners/members/stockholders/directors/officers/managers/superintendents/agents/employees/business associates/suppliers/customers];]**

   [That a reason for [*name of defendant***]'s conduct was [its perception of] the [sex/race/color/religion/ancestry/national origin/disability/medical condition/[***insert other actionable characteristic***]] of a person whom [***name of plaintiff***] was associated with;]**

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.**

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DIRECTIONS FOR USE

Note that this instruction uses the standard of "a reason." The causation standard is still an open issue under this statute.

The judge may decide the issue of whether the defendant is a business establishment as a matter of law. (*Rotary Club of Duarte v. Bd. of Directors* (1986) 178 Cal.App.3d 1035, 1050 [224 Cal.Rptr. 213].) Special interrogatories may be needed if there are factual issues. This element has been omitted from the instruction because it is unlikely to go to a jury.

Select the bracketed option from element 2 that is most appropriate to the facts of the case.

Conceptually, this instruction has some overlap with instruction 2813. For a discussion of the basis of this instruction see *Jackson v. Superior Court* (1994) 30 Cal.App.4th 936, 941 [36 Cal.Rptr.2d 207].

SOURCES AND AUTHORITY

- Civil Code section 51.5 provides:

  (a) No business establishment of any kind whatsoever shall discriminate against, boycott or blacklist, or refuse to buy from, contract with, sell to, or trade with any person in this state because of the race, creed, religion, color, national origin, sex, disability, or medical condition of the person or of the person's partners, members, stockholders, directors, officers, managers, superintendents, agents, employees, business associates, suppliers, or customers, because the person is perceived to have one or more of those characteristics, or because the person is associated with a person who has, or is perceived to have, any of those characteristics.
  (b) As used in this section, "person" includes any person, firm, association, organization, partnership, business trust, corporation, limited liability company, or company.
  (c) This section shall not be construed to require any construction, alteration, repair, structural or otherwise, or modification of any sort whatsoever, beyond that construction, alteration, repair, or modification that is otherwise required by other provisions of law, to any new or existing establishment, facility, building, improvement, or any other structure, nor shall this section be construed to augment, restrict, or alter in any way the authority of the State Architect to require construction, alteration, repair, or modifications that the State Architect otherwise possesses pursuant to other laws.

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(d) For purposes of this section:
  (1) "Disability" means any mental or physical disability as defined in Section 12926 of the Government Code.
  (2) "Medical condition" has the same meaning as defined in subdivision (h) of Section 12926 of the Government Code.

- "In 1976 the Legislature added Civil Code section 51.5 to the Unruh Civil Rights Act and amended Civil Code section 52 (which provides penalties for those who violate the Unruh Civil Rights Act), in order to, inter alia, include section 51.5 in its provisions." (*Pines v. Tomson* (1984) 160 Cal.App.3d 370, 384 [206 Cal.Rptr. 866], footnote omitted.)

- "[I]t is clear from the cases under section 51 that the Legislature did not intend in enacting section 51.5 to limit the broad language of section 51 to include only selling, buying or trading. Both sections 51 and 51.5 have been liberally applied to all types of business activities. Furthermore, section 51.5 forbids a business to 'discriminate against' 'any person' and does not just forbid a business to 'boycott or blacklist, refuse to buy from, sell to, or trade with any person.' " (*Jackson, supra,* 30 Cal.App.4th at p. 941, internal citation and footnote omitted.)

- "Although the phrase 'business establishment of every kind whatsoever' has been interpreted by the Supreme Court and the Court of Appeal in the context of section 51, we are aware of no case which interprets that term in the context of section 51.5. We believe, however, that the Legislature meant the identical language in both sections to have the identical meaning." (*Pines, supra,* 160 Cal.App.3d at p. 384, internal citations omitted.)

- "[T]he classifications specified in section 51.5, which are identical to those of section 51, are likewise not exclusive and encompass other personal characteristics identified in earlier cases." (*Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 538 [30 Cal.Rptr.2d 706], internal citations omitted.)

- "Section 51 by its express language applies only within California. It cannot (with its companion penalty provisions in § 52) be extended into the Hawaiian jurisdiction. A state cannot regulate or proscribe activities conducted in another state or supervise the internal affairs of another state in any way, even though the welfare or health of its citizens may be affected when they travel to that state." (*Archibald v. Cinerama Hawaiian Hotels, Inc.* (1977) 73 Cal.App.3d 152, 159 [140 Cal.Rptr. 599], internal citations omitted, disapproved on other grounds in *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24 [219 Cal.Rptr. 133].)

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2815
Gender Price Discrimination (Civ. Code, § 51.6)
Essential Factual Elements

[*Name of plaintiff*] claims that [*name of defendant*] charged [him/her] a higher price for services because of [his/her] gender. To establish this claim, [*name of plaintiff*] must prove the following:

1. **That [*name of defendant*] charged [*name of plaintiff*] more for services of similar or like kind because of [his/her] gender;**

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.**

It is not improper to charge a higher price for services if the price difference is based upon the amount of time, difficulty, or cost of providing the services.

DIRECTIONS FOR USE

The judge may decide the issue of whether the defendant is a business establishment as a matter of law. (*Rotary Club of Duarte v. Bd. of Directors* (1986) 178 Cal.App.3d 1035, 1050 [224 Cal.Rptr. 213].) Special interrogatories may be needed if there are factual issues. This element has been omitted from the instruction because it is unlikely to go to a jury.

SOURCES AND AUTHORITY

- Civil Code section 51.6 provides:

  (a) This section shall be known, and may be cited, as the Gender Tax Repeal Act of 1995.
  (b) No business establishment of any kind whatsoever may discriminate, with respect to the price charged for services of similar or like kind, against a person because of the person's gender.

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(c) Nothing in subdivision (b) prohibits price differences based specifically upon the amount of time, difficulty, or cost of providing the services.
(d) Except as provided in subdivision (f), the remedies for a violation of this section are the remedies provided in subdivision (a) of Section 52. However, an action under this section is independent of any other remedy or procedure that may be available to an aggrieved party.
(e) This act does not alter or affect the provisions of the Health and Safety Code, the Insurance Code, or other laws that govern health care service plan or insurer underwriting or rating practices.
(f) (1) The following business establishments shall clearly and conspicuously disclose to the customer in writing the pricing for each standard service provided:
(A) Tailors or businesses providing aftermarket clothing alterations.
(B) Barbers or hair salons.
(C) Dry cleaners and laundries providing services to individuals.
(2) The price list shall be posted in an area conspicuous to customers. Posted price lists shall be in no less than 14-point boldface type and clearly and completely display pricing for every standard service offered by the business under paragraph (1).
(3) The business establishment shall provide the customer with a complete written price list upon request.
(4) The business establishment shall display in a conspicuous place at least one clearly visible sign, printed in no less than 24-point boldface type, which reads: "CALIFORNIA LAW PROHIBITS ANY BUSINESS ESTABLISHMENT FROM DISCRIMINATING, WITH RESPECT TO THE PRICE CHARGED FOR SERVICES OF SIMILAR OR LIKE KIND, AGAINST A PERSON BECAUSE OF THE PERSON'S GENDER. A COMPLETE PRICE LIST IS AVAILABLE UPON REQUEST."
(5) A business establishment that fails to correct a violation of this subdivision within 30 days of receiving written notice of the violation is liable for a civil penalty of one thousand dollars ($1,000).
(6) For the purposes of this subdivision, "standard service" means the 15 most frequently requested services provided by the business.

- "Section 51 by its express language applies only within California. It cannot (with its companion penalty provisions in § 52) be extended into the Hawaiian jurisdiction. A state cannot regulate or proscribe activities conducted in another state or supervise the internal affairs of another state in any way, even though the welfare or health of its citizens may be affected when they travel to that state." (*Archibald v. Cinerama Hawaiian Hotels, Inc.* (1977) 73 Cal.App.3d 152, 159 [140 Cal.Rptr. 599], internal citations omitted, disapproved on other grounds in *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24 [219 Cal.Rptr. 133].)

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2816
Ralph Act (Civ. Code, § 51.7)
Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] subjected [***name of plaintiff***] to violence or threat of violence based on [his/her] [sex/race/color/religion/ ancestry/national origin/political affiliation/sex/sexual orientation/age/ disability/position in a labor dispute/[***insert other actionable characteristic***]]. To establish this claim, [***name of plaintiff***] must prove the following:**

1. **That [***name of defendant***] threatened or committed violent acts against [***name of plaintiff***] [or [his/her] property];**

2. **That a reason for [***name of defendant***]'s conduct was [[his/her] perception of] [***name of plaintiff***]'s [sex/race/color/religion/ancestry/ national origin/political affiliation/sex/sexual orientation/age/ disability/position in a labor dispute/[***insert other actionable characteristic***]];**

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

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

DIRECTIONS FOR USE

Note that this instruction uses the standard of "a reason." The causation standard is still an open issue under this statute.

Liability may also be found where a defendant "aids, incites, or conspires" in the denial of a right protected under Civil Code section 51.7. Civil Code section 52(b) provides, in part: "Whoever denies the right provided by Section 51.7 … or aids, incites, or conspires in that denial, is liable for each and every offense for the actual damages suffered by any person denied that right … ." This instruction should be modified if aiding, inciting, or conspiring is asserted as theories of liability. See also instructions in the Conspiracy series.

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SOURCES AND AUTHORITY

- Civil Code section 51.7 provides:

  (a) All persons within the jurisdiction of this state have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property because of their race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age, disability, or position in a labor dispute, or because another person perceives them to have one or more of those characteristics. The identification in this subdivision of particular bases of discrimination is illustrative rather than restrictive. This section does not apply to statements concerning positions in a labor dispute which are made during otherwise lawful labor picketing.
  (b) As used in this section, "sexual orientation" means heterosexuality, homosexuality, or bisexuality.

- Civil Code section 52(b) provides:

  Whoever denies the right provided by Section 51.7 or 51.9, or aids, incites, or conspires in that denial, is liable for each and every offense for the actual damages suffered by any person denied that right and, in addition, the following:
  (1) An amount to be determined by a jury, or a court sitting without a jury, for exemplary damages.
  (2) A civil penalty of twenty-five thousand dollars ($25,000) to be awarded to the person denied the right provided by Section 51.7 in any action brought by the person denied the right, or by the Attorney General, a district attorney, or a city attorney.
  (3) Attorney's fees as may be determined by the court.

- "The unambiguous language of this section gives rise to a cause of action in favor of a person against whom violence or intimidation has been committed or threatened." (*Coon v. Joseph* (1987) 192 Cal.App.3d 1269, 1277 [237 Cal.Rptr. 873].)

- "The test is: 'would a reasonable person, standing in the shoes of the plaintiff, have been intimidated by the actions of the defendant and have perceived a threat of violence?' " (*Winarto v. Toshiba America Electronics Components, Inc.* (9th Cir. 2001) 274 F.3d 1276, 1290–1291, internal citation omitted.)

- "Section 51 by its express language applies only within California. It cannot (with its companion penalty provisions in § 52) be extended into the Hawaiian jurisdiction. A state cannot regulate or proscribe activities conducted in another state or supervise the

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internal affairs of another state in any way, even though the welfare or health of its citizens may be affected when they travel to that state." (*Archibald v. Cinerama Hawaiian Hotels, Inc.* (1977) 73 Cal.App.3d 152, 159 [140 Cal.Rptr. 599], internal citations omitted, disapproved on other grounds in *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24 [219 Cal.Rptr. 133].)

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2817
Sexual Harassment in Defined Relationship (Civ. Code, § 51.9)
Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] sexually harassed [him/her]. To establish this claim, [***name of plaintiff***] must prove the following:**

1. **That [***name of plaintiff***] had a business, service, or professional relationship with [***name of defendant***];**

2. **[That [***name of defendant***] made [sexual advances/solicitations/sexual requests/demands for sexual compliance/[***insert other actionable conduct***] to [***name of plaintiff***];]**

   [That [*name of defendant***] engaged in [verbal/visual/physical] conduct of a [sexual nature/hostile nature based on gender] that was unwelcome and pervasive or severe;]**

3. **That [***name of plaintiff***] was unable to easily end the relationship with [***name of defendant***]; and**

4. **That [***name of plaintiff***] has suffered or will suffer [economic loss or disadvantage/personal injury/the violation of a statutory or constitutional right] as a result of [***name of defendant***]'s conduct.**

DIRECTIONS FOR USE

The first bracketed portion of element 2 should be analogous to quid pro quo harassment under FEHA in terms of the severity of conduct that must be proved.

In element 1, either insert the appropriate profession from the statutory list (Civ. Code, § 51.9(a)(1)(A)–(E)), or if there is a factual dispute over whether the relationship qualifies, provide examples from this list as guidance. (Civ. Code, § 51.9(a)(1)(F).)

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SOURCES AND AUTHORITY

- Civil Code section 51.9 provides:

(a) A person is liable in a cause of action for sexual harassment under this section when the plaintiff proves all of the following elements:
  (1) There is a business, service, or professional relationship between the plaintiff and defendant. Such a relationship may exist between a plaintiff and a person, including, but not limited to, any of the following persons:
    (A) Physician, psychotherapist, or dentist. For purposes of this section, "psychotherapist" has the same meaning as set forth in paragraph (1) of subdivision (c) of Section 728 of the Business and Professions Code.
    (B) Attorney, holder of a master's degree in social work, real estate agent, real estate appraiser, accountant, banker, trust officer, financial planner loan officer, collection service, building contractor, or escrow loan officer.
    (C) Executor, trustee, or administrator.
    (D) Landlord or property manager.
    (E) Teacher.
    (F) A relationship that is substantially similar to any of the above.
  (2) The defendant has made sexual advances, solicitations, sexual requests, demands for sexual compliance by the plaintiff, or engaged in other verbal, visual, or physical conduct of a sexual nature or of a hostile nature based on gender, that were unwelcome and pervasive or severe.
  (3) There is an inability by the plaintiff to easily terminate the relationship.
  (4) The plaintiff has suffered or will suffer economic loss or disadvantage or personal injury, including, but not limited to, emotional distress or the violation of a statutory or constitutional right, as a result of the conduct described in paragraph (2).
(b) In an action pursuant to this section, damages shall be awarded as provided by subdivision (b) of Section 52.
(c) Nothing in this section shall be construed to limit application of any other remedies or rights provided under the law.
(d) The definition of sexual harassment and the standards for determining liability set forth in this section shall be limited to determining liability only with regard to a cause of action brought under this section.

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2818
Bane Act (Civ. Code, § 52.1)
Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] intentionally interfered with [or attempted to interfere with] [***name of plaintiff***]'s civil rights by threatening or committing violent acts. To establish this claim, [***name of plaintiff***] must prove the following:**

1. **That [***name of defendant***] interfered with [or attempted to interfere with] [***name of plaintiff***]'s right to [***insert alleged constitutional or statutory right***] by threatening or committing violent acts;**

2. **[That [***name of plaintiff***] reasonably believed that if [he/she] exercised [his/her] right to [***insert right, e.g., "vote"***] [***name of defendant***] would commit violence against [him/her] or [his/her] property;]**

   [That [*name of defendant***] injured [***name of plaintiff***] or [his/her] property to prevent [***name of plaintiff***] from exercising [his/her] right to [***insert right***] or to retaliate against [***name of plaintiff***] for having exercised [his/her] right to [***insert right***];]**

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

Unless plaintiff is claiming actual damages, omit elements 3 and 4.

SOURCES AND AUTHORITY

- Civil Code section 52.1 provides, in part:

  (a) If a person or persons, whether or not acting under color of law, interferes by threats, intimidation, or coercion, or attempts to interfere by threats, intimidation, or coercion, with the exercise or enjoyment by any individual or individuals of

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rights secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of this state, the Attorney General, or any district attorney or city attorney may bring a civil action for injunctive and other appropriate equitable relief in the name of the people of the State of California, in order to protect the peaceable exercise or enjoyment of the right or rights secured.

(b) Any individual whose exercise or enjoyment of rights secured by the Constitution or laws of the United States, or of rights secured by the Constitution or laws of this state, has been interfered with, or attempted to be interfered with, as described in subdivision (a), may institute and prosecute in his or her own name and on his or her own behalf a civil action for damages, including, but not limited to, damages under Section 52, injunctive relief, and other appropriate equitable relief to protect the peaceable exercise or enjoyment of the right or rights secured.

- Civil Code section 52(b) provides:

  Whoever denies the right provided by Section 51.7 or 51.9, or aids, incites, or conspires in that denial, is liable for each and every offense for the actual damages suffered by any person denied that right and, in addition, the following:

  (1) An amount to be determined by a jury, or a court sitting without a jury, for exemplary damages.

  (2) A civil penalty of twenty-five thousand dollars ($25,000) to be awarded to the person denied the right provided by Section 51.7 in any action brought by the person denied the right, or by the Attorney General, a district attorney, or a city attorney.

  (3) Attorney's fees as may be determined by the court.

- "The Legislature enacted section 52.1 to stem a tide of hate crimes." (*Jones v. Kmart Corp.* (1998) 17 Cal.4th 329, 337 [70 Cal.Rptr.2d 844], internal citation omitted.)

- "Civil Code section 52.1, the Bane Act civil counterpart of [Penal Code] section 422.6, recognizes a private right of action for damages and injunctive relief for interference with civil rights." (*In re M.S.* (1995) 10 Cal.4th 698, 715 [42 Cal.Rptr.2d 355].)

- "[S]ection 52.1 does require an attempted or completed act of interference with a legal right, accompanied by a form of coercion." (*Jones, supra,* 17 Cal.4th at p. 334.)

- Section 52.1 is not a remedy to be used against private citizens for violations of rights that apply only to the state or its agents. (*Jones, supra,* 17 Cal.4th at p. 337 [right to be free from unreasonable search and seizure].)

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- "[I]t is clear that to state a cause of action under section 52.1 there must first be violence or intimidation by threat of violence." (*Cabesuela v. Browning-Ferris Industries of Cal., Inc.* (1998) 68 Cal.App.4th 101, 111 [80 Cal.Rptr.2d 60].)

- Assembly Bill 2719 (Stats. 2000, ch. 98) abrogated the holding of *Boccato v. City of Hermosa Beach* (1994) 29 Cal.App.4th 1797, which held that a plaintiff was required to be a member of a specified protected class in order to bring an action under section 52.1: "It is the intent of the Legislature in enacting this act to clarify that an action brought pursuant to Section 52.1 of the Civil Code does not require the individual whose rights are secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of California, to be a member of a protected class identified by its race, color, religion, or sex, among other things."

- "Subdivision (j) of Civil Code section 52.1 provides that speech alone is insufficient to support such an action, except upon a showing that the speech itself threatens violence against a specific person or group of persons, the person or group of persons against whom the speech is directed 'reasonably fears that, because of the speech, violence will be committed against them or their property and that the person threatening violence has the apparent ability to carry out the threat.' … The presence of the express 'reasonable fear' element, in addition to the 'apparent ability' element, in Civil Code section 52.1, governing civil actions for damages, most likely reflects the Legislature's determination [that] a defendant's civil liability should depend on the harm actually suffered by the victim." (*In re M.S.*, *supra*, 10 Cal.4th at p. 715, internal citation omitted.)

<u>Secondary Sources</u>

- 8 Witkin, Summary of California Law (9th ed. 1988) Constitutional Law, § 775

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2819
Unruh Civil Rights Act—Damages (Civ. Code, §§ 51, 51.5, 51.6)

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."

[*Name of plaintiff*] must prove the amount of [his/her] damages. However, [*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. You must not speculate or guess in awarding damages.

The following are the specific items of damages claimed by [*name of plaintiff*]:

[*Insert item(s) of claimed harm.*]

In addition, you may award [*name of plaintiff*] up to three times the amount of [his/her] actual damages as a penalty against [*name of defendant*].

DIRECTIONS FOR USE

See the instructions in the Damages series (Instructions 2000–2031) for additional instructions on actual damages and punitive damages. Note that the statutory minimum amount of recovery for a plaintiff is $4,000 in addition to actual damages. If the verdict is for less than that amount, the judge should modify the verdict to reflect the statutory minimum.

SOURCES AND AUTHORITY

- Civil Code section 52(a) provides: "Whoever denies, aids or incites a denial, or makes any discrimination or distinction contrary to Section 51, 51.5, or 51.6, is liable for each and every offense for the actual damages, and any amount that may be determined by a jury, or a court sitting without a jury, up to a maximum of three times the amount of actual damage but in no case less than four thousand dollars ($4,000), and any attorney's fees that may be determined by the court in addition thereto, suffered by any person denied the rights provided in Section 51, 51.5, or 51.6."

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2820
Unruh Civil Rights Act—Civil Penalty (Civ. Code, §§ 51.7, 51.9)

If you decide that [*name of plaintiff***] has proved [his/her] claim against [***name of defendant***], you must award the following:**

1. **Actual damages sufficient to reasonably compensate [***name of plaintiff***] for the harm;**

2. **A civil penalty of $25,000; and**

3. **Punitive damages.**

[*Name of plaintiff***] must prove the amount of [his/her] actual damages. However, [***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. You must not speculate or guess in awarding damages.**

The following are the specific items of actual damages claimed by [*name of plaintiff***]:**

[*Insert item(s) of claimed harm.***]**

DIRECTIONS FOR USE

Note that the $25,000 civil penalty is applicable only to actions brought under Civil Code section 51.7. Do not include item 2 in cases brought under Civil Code section 5.19.

See the Damages series (Instructions 200–2031) for additional instructions on actual damages and punitive damages. Instruction 2023, *Punitive Damages—Individual Defendant—Bifurcated Trial (Second Phase),* instructs the jury on how to calculate the amount of punitive damages.

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SOURCES AND AUTHORITY

- Civil Code section 52(b) provides:

  Whoever denies the right provided by Section 51.7 or 51.9, or aids, incites, or conspires in that denial, is liable for each and every offense for the actual damages suffered by any person denied that right and, in addition, the following:
  (1) An amount to be determined by a jury, or a court sitting without a jury, for exemplary damages.
  (2) A civil penalty of twenty-five thousand dollars ($25,000) to be awarded to the person denied the right provided by Section 51.7 in any action brought by the person denied the right, or by the Attorney General, a district attorney, or a city attorney.
  (3) Attorney's fees as may be determined by the court.

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2900
Financial Abuse—Essential Factual Elements
Individual or Individual and Employer Defendants
(Welf. & Inst. Code, §§ 15657, 15610.30)

[*Name of plaintiff***] claims that [***name of defendant***] violated the Elder Abuse and Dependent Adult Civil Protection Act by taking financial advantage of [***name of plaintiff/decedent***]. To establish this claim, [***name of plaintiff***] must prove the following by clear and convincing evidence:**

1. **That [***name of defendant***] [***insert one of the following:***]**

   [[took/hid/appropriated/retained] [*name of plaintiff/decedent***]'s property;]**

   [[assisted in [taking/hiding/appropriating/retaining] [*name of plaintiff/decedent***]'s property;]**

2. **That [***name of plaintiff/decedent***] was [65 years of age or older/a dependent adult];**

3. **That [***name of defendant***] [[took/hid/appropriated/retained]/assisted in [taking/hiding/appropriating/retaining]] the property [for a wrongful use/[or] with the intent to defraud];**

4. **That [***name of defendant***] acted with [recklessness/malice/oppression/ fraud];**

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

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

[One way [*name of plaintiff***] can prove that [***name of defendant***] [[took/hid/ appropriated/retained]/assisted in [taking/hiding/appropriating/ retaining]] the property for a wrongful use is by proving:**

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1. **That [***name of plaintiff/decedent***] had the right to have the property [transferred/made readily available] to [[him/her]/[[his/her] [conservator/trustee/representative/attorney]]; and**

2. **That [***name of defendant***] knew or should have known that [***name of plaintiff/decedent***] had this right.]**

[[*Name of defendant***] should have known that [***name of plaintiff/decedent***] had this right if, on the basis of information received by [[***name of defendant***]/[***name of defendant***]'s authorized third party], it would have been obvious to a reasonable person that [***name of plaintiff/decedent***] had the right to have the property [transferred/made readily available] to [[him/her]/[[his/her] [conservator/trustee/representative/attorney]].**

[[*Name of plaintiff***] also claims that [***name of defendant employer***] is responsible for the harm. To establish this claim, [***name of plaintiff***] must prove [***Insert one or more of the following***:]**

1. **[That [***name of defendant employee***] was an officer, a director, or a managing agent of [***name of defendant employer***] acting in [a corporate/an employment] capacity;] [or]**

2. **[That an officer, a director, or a managing agent of [***name of defendant employer***] had advance knowledge of the unfitness of [***name of defendant employee***] 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 employer***] authorized [***name of defendant employee***]'s conduct;] [or]**

4. **[That an officer, a director, or a managing agent of [***name of defendant employer***] knew of [***name of defendant employee***]'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.]

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DIRECTIONS FOR USE

This instruction is intended for plaintiffs who are seeking survival of damages for pain and suffering and/or attorney fees and costs. Plaintiffs who are seeking conventional tort damages can use common-law tort instructions.

Add the first bracketed portion if the plaintiff is seeking to prove wrongful use by showing that defendant acted in bad faith as defined by the statute. This is not the exclusive manner of proving wrongful conduct under the statute. (See Welf. & Inst. Code, § 15610.30 (b).) Add the second bracketed portion if the plaintiff is also seeking damages against the defendant's employer. If the plaintiff is seeking damages only against the employer, use instruction 2901, *Financial Abuse—Essential Factual Elements—Employer Defendant (Welf. & Inst. Code, §§ 15657, 15610.30).*

There appears to be a misprint in of Welfare and Institutions Code section 15657 (b). The reference should be Code of Civil Procedure section 377.34.

SOURCES AND AUTHORITY

- Welfare and Institutions Code section 15657 provides:

  Where it is proven by clear and convincing evidence that a defendant is liable for physical abuse as defined in Section 15610.63, neglect as defined in Section 15610.57, or fiduciary abuse as defined in Section 15610.30, and that the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of this abuse, in addition to all other remedies otherwise provided by law:

  (a) The court shall award to the plaintiff reasonable attorney's fees and costs. The term "costs" includes, but is not limited to, reasonable fees for the services of a conservator, if any, devoted to the litigation of a claim brought under this article.

  (b) The limitations imposed by Section 337.34 of the Code of Civil Procedure on the damages recoverable shall not apply. However, the damages recovered shall not exceed the damages permitted to be recovered pursuant to subdivision (b) of Section 3333.2 of the Civil Code.

  (c) The standards set forth in subdivision (b) of Section 3294 of the Civil Code regarding the imposition of punitive damages on an employer based upon the acts of an employee shall be satisfied before any damages or attorney's fees permitted under this section may be imposed against an employer.

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- Welfare and Institutions Code section 15610.30 provides:

  (a) "Financial abuse" of an elder or dependent adult occurs when a person or entity does any of the following:
  (1) Takes, secretes, appropriates, or retains real or personal property of an elder or dependent adult to a wrongful use or with intent to defraud, or both.
  (2) Assists in taking, secreting, appropriating, or retaining real or personal property of an elder or dependent adult to a wrongful use or with intent to defraud, or both.
  (b) A person or entity shall be deemed to have taken, secreted, appropriated, or retained property for a wrongful use if, among other things, the person or entity takes, secretes, appropriates or retains possession of property in bad faith.
  (1) A person or entity shall be deemed to have acted in bad faith if the person or entity knew or should have known that the elder or dependent adult had the right to have the property transferred or made readily available to the elder or dependent adult or to his or her representative.
  (2) For purposes of this section, a person or entity should have known of a right specified in paragraph (1) if, on the basis of the information received by the person or entity or the person or entity's authorized third party, or both, it is obvious to a reasonable person that the elder or dependent adult has a right specified in paragraph (1).
  (c) For purposes of this section, "representative" means a person or entity that is either of the following:
  (1) A conservator, trustee, or other representative of the estate of an elder or dependent adult.
  (2) An attorney-in-fact of an elder or dependent adult who acts within the authority of the power of attorney.

- Welfare and Institutions Code section 15610.27 provides: " 'Elder' means any person residing in this state, 65 years of age or older."

- Welfare and Institutions Code section 15610.23 provides:

  (a) "Dependent adult" means any person residing in this state, between the ages of 18 and 64 years, who has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights including, but not limited to, persons who have physical or developmental disabilities or whose physical or mental abilities have diminished because of age.
  (b) "Dependent adult" includes any person between the ages of 18 and 64 who is admitted as an inpatient to a 24-hour health facility, as defined in Sections 1250, 1250.2, and 1250.3 of the Health and Safety Code.

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- "The purpose of the [Elder Abuse Act] is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect." (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33 [82 Cal.Rptr.2d 610].)

- "In order to obtain the remedies available in section 15657, a plaintiff must demonstrate by clear and convincing evidence that defendant is guilty of something more than negligence; he or she must show reckless, oppressive, fraudulent, or malicious conduct. The latter three categories involve 'intentional,' 'willful,' or 'conscious' wrongdoing of a 'despicable' or 'injurious' nature. 'Recklessness' refers to a subjective state of culpability greater than simple negligence, which has been described as a 'deliberate disregard' of the 'high degree of probability' that an injury will occur. Recklessness, unlike negligence, involves more than 'inadvertence, incompetence, unskillfulness, or a failure to take precautions' but rather rises to the level of a 'conscious choice of a course of action ... with knowledge of the serious danger to others involved in it.' " (*Delaney, supra*, 20 Cal.4th at pp. 31–32, internal citations omitted.)

- "As amended in 1991, the Elder Abuse Act was designed to protect elderly and dependent persons from abuse, neglect, or abandonment. In addition to adopting measures designed to encourage reporting of abuse and neglect, the Act authorizes the court to award attorney fees to the prevailing plaintiffs and allows survivors to recover pain and suffering damages in cases of intentional and reckless abuse where the elder has died." (*Mack v. Soung* (2000) 80 Cal.App.4th 966, 971–972 [95 Cal.Rptr.2d 830], internal citations omitted.)

<u>Secondary Sources</u>

- 2 California Elder Law (Cont.Ed.Bar 1993–2002) §§ 14.5–14.6, 14.25–14.30, 14.38–14.47

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2901
Financial Abuse—Essential Factual Elements—Employer Defendant
(Welf. & Inst. Code, §§ 15657, 15610.30)

[*Name of plaintiff***] claims that [***name of defendant***] violated the Elder Abuse and Dependent Adult Civil Protection Act by taking financial advantage of [***name of plaintiff/decedent***] and that [***name of defendant***] is responsible for the harm. To establish this claim, [***name of plaintiff***] must prove the following by clear and convincing evidence:**

1. **That one or more of [***name of defendant***]'s employees [***insert one of the following:***]**

   [[took/hid/appropriated/retained] [*name of plaintiff/decedent***]'s property;]**

   [[assisted in [taking/hiding/appropriating/retaining] [*name of plaintiff/decedent***]'s property;]**

2. **That [***name of plaintiff/decedent***] was [65 years of age or older/a dependent adult];**

3. **That the employee[s] [[took/hid/appropriated/retained]/assisted in [taking/hiding/appropriating/retaining]] the property [for a wrongful use/[or] with the intent to defraud];**

4. **That the employee[s] acted with [recklessness/malice/oppression/ fraud];**

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

6. **That the employee['s]['s'] conduct was a substantial factor in causing [***name of plaintiff/decedent***]'s harm; and**

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

   [That the employee[s] [was/were] [an] officer[s], [a] director[s], or [a] managing agent[s] of [*name of defendant***] acting in [a corporate/an employment] capacity;] [or]**

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[That an officer, a director, or a managing agent of [*name of defendant*] had advance knowledge of the unfitness of the employee[s] and employed [him/her/them] with a knowing disregard of the rights or safety of others;] [or]

[That an officer, a director, or a managing agent of [*name of defendant*] authorized the employee[‘s][s’] conduct;] [or]

[That an officer, a director, or a managing agent of [*name of defendant*] knew of the employee[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.

[One way [*name of plaintiff*] can prove that [the/an] employee [[took/hid/appropriated/retained]/assisted in [taking/hiding/appropriating/retaining]] the property for a wrongful use is by proving:

1. **That [*name of plaintiff/decedent*] had the right to have the property [transferred/made readily available] to [[him/her]/[[his/her] [conservator/trustee/representative/attorney]]; and**

2. **That the employee[s] knew or should have known that [*name of plaintiff/decedent*] had this right.**

[The employee[s] should have known that [*name of plaintiff/decedent*] had this right if, on the basis of information received by [[him/her/them]/an authorized third party], it would have been obvious to a reasonable person that [*name of plaintiff/decedent*] had the right to have the property [transferred/made readily available] to [[him/her]/[[his/her] [conservator/trustee/representative/attorney]].

DIRECTIONS FOR USE

This instruction is intended for plaintiffs who are seeking survival of damages for pain and suffering and/or attorney fees and costs. Plaintiffs who are seeking conventional tort damages can use common-law tort instructions.

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Add the last bracketed portion(s) if the plaintiff is seeking to prove wrongful use by showing that the employee acted in bad faith as defined by the statute. This is not the exclusive manner of proving wrongful conduct under the statute. (See Welf. & Inst. Code, § 15610.30 (b).) If the plaintiff is seeking damages against the employer and the employee, use instruction 2900, *Financial Abuse—Essential Factual Elements—Individual or Individual and Employer Defendant (Welf. & Inst. Code, §§ 15657, 15610.30).*

There appears to be a misprint in of Welfare and Institutions Code section 15657 (b). The reference should be Code of Civil Procedure section 377.34.

SOURCES AND AUTHORITY

- Welfare and Institutions Code section 15657 provides:

  Where it is proven by clear and convincing evidence that a defendant is liable for physical abuse as defined in Section 15610.63, neglect as defined in Section 15610.57, or fiduciary abuse as defined in Section 15610.30, and that the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of this abuse, in addition to all other remedies otherwise provided by law:
  (a) The court shall award to the plaintiff reasonable attorney's fees and costs. The term "costs" includes, but is not limited to, reasonable fees for the services of a conservator, if any, devoted to the litigation of a claim brought under this article.
  (b) The limitations imposed by Section 337.34 of the Code of Civil Procedure on the damages recoverable shall not apply. However, the damages recovered shall not exceed the damages permitted to be recovered pursuant to subdivision (b) of Section 3333.2 of the Civil Code.
  (c) The standards set forth in subdivision (b) of Section 3294 of the Civil Code regarding the imposition of punitive damages on an employer based upon the acts of an employee shall be satisfied before any damages or attorney's fees permitted under this section may be imposed against an employer.

- Welfare and Institutions Code section 15610.30 provides:

  (a) "Financial abuse" of an elder or dependent adult occurs when a person or entity does any of the following:
    (1) Takes, secretes, appropriates, or retains real or personal property of an elder or dependent adult to a wrongful use or with intent to defraud, or both.

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(2) Assists in taking, secreting, appropriating, or retaining real or personal property of an elder or dependent adult to a wrongful use or with intent to defraud, or both.

(b) A person or entity shall be deemed to have taken, secreted, appropriated, or retained property for a wrongful use if, among other things, the person or entity takes, secretes, appropriates or retains possession of property in bad faith.

(1) A person or entity shall be deemed to have acted in bad faith if the person or entity knew or should have known that the elder or dependent adult had the right to have the property transferred or made readily available to the elder or dependent adult or to his or her representative.

(2) For purposes of this section, a person or entity should have known of a right specified in paragraph (1) if, on the basis of the information received by the person or entity or the person or entity's authorized third party, or both, it is obvious to a reasonable person that the elder or dependent adult has a right specified in paragraph (1).

(c) For purposes of this section, "representative" means a person or entity that is either of the following:

(1) A conservator, trustee, or other representative of the estate of an elder or dependent adult.

(2) An attorney-in-fact of an elder or dependent adult who acts within the authority of the power of attorney.

- Civil Code section 3294(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 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."

- Welfare and Institutions Code section 15610.27 provides: " 'Elder' means any person residing in this state, 65 years of age or older."

- Welfare and Institutions Code section 15610.23 provides:

(a) "Dependent adult" means any person residing in this state, between the ages of 18 and 64 years, who has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights including, but not

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limited to, persons who have physical or developmental disabilities or whose physical or mental abilities have diminished because of age.

(b) "Dependent adult" includes any person between the ages of 18 and 64 who is admitted as an inpatient to a 24-hour health facility, as defined in Sections 1250, 1250.2, and 1250.3 of the Health and Safety Code.

- "The purpose of the [Elder Abuse Act] is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect." (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33 [82 Cal.Rptr.2d 610].)

- "In order to obtain the remedies available in section 15657, a plaintiff must demonstrate by clear and convincing evidence that defendant is guilty of something more than negligence; he or she must show reckless, oppressive, fraudulent, or malicious conduct. The latter three categories involve 'intentional,' 'willful,' or 'conscious' wrongdoing of a 'despicable' or 'injurious' nature. 'Recklessness' refers to a subjective state of culpability greater than simple negligence, which has been described as a 'deliberate disregard' of the 'high degree of probability' that an injury will occur. Recklessness, unlike negligence, involves more than 'inadvertence, incompetence, unskillfulness, or a failure to take precautions' but rather rises to the level of a 'conscious choice of a course of action ... with knowledge of the serious danger to others involved in it.' " (*Delaney, supra,* 20 Cal.4th at pp. 31–32, internal citations omitted.)

- "As amended in 1991, the Elder Abuse Act was designed to protect elderly and dependent persons from abuse, neglect, or abandonment. In addition to adopting measures designed to encourage reporting of abuse and neglect, the Act authorizes the court to award attorney fees to the prevailing plaintiffs and allows survivors to recover pain and suffering damages in cases of intentional and reckless abuse where the elder has died." (*Mack v. Soung* (2000) 80 Cal.App.4th 966, 971–972 [95 Cal.Rptr.2d 830], internal citations omitted.)

<u>Secondary Sources</u>

- 2 California Elder Law (Cont.Ed.Bar 1993–2002) §§ 14.5–14.6, 14.25–14.30, 14.38–14.47

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2902
Neglect—Essential Factual Elements
Individual or Individual and Employer Defendants
(Welf. & Inst. Code, §§ 15657, 15610.57)

[*Name of plaintiff***] claims that [***name of plaintiff/decedent***] was neglected by [***name of defendant***] in violation of the Elder Abuse and Dependent Adult Civil Protection Act. To establish this claim, [***name of plaintiff***] must prove the following by clear and convincing evidence:**

1. **That [***name of plaintiff/decedent***] was in [***name of defendant***]'s care or custody;**

2. **That [***name of plaintiff/decedent***] was [65 years of age or older/a dependent adult];**

3. **That [***name of defendant***] failed to use the degree of care that a reasonable person in the same situation would have used by [***insert one or more of the following:***]**

   [failing to assist in personal hygiene or in the provision of food, clothing, or shelter;]

   [failing to provide medical care for physical and mental health needs;]

   [failing to protect [*name of plaintiff/decedent***] from health and safety hazards;]**

   [failing to prevent malnutrition or dehydration;]

   [*insert other grounds for neglect;***]**

4. **That [***name of defendant***] acted with [recklessness/malice/oppression/fraud];**

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

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

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[[*Name of plaintiff***] also claims that [***name of defendant employer***] is responsible for the harm. To establish this claim, [***name of plaintiff***] must prove [***Insert one or more of the following:***]**

1. **[That [***name of defendant employee***] was an officer, a director, or a managing agent of [***name of defendant employer***] acting in [a corporate/an employment] capacity;] [or]**

2. **[That an officer, a director, or a managing agent of [***name of defendant employer***] had advance knowledge of the unfitness of [***name of defendant employee***] 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 employer***] authorized [***name of defendant employee***]'s conduct;] [or]**

4. **[That an officer, a director, or a managing agent of [***name of defendant employer***] knew of [***name of defendant employee***]'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

This instruction is intended for plaintiffs who are seeking survival of damages for pain and suffering and/or attorney fees and costs. Plaintiffs who are seeking conventional tort damages can use common-law tort instructions.

Add the second bracketed portion if the plaintiff is also seeking damages against the defendant's employer. If the plaintiff is seeking damages only against the employer, use instruction 2903, *Neglect—Essential Factual Elements—Employer Defendant (Welf. & Inst. Code, §§ 15657, 15610.57).*

There appears to be a misprint in of Welfare and Institutions Code section 15657 (b). The reference should be Code of Civil Procedure section 377.34.

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SOURCES AND AUTHORITY

- Welfare and Institutions Code section 15657 provides:

  Where it is proven by clear and convincing evidence that a defendant is liable for physical abuse as defined in Section 15610.63, neglect as defined in Section 15610.57, or fiduciary abuse as defined in Section 15610.30, and that the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of this abuse, in addition to all other remedies otherwise provided by law:
  (a) The court shall award to the plaintiff reasonable attorney's fees and costs. The term "costs" includes, but is not limited to, reasonable fees for the services of a conservator, if any, devoted to the litigation of a claim brought under this article.
  (b) The limitations imposed by Section 337.34 of the Code of Civil Procedure on the damages recoverable shall not apply. However, the damages recovered shall not exceed the damages permitted to be recovered pursuant to subdivision (b) of Section 3333.2 of the Civil Code.
  (c) The standards set forth in subdivision (b) of Section 3294 of the Civil Code regarding the imposition of punitive damages on an employer based upon the acts of an employee shall be satisfied before any damages or attorney's fees permitted under this section may be imposed against an employer.

- Welfare and Institutions Code section 15610.57 provides:

  (a) "Neglect" means either of the following:
    (1) The negligent failure of any person having the care or custody of an elder or a dependent adult to exercise that degree of care that a reasonable person in a like position would exercise.
    (2) The negligent failure of the person themselves to exercise that degree of care that a reasonable person in a like position would exercise.
  (b) Neglect includes, but is not limited to, all of the following:
    (1) Failure to assist in personal hygiene, or in the provision of food, clothing, or shelter.
    (2) Failure to provide medical care for physical and mental health needs. No person shall be deemed neglected or abused for the sole reason that he or she voluntarily relies on treatment by spiritual means through prayer alone in lieu of medical treatment.
    (3) Failure to protect from health and safety hazards.
    (4) Failure to prevent malnutrition or dehydration.
    (5) Failure of a person to provide the needs specified in paragraphs (1) to (4), inclusive, for themselves due to ignorance, illiteracy, incompetence, mental limitation, substance abuse, or poor health.

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- "[T]he statutory definition of neglect set forth in the first sentence of Welfare and Institutions Code section 15610.57 is substantially the same as the ordinary definition of neglect." (*In re Conservatorship of Gregory* (2000) 80 Cal.App.4th 514, 521 [95 Cal.Rptr.2d 336].)

- Welfare and Institutions Code section 15657.2 provides: "Notwithstanding this article, any cause of action for injury or damage against a health care provider, as defined in Section 340.5 of the Code of Civil Procedure, based on the health care provider's alleged professional negligence, shall be governed by those laws which specifically apply to those professional negligence causes of action."

- Welfare and Institutions Code section 15610.07 provides:

  "Abuse of an elder or a dependent adult" means either of the following:
  (a) Physical abuse, neglect, financial abuse, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering.
  (b) The deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering.

- Welfare and Institutions Code section 15610.27 provides: " 'Elder' means any person residing in this state, 65 years of age or older."

- Welfare and Institutions Code section 15610.23 provides:

  (a) "Dependent adult" means any person residing in this state, between the ages of 18 and 64 years, who has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights including, but not limited to, persons who have physical or developmental disabilities or whose physical or mental abilities have diminished because of age.
  (b) "Dependent adult" includes any person between the ages of 18 and 64 who is admitted as an inpatient to a 24-hour health facility, as defined in Sections 1250, 1250.2, and 1250.3 of the Health and Safety Code.

- "In order to obtain the remedies available in section 15657, a plaintiff must demonstrate by clear and convincing evidence that defendant is guilty of something more than negligence; he or she must show reckless, oppressive, fraudulent, or malicious conduct. The latter three categories involve 'intentional,' 'willful,' or 'conscious' wrongdoing of a 'despicable' or 'injurious' nature. 'Recklessness' refers to a subjective state of culpability greater than simple negligence, which has been described as a 'deliberate disregard' of the 'high degree of probability' that an injury

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will occur. Recklessness, unlike negligence, involves more than 'inadvertence, incompetence, unskillfulness, or a failure to take precautions' but rather rises to the level of a 'conscious choice of a course of action ... with knowledge of the serious danger to others involved in it.' " (*Delaney v. Baker* (1999) 20 Cal.4th 23, 31–32 [82 Cal.Rptr.2d 610], internal citations omitted.)

- "The purpose of the [Elder Abuse Act] is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect." (*Delaney, supra,* 20 Cal.4th at p. 33.)

- "As amended in 1991, the Elder Abuse Act was designed to protect elderly and dependent persons from abuse, neglect, or abandonment. In addition to adopting measures designed to encourage reporting of abuse and neglect, the Act authorizes the court to award attorney fees to the prevailing plaintiffs and allows survivors to recover pain and suffering damages in cases of intentional and reckless abuse where the elder has died." (*Mack v. Soung* (2000) 80 Cal.App.4th 966, 971–972 [95 Cal.Rptr.2d 830], internal citations omitted.)

- "The effect of the 1991 amendment to the elder abuse law was to … permit a decedent's personal representative or successor to recover pain and suffering damages when plaintiff can prove by clear and convincing evidence recklessness, oppression, fraud, or malice in the commission of elder abuse. Even then, those damages would be subject to the $250,000 cap placed by Civil Code section 3333.2, subdivision (b) for noneconomic damages against a health care provider. In this limited circumstance, the decedent's right to pain and suffering damages would not die with him or her; the damages would be recoverable by a survivor." (*ARA Living Centers—Pacific, Inc. v. Superior Court* (1993) 18 Cal.App.4th 1556, 1563 [23 Cal.Rptr.2d 224].)

- "[I]f the neglect is 'reckless,' or done with 'oppression, fraud or malice,' then the action falls within the scope of section 15657 and as such cannot be considered simply 'based on ... professional negligence' within the meaning of section 15657.2. The use of such language in section 15657, and the explicit exclusion of 'professional negligence' in section 15657.2, make clear the Elder Abuse Act's goal was to provide heightened remedies for, as stated in the legislative history, 'acts of egregious abuse' against elder and dependent adults, while allowing acts of negligence in the rendition of medical services to elder and dependent adults to be governed by laws specifically applicable to such negligence. That only these egregious acts were intended to be sanctioned under section 15657 is further underscored by the fact that the statute requires liability to be proved by a heightened 'clear and convincing evidence' standard." (*Delaney, supra,* 20 Cal.4th at p. 35, internal citation omitted.)

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- "The Act was expressly designed to protect elders and other dependent adults who 'may be subjected to abuse, neglect, or abandonment ... .' Within the Act, two groups of persons who ordinarily assume responsibility for the 'care and custody' of the elderly are identified and defined: health practitioners and care custodians. A 'health practitioner' is defined in section 15610.37 as a 'physician and surgeon, psychiatrist, psychologist, dentist, ...' etc., who 'treats an elder ... for any condition.' 'Care custodians,' on the other hand, are administrators and employees of public and private institutions that provide 'care or services for elders or dependent adults,' including nursing homes, clinics, home health agencies, and similar facilities which house the elderly. The Legislature thus recognized that both classes of professionals—health practitioners as well as care custodians—should be charged with responsibility for the health, safety and welfare of elderly and dependent adults." (*Mack, supra,* 80 Cal.App.4th at p. 974, internal citations omitted.)

Secondary Sources

- 2 California Elder Law (Cont.Ed.Bar 1993–2002) §§ 12.58–12.62

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2903
Neglect—Essential Factual Elements—Employer Defendant
(Welf. & Inst. Code, §§ 15657, 15610.57)

[*Name of plaintiff***] claims [***name of plaintiff/decedent***] was neglected by [***name of defendant***] in violation of the Elder Abuse and Dependent Adult Civil Protection Act and that [***name of defendant***] is responsible for that harm. To establish this claim, [***name of plaintiff***] must prove the following by clear and convincing evidence:**

1. **That [***name of plaintiff/decedent***] was in [***name of defendant***]'s care or custody;**

2. **That [***name of plaintiff/decedent***] was [65 years of age or older/a dependent adult];**

3. **That one or more of [***name of defendant***]'s employees failed to use the degree of care that a reasonable person in the same situation would have used by [***insert one or more of the following:***]**

   [failing to assist in personal hygiene or in the provision of food, clothing, or shelter;]

   [failing to provide medical care for physical and mental health needs;]

   [failing to protect [*name of plaintiff/decedent***] from health and safety hazards;]**

   [failing to prevent malnutrition or dehydration;]

   [*insert other grounds for neglect;***]**

4. **That the employee[s] acted with [recklessness/malice/oppression/ fraud/];**

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

6. **That the employee['s]['] conduct was a substantial factor in causing [***name of plaintiff/decedent***]'s harm; and**

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

[That the employee[s] [was/were] [an] officer[s], [a] director[s], or [a] managing agent[s] of [*name of defendant***] acting in [a corporate/an employment] capacity;] [or]**

[That an officer, a director, or a managing agent of [*name of defendant***] had advance knowledge of the unfitness of the employee[s] and employed [him/her/them] with a knowing disregard of the rights or safety of others;] [or]**

[That an officer, a director, or a managing agent of [*name of defendant***] authorized the employee[‘s][s’] conduct;] [or]**

[That an officer, a director, or a managing agent of [*name of defendant***] knew of the employee[‘s][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

This instruction is intended for plaintiffs who are seeking survival of damages for pain and suffering and/or attorney fees and costs. Plaintiffs who are seeking conventional tort damages can use common-law tort instructions.

If the plaintiff is seeking damages against the employer and the employee, use instruction 2902, *Neglect—Essential Factual Elements—Individual or Individual and Employer Defendants (Welf. & Inst. Code, §§ 15657, 15610.57).*

There appears to be a misprint in of Welfare and Institutions Code section 15657 (b). The reference should be Code of Civil Procedure section 377.34.

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SOURCES AND AUTHORITY

- Welfare and Institutions Code section 15657 provides:

  Where it is proven by clear and convincing evidence that a defendant is liable for physical abuse as defined in Section 15610.63, neglect as defined in Section 15610.57, or fiduciary abuse as defined in Section 15610.30, and that the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of this abuse, in addition to all other remedies otherwise provided by law:
  (a) The court shall award to the plaintiff reasonable attorney's fees and costs. The term "costs" includes, but is not limited to, reasonable fees for the services of a conservator, if any, devoted to the litigation of a claim brought under this article.
  (b) The limitations imposed by Section 337.34 of the Code of Civil Procedure on the damages recoverable shall not apply. However, the damages recovered shall not exceed the damages permitted to be recovered pursuant to subdivision (b) of Section 3333.2 of the Civil Code.
  (c) The standards set forth in subdivision (b) of Section 3294 of the Civil Code regarding the imposition of punitive damages on an employer based upon the acts of an employee shall be satisfied before any damages or attorney's fees permitted under this section may be imposed against an employer.

- Welfare and Institutions Code section 15610.57 provides

  (a) "Neglect" means either of the following:
    (1) The negligent failure of any person having the care or custody of an elder or a dependent adult to exercise that degree of care that a reasonable person in a like position would exercise.
    (2) The negligent failure of the person themselves to exercise that degree of care that a reasonable person in a like position would exercise.
  (b) Neglect includes, but is not limited to, all of the following:
    (1) Failure to assist in personal hygiene, or in the provision of food, clothing, or shelter.
    (2) Failure to provide medical care for physical and mental health needs. No person shall be deemed neglected or abused for the sole reason that he or she voluntarily relies on treatment by spiritual means through prayer alone in lieu of medical treatment.
    (3) Failure to protect from health and safety hazards.
    (4) Failure to prevent malnutrition or dehydration.
    (5) Failure of a person to provide the needs specified in paragraphs (1) to (4), inclusive, for themselves due to ignorance, illiteracy, incompetence, mental limitation, substance abuse, or poor health.

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- Civil Code section 3294(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 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."

- Welfare and Institutions Code section 15657.2 provides: "Notwithstanding this article, any cause of action for injury or damage against a health care provider, as defined in Section 340.5 of the Code of Civil Procedure, based on the health care provider's alleged professional negligence, shall be governed by those laws which specifically apply to those professional negligence causes of action."

- Welfare and Institutions Code section 15610.07 provides:

  "Abuse of an elder or a dependent adult" means either of the following:
  (a) Physical abuse, neglect, financial abuse, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering.
  (b) The deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering.

- Welfare and Institutions Code section 15610.27 provides: " 'Elder' means any person residing in this state, 65 years of age or older."

- Welfare and Institutions Code section 15610.23 provides:

  (a) "Dependent adult" means any person residing in this state, between the ages of 18 and 64 years, who has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights including, but not limited to, persons who have physical or developmental disabilities or whose physical or mental abilities have diminished because of age.
  (b) "Dependent adult" includes any person between the ages of 18 and 64 who is admitted as an inpatient to a 24-hour health facility, as defined in Sections 1250, 1250.2, and 1250.3 of the Health and Safety Code.

- "In order to obtain the remedies available in section 15657, a plaintiff must demonstrate by clear and convincing evidence that defendant is guilty of something

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more than negligence; he or she must show reckless, oppressive, fraudulent, or malicious conduct. The latter three categories involve 'intentional,' 'willful,' or 'conscious' wrongdoing of a 'despicable' or 'injurious' nature. 'Recklessness' refers to a subjective state of culpability greater than simple negligence, which has been described as a 'deliberate disregard' of the 'high degree of probability' that an injury will occur. Recklessness, unlike negligence, involves more than 'inadvertence, incompetence, unskillfulness, or a failure to take precautions' but rather rises to the level of a 'conscious choice of a course of action ... with knowledge of the serious danger to others involved in it.' " (*Delaney v. Baker* (1999) 20 Cal.4th 23, 31–32 [82 Cal.Rptr.2d 610], internal citations omitted.)

- "The purpose of the [Elder Abuse Act] is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect." (*Delaney, supra,* 20 Cal.4th at p. 33.)

- "As amended in 1991, the Elder Abuse Act was designed to protect elderly and dependent persons from abuse, neglect, or abandonment. In addition to adopting measures designed to encourage reporting of abuse and neglect, the Act authorizes the court to award attorney fees to the prevailing plaintiffs and allows survivors to recover pain and suffering damages in cases of intentional and reckless abuse where the elder has died." (*Mack v. Soung* (2000) 80 Cal.App.4th 966, 971–972 [95 Cal.Rptr.2d 830], internal citations omitted.)

- "The effect of the 1991 amendment to the elder abuse law was to … permit a decedent's personal representative or successor to recover pain and suffering damages when plaintiff can prove by clear and convincing evidence recklessness, oppression, fraud, or malice in the commission of elder abuse. Even then, those damages would be subject to the $250,000 cap placed by Civil Code section 3333.2, subdivision (b) for noneconomic damages against a health care provider. In this limited circumstance, the decedent's right to pain and suffering damages would not die with him or her; the damages would be recoverable by a survivor." (*ARA Living Centers - Pacific, Inc. v. Superior Court* (1993) 18 Cal.App.4th 1556, 1563 [23 Cal.Rptr.2d 224].)

- "[I]f the neglect is 'reckless,' or done with 'oppression, fraud or malice,' then the action falls within the scope of section 15657 and as such cannot be considered simply 'based on ... professional negligence' within the meaning of section 15657.2. The use of such language in section 15657, and the explicit exclusion of 'professional negligence' in section 15657.2, make clear the Elder Abuse Act's goal was to provide heightened remedies for, as stated in the legislative history, 'acts of egregious abuse' against elder and dependent adults, while allowing acts of negligence in the rendition of medical services to elder and dependent adults to be governed by laws specifically

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applicable to such negligence. That only these egregious acts were intended to be sanctioned under section 15657 is further underscored by the fact that the statute requires liability to be proved by a heightened 'clear and convincing evidence' standard." (*Delaney, supra*, 20 Cal.4th at p. 35, internal citation omitted.)

- "The Act was expressly designed to protect elders and other dependent adults who 'may be subjected to abuse, neglect, or abandonment ... .' Within the Act, two groups of persons who ordinarily assume responsibility for the 'care and custody' of the elderly are identified and defined: health practitioners and care custodians. A 'health practitioner' is defined in section 15610.37 as a 'physician and surgeon, psychiatrist, psychologist, dentist, ...' etc., who 'treats an elder ... for any condition.' 'Care custodians,' on the other hand, are administrators and employees of public and private institutions that provide 'care or services for elders or dependent adults,' including nursing homes, clinics, home health agencies, and similar facilities which house the elderly. The Legislature thus recognized that both classes of professionals—health practitioners as well as care custodians—should be charged with responsibility for the health, safety and welfare of elderly and dependent adults." (*Mack, supra*, 80 Cal.App.4th at p. 974, internal citations omitted.)

Secondary Sources

- 2 California Elder Law (Cont.Ed.Bar 1993–2002) §§ 12.58–12.62

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2904
Physical Abuse—Essential Factual Elements—Individual or Individual and Employer Defendants (Welf. & Inst. Code, §§ 15657, 15610.63)

[*Name of plaintiff***] claims that [[he/she]***name of decedent***] was physically abused by [***name of defendant***] in violation of the Elder Abuse and Dependent Adult Civil Protection Act. To establish this claim, [***name of plaintiff***] must prove the following by clear and convincing evidence:**

1. **That [***name of defendant***] physically abused [***name of plaintiff/decedent***] by [***insert applicable grounds for abuse***];**

2. **That [***name of plaintiff/decedent***] was [65 years of age or older/a dependent adult];**

3. **That [***name of defendant***] acted with [recklessness/malice/oppression/ fraud];**

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

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

[[*Name of plaintiff***] also claims that [***name of defendant employer***] is responsible for the harm. To establish this claim, [***name of plaintiff***] must prove [***insert one or more of the following:***]]**

1. **[That [***name of defendant employee***] was an officer, a director, or a managing agent of [***name of defendant employer***] acting in a [a corporate/an employment] capacity;] [or]**

2. **[That an officer, a director, or a managing agent of [***name of defendant employer***] had advance knowledge of the unfitness of [***name of defendant employee***] 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 employer***] authorized [***name of defendant employee***]'s conduct;] [or]**

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4. [That an officer, a director, or a managing agent of [*name of defendant employer***] knew of [***name of defendant employee***]'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

This instruction is intended for plaintiffs who are seeking survival of damages for pain and suffering and/or attorney fees and costs. Plaintiffs who are seeking conventional tort damages can use common law tort instructions.

Add the second bracketed portion if the plaintiff is also seeking damages against the defendant's employer. If the plaintiff is only seeking damages against the employer, use instruction 2905, *Physical Abuse—Essential Factual Elements—Employer Defendant (Welf. & Inst. Code, §§ 15657, 15610.63).*

There appears to be a misprint in of Welfare and Institutions Code section 15657 (b). The reference should be Code of Civil Procedure section 377.34.

SOURCES AND AUTHORITY

- Welfare and Institutions Code section 15657 provides:

  Where it is proven by clear and convincing evidence that a defendant is liable for physical abuse as defined in Section 15610.63, neglect as defined in Section 15610.57, or fiduciary abuse as defined in Section 15610.30, and that the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of this abuse, in addition to all other remedies otherwise provided by law:
  (a) The court shall award to the plaintiff reasonable attorney's fees and costs. The term "costs" includes, but is not limited to, reasonable fees for the services of a conservator, if any, devoted to the litigation of a claim brought under this article.
  (b) The limitations imposed by Section 337.34 of the Code of Civil Procedure on the damages recoverable shall not apply. However, the damages recovered shall not exceed the damages permitted to be recovered pursuant to subdivision (b) of Section 3333.2 of the Civil Code.
  (c) The standards set forth in subdivision (b) of Section 3294 of the Civil Code regarding the imposition of punitive damages on an employer based upon the acts

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of an employee shall be satisfied before any damages or attorney's fees permitted under this section may be imposed against an employer.

- Welfare and Institutions Code section 15610.63 provides:

  "Physical abuse" means any of the following:
  (a) Assault, as defined in Section 240 of the Penal Code.
  (b) Battery, as defined in Section 242 of the Penal Code.
  (c) Assault with a deadly weapon or force likely to produce great bodily injury, as defined in Section 245 of the Penal Code.
  (d) Unreasonable physical constraint, or prolonged or continual deprivation of food or water.
  (e) Sexual assault, that means any of the following:
    (1) Sexual battery, as defined in Section 243.4 of the Penal Code.
    (2) Rape, as defined in Section 261 of the Penal Code.
    (3) Rape in concert, as described in Section 264.1 of the Penal Code.
    (4) Spousal rape, as defined in Section 262 of the Penal Code.
    (5) Incest, as defined in Section 285 of the Penal Code.
    (6) Sodomy, as defined in Section 286 of the Penal Code.
    (7) Oral copulation, as defined in Section 288a of the Penal Code.
    (8) Sexual penetration, as defined in Section 289 of the Penal Code.
  (f) Use of a physical or chemical restraint or psychotropic medication under any of the following conditions:
    (1) For punishment.
    (2) For a period beyond that for which the medication was ordered pursuant to the instructions of a physician and surgeon licensed in the State of California, who is providing medical care to the elder or dependent adult at the time the instructions are given.
    (3) For any purpose not authorized by the physician and surgeon.

- "The purpose of the [Elder Abuse Act] is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect." (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33 [82 Cal.Rptr.2d 610].)

- "In order to obtain the remedies available in section 15657, a plaintiff must demonstrate by clear and convincing evidence that defendant is guilty of something more than negligence; he or she must show reckless, oppressive, fraudulent, or malicious conduct. The latter three categories involve 'intentional,' 'willful,' or 'conscious' wrongdoing of a 'despicable' or 'injurious' nature. 'Recklessness' refers to a subjective state of culpability greater than simple negligence, which has been described as a 'deliberate disregard' of the 'high degree of probability' that an injury

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will occur. Recklessness, unlike negligence, involves more than 'inadvertence, incompetence, unskillfulness, or a failure to take precautions' but rather rises to the level of a 'conscious choice of a course of action ... with knowledge of the serious danger to others involved in it.' " (*Delaney, supra,* 20 Cal.4th at pp. 31–32, internal citations omitted.)

- "As amended in 1991, the Elder Abuse Act was designed to protect elderly and dependent persons from abuse, neglect, or abandonment. In addition to adopting measures designed to encourage reporting of abuse and neglect, the Act authorizes the court to award attorney fees to the prevailing plaintiffs and allows survivors to recover pain and suffering damages in cases of intentional and reckless abuse where the elder has died." (*Mack v. Soung* (2000) 80 Cal.App.4th 966, 971–972 [95 Cal.Rptr.2d 830], internal citations omitted.)

Secondary Sources

- 2 California Elder Law (Cont.Ed.Bar 1993–2002) §§ 12.58–12.62

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2905
Physical Abuse—Essential Factual Elements—Employer Defendant
(Welf. & Inst. Code, §§ 15657, 15610.63)

[*Name of plaintiff***] claims that [he/she/[***name of decedent***]] was physically abused by [name of defendant] in violation of the Elder Abuse and Dependent Adult Civil Protection Act and that [***name of defendant***] is responsible for the harm. To establish this claim, [***name of plaintiff***] must prove the following by clear and convincing evidence:**

1. **That one or more employees of [***name of defendant***] physically abused [***name of plaintiff/decedent***] by [***insert applicable grounds for abuse***];**

2. **That [***name of plaintiff/decedent***] was [65 years of age or older/a dependent adult];**

3. **That the employee[s] acted with [recklessness/malice/oppression/ fraud];**

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

5. **That the employee[‘s][s’] conduct was a substantial factor in causing [***name of plaintiff/decedent***]’s harm; and**

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

   [That the employee[s] [was/were] [an] officer[s], [a] director[s], or [a] managing agent[s] of [*name of defendant***] acting in [a corporate/an employment] capacity;] [or]**

   [That an officer, a director, or a managing agent of [*name of defendant***] had advance knowledge of the unfitness of the employee[s] and employed [him/her/them] with a knowing disregard of the rights or safety of others;] [or]**

   [That an officer, a director, or a managing agent of [*name of defendant***] authorized the employee[‘s][s’] conduct;] [or]**

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[That an officer, a director, or a managing agent of [*name of defendant*] knew of the employee[‘s][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

This instruction is intended for plaintiffs who are seeking survival of damages for pain and suffering and/or attorney fees and costs. Plaintiffs who are seeking conventional tort damages can use common-law tort instructions.

If the plaintiff is seeking damages against the employer and the employee, use instruction 2904, *Physical Abuse—Essential Factual Elements—Individual or Individual and Employer Defendants (Welf. & Inst. Code, §§ 15657, 15610.63).*

There appears to be a misprint in of Welfare and Institutions Code section 15657 (b). The reference should be Code of Civil Procedure section 377.34.

SOURCES AND AUTHORITY

- Welfare and Institutions Code section 15657 provides:

  Where it is proven by clear and convincing evidence that a defendant is liable for physical abuse as defined in Section 15610.63, neglect as defined in Section 15610.57, or fiduciary abuse as defined in Section 15610.30, and that the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of this abuse, in addition to all other remedies otherwise provided by law:
  (a) The court shall award to the plaintiff reasonable attorney’s fees and costs. The term “costs” includes, but is not limited to, reasonable fees for the services of a conservator, if any, devoted to the litigation of a claim brought under this article.
  (b) The limitations imposed by Section 337.34 of the Code of Civil Procedure on the damages recoverable shall not apply. However, the damages recovered shall not exceed the damages permitted to be recovered pursuant to subdivision (b) of Section 3333.2 of the Civil Code.
  (c) The standards set forth in subdivision (b) of Section 3294 of the Civil Code regarding the imposition of punitive damages on an employer based upon the acts

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of an employee shall be satisfied before any damages or attorney's fees permitted under this section may be imposed against an employer.

- Welfare and Institutions Code section 15610.63 provides:

  "Physical abuse" means any of the following:
  (a) Assault, as defined in Section 240 of the Penal Code.
  (b) Battery, as defined in Section 242 of the Penal Code.
  (c) Assault with a deadly weapon or force likely to produce great bodily injury, as defined in Section 245 of the Penal Code.
  (d) Unreasonable physical constraint, or prolonged or continual deprivation of food or water.
  (e) Sexual assault, that means any of the following:
    (1) Sexual battery, as defined in Section 243.4 of the Penal Code.
    (2) Rape, as defined in Section 261 of the Penal Code.
    (3) Rape in concert, as described in Section 264.1 of the Penal Code.
    (4) Spousal rape, as defined in Section 262 of the Penal Code.
    (5) Incest, as defined in Section 285 of the Penal Code.
    (6) Sodomy, as defined in Section 286 of the Penal Code.
    (7) Oral copulation, as defined in Section 288a of the Penal Code.
    (8) Sexual penetration, as defined in Section 289 of the Penal Code.
  (f) Use of a physical or chemical restraint or psychotropic medication under any of the following conditions:
    (1) For punishment.
    (2) For a period beyond that for which the medication was ordered pursuant to the instructions of a physician and surgeon licensed in the State of California, who is providing medical care to the elder or dependent adult at the time the instructions are given.
    (3) For any purpose not authorized by the physician and surgeon.

- Civil Code section 3294(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 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."

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- "The purpose of the [Elder Abuse Act] is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect." (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33 [82 Cal.Rptr.2d 610].)

- "In order to obtain the remedies available in section 15657, a plaintiff must demonstrate by clear and convincing evidence that defendant is guilty of something more than negligence; he or she must show reckless, oppressive, fraudulent, or malicious conduct. The latter three categories involve 'intentional,' 'willful,' or 'conscious' wrongdoing of a 'despicable' or 'injurious' nature. 'Recklessness' refers to a subjective state of culpability greater than simple negligence, which has been described as a 'deliberate disregard' of the 'high degree of probability' that an injury will occur. Recklessness, unlike negligence, involves more than 'inadvertence, incompetence, unskillfulness, or a failure to take precautions' but rather rises to the level of a 'conscious choice of a course of action ... with knowledge of the serious danger to others involved in it.' " (*Delaney, supra*, 20 Cal.4th at pp. 31–32, internal citations omitted.)

- "As amended in 1991, the Elder Abuse Act was designed to protect elderly and dependent persons from abuse, neglect, or abandonment. In addition to adopting measures designed to encourage reporting of abuse and neglect, the Act authorizes the court to award attorney fees to the prevailing plaintiffs and allows survivors to recover pain and suffering damages in cases of intentional and reckless abuse where the elder has died." (*Mack v. Soung* (2000) 80 Cal.App.4th 966, 971–972 [95 Cal.Rptr.2d 830], internal citations omitted.)

<u>Secondary Sources</u>

- 2 California Elder Law (Cont.Ed.Bar 1993–2002) §§ 12.58–12.62

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2906
Abduction—Essential Factual Elements
Individual or Individual and Employer Defendants
(Welf. & Inst. Code, §§ 15657.05, 15610.06)

[*Name of plaintiff***] claims that [***name of defendant***] abducted [[him/her]/[***name of decedent***] in violation of the Elder Abuse and Dependent Adult Civil Protection Act. To establish this claim, [***name of plaintiff***] must prove the following by clear and convincing evidence:**

1. **That [***name of defendant***] [removed [***name of plaintiff/decedent***] from California and] restrained [him/her/[***name of plaintiff/decedent***]] from returning to California;**

2. **That [***name of plaintiff/decedent***] was [65 years of age or older/a dependent adult];**

3. **[That [***name of plaintiff/decedent***] did not have the capacity to consent to the [removal/restraint];]**

   [That [[*name of conservator***]/the court] did not consent to the [removal/restraint];]**

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

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

[[*Name of plaintiff***] also claims that [***name of defendant employer***] is responsible for the harm. To establish this claim, [***name of plaintiff***] must prove [***Insert one or more of the following:***]**

1. **[That [***name of defendant employee***] was an officer, a director, or a managing agent of [***name of defendant employer***] acting in [a corporate/an employment] capacity;] [or]**

2. **[That an officer, a director, or a managing agent of [***name of defendant employer***] had advance knowledge of the unfitness of [***name of***

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defendant employee] **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 employer***] authorized [***name of defendant employee***]'s conduct;] [or]**

4. **[That an officer, a director, or a managing agent of [***name of defendant employer***] knew of [***name of defendant employee***]'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

This instruction is intended for plaintiffs who are seeking survival of damages for pain and suffering and/or attorney fees and costs. Plaintiffs who are seeking conventional tort damages can use common-law tort instructions.

Add the second bracketed portion if the plaintiff is also seeking damages against the defendant's employer. If the plaintiff is seeking damages only against the employer, use instruction 2907, *Abduction—Essential Factual Elements—Employer Defendant (Welf. & Inst. Code, §§ 15657.05, 15610.06).*

SOURCES AND AUTHORITY

- Welfare and Institutions Code section 15657.05 provides:

  Where it is proven by clear and convincing evidence that an individual is liable for abduction, as defined in Section 15610.06, in addition to all other remedies otherwise provided by law:
  (a)(1) The court shall award to the plaintiff reasonable attorney's fees and costs. The term "costs" shall include, but is not limited to, costs of representing the abductee and his or her family in this state and any other state in any action related to the abduction and returning of the abductee to this state, as well as travel expenses for returning the abductee to this state and reasonable fees for the services of a conservator, if any, devoted to the litigation of a claim brought under this article.

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(2) The award of attorney's fees shall be governed by the principles set forth in Section 15657.1.

(b) The limitations imposed by Section 377.34 of the Code of Civil Procedure on the damages recoverable shall not apply. However, the damages recovered shall not exceed the damages permitted to be recovered pursuant to subdivision (b) of Section 3333.2 of the Civil Code.

(c) The standards set forth in subdivision (b) of Section 3294 of the Civil Code regarding the imposition of punitive damages on an employer based upon the acts of an employee shall be satisfied before any damages or attorney's fees permitted under this section may be imposed against an employer.

- Welfare and Institutions Code section 15610.06 provides: " 'Abduction' means the removal from this state and the restraint from returning to this state, or the restraint from returning to this state, of any elder or dependent adult who does not have the capacity to consent to the removal from this state and the restraint from returning to this state, or the restraint from returning to this state, as well as the removal from this state or the restraint from returning to this state, of any conservatee without the consent of the conservator or the court."

- "The purpose of the [Elder Abuse Act] is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect." (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33 [82 Cal.Rptr.2d 610].)

- "As amended in 1991, the Elder Abuse Act was designed to protect elderly and dependent persons from abuse, neglect, or abandonment. In addition to adopting measures designed to encourage reporting of abuse and neglect, the Act authorizes the court to award attorney fees to the prevailing plaintiffs and allows survivors to recover pain and suffering damages in cases of intentional and reckless abuse where the elder has died." (*Mack v. Soung* (2000) 80 Cal.App.4th 966, 971–972 [95 Cal.Rptr.2d 830], internal citations omitted.)

Secondary Sources

- 2 California Elder Law (Cont.Ed.Bar 1993–2002) §§ 12.58–12.62

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2907
Abduction—Essential Factual Elements—Employer Defendant
(Welf. & Inst. Code, §§ 15657.05, 15610.06)

[*Name of plaintiff***] claims that [***name of defendant***] abducted [***name of plaintiff/decedent***] in violation of the Elder Abuse and Dependent Adult Civil Protection Act and that [***name of defendant***] is responsible for the harm. To establish this claim, [***name of plaintiff***] must prove the following by clear and convincing evidence:**

1. **That one or more of [***name of defendant***]'s employees [removed [***name of plaintiff/decedent***] from California and] restrained [him/ her/[***name of plaintiff/decedent***]] from returning to California;**

2. **That [***name of plaintiff/decedent***] was [65 years of age or older/a dependent adult];**

3. **[That [***name of plaintiff/decedent***] did not have the capacity to consent to the [removal/restraint];]**

   [That [[*name of conservator***]/the court] did not consent to the [removal/ restraint];]**

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

5. **That the employee['s]['s'] conduct was a substantial factor in causing [***name of plaintiff/decedent***]'s harm; and**

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

   [That the employee[s] [was/were] [an] officer[s], [a] director[s], or [a] managing agent[s] of [*name of defendant***] acting in [a corporate/an employment] capacity;] [or]**

   [That an officer, a director, or a managing agent of [*name of defendant***] had advance knowledge of the unfitness of the employee[s] and employed [him/her/them] with a knowing disregard of the rights or safety of others;] [or]**

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[That an officer, a director, or a managing agent of [*name of defendant*] authorized the employee[‘s][s’] conduct;] [or]

[That an officer, a director, or a managing agent of [*name of defendant*] knew of the employee[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

This instruction is intended for plaintiffs who are seeking survival of damages for pain and suffering and/or attorney fees and costs. Plaintiffs who are seeking conventional tort damages can use common-law tort instructions.

If the plaintiff is seeking damages against the employer and the employee, use instruction 2906, *Abduction—Essential Factual Elements—Individual or Individual and Employer Defendants (Welf. & Inst. Code, §§ 15657, 15610.06).*

SOURCES AND AUTHORITY

- Welfare and Institutions Code section 15657.05 provides:

  Where it is proven by clear and convincing evidence that an individual is liable for abduction, as defined in Section 15610.06, in addition to all other remedies otherwise provided by law:

  (a)(1) The court shall award to the plaintiff reasonable attorney’s fees and costs. The term “costs” shall include, but is not limited to, costs of representing the abductee and his or her family in this state and any other state in any action related to the abduction and returning of the abductee to this state, as well as travel expenses for returning the abductee to this state and reasonable fees for the services of a conservator, if any, devoted to the litigation of a claim brought under this article.

  (2) The award of attorney’s fees shall be governed by the principles set forth in Section 15657.1.

  (b) The limitations imposed by Section 377.34 of the Code of Civil Procedure on the damages recoverable shall not apply. However, the damages recovered shall not

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exceed the damages permitted to be recovered pursuant to subdivision (b) of Section 3333.2 of the Civil Code.

(c) The standards set forth in subdivision (b) of Section 3294 of the Civil Code regarding the imposition of punitive damages on an employer based upon the acts of an employee shall be satisfied before any damages or attorney's fees permitted under this section may be imposed against an employer.

- Welfare and Institutions Code section 15610.06 provides: " 'Abduction' means the removal from this state and the restraint from returning to this state, or the restraint from returning to this state, of any elder or dependent adult who does not have the capacity to consent to the removal from this state and the restraint from returning to this state, or the restraint from returning to this state, as well as the removal from this state or the restraint from returning to this state, of any conservatee without the consent of the conservator or the court."

- Civil Code section 3294(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 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."

- "The purpose of the [Elder Abuse Act] is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect." (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33 [82 Cal.Rptr.2d 610].)

- "As amended in 1991, the Elder Abuse Act was designed to protect elderly and dependent persons from abuse, neglect, or abandonment. In addition to adopting measures designed to encourage reporting of abuse and neglect, the Act authorizes the court to award attorney fees to the prevailing plaintiffs and allows survivors to recover pain and suffering damages in cases of intentional and reckless abuse where the elder has died." (*Mack v. Soung* (2000) 80 Cal.App.4th 966, 971–972 [95 Cal.Rptr.2d 830], internal citations omitted.)

<u>Secondary Sources</u>

- 2 California Elder Law (Cont.Ed.Bar 1993–2002) §§ 12.58–12.62

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2908
"Dependent Adult" Explained (Welf. & Inst. Code, § 15610.23)

A "dependent adult" is a person between the ages of 18 and 64 years [*insert one of the following:***]**

[who has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights. This includes persons who have physical or developmental disabilities or whose physical or mental abilities have diminished because of age.]

[who is admitted as an inpatient to a [*insert 24-hour health facility***].]**

DIRECTIONS FOR USE

Read the alternative that is most appropriate to the facts of the case.

SOURCES AND AUTHORITY

- Welfare and Institutions Code section 15610.23 provides:

  (a) "Dependent adult" means any person residing in this state, between the ages of 18 and 64 years, who has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights including, but not limited to, persons who have physical or developmental disabilities or whose physical or mental abilities have diminished because of age.
  (b) "Dependent adult" includes any person between the ages of 18 and 64 who is admitted as an inpatient to a 24-hour health facility, as defined in Sections 1250, 1250.2, and 1250.3 of the Health and Safety Code.

- Welfare and Institutions Code section 15610.25 provides: " 'Developmentally disabled person' means a person with a developmental disability specified by or as described in subdivision (a) of Section 4512."

<u>Secondary Sources</u>

- 2 California Elder Law (Cont.Ed.Bar 1993–2002) §§ 13.23, 14.25

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2909
"Recklessness" Explained

[*Name of defendant*] acted with "recklessness" if [he/she] knew it was highly probable that [his/her] conduct would cause harm and [he/she] knowingly disregarded this risk.

"Recklessness" is more than just the failure to use reasonable care.

SOURCES AND AUTHORITY

- " 'Recklessness' refers to a subjective state of culpability greater than simple negligence, which has been described as a 'deliberate disregard' of the 'high degree of probability' that an injury will occur. Recklessness, unlike negligence, involves more than 'inadvertence, incompetence, unskillfulness, or a failure to take precautions' but rather rises to the level of a 'conscious choice of a course of action ... with knowledge of the serious danger to others involved in it.' " (*Delaney v. Baker* (1999) 20 Cal.4th 23, 31–32 [82 Cal.Rptr.2d 610], internal citations omitted.)

- In *Conservatorship of Gregory v. Beverly Enterprises, Inc.* (2000) 80 Cal.App.4th 514, 521, the court found that the following instruction adequately defined "recklessness": "[T]he term 'recklessness' requires that the defendant have knowledge of a high degree of probability that dangerous consequences will result from his or her conduct and acts with deliberate disregard of that probability or with a conscious disregard of the probable consequences. Recklessness requires conduct more culpable than mere negligence."

- Restatement Second of Torts section 500 provides: "The actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent."

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2910
"Malice" Explained

"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.

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

SOURCES AND AUTHORITY

- Civil Code section 3294(c)(1) provides: " '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."

- "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.)

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2911
"Oppression" Explained

"Oppression" means that [*name of defendant*]'s conduct was despicable and subjected [*name of plaintiff/decedent*] 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.

SOURCES AND AUTHORITY

- Civil Code section 3294(c)(2) provides: " 'Oppression' means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights."

- "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.)

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2912
"Fraud" Explained

"Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact with the intention of depriving [*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(c)(3) provides: " '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."

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3000
Locality Discrimination—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] engaged in unlawful locality discrimination. To establish this claim, [***name of plaintiff***] must prove the following:**

1. **That [***name of defendant***] [offered to sell/sold/furnished] [***product/service***] at a lower price in one [location/section/community/city] in California than in another [location/section/community/city] in California;**

2. **That [***name of defendant***] intended to destroy competition from an established dealer [or to prevent competition from any person who in good faith intended and attempted to become such a dealer];**

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

The word "price" as used here should be read sufficiently broadly to include "special rebates, collateral contracts, or any device of any nature whereby such discrimination is in substance or fact effected." (Bus. & Prof. Code, § 17049.) To the extent the circumstances of the case warrant it, the word "price" in the instruction may be supplemented or supplanted by other price-related terms.

Business and Professions Code sections 17071 and 17071.5 create rebuttable presumptions regarding the purpose or intent to injure competitors or destroy competition. The Supreme Court has observed: "The obvious and only effect of this provision is to require the defendants to go forward with such proof as would bring them within one of the exceptions or which would negative the prima facie showing of wrongful intent." (*People v. Pay Less Drug Store* (1944) 25 Cal.2d 108, 114 [153 P.2d 9].)

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SOURCES AND AUTHORITY

- Business and Professions Code section 17031 provides: "Locality discrimination means a discrimination between different sections, communities or cities or portions thereof, or between different locations in such sections, communities, cities or portions thereof in this State, by selling or furnishing an article or product, at a lower price in one section, community or city, or any portion thereof, or in one location in such section, community, or city or any portion thereof, than in another."

- Business and Professions Code section 17040 provides: "It is unlawful for any person engaged in the production, manufacture, distribution or sale of any article or product of general use or consumption, with intent to destroy the competition of any regular established dealer in such article or product, or to prevent the competition of any person who in good faith, intends and attempts to become such dealer, to create locality discriminations. [¶] Nothing in this section prohibits the meeting in good faith of a competitive price."

- Business and Professions Code section 17024 provides: " 'Article or product' includes any article, product, commodity, thing of value, service or output of a service trade."

- "The purpose of the Unfair Practices Act (UPA) is 'to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair, dishonest, deceptive, destructive, fraudulent and discriminatory practices by which fair and honest competition is destroyed or prevented.' It forbids most locality discriminations, the use of loss leaders, gifts, secret rebates, boycotts, and 'deceptive, untrue or misleading advertising.' It also prohibits the sale of goods and services below cost." (*Pan Asia Venture Capital Corp. v. Hearst Corp.* (1999) 74 Cal.App.4th 424, 431–432 [88 Cal.Rptr.2d 118], internal citations omitted.)

- "Sections 17031 and 17040 are tailored to address the problem of a distributor, typically a retailer, selling out of many locations, who might use geographical price discrimination as a predatory practice against its own competitors." (*ABC International Traders, Inc. v. Matsushita Electric Corp.* (1997) 14 Cal.4th 1247, 1266 [61 Cal.Rptr.2d 112].)

- "As section 17031 is presently worded, we conclude that the smallest geographic unit it envisages is the individual store or outlet, not the individual purchaser regardless of location." (*Harris v. Capitol Records Distributing Corp.* (1966) 64 Cal.2d 454, 460 [50 Cal.Rptr. 539].)

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- "[T]o fall within [the] prohibition a seller must have at least two different places of business and must sell at a lower price in one than in the other." (*Harris, supra,* 64 Cal.2d at p. 460.)

- Business and Professions Code section 17082 provides, in part: "In any action under this chapter, it is not necessary to allege or prove actual damages or the threat thereof, or actual injury or the threat thereof, to the plaintiff. But, in addition to injunctive relief, any plaintiff in any such action shall be entitled to recover three times the amount of the actual damages, if any, sustained by the plaintiff, as well as three times the actual damages, if any, sustained by any person who has assigned to the plaintiff his claim for damages resulting from a violation of this chapter."

- "While, similar to other cases, damages cannot be awarded in antitrust cases upon sheer guesswork or speculation, the plaintiff seeking damages for loss of profits is required to establish only with reasonable probability the existence of some causal connection between defendant's wrongful act and some loss of the anticipated revenue. Once that has been accomplished, the jury will be permitted to act upon probable and inferential proof and to 'make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly.' " (*Suburban Mobile Homes, Inc. v. AMFAC Communities, Inc.* (1980) 101 Cal.App.3d 532, 545 [161 Cal.Rptr. 811], internal citations omitted.)

- The federal law most comparable to the Unfair Practices Act is the Robinson-Patman Act (15 U.S.C. § 13 et seq.); that act differs substantially from the Unfair Practices Act, however. For a discussion of this subject, see *Turnbull & Turnbull v. ARA Transportation* (1990) 219 Cal.App.3d 816 [268 Cal.Rptr. 856]. One notable difference is that the Robinson-Patman Act requires at least two actual sales. Thus, mere offers to sell cannot violate that act.

<u>Secondary Sources</u>

- 1 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 1997), § 1.02B
- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 591–596

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3001
Below Cost Sales—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] engaged in unlawful sales below cost. To establish this claim, [***name of plaintiff***] must prove the following:**

1. **[That [***name of defendant***] [offered to sell/sold] [***product/service***] at a price that is below cost;]**

   [That [*name of defendant***] gave away [***product/service***];]**

2. **That [***name of defendant***]'s purpose was to injure competitors or destroy competition;**

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

The word "price" as used here should be read sufficiently broadly to include "special rebates, collateral contracts, or any device of any nature whereby such sale below cost is in substance or fact effected." (Bus. & Prof. Code, § 17049.) To the extent the circumstances of the case warrant it, the word "price" in the instruction may be supplemented or supplanted by other such price-related terms.

For instructions on "cost" see instruction 3003, *Definition of "Cost"*; instruction 3004, *Presumptions Concerning Costs—Manufacturer*; instruction 3005, *Presumptions Concerning Costs—Distribution*; and instruction 3006, *Methods of Allocating Costs to an Individual Product.*

Business and Professions Code sections 17071 and 17071.5 create rebuttable presumptions of the purpose or intent to injure competitors or destroy competition. The Supreme Court has observed "[t]he obvious and only effect of this provision is to require the defendants to go forward with such proof as would bring them within one of the

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exceptions or which would negative the prima facie showing of wrongful intent." (*People v. Pay Less Drug Store* (1944) 25 Cal.2d 108, 114 [153 P.2d 9].)

SOURCES AND AUTHORITY

- Business and Professions Code section 17043 provides: "It is unlawful for any person engaged in business within this State to sell any article or product at less than the cost thereof to such vendor, or to give away any article or product, for the purpose of injuring competitors or destroying competition."

- Business and Professions Code section 17024 provides: " 'Article or product' includes any article, product, commodity, thing of value, service or output of a service trade."

- "The purpose of the Unfair Practices Act (UPA) is 'to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair, dishonest, deceptive, destructive, fraudulent and discriminatory practices by which fair and honest competition is destroyed or prevented.' It forbids most locality discriminations, the use of loss leaders, gifts, secret rebates, boycotts, and 'deceptive, untrue or misleading advertising.' It also prohibits the sale of goods and services below cost." (*Pan Asia Venture Capital Corp. v. Hearst Corp.* (1999) 74 Cal.App.4th 424, 431–432 [88 Cal.Rptr.2d 118], internal citations omitted.)

- "Section 17043 uses the word 'purpose,' not 'intent,' not 'knowledge.' We therefore conclude that to violate section 17043, a company must act with the purpose, i.e., the desire, of injuring competitors or destroying competition." (*Cel-Tech Communications, Inc. et al. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 174–175 [83 Cal.Rptr.2d 548].**)**

- "Proof that a defendant sold or distributed articles or products below cost will be 'presumptive evidence of the purpose or intent to injure competitors or destroy competition.' " (*Pan Asia Venture Capital Corp., supra,* 74 Cal.App.4th at p. 432, internal citation omitted.)

- "Determination of the defendant's cost has always been treated as an issue of fact." (*Pan Asia Venture Capital Corp., supra,* 74 Cal.App.4th at p. 433.)

- Business and Professions Code section 17082 provides, in part: "In any action under this chapter, it is not necessary to allege or prove actual damages or the threat thereof, or actual injury or the threat thereof, to the plaintiff. But, in addition to injunctive relief, any plaintiff in any such action shall be entitled to recover three times the

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amount of the actual damages, if any, sustained by the plaintiff, as well as three times the actual damages, if any, sustained by any person who has assigned to the plaintiff his claim for damages resulting from a violation of this chapter."

- "While, similar to other cases, damages cannot be awarded in antitrust cases upon sheer guesswork or speculation, the plaintiff seeking damages for loss of profits is required to establish only with reasonable probability the existence of some causal connection between defendant's wrongful act and some loss of the anticipated revenue. Once that has been accomplished, the jury will be permitted to act upon probable and inferential proof and to 'make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly.' " (*Suburban Mobile Homes, Inc. v. AMFAC Communities, Inc.* (1980) 101 Cal.App.3d 532, 545 [161 Cal.Rptr. 811], internal citations omitted.)

- The federal law most comparable to the Unfair Practices Act is the Robinson-Patman Act (15 U.S.C. § 13 et seq.); that act differs substantially from the Unfair Practices Act, however. For a discussion of this subject, see *Turnbull & Turnbull v. ARA Transportation* (1990) 219 Cal.App.3d 816 [268 Cal.Rptr. 856]. One notable difference is that the Robinson-Patman Act requires at least two actual sales. Thus, mere offers to sell cannot violate that act.

Secondary Sources

- 1 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 1997), § 1.02A
- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 591–596

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3002
Loss Leader Sales—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] [offered to sell/sold/ offered the use of] [***product/service***] as an unlawful loss leader. To establish this claim, [***name of plaintiff***] must prove the following:**

1. **That [***name of defendant***] [offered to sell/sold/offered the use of] [***product/service***] at prices that were below [his/her/its] costs;**

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

   [That [*name of defendant***]'s purpose was to influence, promote, or encourage the purchase of other merchandise from [***name of defendant***]; [or]]**

   [That the [offer/sale] had a tendency or capacity to mislead or deceive purchasers or potential purchasers; [or]]

   [That the [offer/sale] took business away from or otherwise injured competitors;]

3. **That [***name of defendant***]'s purpose was [also] to injure competitors or destroy competition;**

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

The bracketed word "also" in element 3 should be read only if the first alternate bracketed sentence in element 2 has been read.

The word "price" as used here should be read sufficiently broadly to include "special rebates, collateral contracts, or any device of any nature whereby such sale below cost is in substance or fact effected." (Bus. & Prof. Code, § 17049.) To the extent the

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circumstances of the case warrant it, the word "price" in the instruction may be supplemented or supplanted by other price-related terms.

For instructions on "cost" see instruction 3003, *Definition of "Cost"*; instruction 3004, *Presumptions Concerning Costs—Manufacturer*; instruction 3005, *Presumptions Concerning Costs—Distribution*; and instruction 3006, *Methods of Allocating Costs to an Individual Product.*

Business and Professions Code sections 17071 and 17071.5 create rebuttable presumptions regarding the purpose or intent to injure competitors or destroy competition. The Supreme Court has observed: "The obvious and only effect of this provision is to require the defendants to go forward with such proof as would bring them within one of the exceptions or which would negative the prima facie showing of wrongful intent. (*People v. Pay Less Drug Store* (1944) 25 Cal.2d 108, 114 [153 P.2d 9].)

SOURCES AND AUTHORITY

- Business and Professions Code section 17044 provides: "It is unlawful for any person engaged in business within this State to sell or use any article or product as a 'loss leader' as defined in Section 17030 of this chapter."

- Business and Professions Code section 17030 provides:

  "Loss leader" means any article or product sold at less than cost:
  (a) Where the purpose is to induce, promote or encourage the purchase of other merchandise; or
  (b) Where the effect is a tendency or capacity to mislead or deceive purchasers or prospective purchasers; or
  (c) Where the effect is to divert trade from or otherwise injure competitors.

- Business and Professions Code section 17024 provides: " 'Article or product' includes any article, product, commodity, thing of value, service or output of a service trade."

- "The purpose of the Unfair Practices Act (UPA) is 'to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair, dishonest, deceptive, destructive, fraudulent and discriminatory practices by which fair and honest competition is destroyed or prevented.' It forbids most locality discriminations, the use of loss leaders, gifts, secret rebates, boycotts, and 'deceptive, untrue or misleading advertising.' It also prohibits the sale of goods

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and services below cost." (*Pan Asia Venture Capital Corp. v. Hearst Corp.* (1999) 74 Cal.App.4th 424, 431–432 [88 Cal.Rptr.2d 118], internal citations omitted.)

- "[N]otwithstanding the absence of any language to this effect in either section 17044 or section 17030, intent to injure competitors or to destroy competition is required for violation of section 17044. In other words, for competition to be unfair under the Act, the person engaging in the challenged practice must possess an intent to injure his competitors or destroy his competition." (*Dooley's Hardware Mart v. Food Giant Markets, Inc.* (1971) 21 Cal.App.3d 513, 517 [98 Cal.Rptr. 543].)

- "We conclude that to violate sections 17043 and 17044, part of the Unfair Practices Act, which prohibit below-cost sales and loss leaders, a company must act with the purpose, i.e., the desire, of injuring competitors or destroying competition." (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 178 [83 Cal.Rptr.2d 548].)

- It has been held by one federal district court interpreting California's loss leader statute that it applies only to product sales, not giveaways. (*Co-Opportunities, Inc. v. National Broadcasting Co., Inc.* (N.D. Cal. 1981) 510 F.Supp. 43, 49.)

- Business and Professions Code section 17082 provides, in part: "In any action under this chapter, it is not necessary to allege or prove actual damages or the threat thereof, or actual injury or the threat thereof, to the plaintiff. But, in addition to injunctive relief, any plaintiff in any such action shall be entitled to recover three times the amount of the actual damages, if any, sustained by the plaintiff, as well as three times the actual damages, if any, sustained by any person who has assigned to the plaintiff his claim for damages resulting from a violation of this chapter."

- "While, similar to other cases, damages cannot be awarded in antitrust cases upon sheer guesswork or speculation, the plaintiff seeking damages for loss of profits is required to establish only with reasonable probability the existence of some causal connection between defendant's wrongful act and some loss of the anticipated revenue. Once that has been accomplished, the jury will be permitted to act upon probable and inferential proof and to 'make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly.' " (*Suburban Mobile Homes, Inc. v. AMFAC Communities, Inc.* (1980) 101 Cal.App.3d 532, 545 [161 Cal.Rptr. 811], internal citations omitted.)

- The federal law most comparable to the Unfair Practices Act is the Robinson-Patman Act (15 U.S.C. § 13 et seq.); that act differs substantially from the Unfair Practices Act, however. For a discussion of this subject, see *Turnbull & Turnbull v. ARA*

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Transportation (1990) 219 Cal.App.3d 816 [268 Cal.Rptr. 856]. One notable difference is that the Robinson-Patman Act requires at least two actual sales. Thus, mere offers to sell cannot violate that act.

Secondary Sources

- 1 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 1997), § 1.02D
- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, § 595

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3003
Definition of "Cost"

The term "cost" means all costs of doing business, including fixed costs that do not tend to change with sales, such as heat and light, as well as variable costs that do tend to change with sales, such as sales commissions.

Costs of doing business may include the following:

1. **Labor, including salaries of executives and officers;**
2. **Rent and utilities;**
3. **Interest on loans;**
4. **Depreciation;**
5. **Selling cost;**
6. **Maintenance of equipment;**
7. **Delivery costs;**
8. **Credit losses;**
9. **Advertising costs;**
10. **Licenses, taxes; and**
11. **Insurance.**

[The term "cost" as applied to warranty service agreements also includes the cost of parts and delivery of the parts.]

[The term "cost" as applied to distribution also includes either the invoice cost or replacement cost of the product, whichever is lower.]

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[The term "cost" as applied to services also includes the prevailing wage at the time and place these services were provided if [*name of defendant*] was paying less than the prevailing wage.]

Any discounts given for cash payments may not be used to lower costs.

DIRECTIONS FOR USE

The bracketed paragraphs should be inserted as appropriate to the facts.

In cases involving the sale of cellular telephones and cigarettes, Business and Professions Code sections 17026.1 and 17026.5 measure "cost" somewhat differently.

SOURCES AND AUTHORITY

- Business and Professions Code section 17026 provides:

  > "Cost" as applied to production includes the cost of raw materials, labor and all overhead expenses of the producer.
  > "Cost" as applied to distribution means the invoice or replacement cost, whichever is lower, of the article or product to the distributor and vendor, plus the cost of doing business by the distributor and vendor and in the absence of proof of cost of doing business a markup of 6 percent on such invoice or replacement cost shall be prima facie proof of such cost of doing business.
  > "Cost" as applied to warranty service agreements includes the cost of parts, transporting the parts, labor, and all overhead expenses of the service agency.
  > Discounts granted for cash payments shall not be used to reduce costs.

- Business and Professions Code section 17029 provides: " 'Cost of doing business' or 'overhead expense' means all costs of doing business incurred in the conduct of the business and shall include without limitation the following items of expense: labor (including salaries of executives and officers), rent, interest on borrowed capital, depreciation, selling cost, maintenance of equipment, delivery costs, credit losses, all types of licenses, taxes, insurance and advertising."

- Business and Professions Code section 17076 provides: "In any action brought under this chapter, where persons are employed or performing services for any person or in

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the conduct of the business wherein such person is charged with a violation of this chapter, and are so employed or performing such services without compensation or at a wage lower than that prevailing at the time and place of the service for the particular services performed, such services shall be charged as an expense of the business in which rendered and at the rate of the wage for the services rendered prevailing at the time of the service at the place where rendered."

- "Determination of the defendant's cost has always been treated as an issue of fact." (*Pan Asia Venture Capital Corp. v. Hearst Corp.* (1999) 74 Cal.App.4th 424, 433 [88 Cal.Rptr.2d 118].)

- "These statutes embody California's fully allocated cost standard, that is, a fair allocation of all fixed or variable costs associated with production of the article or product." (*Pan Asia Venture Capital Corp., supra,* 74 Cal.App.4th at p. 432, footnote omitted.)

- "Cost is to be measured as 'the fair average cost of production over a reasonable time, rather than the cost of one item on a particular occasion.' " (*Pan Asia Venture Capital Corp., supra,* 74 Cal.App.4th at p. 432, fn. 6, internal citation omitted.)

- "Variable costs are costs that vary with changes in output, while fixed costs are those that do not vary with changes in output." (*Turnbull & Turnbull v. ARA Transportation Inc.* (1990) 219 Cal.App.3d 811, 820 [268 Cal.Rptr. 856].)

- "California employs a fully allocated cost standard to determine whether a sale has violated section 17043. Under sections 17026 and 17029 … cost means invoice cost plus the vendor's full cost of doing business or six percent." (*G.H.I.I. v. MTS Inc.* (1983) 147 Cal.App.3d 256, 275 [195 Cal.Rptr 211], internal citations omitted.)

- "We find the use of the fully allocated cost method, when viewed in conjunction with the injurious intent requirement of section 17043, is rationally related to the valid legislative purpose … as it assists in preventing the creation or perpetuation of monopolies." (*Turnbull & Turnbull, supra,* 219 Cal.App.3d at p. 822.)

- "To be legally acceptable, the allocation of indirect or fixed overhead costs to a particular product or service must be reasonably related to the burden such product or service imposes on the overall cost of doing business." (*Turnbull & Turnbull, supra,* 219 Cal.App.3d at p. 822.)

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Secondary Sources

- 1 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 1997), § 1.02A.4
- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 591–596

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3004
Presumptions Concerning Costs—Manufacturer

A manufacturer's costs include the cost of raw materials and the costs of manufacturing.

The cost of manufacturing is the average cost of manufacture over a reasonable time, rather than the cost of one item at a particular time.

[If [*name of defendant***]'s cost for raw materials cannot be computed, the cost is presumed to be the prevailing price for similar raw materials at the time and place those materials would usually be purchased.]**

[If [*name of defendant***]'s trade or industry has an established cost study or survey for the geographic area in this case, that cost survey may be considered in calculating [***name of defendant***]'s costs.]**

[[*Name of defendant***]'s delivery costs are presumed to be the tariffs set by the California Public Utilities Commission, but this presumption may be overcome by other evidence.]**

DIRECTIONS FOR USE

The bracketed sentences should be inserted as necessary.

SOURCES AND AUTHORITY

- Business and Professions Code section 17026 provides, in part: " 'Cost' as applied to production includes the cost of raw materials, labor and all overhead expenses of the producer."

- Business and Professions Code section 17072 provides: "Where a particular trade or industry, of which a person complained against is a member, has an established cost survey for the locality and vicinity in which the offense is committed, that cost survey is competent evidence to be used in proving the costs of such person."

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- Business and Professions Code section 17073 provides: "Proof of average overall cost of doing business for any particular inventory period when added to the cost of production of each article or product, as to a producer, or invoice or replacement cost, whichever is lower, of each article or product, as to a distributor, is presumptive evidence of cost of each such article or product involved in any action brought under this chapter."

- Business and Professions Code section 17074 provides: "Proof of transportation tariffs when fixed and approved by the Public Utilities Commission of the State of California is presumptive evidence of delivery cost."

- Business and Professions Code section 17077 provides: "In any action or prosecution for sales below cost in violation of this chapter, if the defendant acquires his raw materials for a consideration not wholly or definitely computable in money, the cost of the raw materials shall be presumed to be the prevailing market price for similar raw materials in the ordinary channels of trade in the locality or vicinity in which such raw materials were acquired, at the time of the acquisition."

- "Determination of the defendant's cost has always been treated as an issue of fact." (*Pan Asia Venture Capital Corp. v. Hearst Corp.* (1999) 74 Cal.App.4th 424, 433 [88 Cal.Rptr.2d 118].)

- "California appears to have adopted a very expansive approach to the evidence that may be used to establish cost; no formula has been expressly sustained or denounced." (*Pan Asia Venture Capital Corp., supra,* 74 Cal.App.4th at p. 436.)

- "These statutes embody California's fully allocated cost standard, that is, a fair allocation of all fixed or variable costs associated with production of the article or product." (*Pan Asia Venture Capital Corp., supra,* 74 Cal.App.4th at p. 432, footnote omitted.)

- "Cost is to be measured as 'the fair average cost of production over a reasonable time, rather than the cost of one item on a particular occasion.' " (*Pan Asia Venture Capital Corp., supra,* 74 Cal.App.4th at p. 432, fn. 6, internal citation omitted.)

<u>Secondary Sources</u>

- 1 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 1997), § 1.02A.4
- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 591–596

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3005
Presumptions Concerning Costs—Distributor

A distributor's costs include the cost of the product being distributed and the cost of doing business as a distributor.

The cost of the product being distributed is the amount [*name of defendant***] paid for the product or [his/her/its] cost of replacing the product, whichever is less.**

[*Name of defendant***]'s cost of doing business as a distributor is the average cost of distribution over a reasonable time, rather than the cost of distributing one item at a particular time.**

[If [*name of defendant***]'s trade or industry has an established cost study or survey for the geographic area in this case, that cost survey may be considered in calculating [***name of defendant***]'s costs.]**

[If there is no other proof of the cost of doing business, a markup of six percent on the invoice or replacement cost of an article or product is presumed to be [*name of defendant***]'s additional cost of doing business.]**

[[*Name of defendant***]'s delivery costs are presumed to be the tariffs set by the California Public Utilities Commission, but this presumption may be overcome by other evidence.]**

DIRECTIONS FOR USE

Presumably this instruction would also apply to sellers that are denominated "retailers."

The bracketed sentences should be inserted as necessary.

There is an additional presumption regarding costs in Business and Professions Code section 17026 for warranty service providers: " 'Cost' as applied to warranty service agreements includes the cost of parts, transporting the parts, labor, and all overhead expenses of the service agency.

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SOURCES AND AUTHORITY

- Business and Professions Code section 17026 provides, in part: " 'Cost' as applied to distribution means the invoice or replacement cost, whichever is lower, of the article or product to the distributor and vendor, plus the cost of doing business by the distributor and vendor and in the absence of proof of cost of doing business a markup of 6 percent on such invoice or replacement cost shall be prima facie proof of such cost of doing business."

- Business and Professions Code section 17072 provides: "Where a particular trade or industry, of which a person complained against is a member, has an established cost survey for the locality and vicinity in which the offense is committed, that cost survey is competent evidence to be used in proving the costs of such person."

- Business and Professions Code section 17073 provides: "Proof of average overall cost of doing business for any particular inventory period when added to the cost of production of each article or product, as to a producer, or invoice or replacement cost, whichever is lower, of each article or product, as to a distributor, is presumptive evidence of cost of each such article or product involved in any action brought under this chapter."

- Business and Professions Code section 17074 provides: "Proof of transportation tariffs when fixed and approved by the Public Utilities Commission of the State of California is presumptive evidence of delivery cost."

- "Determination of the defendant's cost has always been treated as an issue of fact." (*Pan Asia Venture Capital Corp. v. Hearst Corp.* (1999) 74 Cal.App.4th 424, 433 [88 Cal.Rptr.2d 118].)

- "California appears to have adopted a very expansive approach to the evidence that may be used to establish cost; no formula has been expressly sustained or denounced." (*Pan Asia Venture Capital Corp., supra,* 74 Cal.App.4th at p. 436.)

<u>Secondary Sources</u>

- 1 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 1997), § 1.02A.4
- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 591–596

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3006
Methods of Allocating Costs to an Individual Product

Although no formula for determining the appropriate cost of a particular [product/service] is set by law, [*insert one of the following:***]**

[the determination of the appropriate cost of [manufacture/distribution] of a particular product must be reasonably related to the burden the product puts on [*name of defendant***]'s overall cost of doing business.]**

[the determination of the cost of providing particular services must be reasonably related to the burden the service puts on [*name of defendant***]'s overall cost of doing business.]**

DIRECTIONS FOR USE

Regarding the first bracketed sentence, if all of the defendant's products are approximately the same, there is no need to allocate the indirect expense, i.e., overhead, according to the unique "burden" each product generates. In such cases, this paragraph could unnecessarily confuse the jury and should be modified or deleted.

SOURCES AND AUTHORITY

- "Determination of the defendant's cost has always been treated as an issue of fact." (*Pan Asia Venture Capital Corp. v. Hearst Corp.* (1999) 74 Cal.App.4th 424, 433 [88 Cal.Rptr.2d 118].)

- "These statutes embody California's fully allocated cost standard, that is, a fair allocation of all fixed or variable costs associated with production of the article or product." (*Pan Asia Venture Capital Corp., supra,* 74 Cal.App.4th at p. 432, footnote omitted.)

- "Cost is to be measured as 'the fair average cost of production over a reasonable time, rather than the cost of one item on a particular occasion.' " (*Pan Asia Venture Capital Corp., supra,* 74 Cal.App.4th at p. 432, fn. 6, internal citation omitted.)

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- "Variable costs are costs that vary with changes in output, while fixed costs are those that do not vary with changes in output." (*Turnbull & Turnbull v. ARA Transportation Inc.* (1990) 219 Cal.App.3d 811, 820 [268 Cal.Rptr. 856].)

- "California employs a fully allocated cost standard to determine whether a sale has violated section 17043. Under sections 17026 and 17029 … cost means invoice cost plus the vendor's full cost of doing business or six percent." (*G.H.I.I. v. MTS Inc.* (1983) 147 Cal.App.3d 256, 275 [195 Cal.Rptr 211], internal citations omitted.)

- "We find the use of the fully allocated cost method, when viewed in conjunction with the injurious intent requirement of section 17043, is rationally related to the valid legislative purpose … as it assists in preventing the creation or perpetuation of monopolies." (*Turnbull & Turnbull, supra,* 219 Cal.App.3d at p. 822.)

- "To be legally acceptable, the allocation of indirect or fixed overhead costs to a particular product or service must be reasonably related to the burden such product or service imposes on the overall cost of doing business." (*Turnbull & Turnbull, supra,* 219 Cal.App.3d at p. 822.)

Secondary Sources

- 1 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 1997), § 1.02A.4
- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 591–596

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3007
Secret Rebates—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] [***insert one or both of the following:***]**

[secretly [gave/received] [payments/rebates/refunds/commissions/ unearned discounts;] [or]

[secretly [gave to some buyers/received] services or privileges that were not given to other buyers purchasing on like terms and conditions.]

To establish this claim, [*name of plaintiff***] must prove the following:**

1. **That [***name of defendant***] secretly [[gave/received] [payments/ rebates/refunds/commissions/unearned discounts] [or] [[gave to some buyers/received] services or privileges] that were not given to other buyers purchasing on like terms and conditions];**

2. **That a competitor was harmed;**

3. **That the [payment/allowance] had a tendency to destroy competition;**

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

Element 2 should be omitted if the plaintiff is a competitor of the defendant; that issue is covered by element 4.

SOURCES AND AUTHORITY

- Business and Professions Code § 17045 provides: "The secret payment or allowance of rebates, refunds, commissions, or unearned discounts, whether in the form of money or otherwise, or secretly extending to certain purchasers special services or

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privileges not extended to all purchasers purchasing upon like terms and conditions, to the injury of a competitor and where such payment or allowance tends to destroy competition, is unlawful."

- "The purpose of the Unfair Practices Act (UPA) is 'to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair, dishonest, deceptive, destructive, fraudulent and discriminatory practices by which fair and honest competition is destroyed or prevented.' It forbids most locality discriminations, the use of loss leaders, gifts, secret rebates, boycotts, and 'deceptive, untrue or misleading advertising.' It also prohibits the sale of goods and services below cost." (*Pan Asia Venture Capital Corp. v. Hearst Corp.* (1999) 74 Cal.App.4th 424, 431–432 [88 Cal.Rptr.2d 118], internal citations omitted.)

- "[T]here are three elements to a violation of section 17045. First, there must be a 'secret' allowance of an 'unearned' discount. Second, there must be 'injury' to a competitor. Third, the allowance must tend to destroy competition." (*Diesel Electric Sales & Service, Inc. v. Marco Marine San Diego, Inc.* (1993) 16 Cal.App.4th 202, 212 [20 Cal.Rptr.2d 62].)

- "By its terms, section 17045 requires the plaintiff to prove not only injury to a competitor, but, *in addition*, a tendency 'to destroy competition.' " (*ABC International Traders, Inc. v. Matsushita Electric Co.* (1997) 14 Cal.4th 1247, 1262 [61 Cal.Rptr.2d 112].)

- "[P]roof of a knowing or intentional receipt by a buyer of a secret, unearned discount is not required under section 17045." (*Diesel Electric Sales & Service, Inc., supra,* 16 Cal.App.4th at p. 214, fn. 4.)

- "[S]ection 17045 does not require a proof of an 'intent' to destroy competition, but only that the secret, unearned discount had a *tendency* to destroy competition." (*Diesel Electric Sales & Service, Inc., supra,* 16 Cal.App.4th at p. 215.)

- Those competing against a seller who provides the secret rebate, on the "primary line," have standing to sue under the statute. Likewise, a customer of the seller who is disfavored by that seller providing a secret rebate to competitors of that customer, creating so-called "secondary line" injury, also has standing to sue. (*ABC International Traders, supra,* 14 Cal.4th at p. 1268.)

- Business and Professions Code section 17082 provides, in part: "In any action under this chapter, it is not necessary to allege or prove actual damages or the threat thereof, or actual injury or the threat thereof, to the plaintiff. But, in addition to injunctive

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relief, any plaintiff in any such action shall be entitled to recover three times the amount of the actual damages, if any, sustained by the plaintiff, as well as three times the actual damages, if any, sustained by any person who has assigned to the plaintiff his claim for damages resulting from a violation of this chapter."

- "While, similar to other cases, damages cannot be awarded in antitrust cases upon sheer guesswork or speculation, the plaintiff seeking damages for loss of profits is required to establish only with reasonable probability the existence of some causal connection between defendant's wrongful act and some loss of the anticipated revenue. Once that has been accomplished, the jury will be permitted to act upon probable and inferential proof and to 'make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly.' " (*Suburban Mobile Homes, Inc. v. AMFAC Communities, Inc.* (1980) 101 Cal.App.3d 532, 545 [161 Cal.Rptr. 811], internal citations omitted.)

Secondary Sources

- 1 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 1997), § 1.02C
- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 591–596

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3008
Secret Rebates—Definition of "Secret"

[Rebates/Refunds/Commissions/Unearned discounts/Services or privileges] are "secret" if other buyers did not know of such [rebates/refunds/unearned discounts/special services or privileges] or if such buyers were not aware of their principal or important terms.

SOURCES AND AUTHORITY

"Viewing the evidence most favorably to [plaintiff], the nondisclosure of [defendant]'s receipt of maximum discounts to which it was not entitled certainly could be construed as a 'secret' allowance." (*Diesel Electric Sales & Service, Inc. v. Marco Marine San Diego, Inc.* (1993) 16 Cal.App.4th 202, 212 [20 Cal.Rptr.2d 62].)

Secondary Sources

- 1 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 1997), § 1.02C.2
- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 591–596

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3009
Affirmative Defense to Locality Discrimination Claim—Cost Justification

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[*Name of defendant***] claims that any locality discrimination proven by [***name of plaintiff***] is within the law. To succeed, [***name of defendant***] must prove that the difference in [his/her/its] price is justified by: [***insert one or more of the following:***]**

[A difference in the [grade/quality/quantity] of the [*product*] [he/she/it] sold in the different locations;] [or]

[The difference in the cost of the [manufacture/sale/delivery] of [his/her/its] [*product*] in the different locations;] [or]

[A difference in the actual cost of transportation from the place the [*product*] was [produced/manufactured/shipped] to the place where the [*product*] was sold.]

DIRECTIONS FOR USE

This defense applies to locality discrimination only.

SOURCES AND AUTHORITY

- Business and Professions Code section 17041 provides: "Nothing in this chapter prohibits locality discriminations which make allowances for differences, if any, in the grade, quality or quantity when based and justified in the cost of manufacture, sale or delivery, or the actual cost of transportation from the point of production, if a raw product or commodity, or from the point of manufacture if a manufactured product or commodity, or from the point of shipment to the point of destination."

- "We … conclude that appellants are not required to negative the exception for differences in grade or other enumerated factors found in section 17041, and deem the complaint sufficient to withstand demurrer without such allegations." (*G.H.I.I. v. MTS Inc.* (1983) 147 Cal.App.3d 256, 273–274 [195 Cal.Rptr 211], internal citations and footnote omitted.)

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Secondary Sources

- 1 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 1997), § 1.02B.5
- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 591–596

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3010
Affirmative Defense to Locality Discrimination, Below Cost Sales, and Loss Leader Sales Claims
Closed-out, Discontinued, Damaged, or Perishable Items

[*Name of defendant***] claims that any [locality discrimination/below cost sales/loss leader sales] proven by [***name of plaintiff***] [is/are] within the law because the [***product***] was being sold as [a close-out/seasonal goods/ damaged goods/perishable goods]. To succeed, [***name of defendant***] must prove the following:**

1. **That [his/her/its] sales were [***insert one or more of the following:***]**

   [in the course of closing out, in good faith, all or any part of [his/ her/its] supply of [*product***], in order to stop trade in [***product***];] [or]**

   [of seasonal goods to prevent loss by depreciation;] [or]

   [of perishable goods to prevent loss by spoilage or depreciation;] [or]

   [of goods that were damaged or deteriorated in quality;] and

2. **That [***name of defendant***] gave sufficient notice of the sale to the public.**

Notice is sufficient only if:

1. **The sale goods are kept separate from other goods;**

2. **The sale goods are clearly marked with the reason[s] for the sales; and**

3. **Any advertisement of such goods indicates the number of items to be sold.**

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DIRECTIONS FOR USE

This defense applies to locality discrimination, below cost sales, and loss leader sales only.

SOURCES AND AUTHORITY

- Business and Professions Code section 17050 provides, in part:

  The prohibitions of this chapter against locality discriminations, sales below cost, and loss leaders do not apply to any sale made:
  (a) In closing out in good faith the owner's stock or any part thereof for the purpose of discontinuing his trade in any such article or product and in the case of the sale of seasonal goods or to the bona fide sale of perishable goods to prevent loss to the vendor by spoilage or depreciation; provided, notice is given to the public thereof.
  (b) When the goods are damaged or deteriorated in quality, and notice is given to the public thereof. …
  The notice required to be given under this section shall not be sufficient unless the subject of such sales is kept separate from other stocks and clearly and legibly marked with the reason for such sales, and any advertisement of such goods must indicate the same facts and the number of items to be sold.

<u>Secondary Sources</u>

- 1 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 1997), § 1.03B
- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 591–596

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3011
Affirmative Defense to Locality Discrimination, Sales Below Cost, Loss Leader Sales, and Secret Rebates Functional Classifications

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[*Name of defendant***] claims that any [locality discrimination/below cost sales/loss leader sales/secret rebates] proven by [***name of plaintiff***] [is/are] within the law because [***name of defendant***] created different classes of customers. To succeed, [***name of defendant***] must prove the following:**

1. **That [***name of defendant***] created different classes of customers, such as [broker/jobber/wholesaler/retailer/[***insert other***]];**

2. **That customers in the different classes performed different functions and assumed the risk, investment, and costs involved;**

3. **That the difference in [price/rebate/discount/special services/ privileges] for [***product/service***] was given only in those sales where the favored buyer performed the function on which the claim of a different class is based; and**

4. **That the difference in price was reasonably related to the value of such function.**

DIRECTIONS FOR USE

This defense applies to locality discrimination, sales below cost, loss leader sales, and secret rebates.

SOURCES AND AUTHORITY

- Business and Professions Code section 17042 provides:

  Nothing in this chapter prohibits any of the following:
  (a) A selection of customers.
  (b) A functional classification by any person of any customer as broker, jobber, wholesaler or retailer.

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(c) A differential in price for any article or product as between any customers in different functional classifications.

- " '[T]he law should tolerate no subterfuge. For instance, where a wholesaler-retailer buys only part of his goods as a wholesaler, he must not claim a functional discount on all. Only to the extent that a buyer actually performs certain functions, assuming all the risk, investment, and costs involved, should he legally qualify for a functional discount. Hence a distributor should be eligible for a discount corresponding to any part of the function he actually performs on that part of the goods for which he performs it.' " (*Diesel Electric Sales & Service, Inc. v. Marco Marine San Diego, Inc.* (1993) 16 Cal.App.4th 202, 217 [20 Cal.Rptr.2d 62], internal citations omitted.)

- "[A] pricing structure in which a distributor sells to a retailer at one discount and to a rack-jobber at another is expressly permitted by section 17042." (*Harris v. Capitol Records Distributing Corp.* (1966) 64 Cal.2d 454, 463 [50 Cal.Rptr. 539], footnote omitted.)

Secondary Sources

- 1 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 1997), § 1.02B.5
- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 591–596

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3012
Affirmative Defense Locality Discrimination, Sales Below Cost, and Loss Leader Sales Claims—Meeting Competition

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[*Name of defendant*] claims that any [locality discrimination/below cost sales/loss leader sales] proven by [*name of plaintiff*] are justified by the need to meet competition. To succeed, [*name of defendant*] must prove that the sales of [*product/service*] were made in an attempt, in good faith, to meet the legal prices of a competitor selling the same [*product/service*] in the ordinary course of business in the same area.

To meet legal prices means to lower the price to a point that the seller believes in good faith is at or above the legal price of the competitor it is trying to meet. That is, a seller may attempt to "meet," but not "beat," what in good faith it believes to be that competitor's legal price.

DIRECTIONS FOR USE

This defense applies to locality discrimination, sales below cost, and loss leader sales only.

SOURCES AND AUTHORITY

- Business and Professions Code section 17050(e) provides, in part: "The prohibitions of this chapter against locality discriminations, sales below cost, and loss leaders do not apply to any sale made … [i]n an endeavor made in good faith by a manufacturer, selling an article or product of his own manufacture, in a transaction and sale to a wholesaler or retailer for resale to meet the legal prices of a competitor selling the same or a similar or comparable article or product, in the same locality or trade area and in the ordinary channels of trade."

- Business and Professions Code section 17042(d) and (e) provides: "The prohibitions of this chapter against locality discriminations, sales below cost, and loss leaders do not apply to any sale made … [i]n an endeavor made in good faith to meet the legal prices of a competitor selling the same article or product, in the same locality or trade area and in the ordinary channels of trade [or] [i]n an endeavor made in good faith by a manufacturer, selling an article or product of his own manufacture, in a transaction

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and sale to a wholesaler or retailer for resale to meet the legal prices of a competitor selling the same or a similar or comparable article or product, in the same locality or trade area and in the ordinary channels of trade."

- "It is safe to assume that merchants generally know who are their competitors, and from what locality or trade area they draw their customers." (*People v. Pay Less Drug Store* (1944) 25 Cal.2d 108, 116 [153 P.2d 9].)

- "The requirement [to ascertain the 'legal prices' of competitors] is not absolute. It is merely that the defendants shall have endeavored 'in good faith' to meet the legal prices of a competitor." (*Pay Less Drug Store, supra,* 25 Cal.2d at p. 117.)

- "The operator of a service industry cannot legally reduce its prices to a below-cost figure with intent to injure another or offer free service to prevent further loss of business to a competitor 'who is indiscriminately and deliberately offering free service and below cost prices to such operator's customers.' Each side must obey the law; the fact that one competing party disregards the statute does not give the other side a legal excuse to do so." (*Page v. Bakersfield Uniform & Towel Supply Co.* (1966) 239 Cal.App.2d 762, 770 [49 Cal.Rptr. 46].)

Secondary Sources

- 1 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 1997), § 1.03A
- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 591–596

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3013
Affirmative Defense to Locality Discrimination Claim Manufacturer Meeting Downstream Competition

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[*Name of defendant*] claims that any locality discrimination proven by [*name of plaintiff*] was justified by the need to meet competition. To succeed, [*name of defendant*] must prove that [his/her/its] sales of [*product/service*] to [*name of reselling customer*] were made in an attempt, in good faith, to meet the legal prices of [*name of competitor's reseller*] selling in the ordinary course of business in the same locality or trade area.

To meet legal prices means to lower the price to a point that the seller believes in good faith is at or above the legal price of the competitor of the reseller whose price it is trying to meet. That is, a seller may attempt to "meet," but not "beat," what in good faith it believes to be that competitor's legal price.

DIRECTIONS FOR USE

This defense applies to locality discrimination when the manufacturer is providing a lower price to its reseller, so that the reseller can compete fairly against the lower prices charged by the reseller of another manufacturer.

SOURCES AND AUTHORITY

- Business and Professions Code section 17042(d) and (e) provides: "The prohibitions of this chapter against locality discriminations, sales below cost, and loss leaders do not apply to any sale made … [i]n an endeavor made in good faith to meet the legal prices of a competitor selling the same article or product, in the same locality or trade area and in the ordinary channels of trade [or] [i]n an endeavor made in good faith by a manufacturer, selling an article or product of his own manufacture, in a transaction and sale to a wholesaler or retailer for resale to meet the legal prices of a competitor selling the same or a similar or comparable article or product, in the same locality or trade area and in the ordinary channels of trade."

- "The requirement [to ascertain the 'legal prices' of competitors] is not absolute. It is merely that the defendants shall have endeavored 'in good faith' to meet the legal

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prices of a competitor." (*People v. Pay Less Drug Store* (1944) 25 Cal.2d 108, 117 [153 P.2d 9].)

- "The operator of a service industry cannot legally reduce its prices to a below-cost figure with intent to injure another or offer free service to prevent further loss of business to a competitor 'who is indiscriminately and deliberately offering free service and below cost prices to such operator's customers.' Each side must obey the law; the fact that one competing party disregards the statute does not give the other side a legal excuse to do so." (*Page v. Bakersfield Uniform & Towel Supply Co.* (1966) 239 Cal.App.2d 762, 770 [49 Cal.Rptr. 46].)

Secondary Sources

- 1 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 1997), § 1.03A
- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 591–596

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3014
Affirmative Defenses—"Good Faith" Explained

In deciding if [*name of defendant*] acted in good faith in attempting to meet competition, you must decide whether [*name of defendant*]'s belief was based on facts that would lead a reasonable person to believe that the price he or she was offering would meet the legal price of his or her competitor. You must consider all of the facts and circumstances present, including but not limited to:

1. **The nature and source of the information on which [*name of defendant*] relied;**

2. **[*Name of defendant*]'s prior experience, if any, with similar information or with persons who provided the information;**

3. **[*Name of defendant*]'s prior pricing practices; and**

4. **[*Name of defendant*]'s general business practices.**

[*Name of defendant*] does not have to prove that [his/her/its] price did actually meet the legal price of its competitor, only that [he/she/it] reasonably believed that [he/she/it] was offering a price that would meet the competitor's price.

DIRECTIONS FOR USE

This instruction provides the jury with a general listing of circumstances against which it might consider evidence in the record to decide whether a defendant's attempts to meet competition were in good faith. The final paragraph eases the defendant's burden of proof with respect to the "meet but don't beat" element because a defendant is required only to prove its reasonable belief that its prices would meet, but not beat, a competitor's prices.

SOURCES AND AUTHORITY

- Business and Professions Code section 17042(d) and (e) provides, in part: "The prohibitions of this chapter against locality discriminations, sales below cost, and loss leaders do not apply to any sale made … [i]n an endeavor made in good faith to meet

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the legal prices of a competitor selling the same article or product, in the same locality or trade area and in the ordinary channels of trade [or] [i]n an endeavor made in good faith by a manufacturer, selling an article or product of his own manufacture, in a transaction and sale to a wholesaler or retailer for resale to meet the legal prices of a competitor selling the same or a similar or comparable article or product, in the same locality or trade area and in the ordinary channels of trade."

- "The requirement [to ascertain the 'legal prices' of competitors] is not absolute. It is merely that the defendants shall have endeavored 'in good faith' to meet the legal prices of a competitor." (*People v. Pay Less Drug Store* (1944) 25 Cal.2d 108, 117 [153 P.2d 9].)

Secondary Sources

- 1 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 1997), § 1.03A
- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 591–596

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3100
Horizontal and Vertical Restraints (Use for Direct Competitors)
Price Fixing—Essential Factual Elements

[*Name of plaintiff*] claims [*name of defendant*] was involved in price fixing. Price fixing is an agreement to set, raise, lower, maintain, or stabilize the prices or other terms of trade charged or to be charged for a product or service, whether the prices agreed upon were high or low, reasonable or unreasonable. To establish this claim, [*name of plaintiff*] must prove the following:

1. **That [*name of defendant*] [and [*name(s) of alleged co-participant(s)*]] agreed to fix [or] [set/raise/lower/maintain/stabilize] prices [or other terms of trade] charged or to be charged for [*product/service*];**

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.**

DIRECTIONS FOR USE

This instruction is intended to apply to both actual and potential competitors. For cases involving vertical restraints, use this instruction but see additional special vertical restraint instructions contained in this series (3109, *Vertical Restraints—Termination of Reseller*; 3110, *Vertical Restraints—Agreement Between Seller and Reseller's Competitor*).

In addition to price, price fixing includes any combination that "tampers with price structures." Like its federal counterpart, the Cartwright Act would seem to prohibit combinations that fix aspects of price such as costs, discounts, credits, financing, warranty, and delivery terms. Therefore, if this case concerns the fixing of an aspect of price, other than price itself, this instruction and those that are related to it should be adapted accordingly.

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SOURCES AND AUTHORITY

- Business and Professions Code section 16726 provides: "Except as provided in this chapter, every trust is unlawful, against public policy and void."

- Business and Professions Code section 16720(d) and (e) provides:

  A trust is a combination of capital, skill or acts by two or more persons for any of the following purposes:
  ….
  (d) To fix at any standard or figure, whereby its price to the public or consumer shall be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, barter, use or consumption in this State.
  (e) To make or enter into or execute or carry out any contracts, obligations or agreements of any kind or description, by which they do all or any or any combination of any of the following:
  (1) Bind themselves not to sell, dispose of or transport any article or any commodity or any article of trade, use, merchandise, commerce or consumption below a common standard figure, or fixed value.
  (2) Agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure.
  (3) Establish or settle the price of any article, commodity or transportation between them or themselves and others, so as directly or indirectly to preclude a free and unrestricted competition among themselves, or any purchasers or consumers in the sale or transportation of any such article or commodity.
  (4) Agree to pool, combine or directly or indirectly unite any interests that they may have connected with the sale or transportation of any such article or commodity, that its price might in any manner be affected.

- " ' "To state a cause of action for conspiracy, the complaint must allege (1) the formation and operation of the conspiracy, (2) the wrongful act or acts done pursuant thereto, and (3) the damage resulting from such act or acts." ' Thus, the Supreme Court applied the pleading requirements for a civil conspiracy action under common law to a statutory action under the Cartwright Act for antitrust conspiracies." (*Cellular Plus, Inc. v. Superior Court* (1993) 14 Cal.App.4th 1224, 1236 [18 Cal.Rptr.2d 308], quoting *Chicago Title Insurance Co. v. Great Western Financial Corp.* (1968) 69 Cal.2d 305, 316 [70 Cal.Rptr. 849].)

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- "A complaint for unlawful price fixing must allege facts demonstrating that separate entities conspired together. Only separate entities pursuing separate economic interests can conspire within the proscription of the antitrust laws against price-fixing combinations." (*Freeman v. San Diego Assn. of Realtors* (1999) 77 Cal.App.3d 171, 188–189 [91 Cal.Rptr.2d 534], internal citations omitted.)

- "The Cartwright Act prohibits every trust, defined as 'a combination of capital, skill or acts by two or more persons' for specified anticompetitive purposes. The federal Sherman Act prohibits every 'contract, combination ... or conspiracy, in restraint of trade.' The similar language of the two acts reflects their common objective to protect and promote competition. Since the Cartwright Act and the federal Sherman Act share similar language and objectives, California courts often look to federal precedents under the Sherman Act for guidance." (*Chavez v. Whirlpool Corp.* (2001) 93 Cal.App.4th 363, 369 [113 Cal.Rptr.2d 175], internal citations omitted.)

- "The Cartwright Act, like the Sherman Act, prohibits 'combinations' for the purpose of restraining trade. '[A] combination means a concert of action by individuals or entities maintaining separate and independent interests.' " (*Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 543 [30 Cal.Rptr.2d 706], internal citations omitted.)

- "Two forms of conspiracy may be used to establish a violation of the antitrust laws: a horizontal restraint, consisting of a collaboration among competitors; or a vertical restraint, based upon an agreement between business entities occupying different levels of the marketing chain." (*G.H.I.I. v. MTS, Inc.* (1983) 147 Cal.App.3d 256, 267 [195 Cal.Rptr. 211], internal citations omitted.)

- " 'Horizontal combinations are cartels or agreements among competitors which restrain competition among enterprises at the same level of distribution. They are ordinarily illegal per se. Vertical restraints are imposed by persons or firms further up the chain of distribution of a specific product (or in rare cases, further down the chain) than the enterprise restrained. Vertical non-price restraints are tested under the rule of reason; that is, the plaintiff must prove that the restraint had an anticompetitive effect in the relevant market in order to prevail.' " (*Exxon Corp. v. Superior Court* (1977) 51 Cal.App.3d 1672, 1680–1681 [60 Cal.Rptr.2d 195], internal citations and footnote omitted.)

- "In general, a Cartwright Act price fixing complaint must allege specific facts in addition to stating the purpose or effect of the price fixing agreement and that the accused was a member of or acted pursuant to the price fixing agreement." (*Cellular Plus, Inc., supra,* 14 Cal.App.4th at p. 1237.)

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- "[A] conspiracy among competitors to restrict output and/or raise prices [is] unlawful per se without regard to any of its effects … ." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 851 [107 Cal.Rptr.2d 841].)

- " 'Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing, division of markets, group boycotts, and tying arrangements.' 'The "per se" doctrine means that a particular practice and the setting in which it occurs is sufficient to compel the conclusion that competition is unreasonably restrained and the practice is consequently illegal.' " (*Oakland-Alameda County Builders Exchange, supra,* 4 Cal.3d at pp. 361–362, internal citations omitted.)

- "It has long been settled that an agreement to fix prices is unlawful per se. It is no excuse that the prices fixed are themselves reasonable." (*Catalano Inc. v. Target Sales, Inc.* (1980) 446 U.S. 643, 647 [100 S.Ct. 1925, 64 L.Ed.2d 580].)

- "Under both California and federal law, agreements fixing or tampering with prices are illegal per se." (*Oakland-Alameda County Builders Exchange v. E. P. Lathrop Construction Co.* (1971) 4 Cal.3d 354, 363 [93 Cal.Rptr. 602].)

- "These rules apply whether the price-fixing scheme is horizontal or vertical; that is, whether the price is fixed among competitors or businesses at different economic levels." (*Mailand v. Burckle* (1978) 20 Cal.3d 367, 377 [143 Cal.Rptr. 1], internal citations omitted.)

- "Under the authorities … the agreement between plaintiffs and defendants and between defendants and Powerine were unlawful per se. It is, therefore, not necessary to inquire whether these arrangements had an actual anticompetitive effect." (*Mailand, supra,* 20 Cal.3d at p. 380.)

- "The alleged antitrust violation need not be the sole or controlling cause of the injury in order to establish proximate cause, but only need be a substantial factor in bringing about the injury." (*Saxer v. Philip Morris, Inc.* (1975) 54 Cal.App.3d 7, 23 [126 Cal.Rptr 327], internal citation omitted.)

- "The plaintiff in a Cartwright Act proceeding must show that an antitrust violation was the proximate cause of his injuries. The frequently stated 'standing to sue' requirement is merely a rule that an action for violation of the antitrust laws may be maintained only by a party within the 'target area' of the antitrust violation, and not by one incidentally injured thereby. An 'antitrust injury' must be proved; that is, the

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type of injury the antitrust laws were intended to prevent, and which flows from the invidious conduct which renders defendants' acts unlawful. Finally, a plaintiff must show an injury within the area of the economy that is endangered by a breakdown of competitive conditions." (*Kolling v. Dow Jones and Co., Inc.* (1983) 137 Cal.App.3d 709, 723–724 [187 Cal.Rptr. 797], internal citations and footnote omitted.)

- "We acknowledge that a plaintiff … must often rely on inference rather than evidence since, usually, unlawful conspiracy is conceived in secrecy and lives its life in the shadow. But, when he does so, he must all the same rely on an inference implying unlawful conspiracy *more likely than* permissible competition, either in itself or together with other inferences or evidence." (*Aguilar, supra,* 25 Cal.4th at p. 857, internal citations omitted.)

- "The exact parameters of 'antitrust injury' under section 16750 have not yet been established through either court decisions or legislation." (*Cellular Plus, Inc., supra,* 14 Cal.App.4th at p. 1234.)

- Section 16750(a) confers a private right of action for treble damages and attorneys fees on "[a]ny person who is injured in his business or property by reason of anything forbidden or declared unlawful by this chapter."

Secondary Sources

- 2 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 2001), §§ 9.03–9.05
- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 575–590

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3101
Horizontal Restraints (Use for Direct Competitors)
Allocation of Trade or Commerce—Essential Factual Elements

[*Name of plaintiff*] claims that [*name of defendant*] agreed to allocate [customers/territories/products]. An agreement to allocate [customers/ territories/products] is an agreement between two or more competitors not to compete [for the business of particular customers/with each other in particular territories/in the sale of a particular product]. To establish this claim, [*name of plaintiff*] must prove the following:

1. **That [*name of defendant*] [and [*name alleged co-participant*] agreed to allocate [customers/territories/products];**

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

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

DIRECTIONS FOR USE

The appropriate bracketed option(s) should be selected and the balance deleted, depending on the specific facts.

SOURCES AND AUTHORITY

- Business and Professions Code section 16726 provides: "Except as provided in this chapter, every trust is unlawful, against public policy and void."

- Business and Professions Code section 16720(a) provides: "A trust is a combination of capital, skill or acts by two or more persons for any of the following purposes: To create or carry out restrictions in trade or commerce."

- "The Cartwright Act, like the Sherman Act, prohibits 'combinations' for the purpose of restraining trade. '[A] combination means a concert of action by individuals or entities maintaining separate and independent interests.' " (*Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 543 [30 Cal.Rptr.2d 706], internal citations omitted.)

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- "It is settled that distributors cannot lawfully agree to divide territories or customers. Such conduct is sometimes called a 'horizontal restraint,' and is a per se violation of the Sherman Act." (*Guild Wineries & Distillers v. J. Sosnick and Son* (1980) 102 Cal.App.3d 627, 633–634 [162 Cal.Rptr. 87], internal citations omitted.)

- " 'One of the classic examples of a per se violation … is an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition. ... This Court has reiterated time and time again that "[h]orizontal territorial limitations ... are naked restraints of trade with no purpose except stifling of competition." Such limitations are per se violations of the Sherman Act.' " (*Palmer v. BRG of Georgia, Inc.* (1990) 498 U.S. 46, 49 [111 S.Ct. 401, 112 L.Ed.2d 349], internal citations omitted.)

- "Two forms of conspiracy may be used to establish a violation of the antitrust laws: a horizontal restraint, consisting of a collaboration among competitors; or a vertical restraint, based upon an agreement between business entities occupying different levels of the marketing chain." (*G.H.I.I. v. MTS, Inc.* (1983) 147 Cal.App.3d 256, 267 [195 Cal.Rptr. 211], internal citations omitted.)

- " 'Horizontal combinations are cartels or agreements among competitors which restrain competition among enterprises at the same level of distribution. They are ordinarily illegal per se. Vertical restraints are imposed by persons or firms further up the chain of distribution of a specific product (or in rare cases, further down the chain) than the enterprise restrained. Vertical non-price restraints are tested under the rule of reason; that is, the plaintiff must prove that the restraint had an anticompetitive effect in the relevant market in order to prevail.' " (*Exxon Corp. v. Superior Court* (1977) 51 Cal.App.3d 1672, 1680–1681 [60 Cal.Rptr.2d 195], internal citations and footnote omitted.)

- "The alleged antitrust violation need not be the sole or controlling cause of the injury in order to establish proximate cause, but only need be a substantial factor in bringing about the injury." (*Saxer v. Philip Morris, Inc.* (1975) 54 Cal.App.3d 7, 23 [126 Cal.Rptr 327], internal citation omitted.)

- "The plaintiff in a Cartwright Act proceeding must show that an antitrust violation was the proximate cause of his injuries. The frequently stated 'standing to sue' requirement is merely a rule that an action for violation of the antitrust laws may be maintained only by a party within the 'target area' of the antitrust violation, and not by one incidentally injured thereby. An 'antitrust injury' must be proved; that is, the type of injury the antitrust laws were intended to prevent, and which flows from the

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invidious conduct which renders defendants' acts unlawful. Finally, a plaintiff must show an injury within the area of the economy that is endangered by a breakdown of competitive conditions." (*Kolling v. Dow Jones and Co., Inc.* (1983) 137 Cal.App.3d 709, 723–724 [187 Cal.Rptr. 797], internal citations and footnote omitted.)

- "The exact parameters of 'antitrust injury' under section 16750 have not yet been established through either court decisions or legislation." (*Cellular Plus, Inc. v. Superior Court* (1993) 14 Cal.App.4th 1224, 1234 [18 Cal.Rptr.2d 308].)

- Section 16750 (a) confers a private right of action for treble damages and attorneys fees on "[a]ny person who is injured in his business or property by reason of anything forbidden or declared unlawful by this chapter."

- "The Cartwright Act prohibits every trust, defined as 'a combination of capital, skill or acts by two or more persons' for specified anticompetitive purposes. The federal Sherman Act prohibits every 'contract, combination ... or conspiracy, in restraint of trade.' The similar language of the two acts reflects their common objective to protect and promote competition. Since the Cartwright Act and the federal Sherman Act share similar language and objectives, California courts often look to federal precedents under the Sherman Act for guidance." (*Chavez v. Whirlpool Corp.* (2001) 93 Cal.App.4th 363, 369 [113 Cal.Rptr.2d 175], internal citations omitted.)

Secondary Sources

- 2 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 2001), §§ 9.03, 9.04, 9.07
- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 575–590

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3102
Horizontal Restraints—Dual Distributor Restraints
Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] [stopped doing business with/refused to deal with/restrained] [[***name of plaintiff***]/a reseller]. To establish this claim, [***name of plaintiff***] must prove the following:**

1. **That [***name of defendant***] sold [***products***] directly in competition with [[***name of plaintiff***]/a reseller] to a significant portion of [[***name of plaintiff***]/the reseller]'s customers or potential customers;**

2. **That [***name of defendant***] [stopped doing business with/refused to deal with/restrained] [[***name of plaintiff***]/the reseller];**

3. **That a reason for the decision to [end business with/refuse to deal with/ restrain] [[***name of plaintiff***]/the reseller] was [[***name of plaintiff***]/the reseller]'s refusal to agree to [***name of defendant***]'s [***specify the claimed restraint, e.g., territorial or customer restrictions***];**

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

The appropriate bracketed options should be selected and the balance deleted depending on the specific facts. For example, the word "reseller" should be used instead of plaintiff if the plaintiff is not the reseller—such as, when the plaintiff is a government enforcer.

SOURCES AND AUTHORITY

- Business and Professions Code section 16726 provides: "Except as provided in this chapter, every trust is unlawful, against public policy and void."

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- Business and Professions Code section 16720(a) provides: "A trust is a combination of capital, skill or acts by two or more persons for any of the following purposes: To create or carry out restrictions in trade or commerce."

- "We hold that it is unlawful for a manufacturer who also distributes its own products in one geographic area to terminate an independent distributor when a substantial factor in bringing about the termination is the distributor's refusal to accept the manufacturer's attempt to enforce or impose territorial or customer restrictions among distributors." (*Guild Wineries & Distillers v. J. Sosnick and Son* (1980) 102 Cal.App.3d 627, 630 [162 Cal.Rptr. 87].)

- " '[A] refusal of a manufacturer to deal with a distributor can constitute a "combination" in restraint of trade within the purview' of the Sherman Act. … We conclude that this case … is governed by a per se principle." (*Guild Wineries & Distilleries, supra,* 102 Cal.App.3d at p. 633.)

- In *Dimidowich v. Bell and Howell* (9th Cir. 1986) 803 F.2d 1473, 1482–1484, opn. mod. (9th Cir. 1987) 810 F.2d 1517, the Ninth Circuit Court of Appeals rejected the holding in *Guild Wineries, supra,* that the per se standard applied, and predicted that the California Supreme Court would overrule *Guild Wineries*. This has not yet occurred. In the meantime, the decision in the *Guild* court remains binding on all subordinate state courts. (*Auto Equity Sales v. Superior Court* (1962) 57 Cal.2d 450, 455 [20 Cal.Rptr. 321].)

- "It is settled that distributors cannot lawfully agree to divide territories or customers. Such conduct is sometimes called a 'horizontal restraint,' and is a per se violation of the Sherman Act. … When Guild became a distributor the same rule became applicable to it. Guild could not lawfully coerce a fellow distributor into allocating customers any more than Sosnick and other distributors could lawfully agree to such an allocation." (*Guild Wineries & Distilleries, supra,* 102 Cal.App.3d at p. 633.)

- "The alleged antitrust violation need not be the sole or controlling cause of the injury in order to establish proximate cause, but only need be a substantial factor in bringing about the injury." (*Saxer v. Philip Morris, Inc.* (1975) 54 Cal.App.3d 7, 23 [126 Cal.Rptr 327], internal citation omitted.)

- "The plaintiff in a Cartwright Act proceeding must show that an antitrust violation was the proximate cause of his injuries. The frequently stated 'standing to sue' requirement is merely a rule that an action for violation of the antitrust laws may be maintained only by a party within the 'target area' of the antitrust violation, and not by one incidentally injured thereby. An 'antitrust injury' must be proved; that is, the

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type of injury the antitrust laws were intended to prevent, and which flows from the invidious conduct which renders defendants' acts unlawful. Finally, a plaintiff must show an injury within the area of the economy that is endangered by a breakdown of competitive conditions." (*Kolling v. Dow Jones and Co., Inc.* (1983) 137 Cal.App.3d 709, 723–724 [187 Cal.Rptr. 797], internal citations and footnote omitted.)

- "The exact parameters of 'antitrust injury' under section 16750 have not yet been established through either court decisions or legislation." (*Cellular Plus, Inc. v. Superior Court* (1993) 14 Cal.App.4th 1224, 1234 [18 Cal.Rptr.2d 308].)

Secondary Sources

- 2 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 2001), §§ 9.03, 9.04, 9.08
- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 575–590

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3103
Horizontal Restraints (Use for Direct Competitors)
Group Boycott—Per Se Violation—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] agreed not to deal with [***name of plaintiff***] [or to deal with [***name of plaintiff***] only on specified terms]. To establish this claim, [***name of plaintiff***] must prove the following:**

1. **That [***name of defendant***] [and [***name of alleged co-participant[s]***]] agreed to [***specify claimed refusal to deal, e.g., "refuse to sell to [name of plaintiff]"***];**

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.**

DIRECTIONS FOR USE

This instruction applies to agreements between competitors that are directly intended to affect competition facing them. In determining whether to give this per se instruction or the rule of reason instructions, it is important whether the challenged combination was horizontal (between competitors), vertical (between sellers and buyers), or some combination of the two. Horizontal combinations are subject to per se instructions; vertical combinations to the rule of reason instructions. Those combinations falling in between must be carefully scrutinized to determine whether their principal purpose is to restrain competition between competitors or to downstream resellers by the seller.

SOURCES AND AUTHORITY

- Business and Professions Code section 16726 provides: "Except as provided in this chapter, every trust is unlawful, against public policy and void."

- Business and Professions Code section 16720(c) provides: "A trust is a combination of capital, skill or acts by two or more persons for any of the following purposes: To prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity."

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- "The antitrust laws do not preclude a party from unilaterally determining the parties with which, or the terms on which, it will transact business. However, it is a violation of the antitrust laws for a group of competitors with separate and independent economic interests, or a single competitor with sufficient leverage, to force another to boycott a competitor at the same level of distribution." (*Freeman v. San Diego Assn. of Realtors* (1999) 77 Cal.App.4th 171, 194 [91 Cal.Rptr.2d 534], internal citation omitted.)

- "It is well settled that the antitrust laws do not preclude a trader from unilaterally determining the parties with whom it will deal and the terms on which it will transact business. An antitrust case must be based upon conspiratorial rather than unilateral conduct. Thus, only group boycotts are unlawful under the Sherman and Cartwright Acts." (*G.H.I.I. v. MTS, Inc.* (1983) 147 Cal.App.3d 256, 267–268 [195 Cal.Rptr. 211], internal citations omitted.)

- " 'Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category. They have not been saved by allegations that they were reasonable in the specific circumstances, nor by a failure to show that they "fixed or regulated prices, parcelled out or limited production, or brought about a deterioration in quality." Even when they operated to lower prices or temporarily to stimulate competition they were banned. For … such agreements, no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment.' " (*Oakland-Alameda County Builders' Exchange v. F. P. Lathrop Construction Co.* (1971) 4 Cal.3d 354, 365 [93 Cal.Rptr. 602], internal citations omitted.)

- "The Cartwright Act, like the Sherman Act, prohibits 'combinations' for the purpose of restraining trade. '[A] combination means a concert of action by individuals or entities maintaining separate and independent interests.' " (*Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 543 [30 Cal.Rptr.2d 706], internal citations omitted.)

- " '[T]there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.' Among these per se violations is the concerted refusal to deal with other traders, or, as it is often called, the group boycott." (*Marin County Bd. of Realtors v. Palsson* (1976) 16 Cal.3d 920, 931–932 [130 Cal.Rptr. 1], internal citations omitted.)

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- In *Marin County Bd. of Realtors, supra,* the Supreme Court explained that there is a distinction between "direct boycotts aimed at coercing parties to adopt noncompetitive practices and indirect boycotts which result in refusals to deal only as a by-product of the agreement." (*Marin County Bd. of Realtors, supra,* 16 Cal.3d at p. 932.)

- Not all group boycotts are evaluated as per se violations: "This limitation on the per se rule is particularly applicable to trade association agreements not directly aimed at coercing third parties and eliminating competitors. In cases involving such agreements, courts have generally applied the rule of reason test." (*Marin County Bd. of Realtors, supra,* 16 Cal.3d at p. 932.)

- "The alleged antitrust violation need not be the sole or controlling cause of the injury in order to establish proximate cause, but only need be a substantial factor in bringing about the injury." (*Saxer v. Philip Morris, Inc.* (1975) 54 Cal.App.3d 7, 23 [126 Cal.Rptr 327], internal citation omitted.)

- "The plaintiff in a Cartwright Act proceeding must show that an antitrust violation was the proximate cause of his injuries. The frequently stated 'standing to sue' requirement is merely a rule that an action for violation of the antitrust laws may be maintained only by a party within the 'target area' of the antitrust violation, and not by one incidentally injured thereby. An 'antitrust injury' must be proved; that is, the type of injury the antitrust laws were intended to prevent, and which flows from the invidious conduct which renders defendants' acts unlawful. Finally, a plaintiff must show an injury within the area of the economy that is endangered by a breakdown of competitive conditions." (*Kolling v. Dow Jones and Co., Inc.* (1983) 137 Cal.App.3d 709, 723–724 [187 Cal.Rptr. 797], internal citations and footnote omitted.)

- "The exact parameters of 'antitrust injury' under section 16750 have not yet been established through either court decisions or legislation." (*Cellular Plus, Inc. v. Superior Court* (1993) 14 Cal.App.4th 1224, 1234 [18 Cal.Rptr.2d 308].)

<u>Secondary Sources</u>

- 2 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 2001), §§ 9.03, 9.04, 9.11
- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 575–590

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3104
Horizontal Restraints—Group Boycott—Rule of Reason
Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] agreed to [***describe conduct, e.g., "formulate an arbitrary membership limitation rule with [identify other participant[s]]"***]. To establish this claim, [***name of plaintiff***] must prove the following:**

1. **That [***name of defendant***] [and [***name of alleged co-participant[s]***] agreed to [***describe conduct, e.g., "formulate an arbitrary membership limitation rule"***];**

2. **That the purpose or effect of [***name of defendant***]'s conduct was to restrain competition;**

3. **That the anticompetitive effect of the restraint[s] outweighed any beneficial effect on competition;**

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

This instruction applies to agreements between competitors that are directly intended to affect competition facing them. In determining whether to give this per se instruction or the rule of reason instructions, it is important whether the challenged combination was horizontal (between competitors), vertical (between sellers and buyers), or some combination of the two. Horizontal combinations are subject to per se instructions; vertical combinations to the rule of reason instructions. Those combinations falling in between must be carefully scrutinized to determine whether their principal purpose is to restrain competition between competitors or to downstream resellers by the seller.

For additional instructions regarding the rule of reason see instructions 3111 through 3114.

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SOURCES AND AUTHORITY

- Business and Professions Code section 16726 provides: "Except as provided in this chapter, every trust is unlawful, against public policy and void."

- Business and Professions Code section 16720(c) provides: "A trust is a combination of capital, skill or acts by two or more persons for any of the following purposes: To prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity."

- Business and Professions Code section 16725 provides: "It is not unlawful to enter into agreements or form associations or combinations, the purpose and effect of which is to promote, encourage or increase competition in any trade or industry, or which are in furtherance of trade."

- "The Cartwright Act, like the Sherman Act, prohibits 'combinations' for the purpose of restraining trade. '[A] combination means a concert of action by individuals or entities maintaining separate and independent interests.' " (*Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 543 [30 Cal.Rptr.2d 706], internal citations omitted.)

- "It is well settled that the antitrust laws do not preclude a trader from unilaterally determining the parties with whom it will deal and the terms on which it will transact business. An antitrust case must be based upon conspiratorial rather than unilateral conduct. Thus, only group boycotts are unlawful under the Sherman and Cartwright Acts." (*G.H.I.I. v. MTS, Inc.* (1983) 147 Cal.App.3d 256, 267–268 [195 Cal.Rptr. 211], internal citations omitted.)

- In *Marin County Bd. of Realtors v. Palsson* (1976) 16 Cal.3d 920, 932 [130 Cal.Rptr. 1], the Supreme Court explained that there is a distinction between "direct boycotts aimed at coercing parties to adopt noncompetitive practices and indirect boycotts which result in refusals to deal only as a by-product of the agreement."

- Not all group boycotts are evaluated as per se violations: "This limitation on the per se rule is particularly applicable to trade association agreements not directly aimed at coercing third parties and eliminating competitors. In cases involving such agreements, courts have generally applied the rule of reason test." (*Marin County Bd. of Realtors, supra,* 16 Cal.3d at p. 932.)

- "Although the Sherman Act and the Cartwright Act by their express terms forbid all restraints on trade, each has been interpreted to permit by implication those restraints

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found to be reasonable." (*Corwin v. Los Angeles Newspaper Service Bureau, Inc.* (1971) 4 Cal.3d 842, 853 [94 Cal.Rptr. 785], internal citation omitted.)

- "To determine whether the restrictions are reasonable, 'the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be obtained, are all relevant facts.' The court should consider 'the percentage of business controlled, the strength of the remaining competition [and] whether the action springs from business requirements or purpose to monopolize ... .' Whether a restraint of trade is reasonable is a question of fact to be determined at trial." (*Corwin, supra,* 4 Cal.3d at pp. 854–855, internal citations omitted.)

- "Generally, in determining whether conduct unreasonably restrains trade, '[a] rule of reason analysis requires a determination of whether ... its anti-competitive effects outweigh its pro-competitive effects.' " (*Bert G. Gianelli Distributing Co. v. Beck and Co.* (1985) 172 Cal.App.3d 1020, 1048 [219 Cal.Rptr. 203], internal citation omitted.)

- "The alleged antitrust violation need not be the sole or controlling cause of the injury in order to establish proximate cause, but only need be a substantial factor in bringing about the injury." (*Saxer v. Philip Morris, Inc.* (1975) 54 Cal.App.3d 7, 23 [126 Cal.Rptr 327], internal citation omitted.)

- "The plaintiff in a Cartwright Act proceeding must show that an antitrust violation was the proximate cause of his injuries. The frequently stated 'standing to sue' requirement is merely a rule that an action for violation of the antitrust laws may be maintained only by a party within the 'target area' of the antitrust violation, and not by one incidentally injured thereby. An 'antitrust injury' must be proved; that is, the type of injury the antitrust laws were intended to prevent, and which flows from the invidious conduct which renders defendants' acts unlawful. Finally, a plaintiff must show an injury within the area of the economy that is endangered by a breakdown of competitive conditions." (*Kolling v. Dow Jones and Co., Inc.* (1983) 137 Cal.App.3d 709, 723–724 [187 Cal.Rptr. 797], internal citations and footnote omitted.)

- "The exact parameters of 'antitrust injury' under section 16750 have not yet been established through either court decisions or legislation." (*Cellular Plus, Inc. v. Superior Court* (1993) 14 Cal.App.4th 1224, 1234 [18 Cal.Rptr.2d 308].)

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Secondary Sources

- 2 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 2001), §§ 9.03, 9.04, 9.11
- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 575–590

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3105
Horizontal and Vertical Restraints
(Use for Direct Competitors or Supplier/Reseller Relations)
Other Unreasonable Restraint of Trade
Rule of Reason—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] agreed to [***insert unreasonable restraint of trade***]. To establish this claim, [***name of plaintiff***] must prove the following:**

1. **That [***name of defendant***] [and [***name of alleged co-participant[s]***]] agreed to [***describe conduct constituting an unreasonable restraint of trade***];**

2. **That the purpose or effect of [***name of defendant***]'s conduct was to restrain competition;**

3. **That the anticompetitive effect of the restraint[s] outweighed any beneficial effect on competition;**

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

This instruction is intended for actions that are limited only by the bounds of human ingenuity. Any such conduct, if it does not fit into a per se category, is judged under the rule of reason. Thus, the illegality of a termination that results from a buyer's disobedience with a seller's exclusive "dealing," territorial location, or customer restrictions, unless ancillary to price fixing, should be resolved under the rule of reason. For cases involving vertical restraints, also see special vertical restraint instructions contained in this series.

It is possible for a complaint to include both per se and rule of reason claims. Also, per se claims alternatively may be tested under the rule of reason if there is reason to believe that proof of the per se claims may fall short. If either is the case, connecting language between the pertinent instructions should be provided, such as: "If you find that [*name of*

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defendant]'s conduct did not amount to an agreement to [*specify conduct, e.g., "fix resale prices," "boycott," "allocate markets"*], [*name of plaintiff*] may still prove that the conduct otherwise lessened competition."

For additional instructions regarding the rule of reason see instructions 3111 through 3114.

SOURCES AND AUTHORITY

- Business and Professions Code section 16726 provides: "Except as provided in this chapter, every trust is unlawful, against public policy and void."

- Business and Professions Code section 16720(a) provides: "A trust is a combination of capital, skill or acts by two or more persons for any of the following purposes: To create or carry out restrictions in trade or commerce."

- Business and Professions Code section 16725 provides: "It is not unlawful to enter into agreements or form associations or combinations, the purpose and effect of which is to promote, encourage or increase competition in any trade or industry, or which are in furtherance of trade."

- "The Cartwright Act, like the Sherman Act, prohibits 'combinations' for the purpose of restraining trade. '[A] combination means a concert of action by individuals or entities maintaining separate and independent interests.' " (*Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 543 [30 Cal.Rptr.2d 706], internal citations omitted.)

- " 'Horizontal combinations are cartels or agreements among competitors which restrain competition among enterprises at the same level of distribution. They are ordinarily illegal per se. Vertical restraints are imposed by persons or firms further up the chain of distribution of a specific product (or in rare cases, further down the chain) than the enterprise restrained. Vertical non-price restraints are tested under the rule of reason; that is, the plaintiff must prove that the restraint had an anticompetitive effect in the relevant market in order to prevail.' " (*Exxon Corp. v. Superior Court* (1977) 51 Cal.App.3d 1672, 1680–1681 [60 Cal.Rptr.2d 195], internal citations and footnote omitted.)

- "Although the Sherman Act and the Cartwright Act by their express terms forbid all restraints on trade, each has been interpreted to permit by implication those restraints found to be reasonable." (*Corwin v. Los Angeles Newspaper Service Bureau, Inc.* (1971) 4 Cal.3d 842, 853 [94 Cal.Rptr. 785], internal citation omitted.)

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- "To determine whether the restrictions are reasonable, 'the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be obtained, are all relevant facts.' The court should consider 'the percentage of business controlled, the strength of the remaining competition [and] whether the action springs from business requirements or purpose to monopolize ... .' Whether a restraint of trade is reasonable is a question of fact to be determined at trial." (*Corwin, supra,* 4 Cal.3d at pp. 854–855, internal citations omitted.)

- "Generally, in determining whether conduct unreasonably restrains trade, '[a] rule of reason analysis requires a determination of whether ... its anti-competitive effects outweigh its pro-competitive effects.' " (*Bert G. Gianelli Distributing Co. v. Beck and Co.* (1985) 172 Cal.App.3d 1020, 1048 [219 Cal.Rptr. 203], internal citation omitted.)

- "The alleged antitrust violation need not be the sole or controlling cause of the injury in order to establish proximate cause, but only need be a substantial factor in bringing about the injury." (*Saxer v. Philip Morris, Inc.* (1975) 54 Cal.App.3d 7, 23 [126 Cal.Rptr 327], internal citation omitted.)

- "The plaintiff in a Cartwright Act proceeding must show that an antitrust violation was the proximate cause of his injuries. The frequently stated 'standing to sue' requirement is merely a rule that an action for violation of the antitrust laws may be maintained only by a party within the 'target area' of the antitrust violation, and not by one incidentally injured thereby. An 'antitrust injury' must be proved; that is, the type of injury the antitrust laws were intended to prevent, and which flows from the invidious conduct which renders defendants' acts unlawful. Finally, a plaintiff must show an injury within the area of the economy that is endangered by a breakdown of competitive conditions." (*Kolling v. Dow Jones and Co., Inc.* (1983) 137 Cal.App.3d 709, 723–724 [187 Cal.Rptr. 797], internal citations and footnote omitted.)

- "The exact parameters of 'antitrust injury' under section 16750 have not yet been established through either court decisions or legislation." (*Cellular Plus, Inc. v. Superior Court* (1993) 14 Cal.App.4th 1224, 1234 [18 Cal.Rptr.2d 308].)

<u>Secondary Sources</u>

- 2 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 2001), § 9.03B
- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 575–590

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3106
Horizontal and Vertical Restraints—"Agreement" Explained

An agreement exists if two or more persons or companies combine or join together for a common purpose. No written document or specific understanding is necessary for an agreement to exist. For [*name of defendant***] to be part of an agreement, [he/she/it] must have known [he/she/it] was joining in an agreement, even if [he/she/it] was not aware of all of its aspects.**

[An agreement also may exist if a person or company unwillingly participates—that is, if another person coerces [him/her/it] to join the agreement against [his/her/its] wishes.]

[To prove the existence of an agreement, [*name of plaintiff***] must show more than a similarity between [***name of defendant***]'s conduct and the conduct of others. Independent business judgment in response to market forces sometimes leads competitors to act in a similar way because of their individual self-interests. That conduct alone is not enough to prove an agreement. However, similar behavior, along with other evidence suggesting joint conduct, may be used to decide whether there was an agreement.]**

In deciding whether [*name of defendant***]'s conduct was the result of an agreement, you may consider the nature of the acts done, the relationships between the parties, the interests of those who allegedly agreed, and other circumstances surrounding the conduct.**

DIRECTIONS FOR USE

The third paragraph should be read only where a horizontal agreement is involved.

SOURCES AND AUTHORITY

- Business and Professions Code section 16720 provides, in part: "A trust is a combination of capital, skill or acts by two or more persons for any of the following purposes: … To create or carry out restrictions in trade or commerce. …"

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- "The Cartwright Act, like the Sherman Act, requires an illegal 'combination' or 'conspiracy' to restrain trade." (*Kolling v. Dow Jones and Co., Inc.* (1982) 137 Cal.App.3d 709, 720 [187 Cal.Rptr. 797], internal citations omitted.)

- " '[A] combination means a concert of action by individuals or entities maintaining separate and independent interests.' " (*Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 543 [30 Cal.Rptr.2d 706], internal citations omitted.)

- "[A] necessary 'conspiracy' or 'combination' cognizable as an antitrust action is formed where a trader uses coercive tactics to impose restraints upon otherwise uncooperative businesses. If a 'single trader' pressures customers or dealers into pricing arrangements, an unlawful combination is established, irrespective of any monopoly or conspiracy, and despite the recognized right of a trader to determine with whom it will deal." (*G.H.I.I. v. MTS, Inc.* (1983) 147 Cal.App.3d 256, 268 [195 Cal.Rptr. 211], internal citations omitted.)

- "In *United States v. International Harvester Co.*, 274 U.S. 693, 47 S.Ct. 748, 71 L.Ed. 1302 (1927), the Court acknowledged as lawful, competitors' practice of independently, and as a matter of business judgment, following the prices of an industry leader. '[T]he fact that competitors may see proper, in the exercise of their own judgment, to follow the prices of another manufacturer, does not establish any suppression of competition or show any sinister domination.' " (*Wilcox, supra,* 815 F.2d at p. 526.)

- "[P]arallel changes in prices and exchanges of price information by competitors may be motivated by legitimate business concerns." (*City of Long Beach v. Standard Oil Co.* (9th Cir. 1989) 872 F.2d 1401, 1406.)

- "Price information published without 'plus factors,' which indicate an agreement, is judged under the rule of reason. If the exchange of price information constitutes reasonable business behavior the exchange is not an illegal agreement. In order to prevail, 'plaintiff must demonstrate that the allegedly parallel acts were against each conspirator's self interest, that is, that the decision to act was not based on a good faith business judgment.' " (*Supermarket of Homes, Inc. v. San Fernando Valley Bd. of Realtors* (9th Cir. 1986) 786 F.2d 1400, 1407, internal citations omitted.)

<u>Secondary Sources</u>

- 2 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 2001), §§ 9.04, 10.04
- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 575–590

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3107
Horizontal and Vertical Restraints
Agreement Between Company and Its Employee

[*Name of plaintiff***] claims that [***name of defendant's agent/employee/officer***], who is an [agent/employee/officer] of [***name of defendant***], had an agreement with [***name of defendant***]. You may find that [***name of defendant's agent/employee/officer***] and [***name of defendant***] had the required agreement only if you decide that [he/she] had a separate economic interest from [***name of defendant***] and acted in [his/her] own separate interest.**

DIRECTIONS FOR USE

This instruction is intended to clarify the circumstances under which an employee, agent, or officer can form an unlawful agreement. The parties may wish to develop an example to illuminate the issue, such as an employee running a side business that may combine with the business of his employer to restrain trade.

SOURCES AND AUTHORITY

- "[T]he Act prohibits the combination of resources of two or more independent interests for the purpose of restraining commerce and preventing market competition in the variety of ways listed in the statute." (*Lowell v. Mother's Cake and Cookie Co.* (1978) 79 Cal.App.3d 13, 23 [144 Cal.Rptr. 664], internal citation omitted.)

- "[A] corporation cannot conspire with itself or its agents for purposes of the antitrust laws." (*Kolling v. Dow Jones and Co., Inc.* (1982) 137 Cal.App.3d 709, 720 [187 Cal.Rptr. 797], internal citation omitted.)

- "It is also held that an individual acting alone through his agent or a corporation acting alone through its officers is not a combination in restraint of trade proscribed by the statute. The rationale of these decisions is that the acts of the agents or employees in the operation of the business are the acts of the principal. … We are of the opinion that the language of section 16720 of the Business and Professions Code contemplates concert of action by separate individuals or entities maintaining separate and independent interests … ." (*Bondi v. Jewels by Edwar, Ltd.* (1968) 267 Cal.App.2d 672, 677–678 [73 Cal.Rptr. 494], internal citations omitted.)

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- "[I]t is well settled that a complaint for antitrust violations which fails to allege such concerted action by separate entities maintaining separate and independent interests is subject to demurrer." (*G.H.I.I. v. MTS, Inc.* (1983) 147 Cal.App.3d 256, 266 [195 Cal.Rptr. 211], internal citations omitted.)

- "[Under the Sherman Act,] [t]he officers of a single firm are not separate economic actors pursuing separate economic interests, so agreements among them do not suddenly bring together economic power that was previously pursuing divergent goals. Coordination within a firm is as likely to result from an effort to compete as from an effort to stifle competition. In the marketplace, such coordination may be necessary if a business enterprise is to compete effectively. For these reasons, officers or employees of the same firm do not provide the plurality of actors imperative for a § 1 conspiracy." (*Copperweld Corp. v. Independence Tube Corp.* (1984) 467 U.S. 752, 769 [104 S.Ct. 2731, 81 L.Ed.2d 628], footnote omitted.)

- "[M]any courts have created an exception for corporate officers acting on their own behalf." (*Copperweld Corp., supra,* 467 U.S. at p. 769, fn. 15.)

- "We … need not reach the broader issue extensively argued in the amicus brief, i.e., whether the *Copperweld* rule would apply to the Cartwright Act when the conspiracy or combination in restraint of trade is purely intra-enterprise and there is no coerced or unwitting compliance by the victim in the forbidden activity." (*MacManus v. A. E. Realty Partners* (1987) 195 Cal.App.3d 1106, 1111, fn. 4 [241 Cal.Rptr. 315].)

Secondary Sources

- 2 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 2001), § 9.04B
- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 575–590

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3108
Horizontal and Vertical Restraints—"Coercion" Explained

Coercion is conduct of a supplier that interferes with the freedom of a [competitor/reseller] to sell in accordance with his or her own judgment. [It may include a threat by [*name of defendant*] to stop doing business with [[*name of plaintiff*]/a reseller] or to hold back any product or service important to its competition in the market.]

Coercion may be proven directly or indirectly. In deciding whether there was coercion, you may consider, among other factors, the following:

(a) Whether [*name of defendant*] placed or threatened to place any penalties on [*name of plaintiff*] for not following [*name of defendant*]'s suggestions;

(b) Whether [*name of defendant*] made or threatened to make an important benefit depend upon [*name of plaintiff*] following [*name of defendant*]'s suggestions;

(c) Whether [*name of defendant*] required [*name of plaintiff*] to get approval before doing something other than what [*name of defendant*] suggested; and

(d) The relative bargaining power of [*name of defendant*] and [*name of plaintiff*].

DIRECTIONS FOR USE

In the first paragraph, second line, if the coercion is claimed to be horizontal, then the word "competitor" should be used instead of "reseller." In the first paragraph, fourth line, the word "reseller" should be used if the plaintiff is not the reseller.

SOURCES AND AUTHORITY

- "[T]he 'conspiracy' or 'combination' necessary to support an antitrust action can be found where a supplier or producer, by coercive conduct, imposes restraints to which distributors involuntarily adhere. If a 'single trader' pressures customers or dealers into

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adhering to resale price maintenance, territorial restrictions, exclusive dealing arrangements or illegal 'tieins,' an unlawful combination is established, irrespective of any monopoly or conspiracy, and despite the recognized right of a producer to determine with whom it will deal." (*Kolling v. Dow Jones & Co.* (1982) 137 Cal.App.3d 709, 720 [187 Cal.Rptr. 797], internal citations omitted.)

- "A manufacturer may choose those with whom it wishes to deal and unilaterally may refuse to deal with a distributor or customer for business reasons without running afoul of the antitrust laws. It will thus be rare for a court to infer a vertical combination solely from a business's unilateral refusal to deal with distributors or customers who do not comply with certain conditions. Nonetheless, there is a line of cases that supports the proposition that a manufacturer may form a 'conspiracy' or 'combination' under the antitrust laws if it imposes restraints on dealers or customers by coercive conduct and they involuntarily adhere to those restraints." (*Dimidowich v. Bell & Howell* (9th Cir. 1986) 803 F.2d 1473, 1478, internal citations omitted.)

Secondary Sources

- 2 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 2001), § 10.04B
- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 575–590

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3109
Vertical Restraints—Termination of Reseller

A supplier, acting independently, may choose those resellers to which it wishes to sell or not sell. It may announce to those resellers the terms of resale, including resale prices, in advance. The supplier may terminate those resellers that do not follow these terms as long as the supplier acts independently in doing so.

However, if a supplier coerces a reseller to follow its suggested terms of resale, and the reseller does so, this conduct is an agreement to restrain competition.

DIRECTIONS FOR USE

There are circumstances where the terminated party that has combined with the supplier, other than as a buyer, may have a claim. For example, a customer that leases the supplier's product and then subleases it may also invoke this law. In such cases, this instruction should be adapted accordingly.

SOURCES AND AUTHORITY

- "If a seller does no more than announce a policy designed to restrain trade, and declines to sell to those who fail to adhere to the policy, no illegal combination is established. Also, a supplier may suggest policies and use persuasion to obtain adherence. At the same time, an illegal combination may be found where a supplier secures compliance with announced policies in restraint of trade by means which go beyond mere announcement of policy and the refusal to deal. If, for example, the supplier takes 'affirmative action' to bring about the involuntary acquiescence of its dealers, an unlawful combination exists." (*Kolling v. Dow Jones & Co.* (1982) 137 Cal.App.3d 709, 721 [187 Cal.Rptr. 797], internal citations omitted.)

- "[A] manufacturer's announcement of a resale price policy and its refusal to deal with dealers who do not comply coupled with the dealers' voluntary acquiescence in the policy does not constitute an implied agreement or an unlawful combination as a matter of law. An unlawful combination arises, however, if the manufacturer goes beyond those measures by seeking communication of a dealer's acquiescence or agreement to

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secure the dealer's compliance, such as by means of coercion, and the dealer so communicates." (*Chavez v. Whirlpool Corp.* (2001) 93 Cal.App.4th 363, 372–373 [113 Cal.Rptr.2d 175], internal citations omitted.)

Secondary Sources

- 2 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 2001), § 10.04A
- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 575–590

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3110
Vertical Restraints
Agreement Between Seller and Reseller's Competitor

If a reseller coerces a supplier to refuse to do business with a competing reseller, and the supplier does so, this conduct is an agreement to restrain competition.

Refusing to do business with a reseller after receiving complaints by a competing reseller is not, by itself, an agreement to restrain competition. However, if a supplier receives such complaints and then agrees with the complaining reseller to act on them, that becomes an agreement to restrain competition.

DIRECTIONS FOR USE

If the complaining competitor is also a named defendant, this instruction must be rewritten to reflect that circumstance.

SOURCES AND AUTHORITY

- In *Bert G. Gianelli Distributing Co. v. Beck & Co.* (1985) 172 Cal.App.3d 1020, 1043–1044 [219 Cal.Rptr. 203], the Court of Appeal held that proof that the reseller competing against the plaintiff complained to the seller about plaintiff's pricing and that the seller then took action against the plaintiff reseller in response to the complaint was sufficient to support a finding of a combination.

- "[T]he plaintiff must present evidence that tends to exclude, although it need not actually exclude, the possibility that the alleged conspirators acted independently rather than collusively. Insufficient is a mere assertion that a reasonable trier of fact might disbelieve any denial by the defendants of an unlawful conspiracy." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 852 [107 Cal.Rptr.2d 841].)

<u>Secondary Sources</u>

- 2 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 2001), § 10.04C
- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 575–590

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3111
Rule of Reason
Anticompetitive Versus Beneficial Effects

In deciding whether [*name of defendant*]'s challenged restraint had an anticompetitive or beneficial purpose or effect on competition, you should consider the results the restraint was intended to achieve or actually did achieve. In balancing these purposes or effects, you also may consider, among other factors, the following:

(a) The effect of the restraint on the business involved;

(b) The history of the restraint;

(c) The reasonableness of the stated purpose for the restraint;

(d) The availability of less restrictive means to accomplish the stated purpose;

(e) The portion of the market affected by the restraint; and

(f) The extent of [*name of defendant*]'s market power.

SOURCES AND AUTHORITY

- "The basic purpose of the antitrust laws is to prevent undue restraints upon trade which have a significant effect on competition. A contract, combination, or conspiracy is an illegal restraint of trade if it constitutes a per se violation of the statute or has as its *purpose* or *effect* an unreasonable restraint of trade. The determination of the existence of such an illegal restraint of trade turns upon findings of fact and involves 'weigh[ing] all of the circumstances of a case.' " (*Corwin v. Los Angeles Newspaper Service Bur.* (1978) 22 Cal.3d 302, 314–315 [148 Cal.Rptr. 918], internal citations omitted and footnotes.)

- "Under the rule of reason, the court inquires into the nature and history of the restraint, as well as other relevant considerations." (*Reynolds v. California Dental Service* (1988) 200 Cal.App.3d 590, 596–597 [246 Cal.Rptr. 331], internal citations omitted.)

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- "The 'rule of reason' permits certain restraints upon trade to be found reasonable. In order to determine whether the restrictions are reasonable, 'the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.' 'Whether a restraint of trade is reasonable is a question of fact to be determined at trial.' " (*Kolling v. Dow Jones & Co.* (1982) 137 Cal.App.3d 709, 727 [187 Cal.Rptr. 797], internal citations omitted.)

Secondary Sources

- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 575–590

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3112
Rule of Reason
"Market Power" Explained

Market power is the ability to increase prices or reduce output without losing market share. The higher a seller's market share, the more likely it has market power.

In deciding whether a seller has market power, you should also consider how difficult it is for a potential competitor to successfully enter the market. The more difficult it is to successfully enter a market, the more likely a seller has market power within that market. Market power is less likely to exist if it is not difficult for potential competitors to enter a market successfully.

Each market has two components: a product market and a geographic market.

DIRECTIONS FOR USE

See instructions that follow explaining the concepts of product market and geographic market: 3113, *Rule of Reason—"Product Market" Explained,* and 3114, *Rule of Reason—"Geographic Market" Explained.*

SOURCES AND AUTHORITY

- "[C]ase law holds that the need to prove market power is a threshold consideration in an antitrust case and is the sine qua non of recovery." (*Exxon Corp. v. Superior Court* (1997) 51 Cal.App.4th 1672, 1681 [60 Cal.Rptr.2d 195], footnote omitted.)

- " 'To meet his initial burden in establishing that the practice is an unreasonable restraint of trade, plaintiff must show that the activity is the type that restrains trade and that the restraint is likely to be of significant magnitude. ... Ordinarily, a plaintiff to do this must delineate a relevant market and show that the defendant plays enough of a role in that market to impair competition significantly.' " (*Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 542 [30 Cal.Rptr.2d 706], internal citations omitted.)

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- "As a practical matter, market power is usually equated with market share. 'Since market power can rarely be measured directly by the methods of litigation, it is normally inferred from possession of a substantial percentage of the sales in a market carefully defined in terms of both product and geography.' " (*Redwood Theaters, Inc. v. Festival Enterprises, Inc.* (1988) 200 Cal.App.3d 687, 704 [248 Cal.Rptr. 1819], internal citation omitted.)

- "By reducing the substitutability of products, a high level of product differentiation results in relative inelasticity of cross-product demand. This inelasticity creates opportunities for suppliers to manipulate the price and quantity of goods sold or to entrench their market position by creating barriers to entry in a market." (*Redwood Theaters, Inc. v. Festival Enterprises, Inc.* (1988) 200 Cal.App.3d 687, 706–707 [248 Cal.Rptr. 1819], footnote omitted.)

Secondary Sources

- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 575–590

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3113
Rule of Reason—"Product Market" Explained

[*Name of plaintiff***] claims that the product market is [***insert claimed product market, e.g., "paper clips"***]. [***Name of defendant***] claims that the product market is [***insert claimed product market, e.g., "all paper fasteners"***].**

To define the product market, you must determine which [products/services] are in the market in which [*name of defendant***] is claimed to have carried out its restraint of trade.**

A product market consists of all [products/services] that can reasonably be used for the same purpose. [Products/services] are not in the same product market if users are not likely to substitute one for the other.

In deciding whether products are reasonable substitutes, you may consider whether a small increase in the price of one product would cause a considerable number of customers of that product to switch to a second product. If so, these two products are likely to be in the same market. If a significant increase in the price of one product does not cause a significant number of consumers to switch to a second product, these products are not likely to be in the same market.

DIRECTIONS FOR USE

The word "services" should be substituted for "products" wherever that word appears if the case concerns services instead of products.

In some cases, an example may be helpful to illustrate the principle of "reasonable interchangeability," such as the following. Of course, this example may be modified to best suit the facts of the case.

> If the price of a loaf of whole wheat bread increases by 10 or 15 cents, a considerable number of customers may decide to purchase white bread instead. Although these products are somewhat different, they may be reasonably interchangeable for purposes of making toast and sandwiches. They are likely then to be in the same relevant product market. However, the relationship between whole wheat bread and other bread products may

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be different. Thus, customers may not believe hot dog buns as quite so interchangeable. Therefore, a 10, 15, or even 50-cent increase in the price of a loaf of wheat bread is not likely to cause too many customers to buy hot dog buns instead. These two products, then, are not likely to be in the same relevant market.

SOURCES AND AUTHORITY

- "The United States Supreme Court has declared that the relevant market is determined by considering 'commodities reasonably interchangeable by consumers for the same purposes.' Or, in other words, the relevant market is composed of products that have reasonable interchangeability for the purpose for which they are produced." (*Exxon Corp. v. Superior Court* (1997) 51 Cal.App.4th 1672, 1682 [60 Cal.Rptr.2d 195], internal citations omitted.)

- "In antitrust law, the interchangeability of products is usually considered in the definition of markets; the boundary of a relevant market is defined by a significant degree of product differentiation." (*Redwood Theaters, Inc. v. Festival Enterprises, Inc.* (1988) 200 Cal.App.3d 687, 705 [248 Cal.Rptr. 1819].)

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3114
Rule of Reason—"Geographic Market" Explained

[*Name of plaintiff***] claims that the relevant geographic market is [***identify area, e.g., "the city of Los Angeles"***]. [***Name of defendant***] claims that the relevant geographic market is [***identify area, e.g., "the state of California"***].**

A geographic market is the area where buyers turn for alternate sources of supply or where sellers normally sell. The geographic market may or may not be the same as the area where the parties in this case currently compete or do business. It may be smaller or larger than that area.

A geographic market may be limited to the area where a product can be shipped and sold profitably. You may consider whether purchasing patterns are so different in the two areas that products sold in one area tend not to be sold in another. For example, this might occur if the cost of transporting a product into or out of the claimed geographic market is large compared to the value of the product.

In deciding whether products are in the same geographic market, you may consider whether a small increase in the price of the product in one area would cause a considerable number of customers in that area to buy the product in another area. If so, these two areas are likely to be in the same geographic market. If a significant increase in the price in one area does not cause a significant number of consumers to buy the product in another area, these areas are not likely to be in the same geographic market.

DIRECTIONS FOR USE

The word "service" should be substituted for "product" wherever that word appears if the case concerns services rather than products.

In some cases an example may be helpful to illustrate the terms used. Regarding the significance of price increases, an example like that given in the Directions for Use in instruction 3113, *Rule of Reason—"Product Market" Explained* may be adapted. Regarding the significance of customer purchasing patterns, the following example may suffice:

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> Retail customers are not likely to travel too far to buy shoes. So, a product market defined as "shoe stores" is not likely to include shoe stores in two towns that are 25 miles from each other. However, if the product market is for an inventory of shoes purchased by shoe stores at wholesale, the geographic market is likely to be nationwide, since shoe stores are likely to purchase shoes no matter where companies distributing shoes are located.

Regarding the significance of transporting costs, the following example may suffice:

> Gravel, which is relatively cheap but heavy, and therefore relatively costly to ship, is likely to compete in a narrower geographic market than computer software, which, if valued by weight, is more costly per pound than gravel but also much less costly to ship. Accordingly, a geographic market defined as a city or a region may be appropriate for assessing gravel competition, while a nationwide, or even worldwide, geographic market may be more appropriate for assessing the competition between software sellers.

SOURCES AND AUTHORITY

- The "area of effective competition in the known line of commerce must be charted by careful selection of the market area in which the seller operates, and to which the purchaser can practicably turn for supplies." (*U.S. v. Philadelphia National Bank* (1963) 374 U.S. 321, 359 [83 S.Ct. 1715, 10 L.Ed.2d 915].)

- "The term 'relevant market' encompasses notions of geography as well as product use, quality, and description. The geographic market extends to the ' " 'area of effective' " competition ... where buyers can turn for alternate sources of supply.' " (*Oltz v. St. Peter's Community Hospital* (9th Cir. 1988) 861 F.2d 1440, 1446, internal citations omitted.)

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3115
Tying—Per Se Violation—Essential Factual Elements
(Bus. & Prof. Code, § 16720)

[*Name of plaintiff***] claims that there is an unlawful tying arrangement in which [***specify the particular real estate, product, or services***] is the tying product and [***specify the particular real estate, product, or services***] is the tied product. A "tying arrangement" is the sale of one product, called the "tying product," where the buyer is required or coerced to also purchase a different, separate product, called the "tied product." For example, if a supermarket sells flour only if its customers also buy sugar, that supermarket would be engaged in tying. Flour would be the tying product and sugar the tied product.**

To establish this claim against [*name of defendant***], [***name of plaintiff***] must prove the following:**

1. **That [***tying item***] and [***tied item***] are separate and distinct;**

2. **That [***name of defendant***] will sell [***tying item***] only if the buyer also purchases [***tied item***], or that [***name of defendant***] sold [***tying item***] and required or otherwise coerced buyers to [also purchase [***tied item***]] [agree not to purchase [***tied item***] from any other supplier];**

3. **That [***name of defendant***] has sufficient economic power in the market for [***tying item***] to coerce at least some buyers of [***tying item***] into [purchasing [***tied item***]] [agreeing not to purchase [***tied item***] from a competitor of [***name of defendant***]];**

4. **That the conduct involves a substantial amount of sales, in terms of the total dollar value of [***tied product or service***]; and**

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.**

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DIRECTIONS FOR USE

This instruction is written for claims brought under Business and Professions Code section 16720. A claim under this section may involve products, land, or services as the tying item and products, land, or services as the tied item. Section 16720 applies a stricter test for tying than Business and Professions Code section 16727. Therefore, if products are the tying item and products or services the tied item, the following instruction, pertinent to section 16727, should be used instead.

The example given was used in two federal cases, *Northern Pacific Railway Co. v. United States* (1958) 356 U.S. 1, 5–6 [78 S.Ct. 514, 2 L.Ed.2d 545] and *Jefferson Parish Hospital District No. 2 v. Hyde* (1984) 466 U.S. 2, 12 [104 S.Ct. 1551, 80 L.Ed.2d 2], but also can help explain the Cartwright Act. The terms "product," "sell," and "purchase" used in this instruction may need to be modified to reflect the facts of the particular case, since tying arrangements challenged under Business and Professions Code section 16720 may involve services, real property, intangibles, leases, licenses, and the like.

Also, an unlawful tying arrangement may be shown where the buyer agrees not to purchase the tied product or service from any other supplier as a condition of obtaining the tying product. If the tying claim involves such a "tie-out" agreement, this instruction must be modified accordingly.

Where the "tying product" is land and the "tied product" is a service or a commodity, logic suggests that the first element, i.e., their distinctness, is beyond dispute and that trying to adapt the bracketed language to such an alleged tie-in may create confusion. In such a case, the court may recite this element, then advise the jury that it has been established by the plaintiff or is undisputed by the defendant. The word "parcels," "lots," or similar terms should be used where both items are land, as in such cases the separateness of the tying and tied land could be in dispute.

SOURCES AND AUTHORITY

- Business and Professions Code section 16720 provides:

  A trust is a combination of capital, skill or acts by two or more persons for any of the following purposes:
  (a) To create or carry out restrictions in trade or commerce.
  (b) To limit or reduce the production, or increase the price of merchandise or of any commodity.
  (c) To prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity.

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(d) To fix at any standard or figure, whereby its price to the public or consumer shall be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, barter, use or consumption in this State.

(e) To make or enter into or execute or carry out any contracts, obligations or agreements of any kind or description, by which they do all or any or any combination of any of the following:

(1) Bind themselves not to sell, dispose of or transport any article or any commodity or any article of trade, use, merchandise, commerce or consumption below a common standard figure, or fixed value.

(2) Agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure.

(3) Establish or settle the price of any article, commodity or transportation between them or themselves and others, so as directly or indirectly to preclude a free and unrestricted competition among themselves, or any purchasers or consumers in the sale or transportation of any such article or commodity.

(4) Agree to pool, combine or directly or indirectly unite any interests that they may have connected with the sale or transportation of any such article or commodity, that its price might in any manner be affected.

- "Antitrust laws against tying arrangements seek to eradicate the evils that (1) competitors are denied free access to the market for the tied product not because the seller imposing the tying requirement has a better or less expensive tied product, but because of the seller's power or leverage in the market for the tying product; and (2) buyers are forced to forego their free choice between competing tied products. Tying arrangements are illegal per se 'whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product' and when 'a total amount of business, substantial enough in terms of dollar-volume so as not to be merely de minimis, is foreclosed to competitors by the tie.' " (*Freeman v. San Diego Assn. of Realtors* (1999) 77 Cal.App.4th 171, 184 [91 Cal.Rptr.2d 534], internal citations omitted.)

- "Case law construing Business & Professions Code section 1627 defines a tying arrangement as 'an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier.' Tying arrangements are illegal per se if the party has sufficient economic power and substantially forecloses competition in the relevant market. Even when not per se illegal, a tying arrangement violates the Cartwright Act if it unreasonably restrains trade." (*Morrision v. Viacom, Inc.* (1997) 52 Cal.App.4th 1514, 1524 [61 Cal.Rptr.2d 544], internal citations omitted.)

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- "The threshold element for a tying claim is the existence of separate products or services in separate markets. Absent separate products in separate markets, the alleged tying and tied products are in reality a single product." (*Freeman, supra,* 77 Cal.App.4th at p. 184, internal citations omitted.)

- "The elements of a per se tying arrangement violative of section 16720 are: '(1) a tying agreement, arrangement or condition existed whereby the sale of the tying product was linked to the sale of the tied product or service; (2) the party had sufficient economic power in the tying market to coerce the purchase of the tied product; (3) a substantial amount of sale was affected in the tied product; and (4) the complaining party sustained pecuniary loss as a consequence of the unlawful act.' " *(Morrison v. Viacom, Inc.* (1998) 66 Cal.App.4th 534, 541–542 [78 Cal.Rptr.2d 133], internal citations omitted.)

- " ' "[T]ying agreements serve hardly any purpose beyond the suppression of competition." They deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market. At the same time buyers are forced to forego their free choice between competing products. For these reasons "tying agreements fare harshly under the laws forbidding restraints of trade." ' " (*Suburban Mobile Homes v. AMFAC Communities* (1980) 101 Cal.App.3d 532, 542 [161 Cal.Rptr. 811], internal citations omitted.)

- "[T]he burden of proving an illegal tying arrangement differs somewhat under section 16720 and section 16727. Under section 16727 the plaintiff must establish that the tie-in substantially lessens competition. This standard is met if either the seller enjoys sufficient economic power in the tying product to appreciably restrain competition in the tied product or if a not insubstantial volume of commerce in the tied product is restrained. Under section 16720 standard, both conditions must be met." (*Suburban Mobile Homes v. AMFAC Communities* (1980) 101 Cal.App.3d 532, 549 [161 Cal.Rptr. 811], internal citation omitted.)

- "The alleged antitrust violation need not be the sole or controlling cause of the injury in order to establish proximate cause, but only need be a substantial factor in bringing about the injury." (*Saxer v. Philip Morris, Inc.* (1975) 54 Cal.App.3d 7, 23 [126 Cal.Rptr 327], internal citation omitted.)

<u>Secondary Sources</u>

- 2 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 2001), § 10.06
- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 575–590

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3116
Tying—Essential Factual Elements
(Bus. & Prof. Code, § 16727)

[*Name of plaintiff***] claims that there is an unlawful tying arrangement in which [***specify the particular product***] is the tying product and [***specify the particular product or services***] is the tied product. A "tying arrangement" is the sale of one product, called the "tying product," where the buyer is required or coerced to also purchase a different, separate product, called the "tied product." For example, if a supermarket sells flour only if its customers also buy sugar, that supermarket would be engaged in tying. Flour would be the tying product and sugar the tied product.**

To establish this claim, [*name of plaintiff***] must prove the following:**

1. **That [***tying item***] and [***tied product or service***] are separate and distinct;**

2. **That [***name of defendant***] will sell [***tying product***] only if the buyer also purchases [***tied product or service***], or that [***name of defendant***] sold [***tying product***] and required or otherwise coerced buyers [to also purchase [***tied product or service***] [or to agree not to purchase [***tied product or service***] from any other supplier];**

3. **That [***insert one or both of the following***]:**

   [[*name of defendant***] has sufficient economic power in the market for [***tying product***] to coerce at least some consumers into purchasing [***tied product or service***];] [or]**

   [the claimed tying arrangement has restrained competition for a substantial amount of sales, in terms of total dollar volume of [*tied product or service***]; and**

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.**

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DIRECTIONS FOR USE

This instruction applies to claims under Business and Professions Code section 16727, which applies only where the tying product consists of "goods, merchandise, machinery, supplies, [or] commodities" and the tied product consists of "goods, merchandise, supplies, commodities, or services." Section 16727 does not apply if the tying product is land or services, nor does it apply if the tied product is land.

The example given was used in two federal cases, *Northern Pacific Railway Co. v. United States* (1958) 356 U.S. 1, 5–6 [78 S.Ct. 514, 2 L.Ed.2d 545] and *Jefferson Parish Hospital District No. 2 v. Hyde* (1984) 466 U.S. 2, 12 [104 S.Ct. 1551, 80 L.Ed.2d 2], but also can help explain the Cartwright Act. The terms "product," "sell," and "purchase" used in this instruction may need to be modified to reflect the facts of the particular case, since tying arrangements challenged under Business and Professions Code section 16720 may involve services, real property, intangibles, leases, licenses, and the like.

Also, an unlawful tying arrangement may be shown where the buyer agrees not to purchase the tied product or service from any other supplier as a condition of obtaining the tying product. If the tying claim involves such a "tie-out" agreement, this instruction must be modified accordingly.

SOURCES AND AUTHORITY

- Business and Professions Code section 16727 provides: "It shall be unlawful for any person to lease or make a sale or contract for the sale of goods, merchandise, machinery, supplies, commodities for use within the State, or to fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, merchandise, machinery, supplies, commodities, or services of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of trade or commerce in any section of the State."

- "In sum, in order to prove an illegal per se tying arrangement there must be a showing that: (1) a tying agreement, arrangement or condition existed whereby the sale of the tying product was linked to the sale of the tied product; (2) the party had sufficient economic power in the tying market to coerce the purchase of the tied product; and (3) a substantial amount of sale was effected in the tied product. Lastly, since the antitrust violation is a species of tort, (4) the complaining party must prove that he suffered pecuniary loss as a consequence of the unlawful act." (*Suburban Mobile Homes v.*

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AMFAC Communities (1980) 101 Cal.App.3d 532, 542–543 [161 Cal.Rptr. 811], internal citations omitted.)

- "[T]he burden of proving an illegal tying arrangement differs somewhat under section 16720 and section 16727. Under section 16727 the plaintiff must establish that the tie-in substantially lessens competition. This standard is met if either the seller enjoys sufficient economic power in the tying product to appreciably restrain competition in the tied product or if a not insubstantial volume of commerce in the tied product is restrained. Under section 16720 standard, both conditions must be met." (*Suburban Mobile Homes, supra,* 101 Cal.App.3d at p. 549, internal citation omitted.)

- "Case law construing Business and Professions Code section 16727 defines a tying arrangement as 'an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier.' Tying arrangements are illegal per se if the party has sufficient economic power and substantially forecloses competition in the relevant market. Even when not per se illegal, a tying arrangement violates the Cartwright Act if it unreasonably restrains trade." (*Morrison v. Viacom, Inc.* (1997) 52 Cal.App.4th 1514, 1524 [61 Cal.Rptr.2d 544], internal citations omitted.)

<u>Secondary Sources</u>

- 2 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 2001), § 10.06
- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 575–590

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3117
Tying—"Separate Products" Explained

In deciding whether [*tying item*] and [*tied item*] are separate and distinct, you should consider, among other factors, the following:

(a) Whether competitors offer to sell the [*tied product or service*] separately from the [*tying product or service*] or only as a unit;

(b) Whether the combined product is composed of varying assortments of component parts;

(c) Whether buyers are or can be charged separately for the [products/services]; and

(d) Whether [*name of defendant*] ever sells or offers to sell the [*tied product or service*] separate from the [*tying product or service*].

Not all of these factors need be present in order for you to conclude that the [*tying product or service*] and the [*tied product or service*] are separate and distinct [*products or services, etc.*].

DIRECTIONS FOR USE

If an example is thought to be in order, users may wish to consider the following:

> For example, even though belt buckles are sometimes sold separately from belts, a belt buckle is normally considered a component of a belt. Therefore, a belt and buckle would normally be considered one product under the law in this case. On the other hand, while belts and wallets are sometimes packaged and sold together, they are not normally considered components of a single product and are normally purchased separately. Therefore, belts and wallets would normally be considered two separate products under the law in this case.

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SOURCES AND AUTHORITY

- "Although we have not found … any definitive test for the determination of this question, the following factors should be taken into account: (1) Whether competitors offer to sell the products or services separately or only as a unit. (2) Whether the combined product or service is composed of varying assortments of component parts. (3) Whether buyers are or can be charged separately for the allegedly separate products or services. (4) Whether the defendant ever sells or offers to sell the products or services separately." (*Corwin v. Los Angeles Newspaper Service Bur.* (1971) 4 Cal.3d 842, 858–859 [94 Cal.Rptr. 785], internal citations omitted.)

Secondary Sources

- 2 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 2001), § 10.06A
- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 575–590

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3118
Tying—"Economic Power" Explained

In determining whether [*name of defendant*] has sufficient economic power in the market for [*tying item*], you may consider whether [*name of defendant*] has such a large share of the market for [*tying product or service*] that buyers do not have alternate sources of [*tying product or service*] or a reasonably available substitute. If [*name of defendant*] has economic power, it may be established even though it exists with respect to some, but not all, buyers.

You may also consider whether a buyer would be unable to easily locate a similar or equally desirable product in the marketplace. If buyers do not generally consider other products to be substitutes, this fact may give [*name of defendant*] economic power over its [*tied item*]. The fact that [*name of defendant*] can produce [*tying product or service*] in an efficient manner or at a high level of quality does not, by itself, mean that competitors do not offer a similar product.

DIRECTIONS FOR USE

This instruction assumes that the plaintiff is seeking relief under Business and Professions Code Section 16720. If the plaintiff is instead seeking relief under Business and Professions Code Section 16727, this element is not required, so long as the plaintiff proves that the claimed tie-in affected a "not insubstantial amount" of sales of the tied product.

SOURCES AND AUTHORITY

- "[W]e emphasize that the power over the tying product … can be sufficient even though the power falls short of dominance and even though the power exists only with respect to some buyers in the market. As the cases unanimously underline, such crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes." (*Suburban Mobile Homes v. AMFAC Communities* (1980) 101 Cal.App.3d 532, 544 [161 Cal.Rptr. 811], internal citations omitted.)

- "Decisions of the United States Supreme Court 'have made unmistakably clear that the economic power over the tying product can be sufficient even though the power falls

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far short of dominance and even though the power exists only with respect to some of the buyers in the market.' " (*Corwin v. Los Angeles Newspaper Services Bur.* (1971) 4 Cal.3d 842, 858 [94 Cal.Rptr. 785], internal citation omitted.)

- "Tying arrangements are illegal per se 'whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product' and when 'a total amount of business, substantial enough in terms of dollar-volume so as not to be merely de minimis, is foreclosed to competitors by the tie.' " (*Freeman v. San Diego Assn. of Realtors* (1999) 77 Cal.App.4th 171, 184 [91 Cal.Rptr.2d 534], internal citations omitted.)

- "To plead this element, appellants must allege facts to show that 'a total amount of business, substantial enough in terms of dollar-volume so as not to be merely de minimis, is foreclosed to competitors by the tie.' " (*Morrison v. Viacom, Inc.* (1998) 66 Cal.App.4th 534, 542 [78 Cal.Rptr.2d 133], internal citation omitted.)

Secondary Sources

- 2 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 2001), § 10.06D
- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 575–590

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3119
"Noerr-Pennington" Doctrine

[*Name of defendant***] claims that [his/her/its] agreement with [***other person***] did not violate the law because [he/she/it] was trying in good faith to influence government action. [***Name of plaintiff***] claims that this action was a sham or a pretext to restrain competition.**

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

1. **That [***name of defendant***]'s actions before [***name of governmental body***] were undertaken without regard to the merits; and**

2. **That the reason [***name of defendant***] engaged in [***specify the petitioning activity, e.g., "filing an objection to an environmental impact report"***] was to use the [***specify the claimed process, e.g., "environmental agency approval"***] process to harm [***name of plaintiff***] by [***specify the manner of harm, e.g., "delaying [name of plaintiff]'s entry into the market"***], rather than to obtain a successful outcome from that process.**

SOURCES AND AUTHORITY

- "The *Noerr-Pennington* doctrine provides that there is no antitrust liability under the Sherman Act for efforts to influence government which are protected by the First Amendment right to petition for redress of grievances, even if the motive behind the efforts is anticompetitive. An exception to the doctrine arises when efforts to influence government are merely a sham; such efforts are not protected by the *Noerr-Pennington* doctrine and are subject to antitrust liability." (*Hi-Top Steel Corp. v. Lehrer* (1994) 24 Cal.App.4th 570, 574–575 [29 Cal.Rptr.2d 646], internal citations omitted.)

- "Stated most generally, the *Noerr-Pennington* doctrine declares that efforts to influence government action are not within the scope of the Sherman Act, regardless of anticompetitive purpose or effect." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 320 [216 Cal.Rptr. 718], internal citations omitted.)

- " 'The right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend

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upon their intent in doing so. It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors.' " (*Hi-Top Steel Corp., supra,* 24 Cal.App.4th at p. 576, internal citations omitted.)

- "[T]he sham exception 'encompasses situations in which persons use the governmental process—as opposed to the outcome of that process—as an anticompetitive weapon.' It 'involves a defendant whose activities are "not genuinely aimed at procuring favorable government action" at all, not one "who 'genuinely seeks to achieve his governmental result, but does so through improper means' " ' " (*Hi-Top Steel Corp., supra,* 24 Cal.App.4th at p. 577, internal citations omitted.)

- "[W]e hold the sham exception to the *Noerr-Pennington* doctrine is applicable in California." (*Hi-Top Steel Corp., supra,* 24 Cal.App.4th at p. 579.)

- "While the *Noerr-Pennington* doctrine was formulated in the context of antitrust cases, it has been applied or discussed in cases involving other types of civil liability, including liability for interference with contractual relations or prospective economic advantage or unfair competition." (*Hi-Top Steel Corp., supra,* 24 Cal.App.4th at pp. 577–578, internal citations omitted.)

<u>Secondary Sources</u>

- 2 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 2001), § 16.11
- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, § 578

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3120
Affirmative Defense—*In Pari Delicto*

[*Name of defendant***] claims that [***name of plaintiff***] may not recover because [***name of plaintiff***] is equally responsible for the harmful conduct. To succeed, [***name of defendant***] must prove the following:**

1. **That [***name of plaintiff***] and [***name of defendant***] have substantially equal economic strength;**

2. **That [***name of plaintiff***] is at least equally responsible for the harmful conduct as [***name of defendant***]; and**

3. **That [***name of plaintiff***] was not compelled by economic pressure to enter into the agreement.**

SOURCES AND AUTHORITY

- "Cases … have declared that if a plaintiff does not bear equal responsibility for establishing the illegal scheme, or if he is compelled by economic pressures to accept such an agreement, he cannot be barred from recovering because he participated therein." (*Mailand v. Burckle* (1978) 20 Cal.3d 367, 381 [143 Cal.Rptr. 1], internal citations omitted.)

Secondary Sources

- 2 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 2001), § 16.13
- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 575–590

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3121
Damages

If you decide that [*name of plaintiff*] has proved [his/her/its] 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 all harm that was caused by [*name of defendant*], even if the harm could not have been anticipated.

[*Name of plaintiff*] must prove the amount of [his/her/its] damages. However, [*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. You must not speculate or guess in awarding damages.

The following are the specific items of damages claimed by [*name of plaintiff*]:

1. **[Loss of reasonably anticipated sales and profits];**

2. **[An increase in [*name of plaintiff*]'s expenses];**

3. **[*insert other applicable item of damage*].**

SOURCES AND AUTHORITY

- Section 16750 (a) confers a private right of action for treble damages and attorneys fees on "[a]ny person who is injured in his business or property by reason of anything forbidden or declared unlawful by this chapter."

- "The plaintiff in a Cartwright Act proceeding must show that an antitrust violation was the proximate cause of his injuries. The frequently stated 'standing to sue' requirement is merely a rule that an action for violation of the antitrust laws may be maintained only by a party within the 'target area' of the antitrust violation, and not by one incidentally injured thereby. An 'antitrust injury' must be proved; that is, the type of injury the antitrust laws were intended to prevent, and which flows from the invidious conduct which renders defendants' acts unlawful. Finally, a plaintiff must show an injury within

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the area of the economy that is endangered by a breakdown of competitive conditions." (*Kolling v. Dow Jones & Co., Inc.* (1983) 137 Cal.App.3d 709, 723–724 [187 Cal.Rptr. 797], internal citations and footnote omitted.)

Secondary Sources

- 2 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 2001), §§ 10.06E, 12.05, 12.07
- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, § 585

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3200
Employer's Affirmative Defense
Injury Covered by Workers' Compensation

[*Name of defendant***] claims that [he/she/it] is not responsible for any harm that [***name of plaintiff***] may have suffered, because [***name of plaintiff***] was [***name of defendant***]'s employee and therefore can only recover under California's Workers' Compensation Act. To succeed, [***name of defendant***] must prove the following:**

1. **That [***name of plaintiff***] was [***name of defendant***]'s employee;**

2. **That [***name of defendant***] had workers' compensation insurance; and**

3. **That [***name of plaintiff***]'s injury occurred while [he/she] was performing a task for or related to [***name of defendant***]'s business.**

Any person performing services for another, other than as an independent contractor, is presumed to be an employee.

DIRECTIONS FOR USE

This instruction is intended for cases where the plaintiff is suing a defendant claiming to be the plaintiff's employer. This instruction is not intended for use in cases where the plaintiff is suing under an exception to the workers' compensation exclusivity rule.

For other instructions regarding employment status, such as special employment and independent contractors, see instructions in the Vicarious Liability series (Instructions 900–919). These instructions may need to be modified to fit this context. Note that this instruction should not be given if the plaintiff/employee has been determined to fall within a statutory exception. For exceptions to Labor Code section 3351, see Labor Code section 3352.

If appropriate to the facts of the case, see instructions on the going-and-coming rule in the Vicarious Liability series. These instructions may need to be modified to fit this context.

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SOURCES AND AUTHORITY

- Labor Code section 3602(a) provides: "Where the conditions of compensation set forth in Section 3600 concur, the right to recover such compensation is, except as specifically provided in this section and Sections 3706 and 4558, the sole and exclusive remedy of the employee or his or her dependents against the employer, and the fact that either the employee or the employer also occupied another or dual capacity prior to, or at the time of, the employee's industrial injury shall not permit the employee or his or her dependents to bring an action at law for damages against the employer."

- Labor Code section 3600(a) provides, in part:

  Liability for the compensation provided by this division, in lieu of any other liability whatsoever to any person except as otherwise specifically provided in Sections 3602, 3706, and 4558, shall, without regard to negligence, exist against an employer for any injury sustained by his or her employees arising out of and in the course of the employment and for the death of any employee if the injury proximately causes death, in those cases where the following conditions of compensation concur:
  (1) Where, at the time of the injury, both the employer and the employee are subject to the compensation provisions of this division.
  (2) Where, at the time of the injury, the employee is performing service growing out of and incidental to his or her employment and is acting within the course of his or her employment.
  (3) Where the injury is proximately caused by the employment, either with or without negligence.

- Labor Code section 3602(c) provides: "In all cases where the conditions of compensation set forth in Section 3600 do not concur, the liability of the employer shall be the same as if this division had not been enacted."

- Labor Code section 3351 provides, in part: " 'Employee' means every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed."

- Labor Code section 3357 provides: "Any person rendering service for another, other than as an independent contractor, or unless expressly excluded herein, is presumed to be an employee."

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- Labor Code section 3706 provides: "If any employer fails to secure the payment of compensation, any injured employee or his dependents may bring an action at law against such employer for damages, as if this division did not apply."

- "[T]he basis for the exclusivity rule in workers' compensation law is the 'presumed "compensation bargain," pursuant to which the employer assumes liability for industrial personal injury or death without regard to fault in exchange for limitations on the amount of that liability. The employee is afforded relatively swift and certain payment of benefits to cure or relieve the effects of industrial injury without having to prove fault but, in exchange, gives up the wider range of damages potentially available in tort.' " (*Fermino v. Fedco, Inc.* (1994) 7 Cal.4th 701, 708 [30 Cal.Rptr.2d 18], internal citation omitted.)

- "Employer conduct is considered outside the scope of the workers' compensation scheme when the employer steps outside of its proper role, or engages in conduct unrelated to the employment relationship, that is not a normal incident of employment, or that violates a fundamental public policy." (*Gomez v. Acquistapace* (1996) 50 Cal.App.4th 740, 751 [57 Cal.Rptr.2d 821], internal citations omitted.)

- "Because an employer faced with a civil complaint seeking to enforce a common law remedy which does not state facts indicating coverage by the act bears the burden of pleading and proving 'that the (act) is a bar to the employee's ordinary remedy,' we believe that the burden includes a showing by the employer-defendant, through appropriate pleading and proof, that he had 'secured the payment of compensation' in accordance with the provisions of the act." (*Doney v. Tambouratgis* (1979) 23 Cal.3d 91, 98, fn. 8 [151 Cal.Rptr. 347], internal citations omitted.)

- "A defendant need not plead and prove that it has purchased workers' compensation insurance where the plaintiff alleges facts that otherwise bring the case within the exclusive province of workers' compensation law, and no facts presented in the pleadings or at trial negate the workers' compensation law's application or the employer's insurance coverage." (*Gibbs v. American Airlines, Inc.* (1999) 74 Cal.App.4th 1, 14 [87 Cal.Rptr.2d 554], internal citations omitted.)

- "[T]he fact that an employee has received workers compensation benefits from some source does not bar the employee's civil action against an uninsured employer. Instead, '[t]he price that must be paid by each employer for immunity from tort liability is the purchase of a workers' compensation policy [and where the employer chooses] not to pay that price [ ] it should not be immune from liability.' " (*Huffman v. City of Poway* (2000) [101 Cal.Rptr.2d 325], internal citations omitted.)

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- "Under the Workers' Compensation Act, employees are automatically entitled to recover benefits for injuries 'arising out of and in the course of the employment.' 'When the conditions of compensation exist, recovery under the workers' compensation scheme "is the exclusive remedy against an employer for injury or death of an employee." ' " (*Piscitelli v. Friedenberg* (2001) 87 Cal.App.4th 953, 983 [105 Cal.Rptr.2d 88], internal citations omitted.)

- "Unlike many other states, in California workers' compensation provides the exclusive remedy for at least some intentional torts committed by an employer. *Fermino* described a 'tripartite system for classifying injuries arising in the course of employment. First, there are injuries caused by employer negligence or without employer fault that are compensated at the normal rate under the workers' compensation system. Second, there are injuries caused by ordinary employer conduct that intentionally, knowingly or recklessly harms an employee, for which the employee may be entitled to extra compensation under section 4553. Third, there are certain types of intentional employer conduct which bring the employer beyond the boundaries of the compensation bargain, for which a civil action may be brought.' " (*Gunnell v. Metrocolor Laboratories, Inc.* (2001) [112 Cal.Rptr.2d 195], internal citations omitted.)

- "It has long been established in this jurisdiction that, generally speaking, a defendant in a civil action who claims to be one of that class of persons protected from an action at law by the provisions of the Workers' Compensation Act bears the burden of pleading and proving, as an affirmative defense to the action, the existence of the conditions of compensation set forth in the statute which are necessary to its application." (*Doney, supra,* 23 Cal.3d at p. 97, internal citations and footnote omitted.)

- "California courts have held worker's compensation proceedings to be the exclusive remedy for certain third party claims deemed collateral to or derivative of the employee's injury. Courts have held that the exclusive jurisdiction provisions bar civil actions against employers by nondependent parents of an employee for the employee's wrongful death, by an employee's spouse for loss of the employee's services or consortium, and for emotional distress suffered by a spouse in witnessing the employee's injuries." (*Snyder v. Michael's Stores, Inc.* (1997) 16 Cal.4th 991, 997 [68 Cal.Rptr.2d 476], internal citations omitted.)

- " 'An employer-employee relationship must exist in order to bring the ... Act into effect.' However, the coverage of the Act extends beyond those who have entered into 'traditional contract[s] of hire.' '[S]ection 3351 provides broadly that for the purpose of the ... Act, " ' "Employee" means every person in the service of an employer under

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any appointment or contract of hire or apprenticeship, express or implied, oral or written....' " ' Given this 'section's explicit use of the disjunctive,' a contract of hire is not 'a prerequisite' to the existence of an employment relationship. Moreover, under section 3357, '[a]ny person rendering service for another, other than as an independent contractor, or unless expressly excluded ... , is presumed to be an employee.' " (*Arriaga v. County of Alameda* (1995) 9 Cal.4th 1055, 1060–1061 [40 Cal.Rptr.2d 116], internal citations omitted.)

- "Given these broad statutory contours, we believe that an 'employment' relationship sufficient to bring the act into play cannot be determined simply from technical contractual or common law conceptions of employment but must instead be resolved by reference to the history and fundamental purposes underlying the Workmen's Compensation Act." (*Laeng v. Workmen's Comp. Appeals Bd.* (1972) 6 Cal.3d 771, 777 [100 Cal.Rptr. 377], internal citations omitted.)

- "[C]ourts generally are more exacting in requiring proof of an employment relationship when such a relationship is asserted as a defense by the employer to a common law action." (*Spradlin v. Cox* (1988) 201 Cal.App.3d 799 [247 Cal.Rptr. 347], internal citation omitted.)

- "The question of whether a person is an employee may be one of fact, of mixed law and fact, or of law only. Where the facts are undisputed, the question is one of law, and the Court of Appeal may independently review those facts to determine the correct answer." (*Barragan v. Workers' Comp. Appeals Bd.* (1987) 195 Cal.App.3d 637, 642 [195 Cal.App.3d 637], internal citations omitted.)

- "An employee may have more than one employer for purposes of workers' compensation, and, in situations of dual employers, the second or 'special' employer may enjoy the same immunity from a common law negligence action on account of an industrial injury as does the first or 'general' employer. Identifying and analyzing such situations 'is one of the most ancient and complex questions of law in not only compensation but tort law.' " (*Santa Cruz Poultry v. Superior Court* (1987) 194 Cal.App.3d 575, 578 [239 Cal.Rptr. 578], internal citation omitted.)

- "In determining whether an employee is covered within the compensation system and thus entitled to recover compensation benefits, the 'definitional reach of these covered employment relationships is very broad.' A covered employee is 'every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written ... .' 'Any person rendering service for another, other than as an independent contractor, or unless expressly excluded herein, is presumed to be an employee.' … [T]hese provisions mandate a broad and generous

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interpretation in favor of inclusion in the system. Necessarily the other side of that coin is a presumption against the availability of a tort action where an employment relation exists. One result cannot exist without the other. Further, this result does not depend upon 'informed consent,' but rather on the parties' legal status. … [W]here the facts of employment are not disputed, the existence of a covered relationship is a question of law." (*Santa Cruz Poultry, supra,* 194 Cal.App.3d at pp. 583–584, internal citations omitted.)

- "Generally, 'in the course of employment' refers to the time and place of the injury. The phrase 'arise out of employment' refers to a causal connection between the employment and the injury." (*Atascadero Unified School Dist. v. W.C.A.B.* (2002) 98 Cal.App.4th 880, 883 [120 Cal.Rptr.2d 239].)

- "The concept of 'scope of employment' in tort is more restrictive than the phrase 'arising out of and in the course of employment,' used in workers' compensation." (*Tognazzini v. San Luis Coastal Unified School Dist.* (2001) 86 Cal.App.4th 1052, 1057 [103 Cal.Rptr.2d 790], internal citations omitted.)

- "Whether an employee's injury arose out of and in the course of her employment is generally a question of fact to be determined in light of the circumstances of the particular case. However, where the facts are undisputed, resolution of the question becomes a matter of law." (*Wright v. Beverly Fabrics, Inc.* (2002) 95 Cal.App.4th 346, 353 [115 Cal.Rptr.2d 503], internal citations omitted.)

- " 'The requirement of .... section 3600 is twofold. On the one hand, the injury must occur "in the course of the employment." This concept "ordinarily refers to the time, place, and circumstances under which the injury occurs." Thus " '[a]n employee is in the "course of his employment" when he does those reasonable things which his contract with his employment expressly or impliedly permits him to do.' " And, ipso facto, an employee acts within the course of his employment when " 'performing a duty imposed upon him by his employer and one necessary to perform before the terms of the contract [are] mutually satisfied.' " ' " 'On the other hand, the statute requires that an injury "arise out of" the employment. ... It has long been settled that for an injury to "arise out of the employment" it must "occur by reason of a condition or incident of [the] employment. ..." That is, the employment and the injury must be linked in some causal fashion.' " (*LaTourette v. Workers' Comp. Appeals Bd.* (1998) 17 Cal.4th 644, 651 [72 Cal.Rptr.2d 217], internal citations and footnote omitted.)

- "Injuries sustained while an employee is performing tasks within his or her employment contract but outside normal work hours are within the course of

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employment. The rationale is that the employee is still acting in furtherance of the employer's business." (*Wright, supra,* 95 Cal.App.4th at p. 354.)

Secondary Sources

- 2 Witkin, Summary of California Law (9th ed. 1987) Workers' Compensation, §§ 25–29, 150–154, 161–165, 185–243
- 1 Levy, California Torts, Workers' Compensation, §§ 10.02, 10.03[3], 10.10
- 1 Hanna, California Law of Employee Injuries and Workers' Compensation (2d ed. 1998) Ch. 3, §§ 4.03–4.06

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3201
Employer's Willful Physical Assault (Lab. Code, § 3602(b)(1))
Essential Factual Elements

[*Name of plaintiff***] claims that [he/she] was harmed because [***name of defendant***] assaulted [him/her]. To establish this claim, [***name of plaintiff***] must prove the following:**

1. **That [***name of defendant***] [***insert one of the following:***]**

   [engaged in physical conduct that a reasonable person would perceive to be a real, present, and apparent threat of bodily harm;]

   [touched [*name of plaintiff***] [or caused [***name of plaintiff***] to be touched] in a harmful or offensive manner];**

2. **That [***name of defendant***] intended to harm [***name of plaintiff***];**

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

This instruction is intended for use in cases where the employer is the defendant and the plaintiff alleges the case falls outside of the workers' compensation exclusivity rule. Use the first bracketed option in element 1 for cases involving assault. Use the second bracketed option for cases involving battery.

Do not use instructions on assault and battery (Instruction 1300, *Battery—Essential Factual Elements*, and Instruction 1301, *Assault—Essential Factual Elements*). For an instruction on ratification, see Instruction 910, *Ratification.*

SOURCES AND AUTHORITY

- Labor Code section 3602(b)(1) provides: "An employee, or his or her dependents in the event of his or her death, may bring an action at law for damages against the

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employer, as if this division did not apply … [w]here the employee's injury or death is proximately caused by a willful physical assault by the employer."

- Labor Code section 3602(b) provides:

  An employee, or his or her dependents in the event of his or her death, may bring an action at law for damages against the employer, as if this division did not apply, in the following instances:
  (1) Where the employee's injury or death is proximately caused by a willful physical assault by the employer.
  (2) Where the employee's injury is aggravated by the employer's fraudulent concealment of the existence of the injury and its connection with the employment, in which case the employer's liability shall be limited to those damages proximately caused by the aggravation. The burden of proof respecting apportionment of damages between the injury and any subsequent aggravation thereof is upon the employer.
  (3) Where the employee's injury or death is proximately caused by a defective product manufactured by the employer and sold, leased, or otherwise transferred for valuable consideration to an independent third person, and that product is thereafter provided for the employee's use by a third person.

- "[T]he 1982 amendments were not intended to provide an exhaustive list of exceptions to the exclusivity rule. They did not, for example, foreclose the recognition of an exception for injuries stemming from wrongful discharges that violated public policy, an issue that neither the Legislature nor the judicial system had confronted in 1982. Section 3602 only applies '[w]here the conditions ... set forth in section 3600 concur,' and does not purport to resolve the ambiguities in that latter section discussed above, nor to definitively delineate the scope of the compensation bargain that has been the key to construing the meaning of section 3600. Rather, section 3602 merely confirms the judicial recognition of certain types of employer acts as outside the compensation bargain, even as it reinforces the exclusivity rule by repealing the dual capacity doctrine." (*Fermino v. Fedco, Inc.* (1994) 7 Cal.4th 701, 720 [30 Cal.Rptr.2d 18], internal citation omitted.)

- "[In *Magliulo v. Superior Court,*] [t]he employee sued the employer for assault and battery, and the court rejected the employer's argument that workers' compensation benefits were the exclusive remedy. The court noted that section 3601 allowed lawsuits for assaults by coemployees, and reasoned that '[i]f the employee can recover both compensation and damages caused by an intentional assault by a fellow worker, he should have no less right because the fellow worker happens to be his

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boss.' " (*Soares v. City of Oakland* (1992) 8 Cal.App.4th 1822, 1826 [12 Cal.Rptr.2d 405], internal citation omitted.)

- "Section 3602(b)(1) was enacted in 1982, 23 years after enactment of section 3601, subdivision (a)(1), to codify the result in *Magliulo v. Superior Court*." (*Soares, supra,* 8 Cal.App.4th at p. 1826, internal citations omitted.)

- "We conclude … that 'willful' employer assaults within the meaning of section 3602(b)(1) do not include all common law batteries, but only those batteries that are specifically intended to injure." (*Soares, supra,* 8 Cal.App.4th at pp. 1828–1829.)

- " 'The modern view respecting actionable intentional misconduct by the employer is that it must be alleged and proved that the employer "acted deliberately with the specific intent to injure" the employee.' " (*Arendell v. Auto Parts Club, Inc.* (1994) 29 Cal.App.4th 1261, 1265 [35 Cal.Rptr.2d 83], internal citations omitted.)

- "[B]odily contact is not necessary for a physical assault." (*Herrick v. Quality Hotels, Inns & Resorts, Inc.* (1993) 19 Cal.App.4th 1608, 1617 [24 Cal.Rptr.2d 203].)

- "*Herrick* explained that bodily contact was not necessary for a 'physical assault,' but that physical assault occurred when someone engaged in physical conduct which a reasonable person would perceive to be a real, present and apparent threat of bodily harm." (*Gunnell v. Metrocolor Laboratories, Inc.* (2001) 92 Cal.App.4th 710, 728 [112 Cal.Rptr.2d 195], internal citation omitted.)

- "[W]e conclude that the exception to the exclusivity rule contained in section 3602, subdivision (b)(1), does not authorize a civil action against an employer for injury resulting from the willful assault of a coemployee based on a theory of respondeat superior." (*Fretland v. County of Humboldt* (1999) 29 Cal.App.4th 1473, 1489 [82 Cal.Rptr.2d 436].)

- "[C]ourts have also recognized that an employer can be held civilly liable as a joint participant in assaultive conduct committed by its employee pursuant to the doctrine of ratification." (*Fretland, supra,* 29 Cal.App.4th at pp. 1489–1490.)

<u>Secondary Sources</u>

- 2 Witkin, Summary of California Law (9th ed. 1987) Workers' Compensation, §§ 42–44

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3202
Fraudulent Concealment of Injury (Lab. Code, § 3602(b)(2))
Essential Factual Elements

[*Name of plaintiff***] claims that [he/she/[***name of decedent***]] was harmed because [***name of defendant***] fraudulently concealed the fact that [***name of plaintiff/decedent***] had been injured on the job. To establish this claim, [***name of plaintiff***] must prove the following:**

1. **That [***name of plaintiff/decedent***] was injured on the job;**

2. **That [***name of defendant***] knew that [***name of plaintiff/decedent***] had suffered a job-related injury;**

3. **That [***name of defendant***] concealed this knowledge from [***name of plaintiff/decedent***]; and**

4. **That [***name of plaintiff/decedent***]'s injury was made worse as a result of this concealment.**

If [*name of plaintiff***] establishes this claim, [he/she] must prove the total damages caused by the injury. [***Name of defendant***] must prove the damages that [***name of plaintiff/decedent***] would have sustained if [***name of defendant***] had not concealed [his/her] injury. [***Name of plaintiff***] is entitled to recover the difference between the two amounts.**

DIRECTIONS FOR USE

This instruction is intended for cases where the employer is the defendant and the plaintiff alleges the case falls outside of the workers' compensation exclusivity rule. This instruction pertains to aggravation of an injury caused by concealment.

SOURCES AND AUTHORITY

- Labor Code Section 3602(b)(2) provides: "An employee, or his or her dependents in the event of his or her death, may bring an action at law for damages against the employer, as if this division did not apply, … [w]here the employee's injury is aggravated by the employer's fraudulent concealment of the existence of the injury

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and its connection with the employment, in which case the employer's liability shall be limited to those damages proximately caused by the aggravation. The burden of proof respecting apportionment of damages between the injury and any subsequent aggravation thereof is upon the employer."

- "[T]he 1982 amendments were not intended to provide an exhaustive list of exceptions to the exclusivity rule. They did not, for example, foreclose the recognition of an exception for injuries stemming from wrongful discharges that violated public policy, an issue that neither the Legislature nor the judicial system had confronted in 1982. Section 3602 only applies '[w]here the conditions ... set forth in section 3600 concur,' and does not purport to resolve the ambiguities in that latter section discussed above, nor to definitively delineate the scope of the compensation bargain that has been the key to construing the meaning of section 3600. Rather, section 3602 merely confirms the judicial recognition of certain types of employer acts as outside the compensation bargain, even as it reinforces the exclusivity rule by repealing the dual capacity doctrine." (*Fermino v. Fedco, Inc.* (1994) 7 Cal.4th 701, 720 [30 Cal.Rptr.2d 18], internal citation omitted.)

- "In general, the Workers' Compensation Act provides an employee with his or her exclusive remedy for a work-related injury. Subject to narrow exceptions, 'where the ... conditions of compensation concur,' an injured employee cannot maintain a civil action against his or her employer or another employee." (*Lopez v. C.G.M. Development, Inc.* (2002) 101 Cal.App.4th 430 [124 Cal.Rptr.2d 227], internal citation omitted.)

- "[A]n employee seeking to state a cause of action against an employer under section 3602(b)(2) must 'in general terms' plead facts that if found true by the trier of fact, establish the existence of three essential elements: (1) the employer knew that the plaintiff had suffered a work-related injury; (2) the employer concealed that knowledge from the plaintiff; and (3) the injury was aggravated as a result of such concealment." (*Palestini v. General Dynamics Corp.* (2002) 99 Cal.App.4th 80, 89–90 [120 Cal.Rptr.2d 741], internal citation omitted.)

- "While there are no cases defining the term 'fraudulent concealment' as used in the section, its general meaning is not difficult to discern. According to both statute and case law, the failure to disclose facts may constitute fraud if the party with knowledge has a duty to make disclosure. We have no reason to believe that the term 'fraudulent concealment' as used in subdivision (b)(2) was intended to have a meaning other than this." (*Foster v. Xerox Corp.* (1985) 40 Cal.3d 306, 309–310 [219 Cal.Rptr. 485], internal citations omitted.)

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- "An employer's actual knowledge of the existence of an employee's injury connected with the employment is a necessary prerequisite to establishing a claim against the employer for fraudulent concealment under section 3602(b)(2). This principle is based on the rationale that an employer cannot be held liable under section 3602(b)(2) for concealing something of which it had no knowledge." (*Palestini, supra,* 99 Cal.App.4th at p. 93, internal citations omitted.)

- "In order to succeed in their attempt to remove their case from the workers' compensation law, appellants first had to show an 'injury.' They then had to prove that the injury was aggravated by Firestone's fraudulent concealment of the existence of the injury and its connection with the employment." (*Santiago v. Firestone Tire & Rubber Co.* (1990) 224 Cal.App.3d 1318, 1330 [274 Cal.Rptr. 576], internal citation omitted.)

- "The Supreme Court in *Johns-Manville* recognized that the aggravation of an injury that results when an employer fraudulently conceals the injury's cause is a harm distinct from the injury itself. For this reason, aggravation that results when an employer fraudulently conceals an injury's cause remains actionable even though the injured party has recovered worker's compensation benefits for the injury itself." (*Aerojet General Corp. v. Superior Court* (1986) 177 Cal.App.3d 950, 956 [223 Cal.Rptr. 249], internal citation omitted.)

Secondary Sources

- 1 Levy, et al., California Torts, Workers' Compensation, § 10.11[1][d]
- 2 Witkin, Summary of California Law (9th ed. 1987) Workers' Compensation, §§ 54–56

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3203
Employer's Defective Product (Lab. Code, § 3602(b)(3))
Essential Factual Elements

[*Name of plaintiff***] claims that [he/she] was harmed by a defective product manufactured by [***name of defendant***]. To establish this claim, [***name of plaintiff***] must prove the following:**

1. **That the [***product***] was manufactured by [***name of defendant***];**

2. **That the [***product***] was [sold/leased/transferred for valuable consideration] to an independent third person;**

3. **That the third person then provided the product for [***name of plaintiff***]'s use;**

4. **That the [***product***] was defective in design or manufacture;**

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

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

DIRECTIONS FOR USE

This instruction is intended for use in cases where the employer is the defendant and the plaintiff alleges that the case falls outside of the workers' compensation exclusivity rule. See the Products Liability series (Instructions 700–758) for instructions on product defect.

SOURCES AND AUTHORITY

- Labor Code section 3602(b)(3) provides: "An employee, or his or her dependents in the event of his or her death, may bring an action at law for damages against the employer, as if this division did not apply … [w]here the employee's injury or death is proximately caused by a defective product manufactured by the employer and sold, leased, or otherwise transferred for valuable consideration to an independent third

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person, and that product is thereafter provided for the employee's use by a third person."

- "[T]he 1982 amendments were not intended to provide an exhaustive list of exceptions to the exclusivity rule. They did not, for example, foreclose the recognition of an exception for injuries stemming from wrongful discharges that violated public policy, an issue that neither the Legislature nor the judicial system had confronted in 1982. Section 3602 only applies '[w]here the conditions ... set forth in section 3600 concur,' and does not purport to resolve the ambiguities in that latter section discussed above, nor to definitively delineate the scope of the compensation bargain that has been the key to construing the meaning of section 3600. Rather, section 3602 merely confirms the judicial recognition of certain types of employer acts as outside the compensation bargain, even as it reinforces the exclusivity rule by repealing the dual capacity doctrine." (*Fermino v. Fedco, Inc.* (1994) 7 Cal.4th 701, 720 [30 Cal.Rptr.2d 18], internal citation omitted.)

- "The language 'provided for the employee's use' indicates the product must be given or furnished to the employee in order for the employee to accomplish some task." (*Behrens v. Fayette Manufacturing Co.* (1992) 4 Cal.App.4th 1567, 1574 [7 Cal.Rptr.2d 264].)

- "Our interpretation is in accord with that of commentators who have noted that the exception of subdivision (b)(3) requires the employee to come into contact with the defective product as a consumer." (*Behrens, supra,* 4 Cal.App.4th at p. 1574, internal citations omitted.)

Secondary Sources

- 1 Levy, et al., California Torts, Workers' Compensation, § 10.11[1][e]
- 2 Witkin, Summary of California Law (9th ed. 1987) Workers' Compensation, § 50

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3204
Removal or Noninstallation of Power Press Guards (Lab. Code, § 4558)—Essential Factual Elements

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[*Name of plaintiff***] claims that [he/she] was harmed because [***name of defendant***] [removed/failed to install] guards on a power press. To establish this claim, [***name of plaintiff***] must prove the following:**

1. **That [***name of defendant***] was [***name of plaintiff***]'s [employer/supervisor];**

2. **That [***name of plaintiff***] was injured while operating a power press;**

3. **That [***name of defendant***] [removed/failed to install] [authorized the [removal of/failure to install]] the guards, knowing that this would create a probability of serious injury or death;**

4. **That the power press's [designer/fabricator/assembler] had [designed the press with guards/installed guards on the press/required guards be attached/specified that guards be attached] and had directly or indirectly conveyed this information to [***name of defendant***]; and**

5. **That [***name of defendant***]'s [removal/failure to install] the guards was a substantial factor in causing [***name of plaintiff***]'s harm.**

A "power press" is a machine that forms materials with a die in the manufacture of other products. A "die" is a tool that imparts shape to material by pressing against or through the material. A "guard" is any device that keeps a worker's hands or other parts of the body outside the point of operation.

DIRECTIONS FOR USE

This instruction is intended for use in cases where the employer is the defendant and the plaintiff alleges that the case falls outside of the workers' compensation exclusivity rule.

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SOURCES AND AUTHORITY

- Labor Code section 4558 provides:

(a) As used in this section:
(1) "Employer" means a named identifiable person who is, prior to the time of the employee's injury or death, an owner or supervisor having managerial authority to direct and control the acts of employees.
(2) "Failure to install" means omitting to attach a point of operation guard either provided or required by the manufacturer, when the attachment is required by the manufacturer and made known by him or her to the employer at the time of acquisition, installation, or manufacturer-required modification of the power press.
(3) "Manufacturer" means the designer, fabricator, or assembler of a power press.
(4) "Power press" means any material-forming machine that utilizes a die which is designed for use in the manufacture of other products.
(5) "Removal" means physical removal of a point of operation guard which is either installed by the manufacturer or installed by the employer pursuant to the requirements or instructions of the manufacturer.
(6) "Specifically authorized" means an affirmative instruction issued by the employer prior to the time of the employee's physical injury or death, but shall not mean any subsequent acquiescence in, or ratification of, removal of a point of operation safety guard.
(b) An employee, or his or her dependents in the event of the employee's death, may bring an action at law for damages against the employer where the employee's injury or death is proximately caused by the employer's knowing removal of, or knowing failure to install, a point of operation guard on a power press, and this removal or failure to install is specifically authorized by the employer under conditions known by the employer to create a probability of serious injury or death.
(c) No liability shall arise under this section absent proof that the manufacturer designed, installed, required, or otherwise provided by specification for the attachment of the guards and conveyed knowledge of the same to the employer. Proof of conveyance of this information to the employer by the manufacturer may come from any source.
(d) No right of action for contribution or indemnity by any defendant shall exist against the employer; however, a defendant may seek contribution after the employee secures a judgment against the employer pursuant to the provisions of this section if the employer fails to discharge his or her comparative share of the judgment.

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- "The obvious legislative intent and purpose in section 4558 is to protect workers from employers who wilfully remove or fail to install appropriate guards on large power tools. Many of these power tools are run by large mechanical motors or hydraulically. These sorts of machines are difficult to stop while they are in their sequence of operation. Without guards, workers are susceptible to extremely serious injuries. For this reason, the Legislature passed section 4558, subdivision (b), which subjects employers to legal liability for removing guards from powerful machinery where the manufacturer has designed the machine to have a protective guard while in operation." (*Ceja v. J.R. Wood, Inc.* (1987) 196 Cal.App.3d 1372, 1377 [242 Cal.Rptr. 531], internal citation omitted.)

- "This statutory definition embraces four elements. 'The power press itself is a machine. It is a machine that forms materials. The formation of materials is effectuated with a die. Finally, the materials being formed with the die are being formed in the manufacture of other products.' " (*McCoy v. Zahniser Graphics, Inc.* (1995) 39 Cal.App.4th 107, 110 [45 Cal.Rptr.2d 871], internal citation omitted.)

- "In all its pertinent uses, then, the term 'die' refers to a tool that imparts shape to material by pressing or impacting against or through the material, that is, by punching, stamping or extruding; in none of its uses does the term refer to a tool that imparts shape by cutting along the material in the manner of a blade." (*Rosales v. Depuy Ace Medical Co.* (2000) 22 Cal.4th 279, 285 [92 Cal.Rptr.2d 465].)

- "[U]nder subdivisions (a)(2) and (c), liability for 'failure to install' a point of operation guard under section 4558 must be predicated upon evidence that the 'manufacturer' either provided or required such a device, which was not installed by the employer." (*Flowmaster, Inc. v. Superior Court* (1993) 16 Cal.App.4th 1019, 1027 [20 Cal.Rptr.2d 666].)

- "We find that the term guard, as used in section 4558, is meant to include the myriad apparatus which are available to accomplish the purpose of keeping the hands of workers outside the point of operation whenever the ram is capable of descending. Because we find that the term guard is not a specific legal term of art, we hold that the trial court properly provided the jury with a dictionary definition of the term guard to explain its meaning under section 4558." (*Bingham v. Cts Corp.* (1991) 231 Cal.App.3d 56, 65 [282 Cal.Rptr. 161], internal citation omitted.)

- "Physical removal, for the purpose of liability under section 4558, means to render a safeguarding apparatus, whether a device or point of operation guard, dysfunctional or unavailable for use by the operator for the particular task assigned." (*Bingham, supra,* 231 Cal.App.3d at p. 68.)

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- "Nothing in the language, history or objectives underlying section 4558 convinces us that the Legislature intended that section 4558 would immunize employers who design, manufacture and install their own power presses without point of operation guards. A manufacturer is defined broadly in section 4558 as a 'designer, fabricator, or assembler of a power press.' An 'employer' is not excluded from the definition of a manufacturer, nor would doing so promote the objectives of the statute." (*Flowmaster, Inc., supra,* 16 Cal.App.4th at pp. 1029–1030, internal citation omitted.)

- "The element of knowledge requires 'actual awareness' by the employer—rather than merely constructive knowledge—that a point of operation guard has either been provided for or is required to prevent the probability of serious injury or death." (*Flowmaster, Inc., supra,* 16 Cal.App.4th at pp. 1031–1032, internal citation and footnote omitted.)

- "Liability under section 4558 can only be imposed if the employer fails to use or removes a safety device required by the manufacturer of the press. Essentially, the culpable conduct is the employer's ignoring of the manufacturer's safety directive. 'From the plain language of section 4558, it is clear that an exception to the exclusivity of workers' compensation only arises for a power press injury where the employer has been expressly informed by the manufacturer that a point of operation guard is required, where the employer then affirmatively removes or fails to install such guard, and where the employer does so under conditions known by the employer to create a probability of serious injury or death.' " (*Aguilera v. Henry Soss & Co.* (1996) 42 Cal.App.4th 1724, 1730 [50 Cal.Rptr.2d 477], internal citation omitted.)

- "Specific authorization demands evidence of an affirmative instruction or other wilful acts on the part of the employer despite actual knowledge of the probability of serious harm." (*Flowmaster, Inc., supra,* 16 Cal.App.4th at p. 1032, internal citation and footnote omitted.)

- "[I]mputation solely because of an agency relationship cannot bring an employer within the reach of section 4558. Only an employer who directly authorized by an affirmative instruction the removal or failure to install a guard may be sued at law under section 4558." (*Watters Associates v. Superior Court* (1990) 218 Cal.App.3d 1322, 1325 [267 Cal.Rptr. 696].)

<u>Secondary Sources</u>

- 1 Levy, et al., California Torts, Workers' Compensation, § 10.11[1][f]
- 2 Witkin, Summary of California Law (9th ed. 1987) Workers' Compensation, § 57

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3205
Co-Employee's Affirmative Defense
Injury Covered by Workers' Compensation

[*Name of defendant***] claims that [he/she] is not responsible for any harm that [***name of plaintiff***] may have suffered because [***name of plaintiff***] was [***name of defendant***]'s co-employee and therefore can recover only under California's Workers' Compensation Act. To succeed, [***name of defendant***] must prove the following:**

1. **That [***name of plaintiff***] and [***name of defendant***] were [***name of employer***]'s employees;**

2. **That [***name of employer***] had workers' compensation insurance; and**

3. **That [***name of defendant***] was acting in the scope of [his/her] employment at the time [***name of plaintiff***] claims [he/she] was harmed.**

DIRECTIONS FOR USE

This instruction is intended for use in cases where a co-employee is the defendant and he or she claims that the case falls within the workers' compensation exclusivity rule. For instructions on scope of employment see instructions in the Vicarious Liability series (Instructions 900–919). Scope of employment in this instruction is the same as in the context of respondeat superior. (*Hendy v. Losse* (1991) 54 Cal.3d 723, 740 [1 Cal.Rptr.2d 543].) See instructions in the Vicarious Responsibility series regarding the definition of "scope of employment."

SOURCES AND AUTHORITY

- Labor Code section 3601 provides:

  (a) Where the conditions of compensation set forth in Section 3600 concur, the right to recover such compensation, pursuant to the provisions of this division is, except as specifically provided in this section, the exclusive remedy for injury or death of an employee against any other employee of the employer acting within the scope of his or her employment, except that an employee, or his or her dependents in the event of his or her death, shall, in addition to the right to compensation against the

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employer, have a right to bring an action at law for damages against the other employee, as if this division did not apply, in either of the following cases:
(1) When the injury or death is proximately caused by the willful and unprovoked physical act of aggression of the other employee.
(2) When the injury or death is proximately caused by the intoxication of the other employee.
(b) In no event, either by legal action or by agreement whether entered into by the other employee or on his or her behalf, shall the employer be held liable, directly or indirectly, for damages awarded against, or for a liability incurred by the other employee under paragraph (1) or (2) of subdivision (a).
(c) No employee shall be held liable, directly or indirectly, to his or her employer, for injury or death of a coemployee except where the injured employee or his or her dependents obtain a recovery under subdivision (a).

- Labor Code section 3351 provides, in part: " 'Employee' means every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed."

- Labor Code section 3357 provides: "Any person rendering service for another, other than as an independent contractor, or unless expressly excluded herein, is presumed to be an employee."

- "[A] coemployee's conduct is within the scope of his or her employment if it could be imputed to the employer under the doctrine of respondeat superior. If the coemployee was not 'engaged in any active service for the employer,' the coemployee was not acting within the scope of employment." (*Hendy, supra,* 54 Cal.3d at p. 723, internal citation omitted.)

- "[G]enerally speaking, a defendant in a civil action who claims to be one of that class of persons protected from an action at law by the provisions of the Workers' Compensation Act bears the burden of pleading and proving, as an affirmative defense to the action, the existence of the conditions of compensation set forth in the statute which are necessary to its application." (*Doney v. Tambouratgis* (1979) 23 Cal.3d 91, 96–97 [151 Cal.Rptr. 347].)

- "In general, if an employer condones what courts have described as 'horseplay' among its employees, an employee who engages in it is within the scope of employment under section 3601, subdivision (a), and is thus immune from suit, unless exceptions apply." (*Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal.4th 995, 1006 [111 Cal.Rptr.2d 564], internal citations omitted.)

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Secondary Sources

- 1 Levy, et al., California Torts, Workers' Compensation, § 10.13
- 2 Witkin, Summary of California Law (9th ed. 1987) Workers' Compensation, §§ 60–64

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3206
Co-Employee's Willful and Unprovoked Physical Act of Aggression (Lab. Code, § 3601(a)(1))—Essential Factual Elements

---

[*Name of plaintiff***] claims that [he/she] was harmed because [***name of defendant***] assaulted [him/her]. To establish this claim, [***name of plaintiff***] must prove the following:**

1. **That [***name of defendant***] [***insert one of the following:***]**

   [engaged in physical conduct that a reasonable person would perceive to be a real, present and apparent threat of bodily harm;]

   [touched [*name of plaintiff***] [or caused [***name of plaintiff***] to be touched] in a harmful or offensive manner;]**

   [*insert other act of physical aggression***];**

2. **That [***name of defendant***]'s conduct was unprovoked;**

3. **That [***name of defendant***] intended to harm [***name of plaintiff***];**

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

This instruction is intended for use in cases where a co-employee is the defendant and the plaintiff alleges that the case falls outside of the workers' compensation exclusivity rule. If this instruction is used, do not use standard tort instructions on assault and battery.

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SOURCES AND AUTHORITY

- Labor Code section 3601 provides:

  (a) Where the conditions of compensation set forth in Section 3600 concur, the right to recover such compensation, pursuant to the provisions of this division is, except as specifically provided in this section, the exclusive remedy for injury or death of an employee against any other employee of the employer acting within the scope of his or her employment, except that an employee, or his or her dependents in the event of his or her death, shall, in addition to the right to compensation against the employer, have a right to bring an action at law for damages against the other employee, as if this division did not apply, in either of the following cases:
  (1) When the injury or death is proximately caused by the willful and unprovoked physical act of aggression of the other employee.
  (2) When the injury or death is proximately caused by the intoxication of the other employee.
  (b) In no event, either by legal action or by agreement whether entered into by the other employee or on his or her behalf, shall the employer be held liable, directly or indirectly, for damages awarded against, or for a liability incurred by the other employee under paragraph (1) or (2) of subdivision (a).
  (c) No employee shall be held liable, directly or indirectly, to his or her employer, for injury or death of a coemployee except where the injured employee or his or her dependents obtain a recovery under subdivision (a).

- "As relevant here, a civil suit is permissible when an employee proximately causes another employee's injury or death by a 'willful and unprovoked physical act of aggression' or by intoxication. If an employee brings a lawsuit against a coemployee based on either of these exceptions, the employer is not 'held liable, directly or indirectly, for damages awarded against, or for a liability incurred by the other employee ... .' This provision is consistent with the view that a coemployee is immune from suit to the extent necessary to prevent an end-run against the employer under the exclusivity rule. 'It is self-evident that Labor Code section 3601 did not establish or create a new right or cause of action in the employee but severely limited a preexisting right to freely sue a fellow employee for damages.' " (*Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal.4th 995, 1002 [111 Cal.Rptr.2d 564], internal citations and footnotes omitted.)

- "[W]e conclude an 'unprovoked physical act of aggression' is unprovoked conduct intended to convey an actual, present, and apparent threat of bodily injury. A 'threat,' of course, is commonly understood as 'an expression of intention to inflict evil, injury, or damage' and as '[a] communicated intent to inflict harm or loss on another

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... .' Thus, 'unprovoked physical act of aggression' logically contemplates intended injurious conduct. By adding the term 'willful,' the Legislature has underscored the need for an intent to bring about the consequences of that expression, i.e., an intent to inflict injury or harm." (*Torres, supra,* 26 Cal.4th at p. 1005, internal citations omitted.)

- "As with other mental states, plaintiffs may rely on circumstantial evidence to prove the intent to injure." (*Torres, supra,* 26 Cal.4th at p. 1009.)

- "[T]o invoke civil liability under section 3601, subdivision (a)(1), a physical act causing a reasonable fear of harm must be pleaded and proved, but the resulting harm need not also be physical." (*Iverson v. Atlas Pacific Engineering* (1983) 143 Cal.App.3d 219, 225 [191 Cal.Rptr. 696].)

- "We agree that conduct constituting a common law assault may be actionable under section 3601(a)(1), provided that the conduct was intended to injure … ." (*Soares v. City of Oakland* (1992) 9 Cal.App.4th 1822, 1829 [12 Cal.Rptr.2d 405].)

- "In general, if an employer condones what courts have described as 'horseplay' among its employees, an employee who engages in it is within the scope of employment under section 3601, subdivision (a), and is thus immune from suit, unless exceptions apply." (*Torres, supra,* 26 Cal.4th at p. 1006, internal citations omitted.)

<u>Secondary Sources</u>

- 1 Levy, et al., California Torts, Workers' Compensation, § 10.13
- 2 Witkin, Summary of California Law (9th ed. 1987) Workers' Compensation, §§ 60–64

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3207
Injury Caused by Co-Employee's Intoxication (Lab. Code, § 3601(a)(2))—Essential Factual Elements

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[*Name of plaintiff***] claims that [he/she] was harmed because [***name of defendant***] was intoxicated. To establish this claim, [***name of plaintiff***] must prove the following:**

1. **That [***name of defendant***] [***insert description of injury-producing conduct***:];**

2. **That [***name of defendant***] was intoxicated;**

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

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

DIRECTIONS FOR USE

This instruction is intended for use in cases where a co-employee is the defendant and the plaintiff alleges that the case falls outside of the workers' compensation exclusivity rule.

SOURCES AND AUTHORITY

- Labor Code section 3601 provides:

  (a) Where the conditions of compensation set forth in Section 3600 concur, the right to recover such compensation, pursuant to the provisions of this division is, except as specifically provided in this section, the exclusive remedy for injury or death of an employee against any other employee of the employer acting within the scope of his or her employment, except that an employee, or his or her dependents in the event of his or her death, shall, in addition to the right to compensation against the employer, have a right to bring an action at law for damages against the other employee, as if this division did not apply, in either of the following cases:
  (1) When the injury or death is proximately caused by the willful and unprovoked physical act of aggression of the other employee.
  (2) When the injury or death is proximately caused by the intoxication of the other employee.

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(b) In no event, either by legal action or by agreement whether entered into by the other employee or on his or her behalf, shall the employer be held liable, directly or indirectly, for damages awarded against, or for a liability incurred by the other employee under paragraph (1) or (2) of subdivision (a).
(c) No employee shall be held liable, directly or indirectly, to his or her employer, for injury or death of a coemployee except where the injured employee or his or her dependents obtain a recovery under subdivision (a).

- "As relevant here, a civil suit is permissible when an employee proximately causes another employee's injury or death by a 'willful and unprovoked physical act of aggression' or by intoxication. If an employee brings a lawsuit against a coemployee based on either of these exceptions, the employer is not 'held liable, directly or indirectly, for damages awarded against, or for a liability incurred by the other employee ... .' This provision is consistent with the view that a coemployee is immune from suit to the extent necessary to prevent an end-run against the employer under the exclusivity rule. 'It is self-evident that Labor Code section 3601 did not establish or create a new right or cause of action in the employee but severely limited a preexisting right to freely sue a fellow employee for damages.' " (*Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal.4th 995, 1002 [111 Cal.Rptr.2d 564], internal citations and footnotes omitted.)

Secondary Sources

- 1 Levy, et al., California Torts, Workers' Compensation, § 10.13
- 2 Witkin, Summary of California Law (9th ed. 1987) Workers' Compensation, §§ 60–64

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2237
Battery

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] [touch [***name of plaintiff***]] [or] [cause [***name of plaintiff***] to be touched] with the intent to harm or offend [***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 presiding juror sign and date this form.

2. Did [*name of plaintiff***] consent to be touched?**

___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 presiding juror sign and date this form.

3. Was [*name of plaintiff***] harmed or offended by [***name of defendant***]'s conduct?**

___Yes ___No

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

4. 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: _____

Presiding Juror

Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 1300, *Battery—Essential Factual Elements.*

If specificity is not required, users do not have to itemize all the damages listed in question 4 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

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

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2238
Battery—Self-Defense/Defense of Others at Issue

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] [touch [***name of plaintiff***]] [or] [cause [***name of plaintiff***] to be touched] with the intent to harm or offend [***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 presiding juror sign and date this form.

2. Did [*name of plaintiff***] consent to be touched?**

___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 presiding juror sign and date this form.

3. Was [*name of plaintiff***] harmed or offended by [***name of defendant***]'s conduct?**

___Yes ___No

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

4. Did [*name of defendant***] reasonably believe that [***name of plaintiff***] was going to harm [him/her/***insert identification of other person***]?**

___Yes ___No

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

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5. Did [*name of defendant***] use only the amount of force that was reasonably necessary to protect [himself/herself/***insert identification of other person***]?**

___Yes ___No

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

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

[[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:] $_____]
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] $_____]
[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]
[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____]

Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 1300, *Battery—Essential Factual Elements*, and Instruction 1304, *Self-Defense/Defense of Others.*

If specificity is not required, users do not have to itemize all the damages listed in question 6 and do not have to categorize “economic” and “noneconomic” damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

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

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2239
Assault

We answer the questions submitted to us as follows:

[1. Did [*name of defendant***] act, intending to cause a harmful or offensive contact with [***name of plaintiff***] or intending to place [***name of plaintiff***] in fear of a harmful or an offensive contact?**

___Yes ___No

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

2. Did [*name of plaintiff***] believe that [he/she] was about to be touched in a harmful or an offensive manner?**

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

[1. Did [*name of defendant***] threaten to touch [***name of plaintiff***] in a harmful or an offensive manner?**

___Yes ___No

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

2. Did it reasonably appear to [*name of plaintiff***] that that [he/she] was about to be touched in a harmful or an offensive 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 presiding juror sign and date this form.

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3. Did [*name of plaintiff*] consent to [*name of defendant*]'s conduct?

___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 presiding juror sign and date this form.

4. Was [*name of plaintiff*] harmed by [*name of defendant*]'s conduct?

___Yes ___No

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

5. What are [*name of plaintiff*]'s damages? [$_____]

[[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:] $_____]
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] $_____]
[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]
[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____]

Signed: _____
Presiding Juror

Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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.

As appropriate to the facts of the case, read either of the bracketed alternative sets of questions 1 and 2. This verdict form is based on Instruction 1301, *Assault—Essential Factual Elements.*

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

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2240
Battery by Peace Officer

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] intentionally touch [***name of plaintiff***] [or cause [***name of plaintiff***] to be touched]?**

___Yes ___No

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

2. Did [*name of defendant***] use unreasonable force in [arresting/preventing the escape of/overcoming the resistance of/[***insert other applicable action***]] [***name of plaintiff***]?**

___Yes ___No

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

3. Did [*name of plaintiff***] consent to the use of that force?**

___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 presiding juror sign and date this form.

4. Was [*name of defendant***]'s use of unreasonable force a substantial factor in causing 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 presiding juror 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: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 1305, *Battery by Peace Officer*.

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

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

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2241
Inducing Breach of Contract

We answer the questions submitted to us as follows:

1. Was there a contract between [*name of plaintiff***] and [***name of third party***]?**

___Yes ___No

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

2. Did [*name of defendant***] know of the contract?**

___Yes ___No

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

3. Did [*name of defendant***] intend to cause [***name of third party***] to breach the contract?**

___Yes ___No

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

4. Did [*name of defendant***]'s conduct cause [***name of third party***] to breach the contract?**

___Yes ___No

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

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5. Was [*name of defendant*]'s conduct a substantial factor in causing [*name of plaintiff*] 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 presiding juror 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: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 1400, *Inducing Breach of Contract.* If specificity is not required, users do not have to itemize all the damages listed in question 6 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further. If there are multiple causes of action, users may wish to combine the individual forms into one form.

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2242
Intentional Interference With Contractual Relations

We answer the questions submitted to us as follows:

1. Was there a contract between [*name of plaintiff***] and [***name of third party***]?**

___Yes ___No

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

2. Did [*name of defendant***] know of the contract?**

___Yes ___No

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

3. Did [*name of defendant***] intend to disrupt the performance of this contract?**

___Yes ___No

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

4. Did [*name of defendant***]'s conduct prevent performance or make performance more expensive or difficult?**

___Yes ___No

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

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

___Yes ___No

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

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

[[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:] $_____]
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] $_____]
[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]
[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____]

Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 1401, *Intentional Interference With Contractual Relations.* If specificity is not required, users do not have to itemize all the damages listed in question 6 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further. If there are multiple causes of action, users may wish to combine the individual forms into one form.

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2243
Intentional Interference With Prospective Economic Relations

We answer the questions submitted to us as follows:

1. Did [*name of plaintiff***] and [***name of third party***] have an economic relationship that probably would have resulted in an economic benefit 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 presiding juror sign and date this form.

2. Did [*name of defendant***] know of the relationship?**

___Yes ___No

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

3. Did [*name of defendant***] intend to disrupt the relationship?**

___Yes ___No

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

4. Did [*name of defendant***] engage in wrongful conduct through [***insert grounds for wrongfulness***]?**

___Yes ___No

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

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5. Was the relationship disrupted?

___Yes ___No

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

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

___Yes ___No

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

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

[[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:] $_____]
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] $_____]
[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]
[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____]

Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 1402, *Intentional Interference With Prospective Economic Relations.*

If specificity is not required, users do not have to itemize all the damages listed in question 7 and do not have to categorize “economic” and “noneconomic” damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

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

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2244
Negligent Interference With Prospective Economic Relations

We answer the questions submitted to us as follows:

1. Did [*name of plaintiff***] and [***name of third party***] have an economic relationship that probably would have resulted in an economic benefit 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 presiding juror sign and date this form.

2. Did [*name of defendant***] know or should [he/she/it] have known of the relationship?**

___Yes ___No

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

3. Did [*name of defendant***] know or should [he/she/it] have known that this relationship would be disrupted if [he/she/it] failed to act with reasonable care?**

___Yes ___No

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

4. Did [*name of defendant***] fail to act with reasonable care?**

___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 presiding juror sign and date this form.

5. Did [*name of defendant***] engage in wrongful conduct through [***insert grounds for wrongfulness***]?**

___Yes ___No

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

6. Was the relationship disrupted?

___Yes ___No

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

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

___Yes ___No

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

8. What are [*name of plaintiff***]'s damages? [$_____]**

[[a. Past economic loss, 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:] $_____]

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TOTAL $_____]

Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 1404, *Negligent Interference With Prospective Economic Relations.*

If specificity is not required, users do not have to itemize all the damages listed in question 8 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

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

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2245
Privacy—Intrusion Into Private Affairs

We answer the questions submitted to us as follows:

1. Did [*name of plaintiff***] have a reasonable expectation of privacy in [***insert facts regarding the place, conversation, or other circumstance***]?**

___Yes ___No

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

2. Did [*name of defendant***] intrude in [***insert facts regarding the place, conversation, or other circumstance***]?**

___Yes ___No

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

3. Would [*name of defendant***]'s intrusion be highly offensive to a reasonable person?**

___Yes ___No

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

4. Was [*name of plaintiff***] 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 presiding juror sign and date this form.

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

___Yes ___No

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

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

[[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:] $_____]
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] $_____]
[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]
[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____]

Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 1250, *Intrusion into Private Affairs.* If specificity is not required, users do not have to itemize all the damages listed in question 6 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further. If there are multiple causes of action, users may wish to combine the individual forms into one form.

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2246
Privacy—Public Disclosure of Private Facts

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] publicize private information concerning [***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 presiding juror sign and date this form.

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

___Yes ___No

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

3. Did [*name of defendant***] know or act with reckless disregard of the fact that a reasonable person in [***name of plaintiff***]'s position would consider the publicity highly offensive?**

___Yes ___No

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

4. Was the private information of legitimate public concern [or did it have a substantial connection to a matter of legitimate public concern]?

___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 presiding juror sign and date this form.

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

___Yes ___No

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

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

[[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:] $_____]
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] $_____]
[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]
[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____]

Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 1251, *Public Disclosure of Private Facts.* If specificity is not required, users do not have to itemize all the damages listed in question 6 and do not have to categorize “economic” and “noneconomic” damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

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

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2247
Privacy—False Light

We answer the questions submitted to us as follows:

1. Did [*name of defendant*] publicize information or material that showed [*name of plaintiff*] in a false light?

___Yes ___No

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

2. Would a reasonable person in [*name of plaintiff*]'s position consider the false light created by the publication to be highly offensive?

___Yes ___No

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

3. Did [*name of defendant*] know the publication would create a false impression about [*name of plaintiff*] or act with reckless disregard for the truth?

___Yes ___No

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

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

___Yes ___No

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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 presiding juror 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: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 1252, *False Light.* If the conduct does not involve a matter of public concern, then substitute the following for question number 3: "Was [*name of defendant*] negligent in determining the truth of the information or whether a false impression would be created by its publication?" If the conduct involved material that is not defamatory on its face, the following question should be added to this form: "Did [*name of plaintiff*] sustain harm to [his/her] property, business, profession, or occupation [including money spent as a result of the statements(s)]?" If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further. If there are multiple causes of action, users may wish to combine the individual forms into one form.

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2248
Privacy—Appropriation of Name or Likeness

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] use [***name of plaintiff***]'s name, likeness, or identity without [***name of plaintiff***]'s permission?**

___Yes ___No

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

2. Did [*name of defendant***] gain a commercial benefit [or some other advantage] by using [***name of plaintiff***]'s name, likeness, or identity?**

___Yes ___No

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

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

___Yes ___No

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

4. 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: _____

Presiding Juror

Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 1253, *Appropriation of Name or Likeness.*

If specificity is not required, users do not have to itemize all the damages listed in question 4 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

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

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2249
Privacy—Use of Name or Likeness (Civ. Code, §§ 3344, 3344.1)

We answer the questions submitted to us as follows:

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

___Yes ___No

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

2. Did [*name of defendant***] have [***name of plaintiff***]'s consent?**

___Yes ___No

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

3. Was [*name of defendant***]'s use of [***name of plaintiff***]'s [name/voice/signature/photograph/likeness] directly connected to [***name of defendant***]'s commercial 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 presiding juror sign and date this form.

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

___Yes ___No

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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 presiding juror 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: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 1254, *Use of Name or Likeness (Civ. Code, §§ 3344, 3344.1).*

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

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

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2250
Privacy—Constitutional Right of Privacy

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] invade [***insert legally protected privacy interest***]?**

___Yes ___No

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

2. Did [*name of plaintiff***] have a reasonable expectation of privacy?**

___Yes ___No

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

3. Was [*name of defendant***]'s conduct a serious invasion of [***name of plaintiff***]'s privacy?**

___Yes ___No

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

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

___Yes ___No

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

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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: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 1255, *Constitutional Right of Privacy.*

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

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2251
Privacy—Constitutional Right of Privacy—Affirmative Defense

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] invade [***insert legally protected privacy interest***]?**

___Yes ___No

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

2. Did [*name of plaintiff***] have a reasonable expectation of privacy?**

___Yes ___No

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

3. Was [*name of defendant***]'s conduct a serious invasion of [***name of plaintiff***]'s privacy?**

___Yes ___No

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

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

___Yes ___No

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

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

___Yes ___No

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

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

___Yes ___No

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

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

[[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:] $_____]
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] $_____]
[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]
[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____]

Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 1255, *Constitutional Right of Privacy*, and Instruction 1256, *Affirmative Defense to Constitutional Right.*

If specificity is not required, users do not have to itemize all the damages listed in question 7 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, 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.

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2252
Privacy—Recording of Confidential Information (Pen. Code, §§ 632, 637.2)

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] [eavesdrop on/record] [***name of plaintiff***]'s conversation by using an electronic device?**

___Yes ___No

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

2. Did [*name of plaintiff***] have a reasonable expectation that the conversation was confidential?**

___Yes ___No

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

3. Did [*name of defendant***] have the consent of all parties to the conversation to [eavesdrop on/record] it?**

___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 presiding juror sign and date this form.

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

___Yes ___No

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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 presiding juror 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: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 1258, *Recording of Confidential Information (Pen. Code, §§ 632, 637.2).*

Questions 4 and 5 do not have to be read if the plaintiff is seeking the statutory penalty only. If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further. If there are multiple causes of action, users may wish to combine the individual forms into one form.

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2253
Intentional Infliction of Emotional Distress

We answer the questions submitted to us as follows:

1. Was [*name of defendant***]'s conduct outrageous?**

___Yes ___No

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

2. [Did [*name of defendant***] intend to cause [***name of plaintiff***] emotional distress?] [or]**

[Did [*name of defendant***] act 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?]**

___Yes ___No

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

3. Did [*name of plaintiff***] suffer severe emotional distress?**

___Yes ___No

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

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

___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 presiding juror 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: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 1500, *Intentional Infliction of Emotional Distress—Essential Factual Elements*.

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

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2254
Intentional Infliction of Emotional Distress
Affirmative Defense of Privileged Conduct

We answer the questions submitted to us as follows:

1. Was [*name of defendant***] exercising [his/her] legal rights or protecting [his/her] economic interests?**

___Yes ___No

If your answer to question 1 is yes, then answer question 2. If you answered no, skip questions 2 and 3 and answer question 4.

2. Was [*name of defendant***]'s conduct lawful and consistent with community standards?**

___Yes ___No

If your answer to question 2 is yes, then answer question 3. If you answered no, skip question 3 and answer question 4.

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

___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 presiding juror sign and date this form.

4. Was [*name of defendant***]'s conduct outrageous?**

___Yes ___No

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

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5. [Did [*name of defendant*] intend to cause [*name of plaintiff*] emotional distress?]

[or]

[Did [*name of defendant*] act 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?]

___Yes ___No

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

6. Did [*name of plaintiff*] suffer severe emotional distress?

___Yes ___No

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

7. Was [*name of defendant*]'s conduct a substantial factor in causing [*name of plaintiff*]'s severe emotional distress?

___Yes ___No

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

8. What are [*name of plaintiff*]'s damages? [$_____]

[[a. Past economic loss, 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: _____
Presiding Juror

Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 1500, *Intentional Infliction of Emotional Distress—Essential Factual Elements*, and Instruction 1505, *Intentional Infliction of Emotional Distress—Affirmative Defense—Privileged Conduct*.

If specificity is not required, users do not have to itemize all the damages listed in question 8 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

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

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2255
Intentional Infliction of Emotional Distress
Fear of Cancer, HIV, or AIDS

We answer the questions submitted to us as follows:

1. Was [*name of defendant***]'s conduct outrageous?**

___Yes ___No

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

2. Did [*name of defendant***]'s conduct expose [***name of plaintiff***] to [***insert applicable carcinogen, toxic substance, HIV, or AIDS***]?**

___Yes ___No

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

3. [Did [*name of defendant***] intend to cause [***name of plaintiff***] emotional distress?] [or]**

[Did [*name of defendant***] act 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?]**

___Yes ___No

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

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4. Did [*name of plaintiff***] suffer severe emotional distress from a reasonable fear of developing [***insert cancer, HIV, or AIDS***]?**

___Yes ___No

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

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

___Yes ___No

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

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

[[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:] $_____]
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] $_____]
[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]
[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____]

Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 1501, *Intentional Infliction of Emotional Distress—Fear of Cancer, HIV, or AIDS.*

If specificity is not required, users do not have to itemize all the damages listed in question 6 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

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

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2256
Negligent Infliction of Emotional Distress
Direct Victim

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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 presiding juror sign and date this form.

2. Did [*name of plaintiff*] suffer serious emotional distress?

___Yes ___No

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

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

___Yes ___No

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

4. 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: _____
Presiding Juror

Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 1506, *Negligent Infliction of Emotional Distress—Direct Victim—Essential Factual Elements.*

If specificity is not required, users do not have to itemize all the damages listed in question 4 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

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

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2257
Negligent Infliction of Emotional Distress
Bystander

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1. Did [*name of defendant***] negligently cause [injury to/the death of] [***name of injury victim***]?**

___Yes ___No

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

2. Was [*name of plaintiff***] present at the scene of the injury when it occurred, and was [he/she] aware that [***name of injury victim***] was being injured?**

___Yes ___No

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

3. Did [*name of plaintiff***] suffer serious emotional distress?**

___Yes ___No

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

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

___Yes ___No

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

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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: _____
Presiding Juror

Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 1507, *Negligent Infliction of Emotional Distress—Bystander—Essential Factual Elements.*

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

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2258
Negligent Infliction of Emotional Distress
Fear of Cancer, HIV, or AIDS

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

___Yes ___No

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

2. Did [*name of plaintiff***] suffer serious emotional distress from a fear that [he/she] would develop [***insert applicable cancer, HIV, or AIDS***] as a result of the exposure?**

___Yes ___No

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

3. Does reliable medical or scientific opinion confirm that it is more likely than not that [*name of plaintiff***] will develop [***insert applicable cancer, HIV, or AIDS***] as a result of the exposure?**

___Yes ___No

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

4. Was [*name of defendant***]'s negligence a substantial factor in causing [***name of plaintiff***]'s serious emotional distress?**

___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 presiding juror 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: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 1508, *Negligent Infliction of Emotional Distress—Fear of Cancer, HIV, or AIDS.*

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

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

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2259
Negligent Infliction of Emotional Distress
Fear of Cancer, HIV, AIDS—Malicious, Oppressive, or Fraudulent Conduct

---

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

___Yes ___No

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

2. Did [*name of defendant***] act 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?]**

___Yes ___No

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

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3. Did [*name of plaintiff***] suffer 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?**

___Yes ___No

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

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

___Yes ___No

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

5. What are [*name of plaintiff***]'s damages? [$_____]**

[[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:] $_____]
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] $_____]
[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]
[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____]

Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 1509, *Negligent Infliction of Emotional Distress—Fear of Cancer, HIV, or AIDS—Malicious, Oppressive, or Fraudulent Conduct.*

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

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

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2260
Malicious Prosecution—Former Criminal Proceeding

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

___Yes ___No

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

2. Did the criminal proceeding end in [*name of plaintiff***]'s favor?**

___Yes ___No

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

3. Did [*name of defendant***] reasonably believe [***insert disputed fact necessary to determine probable cause***]?**

___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 presiding juror sign and date this form.

4. Did [*name of defendant***] act primarily for a purpose other than that of bringing [***name of plaintiff***] to justice?**

___Yes ___No

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

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

___Yes ___No

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

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

[[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:] $_____]
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] $_____]
[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]
[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____]

Signed: _____
Presiding Juror
Dated: _____
[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 1600, *Former Criminal Proceedings.* This form can be adapted to include the affirmative defense of reliance on counsel. See Form 2260 for a form that includes this affirmative defense. If specificity is not required, users do not have to itemize all the damages listed in question 6 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further. If there are multiple causes of action, users may wish to combine the individual forms into one form.

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2261
Malicious Prosecution—Wrongful Use of Civil Proceedings

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1. Was [*name of defendant***] actively involved in bringing [or continuing] a lawsuit against [***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 presiding juror sign and date this form.

2. Did the lawsuit end in [*name of plaintiff***]'s favor?**

___Yes ___No

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

3. Would any reasonable person in [*name of defendant***]'s circumstances have believed [***insert disputed fact necessary to establish probable cause***]?**

___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 presiding juror sign and date this form.

4. Did [*name of defendant***] act primarily for a purpose other than succeeding on the merits of the claim?**

___Yes ___No

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

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

___Yes ___No

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

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

[[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:] $_____]
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] $_____]
[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]
[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]
TOTAL $_____]

Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 1601, *Wrongful Use of Civil Proceedings.* Do not read question 3 if the court has determined from undisputed facts that there was no probable cause. If specificity is not required, users do not have to itemize all the damages listed in question 6 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further. If there are multiple causes of action, users may wish to combine the individual forms into one form.

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2262
Malicious Prosecution—Wrongful Use of Civil Proceedings
Affirmative Defense of Reliance on Counsel

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1. Was [*name of defendant***] actively involved in bringing [or continuing] the lawsuit against [***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 presiding juror sign and date this form.

2. Did [*name of defendant***] make a full and honest disclosure of all the important facts known to [him/her] to [his/her] attorney?**

___Yes ___No

If your answer to question 2 is yes, then answer question 3. If you answered no, skip question 3 and answer question 4.

3. Did [*name of defendant***] reasonably rely on [his/her] attorney's advice?**

___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 presiding juror sign and date this form.

4. Did the lawsuit end in [*name of plaintiff***]'s favor?**

___Yes ___No

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

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5. Would any reasonable person in [*name of defendant*]'s circumstances have believed [*insert disputed fact necessary to establish probable cause*]?

___Yes ___No

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

6. Did [*name of defendant*] act primarily for a purpose other than succeeding on the merits of the claim?

___Yes ___No

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

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

___Yes ___No

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

8. What are [*name of plaintiff*]'s damages? [$_____]

[[a. Past economic loss, 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: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 1601, *Wrongful Use of Civil Proceedings,* and Instruction 1605, *Affirmative Defense—Reliance on Counsel.*

Do not read question 5 if the court has determined from undisputed facts that there was no probable cause.

If specificity is not required, users do not have to itemize all the damages listed in question 8 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

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

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2263
Malicious Prosecution—Wrongful Use of Administrative Proceedings

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1. Was [*name of defendant***] actively involved in bringing [or continuing] an administrative proceeding against [***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 presiding juror sign and date this form.

2. Did [*name of administrative body***] conduct an independent investigation?**

___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 presiding juror sign and date this form.

3. Did the proceeding end in [*name of plaintiff***]'s favor?**

___Yes ___No

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

4. Would any reasonable person in [*name of defendant***]'s circumstances have believed [***insert disputed fact necessary to establish probable cause***]?**

___Yes ___No

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

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5. Did [*name of defendant*] act primarily for a purpose other than succeeding on the merits of the claim?

___Yes ___No

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

6. Was [*name of defendant*]'s conduct a substantial factor in causing [*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 presiding juror 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: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 1602, *Wrongful Use of Administrative Proceedings.*

Do not read question 4 if the court has determined from undisputed facts that there was no probable cause.

If specificity is not required, users do not have to itemize all the damages listed in question 7 and do not have to categorize “economic” and “noneconomic” damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

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

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2264
Abuse of Process

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1. Did [*name of defendant***] [***insert legal procedure, e.g., "take the deposition of [*name of deponent*]"***]?**

___Yes ___No

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

2. Did [*name of defendant***] intentionally use this legal procedure to [***insert alleged improper purpose that procedure was not designed to achieve***]?**

___Yes ___No

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

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

___Yes ___No

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

4. 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: _____
Presiding Juror

Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 1620, *Abuse of Process—Essential Factual Elements.*

If specificity is not required, users do not have to itemize all the damages listed in question 4 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

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

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2265
False Imprisonment—No Arrest Involved

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

___Yes ___No

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

2. Did [*name of plaintiff*] consent?

___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 presiding juror sign and date this form.

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

___Yes ___No

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

4. 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: _____
Presiding Juror

Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 1320, *Essential Factual Elements—No Arrest Involved.*

If specificity is not required, users do not have to itemize all the damages listed in question 4 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

If the jury returns a verdict of no harm, the plaintiff is still entitled to an award of nominal damages, such as one dollar. If nominal damages are being sought, modify the directions after question 3 to direct the jury to skip question 4 and answer question 5 if they find no harm. Then add a new question 5: "What amount of nominal damages do you award [*name of plaintiff*]?" If this is done, add a direction after question 4 that the jury should not answer question 5. Please note that the committee has found no cases requiring the jury to determine the amount of nominal damages.

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

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2266
False Imprisonment—No Arrest Involved
Affirmative Defense—Right to Detain for Investigation

---

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

___Yes ___No

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

2. Did [*name of defendant***] have the right to detain [***name of plaintiff***]?**

___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 presiding juror sign and date this form.

3. Did [*name of plaintiff***] consent?**

___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 presiding juror sign and date this form.

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

___Yes ___No

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

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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: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 1320, *Essential Factual Elements—No Arrest Involved*, and Instruction 1329, *Common Law Right to Detain for Investigation.* If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

If the jury returns a verdict of no harm, the plaintiff is still entitled to an award of nominal damages, such as one dollar. If nominal damages are being sought, modify the directions after question 4 to direct the jury to skip question 5 and answer question 6 if they find no harm. Then add a new question 6: "What amount of nominal damages do you award [*name of plaintiff*]?" If this is done, add a direction after question 5 that the jury should not answer question 6. Please note that the committee has found no cases requiring the jury to determine the amount of nominal damages. If there are multiple causes of action, users may wish to combine the individual forms into one form.

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2267
False Arrest Without Warrant

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1. Did [*name of defendant*] [arrest [*name of plaintiff*]/intentionally cause [*name of plaintiff*] to be arrested] without a warrant?

___Yes ___No

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

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

___Yes ___No

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

3. What are [*name of plaintiff*]'s damages? [$_____]

[[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:] $_____]
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] $_____]
[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]
[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____]

Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 1321, *Essential Factual Elements—False Arrest Without Warrant by Peace Officer.*

If specificity is not required, users do not have to itemize all the damages listed in question 3 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

If the jury returns a verdict of no harm, the plaintiff is still entitled to an award of nominal damages, such as one dollar. If nominal damages are being sought, modify the directions after question 2 to direct the jury to skip question 3 and answer question 4 if they find no harm. Then add a new question 4: "What amount of nominal damages do you award [*name of plaintiff*]?" If this is done, add a direction after question 3 that the jury should not answer question 4. Please note that the committee has found no cases requiring the jury to determine the amount of nominal damages.

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

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2268
False Arrest Without Warrant by Peace Officer
Affirmative Defense—Probable Cause to Arrest

---

1. Did [*name of defendant***] arrest [***name of plaintiff***] without a warrant?**

___Yes ___No

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

2. [Did [*insert facts that, if proved, would constitute reasonable cause to believe that plaintiff had committed a crime in defendant's presence***]?]**

[or]

[Did [*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***]?]**

___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 presiding juror sign and date this form.

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

___Yes ___No

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

4. What are [*name of plaintiff***]'s damages? [$_____]**

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[[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:] $_____]
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] $_____]
[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]
[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____]

Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 1321, *Essential Factual Elements—False Arrest Without Warrant by Peace Officer,* and Instruction 1322, *False Arrest Without Warrant—Affirmative Defense—Peace Officer—Probable Cause to Arrest.*

If specificity is not required, users do not have to itemize all the damages listed in question 4 and do not have to categorize “economic” and “noneconomic” damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further. If the jury returns a verdict of no harm, the plaintiff is still entitled to an award of nominal damages, such as one dollar. If nominal damages are being sought, modify the directions after question 3 to direct the jury to skip question 4 and answer question 5 if they find no harm. Then add a new question 5: “What amount of nominal damages do you award [*name of plaintiff*]?” If this is done, add a direction after question 4 that the jury should not answer question 5. Please note that the committee has found no cases requiring the jury to determine the amount of nominal damages. If there are multiple causes of action, users may wish to combine the individual forms into one form.

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2269
False Arrest Without Warrant by Private Citizen
Affirmative Defense—Probable Cause to Arrest

---

1. Did [*name of defendant***] cause [***name of plaintiff***] to be arrested without a warrant?**

___Yes ___No

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

2. [Did [*name of plaintiff***] commit or attempt to commit a crime in [***name of defendant***]'s presence?]**

[or]

[Was a felony committed and [*insert facts, that if proved, would establish that defendant had reasonable cause to believe that plaintiff had committed a felony***]?]**

___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 presiding juror sign and date this form.

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

___Yes ___No

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

4. What are [*name of plaintiff***]'s damages? [$_____]**

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[[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:] $_____]
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] $_____]
[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]
[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____]

Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 1323, *Essential Factual Elements—False Arrest Without Warrant by Private Citizen,* and Instruction 1324, *False Arrest Without Warrant—Affirmative Defense—Private Citizen—Probable Cause to Arrest.* If specificity is not required, users do not have to itemize all the damages listed in question 4 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

If the jury returns a verdict of no harm, the plaintiff is still entitled to an award of nominal damages, such as one dollar. If nominal damages are being sought, modify the directions after question 3 to direct the jury to skip question 4 and answer question 5 if they find no harm. Then add a new question 5: "What amount of nominal damages do you award [*name of plaintiff*]?" If this is done, add a direction after question 4 that the jury should not answer question 5. Please note that the committee has found no cases requiring the jury to determine the amount of nominal damages.

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

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2270
False Arrest With Warrant

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1. Did [*name of defendant***] [arrest [***name of plaintiff***]/intentionally cause [***name of plaintiff***] to be arrested]?**

___Yes ___No

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

2. [*Insert question regarding facts supporting the invalidity of the warrant or the unlawfulness of the arrest, e.g., "Had the warrant for [*name of plaintiff*]'s arrest expired?"***]**

___Yes ___No

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

3. Was [*name of defendant***]'s conduct a 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 presiding juror 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: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 1325, *Essential Factual Elements—False Arrest With Warrant.*

If specificity is not required, users do not have to itemize all the damages listed in question 4 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

If the jury returns a verdict of no harm, the plaintiff is still entitled to an award of nominal damages, such as one dollar. If nominal damages are being sought, modify the directions after question 3 to direct the jury to skip question 4 and answer question 5 if they find no harm. Then add a new question 5: "What amount of nominal damages do you award [*name of plaintiff*]?" If this is done, add a direction after question 4 that the jury should not answer question 5. Please note that the committee has found no cases requiring the jury to determine the amount of nominal damages.

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

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2271
False Arrest With Warrant—Peace Officer Affirmative Defense—"Good-Faith" Exception

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1. Did [*name of defendant***] arrest [***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 presiding juror sign and date this form.

2. [*Insert question regarding facts supporting the invalidity of the warrant or the unlawfulness of the arrest, e.g., "Had the warrant for [*name of plaintiff*]'s arrest expired?"***]**

___Yes ___No

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

3. Would the arrest warrant have appeared valid to a reasonably intelligent and informed person?

___Yes ___No

If your answer to question 3 is yes, then answer question 4. If you answered no, skip questions 4 and 5 and answer question 6.

4. Did [*name of defendant***] believe the warrant was valid?**

___Yes ___No

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

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5. Did [*name of defendant*] have a reasonable belief that the person arrested was the person referred to in the warrant?

___Yes ___No

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

6. Was [*name of defendant*]'s conduct 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 presiding juror 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: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 1325, *Essential Factual Elements—False Arrest With Warrant,* and Instruction 1326, *False Arrest With Warrant—Peace Officer Affirmative Defense—"Good-Faith" Exception.*

If specificity is not required, users do not have to itemize all the damages listed in question 7 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

If the jury returns a verdict of no harm, the plaintiff is still entitled to an award of nominal damages, such as one dollar. If nominal damages are being sought, modify the directions after question 6 to direct the jury to skip question 7 and answer question 8 if they find no harm. Then add a new question 8: "What amount of nominal damages do you award [*name of plaintiff*]?" If this is done, add a direction after question 7 that the jury should not answer question 8. Please note that the committee has found no cases requiring the jury to determine the amount of nominal damages.

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

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2272
False Imprisonment—Unnecessary Delay in Processing/Releasing

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1. Did [*name of defendant***] hold [***name of plaintiff***] in custody?**

___Yes ___No

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

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

___Yes ___No

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

3. Did [*name of plaintiff***] consent to the delay?**

___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 presiding juror sign and date this form.

4. Was [*name of defendant***]'s conduct 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 presiding juror sign and date this form.

5. What are [*name of plaintiff***]'s damages? [$_____]**

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[[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:] $_____]
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] $_____]
[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]
[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____]

Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 1327, *Essential Factual Elements—Unnecessary Delay in Processing/Releasing.*

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

If the jury returns a verdict of no harm, the plaintiff is still entitled to an award of nominal damages, such as one dollar. If nominal damages are being sought, modify the directions after question 4 to direct the jury to skip question 5 and answer question 6 if they find no harm. Then add a new question 6: "What amount of nominal damages do you award [*name of plaintiff*]?" If this is done, add a direction after question 5 that the jury should not answer question 6. Please note that the committee has found no cases requiring the jury to determine the amount of nominal damages.

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

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2273
Breach of Employment Contract—Unspecified Term

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1. Did [*name of plaintiff***] and [***name of defendant***] enter into an employment relationship?**

___Yes ___No

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

2. Did [*name of defendant***] promise not to [discharge/demote] [***name of plaintiff***] except for good cause?**

___Yes ___No

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

3. Did [*name of plaintiff***] substantially perform [his/her] job duties?**

___Yes ___No

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

4. Was [*name of plaintiff***]'s performance excused or prevented?**

___Yes ___No

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

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5. Did [*name of defendant*] [discharge/demote] [*name of plaintiff*] without good cause?

___Yes ___No

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

6. Was [*name of plaintiff*] harmed by the [discharge/demotion]?

___Yes ___No

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

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

[a. Past economic loss: $_____]

[b. Future economic loss: $_____]

Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 1701, *Breach of Employment Contract—Unspecified Term—Essential Factual Elements.*

The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further. If there are multiple causes of action, users may wish to combine the individual forms into one form.

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2274
Breach of Employment Contract—Unspecified Term Constructive Discharge

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1. Did [*name of plaintiff***] and [***name of defendant***] enter into an employment relationship?**

___Yes ___No

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

2. Did [*name of defendant***] promise not to [discharge/demote] [***name of plaintiff***] except for good cause?**

___Yes ___No

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

3. Did [*name of plaintiff***] substantially perform [his/her] job duties?**

___Yes ___No

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

4. Was [*name of plaintiff***]'s performance excused or prevented?**

___Yes ___No

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

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5. Did [*name of defendant***] knowingly create or permit 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?**

___Yes ___No

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

6. Did [*name of plaintiff***] resign because of the intolerable conditions?**

___Yes ___No

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

7. Was [*name of plaintiff***] harmed by the loss of employment?**

___Yes ___No

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

8. What are [*name of plaintiff***]'s damages? [$_____]**

[a. Past economic loss: $_____]

[b. Future economic loss: $_____]

Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 each case.

This verdict form is based on Instruction 1702, *Breach of Employment Contract—Unspecified Term—Constructive Discharge—Essential Factual Elements.*

The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

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

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2275
Breach of Employment Contract—Specified Term

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1. Did [*name of plaintiff*] and [*name of defendant*] enter into an employment contract that specified a length of time for which [*name of plaintiff*] would remain employed?

___Yes ___No

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

2. Did [*name of plaintiff*] substantially perform [his/her] job duties?

___Yes ___No

If your answer to question 2 is yes, skip question 3 and answer question 4. If you answered no, answer question 3.

3. Was [*name of plaintiff*]'s performance excused or prevented?

___Yes ___No

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

4. Did [*name of defendant*] breach the employment contract by [discharging/demoting] [*name of plaintiff*] before the end of the term of the contract?

___Yes ___No

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

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

___Yes ___No

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

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

[a. Past economic loss: $_____]

[b. Future economic loss: $_____]

Signed: _____
Presiding Juror

Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 each case.

This verdict form is based on Instruction 1710, *Breach of Employment Contract—Specified Term—Essential Factual Elements.*

The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

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

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2276
Breach of Employment Contract—Specified Term
Good Cause Defense

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1. Did [*name of plaintiff*] and [*name of defendant*] enter into an employment contract that specified a length of time for which [*name of plaintiff*] would remain employed?

___Yes ___No

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

2. Did [*name of plaintiff*] substantially perform [his/her] job duties?

___Yes ___No

If your answer to question 2 is yes, skip question 3 and answer question 4. If you answered no, answer question 3.

3. Was [*name of plaintiff*]'s performance excused or prevented?

___Yes ___No

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

4. Did [*name of defendant*] [discharge/demote] [*name of plaintiff*] before the end of the term of the contract?

___Yes ___No

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

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5. Did [*name of defendant*] have good cause to [discharge/demote] [*name of plaintiff*]?

___Yes ___No

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

6. Was [*name of plaintiff*] was harmed by the [discharge/demotion]?

___Yes ___No

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

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

[a. Past economic loss: $_____]

[b. Future economic loss: $_____]

Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 each case. This verdict form is based on Instruction 1710, *Breach of Employment Contract—Specified Term—Essential Factual Elements*, and Instruction 1711, *Breach of Employment Contract—Specified Term—Good Cause Defense.* The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further. If there are multiple causes of action, users may wish to combine the individual forms into one form.

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2277
Employment—Breach of the Implied Covenant of Good Faith and Fair Dealing

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We answer the questions submitted to us as follows:

1. Did [*name of plaintiff***] and [***name of defendant***] enter into an employment contract?**

___Yes ___No

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

2. Did [*name of plaintiff***] substantially perform [his/her] job duties?**

___Yes ___No

If your answer to question 2 is yes, skip question 3 and answer question 4. If you answered no, answer question 3.

3. Was [*name of plaintiff***]'s performance excused or prevented?**

___Yes ___No

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

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

___Yes ___No

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

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5. Did [*name of defendant*] fail to act fairly and in good faith?

___Yes ___No

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

6. Was [*name of plaintiff*] harmed by [*name of defendant*]'s failure to act in good faith?

___Yes ___No

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

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

[a. Past economic loss: $_____]

[b. Future economic loss: $_____]

Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 1720, *Breach of the Implied Covenant of Good Faith and Fair Dealing.* The breakdown of damages in question 7 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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2278
Breach of the Implied Covenant of Good Faith and Fair Dealing
Affirmative Defense—Good Faith Mistaken Belief

We answer the questions submitted to us as follows:

1. Did [*name of plaintiff***] and [***name of defendant***] enter into an employment contract?**

___Yes ___No

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

2. Did [*name of plaintiff***] substantially perform [his/her] job duties?**

___Yes ___No

If your answer to question 2 is yes, skip question 3 and answer question 4. If you answered no, answer question 3.

3. Was [*name of plaintiff***]'s performance excused or prevented?**

___Yes ___No

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

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

___Yes ___No

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

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5. Was [*name of defendant***]'s conduct based on an honest belief that [***insert alleged mistake***]?**

___Yes ___No

If your answer to question 5 is yes, then answer question 6. If you answered no, skip question 6 and answer question 7.

6. If true, would [*insert alleged mistake***] have been a lawful and reasonable business purpose for the conduct?**

___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 presiding juror sign and date this form.

7. Did [*name of defendant***] fail to act fairly and in good faith?**

___Yes ___No

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

8. Was [*name of plaintiff***] harmed by [***name of defendant***]'s failure to act in good faith?**

___Yes ___No

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

9. What are [*name of plaintiff***]'s damages? [$_____]**

[a. Past economic loss: $_____]

[b. Future economic loss: $_____]

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Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 1720, *Breach of the Implied Covenant of Good Faith and Fair Dealing,* and Instruction 1721, *Breach of the Implied Covenant of Good Faith and Fair Dealing—Good Faith Mistaken Belief Defense.* The breakdown of damages in question 9 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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2279
Wrongful Discharge/Demotion in Violation of Public Policy

We answer the questions submitted to us as follows:

1. Was [*name of plaintiff***] employed by [***name of defendant***]?**

___Yes ___No

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

2. Was [*name of plaintiff***] [discharged/demoted]?**

___Yes ___No

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

3. Was one of the reasons [*name of defendant***] [discharged/demoted] [***name of plaintiff***] because [***insert alleged violation of public policy, e.g., "because [name of plaintiff] refused to engage in price fixing"***]?**

___Yes ___No

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

4. Did the [discharge/demotion] cause [*name of plaintiff***] 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 presiding juror 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: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 1730, *Wrongful Discharge/Demotion in Violation of Public Policy—Essential Factual Elements.*

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, 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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2280
Constructive Discharge in Violation of Public Policy
Plaintiff Required to Violate Public Policy

We answer the questions submitted to us as follows:

1. Was [*name of plaintiff***] employed by [***name of defendant***]?**

___Yes ___No

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

2. Did [*name of defendant***] require [***name of plaintiff***] to [***specify alleged conduct in violation of public policy, e.g., "engage in price fixing"***] as a condition of employment?**

___Yes ___No

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

3. Was this condition so intolerable that a reasonable person in [*name of plaintiff***]'s position would have had no reasonable alternative except to resign?**

___Yes ___No

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

4. Did [*name of plaintiff***] resign because of this condition?**

___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 presiding juror sign and date this form.

5. Was the condition 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 presiding juror 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: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 1731, *Constructive Discharge in Violation of Public Policy—Plaintiff Required to Violate Public Policy.*

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If specificity is not required, users do not have to itemize all the damages listed in question 6 and do not have to categorize “economic” and “noneconomic” damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

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

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

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2281
Constructive Discharge in Violation of Public Policy
Plaintiff Required to Endure Intolerable Conditions
For Improper Purpose that Violates Public Policy

We answer the questions submitted to us as follows:

1. Was [*name of plaintiff***] employed by [***name of defendant***]?**

___Yes ___No

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

2. Was [*name of plaintiff***] subjected to 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"***]?**

___Yes ___No

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

3. Did [*name of defendant***] create or know of these conditions?**

___Yes ___No

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

4. Were these conditions so intolerable that a reasonable person in [*name of plaintiff***]'s position would have had no reasonable alternative except to resign?**

___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 presiding juror sign and date this form.

5. Did [*name of plaintiff***] resign because of these working conditions?**

___Yes ___No

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

6. Were the working conditions a substantial factor in causing harm to [*name of plaintiff***]?**

___Yes ___No

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

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

[[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:] $_____]
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] $_____]
[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]
[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____]

Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 1732, *Constructive Discharge in Violation of Public Policy—Plaintiff Required to Endure Intolerable Conditions for Improper Purpose that Violates Public Policy.*

If specificity is not required, users do not have to itemize all the damages listed in question 7 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

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

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

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2282
FEHA—Disparate Treatment—(Gov. Code, § 12940(a))

We answer the questions submitted to us as follows:

1. Was [*name of defendant***] an [employer/[***other covered entity***]]?**

___Yes ___No

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

2. Was [*name of plaintiff***] [an employee of [***name of defendant***]/an applicant to [***name of defendant***] for a job/[***other covered relationship to defendant***]]?**

___Yes ___No

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

3. Did [*name of defendant***] [discharge/refuse to hire/[***other adverse employment action***]] [***name of plaintiff***]?**

___Yes ___No

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

4. Was [*name of plaintiff***]'s [***protected status***] a reason for [***name of defendant***]'s [decision/conduct]?**

___Yes ___No

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

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

___Yes ___No

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

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

[[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:] $_____]
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] $_____]
[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]
[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____]

Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 1740, *Fair Employment and Housing Act—Disparate Treatment—Essential Factual Elements (Gov. Code, § 12940(a)).*

Relationships other than employer/employee can be substituted in question 2, as in element 2 in instruction 1740.

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If specificity is not required, users do not have to itemize all the damages listed in question 6 and do not have to categorize “economic” and “noneconomic” damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

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

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

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2283
FEHA—Disparate Treatment (Gov. Code, § 12940(a))
Affirmative Defense—Bona fide Occupational Qualification

We answer the questions submitted to us as follows:

1. Was [*name of defendant***] an [employer/[***other covered entity***]]?**

___Yes ___No

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

2. Was [*name of plaintiff***] [an employee of [***name of defendant***]/an applicant to [***name of defendant***] for a job/[***other covered relationship to defendant***]]?**

___Yes ___No

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

3. Did [*name of defendant***] [discharge/refuse to hire/[***other adverse employment action***]] [***name of plaintiff***]?**

___Yes ___No

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

4. Was [*name of plaintiff***]'s [***protected status***] a reason for [***name of defendant***]'s [decision/conduct]?**

___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 presiding juror sign and date this form.

5. Was [*protected status***] reasonably necessary for the operation of [***name of defendant***]'s business?**

___Yes ___No

If your answer to question 5 is yes, then answer question 6. If you answered no, skip questions 6, 7, and 8, and answer question 9.

6. Did [*name of defendant***] reasonably believe that substantially all [***members of protected group***] are unable to safely and efficiently perform the job?**

___Yes ___No

If your answer to question 6 is yes, then answer question 7. If you answered no, skip questions 7 and 8, and answer question 9.

7. Was it impossible or highly impractical for [*name of defendant***] to consider whether each [applicant/employee] was able to safely and efficiently perform the job?**

___Yes ___No

If your answer to question 7 is yes, then answer question 8. If you answered no, skip question 8 and answer question 9.

8. Was it impossible or highly impractical for [*name of defendant***] to rearrange job responsibilities to avoid using [***protected status***] as a job requirement?**

___Yes ___No

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

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

___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 presiding juror sign and date this form.

10. What are [*name of plaintiff*]'s damages? [$_____]

[[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:] $_____]
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] $_____]
[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]
[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____]

Signed: _____
Presiding Juror
Dated: _____
[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 1740, *Fair Employment and Housing Act—Disparate Treatment—Essential Factual Elements (Gov. Code, § 12940(a))*, and Instruction 1741, *Affirmative Defense—Bona fide Occupational Qualification.* Relationships other than employer/employee can be substituted in question number 2, as in element 2 in instruction 1740. If specificity is not required, users do not have to itemize all the damages listed in question 10 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further. If there are multiple causes of action, users may wish to combine the individual forms into one form.

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2284
FEHA—Disparate Impact (Gov. Code, § 12940(a))

We answer the questions submitted to us as follows:

1. Was [*name of defendant***] an [employer/[***other covered entity***]]?**

___Yes ___No

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

2. Was [*name of plaintiff***] [an employee of [***name of defendant***]/an applicant to [***name of defendant***] for a job/[***other covered relationship to defendant***]]?**

___Yes ___No

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

3. Did [*name of defendant***] have [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***]?**

___Yes ___No

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

4. Is [*name of plaintiff***] [***protected status***]?**

___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 presiding juror sign and date this form.

5. Was [*name of defendant*]'s [employment practice/selection policy] a substantial factor in causing harm to [*name of plaintiff*]?

___Yes ___No

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

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

[[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:] $_____]
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] $_____]
[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]
[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____]

Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 1742, *Disparate Impact—Essential Factual Elements (Gov. Code, § 12940(a)).*

Relationships other than employer/employee can be substituted in question number 2, as in element 2 in instruction 1742.

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If specificity is not required, users do not have to itemize all the damages listed in question 7 and do not have to categorize “economic” and “noneconomic” damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

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

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

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2285
FEHA—Disparate Impact (Gov. Code, § 12940(a))
Affirmative Defense—Business Necessity/Job Relatedness
Rebuttal to Business Necessity/Job Relatedness Defense

We answer the questions submitted to us as follows:

1. Was [*name of defendant***] an [employer/[***other covered entity***]]?**

___Yes ___No

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

2. Was [*name of plaintiff***] [an employee of [***name of defendant***]/an applicant to [***name of defendant***] for a job/[***other covered relationship to defendant***]]?**

___Yes ___No

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

3. Did [*name of defendant***] have [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***]?**

___Yes ___No

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

4. Is [*name of plaintiff***] [***protected status***]?**

___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 presiding juror sign and date this form.

5. Was the purpose of the [employment practice/selection policy] to operate the business safely and efficiently?

___Yes ___No

If your answer to question 5 is yes, then answer question 6. If you answered no, skip questions 6, 7, and 8, and answer question 9.

6. Did the [employment practice/selection policy] substantially accomplish this business purpose?

___Yes ___No

If your answer to question 6 is yes, then answer question 7. If you answered no, skip questions 7 and 8, and answer question 9.

7. Was there an alternative [employment practice/selection policy] that would have accomplished the business purpose equally well?

___Yes ___No

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

8. Would this alternative [employment practice/selection policy] have had less adverse impact on [*describe members of protected group—for example, persons over the age of 40***]?**

___Yes ___No

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

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9. Was [*name of defendant*]'s [employment practice/selection policy] a substantial factor in causing harm to [*name of plaintiff*]?

___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 presiding juror sign and date this form.

10. What are [*name of plaintiff*]'s damages? [$_____]

[[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:] $_____]
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] $_____]
[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]
[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____]

Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 instructions 1742, *Disparate Impact—Essential Factual Elements (Gov. Code, § 12940(a))*, 1743, *Affirmative Defense—Business Necessity/Job Relatedness*, and 1744, *Disparate Impact—Rebuttal to Business Necessity/Job Relatedness Defense.*

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Relationships other than employer/employee can be substituted in question number 2, as in element 2 in instruction 1742.

If specificity is not required, users do not have to itemize all the damages listed in question 10 and do not have to categorize “economic” and “noneconomic” damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

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

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

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2286
Retaliation (Gov. Code, § 12940(h))

We answer the questions submitted to us as follows:

1. Did [*name of plaintiff***] [***describe protected activity***]?**

___Yes ___No

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

2. Did [*name of defendant***] [discharge/demote/[***other adverse employment action***]] [***name of plaintiff***]?**

___Yes ___No

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

3. Was [*name of plaintiff***]'s [***describe protected activity***] a reason for which [***name of plaintiff***] was [discharged/demoted/[***other adverse employment action***]] by [***name of defendant***]?**

___Yes ___No

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

4. Was [*name of defendant***]'s retaliatory conduct a substantial factor in causing 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 presiding juror 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: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 1745, *Retaliation (Gov. Code, § 12940(h))*.

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

If there are multiple causes of action, users may wish to combine the individual forms into one form. This form may be modified if the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest on specific losses that occurred prior to judgment.

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2287
FEHA—Quid pro quo Sexual Harassment

We answer the questions submitted to us as follows:

1. Was [*name of plaintiff***] an employee of [***name of defendant***]?**

___Yes ___No

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

2. Did [*name of alleged harasser***] make unwanted sexual advances to [***name of plaintiff***] or engage in other unwanted verbal or physical conduct of a sexual nature?**

___Yes ___No

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

3. Were job benefits conditioned on [*name of plaintiff***]'s acceptance of [***name of alleged harasser***]'s sexual advances or conduct?**

___Yes ___No

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

4. Did [*name of defendant (employer)***] [or [his/her/its] supervisors or agents] know or should [he/she/it/they] have known of [***name of alleged harasser***]'s conduct?**

___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 presiding juror sign and date this form.

5. Did [*name of defendant (employer)***] [or [his/her/its] supervisors or agents] fail to take immediate and appropriate corrective action?**

___Yes ___No

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

6. Was [*name of alleged harasser***]'s conduct 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 presiding juror 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: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 1747, *Quid pro quo Sexual Harassment—Essential Factual Elements*.

Relationships other than employer/employee can be substituted in question number 1, as in element 1 in instruction 1747, Quid pro quo Sexual Harassment—Essential Factual Elements. Depending on the facts of the case, other factual scenarios can be substituted in questions 3, 4, and 5 as in elements 3 and 4 in the instruction.

If specificity is not required, users do not have to itemize all the damages listed in question 7 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

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

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

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2288
FEHA—Hostile Work Environment Harassment
Employer or Entity Defendant (Gov. Code, § 12940(j))

We answer the questions submitted to us as follows:

1. Was [*name of plaintiff***] an employee of [***name of defendant***]?**

___Yes ___No

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

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

___Yes ___No

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

3. Was the harassment so severe, widespread, or persistent that it created a hostile or an abusive work environment?

___Yes ___No

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

4. Did [*name of defendant***] [or [his/her/its] supervisors or agents] know or should [he/she/it/they] have known of the conduct?**

___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 presiding juror sign and date this form.

5. Did [*name of defendant***] [or [his/her/its] supervisors or agents] fail to take immediate and appropriate corrective action?**

___Yes ___No

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

6. Was the conduct a substantial factor in causing harm to [*name of plaintiff***]?**

___Yes ___No

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

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

[[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:] $_____]
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] $_____]
[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]
[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____]

Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 1748, *Hostile Work Environment Harassment — Essential Factual Elements—Employer or Entity Defendant (Gov. Code, § 12940(j)).*

Relationships other than employer/employee can be substituted in question number 1, as in element 1 in instruction 1748, Hostile Work Environment Harassment—Essential Factual Elements—Employer or Entity Defendant (Gov. Code, § 12940(j)). Depending on the facts of the case, other factual scenarios can be substituted in question 5 as in element 5 in the instruction.

If specificity is not required, users do not have to itemize all the damages listed in question 7 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

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

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

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2289
FEHA—Hostile Work Environment Harassment—Individual Defendant (Gov. Code, § 12940(j))

We answer the questions submitted to us as follows:

1. Was [*name of plaintiff***] an employee of [***name of employer***]?**

___Yes ___No

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

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

___Yes ___No

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

3. Was the harassing conduct so severe, widespread, or persistent that it created a hostile or an abusive work environment?

___Yes ___No

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

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

___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 presiding juror sign and date this form.

5. Was the conduct a substantial factor in causing harm to [*name of plaintiff***]?**

___Yes ___No

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

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

[[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:] $_____]
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] $_____]
[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]
[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____]

Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 1749, *Hostile Work Environment Harassment—Essential Factual Elements—Individual Defendant (Gov. Code, § 12940(j)).*

Relationships other than employer/employee can be substituted in question number 1, as in element 1 in instruction 1749.

If specificity is not required, users do not have to itemize all the damages listed in question 6 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

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

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

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2290
FEHA—Disability or Medical Condition Discrimination
Disparate Treatment

We answer the questions submitted to us as follows:

1. Was [*name of defendant***] [an employer/[***other covered entity***]]?**

___Yes ___No

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

2. Was [*name of plaintiff***] [an employee of [***name of defendant***]/an applicant to [***name of defendant***] for a job/[***other covered relationship to defendant***]]?**

___Yes ___No

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

3. Did [*name of defendant***] know that [***name of plaintiff***] had [***describe physical disability, mental disability, or medical condition***]?**

___Yes ___No

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

4. Was [*name of plaintiff***] able to perform the essential job duties [with reasonable accommodation for [his/her] condition]?**

___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 presiding juror sign and date this form.

5. Did [*name of defendant***] [discharge/refuse to hire/[***other adverse employment action***]] [***name of plaintiff***]?**

___Yes ___No

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

6. Was [*name of plaintiff***]'s [***describe physical disability, mental disability, or medical condition***] a reason for which [***name of defendant***] [discharged/ refused to hire/[***other adverse employment action***]] [***name of plaintiff***]?**

___Yes ___No

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

7. Was [*name of defendant***]'s [decision/conduct] a substantial factor in causing ham to [***name of plaintiff***]?**

___Yes ___No

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

8. What are [*name of plaintiff***]'s damages? [$_____]**

[[a. Past economic loss, 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: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 1753, *Disability or Medical Condition Discrimination—Disparate Treatment—Essential Factual Elements.*

Relationships other than employer/employee can be substituted in question number 1, as in element 1 in instruction 1753. Depending on the facts of the case, other factual scenarios can be substituted in questions 3 and 6, as in elements 3 and 6 in the instruction.

If specificity is not required, users do not have to itemize all the damages listed in question 8 and do not have to categorize “economic” and “noneconomic” damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, 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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2291
FEHA—Disability Discrimination—Reasonable Accommodation (Gov. Code, § 12940(m))

We answer the questions submitted to us as follows:

1. Was [*name of defendant***] [an employer/[***other covered entity***]]?**

___Yes ___No

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

2. Was [*name of plaintiff***] [an employee of [***name of defendant***]/an applicant to [***name of defendant***] for a job/[***other covered relationship to defendant***]]?**

___Yes ___No

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

3. Did [*name of plaintiff***] have [***describe physical or mental disability***]?**

___Yes ___No

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

4. Did [*name of defendant***] know of [***name of plaintiff***]'s [disability/ condition]?**

___Yes ___No

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

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5. Was [*name of plaintiff*] 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]]?

___Yes ___No

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

6. Did [*name of defendant*] fail to provide reasonable accommodation for [*name of plaintiff*]'s [disability/condition]?

___Yes ___No

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

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

___Yes ___No

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

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: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 1754, *Disability or Medical Condition Discrimination—Disparate Treatment—Essential Factual Elements.*

If specificity is not required, users do not have to itemize all the damages listed in question 8 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

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

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

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2292
FEHA—Disability Discrimination—Reasonable Accommodation (Gov. Code, § 12940(m)) Affirmative Defense—Undue Hardship

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We answer the questions submitted to us as follows:

1. Was [*name of defendant***] [an employer/[***other covered entity***]]?**

___Yes ___No

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

2. Was [*name of plaintiff***] [an employee of [***name of defendant***]/an applicant to [***name of defendant***] for a job/[***other covered relationship to defendant***]]?**

___Yes ___No

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

3. Did [*name of plaintiff***] have [***describe physical or mental disability***]?**

___Yes ___No

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

4. Did [*name of defendant***] know of [***name of plaintiff***]'s [disability/ condition]?**

___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 presiding juror sign and date this form.

5. Was [*name of plaintiff***] 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]]?**

___Yes ___No

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

6. Did [*name of defendant***] fail to provide a reasonable accommodation for [***name of plaintiff***]'s [disability/condition]?**

___Yes ___No

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

7. Would [*name of plaintiff***]'s proposed accommodations have created an undue hardship to the operation of [***name of defendant***]'s business?**

___Yes ___No

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

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

___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 presiding juror 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: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 Instructions 1754, *Disability or Medical Condition Discrimination—Disparate Treatment—Essential Factual Elements*, and Instruction 1758, *Affirmative Defense—Undue Hardship*. If a different affirmative defense is at issue, this form should be tailored accordingly.

If specificity is not required, users do not have to itemize all the damages listed in question 9 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

If there are multiple causes of action, users may wish to combine the individual forms into one form. This form may be modified if the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest on specific losses that occurred prior to judgment.

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2293
FEHA—Religious Creed Discrimination—Failure to Accommodate (Gov. Code, § 12940(l))

We answer the questions submitted to us as follows:

1. Was [*name of defendant***] [an employer/[***other covered entity***]]?**

___Yes ___No

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

2. Was [*name of plaintiff***] [an employee of [***name of defendant***]/an applicant to [***name of defendant***] for a job/[***other covered relationship to defendant***]]?**

___Yes ___No

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

3. Does [*name of plaintiff***] have a sincerely held religious belief that [***describe religious belief, observance, or practice***]?**

___Yes ___No

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

4. Did [*name of plaintiff***]'s religious [belief/observance] conflict with a job requirement?**

___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 presiding juror sign and date this form.

5. Did [*name of defendant***] know of the conflict between [***name of plaintiff***]'s religious [belief/observance] and the job requirement?**

___Yes ___No

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

6. Did [*name of defendant***] reasonably accommodate [***name of plaintiff***]'s religious [belief/observance]?**

___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 presiding juror sign and date this form.

7. Did [*name of defendant***] [discharge/refuse to hire/[***other adverse employment action***]] [***name of plaintiff***] because [***name of plaintiff***] failed to comply with the conflicting job requirement?**

___Yes ___No

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

8. Was [*name of defendant***]'s failure to reasonably accommodate [***name of plaintiff***]'s religious [belief/observance] a substantial factor in causing harm to [***name of plaintiff***]?**

___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 presiding juror 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: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 1759, *Religious Creed Discrimination—Failure to Accommodate—Essential Factual Elements (Gov. Code, § 12940(l)).*

If specificity is not required, users do not have to itemize all the damages listed in question 9 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

If there are multiple causes of action, users may wish to combine the individual forms into one form. This form may be modified if the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest on specific losses that occurred prior to judgment.

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2294
FEHA—Religious Creed Discrimination—Failure to Accommodate (Gov. Code, § 12940(l)) Affirmative Defense—Undue Hardship

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We answer the questions submitted to us as follows:

1. Was [*name of defendant***] [an employer/[***other covered entity***]]?**

___Yes ___No

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

2. Was [*name of plaintiff***] [an employee of [***name of defendant***]/an applicant to [***name of defendant***] for a job/[***other covered relationship to defendant***]]?**

___Yes ___No

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

3. Does [*name of plaintiff***] have a sincerely held religious belief that [***describe religious belief, observance, or practice***]?**

___Yes ___No

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

4. Did [*name of plaintiff***]'s religious [belief/observance] conflict with a job requirement?**

___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 presiding juror sign and date this form.

5. Did [*name of defendant***] know of the conflict between [***name of plaintiff***]'s religious [belief/observance] and the job requirement?**

___Yes ___No

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

6. Did [*name of defendant***] reasonably accommodate [***name of plaintiff***]'s religious [belief/observance]?**

___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 presiding juror sign and date this form.

7. Did [*name of defendant***] explore available ways to accommodate [***name of plaintiff***]'s religious [belief/observance]?**

___Yes ___No

If your answer to question 7 is yes, then answer question 8. If you answered no, skip question 8 and answer question 9.

8. Could [*name of defendant***] have accommodated [***name of plaintiff***]'s religious [belief/observance] without causing undue hardship to [***name of defendant***]'s business?**

___Yes ___No

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

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9. Did [*name of defendant***] [discharge/refuse to hire/[***other adverse employment action***]] [***name of plaintiff***] because [***name of plaintiff***] failed to comply with the conflicting job requirement?**

___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 presiding juror sign and date this form.

10. Was [*name of defendant***]'s failure to reasonably accommodate [***name of plaintiff***]'s religious [belief/observance] a substantial factor in causing harm to [***name of plaintiff***]?**

___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 presiding juror sign and date this form.

11. What are [*name of plaintiff***]'s damages? [$_____]**

[[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:] $_____]
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] $_____]
[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]
[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____]

Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 1759, *Religious Creed Discrimination—Failure to Accommodate—Essential Factual Elements (Gov. Code, § 12940(l)).*

If specificity is not required, users do not have to itemize all the damages listed in question 11 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

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

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

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2295
Violation of CFRA Rights

We answer the questions submitted to us as follows:

1. Was [*name of plaintiff***] an employee of [***name of defendant***]?**

___Yes ___No

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

2. Did [*name of defendant***] employ 50 or more employees within 75 miles of [***name of plaintiff***]'s workplace?**

___Yes ___No

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

3. Did [*name of plaintiff***] [***describe reason for family care or medical leave***]?**

___Yes ___No

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

4. At the time [*name of plaintiff***] needed leave did [he/she] have more than 12 months of service with [***name of defendant***], and had [he/ she] worked at least 1,250 hours for [***name of defendant***] during the previous 12 months?**

___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 presiding juror sign and date this form.

5. Did [*name of plaintiff***] provide reasonable notice to [***name of defendant***] of [his/her] need for [family care/medical] leave?**

___Yes ___No

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

6. Did [*name of defendant***] [refuse to grant [***name of plaintiff***]'s request for [family care/medical] leave] [refuse 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***]?**

___Yes ___No

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

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

___Yes ___No

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

8. What are [*name of plaintiff***]'s damages? [$_____]**

[[a. Past economic loss, 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: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 1761, *Violation of CFRA Rights—Essential Factual Elements.*

If specificity is not required, users do not have to itemize all the damages listed in question 8 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

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

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

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2296
Violation of CFRA Rights
Affirmative Defense—Employment Would Have Ceased

We answer the questions submitted to us as follows:

1. Was [*name of plaintiff***] an employee of [***name of defendant***]?**

___Yes ___No

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

2. Did [*name of defendant***] employ 50 or more employees within 75 miles of [***name of plaintiff***]'s workplace?**

___Yes ___No

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

3. Did [*name of plaintiff***] [***describe reason for family care or medical leave***]?**

___Yes ___No

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

4. At the time [*name of plaintiff***] needed leave did [he/she] have more than 12 months of service with [***name of defendant***], and had [he/ she] worked at least 1,250 hours for [***name of defendant***] during the previous 12 months?**

___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 presiding juror sign and date this form.

5. Did [*name of plaintiff***] provide reasonable notice to [***name of defendant***] of [his/her] need for [family care/medical] leave?**

___Yes ___No

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

6. Did [*name of defendant***] refuse to return [***name of plaintiff***] to the same or to a comparable job when [his/her] [family care/medical] leave ended?**

___Yes ___No

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

7. Would [*name of defendant***] have [discharged/laid off] [***name of plaintiff***] if [he/she] had continued to work during the leave period?**

___Yes ___No

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

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

___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 presiding juror sign and date this form.

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10. What are [*name of plaintiff*]'s damages? [$_____]

[[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:] $_____]
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] $_____]
[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]
[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____]

Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 1761, *Violation of CFRA Rights—Essential Factual Elements,* and Instruction 1764, *Affirmative Defense—Employment Would Have Ceased*. If a different affirmative defense is at issue, this form should be tailored accordingly.

If specificity is not required, users do not have to itemize all the damages listed in question 10 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

If there are multiple causes of action, users may wish to combine the individual forms into one form. This form may be modified if the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest on specific losses that occurred prior to judgment.

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2297
CFRA Rights Retaliation

We answer the questions submitted to us as follows:

1. Was [*name of plaintiff***] an employee of [***name of defendant***]?**

___Yes ___No

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

2. Did [*name of defendant***] employ 50 or more employees within 75 miles of [***name of plaintiff***]'s workplace?**

___Yes ___No

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

3. Did [*name of plaintiff***] [***describe reason for family care or medical leave***]?**

___Yes ___No

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

4. At the time [*name of plaintiff***] needed leave did [he/she] have more than 12 months of service with [***name of defendant***], and had [he/ she] worked at least 1,250 hours for [***name of defendant***] during the previous 12 months?**

___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 presiding juror sign and date this form.

5. Did [*name of plaintiff***] [[request/take] [family care/medical] leave/ [***other protected activity***]]?**

___Yes ___No

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

6. Did [*name of defendant***] [discharge/***other adverse employment action***] [***name of plaintiff***]?**

___Yes ___No

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

7. Was [*name of plaintiff***]'s [[request for/taking] [family care/ medical] leave/[***other protected activity***]] a reason for which [name of plaintiff] was [discharged/***other adverse employment action***]?**

___Yes ___No

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

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

___Yes ___No

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

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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: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 1766, *CFRA Rights Retaliation–Essential Factual Elements.*

If specificity is not required, users do not have to itemize all the damages listed in question 9 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

If there are multiple causes of action, users may wish to combine the individual forms into one form. This form may be modified if the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest on specific losses that occurred prior to judgment.

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2298
Nonpayment of Wages (Lab. Code, §§ 201, 202, 218)

We answer the questions submitted to us as follows:

1. Was [*name of plaintiff***] [***name of defendant***]'s employee?**

___Yes ___No

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

2. Did [[*name of defendant***] discharge [***name of plaintiff***]]/[[***name of plaintiff***] quit [his/her] job]?**

___Yes ___No

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

3. Does [*name of defendant***] owe [***name of plaintiff***] unpaid wages under the terms of the employment?**

___Yes ___No

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

4. What is the amount of unpaid wages? $_____

Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 1767, *Nonpayment of Wages—Essential Factual Elements (Lab. Code, §§ 201, 202, 218).*

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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2299
Nonpayment of Minimum Wage (Lab. Code, § 1194)

We answer the questions submitted to us as follows:

1. Was [*name of plaintiff***] [***name of defendant***]'s employee?**

___Yes ___No

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

2. Was [*name of plaintiff***] paid at a rate less than the legal minimum wage rate for a period of time that [he/she] worked for [***name of defendant***]?**

___Yes ___No

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

3. What is the amount of wages owed? $_____

Signed: _____
Presiding Juror
Dated: _____
[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 1768, *Nonpayment of Minimum Wage—Essential Factual Elements (Lab. Code, § 1194).* 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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2300
Nonpayment of Overtime Compensation (Lab. Code, § 1194)

We answer the questions submitted to us as follows:

1. Was [*name of plaintiff***] [***name of defendant***]'s employee?**

___Yes ___No

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

2. Was [*name of defendant***] required to pay [***name of plaintiff***] overtime?**

___Yes ___No

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

3. Was [*name of plaintiff***] 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***]?**

___Yes ___No

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

4. What is the amount of wages owed? $_____

Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 1769, *Nonpayment of Overtime Compensation—Essential Factual Elements (Lab. Code, § 1194).*

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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2301
Waiting-Time Penalty for Nonpayment of Wages
(Lab. Code, §§ 203, 218)

We answer the questions submitted to us as follows:

1. Was [*name of plaintiff***] [***name of defendant***]'s employee?**

___Yes ___No

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

2. Did [*name of defendant***] discharge [***name of plaintiff***]]?**

___Yes ___No

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

3. Did [*name of defendant***] knowingly fail to [pay/tender payment of] the full amount of wages earned by [***name of plaintiff***] on [his/her] last day of employment?**

___Yes ___No

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

4. For how many calendar days following [*name of plaintiff***]'s last day of employment did [***name of defendant***] knowingly fail to [pay/tender payment of] the full amount of [***name of plaintiff***]'s wages?**

_____ days.

Answer question 5.

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5. What was [*Name of plaintiff*]'s daily wage rate at the time [his/her] employment ended?

$_____ per day.

Signed: _____
Presiding juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 1771, *Waiting-Time Penalty for Nonpayment of Wages—Essential Factual Elements (Lab. Code, §§ 203, 218).* Depending on the facts of the case, other factual scenarios can be substituted in questions 2, 3, and 4, as in elements 2, 3, and 4 in the instruction.

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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2302
Solicitation of Employee by Misrepresentation—(Lab. Code, § 970)

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] make [a] representation(s) to [***name of plaintiff***] about the kind, character, or existence of work?**

___Yes ___No

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

2. [Was/Were] [*name of defendant***]'s representation(s) untrue?**

___Yes ___No

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

3. Did [*name of defendant***] know the representation(s) [was/were] untrue when made?**

___Yes ___No

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

4. Did [*name of defendant***] intend that [***name of plaintiff***] rely on the representation(s)?**

___Yes ___No

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

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5. Did [*name of plaintiff*] reasonably rely on [*name of defendant*]'s representation(s) and move or change [his/her] residence for the purpose of working for [*name of defendant*]?

___Yes ___No

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

6. Was [*name of plaintiff*]'s reliance on [*name of defendant*]'s representation(s) a substantial factor in causing harm to [*name of plaintiff*]?

___Yes ___No

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

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

[[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:] $_____]
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] $_____]
[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]
[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____]

Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 1772, *Solicitation of Employee by Misrepresentation—Essential Factual Elements (Lab. Code, § 970).* Depending on the facts of the case, other factual scenarios can be substituted in question 1, as in element 1 in the instruction.

If specificity is not required, users do not have to itemize all the damages listed in question 7 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

If there are multiple causes of action, users may wish to combine the individual forms into one form. This form may be modified if the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest on specific losses that occurred prior to judgment.

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2303
Preventing Subsequent Employment by Misrepresentation
(Lab. Code, § 1050)

We answer the questions submitted to us as follows:

1. After [*name of plaintiff***]'s employment with [***name of defendant***] ended, did [***name of defendant***] make [a] representation(s) to [***name of prospective employer***] about [***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 presiding juror sign and date this form.

2. [Was/Were] [*name of defendant***]'s representation(s) untrue?**

___Yes ___No

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

3. Did [*name of defendant***] know the representation(s) [was/were] untrue when [he/she/it] made [it/them]?**

___Yes ___No

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

4. Did [*name of defendant***] make the representation(s) with the intent of preventing [***name of plaintiff***] from obtaining employment?**

___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 presiding juror sign and date this form.

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

___Yes ___No

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

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

[[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:] $_____]
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] $_____]
[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]
[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____]

Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 1773, *Preventing Subsequent Employment by Misrepresentation—Essential Factual Elements (Lab. Code, § 1050).*

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If specificity is not required, users do not have to itemize all the damages listed in question 6 and do not have to categorize “economic” and “noneconomic” damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

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

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

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2304
Fair Market Value plus Goodwill

We answer the questions submitted to us as follows:

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

$_____

Answer question 2.

2. Did [*name of property owner***] conduct a business on the property that was taken [or on the property remaining after the taking]?**

___Yes ___No

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

3. Did [*name of property owner***]'s business lose goodwill as a result of the taking?**

___Yes ___No

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

4. Could the loss reasonably have been prevented by a relocation of the business or by taking other action that a reasonably careful person would take to preserve goodwill?

___Yes ___No

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

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

___Yes ___No

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

6. What is value of the loss of goodwill?

$_____

Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 1901, *"Fair Market Value" Explained,* and Instruction 1912, *Goodwill*.

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2305
Fair Market Value plus Severance Damages

We answer the questions submitted to us as follows:

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

$_____

Answer question 2.

2. What was the fair market value of the remaining property on [*date of valuation***]?**

$_____

Answer question 3.

3. What will the fair market value of the remaining property be after the [*name of public entity***]'s proposed project is completed?**

$_____

Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 1901, *"Fair Market Value" Explained*, and Instruction 1911, *Severance Damages*.

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2306
Fair Market Value plus Loss of Inventory/Personal Property

We answer the questions submitted to us as follows:

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

$_____

Answer question 2.

2. Did [*name of property owner***] lose inventory or personal property as a result of the taking?**

___Yes ___No

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

3. Was any portion of the inventory or personal property readily replaceable and not unique?

___Yes ___No

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

4. What is the retail value of the portion of the lost inventory or personal property that was unique and not readily replaceable?

$_____

Answer question 5.

5. What is the wholesale value of the portion of the lost inventory or personal property that was readily replaceable and not unique?

$_____

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Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 1901, *"Fair Market Value" Explained*, and Instruction 1907, *Personal Property and Inventory*.

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2307
Trespass

We answer the questions submitted to us as follows:

1. Did [*name of plaintiff***] [own/lease/occupy/control] the property?**

___Yes ___No

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

2. Did [*name of defendant***] [intentionally or negligently enter [***name of plaintiff***]'s property] [or] [intentionally or negligently cause [another person/[***insert name of thing***]] to enter [***name of plaintiff***]'s 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 presiding juror sign and date this form.

3. Did [*name of defendant***] enter the property without [***name of plaintiff***]'s permission?**

___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 presiding juror sign and date this form.

4. Was [*name of defendant***]'s [entry/conduct] a substantial factor in causing [actual] 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 presiding juror 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: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 1800, *Trespass.* If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If there is an issue regarding whether the defendant exceeded the scope of plaintiff's consent, question 3 can be modified, as in element 3 in instruction 1800. 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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2308
Trespass—Affirmative Defense Of Necessity

We answer the questions submitted to us as follows:

1. Did [*name of plaintiff***] [own/lease/occupy/control] the property?**

___Yes ___No

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

2. Did [*name of defendant***] [intentionally or negligently enter [***name of plaintiff***]'s property] [or] [intentionally or negligently cause [another person/[***insert name of thing***]] to enter [***name of plaintiff***]'s 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 presiding juror sign and date this form.

3. Did [*name of defendant***] enter the property without [***name of plaintiff***]'s permission?**

___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 presiding juror sign and date this form.

4. Was it necessary, or did it reasonably appear to [*name of defendant***] to be necessary, to enter the land to prevent serious harm to a person or property?**

___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 presiding juror sign and date this form.

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

___Yes ___No

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

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

[[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:] $_____]
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] $_____]
[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]
[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____]

Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 1800, *Trespass,* and Instruction 1805, *Defense of Necessity*.

If there is an issue regarding whether the defendant exceeded the scope of plaintiff's consent, question 3 can be modified, as in element 3 in instruction 1800.

If specificity is not required, users do not have to itemize all the damages listed in question 6 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

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

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

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2309
Trespass—Extra Hazardous Activities

We answer the questions submitted to us as follows:

1. Did [*name of plaintiff***] [own/lease/occupy/control] the property?**

___Yes ___No

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

2. Was [*name of defendant***] engaged in [***insert extra hazardous activity***]?**

___Yes ___No

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

3. Did [*insert extra hazardous activity***] cause [***insert thing***] to enter [***name of plaintiff***]'s property?**

___Yes ___No

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

4. Did [*name of plaintiff***] give permission for the entry?**

___Yes ___No

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

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

___Yes ___No

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

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

[[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:] $_____]
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] $_____]
[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]
[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____]

Signed: _____
Presiding Juror
Dated: _____
[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 1801, *Trespass—Extra Hazardous Activities.* If specificity is not required, users do not have to itemize all the damages listed in question 6 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further. If there are multiple causes of action, users may wish to combine the individual forms into one form. If there is an issue regarding whether the defendant exceeded the scope of plaintiff's consent, question 4 can be modified.

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2310
Trespass to Timber (Civ. Code, § 3346; Code Civ. Proc., § 733)

We answer the questions submitted to us as follows:

1. Did [*name of plaintiff***] [own/lease/occupy/control] the property?**

___Yes ___No

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

2. Did [*name of defendant***] intentionally or negligently enter [***name of plaintiff***]'s property and [cut down or damage trees/take timber] located on 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 presiding juror sign and date this form.

3. Did [*name of plaintiff***] give permission to [cut down or damage the trees/take timber]?**

___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 presiding juror sign and date this form.

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

___Yes ___No

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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 presiding juror 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: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 1802, *Trespass—Trespass to Timber (Civ. Code, § 3346; Code Civ. Proc., § 733).* If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further. If there are multiple causes of action, users may wish to combine the individual forms into one form. If there is an issue regarding whether the defendant exceeded the scope of plaintiff's consent, question 3 can be modified, as in element 3 in instruction 1802. 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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2311
Trespass to Timber (Civ. Code, § 3346; Code Civ. Proc., § 733)
Treble Damages Sought

We answer the questions submitted to us as follows:

1. Did [*name of plaintiff***] [own/lease/occupy/control] the property?**

___Yes ___No

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

2. Did [*name of defendant***] intentionally or negligently enter [***name of plaintiff***]'s property and [cut down or damage trees/take timber] located on 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 presiding juror sign and date this form.

3. Did [*name of plaintiff***] give permission to [cut down or damage the trees/take timber]?**

___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 presiding juror sign and date this form.

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

___Yes ___No

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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 presiding juror sign and date this form.

5. Did [*name of defendant***] intend to harm [***name of plaintiff***]?**

___Yes ___No

If your answer to question 5 is no, then answer question 6. If you answered yes, skip question 6 and answer question 7.

6. Did [*name of defendant***] act willfully or maliciously with the intent to vex, harass, or annoy?**

___Yes ___No

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

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

[[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:] $_____]
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] $_____]
[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]
[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____]

Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 1802, *Trespass—Trespass to Timber (Civ. Code, § 3346; Code Civ. Proc., § 733)*, and Instruction 1803, *Treble Damages—Timber*.

If specificity is not required, users do not have to itemize all the damages listed in question 7 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

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

If there is an issue regarding whether the defendant exceeded the scope of the plaintiff's consent, question 3 can be modified as in element 3 in instruction 1802.

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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2312
Public Nuisance

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] create a condition that was harmful to health?**

___Yes ___No

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

2. Did the condition affect a substantial number of people at the same time?

___Yes ___No

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

3. Would an ordinary person have been greatly annoyed or disturbed by the condition?

___Yes ___No

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

4. Did the seriousness of the harm outweigh the social utility of [*name of defendant***]'s conduct?**

___Yes ___No

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

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5. Did [*name of plaintiff*] consent to [*name of defendant*]'s conduct?

___Yes ___No

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

6. Did [*name of plaintiff*] suffer harm that was different from the type of harm suffered by the general public?

___Yes ___No

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

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

___Yes ___No

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

8. What are [*name of plaintiff*]'s damages? [$_____]

[[a. Past economic loss, 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: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 form is based on Instruction 1850, *Public Nuisance—Essential Factual Elements*.

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

Depending on the facts of the case, question 1 can be modified, as in element 1 in instruction 1850.

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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2313
Private Nuisance

We answer the questions submitted to us as follows:

1. Did [*name of plaintiff***] [own/lease/occupy/control] the property?**

___Yes ___No

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

2. Did [*name of defendant***] interfere with [***name of plaintiff***]'s use or enjoyment of [his/her] land?**

___Yes ___No

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

3. Did [*name of plaintiff***] consent to [***name of defendant***]'s conduct?**

___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 presiding juror sign and date this form.

4. Would an ordinary person have been greatly annoyed or disturbed by [*name of defendant***]'s conduct?**

___Yes ___No

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

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

___Yes ___No

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

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

___Yes ___No

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

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

[[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:] $_____]
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] $_____]
[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]
[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____]

Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 form is based on Instruction 1851, *Private Nuisance—Essential Factual Elements*.

If specificity is not required, users do not have to itemize all the damages listed in question 7 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

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

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

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2314
FELA—Negligence—Plaintiff's Negligence at Issue

We answer the questions submitted to us as follows:

1. Was [*name of plaintiff/decedent]***] employed by [***name of defendant***]?**

___Yes ___No

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

2. Was [*name of defendant***] a common carrier by railroad?**

___Yes ___No

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

3. Was [*name of defendant***] engaged in interstate commerce?**

___Yes ___No

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

4. Did [*name of plaintiff/decedent***]'s job duties further, or in any way substantially affect, interstate commerce?**

___Yes ___No

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

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5. Was [*name of plaintiff/decedent***] acting within the scope of [his/her] employment at the time of the incident?**

___Yes ___No

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

6. Was [*name of defendant***] negligent?**

___Yes ___No

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

7. Was [*name of plaintiff***] harmed?**

___Yes ___No

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

8. Was [*name of defendant***]'s negligence a cause of [***name of plaintiff/ decedent***]'s [harm/death]?**

___Yes ___No

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

9. What are [*name of plaintiff***]'s total damages? Do not reduce the damages based on the fault, if any, of [***name of plaintiff/decedent***].**

[$_____]

[[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 10. If [*name of plaintiff*] has not proved any damages, then stop here, answer no further questions, and have the presiding juror sign and date this form.

10. Was [*name of plaintiff/decedent*] negligent?

___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 presiding juror sign and date this form.

11. Was [*name of plaintiff/decedent*]'s negligence a cause of [his/her] harm?

___Yes ___No

If your answer to question 11 is yes, then answer question 12. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

12. What percentage of responsibility for [*name of plaintiff*]'s harm do you assign to:

[*Name of defendant*]: _____%
[*Name of plaintiff/decedent*]: _____%
TOTAL _____%

Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 form is based on Instruction 2100, *FELA—Essential Factual Elements*, and Instruction 2104, *FELA—Contributory Negligence.*

If specificity is not required, users do not have to itemize all the damages listed in question 9 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

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

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2315
Federal Safety Appliance Act or Boiler Inspection Act

We answer the questions submitted to us as follows:

1. Was [*name of plaintiff/decedent]***] employed by [***name of defendant***]?**

___Yes ___No

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

2. Was [*name of defendant***] a common carrier by railroad?**

___Yes ___No

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

3. Was [*name of defendant***] engaged in interstate commerce?**

___Yes ___No

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

4. Did [*name of plaintiff/decedent***]'s job duties further, or in any way substantially affect, interstate commerce?**

___Yes ___No

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

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5. Was [*name of plaintiff/decedent***] acting within the scope of [his/her] employment at the time of the incident?**

___Yes ___No

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

6. Did [*name of defendant***] [***describe violation of Federal Safety Appliance Act/Boiler Inspection Act***]?**

___Yes ___No

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

7. Was [*name of plaintiff***] harmed?**

___Yes ___No

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

8. Was [*name of defendant***]'s conduct a cause of [[***name of plaintiff***]'s harm/[***name of decedent***]'s death]?**

___Yes ___No

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

9. What are [*name of plaintiff***]'s damages? [$_____]**

[[a. Past economic loss, 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 $_____]

Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 form is based on Instruction 2106, *Essential Factual Elements—Federal Safety Appliance Act or Boiler Inspection Act*.

If specificity is not required, users do not have to itemize all the damages listed in question 9 and do not have to categorize “economic” and “non-economic” damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

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

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2316
Punitive Damages—Trial Not Bifurcated

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] act with malice, oppression, or fraud?**

___Yes ___No

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

2. What amount of punitive damages, if any, do you award [*name of plaintiff***]?**

$_____

Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 form is based on Instruction 2021, *Punitive Damages—Individual Defendant—Trial Not Bifurcated.*

Normally, this form should be combined with the verdict form(s) on the underlying cause(s) of action.

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2317
Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee Trial Not Bifurcated

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We answer the questions submitted to us as follows:

1. Did [*name of agent/employee***] act with malice, oppression, or fraud?**

___Yes ___No

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

2. Was [*name of employee/agent***] an officer, director, or managing agent of [***name of defendant***] acting in a [corporate/employment] capacity?**

___Yes ___No

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

3. What amount of punitive damages, if any, do you award [*name of plaintiff***]?**

$_____

Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 form is based on Instruction 2024, *Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee—Trial Not Bifurcated.*

Depending on the facts of the case, alternative grounds for liability may be substituted in question 2, as in instruction 2024.

Normally, this verdict form should be combined with the verdict form(s) on the underlying cause(s) of action.

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2318
Punitive Damages—Entity Defendant
Trial Not Bifurcated

We answer the questions submitted to us as follows:

1. Did one or more officers, directors, or managing agents of [*name of defendant***] act with malice, oppression, or fraud, on behalf of the corporation?**

___Yes ___No

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

2. What amount of punitive damages, if any, do you award [*name of plaintiff***]?**

$_____

Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 form is based on Instruction 2026, *Punitive Damages—Entity Defendant—Trial Not Bifurcated.*

Users may wish to combine this verdict form with the verdict form(s) on the underlying cause(s) of action.

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2319
Punitive Damages—Entity Defendant—Ratification
Trial Not Bifurcated

We answer the questions submitted to us as follows:

1. Did an agent or employee of [*name of defendant***] act with malice, oppression, or fraud?**

___Yes ___No

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

2. Did one or more officers, directors, or managing agents of [*name of defendant***] know of the conduct and adopt or approve it after it occurred?**

___Yes ___No

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

3. What amount of punitive damages, if any, do you award [*name of plaintiff***]?**

$_____

Signed: _____
Presiding juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 form is based on Instruction 2026, *Punitive Damages—Entity Defendant—Trial Not Bifurcated.*

Users may wish to combine this verdict form with the verdict form(s) on the underlying cause(s) of action.

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2320
Punitive Damages—Entity Defendant—Authorization
Trial Not Bifurcated

We answer the questions submitted to us as follows:

1. Did an agent or employee of [*name of defendant***] act with malice, oppression, or fraud?**

___Yes ___No

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

2. Did one or more officers, directors, or managing agents of [*name of defendant***] authorize the conduct that constituted malice, oppression, or fraud?**

___Yes ___No

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

3. What amount of punitive damages, if any, do you award [*name of plaintiff***]?**

$_____

Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 form is based on Instruction 2026, *Punitive Damages—Entity Defendant—Trial Not Bifurcated.*

Users may wish to combine this verdict form with the verdict form(s) on the underlying cause(s) of action.

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2321
Co-participant in a Sports Activity

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] either intentionally injure [***name of plaintiff***] or act so recklessly that [his/her] conduct was outside the range of ordinary activity involved in the sport?**

___Yes ___No

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

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

___Yes ___No

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

3. Was [*name of plaintiff***] injured as a result of a risk that is a normal part of the sport?**

___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 presiding juror sign and date this form.

4. What are [*name of plaintiff***]'s damages? [$_____]**

[[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 $_____]

Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 316A, *Co-participant in a Sports Activity*.

If specificity is not required, users do not have to itemize all the damages listed in question 4 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

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

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

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2322
Liability of Instructors, Trainers, or Coaches

We answer the questions submitted to us as follows:

1. Was [*name of defendant***] [***name of plaintiff***]'s [coach/trainer/instructor]?**

___Yes ___No

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

2. Did [*name of defendant***] increase the risk of harm beyond those risks that are a normal part of the sport in which [***name of plaintiff***] was participating?**

___Yes ___No

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

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

___Yes ___No

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

4. 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: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 316B, *Liability of Instructors, Trainers, or Coaches*.

If specificity is not required, users do not have to itemize all the damages listed in question 4 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

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

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

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2323
SONG-BEVERLY CONSUMER WARRANTY ACT
Breach of Express Warranty—Consumer Goods

We answer the questions submitted to us as follows:

1. Did [*name of plaintiff***] buy a[n] [***consumer product***] [from/distributed by/ manufactured by] [***name of defendant***]?**

___Yes ___No

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

2. Did [*name of defendant***] give [***name of plaintiff***] a warranty?**

___Yes ___No

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

3. Did the [*consumer product***] perform as represented in the warranty?**

___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 presiding juror sign and date this form.

4. Did [*name of plaintiff***] give [***name of defendant***] or its authorized repair facility a reasonable number of opportunities to attempt to repair the [***consumer 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 presiding juror sign and date this form.

5. Did [*name of defendant***] or its authorized repair facility repair the [***consumer product***] to conform to the [written statement/represented quality]?**

___Yes ___No

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

6. Did [*name of defendant***] fail to replace the [***consumer product***] or reimburse [***name of plaintiff***] the appropriate amount of money ?**

___Yes ___No

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

7. Was [*name of defendant***]'s failure to [repair/replace/reimburse [***name of plaintiff***] for] the [***consumer product***] a substantial factor in causing harm to [***name of plaintiff***]?**

___Yes ___No

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

8. What are [*name of plaintiff***]'s damages? $_____**

Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 2400, *Breach of Express Warranty—Consumer Goods—Essential Factual Elements (Civ. Code, § 1794).*

If the plaintiff was unable to deliver the product, modify question 4 as in element 4 of instruction 2400. Omit question 7 if the plaintiff is not seeking consequential damages.

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

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2324
SONG-BEVERLY CONSUMER WARRANTY ACT
Breach of Express Warranty—Consumer Goods
Affirmative Defense—Unauthorized or Unreasonable Use

We answer the questions submitted to us as follows:

1. Did [*name of plaintiff***] buy a[n] [***consumer product***] [from/distributed by/ manufactured by] [***name of defendant***]?**

___Yes ___No

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

2. Did [*name of defendant***] give [***name of plaintiff***] a warranty?**

___Yes ___No

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

3. Did the [*consumer product***] perform as stated for the time specified?**

___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 presiding juror sign and date this form.

4. Was the failure to comply with any written warranty caused by unauthorized or unreasonable use of the [*consumer product***] following its sale?**

___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 presiding juror sign and date this form.

5. Did [*name of plaintiff***] give [***name of defendant***] or its authorized repair facility a reasonable number of opportunities to attempt to repair the [***consumer 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 presiding juror sign and date this form.

6. Did [*name of defendant***] or its authorized repair facility fail to repair the [***consumer product***] to conform to the warranty?**

___Yes ___No

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

7. Did [*name of defendant***] fail to replace the [***consumer product***] or reimburse [***name of plaintiff***] the appropriate amount of money?**

___Yes ___No

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

8. Was [*name of defendant***]'s failure to [repair/replace/reimburse [***name of plaintiff***] for] the [***consumer product***] a substantial factor in causing harm to [***name of plaintiff***]?**

___Yes ___No

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

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9. What are [*name of plaintiff*]'s damages? $_____

Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 2400, *Breach of Express Warranty—Consumer Goods—Essential Factual Elements (Civ. Code, § 1794)*, and Instruction 2408, *Affirmative Defense—Unauthorized or Unreasonable Use.*

If plaintiff was unable to deliver the product, modify question 5 as in element 4 of instruction 2400. Omit question 8 if the plaintiff is not seeking consequential damages.

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

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2325
SONG-BEVERLY CONSUMER WARRANTY ACT
Breach of Express Warranty—New Motor Vehicle—Civil Penalty Sought

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We answer the questions submitted to us as follows:

1. Did [*name of plaintiff***] buy a[n] [***new motor vehicle***] [from/distributed by/ manufactured by] [***name of defendant***]?**

___Yes ___No

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

2. Did [*name of defendant***] give [***name of plaintiff***] a written warranty?**

___Yes ___No

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

3. Did the vehicle have a defect covered by the warranty that substantially impaired its use, value, or safety to [*name of plaintiff***]?**

___Yes ___No

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

4. Did [*name of plaintiff***] give [***name of defendant***] or its authorized repair facility a reasonable number of opportunities to attempt to repair the [***new motor vehicle***]?**

___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 presiding juror sign and date this form.

5. Did [*name of defendant***] or its authorized repair facility fail to service or repair the vehicle to conform to the written warranty?**

___Yes ___No

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

6. Did [*name of defendant***] fail to promptly replace or repurchase the vehicle as requested by [***name of plaintiff***]?**

___Yes ___No

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

7. Was [*name of defendant***]'s breach of the written warranty a substantial factor in causing harm to [***name of plaintiff***]?**

___Yes ___No

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

8. What are [*name of plaintiff***]'s damages? $_____**

Answer question 9.

9. Did [*name of defendant***] intentionally fail to repair or service the [***new motor vehicle***]?**

___Yes ___No

Answer question 10.

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10. Did [*name of defendant*] fail to maintain a qualified arbitration process for its customers?

___Yes ___No

If you answered yes to question 9 or question 10, or yes to both, then answer question 11. If you answered no to both questions 9 and 10, stop here, answer no further questions, and have the presiding juror sign and date this form.

11. What amount, if any, do you impose as a penalty?

$_____

Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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.

If there are multiple causes of action, users may wish to combine the individual forms into one form. This verdict form is based on Instruction 2401, *Breach of Express Warranty—New Motor Vehicle—Essential Factual Elements (Civ. Code, § 1794)*, Instruction 2415, *Civil Penalty–Willful Violation (Civ. Code, § 1794(c))*, and Instruction 2416, *Civil Penalty—New Motor Vehicle (Civ. Code, § 1794(e))*.

If plaintiff was unable to deliver the vehicle, modify question 4 as in element 4 of instruction 2401. Omit question 7 if the plaintiff is not seeking consequential damages.

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2326
SONG-BEVERLY CONSUMER WARRANTY ACT
Breach of Implied Warranty of Merchantability

We answer the questions submitted to us as follows:

1. Did [*name of plaintiff***] buy a[n] [***consumer product***] [manufactured by/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 presiding juror sign and date this form.

2. At the time of purchase was [*name of defendant***] in the business of [selling [***consumer products***] to retail buyers] [manufacturing [***consumer products***]]?**

___Yes ___No

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

3. Was the [*consumer product***] of the same quality as those generally acceptable in the trade?**

___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 presiding juror sign and date this form.

4. Was the [*describe alleged defect***] a substantial factor in causing 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 presiding juror sign and date this form.

5. What are [*name of plaintiff*]'s damages? $_____

Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 2405, *Breach of Implied Warranty of Merchantability—Essential Factual Elements.*

Depending on the facts, question 3 can be modified to cover other grounds for breach of the warranty, as in element 3 of instruction 2405.Omit questions 4 if the plaintiff is not seeking consequential damages.

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

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2327
SONG-BEVERLY CONSUMER WARRANTY ACT
Breach of Implied Warranty of Merchantability
Affirmative Defense—Disclaimer of Implied Warranties

We answer the questions submitted to us as follows:

1. Did [*name of plaintiff***] buy a[n] [***consumer product***] [manufactured by/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 presiding juror sign and date this form.

2. At the time of purchase was [*name of defendant***] in the business of [selling [***consumer products***] to retail buyers] [manufacturing [***consumer products***]]?**

___Yes ___No

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

3. Was the [*consumer product***] of the same quality as those generally acceptable in the trade?**

___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 presiding juror sign and date this form.

4. At the time of sale, was the [*consumer product***] sold on an "as is" or "with all faults" basis?**

___Yes ___No

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If your answer to question 4 is yes, then answer question 5.

5. Was the [*describe alleged defect***] a substantial factor in causing harm to [***name of plaintiff***]?**

___Yes ___No

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

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

Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 2405, *Breach of Implied Warranty of Merchantability—Essential Factual Elements*, and Instruction 2409, *Affirmative Defense—Disclaimer of Implied Warranties.*

Depending on the facts, question 3 can be modified to cover other grounds for breach of the warranty, as in element 3 of instruction 2405. Omit question 5 if the plaintiff is not seeking consequential damages.

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

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2328
SONG-BEVERLY CONSUMER WARRANTY ACT
Breach of Disclosure Obligations

We answer the questions submitted to us as follows:

1. Did [*name of plaintiff***] [buy/lease] a [***motor vehicle***] 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 presiding juror sign and date this form.

2. Did [*name of defendant***] know or should [he/she/it] have known that the vehicle had been returned to the manufacturer under [California's/[***name of state***]'s] motor vehicle warranty laws?**

___Yes ___No

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

3. Prior to the [sale/leasing], did [*name of defendant***] fail to disclose to [***name of plaintiff***], in clear and simple language, the nature of the defect experienced by the original [buyer/lessee] of the vehicle?**

___Yes ___No

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

4. Was [*name of defendant***]'s failure to clearly disclose the defect 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 presiding juror sign and date this form.

5. What are [*name of plaintiff*]'s damages? $_____

Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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.

If there are multiple causes of action, users may wish to combine the individual forms into one form. This verdict form is based on Instruction 2410, *Breach of Disclosure Obligations—Essential Factual Elements.*

If defendant is a manufacturer, substitute question 2 with a question modeled after the first bracketed option in element 2. Depending on the facts, question 4 can be modified to cover other grounds for breach of the warranty, as in element 5 and 6 of instruction 2410. Make sure that the "yes" and "no" directions match appropriately.

Omit question 4 if the plaintiff is not seeking consequential damages.

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2329
Violation of Federal Civil Rights (42 U.S.C. § 1983)—In General

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We answer the questions submitted to us as follows:

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

___Yes ___No

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

2. Did [*name of defendant***] violate [***name of plaintiff***]'s right [***insert right, e.g., "of privacy"***] while acting or pretending to act in the performance of official duties?**

___Yes ___No

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

3. Was [*name of defendant***]'s [***insert wrongful act***] a substantial factor in causing harm to [***name of plaintiff***] 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 presiding juror sign and date this form.

4. What are [*name of plaintiff***]'s damages? [$_____]**

[[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 $_____]

Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 2800, *Violation of Federal Civil Rights (42 U.S.C. § 1983)—In General—Essential Factual Elements.*

If specificity is not required, users do not have to itemize all the damages listed in question 4 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

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

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2330
Excessive Use of Force—Unreasonable Arrest or Other Seizure (42 U.S.C. § 1983)

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] use excessive force in [arresting/detaining] [***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 presiding juror sign and date this form.

2. Was [*name of defendant***] acting or pretending to act in the performance of official duties?**

___Yes ___No

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

3. Was [*name of defendant***]'s use of excessive force a substantial factor in causing harm to [***name of plaintiff***]?**

___Yes ___No

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

4. What are [*name of plaintiff***]'s damages? [$_____]**

[[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 $_____]

Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 2801, *Excessive Use of Force—Unreasonable Arrest or Other Seizure—Essential Factual Elements (42 U.S.C. § 1983).*

If specificity is not required, users do not have to itemize all the damages listed in question 4 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

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

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2331
Unreasonable Search—Search With a Warrant (42 U.S.C. § 1983)

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] conduct an unreasonable search of [***name of plaintiff***]'s [person/home/ automobile/office/[***insert other***]?**

___Yes ___No

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

2. Was [*name of defendant***] acting or pretending to act in the performance of official duties?**

___Yes ___No

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

3. Was [*name of defendant***]'s unreasonable search a substantial factor in causing harm to [***name of plaintiff***]?**

___Yes ___No

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

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: _____

Presiding Juror

Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 2802, *Unreasonable Search—Search With a Warrant (42 U.S.C. § 1983).*

If specificity is not required, users do not have to itemize all the damages listed in question 4 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

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

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2332
Unreasonable Search—Search Without a Warrant (42 U.S.C. § 1983)

We answer the questions submitted to us as follows:

1. Did [*name of defendant*] search [*name of plaintiff*]'s [person/home/ automobile/office/[*insert other*] without a warrant?

___Yes ___No

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

2. Was [*name of defendant*] acting or pretending to act in the performance of official duties?

___Yes ___No

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

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

___Yes ___No

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

4. 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: _____

Presiding Juror

Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 2803, *Unreasonable Search—Search Without a Warrant (42 U.S.C. § 1983).*

If specificity is not required, users do not have to itemize all the damages listed in question 4 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

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

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2333
Unreasonable Search—Search Without a Warrant (42 U.S.C. § 1983)
Affirmative Defense—Search Incident to Lawful Arrest

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] search [***name of plaintiff***]'s [person/home/ automobile/office/[***insert other***] without a warrant?**

___Yes ___No

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

2. Was [*name of defendant***] acting or pretending to act in the performance of official duties;?**

___Yes ___No

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

3. Was the search conducted as part of a lawful arrest of [*name of plaintiff***]?**

___Yes ___No

If your answer to question 3 is yes, then answer question 4. If you answered no, skip questions 4 and 5 and answer question 6.

4. Did [*name of defendant***] search only [***name of plaintiff***] and the area within which [***name of plaintiff***] might have gained possession of a weapon or might have destroyed or hidden evidence?**

___Yes ___No

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

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5. Was the search reasonable under the circumstances?

___Yes ___No

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

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

___Yes ___No

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

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

[[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:] $_____]
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] $_____]
[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]
[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____]

Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 2803, *Unreasonable Search—Search Without a Warrant (42 U.S.C. § 1983)* and Instruction 2804, *Affirmative Defense—Search Incident to Lawful Arrest.* This form can be modified if another affirmative defense is at issue (see Instruction 2805, *Affirmative Defense—Consent to Search*, and Instruction 2806, *Affirmative Defense—Exigent Circumstances*).

If specificity is not required, users do not have to itemize all the damages listed in question 7 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

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

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2334
Municipal Liability (42 U.S.C. § 1983)

We answer the questions submitted to us as follows:

1. Did [*name of officer, employee, etc.***] [intentionally/[***insert other applicable state of mind***]] [***insert conduct allegedly violating plaintiff's civil rights***]?**

___Yes ___No

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

2. Did [*insert conduct allegedly violating plaintiff's civil rights***] occur as a result of the official [policy/custom] of the [***name of municipality***]?**

___Yes ___No

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

3. Was [*name of officer, employee, etc.***]'s conduct a substantial factor in causing harm to [***name of plaintiff***]?**

___Yes ___No

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

4. 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: _____

Presiding Juror

Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 2807, *Municipal Liability (42 U.S.C. § 1983).*

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

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

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2335
Public Entity Liability—Failure To Train (42 U.S.C. § 1983)

We answer the questions submitted to us as follows:

1. Was [*name of public entity***]'s training program inadequate to train its [officers/employees] to properly handle usual and recurring situations?**

___Yes ___No

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

2. Was [*name of public entity***] deliberately indifferent to the need to train its [officers/employees] adequately?**

___Yes ___No

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

3. Was the failure to provide proper training the cause of the deprivation of [*name of plaintiff***]'s right [***insert right, e.g., "of privacy"***]?**

___Yes ___No

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

4. Was [*name of public entity***]'s failure to adequately train its [officers/ employees] a substantial factor in causing 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 presiding juror 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: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 2809, *Public Entity Liability—Failure To Train (42 U.S.C. § 1983).*

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

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

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2336
Violation Of Prisoner's Federal Civil Rights (42 U.S.C. § 1983)
Eighth Amendment—Excessive Force

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] use force against [***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 presiding juror sign and date this form.

2. Was the force excessive?

___Yes ___No

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

3. Was [*name of defendant***] acting or pretending to act in the performance of official duties?**

___Yes ___No

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

4. Was [*name of defendant***]'s use of excessive force a substantial factor in causing harm to [***name of plaintiff***]?**

___Yes ___No

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

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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: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 2810, *Violation Of Prisoner's Federal Civil Rights (42 U.S.C. § 1983)—Eighth Amendment—Excessive Force.*

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

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

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2337
Violation Of Prisoner's Federal Civil Rights (42 U.S.C. § 1983)
Eighth Amendment—General Conditions Of Confinement Claim

We answer the questions submitted to us as follows:

1. Was [*name of plaintiff***] imprisoned under conditions that exposed [him/her] to a substantial risk of serious harm?**

___Yes ___No

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

2. Did [*name of defendant***] know the conditions created a substantial risk of serious harm and disregard that risk by failing to take reasonable measures to correct it?**

___Yes ___No

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

3. Was [*name of defendant***] acting or pretending to act in the performance of official duties?**

___Yes ___No

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

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

___Yes ___No

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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 presiding juror 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: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 2811, *Violation Of Prisoner's Federal Civil Rights (42 U.S.C. § 1983)—Eighth Amendment—General Conditions of Confinement Claim.*

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

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

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2338
Violation Of Prisoner's Federal Civil Rights (42 U.S.C. § 1983)
Eighth Amendment—Medical Care

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] act with deliberate indifference to a serious medical need 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 presiding juror sign and date this form.

2. Was [*name of defendant***] acting or pretending to act in the performance of official duties?**

___Yes ___No

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

3. Was [*name of defendant***]'s deliberate indifference a substantial factor in causing harm to [***name of plaintiff***]?**

___Yes ___No

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

4. What are [*name of plaintiff***]'s damages? [$_____]**

[[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 $_____]

Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 2812, *Violation Of Prisoner's Federal Civil Rights (42 U.S.C. § 1983)—Eighth Amendment—Medical Care.*

If specificity is not required, users do not have to itemize all the damages listed in question 4 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

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

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2339
Unruh Civil Rights Act (Civ. Code, §§ 51, 52)

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] [deny/aid or incite a denial of/discriminate or make a distinction that denied] full and equal [accommodations/ advantages/facilities/privileges/services] 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 presiding juror sign and date this form.

2. Was [[*name of defendant***]'s perception of] [***name of plaintiff***]'s [sex/ race/color/religion/ancestry/national origin/disability/medical condition/[***insert other actionable characteristic***] a reason for [***name of defendant***]'s conduct?**

___Yes ___No

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

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

___Yes ___No

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

4. What are [*name of plaintiff***]'s damages? [$_____]**

[[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 $_____]

Answer question 5.

5. What amount, if any, do you award as a penalty against [*name of defendant***]**

$_____

Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered to the [clerk/bailiff/judge].

DIRECTIONS FOR USE

Because the award of a penalty in question 5 can be a maximum of 3 times the amount of actual damages, the judge should correct the verdict if the jury award goes over that limit. Also, if jury inserts an amount less than $4,000 in question 5, then the judge should increase that award to $4,000 to reflect the statutory minimum.

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 2813, *Unruh Civil Rights Act (Civ. Code, §§ 51, 52)—Essential Factual Elements.*

If the plaintiff's association with another is the basis for the claim, modify question 2 as in element 2 of instruction 2813. If specificity is not required, users do not have to itemize all the damages listed in question 4 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further. If there are multiple causes of action, users may wish to combine the individual forms into one form.

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2340
Unruh Civil Rights Act—Boycott, etc. (Civ. Code, § 51.5)

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] [discriminate against/boycott/blacklist/ refuse to buy from/refuse to contract with/refuse to sell to/refuse to trade with] [***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 presiding juror sign and date this form.

2. Was [[*name of defendant***]'s perception of] [***name of plaintiff***]'s [sex/race/color/religion/ ancestry/national origin/disability/medical condition/[***insert other actionable characteristic***]] a reason for [***name of defendant***]'s conduct?**

___Yes ___No

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

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

___Yes ___No

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

4. What are [*name of plaintiff***]'s damages? [$_____]**

[[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 $_____]

Answer question 5.

5. What amount, if any, do you award as a penalty against [name of defendant]?

$_____

Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered to the [clerk/bailiff/judge].

DIRECTIONS FOR USE

Because the award of a penalty in question 5 can be a maximum of 3 times the amount of actual damages, the judge should correct the verdict if the jury award goes over that amount. Also, if jury inserts an amount less than $4,000 in question 5, then the judge should increase that award to $4,000 to reflect the statutory minimum. 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 2814, *Unruh Civil Rights Act—Boycott, etc. (Civ. Code, § 51.5)—Essential Factual Elements.*

If an alternative basis for the defendant's alleged motivation is at issue, modify question 2 as in element 2 of instruction 2814. If specificity is not required, users do not have to itemize all the damages listed in question 4 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further. If there are multiple causes of action, users may wish to combine the individual forms into one form.

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2341
Gender Price Discrimination (Civ. Code, § 51.6)

We answer the questions submitted to us as follows:

1. Did [*name of defendant*] charge [*name of plaintiff*] more for services of similar or like kind because of [his/her] gender?

___Yes ___No

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

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

___Yes ___No

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

3. 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 $_____]

Answer question 4.

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4. What amount, if any, do you award as a penalty against [*name of defendant***]?**

$_____

Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered to the [clerk/bailiff/judge].

DIRECTIONS FOR USE

Because the award of a penalty in question 4 can be a maximum of 3 times the amount of actual damages, the judge should correct the verdict if the jury award goes over that amount. Also, if jury inserts an amount less than $4,000 in question 4 then the judge should increase that award to $4,000 to reflect the statutory minimum.

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 2815, *Gender Price Discrimination (Civ. Code, § 51.6)—Essential Factual Elements.*

If specificity is not required, users do not have to itemize all the damages listed in question 3 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

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

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2342
Ralph Act (Civ. Code, § 51.7)

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] threaten or commit violent acts against [***name of plaintiff***] [or [his/her] property]?**

___Yes ___No

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

2. Was [[*name of defendant***]'s perception of] [***name of plaintiff***]'s [sex/race/ color/religion/ancestry/national origin/political affiliation/sex/sexual orientation/age/disability/position in a labor dispute/[***insert other actionable characteristic***]] a reason for [***name of defendant***]'s conduct?**

___Yes ___No

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

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

___Yes ___No

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

4. What are [*name of plaintiff***]'s damages? [$_____]**

[[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 $_____]

[Answer question 5.

5. What amount do you award as punitive damages? $_____]

Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 2816, *Ralph Act (Civ. Code, § 51.7)—Essential Factual Elements,* and Instruction 2820, *Unruh Civil Rights Act—Civil Penalty (Civ. Code, §§ 51.7, 51.9).* For instructions on punitive damages, see instructions in the Damages series (Instruction 2000, et seq).

If specificity is not required, users do not have to itemize all the damages listed in question 4 and do not have to categorize “economic” and “noneconomic” damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

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

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2343
Sexual Harassment in Defined Relationship (Civ. Code, § 51.9)

We answer the questions submitted to us as follows:

1. Did [*name of plaintiff***] have a business, service, or professional relationship with [***name of defendant***]?**

___Yes ___No

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

2. Did [*name of defendant***] make [sexual advances/sexual solicitations/ sexual requests/demands for sexual compliance/[***insert other actionable conduct***]] to [***name of plaintiff***]?**

___Yes ___No

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

3. Was [*name of plaintiff***] unable to easily end the relationship with [***name of defendant***]?**

___Yes ___No

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

4. Has [*name of plaintiff***] suffered or will [he/she] suffer [economic loss or disadvantage/personal injury/the violation of a statutory or constitutional right] as a result of [***name of defendant***]'s conduct?**

___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 presiding juror 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 $_____]

[Answer question 6.

6. What amount do you award as punitive damages? $_____]

Signed: _____
Presiding Juror
Dated: _____
[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 2817, *Sexual Harassment in Defined Relationship (Civ. Code, § 51.9)—Essential Factual Elements.* If alternate conduct is alleged, modify question 2 as in element 2 of instruction 2817. If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further. For instructions on punitive damages, see instructions in the Damages series (Instruction 2000, et seq). If there are multiple causes of action, users may wish to combine the individual forms into one form.

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2344
Bane Act (Civ. Code, § 52.1)

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] interfere with [or attempt to interfere with] [***name of plaintiff***]'s right to [***insert alleged constitutional or statutory right***] by threatening or committing violent acts?**

___Yes ___No

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

2. Did [*name of plaintiff***] reasonably believe that if [he/she] exercised [his/her] right to [***insert right, e.g., "to vote"***] [***name of defendant***] would commit violence against [him/her] or [his/her] 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 presiding juror sign and date this form.

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

___Yes ___No

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

4. What are [*name of plaintiff***]'s damages? [$_____]**

[[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 $_____]

[Answer question 5.

5. What amount, if any, do you award as a penalty against [*name of defendant***]?**

$_____]

[Answer question 6.

6. What amount do you award as punitive damages? $_____]

Signed: _____
Presiding Juror
Dated: _____
[When signed/After all verdict forms have been signed], this verdict form must be delivered to the [clerk/bailiff/judge].

DIRECTIONS FOR USE

Civil Code section 52.1 references all damages under section 52, but does not specify whether subdivision 52(a) or 52(b), or both, is/are intended. Depending on how this point is decided, select question 5 and/or 6 as appropriate. 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 2818, *Bane Act (Civ. Code, § 52.1)—Essential Factual Elements.* If the plaintiff alleges an alternative ground of liability, modify question 2 as in element 2 of instruction 2818. If specificity is not required, users do not have to itemize all the damages listed in question 4 and do not have to categorize “economic” and “noneconomic” damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further. If there are multiple causes of action, users may wish to combine the individual forms into one form.

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2345
Financial Abuse—Individual or Individual and Employer Defendant
(Welf. & Inst. Code, §§ 15657, 15610.30)

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] [take/hide/appropriate/retain] [***name of plaintiff/decedent***]'s property for a wrongful use [or with the intent to defraud]?**

___Yes ___No

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

2. Was [*name of plaintiff/decedent***] [65 years of age or older/a dependent adult] at the time of the conduct?**

___Yes ___No

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

3. Did [*name of defendant***] act with [recklessness/malice/oppression/fraud]?**

___Yes ___No

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

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

___Yes ___No

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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 presiding juror sign and date this form.

5. Was [*name of defendant employee***] an officer, director, or managing agent of [***name of defendant employer***] acting in a [corporate/employment] capacity?**

___Yes ___No

Answer question 6.

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

[[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:] $_____]
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] $_____]
[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]
[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____]

Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 2900, *Financial Abuse—Essential Factual Elements—Individual or Individual and Employer Defendant (Welf. & Inst. Code, §§ 15657, 15610.30).*

If the plaintiff alleges that the defendant assisted in the wrongful conduct, modify question 1 as in element 2 of instruction 2900. Question 5 can be altered to correspond to one of the alternative bracketed options in the second part of instruction 2900, or it can be omitted if the plaintiff is not suing an employer.

If specificity is not required, users do not have to itemize all the damages listed in question 6 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

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

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2346
Financial Abuse—Employer Defendant
(Welf. & Inst. Code, §§ 15657, 15610.30)

We answer the questions submitted to us as follows:

1. Did one or more of [*name of defendant***]'s employees [take/hide/appropriate/retain] [***name of plaintiff/decedent***]'s property for a wrongful use [or with the intent to defraud]?**

___Yes ___No

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

2. Was [*name of plaintiff/decedent***] [65 years of age or older/a dependent adult] at the time of the conduct?**

___Yes ___No

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

3. Did the employee[s] act with [recklessness/malice/oppression/fraud]?

___Yes ___No

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

4. Was the employee['s]['s'] conduct a substantial factor in causing 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 presiding juror sign and date this form.

5. Did an officer, a director, or a managing agent of [*name of defendant***] authorize the employee[‘s][s’] conduct?**

___Yes ___No

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

6. What are [*name of plaintiff***]’s damages? [$_____]**

[[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:] $_____]
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] $_____]
[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]
[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____]

Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 2901, *Financial Abuse—Essential Factual Elements—Employer Defendant—(Welf. & Inst. Code, §§ 15657, 15610.30).*

If the plaintiff alleges that the defendant's employees assisted in the wrongful conduct, modify question 1 as in element 2 of instruction 2901. Question 5 can be altered to correspond to one of the alternative bracketed options in element 7 of instruction 2901.

If specificity is not required, users do not have to itemize all the damages listed in question 6 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

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

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2347
Neglect—Individual or Individual and Employer Defendant
(Welf. & Inst. Code, §§ 15657, 15610.57)

We answer the questions submitted to us as follows:

1. Was [*name of plaintiff/decedent***] in [***name of defendant***]'s care or custody?**

___Yes ___No

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

2. Was [*name of plaintiff/decedent***] [65 years of age or older/a dependent adult] while [he/she] was in [***name of defendant***]'s care or custody?**

___Yes ___No

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

3. Did [*name of defendant***] fail to use that degree of care that a reasonable person in the same situation would have used in assisting in personal hygiene, or in the provision of food, clothing, or shelter?**

___Yes ___No

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

4. Did [*name of defendant***] act with [recklessness/malice/oppression/fraud]?**

___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 presiding juror sign and date this form.

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

___Yes ___No

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

6. Did an officer, a director, or a managing agent of [*name of defendant employer***] have advance knowledge of the unfitness of [***name of defendant employee***] and employ [him/her] with a knowing disregard of the rights or safety of others?**

___Yes ___No

Answer question 7.

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: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 2902, *Neglect—Essential Factual Elements—Individual or Individual and Employer Defendant—(Welf. & Inst. Code, §§ 15657, 15610.57).*

Question 3 can be modified to correspond to the alleged wrongful conduct as in element 3 of instruction 2902. Question 6 can be altered to correspond to one of the alternative bracketed options in the lower bracketed portion of instruction 2902, or it can be omitted if the plaintiff is not suing an employer.

If specificity is not required, users do not have to itemize all the damages listed in question 7 and do not have to categorize “economic” and “noneconomic” damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

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

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2348
Neglect—Employer Defendant (Welf. & Inst. Code, §§ 15657, 15610.57)

We answer the questions submitted to us as follows:

1. Was [*name of plaintiff/decedent***] in [***name of defendant***]'s care or custody?**

___Yes ___No

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

2. Was [*name of plaintiff/decedent***] [65 years of age or older/a dependent adult] while [he/she] was in [name of defendant]'s care or custody?**

___Yes ___No

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

3. Did one or more of [*name of defendant***]'s employees fail to use that degree of care that a reasonable person in the same situation would have used in assisting in personal hygiene, or in the provision of food, clothing, or shelter?**

___Yes ___No

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

4. Did the employee[s] act with [recklessness/malice/oppression/ fraud]?

___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 presiding juror sign and date this form.

5. Was the employee[‘s][s’] conduct a substantial factor in causing harm to [*name of plaintiff/decedent***]?**

___Yes ___No

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

6. Did an officer, a director, or a managing agent of [*name of defendant***] have advance knowledge of the unfitness of the employee[s] and employ [him/her/them] with a knowing disregard of the rights or safety of others?**

___Yes ___No

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

7. What are [*name of plaintiff***]’s damages? [$_____]**

[[a. Past economic loss, 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: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 2903, *Neglect—Essential Factual Elements—Employer Defendant—(Welf. & Inst. Code, §§ 15657, 15610.57).*

Question 3 can be modified to correspond to the alleged wrongful conduct as in element 3 of instruction 2903. Question 6 can be altered to correspond to one of the alternative bracketed options in element 8 of instruction 2903.

If specificity is not required, users do not have to itemize all the damages listed in question 7 and do not have to categorize “economic” and “noneconomic” damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

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

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2349
Physical Abuse—Individual or Individual and Employer Defendant
(Welf. & Inst. Code, §§ 15657, 15610.63)

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] physically abuse [***name of plaintiff/decedent***]?**

___Yes ___No

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

2. Was [*name of plaintiff/decedent***] [65 years of age or older/a dependent adult] at the time of the conduct?**

___Yes ___No

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

3. Did [*name of defendant***] act with [recklessness/malice/oppression/fraud]?**

___Yes ___No

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

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

___Yes ___No

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

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5. Did an officer, a director, or a managing agent of [*name of defendant employer***] have advance knowledge of the unfitness of [***name of defendant employee***] and employ [him/her] with a knowing disregard of the rights or safety of others?**

___Yes ___No

Answer question 6.

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

[[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:] $_____]
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] $_____]
[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]
[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____]

Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 2904, *Physical Abuse—Essential Factual Elements—Individual or Individual and Employer Defendant—(Welf. & Inst. Code, §§ 15657, 15610.63).*

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Question 5 can be altered to correspond to one of the alternative bracketed options in the lower bracketed portion of instruction 2904, or it can be omitted if the plaintiff is not suing an employer.

If specificity is not required, users do not have to itemize all the damages listed in question 6 and do not have to categorize “economic” and “noneconomic” damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

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

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2350
Physical Abuse—Employer Defendant
(Welf. & Inst. Code, §§ 15657, 15610.63)

We answer the questions submitted to us as follows:

1. Did one or more of [*name of defendant***]'s employees physically abuse [***name of plaintiff/ decedent***]?**

___Yes ___No

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

2. Was [*name of plaintiff/decedent***] [65 years of age or older/a dependent adult] at the time of the conduct?**

___Yes ___No

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

3. Did the employee[s] act with [recklessness/malice/oppression/fraud]?

___Yes ___No

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

4. Was the employee['s]['s'] conduct a substantial factor in causing harm to [*name of plaintiff/decedent***]?**

___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 presiding juror sign and date this form.

5. Did an officer, a director, or a managing agent of [*name of defendant***] have advance knowledge of the unfitness of the employee[s] and employ [him/her/them] with a knowing disregard of the rights or safety of others?**

___Yes ___No

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

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

[[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:] $_____]
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] $_____]
[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]
[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____]

Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 2905, *Physical Abuse—Essential Factual Elements—Employer Defendant—(Welf. & Inst. Code, §§ 15657, 15610.63).*

Question 5 can be altered to correspond to one of the alternative bracketed options in element 6 of instruction 2905.

If specificity is not required, users do not have to itemize all the damages listed in question 6 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

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

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2351
Abduction—Individual or Individual and Employer Defendant
(Welf. & Inst. Code, §§ 15657.05, 15610.06)

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] [remove [***name of plaintiff/decedent***] from California and] restrain [him/her/[***name of plaintiff/decedent***]] from returning to California?**

___Yes ___No

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

2. Was [*name of plaintiff/decedent***] [65 years of age or older/a dependent adult] at the time of the conduct?**

___Yes ___No

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

3. Did [*name of plaintiff/decedent***] lack the capacity to consent to the [removal/restraint]?**

___Yes ___No

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

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

___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 presiding juror sign and date this form.

5. Was [*name of defendant employee***] an officer, director, or managing agent of [***name of defendant employer***] acting in a [corporate/employment] capacity?**

___Yes ___No

Answer question 6.

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

[[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:] $_____]
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] $_____]
[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]
[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____]

Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 2906, *Abduction—Essential Factual Elements—Individual or Individual and Employer Defendant—(Welf. & Inst. Code, §§ 15657.05, 15610.06).*

Question 3 can be altered to correspond to the alternative bracketed option in element 3 of instruction 2906.

Question 5 can be altered to correspond to one of the alternative bracketed options in the lower bracketed portion of instruction 2906, or it can be omitted if the plaintiff is not suing an employer.

If specificity is not required, users do not have to itemize all the damages listed in question 6 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

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

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2352
Abduction—Employer Defendant
(Welf. & Inst. Code, §§ 15657.05, 15610.06)

We answer the questions submitted to us as follows:

1. **Did one or more of [***name of defendant***]'s employees [remove [***name of plaintiff/decedent***] from California and] restrain [him/her/[***name of plaintiff/decedent***]] from returning to California?**

   ___Yes ___No

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

2. **Was [***name of plaintiff/decedent***] [65 years of age or older/a dependent adult] at the time of the conduct?**

   ___Yes ___No

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

3. **Did [***name of plaintiff/decedent***] lack the capacity to consent to the [removal/restraint]?**

   ___Yes ___No

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

4. **Was the employee['s]['s'] conduct a substantial factor in causing harm to [***name of plaintiff/decedent***]?**

   ___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 presiding juror sign and date this form.

5. [Was/Were] the employee[s] [an] officer[s], director[s], or managing agent[s] of [*name of defendant employer***] acting in a [corporate/ employment] capacity?**

___Yes ___No

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

6. What are [*name of plaintiff***]'s damages? [$_____]**

[[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:] $_____]
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] $_____]
[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]
[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____]

Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered to the [clerk/bailiff/judge].

DIRECTIONS FOR USE

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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 2907, *Abduction—Essential Factual Elements—Employer Defendant—(Welf. & Inst. Code, §§ 15657.05, 15610.06).*

Question 3 can be altered to correspond to the alternative bracketed option in element 3 of instruction 2907.

Question 5 can be altered to correspond to one of the alternative bracketed options in element 6 of instruction 2907.

If specificity is not required, users do not have to itemize all the damages listed in question 6 and do not have to categorize “economic” and “noneconomic” damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

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2353
Parental Liability (Nonstatutory)

We answer the questions submitted to us as follows:

1. Was [*name of defendant***] aware habits or tendencies of [***name of minor***] that created an unreasonable risk of harm to other persons and that led to [***name of plaintiff***]'s harm]?**

___Yes ___No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [*name of defendant***] have the opportunity and ability to control the conduct of [***name of 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 presiding juror sign and date this form.

3. Was [*name of defendant***] negligent because [he/she] failed to exercise reasonable care to prevent [***name of minor***]'s conduct?**

___Yes ___No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was [*name of defendant***]'s negligence a substantial factor in causing 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 presiding juror 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: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 318, *Parental Liability (Nonstatutory).* Questions 1 and 3 can be altered to correspond to one or both of the alternative bracketed option in elements 1 and 3 of instruction 318.

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further. If there are multiple causes of action, users may wish to combine the individual forms into one form.

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2354
Motor Vehicle Owner Liability—Permissive Use of Vehicle

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1. Was [*name of defendant***] an owner of the vehicle at the time of the injury to [***name of plaintiff***]?**

___Yes ___No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [*name of defendant***], by words or conduct, give permission to [***name of driver***] to use the vehicle?**

___Yes ___No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered to the [clerk/bailiff/judge].

DIRECTIONS FOR USE

This is for use with general negligence verdict forms involving motor vehicles. The two questions here should be incorporated into the verdict form regarding the underlying case. 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 513, *Motor Vehicle Owner Liability—Permissive Use of Vehicle.* If there are multiple causes of action, users may wish to combine the individual forms into one form.

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2355
Motor Vehicle Owner Liability—Permissive Use of Vehicle Affirmative Defense—Use Beyond Scope of Permission

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We answer the questions submitted to us as follows:

1. Was [*name of driver***] negligent in operating the vehicle?**

___Yes ___No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was [*name of defendant***] an owner of the vehicle at the time of the injury to [***name of plaintiff***]?**

___Yes ___No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did [*name of defendant***] give permission to [***name of driver***] to use the vehicle?**

___Yes ___No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was [*name of defendant***]'s permission to use the vehicle given for a limited time, place, or purpose?**

___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 presiding juror sign and date this form.

5. Did [*name of driver*]'s use of the vehicle substantially violate the limitations as to time, place, or 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 presiding juror 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: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 513, *Motor Vehicle Owner Liability—Permissive Use of Vehicle*, and Instruction 514, *Motor Vehicle Owner Liability—Affirmative Defense—Use Beyond Scope of Permission.*

If specificity is not required, users do not have to itemize all the damages listed in question 6 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

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2356
Parent's, Guardian's, or Custodian's Liability for Minor's Permissive Use of Motor Vehicle

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We answer the questions submitted to us as follows:

1. Was [*name of minor***] negligent in operating the vehicle?**

___Yes ___No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was [*name of minor***]'s negligence a substantial factor in causing harm to [***name of plaintiff***]?**

___Yes ___No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. At the time of the collision, did [*name of defendant***] have the right to control [***name of minor***]?**

___Yes ___No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Did [*name of defendant***] give [***name of minor***] permission to use the vehicle?**

___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 presiding juror 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: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 515, *Adult's Liability for Minor's Permissive Use of Motor Vehicle.*

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

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2357
Liability of Cosigner of Minor's Application for Driver's License

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We answer the questions submitted to us as follows:

1. Was [*name of minor***] negligent in operating the vehicle?**

___Yes ___No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was [*name of minor***]'s negligence a substantial factor in causing harm to [***name of plaintiff***]?**

___Yes ___No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did [*name of defendant***] sign [***name of minor***]'s application for a driver's license?**

___Yes ___No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. At the time of the collision, had [*name of minor***]'s driver's license been cancelled or revoked by the Department of Motor Vehicles?**

___Yes ___No

If your answer to question 4 is no, then answer question 5. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

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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: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 516, *Liability of Cosigner of Minor's Application for Driver's License.*

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

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2358
Negligent Entrustment of Motor Vehicle

We answer the questions submitted to us as follows:

1. Was [*name of driver***] negligent in operating the vehicle?**

___Yes ___No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was [*name of defendant***] an owner of the vehicle operated by [***name of driver***]?**

___Yes ___No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did [*name of defendant***] know, or should [he/she] have known, that [***name of driver***] was incompetent or unfit to drive?**

___Yes ___No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Did [*name of defendant***] permit [***name of driver***] to use the vehicle?**

___Yes ___No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

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5. Was [*name of defendant*] negligent in permitting [*name of driver*] to drive?

___Yes ___No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Was [*name of driver*]'s incompetence or unfitness to drive a substantial factor in causing harm to [*name of plaintiff*]?

___Yes ___No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. What are [*name of plaintiff*]'s damages? [$_____]

[[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:] $_____]
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] $_____]
[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]
[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____]

Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 517, *Negligent Entrustment of Motor Vehicle*. Modify to include elements of negligence instruction against the driver if plaintiff is suing both driver and owner.

If specificity is not required, users do not have to itemize all the damages listed in question 7 and do not have to categorize “economic” and “noneconomic” damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

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2359
Employer's Willful Physical Assault (Lab. Code, § 3602(b)(1))

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] touch [***name of plaintiff***] in a harmful or offensive manner?**

___Yes ___No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [*name of defendant***] intend to harm [***name of plaintiff***]?**

___Yes ___No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was [*name of defendant***]'s conduct a substantial factor in causing harm to [***name of plaintiff***]?**

___Yes ___No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. 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: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 3101, *Employer's Willful Physical Assault (Lab. Code, § 3602(b)(1))—Essential Factual Elements* .

If the plaintiff alleges that defendant engaged in conduct other than that which is described in question 1, then the question may be modified by choosing one of the other options stated in element 1 of instruction 3101.

If specificity is not required, users do not have to itemize all the damages listed in question 4 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

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2360
Fraudulent Concealment of Injury (Lab. Code, § 3602(b)(2))

We answer the questions submitted to us as follows:

1. Was [*name of plaintiff/decedent***] injured on the job?**

___Yes ___No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [*name of defendant***] know [***name of plaintiff/decedent***] had suffered a job-related injury?**

___Yes ___No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did [*name of defendant***] conceal this knowledge from [***name of plaintiff/decedent***]?**

___Yes ___No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was [*name of plaintiff/decedent***]'s injury made worse as a result of this concealment?**

___Yes ___No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

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5. What are [*name of plaintiff*]'s total 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 $_____]

Answer question 6.

6. What are the damages that [*name of plaintiff/decedent*] would have sustained if [*name of defendant*] had not concealed [his/her] injury?

[$_____]

[[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 $_____]

Answer question 7.

7. Subtract the total amount in question 6 from the total amount in question 5. This is the amount [*name of plaintiff*] is entitled to recover.

$_____

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Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 3102, *Fraudulent Concealment of Injury (Lab. Code, § 3602(b)(2))—Essential Factual Elements.*

If specificity is not required, users do not have to itemize all the damages listed in questions 5 and 6, and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

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2361
Employer's Defective Product (Lab. Code, § 3602(b)(3))

We answer the questions submitted to us as follows:

1. Was the [*product*] manufactured by [*name of defendant*]?

___Yes ___No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was the [*product*] [sold/leased/transferred for valuable consideration] to an independent third person?

___Yes ___No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did the third person then provide the product for [*name of plaintiff*]'s use?

___Yes ___No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was the [*product*] defective in design or manufacture?

___Yes ___No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

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5. Was the [*product*] a substantial factor in causing harm to [*name of plaintiff*]?

___Yes ___No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. What are [*name of plaintiff*]'s damages? [$_____]

[[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:] $_____]
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] $_____]
[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]
[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____]

Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 3103, *Employer's Defective Product (Lab. Code, § 3602(b)(3))—Essential Factual Elements*. If specificity is not required, users do not have to itemize all the damages listed in question 6 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further. If there are multiple causes of action, users may wish to combine the individual forms into one form.

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2362
Removal or Noninstallation of Power Press Guards (Lab. Code, § 4558)

We answer the questions submitted to us as follows:

1. Was [*name of defendant***] [***name of plaintiff***]'s [employer/supervisor]?**

___Yes ___No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was [*name of plaintiff***] injured while operating a power press?**

___Yes ___No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did [*name of defendant***] [remove/fail to install] [authorize the [removal of/failure to install]] the guards knowing that this would create a probability of serious injury or death?**

___Yes ___No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Did the power press's [designer/fabricator/assembler] [design the press with guards/install guards on the press/require guards be attached/specify that guards be attached] and directly or indirectly convey this information 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 presiding juror sign and date this form.

5. Was [*name of defendant*]' [removal/failure to install] the guards a substantial factor in causing harm to [*name of plaintiff*]?

___Yes ___No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. What are [*name of plaintiff*]'s damages? [$_____]

[[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:] $_____]
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] $_____]
[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]
[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____]

Signed: _____
Presiding Juror

Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 3104, *Removal or Noninstallation of Power Press Guards (Lab. Code, § 4558)—Essential Factual Elements.*

If specificity is not required, users do not have to itemize all the damages listed in question 6 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

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2363
Co-Employee's Willful and Unprovoked Physical Act of Aggression (Lab. Code, § 3601(a)(1))

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] touch [***name of plaintiff***] in a harmful or offensive manner?**

___Yes ___No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was [*name of defendant***]'s conduct unprovoked?**

___Yes ___No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did [*name of defendant***] intend to harm [***name of plaintiff***]?**

___Yes ___No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was [*name of defendant***]'s conduct a substantial factor in causing harm to [***name of plaintiff***]?**

___Yes ___No

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If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. What are [*name of plaintiff*]'s damages? [$_____]

[[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:] $_____]
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] $_____]
[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]
[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____]

Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 3106, *Co-Employee's Willful and Unprovoked Physical Act of Aggression (3601(a)(1))—Essential Factual Elements.*

If the plaintiff alleges that the defendant engaged in conduct other than that described in question 1, then the question may be modified by choosing one of the other options stated in element 1 of instruction 3106. If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further. If there are multiple causes of action, users may wish to combine the individual forms into one form.

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2364
Injury Caused by Co-Employee's Intoxication (Lab. Code § 3601(a)(2))

We answer the questions submitted to us as follows:

1. Was [*name of plaintiff***] harmed?**

___Yes ___No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was [*name of defendant***]'s conduct a substantial factor in causing [***name of plaintiff***]'s harm?**

___Yes ___No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was [*name of defendant***] intoxicated?**

___Yes ___No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was [*name of defendant***]'s intoxication 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 presiding juror 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: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 3107, *Injury Caused by Co-Employee's Intoxication—Essential Factual Elements.*

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, 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.

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2365
Breach of Contractual Duty to Indemnify Insured

We answer the questions submitted to us as follows:

1. Did [*name of plaintiff***] suffer a loss?**

___Yes ___No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [*name of plaintiff***] report the loss [as required by the policy]?**

___Yes ___No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was [all or part of] the loss covered under an insurance policy with [*name of defendant***]?**

___Yes ___No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Did [*name of defendant***] fail to pay [***name of plaintiff***] for all of the loss that was covered under the policy?**

___Yes ___No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

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5. What are [*name of plaintiff*]'s damages?

$_____

Signed: _____
Presiding Juror

Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 2600, *Breach of Contractual Duty to Indemnify Insured—Essential Factual Elements.*

If there are multiple causes of action, users may wish to combine the individual forms into one form.

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2366
Bad Faith (First Party)—Unreasonable Denial or Delay of Policy Benefits

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We answer the questions submitted to us as follows:

1. Did [*name of plaintiff***] suffer a loss covered under an insurance policy with [***name of defendant***]?**

___Yes ___No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [*name of plaintiff***] notify [***name of defendant***] of the loss?**

___Yes ___No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did [*name of defendant***] unreasonably [fail to pay/delay payment of] policy benefits?**

___Yes ___No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was [*name of defendant***]'s [failure to pay/delayed payment of] policy benefits a substantial factor in causing harm to [***name of plaintiff***]?**

___Yes ___No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

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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 **$_____]**

[6. What amount do you award as punitive damages?]

[$_____]]

Signed: _____

Presiding Juror

Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 2610, *Bad Faith (First Party)—Unreasonable Denial or Delay of Policy Benefits—Essential Factual Elements.*

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, 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.

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2367
Bad Faith (First Party)—Failure to Properly Investigate Claim

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We answer the questions submitted to us as follows:

1. Did [*name of plaintiff***] suffer a loss covered under an insurance policy with [***name of defendant***]?**

___Yes ___No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [*name of plaintiff***] notify [***name of defendant***] of the loss?**

___Yes ___No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did [*name of defendant***] unreasonably fail to properly investigate the loss and [deny coverage/fail to pay insurance benefits/delay payment of insurance benefits]?**

___Yes ___No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was [*name of defendant***]'s unreasonable failure to properly investigate the loss a substantial factor in causing harm to [***name of plaintiff***]?**

___Yes ___No

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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 presiding juror 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: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 2611, *Bad Faith (First Party)—Failure to Properly Investigate Claim—Essential Factual Elements.*

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to include the categorizations of "economic" and "noneconomic" damages, especially if it is not a Prop. 51 case. The breakdown of damages is optional; depending on the circumstances, 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.

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2368
Bad Faith (First Party)—Breach of Duty to Inform Insured of Rights

---

We answer the questions submitted to us as follows:

1. Did [*name of plaintiff***] suffer a loss covered under an insurance policy with [***name of defendant***]?**

___Yes ___No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [*name of defendant***] [deny coverage for/refuse to pay] [***name of plaintiff***]'s loss?**

___Yes ___No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did [*name of plaintiff***] have the [right/obligation] to [***describe right or obligation at issue; e.g., "to request arbitration within 180 days"***] under the policy?**

___Yes ___No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Did [*name of defendant***] fail to reasonably inform [***name of plaintiff***] of [his/her] [right/obligation] to [***describe right or obligation***]?**

___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 presiding juror sign and date this form.

5. Was [*name of defendant***]'s failure to reasonably inform [***name of plaintiff***] a substantial factor in causing harm to [***name of plaintiff***]?**

___Yes ___No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. What are [*name of plaintiff***]'s damages? [$_____]**

[[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:] $_____]
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] $_____]
[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]
[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____]

Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 2612, *Bad Faith (First Party)—Breach of Duty to Inform Insured of Rights—Essential Factual Elements.*

If specificity is not required, users do not have to itemize all the damages listed in question 6 and do not have to categorize “economic” and “noneconomic” damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

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2369
Unfair Practices Act—Locality Discrimination

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] [offer to sell/sell/furnish] [***product/service***] at a lower price in one [location/section/community/city] in California than in another [location/section/community/city] in California?**

___Yes ___No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [*name of defendant***] intend to destroy competition from an established dealer [or to prevent competition from any person who in good faith intended and attempted to become such a dealer]?**

___Yes ___No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was [*name of defendant***]'s conduct a substantial factor in causing harm to [***name of plaintiff***]?**

___Yes ___No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. What are [*name of plaintiff***]'s damages? $_____**

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Signed: _____
Presiding Juror

Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 3000, *Locality Discrimination—Essential Factual Elements.*

If there are multiple causes of action, users may wish to combine the individual forms into one form.

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2370
Unfair Practices Act—Locality Discrimination Claim
Affirmative Defense of Cost Justification

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] [offer to sell/sell/furnish] [***product/service***] at a lower price in one [location/section/community/city] in California than in another [location/section/community/city] in California?**

___Yes ___No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was the locality discrimination within the law?

___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 presiding juror sign and date this form.

3. Did [*name of defendant***] intend to destroy competition from an established dealer [or to prevent competition from any person who in good faith intended and attempted to become such a dealer]?**

___Yes ___No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was [*name of defendant***]'s conduct a substantial factor in causing harm to [***name of plaintiff***]?**

___Yes ___No

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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 presiding juror sign and date this form.

5. What are [*name of plaintiff*]'s damages? $_____

Signed: _____
Presiding Juror

Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 3000, *Locality Discrimination—Essential Factual Elements,* and Instruction 3009, *Affirmative Defense to Locality Discrimination Claim—Cost Justification.*

If other affirmative defenses are asserted, this form can be modified accordingly. See other Unfair Practices Act verdict forms for examples.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

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2371
Unfair Practices Act—Below Cost Sales

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] [offer to sell/sell] [***product/service***] at a price that was below cost?**

___Yes ___No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was [*name of defendant***]'s purpose to injure competitors or destroy competition?**

___Yes ___No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was [*name of defendant***]'s conduct a substantial factor in causing harm to [***name of plaintiff***]?**

___Yes ___No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. What are [*name of plaintiff***]'s damages? $_____**

Signed: _____
Presiding Juror
Dated: _____
[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 3001, *Below Cost Sales—Essential Factual Elements*.

If the facts involve a gift rather than a sale, question 1 can be modified according to the second alternative in element 1 of Instruction 3001.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

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2372
Unfair Practices Act—Below Cost Sales Claim—Affirmative Defense Closed-out, Discontinued, Damaged, or Perishable Items

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We answer the questions submitted to us as follows:

1. Did [*name of defendant***] [offer to sell/sell] [***product/service***] at a price that was below cost?**

___Yes ___No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Were [his/her/its] sales in the course of closing out, in good faith, all or any portion of [his/her/its] supply of [*product***], in order to stop trade in [***product***]?**

___Yes ___No

If your answer to question 2 is yes, then answer question 3. If you answered no, skip question 3 and answer question 4.

3. Did [*name of defendant***] provide sufficient notice of the sale to the public?**

___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 presiding juror sign and date this form.

4. Was [*name of defendant***]'s purpose to injure competitors or destroy competition?**

___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 presiding juror sign and date this form.

5. Was [*name of defendant***]'s conduct a substantial factor in causing harm to [***name of plaintiff***]?**

___Yes ___No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. What are [*name of plaintiff***]'s damages? $_____**

Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 3001, *Below Cost Sales—Essential Factual Elements*, and Instruction 3010, *Affirmative Defense To Locality Discrimination, Below Cost Sales, and Loss Leader Sales Claims—Closed-out, Discontinued, Damaged, or Perishable Items.*

If other grounds for this defense are asserted, question 2 should be modified according to question 2 in Instruction 3010. If other affirmative defenses are asserted, this form can be modified accordingly. See other Unfair Practices Act verdict forms for examples.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

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2373
Unfair Practices Act—Loss Leader Sales

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] [offer to sell/sell/offer the use of] [***product/service***] at prices that were below [his/her/its] costs?**

___Yes ___No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was [*name of defendant***]'s purpose to influence, promote, or encourage the purchase of other merchandise from [***name of defendant***]?**

___Yes ___No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was [*name of defendant***]'s purpose [also] to injure competitors or destroy competition?**

___Yes ___No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was [*name of defendant***]'s conduct a substantial factor in causing harm to [***name of plaintiff***]?**

___Yes ___No

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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 presiding juror sign and date this form.

5. What are [*name of plaintiff*]'s damages? $_____

Signed: _____
Presiding Juror

Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 3002, *Loss Leader Sales—Essential Factual Elements.*

If other grounds of liability are asserted, question 2 can be modified according to the bracketed alternatives in element 2 of Instruction 3002.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

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2374
Unfair Practices Act—Loss Leader Sales Claim
Affirmative Defense of Meeting Competition

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] [offer to sell/sell/offer the use of] [***product/service***] at prices that were below [his/her/its] costs?**

___Yes ___No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Were the sales of [*product/service***] made in an attempt, in good faith, to meet the legal prices of a competitor selling the same [***product/service***] in the ordinary course of business in the same area?**

___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 presiding juror sign and date this form.

3. Was [*name of defendant***]'s purpose to influence, promote, or encourage the purchase of other merchandise from [***name of defendant***]?**

___Yes ___No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was [*name of defendant***]'s purpose [also] to injure competitors or destroy competition?**

___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 presiding juror sign and date this form.

5. Was [*name of defendant***]'s conduct a substantial factor in causing harm to [***name of plaintiff***]?**

___Yes ___No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. What are [*name of plaintiff***]'s damages? $_____**

Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 3002, *Loss Leader Sales—Essential Factual Elements*, and Instruction 3012, *Affirmative Defense Locality Discrimination, Sales Below Cost, and Loss Leader Sales Claims—Meeting Competition.*

If other grounds of liability are asserted, question 3 can be modified according to the alternative brackets in element 2 of Instruction 3002. If other affirmative defenses are asserted, this form can be modified accordingly. See other Unfair Practices Act verdict forms for examples.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

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2375
Unfair Practices Act—Secret Rebates

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] secretly [[give/receive] [payments/rebates/ refunds/commissions/unearned discounts]] [or] [[give to some buyers/ receive] services or privileges that were not given to other buyers purchasing on like terms and conditions]?**

___Yes ___No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was a competitor 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 presiding juror sign and date this form.

3. Did the [payment/allowance] have a tendency to destroy competition?

___Yes ___No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was [*name of defendant***]'s conduct a substantial factor in causing [***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 presiding juror sign and date this form.

5. What are [*name of plaintiff*]'s damages? $_____

Signed: _____
Presiding Juror

Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 3007, *Secret Rebates—Essential Factual Elements*.

Question 2 should be omitted if the plaintiff is a competitor of the defendant, because that issue is covered by question 4.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

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2376
Unfair Practices Act—Secret Rebates Claim
Affirmative Defense of Functional Classifications

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] secretly [[give/receive] [payments/rebates/ refunds/commissions unearned discounts] [or] [[give to some buyers/ receive] services or privileges that were not given to other buyers purchasing on like terms and conditions]?**

___Yes ___No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [*name of defendant***] create different classes of customers, such as [broker/jobber/wholesaler/retailer/[***insert other***]]?**

___Yes ___No

If your answer to question 2 is yes, then answer question 3. If you answered no, skip questions 3, 4, and 5 and answer question 6.

3. Did customers in the different classes perform different functions and assume the risk, investment, and costs involved?

___Yes ___No

If your answer to question 3 is yes, then answer question 4. If you answered no, skip questions 4 and 5 and answer question 6.

4. Was the difference in [price/rebate/discount/special services/privileges] for [*product/service***] given only in those sales where the favored buyer performed the function on which the claim of a different class is based?**

___Yes ___No

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If your answer to question 4 is yes, then answer question 5. If you answered no, skip question 5 and answer question 6.

5. Was the difference in price reasonably related to the value of such function?

___Yes ___No

If your answer to question 5 is no, then answer question 6. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Was a competitor 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 presiding juror sign and date this form.

7. Did the [payment/allowance] have a tendency to destroy competition?

___Yes ___No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. Was [*name of defendant***]'s conduct a substantial factor in causing harm to [***name of plaintiff***]?**

___Yes ___No

If your answer to question 8 is yes, then answer question 9. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

9. What are [*name of plaintiff***]'s damages? $_____**

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Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 3007, *Secret Rebates—Essential Factual Elements*, and Instruction 3011, *Affirmative Defense to Locality Discrimination, Sales Below Cost, Loss Leader Sales, and Secret Rebates—Functional Classifications.*

Question 6 should be omitted if the plaintiff is a competitor of the defendant, because that issue is covered by question 8.

If other affirmative defenses are asserted, this form can be modified accordingly. See other Unfair Practices Act verdict forms for examples.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

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2377
Cartwright Act—Horizontal and Vertical Restraints (Use for Direct Competitors)—Price Fixing

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We answer the questions submitted to us as follows:

1. Did [*name of defendant***] [and [***name(s) of alleged co-participant(s)***]] agree to fix [or] [set/raise/lower/maintain/stabilize] prices [or other terms of trade] charged or to be charged for [***product/service***]?**

___Yes ___No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was [*name of defendant***]'s conduct a substantial factor in causing harm to [***name of plaintiff***]?**

___Yes ___No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. What are [*name of plaintiff***]'s damages? $_____**

Signed: _____
Presiding Juror

Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 3100, *Horizontal and Vertical Restraints (Use for Direct Competitors)—Price Fixing—Essential Factual Elements.*

If there are multiple causes of action, users may wish to combine the individual forms into one form.

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2378
Cartwright Act—Horizontal Restraints (Use for Direct Competitors) Allocation of Trade or Commerce

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We answer the questions submitted to us as follows:

1. Did [*name of defendant***] [and [***name alleged co-participant***] agree to allocate [customers/territories/products]?**

___Yes ___No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was [*name of defendant***]'s conduct a substantial factor in causing harm to [***name of plaintiff***]?**

___Yes ___No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. What are [*name of plaintiff***]'s damages? $_____**

Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 3101, *Horizontal Restraints (Use for Direct Competitors)—Allocation of Trade or Commerce—Essential Factual Elements.*

If there are multiple causes of action, users may wish to combine the individual forms into one form.

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2379
Cartwright Act—Horizontal Restraints (Use for Direct Competitors) Allocation of Trade or Commerce—Affirmative Defense—*In Pari Delicto*

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] [and [***name alleged co-participant***] agree to allocate [customers/territories/products]?**

___Yes ___No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [*name of plaintiff***] and [***name of defendant***] have substantially equal economic strength?**

___Yes ___No

If your answer to question 2 is yes, then answer question 3. If you answered no, skip questions 3 and 4 and answer question 5.

3. Was [*name of plaintiff***] at least equally responsible for the harmful conduct as [***name of defendant***]?**

___Yes ___No

If your answer to question 3 is yes, then answer question 4. If you answered no, skip question 4 and answer question 5.

4. Was [*name of plaintiff***] compelled by economic pressure to enter into the agreement?**

___Yes ___No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

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5. Was [*name of defendant*]'s conduct a substantial factor in causing harm to [*name of plaintiff*]?

___Yes ___No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. What are [*name of plaintiff*]'s damages? $_____

Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 3101, *Horizontal Restraints (Use for Direct Competitors)—Allocation of Trade or Commerce—Essential Factual Elements,* and Instruction 3120, *Affirmative Defense—In Pari Delicto.*

If there are multiple causes of action, users may wish to combine the individual forms into one form.

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2380
Cartwright Act—Horizontal Restraints—Dual Distributor Restraints

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We answer the questions submitted to us as follows:

1. Did [*name of defendant***] sell [***products***] directly in competition with [***name of plaintiff***] to a significant portion of [***name of plaintiff***]'s customers or potential customers?**

___Yes ___No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [*name of defendant***] [stop doing business with/refuse to deal with/restrain] [***name of plaintiff***]?**

___Yes ___No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was [*name of plaintiff***]'s refusal to agree to [***name of defendant***]'s [***specify the claimed restraint, e.g., territorial or customer restrictions***] a reason for the decision to [end business with/refuse to deal with/restrain] [***name of plaintiff***]?**

___Yes ___No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was [*name of defendant***]'s conduct a substantial factor in causing harm to [***name of plaintiff***]?**

___Yes ___No

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If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. What are [*name of plaintiff*]'s damages? $_____

Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 3102, *Horizontal Restraints—Dual Distributor Restraints—Essential Factual Elements.*

If there are multiple causes of action, users may wish to combine the individual forms into one form.

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2381
Cartwright Act—Horizontal Restraints (Use for Direct Competitors)
Group Boycott—Per Se Violation

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] [and [***name of alleged co-participant***] agree to [***specify claimed refusal to deal, e.g., "refuse to sell 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 presiding juror sign and date this form.

2. Was [*name of defendant***]'s conduct a substantial factor in causing harm to [***name of plaintiff***]?**

___Yes ___No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. What are [*name of plaintiff***]'s damages? $_____**

Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 3103, *Horizontal Restraints (Use for Direct Competitors)—Group Boycott—Per Se Violation—Essential Factual Elements.*

If there are multiple causes of action, users may wish to combine the individual forms into one form.

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2382
Cartwright Act—Horizontal Restraints
Group Boycott—Rule of Reason

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] [and [***name of alleged co-participant***] agree to [***describe conduct, e.g., "formulate an arbitrary membership limitation rule with [identify other participant[s]]"***]?**

___Yes ___No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was the purpose or effect of [*name of defendant***]'s conduct to restrain competition?**

___Yes ___No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did the anticompetitive effect of the restraint[s] outweigh any beneficial effect on competition?

___Yes ___No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was [*name of defendant***]'s conduct a substantial factor in causing harm to [***name of plaintiff***]?**

___Yes ___No

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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 presiding juror sign and date this form.

5. What are [*name of plaintiff*]'s damages? $_____

Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 3104, *Horizontal Restraints—Group Boycott—Rule of Reason—Essential Factual Elements.*

If there are multiple causes of action, users may wish to combine the individual forms into one form.

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2383
Cartwright Act—Horizontal and Vertical Restraints
(Use for Direct Competitors or Supplier/Reseller Relations)
Other Unreasonable Restraint of Trade—Rule of Reason

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] [and [***name of alleged co-participant***] agree to [***describe conduct constituting an unreasonable restraint of trade***]?**

___Yes ___No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was the purpose or effect of [*name of defendant***]'s conduct to restrain competition?**

___Yes ___No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did the anticompetitive effect of the restraint[s] outweigh any beneficial effect on competition?

___Yes ___No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was [*name of defendant***]'s conduct a substantial factor in causing harm to [***name of plaintiff***]?**

___Yes ___No

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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 presiding juror sign and date this form.

5. What are [*name of plaintiff*]'s damages? $_____

Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 3105, *Horizontal and Vertical Restraints (Use for Direct Competitors or Supplier/ Reseller Relations)—Other Unreasonable Restraint of Trade—Rule of Reason—Essential Factual Elements.*

If there are multiple causes of action, users may wish to combine the individual forms into one form.

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2384
Cartwright Act—Horizontal and Vertical Restraints (Use for Direct Competitors or Supplier/Reseller Relations) Other Unreasonable Restraint of Trade—Rule of Reason Affirmative Defense—"Noerr-Pennington" Doctrine

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We answer the questions submitted to us as follows:

1. Did [*name of defendant***] [and [***name of alleged co-participant***] agree to [***describe conduct constituting an unreasonable restraint of trade***]?**

___Yes ___No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Were [*name of defendant***]'s actions before [***name of governmental body***] undertaken without regard to the merits?**

___Yes ___No

If your answer to question 2 is yes, then skip question 3 and answer question 4. If you answered no, answer question 3.

3. Was the reason [*name of defendant***] engaged in [***specify the petitioning activity, e.g., "filing an objection to an environmental impact report"***] to use the [***specify the claimed process, e.g., "environmental agency approval"***] process to harm [***name of plaintiff***] by [***specify the manner of harm, e.g., "delaying [name of plaintiff]'s entry into the market"***], rather than to obtain a successful outcome from that process?**

___Yes ___No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

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4. Was the purpose or effect of [*name of defendant*]'s conduct to restrain competition?

___Yes ___No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Did the anticompetitive effect of the restraint[s] outweigh any beneficial effect on competition?

___Yes ___No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Was [*name of defendant*]'s conduct a substantial factor in causing harm to [*name of plaintiff*]?

___Yes ___No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. What are [*name of plaintiff*]'s damages? $_____

Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 3105, *Horizontal and Vertical Restraints (Use for Direct Competitors or Supplier/ Reseller Relations)—Other Unreasonable Restraint of Trade—Rule of Reason—Essential Factual Elements,* and Instruction 3119, *"Noerr-Pennington" Doctrine.*

If there are multiple causes of action, users may wish to combine the individual forms into one form.

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2385
Cartwright Act—Tying—Per se Violation (Bus. & Prof. Code, § 16720)

We answer the questions submitted to us as follows:

1. Are [*tying item***] and [***tied item***] separate and distinct?**

___Yes ___No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [*name of defendant***] sell [***tying item***] only if the buyer also purchased [***tied item***], or did [***name of defendant***] sell [***tying item***] and require or otherwise coerce buyers to [also purchase [***tied item***]] [agree not to purchase [***tied item***] from any other supplier]?**

___Yes ___No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did [*name of defendant***] have sufficient economic power in the market for [***tying item***] to coerce at least some buyers of [***tying item***] into [purchasing [***tied item***]] [agreeing not to purchase [***tied item***] from a competitor of [***name of defendant***]]?**

___Yes ___No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Did the conduct involve a substantial amount of sales, in terms of the total dollar value of [*tied product or service***]?**

___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 presiding juror sign and date this form.

5. Was [*name of defendant***]'s conduct a substantial factor in causing harm to [***name of plaintiff***]?**

___Yes ___No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. What are [*name of plaintiff***]'s damages? $_____**

Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 3115, *Tying—Per se Violation—Essential Factual Elements (Bus. & Prof. Code § 16720).*

If there are multiple causes of action, users may wish to combine the individual forms into one form.

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2386
Cartwright Act—Tying (Bus. & Prof. Code, § 16727)

We answer the questions submitted to us as follows:

1. Are [*tying item***] and [***tied product or service***] separate and distinct?**

___Yes ___No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [*name of defendant***] sell [***tying product***] only if the buyer also purchased [***tied product or service***], or did [***name of defendant***] sell [***tying product***] and require or otherwise coerce buyers [to also purchase [***tied product or service***] [or agree not to purchase [***tied product or service***] from any other supplier]?**

___Yes ___No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Does [*name of defendant***] have sufficient economic power in the market for [***tying product***] to coerce at least some consumers into purchasing [***tied product or service***]?**

___Yes ___No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was [*name of defendant***]'s conduct a substantial factor in causing harm to [***name of plaintiff***]?**

___Yes ___No

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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 presiding juror sign and date this form.

5. What are [*name of plaintiff*]'s damages? $_____

Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered 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 3116, *Tying—Essential Factual Elements (Bus. & Prof. Code, § 16727).*

If alterative grounds are asserted regarding question 3, this question can be modified according to element 3 of Instruction 3116.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

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