CIVIL JURY INSTRUCTIONS

Judicial Council of California

Task Force on Jury Instructions

The Judicial Council approved these draft civil jury instructions at its July 16, 2003 meeting. The final draft of these instructions will be posted by September 1, 2003.

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CONCLUDING SERIES

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INTRODUCTORY INSTRUCTIONS

100
Preliminary Admonitions

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

Do not allow anything that happens outside this courtroom to affect your decision. During the trial do not talk about this case or the people involved in it with anyone, including your family and friends. You may say you are on a jury and how long the trial may take, but that is all. You must not even talk about the case with the other jurors until after I tell you that it is time for you to decide the case.

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

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

During the trial, do not read, listen to, or watch any news reports about this case. [I have no information that there will be news reports concerning this case.] You must decide this case based only on the evidence presented in this trial. Nothing presented outside this courtroom is evidence unless I specifically tell you it is.

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

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

When it is time to begin your deliberations, you will meet in the jury room. You may discuss the case only in the jury room and only when all the jurors are present.

Do not let bias, sympathy, prejudice, or public opinion influence your verdict.

You, and only you, must decide what the facts are in this case. And, I repeat, your verdict must be based only on the evidence that you hear or see in this courtroom.

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

DIRECTIONS FOR USE

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

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

SOURCES AND AUTHORITY

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

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

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

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

- Jurors are required to avoid discussions with parties, counsel, or witnesses. (*Wright v. Eastlick* (1899) 125 Cal. 517, 520–521, 58 P. 87; *Garden Grove School Dist. v. Hendler* (1965) 63 Cal.2d 141, 144, 45 Cal.Rptr. 313, 403 P.2d 721.)

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

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

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

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

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

INTRODUCTORY INSTRUCTIONS

101
Overview of Trial

To assist you in your tasks as jurors, I will now explain how the trial will proceed. [*Name of plaintiff***] filed this lawsuit. [He/She] is called a plaintiff. [He/She] seeks damages [or other relief] from [***name of defendant***], who is called a defendant. Each plaintiff and each defendant is called a party to the case.**

[[*Name of cross-complainant***] has also filed a lawsuit against [***name of cross-defendant***] for [***insert cause of action***].]**

First, each side may make an opening statement, but neither side is required to do so. An opening statement is not evidence. It is simply an outline to help you understand what that party expects the evidence will show. Also, because it is often difficult to give you the evidence in the order we would prefer, the opening statement allows you to keep an overview of the case in mind during the presentation of the evidence. You cannot use it to make any decisions in this case.

Next, the jury will start hearing the evidence. [*Name of plaintiff***] will present [his/her] evidence first. When [***name of plaintiff***] is finished, [***name of defendant***] will have an opportunity to present [his/her] evidence.**

Each witness will first be questioned by the side that asked the witness to testify. This is called direct examination. Then the other side is permitted to question the witness. This is called cross-examination.

Documents or objects referred to during the trial are called exhibits. Exhibits will be given a number and marked so they may be clearly identified. Exhibits are not evidence until I admit them into evidence. You will be able to look at these exhibits during your deliberations.

There are many rules that govern whether something will be considered evidence in the trial. As one side presents evidence, the other side has the right to object and to ask me to decide if the evidence is permitted by the rules. Usually, I will decide immediately, but sometimes I may have to hear arguments outside of your presence.

After the evidence has been presented, I will instruct you on the law that applies to the case and the attorneys will make closing arguments. What the parties say in closing argument is not evidence. The arguments are offered to help you understand the evidence and how the law applies to it.

DIRECTIONS FOR USE

This instruction is intended to provide a "road map" for the jurors. This instruction should be read in conjunction with instruction 100, *Preliminary Admonitions*.

Throughout these instructions, the names of the parties should be inserted as indicated. This instruction should be modified to reflect the number of plaintiffs and defendants involved in the suit.

If the case involves cross-complainants and cross-defendants, make sure that the names of the parties inserted in the applicable instructions are adjusted accordingly.

SOURCES AND AUTHORITY

- Code of Civil Procedure section 607 provides:

> When the jury has been sworn, the trial must proceed in the following order, unless the court, for special reasons otherwise directs:
>
> 1. The plaintiff may state the issue and his case;
> 2. The defendant may then state his defense, if he so wishes, or wait until after plaintiff has produced his evidence;
> 3. The plaintiff must then produce the evidence on his part;
> 4. The defendant may then open his defense, if he has not done so previously;
> 5. The defendant may then produce the evidence on his part;
> 6. The parties may then respectively offer rebutting evidence only, unless the court, for good reason, in furtherance of justice, permit them to offer evidence upon their original case;
> 7. When the evidence is concluded, unless the case is submitted to the jury on either side or on both sides without argument, the plaintiff must commence and may conclude the argument;
> 8. If several defendants having separate defenses, appear by different counsel, the court must determine their relative order in the evidence and argument;
> 9. The court may then charge the jury.

<u>Secondary Sources</u>

- 7 Witkin, California Procedure (4th ed. 1997) Trial, § 161, pp. 189–190
- California Practice Guide: Civil Trials and Evidence, §§ 1:427–1:432; 4:460–4:463
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 551, *Trial*, § 551.50 (Matthew Bender)

102
Taking Notes During the Trial

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

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

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

DIRECTIONS FOR USE

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

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.)

- "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.)

103
Multiple Parties

[There are [*number*] plaintiffs in this trial. You should decide the case of each plaintiff separately as if it were a separate lawsuit. Each plaintiff is entitled to separate consideration of his or her own claim(s). Unless I tell you otherwise, all instructions apply to each plaintiff.]

[There are [*number*] defendants in this trial. You should decide the case against each defendant separately as if it were a separate lawsuit. Each defendant is entitled to separate consideration of his or her own defenses. Unless I tell you otherwise, all instructions apply to each defendant.]

SOURCES AND AUTHORITY

- "We realize, of course, that multiple defendants are involved and that each defendant is entitled to instructions on, and separate consideration of, every defense available and applicable to it. The purpose of this rule is to insure that the jury will distinguish and evaluate the separate facts relevant to each defendant." (*Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 58 [148 Cal.Rptr. 596], internal citations omitted.)

104
Non-Person Party

A [corporation/partnership/city/county/[*other entity*], [*name of entity*], is a party in this lawsuit. [*Name of entity*] is entitled to the same fair and impartial treatment that you would give to an individual. You must decide this case with the same fairness that you would use if you were deciding the case between individuals.

When I use words like "person" or "he" or "she" in these instructions to refer to a party, those instructions also apply to [*name of entity*].

DIRECTIONS FOR USE

This instruction should be given as an introductory instruction if one of the parties is an entity. Select the type of entity and insert the name of the entity where indicated in the instruction.

SOURCES AND AUTHORITY

- Corporations Code section 207 provides that a corporation "shall have all of the powers of a natural person in carrying out its business activities." Civil Code section 14 defines the word "person," for purposes of that code, to include corporations as well as natural persons.

- As a general rule, a corporation is considered to be a legal entity that has an existence separate from that of its shareholders. (*Erkenbrecher v. Grant* (1921) 187 Cal. 7, 9, 200 P. 641.)

- "In general, any person or entity has capacity to sue or defend a civil action in the California courts. This includes artificial 'persons' such as corporations, partnerships and associations." (*American Alternative Energy Partners II, 1985 v. Windridge, Inc.* (1996) 42 Cal.App.4th 551, 559, 49 Cal.Rptr.2d 686 (internal citations omitted).)

<u>Secondary Sources</u>

- 9 Witkin, Summary of California Law (9th ed. 1989) Corporations, § 1, p. 511

105
Insurance

You must not consider whether any of the parties in this case has insurance. The presence or absence of insurance is totally irrelevant. You must decide this case based only on the law and the evidence.

SOURCES AND AUTHORITY

- Evidence Code section 1155 provides: "Evidence that a person was, at the time a harm was suffered by another, insured wholly or partially against loss arising from liability for that harm is inadmissible to prove negligence or other wrongdoing."

- As a rule, evidence that the defendant has insurance is both irrelevant and prejudicial to the defendant. (*Neumann v. Bishop* (1976) 59 Cal.App.3d 451, 469, 130 Cal.Rptr. 786.)

- Generally, evidence that the plaintiff was insured is not admissible under the "collateral source rule." (*Helfend v. Southern California Rapid Transit Dist.* (1970) 2 Cal.3d 1, 16–18, 84 Cal.Rptr. 173, 465 P.2d 61; *Acosta v. Southern California Rapid Transit Dist.* (1970) 2 Cal.3d 19, 25–26, 84 Cal.Rptr. 184, 465 P.2d 72.)

- Evidence of insurance coverage may be admissible where it is coupled with other relevant evidence, provided that the probative value of the other evidence outweighs the prejudicial effect of the mention of insurance. (*Blake v. E. Thompson Petroleum Repair Co., Inc.* (1985) 170 Cal.App.3d 823, 831, 216 Cal.Rptr. 568.)

- An instruction to disregard whether a party has insurance may, in some cases, cure the effect of counsel's improper reference to insurance. (*Scally v. Pacific Gas & Electric Co.* (1972) 23 Cal.App.3d 806, 814, 100 Cal.Rptr. 501.)

Secondary Sources

- 7 Witkin, California Procedure (4th ed. 1997) Trial, §§ 230–233
- Jefferson, California Evidence Benchbook (3rd ed. 1977) §§ 34.32–34.36
- California Practice Guide: Civil Trials and Evidence, § 5:371
- CALIFORNIA TRIAL GUIDE, Unit 50, *Extrinsic Policies Affecting or Excluding Evidence*, §§ 50.20, 50.32 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 551, *Trial*, § 551.68 (Matthew Bender)

106
Evidence

Sworn testimony, documents, or anything else may be admitted into evidence. You must decide what the facts are in this case from the evidence you see or hear during the trial. You may not consider as evidence anything that you see or hear when court is not in session, even something done or said by one of the parties, attorneys, or witnesses.

What the attorneys say during the trial is not evidence. In their opening statements and closing arguments, the attorneys will talk to you about the law and the evidence. What the lawyers say may help you understand the law and the evidence, but their statements and arguments are not evidence.

The attorneys' questions are not evidence. Only the witnesses' answers are evidence. You should not think that something is true just because an attorney's question suggests that it is true. However, the attorneys for both sides can agree that certain facts are true. This agreement is called a stipulation. No other proof is needed and you must accept those facts as true in this trial.

Each side has the right to object to evidence offered by the other side. If I do not agree with the objection, I will say it is overruled. If I overrule an objection, the witness will answer and you may consider the evidence. If I agree with the objection, I will say it is sustained. If I sustain an objection, you must ignore the question. If the witness did not answer, you must not guess what he or she might have said or why I sustained the objection. If the witness has already answered, you must ignore the answer.

Sometimes an attorney may make a motion to strike testimony that you have heard. If I grant the motion, you must totally disregard that testimony. You must treat it as though it did not exist.

DIRECTIONS FOR USE

This instruction should be given as an introductory instruction.

SOURCES AND AUTHORITY

- Evidence Code section 140 defines "evidence" as "testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact."

- Evidence Code section 312 provides:

  Except as otherwise provided by law, where the trial is by jury:
  (a) All questions of fact are to be decided by the jury.
  (b) Subject to the control of the court, the jury is to determine the effect and value of the evidence addressed to it, including the credibility of witnesses and hearsay declarants.

- Evidence Code section 353 provides:

  A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed by reason of the erroneous admission of evidence unless:
  (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion; and
  (b) The court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and that the error or errors complained of resulted in a miscarriage of justice.

- A stipulation in proper form is binding on the parties if it is within the authority of the attorney. Properly stipulated facts may not be contradicted. (*Palmer v. City of Long Beach* (1948) 33 Cal.2d 134, 141–142, 199 P.2d 952.)

- Courts have held that "attempts to suggest matters of an evidentiary nature to a jury other than by the legitimate introduction into evidence is misconduct whether by questions on cross-examination, argument or other means." (*Smith v. Covell* (1980) 100 Cal.App.3d 947, 960, 161 Cal.Rptr. 377.)

- Courts have stated that "[t]he right to object on appeal to misconduct or improper argument, even when prejudicial, is generally waived in the absence of a proper objection and request the jury be admonished." (*Atkins v. Bisigier* (1971) 16 Cal.App.3d 414, 427, 94 Cal.Rptr. 49; *Horn v. Atchison, Topeka & Santa Fe Ry. Co*. (1964) 61 Cal.2d 602, 610, 39 Cal.Rptr. 721, 394 P.2d 561.)

<u>Secondary Sources</u>

- 1 Witkin, California Evidence (4th ed. 2000) Presentation at Trial
- CALIFORNIA TRIAL GUIDE, Unit 21, *Procedures for Determining Admissibility of Evidence*, §§ 21.01, 21.03 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 322, *Juries and Jury Selection*, §§ 322.56–322.57, Ch. 551, *Trial*, §§ 551.61, 551.77 (Matthew Bender)

107
Witnesses

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

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

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

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

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

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

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

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

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

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

You must not be biased against any witness because of his or her race, sex, religion, occupation, sexual orientation, [or] national origin [or [*insert any other impermissible form of bias***].].**

DIRECTIONS FOR USE

This instruction should be given as an introductory instruction.

SOURCES AND AUTHORITY

- Evidence Code section 312 provides:

  Except as otherwise provided by law, where the trial is by jury:
  (a) All questions of fact are to be decided by the jury.
  (b) Subject to the control of the court, the jury is to determine the effect and value of the evidence addressed to it, including the credibility of witnesses and hearsay declarants.

- Considerations for evaluating the credibility of witnesses are contained in Evidence Code section 780:

  Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following:

  (a) His demeanor while testifying and the manner in which he testifies.
  (b) The character of his testimony.
  (c) The extent of his capacity to perceive, to recollect, or to communicate any matter about which he testifies.
  (d) The extent of his opportunity to perceive any matter about which he testifies.
  (e) His character for honesty or veracity or their opposites.
  (f) The existence or nonexistence of a bias, interest, or other motive.
  (g) A statement previously made by him that is consistent with his testimony at the hearing.
  (h) A statement made by him that is inconsistent with any part of his testimony at the hearing.
  (i) The existence or nonexistence of any fact testified to by him.
  (j) His attitude toward the action in which he testifies or toward the giving of testimony.
  (k) His admission of untruthfulness.

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

their minds, against a less number or against a presumption or other evidence satisfying their minds."

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

Secondary Sources

- CALIFORNIA TRIAL GUIDE, Unit 22, Rules Affecting Admissibility of Evidence, § 22.30 (Matthew Bender)
- CALIFORNIA FORMS PLEADING AND PRACTICE, Ch. 551, *Trial*, § 551.122 (Matthew Bender)

108
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.)

Secondary Sources

- CALIFORNIA TRIAL GUIDE, Unit 3, Other Non-Evidentiary Motions, § 3.32, Unit 20, Procedural Rules for Presentation of Evidence, § 20.13, Unit 91, Jury Deliberations and Rendition of Verdict, §§ 91.10, 91.12 (Matthew Bender)

109
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.

110
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 is not to participate in the deliberations in any way other than as necessary to provide the service to [***name of juror***].**

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 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

200
Obligation to Prove—More Likely True Than Not True

When I tell you that a party must prove something, I mean that the party must persuade you, by the evidence presented in court, that what he or she is trying to prove is more likely to be true than not true. This is sometimes referred to as "the burden of proof."

After weighing all of the evidence, if you cannot decide whether a party has satisfied the burden of proof, you must conclude that the party did not prove that fact. You should consider all the evidence that applies to that fact, no matter which party produced the evidence.

In criminal trials, the prosecution must prove facts showing that the defendant is guilty beyond a reasonable doubt. But in civil trials, such as this one, the party who is required to prove a fact need only prove that the fact is more likely to be true than not true.

DIRECTIONS FOR USE

Evidence Code section 502 requires the court to instruct the jury regarding which party bears the burden of proof on each issue and the requisite degree of proof.

For an instruction on clear and convincing evidence, see instruction 201, *More Likely True—Clear and Convincing Proof.*

SOURCES AND AUTHORITY

- Evidence Code section 115 provides: " 'Burden of proof' means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court. The burden of proof may require a party to raise a reasonable doubt concerning the existence or nonexistence of a fact or that he establish the existence or nonexistence of a fact by preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt. [¶] Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence."

- Evidence Code section 500 provides: "Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting."

- Each party is entitled to the benefit of all the evidence, including the evidence produced by an adversary. (*Willams v. Barnett* (1955) 135 Cal.App.2d 607, 612, 287 P.2d 789; 7 Witkin, Cal. Procedure (4th ed. 1997) Trial, § 305, p. 352.)

- The general rule in California is that " '[i]ssues of fact in civil cases are determined by a preponderance of testimony.' " (*Weiner v. Fleischman* (1991) 54 Cal.3d 476, 483, 286 Cal.Rptr. 40, 816 P.2d 892 (citation omitted).)

- The preponderance-of-the-evidence standard "simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence.' " (*In re Angelia P.* (1981) 28 Cal.3d 908, 918, 171 Cal.Rptr. 637, 623 P.2d 198 (citation omitted).)

- "Preponderance of the evidence" " 'means what it says, viz., that the evidence on one side outweighs, preponderates over, is more than, the evidence on the other side, not necessarily in number of witnesses or quantity, but in its effect on those to whom it is addressed.' " (*Glage v. Hawes Firearms Co.* (1990) 226 Cal.App.3d 314, 325, 276 Cal.Rptr. 430 (quoting *People v. Miller* (1916) 171 Cal. 649, 652, and holding that it was prejudicial misconduct for jurors to refer to the dictionary for definition of the word "preponderance".)

<u>Secondary Sources</u>

- 1 Witkin, California Evidence (4th ed. 2000) Burden of Proof and Presumptions, § 35
- Jefferson, California Evidence Benchbook (3d ed. 1997) ch. 45
- CALIFORNIA TRIAL GUIDE, Unit 91, *Jury Deliberations and Rendition of Verdict*, § 91.20 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 551, *Trial*, §§ 551.90, 551.92 (Matthew Bender)

201
More Likely True—Clear and Convincing Proof

In this case, there are some specific facts that must be proved by the higher standard of clear and convincing evidence. This means the party must persuade you that it is highly probable that the fact is true.

I will tell you specifically which of the facts must be proved by clear and convincing evidence. All the other facts will be proved if they are more likely to be true than not true.

DIRECTIONS FOR USE

Evidence Code section 502 requires the court to instruct the jury regarding which party bears the burden of proof on each issue and the requisite degree of proof.

This instruction should be read immediately after instruction 200, *Obligation to Prove—More Likely True Than Not True*, if the jury will have to decide an issue by means of the clear-and-convincing evidence standard.

SOURCES AND AUTHORITY

- Evidence Code section 115 provides: " 'Burden of proof' means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court. The burden of proof may require a party to raise a reasonable doubt concerning the existence or nonexistence of a fact or that he establish the existence or nonexistence of a fact by preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt. [¶] Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence."

- Evidence Code section 500 provides: "Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting."

- Each party is entitled to the benefit of all the evidence, including the evidence produced by an adversary. (*Willams v. Barnett* (1955) 135 Cal.App.2d 607, 612, 287 P.2d 789; 7 Witkin, Cal. Procedure (4th ed. 1997) Trial, § 305, p. 352.)

- "Proof by clear and convincing evidence is required 'where particularly important individual interests or rights are at stake,' such as the termination of parental rights, involuntary commitment, and deportation. However, 'imposition of even severe civil sanctions that do not implicate such interests has been permitted after proof by a

preponderance of the evidence.' " (*Weiner v. Fleischman* (1991) 54 Cal.3d 476, 487, 286 Cal.Rptr. 40, 816 P.2d 892 (quoting *Herman & MacLean v. Huddleston* (1983) 459 U.S. 375, 389–390).)

- " 'Clear and convincing' evidence requires a finding of high probability." (*In re Angelia P.* (1981) 28 Cal.3d 908, 919, 171 Cal.Rptr. 637, 623 P.2d 198.)

Secondary Sources

- 1 Witkin, California Evidence (4th ed. 2000) Burden of Proof and Presumptions §§ 38, 39
- Jefferson, California Evidence Benchbook (3d ed. 1997) §§ 45.4, 45.21
- CALIFORNIA TRIAL GUIDE, Unit 91, *Jury Deliberations and Rendition of Verdict*, § 91.20 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 551, *Trial*, §§ 551.90, 551.92 (Matthew Bender)

202
Direct and Indirect Evidence

Evidence can come in many forms. It can be testimony about what someone saw or heard or smelled. It can be an exhibit admitted into evidence. It can be someone's opinion.

Some evidence proves a fact directly, such as testimony of a witness who saw a jet plane flying across the sky. Some evidence proves a fact indirectly, such as testimony of a witness who saw only the white trail that jet planes often leave. This indirect evidence is sometimes referred to as "circumstantial evidence." In either instance, the witness's testimony is evidence that a jet plane flew across the sky.

As far as the law is concerned, it makes no difference whether evidence is direct or indirect. You may choose to believe or disbelieve either kind. Whether it is direct or indirect, you should give every piece of evidence whatever weight you think it deserves.

DIRECTIONS FOR USE

An instruction concerning the effect of circumstantial evidence must be given on request when it is called for by the evidence. (*Shepherd v. Walley* (1972) 28 Cal.App.3d 1079, 1084, 105 Cal.Rptr. 387; *Calandri v. Ione Unified School Dist.* (1963) 219 Cal.App.2d 542, 551, 33 Cal.Rptr. 333; *Trapani v. Holzer* (1958) 158 Cal.App.2d 1, 6, 321 P.2d 803.)

SOURCES AND AUTHORITY

- Evidence Code section 410 provides: "As used in this chapter, 'direct evidence' means evidence that directly proves a fact, without an inference or presumption, and which in itself, if true, conclusively establishes that fact."

- Evidence Code section 600(b) provides: "An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action."

- The Assembly Committee on Judiciary Comment to section 600 observes: "Under the Evidence Code, an inference is not itself evidence; it is the result of reasoning from evidence."

- "[T]he fact that evidence is 'circumstantial' does not mean that it cannot be 'substantial.' Relevant circumstantial evidence is admissible in California. Moreover, the jury is entitled to accept persuasive circumstantial evidence even where contradicted by direct testimony." (*Hasson v. Ford Motor Co.* (1977) 19 Cal.3d 530,

548, 138 Cal.Rptr. 705, 564 P.2d 857, overruled on other grounds in *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 34 Cal.Rptr. 2d 607, 882 P.2d 298.)

Secondary Sources

- 1 Witkin, California Evidence (4th ed. 2000) Circumstantial Evidence §§ 1, 2
- 3 Witkin, California Evidence (4th ed. 2000) Presentation at Trial, §§ 138–141
- Jefferson, California Evidence Benchbook (3d ed. 1997) §§ 19.12–19.18
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 551, *Trial*, § 551.62 (Matthew Bender)

COMMENTARY

Outside of the legal profession, the word "indirect" appears to be more commonly used than the word "circumstantial." "The terms 'indirect evidence' and 'circumstantial evidence' are interchangeable and synonymous." (*People v. Yokum* (1956) 145 Cal.App.2d 245, 250, 302 P.2d 406; *People v. Goldstein* (1956) 139 Cal.App.2d 146, 152, 293 P.2d 495.)

203
Party Having Power to Produce Better Evidence

You may consider the ability of each party to provide evidence. If a party provided weaker evidence when it could have provided stronger evidence, you may distrust the weaker evidence.

DIRECTIONS FOR USE

An instruction on failure to produce evidence should not be given if there is no evidence that the party producing inferior evidence had the power to produce superior evidence. (*Thomas v. Gates* (1899) 126 Cal. 1, 6, 58 P. 315; *Hansen v. Warco Steel Corp.* (1965) 237 Cal.App.2d 870, 876, 47 Cal.Rptr. 428; *Holland v. Kerr* (1953) 116 Cal.App.2d 31, 37, 253 P.2d 88.)

The reference to “stronger evidence” applies to evidence that is admissible. This instruction should not be construed to apply to evidence that the court has ruled inadmissible. (*Hansen, supra,* 237 Cal.App.2d at p. 877.)

For willful suppression of evidence see instruction 204, *Willful Suppression of Evidence*.

SOURCES AND AUTHORITY

- Evidence Code section 412 provides: “If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust.”

- Section 412 does not incorporate the "best evidence rule," but instead deals with "stronger and more satisfactory" evidence. (*Largey v. Intrastate Radiotelephone, Inc.* (1982) 136 Cal.App.3d 660, 672, 186 Cal.Rptr. 520 [giving of instruction was proper because corporate records concerning date of meeting could have been stronger evidence than recollection of participants several years later].)

- This inference was a mandatory presumption under former Code of Civil Procedure section 1963(6). It is now considered a permissible inference. (See 3 Witkin, Cal. Evidence (4th ed. 2000) § 114, p. 152.)

COMMENTARY

The instruction uses “may distrust” instead of “should distrust” because the phrase “should be viewed with distrust” in section 412 is weaker than “should distrust.”

Secondary Sources

- 7 Witkin, California Procedure (4th ed. 1997) Trial, § 313, p. 358
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 551, *Trial*, § 551.93 (Matthew Bender)

204
Willful Suppression of Evidence

You may consider whether one party intentionally concealed or destroyed evidence. If you decide that a party did so, you may decide that the evidence would have been unfavorable to that party.

DIRECTIONS FOR USE

This instruction should be given only if there is evidence of suppression. (*In re Estate of Moore* (1919) 180 Cal. 570, 585, 182 P. 285; *Sprague v. Equifax, Inc.* (1985) 166 Cal.App.3d 1012, 1051, 213 Cal.Rptr. 69; *County of Contra Costa v. Nulty* (1965) 237 Cal.App.2d 593, 598, 47 Cal.Rptr. 109.)

In *Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, 12, 74 Cal.Rptr. 2d 248, 954 P.2d 511, a case concerning the tort of intentional spoliation of evidence, the Supreme Court observed that trial courts are free to adapt standard jury instructions on willful suppression to fit the circumstances of the case, "including the egregiousness of the spoliation and the strength and nature of the inference arising from the spoliation."

SOURCES AND AUTHORITY

- 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."

- Former Code of Civil Procedure section 1963 (5) permitted the jury to infer "[t]hat the evidence willfully suppressed would be adverse if produced." Including this inference in a jury instruction on willful suppression is proper because "Evidence Code section 413 was not intended as a change in the law." (*Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 994, 16 Cal.Rptr.2d 787 disapproved of on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664, 25 Cal.Rptr.2d 109, 863 P.2d 179.)

- "A defendant is not under a duty to produce testimony adverse to himself, but if he fails to produce evidence that would naturally have been produced he must take the risk that the trier of the fact will infer, and properly so, that the evidence, had it been produced, would have been adverse." (*Breland v. Traylor Engineering and Manufacturing Co.* (1942) 52 Cal.App.2d 415, 426, 126 P.2d 455.)

Secondary Sources

- 7 Witkin, California Procedure (4th ed. 1997) Trial, § 313, p. 358
- 3 Witkin, California Evidence (4th ed. 2000) Presentation at Trial § 115
- CALIFORNIA FORMS PLEADING AND PRACTICE, Ch. 551, *Trial*, § 551.93 (Matthew Bender)

205
Failure to Explain or Deny Evidence

You may consider whether a party failed to explain or deny some unfavorable evidence. Failure to explain or to deny unfavorable evidence may suggest that the evidence is true.

DIRECTIONS FOR USE

This instruction should be given only if there is a failure to deny or explain a fact that is material to the case.

SOURCES AND AUTHORITY

- 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."

COMMENTARY

Few civil cases discuss this type of instruction. However, several criminal cases hold jurors may be instructed that the failure to explain or deny adverse evidence does not suggest guilt but does suggest that the evidence may be true, and that this failure may more likely lead to inferences unfavorable to the other side. (*People v. Saddler* (1979) 24 Cal.3d 671, 156 Cal.Rptr. 871, 597 P.2d 130.)

206
Evidence Admitted for Limited Purpose

During the trial, I explained to you that certain evidence was admitted for a limited purpose. You may consider that evidence only for the limited purpose that I described, and not for any other purpose.

DIRECTIONS FOR USE

Where appropriate, an instruction limiting the purpose for which evidence is to be considered must be given upon request. (Evid. Code, § 355; *Daggett v. Atchison, Topeka & Santa Fe Ry. Co.* (1957) 48 Cal.2d 655, 665–66, 64 A.L.R.2d 1283, 313 P.2d 557; *Continental Airlines, Inc. v. McDonnell Douglas Corp.* (1989) 216 Cal.App.3d 388, 341, 264 Cal.Rptr. 779.) It is recommended that the judge call attention to the purpose to which the evidence applies.

For instruction on evidence applicable to one party or a limited number of parties, see instruction 207, *Evidence Applicable to One Party*.

SOURCES AND AUTHORITY

- Evidence Code section 355 provides: "When evidence is admissible as to one party or for one purpose and is inadmissible as to another party or for another purpose, the court upon request shall restrict the evidence to its proper scope and instruct the jury accordingly."

- Refusal to give a requested instruction limiting the purpose for which evidence is to be considered may constitute error. (*Adkins v. Brett* (1920) 184 Cal. 252, 261–262, 193 P. 251.)

- Courts have observed that "[w]here the information is admitted for a purpose other than showing the truth of the matter asserted … , prejudice is likely to be minimal and a limiting instruction under section 355 may be requested to control the jury's use of the information." (*Korsak v. Atlas Hotels, Inc.* (1992) 2 Cal.App.4th 1516, 1525, 3 Cal.Rptr. 2d 833.)

- An adverse party may be excused from the requirement of requesting a limiting instruction and may be permitted to assert error if the trial court unequivocally rejects the argument upon which a limiting instruction would be based. (*Warner Construction Corp. v. City of Los Angeles* (1970) 2 Cal.3d 285, 298–299, 85 Cal.Rptr. 444, 466 P.2d 996.)

Secondary Sources

- 1 Witkin, California Evidence (4th ed. 2000) Circumstantial Evidence, §§ 30–34
- Jefferson, California Evidence Benchbook (3d ed. 1997) §§ 20.11–20.13
- CALIFORNIA TRIAL GUIDE, Unit 21, *Procedures for Determining Admissibility of Evidence*, § 21.21 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 551, *Trial*, §§ 551.66, 551.77 (Matthew Bender)

207
Evidence Applicable to One Party

[During the trial, I explained that certain evidence could be considered as to only one party. You may not consider that evidence as to any other party.]

[During the trial, I explained that certain evidence could be considered as to one or more parties but not to every party. You may not consider that evidence as to any other party.]

DIRECTIONS FOR USE

Where appropriate, an instruction limiting the parties to whom evidence applies must be given upon request. (Evid. Code, § 355.) It is recommended that the judge call attention to the party or parties to which the evidence applies.

For instruction on evidence admissible for a limited purpose, see instruction 206, *Evidence Admitted for Limited Purpose*.

SOURCES AND AUTHORITY

- Evidence Code section 355 provides: "When evidence is admissible as to one party or for one purpose and is inadmissible as to another party or for another purpose, the court upon request shall restrict the evidence to its proper scope and instruct the jury accordingly."

Secondary Sources

- 1 Witkin, California Evidence (4th ed. 2000) Circumstantial Evidence, §§ 30–34
- Jefferson, California Evidence Benchbook (3d ed. 1997) §§ 20.11–20.13
- CALIFORNIA TRIAL GUIDE, Unit 21, *Procedures for Determining Admissibility of Evidence*, § 21.21 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 551, *Trial*, §§ 551.66, 551.77 (Matthew Bender)

208
Deposition as Substantive Evidence

During the trial, you heard testimony read from a deposition. A deposition is the testimony of a person taken before trial. At a deposition the person is sworn to tell the truth and is questioned by the attorneys. You must consider the deposition testimony that was read to you in the same way as you consider testimony given in court.

SOURCES AND AUTHORITY

- Code of Civil Procedure section 2002 provides:

  The testimony of witnesses is taken in three modes:
  1. By affidavit;
  2. By deposition;
  3. By oral examination.

- Code of Civil Procedure section 2025(u) provides, in part: "At the trial … any part or all of a deposition may be used against any party who was present or represented at the taking of the deposition … so far as admissible under the rules of evidence applied as though the deponent were then present and testifying as a witness, in accordance with the following [rules set forth in this subdivision]."

- "Admissions contained in depositions and interrogatories are admissible in evidence to establish any material fact." (*Leasman v. Beech Aircraft Corp.* (1975) 48 Cal.App.3d 376, 380, 121 Cal.Rptr. 768.)

<u>Hearsay Exception for Former Testimony</u>

- Evidence Code section 1291(a) provides:

  Evidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and:
  (1) The former testimony is offered against a person who offered it in evidence in his own behalf on the former occasion or against the successor in interest of such person; or
  (2) The party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing.

- Evidence Code section 1292, subdivision (a), provides:

  > Evidence of former testimony is not made inadmissible by the hearsay rule if:
  > (1) The declarant is unavailable as a witness;
  > (2) The former testimony is offered in a civil action; and
  > (3) The issue is such that the party to the action or proceeding in which the former testimony was given had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which the party against whom the testimony is offered has at the hearing.

- Evidence Code section 1290(c) defines "former testimony" as "[a] deposition taken in compliance with law in another action."

- "The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds the witness unavailable as a witness within the meaning of section 240 of the Evidence Code." (*Chavez v. Zapata Ocean Resources, Inc.* (1984) 155 Cal.App.3d 115, 118, 201 Cal.Rptr. 887, citation omitted.)

Secondary Sources

- 3 Witkin, California Evidence (4th ed. 2000) Presentation at Trial § 153–163
- 7 Witkin, California Procedure (4th ed. 1997) Trial, § 304, p. 351
- CALIFORNIA TRIAL GUIDE, Unit 20, *Procedural Rules for Presentation of Evidence*, §§ 20.30–20.38, Unit 40, *Hearsay*, §§ 40.60–40.61 (Matthew Bender)
- CALIFORNIA TORTS, Ch. 72, *Discovery*, § 72.41 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 193, *Discovery: Depositions*, §§ 193.90–193.96 (Matthew Bender)

209
Use of Interrogatories of a Party

Before trial, each party has the right to ask the other parties to answer written questions. These questions are called interrogatories. The answers are also in writing and are given under oath. You must consider the questions and answers that were read to you the same as if the questions and answers had been given in court.

SOURCES AND AUTHORITY

- Code of Civil Procedure section 2030(n) provides: "At the trial or any other hearing in the action, so far as admissible under the rules of evidence, the propounding party or any party other than the responding party may use any answer or part of an answer to an interrogatory only against the responding party. It is not ground for objection to the use of an answer to an interrogatory that the responding party is available to testify, has testified, or will testify at the trial or other hearing."

- "Admissions contained in depositions and interrogatories are admissible in evidence to establish any material fact." (*Leasman v. Beech Aircraft Corp.* (1975) 48 Cal.App.3d 376, 380, 121 Cal.Rptr. 768.)

Secondary Sources

- 3 Witkin, California Evidence (4th ed. 2000) Presentation at Trial § 163
- 7 Witkin, California Procedure (4th ed. 1997) Trial, § 304, p. 351
- CALIFORNIA TRIAL GUIDE, Unit 20, *Procedural Rules for Presentation of Evidence*, § 20.50 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 194, *Discovery: Interrogatories*, § 194.26 (Matthew Bender)

210
Requests for Admissions

Before trial, each party has the right to ask another party to admit in writing that certain matters are true. If the other party admits those matters, you must accept them as true. No further evidence is required to prove them.

[However, these matters must be considered true only as they apply to the party who admitted they were true.]

DIRECTIONS FOR USE

The bracketed phrase should be given if there are multiple parties.

SOURCES AND AUTHORITY

- Requests for admission are authorized by Code of Civil Procedure section 2033(a). Section 2033(n), provides, in part: "Any matter admitted in response to a request for admission is conclusively established against the party making the admission in the pending action. … However, any admission made by a party under this section is (1) binding only on that party, and (2) made for the purpose of the pending action only. It is not an admission by that party for any other purpose, and it shall not be used in any manner against that party in any other proceeding."

- "As Professor Hogan points out, '[t]he request for admission differs fundamentally from the other five discovery tools (depositions, interrogatories, inspection demands, medical examinations, and expert witness exchanges). These other devices have as their main thrust the uncovering of factual data that may be used in proving things at trial. The request for admission looks in the opposite direction. It is a device that seeks to eliminate the need for proof in certain areas of the case.' " (*Brigante v. Huang* (1993) 20 Cal.App.4th 1569, 1577 (quoting 1 Hogan, Modern California Discovery (4th ed. 1988) § 9.1, p. 533).)

- All parties to the action may rely on admissions. (See *Swedberg v. Christiana Community Builders* (1985) 175 Cal.App.3d 138, 143, 220 Cal.Rptr. 544.)

<u>Secondary Sources</u>

- 2 Witkin, California Evidence (4th ed. 2000) Discovery §§ 157–167, 177
- CALIFORNIA TRIAL GUIDE, Unit 20, Procedural *Rules for Presentation of Evidence*, § 20.51 (Matthew Bender)

- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 196, *Discovery: Requests for Admissions*, § 196.19 (Matthew Bender)

211
Prior Conviction of a Felony

You have heard that a witness in this trial has been convicted of a felony. You were told about the conviction only to help you decide whether you should believe the witness. You must not consider it for any other purpose.

SOURCES AND AUTHORITY

- Evidence Code section 788 provides for the circumstances under which evidence of a prior felony conviction may be used to attack a witness's credibility. This section is most often invoked in criminal cases, but it may be used in civil cases as well.

- The standards governing admissibility of prior convictions in civil cases are different from those in criminal proceedings. In *Robbins v. Wong* (1994) 27 Cal.App.4th 261, 273, 32 Cal.Rptr. 2d 337, the court observed: "Given the significant distinctions between the rights enjoyed by criminal defendants and civil litigants, and the diminished level of prejudice attendant to felony impeachment in civil proceedings, it is not unreasonable to require different standards of admissibility in civil and criminal cases." (*Id*. at p. 273.)

  In *Robbins*, the court concluded that article I, section 28 (f) of the California Constitution, as well as any Supreme Court cases on this topic in the criminal arena, does not apply to civil cases. (*Robbins, supra,* 27 Cal.App.4th at p. 274.) However, the court did hold that the trial court "may utilize such decisions to formulate guidelines for the judicial weighing of probative value against prejudicial effect under section 352." (*Ibid*.)

<u>Secondary Sources</u>

- 3 Witkin, California Evidence (4th ed. 2000) Presentation at Trial §§ 292, 294, 295, 308
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 551, *Trial*, § 551.123 (Matthew Bender)

212
Statements of a Party Opponent

A party may offer into evidence any oral or written statement made by an opposing party outside the courtroom.

When you evaluate evidence of such a statement, you must consider these questions:

1. **Do you believe that the party actually made the statement? If you do not believe that the party made the statement, you may not consider the statement at all.**

2. **If you believe that the statement was made, do you believe it was reported accurately?**

You should view testimony about an oral statement made by a party outside the courtroom with caution.

DIRECTIONS FOR USE

Under Evidence Code section 403(c), the court must instruct the jury to disregard a statement offered as evidence if it finds that the preliminary facts do not exist. For adoptive admissions, see instruction 213, *Adoptive Admissions*.

SOURCES AND AUTHORITY

- Evidence Code section 1220 provides: "Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity."

  The Law Revision Commission comment to this section observes that "[t]he rational underlying this exception is that the party cannot object to the lack of the right to cross-examine the declarant since the party himself made the statement."

- There is no requirement that the prior statement of a party must have been against his or her interests when made in order to be admissible. Any prior statement of a party may be offered against him or her in trial. (1 Witkin, Cal. Evidence (4th ed. 2000) Hearsay § 93, pp. 796–797.)

- Evidence Code section 403(a)(4) provides: "The proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact, and the proffered evidence is inadmissible unless the court finds that there is evidence

sufficient to sustain a finding of the existence of the preliminary fact when [t]he proffered evidence is of a statement or other conduct of a particular person and the preliminary fact is whether that person made the statement or so conducted himself."

- The cautionary instruction regarding admissions is derived from common law, formerly codified at Code of Civil Procedure section 2061. The repeal of this section did not affect decisional law concerning the giving of the cautionary instruction. (*People v. Beagle* (1972) 6 Cal.3d 441, 455, fn. 4, 99 Cal.Rptr. 313, 492 P.2d 1.)

- The purpose of the cautionary instruction has been stated as follows: "Ordinarily there is strong reasoning behind the principle that a party's extrajudicial admissions or declarations against interest should be viewed with caution. … No class of evidence is more subject to error or abuse inasmuch as witnesses having the best of motives are generally unable to state the exact language of an admission and are liable, by the omission or the changing of words, to convey a false impression of the language used." (*Pittman v. Boiven* (1967) 249 Cal.App.2d 207, 214, 57 Cal.Rptr. 319.)

- The need to give the cautionary instruction appears to apply to both civil and criminal cases. (See *People v. Livaditis* (1992) 2 Cal.4th 759, 789, 9 Cal.Rptr. 2d 72, 831 P.2d 297 (conc. opn. of Mosk, J.).)

Secondary Sources

- 1 Witkin, California Evidence (4th ed. 2000) Hearsay §§ 90–93, 125
- 3 Witkin, California Evidence (4th ed. 2000) Presentation at Trial § 113
- Jefferson, California Evidence Benchbook (3d ed. 1997) §§ 3.7–3.22
- CALIFORNIA TRIAL GUIDE, Unit 40, *Hearsay*, § 40.30 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 551, *Trial*, § 551.76 (Matthew Bender)

213
Adoptive Admissions

You have heard evidence that [*insert name of declarant***] made the following statement: [***insert description of statement***]. You may consider that statement as evidence against [***insert name of party against whom statement was offered***] only if you find that both of the following conditions are true:**

1. **That [***name of party against whom statement was offered***] was aware of and understood the statement; and**

2. **That [***name of party against whom statement was offered***], by words or conduct, either**

   (a) expressed [his/her] belief that the statement was true; or

   (b) implied that the statement was true.

If you do not decide that these conditions are true, you must not consider the statement at all.

DIRECTIONS FOR USE

Under Evidence Code section 403(c), the court must instruct the jury to disregard the evidence of an adoptive admission if it finds that the preliminary facts do not exist.

For statements of a party opponent, see instruction 212, *Statements of a Party Opponent*. For admissions by silence, see instruction 214, *Admissions by Silence*. Evasive conduct falls under this instruction rather than instruction 212 or 214.

SOURCES AND AUTHORITY

- Evidence Code section 1221 provides: "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth."

- Evidence Code section 403(a)(4) provides: "The proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact, and the proffered evidence is inadmissible unless the court finds that there is evidence sufficient to sustain a finding of the existence of the preliminary fact when [t]he

proffered evidence is of a statement or other conduct of a particular person and the preliminary fact is whether that person made the statement or so conducted himself."

- The basis for the doctrine of adoptive admissions has been stated as follows: "When a person makes a statement in the presence of a party to an action under circumstances that would normally call for a response if the statement were untrue, the statement is admissible for the limited purpose of showing the party's reaction to it. His silence, evasion, or equivocation may be considered as a tacit admission of the statements made in his presence." (*In re Estate of Neilson* (1962) 57 Cal.2d 733, 746, 22 Cal.Rptr. 1, 371 P.2d 745.)

- In order for the hearsay evidence to be admissible, "it must have been shown clearly that [the party] heard and understood the statement." (*Fisch v. Los Angeles Metropolitan Transit Authority* (1963) 219 Cal.App.2d 537, 540, 33 Cal.Rptr. 298.) There must also be evidence of some type of reaction to the statement. (*Ibid*.) It is clear that the doctrine "does not apply if the party is in such physical or mental condition that a reply could not reasonably be expected from him." (*Southers v. Savage* (1961) 191 Cal.App.2d 100, 104, 12 Cal.Rptr. 470.)

Secondary Sources

- 1 Witkin, California Evidence (4th ed. 2000) Hearsay §§ 102–105
- Jefferson, California Evidence Benchbook (3d ed. 1997) §§ 3.23–3.30

214
Admissions by Silence

You have heard evidence that [*insert name of declarant***] made a statement in the presence of [***insert name of party who remained silent***] that [***insert description of statement***]. You have also heard that [***insert name of party who remained silent***] did not deny the statement.**

You may treat the silence of [*insert name of party who remained silent***] as an admission that the statement was true only if you believe all of the following conditions are true:**

1. **That [***insert name of party who remained silent***] was aware of and understood the statement;**

2. **That [he/she], by either words or actions, could have denied the statement but [he/she] did not; and**

3. **That [he/she] would have denied the statement if [he/she] thought it was false. In determining this, you may consider whether, under the circumstances, a reasonable person would have denied the statement if he or she thought it was false.**

If you do not decide that all three of these conditions are true, you must not consider [*insert name of party who remained silent***]'s silence as an admission.**

DIRECTIONS FOR USE

The jury should be instructed on the doctrine of adoptive admission by silence if the evidence giving rise to the doctrine is conflicting. (See *Southers v. Savage* (1961) 191 Cal.App.2d 100, 104–105, 12 Cal.Rptr. 470.)

Under Evidence Code section 403(c), the court must instruct the jury to disregard the evidence if it finds that the preliminary facts do not exist.

For statements of a party opponent, see instruction 212, *Statements of a Party Opponent*. For admissions by words or evasive conduct, see instruction 213, *Adoptive Admissions*.

SOURCES AND AUTHORITY

- Evidence Code section 1221 provides: "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the

party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth."

- Evidence Code section 403(a)(4) provides: "The proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact, and the proffered evidence is inadmissible unless the court finds that there is evidence sufficient to sustain a finding of the existence of the preliminary fact when [t]he proffered evidence is of a statement or other conduct of a particular person and the preliminary fact is whether that person made the statement or so conducted himself."

- The basis for the doctrine of adoptive admissions has been stated as follows: "When a person makes a statement in the presence of a party to an action under circumstances that would normally call for a response if the statement were untrue, the statement is admissible for the limited purpose of showing the party's reaction to it. His silence, evasion, or equivocation may be considered as a tacit admission of the statements made in his presence." (*In re Estate of Neilson* (1962) 57 Cal.2d 733, 746, 22 Cal.Rptr. 1, 371 P.2d 745.)

- This instruction addresses adoption of an admission by silence. Adoption occurs "where declarations of third persons made in the presence of a party give rise to admissions, the conduct of the party in the face of the declaration constituting the adoption of the statement to form an admission." (*In re Estate of Gaines* (1940) 15 Cal.2d 255, 262, 100 P.2d 1055.)

- "The basis of the rule on admissions made in response to accusations is the fact that human experience has shown that generally it is natural to deny an accusation if a party considers himself innocent of negligence or wrongdoing." (*Keller v. Key System Transit Lines* (1954) 129 Cal.App.2d 593, 596, 277 P.2d 869.) If the statement is not accusatory, then the failure to respond is not an admission. (*Neilson, supra,* 57 Cal.2d at p. 747; *Gilbert v. City of Los Angeles* (1967) 249 Cal.App.2d 1006, 1008, 58 Cal.Rptr. 56.)

- Admissibility of this evidence depends upon whether (1) the statement was made under circumstances that call for a reply, (2) whether the party understood the statement, and (3) whether it could be inferred from his conduct that he adopted the statement as an admission. (*Gilbert, supra,* 249 Cal.App.2d at p. 1009.)

- In order for the hearsay evidence to be admissible, "it must have been shown clearly that [the party] heard and understood the statement." (*Fisch v. Los Angeles Metropolitan Transit Authority* (1963) 219 Cal.App.2d 537, 540, 33 Cal.Rptr. 298.) There must also be evidence of some type of reaction to the statement. (*Ibid.*) It is clear that the doctrine "does not apply if the party is in such physical or mental condition that a reply could not reasonably be expected from him." (*Souther, supra,* 191 Cal.App.2d at p. 104.)

Secondary Sources

- 1 Witkin, California Evidence (4th ed. 2000) Hearsay §§ 102–105
- Jefferson, California Evidence Benchbook (3d ed. 1997) §§ 3.23–3.30

215
Exercise of a Communication Privilege

People have a legal right not to disclose what they told their [doctor/ attorney, etc.] in confidence because the law considers this information privileged. People may exercise this privilege freely and without fear of penalty.

You must not use the fact that a witness exercised this privilege to decide whether he or she should be believed. Indeed, you must not let it affect any of your decisions in this case.

DIRECTIONS FOR USE

This instruction must be given upon request, where appropriate. (Evid. Code, § 913(b).)

SOURCES AND AUTHORITY

- Evidence Code section 913(b), provides: "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."

- The comment to Evidence Code section 913 notes that this statute "may modify existing California law as it applies in civil cases." Specifically, the comment notes that section 913 in effect overrules two Supreme Court cases: *Nelson v. Southern Pacific Co*. (1937) 8 Cal.2d 648, 67 P.2d 682 and *Fross v. Wotton* (1935) 3 Cal.2d 384, 44 P.2d 350. The *Nelson* court had held that evidence of a person's exercise of the privilege against self-incrimination in a prior proceeding may be shown for impeachment purposes if he or she testifies in a self-exculpatory manner in a subsequent proceeding. Language in *Fross* indicated 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.

<u>Secondary Sources</u>

- 2 Witkin, California Evidence (4th ed. 2000) Witnesses § 95–97
- Jefferson, California Evidence Benchbook (3d ed. 1997) §§ 35.26–35.27
- CALIFORNIA TRIAL GUIDE, Unit 51, *Privileges*, §§ 51.01–51.32 (Matthew Bender)

216
Exercise of Witness' Right Not to Testify

[*Name of party/witness***] has exercised [his/her] legal right not to testify concerning certain matters. Do not draw any conclusions from the exercise of this right or let it 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) 17 C3d 107, 117 [130 Cal.Rptr. 257, 550 P2d 161], 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.

- 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 ‘[no] 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], 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, 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
- CALIFORNIA TORTS, Ch. 72, *Discovery*, §§ 72.20, 72.30 (Matthew Bender)
- CALIFORNIA TRIAL GUIDE, Unit 51, *Privileges*, § 51.32 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 191, *Discovery: Privileges and Other Discovery Limitations*, § 191.30 et seq. (Matthew Bender)
- CALIFORNIA DEPOSITION AND DISCOVERY PRACTICE, Ch. 21, *Privileged Matters in General*, § 21.20, Ch. 22, *Privilege Against Self-Incrimination* (Matthew Bender)

217
Evidence of Settlement

You have heard evidence that there was a settlement between [*insert names of settling parties***]. You must not consider this settlement to determine responsibility for any harm. You may consider this evidence only to decide whether [***insert name of witness who settled***] is biased or prejudiced and whether [his/her] testimony is believable.**

DIRECTIONS FOR USE

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

SOURCES AND AUTHORITY

- Evidence Code section 1152 (a), provides: "Evidence that a person has, in compromise or from humanitarian motives, furnished or offered or promised to furnish money or any other thing, act, or service to another who has sustained or will sustain or claims that he or she has sustained or will sustain loss or damage, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove his or her liability for the loss or damage or any part of it."

- "While evidence of a settlement agreement is inadmissible to prove liability, it is admissible to show bias or prejudice of an adverse party. Relevant evidence includes evidence relevant to the credibility of a witness." (*Moreno v. Sayre* (1984) 162 Cal.App.3d 116, 126, 208 Cal.Rptr. 444 (internal citations omitted).)

<u>Secondary Sources</u>

- 1 Witkin, California Evidence (4th ed. 2000) Circumstantial Evidence §§ 140–148
- Jefferson, California Evidence Benchbook (3d ed. 1997) §§ 34.15–34.24
- CALIFORNIA TRIAL GUIDE, Unit 50, *Extrinsic Policies Affecting or Excluding Evidence*, § 50.20 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 551, *Trial*, § 551.68 (Matthew Bender)

218
Statements Made to Physician
(Previously Existing Condition)

[*Insert name of health-care provider***] has testified that [***insert name of patient***] made statements to [him/her] about [***name of patient's***] medical history. These statements helped [***name of health-care provider***] diagnose the patient's condition. You can use these statements to help you examine the basis of [***name of health-care provider***]'s opinion. However, you cannot use them for any other purpose.**

[However, a statement by [*name of patient***] to [***name of health-care provider***] of [his/her] current medical condition may be considered as evidence of that medical condition.]**

DIRECTIONS FOR USE

This instruction does not apply to, and should not be used for, a statement of the patient's then-existing physical sensation, mental feeling, pain, or bodily health. Such statements are admissible as an exception to the hearsay rule under Evidence Code section 1250. This instruction also does not apply to statements of a patient regarding a prior mental or physical state if he or she is unavailable as a witness. (Evid. Code, § 1251.)

This instruction also does not apply to, and should not be used for, statements of a party that are offered into evidence by an opposing party. Such statements are admissible as an exception to the hearsay rule under Evidence Code section 1220.

SOURCES AND AUTHORITY

- Statements pointing to the cause of a physical condition may be admissible if they are made by a patient to a physician. The statement must be required for proper diagnosis and treatment and is admissible only to show the basis of the physician's medical opinion. (*People v. Wilson* (1944) 25 Cal.2d 341, 348, 153 P.2d 720; *Johnson v. Aetna Life Insurance Co.* (1963) 221 Cal.App.2d 247, 252, 34 Cal.Rptr. 484; *Willoughby v. Zylstra* (1935) 5 Cal.App.2d 297, 300–301, 42 P.2d 685.)

- Evidence Code section 1250(a) provides, in part:

  > [E]vidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation … is not made inadmissible by the hearsay rule when:

(1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action; or
(2) The evidence is offered to prove or explain acts or conduct of the declarant.

- Evidence Code section 1251 provides, in part:

> [E]vidence of a statement of the declarant's state of mind, emotion, or physical sensation … at a time prior to the statement is not made inadmissible by the hearsay rule if:
> (a) The declarant is unavailable as a witness; and
> (b) The evidence is offered to prove such prior state of mind, emotion, or physical sensation when it is itself an issue in the action and the evidence is not offered to prove any fact other than such state of mind, emotion, or physical sensation.

Secondary Sources

- 1 Witkin, California Evidence (4th ed. 2000) Hearsay § 196
- CALIFORNIA TRIAL GUIDE, Unit 40, *Hearsay*, § 40.42 (Matthew Bender)

219
Expert-Witness Testimony

During the trial you heard testimony from expert witnesses. The law allows an expert to state opinions about matters in his or her field of expertise even if he or she has not witnessed any of the events involved in the trial.

You do not have to accept an expert's opinion. As with any other witness, it is up to you to decide whether you believe the expert's testimony and choose to use it as a basis for your decision. You may believe all, part, or none of an expert's testimony. In deciding whether to believe an expert's testimony, you should consider:

1. The expert's training and experience;

2. The facts the expert relied on; and

3. The reasons for the expert's opinion.

DIRECTIONS FOR USE

This instruction should not be given for expert witness testimony on the standard of care in professional malpractice cases if such testimony is uncontradicted. Uncontradicted testimony of an expert witness on the standard of care in a professional malpractice case is conclusive. (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 632–633, 85 Cal.Rptr. 2d 386; *Conservatorship of McKeown* (1994) 25 Cal.App.4th 502, 509, 30 Cal.Rptr. 2d 542; *Lysick v. Walcom* (1968) 258 Cal.App.2d 136, 156, 65 Cal.Rptr. 406.) In all other cases, the jury may reject expert testimony, provided that the jury does not act arbitrarily. (*McKeown, supra,* 25 Cal.App.4th at p. 509.)

For instruction on hypothetical questions see instruction 220, *Experts—Questions Containing Assumed Facts.* For instruction on conflicting expert testimony see instruction 221, *Conflicting Expert Testimony.*

Add use note re: do not use in eminent domain and inverse condemnation cases.

SOURCES AND AUTHORITY

- The "credibility of expert witnesses is a matter for the jury after proper instructions from the court." (*Williams v. Volkswagenwerk Aktiengesellschaft* (1986) 180 Cal.App.3d 1244, 1265, 226 Cal.Rptr. 306.)

- Under Evidence Code section 801 (a), expert witness testimony "must relate to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (*New v. Consolidated Rock Products Co.* (1985) 171 Cal.App.3d 681, 692, 217 Cal.Rptr. 522.)

- Evidence Code section 720(a) provides, in part: “A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates.”

- Expert witnesses are qualified by special knowledge to form opinions on facts that they have not personally witnessed. (*Manney v. Housing Authority of Richmond* (1947) 79 Cal.App.2d 453, 460, 180 P.2d 69.)

- “Although a jury may not arbitrarily or unreasonably disregard the testimony of an expert, it is not bound by the expert's opinion. Instead, it must give to each opinion the weight which it finds the opinion deserves. So long as it does not do so arbitrarily, a jury may entirely reject the testimony of a plaintiff's expert, even where the defendant does not call any opposing expert and the expert testimony is not contradicted.” (*Howard, supra*, 72 Cal.App.4th at p. 633, citations omitted.)

Secondary Sources

- 1 Witkin, California Evidence (4th ed. 2000) Opinion Evidence §§ 26–44
- Jefferson, California Evidence Benchbook (3d ed. 1997) §§ 29.18–29.55
- CALIFORNIA TORTS, Ch. 3, *Proof of Negligence*, § 3.04 (Matthew Bender)
- CALIFORNIA TRIAL GUIDE, Unit 60, *Opinion Testimony*, § 60.05 (Matthew Bender)
- CALIFORNIA PRODUCTS LIABILITY ACTIONS, Ch. 4, *The Role of the Expert*, § 4.03 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 551, *Trial*, §§ 551.70, 551.113 (Matthew Bender)

220
Experts—Questions Containing Assumed Facts

The law allows expert witnesses to be asked questions that are based on assumed facts. These are sometimes called "hypothetical questions."

In determining the weight to give to the expert's opinion that is based on the assumed facts, you should consider if the assumed facts are true.

DIRECTIONS FOR USE

Juries may be instructed that they should weigh an expert witness's response to a hypothetical question based on their assessment of the accuracy of the assumed facts in the hypothetical question. (*Treadwell v. Nickel* (1924) 194 Cal. 243, 263–264, 228 P. 25.)

For instruction on expert witnesses generally see instruction 219, *Expert-Witness Testimony*. For instruction on conflicting expert testimony see instruction 221, *Conflicting Expert Testimony*.

SOURCES AND AUTHORITY

- The value of an expert's opinion depends on the truth of the facts assumed. (*Richard v. Scott* (1978) 79 Cal.App.3d 57, 63, 144 Cal.Rptr. 672.)

- Hypothetical questions must be based on facts that are supported by the evidence: "It was decided early in this state that a hypothetical question to an expert must be based upon facts shown by the evidence and that the appellate court will place great reliance in the trial court's exercise of its discretion in passing upon a sufficiency of the facts as narrated." (*Hyatt v. Sierra Boat Co.* (1978) 79 Cal.App.3d 325, 339, 145 Cal.Rptr. 47.)

- Hypothetical questions should not omit essential material facts. (*Coe v. State Farm Mutual Automobile Insurance Co.* (1977) 66 Cal.App.3d 981, 995, 136 Cal.Rptr. 331.)

- The jury should not be instructed that they are entitled to reject the entirety of an expert's opinion if a hypothetical assumption has not been proven. Rather, the jury should be instructed "to determine the effect of that failure of proof on the value and weight of the expert opinion based on that assumption." (*Lysick v. Walcom* (1968) 258 Cal.App.2d 136, 156, 65 Cal.Rptr. 406.)

Secondary Sources

- 3 Witkin, California Evidence (4th ed. 2000) Presentation at Trial §§ 194–201
- Jefferson, California Evidence Benchbook (3d ed. 1997) § 29.43, pp. 609–610
- CALIFORNIA TRIAL GUIDE, Unit 60, *Opinion Testimony*, §§ 60.05, 60.50–60.51 (Matthew Bender)
- CALIFORNIA PRODUCTS LIABILITY ACTIONS, Ch. 4, *The Role of the Expert*, § 4.03 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 551, *Trial*, § 551.70 (Matthew Bender)

221
Conflicting Expert Testimony

If the expert witnesses disagreed with one another, you should weigh each opinion against the others. You should examine the reasons given for each opinion and the facts or other matters that each witness relied on. You may also compare the experts' qualifications.

DIRECTIONS FOR USE

Unless the issue is one that can be resolved only with expert testimony, the jury should not be instructed that they must accept the entire testimony of the expert whose testimony appears to be entitled to greater weight. (*Santa Clara County Flood Control and Water Conservation Dist. v. Freitas* (1960) 177 Cal.App.2d 264, 268–269, 2 Cal.Rptr. 129.)

For instruction on expert witnesses generally see instruction 219, *Expert-Witness Testimony*. For instruction on hypothetical questions see instruction 220, *Experts—Questions Containing Assumed Facts.*

SOURCES AND AUTHORITY

- *Santa Clara County Flood Control and Water Conservation Dist., supra,* 177 Cal.App.2d at p. 268.

- The "credibility of expert witnesses is a matter for the jury after proper instructions from the court." (*Williams v. Volkswagenwerk Aktiengesellschaft* (1986) 180 Cal.App.3d 1244, 1265, 226 Cal.Rptr. 306.)

Secondary Sources

- 7 Witkin, California Procedure (4th ed. 1997) Trial, § 303, p. 350–351
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 551, *Trial*, § 551.70 (Matthew Bender)

300
Essential Factual Elements

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

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

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

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

DIRECTIONS FOR USE

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

SOURCES AND AUTHORITY

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

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

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

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

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

Secondary Sources

- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 791–811
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 140, *Contracts* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 50, *Contracts* (Matthew Bender)

301
Third-Party Beneficiary

[*Name of plaintiff***] is not a party to the contract. However, [***name of plaintiff***] may be entitled to damages for breach of contract if [he/she/it] proves that [***insert names of the contracting parties***] intended for [***name of plaintiff***] to benefit from their contract.**

It is not necessary for [*name of plaintiff***] to have been named in the contract. In deciding what [***insert names of the contracting parties***] intended, you should consider the entire contract and the circumstances under which it was made.**

DIRECTIONS FOR USE

This topic may or may not be a question for the jury to decide. Third-party beneficiary status may be determined as a question of law if there is no conflicting extrinsic evidence. (*Kalmanovitz v. Bitting* (1996) 43 Cal.App.4th 311, 315.)

These pattern jury instructions may need to be modified in cases brought by plaintiffs who are third-party beneficiaries.

SOURCES AND AUTHORITY

- Civil Code section 1559 provides: "A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it."

- A third party may qualify as a beneficiary under a contract where the contracting parties must have intended to benefit that individual and such intent appears from the terms of the agreement. (*Brinton v. Bankers Pension Services, Inc.* (1999) 76 Cal.App.4th 550, 558.) However, "[i]nsofar as intent to benefit a third person is important in determining his right to bring an action under a contract, it is sufficient that the promisor must have understood that the promisee had such intent. No specific manifestation by the promisor of an intent to benefit the third person is required." (*Lucas v. Hamm* (1961) 56 Cal.2d 583, 591.)

- "Traditional third party beneficiary principles do not require that the person to be benefited be named in the contract." (*Harper v. Wasau Insurance Co.* (1997) 56 Cal.App.4th 1079, 1086.)

- Civil Code section 1559 excludes enforcement of a contract by persons who are only incidentally or remotely benefited by the agreement. (*Lucas, supra,* 56 Cal.2d at p. 590.)

- "Whether a third party is an intended beneficiary or merely an incidental beneficiary to the contract involves construction of the parties' intent, gleaned from reading the contract as a whole in light of the circumstances under which it was entered. [Citation.]" (*Jones v. Aetna Casualty & Surety Co.* (1994) 26 Cal.App.4th 1717, 1725.)

- Restatement Second of Contracts section 302 provides:

  (1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either
    (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or
    (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.
  (2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.

  This section has been cited by California courts. (See, e.g., *Outdoor Services v. Pabagold* (1986) 185 Cal.App.3d 676, 684.)

- The burden is on the third party "to prove that the performance [it] seeks was actually promised." (*Garcia v. Truck Insurance Exchange* (1984) 36 Cal.3d 426, 436; *Neverkovec v. Fredericks* (1999) 74 Cal.App.4th 337, 348–349.)

<u>Secondary Sources</u>

- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 653–673
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 140, *Contracts*, §§ 140.83, 140.103, 140.131 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 50, *Contracts*, § 50.132 (Matthew Bender)
- CALIFORNIA LEGAL FORMS, Ch. 75, *Formation Of Contracts And Standard Contractual Provisions*, § 75.11 (Matthew Bender)

302
Contract Formation—Essential Factual Elements

[*Name of plaintiff***] claims that the parties entered into a contract. To prove that a contract was created, [***name of plaintiff***] must prove all of the following:**

1. **That the parties were legally capable of entering into the contract;**

2. **That the contract terms were clear enough that the parties could understand what each was required to do;**

3. **That the contract had a legal purpose;**

4. **That the parties agreed to give each other something of value. [A promise to do something or not to do something may have value]; and**

5. **That the parties agreed to the terms of the contract.**

[When you examine whether the parties agreed to the terms of the contract, ask yourself if, under the circumstances, a reasonable person would conclude, from the words and conduct of each party, that there was an agreement. You may not consider the parties' hidden intentions.]

If [*name of plaintiff***] did not prove all of the above, then a contract was not created.**

DIRECTIONS FOR USE

This instruction should only be given where the existence of a contract is contested. If both parties agree that they had a contract, then the instructions relating to whether or not a contract was actually formed would not need to be given. At other times, the parties may be contesting only a limited number of contract formation issues. Also, some of these issues may be decided by the judge as a matter of law. Users should omit elements in this instruction that are not contested so that the jury can focus on the contested issues. Read the bracketed paragraph only if element #5 is read.

The terms "legally capable" and "legal purpose" may require further definition if these issues are before the jury. However, the judge would most likely decide these two issues and so these issues could be deleted from the instruction before it is given to the jury.

The final element of this instruction would be given prior to instructions on offer and acceptance. If neither offer nor acceptance is contested, then this element of the instruction will not need to be given to the jury.

SOURCES AND AUTHORITY

- Civil Code section 1550 provides:

  It is essential to the existence of a contract that there should be:
  1. Parties capable of contracting;
  2. Their consent;
  3. A lawful object; and
  4. A sufficient cause or consideration.

Capacity

- Civil Code section 1556 provides: "All persons are capable of contracting, except minors, persons of unsound mind, and persons deprived of civil rights."

Lawful Object

- The issue of whether a contract is illegal or contrary to public policy is a question of law. (*Jackson v. Rogers & Wells* (1989) 210 Cal.App.3d 336, 350.)

Certainty

- "In order for acceptance of a proposal to result in the formation of a contract, the proposal 'must be sufficiently definite, or must call for such definite terms in the acceptance, that the performance promised is reasonably certain.' [Citation.]" (*Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 811.)

- Section 33(1) of the Restatement Second of Contracts provides: "Even though a manifestation of intention is intended to be understood as an offer, it cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain." Section 33(2) provides: "The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy."

- Courts have stated that the issue of whether a contract is sufficiently definite is a question of law for the court. (*Ladas v. California State Automobile Assn.* (1993) 19 Cal.App.4th 761, 770, fn. 2; *Ersa Grae Corp. v. Fluor Corp.* (1991) 1 Cal.App.4th 613, 623.)

Consideration

- Civil Code section 1605 defines "good consideration" as follows: "Any benefit conferred, or agreed to be conferred, upon the promisor, by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered, by such person, other than such as he is at the time of consent lawfully

bound to suffer, as an inducement to the promisor is a good consideration for a promise."

- Civil Code section 1614 provides: "A written instrument is presumptive evidence of consideration." Civil Code section 1615 provides: "The burden of showing a want of consideration sufficient to support an instrument lies with the party seeking to invalidate or avoid it."

- In *Rancho Santa Fe Pharmacy, Inc. v. Seyfert* (1990) 219 Cal.App.3d 875, 884, the court concluded that the presumption of consideration in section 1614 goes to the burden of producing evidence, not the burden of proof.

- Lack of consideration is an affirmative defense and must be alleged in answer to the complaint. (*National Farm Workers Service Center, Inc. v. M. Caratan, Inc.* (1983) 146 Cal.App.3d 796, 808).

- "Consideration consists not only of benefit received by the promisor, but of detriment to the promisee. … 'It matters not from whom the consideration moves or to whom it goes. If it is bargained for and given in exchange for the promise, the promise is not gratuitous.' " (*Flojo Internat., Inc. v. Lassleben* (1992) 4 Cal.App.4th 713, 719 (internal citation omitted).)

- "Consideration may be an act, forbearance, change in legal relations, or a promise." (1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 207.)

Mutual Consent

- Mutual consent is an essential contract element. (Civ. Code, § 1550.) Under Civil Code section 1565, "[t]he consent of the parties to a contract must be: 1. Free; 2. Mutual; and 3. Communicated by each to the other." Civil Code section 1580 provides, in part: "Consent is not mutual, unless the parties all agree upon the same thing in the same sense."

- California courts use the objective standard to determine mutual consent: "[A plaintiff's] uncommunicated subjective intent is not relevant. The existence of mutual assent is determined by objective criteria. The test is whether a reasonable person would, from the conduct of the parties, conclude that there was mutual agreement." (*Hilleary v. Garvin* (1987) 193 Cal.App.3d 322, 327 (internal citations omitted); see also *Roth v. Malson* (1999) 67 Cal.App.4th 552, 557.)

- Actions as well as words are relevant: "The manifestation of assent to a contractual provision may be 'wholly or partly by written or spoken words or by other acts or by failure to act.' " (*Merced County Sheriff's Employees' Assn. v. County of Merced* (1987) 188 Cal.App.3d 662, 670 (quoting Rest. 2d Contracts, § 19).)

- The surrounding circumstances can also be relevant in determining whether a binding contract has been formed. (*California Food Service Corp.,* Inc. *v. Great American Insurance Co.* (1982) 130 Cal.App.3d 892, 897.) "If words are spoken under circumstances where it is obvious that neither party would be entitled to believe that the other intended a contract to result, there is no contract." (*Fowler v. Security-First National Bank* (1956) 146 Cal.App.2d 37, 47.)

Secondary Sources

- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 119–260, 332, 357, 364, 429, 430
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 140, *Contracts*, §§ 140.10, 140.20–140.25 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 50, *Contracts* (Matthew Bender)
- CALIFORNIA LEGAL FORMS, Ch. 75, *Formation Of Contracts And Standard Contractual Provisions,* §§ 75.10, 75.11 (Matthew Bender)

303
Breach of Contract—Essential Factual Elements

To recover damages from [*name of defendant*] for breach of contract, [*name of plaintiff*] must prove all of the following:

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

2. **That [*name of plaintiff*] did all, or substantially all of the significant things that the contract required [him/her/it] to do [or that [he/she/it] was excused from having to do those things];**

3. **That all conditions required for [*name of defendant*]'s performance had occurred;**

4. **That [*name of defendant*] failed to do something that the contract required [him/her/it] to do; and**

5. **That [*name of plaintiff*] was harmed by that failure.**

If you decide that [*name of plaintiff*] has proved each of the above, your verdict on this claim must be for [*name of plaintiff*]. If you do not find that all of the above have been proved, your verdict must be for [*name of defendant*].

DIRECTIONS FOR USE

In many cases, some of the above elements may not be contested. In those cases, users should delete the elements that are not contested so that the jury can focus on the contested issues.

If the allegation is that the defendant breached the contract by doing something that the contract prohibited, then change element 4 to the following: "That [*name of defendant*] did something that the contract prohibited [him/her/it] from doing."

Equitable remedies are also available for breach. "As a general proposition, '[t]he jury trial is a matter of right in a civil action at law, but not in equity. [Citations.]' " (*C & K Engineering Contractors v. Amber Steel Co., Inc.* (1978) 23 Cal.3d 1, 8; *Selby Contractors, Inc. v. McCarthy* (1979) 91 Cal.App.3d 517, 524.) However, juries may render advisory verdicts on these issues. (*Raedeke v. Gibraltar Savings & Loan Assn.* (1974) 10 Cal.3d 665, 670–671.)

SOURCES AND AUTHORITY

- A complaint for breach of contract must include the following: (1) the existence of a contract, (2) plaintiff's performance or excuse for non-performance, (3) defendant's breach, and (4) damages to plaintiff therefrom. (*Acoustics, Inc. v. Trepte Construction Co.* (1971) 14 Cal.App.3d 887, 913.) Additionally, if the defendant's duty to perform under the contract is conditioned on the happening of some event, the plaintiff must prove that the event transpired. (*Consolidated World Investments, Inc. v. Lido Preferred Ltd.* (1992) 9 Cal.App.4th 373, 380.)

- Civil Code section 1549 provides: "A contract is an agreement to do or not to do a certain thing." Courts have defined the term as follows: "A contract is a voluntary and lawful agreement, by competent parties, for good consideration, to do or not to do a specified thing." (*Robinson v. Magee* (1858) 9 Cal. 81, 83.)

- Section 1 of the Restatement Second of Contracts provides: "A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty."

- "The wrongful, i.e., the unjustified or unexcused, failure to perform a contract is a breach. Where the nonperformance is legally justified, or excused, there may be a failure of consideration, but not a breach." (1 Witkin, Summary of California Law (9th ed. 1987) § 791, p. 715 (internal citations omitted).) "Ordinarily, a breach is the result of an intentional act, but negligent performance may also constitute a breach, giving rise to alternative contract and tort actions." (*Ibid.*)

- The doctrine of substantial performance does not apply to the party accused of the breach. Section 235(2) of the Restatement Second of Contracts provides: "When performance of a duty under a contract is due any non-performance is a breach." Comment (b) to section 235 states that "[w]hen performance is due, … anything short of full performance is a breach, even if the party who does not fully perform was not at fault and even if the defect in his performance was not substantial."

<u>Secondary Sources</u>

- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, § 791, p. 715
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 140, *Contracts*, § 140.50 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 50, *Contracts* (Matthew Bender)

304
Oral or Written Contract Terms

[Contracts may be written or oral.]

[Contracts may be partly written and partly oral.]

Oral contracts are just as valid as written contracts.

DIRECTIONS FOR USE

Give the bracketed alternative that is most applicable to the facts of the case.

If the agreement is fully integrated, this instruction should not be given. Parol evidence is inadmissible if the judge finds that the written agreement is fully integrated: "The parol evidence rule generally prohibits the introduction of extrinsic evidence — oral or written — to vary or contradict the terms of an integrated written instrument." (*EPA Real Estate Partnership v. Kang* (1992) 12 Cal.App.4th 171, 175.)

SOURCES AND AUTHORITY

- Civil Code section 1622 provides that "all contracts may be oral, except such as are specially required by statute to be in writing." (See also Civ. Code, § 1624.)

- In *Lande v. Southern California Freight Lines* (1948) 85 Cal.App.2d 416, 420, the court answered the question "May a contract be partly written and partly oral?" as follows: "This question posed by defendant must be answered in the affirmative in this sense: that a contract or agreement in legal contemplation is neither written nor oral, but oral or written evidence may be received to establish the terms of the contract or agreement between the parties. … A so-called partly written and partly oral contract is in legal effect a contract, the terms of which may be proven by both written and oral evidence."

- Evidence of a contract that is partly oral may be admitted if only part of the contract is fully integrated: "When the parties to a written contract have agreed to it as an 'integration' - a complete and final embodiment of the terms of an agreement - parol evidence cannot be used to add to or vary its terms. . . . . [However,] '[w]hen only part of the agreement is integrated, the same rule applies to that part, but parol evidence may be used to prove elements of the agreement not reduced to writing.' " (*Masterson v. Sine* (1968) 68 Cal.2d 222, 225.)

305
Implied-in-Fact Contract

In deciding whether a contract was created, you should consider the conduct and relationship of the parties as well as all the circumstances of the case.

Contracts can be created by the conduct of the parties, without spoken or written words. Contracts created by conduct are just as valid as contracts formed with words.

Conduct will create a contract if the conduct of both parties is intentional and each knows, or has reason to know, that the other party will interpret the conduct as an agreement to enter into a contract.

SOURCES AND AUTHORITY

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

- Section 19(2) of the Restatement Second of Contracts provides: "The conduct of a party is not effective as a manifestation of his assent unless he intends to engage in the conduct and knows or has reason to know that the other party may infer from his conduct that he assents."

- "Unlike the 'quasi-contractual' quantum meruit theory which operates without an actual agreement of the parties, an implied-in-fact contract entails an actual contract, but one manifested in conduct rather than expressed in words." (*Maglica v. Maglica* (1998) 66 Cal.App.4th 442, 455.)

- Express and implied-in-fact contracts have the same legal effect, but differ in how they are proved at trial: " 'Contracts may be express or implied. These terms, however, do not denote different kinds of contracts, but have reference to the evidence by which the agreement between the parties is shown. If the agreement is shown by the direct words of the parties, spoken or written, the contract is said to be an express one. But if such agreement can only be shown by the acts and conduct of the parties, interpreted in the light of the subject-matter and of the surrounding circumstances, then the contract is an implied one.' " (*Marvin v. Marvin* (1976) 18 Cal.3d 660, 678 fn. 16 (internal citation omitted).)

- "As to the basic elements [of a contract cause of action], there is no difference between an express and implied contract. … While an implied in fact contract may be inferred from the conduct, situation or mutual relation of the parties, the very heart of this kind of agreement is an intent to promise." (*Division of Labor Law Enforcement v. Transpacific Transportation Co.* (1977) 69 Cal.App.3d 268, 275; see also *Friedman v. Friedman* (1993) 20 Cal.App.4th 876, 888.)

- The formation of an implied contract can become an issue for the jury to decide: "Whether or not an implied contract has been created is determined by the acts and conduct of the parties and all the surrounding circumstances involved and is a question of fact." (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 611 (internal citation omitted).)

Secondary Sources

- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, § 11, pp. 46–47
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 140, *Contracts*, §§ 140.10, 140.110 (Matthew Bender)

306
Unformalized Agreement

[*Name of defendant***] contends that the parties did not enter into a contract because the agreement was never written and signed. To overcome this contention, [***name of plaintiff***] must prove both of the following:**

1. **That the parties understood and agreed to the terms of the agreement; and**

2. **That the parties agreed to be bound without a written agreement [or before a written agreement was prepared].**

DIRECTIONS FOR USE

Do not give this instruction unless the defendant has testified or offered other evidence in support of his or her contention.

SOURCES AND AUTHORITY

- "Where the writing at issue shows 'no more than an intent to further reduce the informal writing to a more formal one' the failure to follow it with a more formal writing does not negate the existence of the prior contract. However, where the writing shows it was not intended to be binding until a formal written contract is executed, there is no contract." (*Harris v. Rudin, Richman & Appel* (1999) 74 Cal.App.4th 299, 307 (internal citations omitted).)

- The execution of a formalized written agreement is not necessarily essential to the formation of a contract that is made orally: "[I]f the respective parties orally agreed upon all of the terms and conditions of a proposed written agreement with the mutual intention that the oral agreement should thereupon become binding, the mere fact that a formal written agreement to the same effect has not yet been signed does not alter the binding validity of the oral agreement. [Citation.]" (*Banner Entertainment, Inc. v. Superior Court* (1998) 62 Cal.App.4th 348, 358.)

- If the parties have agreed not to be bound until the agreement is reduced to writing and signed by the parties, then the contract will not be effective until the formal agreement is signed. (*Beck v. American Health Group International, Inc.* (1989) 211 Cal.App.3d 1555, 1562.)

- "Whether it was the parties' mutual intention that their oral agreement to the terms contained in a proposed written agreement should be binding immediately is to be determined from the surrounding facts and circumstances of a particular case and is a

question of fact for the trial court." (*Banner Entertainment, Inc., supra,* 62 Cal.App.4th at p. 358.)

Secondary Sources

- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 136, 142
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 140, *Contracts,* § 140.22 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 50, *Contracts,* § 50.350 (Matthew Bender)

307
Contract Formation—Offer

Both an offer and an acceptance are required to create a contract. [*Name of defendant***] contends that a contract was not created because there was never any offer. To overcome this contention, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] communicated to [***name of defendant***] that [he/she/it] was willing to enter into a contract with [***name of defendant***];**

2. **That the communication contained specific terms; and**

3. **That, based on the communication, [***name of defendant***] could have reasonably concluded that a contract with these terms would result if [he/she/it] accepted the offer.**

If [*name of plaintiff***] did not prove all of the above, then a contract was not created.**

DIRECTIONS FOR USE

Do not give this instruction unless the defendant has testified or offered other evidence in support of his or her contention.

This instruction assumes that the defendant is claiming the plaintiff never made an offer. Change the identities of the parties in the indented paragraphs if, under the facts of the case, the roles of the parties are switched (e.g., if defendant was the alleged offeror.) If the existence of an offer is not contested, then this instruction is unnecessary.

SOURCES AND AUTHORITY

- Courts have adopted the definition of “offer” found at Restatement Second of Contracts, section 24: “ An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.” (*City of Moorpark v. Moorpark Unified School Dist.* (1991) 54 Cal.3d 921, 930.)

- Under basic contract law " '[a]n offer must be sufficiently definite, or must call for such definite terms in the acceptance that the performance promised is reasonably certain.' " (*Ladas v. California State Automobile Assn.* (1993) 19 Cal.App.4th 761, 770.)

- "The trier of fact must determine 'whether a reasonable person would necessarily assume ... a willingness to enter into contract.' [Citation.]" (*In re First Capital Life Insurance Co.* (1995) 34 Cal.App.4th 1283, 1287.)

- Offers should be contrasted with preliminary negotiations: "Preliminary negotiations or an agreement for future negotiations are not the functional equivalent of a valid, subsisting agreement." (*Kruse v. Bank of America* (1988) 202 Cal.App.3d 38, 59.)

Secondary Sources

- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 128–145
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 140, *Contracts,* § 140.22 (Matthew Bender)
- CALIFORNIA LEGAL FORMS, Ch. 75, *Formation Of Contracts And Standard Contractual Provisions,* § 75.210 (Matthew Bender)

308
Contract Formation—Revocation of Offer

Both an offer and an acceptance are required to create a contract. [*Name of defendant***] contends that the offer was withdrawn before it was accepted. To overcome this contention, [***name of plaintiff***] must prove one of the following:**

1. **That [***name of defendant***] did not withdraw the offer; or**

2. **That [***name of plaintiff***] accepted the offer before [***name of defendant***] withdrew it; or**

3. **That [***name of defendant***]'s withdrawal of the offer was never communicated to [***name of plaintiff***].**

If [*name of plaintiff***] did not prove any of the above, then a contract was not created.**

DIRECTIONS FOR USE

Do not give this instruction unless the defendant has testified or offered other evidence in support of his or her contention.

This instruction assumes that the defendant is claiming to have revoked his or her offer. Change the identities of the parties in the indented paragraphs if, under the facts of the case, the roles of the parties are switched (e.g., if defendant was the alleged offeree).

SOURCES AND AUTHORITY

- Civil Code section 1586 provides: "A proposal may be revoked at any time before its acceptance is communicated to the proposer, but not afterwards."

- The methods for revocation are listed in Civil Code section 1587, and include:
  1) Communication of revocation,
  2) Lapse of time for acceptance,
  3) Failure to fulfill condition precedent to acceptance, and
  4) By death or insanity of proposer.

  This instruction addresses the first method.

- "It is a well-established principle of contract law that an offer may be revoked by the offeror any time prior to acceptance." (*T. M. Cobb Co., Inc. v. Superior Court* (1984) 36 Cal.3d 273, 278.)

- " 'Under familiar contract law, a revocation of an offer must be directed to the offeree.' [Citation.]" (*Moffett v. Barclay* (1995) 32 Cal.App.4th 980, 983.)

Secondary Sources

- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 166–171
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 140, *Contracts,* §§ 140.22, 140.61 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 50, *Contracts,* § 50.351 (Matthew Bender)
- CALIFORNIA LEGAL FORMS, Ch. 75, *Formation Of Contracts And Standard Contractual Provisions,* § 75.211 (Matthew Bender)

309
Contract Formation—Acceptance

Both an offer and an acceptance are required to create a contract. [*Name of defendant***] contends that a contract was not created because the offer was never accepted. To overcome this contention, [***name of plaintiff***] must prove both of the following:**

1. **That [***name of defendant***] agreed to be bound by the terms of the offer. [If [***name of defendant***] agreed to be bound only on certain conditions, or if [he/she/it] introduced a new term into the bargain, then there was no acceptance]; and**

2. **That [***name of defendant***] communicated [his/her/its] agreement to [***name of plaintiff***].**

If [*name of plaintiff***] did not prove both of the above, then a contract was not created.**

DIRECTIONS FOR USE

Do not give this instruction unless the defendant has testified or offered other evidence in support of his or her contention.

This instruction assumes that the defendant is claiming to have not accepted plaintiff's offer. Change the identities of the parties in the indented paragraphs if, under the facts of the case, the roles of the parties are switched (e.g., if defendant was the alleged offeror).

SOURCES AND AUTHORITY

- Civil Code 1585 provides: "An acceptance must be absolute and unqualified, or must include in itself an acceptance of that character which the proposer can separate from the rest, and which will conclude the person accepting. A qualified acceptance is a new proposal."

- "[T]erms proposed in an offer must be met exactly, precisely and unequivocally for its acceptance to result in the formation of a binding contract; and a qualified acceptance amounts to a new proposal or counteroffer putting an end to the original offer." (*Panagotacos v. Bank of America* (1998) 60 Cal.App.4th 851, 855–856.)

- "[I]t is not necessarily true that any communication other than an unequivocal acceptance is a rejection. Thus, an acceptance is not invalidated by the fact that it is 'grumbling,' or that the offeree makes some simultaneous 'request.' Nevertheless, it

must appear that the ‘grumble’ does not go so far as to make it doubtful that the expression is really one of assent. Similarly, the ‘request’ must not add additional or different terms from those offered. Otherwise, the ‘acceptance’ becomes a counteroffer.” (*Guzman v.Visalia Community Bank* (1999) 71 Cal.App.4th 1370, 1376.)

- “The interpretation of the purported acceptance or rejection of an offer is a question of fact. Further, based on the general rule that manifested mutual assent rather than actual mental assent is the essential element in the formation of contracts, the test of the true meaning of an acceptance or rejection is not what the party making it thought it meant or intended it to mean. Rather, the test is what a reasonable person in the position of the parties would have thought it meant.” (*Guzman, supra,* 71 Cal.App.4th at pp. 1376–1377.)

- “Acceptance of an offer, which may be manifested by conduct as well as by words, must be expressed or communicated by the offeree to the offeror.” (*Russell v. Union Oil Co.* (1970) 7 Cal.App.3d 110, 114.)

Secondary Sources

- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 186–197
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 140, *Contracts,* § 140.22 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 50, *Contracts,* § 50.352 (Matthew Bender)
- CALIFORNIA LEGAL FORMS, Ch. 75, *Formation Of Contracts And Standard Contractual Provisions,* § 75.214 (Matthew Bender)

310
Contract Formation—Acceptance by Silence

Ordinarily, if a party does not say or do anything in response to another party's offer, then he or she has not accepted the offer. However, if [*name of plaintiff***] proves that both [he/she/it] and [***name of defendant***] understood silence or inaction to mean that [***name of defendant***] had accepted [***name of plaintiff***]'s offer, then there was an acceptance.**

DIRECTIONS FOR USE

This instruction assumes that the defendant is claiming to have not accepted plaintiff's offer. Change the identities of the parties in the last two sets of brackets if, under the facts of the case, the roles of the parties are switched (e.g., if defendant was the alleged offeror).

This instruction should be read in conjunction with and immediately after instruction 309, *Contract Formation—Acceptance*, if acceptance by silence is an issue.

SOURCES AND AUTHORITY

- Because acceptance must be communicated, "[s]ilence in the face of an offer is not an acceptance, unless there is a relationship between the parties or a previous course of dealing pursuant to which silence would be understood as acceptance." (*Southern California Acoustics Co., Inc. v. C. V. Holder, Inc.* (1969) 71 Cal.2d 719, 722.)

- Acceptance may also be inferred from inaction where one has a duty to act, and from retention of the offered benefit. (*Golden Eagle Insurance Co. v. Foremost Insurance Co.* (1993) 20 Cal.App.4th 1372, 1386.)

- Civil Code section 1589 provides: "A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting."

- Section 69(1) of the Restatement Second of Contracts provides:

  (1) Where an offeree fails to reply to an offer, his silence and inaction operate as an acceptance in the following cases only:
  (a) Where an offeree takes the benefit of offered services with reasonable opportunity to reject them and reason to know that they were offered with the expectation of compensation.

(b) Where the offeror has stated or given the offeree reason to understand the assent may be manifested by silence or inaction, and the offeree in remaining silent and inactive intends to accept the offer.
(c) Where because of previous dealings or otherwise, it is reasonable that the offeree should notify the offeror if he does not intend to accept.

Secondary Sources

- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 198–202
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 140, *Contracts,* § 140.22 (Matthew Bender)
- CALIFORNIA LEGAL FORMS, Ch. 75, *Formation Of Contracts And Standard Contractual Provisions,* § 75.11 (Matthew Bender)

311
Contract Formation—Rejection of Offer

[*Name of defendant***] contends that the offer to enter into a contract terminated because [***name of plaintiff***] rejected it. To overcome this contention, [***name of plaintiff***] must prove both of the following:**

1. **That [***name of plaintiff***] did not reject [***name of defendant***]'s offer; and**

2. **That [***name of plaintiff***] did not make any additions or changes to the terms of [***name of defendant***]'s offer.**

If [*name of plaintiff***] did not prove both of the above, then a contract was not created.**

DIRECTIONS FOR USE

Do not give this instruction unless the defendant has testified or offered other evidence in support of his or her contention.

Note that rejections of a contract offer, or proposed alterations to an offer, are effective only if they are communicated to the other party. (See *Beverly Way Associates v. Barham* (1990) 226 Cal.App.3d 49, 55.) If it is necessary for the jury to make a finding regarding the issue of communication then this instruction may need to be modified.

This instruction assumes that the defendant is claiming plaintiff rejected defendant's offer. Change the identities of the parties in the indented paragraphs if, under the facts of the case, the roles of the parties are switched (e.g., if defendant was the alleged offeree).

Conceptually, this instruction dovetails with instruction 309, *Contract Formation—Acceptance*. This instruction is designed for the situation where a party has rejected an offer by not accepting it on its terms.

SOURCES AND AUTHORITY

- Civil Code 1585 provides: "An acceptance must be absolute and unqualified, or must include in itself an acceptance of that character which the proposer can separate from the rest, and which will conclude the person accepting. A qualified acceptance is a new proposal."

- Section 39(2) of the Restatement Second of Contracts provides that "[a]n offeree's power of acceptance is terminated by his making of a counter-offer, unless the offeror

has manifested a contrary intention or unless the counteroffer manifests a contrary intention of the offeree."

- Cases provide that "a qualified acceptance amounts to a new proposal or counter-offer putting an end to the original offer. … A counter-offer containing a condition different from that in the original offer is a new proposal and, if not accepted by the original offeror, amounts to nothing." (*Apablasa v. Merritt and Co.* (1959) 176 Cal.App.2d 719, 726 (internal citations omitted).) More succinctly: "The rejection of an offer kills the offer." (*Stanley v. Robert S. Odell and Co.* (1950) 97 Cal.App.2d 521, 534.)

- "[T]erms proposed in an offer must be met exactly, precisely and unequivocally for its acceptance to result in the formation of a binding contract; and a qualified acceptance amounts to a new proposal or counteroffer putting an end to the original offer." (*Panagotacos v. Bank of America* (1998) 60 Cal.App.4th 851, 855–856.)

- The original offer terminates as soon as the rejection is communicated to the offeror: "It is hornbook law that an unequivocal rejection by an offeree, communicated to the offeror, terminates the offer; even if the offeror does no further act, the offeree cannot later purport to accept the offer and thereby create enforceable contractual rights against the offeror." (*Beverly Way Associates, supra,* 226 Cal.App.3d at p. 55.)

Secondary Sources

- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, § 172, p. 187
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 140, *Contracts*, § 140.22 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 50, *Contracts*, § 50.352 (Matthew Bender)
- CALIFORNIA LEGAL FORMS, Ch. 75, *Formation Of Contracts And Standard Contractual Provisions*, §§ 75.212–75.214 (Matthew Bender)

312
Substantial Performance

[*Name of defendant***] contends that [***name of plaintiff***] did not perform all of the things that [he/she/it] was required to do under the contract, and therefore [***name of defendant***] did not have to perform [his/her/its] obligations under the contract. To overcome this contention, [***name of plaintiff***] must prove both of the following:**

1. **That [***name of plaintiff***] made a good faith effort to comply with the contract; and**

2. **That [***name of defendant***] received essentially what the contract called for because [***name of plaintiff***]'s failures, if any, were so trivial or unimportant that they could have been easily fixed or paid for.**

DIRECTIONS FOR USE

Do not give this instruction unless the defendant has testified or offered other evidence in support of his or her contention.

SOURCES AND AUTHORITY

- " 'Substantial performance means that there has been no willful departure from the terms of the contract, and no omission of any of its essential parts, and that the contractor has in good faith performed all of its substantive terms. If so, he will not be held to have forfeited his right to a recovery by reason of trivial defects or imperfections in the work performed.' " (*Connell v. Higgins* (1915) 170 Cal. 541, 556 (internal citation omitted).)

- The Supreme Court has cited the following passage from Witkin with approval: "At common law, recovery under a contract for work done was dependent upon a complete performance, although hardship might be avoided by permitting recovery in quantum meruit. The prevailing doctrine today, which finds its application chiefly in building contracts, is that substantial performance is sufficient, and justifies an action on the contract, although the other party is entitled to a reduction in the amount called for by the contract, to compensate for the defects. What constitutes substantial performance is a question of fact, but it is essential that there be no wilful departure from the terms of the contract, and that the defects be such as may be easily remedied or compensated, so that the promisee may get practically what the contract calls for." (*Posner v. Grunwald-Marx, Inc*. (1961) 56 Cal.2d 169, 186–187; see also *Kossler v. Palm Springs Developments, Ltd.* (1980) 101 Cal.App.3d 88, 101.)

- " 'Whether, in any case, such defects or omissions are substantial, or merely unimportant mistakes that have been or may be corrected, is generally a question of fact.' " (*Connell, supra,* 170 Cal. at pp. 556–557 (internal citation omitted).)

- "The doctrine of substantial performance has been recognized in California since at least 1921, when the California Supreme Court decided the landmark case of *Thomas Haverty Co. v. Jones* [citation], in which it was stated: 'The general rule on the subject of (contractual) performance is that "Where a person agrees to do a thing for another for a specified sum of money to be paid on full performance, he is not entitled to any part of the sum until he has himself done the thing he agreed to do, unless full performance has been excused, prevented, or delayed by the act of the other party, or by operation of law, or by the act of God or the public enemy." ' " (*Tolstoy Construction Co. v. Minter* (1978) 78 Cal.App.3d 665, 671.)

<u>Secondary Sources</u>

- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 762–763
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 140, *Contracts,* § 140.23 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 50, *Contracts,* §§ 50.30, 50.31 (Matthew Bender)
- CALIFORNIA LEGAL FORMS, Ch. 75, *Formation Of Contracts And Standard Contractual Provisions,* § 75.230 (Matthew Bender)

313
Modification

[*Name of party***] claims that the original contract was modified, or changed. [***Name of party***] must prove that the parties agreed to the modification. [***Name of other party***] denies that the contract was modified.**

The parties to a contract may agree to modify its terms. You must decide whether a reasonable person would conclude from the words and conduct of [*name of plaintiff***] and [***name of defendant***] that they agreed to modify the contract. You cannot consider the parties' hidden intentions.**

[A contract in writing may be modified by a contract in writing.]

[A contract in writing may be modified by an oral agreement to the extent the oral agreement is carried out by the parties.]

[A contract in writing may be modified by an oral agreement if the parties agree to give each other something of value.]

[An oral contract may be modified by consent of the parties, in writing, without an agreement to give each other something of value.]

SOURCES AND AUTHORITY

- "It is axiomatic that the parties to an agreement may modify it." (*Vella v. Hudgins* (1984) 151 Cal.App.3d 515, 519.)

- Civil Code section 1698 provides:

  (a) A contract in writing may be modified by a contract in writing.
  (b) A contract in writing may be modified by an oral agreement to the extent that the oral agreement is executed by the parties.
  (c) Unless the contract otherwise expressly provides, a contract in writing may be modified by an oral agreement supported by new consideration. The statute of frauds (Section 1624) is required to be satisfied if the contract as modified is within its provisions.
  (d) Nothing in this section precludes in an appropriate case the application of rules of law concerning estoppel, oral novation and substitution of a new agreement, rescission of a written contract by an oral agreement, waiver of a provision of a written contract, or oral independent collateral contracts.

- Civil Code section 1697 provides: "A contract not in writing may be modified in any respect by consent of the parties, in writing, without a new consideration, and is extinguished thereby to the extent of the modification."

- "Modification is a change in the obligation by a modifying agreement which requires mutual assent." (*Wade v. Diamond A Cattle Co.* (1975) 44 Cal.App.3d 453, 457.)

- "A contract can, of course, be subsequently modified with the assent of the parties thereto, provided the same elements essential to the validity of the original contract are present." (*Carlson, Collins, Gordon & Bold v. Banducci* (1967) 257 Cal.App.2d 212, 223 (internal citations omitted).)

- Consideration is unnecessary if the modification is to correct errors and omissions. (*Texas Co. v. Todd* (1937) 19 Cal.App.2d 174, 185–186.)

Secondary Sources

- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 909–916
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 140, *Contracts,* §§ 140.112, 140.149–140.152 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 50, *Contracts,* §§ 50.520–50.523 (Matthew Bender)
- CALIFORNIA LEGAL FORMS, Ch. 77, *Discharge of Obligations,* §§ 77.21, 77.121, 77.320–77.323 (Matthew Bender)

314
Interpretation—Disputed Term

[*Name of plaintiff***] and [***name of defendant***] dispute the meaning of the following term contained in their contract: [***insert text of term***].**

[*Name of plaintiff***] claims that the term means: [***insert plaintiff's interpretation of the term***]. [***Name of defendant***] claims that the term means: [***insert defendant's interpretation of the term***]. [***Name of plaintiff***] must prove that [his/her/its] interpretation of the term is correct.**

In deciding what the terms of a contract mean, you must decide what the parties intended at the time the contract was created. You may consider the usual and ordinary meaning of the language used in the contract as well as the circumstances surrounding the making of the contract.

[The following instructions may also help you interpret the terms of the contract:]

DIRECTIONS FOR USE

Read any of the following instructions (as appropriate) on tools for interpretation (instructions 315 through 320) after reading the last bracketed sentence.

SOURCES AND AUTHORITY

- Section 200 of the Restatement Second of Contracts provides: "Interpretation of a promise or agreement or a term thereof is the ascertainment of its meaning."

- Civil Code section 1636 provides: "A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful."

- Civil Code section 1647 provides: "A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates."

- Ordinarily, interpretation is a question of law. (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865–866; Evid. Code, § 310(a).) However, where the contract must be interpreted by conflicting extrinsic evidence, and where the interpretation depends on the resolution of such evidence, then it becomes a question for the jury: "When parol evidence is introduced in aid of the interpretation of uncertain or doubtful language in the contract, the question of the meaning or intent of the parties is one of fact. If the meaning or intent is to be determined one way according to one

view of the facts and another way according to another view, the determination of the disputed matter must be left to the jury." (*Horsemen's Benevolent & Protective Assn. v. Valley Racing Assn.* (1992) 4 Cal.App.4th 1538, 1560.)

- California courts apply an objective test to determine the intent of the parties: "In interpreting a contract, the objective intent, as evidenced by the words of the contract is controlling. We interpret the intent and scope of the agreement by focusing on the usual and ordinary meaning of the language used and the circumstances under which the agreement was made. [Citation.]" (*Lloyd's Underwriters v. Craig & Rush, Inc.* (1994) 26 Cal.App.4th 1194, 1197–1198.)

Secondary Sources

- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 681–683, pp. 615–616
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 140, *Contracts,* § 140.32 (Matthew Bender)
- CALIFORNIA LEGAL FORMS, Ch. 75, *Formation Of Contracts And Standard Contractual Provisions,* § 75.15 (Matthew Bender)

315
Interpretation—Meaning of Ordinary Words

You should assume that the parties intended the words in their contract to have their usual and ordinary meaning unless you decide that the parties intended the words to have a special meaning.

SOURCES AND AUTHORITY

- Civil Code section 1644 provides: "The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed."

- "Under statutory rules of contract interpretation, the mutual intention of the parties at the time the contract is formed governs interpretation. Such intent is to be inferred, if possible, solely from the written provisions of the contract. The 'clear and explicit' meaning of these provisions, interpreted in their 'ordinary and popular sense,' unless 'used by the parties in a technical sense or a special meaning is given to them by usage,' controls judicial interpretation. Thus, if the meaning a layperson would ascribe to contract language is not ambiguous, we apply that meaning." (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 608 (internal citations omitted).)

- "Generally speaking, words in a contract are to be construed according to their plain, ordinary, popular or legal meaning, as the case may be. However, particular expressions may, by trade usage, acquire a different meaning in reference to the subject matter of a contract. If both parties are engaged in that trade, the parties to the contract are deemed to have used them according to their different and peculiar sense as shown by such trade usage and parol evidence is admissible to establish the trade usage even though the words in their ordinary or legal meaning are entirely unambiguous. [Citation.]" (*Hayter Trucking Inc. v. Shell Western E & P, Inc.* (1993) 18 Cal.App.4th 1, 15.)

<u>Secondary Sources</u>

- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, § 685, pp. 618–619
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 140, *Contracts*, § 140.32 (Matthew Bender)
- CALIFORNIA LEGAL FORMS, Ch. 75, *Formation Of Contracts And Standard Contractual Provisions*, § 75.15 (Matthew Bender)

316
Interpretation—Meaning of Technical Words

You should assume that the parties intended technical words used in the contract to have the meaning that is usually given to them by people who work in that technical field, unless you decide that the parties clearly used the words in a different sense.

SOURCES AND AUTHORITY

- Civil Code section 1645 provides: "Technical words are to be interpreted as usually understood by persons in the profession or business to which they relate, unless clearly used in a different sense."

- A court will look beyond the terms of the writing where it appears that the parties intended to ascribe a technical meaning to the terms used. (*Cooper Companies, Inc. v. Transcontinental Insurance Co.* (1995) 31 Cal.App.4th 1094, 1101.)

Secondary Sources

- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, § 685, pp. 618–619
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 140, *Contracts,* § 140.32 (Matthew Bender)
- CALIFORNIA LEGAL FORMS, Ch. 75, *Formation Of Contracts And Standard Contractual Provisions,* § 75.15 (Matthew Bender)

317
Interpretation—Construction of Contract as a Whole

In deciding what the words of a contract meant to the parties, you should consider the whole contract, not just isolated parts. You should use each part to help you interpret the others, so that all the parts make sense when taken together.

SOURCES AND AUTHORITY

- Civil Code section 1641 provides: "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other."

- "[T]he contract must be construed as a whole and the intention of the parties must be ascertained from the consideration of the entire contract, not some isolated portion." (*County of Marin v. Assessment Appeals Bd. of Marin County* (1976) 64 Cal.App.3d 319, 324–325.)

- Contracts should be construed as a whole, with each clause lending meaning to the others. Contractual language should be interpreted in a manner that gives force and effect to every clause rather than to one that renders clauses nugatory, inoperative, or meaningless. (*City of Atascadero v. Merrill Lynch, Pierce, Fenner, & Smith, Inc.* (1998) 68 Cal.App.4th 445, 473; *Titan Corp. v. Aetna Casualty and Surety Co.* (1994) 22 Cal.App.4th 457, 473–474.)

Secondary Sources

- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 686–687, pp. 619–620
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 140, *Contracts,* § 140.32 (Matthew Bender)
- CALIFORNIA LEGAL FORMS, Ch. 75, *Formation Of Contracts And Standard Contractual Provisions,* § 75.15 (Matthew Bender)

318
Interpretation—Construction by Conduct

In deciding what the words in a contract meant to the parties, you may consider how the parties acted after the contract was created but before any disagreement between the parties arose.

SOURCES AND AUTHORITY

- "In construing contract terms, the construction given the contract by the acts and conduct of the parties with knowledge of its terms, and before any controversy arises as to its meaning, is relevant on the issue of the parties' intent." (*Southern Pacific Transportation Co. v. Santa Fe Pacific Pipelines, Inc.* (1999) 74 Cal.App.4th 1232, 1242 (citing *Southern California Edison Co. v. Superior Court* (1995) 37 Cal.App.4th 839, 851.)

- This instruction covers the "rule of practical construction." This rule "is predicated on the common sense concept that 'actions speak louder than words.' Words are frequently but an imperfect medium to convey thought and intention. When the parties to a contract perform under it and demonstrate by their conduct that they knew what they were talking about the courts should enforce that intent." (*Crestview Cemetery Assn. v. Dieden* (1960) 54 Cal.2d 744, 754.)

- "The conduct of the parties after execution of the contract and before any controversy has arisen as to its effect affords the most reliable evidence of the parties' intentions." (*Kennecott Corp. v. Union Oil Co. of California* (1987) 196 Cal.App.3d 1179, 1189.)

- "When the parties perform without objection under a contract the terms of which appear to be indefinite, they have indicated that its terms were sufficiently certain so that they, at least, could perform it." (*Crestview Cemetery Assn., supra,* 54 Cal.2d at p. 795.)

- "[T]his rule is not limited to the joint conduct of the parties in the course of performance of the contract. As stated in Corbin on Contracts, 'The practical interpretation of the contract by one party, evidenced by his words or acts, can be used against him on behalf of the other party, even though that other party had no knowledge of those words or acts when they occurred and did not concur in them. In the litigation that has ensued, one who is maintaining the same interpretation that is evidenced by the other party's earlier words, and acts, can introduce them to support his contention.' We emphasize the conduct of one party to the contract is by no means conclusive evidence as to the meaning of the contract. It is relevant, however, to show the contract is reasonably susceptible to the meaning evidenced by that party's

conduct." (*Southern California Edison Co.*, *supra*, 37 Cal.App.4th at p. 851 (internal citations omitted).)

Secondary Sources

- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, § 689, pp. 622–623
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 140, *Contracts*, § 140.32 (Matthew Bender)

319
Interpretation—Reasonable Time

If a contract does not state a specific time in which the parties are to meet the requirements of the contract, then the parties must meet them within a reasonable time. What is a reasonable time depends on the facts of each case, including the subject matter of the contract, the reasons each party entered into the contract, and the intentions of the parties at the time they entered the contract.

SOURCES AND AUTHORITY

- Civil Code section 1657 provides: "If no time is specified for the performance of an act required to be performed, a reasonable time is allowed. If the act is in its nature capable of being done instantly—as, for example, if it consists in the payment of money only—it must be performed immediately upon the thing to be done being exactly ascertained."

- This rule of construction applies where the contract is silent as to the time of performance. (See *Palmquist v. Palmquist* (1963) 212 Cal.App.2d 322, 331.)

- The reasonableness of time for performance is a question of fact that depends on the circumstances of the particular case. (*Lyon v. Goss* (1942) 19 Cal.2d 659, 673; *Consolidated World Investments, Inc. v. Lido Preferred Ltd.* (1992) 9 Cal.App.4th 373, 381.) These circumstances include the situation of the parties, the nature of the transaction, and the facts of the particular case. (*Sawday v. Vista Irrigation Dist.* (1966) 64 Cal.2d 833, 836.)

Secondary Sources

- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 708–710
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 140, *Contracts*, § 140.41 (Matthew Bender)
- CALIFORNIA LEGAL FORMS, Ch. 75, *Formation Of Contracts And Standard Contractual Provisions*, § 75.15 (Matthew Bender)

320
Interpretation—Construction Against Drafter

In determining the meaning of a term of the contract, you must first consider all of the other instructions that I have given you. If, after considering these instructions, you still cannot agree on the meaning of the term, then you should interpret the contract term against [the party that drafted the term] [the party that caused the uncertainty].

DIRECTIONS FOR USE

This instruction should be given only to a deadlocked jury, so as to avoid giving them this tool to resolve the case before they have truly exhausted the other avenues of approach.

SOURCES AND AUTHORITY

- Civil Code section 1654 provides: "In case of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist."

- Section 1654 states the general rule, but this cannon does not operate to the exclusion of all other rules of contract interpretation. It is used only when none of the canons of construction succeed in dispelling the uncertainty. (*Pacific Gas & Electric Co. v. Superior Court* (1993) 15 Cal.App.4th 576, 596,disapproved on other grounds in *Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal.4th 362, 376–377.)

- This rule is applied more strongly in the case of adhesion contracts. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 801.) It also applies with greater force when the person who prepared the writing is a lawyer. (*Mayhew v. Benninghoff* (1997) 53 Cal.App.4th 1365, 1370.)

Secondary Sources

- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, § 698, pp. 631–632
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 140, *Contracts,* § 140.32 (Matthew Bender)
- CALIFORNIA LEGAL FORMS, Ch. 75, *Formation Of Contracts And Standard Contractual Provisions,* § 75.15 (Matthew Bender)

321
Existence of Condition Precedent Disputed

[*Name of defendant***] claims that the contract with [***name of plaintiff***] provides that [he/she/it] was not required to [***insert duty***] unless [***insert condition precedent***].**

[*Name of defendant***] must prove that the parties agreed to this condition. If [***name of defendant***] proves this, then [***name of plaintiff***] must prove that [***insert condition precedent***].**

If [*name of plaintiff***] does not prove that [***insert condition precedent***], then [***name of defendant***] was not required to [***insert duty***].**

DIRECTIONS FOR USE

This instruction should only be given where both the existence and the occurrence of a condition precedent are contested. If only the occurrence of a condition precedent is contested, use instruction 322, *Occurrence of Agreed Condition Precedent*.

SOURCES AND AUTHORITY

- Civil Code section 1434 provides: "An obligation is conditional, when the rights or duties of any party thereto depend upon the occurrence of an uncertain event."

- Civil Code section 1436 provides: "A condition precedent is one which is to be performed before some right dependent thereon accrues, or some act dependent thereon is performed."

- "Under the law of contracts, parties may expressly agree that a right or duty is conditional upon the occurrence or nonoccurrence of an act or event." (*Platt Pacific, Inc. v. Andelson* (1993) 6 Cal.4th 307, 313.)

- "A condition is a fact, the happening or nonhappening of which creates (condition precedent) or extinguishes (condition subsequent) a duty on the part of the promisor. If the promisor makes an absolute or unconditional promise, he is bound to perform when the time arrives; but if he makes a conditional promise, he binds himself to perform only if the condition precedent occurs, or is relieved from the duty if the condition subsequent occurs. The condition may be the happening of an event, or an act of a party." (1 Witkin, Summary of California Law (9th ed. 1987) Contracts, § 721, pp. 653–654.)

- "[W]here defendant's duty to perform under the contract is conditioned on the happening of some event, the plaintiff must prove the event transpired." (*Consolidated World Investments, Inc. v. Lido Preferred Ltd.* (1992) 9 Cal.App.4th 373, 380.)

- "When a contract establishes the satisfaction of one of the parties as a condition precedent, two tests are recognized: (1) The party is bound to make his decision according to the judicially discerned, objective standard of a reasonable person; (2) the party may make a subjective decision regardless of reasonableness, controlled only by the need for good faith. Which test applies in a given transaction is a matter of actual or judicially inferred intent. Absent an explicit contractual direction or one implied from the subject matter, the law prefers the objective, i.e., reasonable person, test." (*Guntert v. City of Stockton* (1974) 43 Cal.App.3d 203, 209 (internal citations omitted).)

Secondary Sources

- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 725–736
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 140, *Contracts,* §§ 140.44, 140.101 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 50, *Contracts,* §§ 50.20–50.22 (Matthew Bender)
- CALIFORNIA LEGAL FORMS, Ch. 75, *Formation Of Contracts And Standard Contractual Provisions,* § 75.230 (Matthew Bender)

322
Occurrence of Agreed Condition Precedent

The parties agreed in their contract that [*name of defendant***] would not have to [***insert duty***] unless [***insert condition precedent***]. [***Name of defendant***] contends that this condition did not occur and that [he/she/it] did not have to [***insert duty***]. To overcome this contention, [***name of plaintiff***] must prove that [***insert condition precedent***].**

If [*name of plaintiff***] does not prove that [***insert condition precedent***], then [***name of defendant***] was not required to [***insert duty***].**

DIRECTIONS FOR USE

Do not give this instruction unless the defendant has testified or offered other evidence in support of his or her contention.

If both the existence and the occurrence of a condition precedent are contested, use instruction 321, *Existence of Condition Precedent Disputed*.

SOURCES AND AUTHORITY

- Civil Code section 1434 provides: "An obligation is conditional, when the rights or duties of any party thereto depend upon the occurrence of an uncertain event."

- Civil Code section 1436 provides: "A condition precedent is one which is to be performed before some right dependent thereon accrues, or some act dependent thereon is performed."

- "Under the law of contracts, parties may expressly agree that a right or duty is conditional upon the occurrence or nonoccurrence of an act or event." (*Platt Pacific, Inc. v. Andelson* (1993) 6 Cal.4th 307, 313.)

- "A condition is a fact, the happening or nonhappening of which creates (condition precedent) or extinguishes (condition subsequent) a duty on the part of the promisor. If the promisor makes an absolute or unconditional promise, he is bound to perform when the time arrives; but if he makes a conditional promise, he binds himself to perform only if the condition precedent occurs, or is relieved from the duty if the condition subsequent occurs. The condition may be the happening of an event, or an act of a party." (1 Witkin, Summary of California Law (9th ed. 1987) Contracts, § 721, pp. 653–654.)

- Section 224 of the Restatement Second of Contracts provides: "A condition is an event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under a contract becomes due."

- Section 225 of the Restatement Second of Contracts provides:

  (1) Performance of a duty subject to a condition cannot become due unless the condition occurs or its non-occurrence is excused.
  (2) Unless it has been excused, the non-occurrence of a condition discharges the duty when the condition can no longer occur.
  (3) Non-occurrence of a condition is not a breach by a party unless he is under a duty that the condition occur.

- "[W]here defendant's duty to perform under the contract is conditioned on the happening of some event, the plaintiff must prove the event transpired. (*Consolidated World Investments, Inc. v. Lido Preferred Ltd.* (1992) 9 Cal.App.4th 373, 380.)

- "When a contract establishes the satisfaction of one of the parties as a condition precedent, two tests are recognized: (1) The party is bound to make his decision according to the judicially discerned, objective standard of a reasonable person; (2) the party may make a subjective decision regardless of reasonableness, controlled only by the need for good faith. Which test applies in a given transaction is a matter of actual or judicially inferred intent. Absent an explicit contractual direction or one implied from the subject matter, the law prefers the objective, i.e., reasonable person, test." (*Guntert v. City of Stockton* (1974) 43 Cal.App.3d 203, 209 (internal citations omitted).)

<u>Secondary Sources</u>

- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 721–736
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 140, *Contracts,* §§ 140.44, 140.101 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 50, *Contracts,* §§ 50.20–50.22 (Matthew Bender)
- CALIFORNIA LEGAL FORMS, Ch. 75, *Formation Of Contracts And Standard Contractual Provisions,* § 75.230 (Matthew Bender)

323
Waiver of Condition Precedent

[*Name of plaintiff***] and [***name of defendant***] agreed in their contract that [***name of defendant***] would not have to [***insert duty***] unless [***insert condition precedent***]. That condition did not occur. Therefore, [***name of defendant***] contends that [he/she/it] did not have to [***insert duty***].**

To overcome this contention, [*name of plaintiff***] must prove that [***name of defendant***], by words or conduct, gave up [his/her/its] right to require [***insert condition precedent***] before having to [***insert duty***].**

DIRECTIONS FOR USE

Do not give this instruction unless the defendant has testified or offered other evidence in support of his or her contention.

SOURCES AND AUTHORITY

- "Ordinarily, a plaintiff cannot recover on a contract without alleging and proving performance or prevention or waiver of performance of conditions precedent and willingness and ability to perform conditions concurrent." (*Roseleaf Corp. v. Radis* (1953) 122 Cal.App.2d 196, 206.)

- "A condition is waived when a promisor by his words or conduct justifies the promisee in believing that a conditional promise will be performed despite the failure to perform the condition, and the promisee relies upon the promisor's manifestations to his substantial detriment." (*Sosin v. Richardson* (1962) 210 Cal.App.2d 258, 264.)

- Waiver of a condition is a question of fact and not of law. (*Moss v. Minor Properties, Inc.* (1968) 262 Cal.App.2d 847, 857.)

- Section 84 of the Restatement Second of Contracts provides:

  (1) Except as stated in Subsection (2), a promise to perform all or part of a conditional duty under an antecedent contract in spite of the non-occurrence of the condition is binding, whether the promise is made before or after the time for the condition to occur, unless

  (a) occurrence of the condition was a material part of the agreed exchange for the performance of the duty and the promisee was under no duty that it occur; or

(b) uncertainty of the occurrence of the condition was an element of the risk assumed by the promisor.

(2) If such a promise is made before the time for the occurrence of the condition has expired and the condition is within the control of the promisee or a beneficiary, the promisor can make his duty again subject to the condition by notifying the promisee or beneficiary of his intention to do so if

(a) the notification is received while there is still a reasonable time to cause the condition to occur under the antecedent terms or an extension given by the promisor; and

(b) reinstatement of the requirement of the condition is not unjust because of a material change of position by the promisee or beneficiary; and

(c) the promise is not binding apart from the rule stated in Subsection (1).

324
Anticipatory Breach

A party can breach, or break, a contract before performance is required by clearly and positively indicating, by words or conduct, that he or she will not or can not meet the requirements of the contract.

If [*name of plaintiff***] proves that [he/she/it] would have been able to fulfill the terms of the contract and that [***name of defendant***] clearly and positively indicated, by words or conduct, that [he/she/it] would not or could not meet the contract requirements, then [***name of defendant***] breached the contract.**

SOURCES AND AUTHORITY

- Civil Code section 1440 provides: "If a party to an obligation gives notice to another, before the latter is in default, that he will not perform the same upon his part, and does not retract such notice before the time at which performance upon his part is due, such other party is entitled to enforce the obligation without previously performing or offering to perform any conditions upon his part in favor of the former party."

- Courts have defined anticipatory breach as follows: "An anticipatory breach of contract occurs on the part of one of the parties to the instrument when he positively repudiates the contract by acts or statements indicating that he will not or cannot substantially perform essential terms thereof, or by voluntarily transferring to a third person the property rights which are essential to a substantial performance of the previous agreement, or by a voluntary act which renders substantial performance of the contract impossible or apparently impossible." *(C. A. Crane v. East Side Canal & Irrigation Co.* (1935) 6 Cal.App.2d 361, 367.)

- Anticipatory breach can be express or implied: "An express repudiation is a clear, positive, unequivocal refusal to perform; an implied repudiation results from conduct where the promisor puts it out of his power to perform so as to make substantial performance of his promise impossible." (*Taylor v. Johnston* (1975) 15 Cal.3d 130, 137.)

- "In the event the promisor repudiates the contract before the time for his or her performance has arrived, the plaintiff has an election of remedies—he or she may 'treat the repudiation as an anticipatory breach and immediately seek damages for breach of contract, thereby terminating the contractual relation between the parties, or he [or she] can treat the repudiation as an empty threat, wait until the time for performance arrives and exercise his [or her] remedies for actual breach if a breach

does in fact occur at such time.' " (*Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 489.)

- Anticipatory breach can be used as an excuse for plaintiff's failure to substantially perform. (*Gold Mining & Water Co. v. Swinerton* (1943) 23 Cal.2d 19, 29.)

- "Although it is true that an anticipatory breach or repudiation of a contract by one party permits the other party to sue for damages without performing or offering to perform its own obligations, this does not mean damages can be recovered without evidence that, but for the defendant's breach, the plaintiff would have had the ability to perform." (*Esra Grae Corp. v. Fluor Corp.* (1991) 613, 625 (internal citations omitted).)

- Section 253 of the Restatement Second of Contracts:

  (1) Where an obligor repudiates a duty before he has committed a breach by non-performance and before he has received all of the agreed exchange for it, his repudiation alone gives rise to a claim for damages for total breach.
  (2) Where performances are to be exchanged under an exchange of promises, one party's repudiation of a duty to render performance discharges the other party's remaining duties to render performance.

<u>Secondary Sources</u>

- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 805–812
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 140, *Contracts*, §§ 140.54, 140.105 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 50, *Contracts*, § 50.23 (Matthew Bender)
- CALIFORNIA LEGAL FORMS, Ch. 77, *Discharge of Obligations*, §§ 77.15, 77.361 (Matthew Bender)

330
Affirmative Defense—Unilateral Mistake of Fact

[*Name of defendant***] claims that there was no contract because [he/she/it] was mistaken about [***insert description of mistake***]. To succeed, [***name of defendant***] must prove all of the following:**

1. **That [***name of plaintiff***] knew [***name of defendant***] was mistaken about [***insert description of mistake***] and used that mistake to take advantage of [him/her/it];**

2. **That [***name of defendant***]'s mistake was not caused by [his/her/its] excessive carelessness; and**

3. **That [***name of defendant***] would not have agreed to enter into the contract if [he/she/it] had known about the mistake.**

If you decide that [*name of defendant***] has proved all of the above, then no contract was created.**

DIRECTIONS FOR USE

If the mistake is one of law, this may not be a jury issue.

This instruction does not contain the requirement that the mistake be material to the contract because the materiality of a representation is a question of law. (*Merced County Mutual Fire Insurance Co. v. State of California* (1991) 233 Cal.App.3d 765, 772.) Accordingly, the judge would decide whether an alleged mistake was material, and that mistake would be inserted into this instruction.

SOURCES AND AUTHORITY

- The Civil Code provides that consent is not free when obtained through duress, menace, fraud, undue influence, or mistake, and is deemed to have been so obtained when it would not have been given but for such fraud or mistake. (Civ. Code, §§ 1567, 1568.)

- Civil Code section 1576 provides: "Mistake may be either of fact or law."

- Civil Code section 1577 provides the following definition of mistake of fact:

  > Mistake of fact is a mistake, not caused by the neglect of a legal duty on the part of the person making the mistake, and consisting in:
  > 1. An unconscious ignorance or forgetfulness of a fact past or present, material to the contract; or,
  > 2. Belief in the present existence of a thing material to the contract, which does not exist, or in the past existence of such a thing, which has not existed.

- Civil Code section 1578 defines mistake of law:

  > Mistake of law constitutes a mistake, within the meaning of this Article, only when it arises from:
  > 1. A misapprehension of the law by all parties, all supposing that they knew and understood it, and all making substantially the same mistake as to the law; or,
  > 2. A misapprehension of the law by one party, of which the others are aware at the time of contracting, but which they do not rectify.

- "It is settled that to warrant a unilateral rescission of a contract because of mutual mistake, the mistake must relate to basic or material fact, not a collateral matter." (*Wood v. Kalbaugh* (1974) 39 Cal.App.3d 926, 932.)

- The following quotation explains how unilateral mistakes can be used as a defense: "A mistake need not be mutual. Unilateral mistake is ground for relief where the mistake is due to the fault of the other party or the other party knows or has reason to know of the mistake. … To rely on a unilateral mistake of fact, [the party] must demonstrate his mistake was not caused by his 'neglect of a legal duty.' Ordinary negligence does not constitute the neglect of a legal duty as that term is used in section 1577." (*Architects & Contractors Estimating Service, Inc. v. Smith* (1985) 164 Cal.App.3d 1001, 1007–1008 (internal citations omitted).)

- To prevail on a unilateral mistake claim, the defendant must prove that the plaintiff knew that the defendant was mistaken and that plaintiff used that mistake to take advantage of the defendant: "Defendants contend that a material mistake of fact—namely, the defendants' belief that they would not be obligated to install a new roof upon the residence—prevented contract formation. A unilateral mistake of fact may be the basis of relief. However, such a unilateral mistake may not invalidate a contract without a showing that the other party to the contract was aware of the mistaken belief and unfairly utilized that mistaken belief in a manner enabling him to take advantage of the other party." (*Meyer v. Benko* (1976) 55 Cal.App.3d 937, 944 (internal citations omitted).)

- "Failure to make reasonable inquiry to ascertain or effort to understand the meaning and content of the contract upon which one relies constitutes neglect of a legal duty

such as will preclude recovery for unilateral mistake of fact." (*Wal-Noon Corporation v. Hill* (1975) 45 Cal.App.3d 605, 615.) However, "[o]rdinary negligence does not constitute the neglect of a legal duty as that term is used in section 1577." (*Architects & Contractors Estimating Service, Inc., supra,* 164 Cal.App.3d at p. 1008.)

- Neglect of legal duty has been equated with "gross negligence," which is defined as "the want of even scant care or an extreme departure from the ordinary standard of conduct." (*Van Meter v. Bent Construction Co.* (1956) 46 Cal.2d 588, 594.)

Secondary Sources

- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 365–381
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 215, *Duress, Menace, Fraud, Undue Influence, And Mistake*, §§ 215.50–215.57, 215.141 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 92, *Duress, Menace, Fraud, Undue Influence, And Mistake* (Matthew Bender)
- CALIFORNIA LEGAL FORMS, Ch. 77, *Discharge of Obligations,* § 77.350 (Matthew Bender)

331
Affirmative Defense—Bilateral Mistake

[*Name of defendant***] claims that there was no contract because both parties were mistaken about [***insert description of mistake***]. To succeed, [***name of defendant***] must prove both of the following:**

1. **That both parties were mistaken about [***insert description of mistake***]; and**

2. **That [***name of defendant***] would not have agreed to enter into this contract if [he/she/it] had known about the mistake.**

If you decide that [*name of defendant***] has proved both of the above, then no contract was created.**

DIRECTIONS FOR USE

This instruction does not contain the requirement that the mistake be material to the contract because the materiality of a representation is a question of law. (*Merced County Mutual Fire Insurance Co. v. State of California* (1991) 233 Cal.App.3d 765, 772.) Accordingly, the judge would decide whether an alleged mistake was material, and that mistake would be inserted into this instruction.

If the mistake is one of law, this may not be a jury issue.

SOURCES AND AUTHORITY

- The Civil Code provides that consent is not free when obtained through duress, menace, fraud, undue influence, or mistake, and is deemed to have been so obtained when it would not have been given but for such fraud or mistake. (Civ. Code, §§ 1567, 1568.)

- Civil Code section 1576 provides: "Mistake may be either of fact or law."

- Civil Code section 1577 provides the following definition of mistake of fact:

  > Mistake of fact is a mistake, not caused by the neglect of a legal duty on the part of the person making the mistake, and consisting in:
  > 1. An unconscious ignorance or forgetfulness of a fact past or present, material to the contract; or,

2. Belief in the present existence of a thing material to the contract, which does not exist, or in the past existence of such a thing, which has not existed.

- Civil Code section 1578 defines mistake of law:

  Mistake of law constitutes a mistake, within the meaning of this Article, only when it arises from:
  1. A misapprehension of the law by all parties, all supposing that they knew and understood it, and all making substantially the same mistake as to the law; or,
  2. A misapprehension of the law by one party, of which the others are aware at the time of contracting, but which they do not rectify.

- Section 20(1) of the Restatement Second of Contracts provides:

  There is no manifestation of mutual assent to an exchange if the parties attach materially different meanings to their manifestations and
  (a) neither party knows or has reason to know the meaning attached by the other; or
  (b) each party knows or each party has reason to know the meaning attached by the other.

- A mistake of fact may be urged as a defense to an action upon a contract only if the mistake is material to the contract. (*Edwards v. Lang* (1961) 198 Cal.App.2d 5, 12.)

<u>Secondary Sources</u>

- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 365–381
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 215, *Duress, Menace, Fraud, Undue Influence, And Mistake*, §§ 215.50–215.57, 215.140 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 92, *Duress, Menace, Fraud, Undue Influence, And Mistake* (Matthew Bender)
- CALIFORNIA LEGAL FORMS, Ch. 77, *Discharge of Obligations*, § 77.350 (Matthew Bender)

332
Affirmative Defense—Duress

[*Name of defendant***] claims that there was no contract because [his/her] consent was given under duress. To succeed, [***name of defendant***] must prove all of the following:**

1. **That [***name of plaintiff***] used a wrongful act or wrongful threat to pressure [***name of defendant***] into consenting to the contract;**

2. **That [***name of defendant***] was so afraid or intimidated by the wrongful act or wrongful threat that [he/she] did not have the free will to refuse to consent to the contract; and**

3. **That [***name of defendant***] would not have consented to the contract without the wrongful act or wrongful threat.**

An act or a threat is wrongful if [*insert relevant rule—e.g., "what is threatened is a criminal act"***].**

If you decide that [*name of defendant***] has proved all of the above, then no contract was created.**

SOURCES AND AUTHORITY

- The Civil Code provides that consent is not free when obtained through duress, menace, fraud, undue influence, or mistake, and is deemed to have been so obtained when it would not have been given but for such fraud or mistake. (Civ. Code, §§ 1567, 1568.)

- Civil Code section 1569 provides that the following acts constitute duress:

    1. Unlawful confinement of the person of the party, or of the husband or wife of such party, or of an ancestor, descendant, or adopted child of such party, husband, or wife;
    2. Unlawful detention of the property of any such person; or,
    3. Confinement of such person, lawful in form, but fraudulently obtained, or fraudulently made unjustly harassing or oppressive.

- Civil Code section 1570 provides:

  Menace consists in a threat:
  1. Of such duress as is specified in Subdivisions 1 and 3 of the last section;
  2. Of unlawful and violent injury to the person or property of any such person as is specified in the last section; or,
  3. Of injury to the character of any such person.

- "Menace" is considered to be duress: "Under the modern rule, ' "[d]uress, which includes whatever destroys one's free agency and constrains [her] to do what is against [her] will, may be exercised by threats, importunity or any species of mental coercion. It is shown where a party 'intentionally used threats or pressure to induce action or nonaction to the other party's detriment.' " ' The coercion must induce the assent of the coerced party, who has no reasonable alternative to succumbing." (*In re Marriage of Baltins* (1989) 212 Cal.App.3d 66, 84 (citations and footnotes omitted.)

- "Duress envisions some unlawful action by a party by which one's consent is obtained through fear or threats." (*Keithley v. Civil Service Bd. of The City of Oakland* (1970) 11 Cal.App.3d 443, 450 (internal citations omitted).)

- Duress is found only where fear is intentionally used as a means of procuring consent: "[A]n action for duress and menace cannot be sustained when the voluntary action of the apprehensive party is induced by his speculation upon or anticipation of a future event suggested to him by the defendant but not threatened to induce his conduct. The issue in each instance is whether the defendant intentionally exerted an unlawful pressure on the injured party to deprive him of contractual volition and induce him to act to his own detriment." (*Goldstein v. Enoch* (1967) 248 Cal.App.2d 891, 894–895 (internal citations omitted).)

- It is wrongful to use the threat of criminal prosecution to obtain a consent: "California law is clear that an agreement obtained by threat of criminal prosecution constitutes menace and is unenforceable as against public policy." (*Bayscene Resident Negotiators v. Bayscene Mobilehome Park* (1993) 15 Cal.App.4th 119, 127 (internal citations omitted).) However, a threat of legitimate civil action is not considered wrongful: "[T]he action or threat in duress or menace must be unlawful, and a threat to take legal action is not unlawful unless the party making the threat knows the falsity of his claim." (*Odorizzi v. Bloomfield School Dist.* (1966) 246 Cal.App.2d 123, 128.)

- Standard duress is evaluated under a subjective standard: "The question in each case is, Was the person so acted upon by threats of the person claiming the benefit of the contract, for the purpose of obtaining such contract, as to be bereft of the quality of mind essential to the making of a contract, and was the contract thereby obtained? Hence, under this theory duress is to be tested, not by the nature of the threats, but rather by the state of mind induced thereby in the victim." (*In re Marriage of*

Gonzalez (1976) 57 Cal.App.3d 736, 744 (internal quotation marks and citation omitted.)

- The wrongful acts of a third party may constitute duress sufficient to allow rescission of a contract with a party, who, although not participating in those wrongful acts, had knowledge of the innocent party's position. (*Leeper v. Beltrami* (1959) 53 Cal.2d 195, 205–206.)

- It is a well-established rule that evidence relied on to establish a defense of duress must establish the fact with reasonable certainty by clear, cogent, and convincing evidence. (*Stevenson v. Stevenson* (1940) 36 Cal.App.2d 494, 500.)

Secondary Sources

- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 416–422
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 215, *Duress, Menace, Fraud, Undue Influence, And Mistake*, §§ 215.20–215.21, 215.23–215.28, 215.120–215.121 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 92, *Duress, Menace, Fraud, Undue Influence, And Mistake* (Matthew Bender)
- CALIFORNIA LEGAL FORMS, Ch. 77, *Discharge of Obligations,* § 77.351 (Matthew Bender)

333
Affirmative Defense—Economic Duress

[*Name of defendant***] claims that there was no contract because [his/her/its] consent was given under duress. To succeed, [***name of defendant***] must prove both of the following:**

1. **That [***name of plaintiff***] used a wrongful threat to pressure [***name of defendant***]'s consent to the contract; and**

2. **That a reasonable person in [***name of defendant***]'s position would have felt that he or she had no reasonable alternative except to consent to the contract.**

A threat is wrongful if [*insert relevant rule, e.g., "what is threatened is a bad-faith breach of contract"***].**

If you decide that [*name of defendant***] has proved both of the above, then no contract was created.**

SOURCES AND AUTHORITY

- The Civil Code provides that consent is not free when obtained through duress, menace, fraud, undue influence, or mistake, and is deemed to have been so obtained when it would not have been given but for such fraud or mistake. (Civ. Code, §§ 1567, 1568.)

- The doctrine of economic duress has been described recently as follows: " 'As it has evolved to the present day, the economic duress doctrine is not limited by early statutory and judicial expressions requiring an unlawful act in the nature of a tort or a crime. Instead, the doctrine now may come into play upon the doing of a wrongful act which is sufficiently coercive to cause a reasonably prudent person faced with no reasonable alternative to succumb to the perpetrator's pressure. The assertion of a claim known to be false or a bad faith threat to breach a contract or to withhold a payment may constitute a wrongful act for purposes of the economic duress doctrine.'" (*Philippine Export And Foreign Loan Guarantee Corp. v. Chuidian* (1990) 218 Cal.App.3d 1058, 1077–1078 (internal citations omitted).)

- Economic duress is evaluated under an objective standard: "The doctrine of 'economic duress' can apply when one party has done a wrongful act which is sufficiently coercive to cause a reasonably prudent person, faced with no reasonable alternative, to agree to an unfavorable contract. The party subjected to the coercive act, and having no reasonable alternative, can then plead 'economic duress' to avoid

the contract." (*Crosstalk Productions, Inc. v. Jacobson* (1998) 65 Cal.App.4th 631, 644 (internal citation omitted).)

- The nonexistence of a "reasonable alternative" is a question of fact. (*Crosstalk Productions, Inc., supra,* 65 Cal.App.4th at p. 644.)

Secondary Sources

- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 420–422
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 215, *Duress, Menace, Fraud, Undue Influence, And Mistake*, §§ 215.22, 215.122 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 92, *Duress, Menace, Fraud, Undue Influence, And Mistake* (Matthew Bender)

334
Affirmative Defense—Undue Influence

[*Name of defendant*] claims that no contract was created because [he/she] was unfairly pressured by [*name of plaintiff*] into consenting to the contract.

To succeed, [*name of defendant*] must prove both of the following:

1. **That [*name of plaintiff*] used**

   [a relationship of trust and confidence] [or]

   [[*name of defendant*]'s weakness of mind] [or]

   [[*name of defendant*]'s needs or distress]

   to induce or pressure [*name of defendant*] into consenting to the contract; and

2. **That [*name of defendant*] would not otherwise have consented to the contract.**

If you decide that [*name of defendant*] has proved both of the above, then no contract was created.

SOURCES AND AUTHORITY

- The Civil Code provides that consent is not free when obtained through duress, menace, fraud, undue influence, or mistake, and is deemed to have been so obtained when it would not have been given but for such fraud or mistake. (Civ. Code, §§ 1567, 1568.)

- Civil Code section 1575 provides three circumstances that support a finding of undue influence:

  1. In the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him;
  2. In taking an unfair advantage of another's weakness of mind; or,
  3. In taking a grossly oppressive and unfair advantage of another's necessities or distress.

- The question of undue influence is decided as a question of fact: "[D]irect evidence of undue influence is rarely obtainable and, thus the court is normally relegated to

determination by inference from the totality of facts and circumstances. Indeed, there are no fixed definitions or inflexible formulas. Rather, we are concerned with whether from the entire context it appears that one's will was overborne and he was induced to do or forbear to do an act which he would not do, or would do, if left to act freely." (*Keithley v. Civil Service Bd. of the City of Oakland* (1970) 11 Cal.App.3d 443, 451 (internal citations omitted).)

- "In essence, undue influence consists of the use of excessive pressure by a dominant person over a servient person resulting in the apparent will of the servient person being in fact the will of the dominant person. The undue susceptibility to such overpersuasive influence may be the product of physical or emotional exhaustion or anguish which results in one's inability to act with unencumbered volition." (*Keithley, supra,* 11 Cal.App.3d at p. 451.)

- Whether or not the parties have a confidential relationship is a question of fact: "It is, of course, well settled that while the mere fact that a relationship is friendly and intimate does not necessarily amount to a confidential relationship, such relationship may be said to exist whenever trust and confidence is reposed by one person in the integrity and fidelity of another. It is likewise frequently emphasized that the existence of a confidential relationship presents a question of fact which, of necessity, may be determined only on a case by case basis." (*O'Neil v. Spillane* (1975) 45 Cal.App.3d 147, 153 (internal citations omitted).)

<u>Secondary Sources</u>

- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 423–428
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 215, *Duress, Menace, Fraud, Undue Influence, And Mistake,* §§ 215.40–215.42, 215.130–215.132 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 92, *Duress, Menace, Fraud, Undue Influence, And Mistake* (Matthew Bender)
- CALIFORNIA LEGAL FORMS, Ch. 77, *Discharge of Obligations,* § 77.352 (Matthew Bender)

335
Affirmative Defense—Fraud

[*Name of defendant***] claims that no contract was created because [his/her/ its] consent was obtained by fraud. To succeed, [***name of defendant***] must prove all of the following:**

1. **That [***name of plaintiff***] represented that [***insert alleged fraudulent statement***];**
2. **That [***name of plaintiff***] knew that the representation was not true;**
3. **That [***name of plaintiff***] made the representation to persuade [***name of defendant***] to agree to the contract;**
4. **That [***name of defendant***] reasonably relied on this representation; and**
5. **That [***name of defendant***] would not have entered into the contract if [he/she/it] had known that the representation was not true.**

If you decide that [*name of defendant***] has proved all of the above, then no contract was created.**

DIRECTIONS FOR USE

This instruction covers intentional misrepresentation under the first alternative presented in Civil Code section 1572. The other types of fraud that are set forth in section 1572 are negligent misrepresentation, concealment of a material fact, and false promise.

If the case involves an alleged negligent misrepresentation, substitute the following for element 2: "That [*name of plaintiff*] had no reasonable grounds for believing the representation was true."

If the case involves concealment, the following may be substituted for element 1: "That [*name of plaintiff*] intentionally concealed an important fact from [*name of defendant*], creating a false representation." See Instruction 1901, *Concealment*, for alternative ways of proving this element.

If the case involves a false promise, substitute the following for element 1: "That [*name of plaintiff*] made a promise that [he/she/it] did not intend to perform" and insert the word "promise" in place of the word "representation" throughout the remainder of the instruction.

SOURCES AND AUTHORITY

- The Civil Code provides that consent is not free when obtained through duress, menace, fraud, undue influence, or mistake, and is deemed to have been so obtained when it would not have been given but for such fraud or mistake. (Civ. Code, §§ 1567, 1568.)

- Civil Code section 1572 provides:

  > Actual fraud, within the meaning of this Chapter, consists in any of the following acts, committed by a party to the contract, or with his connivance, with intent to deceive another party thereto, or to induce him to enter into the contract:
  >
  > 1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;
  > 2. The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;
  > 3. The suppression of that which is true, by one having knowledge or belief of the fact;
  > 4. A promise made without any intention of performing it; or,
  > 5. Any other act fitted to deceive.

- Fraud can be found in making a misstatement of fact, as well as in the concealment of a fact: "Actual fraud involves conscious misrepresentation, or concealment, or non-disclosure of a material fact which induces the innocent party to enter the contract." (*Odorizzi v. Bloomfield School Dist.* (1966) 246 Cal.App.2d 123, 128.)

- Fraud may be asserted as an affirmative defense: "One who has been induced to enter into a contract by false and fraudulent representations may rescind the contract; or he may affirm it, keeping what he has received under it, and maintain an action to recover damages he has sustained by reason of the fraud; or he may set up such damages as a complete or partial defense if sued on the contract by the other party." (*Grady v. Easley* (1941) 45 Cal.App.2d 632, 642.)

- "It is well established that a defrauded defendant may set up the fraud as a defense and, in fact, may even recoup his damages by counterclaim in an action brought by the guilty party to the contract. [Citations.] The right to avoid for fraud, however, is lost if the injured party, after acquiring knowledge of the fraud, manifests an intention to affirm the contract." (*Bowmer v. H. C. Louis, Inc.* (1966) 243 Cal.App.2d 501, 503.)

Secondary Sources

- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 392–415
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 215, *Duress, Menace, Fraud, Undue Influence, And Mistake*, §§ 215.70–215.72, 215.144 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 92, *Duress, Menace, Fraud, Undue Influence, And Mistake* (Matthew Bender)
- CALIFORNIA LEGAL FORMS, Ch. 77, *Discharge of Obligations*, § 77.353 (Matthew Bender)

336
Affirmative Defense—Waiver

[*Name of defendant***] claims that [he/she/it] did not have to [***insert description of performance***] because [***name of plaintiff***] gave up [his/her/its] right to have [***name of defendant***] perform [this/these] obligation[s]. This is called a "waiver."**

To succeed, [*name of defendant***] must prove both of the following by clear and convincing evidence:**

1. **That [***name of plaintiff***] knew [***name of defendant***] was required to [***insert description of performance***]; and**

2. **That [***name of plaintiff***] freely and knowingly gave up [his/her/its] right to have [***name of defendant***] perform [this/these] obligation[s].**

A waiver may be oral or written or may arise from conduct that shows that [*name of plaintiff***] gave up that right.**

If [*name of defendant***] proves that [***name of plaintiff***] gave up [his/her] right to [***name of defendant***]'s performance of [***insert description of performance***], then [***name of defendant***] was not required to perform [this/these] obligation[s].**

DIRECTIONS FOR USE

This issue is decided under the "clear and convincing" standard of proof. See instruction 201, *More Likely True—Clear and Convincing Proof*

SOURCES AND AUTHORITY

- "Waiver is the intentional relinquishment of a known right after knowledge of the facts." (*Roesch v. De Mota* (1944) 24 Cal.2d 563, 572.)

- "Waiver … is a question of fact and not of law, hence the intention to commit a waiver must be clearly expressed." (*Moss v. Minor Properties, Inc.* (1968) 262 Cal.App.2d 847, 857.)

- When the injured party with knowledge of the breach continues to accept performance from the guilty party, such conduct may constitute a waiver of the breach. (*Kern Sunset Oil Co. v. Good Roads Oil Co*. (1931) 214 Cal. 435, 440–441.)

- There can be no waiver where the one against whom it is asserted has acted without full knowledge of the facts. It cannot be presumed, in the absence of such knowledge, that there was an intention to waive an existing right. (*Craig v. White* (1921) 187 Cal. 489, 498.)

- " 'Waiver always rests upon intent. Waiver is the intentional relinquishment of a known right after knowledge of the facts.' The burden, moreover, is on the party claiming a waiver of a right to prove it by clear and convincing evidence that does not leave the matter to speculation, and 'doubtful cases will be decided against a waiver'." (*City of Ukiah v. Fones* (1966) 64 Cal.2d 104, 107–108; *Florence Western Medical Clinic v. Bonta* (2000) 77 Cal.App.4th 493, 504.)

- The "clear and convincing" standard applies "particularly" to rights favored in the law; however, it does not apply exclusively to such favored rights. It is proper to instruct a jury that waiver must be proved by this higher standard of proof. *(DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe and Takeout III, Ltd.* (1994) 30 Cal.App.4th 54, 61.)

Secondary Sources

- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 140, *Contracts*, §§ 140.57, 140.113, 140.136 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 50, *Contracts*, §§ 50.40, 50.41, 50.110 (Matthew Bender)

337
Affirmative Defense—Novation

[*Name of defendant*] claims that the original contract with [*name of plaintiff*] cannot be enforced because the parties substituted a new and different contract for the original.

To succeed, [*name of defendant*] must prove that all parties agreed, by words or conduct, to cancel the original contract and to substitute a new contract in its place.

If you decide that [*name of defendant*] has proved this, then the original contract is not enforceable.

DIRECTIONS FOR USE

If the contract in question is not the original contract, specify which contract it is instead of "original."

SOURCES AND AUTHORITY

- Civil Code section 1530 provides: "Novation is the substitution of a new obligation for an existing one."

- Civil Code section 1531 provides:

  Novation is made:
  1. By the substitution of a new obligation between the same parties, with intent to extinguish the old obligation;
  2. By the substitution of a new debtor in place of the old one, with intent to release the latter; or,
  3. By the substitution of a new creditor in place of the old one, with intent to transfer the rights of the latter to the former.

- "A novation is a substitution, by agreement, of a new obligation for an existing one, with intent to extinguish the latter. A novation is subject to the general rules governing contracts and requires an intent to discharge the old contract, a mutual assent, and a consideration." (*Klepper v. Hoover* (1971) 21 Cal.App.3d 460, 463.)

- Conduct may form the basis for a novation although there is no express writing or agreement. (*Silva v. Providence Hospital of Oakland* (1939) 14 Cal.2d 762, 773.)

- Novation is a question of fact, and the burden of proving it is upon the party asserting it. (*Alexander v. Angel* (1951) 37 Cal.2d 856, 860.)

- "When there is conflicting evidence the question whether the parties to an agreement entered into a modification or a novation is a question of fact." (*Howard v. County of Amador* (1990) 220 Cal.App.3d 962, 980.)

- "The 'question whether a novation has taken place is always one of intention,' with the controlling factor being the intent of the obligee to effect a release of the original obligor on his obligation under the original agreement." (*Alexander, supra,* 37 Cal.2d at p. 860 (internal citations omitted).)

- "[I]n order for there to be a valid novation, it is necessary that the parties intend that the rights and obligations of the new contract be substituted for the terms and conditions of the old contract." (*Wade v. Diamond A Cattle Co.* (1975) 44 Cal.App.3d 453, 457.)

- "While the evidence in support of a novation must be 'clear and convincing,' the 'whole question is one of fact and depends upon all the facts and circumstance of the particular case,' with the weight and sufficiency of the proof being matters for the determination of the trier of the facts under the general rules applicable to civil actions." (*Alexander, supra,* 37 Cal.2d at pp. 860–861 (internal citations omitted).)

<u>Secondary Sources</u>

- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 906–908
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 140, *Contracts*, § 140.141 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 50, *Contracts*, §§ 50.450–50.464 (Matthew Bender)
- CALIFORNIA LEGAL FORMS, Ch. 77, *Discharge of Obligations,* §§ 77.20, 77.280–77.282 (Matthew Bender)

350
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 caused by the breach. 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."

- 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 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 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 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.)

<u>Secondary Sources</u>

- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, § 813–822
- California Breach of Contract Remedies (Cont.Ed.Bar 1980; 2001 supp.) Recovery of Money Damages, §§ 4.1–4.9
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 140, *Contracts,* §§ 140.55–140.56, 140.100–140.106, Ch. 177, *Damages* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 50, *Contracts,* §§ 50.10–50.11, Ch. 65, *Damages* (Matthew Bender)

351
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 special 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.
  (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.)

- "[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.)

Secondary Sources

- 1 Witkin, Summary of California Law, (9th ed. 1987) § 815
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 177, *Damages* (Matthew Bender)

352
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*] would have received if the contract had been performed and then subtract from that amount the costs [including the value of the [labor/materials/rents/expenses/interest on loans invested in the business]] [*name of plaintiff*] would have had if the contract had been performed.

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 350, *Introduction to Contract Damages*, or Instruction 351, *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."

- "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. 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 (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
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 177, *Damages* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 65, *Damages* (Matthew Bender)

353
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 more profits but for [*name of defendant*]'s breach of the contract.

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

1. **First, calculate [*name of plaintiff*]'s estimated total profit by determining the gross amount [he/she/it] would have received if the contract had been performed, and then subtracting from that amount the costs [including the value of the [labor/materials/rents/expenses/ interest on loans invested in the business]] [*name of plaintiff*] was would have had if the contract had been performed;**

2. **Next, calculate [*name of plaintiff*]'s actual profit by determining the gross amount [he/she/it] actually received, and then subtracting from that amount [*name of plaintiff*]'s actual costs [including the value of the [labor/materials/rents/expenses/interest on loans invested in the business]]; and**

3. **Then, subtract [*name of plaintiff*]'s actual profit, which you determined in the second step, from [his/her/its] estimated total profit, which you determined in the first step. 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 350, *Introduction to Contract Damages*, or Instruction 351, *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."

- "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.

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 (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
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 177, *Damages* (Matthew Bender)

354
Owner's/Lessee'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 [lessee's interest in the] property and its fair market value had the improvements been constructed.]

DIRECTIONS FOR USE

Read this instruction in conjunction with Instruction 350, *Introduction to Contract Damages.* The bracketed options state alternative measures of damage. Choose the option appropriate to the facts of the case. For a definition of "fair market value" see Instruction 3501, *"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 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, 123 [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 at pp. 141–142, internal citations and footnote omitted.)

<u>Secondary Sources</u>

- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 854–855
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 104, *Building Contracts* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 65, *Damages* (Matthew Bender)
- CALIFORNIA LEGAL FORMS, Ch. 30D, *Construction Contracts And Subcontracts,* § 30D.223 (Matthew Bender)

355
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 350, *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*, 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. 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
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 177, *Damages* (Matthew Bender)

356
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 350, *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 3501, *"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."

- "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, 648 [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, 470,471 [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, 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].)

Secondary Sources

- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 843–845
- California Real Property Remedies Practice (Cont.Ed.Bar 1980; 1999 supp.) Breach of Seller-Buyer Agreements, §§ 4.11–4.14
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 177, *Damages*, Ch. 569, *Vendor and Purchaser* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 23, *Real Property Sales Agreements* (Matthew Bender)

357
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 350, *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 3501, *"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.)

- 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].)

- "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, §§ 846–851
- 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
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 569, *Vendor and Purchaser* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 23, *Real Property Sales Agreements* (Matthew Bender)

358
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 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.)

Secondary Sources

- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 140, *Contracts,* § 140.56, Ch. 177, *Damages* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 65, *Damages* (Matthew Bender)

359
Present Cash Value of Future Damages

To recover for future harm, [*name of plaintiff*] must prove that such harm is reasonably certain to occur and must prove the amount of those future damages. 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."

- "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.)

Secondary Sources

- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 177, *Damages* (Matthew Bender)
- CALIFORNIA LEGAL FORMS, Ch. 77, *Discharge of Obligations* (Matthew Bender)

360
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 may still award [him/ her/it] 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
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 177, *Damages* (Matthew Bender)
- CALIFORNIA LEGAL FORMS, Ch. 75, *Formation Of Contracts And Standard Contractual Provisions* (Matthew Bender)

361
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, 761, 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.)

<u>Secondary Sources</u>

- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 177, *Damages* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 65, *Damages* (Matthew Bender)

NEGLIGENCE

400
Essential Factual Elements

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

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

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

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

Just because [*name of plaintiff***] was harmed does not, by itself, mean that [***name of defendant***] is legally responsible for the harm.**

DIRECTIONS FOR USE

In medical malpractice or professional negligence cases, the word "medical" or "professional" should be added before the word "negligence" in the first paragraph.

The last sentence of this instruction is intended to addresses a false belief held by some jurors that they must assign fault just because there is an injury.

SOURCES AND AUTHORITY

- Civil Code section 1714(a) provides, in part: "Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully, or by want of ordinary care, brought the injury upon himself." This statute is the foundation of negligence law in California. (*Rowland v. Christian* (1968) 69 Cal.2d 108, 111–112, 70 Cal.Rptr. 97, 443 P.2d 561.)

- The basic elements of a negligence action are: (1) The defendant had a legal duty to conform to a standard of conduct to protect the plaintiff, (2) the defendant failed to meet this standard of conduct, (3) the defendant's failure was the proximate or legal cause of the resulting injury, and (4) the plaintiff was damaged. (*Ladd v. County of San Mateo* (1996) 12 Cal.4th 913, 917, 50 Cal.Rptr.2d 309, 911 P.2d 496; *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 673, 25 Cal.Rptr.2d 137, 863 P.2d 207.)

- Restatement Second of Torts, section 328A, provides:

  In an action for negligence the plaintiff has the burden of proving
  (a) facts which give rise to a legal duty on the part of the defendant to conform to the standard of conduct established by law for the protection of the plaintiff,
  (b) failure of the defendant to conform to the standard of conduct,
  (c) that such failure is a legal cause of the harm suffered by the plaintiff, and
  (d) that the plaintiff has in fact suffered harm of a kind legally compensable by damages.

- The issue of whether a legal duty exists is an issue of law, not an issue of fact for the jury. (*Kentucky Fried Chicken of California, Inc. v. Superior Court* (1997) 14 Cal.4th 814, 819, 59 Cal.Rptr.2d 756, 927 P.2d 1260; *Isaacs v. Huntington Memorial Hospital* (1985) 38 Cal.3d 112, 124, 211 Cal.Rptr. 356, 695 P.2d 653.) The trier of fact ordinarily determines whether the defendant breached the standard of care, causation, and the amount of damages, if any.

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 729–734, 748, 749
- CALIFORNIA TORTS, Ch. 1, *Negligence: Duty and Breach*, §§ 1.01–1.31, Ch. 2, *Causation*, §§ 2.01–2.11, Ch. 3, *Proof of Negligence*, §§ 3.01–3.34 (Matthew Bender)
- California Tort Guide (Cont.Ed.Bar 1996) §§ 1.4–1.18
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 380, *Negligence* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 165, *Negligence*, §§ 165.10, 165.20 (Matthew Bender)

COMMENTARY

The word “harm” is used throughout these instructions, instead of terms like “loss,” “injury,” and “damage,” because “harm” is all-purpose and suffices in their place.

401
Basic Standard of Care

Negligence is the failure to use reasonable care to prevent harm to oneself or to others.

A person can be negligent by acting or by failing to act. A person is negligent if he or she does something that a reasonably careful person would not do in the same situation or fails to do something that a reasonably careful person would do in the same situation.

You must decide how a reasonably careful person would have acted in [*name of plaintiff/defendant***]'s situation.**

SOURCES AND AUTHORITY

- "The formulation of the standard of care is a question of law for the court. Once the court has formulated the standard, its application to the facts of the case is a task for the trier of fact if reasonable minds might differ as to whether a party's conduct has conformed to the standard." (*Ramirez v. Plough, Inc.* (1993) 6 Cal.4th 539, 546, 25 Cal.Rptr.2d 97, 863 P.2d 167 (internal citations omitted).)

- Restatement Second of Torts, section 282, defines negligence as "conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm."

- Restatement Second of Torts, section 283, provides: "Unless the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like circumstances."

- The California Supreme Court has stated: "Because application of [due care] is inherently situational, the amount of care deemed reasonable in any particular case will vary, while at the same time the standard of conduct itself remains constant, i.e., due care commensurate with the risk posed by the conduct taking into consideration all relevant circumstances. [Citations]." (*Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 997, 35 Cal.Rptr.2d 685, 884 P.2d 142; see also *Tucker v. Lombardo* (1956) 47 Cal.2d 457, 464, 303 P.2d 1041.)

- The proper conduct of a reasonable person in a particular situation may become settled by judicial decision or may be established by statute or administrative regulation. (*Ramirez, supra,* 6 Cal.4th at p. 547.) (See instructions 418 to 421 on negligence per se.)

- Negligence can be found in the doing of an act, as well as in the failure to do an act. (Rest.2d Torts, § 284.)

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 750–751, pp. 87–90
- CALIFORNIA TORTS, Ch. 1, *Negligence: Duty and Breach*, §§ 1.01, 1.02, 1.30 (Matthew Bender)
- California Tort Guide (Cont.Ed.Bar 1996) § 1.3
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 380, *Negligence* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 165, *Negligence*, § 165.31 (Matthew Bender)

402
Standard of Care for Minors

[*Name of plaintiff/defendant***] is a child who was ___ years old at the time of the incident. Children are not held to the same standards of behavior as adults. A child is required to use the amount of care that a reasonably careful child of the same age, intelligence, knowledge, and experience would use in that same situation.**

SOURCES AND AUTHORITY

- "Children are judged by a special subjective standard. … They are only required to exercise that degree of care expected of children of like age, experience and intelligence." (*Daun v. Truax* (1961) 56 Cal.2d 647, 654, 16 Cal.Rptr. 351, 365 P.2d 407.)

- If the negligence is negligence per se, violation of a statute will create a presumption of negligence that "may be rebutted by a showing that the child, in spite of the violation of the statute, exercised the care that children of his maturity, intelligence and capacity ordinarily exercise under similar circumstances." (*Daun, supra,* 56 Cal.2d at p. 655.)

- Restatement Second of Torts, section 283A, provides: "If the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable person of like age, intelligence, and experience under like circumstances."

- The standard of care for minors is not the standard of an "average" child of the same age; the standard is subjective, based on the conduct of a child of the same age, intelligence, and experience as the minor plaintiff or defendant. (*Cummings v. County of Los Angeles* (1961) 56 Cal.2d 258, 263, 14 Cal.Rptr. 668, 363 P.2d 900.)

- An exception to this reduced standard of care may be found if the minor was engaging in an adult activity, such as driving. (*Prichard v. Veterans Cab Co.* (1965) 63 Cal.2d 727, 732, 47 Cal.Rptr. 904, 408 P.2d 360; *Neudeck v. Bransten* (1965) 233 Cal.App.2d 17, 21, 43 Cal.Rptr. 250; see also Rest.2d Torts, § 283A, com. c.)

- Children under the age of five are incapable of contributory negligence as a matter of law. (*Christian v. Goodwin* (1961) 188 Cal.App.2d 650, 655, 10 Cal.Rptr. 507.)

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 806–808
- CALIFORNIA TORTS, Ch. 1, *Negligence: Duty and Breach*, § 1.31 (Matthew Bender)

- California Tort Guide (Cont.Ed.Bar 1996) § 1.19
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 380, *Negligence* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 165, *Negligence*, §§ 165.121, 165.190 (Matthew Bender)
- CALIFORNIA LEGAL FORMS, Ch. 100A, *Personal Affairs of Minors* (Matthew Bender)

403
Standard of Care for Physically Disabled Person

A person with a physical disability is required to use the amount of care that a reasonably careful person who has the same physical disability would use in the same situation.

DIRECTIONS FOR USE

By "same" disability, this instruction is referring to the effect of the disability, not the cause.

SOURCES AND AUTHORITY

- Restatement Second of Torts, section 283C, provides: "If the actor is ill or otherwise physically disabled, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like disability." (See also *Conjorsky v. Murray* (1955) 135 Cal.App.2d 478, 482, 287 P.2d 505; *Jones v. Bayley* (1942) 49 Cal.App.2d 647, 654, 122 P.2d 293.)

- Persons with mental illnesses are not covered by the same standard as persons with physical illnesses. (See *Bashi v. Wodarz* (1996) 45 Cal.App.4th 1314, 1323, 53 Cal.Rptr.2d 635.)

- Civil Code section 41 provides: "A person of unsound mind, of whatever degree, is civilly liable for a wrong done by the person, but is not liable in exemplary damages unless at the time of the act the person was capable of knowing that the act was wrongful." This section applies to negligence. (*Bashi, supra,* 45 Cal.App.4th at p. 1321.)

- Restatement Second of Torts, section 283B, provides: "Unless the actor is a child, his insanity or other mental deficiency does not relieve the actor from liability for conduct which does not conform to the standard of a reasonable man under like circumstances."

- As to contributory negligence, the courts agree with the Restatement's position that mental deficiency that falls short of insanity does not excuse conduct that is otherwise contributory negligence. (*Fox v. City and County of San Francisco* (1975) 47 Cal.App.3d 164, 169, 120 Cal.Rptr. 779; Rest.2d Torts, § 464, com. g.)

<u>Secondary Sources</u>

- California Tort Guide (Cont.Ed.Bar 1996) § 1.20

- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 380, *Negligence* (Matthew Bender)

404
Intoxication

A person is not necessarily negligent just because he or she used alcohol [or drugs]. However, people who drink alcohol [or take drugs] must act just as carefully as those who do not.

DIRECTIONS FOR USE

This instruction should be given only if there is evidence of alcohol or drug consumption. This instruction is not intended for situations in which intoxication is grounds for a negligence per se instruction (e.g., driving under the influence).

SOURCES AND AUTHORITY

- Mere consumption of alcohol is not negligence in and of itself: "The fact that a person when injured was intoxicated is not in itself evidence of contributory negligence, but it is a circumstance to be considered in determining whether his intoxication contributed to his injury." (*Coakley v. Ajuria* (1930) 209 Cal. 745, 752, 290 P. 33.)

- Intoxication is not generally an excuse for failure to comply with the reasonable-person standard. (*Cloud v. Market Street Railway Co.* (1946) 74 Cal.App.2d 92, 97, 168 P.2d 191.)

- Intoxication is not negligence as a matter of law, but it is a circumstance for the jury to consider in determining whether such intoxication was a contributing cause of an injury and is also a question of fact for the jury. (*Pittman v. Boiven* (1967) 249 Cal.App.2d 207, 217, 57 Cal.Rptr. 319; *Barr v. Scott* (1955) 134 Cal.App.2d 823, 827–828, 286 P.2d 552; see also *Emery v. Los Angeles Ry. Corp.* (1943) 61 Cal.App.2d 455, 461, 143 P.2d 112.)

<u>Secondary Sources</u>

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 1075, p. 473
- CALIFORNIA TORTS, Ch. 20, *Motor Vehicles*, §§ 20.02, 20.04 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 380, *Negligence* (Matthew Bender)

405
Plaintiff's Contributory Negligence

[*Name of defendant***] claims that [***name of plaintiff***]'s harm was caused in whole or in part by [***name of plaintiff***]'s own negligence. To succeed on this claim, [***name of defendant***] must prove both of the following:**

1. **That [***name of plaintiff***] was negligent; and**

2. **That [***name of plaintiff***]'s negligence was a substantial factor in causing [his/her] harm.**

If [*name of defendant***] proves the above, [***name of plaintiff***]'s damages are reduced by your determination of the percentage of [***name of plaintiff***]'s responsibility. I will calculate the actual reduction.**

DIRECTIONS FOR USE

This instruction should not be given absent substantial evidence that plaintiff was negligent. (*Drust v. Drust* (1980) 113 Cal.App.3d 1, 6, 169 Cal.Rptr. 750.)

This instruction should be used only where the defendant claims that plaintiff was negligent, there is only one defendant, and the defendant does not claim that any other factor caused the harm.

SOURCES AND AUTHORITY

- In *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, 810, 119 Cal.Rptr. 858, 532 P.2d 1226, the Court concluded that the "all-or-nothing" rule of contributory negligence should be abandoned in favor of a rule that assesses liability in proportion to fault.

- Restatement Second of Torts, section 463, defines "contributory negligence" as "conduct on the part of the plaintiff which falls below the standard to which he should conform for his own protection, and which is a legally contributing cause cooperating with the negligence of the defendant in bringing about the plaintiff's harm."

- It is settled that the issue of contributory negligence must be presented to the jury whenever it is asserted as a defense and there is "some evidence of a substantial character" to support it. (*Hasson v. Ford Motor Co.* (1977) 19 Cal.3d 530, 548, 138 Cal.Rptr. 705, 564 P.2d 857; *Scott v. Alpha Beta Co.* (1980) 104 Cal.App.3d 305, 310, 163 Cal.Rptr. 544.)

- Courts have found that it is not error to use the phrase "contributory negligence" in a jury instruction on comparative negligence: "The use by the trial court of the phrase 'contributory negligence' in instructing on the concept of comparative negligence is innocuous. *Li v. Yellow Cab Co.* [citation] abolished the legal doctrine, but not the phrase or the concept of 'contributory negligence.' A claimant's negligence contributing causally to his own injury may be considered now not as a bar to his recovery, but merely as a factor to be considered in measuring the amount thereof." (*Bradfield v. Trans World Airlines, Inc.* (1979) 88 Cal.App.3d 681, 686, 152 Cal.Rptr. 172.)

- The defendant has the burden of proving contributory negligence. (*Drust, supra,* 113 Cal.App.3d at p. 6.)

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1049–1058, pp. 446–457
- CALIFORNIA TORTS, Ch. 4, *Comparative Negligence, Assumption of the Risk, and Related Defenses*, § 4.04 (Matthew Bender)
- California Tort Guide (Cont.Ed.Bar 1996) §§ 1.38–1.39
- CALIFORNIA TRIAL GUIDE, Unit 90, *Closing Argument*, § 90.91 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 380, *Negligence* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 165, *Negligence*, § 165.380 (Matthew Bender)

406
Apportionment of Responsibility

More than one person's [negligence/fault], [including [*name of plaintiff*]'s], may have been a substantial factor in causing [*name of plaintiff*]'s harm. If so, you must decide how much responsibility each person has by determining, on a percentage basis, the extent to which his or her [negligence/fault] contributed to causing the harm.

DIRECTIONS FOR USE

Do not give the second bracketed phrase if plaintiff's contributory negligence is not at issue.

Use "fault" if there is a need to allocate harm between defendants who are sued for conduct other than negligence, e.g., strict products liability.

SOURCES AND AUTHORITY

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

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

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

<u>Secondary Sources</u>

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 51–55, pp.112–116
- CALIFORNIA TORTS, Ch. 4, *Comparative Negligence, Assumption of the Risk, and Related Defenses*, §§ 4.04–4.03, 4.07–4.08, Ch. 74, *Resolving Multiparty Tort Litigation*, § 74.03 (Matthew Bender)
- California Tort Guide (Cont.Ed.Bar 1996) §§ 1.52–1.59
- CALIFORNIA TRIAL GUIDE, Unit 90, *Closing Argument*, § 90.91 (Matthew Bender)

- CALIFORNIA PRODUCTS LIABILITY ACTIONS, Ch. 2, *Liability for Defective Products*, § 2.14A, Ch. 9, *Damages*, § 9.01 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 300, *Indemnity and Contribution* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 115, *Indemnity and Contribution*, Ch. 165, *Negligence*, §§ 165.284, 165.380 (Matthew Bender)

407
Decedent's Contributory Negligence

[*Name of defendant*] claims that [*name of decedent*]'s death was caused in whole or in part by [*name of decedent*]'s own negligence. To succeed on this claim, [*name of defendant*] must prove both of the following:

1. **That [*name of decedent*] was negligent; and**

2. **That [*name of decedent*]'s negligence was a substantial factor in causing [his/her] death.**

If [*name of defendant*] proves the above, [*name of plaintiff*]'s damages are reduced by your determination of the percentage of [*name of decedent*]'s responsibility. I will calculate the actual reduction.

DIRECTIONS FOR USE

This instruction should not be given absent evidence that the decedent was negligent. (*Drust v. Drust* (1980) 113 Cal.App.3d 1, 6, 169 Cal.Rptr. 750.)

SOURCES AND AUTHORITY

- "[P]rinciples of comparative fault and equitable indemnification support an apportionment of liability among those responsible for the loss, including the decedent, whether it be for personal injury or wrongful death." (*Horwich v. Superior Court* (1999) 21 Cal.4th 272, 285, 87 Cal.Rptr.2d 222, 980 P.2d 927.)

- "[I]n wrongful death actions, the fault of the decedent is attributable to the surviving heirs whose recovery must be offset by the same percentage. [Citation.]" (*Atkins v. Strayhorn* (1990) 223 Cal.App.3d 1380, 1395, 273 Cal.Rptr. 231.)

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 1214, p. 650
- CALIFORNIA TORTS, Ch. 4, *Comparative Negligence, Assumption of the Risk, and Related Defenses*, § 4.07, Ch. 55, *Death and Survival Actions*, § 55.05 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 181, *Death and Survival Actions* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 66, *Death and Survival Actions* (Matthew Bender)

408
Co-participant in a Sports Activity

[*Name of plaintiff*] claims [he/she] was harmed while participating in a sporting activity and that [*name of defendant*] is responsible for that harm. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] either intentionally injured [*name of plaintiff*] or acted so recklessly that [his/her] conduct was totally outside the range of ordinary activity involved in the sport;**

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

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

Conduct is totally outside the range of ordinary activity involved in a sport if that conduct can be prohibited without discouraging vigorous participation or otherwise fundamentally changing the sport.

[*Name of defendant*] is not responsible for an injury resulting from conduct that was merely accidental, careless or negligent.

SOURCES AND AUTHORITY

- "Primary assumption of risk arises where a plaintiff voluntarily participates in an activity or sport involving certain inherent risks; primary assumption of risk ... bar[s] recovery because no duty of care is owed as to such risks." (*Connelly v. Mammoth Mountain Ski Area* (1995) 39 Cal.App.4th 8, 11 [45 Cal.Rptr.2d 855], internal citations omitted.)

- "A coparticipant in an active sport ordinarily bears no liability for an injury resulting from conduct in the course of the sport that is merely careless or negligent." (*Ford v. Gouin* (1992) 3 Cal.4th 339, 342 [11 Cal.Rptr.2d 30].)

- "[W]e conclude that a participant in an active sport breaches a legal duty of care to other participants—i.e., engages in conduct that properly may subject him or her to financial liability—only if the participant intentionally injures another player or engages in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport." (*Knight v. Jewett* (1992) 3 Cal.4th 296, 320 [11 Cal.Rptr.2d 2].)

- "The *Knight* rule, however, 'does not grant unbridled legal immunity to all defendants participating in sporting activity. The Supreme Court has stated that 'it is well established that defendants generally do have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport.' Thus, even though 'defendants generally have no legal duty to eliminate (or protect a plaintiff against) risks inherent in the sport itself,' they may not increase the likelihood of injury above that which is inherent." (*Distefano v. Forester* (2001) 85 Cal.App.4th 1249, 1261 [102 Cal.Rptr.2d 813], internal citations omitted.)

- "In *Freeman v. Hale*, the Court of Appeal advanced a test … for determining what risks are inherent in a sport: '[C]onduct is totally outside the range of ordinary activity involved in the sport (and thus any risks resulting from that conduct are not inherent to the sport) if the prohibition of that conduct would neither deter vigorous participation in the sport nor otherwise fundamentally alter the nature of the sport.' " (*Distefano, supra,* 85 Cal.App.4th at p. 1261.)

- " '[T]he existence and scope of a defendant's duty of care is a legal question which depends on the nature of the sport or activity in question and on the parties' general relationship to the activity, and is an issue to be decided by the court, rather than the jury.' Thus, when the injury occurs in a sports setting the court must decide whether the nature of the sport and the relationship of the defendant and the plaintiff to the sport as coparticipant, coach, premises owner or spectator support the legal conclusion of duty." (*Mastro v. Petrick* (2001) 93 Cal.App.4th 83, 88 [112 Cal.Rptr.2d 185], internal citations omitted.)

- "The existence of a duty of care is a separate issue from the question whether (on the basis of forseeability among other factors) a particular defendant breached that duty of care, which is an essentially factual matter." (*Kockelman v. Segal* (1998) 61 Cal.App.4th 491, 498 [71 Cal.Rptr.2d 552].)

- "A jury could find that, by using a snowboard without the retention strap, in violation of the rules of the ski resort and a county ordinance, defendant unnecessarily increased the danger that his snowboard might escape his control and injure other participants such as plaintiff. The absence of a retention strap could therefore constitute conduct not inherent to the sport which increased the risk of injury." (*Campbell v. Derylo* (1999) 75 Cal.App.4th 823, 829 [89 Cal.Rptr.2d 519].)

<u>Secondary Sources</u>

- 6 Witkin, Summary of California Law (2002 supp.) Torts, §§ 1090A–1090C, pp. 310–329
- CALIFORNIA TORTS, Ch. 4, *Comparative Negligence, Assumption of the Risk, and Related Defenses*, § 4.03, Ch. 15, *General Premises Liability*, § 15.21 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 273, *Games, Sports, and Athletics*, Injuries to Participants Ch. 380, *Negligence* (Matthew Bender)

- CALIFORNIA POINTS AND AUTHORITIES, Ch. 165, *Negligence*, § 165.401 (Matthew Bender)

409
Liability of Instructors, Trainers, or Coaches

[*Name of plaintiff*] claims [he/she] was harmed by [*name of defendant*]'s [coaching/training/instruction]. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] was [*name of plaintiff*]'s [coach/trainer/instructor];**

2. **That [*name of defendant*] increased the risk of harm beyond those risks that are a normal part of the sport in which [*name of plaintiff*] was participating;**

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

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

SOURCES AND AUTHORITY

- "Primary assumption of risk arises where a plaintiff voluntarily participates in an activity or sport involving certain inherent risks; primary assumption of risk ... bar[s] recovery because no duty of care is owed as to such risks." (*Connelly v. Mammoth Mountain Ski Area* (1995) 39 Cal.App.4th 8, 11 [45 Cal.Rptr.2d 855], internal citations omitted.)

- "A coparticipant in an active sport ordinarily bears no liability for an injury resulting from conduct in the course of the sport that is merely careless or negligent." (*Ford v. Gouin* (1992) 3 Cal.4th 339, 342 [11 Cal.Rptr.2d 30].)

- "[W]e conclude that a participant in an active sport breaches a legal duty of care to other participants—i.e., engages in conduct that properly may subject him or her to financial liability—only if the participant intentionally injures another player or engages in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport." (*Knight v. Jewett* (1992) 3 Cal.4th 296, 320 [11 Cal.Rptr.2d 2].)

- "[T]he mere existence of an instructor/pupil relationship does not necessarily preclude application of 'primary assumption of the risk.' Learning any sport inevitably involves attempting new skills. A coach or instructor will often urge the student to go beyond what the student has already mastered; that is the nature of (inherent in) sports instruction." (*Allan v. Snow Summit, Inc.* (1996) 51 Cal.App.4th 1358, 1368–1369 [59 Cal.Rptr.2d 813].)

- “Instructors, like commercial operators of recreational activities, ‘have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport. Thus, although a ski resort has no duty to remove moguls from a ski run, it clearly does have a duty to use due care to maintain its towropes in a safe, working condition so as not to expose skiers to an increased risk of harm. The cases establish that the latter type of risk, posed by a ski resort’s negligence, clearly is not a risk (inherent in the sport) that is assumed by a participant.’ ” (*Fortier v. Los Rios Community College Dist.* (1996) 45 Cal.App.4th 430, 435 [52 Cal.Rptr.2d 812], internal citations omitted.)

- “ ‘Primary assumption of the risk’ applies to injuries from risks ‘inherent in the sport’; the risks are not any the less ‘inherent’ simply because an instructor encourages a student to keep trying when attempting a new skill.” (*Allan, supra,* 51 Cal.App.4th at p. 1369.)

- Coaches and sports instructors “owe students a duty ‘not to increase the risks inherent in the learning process undertaken by the student.’ But this does not require them to ‘fundamentally alter the nature of the sport and, in some instances, effectively preclude participation altogether. ...’ Instead, ‘[b]y choosing to participate in a sport that poses the obvious possibility of injury, the student athlete must learn to accept an adverse result of the risks inherent in the sport.’ ” (*Lupash v. City of Seal Beach* (1999) 75 Cal.App.4th 1428, 1436–1437 [89 Cal.Rptr.2d 920], internal citations omitted.)

- “ ‘[T]he existence and scope of a defendant’s duty of care is a legal question which depends on the nature of the sport or activity in question and on the parties’ general relationship to the activity, and is an issue to be decided by the court, rather than the jury.’ Thus, when the injury occurs in a sports setting the court must decide whether the nature of the sport and the relationship of the defendant and the plaintiff to the sport as coparticipant, coach, premises owner or spectator support the legal conclusion of duty.” (*Mastro v. Petrick* (2001) 93 Cal.App.4th 83, 88 [112 Cal.Rptr.2d 185], internal citations omitted.)

- “The existence of a duty of care is a separate issue from the question whether (on the basis of forseeability among other factors) a particular defendant breached that duty of care, which is an essentially factual matter.” (*Kockelman v. Segal* (1998) 61 Cal.App.4th 491, 498 [71 Cal.Rptr.2d 552].)

<u>Secondary Sources</u>

- 6 Witkin, Summary of California Law (2002 supp.) Torts, §§ 1090A–1090C, pp. 310–329
- CALIFORNIA TORTS, Ch. 4, *Comparative Negligence, Assumption of the Risk, and Related Defenses*, § 4.03 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 273, *Games, Sports, and Athletics*, Injuries to Participants, Ch. 380, *Negligence* (Matthew Bender)

- CALIFORNIA POINTS AND AUTHORITIES, Ch. 165, *Negligence*, § 165.401 (Matthew Bender)

410
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).

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>

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1001–1007, pp. 391–399; *id.* (2002 supp.) at §§ 1003–1006, pp. 271–274
- 1 Levy et al., California Torts (1993) Negligence: Duty and Breach, § 1.12; Vicarious Liability, § 8.08
- California Tort Guide (Cont.Ed.Bar 3d ed. 1996) General Principles, § 1.25, pp. 27–28 (rel. 4/00)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 58, *Assault and Battery*, § 58.16, Ch. 364, *Minors*, Ch. 380, *Negligence* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 165, *Negligence*, § 165.130 (Matthew Bender)
- CALIFORNIA LEGAL FORMS, Ch. 100A, *Personal Affairs of Minors*, § 100A.251 (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice: Torts (1992) Liability for Acts of Others, §§ 3.32–3.5, pp. 48–51

411
Reliance on Good Conduct of Others

Every person has a right to expect that every other person will use reasonable care [and will not violate the law], unless he or she knows, or should know, that the other person will not use reasonable care [or will violate the law].

DIRECTIONS FOR USE

This instruction should not be used if the only other actor is the plaintiff and there is no evidence that the plaintiff acted unreasonably. (*Springer v. Reimers* (1970) 4 Cal.App.3d 325, 336, 84 Cal.Rptr. 486.)

SOURCES AND AUTHORITY

- The general rule is that "every person has a right to presume that every other person will perform his duty and obey the law and in the absence of reasonable grounds to think otherwise, it is not negligence to assume that he is not exposed to danger which could come to him only from violation of law or duty by such other person." (*Celli v. Sports Car Club of America, Inc.* (1972) 29 Cal.App.3d 511, 523, 105 Cal.Rptr. 904.) "However, this rule does not extend to a person who is not exercising ordinary care, nor to one who knows or, by the exercise of such care, would know that the law is not being observed." (*Malone v. Perryman* (1964) 226 Cal.App.2d 227, 234, 37 Cal.Rptr. 864.)

- Defendants are entitled to rely on the reasonable conduct of third parties who owe a duty of care to the plaintiff. (*Tucker v. Lombardo* (1956) 47 Cal.2d 457, 467, 303 P.2d 1041.) The central issue addressed by the instruction is whether or not the bad act of the third person was foreseeable by the defendant. (*Whitton v. State of California* (1979) 98 Cal.App.3d 235, 244–246, 159 Cal.Rptr. 405.) "If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby." (Rest.2d Torts, § 449; *Bigbee v. Pacific Telephone and Telegraph Co.* (1983) 34 Cal.3d 49, 58, 192 Cal.Rptr. 857, 665 P.2d 947.)

- Many cases involving issues of third-party criminal conduct are analyzed as questions of law — i.e., existence of a duty, which may require analysis of foreseeability. (See *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 678, 25 Cal.Rptr.2d 137, 863 P.2d 207; *Kentucky Fried Chicken of California, Inc. v. Superior Court* (1997) 14 Cal.4th 814, 819, 59 Cal.Rptr.2d 756, 927 P.2d 1260.)

- In cases where a third party commits a criminal act, the defendant is generally not liable for failure to protect the plaintiff from the resulting harm. The exceptions are (1) where the defendant has a special relationship to the plaintiff, (2) where the defendant has undertaken an obligation to protect the plaintiff, or (3) where the defendant's conduct created or increased the risk of harm through the misconduct. (Rest.2d Torts, § 302B, com. e.)

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1066–1068, pp. 465–468
- CALIFORNIA TORTS, Ch. 1, *Negligence*, § 1.02 (Matthew Bender)
- CALIFORNIA TRIAL GUIDE, Unit 90, *Closing Argument*, §§ 90.88, 90.90 (Matthew Bender)
- CALIFORNIA PRODUCTS LIABILITY ACTIONS, Ch. 2, *Liability for Defective Products*, § 2.21 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 380, *Negligence* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 165, *Negligence* (Matthew Bender)

412
Duty of Care Owed Children

An adult must anticipate the ordinary behavior of children. An adult must be more careful when dealing with children than with other adults.

DIRECTIONS FOR USE

This instruction is to be used where the plaintiff seeks damages for injury to a minor.

For standard of care for minors, see instruction 402, *Standard of Care for Minors*.

SOURCES AND AUTHORITY

- " 'A child of immature years is expected to exercise only such care as pertains to childhood, and all persons dealing with such a child are chargeable with such knowledge. As a result, one dealing with children is bound to exercise a greater amount of caution than he would were he dealing with an adult.' [Citations]." *(Kataoka v. May Dept. Stores Co.* (1943) 60 Cal.App.2d 177, 182–183, 140 P.2d 467.)

- *Schwartz v. Helms Bakery, Ltd.* (1967) 67 Cal.2d 232, 240, 243, 60 Cal.Rptr. 510, 430 P.2d 68; *Hilyar v. Union Ice Co.* (1955) 45 Cal.2d 30, 37, 286 P.2d 21.

- "A greater degree of care is generally owed to children because of their lack of capacity to appreciate risks and to avoid danger." (*McDaniel v. Sunset Manor Co*. (1990) 220 Cal.App.3d 1, 7, 269 Cal.Rptr. 196, citing *Casas v. Maulhardt Buick, Inc.* (1968) 258 Cal.App.2d 692, 697–700, 66 Cal.Rptr. 44.)

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 809–810, pp. 163–165
- CALIFORNIA TORTS, Ch. 1, *Negligence*, § 1.31 (Matthew Bender)
- California Tort Guide (Cont.Ed.Bar 1996) § 1.19
- CALIFORNIA TRIAL GUIDE, Unit 90, *Closing Argument*, § 90.88 (Matthew Bender)
- CALIFORNIA PRODUCTS LIABILITY ACTIONS, Ch. 10, *Trial*, § 10.05 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 364, *Minors*, Ch. 380, *Negligence* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 165, *Negligence*, § 165.120 (Matthew Bender)

413
Custom or Practice

You may consider customs or practices in the community in deciding whether [*name of plaintiff/defendant***] acted reasonably. Customs and practices do not necessarily determine what a reasonable person would have done in [***name of plaintiff/defendant***]'s situation. They are only factors for you to consider.**

Following a custom or practice does not excuse conduct that is unreasonable. You should consider whether the custom or practice itself is reasonable.

DIRECTIONS FOR USE

An instruction stating that evidence of custom is not controlling on the issue of standard of care should not be given in professional malpractice cases in which expert testimony is used to set the standard of care. (See *Osborn v. Irwin Memorial Blood Bank* (1992) 5 Cal.App.4th 234, 277, 7 Cal.Rptr.2d 101.) The instruction may be used if the standard of care is within common knowledge. (See *Leonard v. Watsonville Community Hospital* (1956) 47 Cal.2d 509, 519, 305 P.2d 36.)

This instruction is also inappropriate in cases involving strict liability (*Titus v. Bethlehem Steel Corp.* (1979) 91 Cal.App.3d 372, 378, 154 Cal.Rptr. 122) or cases involving negligence in the use of public roads (*Shuff v. Irwindale Trucking Co.* (1976) 62 Cal.App.3d 180, 187, 132 Cal.Rptr. 897).

SOURCES AND AUTHORITY

- Evidence of custom and practice is relevant, but not conclusive, on the issue of the standard of care in cases of ordinary negligence. (*Holt v. Department of Food and Agriculture* (1985) 171 Cal.App.3d 427, 435, 218 Cal.Rptr. 1.)

- Restatement Second of Torts, section 295A, provides: "In determining whether conduct is negligent, the customs of the community, or of others under like circumstances, are factors to be taken into account, but are not controlling where a reasonable man would not follow them."

<u>Secondary Sources</u>

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 754–755, pp. 93–96
- CALIFORNIA TORTS, Ch. 1, *Negligence*, § 1.30, Ch. 3, *Proof of Negligence*, § 3.33 (Matthew Bender)
- CALIFORNIA PRODUCTS LIABILITY ACTIONS, Ch. 2, *Liability for Defective Products*, §§ 2.11, 2.21 (Matthew Bender)

- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 380, *Negligence* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 165, *Negligence*, § 165.31 (Matthew Bender)

414
Amount of Caution Required In Dangerous Situations

People must be extremely careful when they deal with dangerous items or participate in dangerous activities. [*Insert type of dangerous item or activity***] is dangerous in and of itself. The risk of harm is so great that the failure to use extreme caution is negligence.**

DIRECTIONS FOR USE

An instruction on the standard of care for extremely dangerous activities is proper only "in situations where the nature of the activity or substance is so inherently dangerous or complex, as such, that the hazard persists despite the exercise of ordinary care." (*Benwell v. Dean* (1964) 227 Cal.App.2d 226, 233, 38 Cal.Rptr. 542; see also *Menchaca v. Helms Bakeries, Inc.* (1968) 68 Cal.2d 535, 544, 67 Cal.Rptr. 775, 439 P.2d 903.)

This instruction should not be given at the same time as an instruction pertaining to standard of care for employees who have to work in dangerous situations. In appropriate cases, juries may be instructed that a person of ordinary prudence is required to exercise extreme caution when engaged in a dangerous activity. (*Borenkraut v. Whitten* (1961) 56 Cal.2d 538, 544–546, 15 Cal.Rptr. 635, 364 P.2d 467.) However, this rule does not apply when a person's lawful employment requires that he or she must work in a dangerous situation. (*McDonald v. City of Oakland* (1967) 255 Cal.App.2d 816, 827, 63 Cal.Rptr. 593.) This is because "reasonable men who are paid to give at least part of their attention to their job" may not be as able to maintain the same standards for personal safety as nonemployees. (*Young v. Aro Corp.* (1974) 36 Cal.App.3d 240, 245, 111 Cal.Rptr. 535.) (See instruction 415, *Employee Required to Work in Dangerous Situations*.)

SOURCES AND AUTHORITY

- Even a slight deviation from the standards of care will constitute negligence in cases involving dangerous instrumentalities. (*Borenkraut, supra,* 56 Cal.2d at p. 545.)

- Dangerous instrumentalities include fire, firearms, explosive or highly inflammable materials, and corrosive or otherwise dangerous or noxious fluids. (*Warner v. Santa Catalina Island Co.* (1955) 44 Cal.2d 310, 317, 282 P.2d 12.)

- In *Menchaca*, the Court held that "[d]riving a motor vehicle may be sufficiently dangerous to warrant special instructions, but it is not so hazardous that it always requires 'extreme caution.' " (*Menchaca, supra,* 68 Cal.2d at p. 544.)

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 762–766, pp. 102–105
- CALIFORNIA TORTS, Ch. 1, *Negligence*, §§ 1.02, 1.30 (Matthew Bender)
- CALIFORNIA PRODUCTS LIABILITY ACTIONS, Ch. 2, *Liability for Defective Products*, § 2.14 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 380, *Negligence* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 165, *Negligence* (Matthew Bender)

415
Employee Required to Work in Dangerous Situations

An employee required to work under dangerous conditions must use the amount of care for [his/her] own safety that a reasonably careful employee would use under the same conditions.

In deciding whether [*name of plaintiff***] was negligent, you should consider how much attention [his/her] work demanded. You should also consider whether [***name of plaintiff***]'s job required [him/her] to take risks that a reasonably careful person would not normally take under ordinary circumstances.**

DIRECTIONS FOR USE

This type of instruction should not be given in cases involving freeway collisions between private and commercial vehicles. (*Shuff v. Irwindale Trucking Co.* (1976) 62 Cal.App.3d 180, 187, 132 Cal.Rptr. 897.)

An instruction on this principle is "aimed at situations where the employment conditions lessen the plaintiff's ability to take precautions." (*Von Beltz v. Stuntman, Inc.* (1989) 207 Cal.App.3d 1467, 1485, 255 Cal.Rptr. 755.) It does not apply where the plaintiff has ample opportunity to consider various precautions (*ibid.*) or when employees act pursuant to choice rather than necessity. (*Roberts v. Guillory* (1972) 25 Cal.App.3d 859, 861–862, 102 Cal.Rptr. 134.)

SOURCES AND AUTHORITY

- This type of instruction "soften[ed] the impact of instructing on the issue of contributory negligence" (*Young v. Aro Corp.* (1974) 36 Cal.App.3d 240, 244, 111 Cal.Rptr. 535) at a time when contributory negligence was a complete bar to a plaintiff's recovery. The instruction may be given in cases involving comparative fault. (See, e.g., *Johnson v. Tosco Corp.* (1991) 1 Cal.App.4th 123, 136–137, 1 Cal.Rptr.2d 747.)

- "It has long been recognized that 'where a person must work in a position of possible danger the amount of care which he is bound to exercise for his own safety may well be less by reason of the necessity of his giving attention to his work than would otherwise be the case.' [Citations]." (*Austin v. Riverside Portland Cement Co.* (1955) 44 Cal.2d 225, 239, 282 P.2d 69.)

- "Considered in the light of the realities of his working life, the laborer's duty may become considerably restricted in scope. In some instances he may find himself powerless to abandon the task at hand with impunity whenever he senses a possible

danger; in others, he may be uncertain as to which person has supervision of the job or control of the place of employment, and therefore unsure as to whom he should direct his complaint; in still others, having been encouraged to continue working under conditions where danger lurks but has not materialized, he may be baffled in making an on-the-spot decision as to the imminence of harm. All of these factors enter into a determination whether his conduct falls below a standard of due care." (*Gyerman v. United States Lines Co.* (1972) 7 Cal.3d 488, 501, 102 Cal.Rptr. 795, 498 P.2d 1043 (citation omitted).)

Secondary Sources

- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 380, *Negligence* (Matthew Bender)

416
Amount of Caution Required in Transmitting Electric Power

People and companies must be very careful in constructing, insulating, inspecting, maintaining, and repairing power lines and transmission equipment at all places where it is reasonably probable that they will cause harm to persons or property.

DIRECTIONS FOR USE

The cases have crafted a specific standard of care for the construction and maintenance of power lines, and juries must be instructed on this standard upon request. (*Scally v. Pacific Gas and Electric Co.* (1972) 23 Cal.App.3d 806, 816, 100 Cal.Rptr. 501.)

SOURCES AND AUTHORITY

- Electric power lines are considered dangerous instrumentalities. (*Polk v. City of Los Angeles* (1945) 26 Cal.2d 519, 525, 159 P.2d 931.)

- The requirement to insulate wires applies to only those wires that may come into contact with people or property: "While an electric company is not under an absolute duty to insulate or make the wires safe in any particular manner, it does have a duty to make the wires safe under all the exigencies created by the surrounding circumstances. The duty of an electric company is alternative, i.e., either to insulate the wires or to so locate them to make them comparatively harmless." (*Scally, supra*, 23 Cal.App.3d at pp. 815–816.)

- *Dunn v. Pacific Gas and Electric Co.* (1954) 43 Cal.2d 265, 272–274, 272 P.2d 745; *McKenzie v. Pacific Gas and Electric Co.* (1962) 200 Cal.App.2d 731, 736, 19 Cal.Rptr. 628 (disapproved on another ground in *Di Mare v. Cresci* (1962) 58 Cal.2d 292, 299, 23 Cal.Rptr. 772, 373 P.2d 860.)

<u>Secondary Sources</u>

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 763, pp. 103–104
- California Tort Guide (Cont.Ed.Bar 1996) §§ 7.1–7.12
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 277, *Gas and Electricity* (Matthew Bender)

417
Special Doctrines: Res ipsa loquitur

In this case, [*name of plaintiff***] may prove that [***name of defendant***]'s negligence caused [his/her] harm if [he/she] proves all of the following:**

1. **That [***name of plaintiff***]'s harm ordinarily would not have happened unless someone was negligent;**

2. **That the harm was caused by something that only [***name of defendant***] controlled; and**

3. **That [***name of plaintiff***]'s voluntary actions did not cause or contribute to the event[s] that harmed [him/her].**

If you decide that [*name of plaintiff***] did not prove one or more of these three things, then [***insert one of the following***]**

> **[your verdict must be for [***name of defendant***].]**
>
> *[or]*
>
> **[you must decide whether [***name of defendant***] was negligent in light of the other instructions I have read.]**

If you decide that [*name of plaintiff***] proved all of these three things, you may, but are not required to, find that [***name of defendant***] was negligent or that [***name of defendant***]'s negligence was a substantial factor in causing [***name of plaintiff***]'s harm, or both.**

You must carefully consider the evidence presented by both [*name of plaintiff***] and [***name of defendant***] before you make your decision. You should not decide in favor of [***name of plaintiff***] unless you believe, after weighing all of the evidence, that it is more probable than not that [***name of defendant***] was negligent and that [his/her] negligence was a substantial factor in causing [***name of plaintiff***]'s harm.**

DIRECTIONS FOR USE

In the second paragraph, the first bracketed option is to be used when plaintiff is relying solely on a res ipsa loquitur theory and has introduced no other evidence of defendant's negligence. The second option is to be used when plaintiff has introduced other evidence of defendant's negligence.

"It follows that where part of the facts basic to the application of the doctrine of res ipsa loquitur is established as a matter of law but that others are not, the court should instruct that application of the doctrine by the jury depends only upon the existence of the basic facts not conclusively established." (*Rimmele v. Northridge Hospital Foundation* (1975) 46 Cal.App.3d 123, 130 [120 Cal.Rptr. 39].)

SOURCES AND AUTHORITY

- "In California, the doctrine of res ipsa loquitur is defined by statute as 'a presumption affecting the burden of producing evidence.' The presumption arises when the evidence satisfies three conditions: '(1) the accident must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff.' A presumption affecting the burden of producing evidence 'require[s] the trier of fact to assume the existence of the presumed fact' unless the defendant introduces evidence to the contrary. The presumed fact, in this context, is that 'a proximate cause of the occurrence was some negligent conduct on the part of the defendant ... .' If the defendant introduces 'evidence which would support a finding that he was not negligent or that any negligence on his part was not a proximate cause of the occurrence,' the trier of fact determines whether defendant was negligent without regard to the presumption, simply by weighing the evidence." (*Brown v. Poway Unified School Dist.* (1993) 4 Cal.4th 820, 825–826 [15 Cal.Rptr.2d 679], internal citations omitted.)

- "Stated less mechanically, a plaintiff suing in a personal injury action is entitled to the benefit of res ipsa loquitur when: 'the accident is of such a nature that it can be said, in the light of past experience, that it probably was the result of negligence by someone and that the defendant is probably the person who is responsible.' " (*Rimmele, supra,* 46 Cal.App.3d at p. 129, internal citations omitted.)

- Evidence Code section 646(c) provides:

> If the evidence, or facts otherwise established, would support a res ipsa loquitur presumption and the defendant has introduced evidence which would support a finding that he was not negligent or that any negligence on his part was not a proximate cause of the occurrence, the court may, and upon request shall, instruct the jury to the effect that:
> (1) If the facts which would give rise to a res ipsa loquitur presumption are found or otherwise established, the jury may draw the inference from such facts that a proximate cause of the occurrence was some negligent conduct on the part of the defendant; and
> (2) The jury shall not find that a proximate cause of the occurrence was some negligent conduct on the part of the defendant unless the jury believes, after weighing all the evidence in the case and drawing such

inferences therefrom as the jury believes are warranted, that it is more probable than not that the occurrence was caused by some negligent conduct on the part of the defendant.

- Under Evidence Code section 604, a presumption affecting the burden of producing evidence "require[s] the trier of fact to assume the existence of the presumed fact" unless the defendant introduces evidence to the contrary. Here, the presumed fact is that "a proximate cause of the occurrence was some negligent conduct on the part of the defendant." (Evid. Code, § 646(c)(1); *Brown, supra,* 4 Cal.4th at p. 826.)

- "The doctrine of res ipsa loquitur is fundamentally a doctrine predicated upon inference deducible from circumstantial evidence." (*Hale v. Venuto* (1982) 137 Cal.App.3d 910, 918 [187 Cal.Rptr. 357].)

- The doctrine "is based on a theory of 'probability' where there is no direct evidence of defendant's conduct, permitting a common sense inference of negligence from the happening of the accident." (*Gicking v. Kimberlin* (1985) 170 Cal.App.3d 73, 75 [215 Cal.Rptr. 834].)

- "All of the cases hold, in effect, that it must appear, either as a matter of common experience or from evidence in the case, that the accident is of a type which probably would not happen unless someone was negligent." (*Zentz v. Coca Cola Bottling Co. of Fresno* (1952) 39 Cal.2d 436, 442–443 [247 P.2d 344].)

- The purpose of the second "control" requirement is to "link the defendant with the probability, already established, that the accident was negligently caused." (*Newing v. Cheatham* (1975) 15 Cal.3d 351, 362 [124 Cal.Rptr. 193].) The control requirement is not absolute. (*Zentz, supra,* 39 Cal.2d at p. 443.)

- "The purpose of [the third] requirement, like that of control by the defendant is to establish that the defendant is the one probably responsible for the accident. The plaintiff need not show that he was entirely inactive at the time of the accident in order to satisfy this requirement, so long as the evidence is such as to eliminate his conduct as a factor contributing to the occurrence. (*Newing, supra,* 15 Cal.3d at p. 363, internal citations omitted.)

- The third condition "should not be confused with the problem of contributory negligence, as to which defendant has the burden of proof. … [I]ts purpose, like that of control by the defendant, is merely to assist the court in determining whether it is more probable than not that the defendant was responsible for the accident." (*Zentz, supra,* 39 Cal.2d at p. 444.)

<u>Secondary Sources</u>

- 1 Witkin, California Evidence (4th ed. 2000) Burden of Proof and Presumptions, §§ 114–118

- CALIFORNIA TORTS, Ch. 3, *Proof of Negligence*, § 3.20 et seq. (Matthew Bender)
- CALIFORNIA TRIAL GUIDE, Unit 11, *Opening Statement*, § 11.42, Unit 90, *Closing Argument*, § 90.90 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 380, *Negligence* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 165, *Negligence*, § 165.340 et seq. (Matthew Bender)

418
Presumption of Negligence per se

[*Insert citation to statute, regulation, or ordinance***] states:**
_____.

If you decide:

1. **That [***name of plaintiff/defendant***] violated this law, and**

2. **That the violation was a substantial factor in bringing about the harm, then you must find that [***name of plaintiff/defendant***] was negligent [unless you also find that the violation was excused].**

If you find that [*name of plaintiff/defendant***] did not violate this law or that the violation was not a substantial factor in bringing about the harm [or if you find the violation was excused], then you must still decide whether [***name of plaintiff/defendant***] was negligent in light of the other instructions.**

DIRECTIONS FOR USE

If a rebuttal is offered on the grounds that the violation was excused, then the bracketed portion of (b) in the second paragraph should be read. For an instruction on excuse, see instruction 420, *Negligence per se: Rebuttal of the Presumption of Negligence (Violation Excused).*

If the statute is lengthy, the judge may want to read it at the end of this instruction instead of at the beginning. The instruction would then need to be revised, to tell the jury that they will be hearing the statute at the end.

Rebuttal of the presumption of negligence is addressed in the instructions that follow (see instructions 420 and 421).

SOURCES AND AUTHORITY

- Evidence Code section 669 codifies the common law presumption of negligence per se and the grounds for rebutting the presumption. Subdivision (a) sets forth the conditions that cause the presumption to arise:

  The failure of a person to exercise due care is presumed if:
  (1) He violated a statute, ordinance, or regulation of a public entity;

(2) The violation proximately caused death or injury to person or property;
(3) The death or injury resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent; and
(4) The person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted.

- In general, the first two elements of Evidence Code section 669(a) are questions to be decided by the trier of fact, while the last two are always questions of law. (*Cade v. Mid-City Hospital Corp.* (1975) 45 Cal.App.3d 589, 597, 119 Cal.Rptr. 571; see also Law Revision Cal. Com. com., Evid. Code, § 669.) However, in some circumstances violation of the law and/or causation can be decided as questions of law. In those cases, it is unnecessary to instruct the jury on the elements decided by the court.

- This jury instruction addresses the establishment of the two factual elements underlying the presumption of negligence. If they are not established, then a finding of negligence cannot be based on the alleged statutory violation. However, negligence can still be proven by other means. (*Nunneley v. Edgar Hotel* (1950) 36 Cal.2d 493, 500–501, 225 P.2d 497.)

- Statutory negligence, or negligence per se, sets the conduct prescribed by the statute as the standard of care. (*Casey v. Russell* (1982) 138 Cal.App.3d 379, 383, 188 Cal.Rptr. 18.) Criminal statutes may be used to set the applicable standard of care. (See *Ramirez v. Plough, Inc.* (1993) 6 Cal.4th 539, 547, 25 Cal.Rptr.2d 97, 863 P.2d 167.) Federal statutes and regulations may be adopted as the standard of care in a negligence action. (*DiRosa v. Showa Denko K. K.* (1996) 44 Cal.App.4th 799, 808, 52 Cal.Rptr.2d 128.)

- Safety orders and regulations of administrative agencies may be used to set the standard of care. However, an administrative agency cannot independently impose a duty of care unless the Legislature has properly delegated that authority to the agency by. (*California Service Station & Auto. Repair Assn. v. American Home Assurance Co.* (1998) 62 Cal.App.4th 1166, 1175, 73 Cal.Rptr.2d 182.)

- This doctrine applies to negligence of the defendant or contributory negligence of the plaintiff. (*Nevis v. Pacific Gas and Electric, Co.* (1954) 43 Cal.2d 626, 631, fn.1, 275 P.2d 761.)

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 818–837, pp. 170–194
- CALIFORNIA TORTS, Ch. 3, *Proof of Negligence*, §§ 3.10, 3.13 (Matthew Bender)
- California Tort Guide (Cont.Ed.Bar 1996) §§ 1.28–1.31

- CALIFORNIA TRIAL GUIDE, Unit 90, *Closing Argument*, §§ 90.88, 90.89 (Matthew Bender)
- CALIFORNIA PRODUCTS LIABILITY ACTIONS, Ch. 7, *Proof*, § 7.04 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 380, *Negligence* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 165, *Negligence*, §§ 165.70, 165.80, 165.81 (Matthew Bender)

419
Presumption of Negligence per se
(Causation Only at Issue)

[Insert citation to statute, regulation, or ordinance] states:
_____.

A violation of this law has been established and is not an issue for you to decide.

[However, you must decide whether the violation was excused. If it was not excused, then you] [You] must decide whether the violation was a substantial factor in harming [*name of plaintiff***].**

If you decide that the violation was a substantial factor, then you must find that [*name of plaintiff/defendant***] was negligent.**

DIRECTIONS FOR USE

The California Law Revision Commission comment on Evidence Code section 669 states that the trier of fact usually decides the question of whether the violation occurred. However, "if a party admits the violation or if the evidence of the violation is undisputed, it is appropriate for the judge to instruct the jury that a violation of the statute, ordinance, or regulation has been established as a matter of law." In such cases, the jury would decide causation and, if applicable, the existence of any justification or excuse. For an instruction on excuse, see instruction 420, *Negligence per se: Rebuttal of the Presumption of Negligence (Violation Excused).*

SOURCES AND AUTHORITY

- Evidence Code section 669

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 818–837, pp. 170–194
- CALIFORNIA TORTS, Ch. 3, *Proof of Negligence*, § 3.10 (Matthew Bender)
- California Tort Guide (Cont.Ed.Bar 1996) §§ 1.28–1.31
- CALIFORNIA TRIAL GUIDE, Unit 90, *Closing Argument*, § 90.89 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 380, *Negligence* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 165, *Negligence*, §§ 165.70, 165.80 (Matthew Bender)

420
Negligence per se: Rebuttal of the Presumption of Negligence (Violation Excused)

A violation of a law is excused if one of the following is true:

(a) The violation was reasonable because of [*name of plaintiff/defendant***]'s [***specify type of "incapacity"***]; [or]**

(b) Despite using reasonable care, [*name of plaintiff/defendant***] was not able to obey the law; [or]**

(c) [*Name of plaintiff/defendant***] faced an emergency that was not caused by [his/her] own misconduct; [or]**

(d) Obeying the law would have involved a greater risk of harm to [*name of plaintiff/defendant***] or to others; [or]**

(e) [*Other reason excusing or justifying noncompliance***.]**

DIRECTIONS FOR USE

Subparagraph (b), regarding an attempt to comply with the applicable statute or regulation, should not be given where the evidence does not show such an attempt. (*Atkins v. Bisigier* (1971) 16 Cal.App.3d 414, 423, 94 Cal.Rptr. 49.) Subparagraph (b) should be used only in special cases because it relies on the concept of due care to avoid a charge of negligence per se.

SOURCES AND AUTHORITY

- Evidence Code section 669(b)(1) provides: "This presumption may be rebutted by proof that [t]he person violating the statute, ordinance, or regulation did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law."

- The language of section 669(b)(1) appears to be based on the following Supreme Court holding: "In our opinion the correct test is whether the person who has violated a statute has sustained the burden of showing that he did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law." (*Alarid v. Vanier* (1958) 50 Cal.2d 617, 624, 327 P.2d 897.)

- In *Casey v. Russell* (1982) 138 Cal.App.3d 379, 188 Cal.Rptr. 18, the court held that an instruction that tracked the language of section 669(b)(1) was erroneous because it "[did] not adequately convey that there must be some special circumstances which justify violating the statute." (*Id*. at p. 385.) The court's opinion cited section 288A of the Restatement Second of Torts for a list of the types of emergencies or unusual circumstances that may justify or excuse a violation of the statute:

  (a) The violation is reasonable because of the actor's incapacity;
  (b) He neither knows nor should know of the occasion for compliance;
  (c) He is unable after reasonable diligence or care to comply;
  (d) He is confronted by an emergency not due to his own misconduct;
  (e) Compliance would involve a greater risk of harm to the actor or to others.

  According to the Restatement comment, this list of circumstances is not meant to be exclusive.

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 818–837, pp. 170–194
- CALIFORNIA TORTS, Ch. 3, *Proof of Negligence*, § 3.13 (Matthew Bender)
- California Tort Guide (Cont.Ed.Bar 1996) §§ 1.28–1.31
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 380, *Negligence* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 165, *Negligence*, § 165.81 (Matthew Bender)

421
Negligence per se: Rebuttal of the Presumption of Negligence (Violation of Minor Excused)

[*Name of plaintiff/defendant***] claims that even if [he/she] violated the law, [he/she] is not negligent because [he/she] was _____ years old at the time of the incident. If you find that [***name of plaintiff/defendant***] was as careful as a reasonably careful child of the same age, intelligence, knowledge and experience would have been in the same situation, then [***name of plaintiff/defendant***] was not negligent.**

DIRECTIONS FOR USE

This instruction does not apply if the minor is engaging in an adult activity. (Evid. Code, § 669(b)(2).)

SOURCES AND AUTHORITY

- Evidence Code section 669(b)(2) provides: "The presumption may be rebutted by proof that [t]he person violating the statute, ordinance, or regulation was a child and exercised the degree of care ordinarily exercised by persons of his maturity, intelligence, and capacity under similar circumstances, but the presumption may not be rebutted by such proof if the violation occurred in the course of an activity normally engaged in only by adults and requiring adult qualifications."

- "The per se negligence instruction is predicated on the theory that the Legislature has adopted a statutory standard of conduct that no reasonable man would violate, and that all reasonable adults would or should know such standard. But this concept does not apply to children." (*Daun v. Truax* (1961) 56 Cal.2d 647, 654–655, 16 Cal.Rptr. 351, 365 P.2d 407.)

- An exception to this reduced standard of care may be found if the minor was engaging in an adult activity, such as driving. (*Prichard v. Veterans Cab Co.* (1965) 63 Cal.2d 727, 732, 47 Cal.Rptr. 904, 408 P.2d 360; *Neudeck v. Bransten* (1965) 233 Cal.App.2d 17, 21, 43 Cal.Rptr. 250; see also Rest.2d Torts, § 283A, com. c.)

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 818–837, pp. 170–194
- CALIFORNIA TORTS, Ch. 3, *Proof of Negligence*, § 3.13 (Matthew Bender)
- California Tort Guide (Cont.Ed.Bar 1996) §§ 1.28–1.31

- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 380, *Negligence* (Matthew Bender)

422
Sale of Alcoholic Beverages to Obviously Intoxicated Minors
(Bus. & Prof. Code, § 25602.1)

[*Name of plaintiff***] claims [***name of defendant***] is responsible for [his/her] harm because [***name of defendant***] sold or gave alcoholic beverages to [***name of alleged minor***], a minor who was already obviously intoxicated.**

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

1. **That [***name of defendant***] was [licensed/authorized/required to be licensed or authorized] to sell alcoholic beverages;**

2. **That [***name of defendant***] sold or gave alcoholic beverages to [***name of alleged minor***];**

3. **That [***name of alleged minor***] was less than 21 years old at the time;**

4. **That when [***name of defendant***] provided the alcoholic beverages, [***name of alleged minor***] displayed symptoms that would lead a reasonable person to conclude that [he/she] was intoxicated;**

5. **That, while intoxicated, [***name of alleged minor***] harmed [himself/herself/[***name of plaintiff***]]; and**

6. **That [***name of defendant***]'s selling or giving alcoholic beverages to [***name of alleged minor***] was a substantial factor in causing [his/her[***name of plaintiff***]'s] harm.**

In deciding whether [*name of alleged minor***] was obviously intoxicated, you may consider whether [he/she] displayed one or more of the following symptoms to [***name of defendant***] before the alcoholic beverages were provided: Impaired judgment; alcoholic breath; incoherent or slurred speech; poor muscular coordination; staggering or unsteady walk or loss of balance; loud, boisterous, or argumentative conduct; flushed face; or other symptoms of intoxication. The mere fact that [***name of alleged minor***] had been drinking is not enough.**

DIRECTIONS FOR USE

For purposes of this instruction, a "minor" is someone under the age of 21.

SOURCES AND AUTHORITY

- Business and Professions Code, section 25602.1, provides, in relevant part: "[A] cause of action may be brought by or on behalf of any person who has suffered injury or death against any person licensed, or required to be licensed … or any person authorized by the federal government to sell alcoholic beverages on a military base or other federal enclave, who sells, furnishes, gives or causes to be sold, furnished or sold, any alcoholic beverage, to any obviously intoxicated minor where the furnishing, sale or giving of that beverage to the minor is the proximate cause of the personal injury or death sustained by that person."

- In *Schaffield v. Abboud* (1993) 15 Cal.App.4th 1133, 1140, 19 Cal.Rptr.2d 205, the court cited the following as "the 'proper test' for determining whether a patron is 'obviously intoxicated': 'The use of intoxicating liquor by the average person in such quantity as to produce intoxication causes many commonly known outward manifestations which are 'plain' and 'easily seen or discovered.' If such outward manifestations exist and the seller still serves the customer so affected, he has violated the law, whether this was because he failed to observe what was plain and easily seen or discovered, or because, having observed, he ignored that which was apparent.' "

- The description of symptoms is derived from an instruction approved in *Jones v. Toyota Motor Co., Ltd.* (1988) 198 Cal.App.3d 364, 370, 243 Cal.Rptr. 611.

- In *Hernandez v. Modesto Portuguese Pentacost Assn.* (1995) 40 Cal.App.4th 1274, 1276, 48 Cal.Rptr.2d 229, the court held that the phrase "causes to be sold" "requires an affirmative act directly related to the sale of alcohol which necessarily brings about the resultant action to which the statute is directed, i.e., the furnishing of alcohol to an obviously intoxicated minor."

- In *Salem v. Superior Court* (1989) 211 Cal.App.3d 595, 603, 259 Cal.Rptr. 447, the court held that injury resulting from intoxication of a person to whom an intoxicated minor gives liquor is not an injury proximately resulting from the sale to the intoxicated minor.

<u>Secondary Sources</u>

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 884, p. 255
- California Tort Guide (Cont.Ed.Bar 1996) § 4.63
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 19, *Alcoholic Beverages: Civil Liability*, §§ 19.12, 19.52, 19.75 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 15, *Alcoholic Beverages* (Matthew Bender)

423
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 injury suffered." (*Braman v. State of California* (1994) 28 Cal.App.4th 344, 349 [33 Cal.Rptr.2d 608], internal citation 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
- CALIFORNIA TORTS, Ch. 60, *General Principles of Liability and Immunity of Public Entities and Employees*, Ch. 61, *Particular Liabilities and Immunities of Public Entities and Public Employees* (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 464, *Public Entities and Officers* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 196, *Public Entities* (Matthew Bender)

430
Causation: Substantial Factor

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

DIRECTIONS FOR USE

In asbestos-related cancer cases, *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 977, 67 Cal.Rptr.2d 16, 941 P.2d 1203 requires an additional instruction regarding exposure to a particular product. See Instruction 435, *Causation for Asbestos-Related Cancer Claims.*

Tentative Draft No. 3 (April 7, 2003) for the Restatement Third of Torts, in its treatment of Torts: Liability for Physical Harm (Basic Principles), section 29, proposes a "scope of liability" approach that de-emphasizes causation and focuses on (1) the nature of the harms that are within the scope of the risk created by the actor's conduct and (2) whether those harms resulted from the risk; this Restatement is not final, and it has not been subject to California judicial review.

SOURCES AND AUTHORITY

- *Bockrath v. Aldrich* Chemical Co., Inc. (1999) 21 Cal.4th 71, 79, 86 Cal.Rptr.2d 846, 980 P.2d 398; *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 67 Cal.Rptr.2d 16, 941 P.2d 1203; *Mitchell v. Gonzales* (1991) 54 Cal.3d 1041, 1 Cal.Rptr.2d 913, 819 P.2d 872

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

- *Espinosa v. Little Company of Mary Hospital* (1995) 31 Cal.App.4th 1304, 1313–1314, 37 Cal.Rptr.2d 541

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

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

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 968, pp. 358–359, 968A
- CALIFORNIA TORTS, Ch. 2, *Causation*, § 2.02 (Matthew Bender)
- California Tort Guide (Cont.Ed.Bar 1996) §§ 1.13–1.15
- CALIFORNIA TRIAL GUIDE, Unit 90, *Closing Argument*, § 90.89 (Matthew Bender)
- CALIFORNIA PRODUCTS LIABILITY ACTIONS, Ch. 2, *Liability for Defective Products*, § 2.22, Ch. 7, *Proof*, § 7.06 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 380, *Negligence* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 165, *Negligence*, §§ 165.260–165.263 (Matthew Bender)

431
Causation: Multiple Causes

A person's negligence may combine with another factor to cause harm. If you find that [*name of defendant*]'s negligence was a substantial factor in causing [*name of plaintiff*]'s harm, then [*name of defendant*] is responsible for the harm. [*Name of defendant*] cannot avoid responsibility just because some other person, condition, or event was also a substantial factor in causing [*name of plaintiff*]'s harm.

DIRECTIONS FOR USE

This instruction will apply only when negligence is the theory asserted against the defendant. This instruction should be modified if the defendant is sued on a theory of product liability or intentional tort.

SOURCES AND AUTHORITY

- Multiple causation, or "concurrent cause," is the basis for the doctrine of comparative fault: "For there to be comparative fault there must be more than one contributory or concurrent legal cause of the injury for which recompense is sought." (*Doupnik v. General Motors Corp.* (1991) 225 Cal.App.3d 849, 866, 275 Cal.Rptr. 715.)

- In *Logacz v. Limansky* (1999) 71 Cal.App.4th 1149,1152, 84 Cal.Rptr.2d 257, the appellate court held that the trial court's error in refusing a concurrent cause instruction was prejudicial.

- In *Espinosa v. Little Company of Mary Hospital* (1995) 31 Cal.App.4th 1304, 37 Cal.Rptr.2d 541, the Court of Appeal reversed the trial court's grant of nonsuit in a medical malpractice case. The plaintiff produced evidence indicating that three causes were responsible for his brain damage, including two that were attributable to the defendants. The trial court ruled in favor of the nonsuit, finding that the plaintiff had not shown causation. The reviewing court disagreed: "Clearly, where a defendant's negligence is a concurring cause of an injury, the law regards it as a legal cause of the injury, regardless of the extent to which it contributes to the injury." (*Id*. at pp. 1317–1318.)

- A concurrent cause can be either another party's negligence or a natural cause. In *Hughey v. Candoli* (1958) 159 Cal.App.2d 231, 323 P.2d 779, the court held that the defendant's negligence in an automobile accident was a proximate cause of the death of a fetus, even though the fetus also had a heart defect: "In this situation the concurrence of the nontortious cause does not absolve defendant from liability for the tortious one." (*Id.* at p. 240.)

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 970
- CALIFORNIA TORTS, Ch. 2, *Causation*, § 2.11 (Matthew Bender)
- California Tort Guide (Cont.Ed.Bar 1996) § 1.16
- CALIFORNIA TRIAL GUIDE, Unit 90, *Closing Argument*, § 90.89 (Matthew Bender)
- CALIFORNIA PRODUCTS LIABILITY ACTIONS, Ch. 7, *Proof*, § 7.06 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 380, *Negligence* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 165, *Negligence*, §§ 165.280–165.284 (Matthew Bender)

432
Causation: Third-Party Conduct as Superseding Cause

[*Name of defendant***] claims that [he/she/it] is not responsible for [***name of plaintiff***]'s harm because of the later misconduct of [***insert name of third party***]. To avoid legal responsibility for the harm, [***name of defendant***] must prove all of the following:**

1. **That [***name of third party***]'s conduct occurred after the conduct of [***name of defendant***];**

2. **That a reasonable person would consider [***name of third party***]'s conduct as a highly unusual or an extraordinary response to the situation;**

3. **That [***name of defendant***] did not know and had no reason to expect that [***name of third party***] would act in a [negligent/wrongful] manner; and**

4. **That the kind of harm resulting from [***name of third party***]'s conduct was different from the kind of harm that could have been reasonably expected from [***name of defendant***]'s conduct.**

DIRECTIONS FOR USE

California courts have held that a superseding cause instruction must be given where the issue is raised by the evidence. (*Paverud v. Niagara Machine and Tool Works* (1987) 189 Cal.App.3d 858, 863, 234 Cal.Rptr. 585.) The issue of superseding cause should be addressed directly in a specific instruction. (*Self v. General Motors* (1974) 42 Cal.App.3d 1, 10, 116 Cal.Rptr. 575.)

Defendants, not plaintiffs, would normally request this type of instruction. In *Fish v. Los Angeles Dodgers Baseball Club* (1976) 56 Cal.App.3d 620, 128 Cal.Rptr. 807, plaintiff requested the superseding cause instruction in response to defendant's closing argument. However, the court found that the doctrine of superseding causation was inapplicable to the facts of that case. (*Id*. at p. 639.) Instead, the court held that failure to give the concurrent cause instruction on behalf of plaintiff was error. (*Id.* at p. 641.)

Where, as a matter of law, a party is liable for subsequent negligence, as in subsequent medical negligence, this instruction should not be given.

SOURCES AND AUTHORITY

- Restatement Second of Torts, section 440, provides: "A superseding cause is an act of a third person or other force which by its intervention prevents the actor from being

liable for harm to another which his antecedent negligence is a substantial factor in bringing about."

- The California courts have adopted the Restatement sections on superseding causation. (*Stewart v. Cox* (1961) 55 Cal.2d 857, 864, 362 P.2d 345; *Brewer v. Teano* (1995) 40 Cal.App.4th 1024, 47 Cal.Rptr.2d 348.)

- "Under the theory of supervening cause, the chain of causation that would otherwise flow from an initial negligent act is broken when an independent act intervenes and supersedes the initial act." (*Hardison v. Bushnell* (1993) 18 Cal.App.4th 22, 26, 22 Cal.Rptr.2d 106.)

- Superseding cause is an affirmative defense that must be proved by the defendant. (*Maupin v. Widling* (1987) 192 Cal.App.3d 568, 578, 237 Cal.Rptr. 521.) If a third party's negligence is asserted as a superseding cause,"[t]he elements of the defense include either foreseeability of the third party's negligence or of the harm, or the highly extraordinary nature or manner of the third party's acts." (*Paverud, supra,* 189 Cal.App.3d at p. 863.)

- The issue of superseding cause turns on foreseeability as it relates to both (1) the defendant's conduct, and (2) the nature of the resulting injury. (*Akins v. County of Sonoma* (1967) 67 Cal.2d 185, 199–200, 60 Cal.Rptr. 499, 430 P.2d 57; *Paverud, supra,* 189 Cal.App.3d at pp. 862–863; *Martinez v. Vintage Petroleum* (1998) 68 Cal.App.4th 695, 700–701, 80 Cal.Rptr.2d 449.)

- Courts have emphasized that "even if the intervening negligent conduct is not foreseeable, [defendant] is not relieved of liability unless the risk of harm suffered also was unforeseeable. [Citations.]." (*Pappert v. San Diego Gas and Electric Co.* (1982) 137 Cal.App.3d 205, 210–211, 186 Cal.Rptr. 847.) In *Pappert*, the court found that the trial court erred in submitting to the jury the issue of whether decedent's negligence was a superseding cause: "Here, the injury sustained, death by electrocution . . . is precisely and directly the result to be expected when a person trimming a tree on his residential property is exposed to the charge from an uninsulated 12,000 volt power line passing through its foliage." (*Id*. at 211.)

- California courts approach the issue of superseding cause by addressing it after affirmative findings have been made on both negligence and causation. Some opinions have noted that this approach may be analytically incorrect because, if a superseding cause is found, then it negates any causation involving the defendant. (*Ewart v. Southern California Gas Co.* (1965) 237 Cal.App.2d 163, 169, 46 Cal.Rptr. 631.)

- Much of this instruction is based on section 447 of the Restatement Second of Torts:

> The fact that an intervening act of a third person is negligent in itself or is done in a negligent manner does not make it a superseding cause of harm

to another which the actor's negligent conduct is a substantial factor in bringing about, if

(a) the actor at the time of his negligent conduct should have realized that a third person might so act, or

(b) a reasonable man knowing the situation existing when the act of the third person was done would not regard it as highly extraordinary that the third person had so acted, or

(c) the intervening act is a normal consequence of a situation created by the actor's conduct and the manner in which it is done is not extraordinarily negligent.

- Note that section 447 is phrased in the negative. It sets forth the three circumstances in which a third party's negligence is *not* a superseding cause. Section 447 does not state when an intervening force *is* a superseding cause, except by negative implication. However, if all three factors are absent, the independent cause must be superseding. To make this point clearer, this instruction is phrased in the affirmative at the outset and requires the defendant to prove that all the factors are absent. (See *Martinez, supra,* 68 Cal.App.4th at p. 702.)

- In this instruction, the term "extraordinary" means "unforeseeable," as in "statistically extremely improbable" or "unpredictable." (*Campodonico v. State Auto Parks, Inc.* (1970) 10 Cal.App.3d 803, 807, 89 Cal.Rptr. 270.)

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 975–976, pp. 366–368
- CALIFORNIA TORTS, Ch. 2, *Causation*, § 2.11 (Matthew Bender)
- California Tort Guide (Cont.Ed.Bar 1996) § 1.17
- CALIFORNIA PRODUCTS LIABILITY ACTIONS, Ch. 2, *Liability for Defective Products*, § 2.22 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 380, *Negligence* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 165, *Negligence*, §§ 165.301, 165.321 (Matthew Bender)

433
Causation: Intentional Tort/Criminal Act as Superseding Cause

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[*Name of defendant***] claims that [he/she/it] is not responsible for [***name of plaintiff***]'s harm because of the later [criminal/intentional] conduct of [***insert name of third party***]. [***Name of defendant***] is not responsible for [***name of plaintiff***]'s harm if [***name of defendant***] proves both of the following:**

1. **That the [intentional/criminal] conduct of [***name of third party***] happened after the conduct of [***name of defendant***]; and**

2. **That [***name of defendant***] did not know and could not have reasonably foreseen that another person would be likely to take advantage of the situation created by the [***name of defendant***]'s conduct to commit this type of act.**

SOURCES AND AUTHORITY

- Restatement Second of Torts, section 448, provides: "The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime."

- The California courts have adopted section 448. (*Kane v. Hartford Accident and Indemnity Co.* (1979) 98 Cal.App.3d 350, 360, 159 Cal.Rptr. 446.)

- Section 449 provides: "If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby." The Court in *Landeros v. Flood* (1976) 17 Cal.3d 399, 411, 131 Cal.Rptr. 69, 551 P.2d 389, relied on section 449.

- If the criminal or tortious conduct encountered by the plaintiff was not foreseeable at the time of defendant's negligence, then the defendant will not be liable. (*Kane, supra,* 98 Cal.App.3d at p. 360 [rape not a result of failure to uncover bonded employee's prior theft-related offenses].)

- Courts have observed that "[c]riminal conduct which causes injury will ordinarily be deemed the proximate cause of an injury, superseding any prior negligence which might otherwise be deemed a contributing cause. [Citation.]" (*Koepke v. Loo* (1993)

18 Cal.App.4th 1444, 1449, 23 Cal.Rptr.2d 34.) However, "[t]he common law rule that an intervening criminal act is, by its very nature, a superseding cause has lost its universal application and its dogmatic rigidity." (*Kane, supra,* 98 Cal.App.3d at p. 360.)

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 992–994, pp. 382–386
- CALIFORNIA TORTS, Ch. 2, *Causation*, § 2.11 (Matthew Bender)
- California Tort Guide (Cont.Ed.Bar 1996) § 1.17
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 380, *Negligence* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 165, *Negligence*, §§ 165.301, 165.303, 165.322 (Matthew Bender)

434
Alternative Causation

You may decide that more than one of the defendants was negligent, but that the negligence of only one of them could have actually caused [*name of plaintiff***]'s harm. If you cannot decide which defendant caused [***name of plaintiff***]'s harm, you must decide that each defendant is responsible for the harm.**

However, if a defendant proves that [he/she/it] did not cause [*name of plaintiff***]'s harm, then you must conclude that defendant is not responsible.**

SOURCES AND AUTHORITY

- This instruction is based on the rule stated in the case of *Summers v. Tice* (1948) 33 Cal.2d 80, 86, 199 P.2d 1, in which the Court held that the burden of proof on causation shifted to the two defendants to prove that each was not the cause of plaintiff's harm: "They brought about a situation where the negligence of one of them injured the plaintiff, hence it should rest with them each to absolve himself if he can. The injured party has been placed by defendants in the unfair position of pointing to which defendant caused the harm. If one can escape the other may also and plaintiff is remediless."

- Restatement Second of Torts, section 433B(3), provides: "Where the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one has caused it, the burden is upon each such actor to prove that he has not caused the harm."

- The *Summers* rule applies to multiple causes, at least one of which is tortious. (*Vahey v. Sacia* (1981) 126 Cal.App.3d 171, 177, fn. 2, 178 Cal.Rptr. 559.) Thus, it can apply where there is only one defendant. (*Id*. at 177) However, California courts apply the alternative liability theory only when all potential tortfeasors have been joined as defendants. (*Setliff v. E. I. Du Pont De Nemours & Co.* (1995) 32 Cal.App.4th 1525, 1534–1535, 38 Cal.Rptr.2d 763.)

<u>Secondary Sources</u>

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 971, pp. 361–362
- CALIFORNIA TORTS, Ch. 2, *Causation*, § 2.03 (Matthew Bender)
- California Tort Guide (Cont.Ed.Bar 1996) § 1.16
- CALIFORNIA PRODUCTS LIABILITY ACTIONS, Ch. 7, *Proof*, § 7.06 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 380, *Negligence* (Matthew Bender)

- CALIFORNIA POINTS AND AUTHORITIES, Ch. 165, *Negligence*, § 165.330 (Matthew Bender)

435
Causation for Asbestos-Related Cancer Claims

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

DIRECTIONS FOR USE

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

This instruction is intended to be given along with Instruction 430, *Causation: Substantial Factor,* and, if necessary, Instruction 431, *Causation: Multiple Causes.*

SOURCES AND AUTHORITY

- "In the context of a cause of action for asbestos-related latent injuries, the plaintiff must first establish some threshold exposure to the defendant's defective asbestos-containing products, and must further establish in reasonable medical probability that a particular exposure or series of exposures was a 'legal cause' of his injury, i.e., a substantial factor in bringing about the injury. In an asbestos-related cancer case, the plaintiff need not prove that fibers from the defendant's product were the ones, or among the ones, that actually began the process of malignant cellular growth. Instead, the plaintiff may meet the burden of proving that exposure to defendant's product was a substantial factor causing the illness by showing that in reasonable medical probability it 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., Inc.* (2002) 98 Cal.App.4th 1098, 1103 [120 Cal.Rptr.2d 23], internal citations omitted.)

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

Secondary Sources

- CALIFORNIA TORTS, Ch. 2, *Causation*, § 2.03 (Matthew Bender)
- CALIFORNIA PRODUCTS LIABILITY ACTIONS, Ch. 2, *Liability for Defective Products*, § 2.22, Ch. 7, *Proof*, § 7.06 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 380, *Negligence* (Matthew Bender)

450
Good Samaritan

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

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

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

   and

2. **That the [additional risk/reliance] resulted in harm to [***name of plaintiff***].**

DIRECTIONS FOR USE

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

SOURCES AND AUTHORITY

- *Westbrooks v. State of California* (1985) 173 Cal.App.3d 1203, 219 Cal.Rptr. 674

- It is a well-established general rule that a person who has not created a danger has no duty to come to the aid of a third party to protect the third party against injury from that danger. However, "the volunteer who, having no initial duty to do so, undertakes to come to the aid of another--the 'good Samaritan' ... is under a duty to exercise due care in performance and is liable if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking. [Citation.]" (*Williams v. State of California* (1983) 34 Cal.3d 18, 23, 192 Cal.Rptr. 233, 664 P.2d 137.) The reliance must have exposed the victim to a risk of harm that was greater than the harm to which the victim was already exposed. (*Id*. at p. 28.)

- Restatement Second of Torts, section 323, provides: "One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise

reasonable care to perform his undertaking, if: his failure to exercise such care increases the risk of such harm, or the harm is suffered because of the other's reliance upon the undertaking."

Under section 323, negligent conduct, standing alone, is insufficient to justify the imposition of liability.

- While both *Williams* and *Westbrooks* involved law enforcement officers, application of the doctrine is not limited to that context. In *Williams*, the Court observed that cases involving police officers who render assistance in non–law enforcement situations involve "no more than the application of the duty of care attaching to any volunteered assistance." (*Williams, supra*, 34 Cal.3d at pp. 25–26.) Also, note that section 323 was cited as a "general principle" by the Court in *Coffee v. Mc Donnell-Douglas Corp*. (1972) 8 Cal.3d 551, 557, 105 Cal.Rptr. 358, 503 P.2d 1366, a case that did not involve law enforcement officers.

- Statutory exceptions to Good Samaritan liability include immunities under certain circumstances for medical licensees (Bus. & Prof. Code, §§ 2395–2398), nurses (Bus. & Prof. Code, §§ 2727.5, 2861.5), dentists (Bus. & Prof. Code, § 1627.5), rescue teams (Health & Saf. Code, § 1317(f)), paramedics (Health & Saf. Code, § 1799.104), those acting to remove food from the throat of a person who is choking (Health & Saf. Code, § 114180(d)), and first-aid volunteers (Gov. Code, § 50086).

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 868–872
- CALIFORNIA TORTS, Ch. 1, *Negligence: Duty and Breach*, § 1.11 (Matthew Bender)
- CALIFORNIA TRIAL GUIDE, Unit 90, *Closing Argument*, § 90.90 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 380, *Negligence* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 165, *Negligence*, § 165.150 (Matthew Bender)

451
Express Assumption of Risk

[*Name of defendant***] claims that [***name of plaintiff***] may not recover any damages because [he/she] agreed before the incident that [he/she] would not hold [***name of defendant***] responsible for any damages.**

If [*name of defendant***] proves that there was such an agreement and that it applies to [***name of plaintiff***]'s claim, then you must find that [***name of defendant***] is not responsible for [***name of plaintiff***]'s harm.**

DIRECTIONS FOR USE

This instruction would be given in very limited circumstances. In reviewing the case law in this area, it appears that both the interpretation of a waiver agreement and application of its legal effect are generally resolved by the judge before trial. This is probably because "'[t]he existence of a duty is a question of law for the court' [citation]. So is the interpretation of a written instrument where the interpretation does not turn on the credibility of extrinsic evidence." (*Allabach v. Santa Clara County Fair Assn., Inc.* (1996) 46 Cal.App.4th 1007, 1011, 54 Cal.Rptr.2d 330.)

There may be contract law defenses (such as fraud, lack of consideration, duress, unconscionability) that could be asserted by the plaintiff to contest the validity of a waiver. If these defenses were to be considered by a jury, then an instruction on express assumption of the risk would probably be necessary.

SOURCES AND AUTHORITY

- "Express assumption occurs when the plaintiff, in advance, expressly consents … to relieve the defendant of an obligation of conduct toward him, and to take his chances of injury from a known risk arising from what the defendant is to do or leave undone. … The result is that … being under no duty, [the defendant] cannot be charged with negligence." (*Saenz v. Whitewater Voyages, Inc.* (1990) 226 Cal.App.3d 758, 764, 276 Cal.Rptr. 672 (internal citations omitted).)

- "[C]ases involving express assumption of risk are concerned with instances in which, as the result of an express agreement, the defendant owes no duty to protect the plaintiff from an injury-causing risk. Thus in this respect express assumption of risk properly can be viewed as analogous to primary assumption of risk." (*Knight v. Jewett* (1992) 3 Cal.4th 296, 308–309, fn. 4, 11 Cal.Rptr.2d 2, 834 P.2d 696.)

- A release may also bar a wrongful death action, depending on the circumstances and terms of an agreement. (See *Coates v. Newhall Land and Farming, Inc.* (1987) 191 Cal.App.3d 1, 7–8, 236 Cal.Rptr. 181.)

- Valid waivers will be upheld provided that they are not contrary to the "public interest." (*Tunkl v. Regents of Univ. of California* (1963) 60 Cal.2d 92, 101, 32 Cal.Rptr. 33, 383 P.2d 441.)

- "To be valid and enforceable, a written release exculpating a tortfeasor from liability for future negligence or misconduct must be clear, unambiguous and explicit in expressing the intent of the parties. … Whether a contract provision is clear and unambiguous is a question of law, not of fact." (*Madison v. Superior Court* (1988) 203 Cal.App.3d 589, 598, 250 Cal.Rptr. 299.)

- Restatement Second of Torts, section 496B, provides: "A plaintiff who by contract or otherwise expressly agrees to accept a risk of harm arising from the defendant's negligent … conduct cannot recover for such harm, unless the agreement is invalid as contrary to public policy."

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 1107, pp. 519–520
- CALIFORNIA TORTS, Ch. 4, *Comparative Negligence, Assumption of the Risk, and Related Defenses*, § 4.03 (Matthew Bender)
- California Tort Guide (Cont.Ed.Bar 1996) § 1.44
- CALIFORNIA TRIAL GUIDE, Unit 90, *Closing Argument*, § 90.90 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 380, *Negligence* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 165, *Negligence*, § 165.402 (Matthew Bender)

452
Sudden Emergency

[*Name of plaintiff/defendant***] claims that [he/she] was not negligent because [he/she] acted with reasonable care in an emergency situation. [***Name of plaintiff/defendant***] was not negligent if [he/she] proves all of the following:**

1. **That there was a sudden and unexpected emergency situation in which someone was in actual or apparent danger of immediate injury;**

2. **That [***name of plaintiff/defendant***] did not cause the emergency; and**

3. **That [***name of plaintiff/defendant***] acted as a reasonably careful person would have acted in similar circumstances, even if it appears later that a different course of action would have been safer.**

DIRECTIONS FOR USE

The instruction should not be given unless at least two courses of action are available to the party after the danger is perceived. (*Anderson v. Latimer* (1985) 166 Cal.App.3d 667, 675, 212 Cal.Rptr. 544.)

Additional instructions should be given if there are alternate theories of negligence.

SOURCES AND AUTHORITY

- The doctrine of imminent peril may be used by either the plaintiff or the defendant, or, in a proper case, both. (*Smith v. Johe* (1957) 154 Cal.App.2d 508, 511–512, 316 P.2d 688.)

- "Whether the conditions for application of the imminent peril doctrine exist is itself a question of fact to be submitted to the jury." (*Damele v. Mack Trucks, Inc.* (1990) 219 Cal.App.3d 29, 37, 267 Cal.Rptr. 197; See also *Leo v. Dunham* (1953) 41 Cal.2d 712, 715, 264 P.2d 1.)

- "[A] person who, without negligence on his part, is suddenly and unexpectedly confronted with peril, arising from either the actual presence, or the appearance, of imminent danger to himself or to others, is not expected nor required to use the same judgment and prudence that is required of him in the exercise of ordinary care in calmer and more deliberate moments." (*Leo, supra,* 41 Cal.2d at p. 714.)

- The "doctrine is properly applied only in cases where an unexpected physical danger is so suddenly presented as to deprive the injured party [or the defendant] of his

power of using reasonable judgment." (*Sadoian v. Modesto Refrigerating Co.* (1958) 157 Cal.App.2d 266, 274, 320 P.2d 583.) The exigent nature of the circumstances effectively lowers the standard of care: " 'The test is whether the actor took one of the courses of action which a standard man in that emergency might have taken, and such a course is not negligent even though it led to an injury which might have been prevented by adopting an alternative course of action.' [Citation.]" (*Schultz v. Mathias* (1970) 3 Cal.App.3d 904, 912–913, 83 Cal.Rptr. 888.)

- The doctrine of imminent peril does not apply to a person whose conduct causes or contributes to the imminent peril. (*Pittman v. Boiven* (1967) 249 Cal.App.2d 207, 216, 57 Cal.Rptr. 319.)

- The doctrine applies when a person perceives danger to himself as well as when he or she perceives a danger to others. (*Damele, supra,* 219 Cal.App.3d at p. 36.)

- "[T]he mere appearance of an imminent peril to others—not an actual imminent peril—is all that is required." (*Damele, supra,* 219 Cal.App.3d at p. 37.)

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 757–758, pp. 96–98
- CALIFORNIA TORTS, Ch. 1, *Negligence: Duty and Breach*, §§ 1.03, 1.11, 1.30 (Matthew Bender)
- California Tort Guide (Cont.Ed.Bar 1996) § 4.7
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 380, *Negligence* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 165, *Negligence*, § 165.250 (Matthew Bender)

453
Rescue

[*Name of plaintiff***] claims that [he/she] was not responsible for [his/her] own injury because [he/she] was attempting to rescue a person who was placed in danger as a result of [***name of defendant***]'s negligence.**

[*Name of plaintiff***] is not responsible for [his/her] own injuries if [he/she] proves all of the following:**

1. **That there was an emergency situation in which someone was in actual or apparent danger of immediate injury;**

2. **That the emergency was created by [***name of defendant***]'s negligence; and**

3. **That [***name of plaintiff***] did not act rashly or recklessly when [he/she] attempted to rescue the victim.**

SOURCES AND AUTHORITY

- In *Solgaard v. Guy F. Atkinson Co.* (1971) 6 Cal.3d 361, 99 Cal.Rptr. 29, 491 P.2d 821, the Court stated the rescue doctrine as follows: "The cases have developed the rule that persons injured in the course of undertaking a necessary rescue may, absent rash or reckless conduct on their part, recover from the person whose negligence created the peril which necessitated the rescue." (*Id.* at p. 368.) The Court found that a doctor, who was injured while attempting to rescue two injured workers, was "entitled to the benefits of the rescue doctrine, including an instruction to the jury that as a rescuer, plaintiff could recover on the basis of defendant's negligence to [the victims], if plaintiff's injury was a proximate result thereof, and if plaintiff acted neither rashly nor recklessly under the circumstances." (*Id.* at p. 369.)

- Before *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, 119 Cal.Rptr. 858, 532 P.2d 1226, the rescue doctrine helped plaintiffs establish duty and was also a defense to the former bar of contributory negligence. (*Solgaard, supra,* 6 Cal.3d at p. 368.) The rescue doctrine may still be a viable counter to a charge of contributory negligence.

- In *Neighbarger v. Irwin Industries, Inc.* (1994) 8 Cal.4th 532, 34 Cal.Rptr.2d 630, 882 P.2d 347, the Court observed that "a person is not contributorily negligent who, with due care, encounters the risk created by the defendant's negligence in order to perform a rescue necessitated by that negligence." (*Id.* at p. 537.) This observation was not essential to the holding of the case, which focused on the issue of duty. Nevertheless, it suggests that the rescue doctrine may still play a role in determining whether or not the plaintiff was at fault.

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1061–1063, pp. 459–462
- CALIFORNIA TORTS, Ch. 1, *Negligence: Duty and Breach*, §§ 1.03, 1.30 (Matthew Bender)
- California Tort Guide (Cont.Ed.Bar 1996) § 1.41
- CALIFORNIA TRIAL GUIDE, Unit 90, *Closing Argument*, § 90.90 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 380, *Negligence* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 165, *Negligence*, § 165.140 (Matthew Bender)

460
Strict Liability for Ultrahazardous Activities
Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] was engaged in an ultrahazardous activity that caused [him/her/it] to be harmed and that [***name of defendant***] is responsible for that harm.**

People who engage in ultrahazardous activities are responsible for the harm these activities cause others, regardless of how carefully they carry out these activities. [*Insert ultrahazardous activity***] is an ultrahazardous activity.**

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

1. **That [***name of defendant***] was engaged in [***insert ultrahazardous activity***];**

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

3. **That [***name of plaintiff***]'s harm was the kind of harm that would be anticipated as a result of the risk created by [***insert ultrahazardous activity***]; and**

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

SOURCES AND AUTHORITY

- "The doctrine of ultrahazardous activity provides that one who undertakes an ultrahazardous activity is liable to every person who is injured as a proximate result of that activity, regardless of the amount of care he uses." (*Pierce v. Pacific Gas & Electric Co.* (1985) 166 Cal.App.3d 68, 85 [212 Cal.Rptr. 283], internal citations omitted.)

- Whether an activity is ultrahazardous is a question of law to be determined by the court. (*Luthringer v. Moore* (1948) 31 Cal.2d 489, 496 [190 P.2d 1].)

- Restatement of Torts Second, section 519 provides:

  (1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.

(2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.

- Restatement of Torts Second, section 520 provides:

  In determining whether an activity is abnormally dangerous, the following factors are to be considered:
  (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
  (b) likelihood that the harm that results from it will be great;
  (c) inability to eliminate the risk by the exercise of reasonable care;
  (d) extent to which the activity is not a matter of common usage;
  (e) inappropriateness of the activity to the place where it is carried on; and
  (f) extent to which its value to the community is outweighed by its dangerous attributes.

- Section 519 formerly provided, in part, that "one who carries on an ultrahazardous activity is liable to another whose person, land or chattels the actor should recognize is likely to be harmed by the unpreventable miscarriage of the activity for harm resulting thereto from that which makes the activity ultrahazardous, although the utmost care is exercised to prevent the harm." This section was followed by the court in *Luthringer, supra,* and by other courts in subsequent cases. (See *Garcia v. Estate of Norton* (1986) 183 Cal.App.3d 413, 418 [228 Cal.Rptr. 108].) This statement regarding forseeability is evidently still good law in California, even though the wording of section 519 does not presently contain the limitation.

- Strict liability in this context has been confined to "consequences which lie within the extraordinary risk posed by the abnormally dangerous activity and is limited to the 'class of persons who are threatened by the abnormal danger, and the kind of damage they may be expected to incur.' " (*Goodwin v. Reilley* (1985) 176 Cal.App.3d 86, 92 [221 Cal.Rptr. 374], citing Prosser & Keeton, The Law of Torts (5th ed. 1984) § 75, p. 562.)

- "The important factor is that certain activities under certain conditions may be so hazardous to the public generally, and of such relative infrequent occurrence, that it may well call for strict liability as the best public policy." (*Luthringer, supra,* 31 Cal.2d at p. 500.)

- "It is axiomatic that an essential element of a plaintiff's cause of action, whether based on negligence or strict liability, is the existence of a causal connection between defendant's act and the injury which plaintiff suffered." (*Smith v. Lockheed Propulsion Co.* (1967) 247 Cal.App.2d 774, 780 [56 Cal.Rptr. 128], internal citations omitted.)

- Defendant contended that the strict liability doctrine "cannot be applied unless the defendant is aware of the abnormally dangerous condition or activity." This is

unsound: One who carried on such an "activity is liable for injuries to a person whom the actor reasonably should recognize as likely to be harmed ... , even though 'the utmost care is exercised to prevent the harm.' " (*Garcia, supra*, 183 Cal.App.3d at p. 420, internal citation omitted.)

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1227–1240
- 1 Levy, et al., California Torts (1985–2000) Strict Liability for Hazardous Activities, §§ 7.01–7.06
- CALIFORNIA ENVIRONMENTAL LAW & LAND USE PRACTICE, Ch. 1, *Nuisance, Trespass, and Strict Liability for Ultrahazardous Activities* (Matthew Bender)
- CALIFORNIA TRIAL GUIDE, Unit 11, *Opening Statement*, § 11.55 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 380, *Negligence* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 234, *Ultrahazardous Activities* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, §§ 2:4–2:10

461
Strict Liability for Injury Caused by Wild Animal
Essential Factual Elements

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

People who own wild animals are responsible for the harm that these animals cause to others, no matter how carefully they guard or restrain their animals.

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

1. **That [***name of defendant***] owned a [***insert type of animal***];**

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

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

SOURCES AND AUTHORITY

- Lions, tigers, bears, elephants, wolves, monkeys, and sharks have been characterized as wild animals. (*Rosenbloom v. Hanour Corp.* (1998) 66 Cal.App.4th 1477, 1479, fn. 1 [78 Cal.Rptr.2d 686].)

- An owner of a wild animal is strictly liable to persons who are injured by the animal: "In such instances the owner is an insurer against the acts of the animal, to one who is injured without fault, and the question of the owner's negligence is not in the case." (*Opelt v. Al G. Barnes Co.* (1919) 41 Cal.App. 776, 779 [183 P. 241].)

- "[I]f the animal which inflicted the injury is vicious and dangerous, known to the defendant to be such, an allegation of negligence on the part of defendant is unnecessary and the averment, if made, may be treated as surplusage." (*Baugh v. Beatty* (1949) 91 Cal.App.2d 786, 791 [205 P.2d 671].)

- A wild animal, of a type to be known to have a vicious nature, is presumed to be vicious. (*Baugh, supra,* 91 Cal.App.2d at p. 791.) Accordingly, an instruction on the owner's knowledge of its ferocity is unnecessary. (*Id.* at p. 791–792.)

- "It is commonly said that scienter, or knowledge of such propensities, must be proved in the case of domestic animals, but is presumed in the case of wild animals." (6 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 1218, p. 653.)

- "The owner of a naturally dangerous animal may be excused from the usual duty of care: 'In cases involving "primary assumption of risk"—where, by virtue of the nature of the activity and the parties' relationship to the activity, the defendant owes no legal duty to protect the plaintiff from the particular risk of harm that caused the injury—the doctrine … operates as a complete bar to the plaintiff's recovery.' " (*Rosenbloom, supra,* 66 Cal.App.4th at p. 1479, internal citation omitted.)

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1217–1218, pp. 653–654
- 1 Levy, et al., California Torts (1985–2000) Strict Liability for Injuries Caused by Animals, §§ 6.01–6.10
- California Tort Guide (Cont.Ed.Bar 1996) §§ 3.3–3.6
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 23, *Animals: Civil Liability* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, §§ 2:20–2:21

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

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

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

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

1. **That [***name of defendant***] owned, kept, or controlled a [***insert type of animal***];**

2. **That the [***insert type of animal***] had an unusually dangerous nature or tendency;**

3. **That before [***name of plaintiff***] was injured, [***name of defendant***] knew or should have known that the [***insert type of animal***] had this nature or tendency;**

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

5. **That the [***insert type of animal***]'s unusually dangerous nature or tendency was a substantial factor in causing [***name of plaintiff***]'s harm.**

SOURCES AND AUTHORITY

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

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

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

- Section 509 of the Restatement Second of Torts provides:

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

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

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

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

<u>Secondary Sources</u>

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1227–1240, pp. 662–675
- 1 Levy, et al., California Torts (1985–2000) Strict Liability for Injuries Caused by Animals, §§ 6.01–6.10
- California Tort Guide (Cont.Ed.Bar 1996) §§ 3.3–3.6
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 23, *Animals: Civil Liability* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, §§ 2:20–2:21

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

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

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

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

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

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

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

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

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

SOURCES AND AUTHORITY

- Civil Code section 3342 (a), provides: "The owner of any dog is liable for the damages suffered by any person who is bitten by the dog while in a public place or lawfully in a private place, including the property of the owner of the dog, regardless of the former viciousness of the dog or the owner's knowledge of such viciousness. A person is lawfully upon the private property of such owner within the meaning of this section when he is on such property in the performance of any duty imposed upon him by the laws of this state or by the laws or postal regulations of the United States, or when he is on such property upon the invitation, express or implied, of the owner."

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

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

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

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

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

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1223–1225, pp. 657–661
- 1 Levy, et al., California Torts (1985–2000) Strict Liability for Injuries Caused by Animals, § 6.12
- California Tort Guide (Cont.Ed.Bar 1996) § 3.2
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 23, *Animals: Civil Liability* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 178, *Premises Liability* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, §§ 2:16

VF-400
Negligence—Single Defendant

We answer the questions submitted to us as follows:

1. Was [*name of defendant***] negligent?**

___Yes ___No

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

2. Was [*name of defendant***]'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. What are [*name of plaintiff***]'s damages?**

[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:]	**$_____]**
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:]	**$_____]**
[c. Past noneconomic loss, including [physical pain/mental suffering:]	**$_____]**
[d. Future noneconomic loss, including [physical pain/mental suffering:]	**$_____]**
	TOTAL $_____

Signed: _____
Presiding Juror
Dated: _____

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

DIRECTIONS FOR USE

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

This verdict form is based on Instruction 400, *Negligence—Essential Factual Elements.*

If specificity is not required, users do not have to itemize all the damages listed in question 3. The breakdown is optional; depending on the circumstances, users may wish to break down the damages even further.

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

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

VF-401
Negligence—Single Defendant
Plaintiff's Negligence at Issue—Fault of Others Not at Issue

We answer the questions submitted to us as follows:

1. Was [*name of defendant***] negligent?**

___Yes ___No

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

2. Was [*name of defendant***]'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. What are [*name of plaintiff***]'s total damages? Do not reduce the damages based on the fault, if any, of [***name of plaintiff***].**

[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:] $_____]
[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 4. 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.**

4. Was [*name of plaintiff*] negligent?

___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 plaintiff*]'s negligence a substantial factor in causing [his/her] 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 percentage of responsibility for [*name of plaintiff*]'s harm do you assign to:

[*Name of defendant*]:	**_____%**
[*Name of plaintiff*]:	**_____%**
TOTAL	**100 %**

Signed: _____
Presiding Juror

Dated: _____

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

DIRECTIONS FOR USE

The special-verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case. This verdict form is based on Instruction 400, *Negligence—Essential Factual Elements*, and Instruction 405, *Plaintiff's Contributory Negligence*.

If specificity is not required, users do not have to itemize all the damages listed in question 3. The breakdown is optional; depending on the circumstances, users may wish to break down the damages even further.

If there are multiple causes of action, users may wish to combine the individual forms into one form. This form may be modified if the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest on specific losses that occurred prior to judgment.

VF-402
Negligence—Fault of Plaintiff and Others at Issue

We answer the questions submitted to us as follows:

1. Was [*name of first defendant***] negligent?**

___Yes **___No**

Was [*name of second defendant***] negligent?**

___Yes **___No**

[*repeat as necessary for other defendants.***]**

If you answered yes in any part of question 1, then answer question 2. If you answered no to all parts of question 1, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. For each defendant that received a "yes" answer in question 1, answer the following:

Was [*name of first defendant***]'s negligence a substantial factor in causing harm to [***name of plaintiff***]?**

___Yes **___No**

Was [*name of second defendant***]'s negligence a substantial factor in causing harm to [***name of plaintiff***]?**

___Yes **___No**

[*repeat as necessary for other defendants.***]**

If you answered yes in any part of question 2 is yes, then answer question 3. If you answered no to all parts of question 2, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. What are [*name of plaintiff***]'s total damages? Do not reduce the damages based on the fault, if any, of [***name of plaintiff***] or others.**

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

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

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

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

TOTAL $_____

If [*name of plaintiff***] has proved any damages, then answer question 5. If [***name of plaintiff***] has not proved any damages, then stop here, answer no further questions, and have the presiding juror sign and date this form.**

4. Was [*name of plaintiff***] negligent?**

___Yes ___No

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

5. Was [*name of plaintiff***]'s negligence a substantial factor in causing [his/her] harm?**

___Yes ___No

If your answer to question 5 is yes, then answer question 6. If you answered no, insert the number zero next to [*name of plaintiff***]'s name in question 8 and answer question 6.**

6. Was [*name/description of first nonparty***] negligent?**

___Yes ___No

Was [*name/description of second nonparty***] negligent?**

___Yes ___No

If you answered yes in any part of 6, then answer question 7. If you answered no to all parts of question 6, answer question 8.

7. **For each person who received a "yes" answer in question 7, answer the following:**

   Was [*name/description of first nonparty***]'s negligence a substantial factor in causing harm to [***name of plaintiff***]?**

   ___Yes ___No

   Was [*name/description of second nonparty***]'s negligence a substantial factor in causing harm to [***name of plaintiff***]?**

   ___Yes ___No

   If you answered yes in any part of question 7, then answer question 8. If you answered no regarding all persons in question 7, then insert the number zero next to their names in question 8 and answer question 8.

8. **What percentage of responsibility for [***name of plaintiff***]'s harm do you assign to the following? Insert a percentage for only those who received "yes" answers in questions 2, 5, or 7:**

[*Name of first defendant***]:**	**_____%**
[*Name of second defendant***]:**	**_____%**
[*Name of plaintiff***]:**	**_____%**
[*Name/description of first nonparty***]:**	**_____%**
[*Name/description of second nonparty***]:**	**_____%**
TOTAL	**_100_%**

Signed: _____
Presiding Juror

Dated: _____

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

DIRECTIONS FOR USE

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

This verdict form is based on Instruction 400, *Negligence—Essential Factual Elements*, Instruction 405, *Plaintiff's Contributory Negligence*; and Instruction 406, *Apportionment of Responsibility*.

If specificity is not required, users do not have to itemize all the damages listed in question 3. The breakdown is optional; depending on the circumstances, users may wish to break down the damages even further.

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

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

Users may wish to have the jury specify the liability and causation of each nonparty actor.

If a second plaintiff is contributorily negligent, add his or her name to the list of possible contributing persons, notwithstanding the fact that the bracket is currently designated as "nonparty."

If superseding cause is an issue, insert a question on that issue after question 5.

This form may be modified if a nonparty is a product manufacturer.

VF-403
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. 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 408, *Co-participant in a Sports Activity*.

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.

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.

VF-404
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:]	**$_____]**
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:]	**$_____]**
[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 409, *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.

VF-405
Parental Liability (Nonstatutory)

We answer the questions submitted to us as follows:

1. **Was [***name of defendant***] aware of habits or tendencies of [***name of minor***] that created an unreasonable risk of harm to other persons and 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**

   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 410, *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 410.

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.

VF-406
Negligence—Sale of Alcoholic Beverages to Obviously Intoxicated Minor

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We answer the questions submitted to us as follows:

1. **Was [***name of defendant***] [licensed] [authorized] [required to be licensed or authorized] to sell alcoholic beverages?**

   ___Yes ___No

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

2. **Did [***name of defendant***] sell or give alcoholic beverages to [***name of alleged minor***]?**

   ___Yes ___No

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

3. **Was [***name of alleged minor***] less than 21 years old at the time?**

   ___Yes ___No

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

4. **Did [***name of alleged minor***] display symptoms that would lead a reasonable person to conclude that [***name of alleged minor***] was intoxicated?**

   ___Yes ___No

   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 alleged minor***] harm [himself/herself/[***name of plaintiff***]] while [***name of alleged minor***] was intoxicated?**

   ___Yes ___No

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

6. Was [*name of defendant***]'s selling or giving alcoholic beverages to [***name of alleged minor***] a substantial factor in causing [his/her/[***name of plaintiff***]]'s harm?**

___Yes ___No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the 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: _____

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

DIRECTIONS FOR USE

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

This verdict form is based on Instruction 422, *Sale of Alcoholic Beverages to Obviously Intoxicated Minor (Bus. & Prof. Code, § 25602.1).*

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

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

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

If contributory negligence is an issue, this form should be modified. See Verdict Form 401, *Plaintiff's Negligence at Issue/Fault of Others Not at Issue*, for a model form involving the issue of contributory negligence.

VF-407
Strict Liability—Ultrahazardous Activities

We answer the questions submitted to us as follows:

1. Was [*name of defendant***] engaged in [***insert ultrahazardous activity***]?**

___Yes ___No

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

2. Was [*name of plaintiff***] harmed?**

___Yes ___No

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

3. Was [*name of plaintiff***]'s harm the kind of harm that would be anticipated as a result of the risk created by [***insert ultrahazardous activity***]?**

___Yes ___No

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

4. Was [*name of defendant***]'s [***insert ultrahazardous activity***] a substantial factor in causing [***name of plaintiff***]'s harm?**

___Yes ___No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the 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: _____

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

DIRECTIONS FOR USE

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

This verdict form is based on Instruction 460, *Strict Liability for Ultrahazardous Activities—Essential Factual Elements.*

If specificity is not required, users do not have to itemize all the damages listed in question 5. The breakdown is optional; depending on the circumstances, users may wish to break down the damages even further.

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

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

VF-408
Strict Liability for Domestic Animal With Dangerous Propensities

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We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] own, keep, or control a [***insert type of animal***]?**

   ___Yes ___No

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

2. **Did the [***insert type of animal***] have an unusually dangerous nature or tendency?**

   ___Yes ___No

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

3. **Did [***name of defendant***] know, or should [he/she] have known, that the [***insert type of animal***] had this nature or tendency?**

   ___Yes ___No

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

4. **Was the [insert type of animal]'s unusually dangerous nature or tendency a substantial factor in causing harm to [name of plaintiff]?**

   ___Yes ___No

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

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

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

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

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

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

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

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

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 462, *Strict Liability for Injury Caused by Domestic Animal With Dangerous Propensities.*

If specificity is not required, users do not have to itemize all the damages listed in question 5. The breakdown is optional; depending on the circumstances, users may wish to break down the damages even further.

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

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

VF-409
Dog Bite Statute (Civ. Code, § 3342)

We answer the questions submitted to us as follows:

1. Did [*name of defendant***]'s dog bite [***name of plaintiff***]?**

___Yes **___No**

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

2. Was [*name of plaintiff***] in a public place/lawfully on private property when [he/she] was bitten?**

___Yes **___No**

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

3. Was the dog 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 the damages, if any, that [*name of plaintiff***] suffered as a result of the dog bite?**

[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:] **$_____]**
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] **$_____]**
[c. Past noneconomic loss, including [physical pain/mental suffering:] **$_____]**
[d. Future noneconomic loss, including [physical pain/mental suffering:] **$_____]**

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

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

DIRECTIONS FOR USE

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

This verdict form is based on Instruction 463, *Dog Bite Statute (Civ. Code, § 3342)-Essential Factual Elements.*

If specificity is not required, users do not have to itemize all the damages listed in question 4. The breakdown is optional; depending on the circumstances, users may wish to break down the damages even further.

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

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

500
Essential Factual Elements

Please see Instruction 400, Essential Factual Elements (Negligence)

DIRECTIONS FOR USE

In medical malpractice or professional negligence cases, the word "medical" or "professional" should be added before the word "negligence" in the first paragraph of instruction 400.

SOURCES AND AUTHORITY

- From a theoretical standpoint, "medical negligence" is still considered "negligence": "With respect to professionals, their specialized education and training do not serve to impose an increased duty of care but rather are considered additional 'circumstances' relevant to an overall assessment of what constitutes 'ordinary prudence' in a particular situation." (*Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 997–998.)

  Accordingly, "[s]ince the standard of care remains constant in terms of 'ordinary prudence,' it is clear that denominating a cause of action as one for 'professional negligence' does not transmute its underlying character. For substantive purposes, it merely serves to establish the basis by which 'ordinary prudence' will be calculated and the defendant's conduct evaluated." (*Flowers, supra*, 8 Cal.4th at p. 998.)

- The distinction between "professional" as opposed to "ordinary" negligence is relevant in relation to certain statutory provisions such as the statute of limitations and Medical Injury Compensation Reform Act (MICRA). (*Flowers, supra*, at pp. 998–999.)

- Code of Civil Procedure section 340.5, which sets the statute of limitations for medical malpractice cases based on professional negligence, and Civil Code sections 3333.1 and 3333.2 (MICRA) define "professional negligence" as "a negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that such services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital."

- The statutory definition of "professional negligence" "focuses on whether the negligence occurs in the rendering of professional services, rather than whether a high

or low level of skill is required. [Citation.]" (*Bellamy v. Appellate Dept. of the Superior Court* (1996) 50 Cal.App.4th 797, 807.)

- A formal physician-patient relationship is not always a prerequisite to bringing a malpractice action: "[E]ven in the absence of a physician-patient relationship, a physician has liability to an examinee for negligence or professional malpractice for injuries incurred during the examination itself." (*Mero v. Sadoff* (1995) 31 Cal.App.4th 1466, 1478.)

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 774–777, pp. 113–118
- CALIFORNIA TORTS, Ch. 30, *General Principles of Liability of Professionals*, § 30.11, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.01 (Matthew Bender)
- California Tort Guide (Cont.Ed.Bar 1996) § 9.65
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 209, *Dentists*, § 209.15, Ch. 295, *Hospitals*, §§ 295.13, 295.43, Ch. 414, *Physicians and Other Medical Personnel* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 175, *Physicians and Surgeons* (Matthew Bender)

501
Standard of Care for HealthCare Professionals

A [*insert type of medical practitioner*] is negligent if [he/she] fails to exercise the level of skill, knowledge, and care in diagnosis and treatment that other reasonably careful [*insert type of medical practitioners*] would possess and use in similar circumstances.

[When you are deciding whether [*name of defendant*] was negligent, you must base your decision only on the testimony of the expert witnesses [including [*name of defendant*]] who have testified in this case.]

DIRECTIONS FOR USE

This instruction is intended to apply to nonspecialist physicians, surgeons, and dentists. The standards of care for nurses, specialists, and hospitals are addressed in separate instructions.

The second paragraph should be used except in cases where the court determines that expert testimony is not necessary to establish the standard of care.

See instructions 219–221 on evaluating the credibility of expert witnesses.

SOURCES AND AUTHORITY

- "With unimportant variations in phrasing, we have consistently held that a physician is required to possess and exercise, in both diagnosis and treatment, that reasonable degree of knowledge and skill which is ordinarily possessed and exercised by other members of his profession in similar circumstances." (*Landeros v. Flood* (1976) 17 Cal.3d 399, 408; see also *Brown v. Colm* (1974) 11 Cal.3d 639, 642–643.)

- "The courts require only that physicians and surgeons exercise in diagnosis and treatment that reasonable degree of skill, knowledge, and care ordinarily possessed and exercised by members of the medical profession under similar circumstances." (*Mann v. Cracchiolo* (1985) 38 Cal.3d 18, 36.)

- In *Hinson v. Clairemont Community Hospital* (1990) 218 Cal.App.3d 1110, 1119–1120 (disapproved on other grounds in *Alexander v. Superior Court* (1993) 5 Cal.4th 1218, 1228), the court observed that failure to possess the requisite level of knowledge and skill is negligence, although a breach of this portion of the standard of care does not, by itself, establish actionable malpractice.

- "The standard of care against which the acts of a medical practitioner are to be measured is a matter peculiarly within the knowledge of experts; it presents the basic issue in a malpractice action and can only be proved by their testimony, unless the conduct required by the particular circumstances is within the common knowledge of laymen." (*Alef v. Alta Bates Hospital* (1992) 5 Cal.App.4th 208, 215.)

- " 'Ordinarily, the standard of care required of a doctor, and whether he exercised such care, can be established only by the testimony of experts in the field.' 'But to that rule there is an exception that is as well settled as the rule itself, and that is where "negligence on the part of a doctor is demonstrated by facts which can be evaluated by resort to common knowledge, expert testimony is not required since scientific enlightenment is not essential for the determination of an obvious fact." ' "(*Gannon v. Elliot* (1993) 19 Cal.App.4th 1, 6 [23 Cal.Rptr.2d 86], internal citations omitted.)

- "We have already held upon authority that the failure to remove a sponge from the abdomen of a patient is negligence of the ordinary type and that it does not involve knowledge of *materia medica* or surgery but that it belongs to that class of mental lapses which frequently occur in the usual routine of business and commerce, and in the multitude of commonplace affairs which come within the group of ordinary actionable negligence. The layman needs no scientific enlightenment to see at once that the omission can be accounted for on no other theory than that someone has committed actionable negligence." (*Ales v. Ryan* (1936) 8 Cal.2d 82, 93 [64 P.2d 409].)

- The medical malpractice standard of care applies to veterinarians. (*Williamson v. Prida* (1999) 75 Cal.App.4th 1417, 1425.)

<u>Secondary Sources</u>

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 774, 792, pp. 113, 137
- CALIFORNIA TORTS, Ch. 30, *General Principles of Liability of Professionals*, § 30.12, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.11 (Matthew Bender)
- California Tort Guide (Cont.Ed.Bar 1996) § 9.1
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 209, *Dentists*, § 209.42, Ch. 295, *Hospitals*, §§ 295.13, 295.43, 295.45, Ch. 414, *Physicians and Other Medical Personnel* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 175, *Physicians and Surgeons* (Matthew Bender)

502
Standard of Care for Medical Specialists

A [*insert type of medical specialist***] is negligent if [he/she] fails to exercise the level of skill, knowledge, and care in diagnosis and treatment that other reasonably careful [***insert type of medical specialists***] would possess and use in similar circumstances.**

[When you are deciding whether [*name of defendant***] was negligent, you must base your decision only on the testimony of the expert witnesses [including [***name of defendant***]] who have testified in this case.]**

DIRECTIONS FOR USE

This instruction is intended to apply to physicians, surgeons, and dentists who are specialists in a particular practice area.

The second paragraph should be used except in cases where the court determines that expert testimony is not necessary to establish the standard of care.

See instructions 219–221 on evaluating the credibility of expert witnesses.

SOURCES AND AUTHORITY

- Specialists, such as anesthesiologists and ophthalmologists, are "held to that standard of learning and skill normally possessed by such specialists in the same or similar locality under the same or similar circumstances." (*Quintal v. Laurel Grove Hospital* (1964) 62 Cal.2d 154, 159–160.) This standard adds a further level to the general standard of care for medical professionals: "In the first place, the special obligation of the professional is exemplified by his duty not merely to perform his work with ordinary care but to use the skill, prudence, and diligence commonly exercised by practitioners of his profession. If he further specializes within the profession, he must meet the standards of knowledge and skill of such specialists." (*Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 188.)

- California imposes a "higher standard of care upon physicians with a specialized practice." (*Neel, supra,* 6 Cal.3d 176 at p. 188, fn. 22.) This higher standard refers to the level of skill that must be exercised, not to the standard of care. (*Valentine v. Kaiser Foundation Hospitals* (1961) 194 Cal.App.2d 282, 294 (disapproved on other grounds by *Siverson v. Weber* (1962) 57 Cal.2d 834, 839).)

- Psychotherapists are considered specialists in their field. (*Tarasoff v. Regents of Univ. of California* (1976) 17 Cal.3d 425, 438; *Kockelman v. Segal* (1998) 61 Cal.App.4th 491, 505.)

Secondary Sources

- CALIFORNIA TORTS, Ch. 30, *General Principles of Liability of Professionals*, § 30.12 (Matthew Bender)
- California Tort Guide (Cont.Ed.Bar 1996) § 9.2
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 414, *Physicians and Other Medical Personnel* (Matthew Bender)

503
Psychotherapist's Duty to Warn—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] was negligent because [he/she] did not warn [***name of plaintiff***] or a law enforcement agency about [***name of third party***]'s threat of violent behavior. To establish this claim, [***name of plaintiff***] must prove all of the following:**

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

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

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

4. **That [***name of defendant***] knew or should have known that [***name of plaintiff***] was [***name of third party***]'s intended victim; and**

5. **That [***name of defendant***] did not make reasonable efforts to warn [***name of plaintiff***] and a law enforcement agency about the threat.**

SOURCES AND AUTHORITY

- Civil Code section 43.92 provides:

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

  (b) If there is a duty to warn and protect under the limited circumstances specified above, the duty shall be discharged by the psychotherapist making reasonable efforts to communicate the threat to the victim or victims and to a law enforcement agency.

- Civil Code section 43.92 was enacted to limit the liability of psychotherapists under *Tarasoff v. Regents of the University of California* (1976) 17 Cal.3d 425, regarding a therapist's duty to warn an intended victim. (*Barry v. Turek* (1990) 218 Cal.App.3d 1241, 1244–1245.) Under this provision, "[p]sychotherapists thus have immunity from *Tarasoff* claims except where the plaintiff proves that the patient has

communicated to his or her psychotherapist a serious threat of physical violence against a reasonably identifiable victim or victims." (*Id.* at p. 1245.)

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

Secondary Sources

- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 304, *Insane and Other Incompetent Persons* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 117, *Insane and Incompetent Persons* (Matthew Bender)

504
Standard of Care for Nurses

A [*insert type of nurse***] is negligent if [he/she] fails to exercise the level of skill, knowledge, and care in diagnosis and treatment that other reasonably careful [***insert type of nurses***] would possess and use in similar circumstances.**

[When you are deciding whether [*name of defendant***] was negligent, you must base your decision only on the testimony of the expert witnesses [including [***name of defendant***]] who have testified in this case.]**

DIRECTIONS FOR USE

The appropriate level of nurse should be inserted where indicated—i.e., registered nurse, licensed vocational nurse, nurse practitioner: "Today's nurses are held to strict professional standards of knowledge and performance, although there are still varying levels of competence relating to education and experience." (*Fraijo v. Hartland Hospital* (1979) 99 Cal.App.3d 331, 342.)

The second paragraph should be used except in cases where the court determines that expert testimony is not necessary to establish the standard of care.

SOURCES AND AUTHORITY

- "The adequacy of a nurse's performance is tested with reference to the performance of the other *nurses*, just as is the case with doctors." (*Fraijo, supra*, 99 Cal.App.3d at p. 341.)

- Courts have held that "a nurse's conduct must not be measured by the standard of care required of a physician or surgeon, but by that of other nurses in the same or similar locality and under similar circumstances." (*Alef v. Alta Bates Hospital* (1992) 5 Cal.App.4th 208, 215.)

- The jury should not be instructed that the standard of care for a nurse practitioner must be measured by the standard of care for a physician or surgeon when the nurse is examining a patient or making a diagnosis. (*Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137, 150.) Courts have observed that nurses are trained, "but to a lesser degree than a physician, in the recognition of the symptoms of diseases and injuries." (*Cooper v. National Motor Bearing Co.* (1955) 136 Cal.App.2d 229, 238.)

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 804, p. 155
- California Tort Guide (Cont.Ed.Bar 1996) § 9.52
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 414, *Physicians and Other Medical Personnel* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 175, *Physicians and Surgeons* (Matthew Bender)

505
Success not Required

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

DIRECTIONS FOR USE

Plaintiffs have argued that this type of instruction "provides too easy an 'out' for malpractice defendants." (*Fraijo v. Hartland Hospital* (1979) 99 Cal.App.3d 331, 343.) Nevertheless, in California, instructions on this point have been sustained when challenged. (*Rainer v. Community Memorial Hospital* (1971) 18 Cal.App.3d 240, 260.)

SOURCES AND AUTHORITY

- "While a physician cannot be held liable for mere errors of judgment or for erroneous conclusions on matters of opinion, he must use the judgment and form the opinions of one possessed of knowledge and skill common to medical men practicing, in the same or like community and that he may have done his best is no answer to an action of this sort." (*Sim v. Weeks* (1935) 7 Cal.App.2d 28, 36.)

- "The 'law has never held a physician or surgeon liable for every untoward result which may occur in medical practice' but it 'demands only that a physician or surgeon have the degree of learning and skill ordinarily possessed by practitioners of the medical profession in the same locality and that he exercise ordinary care in applying such learning and skill to the treatment of his patient.' " (*Huffman v. Lindquist* (1951) 37 Cal.2d 465, 473 [internal citations omitted].)

- It is appropriate to instruct a jury that "they do not necessarily adjudge whether there was negligence in terms of the result achieved… ." (*Dincau v. Tamayose* (1982) 131 Cal.App.3d 780, 800.)

- "[A] physician and surgeon is not required to make a perfect diagnosis but is only required to have that degree of skill and learning ordinarily possessed by physicians of good standing practicing in the same locality and to use ordinary care and diligence in applying that learning to the treatment of his patient." (*Ries v. Reinard* (1941) 47 Cal.App.2d 116, 119.)

- "A doctor is not a warrantor of cures nor is he required to guarantee results and in the absence of a want of reasonable care and skill will not be held responsible for untoward results. (*Sanchez v. Rodriguez* (1964) 226 Cal.App.2d 439, 449.)

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 774, pp. 113–114
- CALIFORNIA TORTS, Ch. 30, *General Principles of Liability of Professionals*, § 30.01 (Matthew Bender)
- California Tort Guide (Cont.Ed.Bar 1996) § 9.5
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 414, *Physicians and Other Medical Personnel* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 175, *Physicians and Surgeons* (Matthew Bender)

506
Alternative Methods of Care

A [*insert type of medical practitioner*] is not necessarily negligent just because [he/she] chooses one medically accepted method of treatment or diagnosis and it turns out that another medically accepted method would have been a better choice.

SOURCES AND AUTHORITY

- "A difference of medical opinion concerning the desirability of one particular medical procedure over another does not … establish that the determination to use one of the procedures was negligent." (*Clemens v. Regents of Univ. of California* (1970) 8 Cal.App.3d 1, 13.)

- "Medicine is not a field of absolutes. There is not ordinarily only one correct route to be followed at any given time. There is always the need for professional judgment as to what course of conduct would be most appropriate with regard to the patient's condition." (*Barton v. Owen* (1977) 71 Cal.App.3d 484, 501–502.)

- This type of instruction may be important in arriving at a fair decision: "[I]n determining whether defendants breached a standard of care owed decedent, the jury may not engage in 'but for' reasoning." (*Meier v. Ross General Hospital* (1968) 69 Cal.2d 420, 435.)

Secondary Sources

- CALIFORNIA TORTS, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.11 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 414, *Physicians and Other Medical Personnel* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 175, *Physicians and Surgeons* (Matthew Bender)

507
Duty to Warn Patient

[*Name of plaintiff***] claims that [***name of defendant***] was negligent because [he/she] did not warn [***name of patient***] that [his/her] condition presented a danger to others.**

[*Name of defendant***] was negligent if [***name of plaintiff***] proves that [he/she] did not take reasonable steps to warn [***name of patient***] that [his/her] condition presented a danger to others.**

DIRECTIONS FOR USE

This instruction is intended to cover situations where a patient's condition foreseeably causes harm to a third party.

SOURCES AND AUTHORITY

- "To avoid liability in this case, [defendants] should have taken whatever steps were reasonable under the circumstances to protect [plaintiff] and other foreseeable victims of [patient]'s dangerous conduct. What is a reasonable step to take will vary from case to case." (*Myers v. Quesenberry* (1983) 144 Cal.App.3d 888, 894 [internal citations omitted].) "Our holding does not require the physician to do anything other than what he was already obligated to do for the protection of the patient. Thus, even though it may appear that the scope of liability has been expanded to include injuries to foreseeable victims other than the patient, the standard of medical care to the patient remains the same." (*Ibid.*)

- "When the avoidance of foreseeable harm to a third person requires a defendant to control the conduct of a person with whom the defendant has a special relationship (such as physician and patient) or to warn the person of the risks involved in certain conduct, the defendant's duty extends to a third person with whom the defendant does not have a special relationship." (*Reisner v. Regents of Univ. of California* (1995) 31 Cal.App.4th 1195, 1198–1199 [infected sex partner could maintain action against his partner's physicians for failing to tell the young woman that she had received HIV-tainted blood].)

- Proof of causation is still required: "[Defendants] will be liable only if [plaintiff] is able to prove their failure to warn [patient] not to drive in an irrational and uncontrolled diabetic condition was a substantial factor in causing his injuries." (*Myers, supra,* 144 Cal.App.3d at p. 895.)

- This obligation to third parties appears to be limited to healthcare professionals and does not apply to ordinary citizens. (*Koepke v. Loo* (1993) 18 Cal.App.4th 1444, 1456–1457.)

Secondary Sources

- CALIFORNIA TORTS, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.16 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 414, *Physicians and Other Medical Personnel* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 175, *Physicians and Surgeons* (Matthew Bender)

508
Duty to Refer to a Specialist

If a reasonably careful [*insert type of medical practitioner***] in the same situation would have referred [***name of patient***] to a [***insert type of medical specialist***], then [***name of defendant***] was negligent if [he/she] did not do so.**

However, if [*name of defendant***] treated [***name of patient***] with as much skill and care as a reasonable [***insert type of medical specialist***] would have, then [***name of defendant***] was not negligent.**

SOURCES AND AUTHORITY

- Physicians who elect to treat a patient even though the patient should have been referred to a specialist will be held to the standard of care of that specialist. If the physician meets the higher standard of care, he or she is not negligent. (*Simone v. Sabo* (1951) 37 Cal.2d 253, 257.)

- If the evidence establishes that the failure of a nurse to consult the attending physician under the circumstances presented in the case is not in accord with the standard of care of the nursing profession, this instruction may be applicable. (*Fraijo v. Hartland Hospital* (1979) 99 Cal.App.3d 331, 344.)

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 774, pp. 113–114
- CALIFORNIA TORTS, Ch. 30, *General Principles of Liability of Professionals*, § 30.12, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.13 (Matthew Bender)
- California Tort Guide (Cont.Ed.Bar 1996) § 9.6
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 209, *Dentists*, § 209.11, Ch. 414, *Physicians and Other Medical Personnel* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 175, *Physicians and Surgeons* (Matthew Bender)

509
Abandonment of Patient

[*Name of plaintiff*] claims [*name of defendant*] was negligent because [he/she] did not give [*name of patient*] enough notice before withdrawing from the case. To succeed, [*name of plaintiff*] must prove both of the following:

1. **That [*name of defendant*] withdrew from [*name of patient*]'s care and treatment; and**

2. **That [*name of defendant*] did not provide sufficient notice for [*name of patient*] to obtain another medical practitioner.**

However, [*name of defendant*] was not negligent if [he/she] proves that [*name of patient*] consented to the withdrawal or declined further medical care.

SOURCES AND AUTHORITY

- As a general proposition, "a physician who abandons a patient may do so 'only … after due notice, and an ample opportunity afforded to secure the presence of other medical attendance.' [Citation.]" (*Payton v. Weaver* (1982) 131 Cal.App.3d 38, 44.)

- "A physician cannot just walk away from a patient after accepting the patient for treatment. … In the absence of the patient's consent, the physician must notify the patient he is withdrawing and allow ample opportunity to secure the presence of another physician." (*Hongsathavij v. Queen of Angels/Hollywood Presbyterian Medical Center* (1998) 62 Cal.App.4th 1123, 1138.)

- "When a competent, informed adult directs the withholding or withdrawal of medical treatment, even at the risk of hastening or causing death, medical professionals who respect that determination will not incur criminal or civil liability: the patient's decision discharges the physician's duty." (*Thor v. Superior Court* (1993) 5 Cal.4th 725, 743.)

<u>Secondary Sources</u>

- CALIFORNIA TORTS, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.42 (Matthew Bender)
- California Tort Guide (Cont.Ed.Bar 1996) § 9.8
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 414, *Physicians and Other Medical Personnel* (Matthew Bender)

- CALIFORNIA POINTS AND AUTHORITIES, Ch. 175, *Physicians and Surgeons* (Matthew Bender)

510
Derivative Liability of Surgeon

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

SOURCES AND AUTHORITY

- While the "captain of the ship" doctrine has never been expressly rejected, it has been eroded by modern courts: "A theory that the surgeon directly controls *all* activities of whatever nature in the operating room certainly is not realistic in present day medical care." (*Truhitte, supra,* 128 Cal.App.3d at p. 348.)

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

- This doctrine applies only to medical personnel who are actively participating in the surgical procedure. (*Thomas v. Intermedics Orthopedics, Inc.* (1996) 47 Cal.App.4th 957, 969.)

Secondary Sources

- 6 Witkin, Summary of California Law (2002 supp.) Torts, § 795, p. 73
- CALIFORNIA TORTS, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.45 (Matthew Bender)
- California Tort Guide (Cont.Ed.Bar 1996) § 9.4
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 414, *Physicians and Other Medical Personnel* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 175, *Physicians and Surgeons* (Matthew Bender)

511
Wrongful Birth—Sterilization/Abortion
Essential Factual Elements

[*Name of plaintiff*] claims that [*name of defendant*] negligently failed to prevent the birth of her child. To establish this claim, [*name of plaintiff*] must prove both of the following:

1. **That [*name of defendant*] performed a negligent [sterilization] [abortion] procedure; and**

2. **That [*name of plaintiff*] gave birth to an unplanned child after this procedure was performed.**

DIRECTIONS FOR USE

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

SOURCES AND AUTHORITY

- "California law now permits a mother to hold medical personnel liable for their negligent failure to prevent or to terminate a pregnancy." (*Foy v. Greenblott* (1983) 141 Cal.App.3d 1, 8.)

- Negligent sterilization procedure that leads to the birth of a child, either normal or disabled, can form the basis of a wrongful birth action. (*Custodio v. Bauer* (1967) 251 Cal.App.2d 303, 323–325; *Morris v. Frudenfeld* (1982) 135 Cal.App.3d 23, 37.) The same is true of an unsuccessful abortion procedure. (*Stills v. Gratton* (1976) 55 Cal.App.3d 698, 707–709.)

- A wrongful birth claim based on a negligently performed sterilization or abortion procedure does not support an action for wrongful life: "California courts do recognize a wrongful life claim by an 'impaired' child for special damages (but not for general damages), when the physician's negligence is the proximate cause of the child's need for extraordinary medical care and training. No court, however, has expanded tort liability to include wrongful life claims by children born without any mental or physical impairment." (*Alexandria S. v. Pacific Fertility Medical Center, Inc.* (1997) 55 Cal.App.4th 110, 122.)

- Civil Code section 43.6(b) provides: "The failure or refusal of a parent to prevent the live birth of his or her child shall not be a defense in any action against a third party,

nor shall the failure or refusal be considered in awarding damages in any such action."

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 796, pp. 141–142
- CALIFORNIA TORTS, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, §§ 31.15, 31.50 (Matthew Bender)
- California Tort Guide (Cont.Ed.Bar 1996) § 9.22
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 414, *Physicians and Other Medical Personnel* (Matthew Bender)

512
Wrongful Birth—Genetic Testing
Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] was negligent because [he/she] failed to inform [him/her] of the risk that [he/she] would have a [genetically impaired/disabled] child. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] negligently failed to diagnose and warn [***name of plaintiff***] that [***name of child***] would probably be born with a [genetic impairment/disability]; and**

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

3. **That if [***name of plaintiff***] had known of the [genetic impairment/ disability], [***insert name of mother***] would not have conceived [***name of child***] [or would not have carried the fetus to term]; and**

4. **That [***name of plaintiff***] will have to pay extraordinary expenses to care for [***name of child***].**

DIRECTIONS FOR USE

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

SOURCES AND AUTHORITY

- "Claims for 'wrongful life' are essentially actions for malpractice based on negligent genetic counseling and testing." (*Gami v. Mullikin Medical Center* (1993) 18 Cal.App.4th 870, 883.) Since the wrongful life action corresponds to the wrongful birth action, it is reasonable to conclude that this principle applies to wrongful birth actions.

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

- Both parent and child may recover damages to compensate for "the extraordinary expenses necessary to treat the hereditary ailment." (*Turpin v. Sortini* (1982) 31 Cal.3d 220, 239.)

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

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 797–800, pp. 143–152
- CALIFORNIA TORTS, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, §§ 31.15, 31.50 (Matthew Bender)
- California Tort Guide (Cont.Ed.Bar 1996) §§ 9.21–9.22
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 414, *Physicians and Other Medical Personnel* (Matthew Bender)

513
Wrongful Life—Essential Factual Elements

[*Name of plaintiff*] claims that [*name of defendant*] was negligent because [he/she] failed to inform [*name of plaintiff*]'s parents of the risk that [he/she] would be born [genetically impaired/disabled]. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] negligently failed to diagnose and warn [*name of plaintiff*]'s parents that their child would probably be born with a [genetic impairment/disability];**

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

3. **That if [*name of plaintiff*]'s parents had known of the hereditary ailment or disability, [his/her] mother would not have conceived [him/her] [or would not have carried the fetus to term]; and**

4. **That [*name of plaintiff*] will have to pay extraordinary medical or training expenses because of [his/her] [genetic impairment/ disability].**

DIRECTIONS FOR USE

In order for this instruction to apply, the genetic impairment must result in a physical or mental disability. This is implied by the fourth element in the instruction.

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

SOURCES AND AUTHORITY

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

- "Claims for 'wrongful life' are essentially actions for malpractice based on negligent genetic counseling and testing." (*Gami v. Mullikan Medical Center* (1993) 18 Cal.App.4th 870, 883.)

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

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

- The negligent failure to administer a test that had only a twenty-percent chance of detecting a genetic abnormality did not establish a reasonably probable causal connection to the birth of a child with Down's Syndrome. (*Simmons v. West Covina Medical Clinic* (1989) 212 Cal.App.3d 696, 702–703.)

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

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

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 797–800, pp. 143–152
- CALIFORNIA TORTS, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, §§ 31.15, 31.50 (Matthew Bender)
- California Tort Guide (Cont.Ed.Bar 1996) §§ 9.21–9.22
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 414, *Physicians and Other Medical Personnel* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 165, *Negligence*, § 165.70 (Matthew Bender)

514
Duty of Hospital

A hospital is negligent if it does not use reasonable care toward its patients. A hospital must provide procedures, policies, facilities, supplies, and qualified personnel reasonably necessary for the treatment of its patients.

[When you are deciding whether [*name of defendant*] was negligent, you must base your decision only on the testimony of the expert witnesses who have testified in this case.]

DIRECTIONS FOR USE

This instruction may be augmented by 515, *Duty of Hospital to Provide Safe Environment*, and/or 516, *Duty of Hospital to Screen Medical Staff*. The second paragraph should be used except in cases where the court determines that expert testimony is not necessary to establish the standard of care.

See instructions 219–221 on evaluating the credibility of expert witnesses.

This instruction is not intended for cases where the hospital is being sued based on the negligence of an agent or employee. See instructions in the Vicarious Liability series and adapt accordingly.

SOURCES AND AUTHORITY

- The amount of care that a hospital must exercise toward a patient varies depending on the patient's condition: "[T]he duty imposed by law on the hospital is that it must exercise such reasonable care toward a patient as his mental and physical condition, if known, require ... ." (*Vistica v. Presbyterian Hospital & Medical Center, Inc.* (1967) 67 Cal.2d 465, 469.)

- A hospital has a duty "to use reasonable care and diligence in safeguarding a patient committed to its charge [citations] and such care and diligence are measured by the capacity of the patient to care for himself." (*Thomas v. Seaside Memorial Hospital* (1947) 80 Cal.App.2d 841, 847.)

- A hospital's duty extends to both treatment and care: "It is the duty of any hospital that undertakes the treatment of an ill or wounded person to use reasonable care and diligence not only in operating upon and treating but also in safeguarding him, and such care and diligence is measured by the capacity of the patient to care for himself." (*Valentin v. La Societe Francaise de Bienfaisance Mutuelle* (1946) 76 Cal.App.2d 1, 4.)

- Hospitals must maintain safe conditions on their premises: "[T]he professional duty of a hospital … is primarily to provide a safe environment within which diagnosis, treatment, and recovery can be carried out. Thus if an unsafe condition of the hospital's premises causes injury to a patient … there is a breach of the hospital's duty *qua* hospital." (*Murillo v. Good Samaritan Hospital* (1979) 99 Cal.App.3d 50, 56–57.)

- Hospitals must monitor a patient's condition: "Defendant . . . was under a duty to observe and know the condition of a patient. Its business is caring for ill persons, and its conduct must be in accordance with that of a person of ordinary prudence under the circumstances, a vital part of those circumstances being the illness of the patient and incidents thereof." (*Rice v. California Lutheran Hospital* (1945) 27 Cal.2d 296, 302.)

- "If a hospital is obliged to maintain its premises and its instrumentalities for the comfort of its patients with such care and diligence as will reasonably assure their safety, it should be equally bound to observe the progress of a patient in his recovery from a major operation with such care and diligence as his condition reasonably requires for his comfort and safety and promptly to employ such agencies as may reasonably appear necessary for the patient's safety." (*Valentin, supra,* 76 Cal.App.2d at p. 5.)

- A hospital has a duty to provide sufficient staff: "No expert opinion is required to prove the hospital's failure to provide an adequate number of trained, qualified personnel at the most critical time in postoperative care was negligent." (*Czubinsky v. Doctors Hospital* (1983) 139 Cal.App.3d 361, 367.)

<u>Secondary Sources</u>

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 801–803, pp. 153–155
- CALIFORNIA TORTS, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.81 (Matthew Bender)
- California Tort Guide (Cont.Ed.Bar 1996) §§ 9.55–9.64
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 295, *Hospitals*, § 295.13 (Matthew Bender)

515
Duty of Hospital to Provide Safe Environment

If [*name of defendant hospital*] knew or reasonably should have known it was likely that [*name of patient*] would harm [himself/herself/another], then [*name of defendant hospital*] had to use reasonable care to prevent such harm.

DIRECTIONS FOR USE

Always read 514, *Duty of Hospital*, in conjunction with this instruction.

SOURCES AND AUTHORITY

- "[T]he duty extends to safeguarding the patient from dangers due to mental incapacity; and where the hospital has notice or knowledge of facts from which it might reasonably be concluded that a patient would be likely to harm himself or others unless preclusive measures were taken, then the hospital must use reasonable care in the circumstances to prevent such harm." (*Vistica v. Presbyterian Hospital & Medical Center, Inc.* (1967) 67 Cal.2d 465, 469.)

- In *Meier v. Ross Gen. Hospital* (1968) 69 Cal.2d 420, 423–424, the Court held that absent reasonable care, the treating doctor and the hospital can be liable even though a suicidal patient's acts are "voluntary." That is, the doctor and the hospital must use reasonable care to prevent the patient from harming herself by her own acts, be they voluntary or involuntary.

- For duty of a hospital that cares for alcoholics see *Wood v. Samaritan Inst.* (1945) 26 Cal.2d 847, 853, and *Emerick v. Raleigh Hills Hospital* (1982) 133 Cal.App.3d 575, 581.

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 801–803, pp. 153–155
- CALIFORNIA TORTS, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.81 (Matthew Bender)
- California Tort Guide (Cont.Ed.Bar 1996) §§ 9.55–9.62
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 295, *Hospitals*, § 295.13 (Matthew Bender)

516
Duty of Hospital to Screen Medical Staff

A hospital is negligent if it does not use reasonable care to select and periodically evaluate its medical staff so that its patients are provided adequate medical care.

DIRECTIONS FOR USE

Always read instruction 514, *Duty of Hospital*, in conjunction with this instruction.

SOURCES AND AUTHORITY

- "[W]e hold a hospital is accountable for negligently screening the competency of its medical staff to insure the adequacy of medical care rendered to patients at its facility." (*Elam v. College Park Hospital* (1982) 132 Cal.App.3d 332, 346.)

- A hospital has a professional responsibility to ensure the competence of its medical staff through careful selection and periodic review. (*Bell v. Sharp Cabrillo Hospital* (1989) 212 Cal.App.3d 1034, 1050.)

- "The hospital has 'a direct and independent responsibility to its patients of insuring the competency of its medical staff and the quality of medical care provided....' [Citation.] Hospitals must be able to establish high standards of professional work and to maintain those standards through careful selection and review of staff. And they are required to do so by both state and federal law. [Citations.]" (*Rhee v. El Camino Hospital Dist.* (1988) 201 Cal.App.3d 477, 489.)

<u>Secondary Sources</u>

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 801–803, pp. 153–155
- CALIFORNIA TORTS, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.81 (Matthew Bender)
- California Tort Guide (Cont.Ed.Bar 1996) §§ 9.55–9.62
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 295, *Hospitals*, § 295.13 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 175, *Physicians and Surgeons* (Matthew Bender)

517
Affirmative Defense—Patient's Duty to Provide for His or Her Own Well-Being

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A patient must use reasonable care to provide for his or her own well-being. This includes a responsibility to [follow a [*insert type of medical practitioner*]'s instructions] [seek medical assistance] when a reasonable person in the same situation would do so.

[*Name of defendant*] claims that [*name of plaintiff*]'s harm was caused, in whole or in part, by [*name of plaintiff*]'s negligence in failing to [follow [*name of defendant*]'s instructions] [seek medical assistance]. To succeed, [*name of defendant*] must prove both of the following:

1. **That [*name of plaintiff*] did not use reasonable care in [following [*name of defendant*]'s instructions] [seeking medical assistance]; and**

2. **That [*name of plaintiff*]'s failure to [follow [*name of defendant*]'s instructions] [seek medical assistance] was a substantial factor in causing [his/her] harm.**

DIRECTIONS FOR USE

It is error to give this type of instruction absent evidence that the patient was contributorily negligent. (*LeMons v. Regents of Univ. of California* (1978) 21 Cal.3d 869, 874.) At least one court has held that it is error to give this kind of instruction absent expert testimony that the plaintiff was negligent. (*Bolen v. Woo* (1979) 96 Cal.App.3d 944, 952.)

Read this instruction in conjunction with basic comparative fault and damages instructions (instructions 405, 406, and 407).

SOURCES AND AUTHORITY

- The defendant has the burden of proving that the plaintiff was contributorily negligent and that this negligence was a cause of the harm. (*Maertins v. Kaiser Foundation Hospitals* (1958) 162 Cal.App.2d 661, 666–667.)

- Mere refusal to follow instructions is not sufficient to show contributory negligence or failure to mitigate damages. The failure must be unreasonable. (*Dodds v. Stellar* (1946) 77 Cal.App.2d 411, 422–423.)

- The issues of contributory negligence and mitigation of damages can become confused in cases involving a patient's failure to follow instructions. (*LeMons, supra,*

21 Cal.3d at pp. 874–875.) However, because contributory negligence is no longer a complete bar to recovery, the distinction may be less critical today.

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 1382, pp. 852–853
- CALIFORNIA TORTS, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.61 (Matthew Bender)
- California Tort Guide (Cont.Ed.Bar 1996) § 9.66
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 295, *Hospitals*, § 295.14 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 175, *Physicians and Surgeons* (Matthew Bender)

518
Medical Malpractice: Res ipsa loquitur

In this case, [*name of plaintiff***] may prove that [***name of defendant***]'s negligence caused [his/her] harm if [he/she] proves all of the following:**

1. **That [***name of plaintiff***]'s harm ordinarily would not have occurred unless someone was negligent [In deciding this issue, you must consider [only] the testimony of the expert witnesses];**

2. **That the harm occurred while [***name of plaintiff***] was under the care and control of [***name of defendant***]; and**

3. **That [***name of plaintiff***]'s voluntary actions did not cause or contribute to the event[s] that harmed [him/her].**

If you decide that [*name of plaintiff***] did not prove one or more of these three things, then [***insert one of the following***]**

> **[your verdict must be for [***name of defendant***].]**
>
> **[you must decide whether [***name of defendant***] was negligent in light of the other instructions I have read.]**

If you decide that [*name of plaintiff***] proved all of these three things, you may, but are not required to, find that [***name of defendant***] was negligent or that [***name of defendant***]'s negligence was a substantial factor in causing [***name of plaintiff***]'s harm, or both.**

You must carefully consider the evidence presented by both [*name of plaintiff***] and [***name of defendant***] before you make your decision. You should not decide in favor of [***name of plaintiff***] unless you believe, after weighing all of the evidence, that it is more likely than not that [***name of defendant***] was negligent and that [his/her] negligence was a substantial factor in causing [***name of plaintiff***]'s harm**

DIRECTIONS FOR USE

The bracketed sentence in element 1 should be read only if expert testimony is introduced. The word "only" within that sentence is to be used only in those cases where the court has determined that the issue of the defendant's negligence involves matters beyond common knowledge.

In the second paragraph, the first bracketed option is to be used when plaintiff is relying solely on a res ipsa loquitur theory and has introduced no other evidence of defendant's negligence. The second option is to be used when plaintiff has introduced other evidence of defendant's negligence.

"It follows that where part of the facts basic to the application of the doctrine of res ipsa loquitur is established as a matter of law but that others are not, the court should instruct that application of the doctrine by the jury depends only upon the existence of the basic facts not conclusively established." (*Rimmele v. Northridge Hospital Foundation* (1975) 46 Cal.App.3d 123, 130 [120 Cal.Rptr. 39].)

SOURCES AND AUTHORITY

- "In California, the doctrine of res ipsa loquitur is defined by statute as 'a presumption affecting the burden of producing evidence.' The presumption arises when the evidence satisfies three conditions: ' "(1) the accident must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff." ' A presumption affecting the burden of producing evidence 'require[s] the trier of fact to assume the existence of the presumed fact' unless the defendant introduces evidence to the contrary. The presumed fact, in this context, is that 'a proximate cause of the occurrence was some negligent conduct on the part of the defendant ... .' If the defendant introduces 'evidence which would support a finding that he was not negligent or that any negligence on his part was not a proximate cause of the occurrence,' the trier of fact determines whether defendant was negligent without regard to the presumption, simply by weighing the evidence." (*Brown v. Poway Unified School Dist.* (1993) 4 Cal.4th 820, 825–826 [15 Cal.Rptr.2d 679], internal citations omitted.)

- "Stated less mechanically, a plaintiff suing in a personal injury action is entitled to the benefit of res ipsa loquitur when: 'the accident is of such a nature that it can be said, in the light of past experience, that it probably was the result of negligence by someone and that the defendant is probably the person who is responsible.' " (*Rimmele, supra,* 46 Cal.App.3d at p. 129, internal citations omitted.)

- Evidence Code section 646(c) provides:

  > If the evidence, or facts otherwise established, would support a res ipsa loquitur presumption and the defendant has introduced evidence which would support a finding that he was not negligent or that any negligence on his part was not a proximate cause of the occurrence, the court may, and upon request shall, instruct the jury to the effect that:
  > (1) If the facts which would give rise to a res ipsa loquitur presumption are found or otherwise established, the jury may draw the inference from

such facts that a proximate cause of the occurrence was some negligent conduct on the part of the defendant; and

(2) The jury shall not find that a proximate cause of the occurrence was some negligent conduct on the part of the defendant unless the jury believes, after weighing all the evidence in the case and drawing such inferences therefrom as the jury believes are warranted, that it is more probable than not that the occurrence was caused by some negligent conduct on the part of the defendant.

- Under Evidence Code section 604, a presumption affecting the burden of producing evidence "require[s] the trier of fact to assume the existence of the presumed fact" unless the defendant introduces evidence to the contrary. Here, the presumed fact is that "a proximate cause of the occurrence was some negligent conduct on the part of the defendant." (Evid. Code, § 646(c)(1); *Brown, supra,* 4 Cal.4th at p. 826.)

- "The doctrine of res ipsa loquitur is fundamentally a doctrine predicated upon inference deducible from circumstantial evidence." (*Hale v. Venuto* (1982) 137 Cal.App.3d 910, 918 [187 Cal.Rptr. 357].)

- The doctrine "is based on a theory of 'probability' where there is no direct evidence of defendant's conduct, permitting a common sense inference of negligence from the happening of the accident." (*Gicking v. Kimberlin* (1985) 170 Cal.App.3d 73, 75 [215 Cal.Rptr. 834].)

- "All of the cases hold, in effect, that it must appear, either as a matter of common experience or from evidence in the case, that the accident is of a type which probably would not happen unless someone was negligent." (*Zentz v. Coca Cola Bottling Co. of Fresno* (1952) 39 Cal.2d 436, 442–443 [247 P.2d 344].)

- "In determining the applicability of res ipsa loquitur, courts have relied on both expert testimony and common knowledge. The standard of care in a professional negligence case can be proved only by expert testimony unless the conduct required by the particular circumstances is within the common knowledge of the layperson." (*Blackwell v. Hurst* (1996) 46 Cal.App.4th 939, 943 [54 Cal.Rptr.2d 209], internal citations omitted.)

- "Under the doctrine of res ipsa loquitur and this common knowledge exception, it is proper to instruct the jury that it can infer negligence from the happening of the accident itself, if it finds based on common knowledge, the testimony of physicians called as expert witnesses, and all the circumstances, that the injury was more likely than not the result of negligence." (*Gannon v. Elliot* (1994) 19 Cal.App.4th 1, 6 [23 Cal.Rptr.2d 86], internal citation omitted.)

- "The fact that a particular injury rarely occurs does not in itself justify an inference of negligence unless some other evidence indicates negligence. To justify res ipsa loquitur instructions, appellant must have produced sufficient evidence to permit the

jury to make the necessary decision. He must have presented 'some substantial evidence which, if believed by the jury, would entitle it to draw an inference of negligence from the happening of the accident itself.' " (*Blackwell, supra,* 46 Cal.App.4th at p. 944, internal citations omitted.)

- The purpose of the second "control" requirement is to "link the defendant with the probability, already established, that the accident was negligently caused." (*Newing v. Cheatham* (1975) 15 Cal.3d 351, 362 [124 Cal.Rptr. 193].) The control requirement is not absolute. (*Zentz, supra,* 39 Cal.2d at p. 443.)

- "The purpose of [the third] requirement, like that of control by the defendant is to establish that the defendant is the one probably responsible for the accident. The plaintiff need not show that he was entirely inactive at the time of the accident in order to satisfy this requirement, so long as the evidence is such as to eliminate his conduct as a factor contributing to the occurrence. (*Newing, supra,* 15 Cal.3d at p. 363, internal citations omitted.)

- The third condition "should not be confused with the problem of contributory negligence, as to which defendant has the burden of proof. … [I]ts purpose, like that of control by the defendant, is merely to assist the court in determining whether it is more probable than not that the defendant was responsible for the accident." (*Zentz, supra,* 39 Cal.2d at p. 444.)

<u>Secondary Sources</u>

- 1 Witkin, California Evidence (4th ed. 2000) Burden of Proof and Presumptions, §§ 114–118, pp. 818–825
- CALIFORNIA TORTS, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.32 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 414, *Physicians and Other Medical Personnel* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 175, *Physicians and Surgeons* (Matthew Bender)

530
Medical Battery

A [*insert type of medical practitioner***] commits a battery if:**

> **[He or she performs a medical procedure without the patient's consent.]**
>
> **[The patient consents to one medical procedure, but the [***insert type of medical practitioner***] performs a substantially different medical procedure.]**
>
> **[The patient consents to a medical procedure, but only on the condition that something else happens, and the [***insert type of medical practitioner***] proceeds even though that condition does not happen.]**

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

DIRECTIONS FOR USE

One of the three bracketed options should be selected, depending on the nature of the case.

SOURCES AND AUTHORITY

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

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

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

- "Consent to medical care, including surgery, may be express or may be implied from the circumstances." (*Bradford v. Winter* (1963) 215 Cal.App.2d 448, 454.)

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

Secondary Sources

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 352–562, pp. 439–658
- CALIFORNIA TORTS, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.41, Ch. 41, *Assault and Battery* (Matthew Bender)
- California Tort Guide (Cont.Ed.Bar 1996) §§ 9.11–9.16
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 58, *Assault and Battery*, § 58.14, Ch. 414, *Physicians and Other Medical Personnel* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 21, *Assault and Battery*, Ch. 175, *Physicians and Surgeons* (Matthew Bender)
- CALIFORNIA LEGAL FORMS, Ch. 104, *Health Care Transactions, Consents, And Directives*, § 104.11 (Matthew Bender)

531
Consent on Behalf of Another

In this case [*name of patient***] could not consent to the [***insert medical procedure***] because [he/she] was [***insert reason — e.g., a minor/incompetent/unconscious***]. In this situation, the law allows [***name of authorized person***] to give consent on behalf of [***name of patient***].**

You must decide whether [*name of authorized person***] consented to the [***insert medical procedure***] performed on [***name of patient***].**

SOURCES AND AUTHORITY

- "If the patient is a minor or incompetent, the authority to consent is transferred to the patient's legal guardian or closest available relative." (*Cobbs v. Grant* (1972) 8 Cal.3d 229, 244; *Farber v. Olkon* (1953) 40 Cal.2d 503, 509.).)

- Family Code section 6910 provides: "The parent, guardian, or caregiver of a minor who is a relative of the minor and who may authorize medical care and dental care under Section 6550, may authorize in writing an adult into whose care a minor has been entrusted to consent to medical care or dental care, or both, for the minor."

Secondary Sources

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, § 353, p. 440
- CALIFORNIA TORTS, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.14 (Matthew Bender)
- California Tort Guide (Cont.Ed.Bar 1996) § 9.16
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 58, *Assault and Battery*, § 58.14, Ch. 285, *Guardianship and Conservatorship: Care of Ward or Conservatee*, Ch. 304, *Insane and Other Incompetent Persons*, Ch. 364, *Minors*, Ch. 394, *Parent and Child*, § 394,54 (Matthew Bender)
- CALIFORNIA LEGAL FORMS, Ch. 104, *Health Care Transactions, Consents, And Directives*, § 104.11 (Matthew Bender)

532
Informed Consent—Definition

A patient's consent to a medical procedure must be "informed." A patient gives an "informed consent" only after the [*insert type of medical practitioner***] has fully explained the proposed treatment or procedure.**

A [*insert type of medical practitioner***] must explain the likelihood of success and the risks of agreeing to a medical procedure in language that the patient can understand and give the patient as much information as [he/she] needs to make an informed decision, including any risk that a reasonable person would consider important in deciding to have the proposed treatment or procedure. The patient must be told about any risk of death or serious injury or significant potential complications that may occur if the procedure is performed. A [***insert type of medical practitioner***] is not required to explain minor risks that are not likely to occur.**

DIRECTIONS FOR USE

This instruction should be read in conjunction with instruction 533, *Failure to Obtain Informed Consent—Essential Factual Elements.*

If the patient is a minor or is incapacitated, tailor the instruction accordingly.
Also, see instruction 531, *Consent on Behalf of Another*.

SOURCES AND AUTHORITY

- A physician is required to disclose "all information relevant to a meaningful decisional process." (*Cobbs v. Grant* (1972) 8 Cal.3d 229, 242.)

- "When a doctor recommends a particular procedure then he or she must disclose to the patient all material information necessary to the decision to undergo the procedure, including a reasonable explanation of the procedure, its likelihood of success, the risks involved in accepting or rejecting the proposed procedure, and any other information a skilled practitioner in good standing would disclose to the patient under the same or similar circumstances." (*Mathis v. Morrissey* (1992) 11 Cal.App.4th 332, 343.)

- "A physician has a duty to inform a patient in lay terms of the dangers inherently and potentially involved in a proposed treatment." (*McKinney v. Nash* (1981) 120 Cal.App.3d 428, 440.)

- Courts have observed that *Cobbs* created a two-part test for disclosure. "First, a physician must disclose to the patient the potential of death, serious harm, and other

complications associated with a proposed procedure." (*Daum v. SpineCare Medical Group, Inc.* (1997) 52 Cal.App.4th 1285, 1301.) "Second, '[b]eyond the foregoing minimal disclosure, a doctor must also reveal to his patient such additional information as a skilled practitioner of good standing would provide under similar circumstances.' " (*Id*. at p. 1302 (citation omitted).) The doctor has no duty to discuss minor risks inherent in common procedures when it is common knowledge that such risks are of very low incidence. (*Cobbs, supra,* 8 Cal.3d at p. 244.)

- The courts have defined "material information" as follows: "Material information is that which the physician knows or should know would be regarded as significant by a reasonable person in the patient's position when deciding to accept or reject the recommended medical procedure. To be material, a fact must also be one which is not commonly appreciated. If the physician knows or should know of a patient's unique concerns or lack of familiarity with medical procedures, this may expand the scope of required disclosure." (*Truman v. Thomas* (1980) 27 Cal.3d 285, 291 [internal citations omitted].)

- "Obviously involved in the equation of materiality are countervailing factors of the seriousness and remoteness of the dangers involved in the medical procedure as well as the risks of a decision not to undergo the procedure." (*McKinney, supra,* 120 Cal.App.3d at p. 441.)

- Expert testimony is not required to establish the duty to disclose the potential of death, serious harm, and other complications. (*Cobbs, supra,* 8 Cal.3d at p. 244.) Expert testimony is admissible to show what other information a skilled practitioner would have given under the circumstances. (*Arato v. Avedon* (1993) 5 Cal.4th 1172, 1191–1192.)

- A physician must also disclose personal interests unrelated to the patient's health, whether research or economic, that may affect his or her medical judgment. (*Moore v. Regents of Univ. of California* (1990) 51 Cal.3d 120, 129–132.)

- Appellate courts have rejected a general duty of disclosure concerning a treatment or procedure a physician does not recommend. However, in some cases, "there may be evidence that would support the conclusion that a doctor should have disclosed information concerning a nonrecommended procedure." (*Vandi v. Permanente Medical Group, Inc.* (1992) 7 Cal.App.4th 1064, 1071.)

<u>Secondary Sources</u>

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 360–361, pp. 446–449
- CALIFORNIA TORTS, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, (Matthew Bender)
- California Tort Guide (Cont.Ed.Bar 1996) § 9.11
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 58, *Assault and Battery*, § 58.14, Ch. 414, *Physicians and Other Medical Personnel* (Matthew Bender)

- CALIFORNIA POINTS AND AUTHORITIES, Ch. 21, *Assault and Battery*, Ch. 175, *Physicians and Surgeons* (Matthew Bender)
- CALIFORNIA LEGAL FORMS, Ch. 104, *Health Care Transactions, Consents, And Directives*, § 104.11 (Matthew Bender)

533
Failure to Obtain Informed Consent—Essential Factual Elements

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[*Name of plaintiff***] claims that [***name of defendant***] was negligent because [he/she] performed a [***insert medical procedure***] on [***name of plaintiff***] without first obtaining [his/her] informed consent. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] performed a [***insert medical procedure***] on [***name of plaintiff***];**

2. **That [***name of plaintiff***] did not give [his/her] informed consent for the [***insert medical procedure***];**

3. **That a reasonable person in [***name of plaintiff***]'s position would not have agreed to the [***insert medical procedure***] if he or she had been fully informed of the results and risks of [and alternatives to] the procedure; and**

4. **That [***name of plaintiff***] was harmed by a result or risk that [***name of defendant***] should have explained before the [***insert medical procedure***] was performed.**

DIRECTIONS FOR USE

This instruction should be read in conjunction with instruction 532, *Informed Consent—Definition.*

If the patient is a minor or is incapacitated, tailor the instruction accordingly.
Also, see instruction 531, *Consent on Behalf of Another*.

SOURCES AND AUTHORITY

- A physician's duty of reasonable disclosure for purposes of consent to a proposed medical procedure was established in *Cobbs v. Grant* (1972) 8 Cal.3d 229.

- On causation: "There must be a causal relationship between the physician's failure to inform and the injury to the plaintiff. Such causal connection arises only if it is established that had revelation been made consent to treatment would not have been given." (*Cobbs, supra,* 8 Cal.3d at p. 245.)

- A doctor generally does not have a duty to disclose information concerning non-recommended procedures. (*Vandi v. Permanente Medical Group, Inc.* (1992) 7

Cal.App.4th 1064, 1071.) However, a doctor must make "such disclosures as are required for competent practice within the medical community." (*Ibid*.)

- The objective test is whether a reasonable person in plaintiff's position would have refused consent if he or she had been fully informed (*Cobbs, supra,* 8 Cal.3d at p. 245.) However, the defendant can seek to prove that this particular plaintiff still would have consented even if properly informed (as an affirmative defense.) (*Warren v. Schecter* (1997) 57 Cal.App.4th 1189, 1206.)

- "[A]n action for failure to obtain informed consent lies where 'an *undisclosed* inherent complication ... occurs,' not where a disclosed complication occurs." (*Warren, supra,* 57 Cal.App.4th at p. 1202 (citation omitted).)

Secondary Sources

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 359–362, pp. 445–449
- CALIFORNIA TORTS, Ch. 31, *Liability of Physicians and Other Medical Practitioners* (Matthew Bender)
- California Tort Guide (Cont.Ed.Bar 1996) § 9.11
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 58, *Assault and Battery*, § 58.14, Ch. 414, *Physicians and Other Medical Personnel* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 21, *Assault and Battery*, Ch. 175, *Physicians and Surgeons* (Matthew Bender)

534
Informed Refusal—Definition

A [*insert type of medical practitioner*] must explain the risks of refusing a procedure in language that the patient can understand and give the patient as much information as [he/she] needs to make an informed decision, including any risk that a reasonable person would consider important in deciding not to have a [*insert medical procedure*]. The patient must be told about any risk of death or serious injury or significant potential complications that may occur if the procedure is refused. A [*insert type of medical practitioner*] is not required to explain minor risks that are not likely to occur.

DIRECTIONS FOR USE

This instruction should be read in conjunction with instruction 535, *Risks of Nontreatment—Essential Factual Elements.* If the patient is a minor or is incapacitated, tailor the instruction accordingly. Also, see instruction 531, *Consent on Behalf of Another*.

SOURCES AND AUTHORITY

- The definition of "informed consent" in *Cobbs v. Grant* (1972) 8 Cal.3d 229 applies "whether the procedure involves treatment or a diagnostic test." (*Truman v. Thomas* (1980) 27 Cal.3d 285, 292.)

- In *Truman*, "the high court extended the duty to make disclosure to include recommended diagnostic as well as therapeutic procedures and to include situations in which the patient declines the recommended procedure." (*Vandi v. Permanente Medical Group, Inc.* (1992) 7 Cal.App.4th 1064, 1069.) This has been termed the "informed refusal" doctrine. (*Townsend v. Turk* (1990) 218 Cal.App.3d 278, 284.)

- "In a nutshell, a doctor has a duty to disclose all material information to his patient which will enable that patient to make an informed decision regarding the taking or refusal to take such a test." (*Moore v. Preventive Medicine Medical Group, Inc.* (1986) 178 Cal.App.3d 728, 736.)

Secondary Sources

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, § 361, pp. 447–449
- CALIFORNIA TORTS, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.14 (Matthew Bender)
- California Tort Guide (Cont.Ed.Bar 1996) § 9.12

- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 414, *Physicians and Other Medical Personnel* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 175, *Physicians and Surgeons* (Matthew Bender)
- CALIFORNIA LEGAL FORMS, Ch. 104, *Health Care Transactions, Consents, And Directives*, § 104.11 (Matthew Bender)

535
Risks of Nontreatment—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] was negligent because [he/she] did not fully inform [***name of plaintiff***] about the risks of refusing the [***insert medical procedure***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] did not perform the [***insert medical procedure***] on [***name of plaintiff***];**

2. **That [***name of defendant***] did not fully inform [***name of plaintiff***] about the risks of refusing the [***insert medical procedure***];**

3. **That a reasonable person in [***name of plaintiff***]'s position would have agreed to the [***insert medical procedure***] if he or she had been fully informed about these risks; and**

4. **That [***name of plaintiff***] was harmed by the failure to have the [***insert medical procedure***] performed.**

DIRECTIONS FOR USE

This instruction should be read in conjunction with instruction 534, *Informed Refusal—Definition.*

If the patient is a minor or is incapacitated, tailor the instruction accordingly.
Also, see instruction 531, *Consent on Behalf of Another*.

SOURCES AND AUTHORITY

- The definition of "informed consent" in *Cobbs v. Grant* (1972) 8 Cal.3d 229 applies "whether the procedure involves treatment or a diagnostic test." (*Truman v. Thomas* (1980) 27 Cal.3d 285, 292.)

- In *Truman*, "the high court extended the duty to make disclosure to include recommended diagnostic as well as therapeutic procedures and to include situations in which the patient declines the recommended procedure." (*Vandi v. Permanente Medical Group, Inc.* (1992) 7 Cal.App.4th 1064, 1069.) This has been termed the "informed refusal" doctrine. (*Townsend v. Turk* (1990) 218 Cal.App.3d 278, 284.)

- "In a nutshell, a doctor has a duty to disclose all material information to his patient which will enable that patient to make an informed decision regarding the taking or

refusal to take such a test." (*Moore v. Preventive Medicine Medical Group, Inc.* (1986) 178 Cal.App.3d 728, 736.)

Secondary Sources

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, § 361, pp. 447–449
- CALIFORNIA TORTS, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.14 (Matthew Bender)
- California Tort Guide (Cont.Ed.Bar 1996) § 9.12
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 414, *Physicians and Other Medical Personnel* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 175, *Physicians and Surgeons* (Matthew Bender)

550
Affirmative Defense—Plaintiff Would Have Consented

[*Name of defendant*] claims that even if a reasonable person in [*name of plaintiff*]'s position might not have consented to the [*insert medical procedure*] if he or she had been given enough information about its risks, [*name of plaintiff*] still would have consented to the procedure.

If you decide [*name of defendant*] has proved that [*name of plaintiff*] would have consented, you must conclude that [his/her] failure to inform [*name of plaintiff*] of the risks was not a substantial factor in causing [*name of plaintiff*]'s harm.

DIRECTIONS FOR USE

"Whenever appropriate, the court should instruct the jury on the defenses available to a doctor who has failed to make the disclosure required by law." (*Cobbs v. Grant* (1972) 8 Cal.3d 229, 245.)

This instruction could be modified to cover "informed refusal" cases by redrafting it to state, in substance, that even if the plaintiff had known of the risks of refusal, he or she still would have refused the test.

SOURCES AND AUTHORITY

- The objective test is whether a reasonable person in plaintiff's position would have refused consent if he or she had been fully informed. (*Cobbs, supra,* 8 Cal.3d at p. 245.) However, the defendant can seek to prove that this particular plaintiff still would have consented even if properly informed (as an affirmative defense). (*Warren v. Schecter* (1997) 57 Cal.App.4th 1189, 1206.)

Secondary Sources

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, § 362, p. 449
- CALIFORNIA TORTS, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.14 (Matthew Bender)
- California Tort Guide (Cont.Ed.Bar 1996) § 9.11
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 414, *Physicians and Other Medical Personnel* (Matthew Bender)

551
Affirmative Defense—Waiver

[*Name of defendant***] claims that [he/she] did not have to inform [***name of patient***] of the risks of the [***insert medical procedure***] because [***name of patient***] asked not to be told of the risks.**

If [*name of defendant***] has proved that [***name of patient***] told [him/her] that [he/she] did not want to be informed of the risks of the [***insert medical procedure***], then you must conclude that [***name of defendant***] was not negligent in failing to inform [***name of patient***] of the risks.**

DIRECTIONS FOR USE

"Whenever appropriate, the court should instruct the jury on the defenses available to a doctor who has failed to make the disclosure required by law." (*Cobbs v. Grant* (1972) 8 Cal.3d 229, 245.) This instruction could be modified to cover "informed refusal" cases by redrafting it to state, in substance, that the plaintiff indicated that he or she did not want to be informed of the risks of refusing the test.

SOURCES AND AUTHORITY

- "[A] medical doctor need not make disclosure of risks when the patient requests that he not be so informed." (*Cobbs, supra,* 8 Cal.3d at p. 245.)

- This defense is considered a "justification." Justification for failure to disclose is an affirmative defense on which the defendant has the burden of proof. (*Mathis v. Morrissey* (1992) 11 Cal.App.4th 332, 347, fn. 9.)

- In *Putensen v. Clay Adams, Inc.* (1970) 12 Cal.App.3d 1062, 1083–1084, the court held that it was not error for the court to refuse an instruction on informed consent where the evidence showed that the doctor's attempt to explain the medical procedure was prevented by the plaintiff's insistence on remaining ignorant of the risks involved.

<u>Secondary Sources</u>

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, § 362, p. 449
- CALIFORNIA TORTS, Ch. 31, *Liability of Physicians and Other Medical Practitioners,* § 31.14 (Matthew Bender)
- California Tort Guide (Cont.Ed.Bar 1996) § 9.11

- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 414, *Physicians and Other Medical Personnel* (Matthew Bender)

552
Affirmative Defense—Simple Procedure

[*Name of defendant*] claims that [he/she] did not have to inform [*name of plaintiff*] of the risks of a [*insert medical procedure*]. A [*insert type of medical practitioner*] is not required to tell a patient about the dangers of a simple procedure if it is commonly understood that the dangers are not likely to occur.

If [*name of defendant*] has proved that a [*insert medical procedure*] is a simple procedure, and that it is commonly understood that any dangers are not likely to occur, then [*name of defendant*] was not required to inform [*name of plaintiff*] of the risks.

DIRECTIONS FOR USE

"Whenever appropriate, the court should instruct the jury on the defenses available to a doctor who has failed to make the disclosure required by law." (*Cobbs v. Grant* (1972) 8 Cal.3d 229, 245.) This instruction could be modified to cover "informed refusal" cases by redrafting it to state, in substance, that the risks of refusing the test were commonly understood to be unlikely to occur.

SOURCES AND AUTHORITY

- "[A] disclosure need not be made if the procedure is simple and the danger remote and commonly appreciated to be remote." (*Cobbs, supra, 8* Cal.3d at p. 245.)

- "[T]here is no physician's duty to discuss the relatively minor risks inherent in common procedures, when it is common knowledge that such risks inherent in the procedure are of very low incidence." (*Cobbs, supra,* 8 Cal.3d at p. 244.)

- This defense is considered a "justification." Justification for failure to disclose is an affirmative defense on which the defendant has the burden of proof. (*Mathis v. Morrissey* (1992) 11 Cal.App.4th 332, 347, fn. 9.)

Secondary Sources

- 5 Witkin, Summary of Cal. Law (9th ed. 1988) § 362, p. 449
- CALIFORNIA TORTS, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.14 (Matthew Bender)
- California Tort Guide (Cont.Ed.Bar 1996) § 9.11
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 58, *Assault and Battery*, § 58.14, Ch. 414, *Physicians and Other Medical Personnel* (Matthew Bender)

- CALIFORNIA POINTS AND AUTHORITIES, Ch. 175, *Physicians and Surgeons* (Matthew Bender)
- CALIFORNIA LEGAL FORMS, Ch. 104, *Health Care Transactions, Consents, And Directives*, § 104.11 (Matthew Bender)

553
Affirmative Defense—Emotional State of Patient

[*Name of defendant***] claims that [he/she] did not have to inform [***name of plaintiff***] of the risks of the [***insert medical procedure***]. A [***insert type of medical practitioner***] does not have to provide information about risks if the information will so seriously upset the patient that the patient will not be able to reasonably consider the risks of refusing to have the medical procedure.**

If [*name of defendant***] has proved that [***name of plaintiff***] would have been so seriously upset by being told of the risks that [he/she] would not have been able to reasonably consider the risks of refusing to have the [***insert medical procedure***], then [***name of defendant***] was not required to inform [***name of plaintiff***] of the risks.**

DIRECTIONS FOR USE

"Whenever appropriate, the court should instruct the jury on the defenses available to a doctor who has failed to make the disclosure required by law." (*Cobbs v. Grant* (1972) 8 Cal.3d 229, 245.) This instruction could be modified to cover "informed refusal" cases by redrafting it to state, in substance, that the information regarding the risks of refusing the test would have seriously upset the patient.

SOURCES AND AUTHORITY

- "A disclosure need not be made beyond that required within the medical community when a doctor can prove by a preponderance of the evidence he relied upon facts which would demonstrate to a reasonable man the disclosure would have so seriously upset the patient that the patient would not have been able to dispassionately weigh the risks of refusing to undergo the recommended treatment." (*Cobbs, supra,* 8 Cal.3d at p. 246.)

- This defense is considered a "justification." Justification for failure to disclose is an affirmative defense on which the defendant has the burden of proof. (*Mathis v. Morrissey* (1992) 11 Cal.App.4th 332, 347, fn. 9.)

Secondary Sources

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, § 362, p. 449
- CALIFORNIA TORTS, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.14 (Matthew Bender)
- California Tort Guide (Cont.Ed.Bar 1996) § 9.11
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 414, *Physicians and Other Medical Personnel* (Matthew Bender)

- CALIFORNIA POINTS AND AUTHORITIES, Ch. 175, *Physicians and Surgeons* (Matthew Bender)
- CALIFORNIA LEGAL FORMS, Ch. 104, *Health Care Transactions, Consents, And Directives*, § 104.11 (Matthew Bender)

554
Affirmative Defense—Emergency

[*Name of defendant***] claims that [he/she] did not have to obtain [***name of patient/ authorized person***]'s informed consent to the [***insert medical procedure***] because an emergency existed.**

To succeed, [*name of defendant***] must prove both of the following:**

1. **That [***name of defendant***] reasonably believed the [***insert medical procedure***] had to be done immediately in order to preserve the life or health of [***name of patient***]; and**

2. **That [***insert one or more of the following:***]**

   [[*name of patient***] was unconscious] [or]**

   [there was not enough time to inform [*name of patient***]] [or]**

   [there was not enough time to get consent from an authorized person.]

DIRECTIONS FOR USE

"Whenever appropriate, the court should instruct the jury on the defenses available to a doctor who has failed to make the disclosure required by law." (*Cobbs v. Grant* (1972) 8 Cal.3d 229, 245.) This instruction could be modified to cover "informed refusal" cases by redrafting it to state, in substance, that the emergency situation made it impossible to inform the patient regarding the risks of refusing the test.

SOURCES AND AUTHORITY

- Consent is implied in an emergency situation. (*Cobbs, supra,* 8 Cal.3d at p. 243.)

- Business and Professions Code sections 2397(a) and 1627.7(a) provide that a medical practitioner shall not be liable for injury caused in emergency situations by reason of the failure to inform if: (1) the patient was unconscious, (2) there was not enough time to inform the patient, or (3) there was not enough time to get consent from an authorized person.

- This defense is considered a "justification." Justification for failure to disclose is an affirmative defense on which the defendant has the burden of proof. (*Mathis v. Morrissey* (1992) 11 Cal.App.4th 332, 347, fn. 9.)

- The existence of an emergency situation can also be a defense to battery. (*Wheeler v. Barker* (1949) 92 Cal.App.2d 776, 781; *Preston v. Hubbell* (1948) 87 Cal.App.2d 53, 57–58; *Hundley v. St. Francis Hospital* (1958) 161 Cal.App.2d 800, 802.)

Secondary Sources

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, § 368, pp. 455–456
- CALIFORNIA TORTS, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, §§ 31.14, 31.62 (Matthew Bender)
- California Tort Guide (Cont.Ed.Bar 1996) § 9.15
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 58, *Assault and Battery*, § 58.14, Ch. 414, *Physicians and Other Medical Personnel* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 21, *Assault and Battery* (Matthew Bender)
- CALIFORNIA LEGAL FORMS, Ch. 104, *Health Care Transactions, Consents, And Directives*, § 104.11 (Matthew Bender)

VF-500
Medical Negligence

We answer the questions submitted to us as follows:

1. **Was [***name of defendant***] negligent in the diagnosis or treatment of [***name of plaintiff***]?**

   ___Yes ___No

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

2. **Was [***name of defendant***]'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. **What are [***name of plaintiff***]'s damages?**

[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:]	**$_____]**
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:]	**$_____]**
[c. Past noneconomic loss, including [physical pain/mental suffering:]	**$_____]**
[d. Future noneconomic loss, including [physical pain/mental suffering:]	**$_____]**
	TOTAL $_____

Signed: _____
Presiding Juror
Dated: _____

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

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 500, *Medical Negligence, Essential Factual Elements.*

If specificity is not required, users do not have to itemize all the damages listed in question 3. The breakdown is optional; depending on the circumstances, users may wish to break down the damages even further.

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

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

VF-501
Medical Negligence—Informed Consent
Affirmative Defense That Plaintiff Would Have Consented Even If Informed

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We answer the questions submitted to us as follows:

1. Did [*name of defendant***] perform a [***insert medical procedure***] on [***name of plaintiff***]?**

___Yes ___No

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

2. Did [*name of plaintiff***] give [his/her] informed consent for the [***insert medical procedure***]?**

___Yes ___No

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

3. Would a reasonable person in [*name of plaintiff***]'s position have refused the [***insert medical procedure***] if he or she had been fully informed of the possible results and risks of [and alternatives to] the [***insert medical procedure***]?**

___Yes ___No

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

4. Would [*name of plaintiff***] have consented to the [***insert medical procedure***] even if [he/she] had been given enough information about the risks of the [***insert medical procedure***]?**

___Yes ___No

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

5. Was [*name of plaintiff***] harmed as a consequence of a result or risk that [***name of defendant***] should have explained before the [***insert medical procedure***] was performed?**

___Yes ___No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the 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: _____

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

DIRECTIONS FOR USE

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

This verdict form is based on Instruction 533, *Failure to Obtain Informed Consent—Essential Factual Elements,* and Instruction 550, *Affirmative Defense—Plaintiff Would Have Consented.*

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

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

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

If the affirmative defense, which is contained in question 4, is not an issue in the case, question 4 should be omitted and the remaining questions renumbered accordingly.

VF-502
Medical Negligence
Informed Consent—Defense of Emergency

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] perform a [***insert medical procedure***] on [***name of plaintiff***]?**

___Yes ___No

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

2. Did [*name of plaintiff***] give [his/her] informed consent to the [***insert medical procedure***]?**

___Yes ___No

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

3. Would a reasonable person in [*name of plaintiff***]'s position have refused the [***insert medical procedure***] if he or she had been fully informed of the possible results and risks of [and alternatives to] the [***insert medical procedure***]?**

___Yes ___No

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

4. Was [*name of plaintiff***] harmed as a consequence of a result or risk that [***name of defendant***] should have explained before the [***insert medical procedure***] was performed?**

___Yes ___No

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

5. Did [*name of defendant*] reasonably believe the [*insert medical procedure*] had to be done immediately in order to preserve the life or health of [*name of plaintiff*]?

___Yes ___No

If your answer to question 5 is no, then answer question 7. If you answered yes to this question, answer question 6.

6. Was [*name of plaintiff*] unconscious?

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

[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:]	**$_____]**
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:]	**$_____]**
[c. Past noneconomic loss, including [physical pain/mental suffering:]	**$_____]**
[d. Future noneconomic loss, including [physical pain/mental suffering:]	**$_____]**
	TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

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

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 533, *Failure to Obtain Informed Consent—Essential Factual Elements,* and Instruction 554, *Affirmative Defense—Emergency.*

Depending on the facts, alternative language may be substituted for question 6 as in item 2 of instruction 554. If specificity is not required, users do not have to itemize all the damages listed in question 7. The breakdown is optional; depending on the circumstances, users may wish to break down the damages even further.

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

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

If the affirmative defense, which is contained in questions 5 and 6, is not an issue in the case, then questions 5 and 6 should be omitted and the remaining questions renumbered accordingly.

PROFESSIONAL MALPRACTICE (NONMEDICAL)

600
Standard of Care

A [*insert type of professional*] is negligent if [he/she] fails to use the skill and care that a reasonably careful [*insert type of professional*] would have used in similar circumstances.

[When you are deciding whether [*name of defendant*] was negligent, you must base your decision only on the testimony of the expert witnesses [including [*name of defendant*]] who have testified in this case.]

DIRECTIONS FOR USE

See Instruction 400, *Essential Factual Elements (Negligence)* for an instruction on the plaintiff's burden of proof. In legal or other nonmedical professional malpractice cases, the word "legal" or "professional" should be added before the word "negligence" in the first paragraph of instruction 400. (See *Sources and Authority* following Instruction 500, *Essential Factual Elements, Professional Malpractice (Medical)*.)

The second paragraph should be used except in cases where the court determines that expert testimony is not necessary.

See instructions 219–221 on evaluating the credibility of expert witnesses.

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

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

SOURCES AND AUTHORITY

- The elements of a cause of action in tort for professional negligence are: "(1) the duty of the professional to use such skill, prudence, and diligence as other members of his profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional's negligence." (*Budd v. Nixen* (1971) 6 Cal.3d 195, 200; *Carlton v. Quint* (2000) 77 Cal.App.4th 690, 699.)

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

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

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

  (A) A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.
  (B) For purposes of this rule, "competence" in any legal service shall mean to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service.
  (C) If a member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by 1) associating with or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before performance is required.

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

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

<u>Secondary Sources</u>

- 1 Witkin, California Procedure (4th ed. 1996) Attorneys, §§ 315–318, pp. 385–387
- 6 Witkin, Summary of California Law (9th ed. 1988), Torts, §§ 804–805, pp. 155–160
- CALIFORNIA TORTS, Ch. 1, *Negligence: Duty and Breach*, § 1.31, Ch. 30, *General Principles of Liability of Professionals*, §§ 30.12, 30.13, Ch. 32, *Liability of Attorney's*, § 32.13 (Matthew Bender)

- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 76, *Attorney Professional Liability*, Ch. 380, *Negligence* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 24, *Attorney's at Law* (Matthew Bender)

601
Damages for Negligent Handling of Legal Matter

To recover damages from [*name of defendant*], [*name of plaintiff*] must prove that [he/she/it] would have obtained a better result if [*name of defendant*] had acted as a reasonably careful attorney.

DIRECTIONS FOR USE

In *Mattco Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal.App.4th 820, the trial-within-a-trial method was applied to accountants. In cases involving professionals other than attorneys, this instruction would need to be modified by inserting the type of the professional in place of "attorney."

The issue of collectibility does not apply to every legal malpractice action: "It is only where the alleged malpractice consists of mishandling a client's claim that the plaintiff must show proper prosecution of the matter would have resulted in a favorable judgment and collection thereof." (*DiPalma v. Seldman* (1994) 27 Cal.App.4th 1499, 1506.)

SOURCES AND AUTHORITY

- "If the allegedly negligent conduct does not cause damage, it generates no cause of action in tort. [Citations.] The mere breach of a professional duty, causing only nominal damages, speculative harm, or the threat of future harm–not yet realized–does not suffice to create a cause of action for negligence." (*Budd v. Nixen* (1971) 6 Cal.3d 195, 200; *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 749–750.)

- The trial within-a-trial method "is the most effective safeguard yet devised against speculative and conjectural claims in this era of ever expanding litigation. It is a standard of proof designed to limit damages to those actually *caused* by a professional's malfeasance." (*Mattco Forge, supra,* 52 Cal.App.4th at p. 834.)

- "For the reasons given above, we conclude that, just as in litigation malpractice actions, a plaintiff in a transactional malpractice action must show that but for the alleged malpractice, it is more likely than not that the plaintiff would have obtained a more favorable result." (*Viner v. Sweet* (2003) 30 Cal.4th 1232.)

- To prove damages in a legal malpractice action, plaintiff must show the probable value of the lawsuit that he or she has lost. Plaintiff must also prove that careful management of his or her claim would have resulted in a favorable judgment and collection of it. (*Campbell v. Magana* (1960) 184 Cal.App.2d 751, 754.) There is no

damage in the absence of these latter elements. (*DiPalma, supra,* 27 Cal.App.4th at pp. 1506–1507.)

- "Because of the legal malpractice, the original target is out of range; thus, the misperforming attorney must stand in and submit to being the target instead of the former target which the attorney negligently permitted to escape. This is the essence of the case-within-a-case doctrine." (*Arciniega v. Bank of San Bernardino* (1997) 52 Cal.App.4th 213, 231.)

- The measure of damages in a case predicated on legal malpractice "is the difference between what was recovered and what would have been recovered but for the attorney's wrongful act or omission. … [I]f a reasonably competent attorney would have obtained a $3 million recovery for the client but the negligent attorney obtained only a $2 million recovery, the client's damage due to the attorney's negligence would be $1 million—the difference between what a competent attorney would have obtained and what the negligent attorney obtained." (*Norton v. Superior Court* (1994) 24 Cal.App.4th 1750, 1758.)

- "The trial-within-a-trial method does not 'recreate what a particular judge or fact finder would have done. Rather, the jury's task is to determine what a reasonable judge or fact finder would have done.' " (*Mattco Forge, supra,* 52 Cal.App.4th at p. 840.)

Secondary Sources

- 1 Witkin, California Procedure (4th ed. 1996) Attorneys, § 338, pp. 413–415
- CALIFORNIA TORTS, Ch. 32, *Liability of Attorney's* (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 76, *Attorney Professional Liability* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 24, *Attorney's at Law* (Matthew Bender)

602
Success not Required

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

SOURCES AND AUTHORITY

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

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

Secondary Sources

- 1 Witkin, California Procedure (4th ed. 1996) Attorneys, §§ 342–345, pp. 418–424
- CALIFORNIA TORTS, Ch. 32, *Liability of Attorney's*, §§ 32.11, 32.62 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 76, *Attorney Professional Liability* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 24, *Attorney's at Law* (Matthew Bender)
- CALIFORNIA LEGAL FORMS, Ch. 1A, *Role Of Counsel In Starting A New Business*, § 1A.30 (Matthew Bender)

603
Alternative Legal Decisions or Strategies

An attorney is not necessarily negligent just because he or she [chooses one legal strategy/makes a decision/makes a recommendation] and it turns out that another [strategy/decision/recommendation] would have been a better choice.

SOURCES AND AUTHORITY

- "We recognize, of course, that an attorney engaging in litigation may have occasion to choose among various alternative strategies available to his client … . " (*Smith v. Lewis* (1975) 13 Cal.3d 349, 359, overruled in part on other grounds in *In re Marriage of Brown* (1976) 15 Cal.3d 838, 851.)

- " 'In view of the complexity of the law and the circumstances which call for difficult choices among possible courses of action, the attorney cannot be held legally responsible for an honest and reasonable mistake of law or an unfortunate selection of remedy *or other procedural step*.' [Citation.]" (*Banerian v. O'Malley* (1974) 42 Cal.App.3d 604, 613.)

Secondary Sources

- CALIFORNIA TORTS, Ch. 32, *Liability of Attorney's*, § 32.11 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 76, *Attorney Professional Liability* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 24, *Attorney's at Law* (Matthew Bender)

604
Referral to Legal Specialist

If a reasonably careful attorney in a similar situation would have referred [*name of plaintiff***] to a legal specialist, then [***name of defendant***] was negligent if [he/she] did not do so.**

However, if [*name of defendant***] handled the matter with as much skill and care as a reasonable legal specialist would have, then [***name of defendant***] was not negligent.**

SOURCES AND AUTHORITY

- This type of an instruction was approved for use in legal malpractice cases in *Horne v. Peckham* (1979) 97 Cal.App.3d 404, 414–415, disapproved on other grounds in *ITT Small Business Finance Corp. v. Niles* (1994) 9 Cal.4th 245, 256.

- Rule of Professional Conduct: Rule 3-110 (C) (Failing to Act Competently) provides: "If a member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by 1) associating with or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before performance is required."

Secondary Sources

- 1 Witkin, California Procedure (4th ed. 1996) Attorneys, § 319, pp. 387–388

605
Breach of Fiduciary Duty—Essential Factual Elements

An attorney has a fiduciary duty to the client. A fiduciary duty is the duty of good faith and undivided loyalty.

[*Name of plaintiff***] claims that [he/she/it] was harmed because [***name of defendant***] breached [his/her] fiduciary duty of [***insert duty, e.g., confidentiality***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] breached the fiduciary duty of [***insert duty***];**

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

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

DIRECTIONS FOR USE

The existence of a fiduciary relationship is a question of law. Whether an attorney has breached that fiduciary duty is a question of fact. (*David Welch Co. v. Erskine & Tulley* (1988) 203 Cal.App.3d 884, 890.)

SOURCES AND AUTHORITY

- "The elements of a cause of action for breach of fiduciary duty are: (1) existence of a fiduciary duty; (2) the breach of that duty; and (3) damage proximately caused by that breach. [Citation.]" (*Mosier v. Southern California Physicians Insurance Exchange* (1998) 63 Cal.App.4th 1022, 1044.)

- "The relation between attorney and client is a fiduciary relation of the very highest character." (*Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 189.)

- Breach of fiduciary duty is a concept that is separate and distinct from traditional professional negligence but which still comprises legal malpractice. (*Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1086.)

- "Expert testimony is not required, but is admissible to establish the duty and breach elements of a cause of action for breach of fiduciary duty where the attorney conduct is a matter beyond common knowledge." (*Stanley, supra,* 35 Cal.App.4th at p. 1087 [internal citations omitted].)

- "The scope of an attorney's fiduciary duty may be determined as a matter of law based on the Rules of Professional Conduct which, 'together with statutes and general principles relating to other fiduciary relationships, all help define the duty component of the fiduciary duty which an attorney owes to his [or her] client.' " (*Stanley*, *supra*, 35 Cal.App.4th at p. 1087, quoting *Mirabito v. Liccardo* (1992) 4 Cal.App.4th 41, 45; *David Welch Co.*, *supra*, 203 Cal.App.3d at p. 890.)

Secondary Sources

- 1 Witkin, California Procedure (4th ed. 1996) Attorneys, § 118, pp. 155–157
- CALIFORNIA TORTS, Ch. 32, *Liability of Attorney's*, § 32.02 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 76, *Attorney Professional Liability* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 24, *Attorney's at Law* (Matthew Bender)

700
Basic Standard of Care

A person must use reasonable care in driving a vehicle. Drivers must keep a lookout for pedestrians, obstacles, and other vehicles. They must also control the speed and movement of their vehicles. The failure to use reasonable care in driving a vehicle is negligence.

DIRECTIONS FOR USE

This instruction states the common-law standard of reasonable care in driving. It applies to negligent conduct that is not covered by provisions of the Vehicle Code: "Aside from the mandate of the statute, the driver of a motor vehicle is bound to use reasonable care to anticipate the presence on the streets of other persons having equal rights with himself to be there." (*Zarzana v. Neve Drug Co.* (1919) 180 Cal. 32, 37 [179 P. 203].)

The instructions in this series should be used in conjunction with instructions on the elements of negligence contained in the negligence series.

SOURCES AND AUTHORITY

- The common-law duty supplements statutory driving regulations: "[A driver is] under a duty, both by statute and common law, to operate his vehicle without negligence so as to abstain from injuring any other person or his property." (*Bewley v. Riggs* (1968) 262 Cal.App.2d 188, 194 [68 Cal.Rptr. 520].)

- The standard of care is that of a reasonably careful person under the circumstances: "[The driver] was required to act as a reasonably prudent person under the same or similar circumstances … ." (*Watkins v. Ohman* (1967) 251 Cal.App.2d 501, 502–503 [59 Cal.Rptr. 709].)

- "The degree of care required in watching the movements of a particular machine depends upon the facts and circumstances existing at the time and place of the accident' and a driver is required to use that degree of care, only, which would be required of a reasonably prudent driver under similar circumstances." (*Whitford v. Pacific Gas and Electric Co.* (1955) 136 Cal.App.2d 697, 702 [289 P.2d 278], internal citations omitted.)

- The common-law requirement goes to the issues of lookout and control. Regardless of whether a driver was complying with the speed limit, "[he was] still bound to anticipate that he might meet persons at any point of the street and in order to avoid a charge of negligence he was bound to use ordinary care and to keep an ordinarily

careful lookout for such persons and keep his machine under such control as would enable him to avoid a collision." (*Boccalero v. Leigh* (1931) 113 Cal.App. 376, 379, [298 P. 526], internal citation omitted.)

- "The operator of a vehicle must keep a proper lookout for other vehicles or persons on the highway and must keep his car under such control as will enable him to avoid a collision; failure to keep such a lookout constitutes negligence." (*Downing v. Barrett Mobile Home Transport, Inc.* (1974) 38 Cal.App.3d 519, 524 [113 Cal.Rptr. 277].)

- On the lookout requirement, one court observed: "The driver of an automobile is bound to use reasonable care to anticipate the presence on the highway of others who have equal right to be there and the fact that his vision is temporarily interfered with, either by the glaring sun or headlights, does not relieve him from that duty." (*Hill v. Peres* (1934) 136 Cal.App. 132, 137 [28 P.2d 946], internal citations omitted.)

- On the control requirement, one court observed: "Cases in which the problem has been presented adhere to the view that a driver must at all times exercise ordinary care to avoid a collision including swerving or altering his course, in addition to applying his brakes, if that would be a reasonable means of avoiding the collision." (*Guyton v. City of Los Angeles* (1959) 174 Cal.App.2d 354, 362 [344 P.2d 910].)

- "The age of a minor who operates a motor vehicle will not excuse him from liability for driving it in a negligent manner, and he will be required to meet the standard established primarily for adults." (*Prichard v. Veterans Cab Co.* (1965) 63 Cal.2d 727, 732 [47 Cal.Rptr. 904].)

- Drivers with mental disabilities are required to exercise the ordinary care required of an adult without such disability. (*Fox v. City and County of San Francisco* (1975) 47 Cal.App.3d 164, 173 [120 Cal.Rptr. 779].)

Secondary Sources

- 2 Levy, et al., California Torts (1985–2000) Motor Vehicles, § 20.01
- California Tort Guide (Cont.Ed.Bar 1996) §§ 4.1– 4.5
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 82, *Automobiles: Causes Of Action*, § 82.10 (Matthew Bender)
- 2 Bancroft-Whitney's California Civil Practice (1992) Torts, § 25.22

701
Definition of Right-of-Way

When the law requires a [driver/pedestrian] to "yield the right-of-way" to [another/a] [vehicle/pedestrian], this means that the [driver/pedestrian] must let the [other] [vehicle/pedestrian] go first.

Even if someone has the right-of-way, that person must use reasonable care to avoid an accident.

DIRECTIONS FOR USE

This instruction should be given following a reading of the appropriate Vehicle Code section.

If the case involves a statutory right-of-way, the jury could also be given instructions on negligence per se, if applicable. Statutes concerning who has the right-of-way include:

Vehicle Code section 21800: Intersection Right of Way; Uncontrolled Intersection; Driver on "Terminating Highway"; Intersection Controlled by Stop Signs; Intersection with Inoperative Signals
Vehicle Code section 21801: Left-Turn Right-of-Way
Vehicle Code section 21802: Approaching Entrance to Intersection
Vehicle Code section 21803: Intersection Controlled by Yield Right-of-Way Sign
Vehicle Code section 21804: Entry onto Highway
Vehicle Code section 21805: Equestrian Crossings
Vehicle Code section 21806: Authorized Emergency Vehicles

SOURCES AND AUTHORITY

- Vehicle Code section 525 provides: " 'Right-of-way' is the privilege of the immediate use of the highway." Courts have observed that "[r]ight of way rules have been described as simply establishing 'a practical basis for necessary courtesy on the highway.' " (*Eagar v. McDonnell Douglas Corp.* (1973) 32 Cal.App.3d 116, 122 [107 Cal.Rptr. 819], internal citation omitted.)

- Having the statutory right-of-way does not excuse the failure to use due care: "Of course, even if [defendant] had the right of way, he had a duty to exercise reasonable care to avoid an accident, and the jury was so instructed." (*Eagar, supra,* 32 Cal.App.3d. at p. 123, fn. 3, internal citation omitted.)

- "When, as here, each motorist has acted reasonably and the pedestrian has failed to exercise due care for her own safety, the law of this state does not permit the technical violation of the pedestrian's right of way statute to impose negligence on the motorists as a matter of law. The statute creates a preferential, but not absolute, right in favor of the pedestrian who is still under a duty to exercise ordinary care." (*Byrne v. City and County of San Francisco* (1980) 113 Cal.App.3d 731, 742 [170 Cal.Rptr. 302].)

- " 'Even where a right of way is given by statute, if conditions so require it to avoid injury to others, the right of way must be yielded.' " (*Bove v. Beckman* (1965) 236 Cal.App.2d 555, 563 [46 Cal.Rptr. 164], internal citation omitted.)

- "Although such a driver may have the right-of-way, he is not absolved of the duty to exercise ordinary care; may not proceed blindly in disregard of an obvious danger; and must be watchful of the direction in which danger is most likely to be apprehended." (*Malone v. Perryman* (1964) 226 Cal.App.2d 227, 234 [37 Cal.Rptr. 864].)

<u>Secondary Sources</u>

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 824
- 2 Levy, et al., California Torts (1985–2000) Motor Vehicles, § 20.68
- California Tort Guide (Cont.Ed.Bar 1996) § 4.15
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 82, *Automobiles: Causes Of Action*, §§ 82.10, 82.68 (Matthew Bender)
- 2 Bancroft-Whitney's California Civil Practice (1992) Torts, § 25.26

702
Waiver of Right-of-Way

A [driver/pedestrian] who has the right-of-way may give up that right and let [another vehicle/a pedestrian] go first. If a [driver/ pedestrian] reasonably believes that [[another/a] driver/a pedestrian] has given up the right-of-way, then he or she may go first.

SOURCES AND AUTHORITY

- "[I]f one who has the right of way 'conducts himself in such a definite manner as to create a reasonable belief in the mind of another person that the right-of-way has been waived, then such other person is entitled to assume that the right of way has been given up to him …' ." (*Hopkins v. Tye* (1959) 174 Cal.App.2d 431, 433 [344 P.2d 640].)

- "A conscious intentional act of waiver of the right of way by the pedestrian is not required. Whether there is a waiver depends upon the acts of the pedestrian. If they are such that a driver could reasonably believe that the pedestrian did not intend to assert her right of way, a waiver occurs." (*Cohen v. Bay Area Pie Company* (1963) 217 Cal.App.2d 69, 72–73 [31 Cal.Rptr. 426], internal citation omitted.)

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 824
- 2 Levy, et al., California Torts (1985–2000) Motor Vehicles, § 20.68[c]
- California Tort Guide (Cont.Ed.Bar 1996) § 4.15

703
Definition of "Immediate Hazard"

The statute just read to you uses the words "immediate hazard." An immediate hazard exists if the approaching vehicle is so near or is approaching so fast that a reasonably careful person would realize that there is a danger of collision [or accident].

DIRECTIONS FOR USE

This instruction is designed to be given as a supplement to the several Vehicle Code provisions that contain the term "immediate hazard." (Veh. Code, §§ 21802 [Approaching intersection entrance], 21803 [Yield right of way], 21804 [Public or private property], 21805 [Equestrian crossings], 21950 [Crosswalks], 21953 [Tunnel or overhead crossing], 21954 [Pedestrian outside crosswalk], 22451 [Train signals].)

SOURCES AND AUTHORITY

- "It is to be noted that the legislature has not set a hard and fast rule for the conduct of drivers approaching through highways but has provided the general rule that such drivers must yield the right of way to others traveling on the highway who are approaching so closely as to constitute 'an immediate hazard.' Our complex traffic problems are such that the circumstances of the traffic on a through highway as a driver approaches must govern his conduct in determining whether it is an immediate hazard. Whether a driver acts with due care or negligently in proceeding across a through highway must as a general rule be left to the determination of the jury in view of all the circumstances." (*Wilkinson v. Marcellus* (1952) 51 Cal.App.2d 630, 633 [125 P.2d 584].)

- At least one court has held that the term "immediate hazard" should be defined for the jury if a party so requests. (*Hickenbottom v. Jeppesen* (1956) 144 Cal.App.2d 115, 121 [300 P.2d 689].) However, any error in failing to define the term will be considered harmless if other instructions cover that point: "The words 'immediate hazard' seem reasonably clear in the context in which they appear, both in the statute and in the instruction given; the hazard of a collision." (*Ibid*.)

<u>Secondary Sources</u>

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 824
- California Tort Guide (Cont.Ed.Bar 1996) §§ 4.10–4.11

704
Left Turns (Veh. Code, § 21801)

The statute just read to you uses the word "hazard." A "hazard" exists if any approaching vehicle is so near or is approaching so fast that a reasonably careful person would realize that there is a danger of a collision [or accident].

[A driver who is attempting to make a left turn must make sure that no oncoming vehicles are close enough to be a hazard before he or she proceeds across each lane.]

DIRECTIONS FOR USE

The bracketed paragraph should be given in appropriate cases involving multiple lanes of oncoming traffic. (*Sesler v. Ghumman* (1990) 219 Cal.App.3d 218, 227 [268 Cal.Rptr. 70].)

SOURCES AND AUTHORITY

- Vehicle Code section 21801(a) provides: "The driver of a vehicle intending to turn to the left or to complete a U-turn . . . shall yield the right-of-way to all vehicles approaching from the opposite direction which are close enough to constitute a hazard at any time during the turning movement, and shall continue to yield the right-of-way to the approaching vehicles until the left turn or U-turn can be made with reasonable safety."

- "We hold section 21802,[1] subdivision (a), requires that where, as here, some, but not all, of the oncoming vehicles have yielded their right-of-way to a left-turning driver, that driver has a continuing duty during the turning movement to ascertain, before proceeding across the next open lane(s), if any vehicle is approaching from the opposite direction so close as to constitute a hazard." (*Sesler, supra,* 219 Cal.App.3d at pp. 224–225)

- Noting that in 1957 the Legislature added the phrase "at any time during the turning movement" to this section, the court in *In re Kirk* (1962) 202 Cal.App.2d 288, 291 [20 Cal.Rptr. 787], reasoned that "if the oncoming vehicle in the lane closest to the left turning vehicle surrenders its right of way by indicating to the operator of the left turning vehicle that it desires him to proceed, such operator may not proceed beyond that first lane of traffic, now effectively blocked by the waiving vehicle, if in fact

[1] This statutory reference appears to be mistaken. The opinion only discusses section 21801 before stating its holding. In fact, the opinion contains no reference to section 21802.

other vehicles approaching in any of the other oncoming lanes will constitute a hazard to the left turning vehicle during the turning movement."

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 824
- 2 Levy, et al., California Torts (1985–2000) Motor Vehicles, § 20.68[2][g]
- California Tort Guide (Cont.Ed.Bar 1996) §§ 4.10–4.11

705
Turning (Veh. Code, § 22107)

A driver must use reasonable care when turning [or moving to the right or to the left].

DIRECTIONS FOR USE

An instruction on this point should be given only if the jury is instructed on Vehicle Code section 22107. It should be read after that section has been given. (*Anderson v. Latimer* (1985) 166 Cal.App.3d 667, 672–673 [212 Cal.Rptr. 544].)

SOURCES AND AUTHORITY

- Vehicle Code section 22107 provides: "No person shall turn a vehicle from a direct course or move right or left upon a roadway until such movement can be made with reasonable safety and then only after the giving of an appropriate signal in the manner provided in this chapter in the event any other vehicle may be affected by the movement."

- "This provision does not require the driver to know that a turn can be made with safety but only that he must exercise reasonable care, and whether such care has been exercised is normally a question of fact." (*Butigan v. Yellow Cab Co.* (1958) 49 Cal.2d 652, 656 [320 P.2d 500].)

- Courts have held that a reading of section 22107 should be followed by an instruction clarifying that the driver is under a duty to exercise only as much care as a reasonably prudent person when making a turn or movement: "An instruction to a jury concerning Vehicle Code, section 544 [now 22107] must make it clear that the driver who is about to turn must exercise such care as would a reasonably prudent man under similar circumstances, no more and no less." (*Lewis v. Franklin* (1958) 161 Cal.App.2d 177, 184 [326 P.2d 625].)

<u>Secondary Sources</u>

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 826
- 2 Levy, et al., California Torts (1985–2000) Motor Vehicles, § 20.67
- California Tort Guide (Cont.Ed.Bar 1996) §§ 4.10–4.11
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 82, *Automobiles: Causes Of Action*, §§ 82.66, 82.67 (Matthew Bender)

706
Basic Speed Law (Veh. Code, § 22350)

A person must drive at a reasonable speed. Whether a particular speed is reasonable depends on the circumstances such as traffic, weather, visibility, and road conditions. Drivers must not drive so fast that they create a danger to people or property.

If [*name of plaintiff/defendant***] has proved that [***name of defendant/plaintiff***] was not driving at a reasonable speed at the time of the accident, then [***name of defendant/ plaintiff***] was negligent.**

SOURCES AND AUTHORITY

- Vehicle Code section 22350 provides: "No person shall drive a vehicle upon a highway at a speed greater than is reasonable or prudent having due regard for weather, visibility, the traffic on, and the surface and width of, the highway, and in no event at a speed which endangers the safety of persons or property."

- "The so-called basic speed law is primarily a regulation of the conduct of the operators of vehicles. They are bound to know the conditions which dictate the speeds at which they can drive with a reasonable degree of safety. They know, or should know, their cars and their own ability to handle them, and especially their ability to come to a stop at different speeds and under different conditions of the surface of the highway." (*Wilding v. Norton* (1957) 156 Cal.App.2d 374, 379 [319 P.2d 440].)

- "Whether Vehicle Code section 22350 has been violated is a question of fact." (*Leighton v. Dodge* (1965) 236 Cal.App.2d 54, 57 [45 Cal.Rptr. 820], internal citation omitted.)

- "A number of cases have held that it is proper to give an instruction in the terms of this section and to inform the jury that a violation of the statute is negligence." (*Hardin v. San Jose City Lines, Inc.* (1953) 41 Cal.2d 432, 438 [260 P.2d 63].)

- The burden of proving negligence in a civil action is on the party charging negligence, and even if such party has established speed in excess of the applicable prima facie limit the party must establish negligence under the circumstances. (*Faselli v. Southern Pacific Co.* (1957) 150 Cal.App.2d 644, 648 [310 P.2d 698].)

- Compliance with the posted speed law does not negate negligence as a matter of law. (*Maxwell v. Colburn* (1980) 105 Cal.App.3d 180, 186 [163 Cal.Rptr. 912].)

- Drivers who are driving at the maximum speed limit on a multi-lane freeway are not under a duty to move their vehicles to the right into the next slower lane when another vehicle approaches them from behind in the same lane at a speed in excess of the posted maximum speed limit. (*Monreal v. Tobin* (1998) 61 Cal.App.4th 1337 [1354–1355 [72 Cal.Rptr.2d 168].)

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 823
- 2 Levy, et al., California Torts (1985–2000) Motor Vehicles, § 20.63[3][a]
- California Tort Guide (Cont.Ed.Bar 1996) § 4.16

707
Speed Limit (Veh. Code, § 22352)

The speed limit where the accident occurred was [*insert number***] miles per hour.**

The speed limit is a factor to consider when you decide whether or not [*name of plaintiff/name of defendant***] was negligent. A driver is not necessarily negligent just because he or she was driving faster than the speed limit. However, a driver may be negligent even if he or she was driving at or below the speed limit.**

SOURCES AND AUTHORITY

- The prima facie speed limits are set by Vehicle Code section 22352.

- Vehicle Code section 40831 provides: "In any civil action proof of speed in excess of any prima facie limit declared in Section 22352 at a particular time and place does not establish negligence as a matter of law but in all such actions it shall be necessary to establish as a fact that the operation of a vehicle at the excess speed constituted negligence."

- A party is entitled to an instruction that the prima facie speed limit is a factor for the jury to consider in making its negligence determination. (*Hardin v. San Jose City Lines* (1953) 41 Cal.2d 432, 439 [260 P.2d 63].)

- "The mere driving of an automobile in excess of the speed limit does not show negligence as a matter of law. [Citation.] The jury was free to find [defendant] not guilty of negligence even if they found that he was exceeding the speed limit." (*Williams v. Cole* (1960) 181 Cal.App.2d 70, 74 [5 Cal.Rptr. 24], internal citations omitted.)

- The burden of proving negligence in a civil action is on the party charging negligence, and even if such party has established speed in excess of the applicable prima facie limit the party must establish negligence under the circumstances. (*Faselli v. Southern Pacific Co.* (1957) 150 Cal.App.2d 644, 648 [310 P.2d 698].)

- "Even though the Texaco truck was traveling at a speed less than the maximum specified in the Vehicle Code, the reasonableness of its speed was a question of fact under all the circumstances, and circumstances may make travel at a speed less than the maximum rate a negligent operation of a motor vehicle." (*Scott v. Texaco, Inc.* (1966) 239 Cal.App.2d 431, 436–437 [48 Cal.Rptr. 785], internal citations omitted.)

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 823
- 2 Levy, et al., California Torts (1985–2000) Motor Vehicles, § 20.63[2][c], [4]
- California Tort Guide (Cont.Ed.Bar 1996) § 4.18
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 82, *Automobiles: Causes Of Action*, § 82.10 (Matthew Bender)

708
Maximum Speed Limit (Veh. Code, §§ 22349, 22356)

The maximum speed limit where the accident occurred was [*insert number*] miles per hour.

DIRECTIONS FOR USE

An instruction on maximum speed limits could be useful to help frame the issue for the jury. On the other hand, a specific instruction on the maximum speed limits may be unnecessary. In the event that there is sufficient evidence to support an instruction that one of the parties violated the maximum speed limit, the judge could give the negligence per se instructions while reciting the specific code section. In that event, the judge would not give an instruction on the basic speed law. (See *Hargrave v. Winquist* (1982) 134 Cal.App.3d 916 [185 Cal.Rptr. 30].)

SOURCES AND AUTHORITY

- Two statutes set the maximum speed limit. Section 22349(a) sets the general maximum speed at 65 miles per hour, and section 22349(b) sets the basic maximum for two-lane, undivided highways at 55 miles per hour. Section 22356 sets the maximum speed at 70 miles per hour at selected locations.

- Section 22400(a) states the "minimum speed law" and provides as follows: "No person shall drive upon a highway at such a slow speed as to impede or block the normal and reasonable movement of traffic unless the reduced speed is necessary for safe operation, because of a grade, or in compliance with law. No person shall bring a vehicle to a complete stop upon a highway so as to impede or block the normal and reasonable movement of traffic unless the stop is necessary for safe operation or in compliance with law."

<u>Secondary Sources</u>

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 823
- 2 Levy, et al., California Torts (1985–2000) Motor Vehicles, § 20.63[2][b], [4][b][iii]
- California Tort Guide (Cont.Ed.Bar 1996) § 4.17

709
Driving Under the Influence (Veh. Code, §§ 23152, 23153)

The statute just read to you uses the term "under the influence." A driver is not necessarily "under the influence" just because he or she has consumed some alcohol [or drugs]. A driver is "under the influence" when he or she has consumed an amount of alcohol [or drugs] that impairs his or her ability to drive in a reasonably careful manner.

DIRECTIONS FOR USE

This instruction is designed to supplement a negligence per se instruction on driving under the influence.

The presumption of intoxication based on a 0.08 blood level applies to criminal prosecutions only. There is no statutory or case authority supporting the conclusion that the presumption applies in civil cases. (*Hyatt v. Sierra Boat Co.* (1978) 79 Cal.App.3d 325, 334 [145 Cal.Rptr. 47].)

For a definition of "drug", see Vehicle Code section 312: "The term 'drug' means any substance or combination of substances, other than alcohol, which could so affect the nervous system, brain, or muscles of a person as to impair, to an appreciable degree, his ability to drive a vehicle in the manner that an ordinarily prudent and cautious man, in full possession of his faculties, using reasonable care, would drive a similar vehicle under like conditions."

SOURCES AND AUTHORITY

- Vehicle Code section 23152(a) provides: "It is unlawful for any person who is under the influence of any alcoholic beverage or drug, or under the combined influence of any alcoholic beverage and drug, to drive a vehicle."

- Vehicle Code section 23153(a) provides: "It is unlawful for any person, while under the influence of any alcoholic beverage or drug, or under the combined influence of any alcoholic beverage and drug, to drive a vehicle and concurrently do any act forbidden by law or neglect any duty imposed by law in driving the vehicle, which act or neglect proximately causes bodily injury to any person other than the driver."

- "All of the decided cases on the subject recognize that it is negligence as a matter of law to drive a vehicle upon a public highway while in an intoxicated condition." (*Zamucen v. Crocker* (1957) 149 Cal.App.2d 312, 316 [308 P.2d 384], internal citations omitted.)

- The term "under the influence" was first defined in *People v. Dingle* (1922) 56 Cal.App. 445, 449 [205 P. 705], as follows: "[I]f intoxicating liquor has so far affected the nervous system, brain, or muscles of the driver of an automobile as to impair, to an appreciable degree, his ability to operate his car in the manner that an ordinarily prudent and cautious man, in the full possession of his faculties, using reasonable care, would operate or drive a similar vehicle under like conditions, then such driver is 'under the influence of intoxicating liquor' within the meaning of the statute."

- "One is not necessarily under the influence of intoxicating liquor as the result of taking one or more drinks. The circumstances and effect must be considered; whether or not a person was under the influence of intoxicating liquor at a certain time is a question of fact for the jury to decide." (*Pittman v. Bovien* (1967) 249 Cal.App.2d 207, 217 [57 Cal.Rptr. 319].)

- Driving while "under the influence" under Vehicle Code sections 23152 and 23153 is not the same as "being under the influence" of a controlled substance under Health and Safety Code section 11550. Under the Vehicle Code provisions, "the defendant's ability to drive must actually be impaired," while the Health and Safety Code provision is violated as soon as the influence is present "in any detectable manner." (*People v. Enriquez* (1996) 42 Cal.App.4th 661, 665 [49 Cal.Rptr.2d 710].)

- Courts have also distinguished the "under the influence" standard from the "obvious intoxication" standard used in Business and Professions Code section 25602.1. (*Jones v. Toyota Motor Co.* (1988) 198 Cal.App.3d 364, 368 [243 Cal.Rptr. 611]: " 'Under the influence' is defined by a person's capability to drive safely, whereas 'obvious intoxication' is defined by a person's appearance.")

<u>Secondary Sources</u>

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 826
- 2 Levy, et al., California Torts (1985–2000) Motor Vehicles, § 20.02[3][b]
- California Tort Guide (Cont.Ed.Bar 1996) § 4.25
- 2 Bancroft-Whitney's California Civil Practice (1992) Torts, § 25.28

710
Duties of Care for Pedestrians and Drivers

The duty to use reasonable care does not require the same amount of caution from drivers and pedestrians. While both drivers and pedestrians must be aware that motor vehicles can cause serious injuries, drivers must use more care than pedestrians.

SOURCES AND AUTHORITY

- Driving is not considered a highly dangerous activity, though it may require a specific instruction: "Driving a motor vehicle may be sufficiently dangerous to warrant special instructions, but it is not so hazardous that it always requires 'extreme caution.' " (*Menchaca v. Helms Bakeries, Inc.* (1968) 68 Cal.2d 535, 544 [67 Cal.Rptr. 775], internal citations omitted.)

- Failure to give an instruction upon request on the relative duties of the driver and the pedestrian has been held to be error. (*Cucinella v. Weston Biscuit Co.* (1954) 42 Cal.2d 71, 81 [265 P.2d 513] [error not prejudicial in this case].)

- In *Dawson v. Lalanne* (1937) 22 Cal.App.2d 314, 315 [70 P.2d 1002], the court held it was error to refuse to instruct the jury that "the plaintiff and the defendant were both chargeable only with the exercise of ordinary care, but a greater amount of such care was required of the defendant at the time of the accident in question by reason of the fact that he was driving and operating an automobile, which is an instrumentality capable of inflicting serious and often fatal injuries upon others using the highway."

- The purpose of instructions concerning the relative standards of care for pedestrians and drivers is "to inform the jury that the elements of action constituting conduct which qualifies as ordinary care are those commensurable with the responsibility involved and depend upon the character of the instrumentality being used or the nature of the act which is being performed, all as related to the surrounding circumstances." (*Cucinella, supra,* 42 Cal.2d at p. 80.)

<u>Secondary Sources</u>

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 825
- 2 Levy, et al., California Torts (1985–2000) Motor Vehicles, §§ 20.10–20.12
- California Tort Guide (Cont.Ed.Bar 1996) §§ 4.72–4.73
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 82, *Automobiles: Causes Of Action*, § 82.10 (Matthew Bender)

711
The Passenger's Duty of Care for Own Safety

A passenger is not required to be aware of the conditions on the highway and is entitled to expect that a driver will use reasonable care. However, if a passenger becomes aware of [a danger on the highway] [the driver's impairment or failure to use reasonable care], then the passenger must take reasonable steps to protect his or her safety.

SOURCES AND AUTHORITY

- " 'In the absence of some fact brought to his attention which would cause a person of ordinary prudence to act otherwise, a passenger in an automobile has no duty to observe traffic conditions on the highway, and his mere failure to do so, without more, will not support a finding of contributory negligence.' In other words, an automobile passenger's "duty to look" does not arise until some factor of danger comes to his attention, thus charging him as a person of ordinary prudence to take steps for his own safety.' " (*Casey v. Russell* (1982) 138 Cal.App.3d 379, 386–387 [188 Cal.Rptr. 18], internal citations omitted.)

- "Even when negligence of a driver may not be imputed to him, the passenger is bound to exercise ordinary care for his own safety. He may not shut his eyes to an obvious danger; he may not blindly rely on the driver in approaching a place of danger. He is normally bound to protest against actual negligence or recklessness of the driver, the extent of his duty in this regard depending upon the particular circumstances of each case and ordinarily being a question of fact for the jury." (*Pobor v. Western Pacific Railroad Co.* (1961) 55 Cal.2d 314, 324 [11 Cal.Rptr. 106], internal citations omitted.)

<u>Secondary Sources</u>

- 2 Levy, et al., California Torts (1985–2000) Motor Vehicles, § 20.03[2][c]
- California Tort Guide (Cont.Ed.Bar 1996) § 4.67–4.71
- 2 Bancroft-Whitney's California Civil Practice (1992) Torts, § 25.29

712
Failure to Wear a Seatbelt

[*Name of defendant***] claims that [***name of plaintiff***] was negligent because [he/she] failed to wear a seat belt. To succeed, [***name of defendant***] must prove all of the following:**

1. **That a working seatbelt was available;**

2. **That a reasonably careful person in [***name of plaintiff***]'s situation would have used the seat belt;**

3. **That [***name of plaintiff***] failed to wear a seatbelt; and**

4. **That, based on expert testimony, [***name of plaintiff***]'s injuries would have been avoided or less severe if [he/she] had used the seat belt.**

[In deciding whether a reasonably careful person would have used a seat belt, you may consider Vehicle Code section 27315, which states: [*insert pertinent provision***].]**

DIRECTIONS FOR USE

Note that Vehicle Code section 27315 applies only to persons 16 years or older. No case law regarding whether persons under 16 can be found comparatively negligent for failing to wear a seatbelt has been found.

SOURCES AND AUTHORITY

- Vehicle Code section 27315, the "Motor Vehicle Safety Act," was adopted in 1985.

- Defendants must prove two elements to establish the seat belt defense: "Defendants, … are required to prove two issues of fact: (1) the defendant must show whether in the exercise of ordinary care the plaintiff should have used the seat belt which was available to him. … (2) The defendant must show what the consequence to the plaintiff would have been had seat belts been used." (*Franklin v. Gibson* (1982) 138 Cal.App.3d 340, 343 [188 Cal.Rptr. 23].)

- The second requirement must almost always be established by expert testimony, and it appears to overlap somewhat with the issue of causation: "Upon a retrial the court or jury will determine whether in the exercise of ordinary care [plaintiff] should have used the seat belt; expert testimony will be required to prove whether [plaintiff] would have been injured, and, if so, the extent of the injuries he would have sustained

if he had been using the seat belt … .”(*Truman v. Vargas* (1969) 275 Cal.App.2d 976, 983 [80 Cal.Rptr. 373].)

- In *Housley v. Godinez* (1992) 4 Cal.App.4th 737, 747 [6 Cal.Rptr.2d 111], the court approved of the following jury instruction, which was read in addition to section 27315: “The Defendants have raised the seat belt defense in this case. First, you must decide whether in the exercise of ordinary care, the Plaintiff should have used seat belts, if available to him. Second you must determine with expert testimony the nature of injuries and damages Plaintiff would have sustained if he had used seat belts.”

- In *Housley, supra,* 4 Cal.App.4th at page 747, the court held that the jury may be instructed “on the existence of the seat belt statute [section 27315] in appropriate cases, while allowing the jury to decide what weight, if any, to give the statute in determining the standard of reasonable care.”

- Subdivision (j) provides that violations of section 27315 “shall not establish negligence as a matter of law or negligence per se for comparative fault purposes, but negligence may be proven as a fact without regard to the violation.” The *Housley* court observed that “nothing in the statute prohibits a jury from knowing and considering its very existence when determining the reasonableness of driving without a seat belt.” (*Housley, supra,* 4 Cal.App.4th at p. 744.)

- Failure to wear a seat belt is not considered a supervening cause. (*Hardison v. Bushnell* (1993) 18 Cal.App.4th 22, 28 [22 Cal.Rptr.2d 106].)

<u>Secondary Sources</u>

- 2 Levy, et al., California Torts (1985–2000) Motor Vehicles, § 20.05[2]
- California Tort Guide (Cont.Ed.Bar 1996) § 4.71
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 82, *Automobiles: Causes Of Action,* § 82.10 (Matthew Bender)
- 2 Bancroft-Whitney’s California Civil Practice (1992) Torts, § 25.26

720
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 [***name of defendant***] gave [***name of driver***] permission to operate the vehicle. To establish this claim, [***name of plaintiff***] must prove all of 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 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 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 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, 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.' " (" (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 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 v. Grieger, Inc.* (1961) 57 Cal.2d 43, 54 [17 Cal.Rptr. 828, 367 P.2d 420], internal quotation marks and citations omitted.)

<u>Secondary Sources</u>

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1028–1031, 1039, pp. 421–424, 431–433; *id.* (2002 supp.) at §§ 1028–1031, pp. 290–292
- 2 Levy et al., California Torts (1985) Motor Vehicles, § 20.20
- California Tort Guide (Cont.Ed.Bar 3d ed. 1996) Automobiles, §§ 4.28–4.32, 4.37, pp. 110–114, 116 (rel. 4/00)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 82, *Automobiles: Causes Of Action*, §§ 82.11, 82.16 (Matthew Bender)
- 2 Bancroft-Whitney's California Civil Practice: Torts (1992) Motor Vehicles, §§ 25:44–25:45, pp. 68–71

721
Motor Vehicle Owner Liability
Affirmative Defense—Use Beyond Scope of Permission

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

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 1040, pp. 433–434; *id.* (2002 supp.) at § 1040, p. 293
- 2 Levy et al., California Torts (1985) Motor Vehicles, § 20.20[5][c]
- California Tort Guide (Cont.Ed.Bar 3d ed. 1996) Automobiles, §§ 4.35–4.36, pp. 115–116 (rel. 4/00)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 82, *Automobiles: Causes Of Action*, § 82.16 (Matthew Bender)

722
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 [*name of defendant*] gave [*name of minor*] permission to operate the vehicle. To establish this claim, [*name of plaintiff*] must prove all of 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 a 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].)

- "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

- 6 Witkin, Summary of California Law (9th ed. 1987) Torts, §§ 1025–1027, pp. 418–421; *id.* (2002 supp.) at §§ 1025–1026, pp. 289–290
- 2 Levy et al., California Torts (1993) Motor Vehicles, § 20.30[1]
- California Tort Guide (Cont.Ed.Bar 3d ed. 1996) Automobiles, §§ 4.42– 4.43, pp. 120–121
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 82, *Automobiles: Causes Of Action*, § 82.16, Ch. 83, *Automobiles: Bringing the Action*, § 83.133 (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice: Torts (1992) Motor Vehicles, § 25.52, pp. 77–78

723
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 [*name of defendant*] signed [*name of minor*]'s application for a driver's license. To establish this claim, [*name of plaintiff*] must prove all of 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."

- 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>

- 6 Witkin, Summary of California Law (9th ed. 1987) Torts, §§ 1025–1027, pp. 418–421; *id.* (2002 supp.) at §§ 1025–1026, pp. 289–290
- 2 Levy et al., California Torts (1993) Motor Vehicles, § 20.30[2]
- California Tort Guide (Cont.Ed.Bar 3d ed. 1996) Automobiles, §§ 4.41, 4.43, pp. 119–121
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 82, *Automobiles: Causes Of Action*, § 82.16, Ch. 83, *Automobiles: Bringing the Action*, § 83.134 (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice: Torts (1992) Motor Vehicles, § 25.52, pp. 77–78

724
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 [***name of defendant***]'s vehicle. To establish this claim, [***name of plaintiff***] must prove all of 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 the vehicle;**

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

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

DIRECTIONS FOR USE

For a definition of "negligence" see instruction 401, 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."

- 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 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.)

- "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].)

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1987) Torts, §§ 998–1000, pp. 389–391; *id.* (2002 supp.) at §§ 999–999C, pp. 268–271
- 2 Levy et al., California Torts (1986) Motor Vehicles, § 20.21
- California Tort Guide (Cont.Ed.Bar 3d ed. 1996) Automobiles, § 4.38, pp. 116.1–117 (rel. 4/97)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 82, *Automobiles: Causes Of Action*, § 82.11 (Matthew Bender)
- 2 Bancroft-Whitney's California Civil Practice: Torts (1992) Motor Vehicles, § 25:47, pp. 71–73

730
Emergency Vehicle Exemption (Veh. Code, § 21055)

[*Name of defendant***] claims that [***name of public employee***] was not required to comply with Vehicle Code section [***insert section number***] because [he/she] was operating an authorized emergency vehicle and was responding to an emergency at the time of the accident.**

To establish that [*name of public employee***] was not required to comply with section [***insert section number***], [***name of defendant***] must prove all of the following:**

1. **That [***name of public employee***] was operating an authorized emergency vehicle;**

2. **That [***name of public employee***] was responding to an emergency situation at the time of the accident; and**

3. **That [***name of public employee***] sounded a siren when reasonably necessary and displayed front red warning lights.**

If you decide that [*name of defendant***] proved all of these things, then you cannot find it negligent for a violation of section [***insert section number***]. However, even if you decide that [***name of defendant***] proved all of these things, you may find it negligent if [***name of public employee***] failed to operate [his/her] vehicle with reasonable care, taking into account the emergency situation.**

DIRECTIONS FOR USE

For a definition of "emergency," see Instruction 731, *Definition of "Emergency" (Veh. Code, § 21055).*

For a definition of "authorized emergency vehicle," see Vehicle Code section 165.

Note that Vehicle Code section 17004 provides: "A public employee is not liable for civil damages on account of personal injury to or death of any person or damage to property resulting from the operation, in the line of duty, of an authorized emergency vehicle while responding to an emergency call or when in the immediate pursuit of an actual or suspected violator of the law, or when responding to but not upon returning from a fire alarm or other emergency call."

SOURCES AND AUTHORITY

- Vehicle Code section 21055 provides, in part:

  The driver of an authorized emergency vehicle is exempt from [specified Vehicle Code sections] under all of the following conditions:
  (a) If the vehicle is being driven in response to an emergency call or while engaged in rescue operations or is being used in the immediate pursuit of an actual or suspected violator of the law or is responding to, but not returning from, a fire alarm, except that fire department vehicles are exempt whether directly responding to an emergency call or operated from one place to another as rendered desirable or necessary by reason of an emergency call and operated to the scene of the emergency or operated from one fire station to another or to some other location by reason of the emergency call.
  (b) If the driver of the vehicle sounds a siren as may be reasonably necessary and the vehicle displays a lighted red lamp visible from the front as a warning to other drivers and pedestrians.

- "The purpose of the statute is to provide a 'clear and speedy pathway' for these municipal vehicles on their flights to emergencies in which the entire public are necessarily concerned." (*Peerless Laundry Services v. City of Los Angeles* (1952) 109 Cal.App.2d 703, 707 [241 P.2d 269].)

- Vehicle Code section 21056 provides: "Section 21055 does not relieve the driver of a vehicle from the duty to drive with due regard for the safety of all persons using the highway, nor protect him from the consequences of an arbitrary exercise of the privileges granted in that section."

- "The effect of Vehicle Code sections 21055 and 21056 is: where the driver of an authorized emergency vehicle is engaged in a specified emergency function he may violate certain rules of the road, such as speed and right of way laws, if he activates his red light and where necessary his siren in order to alert other users of the road to the situation. In such circumstances the driver may not be held to be negligent solely upon the violation of specified rules of the road, but may be held to be negligent if he fails to exercise due regard for the safety of others under the circumstances. Where the driver of an emergency vehicle fails to activate his red light, and where necessary his siren, he is not exempt from the rules of the road even though he may be engaged in a proper emergency function, and negligence may be based upon the violation of the rules of the road." (*City of Sacramento v. Superior Court* (1982) 131 Cal.App.3d 395, 402–403 [182 Cal.Rptr. 443], internal citations omitted.)

- "Notwithstanding [Vehicle Code section 17004], a public entity is liable for injuries proximately caused by negligent acts or omissions in the operation of any motor vehicle by an employee of the public entity, acting within the scope of his or her

employment." (*City of San Jose v. Superior Court* (1985) 166 Cal.App.3d 695, 698 [212 Cal.Rptr. 661], internal citations omitted.)

- "If the driver of an authorized emergency vehicle is responding to an emergency call and gives the prescribed warnings by red light and siren, a charge of negligence against him may not be predicated on his violation of the designated Vehicle Code sections; but if he does not give the warnings, the contrary is true; and in the event the charged negligence is premised on conduct without the scope of the exemption a common-law standard of care is applicable." (*Grant v. Petronella* (1975) 50 Cal.App.3d 281, 286 [123 Cal.Rptr. 399], internal citations omitted.)

- "Where the driver of an emergency vehicle responding to an emergency call does not give the warnings prescribed by section 21055, the legislative warning policy expressed in that section dictates the conclusion [that] the common-law standard of care governing his conduct does not include a consideration of the emergency circumstances attendant upon his response to an emergency call." (*Grant, supra,* 50 Cal.App.3d at p. 289, footnote omitted.)

- The exemption created by section 21055 is an affirmative defense, and the defendant must prove compliance with the conditions. (*Washington v. City and County of San Francisco* (1954) 123 Cal.App.2d 235, 242 [266 P.2d 828].)

- "In short the statute exempts the employer of such a driver from liability for negligence attributable to his failure to comply with specified statutory provisions, but it does not in any manner purport to exempt the employer from liability due to negligence attributable to the driver's failure to maintain that standard of care imposed by the common law." (*Torres v. City of Los Angeles* (1962) 58 Cal.2d 35, 47 [22 Cal.Rptr. 866].)

<u>Secondary Sources</u>

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 227–231
- CALIFORNIA TORTS, Ch. 20, *Motor Vehicles*, § 20.55 (Matthew Bender)
- 2 Government Tort Liability Practice (Cont.Ed.Bar 4th ed. 1999), §§ 11.140–11.144
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 246, *Emergency Vehicles* (Matthew Bender)

731
Definition of "Emergency" (Veh. Code, § 21055)

An "emergency" exists if the driver of an authorized emergency vehicle is [*insert one of the following***]**

[responding to an emergency call.]

[involved in rescue operations.]

[in the immediate pursuit of an actual or suspected violator of the law.]

[responding to, but not returning from, a fire alarm.]

[operating a fire department vehicle while traveling from one place to another place because of an emergency call.]

DIRECTIONS FOR USE

This instruction is based on the language of Vehicle Code section 21055(a) and is only intended for cases in which there is a factual issue regarding whether the defendant was acting in response to an emergency at the time of the accident. (*Washington v. City and County of San Francisco* (1954) 123 Cal.App.2d 235, 241 [266 P.2d 828].)

SOURCES AND AUTHORITY

- Vehicle Code section 21055(a) provides: "The driver of an authorized emergency vehicle is exempt from [specified Vehicle Code sections] under all of the following conditions: If the vehicle is being driven in response to an emergency call or while engaged in rescue operations or is being used in the immediate pursuit of an actual or suspected violator of the law or is responding to, but not returning from, a fire alarm, except that fire department vehicles are exempt whether directly responding to an emergency call or operated from one place to another as rendered desirable or necessary by reason of an emergency call and operated to the scene of the emergency or operated from one fire station to another or to some other location by reason of the emergency call."

- "Whether a vehicle is driven in response to an emergency call depends on the nature of the call received and the situation as presented to the mind of the driver and not upon whether there is an emergency in fact. The driver, of course, should have reasonable grounds to believe that there is an emergency." (*Gallup v.*

Sparks-Mundo Engineering Co. (1954) 43 Cal.2d 1, 5 [271 P.2d 34], internal citations omitted.)

Secondary Sources

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 227–231
- 2 Government Tort Liability Practice (Cont.Ed.Bar 4th ed. 1999), §§ 11.140–11.144

VERDICT FORMS

VF-700
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 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [*name of defendant***], by words or conduct, give permission to [***name of driver***] to use the vehicle?**

___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.

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 in conjunction with the 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 720, *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.

VF-701
Motor Vehicle Owner Liability—Permissive Use of Vehicle
Affirmative Defense—Use Beyond Scope of Permission

We answer the questions submitted to us as follows:

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

2. Did [*name of defendant***], by words or conduct, give permission to [***name of driver***] to use the vehicle?**

___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 permission to use the vehicle given for a limited time, place, or 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. Did [*name of driver***]'s use of the vehicle substantially violate the limitations as to time, place, or purpose?**

___Yes **___No**

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 in conjunction with the general negligence verdict forms involving motor vehicles. The four 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 720, *Motor Vehicle Owner Liability—Permissive Use of Vehicle*, and Instruction 721, *Motor Vehicle Owner Liability—Affirmative Defense—Use Beyond Scope of Permission.*

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

VF-702
Adult'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***], by words or conduct, give [***name of minor***] permission 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.

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 722, *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.

VF-703
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.

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 723, *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.

VF-704
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.

5. 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 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 724, *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 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.

800
Basic Standard of Care for Railroads

Railroad companies must use reasonable care to avoid causing injury to anyone crossing railroad tracks from a street or roadway. [Railroad companies must use reasonable care in the design and maintenance of warning signals and protective devices at railroad crossings.] [Train operators must use reasonable care in operating their trains at railroad crossings.] The failure to use reasonable care is negligence.

DIRECTIONS FOR USE

The instructions in this series should be used together with one or more of the instructions that follow, which give specific guidance on the nature and scope of a railroad's duties of care regarding grade crossings.

Consideration should be given as to whether any of the asserted theories of liability are preempted by federal law (see *CSX Transportation, Inc. v. Easterwood* (1993) 507 U.S. 658 [113 S.Ct. 1732, 123 L.Ed.2d 387] and *Norfolk Southern Railway Co. v. Shanklin* (2000) 529 U.S. 344 [120 S.Ct. 1467, 146 L.Ed.2d 374]). If so, it may be necessary to modify this instruction to avoid indirect reference to these theories.

SOURCES AND AUTHORITY

- The California Supreme Court has stated the duty of railroads at crossings as follows: "Generally speaking, the duty to exercise reasonable or ordinary care is imposed upon the operator of a railroad at public highway crossings with respect to persons traveling upon the highway and over the crossing, both as to the manner of operating the train and the maintenance of the crossing. The standard of care is that of the man of ordinary prudence under the circumstances." (*Peri v. Los Angeles Junction Ry. Co.* (1943) 22 Cal.2d 111, 120 [137 P.2d 441], internal citations omitted.)

- "Ordinarily the issue of the negligence in crossing cases, whether the railroad was negligent in the design and maintenance of the crossing or in the operation of the train, is one of fact as in other negligence cases." (*Romo v. Southern Pacific Transportation Co.* (1977) 71 Cal.App.3d 909, 916 [139 Cal.Rptr. 787], internal citations omitted.)

- The amount of care that is "reasonable" varies in proportion to the circumstances constituting the probable danger. (*Romo, supra,* 71 Cal.App.3d at p. 916.)

- "Where the conditions existing at the crossing create an unusual hazard or danger, the operator of the railroad must exercise care commensurate with those circumstances, and whether he has done so is a question of fact." (*Peri, supra,* 22 Cal.2d at p. 123.)

- "We hold that … federal regulations adopted by the Secretary of Transportation pre-empt respondent's negligence action only insofar as it asserts that petitioner's train was traveling at an excessive speed." (*CSX Transportation, Inc., supra,* 507 U.S. at p. 676.)

- "When the [Federal Highway Administration] approves a crossing improvement project and the State installs the warning devices using federal funds, [federal regulations] establish a federal standard for the adequacy of those devices that displaces state tort law addressing the same subject." (*Norfolk Southern Railway Co., supra,* 529 U.S. at p. 357.)

Secondary Sources

- 2 Levy, et al., California Torts (2000), Carriers, §§ 23.25–23.26
- California Tort Guide (Cont.Ed.Bar 1996) Railroad Crossings, § 12.2
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 485, *Railroads* (Matthew Bender)

801
Duty to Comply With Safety Regulations

An [ordinance/regulation] of the [*insert name of entity***] provides as follows: [***insert text of ordinance or regulation***]**

Railroad companies must obey safety regulations. Regulations state only the minimum measure of care required of a railroad company. Particular conditions and situations may require a company to use more care than the regulations require.

DIRECTIONS FOR USE

Regulations adopted by the Secretary of Transportation pursuant to the Federal Railroad Safety Act preempt state common–law negligence claims based on general allegations of "excessive speed." (*CSX Transportation, Inc. v. Easterwood* (1993) 507 U.S. 658.) Also, claims alleging inadequate warning devices are preempted where federally funded grade crossing improvements have been installed. (*Norfolk Southern Railway Co. v. Shanklin* (2000) 529 U.S. 344 [120 S.Ct. 1467, 146 L.Ed.2d 374].) This instruction is not intended to apply to situations in which a railroad's compliance with these federal safety regulations would preempt state law negligence claims.

SOURCES AND AUTHORITY

- " ' "It is well settled that such statutory regulations constitute only the minimum measure of care required by the railroad, and it is usually a matter for the jury to determine whether something more than the minimum was required under the evidence in the case." A railroad company is not necessarily free from negligence, even though it may have literally complied with safety statutes or rules. The circumstances may require it to do more.' " (*Hogue v. Southern Pacific Co.* (1969) 1 Cal.3d 253, 258 [81 Cal.Rptr. 765], internal citations omitted; *Peri v. Los Angeles Junction Ry. Co.* (1943) 22 Cal.2d 111, 126 [137 P.2d 441].)

- "If the peculiar characteristics of a crossing call for the installation of automatic protection—or the upgrading of existing automatic protection—the railroad may be guilty of negligence in failing to provide such protection." (*Romo v. Southern Pacific Transportation Co.* (1977) 71 Cal.App.3d 909, 916 [139 Cal.Rptr. 787], internal citations omitted.)

- "We hold that … federal regulations adopted by the Secretary of Transportation pre-empt respondent's negligence action only insofar as it asserts that petitioner's train

was traveling at an excessive speed." (*CSX Transportation, Inc., supra,* 507 U.S. at p. 676.)

- "When the [Federal Highway Administration] approves a crossing improvement project and the State installs the warning devices using federal funds, [federal regulations] establish a federal standard for the adequacy of those devices that displaces state tort law addressing the same subject." (*Norfolk Southern Railway Co., supra,* 529 U.S. at p. 357.)

Secondary Sources

- 2 Levy, et al., California Torts (2000), Carriers, § 23.25[4]
- California Tort Guide (Cont.Ed.Bar 1996) Railroad Crossings, § 12.4
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 485, *Railroads* (Matthew Bender)

802
Reasonable Warning of Approach

A train operator must warn others that the train is approaching a crossing by activating the train's [bell] [or] [whistle] [or] [siren] if a reasonable train operator would do so. The warning must be adequate for the existing conditions, including conditions that affect a driver's ability to observe the train's approach.

DIRECTIONS FOR USE

Use this instruction only if the accident occurred in within a city's limits. Public Utilities Code section 7604 provides that a train crew must ring a bell or, except in cities, sound a whistle for a distance of at least 1,320 feet (a quarter mile) before crossing any street, road, or highway and until the train has passed the crossing. Under section 7604(a)(1), operators have discretion to sound warning devices in cities only. Accordingly, if the accident did not occur in a city, use Instruction 801, *Duty to Comply With Safety Regulations.*

This instruction should be used when the plaintiff contends that the train operator failed to give adequate warning that the train was approaching the crossing. The scope of a railroad's duty regarding the installation of traffic control and warning devices at the intersection is covered by Instruction 805, *Installing Warning Systems.*

SOURCES AND AUTHORITY

- Public Utilities Code section 7604(a)(1) provides: "In a city, the ringing of the bell or the sounding of the steam whistle, air siren, or air whistle shall be at the discretion of the operator of the locomotive engine." This section does not prohibit the sounding of a warning device in a city, and if a defendant should have sounded the warning device in the exercise of due care, it is not excused by this code section. (*Southern Pacific Co. v. Haight* (9th Cir. 1942) 126 F.2d 900, 909.)

- Public Utilities Code section 7604 provides that a train crew must ring a bell or, except in cities, sound a whistle for a distance of at least 1,320 feet (a quarter mile) before crossing any street, road, or highway and until the train has passed the crossing. Statutes set forth only a minimum standard of care. (*Marquis v. St. Louis–San Francisco Ry.* (1965) 234 Cal.App.2d 335, 345 [44 Cal.Rptr. 367].)

- The failure to sound a train whistle or bell or to give some other warning can be sufficient, by itself, to support a finding of negligence. (*Peri v. Los Angeles Junction Ry. Co.* (1943) 22 Cal.2d 111, 125 [137 P.2d 441].)

- "It was the duty of those in charge of the train to give notice of the approach of the engine when approaching the highway and its traveling over the highway by all warnings reasonably necessary under the conditions existing at the time and place of the accident." (*Downey v. Santa Fe Transportation Co.* (1955) 134 Cal.App.2d 720, 727 [286 P.2d 40].)

- " 'The conditions with respect to the ability of a traveler on the highway to observe the train approaching the crossing and the character of the crossing may be a basis for the conclusion of the trier of fact that the defendant failed to conform to the required standard of care in respect to the warnings it must give of the approach of the train to the crossing.' " (*Downey, supra,* 134 Cal.App.2d at p. 726, internal citation omitted.)

Secondary Sources

- 2 Levy, et al., California Torts (2000) Carriers, § 23.26[4]
- California Tort Guide (Cont.Ed.Bar 1996) Railroad Crossings, § 12.4
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 485, *Railroads* (Matthew Bender)

803
Regulating Speed

[A railroad company] [A train operator] must use reasonable care to control the train's speed as it approaches and passes through a railroad crossing. The [railroad company] [train operator] must control train speed with due regard for the safety of human life and property, taking into consideration the location and conditions of the crossing.

DIRECTIONS FOR USE

This instruction may not be appropriate in certain cases. Regulations adopted by the Secretary of Transportation pursuant to the Federal Railroad Safety Act preempt state common–law negligence claims based on general allegations of "excessive speed." (*CSX Transportation, Inc. v. Easterwood* (1993) 507 U.S. 658.) However, a negligence action based on a duty to slow or stop a train to avoid a specific, individual hazard is not preempted. (*CSX Transportation, Inc., supra*, 507 U.S. at 676, fn. 15.)

SOURCES AND AUTHORITY

- "We hold that … federal regulations adopted by the Secretary of Transportation pre-empt respondent's negligence action only insofar as it asserts that petitioner's train was traveling at an excessive speed." (*CSX Transportation, Inc., supra*, 507 U.S. at p. 676.)

- "While it is true that no rate of speed is negligence per se in the absence of a statute or ordinance, it does not follow that a railroad company will be permitted to run its trains under all conditions at any rate of speed it may choose. It must regulate its speed with proper regard for the safety of human life and property, especially when running through towns and cities. … The question whether or not a rate of speed is excessive is one of fact for the jury." (*Young v. Pacific Electric Ry. Co*. (1929) 208 Cal. 568, 572 [283 P. 61].)

- "The 'reasonably prudent person' test applies also to the speed at which a train approaches and passes a crossing, and material in the application of that test is 'that no unnecessary risk shall be cast upon the public' considering the 'location and surroundings' of the crossing involved. Specially mentioned is a 'crossing in a thickly populated community and extensively used.' " (*Rice v. Southern Pacific Co.* (1967) 247 Cal.App.2d 701, 707 [55 Cal.Rptr. 840], internal citations omitted.)

- "[I]t is for the jury to say whether the speed of a train was too high for a particular intersection." (*Romo v. Southern Pacific Transportation Co.* (1977) 71 Cal.App.3d 909, 916 [139 Cal.Rptr. 787].)

- "Even when crossing protection is provided and the company speed limit is not exceeded, speeding is still a question of fact." (*Herrera v. Southern Pacific Co*. (1957) 155 Cal.App.2d 781, 787 [318 P.2d 784].)

Secondary Sources

- 2 Levy, et al., California Torts (2000) Carriers, § 23.26[6]
- California Tort Guide (Cont.Ed.Bar 1996) Railroad Crossings, § 12.5
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 485, *Railroads* (Matthew Bender)

804
Lookout for Crossing Traffic

A train operator must keep a reasonable lookout for vehicles and people. If an operator discovers, or should have discovered, that a vehicle or a person is on or near the track, the operator must use reasonable care to avoid causing harm.

DIRECTIONS FOR USE

For an instruction regarding the right to expect that others will use reasonable care, see Instruction 411, *Reliance on Good Conduct of Others*.

Regulations adopted by the Secretary of Transportation pursuant to the Federal Railroad Safety Act preempt state common–law negligence claims based on general allegations of "excessive speed." (*CSX Transportation, Inc. v. Easterwood* (1993) 507 U.S. 658, 676.) However, a negligence action based on a duty to slow or stop a train to avoid a specific, individual hazard is not preempted. (*CSX Transportation, Inc., supra*, 507 U.S. at p. 676, fn. 15.)

SOURCES AND AUTHORITY

- "Obviously, the railroad may not be required to guarantee the safety of those crossing its tracks. It is not required to anticipate that at every crossing, an automobile will be driven in the path of the train. It is only required to exercise ordinary care to discover such automobiles and to thereafter exercise care to avoid a collision." (*Essick v. Union Pacific Ry. Co.* (1960) 182 Cal.App.2d 456, 463 [6 Cal.Rptr. 208].)

- The following instruction was approved in *Essick, supra,* 182 Cal.App.2d at p. 460: "The duty of [defendant] toward persons using the private crossing we are here concerned with was to exercise ordinary care to discover any such persons on or near the crossing and to exercise ordinary care to avoid injuring such persons after their presence on or near the track was discovered."

- "The train crew cannot assume that a highway crossing in the middle of a city will be clear and they must keep a reasonable lookout for the presence of intersecting traffic. This implies as a corollary the further obligation to have the train under such control as may be reasonably necessary to deal with situations which an ordinarily prudent operator would anticipate." (*Herrera v. Southern Pacific Co.* (1957) 155 Cal.App.2d 781, 785 [318 P.2d 784], internal citations omitted.)

- "The installation and maintenance of automatic signals does not relieve a railroad company of this duty of keeping a reasonable lookout for other traffic." (*Herrera, supra,* 155 Cal.App.2d at p. 786, internal citations omitted.)

- "We hold that … federal regulations adopted by the Secretary of Transportation pre-empt respondent's negligence action only insofar as it asserts that petitioner's train was traveling at an excessive speed." (*CSX Transportation, Inc., supra,* 507 U.S. at p. 676.) However, a negligence action based on a duty to slow or stop a train to avoid a specific, individual hazard is not preempted. (*Ibid*, fn. 15.)

- In a thoughtful opinion, the Oklahoma Supreme Court has held the following: "We hold that a specific, individual hazard is a person, vehicle, obstruction, object, or event which is not a fixed condition or feature of the crossing and which is not capable of being taken into account by the Secretary of Transportation in the promulgation of uniform, national speed regulations. In short, a specific, individual hazard refers to a unique occurrence which could lead to a specific and imminent collision and not to allegedly dangerous conditions at a particular crossing." (*Myers v. Missouri Pacific Railroad Co.* (2002) 52 P.3d 1014, 1027, footnotes omitted.)

Secondary Sources

- 2 Levy, et al., California Torts (2000) Carriers, § 23.26[2]
- California Tort Guide (Cont.Ed.Bar 1996) Railroad Crossings, § 12.6
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 485, *Railroads* (Matthew Bender)

805
Installing Warning Systems

Railroad companies must post signs or other devices that give the public reasonable warning of the presence of its tracks. A railroad company must use reasonable care in the design, installation, operation, and maintenance of its warning signals and protective systems. The amount of care that is reasonable depends on the particular characteristics of each crossing.

DIRECTIONS FOR USE

This instruction may not be appropriate in certain cases. Claims alleging inadequate warning devices are preempted where federally funded grade crossing improvements have been installed. (*Norfolk Southern Railway Co. v. Shanklin* (2000) 529 U.S. 344 [120 S.Ct. 1467, 146 L.Ed.2d 374].)

SOURCES AND AUTHORITY

- "[O]nce the [Federal Highway Administration] has funded the crossing improvement and the warning devices are actually installed and operating, the regulation 'displace[s] state and private decision-making authority by establishing a federal-law requirement that certain devices be installed or federal approval obtained.' " (*Norfolk Southern Railway Corp., supra,* 529 U.S. at p. 354, internal citation omitted.)

- "It should be noted that nothing prevents a State from revisiting the adequacy of devices installed using federal funds. States are free to install more protective devices at such crossings with their own funds or with additional funding from the FHWA. What States cannot do—once they have installed federally funded devices at a particular crossing—is hold the railroad responsible for the adequacy of those devices." (*Norfolk Southern Railway Corp., supra,* 529 U.S. at p. 358.)

- "If the peculiar characteristics of a crossing call for the installation of automatic protection—or the upgrading of existing automatic protection—the railroad may be guilty of negligence in failing to provide such protection." (*Romo v. Southern Pacific Transportation Co.* (1977) 71 Cal.App.3d 909, 916 [139 Cal.Rptr. 787], internal citation omitted.)

- "Whether a railroad is negligent in the design and maintenance of the crossing is a question of fact for the jury." (*Wilkinson v. Southern Pacific Co.* (1964) 224 Cal.App.2d 478, 487–488 [36 Cal.Rptr. 689], internal citation omitted.)

- "The defendant, having undertaken to warn travelers of the approach of its trains by the use of a wigwag, was under a duty to use reasonable care in the construction and maintenance of the signal system lest the appearance of safety created by the presence of the device constitute a trap for persons relying upon it for protection." (*Startup v. Pacific Electric Ry. Co.* (1947) 29 Cal.2d 866, 869 [180 P.2d 896].)

- "Whatever may be the purpose of maintaining an automatic wig-wag signal at a railroad crossing, even though it be intended to merely warn travelers of the approach of trains, common justice demands that it shall be so constructed and maintained that it will not lure travelers on the highway into danger. It follows that a company which does maintain such a defective system will be held liable for injuries sustained as the result of those imperfections, regardless of whether the system was designed to warn travelers of the approach of trains rather than to inform them of the danger from stationary cars which block the crossings." (*Mallett v. Southern Pacific Co.* (1937) 20 Cal.App.2d 500, 509 [68 P.2d 281].)

Secondary Sources

- 2 Levy, et al., California Torts (2000) Carriers, § 23.25[4]
- California Tort Guide (Cont.Ed.Bar 1996) Railroad Crossings, §§ 12.8–12.9
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 485, *Railroads* (Matthew Bender)

806
Contributory Negligence
Duty to Approach Crossing With Care

A driver approaching a railroad crossing is required to use reasonable care to discover whether a train is approaching. The amount of care that is reasonable will depend on the circumstances. A railroad track is itself a warning of danger. If the driver's view of approaching trains is blocked, he or she must use greater care than when the view is clear.

If a bell or signal has been placed to warn drivers of danger, a driver is not required to use as much care as when there are no such warnings. However, even if the warning devices are not activated, a driver must use reasonable care in looking and listening for approaching trains.

DIRECTIONS FOR USE

For an instruction regarding the prima facie speed limits set by Vehicle Code section 22352 see Instruction 707, *Speed Limit (Veh. Code, § 22352).* For an instruction on the duty of care of a passenger see Instruction 711, *The Passenger's Duty of Care for Own Safety.* For instructions on negligence per se, see Instructions 418 to 421.

SOURCES AND AUTHORITY

- Vehicle Code section 22451 provides:

  (a) The driver of any vehicle or pedestrian approaching a railroad or rail transit grade crossing shall stop not less than 15 feet from the nearest rail and shall not proceed until he or she can do so safely, whenever the following conditions exist:
  (1) A clearly visible electric or mechanical signal device or a flagman gives warning of the approach or passage of a train or car.
  (2) An approaching train or car is plainly visible or is emitting an audible signal and, by reason of its speed or nearness, is an immediate hazard.
  (b) No driver or pedestrian shall proceed through, around, or under any railroad or rail transit crossing gate while the gate is closed.
  (c) Whenever a railroad or rail transit crossing is equipped with an automated enforcement system, a notice of a violation of this section is subject to the procedures provided in Section 40518.

- Vehicle Code section 22352(a)(1) provides that the prima facie speed limit is 15 miles per hour under the following circumstances: "(A) When traversing a railway grade crossing, if during the last 100 feet of the approach to the crossing the driver

does not have a clear and unobstructed view of the crossing and of any traffic on the railway for a distance of 400 feet in both directions along the railway. This subdivision does not apply in the case of any railway grade crossing where a human flagman is on duty or a clearly visible electrical or mechanical railway crossing signal device is installed but does not then indicate the immediate approach of a railway train or car, and (B) When traversing any intersection of highways if during the last 100 feet of the driver's approach to the intersection the driver does not have a clear and unobstructed view of the intersection and of any traffic upon all of the highways entering the intersection for a distance of 100 feet along all those highways, except at an intersection protected by stop signs or yield right-of-way signs or controlled by official traffic control signals."

- "[T]hat the driver's view is somewhat obstructed does not make him contributorily negligent as a matter of law; whether his failure to stop, the place from which he looks and the character and extent of the obstruction to his view are such that a reasonably prudent person would not have so conducted himself are questions for the jury in determining whether he was guilty of contributory negligence." (*Lucas v. Southern Pacific Co.* (1971) 19 Cal.App.3d 124, 139 [96 Cal.Rptr. 356]

- "A railroad track is itself a warning of danger and a driver intending to cross must avail himself of every opportunity to look and listen; if there are obstructions to the view, he is required to take greater care." (*Wilkinson v. Southern Pacific Co.* (1964) 224 Cal.App.2d 478, 488 [36 Cal.Rptr. 689], internal citation omitted.)

- "A railroad will not be permitted to encourage persons to relax their vigil concerning the dangers that lurk in railroad crossings by assuring them, through the erection of safety devices, that the danger has been removed or minimized, and, at the same time, to hold them to the same degree of care as would be required if those devices had not been provided." (*Will v. Southern Pacific Co.* (1941) 18 Cal.2d 468, 474 [116 P.2d 44], internal citation omitted.)

- "[A] driver may not cross tracks in reliance upon the safety appliances installed by the railroad with complete disregard for his own safety and recover damages for injuries sustained by reason of his own failure to use reasonable care." (*Will, supra,* 18 Cal.2d at p. 475.)

- "Violation of the railroad's statutory duty to sound bell and whistle at a highway crossing does not absolve a driver from his failure to look and listen and, if necessitated by circumstances such as obstructed vision, even to stop." (*Wilkinson, supra,* 224 Cal.App.2d at p. 489.)

- "It is settled that a railroad may not encourage persons traveling on highways to rely on safety devices and then hold them to the same degree of care as if the devices were not present." (*Startup v. Pacific Electric Ry. Co.* (1947) 29 Cal.2d 866, 870 [180 P.2d 896].)

- "When a flagman or mechanical warning device has been provided at a railroad crossing, the driver of an automobile is thereby encouraged to relax his vigilance, and, in using other means to discover whether there is danger of approaching trains, he is not required to exercise the same quantum of care as would otherwise be necessary." (*Spendlove v. Pacific Electric Ry. Co.* (1947) 30 Cal.2d 632, 634 [184 P.2d 873], internal citations omitted.)

- An instruction that a driver must stop, look, and listen when his or her view is obstructed was held prejudicially erroneous in *Anello v. Southern Pacific Co.* (1959) 174 Cal.App.2d 317, 322 [344 P.2d 843].

Secondary Sources

- 2 Levy, et al., California Torts (2000) Carriers, § 23.27
- California Tort Guide (Cont.Ed.Bar 1996) Railroad Crossings, §§ 12.10–12.12
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 485, *Railroads* (Matthew Bender)

900
Introductory Instruction

[*Name of plaintiff***] claims that [he/she] was harmed by [***name of defendant***]'s negligence while [he/she] was a passenger on [***name of defendant***]'s [***insert type of carrier — e.g., train***].**

[In this case, [*name of defendant***] was a common carrier at the time of the incident. A common carrier provides transportation to the general public.]**

[or]

[[*Name of plaintiff***] also claims that [***name of defendant***] was a common carrier at the time of the incident.]**

DIRECTIONS FOR USE

Give either one of the bracketed sentences, depending on whether the defendant's status as a common carrier is contested or not.

This instruction is intended as an introductory instruction to frame the issues. Instruction 400, *Negligence*, would still be given to set forth the elements that plaintiff has to prove in order to recover (i.e., negligence, harm, and causation).

SOURCES AND AUTHORITY

- Civil Code section 2168 provides: "Everyone who offers to the public to carry persons, property, or messages, excepting only telegraphic messages, is a common carrier of whatever he thus offers to carry."

- Civil Code section 2085 provides: "[C]arriage is a contract for the conveyance of property, persons, or messages, from one place to another."

- "[A] common carrier within the meaning of Civil Code section 2168 is any entity which holds itself out to the public generally and indifferently to transport goods or persons from place to place for profit." (*Squaw Valley Ski Corporation v. Superior Court* (1992) 2 Cal.App.4th 1499, 1508 [3 Cal.Rptr.2d 897].)

<u>Secondary Sources</u>

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 767–773
- 2 Levy, et al., California Torts (2003) Carriers, § 23.00

- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 109, *Carriers* (Matthew Bender)
- 2 Bancroft-Whitney's California Civil Practice (1992) Torts, § 28:1

901
Status of Common Carrier Disputed

To prove that [*name of defendant***] was a common carrier, [***name of plaintiff***] must prove that it was in the business of transporting [the property of] the general public.**

In deciding this issue, you may consider whether any of the following factors apply. These factors suggest that a carrier is a common carrier:

(a) The carrier maintains a regular place of business for the purpose of transporting passengers [or property].

(b) The carrier advertises its services to the general public.

(c) The carrier charges standard fees for its services.

(d) [*Insert other applicable factor(s)***.]**

A carrier can be a common carrier even if it does not have a regular schedule of departures, a fixed route, or a transportation license.

If you find that [*name of defendant***] was not a common carrier, then [***name of defendant***] did not have the duty of a common carrier, only a duty of ordinary care.**

DIRECTIONS FOR USE

The court should give the ordinary negligence instructions in conjunction with this one. Ordinary negligence is the standard applicable to private carriers.

SOURCES AND AUTHORITY

- Whether a party is a common carrier is a question of fact, but it can be decided as a matter of law where the facts are undisputed. (*Squaw Valley Ski Corporation v. Superior Court* (1992) 2 Cal.App.4th 1499, 1506 [3 Cal.Rptr.2d 897].)

- Civil Code section 2168 provides: "Everyone who offers to the public to carry persons, property, or messages, excepting only telegraphic messages, is a common carrier of whatever he thus offers to carry."

- Civil Code section 2085 provides: "The contract of carriage is a contract for the conveyance of property, persons, or messages, from one place to another."

- "[A] common carrier within the meaning of Civil Code section 2168 is any entity which holds itself out to the public generally and indifferently to transport goods or persons from place to place for profit." (*Squaw Valley, supra,* 2 Cal.App.4th at p. 1508, internal citations omitted.)

- "A private carrier … is bound only to accept carriage pursuant to special agreement." (*Webster v. Ebright* (1992) 3 Cal.App.4th 784, 787 [4 Cal.Rptr.2d 714].) Private carriers " 'make no public profession that they will carry for all who apply, but … occasionally or upon the particular occasion undertake for compensation to carry the goods of others upon such terms as may be agreed upon.' " (*Id.* at p. 788, internal citations omitted.)

- Private carriers are not held to the "utmost care" standard of common carriers, but are instead required to exercise only ordinary care. (*Webster, supra,* 3 Cal.App.4th at p. 787.)

- " '[T]he law applicable to common carriers is peculiarly rigorous, and it ought not to be extended to persons who have not expressly assumed that character, or by their conduct and from the nature of their business justified the belief on the part of the public that they intended to assume it.' " (*Samuelson v. Public Utilities Com.* (1951) 36 Cal.2d 722, 730 [227 P.2d 256], internal citation omitted.)

- It does not matter if the service is specialized in nature and thus of use to only a small number of people: "To be a common carrier, the entity merely must be of the character that members of the general public may, if they choose, avail themselves of it." (*Squaw Valley, supra,* 2 Cal.App.4th at pp. 1509–1510, internal citation omitted.)

- In *Gradus v. Hanson Aviation, Inc.* (1984) 158 Cal.App.3d 1038 [205 Cal.Rptr. 211], the court approved of an instruction stating that the plaintiff had the burden of proving that the defendant "undertook either expressly or by course of conduct generally and for all persons indifferently to carry and deliver them for hire, so long as it had room." (*Id*. at pp. 1047–1048.) The court also approved of giving the jury the factors of regular place of business, advertising, and standard charges. (*Id*. at p. 1048.) Note that these factors may not be applicable in all cases. For example, ski lifts, elevators, and escalators are considered common carriers even though they do not generally advertise as such or charge a fee. The rationale for the higher standard of care is that "[a]lthough a store does not charge for use of its elevators or escalators, it profits from the utilization of these devices to assist customers in shopping at the store." (*Squaw Valley, supra,* 2 Cal.App.4th at p. 1508.)

- Carriers that are typically thought of as common carriers can, by special arrangement, temporarily become private carriers: "In the situation at bar, the Yellow Cab Company's motor cars were customarily and daily cruising the streets for patronage or awaiting calls of the public. It was a common carrier in transporting such patrons. But when it agreed to act as carrier of handicapped school children under agreement for its operators to escort the pupils to and from their schools and homes to the cab

and to render such service exclusively for them at designated hours, the company ceased to be a common carrier while transporting the specified children during such hours." (*Hopkins v. Yellow Cab Co.* (1952) 114 Cal.App.2d 394, 398 [250 P.2d 330].)

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 768
- 2 Levy, et al., California Torts (2003) Carriers, § 23.01
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 109, *Carriers* (Matthew Bender)
- 2 Bancroft-Whitney's California Civil Practice (1992) Torts, §§ 28:1–28:2

902
Duty of Common Carrier

Common carriers must carry passengers [or property] safely. Common carriers must use the highest care and the vigilance of a very cautious person. They must do all that human care, vigilance, and foresight reasonably can do under the circumstances to avoid harm to passengers [or property].

While a common carrier does not guarantee the safety of its passengers [or property that it transports], it must use reasonable skill to provide everything necessary for safe transportation, in view of the transportation used and the practical operation of the business.

SOURCES AND AUTHORITY

- Civil Code section 2100 provides: "A carrier of persons for reward must use the utmost care and diligence for their safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill."

- "Common carriers bind themselves to carry safely those whom they take into their vehicles, and owe both a duty of utmost care and the vigilance of a very cautious person towards their passengers. Such carriers are responsible for any, even the slightest, negligence and are required to do all that human care, vigilance, and foresight reasonably can do under all the circumstances." (*Acosta v. Southern Cal. Rapid Transit Dist.* (1970) 2 Cal.3d 19, 27 [84 Cal.Rptr. 184], internal citations omitted.)

- The elevated standard of care for common carriers is "based on a recognition that the privilege of serving the public as a common carrier necessarily entails great responsibility, requiring common carriers to exercise a high duty of care towards their customers." (*Squaw Valley Ski Corporation v. Superior Court* (1992) 2 Cal.App.4th 1499, 1507 [3 Cal.Rptr.2d 897].)

- Common carriers are not insurers of their passengers' safety. "Rather, the degree of care and diligence which they must exercise is only such as can reasonably be exercised consistent with the character and mode of conveyance adopted and the practical operation of the business of the carrier." (*Lopez v. Southern Cal. Rapid Transit Dist.* (1985) 40 Cal.3d 780, 785 [221 Cal.Rptr. 840], internal citations omitted.)

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 767
- 2 Levy, et al., California Torts (2003) Carriers, § 23.02
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 109, *Carriers* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 33, *Carriers* (Matthew Bender)
- CALIFORNIA LEGAL FORMS, Ch. 54, *Shipment of Property*, § 54.32 (Matthew Bender)
- 2 Bancroft-Whitney's California Civil Practice (1992) Torts, §§ 28:6–28:9

903
Duty to Provide and Maintain Safe Equipment

Common carriers must use the highest care in constructing, servicing, inspecting, and maintaining their vehicles and equipment for transporting passengers [or property].

A common carrier is responsible for a defect in its vehicles and equipment used for transporting passengers [or property] if the common carrier:

(a) Created the defect; or

(b) Knew of the defect; or

(c) Would have known of the defect if it had used the highest care.

Common carriers must keep up with modern improvements in transportation. While they are not required to seek out and use every new invention, they must adopt commonly accepted safety designs and devices in the vehicles and equipment they use for transporting passengers [or property].

DIRECTIONS FOR USE

To correct the impression that a carrier is absolutely liable for unsafe equipment, this instruction should be given together with instructions stating that a common carrier does not guarantee the safety of its passengers and that the level of care is the highest that reasonably can be exercised consistent with the mode of transportation used and the practical operation of its business as a carrier (see Instruction 902, *Duty of Common Carrier.*) (*Gradus v. Hanson Aviation, Inc.* (1984) 158 Cal.App.3d 1038, 1049–1050 [205 Cal.Rptr. 211].)

SOURCES AND AUTHORITY

- Civil Code section 2101 provides: "A carrier of persons for reward is bound to provide vehicles safe and fit for the purposes to which they are put, and is not excused for default in this respect by any degree of care."

- "The duty of care imposed on a common carrier of passengers includes the duty to furnish safe facilities for their passage." (*Cooper v. National Railroad Passenger Corporation* (1975) 45 Cal.App.3d 389, 395 [119 Cal.Rptr. 541], internal citations omitted, disapproved on other grounds in *Ewing v. Cloverleaf Bowl* (1978) 20 Cal.3d 389, 401 [143 Cal.Rptr. 13].)

- Failure to give an instruction on Civil Code section 2101 may not be error where an instruction on the "utmost care" standard is given. (*Powell v. Dell-Air Aviation, Inc.* (1968) 268 Cal.App.2d 451, 457–458 [74 Cal.Rptr. 3].)

- The Supreme Court found error where an instruction omitted the duty to inspect: "An owner is bound to use the utmost care and diligence in the maintenance of elevators. In the fulfillment of this obligation something more than regular and frequent inspections is required. Perfunctory inspections, although regularly and frequently made, would not meet the obligation appellant owed to respondents. In order to fulfill the duty imposed upon it by law appellant was required to use due care in servicing, inspecting and maintaining the elevator and all the appliances appurtenant thereto. The instruction erroneously failed to include this requirement." (*Brown v. George Pepperdine Foundation* (1943) 23 Cal.2d 256, 261 [143 Cal.Rptr. 929], internal citations omitted.)

- "The [equipment] must, therefore, under the standard of utmost care required of a carrier, be constructed, maintained and operated with the purpose and design to prevent injury … ." (*Vandagriff v. J.C. Penney* (1964) 228 Cal.App.2d 579, 582 [39 Cal.Rptr. 671].)

- Notice of defect is required where the carrier did not create dangerous condition: "In our view, the high degree of care required of a common carrier might impose a greater duty to inspect and thus make notice or knowledge more easily established, but the concept of the carrier's legal responsibility does not exclude the factor of notice or knowledge. The weight of authority supports the proposition that, in cases such as the instant one, actual or constructive notice is a prerequisite to the carrier's liability." (*Gray v. City and County of San Francisco* (1962) 202 Cal.App.2d 319, 330–331 [20 Cal.Rptr. 894].)

- Common carriers "must keep pace with science and art and modern improvement in their application to the carriage of passengers." (*Greyhound Lines, Inc. v. Superior Court* (1970) 3 Cal.App.3d 356, 359 [83 Cal.Rptr. 343], citing *Treadwell v. Whittier* (1889) 80 Cal. 574, 592, 600 [22 P. 266].)

- In *Treadwell*, the court approved of a jury instruction stating that while elevator operators "were not required to seek and apply every new invention, they must adopt such as are found by experience to combine the greater safety with practical use." The court said the instruction "is but a fair deduction from the rule that the defendants must use the utmost care and diligence to carry safely those who ride in their [conveyance] … ." (*Treadwell, supra,* 80 Cal. at pp. 599–600.) The court held that common carriers "are bound for defects in the vehicles which they furnish, which might have been discovered by the most careful examination … ." (*Id.* at p. 595.)

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 767
- 2 Levy, et al., California Torts (2003) Carriers, § 23.03[5]
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 109, *Carriers* (Matthew Bender)
- 2 Bancroft-Whitney's California Civil Practice (1992) Torts, § 28:15

904
Duty of Common Carrier Toward Disabled/Infirm Passengers

If a common carrier voluntarily accepts an ill or a disabled person as a passenger and is aware of that person's condition, it must use as much additional care as is reasonably necessary to ensure the passenger's safety.

SOURCES AND AUTHORITY

- If a carrier voluntarily accepts an ill or disabled person as a passenger and is aware of the passenger's condition, it must exercise as much care as is reasonably necessary to ensure the safety of the passenger, in view of his mental and physical condition. (*McBride v. Atchison, Topeka & Santa Fe Ry. Co.* (1955) 44 Cal.2d 113, 119–120 [279 P.2d 966].)

Secondary Sources

- 2 Levy, et al., California Torts (2003) Carriers, § 23.02[6]
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 109, *Carriers* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 33, *Carriers* (Matthew Bender)
- 2 Bancroft-Whitney's California Civil Practice (1992) Torts, § 28:6

905
Duty of Common Carrier Toward Minor Passengers

If a common carrier voluntarily accepts a child as a passenger, it must use as much additional care as is reasonably necessary to ensure the child's safety.

SOURCES AND AUTHORITY

- A common carrier owes a greater duty of care to minor passengers: "It is settled law that a carrier owes a greater quantum of care to a child of tender years accepted by it as a passenger than it would to an adult." (*Brizzolari v. Market Street Ry. Co.* (1935) 7 Cal.App.2d 246, 248 [46 P.2d 783].)

- "In this instruction, the court admonished the jury that a carrier of passengers owes to children who are passengers on its cars a greater degree of care than it owes to adults. Such an instruction is proper." (*Mudrick v. Market Street Ry. Co.* (1938) 11 Cal.2d 724, 734 [81 P.2d 950].)

Secondary Sources

- 2 Levy, et al., California Torts (2003) Carriers, § 23.02[6]
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 109, *Carriers* (Matthew Bender)
- 2 Bancroft-Whitney's California Civil Practice (1992) Torts, § 28:6

906
Duty of Passenger for Own Safety

While a common carrier must use the highest care for its passengers' safety, passengers need only use reasonable care for their own safety.

SOURCES AND AUTHORITY

- This instruction is intended to clarify that passengers and common carriers have different standards of care. Courts have addressed the potential for confusion in this area when contributory negligence of the passenger is at issue: "As applied to the standard of care imposed upon the common carrier as compared to the standard imposed on the passenger it is both erroneous and misleading to tell the jury, as was done here, that there are no degrees of negligence or contributory negligence in California, since the common carrier is in fact held to a higher degree of care than is the passenger. To follow this erroneous and misleading statement with the instruction, in the identical language used in another instruction concerning the defendant carrier's duty of care, that 'any negligence, however slight,' of the decedent proximately contributing to her death would bar a recovery, was to inform the jury that in determining negligence and contributory negligence they must apply the same standard of care." (*Wilson v. City and County of San Francisco* (1959) 174 Cal.App.2d 273, 276 [344 P.2d 828].)

Secondary Sources

- 2 Levy, et al., California Torts (2003) Carriers, § 23.07[1]
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 109, *Carriers* (Matthew Bender)
- 2 Bancroft-Whitney's California Civil Practice (1992) Torts, § 28:32

907
Status of Passenger Disputed

A common carrier owes the highest care and vigilance to persons only while they are passengers. [*Name of plaintiff***] claims that [he/she] was [***name of defendant***]'s passenger at the time of the incident.**

To establish that [*name of plaintiff***] was a passenger, [he/she] must prove all of the following:**

1. **That [***name of plaintiff***] intended to become a passenger;**

2. **That [***name of plaintiff***] was accepted as a passenger by [***name of defendant***]; and**

3. **That [***name of plaintiff***] placed [himself/herself] under the control of [***name of defendant***]**

To be a passenger, it is not necessary for the person to actually enter the carrier's vehicle [or name mode of travel, e.g., bus, train]; however, the carrier must have taken some action indicating acceptance of the person as a passenger. A person continues to be a passenger until he or she safely leaves the carrier's vehicle [or equipment].

A common carrier must use the highest care and vigilance in providing its passengers with a safe place to get on and off its vehicles [or equipment].

SOURCES AND AUTHORITY

- The heightened degree of care for common carriers is owed only while "passengers are in transitu, and until they have safely departed the carrier's vehicle." (*Marshall v. United Airlines* (1973) 35 Cal.App.3d 84, 86 [110 Cal.Rptr. 416].)

- The relationship of carrier and passenger is "created when one offers to become a passenger, and is accepted as a passenger after he has placed himself under the control of the carrier." (*Grier v. Ferrant* (1944) 62 Cal.App.2d 306, 310 [144 P.2d 631].)

- It is not necessary that the passenger have entered the vehicle for the relationship to exist: " 'The relation is in force when one, intending in good faith to become a passenger, goes to the place designated as the site of departure at the appropriate time and the carrier takes some action indicating acceptance of the passenger as a

traveler.' " (*Orr v. Pacific Southwest Airlines* (1989) 208 Cal.App.3d 1467, 1473 [257 Cal.Rptr. 18], internal citations omitted.)

- The carrier-passenger relationship terminates once the passenger has disembarked and entered a place of relative safety. (*McGettigan v. Bay Area Rapid Transit Dist.* (1997) 57 Cal.App.4th 1011, 1018 [67 Cal.Rptr.2d 516].)

- Carriers must exercise utmost care " '[u]ntil the passenger reaches a place outside the sphere of any activity of the carrier which might reasonably constitute a mobile or animated hazard to the passenger.' " (*Brandelius v. City and County of San Francisco* (1957) 47 Cal.2d 729, 735 [306 P.2d 432] , internal citations omitted.)

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 769
- 2 Levy, et al., California Torts (2003) Carriers, § 23.02[4]
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 109, *Carriers* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 33, *Carriers* (Matthew Bender)
- 2 Bancroft-Whitney's California Civil Practice (1992) Torts, § 28:7

908
Duty to Protect Passengers From Assault

[*Name of plaintiff*] claims that [*name of defendant*] was negligent in failing to prevent an attack by another. To establish this claim, [*name of plaintiff*] must prove both of the following:

1. **That [*name of defendant*] knew or, by using the highest care, should have known that a passenger was reasonably likely to attack another passenger; and**

2. **That by using the highest care, [*name of defendant*] could have prevented or reduced the harm from the attack.**

DIRECTIONS FOR USE

This instruction must be used in conjunction with the instructions in the negligence series.

SOURCES AND AUTHORITY

- Restatement Second of Torts, section 315 states:

  As a general rule, one owes no duty to control the conduct of another, nor to warn those endangered by such conduct. Such a duty may arise, however, if
  (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or
  (b) a special relation exists between the actor and the other which gives the other a right of protection.

- The Supreme Court has held that "[t]he relationship between a common carrier and its passengers is … a special relationship." (*Lopez v. Southern Cal. Rapid Transit Dist.* (1985) 40 Cal.3d 780, 789 [221 Cal.Rptr. 840].)

- The common carrier standard of "utmost care" applies to the duty of a carrier to protect a passenger from assaults by fellow passengers. (*Terrell v. Key System* (1945) 69 Cal.App.2d 682, 686 [159 P.2d 704].) However, the duty can only arise if "in the exercise of the required degree of care the carrier has or should have knowledge of conditions from which it may reasonably be apprehended that an assault on a passenger may occur, and has the ability in the exercise of that degree of care to prevent the injury." (*Ibid.*, internal citations omitted.)

- The *Lopez* court stated the standard of care as follows: "[C]arriers are not insurers of their passenger's safety and will not automatically be liable, regardless of the circumstances, for any injury suffered by a passenger at the hands of a fellow passenger. Rather, a carrier is liable for injuries resulting from an assault by one passenger upon another only where, in the exercise of the required degree of care, the carrier has or should have knowledge from which it may reasonably be apprehended that an assault on a passenger may occur, and has the ability in the exercise of that degree of care to prevent the injury." (*Lopez, supra,* 40 Cal.3d at p. 791, internal citation omitted.)

- There is no liability when a sudden assault occurs with no warning. (*City and County of San Francisco v. Superior Court* (1994) 31 Cal.App.4th 45, 49 [36 Cal.Rptr.2d 372].)

<u>Secondary Sources</u>

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 772
- 2 Levy, et al., California Torts (2003) Carriers, § 23.03[3]
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 109, *Carriers* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 33, *Carriers* (Matthew Bender)
- 2 Bancroft-Whitney's California Civil Practice (1992) Torts, § 28:16

PREMISES LIABILITY

1000
Essential Factual Elements

[*Name of plaintiff***] claims that [he/she] was harmed because of the way [***name of defendant***] managed [his/her/its] property. To establish this claim, [***name of plaintiff***] must prove all of the following:**

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

2. **That [***name of defendant***] was negligent in the use or maintenance of the property;**

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

This set of instructions does not apply to public entities. For cases involving public entity defendants see instructions on dangerous conditions of public property (instruction 1100, et seq.).

SOURCES AND AUTHORITY

- As a general rule, "[e]very one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill *in the management of his property* or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself." (Civ. Code, § 1714(a), italics added)

- "Since *Rowland v. Christian* (1968) 69 Cal.2d 108, 70 Cal.Rptr. 97, the liability of landowners for injuries to people on their property has been governed by general negligence principles." (*Pineda v. Ennabe* (1990) 61 Cal.App.4th 1403, 1407 [72 Cal.Rptr.2d 206].)

- Premises liability is a "form of negligence" in which the owner has a duty to exercise ordinary care in the management of the premises to avoid exposing persons to an unreasonable risk of harm. (*Brooks v. Eugene Burger Management Corp.* (1989) 215 Cal.App.3d 1611, 1619 [264 Cal.Rptr. 756].)

- The general rule of premises liability is set forth in *Sprecher v. Adamson Companies* (1981) 30 Cal.3d 358, 368 [178 Cal.Rptr. 783], which states that a landowner has a "duty to take affirmative action for the protection of individuals coming upon the land." This duty arises because ownership of land includes the right to control and manage the premises. The landowner's "mere possession with its attendant right to control conditions on the premises is a sufficient basis for the imposition of an affirmative duty to act." (*Id.* at p. 370.) The right to control the premises lies at " 'the very heart of the ascription of tortious responsibility' " in premises liability actions. (*Id.* at p. 369.)

- Ordinarily, "[a] defendant cannot be held liable for the defective or dangerous condition of property which it [does] not own, possess, or control." (*Isaacs v. Huntington Memorial Hospital* (1985) 38 Cal.3d 112, 134 [211 Cal.Rptr. 356].) However, "[a] defendant need not own, possess and control property in order to be held liable; control alone is sufficient." (*Alcaraz v. Vece* (1997) 14 Cal.4th 1149, 1162 [60 Cal.Rptr.2d 448].)

- Mere maintenance does not establish control. A landowner's duty to warn or prevent injury from known hazards on abutting property derives from ownership, possession, or control, not mere maintenance. (*Alcaraz, supra,* 14 Cal.4th at p. 1170.)

<u>Secondary Sources</u>

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 891–895
- 1 Levy, et al., California Torts (1985–2000) General Premises Liability, § 15.01
- CALIFORNIA REAL ESTATE LAW AND PRACTICE, Ch. 170, *The Premises: Duties and Liabilities*, §§ 170.01, 170.20, Ch. 381, *Tort Liability of Property Owners,* § 381.01 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 421, *Premises Liability* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 178, *Premises Liability* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, §§ 16:1–16:3

1001
Basic Duty of Care

A person who [owns/leases/occupies/controls] property is negligent if he or she fails to use reasonable care to keep the property in a reasonably safe condition. A person who [owns/leases/occupies/controls] property must use reasonable care to discover any unsafe conditions and to repair, replace, or give adequate warning of anything that could be reasonably expected to harm others.

In deciding whether [*name of defendant***] used reasonable care, you may consider, among other factors, the following:**

(a) The location of the property;

(b) The likelihood that someone would come on to the property in the same manner as [*name of plaintiff***] did;**

(c) The likelihood of harm;

(d) The probable seriousness of such harm;

(e) Whether [*name of defendant***] knew or should have known of the condition that created the risk of harm;**

(f) The difficulty of protecting against the risk of such harm; [and]

(g) The extent of [*name of defendant***]'s control over the condition that created the risk of harm; [and]**

(h) [*Other relevant factor(s)***.]**

DIRECTIONS FOR USE

Not all of these factors will apply to every case. Select those that are appropriate to the facts of the case.

SOURCES AND AUTHORITY

- "Broadly speaking, premises liability alleges a defendant property owner allowed a dangerous condition on its property or failed to take reasonable steps to secure its property against criminal acts by third parties." (*Delgado v. American Multi-Cinema,*

Inc. (1999) 72 Cal.App.4th 1403, 1406, fn. 1 [85 Cal.Rptr.2d 838] internal citation omitted.)

- A landowner owes a duty to exercise reasonable care to maintain his or her property in such a manner as to avoid exposing others to an unreasonable risk of injury. (*Alcaraz v. Vece* (1997) 14 Cal.4th 1149, 1156 [60 Cal.Rptr.2d 448]; *Scott v. Chevron U.S.A.* (1992) 5 Cal.App.4th 510, 515 [6 Cal.Rptr.2d 810].) The failure to fulfill the duty is negligence. (*Sprecher v. Adamson Companies* (1981) 30 Cal.3d 358, 371–372 [178 Cal.Rptr. 783].) The existence of a duty of care is an issue of law for the court. (*Alcaraz, supra,* 14 Cal.4th at p. 1162, fn. 4.)

- "It is now well established that California law requires landowners to maintain land in their possession and control in a reasonably safe condition." (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 674 [25 Cal.Rptr.2d 137], internal citations omitted.)

- "The proper test to be applied to the liability of the possessor of land ... is whether in the management of his property he has acted as a reasonable man in view of the probability of injury to others ... ." (*Rowland v. Christian* (1968) 69 Cal.2d 108, 119 [70 Cal.Rptr. 97].)

- A visitor's status on the property—as a trespasser, a licensee, or an invitee—no longer establishes the extent of the owner's duties to the visitor, although status may be relevant to the specific nature or scope of those duties or to the foreseeability that the visitor might be harmed. (*Ann M., supra,* 6 Cal.4th at pp. 674–675.)

- "As stated in *Beauchamp v. Los Gatos Golf Course* (1969) 273 Cal.App.2d 20, 25, 77 Cal.Rptr. 914, '[t]he term "invitee" has not been abandoned, nor have "trespasser" and "licensee." In the minds of the jury, whether a possessor of the premises has acted as a reasonable man toward a plaintiff, in view of the probability of injury to him, will tend to involve the circumstances under which he came upon defendant's land; and the probability of exposure of plaintiff and others of his class to the risk of injury; as well as whether the condition itself presented an unreasonable risk of harm, in view of the foreseeable use of the property.' Thus, the court concluded, and we agree, *Rowland* 'does not generally abrogate the decisions declaring the substantive duties of the possessor of land to invitees nor those establishing the correlative rights and duties of invitees.' (*Id*., at p. 27.)" (*Williams v. Carl Karcher Enterprises, Inc.* (1986) 182 Cal.App.3d 479, 486–487 [227 Cal.Rptr. 465], overruled on other grounds in *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548 [34 Cal.Rptr.2d 607].)

- The distinction between artificial and natural conditions has been rejected. (*Sprecher, supra,* 30 Cal.3d at p. 371.)

- "It must also be emphasized that the liability imposed is for negligence. The question is whether in the management of his property, the possessor of land has acted as a reasonable person under all the circumstances. The likelihood of injury to plaintiff,

the probable seriousness of such injury, the burden of reducing or avoiding the risk, the location of the land, and the possessor's degree of control over the risk-creating condition are among the factors to be considered by the trier of fact in evaluating the reasonableness of a defendant's conduct." (*Sprecher, supra,* 30 Cal.3d at p. 372.)

- "A landowner's duty of care to avoid exposing others to a risk of injury is not limited to injuries that occur on premises owned or controlled by the landowner. Rather, the duty of care encompasses a duty to avoid exposing persons to risks of injury that occur off-site if the landowner's property is maintained in such a manner as to expose persons to an unreasonable risk of injury off-site." (*Barnes v. Black* (1999) 71 Cal.App.4th 1473, 1478–1479 [84 Cal.Rptr.2d 634], internal citations omitted.)

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 895–896
- 1 Levy, et al., California Torts (1985–2000) General Premises Liability, § 15.01
- CALIFORNIA REAL ESTATE LAW AND PRACTICE, Ch. 170, *The Premises: Duties and Liabilities*, §§ 170.01, 170.03, 170.20, Ch. 381, *Tort Liability of Property Owners,* § 381.01 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 334, *Landlord and Tenant: Claims for Damages*, §§ 334.10, 334.50, Ch. 421, *Premises Liability* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 178, *Premises Liability* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 16:3

1002
Extent of Control Over Premises Area

[*Name of plaintiff*] claims that [*name of defendant*] controlled the property involved in [*name of plaintiff*]'s harm, even though [*name of defendant*] did not own or lease it. A person controls property that he or she does not own or lease when he or she uses the property as if it were his or her own. A person is responsible for maintaining, in reasonably safe condition, all areas he or she controls.

DIRECTIONS FOR USE

Use this instruction only for property that is not actually owned or leased by the defendant.

"[I]t is clear from [*Alcaraz v. Vece* (1997) 14 Cal.4th 1149, 1167 [60 Cal.Rptr.2d 448]] that simple maintenance of an adjoining strip of land owned by another does not constitute an exercise of control over that property. Although evidence of maintenance is considered 'relevant on the issue of control,' the court limited its holding by stating that 'the simple act of mowing a lawn on adjacent property (or otherwise performing minimal, neighborly maintenance of property owned by another) generally will [not], standing alone, constitute an exercise of control over [the] property... .' " (*Contreras v. Anderson* (1997) 59 Cal.App.4th 188, 198–199 [69 Cal.Rptr.2d 69].)

SOURCES AND AUTHORITY

- In *Alcaraz,* the Supreme Court held that a landowner who exercises control over an adjoining strip of land has a duty to protect or warn others entering the adjacent land of a known hazard there. (*Alcaraz, supra,* 14 Cal.4th at pp. 1170–1171.) This duty arises even if the person does not own or exercise control over the hazard and even if the person does not own the abutting property on which the hazard is located. (*Id.* at pp. 1155–1156.) The *Alcaraz* court concluded that such evidence was "sufficient to raise a triable issue of fact as to whether defendants exercised control over the strip of land containing the meter box and thus owed a duty of care to protect or warn plaintiff of the allegedly dangerous condition of the property." (*Id.* at p. 1170, footnote omitted.)

<u>Secondary Sources</u>

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 892–893, 902
- 1 Levy, et al., California Torts (1985–2000) General Premises Liability, §§ 15.02–1503

- CALIFORNIA REAL ESTATE LAW AND PRACTICE, Ch. 381, *Tort Liability of Property Owners*, §§ 381.03–381.04 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 334, *Landlord and Tenant: Claims for Damages*, § 334.52, Ch. 421, *Premises Liability* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 178, *Premises Liability* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 16:2

1003
Unsafe Concealed Conditions

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

[An owner/A lessee/An occupier/One who controls the property] is responsible for an injury caused by a hidden condition if:

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

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

3. **The [owner/lessee/occupier/one who controls the property] failed to take reasonable precautions to protect against the risk of harm.**

[An owner/A lessee/An occupier/One who controls the property] must make reasonable inspections of the property to discover such conditions.

SOURCES AND AUTHORTIES

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

- "Where the occupier of land is aware of a concealed condition involving in the absence of precautions an unreasonable risk of harm to those coming in contact with it and is aware that a person on the premises is about to come in contact with it, the trier of fact can reasonably conclude that a failure to warn or to repair the condition constitutes negligence. Whether or not a guest has a right to expect that his host will remedy dangerous conditions on his account, he should reasonably be entitled to rely upon a warning of the dangerous condition so that he, like the host, will be in a position to take special precautions when he comes in contact with it." (*Rowland v. Christian* (1968) 69 Cal.2d 108, 119 [70 Cal.Rptr. 97].)

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

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

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 924–928
- 1 Levy, et al., California Torts (1985–2000) General Premises Liability, § 15.04
- CALIFORNIA REAL ESTATE LAW AND PRACTICE, Ch. 170, *The Premises: Duties and Liabilities*, § 170.02, Ch. 381, *Tort Liability of Property Owners*, § 381.20 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 334, *Landlord and Tenant: Claims for Damages*, § 334.51, Ch. 421, *Premises Liability* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 178, *Premises Liability* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 16:4

1004
Obviously Unsafe Conditions

If an unsafe condition of the property is so obvious that a person could reasonably be expected to observe it, then the [owner/lessor/occupier/one who controls the property] does not have to warn others about the dangerous condition.

DIRECTIONS FOR USE

Defendants may have a duty to take precautions to protect against the risk of harm from an obviously unsafe condition, even if they do not have a duty to warn. (*Osborn v. Mission Ready Mix* (1990) 224 Cal.App.3d 104, 121–122 [273 Cal.Rptr. 457].)

SOURCES AND AUTHORITY

- Generally, if a danger is so obvious that a person could reasonably be expected to see it, the condition itself serves as a warning, and the landowner is under no further duty to remedy or warn of the condition. (6 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 930, p. 301.) However, this is not true in all cases. "[I]t is foreseeable that even an obvious danger may cause injury, if the practical necessity of encountering the danger, when weighed against the apparent risk involved, is such that under the circumstances, a person might choose to encounter the danger. The foreseeability of injury, in turn, when considered along with various other policy considerations such as the extent of the burden to the defendant and consequences to the community of imposing a duty to remedy such danger may lead to the legal conclusion that the defendant 'owes a duty of due care [to the person injured.]" (*Osborn, supra,* 224 Cal.App.3d at p. 121 [internal citations omitted].)

- It is incorrect to instruct a jury categorically that a business owner cannot be held liable for an injury resulting from an obvious danger. (*Osborn, supra,* 224 Cal.App.3d at p. 116.) There may be a duty to remedy a dangerous condition, even though there is no duty to warn thereof, if the condition is foreseeable. (*Id*. at pp. 121–122.)

- In *Felmlee v. Falcon Cable TV* (1995) 36 Cal.App.4th 1032, 1039–1040 [43 Cal.Rptr.2d 158], the court found that an instruction stating that the defendant "owed no duty to warn plaintiff of a danger which was obvious or which should have been observed in the exercise of ordinary care" was proper: "The jury was free to consider whether Falcon was directly negligent in failing to correct any foreseeable, dangerous condition of the cables which may have contributed to the cause of Felmlee's injuries." (*Id.* at p. 1040.)

- One court has observed: "[T]he 'obvious danger' exception to a landowner's ordinary duty of care is in reality a recharacterization of the former assumption of the risk doctrine, i.e., where the condition is so apparent that the plaintiff must have realized the danger involved, he assumes the risk of injury even if the defendant was negligent. … [T]his type of assumption of the risk has now been merged into comparative negligence." (*Donohue v. San Francisco Housing Authority* (1993) 16 Cal.App.4th 658, 665 [20 Cal.Rptr.2d 148], internal citations omitted.)

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 929–931
- 1 Levy, et al., California Torts (1985–2000) General Premises Liability, § 15.04[4]
- CALIFORNIA REAL ESTATE LAW AND PRACTICE, Ch. 381, *Tort Liability of Property Owners*, §§ 381.20, 381.32 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 421, *Premises Liability* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 178, *Premises Liability* (Matthew Bender)

1005
Business Proprietor's Liability for the Negligent/Intentional/Criminal Conduct of Others

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[An owner of a business that is open to the public/A landlord] must use reasonable care to protect [patrons/guests/tenants] from another person's harmful conduct on [his/her/its] property if the [owner/landlord] can reasonably anticipate such conduct.

SOURCES AND AUTHORITY

- A business proprietor is not an insurer of the safety of his invitees, "but he is required to exercise reasonable care for their safety and is liable for injuries resulting from a breach of this duty. The general duty includes not only the duty to inspect the premises in order to uncover dangerous conditions, but, as well, the duty to take affirmative action to control the wrongful acts of third persons which threaten invitees where the occupant has reasonable cause to anticipate such acts and the probability of injury resulting therefrom." (*Taylor v. Centennial Bowl, Inc.* (1966) 65 Cal.2d 114, 121 [52 Cal.Rptr. 561], internal citations omitted.)

- "Once a court finds that the defendant was under a duty to protect the plaintiff, it is for the factfinder to decide whether the security measures were reasonable under the circumstances. The jury must decide whether the security was adequate." (*Isaacs v. Huntington Memorial Hospital* (1985) 38 Cal.3d 112, 131 [211 Cal.Rptr. 356], internal citation omitted.)

- "[A]s frequently recognized, a duty to take affirmative action to control the wrongful acts of a third party will be imposed only where such conduct can be reasonably anticipated." (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 676 [25 Cal.Rptr.2d 137], internal citations omitted.)

- "In the case of a landlord, this general duty of maintenance, which is owed to tenants and patrons, has been held to include the duty to take reasonable steps to secure common areas against foreseeable criminal acts of third parties that are likely to occur in the absence of such precautionary measures." (*Ann M., supra,* 6 Cal.4th at p. 674, internal citation omitted; *Frances T. v. Village Green Owners Assn.* (1986) 42 Cal.3d 490, 499–501 [229 Cal.Rptr. 456].)

- Restatement Second of Torts, section 344 provides:

  A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon

the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure to the possessor to exercise reasonable care to

(a) discover that such acts are being done or are likely to be done, or

(b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.

- Section 344 has been followed by California courts. (See *Peterson v. San Francisco Community College Dist*. (1984) 36 Cal.3d 799, 807 [205 Cal.Rptr. 842]; *Kentucky Fried Chicken v. Superior Court* (1997) 14 Cal.4th 814, 823 [59 Cal.Rptr.2d 756].)

- Comment (f) to section 344 further explains the section's intent: "Since the possessor is not an insurer of the visitor's safety, he is ordinarily under no duty to exercise any care until he knows or has reason to know that the acts of the third person are occurring, or are about to occur. He may, however, know or have reason to know, from past experience, that there is a likelihood of conduct on the part of third persons in general which is likely to endanger the safety of the visitor, even though he has no reason to expect it on the part of any particular individual. If the place or character of his business, or his past experience, is such that he should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it, and to provide a reasonably sufficient number of servants to afford a reasonable protection."

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 933–944
- 1 Levy, et al., California Torts (1985–2000) General Premises Liability, § 15.06
- CALIFORNIA REAL ESTATE LAW AND PRACTICE, Ch. 170, *The Premises: Duties and Liabilities*, § 170.05, Ch. 381, *Tort Liability of Property Owners*, § 381.21 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 334, *Landlord and Tenant: Claims for Damages*, §§ 334.12, 334.23, 334.57, Ch. 421, *Premises Liability* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 178, *Premises Liability* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 16:5

1006
Landlord's Duty

Before giving possession of leased property to a tenant [or upon renewal of a lease], a landlord must conduct a reasonable inspection of the property for unsafe conditions and correct any such condition discovered in that process. The inspection must include common areas under the landlord's control.

After a tenant has taken possession, a landlord must use reasonable care to correct an unsafe condition under the landlord's control if the landlord knows or reasonably should have known about it.

SOURCES AND AUTHORITY

- "A landlord owes a duty of care to a tenant to provide and maintain safe conditions on the leased premises. This duty of care also extends to the general public. 'A lessor who leases property for a purpose involving the admission of the public is under a duty to see that it is safe for the purposes intended, and to exercise reasonable care to inspect and repair the premises before possession is transferred so as to prevent any unreasonable risk of harm to the public who may enter. An agreement to renew a lease or relet the premises ... cannot relieve the lessor of his duty to see that the premises are reasonably safe at that time.' Where there is a duty to exercise reasonable care in the inspection of premises for dangerous conditions, the lack of awareness of the dangerous condition does not generally preclude liability. 'Although liability might easily be found where the landowner has actual knowledge of the dangerous condition "[t]he landowner's lack of knowledge of the dangerous condition is not a defense. He has an affirmative duty to exercise ordinary care to keep the premises in a reasonably safe condition, and therefore must inspect them or take other proper means to ascertain their condition. And if, by the exercise of reasonable care, he would have discovered the dangerous condition, he is liable." ' " (*Portillo v. Aiassa* (1994) 27 Cal.App.4th 1128, 1134 [32 Cal.Rptr. 755], internal citations omitted.)

- "[A] commercial landowner cannot totally abrogate its landowner responsibilities merely by signing a lease. As the owner of property, a lessor out of possession must exercise due care and must act reasonably toward the tenant as well as to unknown third persons. At the time the lease is executed and upon renewal a landlord has a right to reenter the property, has control of the property, and must inspect the premises to make the premises reasonably safe from dangerous conditions. Even if the commercial landlord executes a contract which requires the tenant to maintain the property in a certain condition, the landlord is obligated at the time the lease is executed to take reasonable precautions to avoid unnecessary danger." (*Mora v.*

Baker Commodities, Inc. (1989) 210 Cal.App.3d 771, 781 [258 Cal.Rptr. 669], internal citations omitted.)

- "[T]he landlord's responsibility to inspect is limited. Like a residential landlord, the duty to inspect charges the lessor 'only with those matters which would have been disclosed by a reasonable inspection.' The burden of reducing or avoiding the risk and the likelihood of injury will affect the determination of what constitutes a reasonable inspection. The landlord's obligation is only to do what is reasonable under the circumstances. The landlord need not take extraordinary measures or make unreasonable expenditures of time and money in trying to discover hazards unless the circumstances so warrant. When there is a potential serious danger, which is foreseeable, a landlord should anticipate the danger and conduct a reasonable inspection before passing possession to the tenant. However, if no such inspection is warranted, the landlord has no such obligation." (*Mora, supra,* 210 Cal.App.3d at p. 782, internal citations and footnote omitted.)

- "[I]t is established that a landlord owes a duty of care to its tenants to take reasonable steps to secure the common areas under its control." (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 675 [25 Cal.Rptr.2d 137].)

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 936–937
- 1 Levy, et al., California Torts (1985–2000) General Premises Liability, § 15.02
- CALIFORNIA REAL ESTATE LAW AND PRACTICE, Ch. 170, *The Premises: Duties and Liabilities*, § 170.03 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 334, *Landlord and Tenant: Claims for Damages*, §§ 334.10, 334.53, Ch. 421, *Premises Liability* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 178, *Premises Liability* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, §§ 16:12–16:16

1007
Sidewalk Abutting Property

[An owner of/A lessee of/An occupier of/One who controls] property must avoid creating an unsafe condition on the surrounding public streets or sidewalks.

SOURCES AND AUTHORITY

- Generally, absent statutory authority to the contrary, a landowner is under no duty to maintain in a safe condition a public street or sidewalk abutting his property (*Sexton v. Brooks* (1952) 39 Cal.2d 153, 157 [245 P.2d 496]). However, "[a]n abutting owner has always had a duty to refrain from affirmative conduct which would render the sidewalk dangerous to the public." (*Selger v. Steven Brothers, Inc.* (1990) 222 Cal.App.3d 1585, 1592 [272 Cal.Rptr. 544], internal citations omitted.)

- The occupier must maintain his or her land in a manner so as not to injure the users of an abutting street or sidewalk. (*Swanberg v. O'Mectin* (1984) 157 Cal.App.3d 325, 330 [203 Cal.Rptr. 701]; *Lompoc Unified School Dist. v. Superior Court* (1993) 20 Cal.App.4th 1688, 1693 [26 Cal.Rptr.2d 122].)

- "An ordinance requiring the abutting landowner to maintain the sidewalk would be construed to create a duty of care to third persons only if the ordinance clearly and unambiguously so provided." (*Selger, supra,* 222 Cal.App.3d at p. 1590, internal citations omitted.)

<u>Secondary Sources</u>

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 900–903
- 1 Levy, et al., California Torts (1985–2000) General Premises Liability, § 15.03[4]
- CALIFORNIA REAL ESTATE LAW AND PRACTICE, Ch. 381, *Tort Liability of Property Owners*, § 381.03 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 178, *Premises Liability* (Matthew Bender)

1008
Liability for Adjacent Altered Sidewalk—Essential Factual Elements

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[*Name of plaintiff***] claims that [he/she] was harmed because [***name of defendant***] was negligent in constructing and maintaining an altered portion of the sidewalk next to [his/her/its] property. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] [or a previous owner] altered [or requested the city to alter] the portion of the sidewalk that caused the harm;**

2. **That the alteration provided a benefit solely to [***name of defendant***]'s property;**

3. **That the alteration served a purpose different from ordinary sidewalk use;**

4. **That [***name of defendant***] failed to use reasonable care in creating or maintaining the altered portion of the sidewalk;**

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

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

SOURCES AND AUTHORITY

- An abutting landowner who has altered an adjacent sidewalk for the benefit of his property apart from the ordinary use for which it was designed has a duty to employ ordinary care in making such alteration and in maintaining that portion of the sidewalk in a reasonably safe condition. (*Peters v. City & County of San Francisco* (1953) 41 Cal.2d 419, 423 [260 P.2d 55]; *Selger v. Steven Brothers, Inc.* (1990) 222 Cal.App.3d 1585, 1594 [272 Cal.Rptr. 544].)

- The duty of care regarding altered sidewalks usually arises in cases involving traps on sidewalks, including coal holes, meter boxes, " 'and other devices of similar character located in the sidewalk which benefit the abutting owner and are located where the general public is likely to walk.' " (*Contreras v. Anderson* (1997) 59 Cal.App.4th 188, 202 [69 Cal.Rptr.2d 69], internal citation omitted.)

- Liability depends on findings of (1) special benefit to the owner's property, (2) alteration of sidewalk for a nontypical purpose, and (3) the degree of exclusivity of benefit. (*Contreras, supra,* 59 Cal.App.4th at p. 202.)

- "The significance of the degree of exclusivity is that proportionately, the greater the exclusivity of use, the more an improvement benefits solely the adjoining property and the more reasonable it is to impose upon the landowner a duty to maintain the improvement in a reasonably safe condition." (*Seaber v. Hotel Del Coronado* (1991) 1 Cal.App.4th 481, 491 [2 Cal.Rptr.2d 405].)

- The requirement of due care in altering a sidewalk applies only to that portion of the sidewalk that is actually altered: "The rule cited by plaintiff requires the owner to keep the altered portion in reasonably safe condition or be liable for injuries resulting therefrom. Plaintiff did not trip on defendant's floral displays, she slipped on the dog dropping, a hazard which defendant did not create." (*Selger, supra*, 222 Cal.App.3d at p. 1595.)

- "The duty to maintain portions of a sidewalk which have been altered for the benefit of the property runs with the land, and a property owner cannot avoid liability on the ground that the condition was created by or at the request of his predecessors in title." (*Peters, supra*, 41 Cal.2d at p. 423.)

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 900–903
- 1 Levy, et al., California Torts (1985–2000) General Premises Liability, § 15.03[4]
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 100, *Employer and Employee*, Ch. 178, *Premises Liability* (Matthew Bender)

1009
Liability to Employees of Independent Contractors for Dangerous Conditions

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

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

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

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

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

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

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

SOURCES AND AUTHORITY

- "[W]e conclude that in the absence of the hirer's retention of control of the methods or operative details of the independent contractor's work, the hirer cannot be held liable to the independent contractor's employee as a result of the dangerous condition on the hirer's property if: 1) a preexisting dangerous condition was known or

reasonably discoverable by the contractor, and the condition is the subject of at least a part of the work contemplated by the independent contractor; or 2) the contractor creates the dangerous condition on the hirer's property and the hirer does not increase the risk of harm by its own affirmative conduct." (*Grahn v. Tosco Corp.* (1997) 58 Cal.App.4th 1373, 1401 [68 Cal.Rptr.2d 806], disapproved of on other grounds in *Hooker, supra,* 27 Cal.4th at p. 214 and *Camargo v. Tjaarda Dairy* (2001) 25 Cal.4th 1235, 1245 [108 Cal.Rptr.2d 617].)

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

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

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

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

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

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

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 922
- 1 Levy, et al., California Torts (1985–2000) General Premises Liability, § 15.08
- CALIFORNIA REAL ESTATE LAW AND PRACTICE, Ch. 381, *Tort Liability of Property Owners*, § 381.23 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 421, *Premises Liability* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 178, *Premises Liability* (Matthew Bender)

1010
Recreation Immunity (Civ. Code, § 846)

[*Name of defendant***] is not responsible for [***name of plaintiff***]'s harm if [he/she] proves that [***name of plaintiff***]'s harm resulted from [his/her] entry on or use of [***name of defendant***]'s property for a recreational purpose,**

[choose one of the following three options]

[unless [*name of plaintiff***] proves all of the following:**

1. **That [***name of defendant***] knew or should have known of the [condition/use/structure/activity on the property] that created an unreasonable risk of serious injury;**

2. **That [***name of defendant***] knew or should have known that someone would probably be seriously injured by the dangerous [condition/use/structure/activity]; and**

3. **That [***name of defendant***] knowingly failed to protect others from the dangerous [condition/use/structure/activity].]**

[or]

[unless [*name of plaintiff***] proves that a charge or fee was paid to [***name of defendant***] to use the property.]**

[or]

[unless [*name of plaintiff***] proves that [***name of defendant***] expressly invited [***name of plaintiff***] to use the property for the recreational purpose.]**

DIRECTIONS FOR USE

Depending on the facts, the court could instruct that the activity involved was a "recreational purpose" as a matter of law. For a comprehensive list of "recreational purposes," refer to Civil Code section 846.

Federal courts interpreting California law have addressed whether the "express invitation" must be personal to the user. The Ninth Circuit has held that invitations to the general public do not qualify as "express invitations" within the meaning of section 846. In *Ravell v. United States* (9th Cir.1994) 22 F.3d 960, the Ninth Circuit held that

California law requires a personal invitation for a section 846 invitation, citing *Johnson v. Unocal Corp.* (1993) 21 Cal.App.4th 310 [26 Cal.Rptr.2d 148]. However, the issue has not been definitively resolved by the California Supreme Court.

SOURCES AND AUTHORITY

- Civil Code section 846 provides:

> An owner of any estate or any other interest in real property, whether possessory or nonpossessory, owes no duty of care to keep the premises safe for entry or use by others for any recreational purpose or to give any warning of hazardous conditions, uses of, structures, or activities on such premises to persons entering for such purpose, except as provided in this section.
>
> A "recreational purpose," as used in this section, includes such activities as fishing, hunting, camping, water sports, hiking, spelunking, sport parachuting, riding, including animal riding, snowmobiling, and all other types of vehicular riding, rock collecting, sightseeing, picnicking, nature study, nature contacting, recreational gardening, gleaning, hang gliding, winter sports, and viewing or enjoying historical, archaeological, scenic, natural, or scientific sites.
>
> An owner of any estate or any other interest in real property, whether possessory or nonpossessory, who gives permission to another for entry or use for the above purpose upon the premises does not thereby (a) extend any assurance that the premises are safe for such purpose, or (b) constitute the person to whom permission has been granted the legal status of an invitee or licensee to whom a duty of care is owed, or (c) assume responsibility for or incur liability for any injury to person or property caused by any act of such person to whom permission has been granted except as provided in this section.
>
> This section does not limit the liability which otherwise exists (a) for willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity; or (b) for injury suffered in any case where permission to enter for the above purpose was granted for a consideration other than the consideration, if any, paid to said landowner by the state, or where consideration has been received from others for the same purpose; or (c) to any persons who are expressly invited rather than merely permitted to come upon the premises by the landowner.
>
> Nothing in this section creates a duty of care or ground of liability for injury to person or property.

- The California Supreme Court has recently summarized the effect of Civil Code section 846 on a landowner's duty of care: "[A]n owner of ... real property owes no duty of care to keep the premises safe for entry or use by others for recreational purposes or to give recreational users warning of hazards on the property, unless: (1) the landowner willfully or maliciously fails to guard or warn against a dangerous condition, use, structure or activity; (2) permission to enter for a recreational purpose is granted for a consideration; or (3) the landowner expressly invites rather than merely permits the user to come upon the premises. The landowner's duty to the nonpaying, uninvited recreational user is, in essence, that owed a trespasser under the common law as it existed prior to *Rowland v. Christian* … ." (*Ornelas v. Randolph* (1993) 4 Cal.4th 1095, 1099–1100 [17 Cal.Rptr.2d 594].)

- "Generally, whether one has entered property for a recreational purpose within the meaning of the statute is a question of fact, to be determined through a consideration of the 'totality of the facts and circumstances, including … the prior use of the land. While the plaintiff's subjective intent will not be controlling, it is relevant to show purpose.' " (*Ornelas, supra,* 4 Cal.4th at p. 1102, internal citation omitted.)

- In *Hubbard v. Brown* (1990) 50 Cal.3d 189, 196 [266 Cal.Rptr. 491], the Supreme Court stated that the phrase "interest in real property" should not be given a narrow or technical interpretation, holding that a federal grazing permit is an interest in real property sufficient to qualify for the immunity.

- Business invitees do not fall within this provision: "We hold that defendants' status as business invitees of the landowner does not satisfy the prerequisite that the party seeking to invoke the immunity provisions of section 846 be '[a]n owner of any estate or any other interest in real property, whether possessory or nonpossessory.' Although such invitee may be entitled to be present on the property during such time as the work is being performed, such presence does not convey any estate or interest in the property." (*Jenson v. Kenneth Mullen, Inc.* (1989) 211 Cal.App.3d 653, 658 [259 Cal.Rptr. 552].)

- A landowner's conduct becomes willful or malicious only if three elements are present: "(1) actual or constructive knowledge of the peril to be apprehended, (2) actual or constructive knowledge that injury is a probable, as opposed to a possible, result of the danger, and (3) conscious failure to act to avoid the peril." (*New v. Consolidated Rock Products Co.* (1985) 171 Cal.App.3d 681, 689–690 [217 Cal.Rptr. 522], internal citations omitted.)

- "The concept of willful misconduct has a well-established, well-defined meaning in California law. 'Willful or wanton misconduct is intentional wrongful conduct, done either with a knowledge that serious injury to another will probably result, or with a wanton and reckless disregard of the possible results.' " (*New, supra,* 171 Cal.App.3d at p. 698, internal citations omitted.)

- *Lostritto v. Southern Pacific Transportation Co*. (1977) 73 Cal.App.3d 737 [140 Cal.Rptr. 905], involved a case in which the plaintiff was injured when he dove from the defendant's trestle into the river below. The court held that the defendant's willful and malicious misconduct could potentially be found when the evidence showed that the trestle was near and accessible to a popular swimming area, that diving from the trestle was a longstanding practice of which the defendant was aware, that the defendant was informed that swimmers had been hurt diving from its trestle, and that the defendant posted no warning signs and failed to erect inexpensive barriers to prevent the practice. (*Id*. at pp. 744–745.)

- "Clearly, consideration means some type of entrance fee or charge for permitting a person to use specially constructed facilities. There are many amusement facilities in government-owned parks that charge admission fees and a consideration in this or a similar context was intended." (*Moore v. City of Torrance* (1979) 101 Cal.App.3d 66, 72 [166 Cal.Rptr. 192], disapproved of on other grounds in *Delta Farms Reclamation Dist. v. Superior Court* (1983) 33 Cal.3d 699 [190 Cal.Rptr. 494].)

- "A landowner must gain some immediate and reasonably direct advantage, usually in the form of an entrance fee, before the exception to immunity for consideration under section 846 comes into play." (*Johnson v. Unocal Corp.* (1993) 21 Cal.App.4th 310, 317.)

- The exceptions for consideration and express invitees should be construed narrowly. (*Johnson, supra,* 21 Cal.App.4th at p. 315.)

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 912–917
- 1 Levy, et al., California Torts, (1985–2000) General Premises Liability, § 15.22
- CALIFORNIA REAL ESTATE LAW AND PRACTICE, Ch. 381, *Tort Liability of Property Owners*, § 381.30 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 421, *Premises Liability* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 178, *Premises Liability* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 16:34

1011
Constructive Notice of Store Owner Regarding Dangerous Conditions

---

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 was of such a nature and existed long enough so that it would have been discovered and corrected by an owner using reasonable care.

If an inspection was not made within a reasonable time before the accident, this may 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.)

- "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.)

<u>Secondary Sources</u>

- CALIFORNIA TORTS, Ch. 15, *General Premises Liability*, § 15.04 (Matthew Bender)
- CALIFORNIA REAL ESTATE LAW AND PRACTICE, Ch. 381, *Tort Liability of Property Owners*, § 381.20 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 421, *Premises Liability* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 178, *Premises Liability* (Matthew Bender)

VF-1000
Premises Liability
Comparative Negligence of Others Not at Issue

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] [own/lease/occupy/control] the property?**

___Yes ___No

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

2. Was [*name of defendant***] negligent in the [use/maintenance] of the property?**

___Yes ___No

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

3. Was [*name of defendant***]'s negligence 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:]	**$_____]**
[d. Future noneconomic loss, including [physical pain/mental suffering:]	**$_____]**
	TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

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

DIRECTIONS FOR USE

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

This verdict form is based on Instruction 1000, *Premises Liability—Essential Factual Elements.*

If specificity is not required, users do not have to itemize all the damages listed in question 4. The breakdown is optional; depending on the circumstances, users may wish to break down the damages even further.

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

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

VF-1001
Premises Liability
Affirmative Defense of Recreation Immunity

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] [own/lease/occupy/control] the property?**

___Yes ___No

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

2. Was [*name of defendant***] negligent in the [use/maintenance] of the property?**

___Yes ___No

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

3. Was [*name of defendant***]'s negligence 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. Did [*name of plaintiff***] enter on or use [***name of defendant***]'s property for a recreational purpose?**

___Yes ___No

If your answer to question 4 is yes, then answer question 5. If you answered no, skip the next three questions and answer question 8.

5. Did [*name of defendant***] know or should [he/she/it] have known of a [condition/ use/structure/activity on the property] that created an unreasonable risk of serious injury?**

___Yes ___No

If your answer to question 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***] know or should [he/she/it] have known that someone would probably be seriously injured by the dangerous [condition/use/structure/activity]?**

___Yes ___No

If your answer to question 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***] knowingly fail to protect others from the dangerous [condition/use/structure/activity]?**

___Yes ___No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the 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	**$_____**

Signed: _____
Presiding Juror

Dated: _____

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

DIRECTIONS FOR USE

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

This verdict form is based on Instruction 1000, *Premises Liability—Essential Factual Elements,* and Instruction 1010, *Recreation Immunity (Civ. Code, § 846).*

If specificity is not required, users do not have to itemize all the damages listed in question 8. The breakdown is optional; depending on the circumstances, users may wish to break down the damages even further.

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

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

This verdict form should be modified (see Instruction 1010, *Recreation Immunity (Civ. Code, § 846)*) if either of the two other grounds for countering this defense is at issue.

DANGEROUS CONDITION OF PUBLIC PROPERTY

1100
Essential Factual Elements (Gov. Code, § 835)

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

1. **That [***name of defendant***] owned [or controlled] the property;**

2. **That the property was in a dangerous condition at the time of the incident;**

3. **That the dangerous condition created a reasonably foreseeable risk of the kind of incident that occurred;**

4. **[That negligent or wrongful conduct of [***name of defendant***]'s employee acting within the scope of [his/her] employment created the dangerous condition;]**

   [or]

   [That [*name of defendant***] had notice of the dangerous condition for a long enough time to have protected against it.]**

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

6. **That the dangerous condition was a substantial factor in causing [***name of plaintiff***]'s harm.**

DIRECTIONS FOR USE

The concept of notice is addressed in subsequent instructions. The concepts of "dangerous condition," "protect against," and "property of a public entity" are addressed in subsequent instructions.

SOURCES AND AUTHORITY

- Government Code section 835 provides:

  Except as provided by statute, a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition

created a reasonably foreseeable risk of the kind of injury which was incurred, and either:

(a) A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or
(b) The public entity had actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.

- Government Code section 835.2(a) provides: "A public entity had actual notice of a dangerous condition within the meaning of subdivision (b) of section 835 if it had actual knowledge of the existence of the condition and knew or should have known of its dangerous character."

- Government Code section 835.2(b) provides, in part: "A public entity had constructive notice of a dangerous condition within the meaning of subdivision (b) of Section 835 only if the plaintiff establishes that the condition had existed for such a period of time and was of such an obvious nature that the public entity, in the exercise of due care, should have discovered the condition and its dangerous character."

- Government Code section 830 provides:

  As used in this chapter:

  (a) "Dangerous condition" means a condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used.
  (b) "Protect against" includes repairing, remedying or correcting a dangerous condition, providing safeguards against a dangerous condition, or warning of a dangerous condition.
  (c) "Property of a public entity" and "public property" mean real or personal property owned or controlled by the public entity, but do not include easements, encroachments and other property that are located on the property of the public entity but are not owned or controlled by the public entity.

- "[A] public entity is not liable for injuries except as provided by statute [Gov. Code, § 815] and [Government Code] section 835 sets out the exclusive conditions under which a public entity is liable for injuries caused by a dangerous condition of public property." (*Brown v. Poway Unified School Dist.* (1993) 4 Cal.4th 820, 829 [15 Cal.Rptr.2d 679].)

- The Supreme Court has observed: "Subdivisions (a) and (b) of section 835 obviously address two different types of cases. However, what distinguishes the two types of cases is not simply whether the public entity has notice of the dangerous condition. Instead, what distinguishes the two cases in practice is who created the dangerous condition. Because an entity must act through its employees, virtually all suits brought on account of dangerous conditions created by the entity will be brought under subdivision (a). In contrast, subdivision (b) can also support suits based on dangerous conditions not created by the entity or its employees." (*Brown, supra*, 4 Cal.4th at p. 836.)

- In section 835(a), "the term 'created' must be defined as the sort of involvement by an employee that would justify a presumption of notice on the entity's part." (*Brown, supra*, 4 Cal.4th at p. 836.) The res ipsa loquitur presumption does not satisfy section 835(a). (*Ibid.*)

- The plaintiff need not prove both that the public entity was negligent in creating the condition and that it had notice of the condition; either negligence or notice is sufficient. (*Curtis v. State of California* (1982) 128 Cal.App.3d 668, 693 [180 Cal.Rptr. 843].)

- "For liability to be imposed on a public entity for a dangerous condition of property, the entity must be in a position to protect against or warn of the hazard. Therefore, the crucial element is not ownership, but rather control." (*Mamola v. State of California ex rel. Dept. of Transportation* (1979) 94 Cal.App.3d 781, 788 [156 Cal.Rptr. 614], internal citation omitted [easement that the state retained over a road created no liability for defect where there was no showing that the state controlled the road].)

- "Liability for injury caused by a dangerous condition of property has been imposed when an unreasonable risk of harm is created by a combination of defect in the property and acts of third parties. However, courts have consistently refused to characterize harmful third party conduct as a dangerous condition—absent some concurrent contributing defect in the property itself." (*Hayes v. State of California* (1974) 11 Cal.3d 469, 472 [113 Cal.Rptr. 599], internal citations omitted.)

<u>Secondary Sources</u>

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 163–197
- CALIFORNIA TORTS, Ch. 61, *Particular Liabilities and Immunities of Public Entities and Public Employees*, § 61.01 (Matthew Bender)
- 2 California Government Tort Liability Practice (Cont.Ed.Bar 4th ed. 1999), §§ 12.9–12.55
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 421, *Premises Liability* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 178, *Premises Liability* (Matthew Bender)

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Control

[*Name of plaintiff***] claims that [***name of defendant***] controlled the property at the time of the incident. In deciding whether [***name of defendant***] controlled the property, you should consider whether it had the power to prevent, fix, or guard against the dangerous condition. You should also consider whether [***name of defendant***] treated the property as if it were its property.**

DIRECTIONS FOR USE

This instruction will not be necessary in most cases. Ownership of public property is generally established as a matter of law by evidence of holding title or other similar evidence.

The power to regulate privately owned facilities is not enough, in and of itself, to impose liability on a public entity (i.e., it is not "control"). (*Aaitui v. Grande Properties* (1994) 29 Cal.App.4th 1369, 1377 [35 Cal.Rptr.2d 123].)

SOURCES AND AUTHORITY

- Government Code section 830(c) provides: " 'Property of a public entity' and 'public property' mean real or personal property owned or controlled by the public entity, but do not include easements, encroachments and other property that are located on the property of the public entity but are not owned or controlled by the public entity."

- "Where the public entity's relationship to the dangerous property is not clear, aid may be sought by inquiring whether the particular defendant had control, in the sense of power to prevent, remedy or guard against the dangerous condition; whether his ownership is a naked title or whether it is coupled with control; and whether a private defendant, having a similar relationship to the property, would be responsible for its safe condition." (*Low v. City of Sacramento* (1970) 7 Cal.App.3d 826, 833–834 [87 Cal.Rptr. 173] [city and county jointly liable for defect in parking strip fronting county hospital].)

- "The *Low*-type inquiry and result are only appropriate '... [w]here the public entity's relationship to the dangerous property is not clear ... .' " (*Searcy v. Hemet Unified School Dist.* (1986) 177 Cal.App.3d 792, 800 [223 Cal.Rptr. 206], internal citation omitted.)

- "For liability to be imposed on a public entity for a dangerous condition of property, the entity must be in a position to protect against or warn of the hazard. Therefore, the

crucial element is not ownership, but rather control." (*Mamola v. State of California ex rel. Dept. of Transportation* (1979) 94 Cal.App.3d 781, 788 [156 Cal.Rptr. 614], internal citation omitted [easement that the state retained over a road created no liability for defect where there was no showing that the state controlled the road].)

- "[I]n identifying the defendant with whom control resides, location of the power to correct the dangerous condition is an aid." (*Low, supra,* 7 Cal.App.3d at p. 832.)

- The issue of control may be decided as a matter of law if the facts are uncontroverted. (*Aaitui, supra,* 29 Cal.App.4th at p. 1377; *Low, supra,* 7 Cal.App.3d at p. 834.)

- In *Holmes v. City of Oakland* (1968) 260 Cal.App.2d 378 [67 Cal.Rptr. 197], the court found that the city had control over a railroad right-of-way over a city street where a city ordinance had reserved extensive powers to regulate and inspect the railroad company's easement.

- The requisite ownership or control must exist at the time of the incident. (*Longfellow v. County of San Luis Obispo* (1983) 144 Cal.App.3d 379, 383 [192 Cal.Rptr. 580]; *Tolan v. State of California* (1979) 100 Cal.App.3d 980 [161 Cal.Rptr. 307].)

- "[A] public entity can be held liable for an accident caused by a condition that exists on property adjacent to a public highway if the condition ' " 'is so connected with or in such proximity to the traveled portion of the highway as to render it unsafe to those traveling thereon.' " (*Carson v. Facilities Development Co.* (1984) 36 Cal.3d 830, 841 [206 Cal.Rptr. 136], internal citations omitted.)

<u>Secondary Sources</u>

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 164–171
- CALIFORNIA TORTS, Ch. 61, *Particular Liabilities and Immunities of Public Entities and Public Employees*, § 61.01[3][b] (Matthew Bender)
- 2 California Government Tort Liability Practice (Cont.Ed.Bar. 4th ed. 1999), §§ 12.9–12.14
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 421, *Premises Liability* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 178, *Premises Liability* (Matthew Bender)

DANGEROUS CONDITION OF PUBLIC PROPERTY

1102
Definition of "Dangerous Condition" (Gov. Code, § 830(a))

A "dangerous condition" is a condition of public property that creates a substantial risk of injury to members of the general public who are using the property [or adjacent property] with reasonable care and in a reasonably foreseeable manner. A condition that creates only a minor risk of injury is not a dangerous condition.

SOURCES AND AUTHORITY

- Government Code section 830(a) provides: " 'Dangerous condition' means a condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used."

- "In general, '[w]hether a given set of facts and circumstances creates a dangerous condition is usually a question of fact and may only be resolved as a question of law if reasonable minds can come to but one conclusion.' " (*Peterson v. San Francisco Community College Dist.* (1984) 36 Cal.3d 799, 810 [205 Cal.Rptr. 842]; *Chowdhury v. City of Los Angeles* (1995) 38 Cal.App.4th 1187, 1194 [45 Cal.Rptr.2d 657]; *Mittenhuber v. City of Redondo Beach* (1983) 142 Cal.App.3d 1, 5 [190 Cal.Rptr. 694].)

- The Government Code permits the court to decide this issue as a matter of law. Section 830.2 provides: "A condition is not a dangerous condition within the meaning of this chapter if the trial or appellate court, viewing the evidence most favorably to the plaintiff, determines as a matter of law that the risk created by the condition was of such a minor, trivial or insignificant nature in view of the surrounding circumstances that no reasonable person would conclude that the condition created a substantial risk of injury when such property or adjacent property was used with due care in a manner in which it was reasonably foreseeable that it would be used."

- In *Davis v. City of Pasadena* (1996) 42 Cal.App.4th 701, 705 [50 Cal.Rptr.2d 8], the court held that stairs converging at right angles were a trivial defect as a matter of law.

- "The negligence of a plaintiff-user of public property … is a defense which may be asserted by a public entity; it has no bearing upon the determination of a 'dangerous condition' in the first instance. So long as a plaintiff-user can establish that a condition of the property creates a substantial risk to any foreseeable user of the public property who uses it with due care, he has successfully alleged the existence of a dangerous condition regardless of his personal lack of due care. If, however, it can

be shown that the property is safe when used with due care and that a risk of harm is created only when foreseeable users fail to exercise due care, then such property is not 'dangerous' within the meaning of section 830, subdivision (a)." (*Fredette v. City of Long Beach* (1986) 187 Cal.App.3d 122, 131 [231 Cal.Rptr. 598], internal citation omitted.)

- "Even though it is foreseeable that persons may use public property without due care, a public entity may not be held liable for failing to take precautions to protect such persons." (*Fredette, supra*, 187 Cal.App.3d at p. 132, internal citation omitted.)

- "Any property can be dangerous if used in a sufficiently abnormal manner; a public entity is required only to make its property safe for reasonably foreseeable careful use." (*Mathews v. City of Cerritos* (1992) 2 Cal.App.4th 1380, 1384 [4 Cal.Rptr.2d 16].)

- "Although public entities may be held liable for injuries occurring to reasonably foreseeable users of the property, even when the property is used for a purpose for which it is not designed or which is illegal, liability may ensue only if the property creates a substantial risk of injury when it is used with due care. Whether a condition creates a substantial risk of harm depends on how the general public would use the property exercising due care, including children who are held to a lower standard of care. (§ 830.) The standard is an objective one; a plaintiff's particular condition …, does not alter the standard." (*Schonfeldt v. State of California* (1998) 61 Cal.App.4th 1462, 1466 [72 Cal.Rptr.2d 464], internal citations omitted.)

- "The majority of cases … have concluded that third party conduct by itself, unrelated to the condition of the property, does not constitute a 'dangerous condition' for which a public entity may be held liable. … Nothing in the provisions of section 835, however, specifically precludes a finding that a public entity may be under a duty, given special circumstances, to protect against harmful criminal conduct on its property." (*Peterson, supra*, 36 Cal.3d at pp. 810–811, internal citations omitted.)

- "Two points applicable to this case are … well established: first, that the location of public property, by virtue of which users are subjected to hazards on adjacent property, may constitute a 'dangerous condition' under sections 830 and 835; second, that a physical condition of the public property that increases the risk of injury from third party conduct may be a 'dangerous condition' under the statutes." (*Bonanno v. Central Contra Costa Transit Authority* (2003) 30 Cal.4th 139, 154 [132 Cal.Rptr.2d 341].)

<u>Secondary Sources</u>

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, § 182
- CALIFORNIA TORTS, Ch. 61, *Particular Liabilities and Immunities of Public Entities and Public Employees*, § 61.01[2][a] (Matthew Bender)
- 2 California Government Tort Liability Practice (Cont.Ed.Bar. 4th ed. 1999), § 12.15

- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 421, *Premises Liability* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 178, *Premises Liability* (Matthew Bender)

1103
Notice (Gov. Code, § 835.2)

[*Name of plaintiff***] must prove that [***name of defendant***] had notice of the dangerous condition before the incident occurred. To prove that there was notice, [***name of plaintiff***] must prove:**

[That [*name of defendant***] knew of the condition and knew or should have known that it was dangerous. A public entity knows of a dangerous condition if an employee knows of the condition and reasonably should have informed the entity about it;]**

[or]

[That the condition had existed for enough time before the incident and was so obvious that the [*name of defendant***] reasonably should have discovered the condition and known that it was dangerous.]**

DIRECTIONS FOR USE

This instruction is intended to be used where the plaintiff relies on Government Code section 835(b). This instruction should be modified if the plaintiff is relying on both section 835(a) and section 835(b) to clarify that proof of notice is not necessary under section 835(a).

For an instruction regarding reasonable inspection systems, see Instruction 1104, *Inspection System*.

SOURCES AND AUTHORITY

- Government Code section 835.2 addresses actual and constructive notice. Section 835.2(a) provides: "A public entity had actual notice of a dangerous condition within the meaning of subdivision (b) of section 835 if it had actual knowledge of the existence of the condition and knew or should have known of its dangerous character."

- Government Code section 835.2(b) provides, in part: "A public entity had constructive notice of a dangerous condition within the meaning of subdivision (b) of Section 835 only if the plaintiff establishes that the condition had existed for such a period of time and was of such an obvious nature that the public entity, in the exercise of due care, should have discovered the condition and its dangerous character."

- " 'It is well settled that constructive notice can be shown by the long continued existence of the dangerous or defective condition, and it is a question of fact for the jury to determine whether the condition complained of has existed for a sufficient time to give the public agency constructive notice.' " (*Erfurt v. State of California* (1983) 41 Cal.App.3d 837, 844–845 [190 Cal.Rptr 569], internal citations omitted.)

- "To establish 'actual notice,' it is not enough to show that the state employees had a general knowledge that people do leave hot coals on public beaches. There must be some evidence that the employees had knowledge of the particular dangerous condition in question." (*State of California v. Superior Court* (1968) 263 Cal.App.2d 396, 399–400 [69 Cal.Rptr. 683], internal citations omitted.)

- "Briefly stated, constructive notice may be imputed if it can be shown that an obvious danger existed for an adequate period of time before the accident to have permitted the state employees, in the exercise of due care, to discover and remedy the situation had they been operating under a reasonable plan of inspection. In the instant case, it can be validly argued that there was a triable issue on the question of inspection, but in determining whether there is constructive notice, the method of inspection has been held to be secondary. The primary and indispensable element of constructive notice is a showing that the obvious condition existed a sufficient period of time before the accident." (*State of California*, *supra*, at p. 400, internal citation omitted.)

Secondary Sources

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, § 184
- CALIFORNIA TORTS, Ch. 61, *Particular Liabilities and Immunities of Public Entities and Public Employees*, § 61.01[4][b] (Matthew Bender)
- 2 California Government Tort Liability Practice (Cont.Ed.Bar 4th ed. 1999), §§ 12.45–12.51
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 421, *Premises Liability* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 178, *Premises Liability* (Matthew Bender)

1104
Inspection System (Gov. Code, § 835.2(b)(1) & (2))

In deciding whether [*name of defendant*] should have discovered the dangerous condition, you may consider whether it had a reasonable inspection system and whether a reasonable system would have revealed the dangerous condition.

[In determining whether an inspection system is reasonable, you may consider the practicality and cost of the system and balance those factors against the likelihood and seriousness of the potential danger if no such system existed.]

[*and/or****]***

[If [*name of defendant*] had a reasonable inspection system but did not detect the dangerous condition, you may consider whether it used reasonable care in maintaining and operating the system.]

DIRECTIONS FOR USE

Read the first paragraph and one or both of the bracketed paragraphs as appropriate to the facts.

SOURCES AND AUTHORITY

- Government Code section 835.2(b) provides, in part:

  On the issue of due care, admissible evidence includes but is not limited to evidence as to:

  (1) Whether the existence of the condition and its dangerous character would have been discovered by an inspection system that was reasonably adequate (considering the practicality and cost of inspection weighed against the likelihood and magnitude of the potential danger to which failure to inspect would give rise) to inform the public entity whether the property was safe for the use or uses for which the public entity used or intended others to use the public property and for uses that the public entity actually knew others were making of the public property or adjacent property.
  (2) Whether the public entity maintained and operated such an inspection system with due care and did not discover the condition.

- "Constructive notice may be found where the dangerous condition would have been discovered by a reasonable inspection." (*Straughter v. State of California* (1976) 89 Cal.App.3d 102, 109 [152 Cal.Rptr. 147], citing to *Stanford v. City of Ontario* (1972) 6 Cal.3d 870, 882 [101 Cal.Rptr. 97].)

- "The questions of whether a dangerous condition could have been discovered by reasonable inspection and whether there was adequate time for preventive measures are properly left to the jury." (*Carson v. Facilities Development Co.* (1984) 36 Cal.3d 830, 843 [206 Cal.Rptr. 136], internal citations omitted.)

- "Although judicial decisions do not always link the issue of constructive notice to the reasonable inspection system …, the Tort Claims Act indicates that, absent other persuasive evidence, the relationship between constructive notice and inspection may be crucial." (California Government Tort Liability Practice (Cont. Ed. Bar 3rd ed. 1992), § 3.37.)

Secondary Sources

- 5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 184
- CALIFORNIA TORTS, Ch. 61, *Particular Liabilities and Immunities of Public Entities and Public Employees*, § 61.03[4][b] (Matthew Bender)
- 2 California Government Tort Liability Practice (Cont.Ed.Bar 4th ed. 1999), §§ 12.48–12.50
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 421, *Premises Liability* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 178, *Premises Liability* (Matthew Bender)

1110
Affirmative Defense
Natural Conditions (Gov. Code, § 831.2)

A public entity is not responsible for harm caused by a natural condition of an unimproved public property. If [*name of defendant*] proves that [*name of plaintiff*]'s injury was caused by such a condition, then it is not responsible for the injury.

SOURCES AND AUTHORITY

- Government Code section 831.2 provides: "Neither a public entity nor a public employee is liable for an injury caused by a natural condition of any unimproved public property, including but not limited to any natural condition of any lake, stream, bay, river or beach."

- Section 831.2 "provides absolute immunity for public entities against claims for injuries caused by natural conditions of unimproved public property. Section 831.2 was enacted to ensure that public entities will not prohibit public access to recreational areas caused by the burden and expense of defending against personal injury suits and of placing such land in a safe condition. Immunity provisions of the tort claims act generally prevail over all sections imposing liability." (*Arroyo v. State of California* (1995) 34 Cal.App.4th 755, 761 [40 Cal.Rptr. 627].)

- Section 831.21(a) provides: "Public beaches shall be deemed to be in a natural condition and unimproved notwithstanding the provision or absence of public safety services such as lifeguards, police or sheriff patrols, medical services, fire protection services, beach cleanup services, or signs. The provisions of this section shall apply only to natural conditions of public property and shall not limit any liability or immunity that may otherwise exist pursuant to this division." This section abrogated *Gonzales v. San Diego* (1982) 130 Cal.App.3d 882 [182 Cal.Rptr. 73] [provision of lifeguard services held to have created "hybrid" condition] (*Knight v. City of Capitola* (1992) 4 Cal.App.4th 918, 929–930 [6 Cal.Rptr.2d 874].)

- "Given the intent of the Legislature in enacting section 831.2, we hold that wild animals are a natural part of the condition of unimproved public property within the meaning of the statute." (*Arroyo, supra,* 34 Cal.App.4th at p. 762.)

- "Case precedent establishes that at least 'some form of physical change in the condition of the property at the location of the injury, which justifies the conclusion that the public entity is responsible for reasonable risk management in that area' is required [to preclude application of the immunity.]" (*Keyes v. Santa Clara Valley*

Water Dist. (1982) 128 Cal.App.3d 882, 888 [180 Cal.Rptr. 586], internal citation omitted.)

- "[I]mprovement of a portion of a park does not remove the immunity from the unimproved areas." (*Rendak v. State of California* (1971) 18 Cal.App.3d 286, 288 [95 Cal.Rptr. 665].)

- "It is now generally settled that human-altered conditions, especially those that have existed for some years, which merely duplicate models common to nature are still 'natural conditions' as a matter of law for the purposes of Government Code section 831.2." (*Tessier v. City of Newport Beach* (1990) 219 Cal.App.3d 310, 314 [268 Cal.Rptr. 233]; see also *Morin v. County of Los Angeles* (1989) 215 Cal.App.3d 184, 188 [263 Cal.Rptr. 479].)

- "The mere attachment of a rope on defendant's undeveloped land by an unknown third party did not change the 'natural condition' of the land." (*Kuykendall v. State of California* (1986) 178 Cal.App.3d 563, 566, 223 Cal.Rptr. 763.)

- Manmade lakes are covered by the section 831.2 immunity. (*Osgood v. County of Shasta* (1975) 50 Cal.App.3d 586 [123 Cal.Rptr. 442]; see also *Knight, supra,* 4 CalApp.4th 918 [artificially rebuilt beach].)

Secondary Sources

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 164, 167
- CALIFORNIA TORTS, Ch. 61, *Particular Liabilities and Immunities of Public Entities and Public Employees*, § 61.03 (Matthew Bender)
- 2 California Government Tort Liability Practice (Cont.Ed.Bar 4th ed. 1999), §§ 12.82–12.87
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 421, *Premises Liability* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 178, *Premises Liability* (Matthew Bender)

COMMENTARY

The terms "natural condition" and "unimproved public property" are not defined in the Tort Claims Act; nor do the cases provide concise definitions of these terms.

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

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

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

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

(b) protecting against the risk of injury.

DIRECTIONS FOR USE

This instruction states a defense to the theory that the entity created a dangerous condition of public property.

SOURCES AND AUTHORITY

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

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

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

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

Secondary Sources

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, § 185
- CALIFORNIA TORTS, Ch. 61, *Particular Liabilities and Immunities of Public Entities and Public Employees*, § 61.03 (Matthew Bender)
- 2 California Government Tort Liability Practice (Cont.Ed.Bar 4th ed. 1999), §§ 12.61–12.62
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 421, *Premises Liability* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 178, *Premises Liability* (Matthew Bender)

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

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

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

DIRECTIONS FOR USE

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

SOURCES AND AUTHORITY

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

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

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

- "Unlike section 830.6 relating to design immunity, section 835.4(b) does not provide that the reasonableness of the action taken shall be determined by the 'trial or

appellate court.' " (*De La Rosa v. City of San Bernardino* (1971) 16 Cal.App.3d 739, 749 [94 Cal.Rptr. 175].)

Secondary Sources

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, § 185
- CALIFORNIA TORTS, Ch. 61, *Particular Liabilities and Immunities of Public Entities and Public Employees*, § 61.03 (Matthew Bender)
- 2 California Government Tort Liability Practice (Cont.Ed.Bar 4th ed. 1999), §§ 12.63–12.65
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 421, *Premises Liability* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 178, *Premises Liability* (Matthew Bender)

1120
Failure to Provide Traffic Control Signals (Gov. Code, § 830.4)

You may not find that [*name of defendant*]'s property was in a dangerous condition just because it did not provide a [*insert device or marking*]. However, you may consider the lack of a [*insert device or marking*], along with other circumstances shown by the evidence, in determining whether [*name of defendant*]'s property was dangerous.

SOURCES AND AUTHORITY

- Government Code section 830.4 provides: "A condition is not a dangerous condition within the meaning of this chapter merely because of the failure to provide regulatory traffic control signals, stop signs, yield right-of-way signs, or speed restriction signs, as described by the Vehicle Code, or distinctive roadway markings as described in Section 21460 of the Vehicle Code."

- "Cases interpreting this statute have held that it provides a shield against liability only in those situations where the alleged dangerous condition exists solely as a result of the public entity's failure to provide a regulatory traffic device or street marking. If a traffic intersection is dangerous for reasons other than the failure to provide regulatory signals or street markings, the statute provides no immunity." (*Washington v. City and County of San Francisco* (1990) 219 Cal.App.3d 1531, 1534–1535 [269 Cal.Rptr. 58].)

- "A public entity does not create a dangerous condition on its property 'merely because of the failure to provide regulatory traffic control signals, stop signs, yield right-of-way signs, or speed restriction signs ... .' (§ 830.4.) If, on the other hand, the government installs traffic signals and invites the public to justifiably rely on them, liability will attach if the signals malfunction, confusing or misleading motorists, and causing an accident to occur. The reasoning behind this rule is that the government creates a dangerous condition and a trap when it operates traffic signals that, for example, direct motorists to 'go' in all four directions of an intersection simultaneously, with predictable results." (*Chowdhury v. City of Los Angeles* (1995) 38 Cal.App.4th 1187, 1194–1195 [45 Cal.Rptr.2d 657], internal citations omitted.)

- "If the government turns off traffic signals entirely to avoid confusion, liability does not attach. 'When the [traffic] lights were turned off, their defective condition could no longer mislead or misdirect the injured party.' The same result obtains whether the traffic signals are extinguished by design or by accident." (*Chowdhury, supra,* 38 Cal.App.4th at p. 1195, internal citations omitted.)

- "Although section 830.4 … provides that a condition of public property is not a dangerous one merely because of the failure to provide regulatory traffic control signals, the absence of such signals for the protection of pedestrians must be taken into consideration, together with other factors. … [T]he lack of crosswalk markings, better illumination and warning signs became important factors in the case when the [pedestrian] subway itself was in a dangerous condition." (*Gardner v. City of San Jose* (1967) 248 Cal.App.2d 798, 803 [57 Cal.Rptr. 176].)

- "In short, a dangerous condition proven to exist, for reasons other than or in addition to the mere failure to provide the controls or markings described in section 830.4, may constitute a proximate cause of injury without regard to whether such condition also constitutes a 'trap,' as described by section 830.8, to one using the public improvement with due care because of the failure to post signs different from those dealt with by section 830.4 warning of that dangerous condition." (*Washington, supra*, 219 Cal.App.3d at p. 1537.)

Secondary Sources

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, § 176
- CALIFORNIA TORTS, Ch. 61, *Particular Liabilities and Immunities of Public Entities and Public Employees*, § 61.03[4] (Matthew Bender)
- 2 California Government Tort Liability Practice (Cont.Ed.Bar 4th ed. 1999), § 12.75
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 421, *Premises Liability* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 178, *Premises Liability* (Matthew Bender)

1121
Failure to Provide Traffic Warning Signals, Signs, or Markings
(Gov. Code, § 830.8)

A public entity is not responsible for harm caused by the lack of a [*insert relevant warning device***] unless a reasonably careful person would not notice or anticipate a dangerous condition of property without the [***insert relevant warning device***].**

SOURCES AND AUTHORITY

- Government Code section 830.8 provides: "Neither a public entity nor a public employee is liable under this chapter for an injury caused by the failure to provide traffic or warning signals, signs, markings or devices described in the Vehicle Code. Nothing in this section exonerates a public entity or public employee from liability for injury proximately caused by such failure if a signal, sign, marking or device (other than one described in Section 830.4) was necessary to warn of a dangerous condition which endangered the safe movement of traffic and which would not be reasonably apparent to, and would not have been anticipated by, a person exercising due care."

- "Section 830.8 provides a limited immunity for public entities exercising their discretion in the placement of warning signs described in the Vehicle Code. 'The broad discretion allowed a public entity in the placement of road control signs is limited, however, by the requirement that there be adequate warning of dangerous conditions not reasonably apparent to motorists.' Thus where the failure to post a warning sign results in a concealed trap for those exercising due care, section 830.8 immunity does not apply." (*Kessler v. State of California* (1988) 206 Cal.App.3d 317, 321–322 [253 Cal.Rptr. 537], internal citations omitted.)

- "A public entity may be liable for accidents proximately caused by its failure to provide a signal, sign, marking or device to warn of a dangerous condition which endangers the safe movement of traffic 'and which would not be reasonably apparent to, and would not have been anticipated by, a person exercising due care.' This 'concealed trap' statute applies to accidents proximately caused when, for example, the public entity fails to post signs warning of a sharp or poorly banked curve ahead on its road or of a hidden intersection behind a promontory, or where a design defect in the roadway causes moisture to freeze and create an icy road surface, a fact known to the public entity but not to unsuspecting motorists, or where road work is being performed on a highway." (*Chowdhury v. City of Los Angeles* (1995) 38 Cal.App.4th 1187, 1196–1197 [45 Cal.Rptr.2d 657], internal citations omitted.)

- "[W]arning devices are required under Government Code section 830.8 only if a dangerous condition exists." (*Callahan v. City and County of San Francisco* (1971) 15 Cal.App.3d 374, 380 [93 Cal.Rptr. 122].)

Secondary Sources

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 176–177
- CALIFORNIA TORTS, Ch. 61, *Particular Liabilities and Immunities of Public Entities and Public Employees*, § 61.03[4] (Matthew Bender)
- 2 California Government Tort Liability Practice (Cont.Ed.Bar 4th ed. 1999), §§ 12.76–12.79
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 421, *Premises Liability* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 178, *Premises Liability* (Matthew Bender)

1122
Affirmative Defense—Weather Conditions Affecting Streets and Highways (Gov. Code, § 831)

[*Name of defendant***] claims it cannot be held responsible for [***name of plaintiff***]'s harm because the harm was caused by [***insert weather condition, e.g., fog, wind, rain, flood, ice or snow***] affecting the use of a public street or highway. To succeed, [***name of defendant***] must prove both of the following:**

1. **That [***insert weather condition, e.g., fog, wind, rain, flood, ice, or snow***] affecting the use of a public street or highway was the cause of [***name of plaintiff***]'s harm; and**

2. **That a reasonably careful person using the public streets and highways would have noticed the [***insert weather condition, e.g., fog, wind, rain, flood, ice or snow***] and anticipated its effect on the use of the street or highway.**

DIRECTIONS FOR USE

The immunity provided by Government Code section 831 does not apply to: effects that would not be reasonably apparent to and anticipated by a person exercising reasonable care, (2) situations where the weather effect combines with other factors that make the road dangerous, (3) sunlight that blinds drivers, or (4) where the weather conditions resulted in physical damage to or deterioration of the street or highway. (See *Erfurt v. State of California* (1983) 141 Cal.App.3d 837, 845–846 [190 Cal.Rptr. 569], and *Flournoy v. State of California* (1969) 275 Cal.App.2d 806, 814 [80 Cal.Rptr. 485].)

SOURCES AND AUTHORITY

- Government Code section 831 provides: "Neither a public entity nor a public employee is liable for an injury caused by the effect on the use of streets and highways of weather conditions as such. Nothing in this section exonerates a public entity or public employee from liability for injury proximately caused by such effect if it would not be reasonably apparent to, and would not be anticipated by, a person exercising due care. For the purpose of this section, the effect on the use of streets and highways of weather conditions includes the effect of fog, wind, rain, flood, ice or snow but does not include physical damage to or deterioration of streets and highways resulting from weather conditions."

- Weather immunity is an affirmative defense. (See *Bossi v. State of California* (1981) 119 Cal.App.3d 313, 321 [174 Cal.Rptr. 93] [jury properly instructed regarding

section 831, but issue was moot because jury did not reach it]; see also *Allyson v. Department of Transportation* (1997) 53 Cal.App.4th 1304, 1319 [62 Cal.Rptr.2d 490].)

- CalTrans's duty regarding transitory conditions affecting road surface and highway safety is discretionary, not mandatory. (*Allyson, supra,* 53 Cal.App.4th at p. 1319.) Accordingly, section 831 immunity is available to CalTrans in appropriate circumstances. (*Id*. at pp. 1320–1321.)

Secondary Sources

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, § 190
- CALIFORNIA TORTS, Ch. 61, *Particular Liabilities and Immunities of Public Entities and Public Employees*, § 61.03[5] (Matthew Bender)
- 2 California Government Tort Liability Practice (Cont.Ed.Bar 4th ed. 1999), §§ 12.80–12.81
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 421, *Premises Liability* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 178, *Premises Liability* (Matthew Bender)

1123
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 plan[s] or design[s] had become dangerous because of a change in physical conditions;**

2. **That [***name of defendant***] had notice 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***] was unable to correct the condition due to practical impossibility or lack of funds but did not reasonably attempt to provide adequate warnings of the dangerous condition.]**

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.

Users should include instructions 1102, *Definition of "Dangerous Condition,"* and 1103, *Notice (Gov. Code, § 835.2),* to define "notice" and "dangerous condition" in connection with this instruction. Additionally, the meaning and legal requirements for a "change of physical condition" have been the subject of numerous decisions involving specific contexts. Appropriate additional instructions to account for these decisions may be necessary.

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 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.)

<u>Secondary Sources</u>

- CALIFORNIA TORTS, Ch. 61, *Particular Liabilities and Immunities of Public Entities and Public Employees*, § 61.03[3][b] (Matthew Bender)

- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 421, *Premises Liability* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 178, *Premises Liability* (Matthew Bender)

VF-1100
Dangerous Condition of Public Property

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] own [or control] the property?**

___Yes ___No

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

2. Was the property in a dangerous condition at the time of the incident?

___Yes ___No

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

3. Did the dangerous condition create a reasonably foreseeable risk that this kind of incident would occur?

___Yes ___No

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

4. [Did the negligent or wrongful conduct of [*name of defendant***]'s employee acting within the scope of [his/her] employment create the dangerous condition?]**

[or]

[Did [*name of defendant***] have notice of the dangerous condition for a long enough time for [***name of defendant***] to have protected against it?]**

___Yes ___No

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

5. Was the dangerous condition 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: _____

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

DIRECTIONS FOR USE

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

This verdict form is based on Instruction 1100, *Essential Factual Elements (Gov. Code, § 835).*

If specificity is not required, users do not have to itemize all the damages listed in question 6. The breakdown is optional; depending on the circumstances, users may wish to break down the damages even further. If there are multiple causes of action, users may wish to combine the individual forms into one form. This form may be modified if the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest on specific losses that occurred prior to judgment.

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

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] own [or control] the property?**

   ___Yes ___No

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

2. **Was the property in a dangerous condition at the time of the incident?**

   ___Yes ___No

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

3. **Did the dangerous condition create a reasonably foreseeable risk that this kind of incident would occur?**

   ___Yes ___No

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

4. **[Did the negligent or wrongful conduct of [***name of defendant***]'s employee acting within the scope of [his/her] employment create the dangerous condition?]**

   [or]

   [Did [*name of defendant***] have notice of the dangerous condition for a long enough time to have protected against it?]**

   ___Yes ___No

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

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

   [or]

   [Was [*name of defendant***] acting reasonably in failing to take sufficient steps to protect against the risk of injury?]**

   ___Yes ___No

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

6. **Was the dangerous condition a substantial factor in causing harm to [***name of plaintiff***]?**

   ___Yes ___No

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

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

[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:]	**$_____]**
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:]	**$_____]**
[c. Past noneconomic loss, including [physical pain/mental suffering:]	**$_____]**
[d. Future noneconomic loss, including [physical pain/mental suffering:]	**$_____]**
	TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

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

DIRECTIONS FOR USE

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

This verdict form is based on Instruction 1100, *Essential Factual Elements (Gov. Code, § 835);* Instruction 1111, *Affirmative Defenses—Condition Created by Reasonable Act or Omission (Gov. Code, § 835.4(a));* and Instruction 1112, *Affirmative Defenses—Reasonable Act or Omission to Correct (Gov. Code, § 835.4(b)).*

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

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

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

1200
Strict Liability
Essential Factual Elements

[*Name of plaintiff***] claims that [he/she] was harmed by a product [distributed/ manufactured/sold] by [***name of defendant***] that:**

[contained a manufacturing defect;] [or]

[was defectively designed;] [or]

[did not include sufficient [instructions] [or] [warning of potential safety hazards].]

SOURCES AND AUTHORITY

- The Supreme Court recently stated the doctrine of strict products liability as follows: "A manufacturer, distributor, or retailer is liable in tort if a defect in the manufacture or design of its product causes injury while the product is being used in a reasonably foreseeable way." (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 560 [34 Cal.Rptr.2d 607] internal citations omitted.)

- "Strict liability has been invoked for three types of defects: manufacturing defects, design defects, and 'warning defects,' i.e., inadequate warnings or failures to warn." (*Anderson v. Owens-Corning Fiberglass Corp.* (1991) 53 Cal.3d 987, 995 [281 Cal.Rptr. 528].)

- The doctrine was originally stated as follows: "A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being. … The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves." (*Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, 62–63 [27 Cal.Rptr. 697].)

- Strict products liability applies to manufacturers, distributors, lessors, and bailors. (*Price v. Shell Oil Co.* (1970) 2 Cal.3d 245, 251–252 [85 Cal.Rptr. 178].)

<u>Secondary Sources</u>

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1241–1249

- CALIFORNIA PRODUCTS LIABILITY ACTIONS, Ch. 2, *Liability for Defective Products*, § 2.10 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 460, *Products Liability*, § 460.11 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 190, *Products Liability* (Matthew Bender)

1201
Strict Liability
Manufacturing Defect—Essential Factual Elements

[*Name of plaintiff***] claims that the [***product***] contained a manufacturing defect. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] [manufactured/distributed/sold] the [***product***];**

2. **That the [***product***] contained a manufacturing defect when it left [***name of defendant***]'s possession;**

3. **That the [***product***] was used [or misused] in a way that was reasonably foreseeable to [***name of defendant***];**

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

5. **That the [***product***]'s defect was a substantial factor in causing [***name of plaintiff***]'s harm.**

DIRECTIONS FOR USE

The following may be added as an additional element after element #2 in cases where it is alleged that the product was changed after it left the defendant's possession but in a manner that was foreseeable:

> That any changes made to the [*product*] after it left [*name of defendant*]'s possession were reasonably foreseeable to [*name of defendant*];

Some cases state that product misuse must be pleaded as an affirmative defense (see, e.g., *Williams v. Beechnut Nutrition Corp.* (1986) 185 Cal.App.3d 135, 141 [229 Cal.Rptr. 605].) However, the subcommittee feels that absence of unforeseeable misuse is an element of plaintiff's claim and that foreseeable misuse is more properly asserted by defendant in support of a claim of contributory negligence. But see below:

- "[P]roduct misuse [is] a defense to strict products liability only when the defendant prove[s] that an unforeseeable abuse or alteration of the product after it left the manufacturer's hands was the sole reason that the product caused injury." (*Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 56 [148 Cal.Rptr. 596], internal citations omitted.)

- " 'Misuse' is a defense only when that misuse is the actual cause of the plaintiff's injury, not when some other defect produces the harm. This causation is one of the elements of the 'misuse' affirmative defense and thus the burden falls on the defendant to prove it." (*Huynh v. Ingersoll-Rand* (1993) 16 Cal.App.4th 825, 831 [20 Cal.Rptr.2d 296], internal citation omitted.)

SOURCES AND AUTHORITY

- " 'Regardless of the theory which liability is predicated upon … it is obvious that to hold a producer, manufacturer, or seller liable for injury caused by a particular product, there must first be proof that the defendant produced, manufactured, sold, or was in some way responsible for the product … .' " (*Garcia v. Joseph Vince Co.* (1978) 84 Cal.App.3d 868, 874 [148 Cal.Rptr. 843], internal citation omitted.)

- "[W]here a plaintiff alleges a product is defective, proof that the product has malfunctioned is essential to establish liability for an injury caused by the defect." (*Khan v. Shiley Inc.* (1990) 217 Cal.App.3d 848, 855 [266 Cal.Rptr. 106].)

- In California, there is no requirement that the plaintiff prove that the defect made the product "unreasonably dangerous." (*Cronin v. J.B.E. Olson Corp.* (1972) 8 Cal.3d 121, 134-135 [104 Cal.Rptr. 433].) Also, the plaintiff does not have to prove that he or she was unaware of the defect. (*Luque v. McLean* (1972) 8 Cal.3d 136, 146 [104 Cal.Rptr. 443].)

- "We agree that strict liability should not be imposed upon a manufacturer when injury results from a use of its product that is not reasonably foreseeable. Although a collision may not be the 'normal' or intended use of a motor vehicle, vehicle manufacturers must take accidents into consideration as reasonably foreseeable occurrences involving their products." (*Cronin, supra,* 8 Cal.3d at p. 126, internal citations omitted.)

- "[T]he law now requires a manufacturer to foresee some degree of misuse and abuse of his product, either by the user or by third parties, and to take reasonable precautions to minimize the harm that may result from misuse and abuse." (*Self v. General Motors Corp.* (1974) 42 Cal.App.3d 1, 7 [116 Cal.Rptr. 575], disapproved and overruled on another issue in *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 580 [34 Cal.Rptr.2d 607].)

- "[A] manufacturer may be held liable where the alteration of the machine or its misuse by the customer was reasonably foreseeable. … It has been held repeatedly that the foreseeability of the misuse of a product is a question for the trier of the facts." (*Thompson v. Package Machinery Co.* (1972) 22 Cal.App.3d 188, 196 [99 Cal.Rptr. 281], internal citations omitted.)

- "A manufacturer is liable only when a defect in its product was a legal cause of injury. A tort is a legal cause of injury only when it is a substantial factor in producing the injury." (*Soule, supra,* 8 Cal.4th at p. 572, internal citations omitted.)

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1241–1249
- CALIFORNIA PRODUCTS LIABILITY ACTIONS, Ch. 2, *Liability for Defective Products,* § 2.11, Ch. 7, *Proof,* § 7.06 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 460, *Products Liability,* §§ 460.11, 460.30 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 190, *Products Liability* (Matthew Bender)

1202
Strict Liability
"Manufacturing Defect" Explained

A product contains a manufacturing defect if the product differs from the manufacturer's design or specifications or from other typical units of the same product line.

SOURCES AND AUTHORITY

- The Supreme Court has defined a manufacturing defect as follows: "In general, a manufacturing or production defect is readily identifiable because a defective product is one that differs from the manufacturer's intended result or from other ostensibly identical units of the same product line." (*Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413, 429 [143 Cal.Rptr. 225].)

- "[A] defective product is viewed as one which fails to match the quality of most like products, and the manufacturer is then liable for injuries resulting from deviations from the norm … ." (*Jiminez v. Sears, Roebuck & Co.* (1971) 4 Cal.3d 379, 383 [93 Cal.Rptr. 769].)

1203
Strict Liability
Design Defect—Consumer Expectation Test—Essential Factual Elements

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[*Name of plaintiff*] claims the [*product*]'s design was defective because the [*product*] did not perform as safely as an ordinary consumer would have expected it to perform. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] [manufactured/distributed/sold] the [*product*];**

2. **[That, at the time of the use, the [*product*] was substantially the same as when it left [*name of defendant*]'s possession;]**

   [or]

   [That any changes made to the [*product*] after it left [*name of defendant*]'s possession were reasonably foreseeable to [*name of defendant*];]

3. **That the [*product*] did not perform as safely as an ordinary consumer would have expected at the time of use;**

4. **That the [*product*] was used [or misused] in a way that was reasonably foreseeable to [*name of defendant*];**

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

6. **That the [*product*]'s design was a substantial factor in causing [*name of plaintiff*]'s harm.**

DIRECTIONS FOR USE

If both tests (the consumer expectation test and the risk-benefit test) for design defect are asserted by the plaintiff, the burden-of-proof instructions must make it clear that the two tests are alternatives. (*Bracisco v. Beech Aircraft Corp.* (1984) 159 Cal.App.3d 1101, 1106–1107.)

Some cases state that product misuse must be pleaded as an affirmative defense (see, e.g., *Williams v. Beechnut Nutrition Corp.* (1986) 185 Cal.App.3d 135, 141 [229 Cal.Rptr. 605].) However, the subcommittee feels that absence of unforeseeable misuse is an element of plaintiff's claim and that foreseeable misuse is more properly asserted by defendant in support of a claim of contributory negligence. But see below:

- "[P]roduct misuse [is] a defense to strict products liability only when the defendant prove[s] that an unforeseeable abuse or alteration of the product after it left the manufacturer's hands was the sole reason that the product caused injury." (*Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 56 [148 Cal.Rptr. 596], internal citation omitted.)

- " 'Misuse' is a defense only when that misuse is the actual cause of the plaintiff's injury, not when some other defect produces the harm. This causation is one of the elements of the 'misuse' affirmative defense and thus the burden falls on the defendant to prove it." (*Huynh v. Ingersoll-Rand* (1993) 16 Cal.App.4th 825, 831 [20 Cal.Rptr.2d 296], internal citation omitted.)

SOURCES AND AUTHORITY

- In *Barker v. Lull Engineering* (1978) 20 Cal.3d 413 [143 Cal.Rptr. 225], the court established two alternative tests for determining whether a product is defectively designed. Under the first test, a product may be found defective in design if the plaintiff demonstrates that the product "failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner." (*Id*. at p. 429.) Under the second test, a product is defective if the risk of danger inherent in the design outweighs the benefits of such design. (*Id*. at p. 430.)

- "[The] dual standard for design defect assures an injured plaintiff protection from products that either fall below ordinary consumer expectations as to safety or that, on balance, are not as safely designed as they should be." (*Barker, supra,* 20 Cal.3d at p. 418.)

- The consumer expectation test "acknowledges the relationship between strict tort liability for a defective product and the common law doctrine of warranty, which holds that a product's presence on the market includes an implied representation 'that it [will] safely do the jobs for which it was built.' " (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 562 [34 Cal.Rptr.2d 607], internal citations omitted.)

- Use of this instruction is limited by the following principles: "[T]he jury may not be left free to find a violation of ordinary consumer expectations whenever it chooses. Unless the facts actually permit an inference that the product's performance did not meet the minimum safety expectations of its ordinary users, the jury must engage in the balancing of risks and benefits required by the second prong of *Barker*. Accordingly, as *Barker* indicated, instructions are misleading and incorrect if they allow a jury to avoid this risk-benefit analysis in a case where it is required." (*Soule, supra,* 8 Cal.4th at p. 568.)

- The consumer expectation test "is reserved for cases in which the everyday experience of the product's users permits a conclusion that the product's design violated minimum safety assumptions, and is thus defective regardless of expert opinion about the merits of the design." (*Soule, supra,* 8 Cal.4th at p. 567.)

- "In determining whether a product's safety satisfies [the consumer expectation test], the jury considers the expectations of a hypothetical reasonable consumer, rather than those of the particular plaintiff in the case." (*Campbell v. General Motors Corp.* (1982) 32 Cal.3d 112, 126 fn. 6 [184 Cal.Rptr. 891].)

- State-of-the-art evidence is not relevant when the plaintiff relies on a consumer expectation theory of design defect. (*Morton v. Owens-Corning Fiberglass Corp.* (1995) 33 Cal.App.4th 1529, 1536 [40 Cal.Rptr.2d 22].)

- "[T]he law now requires a manufacturer to foresee some degree of misuse and abuse of his product, either by the user or by third parties, and to take reasonable precautions to minimize the harm that may result from misuse and abuse." (*Self v. General Motors Corp.* (1974) 42 Cal.App.3d 1, 7 [116 Cal.Rptr. 575], disapproved and overruled on another issue in *Soule, supra*, 8 Cal.4th at p. 580.)

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1254–1264
- CALIFORNIA PRODUCTS LIABILITY ACTIONS, Ch. 2, *Liability for Defective Products*, § 2.11, Ch. 7, *Proof*, § 7.02 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 460, *Products Liability*, § 460.11 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 190, *Products Liability* (Matthew Bender)

1204
Strict Liability
Design Defect—Risk-Benefit Test
Essential Factual Elements—Shifting Burden of Proof

[*Name of plaintiff***] claims that the [***product***]'s design caused harm to [***name of plaintiff***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] [manufactured/distributed/sold] the [***product***];**

2. **[That, at the time of the use, the [***product***] was substantially the same as when it left [***name of defendant***]'s possession;]**

   [or]

   [That any changes made to the [*product***] after it left [***name of defendant***]'s possession were reasonably foreseeable to [***name of defendant***];]**

3. **That the [***product***] was used [or misused] in a way that was reasonably foreseeable to [***name of defendant***]; and**

4. **That the [***product***]'s design was a substantial factor in causing harm to [***name of plaintiff***].**

If [*name of plaintiff***] has proved these four facts, then your decision on this claim must be for [***name of plaintiff***] unless [***name of defendant***] proves that the benefits of the design outweigh the risks of the design. In deciding whether the benefits outweigh the risks, you should consider the following:**

(a) The gravity of the potential harm resulting from the use of the [*product***];**

(b) The likelihood that such harm would occur;

(c) The feasibility of an alternative design;

(d) The cost of an alternative design;

(e) The disadvantages of an alternative design;

(f) [*Other relevant factor(s)***].**

DIRECTIONS FOR USE

If both tests for design defect (the consumer expectation test and the risk-benefit test) are asserted by the plaintiff, the instructions must make it clear that the two tests are alternatives. (*Bracisco v. Beech Aircraft Corp.* (1984) 159 Cal.App.3d 1101, 1106-1107 [206 Cal.Rptr. 431].)

Some cases state that product misuse must be pleaded as an affirmative defense (see, e.g., *Williams v. Beechnut Nutrition Corp.* (1986) 185 Cal.App.3d 135, 141 [229 Cal.Rptr. 605].) However, the subcommittee feels that absence of unforeseeable misuse is an element of plaintiff's claim and that foreseeable misuse is more properly asserted by defendant in support of a claim of contributory negligence. But see below:

- "[P]roduct misuse [is] a defense to strict products liability only when the defendant prove[s] that an unforeseeable abuse or alteration of the product after it left the manufacturer's hands was the sole reason that the product caused injury." (*Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 56 [148 Cal.Rptr. 596], internal citations omitted.)

- " 'Misuse' is a defense only when that misuse is the actual cause of the plaintiff's injury, not when some other defect produces the harm. This causation is one of the elements of the 'misuse' affirmative defense and thus the burden falls on the defendant to prove it." (*Huynh v. Ingersoll-Rand* (1993) 16 Cal.App.4th 825, 831 [20 Cal.Rptr.2d 296], internal citation omitted.)

SOURCES AND AUTHORITY

- Under the risk-benefit test, the plaintiff does not have to prove the presence of a defect. Rather, once the plaintiff makes a prima facie showing that the product's design caused the injury, the burden shifts to the defendant to prove the design was not defective. A jury instruction stating that the plaintiff had the burden of proving that a design was defective in a case based on the risk-benefit test was held to be error in *Moreno v. Fey Manufacturing Corp.* (1983) 149 Cal.App.3d 23, 27 [196 Cal.Rptr. 487], and in *Lunghi v. Clark Equipment Co., Inc.* (1984) 153 Cal.App.3d 485, 498 [200 Cal.Rptr. 387].

- The jury should be directed to consider several factors in deciding whether the risks of a design outweigh its benefits. Among the relevant factors are: "the gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design." (*Bernal v. Richard Wolf Medical Instruments Corp.* (1990) 221 Cal.App.3d 1326, 1331–1332 [272 Cal.Rptr. 41], internal citation omitted, disapproved and overruled on another point in *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 580 [34 Cal.Rptr.2d 607].)

- The plaintiff does not have to prove the existence of a feasible alternative design. (*Bernal, supra,* 221 Cal.App.3d at p. 1335.)

- This instruction should not be used in connection with the consumer expectation test for design defect: "Risk-benefit weighing is not a formal part of, nor may it serve as a 'defense' to, the consumer expectations test." (*Bresnahan v. Chrysler Corp.* (1995) 32 Cal.App.4th 1559, 1569 [38 Cal.Rptr.2d 446], internal citation omitted.)

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1254–1264
- CALIFORNIA PRODUCTS LIABILITY ACTIONS, Ch. 7, *Proof*, § 7.02 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 460, *Products Liability*, § 460.11 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 190, *Products Liability* (Matthew Bender)

1205
Strict Liability
Failure to Warn—Essential Factual Elements

[*Name of plaintiff***] claims that the [***product***] lacked sufficient [instructions] [or] [warning of potential [risks/side effects/allergic reactions]]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] [manufactured/distributed/sold] the [***product***];**

2. **That the [***product***] had potential [risks/side effects/allergic reactions] that were [known] [or] [knowable by the use of scientific knowledge available] at the time of [manufacture/distribution/sale];**

3. **That the potential [risks/side effects/allergic reactions] presented a substantial danger to users of the [***product***];**

4. **That ordinary consumers would not have recognized the potential [risks/side effects/allergic reactions];**

5. **That [***name of defendant***] failed to adequately warn [or instruct] of the potential [risks/side effects/allergic reactions];**

6. **That the [***product***] was used [or misused] in a way that was reasonably foreseeable to [***name of defendant***];**

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

8. **That lack of sufficient [instructions] [or] [warnings] was a substantial factor in causing [***name of plaintiff***]'s harm.**

[The warning must be given to the prescribing physician and must include the potential risks, side effects, or allergic reactions that may follow the foreseeable use of the product. [*Name of defendant***] had a continuing duty to warn physicians as long as the product was in use.]**

DIRECTIONS FOR USE

A fuller definition of "scientific knowledge" may be appropriate in certain cases. Such a definition would advise that the defendant did not adequately warn of a potential risk, side effect, or allergic reaction that was "knowable in light of the generally recognized

and prevailing best scientific and medical knowledge available." (*Carlin v. Superior Court* (1996) 13 Cal.4th 1104, 1112 [56 Cal.Rptr.2d 162].)

The last bracketed paragraph should be read only in prescription product cases: "In the case of prescription drugs and implants, the physician stands in the shoes of the 'ordinary user' because it is through the physician that a patient learns of the properties and proper use of the drug or implant. Thus, the duty to warn in these cases runs to the physician, not the patient." (*Valentine v. Baxter Healthcare Corp.* (1999) 68 Cal.App.4th 1467 [81 Cal.Rptr.2d 252].)

Some cases state that product misuse must be pleaded as an affirmative defense (see, e.g., *Williams v. Beechnut Nutrition Corp.* (1986) 185 Cal.App.3d 135, 141 [229 Cal.Rptr. 605].) However, the subcommittee feels that absence of unforeseeable misuse is an element of plaintiff's claim and that foreseeable misuse is more properly asserted by defendant in support of a claim of contributory negligence. But see below:

- "[P]roduct misuse [is] a defense to strict products liability only when the defendant prove[s] that an unforeseeable abuse or alteration of the product after it left the manufacturer's hands was the sole reason that the product caused injury." (*Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 56 [148 Cal.Rptr. 596], internal citations omitted.)

- " 'Misuse' is a defense only when that misuse is the actual cause of the plaintiff's injury, not when some other defect produces the harm. This causation is one of the elements of the 'misuse' affirmative defense and thus the burden falls on the defendant to prove it." (*Huynh v. Ingersoll-Rand* (1993) 16 Cal.App.4th 825, 831 [20 Cal.Rptr.2d 296], internal citation omitted.)

SOURCES AND AUTHORITY

- "[A] manufacturer or a supplier of a product is required to give warnings of any dangerous propensities in the product, or in its use, of which he knows, or should know, and which the user of the product would not ordinarily discover." (*Groll v. Shell Oil Co.* (1983) 148 Cal.App.3d 444, 448 [196 Cal.Rptr. 52], internal citations omitted.)

- "Even though the product is flawlessly designed and manufactured, it may be found defective within the general strict liability rule and its manufacturer or supplier held strictly liable because of the failure to provide an adequate warning." (*Persons v. Salomon North America, Inc.* (1990) 217 Cal.App.3d 168, 174 [265 Cal.Rptr. 773], internal citations omitted.)

- "Strict liability is not concerned with the standard of due care or the reasonableness of a manufacturer's conduct. The rules of strict liability require a plaintiff to prove only that the defendant did not adequately warn of a particular risk that was known or knowable in light of the generally recognized and prevailing best scientific and

medical knowledge available at the time of manufacture and distribution. … [T]he manufacturer is liable if it failed to give warning of dangers that were known to the scientific community at the time it manufactured or distributed the product." (*Anderson v. Owens-Corning Fiberglass Corp.* (1991) 53 Cal.3d 987, 1002–1003 [281 Cal.Rptr. 528].)

- "The actual knowledge of the individual manufacturer, even if reasonably prudent, is not the issue. We view the standard to require that the manufacturer is held to the knowledge and skill of an expert in the field; it is obliged to keep abreast of any scientific discoveries and is presumed to know the results of all such advances." (*Carlin v. Superior Court* (1996) 13 Cal.4th 1104, 1113, n. 3 [56 Cal.Rptr.2d 162].)

- "[A] defendant in a strict products liability action based upon an alleged failure to warn of a risk of harm may present evidence of the state of the art, i.e., evidence that the particular risk was neither known nor knowable by the application of scientific knowledge available at the time of manufacture and/or distribution." (*Anderson, supra,* 53 Cal.3d at p. 1004.)

- "[T]here can be no liability for failure to warn where the instructions or warnings sufficiently alert the user to the possibility of danger." (*Aguayo v. Crompton & Knowles Corp.* (1986) 183 Cal.App.3d 1032, 1042 [228 Cal.Rptr. 768], internal citation omitted.)

- "A duty to warn or disclose danger arises when an article is or should be known to be dangerous for its intended use, either inherently or because of defects." (*DeLeon v. Commercial Manufacturing and Supply Co.* (1983) 148 Cal.App.3d 336, 343 [195 Cal.Rptr. 867], internal citation omitted.)

- "California is well settled into the majority view that knowledge, actual or constructive, is a requisite for strict liability for failure to warn … ." (*Anderson, supra,* 53 Cal.3d at p. 1000.)

- "[T]he duty to warn is not conditioned upon [actual or constructive] knowledge [of a danger] where the defectiveness of a product depends on the adequacy of instructions furnished by the supplier which are essential to the assembly and use of its product." (*Midgley v. S.S. Kresge Co.* (1976) 55 Cal.App.3d 67, 74 [127 Cal.Rptr. 217].)

- Under *Cronin*, plaintiffs in cases involving manufacturing and design defects do not have to prove that a defect made a product unreasonably dangerous; however, that case "did not preclude weighing the degree of dangerousness in the failure to warn cases." (*Cavers v. Cushman Motor Sales, Inc.* (1979) 95 Cal.App.3d 338, 343 [157 Cal.Rptr. 142].)

- "[T]he warning requirement is not limited to unreasonably or unavoidably dangerous products. Rather, directions or warnings are in order where reasonably required to prevent the use of a product from becoming unreasonably dangerous. It is the lack of

such a warning which renders a product unreasonably dangerous and therefore defective." (*Gonzales v. Carmenita Ford Truck Sales, Inc.* (1987) 192 Cal.App.3d 1143, 1150.)

- "In most cases, … the adequacy of a warning is a question of fact for the jury. (*Jackson v. Deft, Inc.* (1990) 223 Cal.App.3d 1305, 1320 [273 Cal.Rptr. 214].)

- "[A] pharmaceutical manufacturer may not be required to provide warning of a risk known to the medical community." (*Carlin, supra,* 13 Cal.4th at p. 1111.)

- "We are aware of no authority which requires a manufacturer to warn of a risk which is readily known and apparent to the consumer, in this case the physician." (*Plenger v. Alza Corp*. (1992) 11 Cal.App.4th 349, 362 [13 Cal.Rptr.2d 811].)

- "A manufacturer's duty to warn is a continuous duty which lasts as long as the product is in use. … [T]he manufacturer must continue to provide physicians with warnings, at least so long as it is manufacturing and distributing the product." (*Valentine v. Baxter Healthcare Corp.* (1999) 68 Cal.App.4th 1467, 1477 [81 Cal.Rptr.2d 252].)

- "[T]he law now requires a manufacturer to foresee some degree of misuse and abuse of his product, either by the user or by third parties, and to take reasonable precautions to minimize the harm that may result from misuse and abuse." (*Self v. General Motors Corp.* (1974) 42 Cal.App.3d 1, 7 [116 Cal.Rptr. 575], disapproved and overruled on another issue in *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 580 [34 Cal.Rptr.2d 607].)

<u>Secondary Sources</u>

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1265–1271
- CALIFORNIA PRODUCTS LIABILITY ACTIONS, Ch. 2, *Liability for Defective Products,* § 2.11, Ch. 7, *Proof*, § 7.05 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 460, *Products Liability*, §§ 460.11, 460.164 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 190, *Products Liability* (Matthew Bender)

1206
Strict Liability
Failure to Warn—Products Containing Allergens (not Prescription Drugs)
Essential Factual Elements

[*Name of plaintiff***] claims that the [***product***] was defective because it lacked sufficient warnings of potential allergic reactions. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] [manufactured/distributed/sold] the [***product***];**

2. **That a substantial number of people are allergic to an ingredient in the [***product***];**

3. **That the danger of the ingredient is not generally known, or, if known, the ingredient is one that a consumer would not reasonably expect to find in the [***product***];**

4. **That [***name of defendant***] knew or, by the use of scientific knowledge available at the time, should have known of the ingredient's danger and presence;**

5. **That [***name of defendant***] failed to provide sufficient warnings concerning the ingredient's danger or presence;**

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

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

DIRECTIONS FOR USE

A fuller definition of "scientific knowledge" may be appropriate in certain cases. Such a definition would advise that the defendant did not adequately warn of a potential risk, side effect, or allergic reaction that was "knowable in light of the generally recognized and prevailing best scientific and medical knowledge available," (*Carlin v. Superior Court* (1996) 13 Cal.4th 1104, 1112 [56 Cal.Rptr.2d 162]), and "knowable by the application of reasonable, developed human skill and foresight." (*Livingston v. Marie Callender's Inc.* (1999) 72 Cal.App.4th 830, 839 [85 Cal.Rptr.2d 528].)

SOURCES AND AUTHORITY

- This instruction is based on the holding in *Livingston v. Marie Callender's, Inc.* (1999) 72 Cal.App.4th 830, 838–839 [85 Cal.Rptr.2d 528], adopting Restatement Second of Torts section 402A, comment j, and Restatement Third of Torts: Products Liability, section 2, comment k in cases involving allergic reactions.

- "California has adopted the Restatement Second of Torts, section 402A, comment j application of strict tort liability failure to warn in the case of allergies. Several Court of Appeal decisions in the context of allergic reactions to non-food products are consistent with or have expressly adopted comment j." (*Livingston, supra*, 72 Cal.App.4th at p. 838.)

- Restatement Second of Torts section 402A, comment j states: "In order to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warning, on the container, as to its use. The seller may reasonably assume that those with common allergies, as for example to eggs or strawberries, will be aware of them, and he is not required to warn against them. Where, however, the product contains an ingredient to which a substantial number of the population are allergic, and the ingredient is one whose danger is not generally known, or if known is one which the consumer would reasonably not expect to find in the product, the seller is required to give warning against it, if he has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge, of the presence of the ingredient and the danger. Likewise in the case of poisonous drugs, or those unduly dangerous."

- "[A] defendant may be liable to a plaintiff who suffered an allergic reaction to a product on a strict liability failure to warn theory when: the defendant's product contained an ingredient to which a substantial number of the population are allergic; the ingredient 'is one whose danger is not generally known, or if known is one which the consumer would reasonably not expect to find in the product'; and where the defendant knew or by the application of reasonable developed human skill and foresight should have know[n], of the presence of the ingredient and the danger.' " (*Livingston, supra*, 72 Cal.App.4th at p. 839.)

- "The recently adopted Restatement Third of Torts: Products Liability, section 2, comment k, similarly states: 'Cases of adverse allergic or idiosyncratic reactions involve a special subset of products that may be defective because of inadequate warnings ... . [¶] The general rule in cases involving allergic reactions is that a warning is required when the harm-causing ingredient is one to which a substantial number of persons are allergic.' Further, the Restatement Third of Torts: Products Liability, section 2, comment k notes: 'The ingredient that causes the allergic reaction must be one whose danger or whose presence in the product is not generally known to consumers.. .. When the presence of the allergenic ingredient would not be anticipated by a reasonable user or consumer, warnings concerning its presence are required.' " (*Livingston, supra*, 72 Cal.App.4th 830, 838–839.)

- "Those issues [noted in the Restatement] are for the trier of fact to determine." (*Livingston, supra*, 72 Cal.App.4th at p. 840.)

- *Livingston* was a food product case; however there are several non–food product cases that are consistent with or have also expressly adopted comment j. (See *McKinnery v. Revlon, Inc.* (1992) 2 Cal.App.4th 602, 607, 608 fn. 3 [3 Cal.Rptr.2d 72] [home hair-frosting product]; *Oakes v. E.I. DuPont de Nemours & Co., Inc.* (1969) 272 Cal.App.2d 645, 649 [77 Cal.Rptr. 709] [weed killer]; *Harris v. Belton* (1968) 258 Cal.App.2d 595, 608 [65 Cal.Rptr. 808] [skin tone cream].)

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1265–1271
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 460, *Products Liability*, §§ 460.11, 460.165 (Matthew Bender)

1207
Strict Liability
Comparative Fault—Contributory Negligence

[*Name of defendant***] claims that [***name of plaintiff***]'s harm was caused, in whole or in part, by [***name of plaintiff***]'s [and/or] [***name of third person***]'s negligence. To succeed on this claim, [***name of defendant***] must prove both of the following:**

1. **[***insert one or more of the following:***]**

   [That [*name of plaintiff***] [and/or] [***name of third person***] negligently [used/misused/modified] the [product];] [or]**

   [That [*name of plaintiff***] [and/or] [***name of third person***] [was/were] [otherwise] negligent;]**

   and

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

[If the product was misused or modified in a way that was reasonably foreseeable to [*name of defendant***], [he/she/it] may still succeed on this claim if you find that the misuse or modification was negligent and was a substantial factor in causing [***name of plaintiff***]'s harm.]**

If [*name of defendant***] proves the above, [***name of plaintiff***]'s damages are reduced by your determination of the percentage of [***name of plaintiff***]'s [and/or] [***name of third person***]'s responsibility. I will calculate the actual reduction.**

DIRECTIONS FOR USE

See also instruction 405, *Plaintiff's Contributory Negligence*., instruction 406, *Apportionment of Responsibility* and instruction 407, *Decedent's Contributory Negligence* and instruction.

Give this instruction only where the defendant has raised the issue of comparative fault.

SOURCES AND AUTHORITY

- In *Daly v. General Motors Corp*. (1978) 20 Cal.3d 725, 737 [144 Cal.Rptr. 380], the California Supreme Court held that comparative fault applies to strict products

liability actions. The court explained: "[W]e do not permit plaintiff's own conduct relative to the product to escape unexamined, and as to that share of plaintiff's damages which flows from his own fault we discern no reason of policy why it should, following *Li*, be borne by others."

- "[A] petitioner's recovery may accordingly be reduced, but not barred, where his lack of reasonable care is shown to have contributed to his injury." (*Bradfield v. Trans World Airlines* (1979) 88 Cal.App.3d 681, 686 [152 Cal.Rptr. 172].)

Secondary Sources

- CALIFORNIA PRODUCTS LIABILITY ACTIONS, Ch. 8, *Defenses*, §§ 8.03, 8.04 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 460, *Products Liability*, §§ 460.53, 460.182 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 190, *Products Liability* (Matthew Bender)

1220
Negligence
Essential Factual Elements

[*Name of plaintiff***] [also] claims that [he/she] was harmed by [***name of defendant***]'s negligence and that [he/she/it] should be held responsible for that harm. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] [designed/manufactured/supplied/installed/inspected/ repaired/rented] the [***product***];**

2. **That [***name of defendant***] was negligent in [designing/manufacturing/ supplying/installing/inspecting/repairing/renting] the [***product***];**

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.**

SOURCES AND AUTHORITY

- "No valid reason appears to require a plaintiff to elect whether to proceed on the theory of strict liability in tort or on the theory of negligence. … Nor does it appear that instructions on the two theories will be confusing to the jury. There is nothing inconsistent in instructions on the two theories and to a large extent the two theories parallel and supplement each other." (*Jimenez v. Sears, Roebuck & Co.* (1971) 4 Cal.3d 379, 387 [93 Cal.Rptr. 769].)

- "The courts of this state are committed to the doctrine that the duty of care exists in the absence of privity of contract not only where the article manufactured is inherently dangerous but also where it is reasonably certain, if negligently manufactured or constructed, to place life and limb in peril." (*Sheward v. Virtue* (1942) 20 Cal.2d 410, 412 [126 P.2d 345], internal citations omitted.)

- Manufacturers or other suppliers of goods and buyers or users have a "special relationship" giving rise to an affirmative duty to assist or protect. (6 Witkin, Summary of Cal. (9th ed. 1988) §§ 858, 859, pp. 220–223.)

- Restatement Second of Torts, section 388, comment (c) provides: "These rules … apply to sellers, lessors, donors, or lenders, irrespective of whether the chattel is made by them or by a third person. They apply to all kinds of bailors. … They also apply to

one who undertakes the repair of a chattel and who delivers it back with knowledge that it is defective because of the work which he is employed to do upon it."

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 1244
- CALIFORNIA PRODUCTS LIABILITY ACTIONS, Ch. 2, *Liability for Defective Products*, § 2.20 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 460, *Products Liability*, § 460.32 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 190, *Products Liability* (Matthew Bender)

1221
Negligence
Basic Standard of Care

A [designer/manufacturer/supplier/installer/repairer] is negligent if [he/she/it] fails to use the amount of care in [designing/manufacturing/inspecting/installing/ repairing] the product that a reasonably careful [designer/manufacturer/supplier/ installer/repairer] would use in similar circumstances to avoid exposing others to a foreseeable risk of harm.

In determining whether [*name of defendant***] used reasonable care, you should balance what [***name of defendant***] knew or should have known about the likelihood and severity of potential harm from the product against the burden of taking safety measures to reduce or avoid the harm.**

DIRECTIONS FOR USE

The duty to inspect or test is included in the "knew or should have known" standard of this instruction: "If the manufacturer designs the product safely, manufactures the product safely, and provides an adequate warning of dangers inherent in the use of the product, then a failure to test the product cannot, standing alone, cause any injury. The duty to test is a subpart of the other three duties because a breach of the duty to test cannot by itself cause any injury." (*Valentine v. Baxter Healthcare Corp.* (1999) 68 Cal.App.4th 1467, 1486 [81 Cal.Rptr.2d 252], quoting *Kociemba v. G.D. Searle & Co.* (D.Minn. 1989) 707 F.Supp. 1517, 1527).)

Presumably, the judge will have already determined that the manufacturer owed the plaintiff a duty because the product was of a type that could endanger others if it was negligently made. Accordingly, that element is eliminated in this instruction.

SOURCES AND AUTHORITY

- "A manufacturer/seller of a product is under a duty to exercise reasonable care in its design so that it can be safely used as intended by its buyer/consumer." (*Williams v. Beechnut Nutrition Corp.* (1986) 185 Cal.App.3d 135, 141.) This duty " 'extends to all persons within the range of potential danger.' " (*Ibid*., internal citations omitted.)

- "In determining what precautions, if any, were required under the circumstances, the likelihood of harm, and the gravity of the harm if it happens, must be balanced against the burden of the precaution which would be effective to avoid the harm." (*Putensen v. Clay Adams, Inc.* (1970) 12 Cal.App.3d 1062, 1077–1078 [91 Cal.Rptr. 319], internal citations omitted.)

- Restatement Second of Torts section 395 provides: “A manufacturer who fails to exercise reasonable care in the manufacture of a chattel which, unless carefully made, he should recognize as involving an unreasonable risk of causing physical harm to those who use it for a purpose for which the manufacturer should expect it to be used and to those whom he should expect to be endangered by its probable use, is subject to liability for physical harm caused to them by its lawful use in a manner and for a purpose for which it is supplied.”

- In a non–res ipsa loquitur case involving a manufacturing defect only, the failure to follow *Jiminez v. Sears, Roebuck & Co.* (1971) 4 Cal.3d 379, 387 [93 Cal.Rptr. 769] by refusing to give negligence instructions does not require reversal. (*Montez v. Ford Motor Co.* (1980) 101 Cal.App.3d 315, 317 [161 Cal.Rptr. 578].)

- “[F]reedom from negligence does not inure to the manufacturer because it purchased parts from another which were defective.” (*Sheward v. Virtue* (1942) 20 Cal.2d 410, 412 [126 P.2d 345].)

- Restatement Second of Torts section 398, provides: “A manufacturer of a chattel made under a plan or design which makes it dangerous for the uses for which it is manufactured is subject to liability to others whom he should expect to use the chattel or to be endangered by its probable use for physical harm caused by his failure to exercise reasonable care in the adoption of a safe plan or design.”

- Section 398 was cited with approval in *Pike v. Frank G. Hough Co.* (1970) 2 Cal.3d 465, 470 [85 Cal.Rptr. 629].

- “What is ‘reasonable care,’ of course, varies with the facts of each case, but it involves a balancing of the likelihood of harm to be expected from a machine with a given design and the gravity of harm if it happens against the burden of the precaution which would be effective to avoid the harm.” (*Pike, supra,* 2 Cal.3d at p. 470, internal citation omitted.)

- “A danger is unreasonable when it is foreseeable, and the manufacturer's ability, actual, constructive, or potential, to forestall unreasonable danger is the measure of its duty in the design of its product.” (*Balido v. Improved Machinery, Inc.* (1972) 29 Cal.App.3d 633, 640 [105 Cal.Rptr. 890], disapproved on other grounds in *Regents of University of California v. Hartford Accident & Indemnity Co.* (1978) 21 Cal.3d 624, 641–642 [147 Cal.Rptr. 486].)

- “With respect to tests or inspections, it is well settled that where an article is such that it is reasonably certain, if negligently manufactured or designed, to place life and limb in peril, the manufacturer is chargeable with negligence if the defective condition could be disclosed by reasonable inspection and tests, and such inspection and tests are omitted.” (*Putensen, supra,* 12 Cal.App.3d at p. 1078, internal citations omitted.)

- Restatement Second of Torts section 396 provides: "A manufacturer of a chattel is subject to liability under the rules stated in sections 394 and 395 although the dangerous character or condition of the chattel is discoverable by an inspection which the seller or any other person is under a duty to the person injured to make."

- "[W]here an article is either inherently dangerous or reasonably certain to place life and limb in peril when negligently made, a manufacturer owes a duty of care to those who are the ultimate users. This duty requires reasonable care to be exercised in assembling component parts and inspecting and testing them before the product leaves the plant." (*Reynolds v. Natural Gas Equipment, Inc.* (1960) 184 Cal.App.2d 724, 736 [7 Cal.Rptr. 879], internal citations omitted.)

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 1244
- CALIFORNIA PRODUCTS LIABILITY ACTIONS, Ch. 2, *Liability for Defective Products*, § 2.21 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 190, *Products Liability* (Matthew Bender)

1222
Negligence
Manufacturer or Supplier—Duty to Warn—Essential Factual Elements

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[*Name of plaintiff***] claims that [***name of defendant***] was negligent by not using reasonable care to warn [or instruct] about the [***product***]'s dangerous condition or about facts that make the [***product***] likely to be dangerous. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] [manufactured/distributed/sold] the [***product***];**

2. **That [***name of defendant***] knew or reasonably should have known that the [***product***] was dangerous or was likely to be dangerous when used in a reasonably foreseeable manner;**

3. **That [***name of defendant***] knew or reasonably should have known that users would not realize the danger;**

4. **That [***name of defendant***] failed to adequately warn of the danger [or instruct on the safe use of the [***product***]];**

5. **That a reasonable [manufacturer/distributor/seller] under the same or similar circumstances would have warned of the danger [or instructed on the safe use of the [***product***]];**

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

7. **That [***name of defendant***]'s failure to warn [or instruct] was a substantial factor in causing [***name of plaintiff***]'s harm.**

[The warning must be given to the prescribing physician and must include the potential risks or side effects that may follow the foreseeable use of the product. [*Name of defendant***] had a continuing duty to warn physicians as long as the product was in use.]**

DIRECTIONS FOR USE

Last bracketed paragraph is to be used in prescription drug cases only.

SOURCES AND AUTHORITY

- A manufacturer "has a duty to use reasonable care to give warning of the dangerous condition of the product or of facts which make it likely to be dangerous to those whom he should expect to use the product or be endangered by its probable use, if the manufacturer has reason to believe that they will not realize its dangerous condition." (*Putensen v. Clay Adams, Inc.* (1970) 12 Cal.App.3d 1062, 1076–1077 [91 Cal.Rptr. 319].)

- "Negligence law in a failure-to-warn case requires a plaintiff to prove that a manufacturer or distributor did not warn of a particular risk for reasons which fell below the acceptable standard of care, i.e., what a reasonably prudent manufacturer would have known and warned about." (*Anderson v. Owens-Corning Fiberglass Corp.* (1991) 53 Cal.3d 987, 1002 [281 Cal.Rptr. 528].)

- Restatement Second of Torts section 388 provides:

  > One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, by a person for whose use it is supplied if the supplier
  > (a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and
  > (b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and
  > (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.

- Restatement Second of Torts section 394 provides: "The manufacturer of a chattel which he knows or has reason to know to be, or to be likely to be, dangerous for use is subject to the liability of a supplier of chattels with such knowledge."

- These sections have been cited with approval by California courts. (See *Putensen, supra,* 12 Cal.App.3d at p. 1077 and cases cited therein.)

- There is no duty to warn of obvious defects. (*Krawitz v. Rusch* (1989) 209 Cal.App.3d 957, 966 [257 Cal.Rptr. 610]; *Holmes v. J.C. Penney Co.* (1982) 133 Cal.App.3d 216, 220 [183 Cal.Rptr. 777]; *Morris v. Toy Box* (1962) 204 Cal.App.2d 468, 471 [22 Cal.Rptr. 572]

- "When a manufacturer or distributor has no effective way to convey a product warning to the ultimate consumer, the manufacturer should be permitted to rely on downstream suppliers to provide the warning: 'Modern life would be intolerable unless one were permitted to rely to a certain extent on others doing what they normally do, particularly if it is their duty to do so.' " (*Persons v. Solomon North*

America (1990) 217 Cal.App.3d 168, 178 [265 Cal.Rptr. 773], internal citation omitted.)

- The duty of a manufacturer to warn about the potential hazards of its product, even when that product is only a component of an item manufactured or assembled by a third party, has been recognized, but is limited. (See *Groll v. Shell Oil Co.* (1983) 148 Cal.App.3d 444, 449 [196 Cal.Rptr. 52]; *Artiglio v. General Electric Co.* (1998) 61 Cal.App.4th 830, 837 [71 Cal.Rptr.2d 817].)

Secondary Sources

- CALIFORNIA PRODUCTS LIABILITY ACTIONS, Ch. 2, *Liability for Defective Products*, § 2.21, Ch. 7, *Proof*, § 7.05 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 190, *Products Liability* (Matthew Bender)

1223
Negligence
Recall/Retrofit

A product manufacturer or supplier that knows of a dangerous defect in a previously sold product is required to use reasonable care under the circumstances. In deciding whether [*name of defendant***] used reasonable care, you should consider, among other factors, the following:**

(a) Whether [*name of defendant***] provided an adequate warning of the [***product***]'s danger;**

(b) Whether [*name of defendant***] recalled the [***product***]; [and]**

(c) Whether [*name of defendant***] corrected the defect in the [***product***]; [and]**

(d) [*insert other applicable factor***].**

SOURCES AND AUTHORITY

- "Failure to conduct an adequate retrofit campaign may constitute negligence apart from the issue of defective design." (*Hernandez v. Badger Construction Equipment Co.* (1994) 28 Cal.App.4th 1791, 1827 [34 Cal.Rptr.2d 732], internal citation omitted.)

- In *Lunghi v. Clark Equipment Co*. (1984) 153 Cal.App.3d 485 [200 Cal.Rptr. 387], the court observed that, where the evidence showed that the manufacturer became aware of dangers after the product had been on the market, the jury "could still have found that Clark's knowledge of the injuries caused by these features imposed a duty to warn of the danger, and/or a duty to conduct an adequate retrofit campaign." The failure to meet the standard of reasonable care with regard to either of these duties could have supported a finding of negligence. (*Id.* at p. 494.)

- In *Balido v. Improved Machinery, Inc.* (1972) 29 Cal.App.3d 633 [105 Cal.Rptr. 890] (disapproved on other grounds in *Regents of University of California v. Hartford Accident & Indemnity Co.* (1978) 21 Cal.3d 624, 641–642 [147 Cal.Rptr. 486]), the court concluded that a jury could reasonably have found negligence based upon the manufacturer's failure to retrofit equipment determined to be unsafe after it was sold, even though the manufacturer told the equipment's owners of the safety problems and offered to correct those problems for $500. (*Id*. at p. 649.)

- If a customer fails to comply with a recall notice, this will not automatically absolve the manufacturer from liability: “A manufacturer cannot delegate responsibility for the safety of its product to dealers, much less purchasers.” (*Springmeyer v. Ford Motor Co.* (1998) 60 Cal.App.4th 1541, 1562 [71 Cal.Rptr.2d 190], internal citations omitted.)

1224
Negligence
Negligence for Product Rental/Standard of Care

[A person who rents products to others for money is negligent if he or she fails to use reasonable care to:

1. **Inspect the products for defects;**
2. **Make them safe for their intended use; and**
3. **Adequately warn of any known dangers.]**

[or]

[A person who lends products to others without charge only is required to use reasonable care to warn of known defects.]

DIRECTIONS FOR USE

Use this instruction in conjunction with 1220, *Negligence: Essential Factual Elements*, and instead of 1221, *Negligence: Basic Standard of Care*, in cases involving rentals.

If the case involves a product lent gratuitously for the mutual benefit of the parties (e.g., to a prospective purchaser), the first paragraph is applicable and the instruction needs to be modified.

In a purely gratuitous lending case, if the object is a "dangerous instrumentality" there may be a duty to conduct a reasonable inspection before lending. (See *Tierstein v. Licht* (1959) 174 Cal.App.2d 835, 842 [345 P.2d 341]).

SOURCES AND AUTHORITY

- If a bailment is for hire, or provides a mutual benefit, the bailor has a duty to the bailee and to third persons to (1) warn of actually known defects and (2) to use reasonable care to make an examination of the good before lending it "in order to make certain that it [is] fit for the use know to be intended." (*Tierstein, supra,* 174 Cal.App.2d at pp. 840–841 [345 P.2d 341].)

- A bailment, otherwise gratuitous, where made to induce a purchase, has been considered sufficient to give rise to the same duty of reasonable care on the part of the

bailor as an ordinary bailment for hire. This is regarded as a bailment for mutual benefit. (*Tierstein, supra,* 174 Cal.App.2d at p. 842.)

- Under either a negligence or an implied warranty theory, "the essential inquiry is whether [the defendants] made such inspection of their equipment as was necessary to discharge their duty of reasonable care." (*McNeal v. Greenberg* (1953) 40 Cal.2d 740, 742 [255 P.2d 810].) The bailor is not an insurer or guarantor. (*Tierstein, supra,* 174 Cal.App.2d at p. 841.)

- Civil Code section 1955 provides: "Except as otherwise agreed by the lessor and the lessee in lease agreements for a term of more than 20 days, one who leases personal property must deliver it to the lessee, secure his or her quiet enjoyment thereof against all lawful claimants, put it into a condition fit for the purpose for which he or she leases it, and repair all deteriorations thereof not occasioned by the fault of the lessee and not the natural result of its use."

- Restatement Second of Torts section 408 provides: "One who leases a chattel as safe for immediate use is subject to liability to those whom he should expect to use the chattel, or to be endangered by its probable use, for physical harm caused by its use in a manner for which, and by a person for whose use, it is leased, if the lessor fails to exercise reasonable care to make it safe for such use or to disclose its actual condition to those who may be expected to use it."

- This section was cited with approval in *Rae v. California Equipment Co.* (1939) 12 Cal.2d 563, 569 [86 P.2d 352].

- "The general rule is that the only duty which a gratuitous bailor owes either to the bailee or to third persons is to warn them of actually known defects which render the chattel dangerous for the purpose for which it is ordinarily used; he has no liability for injuries caused by defects in the subject matter of the bailment of which he was not aware." (*Tierstein, supra,* 174 Cal.App.2d at p. 841.)

1230
Express Warranty—Essential Factual Elements

[*Name of plaintiff***] claims that [he/she/it] was harmed by the [***product***] because [***name of defendant***] represented, either by words or actions, that the [***product***] [***insert description of alleged express warranty, e.g., "was safe"***], but the [***product***] was not as represented. To establish this claim, [***name of plaintiff***] must prove all of the following:**

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

   [made a [statement of fact/promise] that the [*product***] [***insert description of alleged express warranty***];] [or]**

   [gave [*name of plaintiff***] a description of the [***product***];] [or]**

   [gave [*name of plaintiff***] a sample or model of the [***product***];]**

2. **That the [***product***] [***insert one or more of the following***]**

   [did not perform as [stated/promised];] [or]

   [did not meet the quality of the [description/sample/model];]

3. **[That [***name of plaintiff***] took reasonable steps to notify [***name of defendant***] within a reasonable time that the [***product***] was not as represented, whether or not [***name of defendant***] received such notice;]**

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

5. **That the failure of the [***product***] to be as represented was a substantial factor in causing [***name of plaintiff***]'s harm.**

[Formal words such as "warranty" or "guarantee" are not required to create a warranty. It is also not necessary for [*name of defendant***] to have specifically intended to create a warranty. But a warranty is not created if [***name of defendant***] simply stated the value of the goods or only gave [his/her] opinion of or recommendation regarding the goods.]**

DIRECTIONS FOR USE

The giving of notice to the seller is not required in personal injury or property damage lawsuits against a manufacturer or another supplier with whom the plaintiff has not directly dealt. (*Greenman v. Yuba Power Products* (1963) 59 Cal.2d 57, 61 [27 Cal.Rptr. 697]; *Gherna v. Ford Motor Co.* (1966) 246 Cal.App.2d 639, 652–653 [55 Cal.Rptr. 94].)

If an instruction on the giving of notice to the seller is needed see Instruction 1243, *Notification/Reasonable Time*.

SOURCES AND AUTHORITY

- "A warranty relates to the title, character, quality, identity, or condition of the goods. The purpose of the law of warranty is to determine what it is that the seller has in essence agreed to sell." (*Keith v. Buchanan* (1985) 173 Cal.App.3d 13, 20 [220 Cal.Rptr. 392], internal citation omitted.)

- "A warranty is a contractual term concerning some aspect of the sale, such as title to the goods, or their quality or quantity." (3 Witkin, Summary of Cal. Law (9th ed. 1987) Sales, § 50, p. 46.)

- California Commercial Code section 2313 provides:

  (1) Express warranties by the seller are created as follows:
  - (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
  - (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
  - (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

  (2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

- California Commercial Code section 2102 provides: "Unless the context otherwise requires, this division applies to transactions in goods." Section 2105 defines "goods" as "all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale."

- "Privity is not required for an action based upon an express warranty." (*Hauter v. Zogarts* (1975) 14 Cal.3d 104, 115, n. 8 [120 Cal.Rptr. 681].)

- " 'The determination as to whether a particular statement is an expression of opinion or an affirmation of fact is often difficult, and frequently is dependent upon the facts and circumstances existing at the time the statement is made.' " (*Keith, supra,* 173 Cal.App.3d at p. 21, internal citation omitted.)

- "Statements made by a seller during the course of negotiation over a contract are presumptively affirmations of fact unless it can be demonstrated that the buyer could only have reasonably considered the statement as a statement of the seller's opinion. Commentators have noted several factors which tend to indicate an opinion statement. These are (1) lack of specificity in the statement made, (2) a statement that is made in an equivocal manner, or (3) a statement which reveals that the goods are experimental in nature." (*Keith, supra,* 173 Cal.App.3d at p. 21.)

- "It is important to note … that even statements of opinion can become warranties under the code if they become part of the basis of the bargain." (*Hauter v. Zogarts* (1975) 14 Cal.3d 104, 115, fn. 10.)

- The California Supreme Court has stated that "[t]he basis of the bargain requirement represents a significant change in the law of warranties. Whereas plaintiffs in the past have had to prove their reliance upon specific promises made by the seller, the Uniform Commercial Code requires no such proof." (*Hauter, supra,* 14 Cal.3d at p. 115.) However, the court also noted that there is some controversy as to the role, if any, of reliance in this area.

- The court in *Keith, supra,* 173 Cal.App.3d at p. 23, held that the seller has the burden of proving that the bargain did not rest at all on the representation, for example, by showing that the buyer inspected and discovered the defect before the contract was made.

- "It is immaterial whether defendant had actual knowledge of the contraindications. 'The obligation of a warranty is absolute, and is imposed as a matter of law irrespective of whether the seller knew or should have known of the falsity of his representations.' " (*Grinnell v. Charles Pfizer & Co.* (1969) 274 Cal.App.2d 424, 442 [79 Cal.Rptr. 369], internal citations omitted.)

- "[A] sale is ordinarily an essential element of any warranty, express or implied … [citations].)" (*Fogo v. Cutter Laboratories, Inc.* (1977) 68 Cal.App.3d 744, 759 [137 Cal.Rptr. 417.)

<u>Secondary Sources</u>

- 3 Witkin, Summary of California Law (9th ed. 1987) Sales, §§ 55–63
- CALIFORNIA PRODUCTS LIABILITY ACTIONS, Ch. 2, *Liability for Defective Products,* §§ 2.31–2.33, Ch. 7, *Proof,* § 7.03 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 502, *Sales: Warranties,* §§ 502.23, 502.42–502.50, 502.140–502.150 (Matthew Bender)

- CALIFORNIA POINTS AND AUTHORITIES, Ch. 206, *Sales* (Matthew Bender)

1231
Implied Warranty of Merchantability—Essential Factual Elements

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[*Name of plaintiff***] [also] claims that [he/she/it] was harmed by the [***product***] that [he/she/it] bought from [***name of defendant***] because the [***product***] did not have the quality that a buyer would expect. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] bought the [***product***] from [***name of defendant***];**

2. **That, at the time of purchase, [***name of defendant***] was in the business of selling these goods [or by [his/her/its] occupation held [himself/herself/itself] out as having special knowledge or skill regarding these goods];**

3. **That the [***product***] [***insert one or more of the following:***]**

   [was not of the same quality as those generally acceptable in the trade;]

   [was not fit for the ordinary purposes for which such goods are used;]

   [did not conform to the quality established by the parties' prior dealings or by usage of trade;]

   [*other ground as set forth in Commercial Code section 2314(2)***;]**

4. **[That [***name of plaintiff***] took reasonable steps to notify [***name of defendant***] within a reasonable time that the [***product***] did not have the expected quality;]**

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

6. **That the failure of the [***product***] to have the expected quality was a substantial factor in causing [***name of plaintiff***]'s harm.**

DIRECTIONS FOR USE

This cause of action could also apply to products that are leased. If so, modify the instruction accordingly.

The giving of notice to the seller is not required in personal injury or property damage lawsuits against a manufacturer or another supplier with whom the plaintiff has not

directly dealt. (*Greenman v. Yuba Power Products* (1963) 59 Cal.2d 57, 61 [27 Cal.Rptr. 697]; *Gherna v. Ford Motor Co.* (1966) 246 Cal.App.2d 639, 652–653 [55 Cal.Rptr. 94].)

If an instruction on the giving of notice to the seller is needed see Instruction 1243, *Notification/Reasonable Time*.

SOURCES AND AUTHORITY

- "A warranty is a contractual term concerning some aspect of the sale, such as title to the goods, or their quality or quantity." (3 Witkin, Summary of Cal. Law (9th ed. 1987) Sales § 50, p. 46.)

- "Unlike express warranties, which are basically contractual in nature, the implied warranty of merchantability arises by operation of law. It 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 citations omitted.)

- It has been observed that "in cases involving personal injuries resulting from defective products, the theory of strict liability in tort has virtually superseded the concept of implied warranties." (*Grinnell v. Charles Pfizer & Co.* (1969) 274 Cal.App.2d 424, 432 [79 Cal.Rptr. 369].)

- Commercial Code section 2314 provides:

  (1) Unless excluded or modified (Section 2316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.
  (2) Goods to be merchantable must be at least such as
    (a) Pass without objection in the trade under the contract description; and
    (b) In the case of fungible goods, are of fair average quality within the description; and
    (c) Are fit for the ordinary purposes for which such goods are used; and
    (d) Run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
    (e) Are adequately contained, packaged, and labeled as the agreement may require; and
    (f) Conform to the promises or affirmations of fact made on the container or label if any.
  (3) Unless excluded or modified (Section 2316) other implied warranties may arise from course of dealing or usage of trade.

- "Vertical privity is a prerequisite in California for recovery on a theory of breach of the implied warranties of fitness and merchantability." (*U.S. Roofing, Inc. v. Credit Alliance Corp.* (1991) 228 Cal.App.3d 1431, 1441 [279 Cal.Rptr. 533], internal citations omitted.)

- Although privity appears to be required for actions based upon the implied warranty of merchantability, there are exceptions to this rule, such as one for members of the purchaser's family. (*Hauter v. Zogarts* (1975) 14 Cal.3d 104, 115 fn. 8 [120 Cal.Rptr. 681].) Vertical privity is also waived for employees. (*Peterson v. Lamb Rubber Co.* (1960) 54 Cal.2d 339 [5 Cal.Rptr. 863].) A plaintiff satisfies the privity requirement when he leases or negotiates the sale or lease of the product. (*United States Roofing, supra*.)

- Commercial Code section 2104(1) defines "merchant," in relevant part, as "a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction."

- Commercial Code section 2105(1) defines "goods," in relevant part, as "all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid."

- Commercial Code section 1205 provides:

  (1) A course of dealing is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.
  (2) A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage are to be proved as facts. If it is established that such a usage is embodied in a written trade code or similar writing the interpretation of the writing is for the court.
  (3) A course of dealing between parties and any usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware give particular meaning to and supplement or qualify terms of an agreement.
  (4) The express terms of an agreement and an applicable course of dealing or usage of trade shall be construed wherever reasonable as consistent with each other; but when such construction is unreasonable express terms control both course of dealing and usage of trade and course of dealing controls usage of trade.

(5) An applicable usage of trade in the place where any part of performance is to occur shall be used in interpreting the agreement as to that part of the performance.
(6) Evidence of a relevant usage of trade offered by one party is not admissible unless and until he has given the other party such notice as the court finds sufficient to prevent unfair surprise to the latter.

Secondary Sources

- CALIFORNIA PRODUCTS LIABILITY ACTIONS, Ch. 2, *Liability for Defective Products*, §§ 2.31–2.33, Ch. 7, *Proof*, § 7.03 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 502, *Sales: Warranties*, §§ 502.24, 502.51, 502.200–502.214 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 206, *Sales* (Matthew Bender)

1232
Implied Warranty of Fitness for a Particular Purpose—Essential Factual Elements

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[*Name of plaintiff*] claims that [he/she/it] was harmed by the [*product*] that [he/she/it] bought from [*name of defendant*] because the [*product*] was not suitable for [*name of plaintiff*]'s intended purpose. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of plaintiff*] bought the [*product*] from [*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 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 [his/her/its] skill and judgment to select or furnish a product that was suitable for the particular purpose;**

4. **That [*name of plaintiff*] justifiably relied on [*name of defendant*]'s skill and judgment;**

5. **That the [*product*] was not suitable for the particular purpose;**

6. **[That [*name of plaintiff*] took reasonable steps to notify [*name of defendant*] within a reasonable time that the [*product*] was not suitable;]**

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

8. **That the failure of the [*product*] to be suitable was a substantial factor in causing [*name of plaintiff*]'s harm.**

DIRECTIONS FOR USE

This cause of action could also apply to products that are leased. If so, modify the instruction accordingly.

The giving of notice to the seller is not required in personal injury or property damage lawsuits against a manufacturer or another supplier with whom the plaintiff has not directly dealt. (*Greenman v. Yuba Power Products* (1963) 59 Cal.2d 57, 61 [27 Cal.Rptr. 697]; *Gherna v. Ford Motor Co.* (1966) 246 Cal.App.2d 639, 652–653 [55 Cal.Rptr. 94].)

If an instruction on the giving of notice to the seller is needed see Instruction 1243, *Notification/Reasonable Time*.

SOURCES AND AUTHORITY

- "A warranty is a contractual term concerning some aspect of the sale, such as title to the goods, or their quality or quantity." (3 Witkin, Summary of Cal. Law (9th ed. 1987) Sales § 50, p. 46.)

- Commercial Code section 2315 provides: "Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose."

- "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 citation 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 1292, 1295, fn. 2. [44 Cal.Rptr.2d 526], internal citation omitted.)

- "The warranty of fitness for a particular purpose is not limited to sales by a merchant as is the warranty of merchantability. It may be imposed on any seller possessing sufficient skill and judgment to justify the buyer's reliance. The Code drafters suggest, however, that a nonmerchant seller will only in particular circumstances have that degree of skill and judgment necessary to justify imposing the warranty." (3 Witkin, Summary of Cal. Law (9th ed. 1987) Sales, § 72, p. 65.)

- "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.)

- In *Keith*, the reviewing court upheld the trial court's finding that there was no reliance because "the plaintiff did not rely on the skill and judgment of the defendants to select a suitable vessel, but that he rather relied on his own experts." (*Keith, supra,* 173 Cal.App.3d at p. 25.)

- "Vertical privity is a prerequisite in California for recovery on a theory of breach of the implied warranties of fitness and merchantability." (*U.S. Roofing, Inc. v. Credit Alliance Corp.* (1991) 228 Cal.App.3d 1431, 1441 [279 Cal.Rptr. 533], internal citations omitted.)

- Although privity appears to be required for actions based upon the implied warranty of merchantability, there are exceptions to this rule, such as one for members of the purchaser's family. (*Hauter v. Zogarts* (1975) 14 Cal.3d 104, 115 fn. 8 [120 Cal.Rptr. 681].) Vertical privity is also waived for employees. (*Peterson v. Lamb Rubber Co.* (1960) 54 Cal.2d 339 [5 Cal.Rptr. 863].) A plaintiff satisfies the privity requirement when he leases or negotiates the sale or lease of the product. (*United States Roofing, supra*.)

Secondary Sources

- CALIFORNIA PRODUCTS LIABILITY ACTIONS, Ch. 2, *Liability for Defective Products,* § 2.31 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 502, *Sales: Warranties,* §§ 502.24, 502.51, 502.220 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 206, *Sales* (Matthew Bender)

1233
Implied Warranty of Merchantability for Food—Essential Factual Elements

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[*Name of plaintiff***] claims that [he/she] was harmed by the [***food product***] that was sold by [***name of defendant***] because the [***food product***] was not fit for human consumption. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [ate/drank] a [***food product***] sold by [***name of defendant***];**

2. **That, at the time of purchase, [***name of defendant***] was in the business of selling the [***food product***] [or by [his/her] occupation held [himself/herself/itself] out as having special knowledge or skill regarding this [***food product***]];**

3. **That the [***food product***] was harmful when consumed;**

4. **That the harmful condition would not reasonably be expected by the average consumer;**

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

6. **That the [***food product***] was a substantial factor in causing [***name of plaintiff***]'s harm.**

DIRECTIONS FOR USE

If an instruction on the giving of notice to the seller is needed see Instruction 1243, *Notification/Reasonable Time*.

The subcommittee believes that the judge, not the jury, would decide whether the food substance is natural or foreign under *Mexicali Rose v. Superior Court* (1992) 1 Cal.4th 617 [4 Cal.Rptr.2d 145].)

SOURCES AND AUTHORITY

- "In the peculiar context of foodstuffs, the theory of breach of an implied warranty of merchantability has closer affinities to tort law than to contract law because it allows recovery of damages, without regard to privity of contract, for personal injuries as well as economic loss." (*Shade Foods, Inc. v. Innovative Products Sales &*

Marketing, Inc. (2000) 78 Cal.App.4th 847, 871 [93 Cal.Rptr.2d], internal citations omitted.)

- "If the injury-producing substance is natural to the preparation of the food served, it can be said that it was reasonably expected by its very nature and the food cannot be determined unfit or defective. A plaintiff in such a case has no cause of action in strict liability or implied warranty. If, however, the presence of the natural substance is due to a restaurateur's failure to exercise due care in food preparation, the injured patron may sue under a negligence theory." (*Mexicali Rose v. Superior Court* (1992) 1 Cal.4th 617, 633 [4 Cal.Rptr.2d 145].)

- "If the injury-causing substance is foreign to the food served, then the injured patron may also state a cause of action in implied warranty and strict liability, and the trier of fact will determine whether the substance (i) could be reasonably expected by the average consumer and (ii) rendered the food unfit or defective." (*Mexicali Rose, supra,* 1 Cal.4th at p. 633.)

- The *Mexicali Rose* decision was limited to commercial restaurant establishments. (*Mexicali Rose, supra,* 1 Cal.4th at p. 619, fn. 1.) However, the reasoning of that case has been applied to supermarkets. (*Ford v. Miller Meat Co.* (1994) 28 Cal.App.4th 1196 [33 Cal.Rptr.2d 899].)

- "The term 'natural' refers to bones and other substances natural to the product served, and does not encompass substances such as mold, botulinus bacteria or other substances (like rat flesh or cow eyes) not natural to the preparation of the product served." (*Mexicali Rose, supra,* 1 Cal.4th at p. 631, fn. 5.)

- It appears that the court would decide as a matter of law if the injury-producing substance is "natural" or not: "If the injury-producing substance is natural to the preparation of the food served, it can be said that it was reasonably expected by its very nature and the food cannot be determined unfit or defective. A plaintiff in such a case has no cause of action in strict liability or implied warranty." (*Mexicali Rose, supra,* 1 Cal.4th at p. 633.)

<u>Secondary Sources</u>

- CALIFORNIA PRODUCTS LIABILITY ACTIONS, Ch. 2, *Liability for Defective Products,* § 2.32 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 268, *Food,* Ch. 502, *Sales: Warranties,* § 502.201 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 206, *Sales* (Matthew Bender)

1240
Affirmative Defense to Express Warranty—Not "Basis of Bargain"

[*Name of defendant***] is not responsible for any harm to [***name of plaintiff***] if [***name of defendant***] proves that [***name of plaintiff***] did not rely on [his/her/its] [statement/ description/sample/model] in deciding to [purchase/use] the [***product***].**

SOURCES AND AUTHORITY

- "Under former provisions of law, a purchaser was required to prove that he or she acted in reliance upon representations made by the seller." (*Keith v. Buchanan* (1985) 173 Cal.App.3d 13, 22 [220 Cal.Rptr. 392].) However, Commercial Code section 2313 does not contain an explicit reliance requirement, leading at least one court to conclude that "[i]t is clear from the new language of this code section that the concept of reliance has been purposefully abandoned." (*Id.* at p. 23.)

- "A warranty statement made by a seller is presumptively part of the basis of the bargain, and the burden is on the seller to prove that the resulting bargain does not rest at all on the representation." (*Keith, supra,* 173 Cal.App.3d at p. 23.)

- "The buyer's actual knowledge of the true condition of the goods prior to the making of the contract may make it plain that the seller's statement was not relied upon as one of the inducements for the purchase, but the burden is on the seller to demonstrate such knowledge on the part of the buyer. Where the buyer inspects the goods before purchase, he may be deemed to have waived the seller's express warranties. But, an examination or inspection by the buyer of the goods does not necessarily discharge the seller from an express warranty if the defect was not actually discovered and waived." (*Keith, supra,* 173 Cal.App.3d at pp. 23–24.)

<u>Secondary Sources</u>

- CALIFORNIA PRODUCTS LIABILITY ACTIONS, Ch. 8, *Defenses*, § 8.07 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 206, *Sales* (Matthew Bender)

1241
Affirmative Defense—Exclusion or Modification of Express Warranty

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[*Name of defendant***] claims that [he/she/it] is not responsible for any harm to [***name of plaintiff***] because [***name of defendant***], by words or conduct, limited [his/her/its] representations regarding the [***product***]. To succeed, [***name of defendant***] must prove that [he/she/it] clearly limited the representations regarding [***insert alleged warranty, e.g., "seaworthiness"***].**

DIRECTIONS FOR USE

Limitation can be by words or conduct.

SOURCES AND AUTHORITY

- Commercial Code section 2316(1) provides: "Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this division on parol or extrinsic evidence (Section 2202) negation or limitation is inoperative to the extent that such construction is unreasonable."

- "Although section 2316 has drawn criticism for its vagueness, its purpose is clear. No warranty, express or implied, can be modified or disclaimed unless a seller clearly limits his liability." (*Hauter v. Zogarts* (1975) 14 Cal.3d 104, 118-119 [120 Cal.Rptr. 681], internal citations omitted.)

- "Because a disclaimer or modification is inconsistent with an express warranty, words of disclaimer or modification give way to words of warranty unless some clear agreement between the parties dictates the contrary relationship. At the very least, section 2316 allows limitation of warranties only by means of words that clearly communicate that a particular risk falls on the buyer." (*Hauter, supra,* 14 Cal.3d at p. 119, internal citation omitted.)

- The Uniform Commercial Code Comment to section 2316 states: "This section is designed principally to deal with those frequent clauses in sales contracts which seek to exclude 'all warranties, express or implied.' It seeks to protect a buyer from unexpected and unbargained language of express warranty … ."

- "[A]ny disclaimer or modification must be strictly construed against the seller." (*Hauter, supra,* 14 Cal.3d at p. 119.)

- "Strict construction against the person who has both warranted a particular fact to be true and then attempted to disclaim the warranty is especially appropriate in light of the fact that '[a] disclaimer of an express warranty is essentially contradictory, ...' " (*Fundin v. Chicago Pneumatic Tool Co.* (1984) 152 Cal.App.3d 951, 958 [199 Cal.Rptr. 789], internal citation omitted.)

- "A disclaimer of warranties must be specifically bargained for so that a disclaimer in a warranty given to the buyer after he signs the contract is not binding." (*Dorman v. International Harvester Co.* (1975) 46 Cal.App.3d 11, 19–20 [120 Cal.Rptr. 516].)

- "Interpretation of a written document, where extrinsic evidence is unnecessary, is a question of law for the trial court to determine." (*Temple v. Velcro USA, Inc.* (1983) 148 Cal.App.3d 1090, 1095 [196 Cal.Rptr. 531], internal citations omitted.)

Secondary Sources

- CALIFORNIA PRODUCTS LIABILITY ACTIONS, Ch. 8, *Defenses*, § 8.07 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 502, *Sales: Warranties*, § 502.23 (Matthew Bender)

1242
Affirmative Defense—Exclusion of Implied Warranties

[*Name of defendant***] claims that [he/she/it] is not responsible for any harm to [***name of plaintiff***] because [***name of defendant***] eliminated any implied representations relating to [the quality that a buyer would expect from the [***product***]] [or] [the [***product***]'s fitness for a particular purpose]. To succeed, [***name of defendant***] must prove:**

[*Insert one or more of the following:***]**

> **[That the sale of the [***product***] included notice using words such as "with all faults," "as is," or other language that would have made a buyer aware that the [***product***] was being sold without any guarantees.]**
>
> **[That, before entering into the contract, [***name of plaintiff***] examined the [product/sample/model] as fully as desired and that a complete examination would have revealed the [***product***]'s deficiency.]**
>
> **[That [***name of plaintiff***] refused, after a demand by [***name of defendant***], to examine the [product/sample/model] and that such examination would have revealed the [***product***]'s deficiency.]**
>
> **[That the parties' prior dealings, course of performance, or usage of trade had eliminated any implied representations.]**

SOURCES AND AUTHORITY

- Commercial Code section 2316(2) provides, in part: "Subject to subdivision (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous."

- The Uniform Commercial Code Comment to this section states: "Disclaimer of the implied warranty of merchantability is permitted under subsection (2), but with the safeguard that such disclaimers must mention merchantability and in case of a writing must be conspicuous."

- In most cases, it appears that a jury would be instructed on this theory of disclaimer only if the alleged disclaimer was made orally: "Interpretation of a written document, where extrinsic evidence is unnecessary, is a question of law for the trial court to

determine." (*Temple v. Velcro USA, Inc.* (1983) 148 Cal.App.3d 1090, 1095 [196 Cal.Rptr. 531], internal citations omitted.)

- Commercial Code section 2316(2) also provides, in part: "Language to exclude all implied warranties of fitness is sufficient if it states, for example, that 'There are no warranties which extend beyond the description on the face hereof.' "

- The Uniform Commercial Code Comment to section 2316 states: "Unlike the implied warranty of merchantability, implied warranties of fitness for a particular purpose may be excluded by general language, but only if it is in writing and conspicuous." Accordingly, disclaimers of warranties for a particular purpose are probably issues for the court only. Section 1201(10) provides: "A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as: NONNEGOTI-ABLE BILL OF LADING) is conspicuous. Language in the body of a form is 'conspicuous' if it is in larger or other contrasting type or color. But in a telegram any stated term is 'conspicuous.' Whether a term or clause is 'conspicuous' or not is for decision by the court."

- The Uniform Commercial Code Comment to section 2316 observes that "oral language of disclaimer may raise issues of fact as to whether reliance by the buyer occurred and whether the seller had 'reason to know' under the section on implied warranty of fitness for a particular purpose."

- "A disclaimer of warranties must be specifically bargained for so that a disclaimer in a warranty given to the buyer after he signs the contract is not binding." (*Dorman v. International Harvester Co.* (1975) 46 Cal.App.3d 11, 19–20 [120 Cal.Rptr. 516].)

- "[A]ny disclaimer or modification must be strictly construed against the seller." (*Hauter v. Zogarts* (1975) 14 Cal.3d 104, 119 [120 Cal.Rptr. 681].)

- Commercial Code section 2316(3) provides:

  Notwithstanding subdivision (2)
  (a) Unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is," "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and
  (b) When the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and
  (c) An implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.

- The Uniform Commercial Code Comment to section 2316 states that the three exceptions listed under subdivision (3) "are common factual situations in which the circumstances surrounding the transaction are in themselves sufficient to call the buyer's attention to the fact that no implied warranties are made or that a certain implied warranty is being excluded."

- The Uniform Commercial Code comment to section 2316 states: "Paragraph (a) of subsection (3) deals with general terms such as 'as is,' 'as they stand,' 'with all faults,' and the like. Such terms in ordinary commercial usage are understood to mean that the buyer takes the entire risk as to the quality of the goods involved."

- The Uniform Commercial Code comment to section 2316 states: "In order to bring the transaction within the scope of 'refused to examine' in paragraph (b), it is not sufficient that the goods are available for inspection. There must in addition be a demand by the seller that the buyer examine the goods fully."

- The Uniform Commercial Code comment to section 2316 states: "The particular buyer's skill and the normal method of examining goods in the circumstances determine what defects are excluded by the examination."

- "Interpretation of a written document, where extrinsic evidence is unnecessary, is a question of law for the trial court to determine." (*Temple, supra,* 148 Cal.App.3d at p. 1095, internal citations omitted.)

Secondary Sources

- CALIFORNIA PRODUCTS LIABILITY ACTIONS, Ch. 8, *Defenses*, § 8.07 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 502, *Sales: Warranties*, § 502.24 (Matthew Bender)

1243
Notification/Reasonable Time

If a buyer is required to notify the seller that a product [is not as represented] [does not have the expected quality] [is not suitable] [is in a harmful condition], [he/she/it] must do so within a reasonable time after [he/she/it] discovers or should have discovered this. A reasonable time depends on the circumstances of the case. In determining whether notice was given within a reasonable time, you must apply a more relaxed standard to a retail consumer than you would to a merchant buyer. A buyer notifies a seller by taking such steps as may be reasonably required to inform the seller [regardless of whether the seller actually receives the notice].

SOURCES AND AUTHORITY

- Commercial Code section 2607(3) provides: "Where a tender has been accepted [t]he buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy."

- Commercial Code section 1201(26) defines "notification" as follows: "A person 'notifies' or 'gives' a notice or notification to another by taking such steps as may be reasonably required to inform the other in ordinary course whether or not such other actually comes to know of it."

- Commercial Code section 1204(2) provides: "What is a reasonable time for taking any action depends on the nature, purpose and circumstances of such action."

- The Uniform Commercial Code comment to section 2607(3) states: "The time of notification is to be determined by applying commercial standards to a merchant buyer. 'A reasonable time' for notification from a retail consumer is to be judged by different standards so that in his case it will be extended, for the rule of requiring notification is designed to defeat commercial bad faith, not to deprive a good faith consumer of his remedy. The content of the notification need merely be sufficient to let the seller know that the transaction is still troublesome and must be watched. There is no reason to require that the notification which saves the buyer's rights under this section must include a clear statement of all the objections that will be relied on by the buyer, as under the section covering statements of defects upon rejection (Section 2-605). Nor is there reason for requiring the notification to be a claim for damages or of any threatened litigation or other resort to a remedy. The notification which saves the buyer's rights under this Article need only be such as informs the seller that the transaction is claimed to involve a breach, and thus opens the way for normal settlement through negotiation."

- A plaintiff is not required to prove that he or she gave notice of a breach of warranty in personal injury and property damage lawsuits against a manufacturer or another supplier with whom the plaintiff has not directly dealt. (*Greenman v. Yuba Power Products* (1963) 59 Cal.2d 57, 61 [27 Cal.Rptr. 697]; *Gherna v. Ford Motor Co.* (1966) 246 Cal.App.2d 639, 652–653 [55 Cal.Rptr. 94].)

- Notice is more likely to be required in disputes between merchants. (See *Fieldstone Co. v. Briggs Plumbing Products, Inc.* (1997) 54 Cal.App.4th 357, 369–370 [62 Cal.Rptr.2d 701].)

- When required, notice must be pleaded and proved. (*Vogel v. Thrifty Drug Co.* (1954) 43 Cal.2d 184, 188 [272 P.2d 1].)

- The purpose of the demand for notice is to protect the seller from stale claims (*Whitfield v. Jessup* (1948) 31 Cal.2d 826, 828 [193 P.2d 1]; *Metowski v. Triad Corp.* (1972) 28 Cal.App.3d 332, 339 [104 Cal.Rptr. 599]) and to give the defendant an opportunity to repair the defective item, reduce damages, improve products in the future, and negotiate settlements. (*Pollard v. Saxe & Yolles Development Co.* (1974) 12 Cal.3d 374, 380 [115 Cal.Rptr. 648].)

Secondary Sources

- CALIFORNIA PRODUCTS LIABILITY ACTIONS, Ch. 8, *Defenses*, § 8.07 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 502, *Sales: Warranties*, §§ 502.28, 502.100 (Matthew Bender)

VF-1200
Strict Products Liability
Manufacturing Defect—Comparative Negligence at Issue

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] [manufacture/distribute/sell] the [***product***]?**

___Yes ___No

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

2. Did the [*product***] contain a manufacturing defect when it left [***name of defendant***]'s possession?**

___Yes ___No

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

3. Was the [*product***] used [or misused] in a way that was reasonably foreseeable to [***name of defendant***]?**

___Yes ___No

If your answer to question 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. Was the manufacturing defect a substantial factor in causing harm to [*name of plaintiff***]?**

___Yes ___No

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

5. What are [*name of plaintiff*]'s damages? Do not reduce the damages based on the fault, if any, of [*name of plaintiff*] or [*name/description of other person*].

[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:]	**$_____]**
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:]	**$_____]**
[c. Past noneconomic loss, including [physical pain/mental suffering:]	**$_____]**
[d. Future noneconomic loss, including [physical pain/mental suffering:]	**$_____]**
	TOTAL $_____

If [*name of plaintiff*] has proved any damages, answer question 6. If [*name of plaintiff*] has not proved any damages, then stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Was [*name of plaintiff*] negligent?

___Yes ___No

If your answer to question 6 is yes, then answer question 7. If you answered no, insert the number zero next to [*name of plaintiff*]'s name in question 10 and answer question 8.

7. Was [*name of plaintiff*]'s negligence a substantial factor in causing [his/her] harm?

___Yes ___No

If your answer to question 7 is yes, then answer question 8. If you answered no, insert the number zero next to [*name of plaintiff*]'s name in question 10 and answer question 8.

8. Was [*name/description of other person*] negligent?

___Yes ___No

If your answer to question 8 is yes, then answer question 9. If you answered no, insert the number zero next to [*name/description of other person*]'s name in question 10 and answer question 10.

9. Was [*name/description of other person***]'s negligence a substantial factor in causing harm to [***name of plaintiff***]?**

___Yes ___No

If your answer to question 9 is yes, then answer question 10. If you answered no, insert the number zero next to [*name/description of other person***]'s name in question 10 and answer question 10.**

10. What percentage of responsibility for [*name of plaintiff***]'s harm do you assign to:**

[*Name of defendant***]:**	**_____%**
[*Name of plaintiff***]:**	**_____%**
[*Name/description of other person***]:**	**_____%**
TOTAL	**100 %**

Signed: _____
Presiding Juror

Dated: _____

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

DIRECTIONS FOR USE

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

This verdict form is based on Instruction 1201, *Strict Liability—Manufacturing Defect—Necessary Factual Elements,* and Instruction 1207, *Strict Liability Comparative Fault—Contributory Negligence.*

If specificity is not required, users do not have to itemize all the damages listed in question 5. The breakdown is optional; depending on the circumstances, users may wish to break down the damages even further.

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

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

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

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] [manufacture/distribute/sell] the [***product***]?**

___Yes ___No

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

2. At the time the [*product***] was used, was it substantially the same as when it left [***name of defendant***]'s possession?**

___Yes ___No

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

3. Did the [*product***] perform as safely as an ordinary consumer would have expected?**

___Yes ___No

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

4. Was the [*product***] used [or misused] in a way that was reasonably foreseeable to [***name of defendant***]?**

___Yes ___No

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

5. Was the [*product*]'s design a substantial factor in causing harm to [*name of plaintiff*]?

___Yes ___No

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

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

[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:]	**$_____]**
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:]	**$_____]**
[c. Past noneconomic loss, including [physical pain/mental suffering:]	**$_____]**
[d. Future noneconomic loss, including [physical pain/mental suffering:]	**$_____]**
	TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

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

DIRECTIONS FOR USE

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

This verdict form is based on Instruction 1203, *Strict Liability Design Defect—Consumer Expectation Test—Necessary Factual Elements.*

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

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

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

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

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] [manufacture/distribute/sell] the [***product***]?**

___Yes ___No

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

2. At the time the [*product***] was used, was it substantially the same as when it left [***name of defendant***]'s possession?**

___Yes ___No

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

3. Was the [*product***] used [or misused] in a way that was reasonably foreseeable to [***name of defendant***]?**

___Yes ___No

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

4. Was the [*product***]'s design a substantial factor in causing harm to [***name of plaintiff***]?**

___Yes ___No

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

5. Did the benefits of the [*product***]'s design outweigh the risks of the design?**

___Yes ___No

If your answer to question 5 is no, then answer question 6. If you answered yes, stop here, answer no further questions, and have the 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: _____

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

DIRECTIONS FOR USE

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

This verdict form is based on Instruction 1204, *Strict Liability Design Defect—Risk-Benefit Test—Necessary Factual Elements—Shifting Burden of Proof.*

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

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

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.

VF-1203
Strict Products Liability
Failure to Warn

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] [manufacture/distribute/sell] the [***product***]?**

___Yes ___No

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

2. Did the [*product***] have potential [risks/side effects/allergic reactions] that were [known] [or] [knowable through the use of scientific knowledge available] at the time of [manufacture/distribution/sale]?**

___Yes ___No

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

3. Did the potential [risks/side effects/allergic reactions] present a substantial danger to users of the [*product***]?**

___Yes ___No

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

4. Would ordinary consumers have recognized the potential [risks/side effects/ allergic reactions]?

___Yes ___No

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

5. Did [*name of defendant*] fail to adequately warn [or instruct] of the potential [risks/side effects/allergic reactions]?

___Yes ___No

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

6. Was the [*product*] used [or misused] in a way that was reasonably foreseeable to [*name of defendant*]?

___Yes ___No

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

7. Was the lack of sufficient [instructions] [or] [warnings] 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 $_____

Signed: _____
Presiding Juror

Dated: _____

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

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 1205, *Strict Liability Failure to Warn—Necessary Factual Elements.*

If specificity is not required, users do not have to itemize all the damages listed in question 8. The breakdown is optional; depending on the circumstances, users may wish to break down the damages even further.

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

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

VF-1204
Products Liability—Negligence
Plaintiff's Contributory Negligence at Issue

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] [design/manufacture/supply/install/inspect/repair/rent] the [***product***]?**

___Yes ___No

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

2. Was [*name of defendant***] negligent in [designing/manufacturing/supplying/installing/inspecting/repairing/renting] the [***product***]?**

___Yes ___No

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

3. Was [*name of defendant***]'s negligence 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 total damages? Do not reduce the damages based on the fault, if any, of [***name of plaintiff***].**

[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:] $_____]
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] $_____]
[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

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

TOTAL $_____

If [*name of plaintiff***] has proved any damages, answer question 5. If [***name of plaintiff***] has not proved any damages, then stop here, answer no further questions, and have the presiding juror sign and date this form.**

5. Was [*name of plaintiff***] negligent?**

___Yes **___No**

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

6. Was [*name of plaintiff***]'s negligence a substantial factor in causing [his/her] harm?**

___Yes **___No**

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

7. What percentage of responsibility for [*name of plaintiff***]'s harm do you assign to:**

[*Name of defendant***]:**	**_____%**
[*Name of plaintiff***]:**	**_____%**
TOTAL	**100__%**

Signed: _____
Presiding Juror

Dated: _____

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

DIRECTIONS FOR USE

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

This verdict form is based on Instruction 1220, *Negligence—Necessary Factual Elements,* and Instruction 405, *Plaintiff's Contributory Negligence.*

If specificity is not required, users do not have to itemize all the damages listed in question 4. The breakdown is optional; depending on the circumstances, users may wish to break down the damages even further.

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

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

VF-1205
Products Liability
Negligent Failure to Warn

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] [manufacture/distribute/sell] the [***product***]?**

___Yes ___No

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

2. Did [*name of defendant***] know or should [he/she/it] reasonably have known that the [***product***] was dangerous or was likely to be dangerous when used in a reasonably foreseeable manner?**

___Yes ___No

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

3. Did [*name of defendant***] know or should [he/she/it] reasonably have known that users would not realize the danger?**

___Yes ___No

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

4. Did [*name of defendant***] fail to adequately warn of the danger [or instruct on the safe use of] the [***product***]?**

___Yes ___No

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. Would a reasonable [manufacturer/distributor/seller] under the same or similar circumstances have warned of the danger [or instructed on the safe use of] the [*product*]?

___Yes ___No

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

6. Was [*name of defendant*]'s failure to warn 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: _____

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

DIRECTIONS FOR USE

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

This verdict form is based on Instruction 1222, *Negligence—Manufacturer or Supplier—Duty to Warn—Essential Factual Elements.*

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

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

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

VF-1206
Products Liability—Express Warranty
Affirmative Defense—Not "Basis of Bargain"

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] represent by a [statement of fact/promise/description/ sample/model] that the [***product***] [***insert description of alleged express warranty***]?**

___Yes ___No

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

2. Did [*name of plaintiff***] rely on [***name of defendant***]'s [statement of fact/promise/ description/sample/model] in deciding to [purchase/use] the [***product***]?**

___Yes ___No

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

3. Did the [*product***] fail to [perform] [or] [have the same quality] as represented?**

___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 failure of the [*product***] to [perform] [or] [meet the quality] as represented a substantial factor in causing harm to [***name of plaintiff***]?**

___Yes ___No

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

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

[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:]	**$_____]**
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:]	**$_____]**
[c. Past noneconomic loss, including [physical pain/mental suffering:]	**$_____]**
[d. Future noneconomic loss, including [physical pain/mental suffering:]	**$_____]**
	TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

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

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.

Under various circumstances, the plaintiff must also prove that he or she made a reasonable attempt to notify the defendant of the defect. Thus, where appropriate, the following question should be added prior to the question regarding the plaintiff's harm: "Did [*name of plaintiff*] take reasonable steps to notify [*name of defendant*] within a reasonable time that the [*product*] [was not/did not perform] as requested?

This verdict form is based on Instruction 1230, *Express Warranty,* and Instruction 1240, *Affirmative Defense to Express Warranty—Not "Basis of Bargain."*

If specificity is not required, users do not have to itemize all the damages listed in question 5. The breakdown is optional; depending on the circumstances, users may wish to break down the damages even further.

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.

Do not include question 2 if the affirmative defense is not at issue.

VF-1207
Products Liability
Implied Warranty of Merchantability
Affirmative Defense—Exclusion of Implied Warranties

We answer the questions submitted to us as follows:

1. Did [*name of plaintiff***] buy the [***product***] from [***name of defendant***]?**

___Yes ___No

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

2. Was [*name of defendant***] in the business of selling these goods?**

___Yes ___No

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

3. Did the sale of the [*product***] include notice that would have made a buyer aware that it was being sold without any representations relating to the quality that a buyer would expect?**

___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 [*product***] fit for the ordinary purposes for which such goods are used?**

___Yes ___No

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

5. Was the failure of the [*product*] to have the expected quality 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: _____

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

DIRECTIONS FOR USE

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

This verdict form is based on Instruction 1231, *Implied Warranty of Merchantability*, and Instruction 1242, *Affirmative Defense—Exclusion of Implied Warranties.*

Under various circumstances, the plaintiff must also prove that he or she made a reasonable attempt to notify the defendant of the defect. Thus, where appropriate, the following question should be added prior to the question regarding the plaintiff's harm: "Did [*name of plaintiff*] take reasonable steps to notify [*name of defendant*] within a reasonable time that the [*product*] [was not/did not perform] as requested?

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

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

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

Question 2 should be modified if the defendant held himself or herself out as having special knowledge or skill regarding the goods. Question 3 should be modified if a different ground of liability is asserted under Commercial Code section 2314(2). Question 6 should be modified if the defendant is asserting other grounds under Commercial Code section 2316(3). This form should also be modified if notification is an issue.

Do not include question 3 if the affirmative defense is not at issue.

VF-1208
Products Liability
Implied Warranty of Fitness for a Particular Purpose

We answer the questions submitted to us as follows:

1. Did [*name of plaintiff***] buy the [***product***] from [***name of defendant***]?**

___Yes ___No

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

2. At the time of purchase, did [*name of defendant***] know or have reason to know that [***name of plaintiff***] intended to use the [***product***] for a particular purpose?**

___Yes ___No

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

3. At the time of purchase, did [*name of defendant***] know that [***name of plaintiff***] was relying on [***name of defendant***]'s skill and judgment to select or furnish a product that was suitable for the particular purpose?**

___Yes ___No

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

4. Did [*name of plaintiff***] justifiably rely on [***name of defendant***]'s skill and judgment?**

___Yes ___No

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

5. Was the [*product***] suitable for the particular purpose?**

___Yes ___No

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

6. Was the failure of the [*product*] to be suitable 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: _____

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

DIRECTIONS FOR USE

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

This verdict form is based on Instruction 1232, *Implied Warranty of Fitness for a Particular Purpose.*

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

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

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

Question 2 of this form should be modified if the defendant held himself or herself out as having special knowledge or skill regarding the goods. Question 3 should be modified if a different ground of liability is asserted under Commercial Code section 2314(2). This form should also be modified if notification is an issue.

1300
Battery-Essential Factual Elements

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

1. **That [***name of defendant***] [touched [***name of plaintiff***]] [or] [caused [***name of plaintiff***] to be touched] with the intent to harm or offend [him/her];**

2. **That [***name of plaintiff***] did not consent to be touched; and**

3. **That [***name of plaintiff***] was harmed or offended by [***name of defendant***]'s conduct.**

[A touching is offensive if it offends a reasonable sense of personal dignity.]

DIRECTIONS FOR USE

Give last bracketed paragraph only if the offensive nature of the conduct is at issue. In most cases, it will be clear whether the alleged conduct was offensive.

For a definition of "intent" see Instruction 1320, *Intent.*

SOURCES AND AUTHORITY

- "A battery is any intentional, unlawful and harmful contact by one person with the person of another. … A harmful contact, intentionally done is the essence of a battery. A contact is 'unlawful' if it is unconsented to." (*Ashcraft v. King* (1991) 228 Cal.App.3d 604, 611 [278 Cal.Rptr. 900], internal citations omitted.)

- "A battery is a violation of an individual's interest in freedom from intentional, unlawful, harmful or offensive unconsented contacts with his or her person." (*Rains v. Superior Court* (1984) 150 Cal.App.3d 933, 938 [198 Cal.Rptr. 249].)

- "Although it is not incorrect to say that battery is an unlawful touching,…it is redundant to use 'unlawful' in defining battery in a jury instruction, and may be misleading to do so without informing the jury what would make the conduct unlawful." (*Barouh v. Haberman* (1994) 26 Cal.App.4th 40, 45 [31 Cal.Rptr.2d 259], internal citation omitted.)

- "The crimes of assault and battery are intentional torts. In the perpetration of such crimes negligence is not involved. As between the guilty aggressor and the person

attacked the former may not shield himself behind the charge that his victim may have been guilty of contributory negligence, for such a plea is unavailable to him." (*Bartosh v. Banning* (1967) 251 Cal.App.2d 378, 385 [59 Cal.Rptr. 382].)

- Restatement Second of Torts, section 13 provides:

  An actor is subject to liability to another for battery if
  (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and
  (b) a harmful contact with the person of the other directly or indirectly results.

- " 'It has long been established, both in tort and criminal law, that "the least touching" may constitute battery. In other words, force against the person is enough; it need not be violent or severe, it need not cause bodily harm or even pain, and it need not leave any mark.' " (*People v. Mansfield* (1988) 200 Cal.App.3d 82, 88 [245 Cal.Rptr. 800], internal citations omitted.)

- Civil Code section 3515 provides: "He who consents to an act is not wronged by it."

- "The element of lack of consent to the particular contact is an essential element of battery." (*Rains, supra,* 150 Cal.App.3d at p. 938.)

- "As a general rule, one who consents to a touching cannot recover in an action for battery. … However, it is well-recognized a person may place conditions on the consent. If the actor exceeds the terms or conditions of the consent, the consent does not protect the actor from liability for the excessive act." (*Ashcraft, supra,* 228 Cal.App.3d at pp. 609–610.)

- "In an action for civil battery the element of intent is satisfied if the evidence shows defendant acted with a 'willful disregard' of the plaintiff's rights." (*Ashcraft, supra,* 228 Cal.App.3d at p. 613, internal citation omitted.)

- Restatement Second of Torts, section 19 provides: "A bodily contact is offensive if it offends a reasonable sense of personal dignity."

- " 'The usages of decent society determine what is offensive.' " (*Barouh, supra,* 26 Cal.App.4th at p. 46, fn. 5, internal citation omitted.)

- "Even though pushing a door cannot be deemed a harmful injury, the pushing of a door which was touching the prosecutrix could be deemed an offensive touching and a battery is defined as a harmful or offensive touching." (*People v. Puckett* (1975) 44 Cal.App.3d 607, 614–615 [118 Cal.Rptr. 884].)

- " 'If defendant unlawfully aims at one person and hits another he is guilty of assault and battery on the party he hit, the injury being the direct, natural and probable consequence of the wrongful act.' " (*Singer v. Marx* (1956) 144 Cal.App.2d 637, 642 [301 P.2d 440], internal citation omitted.)

Secondary Sources

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 346–368
- 3 Levy, et al., California Torts (1985–2000) Assault and Battery, § 41.01[3]
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 58, *Assault and Battery*, § 58.13 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 21, *Assault and Battery* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, §§ 12:7–12:9

1301
Assault—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] assaulted [him/her]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **[That [***name of defendant***] intentionally did an act that made [***name of plaintiff***] reasonably believe that [he/she] was about to be touched in a harmful or offensive manner;]**

   [or]

   [That [*name of defendant***] threatened to touch [***name of plaintiff***] in a harmful or offensive manner, and that it reasonably appeared to [***name of plaintiff***] that [he/she] was about to carry out the threat;]**

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

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

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

[A touching is offensive if it offends a reasonable sense of personal dignity.]

DIRECTIONS FOR USE

For a definition of "intent" see instruction 1320, *Intent*.

SOURCES AND AUTHORITY

- " 'Generally speaking, an assault is a demonstration of an unlawful intent by one person to inflict immediate injury on the person of another then present.' A civil action for assault is based upon an invasion of the right of a person to live without being put in fear of personal harm." (*Lowry v. Standard Oil Co. of California* (1944) 63 Cal.App.2d 1, 6–7 [146 P.2d 57], internal citation omitted.)

- "The tort of assault is complete when the anticipation of harm occurs." (*Kiseskey v. Carpenters' Trust for Southern California* (1983) 144 Cal.App.3d 222, 232 [192 Cal.Rptr 492].)

- Restatement Second of Torts, section 21 provides:

  (1) An actor is subject to liability to another for assault if
  (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such contact, and
  (b) the other is thereby put in such imminent apprehension.
  (2) An action which is not done with the intention stated in Subsection (1, a) does not make the actor liable to the other for an apprehension caused thereby although the act involves an unreasonable risk of causing it, and, therefore would be negligent or reckless if the risk threatened bodily harm.

- Words alone do not amount to an assault. (*Tomblinson v. Nobile* (1951) 103 Cal.App.2d 266, 269 [229 P.2d 97].)

- Restatement Second of Torts, section 31 provides: "Words do not make the actor liable for assault unless together with other acts or circumstances they put the other in reasonable apprehension of an imminent harmful or offensive contact with his person."

<u>Secondary Sources</u>

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 346–368
- 3 Levy, et al., California Torts (1985–2000) Assault and Battery, § 41.01[4]
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 58, *Assault and Battery*, § 58.15 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 21, *Assault and Battery* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, §§ 12:3–12:6

1302
Consent Explained

A plaintiff may express consent by words or acts that are reasonably understood by another person as consent.

A plaintiff may also express consent by silence or inaction if a reasonable person would understand that the silence or inaction intended to indicate consent.

DIRECTIONS FOR USE

See Instruction 1303, *Invalid Consent*, if there is an issue concerning the validity of plaintiff's consent.

SOURCES AND AUTHORITY

- Restatement Second of Torts, section 892 provides:

  (1) Consent is willingness in fact for conduct to occur. It may be manifested by action or inaction and need not be communicated to the actor.
  (2) If words or conduct are reasonably understood by another to be intended as consent, they constitute apparent consent and are as effective as consent in fact.

- Civil Code section 3515 provides: "He who consents to an act is not wronged by it."

- "The element of lack of consent to the particular contact is an essential element of battery." (*Rains v. Superior Court* (1984) 150 Cal.App.3d 933, 938 [198 Cal.Rptr. 249].)

- "Consent to an act, otherwise a battery, normally vitiates the wrong." *(Barbara A. v. John G.* (1983) 145 Cal.App.3d 369, 375 [193 Cal.Rptr. 422].)

- "As a general rule, one who consents to a touching cannot recover in an action for battery. … However, it is well-recognized a person may place conditions on the consent. If the actor exceeds the terms or conditions of the consent, the consent does not protect the actor from liability for the excessive act." (*Ashcraft v. King* (1991) 228 Cal.App.3d 604, 609–610 [278 Cal.Rptr. 900].)

<u>Secondary Sources</u>

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 350–368

- 3 Levy, et al., California Torts (1985–2000) Assault and Battery, § 41.20
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 58, *Assault and Battery*, § 58.91 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 21, *Assault and Battery* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, §§ 12:9, 12:18–12:19

1303
Invalid Consent

[*Name of plaintiff***] claims that [his/her] consent [was obtained by fraud/mistake duress] [was obtained as a result of [his/her] incapacity] [or that [***name of defendant***]'s conduct went beyond the scope of [his/her] limited consent].**

If [*name of plaintiff***] proves that [his/her] consent was [***insert ground for vitiating consent, e.g., "obtained by fraud," "exceeded"***], then you must find that [he/she] did not consent.**

DIRECTIONS FOR USE

For instructions on fraud, mistake, and duress see other instructions in *Contracts* and *Fraud and Deceit*.

SOURCES AND AUTHORITY

- Restatement Second of Torts, section 892B provides:

  (1) Except as stated in subsection (2), consent to conduct of another is effective for all consequences of the conduct and for the invasion of any interests resulting from it.
  (2) If the person consenting to the conduct of another is induced to consent by a substantial mistake concerning the nature of the invasion of his interests or the extent of the harm to be expected from it and the mistake is known to the other or is induced by the other's misrepresentation, the consent is not effective for the unexpected invasion or harm.
  (3) Consent is not effective if it is given under duress.

- Consent may be invalidated if the act exceeds the scope of the consent or if the consent is fraudulently induced. (*Barbara A. v. John G.* (1983) 145 Cal.App.3d 369, 375 [193 Cal.Rptr. 422].)

- Liability may be found where a physician "intentionally deceive[s] another into submitting to otherwise offensive touching to achieve a nontherapeutic purpose known only to the physician." (*Rains v. Superior Court* (1984) 150 Cal.App.3d 933, 941 [198 Cal.Rptr. 249].)

- "As a general rule, one who consents to a touching cannot recover in an action for battery. … However, it is well-recognized a person may place conditions on the consent. If the actor exceeds the terms or conditions of the consent, the consent does

not protect the actor from liability for the excessive act." (*Ashcraft v. King* (1991) 228 Cal.App.3d 604, 609–610 [278 Cal.Rptr 900].)

Secondary Sources

- 5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, §§ 350–368
- 3 Levy, et al., California Torts (1985–2000) Assault and Battery, § 41.20
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 58, *Assault and Battery*, §§ 58.57, 58.91 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 21, *Assault and Battery* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, §§ 12:9, 12:18–12:19

1304
Self-Defense/Defense of Others

[*Name of defendant***] claims that [he/she] is not responsible for [***name of plaintiff***]'s harm because [he/she] was acting in [self-defense/defense of another]. To succeed, [***name of defendant***] must prove both of the following:**

1. **That [***name of defendant***] reasonably believed that [***name of plaintiff***] was going to harm [him/her/***insert identification of other person***]; and**

2. **That [***name of defendant***] used only the amount of force that was reasonably necessary to protect [himself/herself/[***insert identification of other person***]].**

SOURCES AND AUTHORITY

- Civil Code section 50 provides, in part: "Any necessary force may be used to protect from wrongful injury the person or property of oneself, … or member of one's family, or of a ward, servant, master, or guest."

- "Self-defense being an affirmative defense, it must, in a civil action, be established by the defendant by a preponderance of the evidence." (*Bartosh v. Banning* (1967) 251 Cal.App.2d 378, 386 [59 Cal.Rptr. 382].)

- "The right to use force against another has long been limited by the condition that the force be no more than " 'that which reasonably appears necessary, in view of all the circumstances of the case, to prevent the impending injury.' " When the amount of force used is justifiable under the circumstances, it is not willful and the actor may escape liability for intentionally injurious conduct that is otherwise actionable. But if force is applied in excess of that which is justified, the actor remains subject to liability for the damages resulting from the excessive use of force. … When an alleged act of self-defense or defense of property is at issue, the question of what force was reasonable and justified is peculiarly one for determination by the trier of fact." (*Cavillo-Silva v. Home Grocery* (1998) 19 Cal.4th 714 [80 Cal.Rptr.2d 506, 968 P.2d 65], internal citations omitted.)

- "The right of self-defense is not limited by actualities. The correct rule … [is]: 'Generally, the force that one may use in self-defense is that which reasonably appears necessary, in view of all the circumstances of the case, to prevent the impending injury.' In emphasizing that the law of self-defense is a law of necessity courts should never lose sight of the fact that the necessity may be either real or apparent." (*Vaughn v. Jonas* (1948) 31 Cal.2d 586, 599–600 [191 P.2d 432], internal citations omitted.)

Secondary Sources

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 369–374
- 3 Levy, et al., California Torts (1985–2000) Assault and Battery, § 41.21
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 58, *Assault and Battery*, § 58.19–58.20, 58.70–58.71 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 21, *Assault and Battery* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, §§ 12:20–12:21

1305
Battery by Peace Officer

[*Name of plaintiff***] claims that [***name of defendant***] harmed [him/her] by using unreasonable force to [arrest [him/her]/prevent [his/her] escape /overcome [his/her] resistance /[***insert other applicable action***]]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] intentionally touched [***name of plaintiff***] [or caused [***name of plaintiff***] to be touched];**

2. **That [***name of defendant***] used unreasonable force to [arrest/prevent the escape of/overcome the resistance of/***insert other applicable action***] [***name of plaintiff***];**

3. **That [***name of plaintiff***] did not consent to the use of that force;**

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

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

A [*insert type of peace officer***] may use reasonable force to arrest or detain a person when he or she has reasonable cause to believe that that person has committed a crime. Even if the [***insert type of peace officer***] is mistaken, a person being arrested or detained has a duty not to use force to resist a [***insert type of peace officer***] unless [he/she] is using unreasonable force.**

In deciding whether [*name of defendant***] used unreasonable force, you must determine the amount of force that would have appeared reasonable to a [***insert type of peace officer***] in [***name of defendant***]'s position under the same or similar circumstances. You should consider, among others 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 arrest or attempting to evade arrest.**

[A [*insert type of peace officer***] who makes or attempts to make an arrest is not required to retreat or cease from his or her efforts because of the resistance or threatened resistance of the person being arrested.]**

DIRECTIONS FOR USE

Coerced consent is frequently an issue in these cases.

SOURCES AND AUTHORITY

- California Penal Code section 835a states: "Any peace officer, who has reasonable cause to believe that the person to be arrested has committed a public offense, may use reasonable force to effect the arrest, to prevent escape or to overcome resistance. A peace officer who makes or attempts to make an arrest need not retreat or desist from his efforts by reason of the resistance or threatened resistance of the person being arrested; nor shall such officer be deemed an aggressor or lose his right to self-defense by the use of reasonable force to effect the arrest or to prevent escape or to overcome resistance."

- California Penal Code section 834a states: "If a person has knowledge, or by the exercise of reasonable care, should have knowledge, that he is being arrested by a peace officer, it is the duty of such person to refrain from using force or any weapon to resist such arrest."

- "[T]here is no right to use force, reasonable or otherwise, to resist an unlawful detention … ." (*Evans v. City of Bakersfield* (1994) 22 Cal.App.4th 321, 333 [27 Cal.Rptr.2d 406].)

- "[E]xecution of an unlawful arrest or detention does not give license to an individual to strike or assault the officer unless excessive force is used or threatened; excessive force in that event triggers the individual's right of self-defense." (*Evans, supra,* 22 Cal.App.4th at p. 331, internal citation omitted.)

- A plaintiff bringing a battery action against a police officer has the burden of proving unreasonable force as an element of the tort. (*Edson v. City of Anaheim* (1998) 63 Cal.App.4th 1269, 1272 [74 Cal.Rptr.2d 614].)

- Excessive force claims under federal law are analyzed under the Fourth Amendment and its "reasonableness" standard. The test of reasonableness is this context is an objective one, viewed from the vantage of a reasonable officer on the scene. (*Martinez v. County of Los Angeles* (1996) 47 Cal.App.4th 334, 343 [54 Cal.Rptr.2d 772].)

- In *Scruggs v. Haynes* (1967) 252 Cal.App.2d 256, 262 [60 Cal.Rptr. 355], the trial court found that the police officers used excessive, unwarranted, and unnecessary force to effect the arrest of the plaintiff. The court determined that whether the plaintiff knew or should have known that he was being arrested was not clear.

Secondary Sources

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, § 376
- 3 Levy, et al., California Torts (1985–2000) Assault and Battery, § 41.24
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 58, *Assault and Battery*, §§ 58.22, 58.61, 58.92 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 21, *Assault and Battery* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 12:22

1320
Intent

[*Name of defendant***] acted intentionally if [he/she] intended to [***insert facts, e.g., "assault [name of plaintiff]," "commit a battery"***] or if [he/she] was substantially certain that the [***insert facts, e.g., "assault," "battery"***] would result from [his/her] conduct.**

DIRECTIONS FOR USE

This instruction may be used to define intent for other intentional torts, where appropriate.

SOURCES AND AUTHORITY

- "In an action for civil battery the element of intent is satisfied if the evidence shows defendant acted with a 'willful disregard' of the plaintiff's rights." (*Ashcraft v. King* (1991) 228 Cal.App.3d 604, 613 [278 Cal.Rptr. 900], internal citation omitted.)

- "As a general rule, California law recognizes that '…every person is presumed to intend the natural and probable consequences of his acts.' Thus, a person who acts willfully may be said to intend 'those consequences which (a) represent the very purpose for which an act is done (regardless of the likelihood of occurrence), or (b) are known to be substantially certain to result (regardless of desire).' The same definition is applied to many intentional torts." (*Gomez v. Acquistapace* (1996) 50 Cal.App.4th 740, 746 [57 Cal.Rptr.2d 821], internal citations omitted.)

<u>Secondary Sources</u>

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, § 348
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 58, *Assault and Battery* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 21, *Assault and Battery* (Matthew Bender)

VF-1300
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 [him/her]?**

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

VF-1301
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 [him/her]?**

___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.

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.

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.

VF-1302
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 [him/her] 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?**

___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.]

[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 [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.]

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

___Yes ___No

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

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

[a. Past economic loss, 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.

As appropriate to the facts of the case, read one 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.

VF-1304
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**

   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.

FALSE IMPRISONMENT

1400
Essential Factual Elements
No Arrest Involved

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

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

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

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

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

DIRECTIONS FOR USE

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

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

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

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

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

The confinement must be for "an appreciable length of time, however short." (*City of Newport Beach v. Sasse* (1970) 9 Cal.App.3d 803, 810 [88 Cal.Rptr. 476].) If this is an issue, the judge can instruct on this point as follows: "There is no requirement that the confinement last for a particular period of time."

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

SOURCES AND AUTHORITY

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

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

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

- There is no requirement that the restraint last for any particular period of time. (See *Alterauge v. Los Angeles Turf Club* (1950) 97 Cal.App.2d 735, 736 [218 P.2d 802] [15 minutes was sufficient for false imprisonment]; see also *City of Newport Beach, supra,* 9 Cal.App.3d at p. 810 [restraint must be for an "appreciable length of time, however short"].)

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

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

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

- "[T]he critical question as to causation in intentional torts is whether the actor's conduct is a substantial factor in bringing about the type of harm which he intended from his original act." (*Null v. City of Los Angeles* (1988) 206 Cal.App.3d 1528, 1536, fn. 6 [254 Cal.Rptr. 492], internal citations omitted.)

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

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

Secondary Sources

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 378–380
- 3 Levy et al., California Torts (1985–2000) False Imprisonment and False Arrest, §§ 42.01, 42.07, 42.20
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 257, *False Imprisonment* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 103, *False Imprisonment* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, §§ 13:8–13:10

1401
Essential Factual Elements
False Arrest Without Warrant by Peace Officer

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

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

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

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

DIRECTIONS FOR USE

Give instruction 1402, *False Arrest Without Warrant: Affirmative Defense—Peace Officer—Probable Cause to Arrest*, if applicable, immediately after this instruction.

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

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

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

SOURCES AND AUTHORITY

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

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

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

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

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

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

<u>Secondary Sources</u>

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 384–393
- 3 Levy et al., California Torts (1985–2000) False Imprisonment and False Arrest, § 42.23
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 257, *False Imprisonment* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 13:20

1402
False Arrest Without Warrant
Affirmative Defense–Peace Officer–Probable Cause to Arrest

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

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

DIRECTIONS FOR USE

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

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

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

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

SOURCES AND AUTHORITY

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

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

- Penal Code section 15 provides: "A crime or public offense is an act committed or omitted in violation of a law forbidding or commanding it, and to which is annexed, upon conviction, either of the following punishments: (1) death; (2) imprisonment; (3) fine; (4) removal from office; or, (5) disqualification to hold and enjoy any office of honor, trust, or profit in this State."

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

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

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

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

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

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

Secondary Sources

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 386, 389
- 3 Levy et al., California Torts (1985–2000) False Imprisonment and False Arrest, § 42.23
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 257, *False Imprisonment* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 103, *False Imprisonment* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, §§ 13:22–13:24

1403
Essential Factual Elements
False Arrest Without Warrant by Private Citizen

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

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

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

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

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

DIRECTIONS FOR USE

Give instruction 1404, *False Arrest Without Warrant—Affirmative Defense—Private Citizen—Probable Cause to Arrest*, if applicable, immediately after this instruction.

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

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

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

SOURCES AND AUTHORITY

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

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

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

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

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

<u>Secondary Sources</u>

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 390–392
- 3 Levy et al., California Torts (1985–2000) False Imprisonment and False Arrest, § 42.22
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 257, *False Imprisonment* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, §§ 13:8–13:10

1404
False Arrest Without Warrant—Affirmative Defense
Private Citizen—Probable Cause to Arrest

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

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

[OR]

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

DIRECTIONS FOR USE

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

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

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

SOURCES AND AUTHORITY

- Penal Code section 837 provides:

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

- Penal Code section 15 provides: "A crime or public offense is an act committed or omitted in violation of a law forbidding or commanding it, and to which is annexed, upon conviction, either of the following punishments: (1) death; (2) imprisonment; (3) fine; (4) removal from office; or, (5) disqualification to hold and enjoy any office of honor, trust, or profit in this State."

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

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

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

Secondary Sources

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 390–392
- 3 Levy et al., California Torts (1985–2000) False Imprisonment and False Arrest, § 42.22
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 257, *False Imprisonment* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 103, *False Imprisonment* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 13:11

1405
Essential Factual Elements
False Arrest With Warrant

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

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

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

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

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

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

DIRECTIONS FOR USE

Instruction 1406, *False Arrest With Warrant—Peace Officer—Affirmative Defense "Good-Faith" Exception*, should be given after this instruction if that defense is asserted.

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

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

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

SOURCES AND AUTHORITY

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

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

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

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

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

<u>Secondary Sources</u>

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 394–396
- 3 Levy et al., California Torts (1985–2000) False Imprisonment and False Arrest, § 42.25
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 257, *False Imprisonment* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, §§ 13:26–13:30

1406
False Arrest With Warrant—Peace Officer Affirmative Defense—"Good-Faith" Exception

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

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

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

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

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

DIRECTIONS FOR USE

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

SOURCES AND AUTHORITY

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

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

- " 'Malice,' as that term is used in section 43.55, refers not to the actual physical execution of the warrant, but to the officer's state of mind in procuring or executing the warrant. For instance, malice for purposes of section 43.55 has been found in situations where the officer purposefully withheld exculpatory evidence from the magistrate issuing the arrest warrant, where the officer knowingly used false information in order to obtain the warrant, or where the officer executes the warrant

with knowledge that it has been recalled or is no longer valid." (*Ting v. U.S.* (9th Cir. 1991) 927 F.2d 1504, 1514, internal citations omitted.)

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

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

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

Secondary Sources

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 394–396
- 3 Levy et al., California Torts (1985–2000) False Imprisonment and False Arrest, § 42.25
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 257, *False Imprisonment* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 103, *False Imprisonment* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, §§ 13:26–13:30

1407
Essential Factual Elements
Unnecessary Delay in Processing/Releasing

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

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

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

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

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

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

DIRECTIONS FOR USE

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

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

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

SOURCES AND AUTHORITY

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

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

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

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

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

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

- “In determining which delays are necessary, this court has rejected arguments that the delay was ‘not unusual’ or made ‘the work of the police and the district attorney easier.’ As the Court of Appeal recently observed, ‘[t]here is no authority to delay for the purpose of investigating the case. Subject to obvious health considerations the only permissible delay between the time of arrest and bringing the accused before a magistrate is the time necessary: to complete the arrest; to book the accused; to transport the accused to court; or the district attorney to evaluate the evidence for the limited purpose of determining what charge, if any, is to be filed; and to complete the necessary clerical and administrative tasks to prepare a formal pleading.’ ” (*Youngblood v. Gates* (1988) 200 Cal.App.3d 1302, 1319 [246 Cal.Rptr. 775], internal citations omitted.)

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

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

Secondary Sources

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, § 398
- 3 Levy et al., California Torts (1985–2000) False Imprisonment and False Arrest, § 42.26
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 257, *False Imprisonment* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 103, *False Imprisonment* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, §§ 13:31–13:34

1408
Affirmative Defense
Police Officer's Lawful Authority to Detain

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

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

DIRECTIONS FOR USE

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

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

SOURCES AND AUTHORITY

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

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

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

- "The Fourth Amendment to the United States Constitution prohibits seizures of persons, including brief investigative stops, when they are 'unreasonable.' Our state Constitution has a similar provision. A seizure occurs whenever a police officer 'by

means of physical force or show of authority' restrains the liberty of a person to walk away." (*People v. Souza* (1994) 9 Cal.4th 224, 229 [36 Cal.Rptr.2d 569], internal citations omitted.)

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

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

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

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

<u>Secondary Sources</u>:

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, § 381
- 3 Levy et al., California Torts (1985–2000) False Imprisonment and False Arrest, § 42.20
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 103, *False Imprisonment* (Matthew Bender)

1409
Common Law Right to Detain for Investigation

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

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

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

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

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

SOURCES AND AUTHORITY

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

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

- "Merchants who detain individuals whom they have probable cause to believe are about to injure their property are privileged against a false imprisonment action. The detention itself must be carried out for a reasonable time and in a reasonable manner." (*Fermino v. Fedco, Inc.* (1994) 7 Cal.4th 701, 716 [30 Cal.Rptr.2d 18].)

- "We note that the merchant's privilege is a defense to a false imprisonment action. As such, the lack of that privilege on defendant's part need not be specifically pleaded by plaintiff. Although a false imprisonment must involve an 'unlawful' restraint on an individual's liberty, [plaintiff's] allegations sufficiently plead that her confinement was unlawful. Moreover, the question of whether a detainment was reasonable is

generally a question of fact." (*Fermino, supra*, 7 Cal.4th at p. 723, fn. 8, internal citations omitted.)

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

Secondary Sources

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 381–382
- 3 Levy et al., California Torts (1985–2000) False Imprisonment and False Arrest, § 42.20
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 257, *False Imprisonment* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 103, *False Imprisonment* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 13:11

VF-1400
False Imprisonment—No Arrest Involved

We answer the questions submitted to us as follows:

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

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, *Essential Factual Elements—No Arrest Involved.*

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 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.

VF-1401
False Imprisonment—No Arrest Involved
Affirmative Defense—Right to Detain for Investigation

We answer the questions submitted to us as follows:

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.

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 1400, *Essential Factual Elements—No Arrest Involved*, and Instruction 1409, *Common Law Right to Detain for Investigation.*

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 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.

VF-1402
False Arrest Without Warrant

We answer the questions submitted to us as follows:

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].

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, *Essential Factual Elements—False Arrest Without Warrant by Peace Officer.*

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 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.

VF-1403
False Arrest Without Warrant by Peace Officer
Affirmative Defense—Probable Cause to Arrest

We answer the questions submitted to us as follows:

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?**

[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, *Essential Factual Elements—False Arrest Without Warrant by Peace Officer,* and Instruction 1402, *False Arrest Without Warrant—Affirmative Defense—Peace Officer—Probable Cause to Arrest.*

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 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.

VF-1404
False Arrest Without Warrant by Private Citizen
Affirmative Defense—Probable Cause to Arrest

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] 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. [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?**

[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 1403, *Essential Factual Elements—False Arrest Without Warrant by Private Citizen*, and Instruction 1404, *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.

VF-1405
False Arrest With Warrant

We answer the questions submitted to us as follows:

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 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:] $_____]
   [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 1405, *Essential Factual Elements—False Arrest With Warrant.*

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 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.

VF-1406
False Arrest With Warrant—Peace Officer
Affirmative Defense—"Good-Faith" Exception

We answer the questions submitted to us as follows:

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.

5. Did [*name of defendant***] have a reasonable belief that [***name of plaintiff***] 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 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].

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 1405, *Essential Factual Elements—False Arrest With Warrant,* and Instruction 1406, *False Arrest With Warrant—Peace Officer Affirmative Defense—"Good-Faith" Exception.*

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 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.

VF-1407
False Imprisonment—Unnecessary Delay in Processing/Releasing

We answer the questions submitted to us as follows:

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 harm to [***name of plaintiff***]?**

___Yes **___No**

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

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

[a. Past economic loss, 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 1407, *Essential Factual Elements—Unnecessary Delay in Processing/Releasing.*

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 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.

1500
Former Criminal Proceeding

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

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

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

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

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

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

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

DIRECTIONS FOR USE

Do not read element #3 if the court has determined from undisputed facts that there was no probable cause. If the jury must determine facts in dispute before the judge can determine probable cause, it may be easier to give a separate instruction listing all the factual issues that the jury must determine (see instruction 1503, *Reasonable Grounds*.)

Do not read element #2 if the court has determined that there was a favorable termination. If the jury must decide a factual dispute on favorable termination, use instruction 1504, *Favorable Termination*.

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

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

SOURCES AND AUTHORITY

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

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

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

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

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

- Restatement Second of Torts, section 653 provides:

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

- Restatement Second of Torts, section 673 provides:

  > (1) In an action for malicious prosecution the court determines whether
  > (a) the proceedings of which the plaintiff complains were criminal in character;
  > (b) the proceedings were terminated in favor of the plaintiff;
  > (c) the defendant had probable cause for initiating or continuing the proceedings;

(d) the harm suffered by the plaintiff is a proper element for the jury to consider in assessing damages.

(2) In an action for malicious prosecution, subject to the control of the court, the jury determines

(a) the circumstances under which the proceedings were initiated in so far as this determination may be necessary to enable the court to determine whether the defendant had probable cause for initiating or continuing the proceedings;

(b) whether the defendant acted primarily for a purpose other than that of bringing an offender to justice;

(c) the circumstances under which the proceedings were terminated;

(d) the amount that the plaintiff is entitled to recover as damages;

(e) whether punitive damages are to be awarded, and if so, their amount.

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

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

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

- " 'The theory underlying the requirement of favorable termination is that it tends to indicate the innocence of the accused, and coupled with the other elements of lack of probable cause and malice, establishes the tort, that is, the malicious and unfounded charge of crime against an innocent person.' " (*Cote v. Henderson* (1990) 218 Cal.App.3d 796, 804 [267 Cal.Rptr. 274], quoting *Jaffe v. Stone* (1941) 18 Cal.2d 146, 150 [114 P.2d 335].)

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

- "In a malicious prosecution case the plaintiff is not required ... to show that the prosecution was inspired by personal hostility, a grudge or ill will. What is required is evidence which establishes bad faith, or the absence of an honest and sincere belief

that the prosecution was justified by the existent facts and circumstances." (*Singleton*, *supra*, 68 Cal.App.2d at p. 696, internal citation omitted.)

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

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

Secondary Sources

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 418–430
- CALIFORNIA TORTS, Ch. 43, *Malicious Prosecution and Abuse of Process,* §§ 43.01–43.06 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 357, *Malicious Prosecution and Abuse of Process* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 147, *Malicious Prosecution and Abuse of Process* (Matthew Bender)

1501
Wrongful Use of Civil Proceedings

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

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

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

3. **That no reasonable person in [***name of defendant***]'s circumstances would have believed [***insert disputed fact necessary to establish probable cause***];**

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

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

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

DIRECTIONS FOR USE

Do not read element #3 if the court has determined from undisputed facts that there was no probable cause. If the jury must determine facts in dispute before the judge can determine probable cause, it may be easier to give a separate instruction listing all the factual issues that the jury must determine (see instruction 1503, *Reasonable Grounds*.)

Do not read element #2 if the court has determined that there was a favorable termination. If the jury must decide a factual dispute on favorable termination, use instruction 1504, *Favorable Termination*.

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

SOURCES AND AUTHORITY

- "Although the tort is usually called 'malicious prosecution,' the word 'prosecution' is not a particularly apt description of the underlying civil action. … The Restatement

refers to ‘wrongful use of civil proceedings,’ and the phrase used in the text (‘malicious institution of a civil proceeding’) has been approved.” (5 Witkin, Summary of Cal. Law (9th ed. 1988) § 431, p. 512, internal citations omitted.)

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

- Restatement Second of Torts section 674 provides:

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

- “The malicious commencement of a civil proceeding is actionable because it harms the individual against whom the claim is made, and also because it threatens the efficient administration of justice. The individual is harmed because he is compelled to defend against a fabricated claim which not only subjects him to the panoply of psychological pressures most civil defendants suffer, but also the additional stress of attempting to resist a suit commenced out of spite or ill will, often magnified by slanderous allegations in the pleadings.” (*Merlet v. Rizzo* (1998) 64 Cal.App.4th 53, 59 [75 Cal.Rptr.2d 83], internal citation omitted.)

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

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

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

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

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

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

- Restatement Second of Torts, section 681A provides:

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

- Restatement Second of Torts, section 681B provides:

  (1) In an action for wrongful civil proceedings, the court determines whether
  (a) a civil proceeding has been initiated;
  (b) the proceeding was terminated in favor of the plaintiff;
  (c) the defendant had probable cause for his action;
  (d) the harm suffered by the plaintiff is a proper element for the jury to consider in assessing damages.
  (2) In an action for wrongful civil proceedings, subject to the control of the court, the jury determines
  (a) the circumstances under which the proceedings were initiated in so far as may be necessary to enable the court to determine whether the defendant had probable cause for initiating them;

(b) whether the defendant acted primarily for a purpose other than that of securing the proper adjudication of the claim on which the proceeding was based;
(c) the circumstances under which the proceedings were terminated;
(d) the amount that the plaintiff is entitled to recover as general and special damages;
(e) whether punitive damages are to be awarded, and if so, in what amount.

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

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

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

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

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

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

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

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

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

- "California courts have held that victory at trial, though reversed on appeal, conclusively establishes probable cause." (*Roberts, supra,* 76 Cal.App.4th at p. 383.)

- "Without actual malice, there can be no action for malicious prosecution. Negligence does not equate with malice. Nor does the negligent filing of a case necessarily constitute the malicious prosecution of that case." (*Grindle v. Lorbeer* (1987) 196 Cal.App.3d 1461, 1468 [242 Cal.Rptr. 562].)

- "The motive of the defendant must have been something other than that of bringing a perceived guilty person to justice or the satisfaction in a civil action of some personal or financial purpose. The plaintiff must plead and prove actual ill will or some improper ulterior motive. It may range anywhere from open hostility to indifference." (*Downey Venture v. LMI Insurance Co.* (1998) 66 Cal.App.4th 478, 494 [78 Cal.Rptr.2d 142], internal citations omitted.)

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

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

- The litigation privilege of Civil Code section 47 does not preclude malicious prosecution actions. See *Kimmel v. Goland* (1990) 51 Cal.3d 202, 209 [271 Cal.Rptr.

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

Secondary Sources

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 431–454
- CALIFORNIA TORTS, Ch. 43, *Malicious Prosecution and Abuse of Process,* §§ 43.01–43.06 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 357, *Malicious Prosecution and Abuse of Process* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 147, *Malicious Prosecution and Abuse of Process* (Matthew Bender)

1502
Wrongful Use of Administrative Proceedings

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

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

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

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

4. **That no reasonable person in [***name of defendant***]'s circumstances would have believed [***insert disputed fact necessary to establish probable cause***];**

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

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

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

DIRECTIONS FOR USE

Do not read element #4 if the court has determined from undisputed facts that there was no probable cause. If the jury must determine facts in dispute before the judge can determine probable cause, it may be easier to give a separate instruction listing all the factual issues that the jury must determine (see instruction 1503, *Reasonable Grounds*.)

Do not read element #3 if the court has determined that there was a favorable termination. If the jury must decide a factual dispute on favorable termination, use instruction 1504, *Favorable Termination*.

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

SOURCES AND AUTHORITY

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

- Restatement Second of Torts, section 680 provides:

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

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

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

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

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

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

Secondary Sources

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 455–458
- CALIFORNIA TORTS, Ch. 43, *Malicious Prosecution and Abuse of Process,* §§ 43.01–43.06 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 357, *Malicious Prosecution and Abuse of Process* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 147, *Malicious Prosecution and Abuse of Process* (Matthew Bender)

1503
Reasonable Grounds

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

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

SOURCES AND AUTHORITY

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

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

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

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

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

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

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

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

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

<u>Secondary Sources</u>

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 424–428
- CALIFORNIA TORTS, Ch. 43, *Malicious Prosecution and Abuse of Process,* § 43.05 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 357, *Malicious Prosecution and Abuse of Process* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 147, *Malicious Prosecution and Abuse of Process* (Matthew Bender)

1504
Favorable Termination

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

[*List all factual disputes that must be resolved by the jury.***]**

SOURCES AND AUTHORITY

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

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

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

- "Favorable termination can occur short of a trial on the merits, but it must bear on the merits. Thus, a plaintiff does not establish favorable termination merely by showing that he or she prevailed in an underlying action." (*Sierra Club Foundation v. Graham* (1999) 72 Cal.App.4th 1135, 1149 [85 Cal.Rptr.2d 726], internal citation omitted.)

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

<u>Secondary Sources</u>

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 421–423
- CALIFORNIA TORTS, Ch. 43, *Malicious Prosecution and Abuse of Process*, § 43.04 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 357, *Malicious Prosecution and Abuse of Process* (Matthew Bender)

- CALIFORNIA POINTS AND AUTHORITIES, Ch. 147, *Malicious Prosecution and Abuse of Process* (Matthew Bender)

1505
Affirmative Defense—Reliance on Counsel

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

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

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

SOURCES AND AUTHORITY

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

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

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

<u>Secondary Sources</u>

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, § 449
- CALIFORNIA TORTS, Ch. 43, *Malicious Prosecution and Abuse of Process,* § 43.07 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 357, *Malicious Prosecution and Abuse of Process* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 147, *Malicious Prosecution and Abuse of Process* (Matthew Bender)

1506
Public Entities and Employees (Gov. Code, § 821.6)

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

DIRECTIONS FOR USE

For an instruction on scope of employment, see instruction 3720, *Vicarious Responsibility: Scope of Employment.*

SOURCES AND AUTHORITY

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

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

Secondary Sources

- 5 Witkin, Summary of California Law (9th ed. 2000 supp.) Torts, § 246
- CALIFORNIA TORTS, Ch. 43, *Malicious Prosecution and Abuse of Process,* § 43.06 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 357, *Malicious Prosecution and Abuse of Process* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 147, *Malicious Prosecution and Abuse of Process* (Matthew Bender)

1520
Abuse of Process
Essential Factual Elements

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

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

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

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

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

SOURCES AND AUTHORITY

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

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

- Restatement Second of Torts, section 682 provides: "One who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process."

- "Malicious prosecution and abuse of process are distinct. The former concerns a meritless lawsuit (and all the damage it inflicted). The latter concerns the misuse of the tools the law affords litigants once they are in a lawsuit (regardless of whether there was probable cause to commence that lawsuit in the first place). Hence, abuse of process claims typically arise for improper or excessive attachments or improper use

of discovery." (*Bidna v. Rosen* (1993) 19 Cal.App.4th 27, 40 [23 Cal.Rptr.2d 251], internal citations omitted.)

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

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

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

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

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

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

- " ' "Some definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process, is required; and there is no liability where the defendant has done nothing more than carry out the process to its authorized

conclusion, even though with bad intentions." ' " (*Clark Equipment Co. v. Wheat* (1979) 92 Cal.App.3d 503, 524 [154 Cal.Rptr. 874], internal citations omitted.)

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

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

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

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

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

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

<u>Secondary Sources</u>

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 459–470
- CALIFORNIA TORTS, Ch. 43, *Malicious Prosecution and Abuse of Process*, §§ 43.20–43.25 (Matthew Bender)

- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 357, *Malicious Prosecution and Abuse of Process* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 147, *Malicious Prosecution and Abuse of Process* (Matthew Bender)

VF-1500
Malicious Prosecution—Former Criminal Proceeding

We answer the questions submitted to us as follows:

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.

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.

VF-1501
Malicious Prosecution—Wrongful Use of Civil Proceedings

We answer the questions submitted to us as follows:

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.

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 1501, *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.

VF-1502
Malicious Prosecution—Wrongful Use of Civil Proceedings
Affirmative Defense of Reliance on Counsel

We answer the questions submitted to us as follows:

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.

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 $_____

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 1501, *Wrongful Use of Civil Proceedings*, and Instruction 1505, *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.

VF-1503
Malicious Prosecution—Wrongful Use of Administrative Proceedings

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We answer the questions submitted to us as follows:

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.

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 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].

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 1502, *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.

VF-1504
Abuse of Process

We answer the questions submitted to us as follows:

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

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 1520, *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.

1600
Intentional Infliction of Emotional Distress
Essential Factual Elements

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

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

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

   [or]

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

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

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

DIRECTIONS FOR USE

Instructions 1602–1604, regarding the elements of intentional infliction of emotional distress, should be given with the above instruction.

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

SOURCES AND AUTHORITY

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

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

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

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

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

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

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

<u>Secondary Sources</u>

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 404–406
- CALIFORNIA TORTS, Ch. 44, *Intentional Infliction of Emotional Distress*, § 44.01 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 362, *Mental Suffering and Emotional Distress* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 153, *Mental Suffering and Emotional Distress* (Matthew Bender)

1601
Intentional Infliction of Emotional Distress
Fear of Cancer, HIV, or AIDS

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

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

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

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

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

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

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

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

DIRECTIONS FOR USE

Instructions 1602–1604, regarding the elements of intentional infliction of emotional distress, should be given with the above instruction. Depending on the facts of the case, a plaintiff could choose one or both of the bracketed choices in element #3.

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

See instructions 1622 and 1623 for claims of negligent infliction of emotional distress involving fear of cancer, HIV, or AIDS.

SOURCES AND AUTHORITY

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

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

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

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

- The court in *Herbert v. Regents of University of California* (1994) 26 Cal.App.4th 782, 787–788 [31 Cal.Rptr.2d 709] held that the rules relating to recovery of damages for fear of cancer apply to fear of AIDS. See also *Kerins v. Hartley* (1994) 27 Cal.App.4th 1062, 1075 [33 Cal.Rptr.2d 172].

<u>Secondary Sources</u>

- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 362, *Mental Suffering and Emotional Distress* (Matthew Bender)

- CALIFORNIA POINTS AND AUTHORITIES, Ch. 153, *Mental Suffering and Emotional Distress* (Matthew Bender)

1602
Intentional Infliction of Emotional Distress
"Outrageous Conduct" Defined

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

In deciding whether [*name of defendant*]'s conduct was outrageous, you may consider, among other factors, the following:

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

(b) Whether [*name of defendant*] knew that [*name of plaintiff*] was particularly vulnerable to emotional distress; and

(c) Whether [*name of defendant*] knew that [his/her] conduct would likely result in harm due to mental distress.

DIRECTIONS FOR USE

Read the appropriate factors that apply to the facts of the case. Factors that do not apply may be deleted from this instruction.

SOURCES AND AUTHORITY

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

- "[L]iability 'does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. … There is no occasion for the law to intervene … where someone's feelings are hurt.' " (*Agarwal v. Johnson* (1979) 25 Cal.3d 932, 946 [160 Cal.Rptr. 141], quoting Rest.2d Torts, § 46, com. d, overruled on other grounds in *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 579–580 [88 Cal.Rptr.2d 19].)

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

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

- Relationships that have been recognized as significantly contributing to the conclusion that particular conduct was outrageous include: employer-employee (*Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, 498, fn.2 [86 Cal.Rptr. 88]), insurer-insured (*Fletcher v. Western National Life Insurance Co.* (1970) 10 Cal.App.3d 376, 403–404 [89 Cal.Rptr. 78]), landlord-tenant (*Aweeka v. Bonds* (1971) 20 Cal.App.3d 278, 281–282 [97 Cal.Rptr. 650]), hospital-patient (*Bundren v. Superior Court* (1983) 145 Cal.App.3d 784, 791–792 [193 Cal.Rptr. 671]), attorney-client (*McDaniel v. Gile* (1991) 230 Cal.App.3d 363, 373 [281 Cal.Rptr. 242]), collecting creditors (*Bundren, supra,* at p. 791, fn. 8), and religious institutions (*Molko, supra,* 46 Cal.3d at pp. 1122–1123).

Secondary Sources

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 404–406
- CALIFORNIA TORTS, Ch. 44, *Intentional Infliction of Emotional Distress*, §§ 44.01, 44.03 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 362, *Mental Suffering and Emotional Distress* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 153, *Mental Suffering and Emotional Distress* (Matthew Bender)

1603
Intentional Infliction of Emotional Distress
"Reckless Disregard" Defined

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

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

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

SOURCES AND AUTHORITY

- "[I]t is not essential to liability that a trier of fact find a malicious or evil purpose. It is enough that defendant 'devoted little or no thought' to probable consequences of his conduct." (*KOVR-TV, Inc. v. Superior Court* (1995) 31 Cal.App.4th 1023, 1031–1032 [37 Cal.Rptr.2d 431], internal citation omitted.)

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

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

<u>Secondary Sources</u>

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, § 405
- CALIFORNIA TORTS, Ch. 44, *Intentional Infliction of Emotional Distress*, § 44.01 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 362, *Mental Suffering and Emotional Distress* (Matthew Bender)

- CALIFORNIA POINTS AND AUTHORITIES, Ch. 153, *Mental Suffering and Emotional Distress* (Matthew Bender)

1604
Intentional Infliction of Emotional Distress
"Severe Emotional Distress" Defined

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

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

SOURCES AND AUTHORITY

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

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

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

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

<u>Secondary Sources</u>

- CALIFORNIA TORTS, Ch. 44, *Intentional Infliction of Emotional Distress*, § 44.01 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 362, *Mental Suffering and Emotional Distress* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 153, *Mental Suffering and Emotional Distress* (Matthew Bender)

1605
Intentional Infliction of Emotional Distress
Affirmative Defense—Privileged Conduct

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

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

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

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

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

DIRECTIONS FOR USE

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

SOURCES AND AUTHORITY

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

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

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

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

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

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

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

Secondary Sources

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, § 407
- CALIFORNIA TORTS, Ch. 44, *Intentional Infliction of Emotional Distress*, § 44.06 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 362, *Mental Suffering and Emotional Distress* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 153, *Mental Suffering and Emotional Distress* (Matthew Bender)

1620
Negligent Infliction of Emotional Distress
Direct Victim—Essential Factual Elements

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

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

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

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

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

DIRECTIONS FOR USE

The California Supreme Court has allowed plaintiffs to bring negligent infliction of emotional distress actions as "direct victims" in only three types of factual situations: (1) the negligent mishandling of corpses (*Christensen v. Superior Court* (1991) 54 Cal.3d 868, 879 [2 Cal.Rptr.2d 79]); (2) the negligent misdiagnosis of a disease that could potentially harm another (*Molien v. Kaiser Foundation Hospitals* (1980) 27 Cal.3d 916, 923 [167 Cal.Rptr. 831]; and (3) the negligent breach of a duty arising out of a preexisting relationship (*Burgess v. Superior Court* (1992) 2 Cal.4th 1064, 1076 [9 Cal.Rptr.2d 615].)

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

This instruction should be read in conjunction with either instruction 401, *Basic Standard of Care*, or instruction 418, *Presumption of Negligence per se*.

This instruction is for use where the plaintiff is a "direct victim" of defendant's negligent conduct. Where the plaintiff witnesses the injury of another, use instruction 1621, *Negligent Infliction of Emotional Distress—Bystander—Essential Factual Elements.*

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

SOURCES AND AUTHORITY

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

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

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

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

<u>Secondary Sources:</u>

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 838
- CALIFORNIA TORTS, Ch. 5, *Negligent Infliction of Emotional Distress*, § 5.03 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 362, *Mental Suffering and Emotional Distress* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 153, *Mental Suffering and Emotional Distress* (Matthew Bender)

1621
Negligent Infliction of Emotional Distress
Bystander—Essential Elements

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

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

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

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

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

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

DIRECTIONS FOR USE

This instruction is for use in bystander cases, where a plaintiff seeks recovery for damages suffered as a percipient witness of injury to others. If the plaintiff is a direct victim of tortious conduct, use instruction 1620, *Negligent Infliction of Emotional Distress—Direct Victim—Essential Factual Elements.*

This instruction should be read in conjunction with either instruction 401, *Basic Standard of Care*, or instruction 418, *Presumption of Negligence per se*.

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

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

SOURCES AND AUTHORITY

- A bystander who witnesses the negligent infliction of death or injury of another may recover for resulting emotional trauma even though he or she did not fear imminent physical harm. (*Dillon v. Legg* (1968) 68 Cal.2d 728, 746–747 [69 Cal.Rptr. 72].)

- "In the absence of physical injury or impact to the plaintiff himself, damages for emotional distress should be recoverable only if the plaintiff: (1) is closely related to the injury victim, (2) is present at the scene of the injury-producing event at the time it occurs and is then aware that it is causing injury to the victim and, (3) as a result suffers emotional distress beyond that which would be anticipated in a disinterested witness." (*Thing v. La Chusa* (1989) 48 Cal.3d 644, 647 [257 Cal.Rptr. 865].)

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

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

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

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

<u>Secondary Sources</u>

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 840–850
- CALIFORNIA TORTS, Ch. 5, *Negligent Infliction of Emotional Distress*, § 5.04 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 362, *Mental Suffering and Emotional Distress* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 153, *Mental Suffering and Emotional Distress* (Matthew Bender)

1622
Negligent Infliction of Emotional Distress
Fear of Cancer, HIV, or AIDS

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

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

2. **That [***name of plaintiff***] suffered serious emotional distress from a fear that [he/she] will develop [***insert applicable cancer, HIV, or AIDS***] as a result of the exposure;**

3. **That reliable medical or scientific opinion confirms 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; and**

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

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

DIRECTIONS FOR USE

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

This instruction should be read in conjunction with either instruction 401, *Basic Standard of Care*, or instruction 418, *Presumption of Negligence per se*.

If plaintiff alleges that defendant's conduct constituted oppression, fraud, or malice, then instruction 1623, *Negligent Infliction of Emotional Distress—Fear of Cancer, HIV, or AIDS—Malicious, Oppressive or Fraudulent Conduct*, should be read.

SOURCES AND AUTHORITY

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

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

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

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

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

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

- Comparative fault principles may be applied to reduce amount of recovery for emotional distress based on fear of developing cancer when plaintiff's smoking is negligent and a portion of the fear of cancer is attributable to the smoking. (*Potter, supra,* 6 Cal.4th at p. 965, 974.)

<u>Secondary Sources</u>

- CALIFORNIA TORTS, Ch. 5, *Negligent Infliction of Emotional Distress*, § 5.02 (Matthew Bender)

- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 362, *Mental Suffering and Emotional Distress* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 153, *Mental Suffering and Emotional Distress* (Matthew Bender)

1623
Negligent Infliction of Emotional Distress
Fear of Cancer, HIV, AIDS—Malicious, Oppressive, or Fraudulent Conduct

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

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

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

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

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

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

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

3. **That [***name of plaintiff***] suffered serious emotional distress from a fear that [he/she] will develop [***insert applicable cancer, HIV, or AIDS***] as a result of the exposure;**

4. **That reliable medical or scientific opinion confirms that [name of plaintiff]'s risk of developing [insert applicable cancer, HIV, or AIDS] was significantly increased by the exposure and has resulted in an actual risk that is significant; and**

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

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

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

DIRECTIONS FOR USE

Use instruction 1622, *Negligent Infliction of Emotional Distress: Fear of Cancer, HIV, or AIDS*, if plaintiff alleges the same tort without punitive conduct.

This instruction should be read in conjunction with either instruction 401, *Basic Standard of Care*, or instruction 418, *Presumption of Negligence per se*.

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

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

SOURCES AND AUTHORITY

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

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

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

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

- Civil Code section 3294(c) provides:

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

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

- "Used in its ordinary sense, the adjective 'despicable' is a powerful term that refers to circumstances that are 'base,' 'vile,' or 'contemptible.' " (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 725 [34 Cal.Rptr.2d 898].)

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

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

<u>Secondary Sources</u>

- CALIFORNIA TORTS, Ch. 5, *Negligent Infliction of Emotional Distress*, § 5.02 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 362, *Mental Suffering and Emotional Distress* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 153, *Mental Suffering and Emotional Distress* (Matthew Bender)

VF-1600
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**

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 1600, *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.

VF-1601
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.

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:]	**$_____]**
[d. [Future noneconomic loss, including [physical pain/mental suffering:]	**$_____]**
	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, *Intentional Infliction of Emotional Distress—Essential Factual Elements*, and Instruction 1605, *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.

VF-1602
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.

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].

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, *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.

VF-1603
Negligent Infliction of Emotional Distress
Direct Victim

We answer the questions submitted to us as follows:

1. Was [*name of defendant***] negligent?**

___Yes **___No**

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the 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:] **$_____]**
[d. Future noneconomic loss, including [physical pain/mental suffering:] **$_____]**

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 1606, *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.

VF-1604
Negligent Infliction of Emotional Distress-Bystander

We answer the questions submitted to us as follows:

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.

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 1620, *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 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.

VF-1605
Negligent Infliction of Emotional Distress
Fear of Cancer, HIV, or AIDS

We answer the questions submitted to us as follows:

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**

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 1622, *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.

VF-1606
Negligent Infliction of Emotional Distress
Fear of Cancer, HIV, AIDS—Malicious, Oppressive, or Fraudulent Conduct

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We answer the questions submitted to us as follows:

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.

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].

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 1623, *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.

1700
Defamation Per Se—Essential Factual Elements
(Public Officer/Figure and Limited Public Figure)

[*Name of plaintiff***] claims that [***name of defendant***] harmed [him/her] by making [one or more of] the following statement(s): [***list all claimed per se defamatory statements***]. To establish this claim, [***name of plaintiff***] must prove that all of the following are more likely true than not true:**

[*Liability***]**

1. **That [***name of defendant***] made [one or more of] the statement(s) to [a person/persons] other than [***name of plaintiff***];**

2. **That [this person/these people] reasonably understood that the statement(s) [was/were] about [***name of plaintiff***];**

3. **[That [this person/these people] reasonably understood the statement(s) to mean that [***insert ground(s) for defamation per se, e.g., "[name of plaintiff] had committed a crime"***]; and**

4. **That the statement(s) [was/were] false.**

In addition, [*name of plaintiff***] must prove by clear and convincing evidence that [***name of defendant***] knew the statement(s) [was/were] false or had serious doubts about the truth of the statement(s).**

[*Nominal Damages***]**

If [*name of plaintiff***] has proved all of the above, the law assumes that [his/her] reputation has been harmed. Without further evidence of damage, [***name of plaintiff***] is entitled to a nominal sum such as one dollar or such greater sum as you believe is proper for the assumed harm to [his/her] reputation under the circumstances of this case.**

[*Actual Damages***]**

[*Name of plaintiff***] is also entitled to recover if [he/she] proves it is more likely true than not true that [***name of defendant***]'s wrongful conduct was a substantial factor in causing any of the following actual damages:**

a. **Harm to [***name of plaintiff***]'s property, business, trade, profession, or occupation;**

b. **Expenses [*name of plaintiff*] had to pay as a result of the defamatory statements;**

c. **Harm to [*name of plaintiff*]'s reputation in addition to that assumed by the law; or**

d. **Shame, mortification, or hurt feelings.**

[*Punitive Damages*]

[*Name of plaintiff*] may also recover damages to punish [*name of defendant*] if [he/she] proves by clear and convincing evidence that [*name of defendant*] acted with malice, oppression, or fraud.

"Malice" means that [*name of defendant*] acted with intent to cause injury or that [his/her] conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A person acts with knowing disregard when he or she is aware of the probable dangerous consequences of his or her conduct and deliberately fails to avoid those consequences.

"Oppression" means that [*name of defendant*]'s conduct was despicable and subjected [*name of plaintiff*] to cruel and unjust hardship in knowing disregard of [his/her] rights.

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

"Fraud" means that [*name of defendant*] intentionally misrepresented or concealed a material fact and did so intending to deprive [*name of plaintiff*] of property or of a legal right or otherwise to cause [him/her] injury.

DIRECTIONS FOR USE

A special verdict form should be used in this type of case.

Use the bracketed element number 3 only when the statement is not defamatory on its face (i.e., where the judge has not determined that the statement is defamatory as a matter of law). For statutory grounds of defamation per se see Civil Code sections 45 [Libel] and 46 [Slander]. Note that certain specific grounds of libel per se have been defined by case law.

SOURCES AND AUTHORITY

- "Defamation is an invasion of the interest in reputation. The tort involves the intentional publication of a statement of fact that is false, unprivileged, and has a natural tendency to injure or which causes special damage." (*Smith v. Maldonado* (1999) 72 Cal.App.4th 637, 645 [85 Cal.Rptr.2d 397].)

- Civil Code section 44 provides:

  Defamation is effected by either of the following:
  (a) Libel;
  (b) Slander.

- Civil Code section 45 provides: "Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation."

- Civil Code section 46 provides:

  Slander is a false and unprivileged publication, orally uttered, and also communications by radio or any mechanical or other means which:
  1. Charges any person with crime, or with having been indicted, convicted, or punished for crime;
  2. Imputes in him the present existence of an infectious, contagious, or loathsome disease;
  3. Tends directly to injure him in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profits;
  4. Imputes to him impotence or a want of chastity; or
  5. Which, by natural consequence, causes actual damage.

- Section 558 of the Restatement Second of Torts provides:

  To create liability for defamation there must be:
  (a) a false and defamatory statement concerning another;
  (b) an unprivileged publication to a third party;
  (c) fault amounting at least to negligence on the part of the publisher; and
  (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.

- Section 559 states: "A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."

- Section 563 states: “The meaning of a communication is that which the recipient correctly, or mistakenly but reasonably, understands that it was intended to express.”

- Section 577(1) of the Restatement Second of Torts provides: “Publication of defamatory matter is its communication intentionally or by a negligent act to one other than the person defamed.”

- California does not follow the majority rule, which is that all libel is actionable per se. If the court determines that the statement is reasonably susceptible to a defamatory interpretation, it is for the jury to determine if a defamatory meaning was in fact conveyed to a listener or reader. (*Kahn v. Bower* (1991) 232 Cal.App.3d 1599, 1608 [284 Cal.Rptr. 244].)

- A plaintiff is not required to allege special damages if the if statement is libelous per se (either on its face or by jury finding). (See *Selleck v. Globe International, Inc.* (1985) 166 Cal.App.3d 1123, 1130 [212 Cal.Rptr. 838].)

- The distinction between fact and opinion is not absolute: “A statement of opinion … may still be actionable ‘if it implies the allegation of undisclosed defamatory facts as the basis for the opinion.’ [Citations.]” (*Copp v. Paxton* (1996) 45 Cal.App.4th 829, 837 [52 Cal.Rptr.2d 831], internal citations omitted.)

- “In defamation actions generally, factual truth is a defense which it is the defendant's burden to prove. In a defamation action against a newspaper by a private person suing over statements of public concern, however, the First Amendment places the burden of proving falsity on the plaintiff. As a matter of constitutional law, therefore, media statements on matters of public interest, including statements of opinion which reasonably imply a knowledge of facts, ‘must be provable as false before there can be liability under state defamation law.’ Whether a statement contains provably false factual assertions is a question of law for the trial court to decide.” (*Eisenberg v. Alameda Newspapers, Inc.* (1999) 74 Cal.App.4th 1359, 1382 [88 Cal.Rptr.2d 802], internal citations omitted.)

- In matters involving public concern, the First Amendment protection applies to non-media defendants, putting the burden of proving falsity of the statement on the plaintiff. (*Nizam-Aldine v. City of Oakland* (1996) 47 Cal.App.4th 364, 375 [54 Cal.Rptr.2d 781].)

- “Publication means communication to some third person who understands the defamatory meaning of the statement and its application to the person to whom reference is made. Publication need not be to the ‘public’ at large; communication to a single individual is sufficient.” (*Smith, supra,* 72 Cal.App.4th at p. 645, internal citations omitted.)

- “[W]hen a party repeats a slanderous charge, he is equally guilty of defamation, even though he states the source of the charge and indicates that he is merely repeating a

rumor." (*Jackson v. Paramount Pictures Corp.* (1998) 68 Cal.App.4th 10, 26 [80 Cal.Rptr. 1], internal citation omitted.)

- "At common law, one who republishes a defamatory statement is deemed thereby to have adopted it and so may be held liable, together with the person who originated the statement, for resulting injury to the reputation of the defamation victim. California has adopted the common law in this regard, although by statute the republication of defamatory statements is privileged in certain defined situations." (*Khawar v. Globe Internat., Inc.* (1998) 19 Cal.4th 254, 268 [79 Cal.Rptr.2d 178], internal citations omitted.)

- The general rule is that "a plaintiff cannot manufacture a defamation cause of action by publishing the statements to third persons; the publication must be done by the defendant." (*Live Oak Publishing Co. v. Cohagan* (1991) 234 Cal.App.3d 1277, 1284 [286 Cal.Rptr. 198], internal citations omitted.) There is an exception to this rule when it is foreseeable that the plaintiff "will be under a strong compulsion to disclose the contents of the defamatory statement to a third person after he has read it or been informed of its contents." (*McKinney v. County of Santa Clara* (1980) 110 Cal.App.3d 787, 796 [168 Cal.Rptr. 89], internal citations omitted.)

- Whether a plaintiff in a defamation action is a public figure is a question of law for the trial court. (*Reader's Digest Assn. v. Superior Court* (1984) 37 Cal.3d 244, 252 [208 Cal.Rptr. 137].) "The question whether a plaintiff is a public figure is to be determined by the court, not the jury." (*Stolz v. KSFM 102 FM* (1994) 30 Cal.App.4th 195, 203 [35 Cal.Rptr.2d 740], internal citation omitted.)

- "To qualify as a limited purpose public figure, a plaintiff 'must have undertaken some voluntary [affirmative] act[ion] through which he seeks to influence the resolution of the public issues involved.' " (*Rudnick v. McMillan* (1994) 25 Cal.App.4th 1183, 1190 [31 Cal.Rptr.2d 193]; see also *Mosesian v. McClatchy Newspapers* (1991) 233 Cal.App.3d 1685, 1689 [285 Cal.Rptr. 430].)

- "The First Amendment limits California's libel law in various respects. When, as here, the plaintiff is a public figure, he cannot recover unless he proves by clear and convincing evidence that the defendant published the defamatory statement with actual malice, i.e., with 'knowledge that it was false or with reckless disregard of whether it was false or not.' Mere negligence does not suffice. Rather, the plaintiff must demonstrate that the author 'in fact entertained serious doubts as to the truth of his publication,' or acted with a 'high degree of awareness of … probable falsity.' " (*Masson v. New Yorker Magazine* (1991) 501 U.S. 496, 510 [115 L.Ed.2d 447, 111 S.Ct. 2419], internal citations omitted; see *St. Amant v. Thompson* (1968) 390 U.S. 727, 731 [20 L.Ed.2d 262, 88 S.Ct. 1323]; *New York Times v. Sullivan* (1964) 376 U.S. 254, 279–280 [11 L.Ed.2d 686, 84 S.Ct. 710].)

- The *New York Times v. Sullivan* standard applies to private individuals with respect to presumed or punitive damages if the statement involves a matter of public concern.

(*Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 349 [41 L.Ed.2d 789, 94 S.Ct. 2997].)

- California "permits defamation liability so long as it is consistent with the requirements of the United States Constitution." (*Melaleuca, Inc. v. Clark* (1998) 66 Cal.App.4th 1344, 1359, citing *Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 740–742 [257 Cal.Rptr. 708].)

- "Actual malice under the *New York Times* standard should not be confused with the concept of malice as an evil intent or a motive arising from spite or ill will. … In place of the term actual malice, it is better practice that jury instructions refer to publication of a statement with knowledge of falsity or reckless disregard as to truth or falsity." (*Masson, supra,* 501 U.S. at pp. 510–511.)

- Actual malice "does not require that the reporter hold a devout belief in the truth of the story being reported, only that he or she refrain from either reporting a story he or she knows to be false or acting in reckless disregard of the truth." (*Jackson, supra,* 68 Cal.App.4th at p. 35.)

- "The law is clear [that] the recklessness or doubt which gives rise to actual or constitutional malice is subjective recklessness or doubt." (*Melaleuca, supra,* 66 Cal.App.4th at p. 1365.)

- To show reckless disregard, "[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice." (*St. Amant, supra,* 390 U.S. at p. 731.)

- "Although the issue turns on the subjective good faith of the defendant, the plaintiff may attempt to prove reckless disregard for truth by circumstantial evidence. 'A failure to investigate, anger and hostility toward the plaintiff, reliance upon sources known to be unreliable, or known to be biased against the plaintiff—such factors may, in an appropriate case, indicate that the publisher himself had serious doubts regarding the truth of his publication.' " (*Copp, supra,* 45 Cal.App.4th at p. 847, quoting *Reader's Digest Assn., supra,* 37 Cal.3d at p. 258.)

- "An entity other than a natural person may be libeled." (*Live Oak Publishing Co., supra,* 234 Cal.App.3d at p. 1283.)

<u>Secondary Sources</u>

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 471–493, 534–542
- 4 Levy, et al., California Torts (1985–2000) Defamation, §§ 45.04, 45:13
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 340, *Libel and Slander* (Matthew Bender)

- CALIFORNIA POINTS AND AUTHORITIES, Ch. 142, *Libel and Slander (Defamation)* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, §§ 21:1–21:2, 21:22–21:25, 21:44–21:52

1701
Defamation Per Quod—Essential Factual Elements
(Public Officer/Figure and Limited Public Figure)

[*Name of plaintiff***] claims that [***name of defendant***] harmed [him/her] by making [one or more of] the following statement(s): [***list all claimed per quod defamatory statements***].**

[*Liability***]**

To establish this claim, [*name of plaintiff***] must prove that all of the following are more likely true than not true:**

1. **That [***name of defendant***] made [one or more of] the statement(s) to [a person/ persons] other than [***name of plaintiff***];**

2. **That [this person/these people] reasonably understood that the statement(s) [was/were] about [***name of plaintiff***];**

3. **That because of the facts and circumstances known to the [listener(s)/ reader(s)] of the statement(s), [it/they] tended to injure [***name of plaintiff***] in [his/her] occupation [or to expose [him/her] to hatred, contempt, ridicule, or shame] [or to discourage others from associating or dealing with [him/her]];**

4. **That the statement(s) [was/were] false;**

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

6. **That the statement(s) [was/were] a substantial factor in causing [***name of plaintiff***]'s harm.**

In addition, [*name of plaintiff***] must prove by clear and convincing evidence that [***name of defendant***] knew the statement(s) [was/were] false or had serious doubts about the truth of the statement(s).**

[*Actual Damages***]**

If [*name of plaintiff***] has proved all of the above, then [he/she] is entitled to recover if [he/she] proves it is more likely true than not true that [***name of defendant***]'s wrongful conduct was a substantial factor in causing any of the following actual damages:**

a. **Harm to [*name of plaintiff*]'s property, business, trade, profession, or occupation;**

b. **Expenses [*name of plaintiff*] had to pay as a result of the defamatory statements;**

c. **Harm to [*name of plaintiff*]'s reputation; or**

d. **Shame, mortification, or hurt feelings;**

[*Punitive Damages*]

[*Name of plaintiff*] may also recover damages to punish [*name of defendant*] if [he/she] proves by clear and convincing evidence that [*name of defendant*] acted with malice, oppression, or fraud.

"Malice" means that [*name of defendant*] acted with intent to cause injury or that [his/her] conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A person acts with knowing disregard when he or she is aware of the probable dangerous consequences of his or her conduct and deliberately fails to avoid those consequences.

"Oppression" means that [*name of defendant*]'s conduct was despicable and subjected [*name of plaintiff*] to cruel and unjust hardship in knowing disregard of [his/her] rights.

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

"Fraud" means that [*name of defendant*] intentionally misrepresented or concealed a material fact and did so intending to deprive [*name of plaintiff*] of property or of a legal right or otherwise to cause [him/her] injury.

DIRECTIONS FOR USE

A special-verdict form should be used in this type of case.

Presumed damages either are not available or will likely not be sought in a per quod case.

SOURCES AND AUTHORITY

- Civil Code section 45a provides: "A libel which is defamatory of the plaintiff without the necessity of explanatory matter, such as an inducement, innuendo or other extrinsic fact, is said to be a libel on its face. Defamatory language not libelous on its

face is not actionable unless the plaintiff alleges and proves that he has suffered special damage as a proximate result thereof. Special damage is defined in Section 48a of this code."

- Civil Code section 48a (d) provides: " 'Special damages' are all damages which plaintiff alleges and proves that he has suffered in respect to his property, business, trade, profession or occupation, including such amounts of money as the plaintiff alleges and proves he has expended as a result of the alleged libel, and no other."

- Section 559 of the Restatement Second of Torts states: "A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."

- "Libel is recognized as either being per se (on its face), or per quod (literally meaning, 'whereby'), and each requires a different standard of pleading." (*Palm Springs Tennis Club v. Rangel* (1999) 73 Cal.App.4th 1, 5 [86 Cal.Rptr.2d 73].)

- "If [a] defamatory meaning would appear only to readers who might be able to recognize it through some knowledge of specific facts and/or circumstances, not discernible from the face of the publication, and which are not matters of common knowledge rationally attributable to all reasonable persons, then the libel cannot be libel per se but will be libel per quod." (*Palm Springs Tennis Club, supra,* 73 Cal.App.4th at p. 5, internal citation omitted.)

- "In pleading a case of libel per quod the plaintiff cannot assume that the court has access to the reader's special knowledge of extrinsic facts but must specially plead and prove those facts." (*Palm Springs Tennis Club, supra,* 73 Cal.App.4th at p. 7.)

- "A libel 'per quod,' … requires that the injurious character or effect be established by allegation and proof." (*Slaughter v. Friedman* (1982) 32 Cal.3d 149, 153–154 [185 Cal.Rptr 244].)

- "In the libel context, 'inducement' and 'innuendo' are terms of art: '[W]here the language is ambiguous and an explanation is necessary to establish the defamatory meaning, the pleader must do two things: (1) Allege his interpretation of the defamatory meaning of the language (the "innuendo," …); (2) support that interpretation by alleging facts showing that the readers or hearers to whom it was published would understand it in that defamatory sense (the "inducement".)' " (*Barnes-Hind v. Superior Court* (1986) 181 Cal.App.3d 377, 387 [226 Cal.Rptr. 354], internal citations omitted.)

- "The question whether a plaintiff is a public figure is to be determined by the court, not the jury." (*Stolz v. KSFM 102 FM* (1994) 30 Cal.App.4th 195, 203 [35 Cal.Rptr.2d 740], internal citation omitted.)

Secondary Sources

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 471–493, 534–542
- 4 Levy, et al., California Torts (1985–2000) Defamation, §§ 45.04, 45:13
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 340, *Libel and Slander* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 142, *Libel and Slander (Defamation)* (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 340, *Libel and Slander* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 142, *Libel and Slander (Defamation)* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, §§ 21:1–21:2, 21:22–21:25, 21:44–21:52

1702
Defamation Per Se—Essential Factual Elements
(Private Figure—Matter of Public Concern)

[*Name of plaintiff***] claims that [***name of defendant***] harmed [him/her] by making [one or more of] the following statement(s): [***list all claimed per se defamatory statement(s)***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

[*Liability***]**

1. **That [***name of defendant***] made [one or more of] the statement(s) to [a person/ persons] other than [***name of plaintiff***];**

2. **That [this person/these people] reasonably understood that the statement(s) [was/were] about [***name of plaintiff***];**

3. **[That [this person/these people] reasonably understood the statement(s) to mean that [***insert ground(s) defamation per se, e.g., "[name of plaintiff] had committed a crime"***];**

4. **That the statement(s) [was/were] false; and**

5. **That [***name of defendant***] failed to use reasonable care to determine the truth or falsity of the statement(s).**

[*Actual damages***]**

If [*name of plaintiff***] has proved all of the above, then [he/she] is entitled to recover if [he/she] proves that [***name of defendant***]'s wrongful conduct was a substantial factor in causing any of the following actual damages:**

a. **Harm to [***name of plaintiff***]'s property, business, trade, profession, or occupation;**

b. **Expenses [***name of plaintiff***] had to pay as a result of the defamatory statements;**

c. **Harm to [***name of plaintiff***]'s reputation; or**

d. **Shame, mortification, or hurt feelings.**

[*Nominal damages***]**

If [*name of plaintiff***] has failed to prove any of the above actual damages but proves by clear and convincing evidence that [***name of defendant***] knew the statement(s) [was/were] false or that [he/she] had serious doubts about the truth of the statement(s), then the law assumes that [***name of plaintiff***]'s reputation has been harmed. Without further evidence of damage [***name of plaintiff***] is entitled to a nominal sum such as one dollar or such greater sum as you believe is proper for the assumed harm to [his/her] reputation under the circumstances of this case.**

[*Punitive damages***]**

[*Name of plaintiff***] may also recover damages to punish [***name of defendant***] if [he/she] proves by clear and convincing evidence that [***name of defendant***] either knew the statement(s) [was/were] false or had serious doubts about the truth of the statement(s), and that [he/she] acted with malice, oppression, or fraud.**

"Malice" means that [*name of defendant***] acted with intent to cause injury or that [his/her] conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A person acts with knowing disregard when he or she is aware of the probable dangerous consequences of his or her conduct and deliberately fails to avoid those consequences.**

"Oppression" means that [*name of defendant***]'s conduct was despicable and subjected [***name of plaintiff***] to cruel and unjust hardship in knowing disregard of [his/her] rights.**

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

"Fraud" means that [*name of defendant***] intentionally misrepresented or concealed a material fact and did so intending to deprive [***name of plaintiff***] of property or of a legal right or otherwise to cause [him/her] injury.**

DIRECTIONS FOR USE

A special verdict form should be used in this type of case.

Use the bracketed element number 3 only when the statement is not defamatory on its face (i.e., where the judge has not determined that the statement is defamatory as a matter of law.) For statutory grounds of defamation per se see Civil Code sections 45 [Libel] and 46 [Slander]. Note that certain specific grounds of libel per se have been defined by case law.

Regarding the issue of what is a public concern, courts have observed: " 'If the issue was being debated publicly and if it had foreseeable and substantial ramifications for nonparticipants, it was a public controversy.' " (*Copp v. Paxton* (1996) 45 Cal.App.4th 829, 837 [52 Cal.Rptr.2d 831], quoting *Waldbaum v. Fairchild Publications, Inc.* (D.C. Cir. 1980) 627 F.2d 1287, 1297.)

SOURCES AND AUTHORITY

- "Defamation is an invasion of the interest in reputation. The tort involves the intentional publication of a statement of fact that is false, unprivileged, and has a natural tendency to injure or which causes special damage." (*Smith v. Maldonado* (1999) 72 Cal.App.4th 637, 645 [85 Cal.Rptr.2d 397].)

- "The question whether a plaintiff is a public figure is to be determined by the court, not the jury." (*Stolz v. KSFM 102 FM* (1994) 30 Cal.App.4th 195, 203 [35 Cal.Rptr.2d 740], internal citation omitted.)

- A private plaintiff is not required to prove malice to recover actual damages. (*Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 347 [41 L.Ed.2d 789, 94 S.Ct. 2997]; *Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 742 [257 Cal.Rptr. 708].)

- The jury should be instructed that the defendant's negligence is an element of libel if the plaintiff is a private figure. (*Carney v. Santa Cruz Women Against Rape* (1990) 221 Cal.App.3d 1009, 1016 [271 Cal.Rptr. 30].)

- "When the speech involves a matter of public concern, a private-figure plaintiff has the burden of proving the falsity of the defamation." (*Brown, supra,* 48 Cal.3d at p. 747.)

- "Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. Of course, juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury." (*Gertz, supra,* 418 U.S. at p. 350.)

- Private-figure plaintiffs must prove actual malice to recover punitive or presumed damages for defamation if the matter is one of public concern. They are only required to prove negligence to recover damages for actual injury to reputation. (*Khawar v. Globe Internat., Inc*. (1998) 19 Cal.4th 254, 273–274 [79 Cal.Rptr.2d 178].)

- "A private-figure plaintiff must prove at least negligence to recover any damages and, when the speech involves a matter of public concern, he must also prove *New York Times* malice … to recover presumed or punitive damages. This malice must be established by 'clear and convincing proof.' " (*Brown, supra,* 48 Cal.3d at p. 747.)

- When the court is instructing on punitive damages, it is error to fail to instruct that *New York Times* malice is required when the statements at issue involve matters of public concern. (*Carney, supra,* 221 Cal.App.3d at p. 1022.)

- "To prove actual malice … a plaintiff must 'demonstrate with clear and convincing evidence that the defendant realized that his statement was false or that he subjectively entertained serious doubts as to the truth of his statement.' " (*Khawar, supra,* 19 Cal.4th at p. 275, internal citation omitted.)

- "Because actual malice is a higher fault standard than negligence, a finding of actual malice generally includes a finding of negligence … ." (*Khawar, supra,* 19 Cal.4th at p. 279.)

- " 'The inquiry into the protected status of speech is one of law, not fact.' " (*Nizam-Aldine v. City of Oakland* (1996) 47 Cal.App.4th 364, 375 [54 Cal.Rptr.2d 781], quoting *Connick v. Myers* (1983) 461 U.S. 138, 148, fn. 7 [75 L.Ed.2d 708, 720, 103 S.Ct. 1684].)

- "For the *New York Times* standard to be met, 'the publisher must come close to willfully blinding itself to the falsity of its utterance.' " (*Brown, supra,* 48 Cal.3d at p. 747, internal citation omitted.)

- " 'While such speech is not totally unprotected by the First Amendment, its protections are less stringent' [than that applying to speech on matters of public concern]." (*Savage v. Pacific Gas & Electric Co.* (1993) 21 Cal.App.4th 434, 445 [26 Cal.Rptr.2d 305], internal citation omitted.)

<u>Secondary Sources</u>

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 471–493, 543–546
- 4 Levy, et al., California Torts (1985–2000) Defamation, §§ 45.04, 45:13
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 340, *Libel and Slander* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 142, *Libel and Slander (Defamation)* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, §§ 21:1–21:2, 21:22–21:25, 21:51

1703
Defamation Per Quod—Essential Factual Elements
(Private Figure—Matter of Public Concern)

[*Name of plaintiff***] claims that [***name of defendant***] harmed [him/her] by making [one or more of] the following statement(s): [***insert all claimed per quod defamatory statements***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

[*Liability***]**

1. **That [***name of defendant***] made [one or more of] the statement(s) to [a person/ persons] other than [***name of plaintiff***];**

2. **That [this person/these people] reasonably understood that the statement(s) [was/were] about [***name of plaintiff***];**

3. **That because of the facts and circumstances known to the [listener(s)/ reader(s)] of the statement(s), [it/they] tended to injure [***name of plaintiff***] in [his/her] occupation [or to expose [him/her] to hatred, contempt, ridicule, or shame] [or to discourage others from associating or dealing with [him/her]];**

4. **That the statement(s) [was/were] false;**

5. **That [***name of defendant***] failed to use reasonable care to determine the truth or falsity of the statement(s);**

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

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

[*Actual damages***]**

If [*name of plaintiff***] has proved all of the above, then [he/she] is entitled to recover if [he/she] proves that [***name of defendant***]'s wrongful conduct was a substantial factor in causing any of the following actual damages:**

a. **Harm to [***name of plaintiff***]'s property, business, trade, profession, or occupation;**

b. **Expenses [*name of plaintiff*] had to pay as a result of the defamatory statements;**

c. **Harm to [*name of plaintiff*]'s reputation; or**

d. **Shame, mortification, or hurt feelings.**

[*Punitive Damages*]

[*Name of plaintiff*] may also recover damages to punish [*name of defendant*] if [he/she] proves by clear and convincing evidence that [*name of defendant*] either knew the statement(s) [was/were] false or had serious doubts about the truth of the statement(s), and that [he/she] acted with malice, oppression, or fraud.

"Malice" means that [*name of defendant*] acted with intent to cause injury or that [his/her] conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A person acts with knowing disregard when he or she is aware of the probable dangerous consequences of his or her conduct and deliberately fails to avoid those consequences.

"Oppression" means that [*name of defendant*]'s conduct was despicable and subjected [*name of plaintiff*] to cruel and unjust hardship in knowing disregard of [his/her] rights.

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

"Fraud" means that [*name of defendant*] intentionally misrepresented or concealed a material fact and did so intending to deprive [*name of plaintiff*] of property or of a legal right or otherwise to cause [him/her] injury.

DIRECTIONS FOR USE

A special verdict form should be used in this type of case.

Regarding the issue of what is a public concern, courts have observed: " 'If the issue was being debated publicly and if it had foreseeable and substantial ramifications for nonparticipants, it was a public controversy.' " (*Copp v. Paxton* (1996) 45 Cal.App.4th 829, 837 [52 Cal.Rptr.2d 831], quoting *Waldbaum v. Fairchild Publications, Inc.* (D.C. Cir. 1980) 627 F.2d 1287, 1297.)

Presumed damages either are not available or will likely not be sought in a per quod case.

SOURCES AND AUTHORITY

- Civil Code section 45a provides: "A libel which is defamatory of the plaintiff without the necessity of explanatory matter, such as an inducement, innuendo or other extrinsic fact, is said to be a libel on its face. Defamatory language not libelous on its face is not actionable unless the plaintiff alleges and proves that he has suffered special damage as a proximate result thereof. Special damage is defined in Section 48a of this code."

- Civil Code section 48a(d) provides: " 'Special damages' are all damages which plaintiff alleges and proves that he has suffered in respect to his property, business, trade, profession or occupation, including such amounts of money as the plaintiff alleges and proves he has expended as a result of the alleged libel, and no other."

- Section 559 of the Restatement Second of Torts states: "A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."

- "Libel is recognized as either being per se (on its face), or per quod (literally meaning, 'whereby'), and each requires a different standard of pleading." (*Palm Springs Tennis Club v. Rangel* (1999) 73 Cal.App.4th 1, 5 [86 Cal.Rptr.2d 73].)

- "If [a] defamatory meaning would appear only to readers who might be able to recognize it through some knowledge of specific facts and/or circumstances, not discernible from the face of the publication, and which are not matters of common knowledge rationally attributable to all reasonable persons, then the libel cannot be libel per se but will be libel per quod." (*Palm Springs Tennis Club, supra,* 73 Cal.App.4th at p. 5, internal citation omitted.)

- "In pleading a case of libel per quod the plaintiff cannot assume that the court has access to the reader's special knowledge of extrinsic facts but must specially plead and prove those facts." (*Palm Springs Tennis Club, supra,* 73 Cal.App.4th at p. 7.)

- "A libel 'per quod' … requires that the injurious character or effect be established by allegation and proof." (*Slaughter v. Friedman* (1982) 32 Cal.3d 149, 153–154 [185 Cal.Rptr 244].)

- "In the libel context, 'inducement' and 'innuendo' are terms of art: '[W]here the language is ambiguous and an explanation is necessary to establish the defamatory meaning, the pleader must do two things: (1) Allege his interpretation of the defamatory meaning of the language (the "innuendo," …); (2) support that interpretation by alleging facts showing that the readers or hearers to whom it was published would understand it in that defamatory sense (the "inducement".)' " (*Barnes-Hind v. Superior Court* (1986) 181 Cal.App.3d 377, 387 [226 Cal.Rptr. 354].)

- "A defamatory publication not libelous on its face is not actionable unless the plaintiff alleges that he has suffered special damages as a result thereof." (*Selleck v. Globe Internat., Inc.* (1985) 166 Cal.App.3d 1123, 1130 [212 Cal.Rptr. 838].)

- "The question whether a statement is reasonably susceptible to a defamatory interpretation is a question of law for the trial court. Only once the court has determined that a statement is reasonably susceptible to such a defamatory interpretation does it become a question for the trier of fact whether or not it was so understood." (*Smith v. Maldonado* (1999) 72 Cal.App.4th 637, 647 [85 Cal.Rptr.2d 397], internal citations omitted.)

- Private-figure plaintiffs must prove actual malice to recover punitive or presumed damages for defamation if the matter is one of public concern. They are only required to prove negligence to recover damages for actual injury to reputation. (*Khawar v. Globe International, Inc.* (1998) 19 Cal.4th 254, 273–274 [79 Cal.Rptr.2d 178].)

- If the language is not defamatory on its face, there is no distinction between libel and slander: "In either case, the fact that a statement is not defamatory on its face requires only that the plaintiff plead and prove the defamatory meaning and special damages." (*Savage v. Pacific Gas & Electric Co.* (1993) 21 Cal.App.4th 434, 447 [26 Cal.Rptr.2d 305].)

- According to *Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 347 [41 L.Ed.2d 789, 94 S.Ct. 2997], a plaintiff must prove that the defendant was at least negligent in failing to ascertain the truth or falsity of the statement. (*Savage, supra,* 21 Cal.App.4th at p. 448.)

- "The question whether a plaintiff is a public figure is to be determined by the court, not the jury." (*Stolz v. KSFM 102 FM* (1994) 30 Cal.App.4th 195, 203 [35 Cal.Rptr.2d 740], internal citation omitted.)

<u>Secondary Sources</u>

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 471–493, 543–546
- 4 Levy, et al., California Torts (1985–2000) Defamation, §§ 45.04, 45:13
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 340, *Libel and Slander* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 142, *Libel and Slander (Defamation)* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, §§ 21:1–21:2, 21:22–21:25, 21:51

1704
Defamation Per Se—Essential Factual Elements
(Private Figure–Matter of Private Concern)

[*Name of plaintiff***] claims that [***name of defendant***] harmed [him/her] by making [one or more of] the following statement(s): [***list all claimed per se defamatory statement(s)***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

[*Liability***]**

1. **That [***name of defendant***] made [one or more of] the statement(s) to [a person/persons] other than [***name of plaintiff***];**

2. **That [this person/these people] reasonably understood that the statement(s) [was/were] about [***name of plaintiff***];**

3. **[That [this person/these people] reasonably understood the statement(s) to mean that [***insert ground(s) for defamation per se, e.g., "[name of plaintiff] had committed a crime"***];**

4. **That [***name of defendant***] failed to use reasonable care to determine the truth or falsity of the statement(s).**

[*Nominal damages***]**

If [*name of plaintiff***] has proved all of the above, the law assumes that [his/her] reputation has been harmed. Without further evidence of damage, [***name of plaintiff***] is entitled to a nominal sum such as one dollar or such greater sum as you believe is proper for the assumed harm to [his/her] reputation under the circumstances of this case.**

[*Actual damages***]**

[*Name of plaintiff***] is also entitled to recover if [he/she] proves that [***name of defendant***]'s wrongful conduct was a substantial factor in causing any of the following actual damages:**

a. **Harm to [***name of plaintiff***]'s property, business, trade, profession, or occupation;**

b. **Expenses [***name of plaintiff***] had to pay as a result of the defamatory statements;**

c. **Harm to [*name of plaintiff*]'s reputation in addition to that assumed by the law; or**

d. **Shame, mortification, or hurt feelings.**

[*Punitive damages*]

[*Name of plaintiff*] may also recover damages to punish [*name of defendant*] if [her/she] proves by clear and convincing evidence that [*name of defendant*] acted with malice, oppression, or fraud.

"Malice" means that [*name of defendant*] acted with intent to cause injury or that [his/her] conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A person acts with knowing disregard when he or she is aware of the probable dangerous consequences of his or her conduct and deliberately fails to avoid those consequences.

"Oppression" means that [*name of defendant*]'s conduct was despicable and subjected [*name of plaintiff*] to cruel and unjust hardship in knowing disregard of [his/her] rights.

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

"Fraud" means that [*name of defendant*] intentionally misrepresented or concealed a material fact and did so intending to deprive [*name of plaintiff*] of property or of a legal right or otherwise to cause [him/her] injury.

DIRECTIONS FOR USE

A special-verdict form should be used in this type of case.

Use the bracketed element number 3 only when the statement is not defamatory on its face (i.e., where the judge has not determined that the statement is defamatory as a matter of law). For statutory grounds of defamation per se see Civil Code sections 45 [Libel] and 46 [Slander]. Note that certain specific grounds of libel per se have been defined by case law.

SOURCES AND AUTHORITY

- "Defamation is an invasion of the interest in reputation. The tort involves the intentional publication of a statement of fact that is false, unprivileged, and has a natural tendency to injure or which causes special damage." (*Smith v. Maldonado* (1999) 72 Cal.App.4th 637, 645 [85 Cal.Rptr.2d 397].)

- "The question whether a plaintiff is a public figure [or not] is to be determined by the court, not the jury." (*Stolz v. KSFM 102 FM* (1994) 30 Cal.App.4th 195, 203 [35 Cal.Rptr.2d 740], internal citation omitted.)

- The jury should be instructed that the defendant's negligence is an element of libel if the plaintiff is a private figure. (*Carney v. Santa Cruz Women Against Rape* (1990) 221 Cal.App.3d 1009, 1016 [271 Cal.Rptr. 30].)

- "A private-figure plaintiff must prove at least negligence to recover any damages and, when the speech involves a matter of public concern, he must also prove *New York Times* malice to recover presumed or punitive damages." (*Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 747 [257 Cal.Rptr. 708].)

- "The First Amendment trumps the common law presumption of falsity in defamation cases involving private-figure plaintiffs when the allegedly defamatory statements pertain to a matter of public interest." (*Nizam-Aldine v. City of Oakland* (1996) 47 Cal.App.4th 364, 375 [54 Cal.Rptr.2d 781].)

- "Thus, in a defamation action the burden is normally on the defendant to prove the truth of the allegedly defamatory communications. However, in accommodation of First Amendment considerations (which are implicated by state defamation laws), where the plaintiff is a public figure, the 'public-figure plaintiff must show the falsity of the statements at issue in order to prevail in a suit for defamation.' " (*Stoltz, supra,* 30 Cal.App.4th at p. 202, internal citations omitted.)

- "Since the statements at issue here involved a matter of purely private concern communicated between private individuals, we do not regard them as raising a First Amendment issue. 'While such speech is not totally unprotected by the First Amendment, its protections are less stringent' [than that applying to speech on matters of public concern]." (*Savage v. Pacific Gas & Electric Co.* (1993) 21 Cal.App.4th 434, 445 [26 Cal.Rptr.2d 305], quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.* (1985) 472 U.S. 749, 760 [86 L.Ed.2d 593, 105 S.Ct. 2939], internal citation omitted.)

- "We conclude that permitting recovery of presumed and punitive damages in defamation cases absent a showing of 'actual malice' does not violate the First Amendment when the defamatory statements do not involve matters of public concern." (*Dun & Bradstreet, Inc., supra,* 472 U.S. at p. 763.)

- "When the speech is of exclusively private concern and the plaintiff is a private figure, as in *Dun & Bradstreet,* the constitutional requirements do not necessarily force any change in at least some of the features of the common-law landscape." (*Philadelphia Newspapers, Inc. v. Hepps* (1986) 475 U.S. 767, 775 [89 L.Ed.2d 783, 106 S.Ct. 1558].)

- "In defamation actions generally, factual truth is a defense which it is the defendant's burden to prove. In a defamation action against a newspaper by a private person suing over statements of public concern, however, the First Amendment places the burden of proving falsity on the plaintiff." (*Eisenberg v. Alameda Newspapers, Inc.* (1999) 74 Cal.App.4th 1359, 1382 [88 Cal.Rptr.2d 802].)

Secondary Sources

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 471–493, 546
- 4 Levy, et al., California Torts (1985–2000) Defamation, §§ 45.04, 45.13
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 340, *Libel and Slander* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 142, *Libel and Slander (Defamation)* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, §§ 21:1–21:2, 21:22–21:25, 21:51

1705
Defamation Per Quod–Essential Factual Elements
(Private Figure–Matter of Private Concern)

[*Name of plaintiff***] claims that [***name of defendant***] harmed [him/her] by making [one or more of] the following statement(s): [***insert all claimed per quod defamatory statements***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

[*Liability***]**

1. **That [***name of defendant***] made [one or more of] the statement(s) to [a person/ persons] other than [***name of plaintiff***];**

2. **That [this person/these people] reasonably understood that the statement(s) [was/were] about [***name of plaintiff***];**

3. **That because of the facts and circumstances known to the [listener(s)/ reader(s)] of the statement(s), [it/they] tended to injure [***name of plaintiff***] in [his/her] occupation [or to expose [him/her] to hatred, contempt, ridicule, or shame] [or to discourage others from associating or dealing with [him/her]];**

4. **That [***name of defendant***] failed to use reasonable care to determine the truth or falsity of the statement(s);**

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

6. **That the statement(s) [was/were] a substantial factor in causing [***name of plaintiff***]'s harm.**

[*Actual damages***]**

If [*name of plaintiff***] has proved all of the above, then [he/she] is entitled to recover if [he/she] proves that [***name of defendant***]'s wrongful conduct was a substantial factor in causing any of the following actual damages:**

a. **Harm to [***name of plaintiff***]'s property, business, trade, profession, or occupation;**

b. **Expenses [***name of plaintiff***] had to pay as a result of the defamatory statements;**

c. **Harm to [*name of plaintiff*]'s reputation; or**

d. **Shame, mortification, or hurt feelings.**

[*Punitive damages*]

[*Name of plaintiff*] may also recover damages to punish [*name of defendant*] if [he/she] proves by clear and convincing evidence that [*name of defendant*] acted with malice, oppression, or fraud.

"Malice" means that [*name of defendant*] acted with intent to cause injury or that [his/her] conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A person acts with knowing disregard when he or she is aware of the probable dangerous consequences of his or her conduct and deliberately fails to avoid those consequences.

"Oppression" means that [*name of defendant*]'s conduct was despicable and subjected [*name of plaintiff*] to cruel and unjust hardship in knowing disregard of [his/her] rights.

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

"Fraud" means that [*name of defendant*] intentionally misrepresented or concealed a material fact and did so intending to deprive [*name of plaintiff*] of property or of a legal right or otherwise to cause [him/her] injury.

DIRECTIONS FOR USE

A special verdict form should be used in this type of case.

Presumed damages either are not available or will likely not be sought in a per quod case.

SOURCES AND AUTHORITY

- Civil Code section 45a provides: "A libel which is defamatory of the plaintiff without the necessity of explanatory matter, such as an inducement, innuendo or other extrinsic fact, is said to be a libel on its face. Defamatory language not libelous on its face is not actionable unless the plaintiff alleges and proves that he has suffered special damage as a proximate result thereof. Special damage is defined in Section 48a of this code."

- Civil Code section 48a(d) provides: "Special damages" are all damages which plaintiff alleges and proves that he has suffered in respect to his property, business,

trade, profession or occupation, including such amounts of money as the plaintiff alleges and proves he has expended as a result of the alleged libel, and no other."

- Section 559 of the Restatement Second of Torts states: "A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."

- "Libel is recognized as either being per se (on its face), or per quod (literally meaning, 'whereby'), and each requires a different standard of pleading." (*Palm Springs Tennis Club v. Rangel* (1999) 73 Cal.App.4th 1, 5 [86 Cal.Rptr.2d 73].)

- "If [a] defamatory meaning would appear only to readers who might be able to recognize it through some knowledge of specific facts and/or circumstances, not discernible from the face of the publication, and which are not matters of common knowledge rationally attributable to all reasonable persons, then the libel cannot be libel per se but will be libel per quod." (*Palm Springs Tennis Club, supra,* 73 Cal.App.4th at p. 5, internal citation omitted.)

- "In pleading a case of libel per quod the plaintiff cannot assume that the court has access to the reader's special knowledge of extrinsic facts but must specially plead and prove those facts." (*Palm Springs Tennis Club, supra,* 73 Cal.App.4th at p. 7.)

- "A libel 'per quod' … requires that the injurious character or effect be established by allegation and proof." (*Slaughter v. Friedman* (1982) 32 Cal.3d 149, 153–154 [185 Cal.Rptr 244].)

- "In the libel context, 'inducement' and 'innuendo' are terms of art: '[W]here the language is ambiguous and an explanation is necessary to establish the defamatory meaning, the pleader must do two things: (1) allege his interpretation of the defamatory meaning of the language (the "innuendo," …); (2) support that interpretation by alleging facts showing that the readers or hearers to whom it was published would understand it in that defamatory sense (the "inducement")." (*Barnes-Hind v. Superior Court* (1986) 181 Cal.App.3d 377, 387 [226 Cal.Rptr. 354].)

- "A defamatory publication not libelous on its face is not actionable unless the plaintiff alleges that he has suffered special damages as a result thereof." (*Selleck v. Globe Internat., Inc.* (1985) 166 Cal.App.3d 1123, 1130 [212 Cal.Rptr. 838].)

- "The question whether a statement is reasonably susceptible to a defamatory interpretation is a question of law for the trial court. Only once the court has determined that a statement is reasonably susceptible to such a defamatory interpretation does it become a question for the trier of fact whether or not it was so understood." (*Smith v. Maldonado* (1999) 72 Cal.App.4th 637, 647 [85 Cal.Rptr.2d 397], internal citations omitted.)

- Private-figure plaintiffs must prove actual malice to recover punitive or presumed damages for defamation if the matter is one of public concern. They are required to prove only negligence to recover damages for actual injury to reputation. (*Khawar v. Globe Internat., Inc*. (1998) 19 Cal.4th 254, 273–274 [79 Cal.Rptr.2d 178].)

- If the language is not defamatory on its face, there is no distinction between libel and slander: "In either case, the fact that a statement is not defamatory on its face requires only that the plaintiff plead and prove the defamatory meaning and special damages." (*Savage v. Pacific Gas & Electric Co.* (1993) 21 Cal.App.4th 434, 447 [26 Cal.Rptr.2d 305].)

- According to *Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 347 [41 L.Ed.2d 789, 94 S.Ct. 2997], a plaintiff must prove that the defendant was at least negligent in failing to ascertain the truth or falsity of the statement. (*Savage, supra,* 21 Cal.App.4th at p. 448.)

- "The question whether a plaintiff is a public figure is to be determined by the court, not the jury." (*Stolz v. KSFM 102 FM* (1994) 30 Cal.App.4th 195, 203 [35 Cal.Rptr.2d 740], internal citation omitted.)

<u>Secondary Sources</u>

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 471–493, 546
- 4 Levy, et al., California Torts (1985–2000) Defamation, §§ 45.04, 45.13
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 340, *Libel and Slander* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 142, *Libel and Slander (Defamation)* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, §§ 21:1–21:2, 21:22–21:25, 21:51

1706
Definition of Statement

The word "statement" in these instructions refers to any form of communication or representation, including spoken or written words [or] pictures [or] [*insert audible or visual representations***].**

DIRECTIONS FOR USE

This instruction may be necessary in every case, but could be useful in cases where defamatory material is not written or verbal.

SOURCES AND AUTHORITY

- Civil Code 45 provides: "Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation."

- Civil Code 46 provides:

  Slander is a false and unprivileged publication, orally uttered, and also communications by radio or any mechanical or other means which:
  1. Charges any person with crime, or with having been indicted, convicted, or punished for crime;
  2. Imputes in him the present existence of an infectious, contagious, or loathsome disease;
  3. Tends directly to injure him in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profits;
  4. Imputes to him impotence or a want of chastity; or
  5. Which, by natural consequence, causes actual damage.

<u>Secondary Sources</u>

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, § 472
- 4 Levy, et al., California Torts (1985–2000) Defamation, § 45.02
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 340, *Libel and Slander* (Matthew Bender)

- CALIFORNIA POINTS AND AUTHORITIES, Ch. 142, *Libel and Slander (Defamation)* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 21:2

1707
Fact Versus Opinion

For [*name of plaintiff*] to recover, [*name of defendant*]'s statement(s) must have been statements of fact, not opinion. A statement of fact is a statement that can be proved to be true or false. An opinion may be considered a statement of fact if the opinion suggests that facts exist.

In deciding this issue, you should consider whether the average [reader/listener] would conclude from the language of the statement and its context that [name of defendant] was making a statement of fact.

DIRECTIONS FOR USE

This instruction may not be necessary in all cases: "The critical determination of whether an allegedly defamatory statement constitutes fact or opinion is a question of law for the court and therefore suitable for resolution by demurrer. If the court concludes the statement could reasonably be construed as either fact or opinion, the issue should be resolved by a jury." (*Campanelli v. Regents of University. of California* (1996) 44 Cal.App.4th 572, 578 [51 Cal.Rptr.2d 891], internal citations omitted.)

SOURCES AND AUTHORITY

- The statutory definitions of libel in slander "can be meaningfully applied only to statements that are capable of being proved as false or true." (*Savage v. Pacific Gas & Electric Co.* (1993) 21 Cal.App.4th 434, 445 [26 Cal.Rptr.2d 305].)

- "Thus, 'rhetorical hyperbole,' 'vigorous epithet[s],' 'lusty and imaginative expressions[s] of contempt,' and language used 'in a loose, figurative sense' have all been accorded constitutional protection." (*Ferlauto v. Hamsher* (1999) 74 Cal.App.4th 1394, 1401 [88 Cal.Rptr.2d 843].)

- " 'If a speaker says, "In my opinion John Jones is a liar," he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact." (*Milkovich v. Lorain Journal Co.* (1990) 479 U.S. 1, 18 [111 L.Ed.2d 1, 110 S.Ct. 2695].)

- California courts use a "totality of the circumstances" test to determine if a statement is one of fact or of opinion. (*Baker v. Los Angeles Herald Examiner* (1986) 42 Cal.3d

254, 260 [228 Cal.Rptr. 206].) "The court must put itself in the place of an average reader and decide the natural and probable effect of the statement." (*Hofmann Co. v. E.I. Du Pont de Nemors & Co.* (1988) 202 Cal.App.3d 390, 398 [248 Cal.Rptr. 384].)

- "[S]ome statements are ambiguous and cannot be characterized as factual or nonfactual as a matter of law. 'In these circumstances, it is for the jury to determine whether an ordinary reader would have understood the article as a factual assertion. …' " (*Kahn v. Bower* (1991) 232 Cal.App.3d 1599, 1608 [284 Cal.Rptr. 244], internal citations omitted.)

Secondary Sources

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, § 486
- 4 Levy, et al., California Torts (1985–2000) Defamation, §§ 45.05–45.06
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 340, *Libel and Slander* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 142, *Libel and Slander (Defamation)* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, §§ 21:20–21:21

1708
Coerced Self-Publication

[*Name of plaintiff***] claims that [***name of defendant***] is responsible for [his/her] harm even though [***name of defendant***] did not communicate the statement(s) to anyone other than [***name of plaintiff***]. To succeed, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] made the statement(s) to [***name of plaintiff***];**

2. **That [***name of plaintiff***] was under strong pressure to communicate [***name of defendant***]'s statement(s) to another person; and**

3. **That when [***name of defendant***] made the statements, [he/she] should have known that [***name of plaintiff*** **another] would be under strong pressure to communicate them to person.**

If [*name of plaintiff***] has proved all of the above, then you must find that [***name of defendant***] was responsible for the communication of the statement(s).**

SOURCES AND AUTHORITY

- The general rule is that "[a] plaintiff cannot manufacture a defamation cause of action by publishing the statements to third persons; the publication must be done by the defendant." (*Live Oak Publishing Co. v. Cohagan* (1991) 234 Cal.App.3d 1277, 1284 [286 Cal.Rptr. 198].) The exception to the rule occurs when it is foreseeable that the defendant's act would result in plaintiff's publication to a third person. (*Ibid.*)

- "A self-publication of the alleged defamatory statement may be imputed to the originator of the statement if 'the person defamed is operating under a strong compulsion to republish the defamatory statement and the circumstances which create the strong compulsion are known to the originator of the defamatory statement at the time he communicates it to the person defamed.' " (*Davis v. Consolidated Freightways* (1994) 29 Cal.App.4th 354, 373 [34 Cal.Rptr.2d 438], quoting *McKinney v. County of Santa Clara* (1980) 110 Cal.App.3d 787, 797–798 [168 Cal.Rptr. 89].)

- "This exception has been limited to a narrow class of cases, usually where a plaintiff is compelled to republish the statements in aid of disproving them." (*Live Oak Publishing Co., supra*, 234 Cal.App.3d at p. 1285.)

- To determine if the coercion exception applies, the test is "whether 'because of some necessity he was under to communicate the matter to others, it was reasonably to be anticipated that he would do so.' " (*Live Oak Publishing Co., supra,* 234 Cal.App.3d at p. 1285.)

Secondary Sources

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, § 478
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 340, *Libel and Slander* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 142, *Libel and Slander (Defamation)* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 21:15

1720
Defense of the Truth

[*Name of defendant***] is not responsible for [***name of plaintiff***]'s harm, if any, if [he/she] proves that [his/her] statement(s) about [***name of plaintiff***] [was/were] true. [***Name of defendant***] does not have to prove that the statement(s) [was/were] true in every detail, so long as the statement(s) [was/were] substantially true.**

DIRECTIONS FOR USE

This instruction is to be used only in cases involving private plaintiffs on matters of private concern. In cases involving public figures or matters of public concern, the burden of proving falsity is on the plaintiff.

SOURCES AND AUTHORITY

- Section 581A of the Restatement Second of Torts provides: "One who publishes a defamatory statement of fact is not subject to liability for defamation if the statement is true."

- "Truth, of course, is an absolute defense to any libel action. In order to establish the defense, the defendant need not prove the literal truth of the allegedly libelous accusation, so long as the imputation is substantially true so as to justify the 'just or sting' of the remark." (*Campanelli v. Regents of Univ. of California* (1996) 44 Cal.App.4th 572, 581–582 [51 Cal.Rptr.2d 891], internal citations omitted.)

Secondary Sources

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, § 494–497
- 4 Levy, et al., California Torts (1985–2000) Defamation, § 45.10
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 340, *Libel and Slander* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 142, *Libel and Slander (Defamation)* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, §§ 21:19, 21:52

1721
Defense of Consent

[*Name of defendant***] is not responsible for [***name of plaintiff***]'s harm, if any, if [he/she] proves that [***name of plaintiff***] consented, by words or conduct, to [***name of defendant***]'s communication of the statement(s) to others. In deciding whether [***name of plaintiff***] consented to the communication, you should consider the circumstances surrounding the words or conduct.**

SOURCES AND AUTHORITY

- Restatement Second of Torts section 583 provides, in part: "[T]he consent of another to the publication of defamatory matter concerning him is a complete defense to his action for defamation."

- "One of the oldest and most widely recognized defenses to the publication of defamatory matter is the doctrine of consent, which has been classified as a form of absolute privilege." (*Royer v. Steinberg* (1979) 90 Cal.App.3d 490, 498 [153 Cal.Rptr. 499].)

- "One of the primary purposes of the doctrine of consent in defamation law is to prevent a party from inviting or inducing indiscretion and thereby laying the foundation of a lawsuit for his own pecuniary gain." (*Royer, supra,* 90 Cal.App.3d at p. 499.)

- This rule applies when the plaintiff asks the defendant to repeat the statement to others and when the plaintiff himself repeats the statements to others. (*Royer, supra,* 90 Cal.App.3d at p. 498 [but see Instruction 1708, *Coerced Self-Publication*].)

<u>Secondary Sources</u>

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, § 517
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 340, *Libel and Slander* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 142, *Libel and Slander (Defamation)* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 21:28

1722
Retraction: Newspaper or Broadcast (Civ. Code, § 48a)

Because [*name of defendant*] is a [newspaper/broadcaster], [*name of plaintiff*] may recover only the following:

(a) Damages to property, business, trade, profession, or occupation; and

(b) Damages for money spent as a result of the defamation.

However, this limitation does not apply if [*name of plaintiff*] proves both of the following:

1. **That [*name of plaintiff*] demanded a correction of the statement within 20 days of discovering the statement; and**

2. **That [*name of defendant*] did not publish an adequate correction;**

   [or]

   That [*name of defendant*]'s correction was not substantially as conspicuous as the original [publication/broadcast];

   [or]

   That [*name of defendant*]'s correction was not [published/broadcast] within three weeks of [*name of plaintiff*]'s demand.

DIRECTIONS FOR USE

The judge should decide whether the demand was served in compliance with the statute. (*O'Hara v. Storer Communications, Inc.* (1991) 231 Cal.App.3d 1101, 1110 [282 Cal.Rptr. 712].)

SOURCES AND AUTHORITY

- Civil Code section 48a provides:

  1. In any action for damages for the publication of a libel in a newspaper, or of a slander by radio broadcast, plaintiff shall recover no more than special damages unless a correction be demanded and be not published

or broadcast, as hereinafter provided. Plaintiff shall serve upon the publisher, at the place of publication or broadcaster at the place of broadcast, a written notice specifying the statements claimed to be libelous and demanding that the same be corrected. Said notice and demand must be served within 20 days after knowledge of the publication or broadcast of the statements claimed to be libelous.

2. If a correction be demanded within said period and be not published or broadcast in substantially as conspicuous a manner in said newspaper or on said broadcasting station as were the statements claimed to be libelous, in a regular issue thereof published or broadcast within three weeks after such service, plaintiff, if he pleads and proves such notice, demand and failure to correct, and if his cause of action be maintained, may recover general, special and exemplary damages; provided that no exemplary damages may be recovered unless the plaintiff shall prove that defendant made the publication or broadcast with actual malice and then only in the discretion of the court or jury, and actual malice shall not be inferred or presumed from the publication or broadcast.
3. A correction published or broadcast in substantially as conspicuous a manner in said newspaper or on said broadcasting station as the statements claimed in the complaint to be libelous, prior to receipt of a demand therefor, shall be of the same force and effect as though such correction had been published or broadcast within three weeks after a demand therefor.
4. [Definitions.] As used herein, the terms “general damages,” “special damages,” “exemplary damages” and “actual malice,” are defined as follows:
    (a) “General damages” are damages for loss of reputation, shame, mortification and hurt feelings;
    (b) “Special damages” are all damages which plaintiff alleges and proves that he has suffered in respect to his property, business, trade, profession or occupation, including such amounts of money as the plaintiff alleges and proves he has expended as a result of the alleged libel, and no other;
    (c) “Exemplary damages” are damages which may in the discretion of the court or jury be recovered in addition to general and special damages for the sake of example and by way of punishing a defendant who has made the publication or broadcast with actual malice;
    (d) “Actual malice” is that state of mind arising from hatred or ill will toward the plaintiff; provided, however, that such a state of mind occasioned by a good faith belief on the part of the defendant in the truth of the libelous publication or broadcast at the time it is published or broadcast shall not constitute actual malice.

- "Under California law, a newspaper gains immunity from liability for all but 'special damages' when it prints a retraction satisfying the requirements of section 48a." (*Pierce v. San Jose Mercury News* (1989) 214 Cal.App.3d 1626, 1631 [263 Cal.Rptr. 410]; see also *Twin Coast Newspapers, Inc. v. Superior Court* (1989) 208 Cal.App.3d 656 [256 Cal.Rptr. 310].)

- "An equivocal or incomplete retraction obviously serves no purpose even if it is published in 'substantially as conspicuous a manner ... as were the statements claimed to be libelous.' " (*Weller v. American Broadcasting Companies, Inc.* (1991) 232 Cal.App.3d 991, 1011 [283 Cal.Rptr. 644].)

Secondary Sources

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 557–566
- 4 Levy, et al., California Torts (1985–2000) Defamation, § 45.24
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 340, *Libel and Slander* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 142, *Libel and Slander (Defamation)* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, §§ 21:55–21:57

1723
Qualified Privilege (Civ. Code, § 47(c))

Under the circumstances of this case, [*name of plaintiff*] cannot recover damages from [*name of defendant*], even if the statement(s) [was/were] false, unless [he/she] also proves that [*name of defendant*] acted with hatred or ill will toward [him/her].

If [*name of defendant*] acted without reasonable grounds for believing the truth of the statement(s), this is a factor you may consider in determining whether [he/she] acted with hatred or ill will toward [*name of plaintiff*].

DIRECTIONS FOR USE

This instruction is applicable only if the judge determines that the conditions supporting the Civil Code section 47(c) privilege have arisen.

The judge determines all the other Civil Code section 47 privileges as a matter of law.

SOURCES AND AUTHORITY

- Civil Code section 47(c) grants a conditional privilege against defamation to communications made without malice on subjects of mutual interest. A privileged publication is made "without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information."

- Section 48 provides that, with respect to section 47(c), "malice is not inferred from the communication."

- For purposes of this section "malice has been defined as 'a state of mind arising from hatred or ill will, evidencing a willingness to vex, annoy or injure another person.' " (*Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 723 [257 Cal.Rptr. 708], internal citation omitted.)

- "[M]aliciousness cannot be derived from negligence. Malice entails more than sloppiness or, as in this case, an easily explained typo." (*Bierbower v. FHP, Inc.* (1999) 70 Cal.App.4th 1, 9 [82 Cal.Rptr.2d 393].)

- Instructing the jury on "malice" as defined in the context of the common-interest privilege is insufficient by itself to impose liability for defamation. (*Carney v. Santa Cruz Women Against Rape* (1990) 221 Cal.App.3d 1009, 1016 [271 Cal.Rptr. 30].)

Even in matters of private interest, the jury must find that the defendant was at least negligent. (*Ibid*.)

- While defendants have the burden of proving that an allegedly defamatory statement falls within the scope of the common-interest privilege, plaintiffs have the burden of proving that that the statement was made with malice. (*Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1203 [31 Cal.Rptr.2d 776].)

- "[I]f malice is shown, the privilege is not merely overcome; it never arises in the first instance. … [T]he characterization of the privilege as qualified or conditional is incorrect to the extent that it suggests the privilege is defeasible." (*Brown, supra*, 48 Cal.3d at p. 723, fn. 7.)

Secondary Sources

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 518–533
- 4 Levy, et al., California Torts (1985–2000) Defamation, § 45.12
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 340, *Libel and Slander* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 142, *Libel and Slander (Defamation)* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, §§ 21:40–21:41

VF-1700
Defamation per se—Essential Factual Elements
(Public Officer/Figure and Limited Public Figure)

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] make [one or more of] the following statement(s) to [a person/persons] other than [***name of plaintiff***]? [***List all claimed per se defamatory statements.***]**

___Yes ___No

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

2. Did the [person/people] to whom the statements were made reasonably understand that the statement(s) [was/were] about [*name of plaintiff***]?**

___Yes ___No

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

3. Did [this person/these people] reasonably understand the statement(s) to mean that [*insert ground(s) for defamation per se, e.g., "[name of plaintiff] had committed a crime"***]?**

___Yes ___No

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

4. [Was/Were] the statement(s) false?

___Yes ___No

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

5. Did [*name of plaintiff*] prove by clear and convincing evidence that [*name of defendant*] knew the statement(s) [was/were] false or had serious doubts about the truth of the statement(s)?

___Yes ___No

If your answer to question 5 is yes, then answer questions 6, 7, and 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

ASSUMED DAMAGES TO REPUTATION

6. What are the damages you award [name of plaintiff] for the assumed harm to [his/her] reputation? $_____

ACTUAL DAMAGES

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

___Yes ___No

If your answer to question 7 is yes, then answer questions 8. If you answered no, skip question 8 and answer question 9.

8. In addition to the amount awarded in question 6, what are [*name of plaintiff*]'s actual damages? $_____

PUNITIVE DAMAGES

9. Did [*name of plaintiff*] prove by clear and convincing evidence that [*name of defendant*] acted with malice, oppression, or fraud?

___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 is your award of punitive damages, if any, against [*name of defendant*]? $_____

Signed: _____
Presiding Juror

Dated: _____

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

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 1700, *Defamation Per Se—Essential Factual Elements (Public Officer/Figure and Limited Public Figure).*

Users may need to itemize all the damages listed in question 8 if, for example, there are multiple defendants and issues regarding apportionment of damages under Proposition 51.

Give the jury question 3 only if the statement is not defamatory on its face.

Omit question 10 if the issue of punitive damages has been bifurcated.

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

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

VF-1701
Defamation per quod—Essential Factual Elements
(Public Officer/Figure and Limited Public Figure)

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] make [one or more of] the following statement(s) to [a person/persons] other than [***name of plaintiff***]? [***List all claimed per se defamatory statements.***]**

___Yes ___No

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

2. Did the [person/people] to whom the statements were made reasonably understand that the statement(s) [was/were] about [*name of plaintiff***]?**

___Yes ___No

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

3. [Was/Were] the statement(s) false?

___Yes ___No

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

4. Did [*name of plaintiff***] prove by clear and convincing evidence that [***name of defendant***] knew the statement(s) [was/were] false or had serious doubts about the truth of the statement(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.

5. [Is/Are] the statement(s), because of facts known to the people who heard or read [it/them], the kind that would tend to injure [*name of plaintiff*] in [his/her] occupation?

___Yes ___No

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

6. Did [*name of plaintiff*] suffer harm to [his/her] property, business, profession, or occupation [including money spent as a result of the statement(s)]?

___Yes ___No

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

ACTUAL DAMAGES

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

___Yes ___No

If your answer to question 7 is yes, then answer questions 8. If you answered no, skip question 8 and answer question 9.

8. What are [*name of plaintiff*]'s actual damages? [$_____]

PUNITIVE DAMAGES

9. Did [*name of plaintiff*] prove by clear and convincing evidence that [*name of defendant*] acted with malice, oppression, or fraud?

___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 is your award of punitive damages, if any, against [*name of defendant***]?**

$_____

Signed: _____
Presiding Juror
Dated: _____

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

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, *Defamation Per Quod—Essential Factual Elements (Public Officer/Figure and Limited Public Figure).*

Users may need to itemize all the damages listed in question 8 if, for example, there are multiple defendants and issues regarding apportionment of damages under Proposition 51.

Question 5 may be modified by referring to one of the other two grounds listed in element 3 of Instruction 1701, *Defamation Per Quod—Essential Factual Elements (Public Officer/Figure and Limited Public Figure),* depending on which ground is applicable in the case.

Additional questions may be needed on the issue of punitive damages if the defendant is a corporate or other entity.

Omit question 10 if the issue of punitive damages has been bifurcated.

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

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

VF-1702
Defamation per se—Essential Factual Elements
(Private Figure—Matter of Public Concern)

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] make [one or more of] the following statement(s) to [a person/persons] other than [***name of plaintiff***]? [***List all claimed per se defamatory statements.***]**

___Yes ___No

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

2. Did the [person/people] to whom the statements were made reasonably understand that the statement(s) [was/were] about [*name of plaintiff***]?**

___Yes ___No

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

3. Did [this person/these people] reasonably understand the statement(s) to mean that [*insert ground(s) for defamation per se, e.g., "[name of plaintiff] had committed a crime"***]?**

___Yes ___No

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

4. [Was/Were] the statement(s) false?

___Yes ___No

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

5. Did [*name of defendant*] fail to use reasonable care to determine the truth or falsity of the statement(s)?

___Yes ___No

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

ACTUAL DAMAGES

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

___Yes ___No

If your answer to question 6 is yes, then answer question 7. If you answered no, skip question 7 and answer question 8.

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

If [*name of plaintiff*] has not proved any actual damages, answer question 8. If [*name of plaintiff*] has proved any actual damages, skip questions 8 and 9 and answer question 10.

ASSUMED DAMAGES TO REPUTATION

8. Did [*name of plaintiff*] prove by clear and convincing evidence that [*name of defendant*] knew the statement(s) [was/were] false or had serious doubts about the truth of the statement(s)?

___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 the damages you award [*name of plaintiff*] for the assumed harm to [his/her] reputation? You must award at least a nominal sum. $_____

Regardless of your answer to question 9, skip question 10 and answer question 11.

PUNITIVE DAMAGES

10. Did [*name of plaintiff***] prove by clear and convincing evidence that [***name of defendant***] knew the statement(s) [was/were] false or had serious doubts about the truth of the statement(s)?**

___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. Did [*name of plaintiff***] prove by clear and convincing evidence that [***name of defendant***] acted with malice, oppression, or fraud?**

___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 amount, if any, do you award as punitive damages against [*name of defendant***]? $_____**

Signed: _____
Presiding Juror
Dated: _____

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

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 1702, *Defamation Per Se—Essential Factual Elements (Private Figure—Matter of Public Concern).*

Users may need to itemize all the damages listed in question 7 if, for example, there are multiple defendants and issues regarding apportionment of damages under Proposition 51.

Give the jury question 3 only if the statement is not defamatory on its face.

Additional questions may be needed on the issue of punitive damages if the defendant is a corporate or other entity.

Omit question 12 if the issue of punitive damages has been bifurcated.

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

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

VF-1703
Defamation per quod—Essential Factual Elements
(Private Figure—Matter of Public Concern)

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] make [one or more of] the following statement(s) to [a person/persons] other than [***name of plaintiff***]? [***List all claimed per se defamatory statements.***]**

___Yes ___No

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

2. Did the [person/people] to whom the statements were made reasonably understand that the statement(s) [was/were] about [*name of plaintiff***]?**

___Yes ___No

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

3. [Was/Were] the statement(s) false?

___Yes ___No

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

4. Did [*name of defendant***] fail to use reasonable care to determine the truth or falsity of the statements?**

___Yes ___No

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. [Is/Are] the statement(s), because of facts known to the people who heard or read the statements, the kind of statements that would tend to injure [*name of plaintiff*] in [his/her] occupation?

___Yes ___No

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

6. Did [*name of plaintiff*] suffer harm to [his/her] property, business, profession, or occupation [including money spent as a result of the statement(s)]?

___Yes ___No

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

7. [Were/Was] the statement(s) a substantial factor in causing [*name of plaintiff*]'s harm?

___Yes ___No

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

ACTUAL DAMAGES

8. What are [*name of plaintiff*]'s actual damages? [$_____]

If [*name of plaintiff*] has not proved any actual damages, stop here, answer no further questions, and have the presiding juror sign and date this form. If you awarded actual damages, answer question 9.

PUNITIVE DAMAGES

9. Did [*name of plaintiff*] prove by clear and convincing evidence that [*name of defendant*] knew the statement(s) [was/were] false or had serious doubts about the truth of the statement(s)?

___Yes ___No

If your answer to question 9 is yes, then answer question 10. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

10. Has [*name of plaintiff***] proved by clear and convincing evidence that [***name of defendant***] acted with malice, oppression, or fraud?**

___Yes ___No

If your answer to question 10 is yes, then answer question 11. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

11. What amount, if any, do you award as punitive damages against [*name of defendant***]? $_____**

Signed: _____
Presiding Juror

Dated: _____

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

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 1703, *Defamation Per Quod—Essential Factual Elements (Private Figure—Matter of Public Concern).*

Users may need to itemize all the damages listed in question 8 if, for example, there are multiple defendants and issues regarding apportionment of damages under Proposition 51.

Question 5 may be modified by referring to one of the other two grounds listed in element 3 of Instruction 1703, *Defamation Per Quod—Essential Factual Elements (Private Figure—Matter of Public Concern),* depending on which ground is applicable in the case.

Additional questions may be needed on the issue of punitive damages if the defendant is a corporate or other entity.

Omit question 11 if the issue of punitive damages has been bifurcated.

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

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

VF-1704
Defamation per se—Essential Factual Elements
(Private Figure—Matter of Private Concern)

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] make [one or more of] the following statement(s) to [a person/persons] other than [***name of plaintiff***]? [***List all claimed per se defamatory statements.***]**

   ___Yes ___No

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

2. **Did the [person/people] to whom the statements were made reasonably understand that the statement(s) [was/were] about [***name of plaintiff***]?**

   ___Yes ___No

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

3. **Did [this person/these people] reasonably understand the statement(s) to mean that [***insert ground(s) for defamation per se, e.g., "[name of plaintiff] had committed a crime"***]?**

   ___Yes ___No

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

4. **Did [***name of defendant***] fail to use reasonable care to determine the truth or falsity of the statement(s)?**

   ___Yes ___No

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.

ACTUAL DAMAGES

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

[a. Past economic loss, including harm to [*name of plaintiff*]'s property, business, trade, profession, or occupation, and expenses [*name of plaintiff*] had to pay as a result of the defamatory statements]	**$_____]**
[b. Future economic loss, including harm to [*name of plaintiff*]'s property, business, trade, profession, or occupation, and expenses [*name of plaintiff*] will have to pay as a result of the defamatory statements]	**$_____]**
[c. Past noneconomic loss including shame, mortification, or hurt feelings, and harm to [*name of plaintiff*]'s reputation]	**$_____]**
[d. Future noneconomic loss including shame, mortification, or hurt feelings, and harm to [*name of plaintiff*]'s reputation]	**$_____]**
TOTAL	**$_____**

If [*name of plaintiff*] has not proved any actual damages, then answer question 6. If [*name of plaintiff*] has proved any actual damages, skip question 6 and answer question 7.

ASSUMED DAMAGES TO REPUTATION

6. What are the damages you award [*name of plaintiff*] for the assumed harm to [his/her] reputation? You must award at least a nominal sum. $_____

Regardless of your answer to question 6, answer question 7.

PUNITIVE DAMAGES

7. Has [*name of plaintiff*] proved by clear and convincing evidence that [*name of defendant*] acted with malice, oppression, or fraud?

___Yes ___No

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

8. What amount, if any, do you award as punitive damages against [*name of defendant***]?**

$_____

Signed: _____
Presiding Juror

Dated: _____

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

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 1704, *Defamation Per Se—Essential Factual Elements (Private Figure—Matter of Private Concern).*

If specificity is not required, users do not have to itemize all the damages listed in question 5. The breakdown is optional; depending on the circumstances, users may wish to break down the damages even further.

Give the jury question 3 only if the statement is not defamatory on its face.

Additional questions may be needed on the issue of punitive damages if the defendant is a corporate or other entity.

Omit question 8 if the issue of punitive damages has been bifurcated.

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

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

VF-1705
Defamation per quod—Essential Factual Elements
(Private Figure—Matter of Private Concern)

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] make [one or more of] the following statement(s) to [a person/persons] other than [***name of plaintiff***]? [***List all claimed per quod defamatory statements.***]**

___Yes ___No

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

2. Did the [person/people] to whom the statements were made reasonably understand that the statement(s) [was/were] about [*name of plaintiff***]?**

___Yes ___No

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

3. Did [*name of defendant***] fail to use reasonable care to determine the truth or falsity of the statements?**

___Yes ___No

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

4. Did the statement(s) tend to injure [*name of plaintiff***] in [his/her] occupation?**

___Yes ___No

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

5. Did [*name of plaintiff*] suffer harm to [his/her] property, business, profession, or occupation [including money spent as a result of the statement(s)]?

___Yes ___No

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

6. [Were/Was] the statement(s) a substantial factor in causing [*name of plaintiff*]'s harm?

___Yes ___No

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

ACTUAL DAMAGES

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

[a. [Past economic loss, including harm to [*name of plaintiff*]'s property, business, trade, profession, or occupation, and expenses [*name of plaintiff*] had to pay as a result of the defamatory statements]	**$_____]**
b. [Future economic loss, including harm to [*name of plaintiff*]'s property, business, trade, profession, or occupation, and expenses [*name of plaintiff*] will have to pay as a result of the defamatory statements]	**$_____]**
[c. Past noneconomic loss including shame, mortification, or hurt feelings, and harm to [*name of plaintiff*]'s reputation]	**$_____]**
[d. Future noneconomic loss including shame, mortification, or hurt feelings, and harm to [*name of plaintiff*]'s reputation]	**$_____]**
TOTAL	**$_____**

If [*name of plaintiff*] has not proved any actual damages, stop here, answer no further questions, and have the presiding juror sign and date this form. If you awarded actual damages, answer question 8.

PUNITIVE DAMAGES

8. Has [*name of plaintiff*] proved by clear and convincing evidence that [*name of defendant*] acted with malice, oppression, or fraud?

___Yes ___No

If your answer to question 8 is yes, then answer question 9. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

9. What amount, if any, do you award as punitive damages against [*name of defendant*]?

$_____

Signed: _____
Presiding Juror
Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

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 1703, *Defamation Per Quod—Essential Factual Elements (Private Figure—Matter of Public Concern).*

Users may need to itemize all the damages listed in question 7 if, for example, there are multiple defendants and issues regarding apportionment of damages under Proposition 51.

Question 4 may be modified by referring to one of the other two grounds listed in element 3 of Instruction 1705, *Defamation Per Quod—Essential Factual Elements (Private Figure—Matter of Private Concern),* depending on which ground is applicable in the case.

Additional questions may be needed on the issue of punitive damages if the defendant is a corporate or other entity.

Omit question 9 if the issue of punitive damages has been bifurcated.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

This form may be modified if the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest on specific losses that occurred prior to judgment.

PER QUOD

	PUBLIC FIGURE				PRIVATE FIGURE			
	C/A	**ASSUMED BY LAW**	**ACTUAL**	**PUNI. D**	**C/A**	**ASSUMED BY LAW**	**ACTUAL**	**PUNI. D**
PUBLIC **ISSUE**	NYT Malice	No	Yes, if shown by Prepon.	Yes, if shown by CC 3924	NYT Malice	No	Yes, if shown by Prepon.	Yes, if shown by CC 3294
	Negligence	----	----	----	Negligence	No	Yes, if shown by Prepon.	No
PRIVATE **ISSUE**	NYT Malice	No	Yes, if shown by Prepon.	Yes, if shown by CC 3924	NYT Malice	----		----
	Negligence	----	----	----	Negligence	No	Yes, if shown by Prepon.	Yes, if shown by CC 3294

C/A – Cause of Action – either New York Times malice, or Negligence.
PUNI. D – Punitive Damages

PER SE

	PUBLIC FIGURE				PRIVATE FIGURE			
	C/A	**ASSUMED** BY LAW	**ACTUAL**	**PUNI. D**	**C/A**	**ASSUMED** BY LAW	**ACTUAL**	**PUNI. D**
PUBLIC ISSUE	NYT Malice	Yes	Yes, if shown by Prepon.	Yes, if shown by CC 3924	NYT Malice	Yes	Yes, if shown by Prepon.	Yes, if shown by CC 3294
	Negligence	----	----	----	Negligence	No	Yes, if shown by Prepon.	No
PRIVATE **ISSUE**	NYT Malice	Yes	Yes, if shown by Prepon.	Yes, if shown by CC 3924	NYT Malice	----	----	----
	Negligence	----	----	----	Negligence	Yes	Yes, if shown by Prepon.	Yes, if shown by CC 3294

C/A – Cause of Action – either New York Times malice, or Negligence.
PUNI. D – Punitive Damages

1800
Intrusion Into Private Affairs

[*Name of plaintiff***] claims that [***name of defendant***] violated [his/her] right to privacy. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] had a reasonable expectation of privacy in [***insert facts regarding the place, conversation, or other circumstance***];**

2. **That [***name of defendant***] intentionally intruded in [***insert facts regarding the place, conversation, or other circumstance***];**

3. **That [***name of defendant***]'s intrusion would be highly offensive to a reasonable person;**

4. **That [***name of plaintiff***] was harmed; and**

5. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

In deciding whether an intrusion is highly offensive, you should consider, among other factors, the following:

(a) The circumstances surrounding the intrusion;

(b) [*Name of defendant***]'s motives and goals;**

(c) The setting in which the intrusion occurred; [and]

(d) How much privacy [*name of plaintiff***] could expect in that setting; [and]**

(e) [*Insert other applicable factor***].**

DIRECTIONS FOR USE

If the plaintiff is asserting more than one privacy right, give an introductory instruction stating that a person's right to privacy can be violated in more than one way and listing the legal theories under which the plaintiff is suing.

SOURCES AND AUTHORITY

- The four types of privacy torts are (1) intrusion upon one's physical solitude or seclusion, (2) public disclosure of private facts, (3) false light in the public eye, and (4) appropriation of the plaintiff's name or likeness. (*Forsher v. Bugliosi* (1980) 26 Cal.3d 792, 808 [163 Cal.Rptr. 628].)

- The tort of intrusion "encompasses unconsented-to physical intrusion into the home, hospital room or other place the privacy of which is legally recognized, as well as unwarranted sensory intrusions such as eavesdropping, wiretapping, and visual or photographic spying." (*Shulman v. Group W Productions, Inc.* (1998) 18 Cal.4th 200, 230 [74 Cal.Rptr.2d 843], internal citation omitted.)

- The right of privacy was first recognized in California in the case of *Melvin v. Reid* (1931) 112 Cal.App. 285, 291 [297 P. 91]. The court found a legal foundation for the tort in the right to pursue and obtain happiness found in article 1, section 1 of the California Constitution.

- Restatement Second of Torts, section 652B provides: "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person."

- "California common law has generally followed Prosser's classification of privacy interests as embodied in the Restatement." (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 24 [26 Cal.Rptr.2d 834], internal citation omitted.)

- The element of intrusion "is not met when the plaintiff has merely been observed, or even photographed or recorded, in a public place. Rather, 'the plaintiff must show the defendant penetrated some zone of physical or sensory privacy surrounding, or obtained unwanted access to data about, the plaintiff.' " (*Sanders v. American Broadcasting Co.* (1999) 20 Cal.4th 907, 914–915 [85 Cal.Rptr.2d 909], internal citations omitted.)

- The plaintiff does not have to prove that he or she had a "complete expectation of privacy": "Privacy for purposes of the intrusion tort must be evaluated with respect to the identity of the alleged intruder and the nature of the intrusion." (*Sanders, supra,* 20 Cal.4th at p. 918.)

- "While what is 'highly offensive to a reasonable person' suggests a standard upon which a jury would properly be instructed, there is a preliminary determination of 'offensiveness' which must be made by the court in discerning the existence of a cause of action for intrusion. … A court determining the existence of 'offensiveness' would consider the degree of intrusion, the context, conduct and circumstances surrounding the intrusion as well as the intruder's motives and objectives, the setting into which he intrudes, and the expectations of those whose privacy is invaded."

(*Miller v. National Broadcasting Co.* (1986) 187 Cal.App.3d 1463, 1483–1484 [232 Cal.Rptr. 668].)

- "[L]iability under the intrusion tort requires that the invasion be highly offensive to a reasonable person, considering, among other factors, the motive of the alleged intruder." (*Sanders, supra,* 20 Cal.4th at p. 911, internal citations omitted.)

- Damages flowing from an invasion of privacy "logically would include an award for mental suffering and anguish." (*Miller, supra,* 187 Cal.App.3d at p. 1484, citing *Fairfield v. American Photocopy Equipment Co.* (1955) 138 Cal.App.2d 82 [291 P.2d 194].)

- Related statutory actions can be brought for stalking (Civ. Code, § 1708.7), physical invasion of privacy, (Civ. Code, § 1708.8), and eavesdropping and wiretapping (Pen. Code, § 637.2). Civil Code section 1708.8 was enacted in 1998 as an anti-paparazzi measure. To date there are no reported cases based on this statute.

Secondary Sources

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 577–580
- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 1438
- 4 Levy et al., California Torts (1985–2000) Invasion of Privacy, § 46.02
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 429, *Privacy* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 185, *Privacy* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 20:8

1801
Public Disclosure of Private Facts

[*Name of plaintiff***] claims that [***name of defendant***] violated [his/her] right to privacy. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] publicized private information concerning [***name of plaintiff***];**

2. **That a reasonable person in [***name of plaintiff***]'s position would consider the publicity highly offensive;**

3. **That [***name of defendant***] knew, or acted with reckless disregard of the fact, that a reasonable person in [***name of plaintiff***]'s position would consider the publicity highly offensive;**

4. **That the private information was not of legitimate public concern [or did not have a substantial connection to a matter of legitimate public concern];**

5. **That [***name of plaintiff***] was harmed; and**

6. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

In deciding whether the information was a matter of legitimate public concern, you should consider, among other factors, the following:

(a) The social value of the information;

(b) The extent of the intrusion into [*name of plaintiff***]'s privacy; [and]**

(c) Whether [*name of plaintiff***] consented to the publicity explicitly or by voluntarily seeking public attention or a public office; [and]**

(d) [*Insert other applicable factor***].**

[In deciding whether [*name of defendant***] publicized the information, you should determine whether it was made public either by communicating it to the public at large or to so many people that the information was substantially certain to become public knowledge.]**

DIRECTIONS FOR USE

If the plaintiff is asserting more than one privacy right, give an introductory instruction stating that a person's right to privacy can be violated in more than one way and listing the legal theories under which the plaintiff is suing.

Comment (a) to Restatement Second of Torts, section 652D states that "publicity" "means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge." This point has been placed in brackets because it may not be an issue in every case.

SOURCES AND AUTHORITY

- The public disclosure tort has the following elements: "(1) public disclosure (2) of a private fact (3) which would be offensive and objectionable to the reasonable person and (4) which is not of legitimate public concern." (*Diaz v. Oakland Tribune, Inc.* (1983) 139 Cal.App.3d 118, 126 [188 Cal.Rptr. 762], internal citations omitted.)

- Restatement Second of Torts, section 652D provides:

  > One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that
  > (a) would be highly offensive to a reasonable person, and
  > (b) is not of legitimate concern to the public.

- "California common law has generally followed Prosser's classification of privacy interests as embodied in the Restatement." (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 24 [26 Cal.Rptr.2d 834], internal citation omitted.)

- "Generally speaking, matter which is already in the public domain is not private, and its publication is protected." (*Diaz, supra,* 139 Cal.App.3d at p. 131, internal citations omitted.) However, "matter which was once of public record may be protected as private facts where disclosure of that information would not be newsworthy." (*Id.* at p. 132.)

- Because of the right to freedom of speech, the Supreme Court has stated: "[W]e find it reasonable to require a plaintiff to prove, in each case, that the publisher invaded his privacy with reckless disregard for the fact that reasonable men would find the invasion highly offensive." (*Briscoe v. Reader's Digest Assn., Inc.* (1971) 4 Cal.3d 529, 542–543 [93 Cal.Rptr. 866].)

- In *Johnson v. Harcourt, Brace, Jovanovich, Inc.* (1974) 43 Cal.App.3d 880, 891, fn. 11 [118 Cal.Rptr. 370], the court observed: "If a jury finds that a publication discloses

private facts which are 'highly offensive and injurious to the reasonable man' [citation] then it would *inter alia* also satisfy the reckless disregard requirement."

- "*Diaz* … expressly makes the lack of newsworthiness part of the plaintiff's case in a private facts action. … We therefore agree with defendants that under California common law the dissemination of truthful, newsworthy material is not actionable as a publication of private facts." (*Shulman v. Group W Productions, Inc.* (1998) 18 Cal.4th 200, 215 [74 Cal.Rptr.2d 843], internal citations omitted.)

- "[T]he newsworthy privilege is not without limitation. Where the publicity is so offensive as to constitute a 'morbid and sensational prying into private lives for its own sake, …' it serves no legitimate public interest and is not deserving of protection." (*Diaz, supra,* 139 Cal.App.3d at p. 126, internal citation omitted.)

- "Almost any truthful commentary on public officials or public affairs, no matter how serious the invasion of privacy, will be privileged."(*Briscoe, supra,* 4 Cal.3d at p. 535, fn. 5.)

- Courts have devised a three-part test for evaluating newsworthiness: "the social value of the facts published, the depth of the article's intrusion into ostensibly private affairs, and the extent to which the party voluntarily acceded to a position of public notoriety." (*Briscoe, supra,* 4 Cal.3d at p. 541, internal citations omitted.)

- "Whether a publication is or is not newsworthy depends upon the contemporary community mores and standards of decency. This is largely a question of fact, which a jury is uniquely well-suited to decide." (*Diaz, supra,* 139 Cal.App.3d at p. 133.)

<u>Secondary Sources</u>

- 5 Witkin**,** *Summary of California Law (9th ed. 1988) Torts, §§ 582–583*
- 4 Levy et al., California Torts (1985–2000) Invasion of Privacy, § 46.03
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 429, *Privacy* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 185, *Privacy* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 20.10

1802
False Light

[*Name of plaintiff***] claims that [***name of defendant***] violated [his/her] right to privacy. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] publicized information or material that showed [***name of plaintiff***] in a false light;**

2. **That the false light created by the publication would be highly offensive to a reasonable person in [***name of plaintiff***]'s position;**

3. **[That there is clear and convincing evidence that [***name of defendant***] knew the publication would create a false impression about [***name of plaintiff***] or acted with reckless disregard for the truth;]**

   [or]

   [That [*name of defendant***] was negligent in determining the truth of the information or whether a false impression would be created by its publication;]**

4. **[That [***name of plaintiff***] was harmed; and]**

   [or]

   [That [*name of plaintiff***] sustained harm to [his/her] property, business, profession, or occupation [including money spent as a result of the statement(s)]; and]**

5. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

[In deciding whether [*name of defendant***] publicized the information or material, you should determine whether it was made public either by communicating it to the public at large or to so many people that the information or material was substantially certain to become public knowledge.]**

DIRECTIONS FOR USE

If the plaintiff is asserting more than one privacy right, give an introductory instruction stating that a person's right to privacy can be violated in more than one way and listing the legal theories under which the plaintiff is suing.

The bracketed options for element 3 should be used in the alternative, depending on whether the conduct involves a matter of public concern.

Comment (a) to Restatement Second of Torts, section 652D states that "publicity" "means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge." This point has been placed in brackets because it may not be an issue in every case.

As reflected in the citations below, false light claims are subject to the same constitutional protections that apply to defamation claims. Thus, a knowing violation or reckless disregard for the plaintiff's rights is required where the plaintiff is a public figure or the subject matter of the communication is a matter of public concern. If a false light claim is combined with a defamation or libel claim, the standard applied in the instructions should be equivalent.

If plaintiff has combined a false light claim with a claim of defamation or libel, the court should consider whether separate instructions on each claim should be given in light of *Eisenberg v. Alameda Newspapers* (1999) 74 Cal.App.4th 1359, 1385 fn 13 [88 Cal.Rptr.2d 802] and *Briscoe v. Reader's Digest Ass'n* (1971) 4 Cal.3d 529 543 [93 Cal.Rptr. 866].

SOURCES AND AUTHORITY

- Restatement Second of Torts, section 652E provides:

  > One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if
  > (a) the false light in which the other was placed would be highly offensive to a reasonable person, and
  > (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

- "California common law has generally followed Prosser's classification of privacy interests as embodied in the Restatement." (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 24 [26 Cal.Rptr.2d 834], internal citation omitted.)

- "In order to be actionable, the false light in which the plaintiff is placed must be highly offensive to a reasonable person. Although it is not necessary that the plaintiff be defamed, publicity placing one in a highly offensive false light will in most cases be defamatory as well." (*Fellows v. National Enquirer* (1986) 42 Cal.3d 234, 238–239 [228 Cal.Rptr. 215], internal citation omitted.)

- "When a false light claim is coupled with a defamation claim, the false light claim is essentially superfluous, and stands or falls on whether it meets the same requirements as the defamation cause of action." (*Eisenberg, supra,* 74 Cal.App.4th at 1385, fn. 13, internal citations omitted.)

- "[A] 'false light' cause of action 'is in substance equivalent to … (a) libel claim, and should meet the same requirements of the libel claim … including proof of malice." (*Briscoe, supra,* 4 Cal.3d at p. 543, internal citation omitted.)

- "The *New York Times* decision defined a zone of constitutional protection within which one could publish concerning a public figure without fear of liability. That constitutional protection does not depend on the label given the stated cause of action; it bars not only actions for defamation, but also claims for invasion of privacy." (*Reader's Digest Assn. v. Superior Court* (1984) 37 Cal.3d 244, 265 [208 Cal.Rptr. 137], internal citations omitted.)

- In *Time, Inc. v. Hill* (1967) 385 U.S. 374 [17 L.Ed.2d 456; 87 S.Ct. 534], the Court held that the *New York Times v. Sullivan* malice standard applied to a privacy action that was based on a "false light" statute where the matter involved a public figure. Given the similarities between defamation and false light actions, it appears likely that the negligence standard for private figure defamation plaintiffs announced in *Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323 [41 L.Ed.2d 789; 94 S.Ct. 2997] should apply to private figure false light plaintiffs.

- Plaintiffs must comply with the retraction statute (Civ. Code, § 48a) to recover more than special damages in a false light cause of action. (*Briscoe, supra,* 4 Cal.3d at p. 543.)

- "We hold that whenever a claim for false light invasion of privacy is based on language that is defamatory within the meaning of section 45a, pleading and proof of special damages are required." (*Fellows, supra,* 42 Cal.3d at p. 251.)

<u>Secondary Sources</u>

- 5 Witkin**,** Summary of California Law (9th ed. 1988) Torts, §§ 584–586
- 4 Levy et al., California Torts (1985–2000) Invasion of Privacy, § 46.04
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 429, *Privacy* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 185, *Privacy* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, §§ 20:12–20:15

1803
Appropriation of Name or Likeness

[*Name of plaintiff***] claims that [***name of defendant***] violated [his/her] right to privacy. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] used [***name of plaintiff***]'s name, likeness, or identity without [his/her] permission;**

2. **That [***name of defendant***] gained a commercial benefit [or some other advantage] by using [***name of plaintiff***]'s name, likeness, or identity;**

3. **That [***name of plaintiff***] was harmed; and**

4. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

[5. That the privacy interests of [*name of plaintiff***] outweigh the public interest served by [***name of defendant***]'s use of [his/her] name, likeness, or identity.**

In deciding whether [*name of plaintiff***]'s privacy interest outweighs the public's interest, you should consider where the information was used, the extent of the use, the public interest served by the use, and the seriousness of the interference with [***name of plaintiff***]'s privacy.]**

DIRECTIONS FOR USE

If the plaintiff is asserting more than one privacy right, give an introductory instruction stating that a person's right to privacy can be violated in more than one way and listing the legal theories under which the plaintiff is suing.

If the alleged "benefit" is not commercial, the judge will need to determine whether the advantage gained by the defendant qualifies as "some other advantage."

If suing under both the common law and Civil Code section 3344, the judge may need to explain that a person's voice, for example, may qualify as "identity" if the voice is sufficient to cause listeners to identify the plaintiff. The two causes of action overlap, and the same conduct should be covered by both.

The last bracketed element and the last bracketed paragraph are appropriate in cases that implicate a defendant's First Amendment right to freedom of expression and freedom of

the press. (See *Gionfriddo v. Major League Baseball* (2001) 94 Cal.App.4th 400, 409–410 [114 Cal.Rptr.2d 307].)

SOURCES AND AUTHORITY

- "A common law cause of action for appropriation of name or likeness may be pleaded by alleging (1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury." (*Eastwood v. Superior Court* (1983) 149 Cal.App.3d 409, 417 [198 Cal.Rptr. 342], internal citations omitted.)

- Section 652C of the Restatement Second of Torts provides: "One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy."

- "California common law has generally followed Prosser's classification of privacy interests as embodied in the Restatement." (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 24 [26 Cal.Rptr.2d 834], internal citation omitted.)

- "[T]he appearance of an 'endorsement' is not the *sine qua non* of a claim for commercial appropriation." (*Eastwood, supra,* at p. 419.)

- "[N]o cause of action will lie for the '[p]ublication of matters in the public interest, which rests on the right of the public to know and the freedom of the press to tell it.' " (*Montana v. San Jose Mercury News* (1995) 34 Cal.App.4th 790, 793 [40 Cal.Rptr.2d 639], internal citation omitted.)

- "The difficulty in defining the boundaries of the right, as applied in the publication field, is inherent in the necessity of balancing the public interest in the dissemination of news, information and education against the individuals' interest in peace of mind and freedom from emotional disturbances. When words relating to or actual pictures of a person or his name are published, the circumstances may indicate that public interest is predominant. Factors deserving consideration may include the medium of publication, the extent of the use, the public interest served by the publication, and the seriousness of the interference with the person's privacy." (*Gill v. Curtis Publishing Co.* (1952) 38 Cal.2d 273, 278–279 [239 P.2d 630].

- "Even if each of these elements is established, however, the common law right does not provide relief for every publication of a person's name or likeness. The First Amendment requires that the right to be protected from unauthorized publicity 'be balanced against the public interest in the dissemination of news and information consistent with the democratic processes under the constitutional guaranties of freedom of speech and of the press.' " (*Gionfriddo, supra,* 94 Cal.App.4th at pp. 409–410, internal citations and footnote omitted.)

- "Public interest attaches to people who by their accomplishments or mode of living create a bona fide attention to their activities." (*Dora v. Frontline Video, Inc.* (1993) 15 Cal.App.4th 536, 542 [18 Cal.Rptr.2d 790], internal citation omitted.)

- Civil Code section 3344 complements the common law tort of appropriation. (*Eastwood, supra,* 149 Cal.App.3d at pp. 416–417.)

Secondary Sources

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 587–588
- 4 Levy et al., California Torts (1985–2000) Invasion of Privacy, § 46.05
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 429, *Privacy* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 185, *Privacy* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 20:16

1804
Use of Name or Likeness (Civ. Code, §§ 3344, 3344.1)

[*Name of plaintiff***] claims that [***name of defendant***] violated [his/her] right to privacy. To succeed on this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] knowingly used [***name of plaintiff***]'s [name/voice/ signature/photograph/likeness] on merchandise or to advertise or sell products or services;**

2. **That [***name of defendant***] did not have [***name of plaintiff***]'s consent;**

3. **That [***name of defendant***]'s use of [***name of plaintiff***]'s [name/voice/signature/ photograph/likeness] was directly connected to [***name of defendant***]'s commercial purpose;**

4. **[That the use did not occur in connection with a [[news/public affairs/sports] broadcast or account] [political campaign];]**

5. **[That [***name of defendant***] knew the account was false or that [***name of defendant***] acted with knowledge or in reckless disregard of its falsity;]**

   [That [*name of defendant***] was negligent in determining the truth of the account;]**

6. **That [***name of plaintiff***] was harmed; and**

7. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

DIRECTIONS FOR USE

If the plaintiff is asserting more than one privacy right, give an introductory instruction stating that a person's right to privacy can be violated in more than one way and listing the legal theories under which the plaintiff is suing.

Depending on the facts, the jury may need to be instructed on elements 4 or 5, which are based on Civil Code section 3344(d). (*Eastwood v. Superior Court* (1983) 149 Cal.App.3d 409, 425 [198 Cal.Rptr. 342].) In *Eastwood*, the court held that subdivision (d), as it pertains to news, "does not provide an exemption for a knowing or reckless falsehood." If subdivision (d) is implicated by the facts, the burden of proof is on the plaintiff to demonstrate that the news account was false and that the defendant acted with

knowledge or in reckless disregard of its falsity. (*Id.* at p. 426.) The lower standard of negligence, stated in the second bracketed option in element 5, may be appropriate if the plaintiff is not a public figure.

If plaintiff alleges that that the publication was not covered by subdivision (d) (e.g., not a "news" account) but that even if it was covered it is not protected because it was false, then both elements 4 and 5 should be given. In that case, it should be made clear to the jury that if the plaintiff fails to prove element 4, the claim is still viable if the plaintiff proves element 5. Note that a plaintiff is entitled to the sum of $750 under Civil Code section 3344(a) even if actual damages are not proven.

SOURCES AND AUTHORITY

- Civil Code section 3344 is "a commercial appropriation statute which complements the common law tort of appropriation." (*KNB Enterprises v. Matthews* (2000) 78 Cal.App.4th 362, 366–367 [92 Cal.Rptr.2d 713].)

- Civil Code section 3344(a) provides: "Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent, or, in the case of a minor, the prior consent of his parent or legal guardian, shall be liable for any damages sustained by the person or persons injured as a result thereof. In addition, in any action brought under this section, the person who violated the section shall be liable to the injured party or parties in an amount equal to the greater of seven hundred fifty dollars ($750) or the actual damages suffered by him or her as a result of the unauthorized use, and any profits from the unauthorized use that are attributable to the use and are not taken into account in computing the actual damages. In establishing such profits, the injured party or parties are required to present proof only of the gross revenue attributable to such use, and the person who violated this section is required to prove his or her deductible expenses. Punitive damages may also be awarded to the injured party or parties. The prevailing party in any action under this section shall also be entitled to attorney's fees and costs."

- Civil Code section 3344(d) provides: "For purposes of this section, a use of a name, voice, signature, photograph, or likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign, shall not constitute a use for which consent is required under subdivision (a)."

- "[C]alifornia's appropriation statute is not limited to celebrity plaintiffs." (*KNB Enterprises, supra,* 78 Cal.App.4th at p. 367.)

- "The differences between the common law and statutory actions are: (1) Section 3344, subdivision (a) requires a knowing use whereas under case law, mistake and inadvertence are not a defense against commercial appropriation; and (2) Section 3344, subdivision (g) expressly provides that its remedies are cumulative and in

addition to any provided for by law." (*Eastwood v. Superior Court* (1983) 149 Cal.App.3d 409, 417, fn. 6 [198 Cal.Rptr. 342], internal citation omitted.)

- In addition to the common law elements, a party seeking the statutory remedy provided in section 3344 must also allege "a knowing use of the plaintiff's name, photograph or likeness" and "a 'direct' connection must be alleged between the use and the commercial purpose." (*Eastwood, supra,* 149 Cal.App.3d at pp. 417–418, internal citation omitted; see *Johnson v. Harcourt, Brace, Jovanovich, Inc.* (1974) 43 Cal.App.3d 880, 895 [118 Cal.Rptr. 370].)

- In *Eastwood, supra,* the court held that subdivision (d), as it pertains to news, "does not provide an exemption for a knowing or reckless falsehood." (*Eastwood, supra,* 149 Cal.App.3d at p. 425.) If subdivision (d) is implicated by the facts, the burden of proof is on the plaintiff to demonstrate that the news account was false and that the defendant acted with knowledge or in reckless disregard of its falsity. (*Id.* at p. 426.)

- "Any facts which tend to disprove one of the allegations raised in a complaint may be offered in the defendant's answer based upon a general denial and need not be raised by affirmative defense. … Throughout this litigation plaintiffs have borne the burden of establishing that their names and likenesses were used in violation of section 3344, and this burden has always required proof that the disputed uses fell outside the exemptions granted by subdivision (d)." (*Gionfriddo v. Major League Baseball* (2001) 94 Cal.App.4th 400, 416–417 [114 Cal.Rptr.2d 307], internal citation omitted.)

- "We presume that the Legislature intended that the category of public affairs would include things that would not necessarily be considered news. Otherwise, the appearance of one of those terms in the subsection would be superfluous, a reading we are not entitled to give to the statute. We also presume that the term 'public affairs' was intended to mean something less important than news. Public affairs must be related to real-life occurrences." (*Dora v. Frontline Video* (1993) 15 Cal.App.4th 536, 546 [18 Cal.Rptr.2d 790], internal citations omitted.)

- "[N]o cause of action will lie for the 'publication of matters in the public interest, which rests on the right of the public to know and the freedom of the press to tell it.' " (*Montana v. San Jose Mercury News* (1995) 34 Cal.App.4th 790, 793 [40 Cal.Rptr.2d 639], internal citations omitted.)

<u>Secondary Sources</u>

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 589–591
- 4 Levy et al., California Torts (1985–2000) Invasion of Privacy, § 46.05
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 429, *Privacy* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 185, *Privacy* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 20:17

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 value of the [***insert type of work, e.g. "picture"***] does not result primarily from [***name of plaintiff***]'s fame.**

DIRECTIONS FOR USE

This instructions assumes that the plaintiff is the celebrity whose likeness is the subject of the trial. This instruction will need to be modified if the plaintiff is not the actual celebrity.

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].)

- "[C]ourts can often resolve the question as a matter of law simply by viewing the work in question and, if necessary, comparing it to an actual likeness of the person or persons portrayed. Because of these circumstances, an action presenting this issue is often properly resolved on summary judgment or, if the complaint includes the work in question, even demurrer." (*Winter v. DC Comics* (2003) 30 Cal.4th 881, 891–892 [134 Cal.Rptr.2d 634], internal citation omitted.)

- "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 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.)

- "The distinction between parody and other forms of literary expression is irrelevant to the *Comedy III* transformative test. It does not matter what precise literary category the work falls into. What matters is whether the work is transformative, not whether it is parody or satire or caricature or serious social commentary or any other specific form of expression." (*Winter, supra,* 30 Cal.4th at p. 891.)

<u>Secondary Sources</u>

- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 429, *Privacy* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 185, *Privacy* (Matthew Bender)

1806
Constitutional Right of Privacy

California law recognizes a right to privacy in [*insert legally protected privacy interest***]. [***Name of plaintiff***] claims that [***name of defendant***] violated that right. To establish this claim, [***name of plaintiff***] must prove the following:**

1. **That [***name of plaintiff***] had a reasonable expectation of privacy in [***insert legally protected privacy interest***] under the circumstances;**

2. **That [***name of defendant***] invaded [***name of plaintiff***]'s privacy in [***insert legally protected privacy interest***];**

3. **That [***name of defendant***]'s conduct was a serious invasion of [***name of plaintiff***]'s privacy;**

4. **That [***name of plaintiff***] was harmed; and**

5. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

DIRECTIONS FOR USE

If the plaintiff is asserting more than one privacy right, give an introductory instruction stating that a person's right to privacy can be violated in more than one way and listing the legal theories under which the plaintiff is suing.

"Legally recognized privacy interests are generally of two classes: (1) interests in precluding the dissemination or misuse of sensitive and confidential information ('informational privacy'); and (2) interests in making intimate personal decisions or conducting personal activities without observation, intrusion, or interference ('autonomy privacy')." (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 20 [26 Cal.Rptr.2d 834].) "Whether a legally recognized privacy interest is present in a given case is a question of law to be decided by the court." (*Hill, supra,* 7 Cal.4th at p. 40.)

For an affirmative defense instruction see instruction 1807, *Affirmative Defense to Constitutional Right.* Other affirmative defenses may be available.

SOURCES AND AUTHORITY

- "[T]he Privacy Initiative in article I, section 1 of the California Constitution creates a right of action against private as well as government entities." (*Hill, supra,* 7 Cal.4th at p. 20.)

- The California Constitution expressly provides that all people have the "inalienable" right to privacy. (Cal. Const., art. I, § 1; see also *American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 325–326 [66 Cal.Rptr.2d 210], observing that the California Constitution expressly recognizes a right of privacy and is considered broader than the implied federal right to privacy.)

- "Based on our review of the Privacy Initiative, we hold that a plaintiff alleging an invasion of privacy in violation of the state constitutional right to privacy must establish each of the following: (1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy." (*Hill, supra,* 7 Cal. 4th at p. 39.)

- Note that subsequent Supreme Court opinions have referred to the three elements stated in *Hill* as "threshold elements" that a plaintiff must meet before he or she can maintain a cause of action. (See *Loder v. City of Glendale* (1997) 14 Cal.4th 846, 893 [59 Cal.Rptr.2d 696].)

- It has been observed that "[o]utside the right to privacy and eminent domain contexts, only a couple of California appellate court opinions have held that there is a right to damages for violations of state constitutional provisions … ." (*Bonner v. City of Santa Ana* (1996) 45 Cal.App.4th 1465, 1471 [53 Cal.Rptr.2d 671], internal citations omitted.)

- "Whether plaintiff has a reasonable expectation of privacy in the circumstances and whether defendant's conduct constitutes a serious invasion of privacy are mixed questions of law and fact. If the undisputed material facts show no reasonable expectation of privacy or an insubstantial impact on privacy interests, the question of invasion may be adjudicated as a matter of law." (*Hill, supra,* 7 Cal.4th at p. 40.)

<u>Secondary Sources</u>

- 7 Witkin, Summary of California Law (9th ed. 1988) Const. Law, §§ 454–471
- 4 Levy et al., California Torts (1985–2000) Invasion of Privacy, § 46.06
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 429, *Privacy* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 185, *Privacy* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, §§ 20:18–20:20

1807
Affirmative Defense to Constitutional Right

[*Name of defendant***] claims that even if [***name of plaintiff***] has proven all of the above, [his/her/its] conduct was justified. [***Name of defendant***] must prove that the circumstances justified the invasion of privacy because the invasion of privacy substantially furthered [***insert relevant legitimate or compelling competing interest***].**

If [*name of defendant***] proves that [his/her/its] conduct was justified, then you must find for [***name of defendant***] unless [***name of plaintiff***] proves that there was a practical, effective, and less invasive method of achieving [***name of defendant***]'s purpose.**

DIRECTIONS FOR USE

Note that whether the countervailing interest needs to be "compelling" or "legitimate" depends on the status of the defendant: "In general, where the privacy violation is alleged against a private entity, the defendant is not required to establish a 'compelling interest' but, rather, one that is 'legitimate' or 'important.' " (*Pettus v. Cole* (1996) 49 Cal.App.4th 402, 440 [57 Cal.Rptr.2d 46].)

SOURCES AND AUTHORITY

- "A defendant may prevail in a state constitutional privacy case by negating any of the three elements just discussed or by pleading and proving, as an affirmative defense, that the invasion of privacy is justified because it substantively furthers one or more countervailing interests. The plaintiff, in turn, may rebut a defendant's assertion of countervailing interests by showing there are feasible and effective alternatives to defendant's conduct which have a lesser impact on privacy interests. Of course, a defendant may also plead and prove other available defenses, e.g., consent, unclean hands, etc., that may be appropriate in view of the nature of the claim and the relief requested." (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 40 [26 Cal.Rptr.2d 834].)

- "The existence of a sufficient countervailing interest or an alternative course of conduct present threshold questions of law for the court. The relative strength of countervailing interests and the feasibility of alternatives present mixed questions of law and fact. Again, in cases where material facts are undisputed, adjudication as a matter of law may be appropriate." (*Hill, supra,* 7 Cal.4th at p. 39.)

- "In general, where the privacy violation is alleged against a private entity, the defendant is not required to establish a 'compelling interest' but, rather, one that is 'legitimate' or 'important.' " (*Pettus, supra,* 49 Cal.App.4th at p. 440.)

Secondary Sources

- 7 WITKIN**,** Summary of California Law (9th ed. 1988) Const. Law, §§ 454–471
- 4 Levy et al., California Torts (1985–2000) Invasion of Privacy, § 46.06
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 429, *Privacy* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 185, *Privacy* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, §§ 20:18–20:20

1808
Stalking (Civ. Code, § 1708.7)

[*Name of plaintiff***] claims that [***name of defendant***] violated [his/her] right to privacy. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] engaged in a pattern of conduct with the intent to [follow/alarm/harass] [***name of plaintiff***]. The pattern of conduct must be supported by evidence in addition to [***name of plaintiff***]'s testimony;**

2. **That as a result of this conduct [***name of plaintiff***] reasonably feared for [his/her] own safety [or for the safety of an immediate family member]; and**

3. **(a) That, as part of the pattern of conduct, [***name of defendant***] made a believable threat with the intent to place [***name of plaintiff***] in reasonable fear for [his/her] safety [or the safety of an immediate family member]; and**

   (b) That [*name of plaintiff***] clearly demanded at least once that [***name of defendant***] stop; and**

   (c) That [*name of defendant***] persisted in [his/her] pattern of conduct;**

   [or]

   That [*name of defendant***] violated a restraining order prohibiting the pattern of conduct;**

4. **That [***name of plaintiff***] was harmed; and**

5. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

["Harass" means a knowing and willful course of conduct directed at [*name of plaintiff***] that seriously alarms, annoys, torments, or terrorizes [him/her], and which serves no legitimate purpose. The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to [***name of plaintiff***]].**

A "pattern of conduct" means a series of words or actions over a period of time, however short, that reflects an ongoing purpose.

SOURCES AND AUTHORITY

- Civil Code section 1708.7 provides:

(a) A person is liable for the tort of stalking when the plaintiff proves all of the following elements of the tort:

(1) The defendant engaged in a pattern of conduct the intent of which was to follow, alarm, or harass the plaintiff. In order to establish this element, the plaintiff shall be required to support his or her allegations with independent corroborating evidence.

(2) As a result of that pattern of conduct, the plaintiff reasonably feared for his or her safety, or the safety of an immediate family member. For purposes of this paragraph, "immediate family" means a spouse, parent, child, any person related by consanguinity or affinity within the second degree, or any person who regularly resides, or, within the six months preceding any portion of the pattern of conduct, regularly resided, in the plaintiff's household.

(3) One of the following:

(A) The defendant, as a part of the pattern of conduct specified in paragraph (1), made a credible threat with the intent to place the plaintiff in reasonable fear for his or her safety, or the safety of an immediate family member and, on at least one occasion, the plaintiff clearly and definitively demanded that the defendant cease and abate his or her pattern of conduct and the defendant persisted in his or her pattern of conduct.

(B) The defendant violated a restraining order, including, but not limited to, any order issued pursuant to Section 527.6 of the Code of Civil Procedure, prohibiting any act described in subdivision (a).

(b) For the purposes of this section:

(1) "Pattern of conduct" means conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose. Constitutionally protected activity is not included within the meaning of "pattern of conduct."

(2) "Credible threat" means a verbal or written threat, including that communicated by means of an electronic communication device, or a threat implied by a pattern of conduct or a combination of verbal, written, or electronically communicated statements and conduct, made with the intent and apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety or the safety of his or her immediate family.

(3) "Electronic communication device" includes, but is not limited to, telephones, cellular telephones, computers, video recorders, fax machines, or pagers. "Electronic communication" has the same meaning as the term defined in Subsection 12 of Section 2510 of Title 18 of the United States Code.

(4) "Harass" means a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, torments, or terrorizes the person, and which serves no legitimate purpose. The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the person.

(c) A person who commits the tort of stalking upon another is liable to that person for damages, including, but not limited to, general damages, special damages, and punitive damages pursuant to Section 3294.

(d) In an action pursuant to this section, the court may grant equitable relief, including, but not limited to, an injunction.

(e) The rights and remedies provided in this section are cumulative and in addition to any other rights and remedies provided by law.

(f) This section shall not be construed to impair any constitutionally protected activity, including, but not limited to, speech, protest, and assembly.

Secondary Sources

- 5 Witkin, Summary of California Law (Supp. 2002) Torts, § 581A
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 429, *Privacy* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 185, *Privacy* (Matthew Bender)

1809
Recording of Confidential Information (Pen. Code, §§ 632, 637.2)

[*Name of plaintiff***] claims that [***name of defendant***] violated [his/her] right to privacy. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] intentionally [eavesdropped on/recorded] [***name of plaintiff***]'s conversation by using an electronic device;**

2. **That [***name of plaintiff***] had a reasonable expectation that the conversation was not being overheard or recorded; [and]**

3. **That [***name of defendant***] did not have the consent of all parties to the conversation to [eavesdrop on/record] it;**

4. **[That [***name of plaintiff***] was harmed; and]**

5. **[That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.]**

DIRECTIONS FOR USE

If the plaintiff is asserting more than one privacy right, give an introductory instruction stating that a person's right to privacy can be violated in more than one way and listing the legal theories under which the plaintiff is suing.

Elements #4 and #5 are in brackets because if there is no actual harm, plaintiff can recover the statutory penalty. If plaintiff is seeking actual damages, such damages must be proven along with causation.

SOURCES AND AUTHORITY

- Penal Code section 632(a) provides: "Every person who, intentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device, eavesdrops upon or records the confidential communication, whether the communication is carried on among the parties in the presence of one another or by means of a telegraph, telephone, or other device, except a radio, shall be punished by a fine not exceeding two thousand five hundred dollars ($2,500), or imprisonment in the county jail not exceeding one year, or in the state prison, or by both that fine and imprisonment. If the person has previously been convicted of a violation of this section or Section 631, 632.5, 632.6, 632.7, or 636, the person shall be punished by a fine not exceeding ten thousand dollars ($10,000), by

imprisonment in the county jail not exceeding one year, or in the state prison, or by both that fine and imprisonment."

- Penal Code, section 637.2 provides:

  (a) Any person who has been injured by a violation of this chapter may bring an action against the person who committed the violation for the greater of the following amounts:
      (1) Five thousand dollars ($5,000).
      (2) Three times the amount of actual damages, if any, sustained by the plaintiff.
  (b) Any person may, in accordance with Chapter 3 (commencing with Section 525) of Title 7 of Part 2 of the Code of Civil Procedure, bring an action to enjoin and restrain any violation of this chapter, and may in the same action seek damages as provided by subdivision (a). It is not a necessary prerequisite to an action pursuant to this section that the plaintiff has suffered, or be threatened with, actual damages.

- "[A] conversation is confidential under section 632 if a party to that conversation has an objectively reasonable expectation that the conversation is not being overheard or recorded." (*Flanagan v. Flanagan* (2002) 27 Cal.4th 766, 769 [117 Cal.Rptr.2d 574].)

- " 'A communication must be protected if either party reasonably expects the communication to be confined to the parties.' " (*Coulter v. Bank of America* (1994) 28 Cal.App.4th 923, 929 [33 Cal.Rptr.2d 766], internal citation omitted.)

- "While one who imparts private information risks the betrayal of his confidence by the other party, a substantial distinction has been recognized between the secondhand repetition of the contents of a conversation and its simultaneous dissemination to an unannounced second auditor, whether that auditor be a person or a mechanical device." (*Ribas v. Clark* (1985) 38 Cal.3d 355, 360–361 [212 Cal.Rptr. 143].)

- "We hold that an actionable violation of section 632 does not require disclosure of a confidential communication to a third party." (*Friddle v. Epstein* (1993) 16 Cal.App.4th 1649, 1660 [21 Cal.Rptr.2d 85].)

- "The right to recover [the] statutory minimum accrue[s] at the moment the Privacy Act [is] violated." (*Friddle, supra,* 16 Cal.App.4th at p. 1661.)

- "If the plaintiff has suffered injuries akin to those for emotional distress, 'i.e., anxiety, embarrassment, humiliation, shame, depression, feelings of powerlessness, anguish, etc.,' these are 'actual' damages which shall be trebled." (*Friddle, supra,* 16 Cal.App.4th at p. 1660.)

- "Because the right to [the statutory] award accrues at the moment of the violation, it is not barred by the judicial privilege. … Section 637.2 therefore permits him to

pursue his statutory remedy of a civil lawsuit for $3,000, even though the judicial privilege bars his recovery for the only actual damage he claims to have suffered." (*Ribas, supra,* 38 Cal.3d at p. 365.)

Secondary Sources

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, § 581
- 4 Levy et al., California Torts (1985–2000) Invasion of Privacy, § 46.07[8]
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 429, *Privacy* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 185, *Privacy* (Matthew Bender)

1820
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 particular 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 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.]**

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 1700 to 1705).

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.)

- "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.)

Secondary Sources

- CALIFORNIA TORTS, Ch. 46, *Invasion of Privacy*, § 46.13 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 429, *Privacy* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 185, *Privacy* (Matthew Bender)

1821
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 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.**

[*Name of plaintiff***] must prove the amount of gross revenue, and [***name of defendant***] must prove the amount of expenses**

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.)

<u>Secondary Sources</u>

- CALIFORNIA TORTS, Ch. 46, *Invasion of Privacy*, § 46.13 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 429, *Privacy* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 185, *Privacy* (Matthew Bender)

VERDICT FORMS

VF-1800
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***] intentionally 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 defendant***]'s conduct a substantial factor in causing harm to [***name of plaintiff***]?**

   ___Yes **___No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. What are [*name of plaintiff*]'s damages?

[a. Past economic loss, 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, *Intrusion into Private Affairs.*

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.

VF-1801
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**

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.

This verdict form is based on Instruction 1801, *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.

VF-1802
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. **Is there clear and convincing evidence that [***name of defendant***] either knew the publication would create a false impression about [***name of plaintiff***] or acted 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**

   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, *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.

VF-1803
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:] **$_____]**
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] **$_____]**
[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 1803, *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.

VF-1804
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**

   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 1804, *Use of Name or Likeness (Civ. Code, §§ 3344, 3344.1).*

Additional questions may be necessary if the facts implicate Civil Code section 3344(d) (see Directions for Use under Instruction 1804). 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.

VF-1805
Privacy—Constitutional Right of Privacy

We answer the questions submitted to us as follows:

1. **Did [***name of plaintiff***] have a reasonable expectation of privacy in [***insert legally protected privacy interest***] under the circumstances?**

   ___Yes **___No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [***name of defendant***] invade [***name of plaintiff***]'s [***insert legally protected privacy interest***]?**

   ___Yes **___No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Was [***name of defendant***]'s conduct a serious invasion of [***name of plaintiff***]'s privacy?**

   ___Yes **___No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Was [***name of defendant***]'s conduct a substantial factor in causing harm to [***name of plaintiff***]?**

   ___Yes **___No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. What are [*name of plaintiff*]'s damages?

[a. Past economic loss, 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 1806, *Constitutional Right of Privacy*.

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, 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.

VF-1806
Privacy—Constitutional Right of Privacy—Affirmative Defense

We answer the questions submitted to us as follows:

1. **Did [***name of plaintiff***] have a reasonable expectation of privacy in [***insert legally protected privacy interest***] under the circumstances?**

   ___Yes **___No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [***name of defendant***] invade [***name of plaintiff***]'s [***insert legally protected privacy interest***]?**

   ___Yes **___No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Was [***name of defendant***]'s conduct a serious invasion of [***name of plaintiff***]'s privacy?**

   ___Yes **___No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Was [***name of defendant***]'s conduct justified because of [***insert relevant legitimate competing interest***]?**

   ___Yes **___No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, skip question 5 and answer question 6.

5. **Was there a practical, effective, and less invasive method of achieving [***name of defendant***]'s purpose?**

   ___Yes **___No**

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Was [*name of defendant***]'s conduct a substantial factor in causing harm to [***name of plaintiff***]?**

___Yes ___No

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].

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 1806, *Constitutional Right of Privacy,* and Instruction 1807, *Affirmative Defense to Constitutional Right.*

If specificity is not required, users do not have to itemize all the damages listed in question 7 and do not have to categorize “economic” and “noneconomic” damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, 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.

VF-1807
Privacy—Recording of Confidential Information (Pen. Code, §§ 632, 637.2)

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] intentionally [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 not being overheard or recorded?**

___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**

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 1809, *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.

FRAUD OR DECEIT

1900
Intentional Misrepresentation

[*Name of plaintiff***] claims that [***name of defendant***] made a false representation that harmed [him/her/it]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] represented to [***name of plaintiff***] that an important fact was true;**

2. **That [***name of defendant***]'s representation was false;**

3. **That [***name of defendant***] knew that the representation was false when [he/she] made it, or that [he/she] made the representation recklessly and without regard for its truth;**

4. **That [***name of defendant***] intended that [***name of plaintiff***] rely on the representation;**

5. **That [***name of plaintiff***] reasonably relied on [***name of defendant***]'s representation;**

6. **That [***name of plaintiff***] was harmed; and**

7. **That [***name of plaintiff***]'s reliance on [***name of defendant***]'s representation was a substantial factor in causing [his/her/its] harm.**

DIRECTIONS FOR USE

If it is disputed that a representation was made, the jury should be instructed that "a representation may be made orally, in writing, or by nonverbal conduct."

SOURCES AND AUTHORITY

- "Fraud" and "deceit" are defined in Civil Code sections 1572, 1709, and 1710. Courts appear to refer to the terms interchangeably, though technically "fraud" applies to only contract actions.

- Civil Code section 1709 defines "deceit" generally: "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 1710 specifies four kinds of deceit. This instruction applies to the first:

  A deceit, within the meaning of the last section, is either:
  1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true [intentional misrepresentation of fact];
  2. The assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true [negligent misrepresentation of fact];
  3. The suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact [concealment or suppression of fact]; or,
  4. A promise, made without any intention of performing it [promissory fraud].

- Civil Code section 1572, dealing specifically with fraud in the making of contracts, restates these definitions in slightly differing language, with the addition of a fifth kind of deceit, described generally as "[a]ny other act fitted to deceive." Fraud in the context of contract formation is covered by other instructions.

- The tort of deceit or fraud requires "(a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or scienter); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 974 [64 Cal.Rptr.2d 843], internal quotation marks omitted; *Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1108 [252 Cal.Rptr. 122].)

- Sometimes this tort is stated with four elements instead of five: "(1) a knowingly false representation by the defendant; (2) an intent to deceive or induce reliance; (3) justifiable reliance by the plaintiff; and (4) resulting damages." (*Service by Medallion, Inc. v. Clorox Co.* (1996) 44 Cal.App.4th 1807, 1816 [52 Cal.Rptr.2d 650].)

- The representation must ordinarily be an affirmation of fact, as opposed to an opinion. Under the Restatement Second of Torts section 538A, a representation is an opinion "if it expresses only (a) the belief of the maker, without certainty, as to the existence of a fact; or (b) his judgment as to quality, value, authenticity, or other matters of judgement." Opinions are addressed in Instruction 1904, *Opinions as Statements of Fact.*

- "Puffing," or sales talk, is generally considered opinion, unless it involves a representation of product safety. (*Hauter v. Zogarts* (1975) 14 Cal.3d 104, 112 [120 Cal.Rptr. 681].)

- "Fraud is an intentional tort; it is the element of fraudulent intent, or intent to deceive, that distinguishes it from actionable negligent misrepresentation and from nonactionable innocent misrepresentation. It is the element of intent which makes fraud actionable, irrespective of any contractual or fiduciary duty one party might owe to the other." (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 482 [80 Cal.Rptr.2d 329], internal citations omitted.)

- "A misrepresentation need not be oral; it may be implied by conduct." (*Thrifty-Tel, Inc. v. Bezenek* (1996) 46 Cal.App.4th 1559, 1567 [54 Cal.Rptr.2d 468], internal citations omitted.)

- " '[F]alse representations made recklessly and without regard for their truth in order to induce action by another are the equivalent of misrepresentations knowingly and intentionally uttered.' " (*Engalla, supra,* 15 Cal.4th at p. 974, quoting *Yellow Creek Logging Corp. v. Dare* (1963) 216 Cal.App.2d 50, 55 [30 Cal.Rptr. 629].)

- "Actual reliance occurs when a misrepresentation is 'an immediate cause of [a plaintiff's] conduct, which alters his legal relations,' and when, absent such representation, 'he would not, in all reasonable probability, have entered into the contract or other transaction.' 'It is not ... necessary that [a plaintiff's] reliance upon the truth of the fraudulent misrepresentation be the sole or even the predominant or decisive factor in influencing his conduct. … It is enough that the representation has played a substantial part, and so has been a substantial factor, in influencing his decision.' " (*Engalla, supra,* 15 Cal.4th at pp. 976–977, internal citations omitted.)

- "Justifiable reliance is an essential element of a claim for fraudulent misrepresentation, and the reasonableness of the reliance is ordinarily a question of fact." (*Guido v. Koopman* (1991) 1 Cal.App.4th 837, 843 [2 Cal.Rptr.2d 437] internal citations omitted.)

- "A 'complete causal relationship' between the fraud or deceit and the plaintiff's damages is required. … Causation requires proof that the defendant's conduct was a 'substantial factor' in bringing about the harm to the plaintiff." (*Williams v. Wraxall* (1995) 33 Cal.App.4th 120, 132 [39 Cal.Rptr.2d 658], internal citations omitted.)

- "In order to recover for fraud, as in any other tort, the plaintiff must plead and prove the 'detriment proximately caused' by the defendant's tortious conduct. Deception without resulting loss is not actionable fraud." (*Service by Medallion, Inc., supra,* 44 Cal.App.4th at p. 1818, internal citations omitted.)

<u>Secondary Sources</u>

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 674–719
- 3 Levy, et al., California Torts (1985–2000) Fraud and Deceit and Other Business Torts, §§ 40.02, 40.05

- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 269, *Fraud and Deceit* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 105, *Fraud and Deceit* (Matthew Bender)
- 2 Bancroft-Whitney's California Civil Practice (1992) Torts, § 22:12

1901
Concealment

[*Name of plaintiff***] claims that [he/she] was harmed because [***name of defendant***] concealed certain information. To establish this claim, [***name of plaintiff***] must prove all of the following:**

[1. (a) That [*name of defendant***] and [***name of plaintiff***] were [***insert type of fiduciary relationship, e.g., "business partners"***]; and**

(b) That [*name of defendant***] intentionally failed to disclose an important fact to [***name of plaintiff***];]**

[or]

[1. That [*name of defendant***] disclosed some facts to [***name of plaintiff***] but intentionally failed to disclose [other/another] important fact(s), making the disclosure deceptive;]**

[or]

[1. That [*name of defendant***] intentionally failed to disclose an important fact that was known only to [him/her/it] and that [***name of plaintiff***] could not have discovered;]**

[or]

[1. That [*name of defendant***] actively concealed an important fact from [***name of plaintiff***] or prevented [him/her/it] from discovering that fact;]**

2. That [*name of plaintiff***] did not know of the concealed fact;**

3. That [*name of defendant***] intended to deceive [***name of plaintiff***] by concealing the fact;**

4. That [*name of plaintiff***] reasonably relied on [***name of defendant***]'s deception;**

5. That [*name of plaintiff***] was harmed; and**

6. That [*name of defendant***]'s concealment was a substantial factor in causing [***name of plaintiff***]'s harm.**

DIRECTIONS FOR USE

Under the second, third, and fourth bracketed instructions under element 1, if the defendant asserts that there was no relationship based on a transaction giving rise to a duty to disclose, then the jury should also be instructed to determine whether the requisite relationship existed.

Element 2 may be deleted if the third alternative bracketed instruction under element 1 is used.

SOURCES AND AUTHORITY

- Civil Code section 1710 specifies four kinds of deceit. This instruction is derived from the third kind:

  > A deceit, within the meaning of [section 1709], is either:
  > 1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;
  > 2. The assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be;
  > 3. The suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact; or,
  > 4. A promise, made without any intention of performing it.

- "[T]he elements of an action for fraud and deceit based on a concealment are: (1) the defendant must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the plaintiff, (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage." (*Marketing West, Inc. v. Sanyo Fisher (USA) Corp.* (1992) 6 Cal.App.4th 603, 612–613 [7 Cal.Rptr.2d 859].)

- "There are 'four circumstances in which nondisclosure or concealment may constitute actionable fraud: (1) when the defendant is in a fiduciary relationship with the plaintiff; (2) when the defendant had exclusive knowledge of material facts not known to the plaintiff; (3) when the defendant actively conceals a material fact from the plaintiff; and (4) when the defendant makes partial representations but also suppresses some material facts. … Each of the [three nonfiduciary] circumstances in which nondisclosure may be actionable presupposes the existence of some other relationship between the plaintiff and defendant in which a duty to disclose can arise. ... [¶] ... [S]uch a relationship can only come into being as a result of some sort of

transaction between the parties. … Thus, a duty to disclose may arise from the relationship between seller and buyer, employer and prospective employee, doctor and patient, or parties entering into any kind of contractual agreement.' All of these relationships are created by transactions between parties from which a duty to disclose facts material to the transaction arises under certain circumstances." (*LiMandri v. Judkins* (1997) 52 Cal.App.4th 326, 336–337 [60 Cal.Rptr.2d 539], internal citations, italics, and footnote omitted.)

- "Ordinarily, failure to disclose material facts is not actionable fraud unless there is some fiduciary relationship giving rise to a duty to disclose … [however,] '[t]he duty to disclose may arise without any confidential relationship where the defendant alone has knowledge of material facts which are not accessible to the plaintiff.' " (*Magpali v. Farmers Group, Inc.* (1996) 48 Cal.App.4th 471, 482 [55 Cal.Rptr.2d 225] internal citations omitted.)

- "In transactions which do not involve fiduciary or confidential relations, a cause of action for non-disclosure of material facts may arise in at least three instances: (1) the defendant makes representations but does not disclose facts which materially qualify the facts disclosed, or which render his disclosure likely to mislead; (2) the facts are known or accessible only to defendant, and defendant knows they are not known to or reasonably discoverable by the plaintiff; (3) the defendant actively conceals discovery from the plaintiff." (*Warner Construction Corp. v. City of Los Angeles* (1970) 2 Cal.3d 285, 294 [85 Cal.Rptr. 444], footnotes omitted.)

- "[A]ctive concealment of facts and mere nondisclosure of facts may under certain circumstances be actionable without [a fiduciary or confidential] relationship. For example, a duty to disclose may arise without a confidential or fiduciary relationship where the defendant, a real estate agent or broker, alone has knowledge of material facts which are not accessible to the plaintiff, a buyer of real property." (*La Jolla Village Homeowners' Assn. v. Superior Court* (1989) 212 Cal.App.3d 1131, 1151 [261 Cal.Rptr. 146], internal citations omitted.)

- "Even if a fiduciary relationship is not involved, a non-disclosure claim arises when the defendant makes representations but fails to disclose additional facts which materially qualify the facts disclosed, or which render the disclosure likely to mislead." (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 666 [51 Cal.Rptr.2d 907], internal citations omitted.)

- " '[T]he rule has long been settled in this state that although one may be under no duty to speak as to a matter, "if he undertakes to do so, either voluntarily or in response to inquiries, he is bound not only to state truly what he tells but also not to suppress or conceal any facts within his knowledge which materially qualify those stated. If he speaks at all he must make a full and fair disclosure." ' " (*Marketing West, Inc., supra,* 6 Cal.App.4th at p. 613, internal citation omitted.)

- "Contrary to plaintiffs' assertion, it is not logically impossible to prove reliance on an omission. One need only prove that, had the omitted information been disclosed, one would have been aware of it and behaved differently." (*Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1093 [23 Cal.Rptr.2d 101].)

Secondary Sources

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 697–703
- 3 Levy, et al., California Torts (1985–2000) Fraud and Deceit and Other Business Torts, § 40.03[2][b]
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 269, *Fraud and Deceit* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 105, *Fraud and Deceit* (Matthew Bender)
- 2 Bancroft-Whitney's California Civil Practice (1992) Torts, § 22:16

1902
False Promise

[*Name of plaintiff*] claims [he/she] was harmed because [*name of defendant*] made a false promise. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] made a promise to [*name of plaintiff*];**
2. **That this promise was important to the transaction;**
3. **That [*name of defendant*] did not intend to perform this promise when [he/she] made it;**
4. **That [*name of defendant*] intended that [*name of plaintiff*] rely on this promise;**
5. **That [*name of plaintiff*] reasonably relied on [*name of defendant*]'s promise;**
6. **That [*name of defendant*] did not perform the promised act;**
7. **That [*name of plaintiff*] was harmed; and**
8. **That [*name of plaintiff*]'s reliance on [*name of defendant*]'s promise was a substantial factor in causing [his/her/its] harm.**

DIRECTIONS FOR USE

Insert brief description of transaction in elements 2 and 5 if it can be simply stated.

SOURCE AND AUTHORITY

- Civil Code section 1710 specifies four kinds of deceit. This instruction is based on the fourth one:

  A deceit, within the meaning of the last section, is either:
  1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;
  2. The assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true;
  3. The suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact; or,

4. A promise, made without any intention of performing it.

- " ' "Promissory fraud" is a subspecies of fraud and deceit. A promise to do something necessarily implies the intention to perform; hence, where a promise is made without such intention, there is an implied misrepresentation of fact that may be actionable fraud. [¶] An action for promissory fraud may lie where a defendant fraudulently induces the plaintiff to enter into a contract.' " (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 973–974 [64 Cal.Rptr.2d 843], internal citations omitted.)

- "A promise of future conduct is actionable as fraud only if made without a present intent to perform. 'A declaration of intention, although in the nature of a promise, made in good faith, without intention to deceive, and in the honest expectation that it will be fulfilled, even though it is not carried out, does not constitute a fraud.' Moreover, ' "something more than nonperformance is required to prove the defendant's intent not to perform his promise." ... [I]f plaintiff adduces no further evidence of fraudulent intent than proof of nonperformance of an oral promise, he will never reach a jury.' " (*Magpali v. Farmers, Inc.* (1996) 48 Cal.App.4th 471, 481, 55 Cal.Rptr.2d 225 (internal citations omitted).)

- "[I]n order to support a claim of fraud based upon the alleged failure to perform a promise, it must be shown that the promisor did not intend to perform at the time the promise was made." (*Conrad v. Bank of America* (1996) 45 Cal.App.4th 133, 157 [53 Cal.Rptr.2d 336], citing *Tenzer v. Superscope, Inc.* (1985) 39 Cal.3d 18, 30 [216 Cal.Rptr. 130].)

<u>Secondary Sources</u>

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 685–692
- 3 Levy, et al., California Torts (1985–2000) Fraud and Deceit and Other Business Torts, § 40.03[1][a]
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 269, *Fraud and Deceit* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 105, *Fraud and Deceit* (Matthew Bender)
- 2 Bancroft-Whitney's California Civil Practice (1992) Torts, § 22:20

1903
Negligent Misrepresentation

[*Name of plaintiff*] claims [he/she] was harmed because [*name of defendant*] negligently misrepresented an important fact. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] represented to [*name of plaintiff*] that an important fact was true;**

2. **That [*name of defendant*]'s representation was not true;**

3. **That [*name of defendant*] had no reasonable grounds for believing the representation was true when [he/she] made it;**

4. **That [*name of defendant*] intended that [*name of plaintiff*] rely on this representation;**

5. **That [*name of plaintiff*] reasonably relied on [*name of defendant*]'s representation;**

6. **That [*name of plaintiff*] was harmed; and**

7. **That [*name of plaintiff*]'s reliance on [*name of defendant*]'s representation was a substantial factor in causing [his/her/its] harm.**

SOURCE AND AUTHORITY

- Civil Code section 1710 specifies four kinds of deceit. This instruction is based on the second one:

  A deceit, within the meaning of the last section, is either:
  1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true [intentional misrepresentation of fact];
  2. The assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true [negligent misrepresentation of fact];
  3. The suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact [concealment or suppression of fact]; or,
  4. A promise, made without any intention of performing it.

- "Negligent misrepresentation is a form of deceit, the elements of which consist of (1) a misrepresentation of a past or existing material fact, (2) without reasonable grounds for believing it to be true, (3) with intent to induce another's reliance on the fact misrepresented, (4) ignorance of the truth and justifiable reliance thereon by the party to whom the misrepresentation was directed, and (5) damages." (*Fox v. Pollack* (1986) 181 Cal.App.3d 954, 962 [226 Cal.Rptr. 532], internal citation omitted.)

- " 'To be actionable deceit, the representation need not be made with knowledge of actual falsity, but need only be an "assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true" and made "with intent to induce [the recipient] to alter his position to his injury or his risk... ." ' The elements of negligent misrepresentation also include justifiable reliance on the representation, and resulting damage." (*B.L.M. v. Sabo & Deitsch* (1997) 55 Cal.App.4th 823, 834 [64 Cal.Rptr.2d 335], internal citations omitted.)

- "As is true of negligence, responsibility for negligent misrepresentation rests upon the existence of a legal duty, imposed by contract, statute or otherwise, owed by a defendant to the injured person. The determination of whether a duty exists is primarily a question of law." (*Eddy v. Sharp* (1988) 199 Cal.App.3d 858, 864 [245 Cal.Rptr. 211], internal citations omitted.)

- " ' "Where the defendant makes false statements, honestly believing that they are true, but without reasonable ground for such belief, he may be liable for negligent misrep-resentation, a form of deceit." ' If defendant's belief 'is both honest and reasonable, the misrepresentation is innocent and there is no tort liability.' " (*Diediker v. Peelle Financial Corp.* (1997) 60 Cal.App.4th 288, 297 [70 Cal.Rptr.2d 442], internal citations omitted.)

- "Parties cannot read something into a neutral statement in order to justify a claim for negligent misrepresentation. The tort requires a 'positive assertion.' 'An "implied" assertion or representation is not enough.' " (*Diediker, supra,* 60 Cal.App.4th at pp. 297–298, internal citations omitted.)

- "Whether a defendant had reasonable ground for believing his or her false statement to be true is ordinarily a question of fact." (*Quality Wash Group V, Ltd. v. Hallak* (1996) 50 Cal.App.4th 1687, 1696 [58 Cal.Rptr.2d 592], internal citations omitted.)

<u>Secondary Sources</u>

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 720–724
- 3 Levy, et al., California Torts (1985–2000) Fraud and Deceit and Other Business Torts, § 40.10
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 269, *Fraud and Deceit* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 105, *Fraud and Deceit* (Matthew Bender)
- 2 Bancroft-Whitney's California Civil Practice (1992) Torts, §§ 22:13–22:15

1904
Opinions as Statements of Fact

Ordinarily, an opinion is not considered a representation of fact. An opinion is a person's belief that a fact exists, a statement regarding a future event, or a judgment about quality, value, authenticity, or similar matters. However, [*name of defendant***]'s opinion is considered a representation of fact if [***name of plaintiff***] proves that:**

> **[[***Name of defendant***] claimed to have special knowledge about the subject matter that [***name of plaintiff***] did not have;] [or]**
>
> **[[***Name of defendant***] made a representation, not as a casual expression of belief, but in a way that declared the matter to be true;] [or]**
>
> **[[***Name of defendant***] had a relationship of trust and confidence with [***name of plaintiff***];] [or]**
>
> **[[***Name of defendant***] had some other special reason to expect that [***name of plaintiff***] would rely on his or her opinion;] [or]**
>
> **[[***Name of defendant***] represented that [his/her/its] product was safe.]**

DIRECTIONS FOR USE

This is not a stand-alone instruction. It should be read in conjunction with one of the elements instructions (instructions 1900–1903).

The second bracketed option appears to be limited to cases involving professional opinions. (*Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 408 [11 Cal.Rptr.2d 51].)

Alternative bracketed options that do not apply to the facts of the case may be deleted.

SOURCES AND AUTHORITY

- Restatement of Torts, section 542 states:

  The recipient of a fraudulent misrepresentation solely of the maker's opinion is not justified in relying upon it in a transaction with the maker, unless the fact to which the opinion relates is material, and the maker
  (a) purports to have special knowledge of the matter that the recipient does not have, or

(b) stands in a fiduciary or other similar relation of trust and confidence to the recipient, or
(c) has successfully endeavored to secure the confidence of the recipient, or
(d) has some other special reason to expect that the recipient will rely on his opinion.

- Restatement Second of Torts, section 538A states: "A representation is one of opinion if it expresses only (a) the belief of the maker, without certainty, as to the existence of a fact; or (b) his judgment as to quality, value, authenticity, or other matters of judgment."

- Restatement Second of Torts, section 539 states:

  (1) A statement of opinion as to facts not disclosed and not otherwise known to the recipient may, if it is reasonable to do so, be interpreted by him as an implied statement (a) that the facts known to the maker are not incompatible with his opinion; or (b) that he knows facts sufficient to justify him in forming it.
  (2) In determining whether a statement of opinion may reasonably be so interpreted, the recipient's belief as to whether the maker has an adverse interest is important.

- "Generally, actionable misrepresentation must be one of existing fact; 'predictions as to future events, or statements as to future action by some third party, are deemed opinions, and not actionable fraud ... .' But there are exceptions to this rule: '(1) where a party holds himself out to be specially qualified and the other party is so situated that he may reasonably rely upon the former's superior knowledge; (2) where the opinion is by a fiduciary or other trusted person; [and,] (3) where a party states his opinion as an existing fact or as implying facts which justify a belief in the truth of the opinion.' " (*Cohen v. S&S Construction Co.* (1983) 151 Cal.App.3d 941, 946 [201 Cal.Rptr. 173], internal citations omitted.)

- "A statement couched as an opinion, by one having special knowledge of the subject, may be treated as an actionable misstatement of fact. Whether a statement is nonactionable opinion or actionable misrepresentation of fact is a question of fact for the jury." (*Furla v. Jon Douglas Co.* (1998) 65 Cal.App.4th 1069, 1080–1081 [76 Cal.Rptr.2d 911], internal citations omitted.)

- "Puffing," or sales talk, is generally considered opinion, unless it involves a representation that a product is safe. (*Hauter v. Zogarts* (1975) 14 Cal.3d 104 [120 Cal.Rptr. 681]; see also *Continental Airlines, Inc. v. McDonnell Douglas Corp.* (1989) 216 Cal.App.3d 388, 424 [264 Cal.Rptr. 779].)

- "Under certain circumstances, expressions of professional opinion are treated as representations of fact. When a statement, although in the form of an opinion, is 'not

a casual expression of belief' but 'a deliberate affirmation of the matters stated,' it may be regarded as a positive assertion of fact. Moreover, when a party possesses or holds itself out as possessing superior knowledge or special information or expertise regarding the subject matter and a plaintiff is so situated that it may reasonably rely on such supposed knowledge, information, or expertise, the defendant's representation may be treated as one of material fact." (*Bily, supra,* 3 Cal.4th at p. 408, internal citations omitted.)

Secondary Sources

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 678–682
- 3 Levy, et al., California Torts (1985–2000) Fraud and Deceit and Other Business Torts, § 40.03[1][b]
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 269, *Fraud and Deceit* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 105, *Fraud and Deceit* (Matthew Bender)
- 2 Bancroft-Whitney's California Civil Practice (1992) Torts, §§ 22:21–22:28

1905
Definition of Important Fact/Promise

A [fact/promise] is important if it would influence a reasonable person's judgment or conduct. A [fact/promise] is also important if the person who [represents/makes] it knows that the person to whom the [representation/promise] is made is likely to be influenced by it even if a reasonable person would not.

SOURCES AND AUTHORITY

- "According to the Restatement of Torts, '[r]eliance upon a fraudulent misrepresentation is not justifiable unless the matter misrepresented is material. … The matter is material if ... a reasonable [person] would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question ... .' But materiality is a jury question, and a 'court may [only] withdraw the case from the jury if the fact misrepresented is so obviously unimportant that the jury could not reasonably find that a reasonable man would have been influenced by it.' " (*Charpentier v. Los Angeles Rams* (1999) 75 Cal.App.4th 301, 312–313 [89 Cal.Rptr.2d 115], internal citations omitted.)

- "Viewed in terms of materiality, '[a] false representation which cannot possibly affect the intrinsic merits of a business transaction must necessarily be immaterial because reliance upon it could not produce injury in a legal sense.' " (*Service by Medallion, Inc. v. Clorox Co.* (1996) 44 Cal.App.4th 1807, 1818 [52 Cal.Rptr.2d 650], internal citation omitted.)

- "A misrepresentation of fact is material if it induced the plaintiff to alter his position to his detriment. Stated in terms of reliance, materiality means that without the misrepresentation, the plaintiff would not have acted as he did. 'It must be shown that the plaintiff actually relied upon the misrepresentation; i.e., that the representation was "an immediate cause of his conduct which alters his legal relations," and that without such representation, "he would not, in all reasonable probability, have entered into the contract or other transaction." ' " (*Okun v. Morton* (1988) 203 Cal.App.3d 805, 828 [250 Cal.Rptr. 220], internal citations omitted.)

<u>Secondary Sources</u>

- 3 Levy, et al., California Torts (1985–2000) Fraud and Deceit and Other Business Torts, § 40.03[4]
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 269, *Fraud and Deceit* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 105, *Fraud and Deceit* (Matthew Bender)

- 2 Bancroft-Whitney's California Civil Practice (1992) Torts, § 22:29

1906
Misrepresentations Made to Persons Other Than the Plaintiff

[*Name of defendant***] is responsible for a representation that was not made directly to [***name of plaintiff***] if [he/she/it] made the representation [to a group of persons including [***name of plaintiff***]] [or] [to another person, intending or reasonably expecting that it would be repeated to [***name of plaintiff***]].**

DIRECTIONS FOR USE

An instruction on concealment made to a person other than the plaintiff is not necessary; this point is covered by the third option of element 1 in Instruction 1901, *Concealment*.

SOURCES AND AUTHORITY

- Civil Code section 1711 provides: "One who practices a deceit with intent to defraud the public, or a particular class of persons, is deemed to have intended to defraud every individual in that class, who is actually misled by the deceit."

- "It is true that in order for a defendant to be liable for fraud, he or she must intend that a particular representation (or concealment) be relied upon by a specific person or persons. However, it is also established that a defendant cannot escape liability if he or she makes a representation to one person while intending or having reason to expect that it will be repeated to and acted upon by the plaintiff (or someone in the class of persons of which plaintiff is a member). This is the principle of indirect deception described in section 533 of the Restatement Second of Torts (section 533): 'The maker of a fraudulent misrepresentation is subject to liability for pecuniary loss to another who acts in justifiable reliance upon it if the misrepresentation, although not made directly to the other, is made to a third person and the maker intends or has reason to expect that its terms will be repeated or its substance communicated to the other, and that it will influence his conduct in the transaction or type of transaction involved.' Comment d to section 533 makes it clear the rule of section 533 applies where the maker of the misrepresentation has information that gives him special reason to expect that the information will be communicated to others and will influence their conduct. Comment g goes on to explain that it is not necessary that the maker of the misrepresentation have the particular person in mind. It is enough that it is intended to be repeated to a particular class of persons." (*Shapiro v. Sutherland* (1998) 64 Cal.App.4th 1534, 1548 [76 Cal.Rptr.2d 101], internal citations omitted.)

- See also *Geernaert v. Mitchell* (1995) 31 Cal.App.4th 601, 605–606 [37 Cal.Rptr.2d 483].

Secondary Sources

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 706–709
- 3 Levy, et al., California Torts (1985–2000) Fraud and Deceit and Other Business Torts, § 40.05[3]
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 269, *Fraud and Deceit* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 105, *Fraud and Deceit* (Matthew Bender)
- 2 Bancroft-Whitney's California Civil Practice (1992) Torts, § 22:34

1907
Reliance

[*Name of plaintiff***] relied on [***name of defendant***]'s [misrepresentation/concealment] if it caused [him/her/it] to [***insert brief description of the action, e.g., "buy the house"***], and if [he/she] would probably not have done so without such [misrepresentation/ concealment].**

It is not necessary for a [misrepresentation/concealment] to be the only reason for [*name of plaintiff***]'s conduct. It is enough if a [misrepresentation/concealment] substantially influenced [***name of plaintiff***]'s choice, even if it was not the only reason for [his/her] conduct.**

SOURCES AND AUTHORITY

- "It is settled that a plaintiff, to state a cause of action for deceit based on a misrepresentation, must plead that he or she actually relied on the misrepresentation." (*Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1088 [23 Cal.Rptr.2d 101], internal citations omitted.)

- "Reliance exists when the misrepresentation or nondisclosure was an immediate cause of the plaintiff's conduct which altered his or her legal relations, and when without such misrepresentation or nondisclosure he or she would not, in all reasonable probability, have entered into the contract or other transaction. 'Except in the rare case where the undisputed facts leave no room for a reasonable difference of opinion whether the plaintiff's reliance is reasonable is a question of fact.' " (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1239 [44 Cal.Rptr.2d 352], internal citations omitted.)

- "In establishing the reliance element of a cause of action for fraud, it is settled that the alleged fraud need not be the sole cause of a party's reliance. Instead, reliance may be established on the basis of circumstantial evidence showing the alleged fraudulent misrepresentation or concealment substantially influenced the party's choice, even though other influences may have operated as well." (*Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 170 [80 Cal.Rptr.2d 66], internal citations omitted.)

- "[A] presumption, or at least an inference, of reliance arises wherever there is a showing that a misrepresentation was material. A misrepresentation is judged to be 'material' if 'a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question' and as such, materiality is generally a question of fact unless the 'fact misrepresented is so obviously unimportant that the jury could not reasonably find that a reasonable man

would have been influenced by it.' " (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 977 [64 Cal.Rptr.2d 843].)

Secondary Sources

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 711–713
- 3 Levy, et al., California Torts (1985–2000) Fraud and Deceit and Other Business Torts, §§ 40.05–40.06
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 269, *Fraud and Deceit* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 105, *Fraud and Deceit* (Matthew Bender)
- 2 Bancroft-Whitney's California Civil Practice (1992) Torts, § 22:31

1908
Reasonable Reliance

You must determine the reasonableness of [*name of plaintiff*]'s reliance by taking into account [his/her] mental capacity, knowledge, and experience.

DIRECTIONS FOR USE

This Instruction is appropriate for cases in which evidence of the plaintiff's greater or lesser personal knowledge, education, experience or capacity has been introduced. Trial of class actions may require a different instruction. In that context, the Supreme Court has held that the jury can find that plaintiff class's reliance was justified if plaintiff proves that a reasonable person in the relevant circumstances would have relied on the representation. (*Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 814 n. 19 [94 Cal.Rptr. 796]; see also *Wilner v. Sunset Life Insurance Co.* (2000) 78 Cal.App.4th 952, 963 [93 Cal.Rptr.2d 413].) In class cases, the following instruction would be appropriate in lieu of the instruction provided above: "If you find that a reasonable person would have relied upon [*name of defendant*]'s [misrepresentation/concealment], then you may conclude that [*name of plaintiff*]'s reliance was reasonable under the circumstances."

SOURCES AND AUTHORITY

- "Whether reliance is justified is a question of fact for the determination of the trial court; the issue is whether the person who claims reliance was justified in believing the representation in the light of his own knowledge and experience." (*Gray v. Don Miller & Associates, Inc.* (1984) 35 Cal.3d 498, 503 [198 Cal.Rptr. 551], internal citations omitted.)

- The "leading case" (see *Blankenheim v. E.F. Hutton, Co.* (1990) 217 Cal.App.3d 1463, 1474 [266 Cal.Rptr. 593]) on justifiable reliance states: "Nor is a plaintiff held to the standard of precaution or of minimum knowledge of a hypothetical, reasonable man. Exceptionally gullible or ignorant people have been permitted to recover from defendants who took advantage of them in circumstances where persons of normal intelligence would not have been misled. 'No rogue should enjoy his ill-gotten plunder for the simple reason that his victim is by chance a fool.' If the conduct of the plaintiff in the light of his own intelligence and information was manifestly unreasonable, however, he will be denied a recovery. 'He may not put faith in representations which are preposterous, or which are shown by facts within his observation to be so patently and obviously false that he must have closed his eyes to avoid discovery of the truth.' " (*Seeger v. Odell* (1941) 18 Cal.2d 409, 415 [115 P.2d 977], internal citations omitted.)

- "Except in the rare case where the undisputed facts leave no room for a reasonable difference of opinion, the question of whether a plaintiff's reliance is reasonable is a question of fact. 'What would constitute fraud in a given instance might not be fraudulent when exercised toward another person. The test of the representation is its actual effect on the particular mind ... .' " (*Blankenheim, supra,* 217 Cal.App.3d at p. 1475, internal citations omitted.)

- "[Plaintiff]'s deposition testimony on which appellants rely also reveals that she is a practicing attorney and uses releases in her practice. In essence, she is asking this court to rule that a practicing attorney can rely on the advice of an equestrian instructor as to the validity of a written release of liability that she executed without reading. In determining whether one can reasonably or justifiably rely on an alleged misrepresentation, the knowledge, education and experience of the person claiming reliance must be considered. Under these circumstances, we conclude as a matter of law that any such reliance was not reasonable." (*Guido v. Koopman* (1991) 1 Cal.App.4th 837, 843–844 [2 Cal.Rptr.2d 437], internal citations omitted.)

Secondary Sources

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 714–719
- 3 Levy, et al., California Torts (1985–2000) Fraud and Deceit and Other Business Torts, § 40.06
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 269, *Fraud and Deceit* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 105, *Fraud and Deceit* (Matthew Bender)
- 2 Bancroft-Whitney's California Civil Practice (1992) Torts, § 22:32

1920
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 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] if those amounts would not otherwise have been spent in the purchase or acquisition of the property; [and]]**

3. **[[***Insert additional harm arising from the transaction***] to the extent that [***name of defendant***]'s [false representation/failure to disclose/promise] was a substantial factor in causing that [***insert additional harm arising from the transaction***]; [and]]**

4. **[Lost profits or other gains.]**

DIRECTIONS FOR USE

Insert bracketed elements of damages if they are claimed by the plaintiff. For an instruction on damages for loss of use see Instruction 3903G, *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].)

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.

- "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) Fraud and Deceit and Other Business Torts, § 40.23
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 269, *Fraud and Deceit* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 105, *Fraud and Deceit* (Matthew Bender)

1921
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 all of the following:

1. **That [*name of plaintiff*] acquired the property for the purpose of using or reselling it for profit or 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 or 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 or gains.**

You do not have to calculate the amount of the lost profits or gains 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 1920, *Buyer's Damages for Purchase or Acquisition of Property,* if the plaintiff is claiming lost profits or gains.

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 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].)

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1445–1447
- 3 Levy et al., California Torts (1985–2000) Fraud and Deceit and Other Business Torts, § 40.23
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 269, *Fraud and Deceit* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 105, *Fraud and Deceit* (Matthew Bender)

1922
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***] must prove the amount of [his/her/its] damages. However, [***name of plaintiff***] does not have to prove 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 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] if those amounts would not otherwise have been spent in the sale or exchange of the property;]**

3. **[Loss of use and enjoyment of the property from [***insert beginning date***] to [***insert end date***], to the extent that [***name of defendant***]'s [false representation/ failure to disclose/promise] was a substantial factor in causing that loss of use and enjoyment of the property;]**

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.]**

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 3903N, *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 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.)

- "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.)

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1445–1447
- 3 Levy et al., California Torts (1985–2000) Fraud and Deceit and Other Business Torts, § 40.23
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 269, *Fraud and Deceit* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 105, *Fraud and Deceit* (Matthew Bender)

1923
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 [*name of defendant***] was a substantial factor in causing, even if the particular 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 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] if those amounts would not otherwise have been spent.**

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."

- 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 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, §§ 1441–1448
- 3 Levy et al., California Torts (1985–2000) Fraud and Deceit and Other Business Torts, § 40.23
- California FORMS OF PLEADING AND PRACTICE, Ch. 269, *Fraud and Deceit* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 105, *Fraud and Deceit* (Matthew Bender)

1924
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 [*name of defendant*] was a substantial factor in causing, even if the particular 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 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].

[*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] if those amounts would not otherwise have been spent.

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 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.)

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1441–1448
- 3 Levy et al., California Torts (1985–2000) Fraud and Deceit and Other Business Torts, § 40.23
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 269, *Fraud and Deceit* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 105, *Fraud and Deceit* (Matthew Bender)

VF-1900
Intentional Misrepresentation

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] make a false representation of an important fact to [***name of plaintiff***]?**

___Yes ___No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [*name of defendant***] know that the representation was false, or did [he/she] make the representation recklessly and without regard for its truth?**

___Yes ___No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did [*name of defendant***] intend that [***name of plaintiff***] rely on the representation?**

___Yes ___No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Did [*name of plaintiff***] reasonably rely on the representation?**

___Yes ___No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Was [*name of plaintiff***]'s reliance on [***name of defendant***]'s representation 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: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

DIRECTIONS FOR USE

The special-verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on Instruction 1900, *Intentional Misrepresentation.*

If specificity is not required, users do not have to itemize all the damages listed in question 6. The breakdown is optional; depending on the circumstances, users may wish to break down the damages even further.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

This form may be modified if the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest on specific losses that occurred prior to judgment.

VF-1901
Fraud or Deceit—Concealment

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] intentionally fail to disclose an important fact that [***name of plaintiff***] did not know and could not reasonably have discovered?**

   ___Yes ___No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [***name of defendant***] intend to deceive [***name of plaintiff***] by concealing the fact?**

   ___Yes ___No

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [***name of plaintiff***] rely on [***name of defendant***]'s deception and was such reliance reasonable under the circumstances?**

   ___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 concealment a substantial factor in causing harm to [***name of plaintiff***]?**

   ___Yes ___No

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. What are [*name of plaintiff*]'s damages?

[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:]	**$_____]**
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:]	**$_____]**
[c. Past noneconomic loss, including [physical pain/mental suffering:]	**$_____]**
[d. Future noneconomic loss, including [physical pain/mental suffering:]	**$_____]**
	TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

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, *Concealment.*

If specificity is not required, users do not have to itemize all the damages listed in question 5. The breakdown is optional; depending on the circumstances, users may wish to break down the damages even further.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

This form may be modified if the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest on specific losses that occurred prior to judgment.

Modify question 1 by referring to one of the other three grounds for concealment listed in element 1 of Instruction 1901, *Concealment*, depending on which ground is applicable to the facts of the case.

VF-1902
Fraud or Deceit—False Promise

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] make a promise to [***name of plaintiff***] that was important to the transaction?**

___Yes ___No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [*name of defendant***] intend to perform this promise when [he/she] made it?**

___Yes ___No

If your answer to question 2 is no, then answer question 3. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did [*name of defendant***] intend that [***name of plaintiff***] rely on this promise?**

___Yes ___No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Did [*name of plaintiff***] reasonably rely on this promise?**

___Yes ___No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Did [*name of defendant***] perform the promised act?**

___Yes ___No

If your answer to question 5 is no, then answer question 6. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Was [*name of plaintiff***]'s reliance on [***name of defendant***]'s promise 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: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

DIRECTIONS FOR USE

The special-verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on Instruction 1902, *False Promise.*

If specificity is not required, users do not have to itemize all the damages listed in question 7. The breakdown is optional; depending on the circumstances, users may wish to break down the damages even further.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

This form may be modified if the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest on specific losses that occurred prior to judgment.

VF-1903
Fraud or Deceit—Negligent Misrepresentation

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] make a false representation of an important fact to [***name of plaintiff***]?**

___Yes ___No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [*name of defendant***] have reasonable grounds for believing the representation was true when [he/she] made it?**

___Yes ___No

If your answer to question 2 is no, then answer question 3. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did [*name of defendant***] intend that [***name of plaintiff***] rely on the representation?**

___Yes ___No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Did [*name of plaintiff***] reasonably rely on the representation?**

___Yes ___No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Was [*name of plaintiff***]'s reliance on [***name of defendant***]'s representation 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: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

DIRECTIONS FOR USE

The special-verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on Instruction 1903, *Negligent Misrepresentation.*

If specificity is not required, users do not have to itemize all the damages listed in question 6. The breakdown is optional; depending on the circumstances, users may wish to break down the damages even further.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

This form may be modified if the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest on specific losses that occurred prior to judgment.

2000
Trespass

[*Name of plaintiff***] claims that [***name of defendant***] trespassed on [**his/her/its**] property. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [owned/leased/occupied/controlled] the property;**

2. **That [***name of defendant***] [intentionally, recklessly, or negligently entered [***name of plaintiff***]'s property] [or]**

   [intentionally, recklessly, or negligently caused [another person/[*insert name of thing***]] to enter [***name of plaintiff***]'s property];**

3. **That [***name of plaintiff***] did not give permission for the entry [or that [***name of defendant***] exceeded [***name of plaintiff***]'s permission]; [and]**

4. **That [***name of plaintiff***] was [actually] harmed; and**

5. **That [***name of defendant***]'s [entry/conduct] was a substantial factor in causing [***name of plaintiff***]'s harm.**

[Entry can be on, above, or below the surface of the land.]

[Entry may occur indirectly, such as by causing vibrations that damage the land or structures or other improvements on the land.]

DIRECTIONS FOR USE

If plaintiff is seeking nominal damages as an alternative to actual damages, insert the following paragraph above element #4:

> If you find all of the above, then the law assumes that [*name of plaintiff*] has been harmed and [*name of plaintiff*] is entitled to a nominal sum such as one dollar. [*Name of plaintiff*] is entitled to additional damages if [name of plaintiff] proves the following:

The last sentence of the above paragraph, along with the final two elements of this instruction, should be omitted if plaintiff is seeking nominal damages only. Read "actually" in the fourth element only if nominal damages are also being sought.

Nominal damages alone are not available in cases involving intangible intrusions such as noise and vibrations; proof of actual damage to the property is required: "[T]he rule is that actionable trespass may not be predicated upon nondamaging noise, odor, or light intrusion." (*San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 936 [55 Cal.Rptr.2d 724], internal citation omitted.)

For an instruction on control of property, see Premises Liability instruction 1002, *Extent of Control Over Premises Area*.

Intent to commit the act constituting the trespass is a necessary element, but intent to damage is not necessary. (*Meyer v. Pacific Employers Insurance Co.* (1965) 233 Cal.App.2d 321 [43 Cal.Rptr. 542].)

SOURCES AND AUTHORITY

- "As a general rule, landowners and tenants have a right to exclude persons from trespassing on private property; the right to exclude persons is a fundamental aspect of private property ownership." (*Allred v. Harris* (1993) 14 Cal.App.4th 1386, 1390 [18 Cal.Rptr.2d 530], internal citation omitted.)

- "Trespass is an unlawful interference with possession of property. The emission of sound waves which cause actual physical damage to property constitutes a trespass. Liability for trespass may be imposed for conduct which is intentional, reckless, negligent or the result of an extra-hazardous activity." (*Staples v. Hoefke* (1987) 189 Cal.App.3d 1397, 1406 [235 Cal.Rptr. 165], internal citations omitted.)

- "California's definition of trespass is considerably narrower than its definition of nuisance. ' "A trespass is an invasion of the interest in the exclusive possession of land, as by entry upon it ... . A nuisance is an interference with the interest in the private use and enjoyment of the land and does not require interference with the possession." ' California has adhered firmly to the view that '[t]he cause of action for trespass is designed to protect possessory—not necessarily ownership—interests in land from unlawful interference.' " (*Capogeannis v. Superior Court* (1992) 12 Cal.App.4th 668, 674 [15 Cal.Rptr.2d 796], internal citations omitted.)

- " 'A trespass may be committed by the continued presence on the land of a structure, chattel, or other thing which the actor has tortiously placed there, whether or not the actor has the ability to remove it.' Under this definition, 'tortious conduct' denotes that conduct, whether of act or omission, which subjects the actor to liability under the principles of the law of torts." (*Newhall Land & Farming Co. v. Superior Court* (1993) 19 Cal.App.4th 334, 345 [23 Cal.Rptr.2d 377], internal citations omitted.)

- The common-law distinction between direct and constructive trespass is not followed in California. A trespass may be committed by consequential and indirect injuries as well as by direct and forcible harm. (*Gallin v. Poulou* (1956) 140 Cal.App.2d 638, 641 [295 P.2d 958].)

- "An action for trespass may technically be maintained only by one whose right to possession has been violated; however, an out-of-possession property owner may recover for an injury to the land by a trespasser which damages the ownership interest." (*Smith v. Cap Concrete* (1982) 133 Cal.App.3d 769, 774 [184 Cal.Rptr. 308], internal citation omitted.)

- "Under the forcible entry statutes the fact that a defendant may have title or the right to possession of the land is no defense. The plaintiff's interest in peaceable even if wrongful possession is secured against forcible intrusion by conferring on him the right to restitution of the premises, the primary remedy, and incidentally awarding damages proximately caused by the forcible entry. (*Allen v. McMillion* (1978) 82 Cal.App.3d 211, 218–219 [147 Cal.Rptr. 77].)

- "Where there is a consensual entry, there is no tort, because lack of consent is an element of the wrong." (*Civic Western Corp. v. Zila Industries, Inc.* (1977) 66 Cal.App.3d 1, 16–17 [135 Cal.Rptr. 915].)

- " 'A conditional or restricted consent to enter land creates a privilege to do so only insofar as the condition or restriction is complied with.' " (*Civic Western Corp., supra,* 66 Cal.App.3d at p. 17, quoting Rest.2d Torts, § 168.)

- "Where one has permission to use land for a particular purpose and proceeds to abuse the privilege, or commits any act hostile to the interests of the lessor, he becomes a trespasser. 'A good faith belief that entry has been authorized or permitted provides no excuse for infringement of property rights if consent was not in fact given by the property owner whose rights are at issue. Accordingly, by showing they gave no authorization, [plaintiffs] established the lack of consent necessary to support their action for injury to their ownership interests.' " (*Cassinos v. Union Oil Co.* (1993) 14 Cal.App.4th 1770, 1780 [18 Cal.Rptr.2d 574], internal citations omitted.)

- " 'The intent required as a basis for liability as a trespasser is simply an intent to be at the place on the land where the trespass allegedly occurred. ... The defendant is liable for an intentional entry although he has acted in good faith, under the mistaken belief, however reasonable, that he is committing no wrong.' " (*Miller v. National Broadcasting Corp.* (1987) 187 Cal.App.3d 1463, 1480–1481 [232 Cal.Rptr. 668], internal citation omitted.)

- "The general rule is simply that damages may be recovered for annoyance and distress, including mental anguish, proximately caused by a trespass." (*Armitage v. Decker* (1990) 218 Cal.App.3d 887, 905 [267 Cal.Rptr. 399], internal citations omitted.)

- "Causes of action for conversion and trespass support an award for exemplary damages." (*Krieger v. Pacific Gas & Electric Co.* (1981) 119 Cal.App.3d 137, 148 [173 Cal.Rptr. 751], internal citation omitted.)

- "It is true that an action for trespass will support an award of nominal damages where actual damages are not shown. However, nominal damages need not be awarded where no actual loss has occurred. 'Failure to return a verdict for nominal damages is not in general ground for reversing a judgment or granting a new trial.' " (*Staples, supra,* 189 Cal.App.3d at p. 1406, internal citations omitted.)

- "Trespass may be ' "by personal intrusion of the wrongdoer or by his failure to leave; by throwing or placing something on the land; or by causing the entry of some other person." ' A trespass may be on the surface of the land, above it, or below it. The migration of pollutants from one property to another may constitute a trespass, a nuisance, or both." (*Martin Marietta Corp. v. Insurance Co. of North America* (1995) 40 Cal.App.4th 1113, 1132 [47 Cal.Rptr.2d 670], internal citations omitted.)

- "Respondent's plant was located in a zone which permitted its operation. It comes within the protection of section 731a of the Code of Civil Procedure which, subject to certain exceptions, generally provides that where a manufacturing or commercial operation is permitted by local zoning, no private individual can enjoin such an operation. It has been determined, however, that this section does not operate to bar recovery for damages for trespassory invasions of another's property occasioned by the conduct of such manufacturing or commercial use." (*Roberts v. Permanente Corp*. (1961) 188 Cal.App.2d 526, 529 [10 Cal.Rptr. 519], internal citations omitted.)

Secondary Sources

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 604–606
- 2 Levy et al., California Torts (1985–2000) Nuisance and Trespass, § 17.20
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 550, *Trespass*, (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 225, *Trespass* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, §§ 18:1, 18:4–18:8, 18:10

2001
Trespass—Extrahazardous Activities

[*Name of plaintiff***] claims that [***name of defendant***] trespassed on [his/her/its] property. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [owned/leased/occupied/controlled] the property;**

2. **That [***name of defendant***] was engaged in [***insert extrahazardous activity***];**

3. **That [***insert extrahazardous activity***] caused [***insert thing***] to enter [***name of plaintiff***]'s property;**

4. **That [***name of plaintiff***] did not give permission for the entry [or that [***name of defendant***] exceeded [***name of plaintiff***]'s permission];**

5. **That [***name of plaintiff***] was harmed; and**

6. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

[Entry can be on, above, or below the surface of the land.]

[Entry may occur indirectly, such as by causing vibrations that damage the land or property on the land.]

DIRECTIONS FOR USE

Nominal damages alone are not available in cases involving intangible intrusions such as noise and vibrations; proof of actual damage to the property is required: "[T]he rule is that actionable trespass may not be predicated upon nondamaging noise, odor, or light intrusion." (*San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 936 [55 Cal.Rptr.2d 724], internal citation omitted.)

"Whether an activity is ultrahazardous is a question of law to be determined by the court." (*Smith, supra,* 247 Cal.App.2d at p. 785.)

SOURCES AND AUTHORITY

- "[W]e conclude that the rule of the Restatement is sound, and that in this state there is no liability for a trespass unless the trespass is intentional, the result of recklessness

or negligence, or the result of engaging in an extra-hazardous activity." (*Gallin v. Poulou* (1956) 140 Cal.App.2d 638, 645 [295 P.2d 958].)

- "Section 520 of the Restatement of Torts defines ultrahazardous activity as follows: 'An activity is ultrahazardous if it (a) necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of the utmost care, and (b) is not a matter of common usage.' California has apparently accepted the Restatement definition." (*Smith v. Lockheed Propulsion Co.* (1967) 247 Cal.App.2d 774, 785 [56 Cal.Rptr. 128], internal citations omitted.)

- "Trespass may be ' "by personal intrusion of the wrongdoer or by his failure to leave; by throwing or placing something on the land; or by causing the entry of some other person." ' A trespass may be on the surface of the land, above it, or below it. The migration of pollutants from one property to another may constitute a trespass, a nuisance, or both." (*Martin Marietta Corp. v. Insurance Co. of North America* (1995) 40 Cal.App.4th 1113, 1132 [47 Cal.Rptr.2d 670], internal citations omitted.)

<u>Secondary Sources</u>

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 604–606
- 2 Levy et al., California Torts (1985–2000) Nuisance and Trespass, § 17.20
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, §§ 18:1, 18:4–18:8, 18:10

2002
Trespass to Timber (Civ. Code, § 3346; Code Civ. Proc., § 733)

[*Name of plaintiff***] claims that [***name of defendant***] trespassed on [his/her/its] property and [cut down or damaged trees/took timber]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [owned/leased/occupied/controlled] the property;**

2. **That [***name of defendant***] intentionally, recklessly, or negligently entered [***name of plaintiff***]'s property and [cut down or damaged trees/took timber] located on the property;**

3. **That [***name of plaintiff***] did not give permission to [cut down or damage the trees/take timber] [or that [***name of defendant***] exceeded [***name of plaintiff***]'s permission];**

4. **That [***name of plaintiff***] was harmed; and**

5. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

DIRECTIONS FOR USE

Note that the affirmative defense of reliance on a survey could be raised by defendant.

SOURCES AND AUTHORITY

- Civil Code section 3346 provides, in part: "For wrongful injuries to timber, trees, or underwood upon the land of another, or removal thereof, the measure of damages is three times such sum as would compensate for the actual detriment ... ."

- Code of Civil Procedure section 733 provides: "Any person who cuts down or carries off any wood or underwood, tree, or timber, ... or otherwise injures any tree or timber on the land of another person, ... is liable to the owner of such land, ... for treble the amount of damages which may be assessed therefor, in a civil action, in any Court having jurisdiction."

- "Although an award of double the actual damages is mandatory under section 3346, the court retains discretion whether to triple them under that statute or Code of Civil Procedure section 733. 'So, the effect of section 3346 as amended, read together with section 733, is that the Legislature intended, insofar as wilful and malicious trespass

is concerned under either section, to leave the imposition of treble damages discretion-ary with the court, but to place a floor upon that discretion at double damages which must be applied whether the trespass be wilful and malicious or casual and involun-tary, etc. There are now three measures of damages applicable to the pertinent types of trespass: (1) for wilful and malicious trespass the court may impose treble damages but must impose double damages; (2) for casual and involuntary trespass, etc., the court must impose double damages; and (3) for trespass under authority actual damages.' " (*Ostling v. Loring* (1994) 27 Cal.App.4th 1731, 1742 [33 Cal.Rptr.2d 391], internal citation omitted.)

- The damages provisions in these two sections must be "treated as penal and punitive." (*Baker v. Ramirez* (1987) 190 Cal.App.3d 1123, 1138 [235 Cal.Rptr. 857], internal citation omitted.)

- " 'However, due to the penal nature of these provisions, the damages should be neither doubled nor tripled under section 3346 if punitive damages are awarded under section 3294. That would amount to punishing the defendant twice and is not necessary to further the policy behind section 3294 of educating blunderers (persons who mistake location of boundary lines) and discouraging rogues (persons who ignore boundary lines).' " (*Hassoldt v. Patrick Media Group, Inc.* (2000) 84 Cal.App.4th 153, 169 [100 Cal.Rptr.2d 662], internal citations omitted.)

- "Treble damages could only be awarded under [section 3346] where the wrongdoer intentionally acted wilfully or maliciously. The required intent is one to vex, harass or annoy, and the existence of such intent is a question of fact for the trial court." (*Sills v. Siller* (1963) 218 Cal.App.2d 735, 743 [32 Cal.Rptr. 621], internal citation omitted.)

- "Although neither section [3346 or 733] expressly so provides, it is now settled that to warrant such an award of treble damages it must be established that the wrongful act was willful and malicious." (*Caldwell v. Walker* (1963) 211 Cal.App.2d 758, 762 [27 Cal.Rptr. 675], internal citations omitted.)

- "A proper and helpful analogue here is the award of exemplary damages under section 3294 of the Civil Code when a defendant has been guilty, inter alia, of 'malice, express or implied.' " (*Caldwell, supra*, 211 Cal.App.2d at pp. 763–764.)

- "Diminution in market value … is not an absolute limitation; several other theories are available to fix appropriate compensation for the plaintiff's loss. … One alternative measure of damages is the cost of restoring the property to its condition prior to the injury. Courts will normally not award costs of restoration if they exceed the diminution in the value of the property; the plaintiff may be awarded the lesser of the two amounts." (*Henniger v. Dunn* (1980) 101 Cal.App.3d 858, 862 [162 Cal.Rptr. 104], internal citations omitted.)

- "The rule precluding recovery of restoration costs in excess of diminution in value is, however, not of invariable application. Restoration costs may be awarded even though they exceed the decrease in market value if 'there is a reason personal to the owner for restoring the original condition,' or 'where there is reason to believe that the plaintiff will, if fact, make the repairs." (*Henniger, supra*, 101 Cal.App.3d at p. 863, internal citations omitted.)

- "Courts have stressed that only reasonable costs of replacing destroyed trees with identical or substantially similar trees may be recovered." (*Henniger, supra*, 101 Cal.App.3d at p. 865.)

2003
Treble Damages—Timber

[*Name of plaintiff***] also claims that [***name of defendant***]'s conduct in cutting down, damaging, or harvesting [***name of plaintiff***]'s trees was intentional and despicable.**

To establish this claim, [*name of plaintiff***] must prove that [***name of defendant***] intended to harm [him/her/it] and acted willfully or maliciously with the intent to vex, harass, or annoy.**

DIRECTIONS FOR USE

Read this instruction only if plaintiff is seeking treble damages. The judge should ensure that this finding is noted on the special verdict form.

SOURCES AND AUTHORITY

- Civil Code section 3346 provides, in part: "For wrongful injuries to timber, trees, or underwood upon the land of another, or removal thereof, the measure of damages is three times such sum as would compensate for the actual detriment ... ."

- Code of Civil Procedure section 733 provides, in part: "Any person who cuts down or carries off any wood or underwood, tree, or timber, ... or otherwise injures any tree or timber on the land of another person, ... is liable to the owner of such land, ... for treble the amount of damages which may be assessed therefor, in a civil action, in any Court having jurisdiction."

- The damages provisions in these two sections must be "treated as penal and punitive." (*Baker v. Ramirez* (1987) 190 Cal.App.3d 1123, 1138 [235 Cal.Rptr. 857], internal citation omitted.)

- " 'However, due to the penal nature of these provisions, the damages should be neither doubled nor tripled under section 3346 if punitive damages are awarded under section 3294. That would amount to punishing the defendant twice and is not necessary to further the policy behind section 3294 of educating blunderers (persons who mistake location of boundary lines) and discouraging rogues (persons who ignore boundary lines).' " (*Hassoldt v. Patrick Media Group, Inc.* (2000) 84 Cal.App.4th 153, 169 [100 Cal.Rptr.2d 662], internal citations omitted.)

- "Although an award of double the actual damages is mandatory under section 3346, the court retains discretion whether to triple them under that statute or Code of Civil Procedure section 733. 'So, the effect of section 3346 as amended, read together with

section 733, is that the Legislature intended, insofar as wilful and malicious trespass is concerned under either section, to leave the imposition of treble damages discretion-ary with the court, but to place a floor upon that discretion at double damages which must be applied whether the trespass be wilful and malicious or casual and involun-tary, etc. There are now three measures of damages applicable to the pertinent types of trespass: (1) for wilful and malicious trespass the court may impose treble damages but must impose double damages; (2) for casual and involuntary trespass, etc., the court must impose double damages; and (3) for trespass under authority actual damages.' " (*Ostling v. Loring* (1994) 27 Cal.App.4th 1731, 1742 [33 Cal.Rptr.2d 391], internal citation omitted.)

- "Treble damages could only be awarded under [section 3346] where the wrongdoer intentionally acted wilfully or maliciously. The required intent is one to vex, harass or annoy, and the existence of such intent is a question of fact for the trial court." (*Sills v. Siller* (1963) 218 Cal.App.2d 735, 743 [32 Cal.Rptr. 621], internal citation omitted.)

- "Although neither section [3346 or 733] expressly so provides, it is now settled that to warrant such an award of treble damages it must be established that the wrongful act was willful and malicious." (*Caldwell v. Walker* (1963) 211 Cal.App.2d 758, 762 [27 Cal.Rptr. 675], internal citations omitted.)

- "A proper and helpful analogue here is the award of exemplary damages under section 3294 of the Civil Code when a defendant has been guilty, inter alia, of 'malice, express or implied.' " (*Caldwell, supra*, 211 Cal.App.2d at pp. 763–764.)

2004
Intentional Entry Explained

[An entry is intentional if a person knowingly goes onto the property of another or knowingly causes something to go onto that property.]

[An entry is [also] intentional if a person engages in conduct that is substantially certain to cause something to go onto that property.]

[An entry is [also] intentional even if a person mistakenly thinks he or she has a right to come onto that property.]

DIRECTIONS FOR USE

This instruction is not intended for general use in every case. Read a bracketed sentence or sentences only in unusual cases where an issue regarding the entry is raised and further explanation is required.

SOURCES AND AUTHORITY

- "The doing of an act which will to a substantial certainty result in the entry of foreign matter upon another's land suffices for an intentional trespass to land upon which liability may be based. It was error to instruct the jury that an 'intent to harm' was required." (*Roberts v. Permanente Corp*. (1961) 188 Cal.App.2d 526, 530–531 [10 Cal.Rptr. 519], internal citation omitted.)

- An instruction on the definition of intentional trespass is considered a proper statement of law. Failure to give this instruction on request where appropriate is error. (*Staples v. Hoefke* (1987) 189 Cal.App.3d 1397, 1407 [235 Cal.Rptr. 165].)

- "As Prosser and Keeton on Torts explained, '[t]he intent required as a basis for liability as a trespasser is simply an intent to be at the place on the land where the trespass allegedly occurred ... . The defendant is liable for an intentional entry although he has acted in good faith, under the mistaken belief, however reasonable, that he is committing no wrong.' " (*Miller v. National Broadcasting Corp.* (1987) 187 Cal.App.3d 1463, 1480–1481 [232 Cal.Rptr. 668].)

<u>Secondary Sources</u>

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, § 604
- 2 Levy et al., California Torts (1985–2000) Nuisance and Trespass, § 17.20[3]

- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 550, *Trespass*, § 550.15 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 225, *Trespass* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 18:4

2005
Defense of Necessity

[*Name of defendant***] claims that [he/she/it] is not responsible for [***name of plaintiff***]'s harm, if any, because the entry on to [***name of plaintiff***]'s property was lawful. To succeed, [***name of defendant***] must prove that it was necessary, or reasonably appeared to [him/her/it] to be necessary, to enter the land to prevent serious harm to a person or property.**

SOURCES AND AUTHORITY

- "[I]t has long recognized that '[n]ecessity often justifies an action which would otherwise constitute a trespass, as where the act is prompted by the motive of preserving life or property and reasonably appears to the actor to be necessary for that purpose.' " (*People v. Ray* (1999) 21 Cal.4th 464, 473 [88 Cal.Rptr.2d 1], internal citations omitted.)

- Restatement Second of Torts, section 167 provides:

  (1) One is privileged to enter or remain on land in the possession of another if it is or reasonably appears to be necessary to prevent serious harm to
  (a) the actor, or his land or chattels, or
  (b) the other or a third person, or the land or chattels of either, unless the actor knows or has reason to know that the one for whose benefit he enters is unwilling that he shall take such action.
  (2) Where the entry is for the benefit of the actor or a third person, he is subject to liability for any harm done in the exercise of the privilege stated in Subsection (1) to any legally protected interest of the possessor in the land or connected with it, except where the threat of harm to avert which the entry is made is caused by the tortious conduct or contributory negligence of the possessor.

- This Restatement section was approved in *Ray, supra*, 21 Cal.4th at p. 474.

<u>Secondary Sources</u>

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, § 608
- 2 Levy et al., California Torts (1985–2000) Nuisance and Trespass, § 17.22[2]
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 550, *Trespass*, §§ 550.22, 550.51 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 225, *Trespass* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 18:11

2020
Public Nuisance—Essential Factual Elements

[*Name of plaintiff***] claims that [he/she] suffered harm because [***name of defendant***] created a nuisance. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] created a condition that [***insert one or more of the following***]**

   [was harmful to health;] [or]

   [was indecent or offensive to the senses;] [or]

   [was an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property;] [or]

   [unlawfully obstructed the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway;]

2. **That the condition affected a substantial number of people at the same time;**

3. **That an ordinary person would be reasonably annoyed or disturbed by the condition;**

4. **That the seriousness of the harm outweighs the social utility of [***name of defendant***]'s conduct;**

5. **That [***name of plaintiff***] did not consent to [***name of defendant***]'s conduct;**

6. **That [***name of plaintiff***] suffered harm that was different from the type of harm suffered by the general public; and**

7. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

DIRECTIONS FOR USE

Private nuisance concerns injury to a property interest. Public nuisance is not dependent on an interference with rights of land: "[A] private nuisance is a civil wrong based on disturbance of rights in land while a public nuisance is not dependent upon a disturbance

of rights in land but upon an interference with the rights of the community at large." (*Venuto v. Owens-Corning Fiberglass Corp.* (1971) 22 Cal.App.3d 116, 124 [99 Cal.Rptr. 350], internal citation omitted.)

SOURCES AND AUTHORITY

- Civil Code section 3479 provides: "Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance."

- Civil Code section 3480 provides: "A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal."

- Civil Code section 3493 provides: "A private person may maintain an action for a public nuisance, if it is specially injurious to himself, but not otherwise."

- Civil Code section 3482 provides: "Nothing which is done or maintained under the express authority of a statue can be deemed a nuisance."

- "[T]he exculpatory effect of Civil Code section 3482 has been circumscribed by decisions of this court. … ' "A statutory sanction cannot be pleaded in justification of acts which by the general rules of law constitute a nuisance, unless the acts complained of are authorized by the express terms of the statute under which the justification is made, or by the plainest and most necessary implication from the powers expressly conferred, so that it can be fairly stated that the legislature contemplated the doing of the very act which occasions the injury." ' " (*Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, 291 [142 Cal.Rptr. 429], internal citation omitted.)

- "The damage suffered [by a private person] must be different in kind and not merely in degree from that suffered by other members of the public." (*Koll-Irvine Center Property Owners Assn. v. County of Orange* (1994) 24 Cal.App.4th 1036, 1039 [29 Cal.Rptr.2d 664], internal citations omitted.)

- "Where the nuisance alleged is not also a private nuisance as to a private individual he does not have a cause of action on account of a public nuisance unless he alleges facts showing special injury to himself in person or property of a character different in kind from that suffered by the general public." (*Venuto, supra*, 22 Cal.App.3d at p. 124, internal citations omitted.)

- "Unlike the private nuisance—tied to and designed to vindicate individual ownership interests in land—the 'common' or public nuisance emerged from distinctly different historical origins. The public nuisance doctrine is aimed at the protection and redress of community interests and, at least in theory, embodies a kind of collective ideal of civil life which the courts have vindicated by equitable remedies since the beginning of the 16th century." (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1103 [60 Cal.Rptr.2d 277].)

- "Where … the nuisance is a private as well as a public one, there is no requirement that the plaintiff suffer damage different in kind from that suffered by the general public and he 'does not lose his rights as a landowner merely because others suffer damage of the same kind, or even of the same degree … .' " (*Venuto, supra*, 22 Cal.App.3d at p. 124, internal citations omitted.)

- "Of course, not every interference with collective social interests constitutes a public nuisance. To qualify … the interference must be both substantial and unreasonable." (*People ex rel. Gallo, supra*, 14 Cal.4th at p. 1105.)

- "An essential element of a cause of action for nuisance is damage or injury." (*Helix Land Co., Inc. v. City of San Diego* (1978) 82 Cal.App.3d 932, 950 [147 Cal.Rptr. 683].)

- "By analogy to the rules governing tort liability, courts apply the same elements to determine liability for a public nuisance." (*People ex rel. Gallo, supra,* 14 Cal.4th at p. 1105, fn. 3, internal citation omitted.)

- Restatement Second of Torts, section 826 provides:

  An intentional invasion of another's interest in the use and enjoyment of land is unreasonable if
  (a) the gravity of the harm outweighs the utility of the actor's conduct, or
  (b) the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible.

- Restatement Second of Torts, section 827 provides:

  In determining the gravity of the harm from an intentional invasion of another's interest in the use and enjoyment of land, the following factors are important:
  (a) The extent of the harm involved;
  (b) the character of the harm involved;
  (c) the social value that the law attaches to the type of use or enjoyment invaded;

(d) the suitability of the particular use or enjoyment invaded to the character of the locality; and
(e) the burden on the person harmed of avoiding the harm.

- Restatement Second of Torts, section 828 provides:

  In determining the utility of conduct that causes an intentional invasion of another's interest in the use and enjoyment of land, the following factors are important:
  (a) the social value that the law attaches to the primary purpose of the conduct;
  (b) the suitability of the conduct to the character of the locality; and
  (c) the impracticability of preventing or avoiding the invasion.

Secondary Sources

- 2 Levy et al., California Torts (1985–2000) Nuisance and Trespass, §§ 17.01–17:04, 17:06
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 391, *Nuisance* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 167, *Nuisance* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, §§ 17:1–17:3

2021
Private Nuisance—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] interfered with [***name of plaintiff***]'s use and enjoyment of [his/her] land. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [owned/leased/occupied/controlled] the property;**

2. **That [***name of defendant***] created a condition that [***insert one or more of the following:***]**

   [was harmful to health;] [or]

   [was indecent or offensive to the senses;] [or]

   [was an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property;] [or]

   [unlawfully obstructed the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway;]

3. **That this condition interfered with [***name of plaintiff***]'s use or enjoyment of [his/her] land;**

4. **That [***name of plaintiff***] did not consent to [***name of defendant***]'s conduct;**

5. **That an ordinary person would be reasonably annoyed or disturbed by [***name of defendant***]'s conduct;**

6. **That [***name of plaintiff***] was harmed;**

7. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm; and**

8. **That the seriousness of the harm outweighs the public benefit of [***name of defendant***]'s conduct.**

DIRECTIONS FOR USE

For instruction on control of property see Premises Liability instruction 1002, *Extent of Control Over Premises Area*.

SOURCES AND AUTHORITY

- Civil Code section 3479 provides: "Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance."

- Civil Code section 3482 provides: "Nothing which is done or maintained under the express authority of a statue can be deemed a nuisance."

- "[T]he exculpatory effect of Civil Code section 3482 has been circumscribed by decisions of this court. … ' "A statutory sanction cannot be pleaded in justification of acts which by the general rules of law constitute a nuisance, unless the acts complained of are authorized by the express terms of the statute under which the justification is made, or by the plainest and most necessary implication from the powers expressly conferred, so that it can be fairly stated that the legislature contemplated the doing of the very act which occasions the injury." ' " (*Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, 291 [142 Cal.Rptr. 429], internal citation omitted.)

- "In distinction to trespass, liability for nuisance does not require proof of damage to the plaintiff's property; proof of interference with the plaintiff's use and enjoyment of that property is sufficient." (*San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 937 [55 Cal.Rptr.2d 724].)

- "[T]he essence of a private nuisance is its interference with the use and enjoyment of land. The activity in issue must 'disturb or prevent the comfortable enjoyment of property', such as smoke from an asphalt mixing plant, noise and odors from the operation of a refreshment stand, or the noise and vibration of machinery." (*Oliver v. AT&T Wireless Services* (1999) 76 Cal.App.4th 521, 534 [90 Cal.Rptr.2d 491], internal citations omitted.)

- "Unlike public nuisance, which is an interference with the rights of the community at large, private nuisance is a civil wrong based on disturbance of rights in land. A nuisance may be both public and private, but to proceed on a private nuisance theory the plaintiff must prove an injury specifically referable to the use and enjoyment of his or her land. The injury, however, need not be different in kind from that suffered by the general public." (*Koll-Irvine Center Property Owners Assn. v. County of Orange* (1994) 24 Cal.App.4th 1036, 1041 [29 Cal.Rptr.2d 664].)

- “Examples of interferences with the use and enjoyment of land actionable under a private nuisance theory are legion. ‘So long as the interference is substantial and unreasonable, and such as would be offensive or inconvenient to the normal person, virtually any disturbance of the enjoyment of the property may amount to a nuisance.’” (*Koll-Irvine Center Property Owners Assn., supra,* 24 Cal.App.4th at p. 1041, internal citation omitted.)

- “The first additional requirement for recovery of damages on a nuisance theory is proof that the invasion of the plaintiff's interest in the use and enjoyment of the land was substantial, i.e., that it caused the plaintiff to suffer ‘substantial actual damage.’ The Restatement recognizes the same requirement as the need for proof of ‘significant harm,’ which it variously defines as ‘harm of importance’ and a ‘real and appreciable invasion of the plaintiff's interests’ and an invasion that is ‘definitely offensive, seriously annoying or intolerable.’ The degree of harm is to be judged by an objective standard, i.e., what effect would the invasion have on persons of normal health and sensibilities living in the same community? ‘If normal persons in that locality would not be substantially annoyed or disturbed by the situation, then the invasion is not a significant one, even though the idiosyncrasies of the particular plaintiff may make it unendurable to him.’ This is, of course, a question of fact that turns on the circumstances of each case.” (*San Diego Gas & Electric Co., supra,* 13 Cal.4th at p. 938, internal citations omitted.)

- “The second additional requirement for nuisance is superficially similar but analytically distinct: ‘The interference with the protected interest must not only be substantial, but it must also be unreasonable’, i.e., it must be ‘of such a nature, duration or amount as to constitute unreasonable interference with the use and enjoyment of the land.’ The primary test for determining whether the invasion is unreasonable is whether the gravity of the harm outweighs the social utility of the defendant's conduct, taking a number of factors into account. Again the standard is objective: the question is not whether the particular plaintiff found the invasion unreasonable, but ‘whether reasonable persons generally, looking at the whole situation impartially and objectively, would consider it unreasonable.’ And again this is a question of fact: ‘Fundamentally, the unreasonableness of intentional invasions is a problem of relative values to be determined by the trier of fact in each case in the light of all the circumstances of that case.’ (*San Diego Gas & Electric Co., supra,* 13 Cal.4th at pp. 938–939, internal citations omitted.)

- Restatement Second of Torts, section 826 provides:

  An intentional invasion of another’s interest in the use and enjoyment of land is unreasonable if

  (a) the gravity of the harm outweighs the utility of the actor’s conduct, or

  (b) the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible.

- Restatement Second of Torts, section 827 provides:

  In determining the gravity of the harm from an intentional invasion of another's interest in the use and enjoyment of land, the following factors are important:
  (a) the extent of the harm involved;
  (b) the character of the harm involved;
  (c) the social value that the law attaches to the type of use or enjoyment invaded;
  (d) the suitability of the particular use or enjoyment invaded to the character of the locality; and
  (e) the burden on the person harmed of avoiding the harm.

- Restatement Second of Torts, section 828 provides:

  In determining the utility of conduct that causes an intentional invasion of another's interest in the use and enjoyment of land, the following factors are important:
  (a) the social value that the law attaches to the primary purpose of the conduct;
  (b) the suitability of the conduct to the character of the locality; and
  (c) the impracticability of preventing or avoiding the invasion.

Secondary Sources

- 2 Levy et al., California Torts (1985–2000) Nuisance and Trespass, §§ 17.01–17.05
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, §§ 17:1–17:2, 17:4

VF-2000
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**

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 2000, *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 2000.

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.

VF-2001
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**

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.

This verdict form is based on Instruction 2000, *Trespass*, and Instruction 2005, *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 2000.

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.

VF-2002
Trespass—Extrahazardous 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 extrahazardous 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 extrahazardous 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.

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 2001, *Trespass—Extrahazardous 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.

VF-2003
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, recklessly, 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**

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 2002, *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 2002.

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.

VF-2004
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, recklessly, 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**

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].

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 2002, *Trespass—Trespass to Timber (Civ. Code, § 3346; Code Civ. Proc., § 733)*, and Instruction 2003, *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 2002.

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.

VF-2005
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 reasonably annoyed or disturbed by the condition?

___Yes **___No**

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Did the seriousness of the harm outweigh the social utility of [*name of defendant***]'s conduct?**

___Yes **___No**

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Did [*name of plaintiff***] consent to [***name of defendant***]'s conduct?**

___Yes **___No**

If your answer to question 5 is no, then answer question 6. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Did [*name of plaintiff***] suffer harm that was different from the type of harm suffered by the general public?**

___Yes ___No

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	**$_____**

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 2020, *Public Nuisance—Essential Factual Elements.*

Other factual situations may be substituted in question 1 as in element 1 of Instruction 2020.

If specificity is not required, users do not have to itemize all the damages listed in question 8 and do not have to categorize “economic” and “non-economic” damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, 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 2020.

This form may be modified if the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest on specific losses that occurred prior to judgment.

VF-2006
Private Nuisance

We answer the questions submitted to us as follows:

1. Did [*name of plaintiff***] [own/lease/occupy/control] the property?**

___Yes **___No**

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [*name of defendant***] create a condition that was harmful to health?**

___Yes **___No**

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did this condition interfere with [*name of plaintiff***]'s use or enjoyment of [his/her] land?**

___Yes **___No**

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Did [*name of plaintiff***] consent to [***name of defendant***]'s conduct?**

___Yes **___No**

If your answer to question 4 is no, then answer question 5. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Would an ordinary person have been reasonably annoyed or disturbed by [*name of defendant***]'s conduct?**

___Yes **___No**

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Was [*name of defendant***]'s conduct a substantial factor in causing harm to [***name of plaintiff***]?**

___Yes ___No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. Did the seriousness of the harm outweigh the public benefit of [*name of defendant***]'s conduct?**

___Yes ___No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. What are [*name of plaintiff***]'s damages?**

[a. Past economic loss, 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 form is based on Instruction 2021, *Private Nuisance—Essential Factual Elements.*

Depending on the facts of the case, question 1 can be modified, as in element 1 in instruction 2021.

If specificity is not required, users do not have to itemize all the damages listed in question 8 and do not have to categorize “economic” and “noneconomic” damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, 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.

2100
Conversion—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] wrongfully exercised control over [his/her/its] personal property. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [owned/possessed/had a right to possess] a [***insert item of personal property***];**

2. **That [***name of defendant***] intentionally [***insert one or more of the following:***]**

   [took possession of the [*insert item of personal property***] for a significant period of time;] [or]**

   [prevented [*name of plaintiff***] from having access to the [***insert item of personal property***] for a significant period of time;] [or]**

   [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.)

- "[I]t is generally acknowledged that conversion is a tort that may be committed only with relation to personal property and not real property." (*Munger v. Moore* (1970) 11

Cal.App.3d 1, 7 [89 Cal.Rptr. 323], disagreeing with *Katz v. Enos* (1945) 68 Cal.App.2d 266, 269 [156 p.2d 461].)

- "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.)

- "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.)

- "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. 1988) Torts, § 610 et seq.
- CALIFORNIA TORTS, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.40 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 150, *Conversion*, §§ 150.10, 150.40–150.41 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 51, *Conversion* (Matthew Bender)

2101
Trespass to Chattels—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] wrongfully trespassed on [his/her/its] personal property. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [owned/possessed/had a right to possess] a [***insert item of personal property***];**

2. **That [***name of defendant***] intentionally [***insert one or more of the following:***]**

   [interfered with [*name of plaintiff***]'s use or possession of the [***insert item of personal property***];]**

   [or]

   [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.)

- "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.* (N.D.Cal. 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 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* (D.C.Cir. 1969) 410 F.2d 701, 707, footnotes omitted.)

2102
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 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;] [and]**

2. **Reasonable compensation for the time and money spent by [***name of plaintiff***] in attempting to recover the [***insert item of personal property***]; [and]**

3. **[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:**

1. **That [***describe special circumstances that require a measure of damages other than value***];**

2. **That it was reasonably foreseeable that special injury or harm would result from the conversion; and**

3. **That reasonable care on [***name of plaintiff***]'s part would not have prevented the loss.]**

["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, 477 [65 Cal.Rptr.2d 473].)

See Commercial Code section 3420 regarding conversion of negotiable instruments.

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].)

- "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 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 the 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.)

- "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* (1962) 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 generally by the trier of fact." (*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.)

- Code of Civil Procedure section 1263.320(a) provides: "The fair market value of the property taken is the highest price on the date of valuation that would be agreed to by a seller, being willing to sell but under no particular or urgent necessity for so doing, nor obliged to sell, and a buyer, being ready, willing, and able to buy but under no particular necessity for so doing, each dealing with the other with full knowledge of all the uses and purposes for which the property is reasonably adaptable and available."

Secondary Sources

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, § 1455
- CALIFORNIA TORTS, Ch. 50, *Damages*, §§ 50.01–50.03 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 150, *Conversion*, §§ 150.10, 150.40–150.41 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 51, *Conversion* (Matthew Bender)

2200
Inducing Breach of Contract

[*Name of plaintiff***] claims that [***name of defendant***] intentionally caused [***name of third party***] to breach [his/her/its] contract with [***name of plaintiff***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That there was a contract between [***name of plaintiff***] and [***name of third party***];**
2. **That [***name of defendant***] knew of the contract;**
3. **That [***name of defendant***] intended to cause [***name of third party***] to breach the contract;**
4. **That [***name of defendant***]'s conduct caused [***name of third party***] to breach the contract;**
5. **That [***name of plaintiff***] was harmed; and**
6. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

DIRECTIONS FOR USE

If the validity of a contract is an issue, see the series of contracts instructions (Instructions 300, et seq.).

SOURCES AND AUTHORITY

- Restatement Second of Torts, section 766 provides: "One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract."

- "The elements which a plaintiff must plead to state the cause of action for intentional interference with contractual relations are (1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage."

(*Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1126 [270 Cal.Rptr. 1], internal citations omitted.)

- "[C]ases have pointed out that while the tort of inducing breach of contract requires proof of a breach, the cause of action for interference with contractual relations is distinct and requires only proof of interference." (*Pacific Gas & Electric Co., supra,* 50 Cal.3d at p. 1129, internal citations omitted.)

- "[A] cause of action for intentional interference with contract requires an underlying enforceable contract. Where there is no existing enforceable contract, only a claim for interference with prospective advantage may be pleaded." (*PMC, Inc. v. Saban Entertainment, Inc.* (1996) 45 Cal.App.4th 579, 601 [52 Cal.Rptr.2d 877].)

- "The act of inducing the breach must be an intentional one. If the actor had no knowledge of the existence of the contract or his actions were not intended to induce a breach, he cannot be held liable though an actual breach results from his lawful and proper acts." (*Imperial Ice Co. v. Rossier* (1941) 18 Cal.2d 33, 37 [112 P.2d 631], internal citations omitted.)

- "It is not enough that the actor intended to perform the acts which caused the result—he or she must have intended to cause the result itself." (*Kasparian v. County of Los Angeles* (1995) 38 Cal.App.4th 242, 261 [45 Cal.Rptr.2d 90].)

- "[T]he tort cause of action for interference with a contract does not lie against a party to the contract. [Citations.] … The tort duty not to interfere with the contract falls only on strangers-interlopers who have no legitimate interest in the scope or course of the contract's performance." (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 514 [28 Cal.Rptr.2d 475], internal citations omitted.)

- "[I]nterference with an at-will contract is actionable interference with the contractual relationship, on the theory that a contract at the will of the parties, respectively, does not make it one at the will of others. [Citations]" (*Pacific Gas & Electric Co., supra,* 50 Cal.3d at p. 1127, internal citations and quotations omitted.)

- "Because interference with an existing contract receives greater solicitude than does interference with prospective economic advantage, it is not necessary that the defendant's conduct be wrongful apart from the interference with the contract itself." (*Quelimane Co. v. Stewart Title Guaranty Co.* (1990) 19 Cal.4th 26, 55 [77 Cal.Rptr.2d 709], internal citations omitted.)

- "We conclude that a plaintiff seeking to state a claim for intentional interference with contract or prospective economic advantage because defendant induced another to undertake litigation must allege that the litigation was brought without probable cause and that the litigation concluded in plaintiff's favor." (*Pacific Gas & Electric Co., supra,* 50 Cal.3d at p. 1137.)

Secondary Sources

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 642–651
- 3 Levy, et al., California Torts (1985–2000) Fraud and Deceit and Other Business Torts, §§ 40.110–40.117
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 565, *Unfair Competition* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 122, *Interference* (Matthew Bender)

2201
Intentional Interference With Contractual Relations

[*Name of plaintiff***] claims that [***name of defendant***] intentionally interfered with the contract between [him/her/it] and [***name of third party***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That there was a contract between [***name of plaintiff***] and [***name of third party***];**
2. **That [***name of defendant***] knew of the contract;**
3. **That [***name of defendant***] intended to disrupt the performance of this contract;**
4. **That [***name of defendant***]'s conduct prevented performance or made performance more expensive or difficult;**
5. **That [***name of plaintiff***] was harmed; and**
6. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

DIRECTIONS FOR USE

- If the validity of a contract is an issue, see the series of contracts instructions (Instructions 300, et seq.).

SOURCES AND AUTHORITY

- "The elements which a plaintiff must plead to state the cause of action for intentional interference with contractual relations are (1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage." (*Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1126 [270 Cal.Rptr. 1], internal citations omitted.)

- "[A] cause of action for intentional interference with contract requires an underlying enforceable contract. Where there is no existing enforceable contract, only a claim for interference with prospective advantage may be pleaded." (*PMC, Inc. v. Saban Entertainment, Inc.* (1996) 45 Cal.App.4th 579, 601 [52 Cal.Rptr.2d 877].)

- "Because interference with an existing contract receives greater solicitude than does interference with prospective economic advantage, it is not necessary that the defendant's conduct be wrongful apart from the interference with the contract itself." (*Quelimane Co. v. Stewart Title Guaranty Co.* (1990) 19 Cal.4th 26, 55, [77 Cal.Rptr.2d 709], internal citations omitted.)

- "It is not enough that the actor intended to perform the acts which caused the result—he or she must have intended to cause the result itself." (*Kasparian v. County of Los Angeles* (1995) 38 Cal.App.4th 242, 261 [45 Cal.Rptr.2d 90].)

- Restatement Second of Torts, section 766A provides: "One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by preventing the other from performing the contract or causing his performance to be more expensive or burdensome, is subject to liability to the other for the pecuniary loss resulting to him."

- "Plaintiff need not allege an actual or inevitable breach of contract in order to state a claim for disruption of contractual relations. We have recognized that interference with the plaintiff's performance may give rise to a claim for interference with contractual relations if plaintiff's performance is made more costly or more burdensome. Other cases have pointed out that while the tort of inducing breach of contract requires proof of a breach, the cause of action for interference with contractual relations is distinct and requires only proof of interference. " (*Pacific Gas & Electric Co., supra,* 50 Cal.3d at p. 1129, internal citations omitted.)

- "[I]nterference with an at-will contract is actionable interference with the contractual relationship, on the theory that a contract at the will of the parties, respectively, does not make it one at the will of others." (*Pacific Gas & Electric Co., supra,* 50 Cal.3d at p. 1127, internal citations and quotations omitted.)

- "We conclude that a plaintiff seeking to state a claim for intentional interference with contract or prospective economic advantage because defendant induced another to undertake litigation must allege that the litigation was brought without probable cause and that the litigation concluded in plaintiff's favor." (*Pacific Gas & Electric Co., supra,* 50 Cal.3d at p. 1137.)

<u>Secondary Sources</u>

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, § 652
- 3 Levy et al., California Torts (1985–2000) Fraud and Deceit and Other Business Torts, §§ 40.110–40.117
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 565, *Unfair Competition* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 122, *Interference* (Matthew Bender)

2202
Intentional Interference With Prospective Economic Relations

[*Name of plaintiff***] claims that [***name of defendant***] intentionally interfered with an economic relationship between [him/her/it] and [***name of third party***] that probably would have resulted in an economic benefit to [***name of plaintiff***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] and [***name of third party***] were in an economic relationship that probably would have resulted in an economic benefit to [***name of plaintiff***];**

2. **That [***name of defendant***] knew of the relationship;**

3. **That [***name of defendant***] intended to disrupt the relationship;**

4. **That [***name of defendant***] engaged in wrongful conduct through [***insert grounds for wrongfulness, e.g., misrepresentation, fraud, violation of statute***];**

5. **That the relationship was disrupted;**

6. **That [***name of plaintiff***] was harmed; and**

7. **That [***name of defendant***]'s wrongful conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

DIRECTIONS FOR USE

Regarding element number 4, the court must specifically state for the jury the conduct that the judge has determined as a matter of law would satisfy the "wrongful conduct" standard. This conduct must fall outside the privilege of fair competition. (*PMC, Inc. v. Saban Entertainment, Inc.* (1996) 45 Cal.App.4th 579, 603 [52 Cal.Rptr.2d 877]; *Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 393 [45 Cal.Rptr.2d 436].) The jury must then decide whether the defendant engaged in the conduct as defined by the judge. If the conduct is tortious, the judge should instruct on the elements of the tort.

SOURCES AND AUTHORITY

- "The tort of intentional or negligent interference with prospective economic advantage imposes liability for improper methods of disrupting or diverting the business relationship of another which fall outside the boundaries of fair

competition." (*Settimo Associates v. Environ Systems, Inc.* (1993) 14 Cal.App.4th 842, 845 [17 Cal.Rptr.2d 757], internal citation omitted.)

- "The tort of interference with prospective economic advantage protects the same interest in stable economic relationships as does the tort of interference with contract, though interference with prospective advantage does not require proof of a legally binding contract. The chief practical distinction between interference with contract and interference with prospective economic advantage is that a broader range of privilege to interfere is recognized when the relationship or economic advantage interfered with is only prospective." (*Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1126 [270 Cal.Rptr. 1], internal citations omitted.)

- The elements are "(1) [a]n economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant." (*Youst v. Longo* (1987) 43 Cal.3d 64, 71, fn. 6 [233 Cal.Rptr. 294].)

- Restatement Second of Torts, section 766B provides:

  One who intentionally and improperly interferes with another's prospective contractual relation (except a contract to marry) is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of
  (a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or
  (b) preventing the other from acquiring or continuing the prospective relation.

- Restatement Second of Torts, section 767 provides:

  In determining whether an actor's conduct in intentionally interfering with a contract or a prospective contractual relation of another is improper or not, consideration is given to the following factors:
  (a) the nature of the actor's conduct,
  (b) the actor's motive,
  (c) the interests of the other with which the actor's conduct interferes,
  (d) the interests sought to be advanced by the actor,
  (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,
  (f) the proximity or remoteness of the actor's conduct to the interference and
  (g) the relations between the parties.

- "[A]n essential element of the tort of intentional interference with prospective business advantage is the existence of a business relationship with which the tortfeasor interfered. Although this need not be a contractual relationship, an existing

relationship is required." (*Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 546 [30 Cal.Rptr.2d 706], internal citations omitted.)

- As in the tort of interference with contractual relations, a party to the prospective economic relation cannot be made the subject of an action for interference with that prospective relation. (*Kasparian v. County of Los Angeles* (1995) 38 Cal.App.4th 242, 266, 45 Cal.Rptr.2d 90.)

- "Although varying language has been used to express this threshold requirement, the cases generally agree it must be reasonably probable that the prospective economic advantage would have been realized but for defendant's interference." (*Youst, supra,* 43 Cal.3d at p. 71, internal citations omitted.)

- In *Della Penna, supra,* 11 Cal.4th at p. 393, the Supreme Court held that "a plaintiff seeking to recover for an alleged interference with prospective contractual or economic relations must plead and prove as part of its case-in-chief that the defendant not only knowingly interfered with the plaintiff's expectancy, but engaged in conduct that was wrongful by some legal measure other than the fact of interference itself."

- "*Della Penna* did not specify what sort of conduct would qualify as 'wrongful' apart from the interference itself." (*Limandri v. Judkins* (1997) 52 Cal.App.4th 326, 340 [60 Cal.Rptr.2d 539].)

- "Justice Mosk's concurring opinion in *Della Penna* advocates that proscribed conduct be limited to means that are independently tortious or a restraint of trade. The Oregon Supreme Court suggests that conduct may be wrongful if it violates 'a statute or other regulation, or a recognized rule of common law, or perhaps an established standard of a trade or profession.' … Our Supreme Court may later have occasion to clarify the meaning of 'wrongful conduct' or 'wrongfulness,' or it may be that a precise definition proves impossible." (*Arntz Contracting Co. v. St. Paul Fire and Marine Insurance Co.* (1996) 47 Cal.App.4th 464, 477–478 [54 Cal.Rptr.2d 888], internal citations omitted.)

- "Commonly included among improper means are actions which are independently actionable, violations of federal or state law or unethical business practices, e.g., violence, misrepresentation, unfounded litigation, defamation, trade libel or trade mark infringement." (*PMC, Inc., supra,* 45 Cal.App.4th at p. 603, internal citation omitted.)

- "It is insufficient to allege the defendant engaged in tortious conduct distinct from or only tangentially related to the conduct constituting the actual interference." (*Limandri, supra,* 52 Cal.App.4th at p. 342.)

- "[O]ur focus for determining the wrongfulness of those intentional acts should be on the defendant's objective conduct, and evidence of motive or other subjective states

of mind is relevant only to illuminating the nature of that conduct." (*Arntz Contracting Co., supra,* 47 Cal.App.4th at p. 477.)

- "Since the crux of the competition privilege is that one can interfere with a competitor's prospective contractual relationship with a third party as long as the interfering conduct is not independently wrongful (i.e., wrongful apart from the fact of the interference itself), *Della Penna*'s requirement that a plaintiff plead and prove such wrongful conduct in order to recover for intentional interference with prospective economic advantage has resulted in a shift of burden of proof. It is now the plaintiff's burden to prove, as an element of the cause of action itself, that the defendant's conduct was independently wrongful and, therefore, was not privileged rather than the defendant's burden to prove, as an affirmative defense, that it's [*sic*] conduct was not independently wrongful and therefore was privileged." (*Bed, Bath & Beyond of La Jolla, Inc. v. La Jolla Village Square Venture Partners* (1997) 52 Cal.App.4th 867, 881 [60 Cal.Rptr.2d 830].)

- Other courts have stated that "[t]he *Della Penna* court disapproved the view treating justification as an affirmative defense." (*Westside Center Associates v. Safeway Stores 23, Inc.* (1996) 42 Cal.App.4th 507, 521, fn. 16 [49 Cal.Rptr.2d 793].)

- There are other privileges that a defendant could assert in appropriate cases, such as the "manager's privilege" (see *Halvorsen v. Aramark Uniform Services, Inc.* (1998) 65 Cal.App.4th 1383, 1391–1392 [77 Cal.Rptr.2d 383].)

- "We conclude that a plaintiff seeking to state a claim for intentional interference with contract or prospective economic advantage because defendant induced another to undertake litigation, must allege that the litigation was brought without probable cause and that the litigation concluded in plaintiff's favor." (*Pacific Gas & Electric Co., supra,* 50 Cal.3d at p. 1137.)

<u>Secondary Sources</u>

- 5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, §§ 652–665
- 3 Levy, et al., California Torts (1985–2000) Fraud and Deceit and Other Business Torts, §§ 40.100–40.105
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 565, *Unfair Competition* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 122, *Interference* (Matthew Bender)

2203
Intent

In deciding whether [*name of defendant*] acted intentionally, you may consider whether [he/she/it] knew that a [breach/disruption] was substantially certain to result from [his/her/its] conduct.

SOURCES AND AUTHORITY

- "In this case, the jury was instructed that '[a] defendant is deemed to have acted intentionally if it knew that disruption or interference with an advantageous relationship was substantially certain to result from its conduct.' Intent, of course, may be established by inference as well as by direct proof. Thus, the trial court could properly have instructed the jury that it might infer culpable intent from conduct 'substantially certain' to interfere with the contract. Here, though, the jury was instructed that culpable intent was 'deemed' to exist if Standard knew that its conduct would interfere with the contract. Under the principles outlined above, this instruction was clearly in error." (*Seaman's Direct Buying Service, Inc. v. Standard Oil Co.* (1984) 36 Cal.3d 752, 767 [206 Cal.Rptr. 354], overruled on other grounds in *Freeman & Mills, Inc. v. Belcher Oil Co.* (1995) 11 Cal.4th 85 [44 Cal.Rptr.2d 420]; disapproved on other grounds in *Della Penna v. Toyota Motor Co.* (1995) 11 Cal.4th 376, 393, fn. 5 [45 Cal.Rptr.2d 436].)

- The *Della Penna* court observed that intentional interference torts are only remotely related to, and have a "superficial kinship" with, other intentional torts, such as battery or false imprisonment. (*Della Penna, supra,* 11 Cal.4th at p. 383.)

Secondary Sources

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, § 653
- 3 Levy, et al., California Torts (1985–2000) Fraud and Deceit and Other Business Torts, § 40.104
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 565, *Unfair Competition* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 122, *Interference* (Matthew Bender)

2204
Negligent Interference With Prospective Economic Relations

[*Name of plaintiff***] claims that [***name of defendant***] negligently interfered with a relationship between [him/her/it] and [***name of third party***] that probably would have resulted in an economic benefit to [***name of plaintiff***]. To succeed on this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] and [***name of third party***] were in an economic relationship that probably would have resulted in a future economic benefit to [***name of plaintiff***];**

2. **That [***name of defendant***] knew or should have known of this relationship;**

3. **That [***name of defendant***] knew or should have known that this relationship would be disrupted if [he/she/it] failed to act with reasonable care;**

4. **That [***name of defendant***] failed to act with reasonable care;**

5. **That [***name of defendant***] engaged in wrongful conduct through [***insert grounds for wrongfulness, e.g., breach of contract with another, misrepresentation, fraud, violation of statute***];**

6. **That the relationship was disrupted;**

7. **That [***name of plaintiff***] was harmed; and**

8. **That [***name of defendant***]'s wrongful conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

DIRECTIONS FOR USE

Regarding the fifth element, the judge must specifically state for the jury the conduct that the judge has determined as a matter of law would satisfy the "wrongful conduct" standard. This conduct must fall outside the privilege of fair competition. (*PMC, Inc. v. Saban Entertainment, Inc.* (1996) 45 Cal.App.4th 579, 603 [52 Cal.Rptr.2d 877]; *Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 393 [45 Cal.Rptr.2d 436].). The jury must then decide whether the defendant engaged in the conduct as defined by the judge. If the conduct is tortious, judge should instruct on the elements of the tort.

SOURCES AND AUTHORITY

- "The tort of intentional or negligent interference with prospective economic advantage imposes liability for improper methods of disrupting or diverting the business relationship of another which fall outside the boundaries of fair competition." (*Settimo Associates v. Environ Systems, Inc.* (1993) 14 Cal.App.4th 842, 845 [17 Cal.Rptr.2d 757], internal citation omitted.)

- "The tort of negligent interference with prospective economic advantage is established where a plaintiff demonstrates that (1) an economic relationship existed between the plaintiff and a third party which contained a reasonably probable future economic benefit or advantage to plaintiff; (2) the defendant knew of the existence of the relationship and was aware or should have been aware that if it did not act with due care its actions would interfere with this relationship and cause plaintiff to lose in whole or in part the probable future economic benefit or advantage of the relationship; (3) the defendant was negligent; and (4) such negligence caused damage to plaintiff in that the relationship was actually interfered with or disrupted and plaintiff lost in whole or in part the economic benefits or advantage reasonably expected from the relationship." (*North American Chemical Co. v. Superior Court* (1997) 59 Cal.App.4th 764, 786 [69 Cal.Rptr.2d 466].)

- " 'The tort of negligent interference with economic relationship arises only when the defendant owes the plaintiff a duty of care.' " (*LiMandri v. Judkins* (1997) 52 Cal.App.4th 326, 348 [60 Cal.Rptr.2d 539], internal citation omitted.)

- "Where a special relationship exists between the parties, a plaintiff may recover for loss of expected economic advantage through the negligent performance of a contract although the parties were not in contractual privity." (*J'Aire Corp. v. Gregory* (1979) 24 Cal.3d 799, 804 [157 Cal.Rptr. 407].)

- The trial court should instruct the jury on the "independently wrongful" element of the tort of negligent interference with prospective economic advantage. (*National Medical Transportation Network v. Deloitte & Touche* (1998) 62 Cal.App.4th 412, 440 [72 Cal.Rptr.2d 720].)

- "Commonly included among improper means are actions which are independently actionable, violations of federal or state law or unethical business practices, e.g., violence, misrepresentation, unfounded litigation, defamation, trade libel or trade mark infringement." (*PMC, Inc., supra,* 45 Cal.App.4th at p. 603, internal citation omitted.)

- Notably, one of the criteria for establishing the existence of a duty of care is "the 'blameworthiness' of the defendant's conduct." (*Lange v. TIG Insurance Co.* (1999) 68 Cal.App.4th 1179, 1187 [81 Cal.Rptr.2d 39].) The *Lange* court stated that in a negligent interference case "a defendant's conduct is blameworthy only if it was independently wrongful apart from the interference itself." (*Ibid.*) Thus, the

"independently wrongful" element may, in effect, be decided by the judge in the course of determining whether a duty of care was owed.

- There is currently no cause of action for negligent interference with contractual relations (see *Fifield Manor v. Finston* (1960) 54 Cal.2d 632 [7 Cal.Rptr. 377]): "Although the continuing validity of the so-called '*Fifield* rule' is questionable in light of the California Supreme Court's recognition in *J'Aire* of a cause of action for negligent interference with prospective economic advantage, the Supreme Court has yet to disapprove *Fifield*." (*LiMandri, supra,* 52 Cal.App.4th at p. 349.)

- "Under the privilege of free competition, a competitor is free to divert business to himself as long as he uses fair and reasonable means. Thus, the plaintiff must present facts indicating the defendant's interference is somehow wrongful—i.e., based on facts that take the defendant's actions out of the realm of legitimate business transactions." (*Tri-Growth Centre City, Ltd. v. Silldorf, Burdman, Duignan & Eisenberg* (1989) 216 Cal.App.3d 1139, 1153–1154 [265 Cal.Rptr. 330], internal citations omitted.)

- "Since the crux of the competition privilege is that one can interfere with a competitor's prospective contractual relationship with a third party as long as the interfering conduct is not independently wrongful (i.e., wrongful apart from the fact of the interference itself), *Della Penna*'s requirement that a plaintiff plead and prove such wrongful conduct in order to recover for intentional interference with prospective economic advantage has resulted in a shift of burden of proof. It is now the plaintiff's burden to prove, as an element of the cause of action itself, that the defendant's conduct was independently wrongful and, therefore, was not privileged rather than the defendant's burden to prove, as an affirmative defense, that it's [*sic*] conduct was not independently wrongful and therefore was privileged." (*Bed, Bath & Beyond of La Jolla, Inc. v. La Jolla Village Square Venture Partners* (1997) 52 Cal.App.4th 867, 881 [60 Cal.Rptr.2d 830].)

- There are other privileges that a defendant could assert in appropriate cases, such as the "manager's privilege" (see *Halvorsen v. Aramark Uniform Services, Inc.* (1998) 65 Cal.App.4th 1383, 1391–1392 [77 Cal.Rptr.2d 383].)

<u>Secondary Sources</u>

- 5 Witkin, Summary of Californai Law (9th ed. 1988) Torts, §§ 659–663
- 3 Levy, et al., California Torts (1985–2000) Fraud and Deceit and Other Business Torts, § 40.104
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 565, *Unfair Competition* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 122, *Interference* (Matthew Bender)

VF-2200
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.

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 2200, *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.

VF-2201
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.

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 2201, *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.

VF-2202
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.

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].

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 2202, *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.

VF-2203
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**

   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:]	**$_____]**
[d. Future noneconomic loss, including [physical pain/mental suffering:]	**$_____]**
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 2204, *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.

2300
Breach of Contractual Duty to Pay a Covered Claim
Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] breached its duty to pay [him/her/it] for a loss covered under an insurance policy. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] suffered a loss, [all or part of] which was covered under an insurance policy with [***name of defendant***];**

2. **That [***name of defendant***] was notified of the loss [as required by the policy]; and**

3. **The amount of the covered loss that [***name of defendant***] failed to pay.**

DIRECTIONS FOR USE

The instructions in this series assume the plaintiff is the insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case.

This instruction is intended for first party coverage claims. Use bracketed language in element 2 if the jury is required to resolve a factual dispute over whether the manner in which the insurer received notice conformed to the policy requirements for notice. For a claim arising under an insurance binder rather than an issued policy, see Instruction 2301, *Breach of Insurance Binder—Essential Factual Elements*. If the policy at issue has been lost or destroyed, read Instruction 2305, *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].)

<u>Secondary Sources</u>

- 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

- CALIFORNIA TORTS, Ch. 82, *Claims and Disputes Under Insurance Policies*, § 82.50[2][c] (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 308, *Insurance* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 120, *Insurance*, §§ 120.83, 120.90, 120.115 (Matthew Bender)

2301
Breach of Insurance Binder
Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] breached its duty to pay [him/her/it] for a loss or liability covered under a temporary insurance contract called an insurance binder. To establish this claim, [***name of plaintiff***] must prove all of 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/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 [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**

5. **That [***name of defendant***] was notified of the loss [as required by the insurance binder];**

6. **The amount of the covered loss or liability that [***name of defendant***] failed to pay.**

DIRECTIONS FOR USE

The instructions in this series assume the plaintiff is the insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case.

This instruction is intended for 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.

Use bracketed language in element 5 if the jury is required to resolve a factual dispute over whether the manner in which the insurer received notice conformed to the policy requirements for notice. Element number 4 should be modified if there is an issue

regarding whether the insurance company's agent made oral statements at variance with the policy language.

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.)

- "[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.)

Secondary Sources

- 1 Witkin, Summary of California Law (9th ed. 2002 supp.) Contracts, § 141A, pp. 81–82
- 2 California Insurance Law & Practice (Matthew Bender 2002) Issuance of Insurance Policies, § 9.06[1]–[7]
- 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
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 308, *Insurance* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 120, *Insurance*, § 120.15 (Matthew Bender)
- CALIFORNIA LEGAL FORMS: TRANSACTION GUIDE, Ch. 26A, *Title Insurance*, §§ 26A.15, 26A.220 (Matthew Bender)

2302
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 all of 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

The instructions in this series assume the plaintiff is the insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case.

This instruction is intended for 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."

- "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].)

Secondary Sources

- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, § 137, pp. 160–161
- 2 California Insurance Law & Practice (Matthew Bender 2002) Issuance of Insurance Policies, § 9.07
- 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
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 308, *Insurance* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 120, *Insurance*, §§ 120.19–120.20 (Matthew Bender)

2303
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

The instructions in this series assume the plaintiff is the insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case.

This instruction 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>

- 1 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar 2001) Analyzing Coverage: Reading and Interpreting Insurance Policies, § 3.63, pp. 120–121
- Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group 2002) 15:911–15:912, p. 15-158
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 308, *Insurance* (Matthew Bender)

2304
Exception to Insurance Policy Exclusion—Burden of Proof

[*Name of plaintiff***] claims that [his/her/its] [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/her/its] [liability/loss] [arises out of/ is based on/occurred because] [***state exception to policy exclusion***].**

DIRECTIONS FOR USE

The instructions in this series assume the plaintiff is the insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case.

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

- 1 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar 2001) Analyzing Coverage: Reading and Interpreting Insurance Policies, § 3.63, pp. 120–121
- Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group 2002) 15:913–15:915.5, pp. 15-158–15-160
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 308, *Insurance* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 120, *Insurance*, §§ 120.40, 120.42 (Matthew Bender)

2305
Lost or Destroyed Insurance Policy

[*Name of plaintiff***] claims that [he/she/it] was covered under an insurance policy that was lost or destroyed. To establish coverage under a lost policy, [***name of plaintiff***] must prove all of 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/its] claim for insurance benefits.**

DIRECTIONS FOR USE

The instructions in this series assume the plaintiff is the insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case.

Read this instruction in conjunction with Instruction 2300, *Breach of Contractual Duty to Pay a Covered Claim—Essential Factual Elements.* 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."

- 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

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

- 3 Witkin, California Evidence (4th ed. 2000) Presentation at Trial, §§ 48–50, 59–60, 63, 65, pp. 81–84, 91–97
- 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
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 308, *Insurance* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 120, *Insurance*, § 120.42 (Matthew Bender)

2306
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

The instructions in this series assume the plaintiff is the insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case.

This instruction 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].)

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 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]
- 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
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 26, *Insurance* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 120, *Insurance*, § 120.50 (Matthew Bender)

2307
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

The instructions in this series assume the plaintiff is the insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case.

This instruction 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 3709, *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.)

- 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.)

- "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
- 5 California Insurance Law & Practice (Matthew Bender 2002) Operating Requirements of Agents and Brokers, §§ 61.01[4]
- 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
- CALIFORNIA UNINSURED MOTORIST LAW, Ch. 24, *Bad Faith in Uninsured Motorist Law*, § 24.40 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 26, *Insurance* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 120, *Insurance*, §§ 120.18, 120.110, 120.170, 120.383, 120.392, 120.403 (Matthew Bender)

2308
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/its] application for insurance. To establish this claim, [***name of insurer***] must prove all of 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.)

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."

- "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].)

- "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.)

<u>Secondary Sources</u>

- 2 California Insurance Law & Practice (Matthew Bender 2002) The Insurance Contract, § 8.10[1]
- 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
- CALIFORNIA UNINSURED MOTORIST LAW, Ch. 24, *Bad Faith in Uninsured Motorist Law,* § 24.40 (Matthew Bender)

- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 26, *Insurance* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 120, *Insurance*, §§ 120.250-120.251, 120.260 (Matthew Bender)

2309
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 all of 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, 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]
- 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
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 26, *Insurance* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 120, *Insurance*, §§ 120.250-120.251 (Matthew Bender)

2320
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 it did not receive timely notice of the [lawsuit/[***insert other***]]. To succeed, [***name of defendant***] must prove both of the following:**

1. **That [***name of plaintiff***] did not give [***name of defendant***] notice [or that [***name of defendant***] did not receive notice by some other means] [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

The instructions in this series assume the plaintiff is the insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case.

This instruction is intended for use by an insurer as a defense to a breach of contract action based on a third party liability policy. 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.)

- "[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]
- 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
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 26, *Insurance* (Matthew Bender)

2321
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/its] defense. To succeed, [***name of defendant***] must prove all of the following:**

1. **That [***name of plaintiff***] failed to cooperate in the defense of the lawsuit against [him/her/it];**

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/its] 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

The instructions in this series assume the plaintiff is the insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case.

This instruction is intended for use by an insurer as a defense to a breach of contract action based on a third party liability policy. This instruction also may be modified for use as a defense to a judgment creditor's action to recover on a liability policy.

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 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].)

<u>Secondary Sources</u>

- 4 California Insurance Law & Practice (Matthew Bender 2002) Liability Insurance in General, §§ 41.64[1]–[11]
- 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

2330
Implied Obligation of Good Faith and Fair Dealing Explained

In every insurance policy there is an implied obligation of good faith and fair dealing that neither the insurance company nor the insured will do anything to injure the right of the other party to receive the benefits of the agreement.

To fulfill its implied obligation of good faith and fair dealing, an insurance company must give at least as much consideration to the interests of the insured as it gives to its own interests.

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].)

<u>Secondary Sources</u>

- 2 California Insurance Law & Practice (Matthew Bender 2002) Claims Handling And The Duty Of Good Faith, §§ 13.03[1][a]–[c], pp. 13-12–13-16
- 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
- CALIFORNIA UNINSURED MOTORIST LAW, Ch. 13, *Rights, Duties, and Obligations of the Parties*, § 13.23, Ch. 24, *Bad Faith in Uninsured Motorist Law*, §§ 24.10, 24.20-24.21, 24.40 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 26, *Insurance* (Matthew Bender)
- CALIFORNIA LEGAL FORMS, Ch. 26A; *Title Insurance*, § 26A.17[a] (Matthew Bender)

2331
Breach of the Implied Obligation of Good Faith and Fair Dealing—Failure or Delay in Payment
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 all of the following:**

1. **That [***name of plaintiff***] suffered a loss covered under an insurance policy with [***name of defendant***];**

2. **That [***name of defendant***] was notified of the loss;**

3. **That [***name of defendant***] unreasonably [failed to pay/delayed payment of] policy benefits;**

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

The instructions in this series assume the plaintiff is the insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case.

For instructions regarding general breach of contract issues, refer to the Contracts series (Instruction 300, 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.)

- "[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.)

- "[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
- 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
- CALIFORNIA UNINSURED MOTORIST LAW, Ch. 13, *Rights, Duties, and Obligations of the Parties*, § 13.23, Ch. 24, *Bad Faith in Uninsured Motorist Law*, §§ 24.10, 24.20-24.21, 24.40 (Matthew Bender)
- CALIFORNIA TORTS, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.140, Ch. 82, *Claims and Disputes Under Insurance Policies*, §§ 82.21, 82.50 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 26, *Insurance* (Matthew Bender)
- CALIFORNIA LEGAL FORMS, Ch. 26A, *Title Insurance*, § 26A.17[a] (Matthew Bender)

2332
Bad Faith (First Party)—Failure to Properly Investigate Claim
Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] breached the obligation of good faith and fair dealing by failing to properly investigate [his/her/its] loss. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] suffered a loss covered under an insurance policy with [***name of defendant***];**

2. **That [***name of plaintiff***] notified [***name of defendant***] of the loss;**

3. **That [***name of defendant***] unreasonably failed to properly investigate the loss 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

The instructions in this series assume the plaintiff is the insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case.

For instructions regarding general breach of contract issues, refer to the Contracts series (Instructions 300, et seq).

SOURCES AND AUTHORITY

- "[A]n insurer may breach the covenant of good faith and fair dealing when it fails to properly investigate its insured's claim." (*Egan v. Mutual of Omaha Insurance Co.* (1979) 24 Cal.3d 809, 817 [169 Cal.Rptr. 691].)

- "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].)

- "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]
- 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
- CALIFORNIA UNINSURED MOTORIST LAW, Ch. 24, *Bad Faith in Uninsured Motorist Law*, § 24.11 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 26, *Insurance* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 120, *Insurance*, §§ 120.153, 120.184 (Matthew Bender)

2333
Bad Faith (First Party)—Breach of Duty to Inform Insured of Rights
Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] breached the obligation of good faith and fair dealing by failing to reasonably inform [him/her/it] of [his/her/its] rights and obligations under an insurance policy. To succeed, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] suffered a loss covered under an insurance policy with [***name of defendant***];**

2. **That [***name of defendant***] [denied coverage for/refused to pay] [***name of plaintiff***]'s loss;**

3. **That under the policy [***name of plaintiff***] had the [right/obligation] to [***describe right or obligation at issue; e.g., "to request arbitration within 180 days"***];**

4. **That [***name of defendant***] did not reasonably inform [***name of plaintiff***] of [his/her/its] [right/obligation] to [***describe right or obligation***];**

5. **That [***name of plaintiff***] was harmed; and**

6. **That [***name of defendant***]'s failure to reasonably inform [***name of plaintiff***] was a substantial factor in causing [his/her/its] harm.**

DIRECTIONS FOR USE

The instructions in this series assume the plaintiff is the insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case.

This instruction is intended for use in appropriate cases where 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 300, et seq).

SOURCES AND AUTHORITY

- The insurer's implied duty of good faith and fair dealing includes "the duty reasonably to inform an insured of the insured's rights and obligations under the insurance policy. In particular, in situations in which an insured's lack of knowledge may potentially result in a loss of benefits or a forfeiture of rights, an insurer [is] required to bring to the insured's attention relevant information so as to enable the insured to take action to secure rights afforded by the policy." (*Davis v. Blue Cross of Northern California* (1979) 25 Cal.3d 418, 428 [158 Cal.Rptr. 828].)

- "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
- 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
- CALIFORNIA UNINSURED MOTORIST LAW, Ch. 24, *Bad Faith in Uninsured Motorist Law*, § 24.22 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 120, *Insurance*, §§ 120.383-120.84, 120.390 (Matthew Bender)

2334
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 all of the following:

1. **[That a lawsuit was brought against [*name of plaintiff*] for a claim covered by [*name of defendant*]'s policy;]**

   [That [*name of defendant*] defended [*name of plaintiff*] in a lawsuit brought against [him/her/it] without reserving the right to deny liability;]

2. **That [*name of defendant*] unreasonably failed to accept a reasonable settlement demand for an amount within policy limits;**

3. **That a monetary judgment was entered against [*name of plaintiff*] for a sum greater than the policy limits; and**

4. **The amount in excess of the policy limits that [*name of plaintiff*] [paid/ is obligated to pay].**

"Policy limits" means the highest amount available under the policy for the claim against [*name of plaintiff*].

A settlement demand is reasonable if in light of the claimed 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

The instructions in this series assume the plaintiff is the insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case. This instruction is intended for use where 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 300, et seq).

If it is alleged that a demand was made in excess of limits and there is a claim that the defendant should have contributed the policy limits, then this instruction will need to be modified.

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 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.)

<u>Secondary Sources</u>

- 2 California Insurance Law & Practice (Matthew Bender 2002) Claims Handling and the Duty of Good Faith, §§ 13.07[1]–[3]
- 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
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 26, *Insurance* (Matthew Bender)

- CALIFORNIA POINTS AND AUTHORITIES, Ch. 120, *Insurance*, §§ 120.195, 120.199, 120.205, 120.207 (Matthew Bender)

2335
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 incorrect.]**

DIRECTIONS FOR USE

The instructions in this series assume the plaintiff is the insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case.

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"].)

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].)

- "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
- CALIFORNIA UNINSURED MOTORIST LAW, Ch. 21, *Defending an Uninsured Motorist Claim*, §§ 21.20, 21.31 (Matthew Bender)
- CALIFORNIA TORTS, Ch. 82, *Claims and Disputes Under Insurance Policies*, § 82.55 (Matthew Bender)

2350
Damages for Bad Faith

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 particular 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 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/it] to hire an attorney to recover the policy benefits. [***Name of plaintiff***] may recover attorney fees [he/she/it] incurred to obtain policy benefits but not attorney fees [he/she/it] incurred for other purposes.]**

DIRECTIONS FOR USE

The instructions in this series assume the plaintiff is the insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case.

For instructions on damages for pain and suffering, see Instructions 3905, *Items of Noneconomic Damage*, and Instruction 3905A, *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]
- 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
- CALIFORNIA UNINSURED MOTORIST LAW, Ch. 25, *Uninsured Motorist Bad Faith Litigation*, §§ 25.40–25.44 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 26, *Insurance* (Matthew Bender)

2360
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 all of 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

The instructions in this series assume the plaintiff is the insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case.

This instruction is intended for 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.

Note that Insurance Code section 11580 requires that the policy be "issued or delivered to [a] person in this state." This issue should be added as an element if it is disputed in the case.

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].)

- "[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. 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 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) Liability Insurance in General, §§ 41.60–41.63
- 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
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 26, *Insurance* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 120, *Insurance*, §§ 120.186, 120.198, 120.206 (Matthew Bender)

2361
Negligent Failure to Obtain Insurance Coverage
Essential Factual Elements

[*Name of plaintiff***] claims that [he/she/it] was harmed by [***name of defendant***]'s negligent failure to obtain insurance requested by [him/her/it]. To establish this claim, [***name of plaintiff***] must prove all of 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 [him/her/it];**

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

The instructions in this series assume the plaintiff is the insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case.

For general tort instructions, including the definition of "substantial factor," see the Negligence series (Instruction 400, 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 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]
- 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
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 120, *Insurance*, § 120.402 (Matthew Bender)

VERDICT FORMS

VF-2300
Breach of Contractual Duty to Pay a Covered Claim

We answer the questions submitted to us as follows:

1. Did [*name of plaintiff***] suffer a loss, [all or part of] which was covered under an insurance policy with [***name of defendant***]?**

___Yes **___No**

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was [*name of defendant***] notified of the loss [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. What is the amount of the covered loss that [*name of defendant***] failed to pay [***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 verdict form is based on Instruction 2300, *Breach of Contractual Duty to Pay a Covered Claim—Essential Factual Elements*.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

VF-2301
Breach of the Implied Obligation of Good Faith and Fair Dealing
Failure or Delay in Payment

We answer the questions submitted to us as follows:

1. **Did [***name of plaintiff***] suffer a loss covered under an insurance policy with [***name of defendant***]?**

   ___Yes **___No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Was [***name of defendant***] notified of the loss?**

   ___Yes **___No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [***name of defendant***] unreasonably [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.

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 2331, *Breach of the Implied Obligation of Good Faith and Fair Dealing—Failure or Delay in Payment—Essential Factual Elements*.

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, 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.

VF-2302
Bad Faith (First Party)—Failure to Properly Investigate Claim

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We answer the questions submitted to us as follows:

1. **Did [***name of plaintiff***] suffer a loss covered under an insurance policy with [***name of defendant***]?**

   ___Yes **___No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [***name of plaintiff***] notify [***name of defendant***] of the loss?**

   ___Yes **___No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [***name of defendant***] unreasonably fail to properly investigate the loss and [deny coverage/fail to pay insurance benefits/delay payment of insurance benefits]?**

   ___Yes **___No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Was [***name of defendant***]'s unreasonable failure to properly investigate the loss a substantial factor in causing harm to [***name of plaintiff***]?**

   ___Yes **___No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. What are [*name of plaintiff*]'s damages?

[a. Past economic loss, 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 2332, *Bad Faith (First Party)—Failure to Properly Investigate Claim—Essential Factual Elements.*

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to include the categorizations of "economic" and "noneconomic" damages, especially if it is not a Prop. 51 case. The breakdown of damages is optional; depending on the circumstances, 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.

VF-2303
Bad Faith (First Party)—Breach of Duty to Inform Insured of Rights

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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 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**

   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. This verdict form is based on Instruction 2333, *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.

2400
Breach of Employment Contract—Unspecified Term
"At-Will" Presumption

An employment relationship may be ended by either the employer or the employee, at any time, for any [lawful] reason, or for no reason at all, unless the employee proves that the parties, by words or conduct, agreed that the employee would be discharged only for good cause. This relationship is called "at-will employment."

DIRECTIONS FOR USE

If the plaintiff has made no claim other than the contract claim, then the word "lawful" may be omitted. If the plaintiff has made a claim for wrongful termination or violation of the Fair Employment and Housing Act, then the word "lawful" should be included in order to avoid confusing the jury.

Give this instruction only if the term of employment is unspecified.

SOURCES AND AUTHORITY

- Labor Code section 2922 provides in pertinent part: "An employment, having no specified term, may be terminated at the will of either party on notice to the other."

- "Labor Code section 2922 has been recognized as creating a presumption. The statute creates a presumption of at-will employment which may be overcome 'by evidence that despite the absence of a specified term, the parties agreed that the employer's power to terminate would be limited in some way, e.g., by a requirement that termination be based only on "good cause." ' " (*Haycock v. Hughes Aircraft Co.* (1994) 22 Cal.App.4th 1473, 1488 [28 Cal.Rptr.2d 248], internal citations omitted.)

- Labor Code section 2750 provides: "The contract of employment is a contract by which one, who is called the employer, engages another, who is called the employee, to do something for the benefit of the employer or a third person."

- "Where there is no express agreement, the issue is whether other evidence of the parties' conduct has a 'tendency in reason' to demonstrate the existence of an actual mutual understanding on particular terms and conditions of employment. If such evidence logically permits conflicting inferences, a question of fact is presented. But where the undisputed facts negate the existence or the breach of the contract claimed, summary judgment is proper." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 337 [100 Cal.Rptr.2d 352] internal citations omitted.)

- "Because the presumption of at-will employment is premised upon public policy considerations, it is one affecting the burden of proof. Therefore, even if no substantial evidence was presented by defendants that plaintiff's employment was at-will, the presumption of Labor Code section 2922 required the issue to be submitted to the jury." (*Alexander v. Nextel Communications, Inc.* (1997) 52 Cal.App.4th 1376, 1381–1382 [61 Cal.Rptr.2d 293], internal citations omitted.)

- "The presumption that an employment relationship of indefinite duration is intended to be terminable at will is therefore 'subject, like any presumption, to contrary evidence. This may take the form of an agreement, express or implied, that ... the employment relationship will continue indefinitely, pending the occurrence of some event such as the employer's dissatisfaction with the employee's services or the existence of some "cause" for termination.' " (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 680 [254 Cal.Rptr. 211], internal citation omitted.)

Secondary Sources

- 2 Witkin, Summary of California Law (9th ed. 1987) Agency and Employment, §§ 165–166
- 4 Wilcox, California Employment Law (1989) *Liability for Wrongful Termination and Discipline*, § 60.02
- 1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 1997) Contract Actions, § 8.13
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.10–11. 249.13, 249.21, 249.43 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 100, *Wrongful Termination and Discipline*, Forms 1, 2, 5-6 (Matthew Bender)

2401
Breach of Employment Contract—Unspecified Term
Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] breached their employment contract. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] and [***name of defendant***] entered into an employment relationship. [An employment contract or a provision in an employment contract may be [written or oral/partly written and partly oral/created by the conduct of the parties]];**

2. **That [***name of defendant***] promised, by words or conduct, to [discharge/ demote] [***name of plaintiff***] only for good cause;**

3. **That [***name of plaintiff***] substantially performed [his/her] job duties [unless [***name of plaintiff***]'s performance was excused [or prevented];**

4. **That [***name of defendant***] [discharged/demoted] [***name of plaintiff***] without good cause; and**

5. **That [***name of plaintiff***] was harmed by the [discharge/demotion].**

DIRECTIONS FOR USE

In cases where constructive discharge is alleged use instruction 2402 instead of this one.

The element of substantial performance should not be confused with the "good cause" defense: "The action is primarily for breach of contract. It was therefore incumbent upon plaintiff to prove that he was able and offered to fulfill all obligations imposed upon him by the contract. Plaintiff failed to meet this requirement; by voluntarily withdrawing from the contract he excused further performance by defendant." (*Kane v. Sklar* (1954) 122 Cal.App.2d 480, 482 [265 P.2d 29], internal citation omitted.) Element number 3 may be deleted if substantial performance is not a disputed issue.

See also instruction 304, *Oral or Written Contract Terms*, and instruction 305, *Implied-in-Fact Contract*.

The California Supreme Court has extended the implied contract theory to encompass demotions or other similar employment decisions that violate the terms of an implied contract. (See *Scott v. Pacific Gas & Electric Co.* (1995) 11 Cal.4th 454, 473–474 [46 Cal.Rptr.2d 427].) As a result, the bracketed language regarding an alleged wrongful

demotion may be given, or other appropriate language for other similar employment decisions, depending on the facts of the case.

SOURCES AND AUTHORITY

- Labor Code section 2922 provides: "An employment, having no specified term, may be terminated at the will of either party on notice to the other. Employment for a specified term means an employment for a period greater than one month."

- Civil Code section 1439 provides, in part: "Before any party to an obligation can require another party to perform any act under it, he must fulfill all conditions precedent thereto imposed upon himself; and must be able and offer to fulfill all conditions concurrent so imposed upon him on the like fulfillment by the other party."

- "Where there is no express agreement, the issue is whether other evidence of the parties' conduct has a 'tendency in reason' to demonstrate the existence of an actual mutual understanding on particular terms and conditions of employment. If such evidence logically permits conflicting inferences, a question of fact is presented. But where the undisputed facts negate the existence or the breach of the contract claimed, summary judgment is proper." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 337 [100 Cal.Rptr.2d 352] internal citations omitted.)

- The employee bears the ultimate burden of proving that he or she was wrongfully terminated. (*Pugh v. See's Candies, Inc.* (*Pugh I*) (1981) 116 Cal.App.3d 311, 330 [171 Cal.Rptr. 917].)

- "The presumption that an employment relationship of indefinite duration is intended to be terminable at will is therefore 'subject, like any presumption, to contrary evidence. This may take the form of an agreement, express or implied, that ... the employment relationship will continue indefinitely, pending the occurrence of some event such as the employer's dissatisfaction with the employee's services or the existence of some "cause" for termination.' " (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 680 [254 Cal.Rptr. 211], internal citation omitted.)

- "In *Foley*, we identified several factors, apart from express terms, that may bear upon 'the existence and content of an ... [implied-in-fact] agreement' placing limits on the employer's right to discharge an employee. These factors might include ' "the personnel policies or practices of the employer, the employee's longevity of service, actions or communications by the employer reflecting assurances of continued employment, and the practices of the industry in which the employee is engaged." ' " (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 336–337 [100 Cal.Rptr.2d 352] internal citations omitted.)

- Civil Code sections 1619–1621 together provide as follows: "A contract is either express or implied. An express contract is one, the terms of which are stated in words.

An implied contract is one, the existence and terms of which are manifested by conduct."

- " 'Good cause' or 'just cause' for termination connotes ' "a fair and honest cause or reason,"'' regulated by the good faith of the employer. The term is relative. Whether good cause exists is dependent upon the particular circumstances of each case. In deciding whether good cause exists, there must be a balance between the employer's interest in operating its business efficiently and profitably and the employee's interest in continued employment. Care must be exercised so as not to interfere with the employer's legitimate exercise of managerial discretion. While the scope of such discretion is substantial, it is not unrestricted. Good cause is not properly found where the asserted reasons for discharge are 'trivial, capricious, unrelated to business needs or goals, or pretextual.' Where there is a contract to terminate only for good cause, the employer has no right to terminate for an arbitrary or unreasonable decision." (*Walker v. Blue Cross of California* (1992) 4 Cal.App.4th 985, 994 [6 Cal.Rptr.2d 184], internal citations omitted, abrogated on another ground in *Guz, supra,* 24 Cal.4th at p. 351.)

- "The general rule is that the measure of recovery by a wrongfully discharged employee is the amount of salary agreed upon for the period of service, less the amount which the employer affirmatively proves the employee has earned or with reasonable effort might have earned from other employment." (*Parker v. Twentieth Century Fox-Film Corp.* (1970) 3 Cal.3d 176, 181 [89 Cal.Rptr. 737], internal citations omitted.)

Secondary Sources

- 4 Wilcox, California Employment Law (1989) *Liability for Wrongful Termination and Discipline*, §§ 60.05, 60.07
- 1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 1997) Contract Actions, §§ 8.1–8.21
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.90, 249.43, Ch. 250, *Employment Law: Wage and Hour Disputes*, § 250.66 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 100, *Wrongful Termination and Discipline*, Forms 2, 5, 11, 15, Ch. 50, *Contracts*, §§ 50.10–50.11, 50.350 (Matthew Bender)
- Bancroft-Whitney's Cal. Civil Practice: Employment Litigation (1993) Termination of Employment, §§ 6:11–6:13, 6:18

2402
Breach of Employment Contract—Unspecified Term
Constructive Discharge—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] breached their employment contract by forcing [***name of plaintiff***] to resign. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] and [***name of defendant***] entered into an employment relationship. [An employment contract or a provision in an employment contract may be [written or oral/partly written and partly oral/created by the conduct of the parties]];**

2. **That [***name of defendant***] promised, by words or conduct, to discharge [***name of plaintiff***] only for good cause;**

3. **That [***name of plaintiff***] substantially performed [his/her] job duties [unless [***name of plaintiff***]'s performance was excused [or prevented]];**

4. **That [***name of defendant***] intentionally created or knowingly permitted working conditions to exist that were so intolerable that a reasonable person in [***name of plaintiff***]'s position would have had no reasonable alternative except to resign;**

5. **That [***name of plaintiff***] resigned because of the intolerable conditions; and**

6. **That [***name of plaintiff***] was harmed by the loss of employment.**

To be intolerable, the adverse working conditions must be unusually or repeatedly offensive to a reasonable person in [*name of plaintiff***]'s position.**

DIRECTIONS FOR USE

The element of substantial performance should not be confused with the "good cause" defense: "The action is primarily for breach of contract. It was therefore incumbent upon plaintiff to prove that he was able and offered to fulfill all obligations imposed upon him by the contract. Plaintiff failed to meet this requirement; by voluntarily withdrawing from the contract he excused further performance by defendant." (*Kane v. Sklar* (1954) 122 Cal.App.2d 480, 482 [265 P.2d 29], internal citation omitted.) Element number 3 may be deleted if substantial performance is not a disputed issue.

SOURCES AND AUTHORITY

- Labor Code section 2922 provides: "An employment, having no specified term, may be terminated at the will of either party on notice to the other. Employment for a specified term means an employment for a period greater than one month."

- Civil Code section 1439 provides, in part: "Before any party to an obligation can require another party to perform any act under it, he must fulfill all conditions precedent thereto imposed upon himself; and must be able and offer to fulfill all conditions concurrent so imposed upon him on the like fulfillment by the other party."

- "Where there is no express agreement, the issue is whether other evidence of the parties' conduct has a 'tendency in reason' to demonstrate the existence of an actual mutual understanding on particular terms and conditions of employment. If such evidence logically permits conflicting inferences, a question of fact is presented. But where the undisputed facts negate the existence or the breach of the contract claimed, summary judgment is proper." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 337 [100 Cal.Rptr.2d 352] internal citations omitted.)

- The employee bears the ultimate burden of proving that he or she was wrongfully terminated. (*Pugh v. See's Candies, Inc.* (*Pugh I*) (1981) 116 Cal.App.3d 311, 330 [171 Cal.Rptr. 917].)

- "Standing alone, constructive discharge is neither a tort nor a breach of contact, but a doctrine that transforms what is ostensibly a resignation into a firing. Even after establishing constructive discharge, an employee must independently prove a breach of contract or tort in connection with employment termination in order to obtain damages for wrongful discharge." (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1251 [32 Cal.Rptr.2d 223], internal citation omitted.)

- "The presumption that an employment relationship of indefinite duration is intended to be terminable at will is therefore 'subject, like any presumption, to contrary evidence. This may take the form of an agreement, express or implied, that ... the employment relationship will continue indefinitely, pending the occurrence of some event such as the employer's dissatisfaction with the employee's services or the existence of some "cause" for termination.' " (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 680 [254 Cal.Rptr. 211], internal citation omitted.)

- "In *Foley*, we identified several factors, apart from express terms, that may bear upon 'the existence and content of an ... [implied-in-fact] agreement' placing limits on the employer's right to discharge an employee. These factors might include ' "the personnel policies or practices of the employer, the employee's longevity of service, actions or communications by the employer reflecting assurances of continued employment, and the practices of the industry in which the employee is engaged." ' "

(*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 336–337 [100 Cal.Rptr.2d 352] internal citations omitted.)

- Civil Code sections 1619–1621 together provide as follows: "A contract is either express or implied. An express contract is one, the terms of which are stated in words. An implied contract is one, the existence and terms of which are manifested by conduct."

- " 'Good cause' or 'just cause' for termination connotes ' "a fair and honest cause or reason,"'' regulated by the good faith of the employer. The term is relative. Whether good cause exists is dependent upon the particular circumstances of each case. In deciding whether good cause exists, there must be a balance between the employer's interest in operating its business efficiently and profitably and the employee's interest in continued employment. Care must be exercised so as not to interfere with the employer's legitimate exercise of managerial discretion. While the scope of such discretion is substantial, it is not unrestricted. Good cause is not properly found where the asserted reasons for discharge are 'trivial, capricious, unrelated to business needs or goals, or pretextual.' Where there is a contract to terminate only for good cause, the employer has no right to terminate for an arbitrary or unreasonable decision." (*Walker v. Blue Cross of California* (1992) 4 Cal.App.4th 985, 994 [6 Cal.Rptr.2d 184], internal citations omitted, abrogated on another ground in *Guz, supra,* 24 Cal.4th at p. 351.)

- "Constructive discharge occurs when the employer's conduct effectively forces an employee to resign. Although the employee may say, 'I quit,' the employment relationship is actually severed involuntarily by the employer's acts, against the employee's will. As a result, a constructive discharge is legally regarded as a firing rather than a resignation." (*Turner, supra,* 7 Cal.4th at pp. 1245–1246, internal citation omitted.)

- "In order to amount to constructive discharge, adverse working conditions must be unusually 'aggravated' or amount to a 'continuous pattern' before the situation will be deemed intolerable. In general, '[s]ingle, trivial, or isolated acts of [misconduct] are insufficient' to support a constructive discharge claim. Moreover, a poor performance rating or a demotion, even when accompanied by reduction in pay, does not by itself trigger a constructive discharge." (*Turner, supra,* 7 Cal.4th at p. 1247, internal citation and fns. omitted.)

- "Whether conditions were so intolerable as to justify a reasonable employee's decision to resign is normally a question of fact." (*Valdez v. City of Los* Angeles (1991) 231 Cal.App.3d 1043, 1056 [282 Cal.Rptr. 726].)

- "In some circumstances, a single intolerable incident, such as a crime of violence against an employee by an employer, or an employer's ultimatum that an employee commit a crime, may constitute a constructive discharge. Such misconduct potentially could be found 'aggravated.' " (*Turner, supra,* 7 Cal.4th at p. 1247, fn. 3.)

- "[T]he standard by which a constructive discharge is determined is an objective one-the question is 'whether a reasonable person faced with the allegedly intolerable employer actions or conditions of employment would have no reasonable alternative except to quit.' " (*Turner, supra,* 7 Cal.4th at p. 1248, internal citations omitted.)

- "In order to establish a constructive discharge, an employee must plead and prove, by the usual preponderance of the evidence standard, that the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign. For purposes of this standard, the requisite knowledge or intent must exist on the part of either the employer or those persons who effectively represent the employer, i.e., its officers, directors, managing agents, or supervisory employees." (*Turner, supra,* 7 Cal.4th at p. 1251.)

- "The length of time the plaintiff remained on the job may be one relevant factor in determining the intolerability of employment conditions from the standpoint of a reasonable person. Neither logic nor precedent suggests it should always be dispositive." (*Turner, supra,* 7 Cal.4th at p. 1254.)

- "The general rule is that the measure of recovery by a wrongfully discharged employee is the amount of salary agreed upon for the period of service, less the amount which the employer affirmatively proves the employee has earned or with reasonable effort might have earned from other employment." (*Parker v. Twentieth Century Fox-Film Corp.* (1970) 3 Cal.3d 176, 181 [89 Cal.Rptr. 737], internal citations omitted.)

<u>Secondary Sources</u>

- 2 Witkin, Summary of California Law (2000 supp.) Agency and Employment, §§ 184 M–184 O
- 4 Wilcox, California Employment Law (1989) *Liability for Wrongful Termination and Discipline*, §§ 60.05, 60.07
- 1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 1997) Contract Actions, §§ 8.1–8.21
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 249, *Employment Law: Termination and Discipline*, § 249.15 (Matthew Bender)
- Bancroft-Whitney's Cal. Civil Practice: Employment Litigation (1993) Termination of Employment, §§ 6:11–6:13, 6:18

2403
Breach of Employment Contract—Unspecified Term
Implied-in-Fact Promise Not to Discharge Without Good Cause

An employer promises to [discharge/demote] an employee only for good cause if it is reasonable for an employee to conclude, from the employer's words or conduct, that [he/she] will be [discharged/demoted] only for good cause.

In deciding whether [*name of defendant***] promised to [discharge/demote] [***name of plaintiff***] only for good cause, you may consider, among other factors, the following:**

(a) [*Name of defendant***]'s personnel policies [and/or] practices;**

(b) [*Name of plaintiff***]'s length of service;**

(c) Any raises, commendations, positive evaluations and promotions received by [*name of plaintiff***]; [and]**

(d) Whether [*name of defendant***] said or did anything to assure [***name of plaintiff***] of continued employment; [and]**

(e) [*Insert other relevant factor(s).***]**

Length of service, raises, and promotions by themselves are not enough to imply such a promise, although they are factors for you to consider.

DIRECTIONS FOR USE

In certain cases, it may be necessary to instruct the jury that if it finds there is an express at-will agreement, there may not be an implied agreement to the contrary: "[M]ost cases applying California law, both pre and post-*Foley*, have held that an at-will provision in an *express written agreement*, signed by the employee, *cannot* be overcome by proof of an implied contrary understanding." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 340 fn. 10 [100 Cal.Rptr.2d 352].)

This instruction should be read when an employee is basing his or her claim of wrongful discharge on an implied covenant not to terminate except for good cause. Only those factors that apply to the facts of the particular case should be read.

"[A]n employee's *mere* passage of time in the employer's service, even where marked with tangible indicia that the employer approves the employee's work, cannot *alone* form an implied-in-fact contract that the employee is no longer at will. Absent other evidence

of the employer's intent, longevity, raises and promotions are their own rewards for the employee's continuing valued service; they do not, *in and of themselves*, additionally constitute a contractual guarantee of future employment security." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 341–342 [100 Cal.Rptr.2d 352].)

SOURCES AND AUTHORITY

- Civil Code sections 1619–1621 together provide as follows: "A contract is either express or implied. An express contract is one, the terms of which are stated in words. An implied contract is one, the existence and terms of which are manifested by conduct."

- "Where there is no express agreement, the issue is whether other evidence of the parties' conduct has a 'tendency in reason' to demonstrate the existence of an actual mutual understanding on particular terms and conditions of employment. If such evidence logically permits conflicting inferences, a question of fact is presented." (*Guz, supra,* 24 Cal.4th at p. 337, internal citations omitted.)

- "In the employment context, factors apart from consideration and express terms may be used to ascertain the existence and content of an employment agreement, including 'the personnel policies or practices of the employer, the employee's longevity of service, actions or communications by the employer reflecting assurances of continued employment, and the practices of the industry in which the employee is engaged.' " (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 680, internal citation omitted.)

- "We agree that disclaimer language in an employee handbook or policy manual does not necessarily mean an employee is employed at will. But even if a handbook disclaimer is not controlling in every case, neither can such a provision be ignored in determining whether the parties' conduct was intended, and reasonably understood, to create binding limits on an employer's statutory right to terminate the relationship at will. Like any direct expression of employer intent, communicated to employees and intended to apply to them, such language must be taken into account, along with all other pertinent evidence, in ascertaining the terms on which a worker was employed." (*Guz, supra,* 24 Cal.4th at p. 340, internal citations omitted.)

- "Conceptually, there is no rational reason why an employer's policy that its employees will not be demoted except for good cause, like a policy restricting termination or providing for severance pay, cannot become an implied term of an employment contract. In each of these instances, an employer promises to confer a significant benefit on the employee, and it is a question of fact whether that promise was reasonably understood by the employee to create a contractual obligation." (*Scott v. Pacific Gas & Electric Co.* (1995) 11 Cal. 4th 454, 464 [46 Cal.Rptr.2d 427].)

Secondary Sources

- 2 Witkin, Summary of California Law (2000 supp.) Agency and Employment, § 184 E
- 4 Wilcox, California Employment Law (1989) *Liability for Wrongful Termination and Discipline*, § 60.05[2][a]–[e]
- 1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 1997) Contract Actions, §§ 8.6–8.16
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.01, 249.13, 249.15, 249.50 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 100, *Wrongful Termination and Discipline*, Forms 2, 5, 8–10, 15, 22 (Matthew Bender)
- Bancroft-Whitney's Cal. Civil Practice: Employment Litigation (2001 supp.) Termination of Employment, §§ 6:13–6:14

2404
Breach of Employment Contract—Unspecified Term
"Good Cause" Defined

Good cause exists when an employer's decision to [discharge/demote] an employee is made in good faith and based on a fair and honest reason. Good cause does not exist if the employer's reasons for the [discharge/ demotion] are trivial, arbitrary, inconsistent with usual practices, [or] unrelated to business needs or goals [or if the stated reasons conceal the employer's true reasons.]

In deciding whether [*name of defendant***] had good cause to [discharge/ demote] [***name of plaintiff***], you must balance [***name of defendant***]'s interest in operating the business efficiently and profitably against the interest of [***name of plaintiff***] in maintaining employment.**

[If [*name of plaintiff***] had a sensitive managerial position, then [***name of defendant***] had substantial, though not unlimited, discretion in [discharging/demoting] [him/ her].]**

DIRECTIONS FOR USE

This instruction may not be appropriate in the context of an implied employment contract where the parties have agreed to a particular meaning of "good cause" (e.g., a written employment agreement specifically defining "good cause" for discharge). If so, the instruction should be modified accordingly.

Only read last bracketed phrase in the first paragraph in cases where there is an issue involving pretext.

The last bracketed sentence in the second paragraph should be given when the employee is in such a position that the employer would be allowed greater discretion in its decision to discharge the employee: "[W]here, as here, the employee occupies a sensitive managerial or confidential position, the employer must of necessity be allowed substantial scope for the exercise of subjective judgment." (*Pugh v. See's Candies, Inc.* (*Pugh I*) (1981) 116 Cal.App.3d 311, 330 [171 Cal.Rptr. 917].) Note that the term "confidential position" has not been defined by California case law.

When the reason given for the discharge is misconduct, and there is a factual dispute whether the misconduct occurred, then the court should give instruction 2405, *Breach of Employment Contract—"Good Cause" Defined—Misconduct*, instead of this instruction. (See *Cotran v. Rollins Hudig Hall International, Inc.* (1998) 17 Cal.4th 93, 107 [69 Cal.Rptr.2d 900].)

SOURCES AND AUTHORITY

- Whether good cause exists is usually a matter to be determined by the trier of fact. (*Wallis v. Farmers Group, Inc.* (1990) 220 Cal.App.3d 718, 733 [269 Cal.Rptr. 299].)

- " 'Good cause' or 'just cause' for termination connotes ' " 'a fair and honest cause or reason,' " ' regulated by the good faith of the employer. The term is relative. Whether good cause exists is dependent upon the particular circumstances of each case. In deciding whether good cause exists, there must be a balance between the employer's interest in operating its business efficiently and profitably and the employee's interest in continued employment. Care must be exercised so as not to interfere with the employer's legitimate exercise of managerial discretion. While the scope of such discretion is substantial, it is not unrestricted. Good cause is not properly found where the asserted reasons for discharge are 'trivial, capricious, unrelated to business needs or goals, or pretextual.' Where there is a contract to terminate only for good cause, the employer has no right to terminate for an arbitrary or unreasonable decision." (*Walker v. Blue Cross of California* (1992) 4 Cal.App.4th 985, 994 [6 Cal.Rptr.2d 184], internal citations omitted, abrogated on another ground in *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 351 [10 Cal.Rptr.2d 376].)

- The Court of Appeal in *Pugh I* observed that "good cause" in the context of wrongful termination based on an implied contract "is quite different from the standard applicable in determining the propriety of an employee's termination under a contract for a specified term." (*Pugh, supra,* 116 Cal.App.3d at p. 330.)

- "We have held that appellant has demonstrated a prima facie case of wrongful termination in violation of his contract of employment. The burden of coming forward with evidence as to the reason for appellant's termination now shifts to the employer. Appellant may attack the employer's offered explanation, either on the ground that it is pretextual (and that the real reason is one prohibited by contract or public policy, or on the ground that it is insufficient to meet the employer's obligations under contract or applicable legal principles. Appellant bears, however, the ultimate burden of proving that he was terminated wrongfully." (*Pugh, supra,* 116 Cal.App.3d at pp. 329–330, internal citation omitted.)

<u>Secondary Sources</u>

- 2 Witkin, Summary of California Law (2000 supp.) Agency and Employment, § 156 165–166
- 4 Wilcox, California Employment Law (1989) *Liability for Wrongful Termination and Discipline*, § 60.09[5][b]
- 1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 1997) Contract Actions, §§ 8.22–8.25
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.21, 249.63 (Matthew Bender)

- CALIFORNIA POINTS AND AUTHORITIES, Ch. 100, *Wrongful Termination and Discipline*, Forms 2, 10, 15, 22 (Matthew Bender)
- Bancroft-Whitney's Cal. Civil Practice: Employment Litigation (2001 supp.) Termination of Employment, § 6:18

2405
Breach of Implied Employment Contract—Unspecified Term "Good Cause" Defined—Misconduct

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[*Name of plaintiff***] claims that [***name of defendant***] did not have good cause to [discharge/demote] [him/her] for misconduct. [***Name of defendant***] had good cause to [discharge/demote] [***name of plaintiff***] for misconduct if [***name of defendant***], acting in good faith, conducted an appropriate investigation giving [him/her/it] reasonable grounds to believe that [***name of plaintiff***] engaged in misconduct.**

An appropriate investigation is one that is reasonable under the circumstances and includes notice to the employee of the claimed misconduct and an opportunity for the employee to answer the charge of misconduct before the decision to [discharge/ demote] is made. You may find that [*name of defendant***] had good cause to [discharge/demote] [***name of plaintiff***] without deciding whether [***name of plaintiff***] actually engaged in misconduct.**

DIRECTIONS FOR USE

This instruction should be given when there is a dispute as to whether misconduct, in fact, occurred. (*Cotran v. Rollins Hudig Hall International, Inc.* (1998) 17 Cal.4th 93 [69 Cal.Rptr.2d 900].)

SOURCES AND AUTHORITY

- "The proper inquiry for the jury … is not, 'Did the employee *in fact* commit the act leading to dismissal?' It is 'Was the factual basis on which the employer concluded a dischargeable act had been committed reached honestly, after an appropriate investigation and for reasons that that are not arbitrary or pretextual?' The jury conducts a factual inquiry in both cases, but the questions are not the same. In the first, the jury decides the ultimate truth of the employee's alleged misconduct. In the second, it focuses on the *employer's response* to allegations of misconduct." (*Cotran, supra,* 17 Cal.4th at p. 107.)

- "We give operative meaning to the term 'good cause' in the context of implied employment contracts by defining it … as fair and honest reasons, regulated by good faith on the part of the employer, that are not trivial, arbitrary or capricious, unrelated to business needs or goals, or pretextual. A reasoned conclusion, in short, supported by substantial evidence gathered through an adequate investigation that includes notice of the claimed misconduct and a chance for the employee to respond." (*Cotran, supra,* 17 Cal.4th at pp. 107–108, internal citations omitted.)

- "*Cotran* set forth a new standard for good cause in termination decisions. Three factual determinations are relevant to the question of employer liability: (1) did the employer act with good faith in making the decision to terminate; (2) did the decision follow an investigation that was appropriate under the circumstances; and (3) did the employer have reasonable grounds for believing the employee had engaged in the misconduct." (*Silva v. Lucky Stores, Inc.* (1998) 65 Cal.App.4th 256, 264 [76 Cal.Rptr.2d 382], internal citation omitted.)

- "We have held that appellant has demonstrated a prima facie case of wrongful termination in violation of his contract of employment. The burden of coming forward with evidence as to the reason for appellant's termination now shifts to the employer. Appellant may attack the employer's offered explanation, either on the ground that it is pretextual and that the real reason is one prohibited by contract or public policy, or on the ground that it is insufficient to meet the employer's obligations under contract or applicable legal principles. Appellant bears, however, the ultimate burden of proving that he was terminated wrongfully." (*Pugh, supra,* 116 Cal.App.3d at pp. 329–330, internal citation omitted.)

<u>Secondary Sources</u>

- 2 Witkin, Summary of California Law (2000 supp.) Agency and Employment, § 156
- 4 Wilcox, California Employment Law (1989) *Liability for Wrongful Termination and Discipline*, § 60.09[5][b]
- 1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 1997) Contract Actions, § 8.26
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.21, 249.43 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 100, *Wrongful Termination and Discipline*, Forms 8, 15 (Matthew Bender)
- Bancroft-Whitney's Cal. Civil Practice: Employment Litigation (1993) Termination of Employment, §§ 6:18–6.19

2406
Breach of Employment Contract—Unspecified Term
Damages

If you find that [*name of defendant***] [discharged/demoted] [***name of plaintiff***] in breach of an employment contract, then you must decide the amount of damages, if any, that [***name of plaintiff***] has proved [he/she] is entitled to recover. To make that decision, you must:**

1. **Decide the amount that [***name of plaintiff***] would have earned from [***name of defendant***] up to today, including any benefits and pay increases; [and]**

2. **Add the present cash value of any future wages and benefits that [he/she] would have earned after today for the length of time the employment with [***name of defendant***] was reasonably certain to continue; [and]**

3. **[***Describe any other contract damages that were allegedly caused by defendant's conduct.***]**

In determining the period that [*name of plaintiff***]'s employment was reasonably certain to have continued, you should consider, among other factors, the following:**

(a) [*Name of plaintiff***]'s age, work performance, and intent regarding continuing employment with [***name of defendant***];**

(b) [*Name of defendant***]'s prospects for continuing the operations involving [***name of plaintiff***]; and**

(c) Any other factor that bears on how long [*name of plaintiff***] would have continued to work.**

DIRECTIONS FOR USE

For an instruction on mitigation see instruction 2407, *Breach of Employment Contract—Unspecified Term—Employee's Duty to Mitigate Damages*. This instruction should be given when plaintiff claims loss of employment from a wrongful discharge or demotion or a breach of the covenant of good faith and fair dealing. For an instruction on present cash value see instruction 3904, *Present Cash Value*.

SOURCES AND AUTHORITY

- "The general rule is that the measure of recovery by a wrongfully discharged employee is the amount of salary agreed upon for the period of service, less the amount which the employer affirmatively proves the employee has earned or with reasonable effort might have earned from other employment. However, before projected earnings from other employment opportunities not sought or accepted by the discharged employee can be applied mitigation, the employer must show that the other employment was comparable, or substantially similar, to that of which the employee has been deprived; the employee's rejection of or failure to seek other available employment of a different or inferior kind may not be resorted to in order to mitigate damages." (*Parker v. Twentieth Century-Fox Film Corp.* (1970) 3 Cal.3d 176, 181–182, [89 Cal.Rptr. 737], internal citations omitted.)

- Civil Code section 3300 provides: "For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom."

- "[I]t is our view that in an action for wrongful discharge, and pursuant to the present day concept of employer-employee relations, the term 'wages' should be deemed to include not only the periodic monetary earnings of the employee but also the other benefits to which he is entitled as a part of his compensation." (*Wise v. Southern Pac. Co.* (1970) 1 Cal.3d 600, 607 [83 Cal.Rptr. 202].)

- In determining the period that plaintiff's employment was reasonably certain to have continued, the trial court took into consideration plaintiff's " 'physical condition, his age, his propensity for hard work, his expertise in managing defendants' offices, the profit history of his operation, the foreseeability of the continued future demand for tax return service to small taxpayers.' " (*Drzewiecki v. H & R Block, Inc.* (1972) 24 Cal.App.3d 695, 705 [101 Cal.Rptr. 169].)

- In cases for wrongful demotion, the measure of damages is "the difference in compensation before and after the demotion." (*Scott v. Pacific Gas & Electric Company* (1995) 11 Cal.4th 454, 468 [46 Cal.Rptr.2d 427].)

<u>Secondary Sources</u>

- 2 Witkin, Summary of California Law (9th ed. 1987) Agency and Employment, §§ 179, 180
- 4 Wilcox, California Employment Law (1989) *Liability for Wrongful Termination and Discipline*, § 60.08[3]
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.01, 249.17, 249.50 (Matthew Bender)

- CALIFORNIA POINTS AND AUTHORITIES, Ch. 100, *Wrongful Termination and Discipline*, Forms 8, 15 (Matthew Bender)

2407
Breach of Employment Contract—Unspecified Term
Employee's Duty to Mitigate Damages

[*Name of defendant***] claims that if [***name of plaintiff***] is entitled to any damages, they should be reduced by the amount that [he/she] could have earned from other employment. To succeed, [***name of defendant***] must prove all of the following:**

1. **That employment substantially similar to [***name of plaintiff***]'s former job was available to [him/her];**

2. **That [***name of plaintiff***] failed to make reasonable efforts to seek [and retain] such employment; and**

3. **The amount that [***name of plaintiff***] could have earned from such employment.**

In deciding whether the employment was substantially similar, you should consider, among other factors, whether:

(a) The nature of the work was different from [*name of plaintiff***]'s employment with [***name of defendant***];**

(b) The new position was substantially inferior to [*name of plaintiff***]'s former position;**

(c) The salary, benefits, and hours of the job were similar to [*name of plaintiff***]'s former job;**

(d) The new position required similar skills, background and experience;

(e) The job responsibilities were similar; [and]

(f) The job was in the same locality; [and]

(g) [*insert other relevant factor(s)***].**

[In deciding whether [*name of plaintiff***] failed to make reasonable efforts to retain comparable employment, you should consider whether [***name of plaintiff***] quit or was discharged from that employment for a reason within [his/her] control.]**

DIRECTIONS FOR USE

This instruction should be given when there is evidence that the employee's damages could have been mitigated. The bracketed language regarding plaintiff's failure to retain a new job is based on the holding in *Stanchfield v. Hamer Toyota, Inc.* (1995) 37 Cal.App.4th 1495, 1502–1503 [44 Cal.Rptr.2d 565].

Only read factors that have been shown by the evidence.

This instruction should not be used for wrongful demotion cases.

SOURCES AND AUTHORITY

- "The general rule is that the measure of recovery by a wrongfully discharged employee is the amount of salary agreed upon for the period of service, less the amount which the employer affirmatively proves the employee has earned or with reasonable effort might have earned from other employment. However, before projected earnings from other employment opportunities not sought or accepted by the discharged employee can be applied mitigation, the employer must show that the other employment was comparable, or substantially similar, to that of which the employee has been deprived; the employee's rejection of or failure to seek other available employment of a different or inferior kind may not be resorted to in order to mitigate damages." (*Parker v. Twentieth Century-Fox Film Corp.* (1970) 3 Cal.3d 176, 181–182 [89 Cal.Rptr. 737], internal citations omitted.)

- "The burden is on the employer to prove that substantially similar employment was available which the wrongfully discharged employee could have obtained with reasonable effort." (*Chyten v. Lawrence & Howell Investments* (1993) 23 Cal.App.4th 607, 616 [46 Cal.Rptr.2d 459].)

- "[W]e conclude that the trial court should not have deducted from plaintiff's recovery against defendant the amount that the court found she might have earned in employment which was substantially inferior to her position with defendant." (*Rabago-Alvarez v. Dart Industries, Inc.* (1976) 55 Cal.App.3d 91, 99.)

- "[I]n those instances where the jury determines the employee was fired from a substantially similar position for cause, any amount the employee with reasonable effort could have earned by retaining that employment should be deducted from the amount of damages which otherwise would have been awarded to the employee under the terms of the original employment agreement." (*Stanchfield, supra,* 37 Cal.App.4th at pp. 1502–1503.)

- In deciding whether a school bus driver could have obtained a substantially similar job in other nearby school districts, the court looked at several factors, including salary, benefits, hours of work per day, hours of work per year, locality, and

availability of a merit-based system. (*California School Employees Ass'n v. Personnel Commission* (1973) 30 Cal.App.3d 241, 250–255 [106 Cal.Rptr. 283].)

Secondary Sources

- 4 Wilcox, California Employment Law (1989) *Liability for Wrongful Termination and Discipline*, § 60.08[4]
- 1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 1997) Contract Actions, § 8.41
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.18, 249.65 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 100, *Wrongful Termination and Discipline*, Forms 40, 142 (Matthew Bender)

2420
Breach of Employment Contract—Specified Term
Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] breached an employment contract for a specified term. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] and [***name of defendant***] entered into an employment contract that specified a length of time that [***name of plaintiff***] would remain employed;**

2. **That [***name of plaintiff***] substantially performed [his/her] job duties [unless [***name of plaintiff***]'s performance was excused [or prevented]];**

3. **That [***name of defendant***] breached the employment contract by [discharging/demoting] [***name of plaintiff***] before the end of the term of the contract; and**

4. **That [***name of plaintiff***] was harmed by the [discharge/demotion].**

DIRECTIONS FOR USE

The element of substantial performance should not be confused with the "good cause" defense: "The action is primarily for breach of contract. It was therefore incumbent upon plaintiff to prove that he was able and offered to fulfill all obligations imposed upon him by the contract. Plaintiff failed to meet this requirement; by voluntarily withdrawing from the contract he excused further performance by defendant." (*Kane v. Sklar* (1954) 122 Cal.App.2d 480, 482 [265 P.2d 29], internal citation omitted.) Element number 2 may be deleted if substantial performance is not an issue.

See also instruction 304, *Oral or Written Contract Terms,* and instruction 305, *Implied-in-Fact Contract.*

SOURCES AND AUTHORITY

- Labor Code section 2922 provides: "An employment, having no specified term, may be terminated at the will of either party on notice to the other. Employment for a specified term means employment for a period of greater than one month."

- Labor Code section 2924 provides: "An employment for a specified term may be terminated at any time by the employer in case of any willful breach of duty by the

employee in the course of his employment, or in case of his habitual neglect of his duty or continued incapacity to perform it."

- Civil Code section 1439 provides, in part: "Before any party to an obligation can require another party to perform any act under it, he must fulfill all conditions precedent thereto imposed upon himself; and must be able and offer to fulfill all conditions concurrent so imposed upon him on the like fulfillment by the other party."

- "[L]abor Code section 2924 has traditionally been interpreted to 'inhibit[] the termination of employment for a specified term except in case of a wilful breach of duty, of habitual neglect of, or continued incapacity to perform, a duty.' " (*Khajavi v. Feather River Anesthesia Medical Group* (2000) 84 Cal.App.4th 32, 57 [100 Cal.Rptr.2d 627], internal citations omitted.)

- "Stated simply, the contract compensation for the unexpired period of the contract affords a prima facie measure of damages; the actual measured damage, however, is the contract amount reduced by compensation received during the unexpired term; if, however, such other compensation has not been received, the contract amount may still be reduced or eliminated by a showing that the employee, by the exercise of reasonable diligence and effort, could have procured comparable employment and thus mitigated the damages." (*Erler v. Five Points Motors, Inc.* (1967) 249 Cal.App.2d 560, 562 [57 Cal.Rptr. 516].)

Secondary Sources

- 1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 1997) Contract Actions, § 8.20
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.21 (Matthew Bender)

2421
Breach of Employment Contract—Specified Term
Good Cause Defense

[*Name of defendant***] claims that [he/she/it] did not breach the employment contract because [he/she/it] [discharged/demoted] [***name of plaintiff***] for good cause. To establish good cause [***name of defendant***] must prove:**

> **[that [***name of plaintiff***] willfully breached a job duty] [or]**
>
> **[that [***name of plaintiff***] continually neglected [his/her] job duties] [or]**
>
> **[that a continued incapacity prevented [***name of plaintiff***] from performing [his/her] job duties .]**

DIRECTIONS FOR USE

This instruction should be given when the employee alleges wrongful discharge in breach of an employment contract for a specified term and the employer defends by asserting plaintiff was justifiably discharged.

This instruction may not be appropriate in the context of an employment contract where the parties have agreed to a particular meaning of "good cause" (e.g., a written employment agreement specifically defining "good cause" for discharge). If so, the instruction should be modified accordingly.

Modification of the third element may be necessary where the plaintiff has a statutory right to be absent for work (for example, for family and medical leave or to accommodate a disability).

SOURCES AND AUTHORITIES

- Labor Code section 2922 provides: "An employment, having no specified term, may be terminated at the will of either party on notice to the other. Employment for a specified term means employment for a period of greater than one month."

- Labor Code section 2924 provides: "An employment for a specified term may be terminated at any time by the employer in case of any willful breach of duty by the employee in the course of his employment, or in case of his habitual neglect of his duty or continued incapacity to perform it."

- "[L]abor Code section 2924 has traditionally been interpreted to 'inhibit[] the termination of employment for a specified term except in case of a wilful breach of duty, of habitual neglect of, or continued incapacity to perform, a duty.' " (*Khajavi v. Feather River Anesthesia Medical Group* (2000) 84 Cal.App.4th 32, 57 [100 Cal.Rptr.2d 627], internal citations omitted.)

- Labor Code section 2924 "does not grant a right to terminate prior to the end of the employee's term on the basis of a mistaken belief of a breach." (*Khajavi, supra,* 84 Cal.App.4th at pp. 58–59.)

- Good cause in the context of wrongful termination based on an implied contract " 'is quite different from the standard applicable in determining the propriety of an employee's termination under a contract for a specified term.' " (*Khajavi, supra,* 84 Cal.App.4th at p. 58, internal citations omitted.)

- "An employer is justified in discharging his employee, when the latter fails to perform his duty, even though injury does not result to the employer as a result of the employee's failure to do his duty." (*Bank of America National Trust & Savings Ass'n v. Republic Productions, Inc.* (1941) 44 Cal.App.2d 651, 654 [112 P.2d 972], internal citation omitted.)

- "It is therefore not every deviation of the employee from the standard of performance sought by his employer that will justify a discharge. There must be some 'wilful act or wilful misconduct ...' when the employee uses his best efforts to serve the interests of his employer." (*Holtzendorff v. Housing Authority of the City of Los Angeles* (1967) 250 Cal.App.2d 596, 610 [58 Cal.Rptr. 886], internal citation omitted.)

- " 'Willful' disobedience of a specific, peremptory instruction of the master, if the instruction be reasonable and consistent with the contract, is a breach of duty–a breach of the contract of service; and, like any other breach of the contract, of itself entitles the master to renounce the contract of employment". (*May v. New York Motion Picture Corp.* (1920) 45 Cal.App. 396, 403 [187 P. 785].)

<u>Secondary Sources</u>

- 1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 1997) Contract Actions, § 8.20
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.13, 249.21, 249.60–63 (Matthew Bender)

2422
Breach of Employment Contract—Specified Term
Damages

If you find that [*name of defendant***] [discharged/demoted] [***name of plaintiff***] in breach of an employment contract for a specified term, then you must decide the damages, if any, that [***name of plaintiff***] has proved [he/she] is entitled to recover. To make that decision, you must:**

1. **Decide the amount that [***name of plaintiff***] would have earned up to today, including any benefits and pay increases; [and]**

2. **Add the present cash value of any future wages and benefits that [he/she] would have earned up to the end of the term of the contract; [and]**

3. **[***Describe any other contract damages that were allegedly caused by defendant's conduct.***]**

[If you find that [*name of plaintiff***] would have exercised [his/her] option to extend the term of the employment contract, then you may consider the total term of [***name of plaintiff***]'s employment contract to be [***specify length of original contract term plus option term***].]**

DIRECTIONS FOR USE

Use instruction 2407, *Breach of Employment Contract—Unspecified Term—Employee's Duty to Mitigate Damages*, if the defendant seeks an offset for wages plaintiff could have earned from similar employment.

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."

- "Stated simply, the contract compensation for the unexpired period of the contract affords a prima facie measure of damages; the actual measured damage, however, is the contract amount reduced by compensation received during the unexpired term; if, however, such other compensation has not been received, the contract amount may still be reduced or eliminated by a showing that the employee, by the exercise of

reasonable diligence and effort, could have procured comparable employment and thus mitigated the damages." (*Erler v. Five Points Motors, Inc.* (1967) 249 Cal.App.2d 560, 562 [57 Cal.Rptr. 516].)

- In appropriate circumstances, the court may authorize the trier of fact to "consider the probability the employee would exercise the option in determining the length of the unexpired term of employment when applying the applicable measure of damages." (*Oldenkott v. American Electric, Inc.* (1971) 14 Cal.App.3d 198, 204 [92 Cal.Rptr. 127].)

- "The trial court correctly found that defendants wrongfully terminated the employment contract and that the measure of damages was the difference between the amount Silva would have received under the contract and that amount which Silva actually received from his other employment." (*Silva v. McCoy* (1968) 259 Cal.App.2d 256, 260 [66 Cal.Rptr. 364].)

- "The plaintiff has the burden of proving his damage. The law is settled that he has the duty of minimizing that damage. While the contract wages are prima facie [evidence of] his damage, his actual damage is the amount of money he was out of pocket by reason of the wrongful discharge." (*Erler v. Five Points Motors, Inc., supra,* 249 Cal.App.2d at pp. 567–568.)

- "The burden of proof is on the party whose breach caused damage, to establish matters relied on to mitigate damage." (*Steelduct Co. v. Henger-Seltzer Co.* (1945) 26 Cal.2d 634, 654 [160 P.2d 804], internal citations omitted.)

<u>Secondary Sources</u>

- California forms of pleading and practice, Ch. 249, Employment Law: Termination and Discipline, § 249.21 (Matthew Bender)

2423
Breach of the Implied Covenant of Good Faith and Fair Dealing
Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] violated the duty to act fairly and in good faith. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] and [***name of defendant***] entered into an employment relationship;**

2. **That [***name of plaintiff***] substantially performed [his/her] job duties [unless [***name of plaintiff***]'s performance was excused [or prevented]];**

3. **That [***name of defendant***] [***specify conduct that plaintiff claims prevented him/her from receiving the benefits that he/she was entitled to have received under the contract***];**

4. **That [***name of defendant***]'s conduct was a failure to act fairly and in good faith; and**

5. **That [***name of plaintiff***] was harmed by [***name of defendant***]'s conduct.**

Both parties to an employment relationship have a duty not to do anything that prevents the other party from receiving the benefits of their agreement. Good faith means honesty of purpose without any intention to mislead or to take unfair advantage of another. Generally speaking, it means being faithful to one's duty or obligation.

DIRECTIONS FOR USE

If the existence of a contract is at issue see instructions on contract formation in the 300 series.

This instruction must be completed by inserting an explanation of the conduct that violated the duty to act in good faith.

The element of substantial performance should not be confused with the "good cause" defense: "The action is primarily for breach of contract. It was therefore incumbent upon plaintiff to prove that he was able and offered to fulfill all obligations imposed upon him by the contract. Plaintiff failed to meet this requirement; by voluntarily withdrawing from the contract he excused further performance by defendant." (Kane v. Sklar (1954) 122

Cal.App.2d 480, 482 [265 P.2d 29], internal citation omitted.) Element number 3 may be deleted if substantial performance is not an issue.

Do not give this instruction if the alleged breach is only the termination of an at-will contract. (See *Eisenberg v. Alameda Newspapers, Inc.* (1999) 74 Cal.App.4th 1359, 1391 [88 Cal.Rptr.2d 802].)

SOURCES AND AUTHORITY

- Restatement Second of Contracts section 205 provides: "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." Comment (a) to this section provides, in part: "The phrase 'good faith' is used in a variety of contexts, and its meaning varies somewhat with the context. Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving 'bad faith' because they violate community standards of decency, fairness or reasonableness. The appropriate remedy for a breach of the duty of good faith also varies with the circumstances."

- Civil Code section 1439 provides, in part: "Before any party to an obligation can require another party to perform any act under it, he must fulfill all conditions precedent thereto imposed upon himself; and must be able and offer to fulfill all conditions concurrent so imposed upon him on the like fulfillment by the other party."

- "We therefore conclude that the employment relationship is not sufficiently similar to that of insurer and insured to warrant judicial extension of the proposed additional tort remedies in view of the countervailing concerns about economic policy and stability, the traditional separation of tort and contract law, and finally, the numerous protections against improper terminations already afforded employees." (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 693 [254 Cal.Rptr. 211].)

- "The covenant of good faith and fair dealing, implied by law in every contract, exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive the benefits of the agreement actually made. The covenant thus cannot " 'be endowed with an existence independent of its contractual underpinnings.' " It cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 349–350 [100 Cal.Rptr.2d 352.], internal citations omitted.)

- "A breach of the contract may also constitute a breach of the implied covenant of good faith and fair dealing. But insofar as the employer's acts are directly actionable as a breach of an implied-in-fact contract term, a claim that merely realleges that breach as a violation of the covenant is superfluous. This is because, as we explained at length in *Foley*, the remedy for breach of an employment agreement, including the

covenant of good faith and fair dealing implied by law therein, is solely contractual. In the employment context, an implied covenant theory affords no separate measure of recovery, such as tort damages." (*Guz, supra,* 24 Cal.4th at p. 352, internal citation omitted.)

- "Where there is no underlying contract there can be no duty of good faith arising from the implied covenant." (*Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 819 [85 Cal.Rptr.2d 459].)

- "We do not suggest the covenant of good faith and fair dealing has no function whatever in the interpretation and enforcement of employment contracts. As indicated above, the covenant prevents a party from acting in bad faith to frustrate the contract's actual benefits. Thus, for example, the covenant might be violated if termination of an at-will employee was a mere pretext to cheat the worker out of another contract benefit to which the employee was clearly entitled, such as compensation already earned." (*Guz, supra,* 24 Cal.4th at p. 353, fn. 18.)

- "The reason for an employee's dismissal and whether that reason constitutes bad faith are evidentiary questions most properly resolved by the trier of fact." (*Luck v. Southern Pacific Transportation Co.* (1990) 218 Cal.App.3d 1, 26 [267 Cal.Rptr. 618], internal citations omitted.)

Secondary Sources

- 4 Wilcox, California Employment Law (1989) *Liability for Wrongful Termination and Discipline*, §§ 60.02[2][c], 60.06
- 1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 1997) Contract Actions, §§ 8.27–8.28
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 249, *Employment Law: Termination and Discipline*, § 249.14 (Matthew Bender)
- Bancroft-Whitney's Cal. Civil Practice: Employment Litigation (1993) Termination of Employment, §§ 6.20–6.21

2424
Breach of the Implied Covenant of Good Faith and Fair Dealing
Good Faith Mistaken Belief Defense

[*Name of defendant***] claims that [he/she/it] did not breach the duty to act fairly and in good faith because [he/she/it] believed that there was a legitimate and reasonable business purpose for the conduct.**

To succeed, [*name of defendant***] must prove both of the following:**

1. **That [his/her/its] conduct was based on an honest belief that [***insert alleged mistake***]; and**

2. **That, if true, [***insert alleged mistake***] would have been a legitimate and reasonable business purpose for the conduct.**

SOURCES AND AUTHORITY

- "[B]ecause the implied covenant of good faith and fair dealing requires the employer to act fairly and in good faith, an employer's honest though mistaken belief that legitimate business reasons provided good cause for discharge, will negate a claim it sought in bad faith to deprive the employee of the benefits of the contract. (*Wilkerson v. Wells Fargo Bank* (1989) 212 Cal.App.3d 1217, 1231 [261 Cal.Rptr. 185], internal citation omitted, disapproved on other grounds in *Cotran v. Rollins Hudig Hall International, Inc.* (1998) 17 Cal.4th 93, 96 [69 Cal.Rptr.2d 900]

- "The jury was instructed that the neglect or refusal to fulfill a contractual obligation based on an honest, mistaken belief did not constitute a breach of the implied covenant." (*Luck v. Southern Pacific Transportation Co.* (1990) 218 Cal.App.3d 1, 26 [267 Cal.Rptr. 618].)

- "[*F*]*oley* does not preclude inquiry into an employer's motive for discharging an employee … . " (*Seubert v. McKesson Corp.* (1990) 223 Cal.App.3d 1514, 1521 [273 Cal.Rptr. 296].)

- "[T]he jury was asked to determine in its special verdict whether appellants had a legitimate reason to terminate [plaintiff]'s employment and whether appellants acted in good faith on an honest but mistaken belief that they had a legitimate business reason to terminate [plaintiff]'s employment." (*Seubert v. McKesson Corp.* (1990) 223 Cal.App.3d 1514, 1521 [273 Cal.Rptr. 296] [upholding jury instruction].)

Secondary Sources

- CALIFORNIA POINTS AND AUTHORITIES, Ch. 100, *Wrongful Termination and Discipline*, Form 16 (Matthew Bender)

2430
Wrongful Discharge/Demotion in Violation of Public Policy
Essential Factual Elements

[*Name of plaintiff***] claims [he/she] was [discharged/demoted] from employment for reasons that violate a public policy. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was employed by [***name of defendant***];**

2. **That [***name of defendant***] [discharged/demoted] [***name of plaintiff***];**

3. **That [***insert alleged violation of public policy, e.g., "[*name of plaintiff*]'s refusal to engage in price fixing"***] was a motivating reason for [***name of plaintiff***]'s [discharge/demotion]; and**

4. **That the [discharge/demotion] caused [***name of plaintiff***] harm.**

DIRECTIONS FOR USE

The judge should determine whether the purported reason for firing the plaintiff would amount to a violation of public policy.

This instruction must be supplemented with instruction 2433, *Wrongful Discharge in Violation of Public Policy—Damages.* If plaintiff alleges he or she was forced or coerced to resign, then instruction 2431, *Constructive Discharge in Violation of Public Policy—Plaintiff Required to Violate Public Policy*, or instruction 2432, *Constructive Discharge in Violation of Public Policy—Plaintiff Required to Endure Intolerable Conditions for Improper Purpose that Violates Public Policy*, should be given instead.

The California Supreme Court has extended employment claims to encompass demotions or other similar employment decisions. (See *Scott v. Pacific Gas & Electric Co.* (1995) 11 Cal.4th 454, 473–474 [46 Cal.Rptr.2d 427].) The bracketed language regarding an alleged wrongful demotion may be given, depending on the facts of the case, or other appropriate language for other similar employment decisions.

SOURCES AND AUTHORITY

- "[W]hen an employer's discharge of an employee violates fundamental principles of public policy, the discharged employee may maintain a tort action and recover damages traditionally available in such actions." (*Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 170 [164 Cal.Rptr. 839].)

- "[T]his court established a set of requirements that a policy must satisfy to support a tortious discharge claim. First, the policy must be supported by either constitutional or statutory provisions. Second, the policy must be 'public' in the sense that it 'inures to the benefit of the public' rather than serving merely the interests of the individual. Third, the policy must have been articulated at the time of the discharge. Fourth, the policy must be 'fundamental' and 'substantial.' " (*Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 889–890 [66 Cal.Rptr.2d 888], fn. omitted.)

- "[T]he cases in which violations of public policy are found generally fall into four categories: (1) refusing to violate a statute; (2) performing a statutory obligation (3) exercising a statutory right or privilege; and (4) reporting an alleged violation of a statute of public importance." (*Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1090–1091 [4 Cal.Rptr.2d 874], internal citations and fn. omitted, overruled on other grounds in *Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 80, fn. 6 [78 Cal.Rptr.2d 16]; accord *Stevenson, supra,* 16 Cal.4th at p. 889.)

- "In addition to statutes and constitutional provisions, valid administrative regulations may also serve as a source of fundamental public policy that impacts on an employer's right to discharge employees when such regulations implement fundamental public policy found in their enabling statutes." (*D'sa v. Playhut, Inc.* (2000) 85 Cal.App.4th 927, 933 [102 Cal.Rptr.2d 495], internal citation omitted.)

- "In the context of a tort claim for wrongful discharge, tethering public policy to specific constitutional or statutory provisions serves not only to avoid judicial interference with the legislative domain, but also to ensure that employers have adequate notice of the conduct that will subject them to tort liability to the employees they discharge … ."(*Stevenson, supra,* 16 Cal.4th at p. 889.)

- "[A]n employee need not prove an actual violation of law; it suffices if the employer fired him for reporting his 'reasonably based suspicions' of illegal activity." (*Green, supra,* 19 Cal.4th at p. 87, internal citation omitted.)

- "[A]n employer's authority over its employee does not include the right to demand that the employee commit a criminal act to further its interests, and an employer may not coerce compliance with such unlawful directions by discharging an employee who refuses to follow such an order. . ." (*Tameny, supra,* 27 Cal.3d at p. 178.)

- Employees in both the private and public sector may assert this claim. (*See Shoemaker v. Myers* (1992) 2 Cal.App.4th 1407, 4 Cal.Rptr.2d 203.)

<u>Secondary Sources</u>

- 4 Wilcox, California Employment Law (1989) *Liability for Wrongful Termination and Discipline,* § 60.04

- 1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 1997) Public Policy Violations, §§ 5.5–5.70
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.12, 249.50–52 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 100, *Wrongful Termination and Discipline*, Forms 40–46 (Matthew Bender)
- Bancroft-Whitney's Cal. Civil Practice: Employment Litigation (1993) §§ 6:22–6:24

2431
Constructive Discharge in Violation of Public Policy
Plaintiff Required to Violate Public Policy

[*Name of plaintiff***] claims that [he/she] was forced to resign rather than commit a violation of public policy. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was employed by [***name of defendant***];**

2. **That, [***name of defendant***] required [***name of plaintiff***] to [***specify alleged conduct in violation of public policy, e.g., "engage in price fixing"***];**

3. **That this requirement was so intolerable that a reasonable person in [***name of plaintiff***]'s position would have had no reasonable alternative except to resign;**

4. **That [***name of plaintiff***] resigned because of this requirement;**

5. **That [***name of plaintiff***] was harmed; and**

6. **That the requirement was a substantial factor in causing [***name of plaintiff***]'s harm.**

DIRECTIONS FOR USE

The judge should determine whether the purported reason for plaintiff's resignation would amount to a violation of public policy.

This instruction should be given when a plaintiff claims his or her constructive termination was wrongful because the defendant required the plaintiff to commit an act in violation of public policy. In cases where the plaintiff alleges he or she was subjected to working conditions that violate public policy see instruction 2432, *Constructive Discharge in Violation of Public Policy—Plaintiff Required to Endure Intolerable Conditions for Improper Purpose that Violates Public Policy*.

This instruction must be supplemented with instruction 2433, *Wrongful Discharge in Violation of Public Policy—Damages.*

SOURCES OF AUTHORITY

- "[W]hen an employer's discharge of an employee violates fundamental principles of public policy, the discharged employee may maintain a tort action and recover damages traditionally available in such actions." (*Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 170 [164 Cal.Rptr. 839].)

- "[A]n employer's authority over its employees does not include the right to demand that the employee commit a criminal act to further its interests, and an employer may not coerce compliance with such unlawful directions by discharging an employee who refuses to follow such an order. An employer engaging in such conduct violates a basic duty imposed by law upon all employers, and thus an employee who has suffered damages as a result of such discharge may maintain a tort action for wrongful discharge against the employer." (*Tameny, supra,* 27 Cal.3d at p. 178.)

- "[T]his court established a set of requirements that a policy must satisfy to support a tortious discharge claim. First, the policy must be supported by either constitutional or statutory provisions. Second, the policy must be 'public' in the sense that it 'inures to the benefit of the public' rather than serving merely the interests of the individual. Third, the policy must have been articulated at the time of the discharge. Fourth, the policy must be 'fundamental' and 'substantial.' " (*Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 889–890 [66 Cal.Rptr.2d 888], fn. omitted.)

- "[T]he cases in which violations of public policy are found generally fall into four categories: (1) refusing to violate a statute; (2) performing a statutory obligation (3) exercising a statutory right or privilege; and (4) reporting an alleged violation of a statute of public importance." (*Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1090–1091 [4 Cal.Rptr.2d 874], internal citations and fn. omitted, overruled on other grounds in *Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 80, fn. 6 [78 Cal.Rptr.2d 16]; accord *Stevenson, supra,* 16 Cal.4th at p. 889.)

- "In addition to statutes and constitutional provisions, valid administrative regulations may also serve as a source of fundamental public policy that impacts on an employer's right to discharge employees when such regulations implement fundamental public policy found in their enabling statutes." (*D'sa v. Playhut, Inc.* (2000) 85 Cal.App.4th 927, 933 [102 Cal.Rptr.2d 495], internal citation omitted.)

- "Constructive discharge occurs when the employer's conduct effectively forces an employee to resign. Although the employee may say, 'I quit,' the employment relationship is actually severed involuntarily by the employer's acts, against the employee's will. As a result, a constructive discharge is legally regarded as a firing rather than a resignation." (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1244–1245, internal citation omitted.)

- "Whether conditions were so intolerable as to justify a reasonable employee's decision to resign is normally a question of fact." (*Valdez v. City of Los* Angeles (1991) 231 Cal.App.3d 1043, 1056 [282 Cal.Rptr. 726], internal citation omitted.)

- "In order to establish a constructive discharge, an employee must plead and prove … that the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign." (*Turner, supra,* 7 Cal.4th at p. 1251.)

- "The conditions giving rise to the resignation must be sufficiently extraordinary and egregious to overcome the normal motivation of a competent, diligent, and reasonable employee to remain on the job to earn a livelihood and to serve his or her employer. The proper focus is on whether the resignation was coerced, not whether it was simply one rational option for the employee." (*Turner, supra,* 7 Cal.4th at p. 1246.)

- "In some circumstances, a single intolerable incident, such as a crime of violence against an employee by an employer, or an employer's ultimatum that an employee commit a crime, may constitute a constructive discharge. Such misconduct potentially could be found 'aggravated.' " (*Turner, supra,* 7 Cal.4th at p. 1247, fn. 3.)

- "The mere existence of illegal conduct in a workplace does not, without more, render employment conditions intolerable to a reasonable employee." (*Turner, supra,* 7 Cal.4th at p. 1254.)

- "[T]he standard by which a constructive discharge is determined is an objective one—the question is 'whether a reasonable person faced with the allegedly intolerable employer actions or conditions of employment would have no reasonable alternative except to quit.' " (*Turner, supra,* 7 Cal.4th at p. 1248, internal citations omitted.)

- "The length of time the plaintiff remained on the job may be one relevant factor in determining the intolerability of employment conditions from the standpoint of a reasonable person." (*Turner, supra,* 7 Cal.4th at p. 1254.)

<u>Secondary Sources</u>

- 4 Wilcox, California Employment Law (1989) *Liability for Wrongful Termination and Discipline*, § 60.04
- 1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 1997) Public Policy Violations, §§ 5.45–5.46
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.12, 249.15 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 100, *Wrongful Termination and Discipline*, Forms 20, 24–27 (Matthew Bender)

- Bancroft-Whitney's Cal. Civil Practice: Employment Litigation (1993) §§ 6:22–6:24

2432
Constructive Discharge in Violation of Public Policy
Plaintiff Required to Endure Intolerable Conditions for Improper Purpose that Violates Public Policy

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[*Name of plaintiff***] claims that [***name of defendant***] forced [him/her] to resign for reasons that violate public policy. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was employed by [***name of defendant***];**

2. **That [***name of plaintiff***] was subjected to working conditions that violated public policy, in that [***describe conditions imposed on the employee that constitute the violation, e.g. "[*name of plaintiff*] was treated intolerably in retaliation for filing a workers' compensation claim"***];**

3. **That [***name of defendant***] intentionally created or knowingly permitted these working conditions;**

4. **That these working conditions were so intolerable that a reasonable person in [***name of plaintiff***]'s position would have had no reasonable alternative except to resign;**

5. **That [***name of plaintiff***] resigned because of these working conditions;**

6. **That [***name of plaintiff***] was harmed; and**

7. **That the working conditions were a substantial factor in causing [***name of plaintiff***]'s harm.**

To be intolerable, the adverse working conditions must be unusually or repeatedly offensive to a reasonable person in [*name of plaintiff***]'s position.**

DIRECTIONS FOR USE

The judge should determine whether the purported reason for plaintiff's resignation would amount to a violation of public policy.

This instruction should be given when plaintiff claims his/her constructive termination was wrongful because defendant subjected plaintiff to intolerable working conditions in violation of public policy. The instruction must be supplemented with instruction 2433, *Wrongful Discharge in Violation of Public Policy—Damages.*

SOURCES OF AUTHORITY

- "[W]hen an employer's discharge of an employee violates fundamental principles of public policy, the discharged employee may maintain a tort action and recover damages traditionally available in such actions." (*Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 170 [164 Cal.Rptr. 839].)

- "[T]his court established a set of requirements that a policy must satisfy to support a tortious discharge claim. First, the policy must be supported by either constitutional or statutory provisions. Second, the policy must be 'public' in the sense that it 'inures to the benefit of the public' rather than serving merely the interests of the individual. Third, the policy must have been articulated at the time of the discharge. Fourth, the policy must be 'fundamental' and 'substantial.' " (*Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 889–890 [66 Cal.Rptr.2d 888], fn. omitted.)

- "In addition to statutes and constitutional provisions, valid administrative regulations may also serve as a source of fundamental public policy that impacts on an employer's right to discharge employees when such regulations implement fundamental public policy found in their enabling statutes." (*D'sa v. Playhut, Inc.* (2000) 85 Cal.App.4th 927, 933 [102 Cal.Rptr.2d 495], internal citation omitted.)

- In *Rojo v. Kliger* (1990) 52 Cal.3d 65, 88–91 [276 Cal.Rptr. 130], the court held that an employee terminated in retaliation for refusing her employer's sexual advances may state a wrongful termination cause of action in tort.

- "Constructive discharge occurs when the employer's conduct effectively forces an employee to resign. Although the employee may say, 'I quit,' the employment relationship is actually severed involuntarily by the employer's acts, against the employee's will. As a result, a constructive discharge is legally regarded as a firing rather than a resignation." (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1244–1245, internal citation omitted.)

- "Whether conditions were so intolerable as to justify a reasonable employee's decision to resign is normally a question of fact." (*Valdez v. City of Los* Angeles (1991) 231 Cal.App.3d 1043, 1056 [282 Cal.Rptr. 726], internal citation omitted.)

- "In order to establish a constructive discharge, an employee must plead and prove … that the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign." (*Turner, supra,* 7 Cal.4th at p. 1251.)

- "The conditions giving rise to the resignation must be sufficiently extraordinary and egregious to overcome the normal motivation of a competent, diligent, and reasonable employee to remain on the job to earn a livelihood and to serve his or her employer.

The proper focus is on whether the resignation was coerced, not whether it was simply one rational option for the employee." (*Turner, supra,* 7 Cal.4th at p. 1246.)

- "In some circumstances, a single intolerable incident, such as a crime of violence against an employee by an employer, or an employer's ultimatum that an employee commit a crime, may constitute a constructive discharge. Such misconduct potentially could be found 'aggravated.' " (*Turner, supra,* 7 Cal.4th at p. 1247, fn. 3.)

- "The mere existence of illegal conduct in a workplace does not, without more, render employment conditions intolerable to a reasonable employee." (*Turner, supra,* 7 Cal.4th at p. 1254.)

- "[T]he standard by which a constructive discharge is determined is an objective one—the question is 'whether a reasonable person faced with the allegedly intolerable employer actions or conditions of employment would have no reasonable alternative except to quit.' " (*Turner, supra,* 7 Cal.4th at p. 1248, internal citations omitted.)

- "The length of time the plaintiff remained on the job may be one relevant factor in determining the intolerability of employment conditions from the standpoint of a reasonable person." (*Turner, supra,* 7 Cal.4th at p. 1254.)

Secondary Sources

- 4 Wilcox, California Employment Law (1989) *Liability for Wrongful Termination and Discipline*, § 60.04
- 1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 1997) Public Policy Violations, §§ 5.45–5.46
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.15, 249.50 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 100, *Wrongful Termination and Discipline*, Forms 20, 23 (Matthew Bender)
- Bancroft-Whitney's Cal. Civil Practice: Employment Litigation (1993) §§ 6:22–6:24

2433
Wrongful Discharge in Violation of Public Policy
Damages

If you find that [*name of defendant***] [discharged/constructively discharged] [***name of plaintiff***] in violation of public policy, then you must decide the amount of damages that [***name of plaintiff***] has proven [he/she] is entitled to recover, if any. To make that decision, you must:**

1. **Decide the amount that [***name of plaintiff***] would have earned up to today, including any benefits and pay increases; [and]**

2. **Add the present cash value of any future wages and benefits that [he/she] would have earned for the length of time the employment with [***name of defendant***] was reasonably certain to continue; [and]**

3. **[Add damages for [***describe any other damages that were allegedly caused by defendant's conduct, e.g., "emotional distress"***] if you find that [***name of defendant***]'s conduct was a substantial factor in causing that harm.]**

In determining the period that [*name of plaintiff***]'s employment was reasonably certain to have continued, you should consider such things as:**

(a) [*Name of plaintiff***]'s age, work performance, and intent regarding continuing employment with [***name of defendant***];**

(b) [*Name of defendant***]'s prospects for continuing the operations involving [***name of plaintiff***]; and**

(c) Any other factor that bears on how long [*name of plaintiff***] would have continued to work.**

DIRECTIONS FOR USE

This instruction should be followed by instruction 2407, *Breach of Employment Contract—Unspecified Term—Employee's Duty to Mitigate Damages,* in cases where the employee's duty to mitigate damages is at issue.

Other types of tort damages may be available to a plaintiff. For an instruction on emotional distress damages, see Instruction 3905A, *Physical Pain and Mental Suffering and Emotional Distress (Noneconomic Damages).* See punitive damages instructions in the damages section (instruction 3940, et seq.).

SOURCES AND AUTHORITY

- A tortious termination subjects the employer to " 'liability for compensatory and punitive damages under normal tort principles.' " (*Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1101 [4 Cal.Rptr.2d 874], internal citation omitted.)

- "The general rule is that the measure of recovery by a wrongfully discharged employee is the amount of salary agreed upon for the period of service, less the amount which the employer affirmatively proves the employee has earned or with reasonable effort might have earned from other employment." (*Parker v. Twentieth Century Fox-Film Corp.* (1970) 3 Cal.3d 176, 181 [89 Cal.Rptr. 737], internal citations omitted; see *Smith v. Brown-Forman Distillers Corp.* (1987) 196 Cal.App.3d 503, 518 [241 Cal.Rptr. 916].)

- "A plaintiff may recover for detriment reasonably certain to result in the future. While there is no clearly established definition of 'reasonable certainty,' evidence of future detriment has been held sufficient based on expert medical opinion which considered the plaintiff's particular circumstances and the expert's experience with similar cases." (*Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 995 [16 Cal.Rptr.2d 787], internal citations omitted, disapproved of on another ground in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664 [25 Cal.Rptr.2d 109].)

- "[I]t is our view that in an action for wrongful discharge, and pursuant to the present day concept of employer-employee relations, the term 'wages' should be deemed to include not only the periodic monetary earnings of the employee but also the other benefits to which he is entitled as a part of his compensation." (*Wise v. Southern Pac. Co.* (1970) 1 Cal.3d 600, 607 [83 Cal.Rptr. 202].)

- In determining the period that plaintiff's employment was reasonably certain to have continued, the trial court took into consideration plaintiff's " 'physical condition, his age, his propensity for hard work, his expertise in managing defendants' offices, the profit history of his operation, the foreseeability of the continued future demand for tax return service to small taxpayers.' " (*Drzewiecki v. H & R Block, Inc.* (1972) 24 Cal.App.3d 695, 705 [101 Cal.Rptr. 169].)

- Civil Code section 3294(a) allows a plaintiff to seek punitive damages "for the breach of an obligation not arising from contract" when the plaintiff can show by "clear and convincing evidence" that a defendant "has been guilty of oppression, fraud, or malice."

- Civil Code section 3294, subdivision (b) provides: "An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights and safety

of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation."

- In adding subdivision (b) to section 3294 in 1980, "[t]he drafters' goals were to avoid imposing punitive damages on employers who were merely negligent or reckless and to distinguish ordinary respondeat superior liability from corporate liability for punitive damages." (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572 [88 Cal.Rptr.2d 19], see *Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1150–1151 [74 Cal.Rptr.2d 510].)

Secondary Sources

- 4 Wilcox, California Employment Law (1989) *Liability for Wrongful Termination and Discipline*, § 60.08[2]
- 1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 1997) Public Policy Violations, §§ 5.64–5.67
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.18, 249.50–55, 249.80–81, 249.90 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 100, *Wrongful Termination and Discipline*, Forms 32, 44 (Matthew Bender)

VF-2400
Breach of Employment Contract—Unspecified Term

We answer the questions submitted to us as follows:

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, by words or conduct, 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.

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: $_____]

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 2401, *Breach of Employment Contract—Unspecified Term—Essential Factual Elements.*

Questions 3 and 4 should be deleted if substantial performance is not at issue.

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.

VF-2401
Breach of Employment Contract—Unspecified Term
Constructive Discharge

We answer the questions submitted to us as follows:

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, by words or conduct, 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.

5. **Did [***name of defendant***] intentionally create or knowingly 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: $_____]

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 each case.

This verdict form is based on Instruction 2402, *Breach of Employment Contract—Unspecified Term—Constructive Discharge—Essential Factual Elements.*

Questions 3 and 4 should be deleted if substantial performance is not at issue.

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.

VF-2402
Breach of Employment Contract—Specified Term

We answer the questions submitted to us as follows:

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.

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: $_____]

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 each case.

This verdict form is based on Instruction 2420, *Breach of Employment Contract—Specified Term—Essential Factual Elements.*

Questions 2 and 3 should be deleted if substantial performance is not at issue.

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.

VF-2403
Breach of Employment Contract—Specified Term
Good Cause Defense

We answer the questions submitted to us as follows:

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.

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: $_____]

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 each case. This verdict form is based on Instruction 2420, *Breach of Employment Contract—Specified Term—Essential Factual Elements*, and Instruction 2421, *Breach of Employment Contract—Specified Term—Good Cause Defense.*

Questions 2 and 3 should be deleted if substantial performance is not at issue.

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.

VF-2404
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 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 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.

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 fairly and 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: $_____]

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 2423, *Breach of the Implied Covenant of Good Faith and Fair Dealing.*

Questions 2 and 3 should be deleted if substantial performance is not at issue. 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.

VF-2405
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 agreement?**

___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.

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 legitimate 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: $_____]

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 2423, *Breach of the Implied Covenant of Good Faith and Fair Dealing,* and Instruction 2424, *Breach of the Implied Covenant of Good Faith and Fair Dealing—Good Faith Mistaken Belief Defense.*

Questions 2 and 3 should be deleted if substantial performance is not at issue.
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.

VF-2406
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 [*name of plaintiff***]'s [***insert alleged activity protected by public policy, e.g., "refusal to engage in price fixing"***] a motivating reason for [***name of defendant***]'s decision to [discharge/demote] [***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 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.

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 2430, *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.

VF-2407
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 requirement 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 requirement?**

___Yes **___No**

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Was the requirement 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 2431, *Constructive Discharge in Violation of Public Policy—Plaintiff Required to Violate Public Policy*.

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.

VF-2408
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***] intentionally create or knowingly permit these working 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 working conditions 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 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].

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 2432, *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.

2500
Fair Employment and Housing Act
Disparate Treatment—Essential Factual Elements
(Gov. Code, § 12940(a))

[*Name of plaintiff***] claims that [***name of defendant***] wrongfully discriminated against [him/her]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was [an employer/[***other covered entity***]];**

2. **That [***name of plaintiff***] [was an employee of [***name of defendant***]/applied to [***name of defendant***] for a job/[***describe other covered relationship to defendant***]];**

3. **That [***name of defendant***] [discharged/refused to hire/[***other adverse employment action***]] [***name of plaintiff***];**

4. **That [***name of plaintiff***]'s [***protected status—for example, race, gender, or age***] was a motivating reason for the [discharge/refusal to hire/[***other adverse employment action***]];**

5. **That [***name of plaintiff***] was harmed; and**

6. **That the [discharge/refusal to hire/[***other adverse employment action***]] was a substantial factor in causing [***name of plaintiff***]'s harm.**

DIRECTIONS FOR USE

This instruction is intended for use when a plaintiff alleges disparate treatment discrimination under the FEHA against an employer or other covered entity. Disparate treatment occurs when an employer treats an individual less favorably than others because of the individual's protected status. In contrast, disparate impact (the other general theory of discrimination) occurs when an employer has an employment practice that appears neutral but has an adverse impact on members of a protected group. For disparate impact claims, see instruction 2502, *Fair Employment and Housing Act—Disparate Impact—Essential Factual Elements.*

Elements that are uncontested should be deleted from this instruction.
If element 1 is given, the court may need to instruct the jury on the statutory definition of "employer" under the FEHA. Other covered entities under the FEHA include labor organizations, employment agencies, and apprenticeship training programs. (See Gov. Code, § 12940(a)–(d).)

For damages instructions, see applicable instructions on tort damages.

SOURCES AND AUTHORITY

- Government Code section 12940(a) provides that it is an unlawful employment practice "[f]or an employer, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, or sexual orientation of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment."

- Government Code section 12926(m) provides: " 'Race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation' includes a perception that the person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics."

- "[C]onceptually the theory of 'disparate treatment' … is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin.' " (*Mixon v. Fair Employment and Housing Com.* (1987) 192 Cal.App.3d 1306, 1317 [237 Cal.Rptr. 884], quoting *Teamsters v. United States* (1977) 431 U.S. 324, 335–336, fn. 15 [97 S.Ct. 1843, 52 L.Ed.2d 396].)

- "[W]hether or not a plaintiff has met his or her prima facie burden [under *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 [93 S.Ct. 1817, 36 L.Ed.2d 668]], and whether or not the defendant has rebutted the plaintiff's prima facie showing, are questions of law for the trial court, not questions of fact for the jury." (*Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 201 [48 Cal.Rptr.2d 448].)

- "[If] the case is submitted to the trier of fact, the intermediate burdens set forth in *McDonnell Douglas* will fall away, and the fact finder will have only to decide the ultimate issue of whether the employer's discriminatory intent was a motivating factor in the adverse employment decision." (*Caldwell, supra,* 41 Cal.App.4th at p. 205.)

- "The ultimate burden of persuasion on the issue of actual discrimination remains with the plaintiff." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 356 [100 Cal.Rptr.2d 352].)

- "While a complainant need not prove that [discriminatory] animus was the sole motivation behind a challenged action, he must prove by a preponderance of the

evidence that there was a ‘causal connection’ between the employee’s protected status and the adverse employment decision.” (*Mixon, supra*, 192 Cal.App.3d at p. 1319.)

- “Because of the similarity between state and federal employment discrimination laws, California courts look to pertinent federal precedent when applying our own statutes.” (*Guz, supra*, 24 Cal.4th at p. 354.)

- “We have held ‘that, in a civil action under the FEHA, all relief generally available in noncontractual actions … may be obtained.’ This includes injunctive relief.” (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 132 [87 Cal.Rptr.2d 132], internal citations omitted.)

- “The FEHA does not itself authorize punitive damages. It is, however, settled that California’s punitive damages statute, Civil Code section 3294, applies to actions brought under the FEHA … .” (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1147–1148 [74 Cal.Rptr.2d 510], internal citations omitted.)

Secondary Sources

- 8 Witkin, Summary of California Law (9th ed. 1988) Constitutional Law, §§ 756–757, pp. 252–254; *id.* (2002 supp.) at §§ 756–757, pp. 131–134
- 1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 2000) Discrimination Claims, §§ 2.61, 2.63, 2.66, pp. 50–51, 53, 55
- 3 Wilcox, California Employment Law (1989) *Civil Actions Under Equal Employment Opportunity Laws*, §§ 43.01, 43.01[2][b]
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.23[2] (Matthew Bender)
- Bancroft-Whitney’s California Civil Practice: Employment Litigation (2000 supp.) Discrimination in Employment, §§ 2.2, 2.20, pp. 20–21, 39–40

2501
Fair Employment and Housing Act
Affirmative Defense—Bona fide Occupational Qualification

[*Name of defendant***] claims that [his/her/its] decision to [discharge/[***other adverse employment action***]] [***name of plaintiff***] was lawful because [he/she/it] was entitled to consider [***protected status—for example, race, gender, or age***] as a job requirement. To succeed, [***name of defendant***] must prove all of the following:**

1. **That the job requirement was reasonably necessary for the operation of [***name of defendant***]'s business;**

2. **That [***name of defendant***] had a reasonable basis for believing that substantially all [***members of protected group***] are unable to safely and efficiently perform that job;**

3. **That it was impossible or highly impractical to consider whether each [applicant/employee] was able to safely and efficiently perform the job; and**

4. **That it was impossible or highly impractical for [***name of defendant***] to rearrange job responsibilities to avoid using [***protected status***] as a job requirement.**

DIRECTIONS FOR USE

An employer may assert the bona fide occupational qualification (BFOQ) defense where the employer has a practice that on its face excludes an entire group of individuals because of their protected status.

SOURCES AND AUTHORITY

- Government Code section 12940 provides that certain discriminatory employment practices are unlawful "unless based upon a bona fide occupational qualification."

- The Fair Employment and Housing Commission's regulations provide: "Where an employer … has a practice which on its face excludes an entire group of individuals on a basis enumerated in the [FEHA], … the employer … must prove that the practice is justified because all or substantially all of the excluded individuals are unable to safely and efficiently perform the job in question and because the essence of the business operation would otherwise be undermined." (Cal. Code Regs., tit. 2, § 7286.7(a).)

- Federal title VII provides that "a bona fide occupational qualification [is] reasonably necessary to the normal operation of [the] particular business or enterprise." (42 U.S.C. § 2000e-2(e)(1).)

- The BFOQ defense is a narrow exception to the general prohibition on discrimination. (*Bohemian Club v. Fair Employment & Housing Com.* (1986) 187 Cal.App.3d 1, 19 [231 Cal.Rptr. 769]; *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW v. Johnson Controls, Inc.* (1991) 499 U.S. 187, 201 [111 S.Ct. 1196, 113 L.Ed.2d 158].)

- " '[I]n order to rely on the bona fide occupational qualification exception an employer has the burden of proving that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved.' " (*Bohemian Club, supra*, 187 Cal.App.3d at p. 19, quoting *Weeks v. Southern Bell Telephone & Telegraph Co.* (5th Cir. 1969) 408 F.2d 228, 235.)

- "First, the employer must demonstrate that the occupational qualification is 'reasonably necessary to the normal operation of [the] particular business.' Secondly, the employer must show that the categorical exclusion based on [the] protected class characteristic is justified, i.e., that 'all or substantially all' of the persons with subject class characteristic fail to satisfy the occupational qualification." (*Johnson Controls, Inc. v. Fair Employment & Housing Com.* (1990) 218 Cal.App.3d 517, 540 [267 Cal.Rptr. 769], quoting *Weeks, supra*, 408 F.2d at p. 235.)

- "Even if an employer can demonstrate that certain jobs require members of one sex, the employer must also 'bear the burden of proving that because of the nature of the operation of the business they could not rearrange job responsibilities …' in order to reduce the BFOQ necessity." (*Johnson Controls, Inc.*, *supra*, 218 Cal.App.3d at p. 541, quoting *Hardin v. Stynchcomb* (11th Cir. 1982) 691 F.2d 1364, 1370–1371.)

- "Alternatively, the employer could establish that age was a legitimate proxy for the safety-related job qualifications by proving that it is 'impossible or highly impractical' to deal with the older employees on an individualized basis." (*Western Airlines, Inc. v. Criswell* (1985) 472 U.S. 400, 414–415, internal citation and footnote omitted.)

- "The Fair Employment and Housing Commission has interpreted the BFOQ defense in a manner incorporating all of the federal requirements necessary for its establishment. …¶ The standards of the Commission are … in harmony with federal law regarding the availability of a BFOQ defense." (*Bohemian Club, supra*, 187 Cal.App.3d at p. 19.)

- "By modifying 'qualification' with 'occupational,' Congress narrowed the term to qualifications that affect an employee's ability to do the job." (*International Union,*

United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, supra, 499 U.S. at p. 201.)

COMMENTARY

Element 1 is based on language used in section 703(e)(1) of title VII (42 U.S.C. § 2000e-2(e)(1)) and the Age Discrimination in Employment Act (29 U.S.C. § 623(f)(1)). In contrast, California Code of Regulations, title 2, section 7286.7(a) provides as an element of the BFOQ defense that "the essence of the business operation would otherwise be undermined." The language derived from federal statutes has been cited by California courts and may be easier for a lay juror to understand.

Secondary Sources

- 8 Witkin, Summary of California Law (9th ed. 1988) Constitutional Law, § 760, pp. 260–261; *id.* (2002 supp.) at § 760A, pp. 141–144
- 1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 2000) Sexual Harassment, §§ 3.27–3.28, pp. 133–135; Discrimination Claims, § 2.108, p. 83
- 2 Wilcox, California Employment Law (1989) *Civil Actions Under Equal Employment Opportunity Laws*, §§ 41.94[3], 41.108
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.54[4], 115.101 (Matthew Bender)
- Bancroft-Whitney's California Civil Practice: Employment Litigation (1993) Discrimination in Employment, § 2:80, pp. 100–101 (rel. 12/93)

2502
Fair Employment and Housing Act
Disparate Impact—Essential Factual Elements
(Gov. Code, § 12940(a))

[*Name of plaintiff***] claims that [***name of defendant***] had [an employment practice/a selection policy] that wrongfully discriminated against [him/her]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was [an employer/[***other covered entity***]];**

2. **That [***name of plaintiff***] [was an employee of [***name of defendant***]/applied to [***name of defendant***] for a job/[***other covered relationship to defendant***]];**

3. **That [***name of defendant***] had [an employment practice of [***describe practice***]/a selection policy of [***describe policy***]] that had a disproportionate adverse effect on [***describe protected group—for example, persons over the age of 40***];**

4. **That [***name of plaintiff***] is [***protected status***];**

5. **That [***name of plaintiff***] was harmed; and**

6. **That [***name of defendant***]'s [employment practice/selection policy] was a substantial factor in causing [***name of plaintiff***]'s harm.**

DIRECTIONS FOR USE

This instruction is intended for disparate impact employment discrimination claims. Disparate impact occurs when an employer has an employment practice that appears neutral but has an adverse impact on members of a protected group and cannot be justified by business necessity.

Uncontested elements should be deleted from this instruction.

If element 1 is given, the court may need to instruct the jury on the statutory definition of "employer" under the FEHA. Other covered entities under the FEHA include labor organizations, employment agencies, and apprenticeship training programs. (See Gov. Code, § 12940(a)–(d).)

The court should consider instructing the jury on the meaning of "adverse impact," tailored to the facts of the case and the applicable law.

SOURCES AND AUTHORITY

- Government Code section 12940(a) provides that it is an unlawful employment practice "[f]or an employer, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, or sexual orientation of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment."

- Government Code section 12941.1 expresses the Legislature's rejection of the opinion in *Marks v. Loral Corp.* (1997) 57 Cal.App.4th 30 [68 Cal.Rptr.2d 1] and states, in part: "The Legislature declares its intent that the use of salary as the basis for differentiating between employees when terminating employment may be found to constitute age discrimination if use of that criterion adversely impacts older workers as a group, and further declares its intent that the disparate impact theory of proof may be used in claims of age discrimination."

- The California Fair Employment and Housing Commission's regulations state: "Where an employer or other covered entity has a facially neutral practice which has an adverse impact (i.e., is discriminatory in effect), the employer or other covered entity must prove that there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business and that the challenged practice effectively fulfills the business purpose it is supposed to serve. The practice may still be impermissible where it is shown that there exists an alternative practice which would accomplish the business purpose equally well with a lesser discriminatory impact." (Cal. Code Regs., tit. 2, § 7286.7(b).)

- The California Fair Employment and Housing Commission's regulations state: "Any policy or practice of an employer or other covered entity which has an adverse impact on employment opportunities of individuals on a basis enumerated in the Act is unlawful unless the policy or practice is job-related. … A testing device or other means of selection which is facially neutral, but which has an adverse impact (as described in the Uniform Guidelines on Employee Selection Procedures (29 CFR 1607 (1978)) upon persons on a basis enumerated in the Act, is permissible only upon a showing that the selection practice is sufficiently related to an essential function of the job in question to warrant its use." (Cal. Code Regs., tit. 2, § 7287.4(a), (e).)

- "Prohibited discrimination may … be found on a theory of disparate impact, i.e., that regardless of motive, a *facially neutral* employer practice or policy, bearing no manifest relationship to job requirements, *in fact* had a disproportionate adverse effect on members of the protected class." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354, fn. 20 [100 Cal.Rptr.2d 352], internal citations omitted.)

- "A 'disparate impact' plaintiff … may prevail without proving intentional discrimination … [However,] a disparate impact plaintiff 'must not merely prove circumstances raising an inference of discriminatory impact; he must prove the discriminatory impact at issue.' " (*Ibarbia v. Regents of the University of California* (1987) 191 Cal.App.3d 1318, 1329–1330 [237 Cal.Rptr. 92], quoting *Lowe v. City of Monrovia* (9th Cir. 1985) 775 F.2d 998, 1004.)

- " 'To establish a prima facie case of discrimination, a plaintiff must show that the facially neutral employment practice had a significantly discriminatory impact. If that showing is made, the employer must then demonstrate that "any given requirement [has] a manifest relationship to the employment in question," in order to avoid a finding of discrimination … Even in such a case, however, the plaintiff may prevail, if he shows that the employer was using the practice as a mere pretext for discrimination.' " (*City and County of San Francisco v. Fair Employment and Housing Com.* (1987) 191 Cal.App.3d 976, 985 [236 Cal.Rptr. 716], quoting *Connecticut v. Teal* (1982) 457 U.S. 440, 446–447 [102 S.Ct. 2525, 73 L.Ed.2d 130], internal citation omitted.)

- Under federal title VII, a plaintiff may establish an unlawful employment practice based on disparate impact in one of two ways: (1) the plaintiff demonstrates that a defendant uses a particular employment practice that causes a disparate impact on the basis of a protected status, and the defendant "fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity"; or (2) the plaintiff demonstrates that there is an alternative employment practice with less adverse impact, and the defendant "refuses to adopt such alternative employment practice." (42 U.S.C. § 2000e-2(k)(1)(A).)

COMMENTARY

This instruction has been drafted with the understanding that disparate impact under FEHA is an emerging area of law.

Secondary Sources

- 1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 2000) Discrimination Claims, § 2.65, pp. 54–55
- 3 Wilcox, California Employment Law (1989) *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.21; *id,. Civil Actions Under Equal Employment Opportunity Laws*, § 43.01[2][c]
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.23[4] (Matthew Bender)
- Bancroft-Whitney's California Civil Practice: Employment Litigation (1993) Discrimination in Employment, § 2.23, pp. 35–37

2503
Fair Employment and Housing Act
Affirmative Defense—Business Necessity/Job Relatedness

[*Name of defendant***] claims that the [employment practice/selection policy] is lawful because it is necessary to [his/her/its] business. To succeed, [***name of defendant***] must prove both of the following:**

1. **That the purpose of the [employment practice/selection policy] is to operate the business safely and efficiently; and**

2. **That the [employment practice/selection policy] substantially accomplishes this business purpose.**

DIRECTIONS FOR USE

The defense of business necessity is available for disparate impact claims but may not be used as a defense against a claim of intentional discrimination.

Instruction 2504, *Fair Employment and Housing Act—Disparate Impact—Rebuttal to Business Necessity/Job Relatedness Defense*, must be given if defendant asserts the defense of business necessity to a disparate impact employment discrimination claim.

SOURCES AND AUTHORITY

- The California Fair Employment and Housing Commission's regulations provide: "Where an employer or other covered entity has a facially neutral practice which has an adverse impact (i.e., is discriminatory in effect), the employer or other covered entity must prove that there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business and that the challenged practice effectively fulfills the business purpose it is supposed to serve. The practice may still be impermissible where it is shown that there exists an alternative practice which would accomplish the business purpose equally well with a lesser discriminatory impact." (Cal. Code Regs., tit. 2, § 7286.7(b).)

- The California Fair Employment and Housing Commission's regulations provide: "Any policy or practice of an employer or other covered entity which has an adverse impact on employment opportunities of individuals on a basis enumerated in the Act is unlawful unless the policy or practice is job-related. … A testing device or other means of selection which is facially neutral, but which has an adverse impact (as described in the Uniform Guidelines on Employee Selection Procedures (29 CFR 1607 (1978)) upon persons on a basis enumerated in the Act, is permissible only upon

a showing that the selection practice is sufficiently related to an essential function of the job in question to warrant its use." (Cal. Code Regs., tit. 2, § 7287.4(a), (e).)

- "In order to meet its burden the [employer] must demonstrate a business necessity for use of the [discriminatory employment practice]. … 'The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any [discriminatory] impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact.' " (*City and County of San Francisco v. Fair Employment and Housing Com.* (1987) 191 Cal.App.3d 976, 989–990 [236 Cal.Rptr. 716], quoting *Robinson v. Lorillard Corp.* (4th Cir. 1971) 444 F.2d 791, 798.)

- The federal Civil Rights Act of 1991 states that one of its purposes is "to codify the concepts of 'business necessity' and 'job related' enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) [91 S.Ct. 849, 28 L.Ed.2d 158], and in other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) [109 S.Ct. 2115, 104 L.Ed.2d 733]." (Civil Rights Act of 1991, Pub.L. No. 102-166, § 3(2) (Nov. 21, 1991) 105 Stat. 1071, 1071.)

- Federal title VII provides that while business necessity is a defense to a claim of disparate impact discrimination, "[a] demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination." (42 U.S.C. § 2000e-2(k)(2).)

- "The touchstone is business necessity. If an employment practice which operates to exclude [a protected group] cannot be shown to be related to job performance, the practice is prohibited … Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question." (*Griggs, supra,* 401 U.S. at pp. 431–432.)

- "[T]he employer may defend its policy or practice by proving that it is 'job related for the position in question and consistent with business necessity.' Though the key terms have been used since *Griggs,* their meaning remains unclear." (1 Lindemann and Grossman, Employment Discrimination Law (3d ed. 1996) Adverse Impact, p. 106, footnotes omitted.)

- "[T]here is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business for it to pass muster: this degree of scrutiny would be almost impossible for most employers to meet ... " (*Wards Cove Packing Co., Inc., supra,* 490 U.S. at p. 659.) [Note: This portion of *Wards Cove* may have been superseded by the Civil Rights Act of 1991.]

Secondary Sources

- 1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 2000) Discrimination Claims, § 2.65, pp. 54–55
- 3 Wilcox, California Employment Law (1989) *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.21[4], 41.95[1]; *id. Civil Actions Under Equal Employment Opportunity Laws* § 43.01[2][c]
- 1 Lindemann and Grossman, Employment Discrimination Law (3d ed. 1996) Adverse Impact, pp. 106–110; *id.* (2000 supp.) at pp. 62–64
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.23[4][d], 115.54[5], 115.102–115.103 (Matthew Bender)
- Bancroft-Whitney's California Civil Practice: Employment Litigation (1993) Discrimination in Employment, § 2.25, pp. 38–40

2504
Fair Employment and Housing Act
Disparate Impact—Rebuttal to Business Necessity/Job Relatedness Defense

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If [*name of defendant***] proves that the [employment practice/selection policy] is necessary to [his/her/its] business, then the [employment practice/selection policy] is lawful unless [***name of plaintiff***] proves both of the following:**

1. **That there was an alternative [employment practice/selection policy] that would have accomplished the business purpose equally well; and**

2. **That the alternative [employment practice/selection policy] would have had less adverse impact on [***describe members of protected group—for example, "persons over the age of 40"***].**

DIRECTIONS FOR USE

Federal title VII requires a plaintiff to demonstrate that the employer refused to adopt the alternative employment practice (see 42 U.S.C. § 2000e-2(K)(1)(A)(ii)). There are no published court opinions determining if a similar requirement exists under California law.

This instruction must be given if defendant asserts the defense of business necessity to a disparate impact employment discrimination claim. (See instruction 2503, *Fair Employment and Housing Act—Affirmative Defense—Business Necessity/Job Relatedness*.)

SOURCES AND AUTHORITY

- " 'The test [of the business necessity defense] is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any [discriminatory] impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential [discriminatory] impact.' " (*City and County of San Francisco v. Fair Employment and Housing Com.* (1987) 191 Cal.App.3d 976, 989–990 [236 Cal.Rptr. 716internal citation omitted.)

- The California Fair Employment and Housing Commission's regulations provide: "Where an employer or other covered entity has a facially neutral practice which has an adverse impact (i.e., is discriminatory in effect), the employer or other covered

entity must prove that there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business and that the challenged practice effectively fulfills the business purpose it is supposed to serve. The practice may still be impermissible where it is shown that there exists an alternative practice which would accomplish the business purpose equally well with a lesser discriminatory impact." (Cal. Code Regs., tit. 2, § 7286.7(b).)

- "[T]he standards established by the FEHC for evaluating a facially neutral selection criterion which has a discriminatory impact on a protected group are identical to federal standards under Title VII." (*City and County of San Francisco, supra*, 191 Cal.App.3d at p. 986.)

- Under federal title VII, a plaintiff may establish an unlawful employment practice based on disparate impact in one of two ways: (1) the plaintiff demonstrates that a defendant uses a particular employment practice that causes a disparate impact on the basis of a protected status, and the defendant "fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity"; or (2) the plaintiff demonstrates that there is an alternative employment practice with less adverse impact, and the defendant "refuses to adopt such alternative employment practice." (42 U.S.C. § 2000e-2(k)(1)(A).)

- "If an employer does then meet the burden of proving that its tests are 'job related,' it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable [discriminatory] effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.' " (*Albemarle Paper Co. v. Moody* (1975) 422 U.S. 405, 425 [95 S.Ct. 2362, 45 L.Ed.2d 280], internal citation omitted.)

<u>Secondary Sources</u>

- 3 Wilcox, California Employment Law (1989) *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.21[2]; *id.*, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01[2][d]
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.23[2][c] (Matthew Bender)
- Bancroft-Whitney's California Civil Practice: Employment Litigation (1993) Discrimination in Employment, § 2.26, p. 40

2505
Fair Employment and Housing Act
Retaliation (Gov. Code, § 12940(h))

[*Name of plaintiff***] claims that [***name of defendant***] retaliated against [him/her] for [***describe activity protected by the FEHA***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [***describe protected activity***];**

2. **That [***name of defendant***] [discharged/demoted/[***other adverse employment action***]] [***name of plaintiff***];**

3. **That [***name of plaintiff***]'s [***describe protected activity***] was a motivating reason for [***name of defendant***]'s decision to [discharge/ demote/[***other adverse employment action***]] [***name of plaintiff***];**

4. **That [***name of plaintiff***] was harmed; and**

5. **That [***name of defendant***]'s retaliatory conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

DIRECTIONS FOR USE

This instruction must be modified to describe the protected activity in question. Government Code section 12940(h) provides that it is unlawful to retaliate against a person "because the person has opposed any practices forbidden under [Government Code sections 12900 through 12966] or because the person has filed a complaint, testified, or assisted in any proceeding under [the FEHA]."

SOURCES AND AUTHORITY

- Government Code section 12940(h) provides that it is an unlawful employment practice "[f]or any employer, labor organization, employment agency, or person to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part."

- The FEHA defines a "person" as "one or more individuals, partnerships, associations, corporations, limited liability companies, legal representatives, trustees, trustees in bankruptcy, and receivers or other fiduciaries." (Gov. Code, § 12925(d).)

- The Fair Employment and Housing Commission's regulations provide: "It is unlawful for an employer or other covered entity to demote, suspend, reduce, fail to hire or consider for hire, fail to give equal consideration in making employment decisions, fail to treat impartially in the context of any recommendations for subsequent employment which the employer or other covered entity may make, adversely affect working conditions or otherwise deny any employment benefit to an individual because that individual has opposed practices prohibited by the Act or has filed a complaint, testified, assisted or participated in any manner in an investigation, proceeding, or hearing conducted by the Commission or Department or their staffs." (Cal. Code Regs, tit. 2, § 7287.8(a).)

- "To establish a prima facie case of retaliation, 'the plaintiff must show that he engaged in a protected activity, his employer subjected him to adverse employment action, and there is a causal link between the protected activity and the employer's action.' " (*Iwekaogwu v. City of Los Angeles* (1999) 75 Cal.App.4th 803, 814 [89 Cal.Rptr.2d 505], quoting *Flait v. North American Watch Corp.* (1992) 3 Cal.App.4th 467, 476 [4 Cal.Rptr.2d 522].)

- "The employment action must be both detrimental and substantial. … We must analyze [plaintiff's] complaints of adverse employment actions to determine if they result in a material change in the terms of her employment, impair her employment in some cognizable manner, or show some other employment injury. … [W]e do not find that [plaintiff's] complaint alleges the necessary material changes in the terms of her employment to cause employment injury. Most of the actions upon which she relies were one time events. … The other allegations … are not accompanied by facts which evidence both a substantial and detrimental effect on her employment." (*Thomas v. Department of Corrections* (2000) 77 Cal.App.4th 507, 511–512 [91 Cal.Rptr.2d 770], internal citations omitted.)

- "The retaliatory motive is 'proved by showing that plaintiff engaged in protected activities, that his employer was aware of the protected activities, and that the adverse action followed within a relatively short time thereafter.' 'The causal link may be established by an inference derived from circumstantial evidence, "such as the employer's knowledge that the [employee] engaged in protected activities and the proximity in time between the protected action and allegedly retaliatory employment decision [citation]." ' " (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 615 [262 Cal.Rptr. 842], internal citations omitted.)

- "We conclude a supervisor is a 'person' subject to liability under FEHA. … As to supervisors, we conclude the language of FEHA is unambiguous in imposing personal liability for harassment or retaliation in violation of FEHA." (*Page v. Superior Court* (1995) 31 Cal.App.4th 1206, 1208, 1212 [37 Cal.Rptr.2d 529].)

Secondary Sources

- 8 Witkin, Summary of California Law (9th ed. 1988) Constitutional Law, § 763, p. 265; *id.* (2002 supp.) at § 763, pp. 168–169
- 1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 1993) Discrimination Claims, §§ 2.83–2.88, pp. 68–72; *id.* (2001 supp.) at §§ 2:84–2:88, pp. 89–96
- 2 Wilcox, California Employment Law (1989) *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.131
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.37, 115.94 (Matthew Bender)
- Bancroft-Whitney's California Civil Practice: Employment Litigation (1993) Discrimination in Employment, §§ 2:70–2:71, pp. 90–92 (rel. 12/93); *id.* (2001 supp.) at §§ 2:70–2:71, pp. 78–81

2506
Fair Employment and Housing Act
Affirmative Defense—After-Acquired Evidence

[*Name of defendant***] claims that [he/she/it] would have discharged [***name of plaintiff***] anyway if [he/she/it] had known that [***name of plaintiff***] [***describe misconduct***]. You must decide whether [***name of defendant***] has proved all of the following:**

1. **That [***name of plaintiff***] [***describe misconduct***];**

2. **That [***name of plaintiff***]'s misconduct was sufficiently severe that [***name of defendant***] would have discharged [him/her] because of that misconduct alone had [***name of defendant***] known of it; and**

3. **That [***name of defendant***] would have discharged [***name of plaintiff***] for [his/her] misconduct as a matter of settled company policy.**

DIRECTIONS FOR USE

The after-acquired-evidence doctrine is an equitable defense that is determined by the court based on the facts of the case. This instruction assists the judge where the facts are in dispute. (See, *e.g.*, *Thompson v. Tracor Flight Systems, Inc.* (2001) 86 Cal.App.4th 1156, 1173 [104 Cal.Rptr.2d 95].)

SOURCES AND AUTHORITY

- "In general, the after-acquired-evidence doctrine shields an employer from liability or limits available relief where, after a termination, the employer learns for the first time about employee wrongdoing that would have led to the discharge in any event. Employee wrongdoing in after-acquired-evidence cases generally falls into one of two categories: (1) misrepresentations on a resume or job application; or (2) posthire, on-the-job misconduct." (*Camp v. Jeffer, Mangels, Butler & Marmaro* (1995) 35 Cal.App.4th 620, 632 [41 Cal.Rptr.2d 329].)

- "The after-acquired-evidence doctrine serves as a complete or partial defense to an employee's claim of wrongful discharge … To invoke this doctrine, '… the employer must establish "that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it" … [T]he employer … must show that such a firing would have taken place as a matter of "settled" company policy.' " (*Murillo v. Rite Stuff Foods, Inc.* (1998) 65 Cal.App.4th 833, 842, 845–846 [77 Cal.Rptr.2d 12], internal citations omitted.)

- "Where an employer seeks to rely upon after-acquired evidence of wrongdoing, it must first establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge." (*McKennon v. Nashville Banner Publishing Co.* (1995) 513 U.S. 352, 362–363 [115 S.Ct. 879, 130 L.Ed.2d 852].)

- "Courts must tread carefully in applying the after-acquired-evidence doctrine to discrimination claims. … Where, as here, the discriminatory conduct was pervasive during the term of employment, therefore, it would not be sound public policy to bar recovery for injuries suffered while employed. In applying the after-acquired-evidence doctrine, the equities between employer and employee can be balanced by barring all portions of the employment discrimination claim tied to the employee's discharge." (*Murillo, supra*, 65 Cal.App.4th at pp. 849–850.)

- "As the Supreme Court recognized in *McKennon*, the use of after-acquired evidence must 'take due account of the lawful prerogatives of the employer in the usual course of its business and the corresponding equities that it has arising from the employee's wrongdoing.' We appreciate that the facts in *McKennon* … presented a situation where balancing the equities should permit a finding of employer liability—to reinforce the importance of antidiscrimination laws—while limiting an employee's damages—to take account of an employer's business prerogatives. However, the equities compel a different result where an employee who is disqualified from employment by government-imposed requirements nevertheless obtains a job by misrepresenting the pertinent qualifications. In such a situation, the employee should have no recourse for an alleged wrongful termination of employment." (*Camp, supra*, 35 Cal.App.4th at pp. 637–638, internal citation omitted.)

- "We decline to adopt a blanket rule that material falsification of an employment application is a complete defense to a claim that the employer, while still unaware of the falsification, terminated the employment in violation of the employee's legal rights." (*Cooper v. Rykoff-Sexton, Inc.* (1994) 24 Cal.App.4th 614, 617 [29 Cal.Rptr.2d 642].)

- "The doctrine [of after-acquired evidence] is the basis for an equitable defense related to the traditional defense of 'unclean hands' … [¶] In the present case, there were conflicts in the evidence concerning respondent's actions, her motivations, and the possible consequences of her actions within appellant's disciplinary system. The trial court submitted those factual questions to the jury for resolution and then used the resulting special verdict as the basis for concluding appellant was not entitled to equitable reduction of the damages award." (*Thompson, supra*, 86 Cal.App.4th at p. 1173.)

<u>Secondary Sources</u>

- 2 Witkin, Summary of California Law (2002 supp.) Agency and Employment, § 164A, pp. 59–62

- 1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 2000) Discrimination Claims, § 2.107, pp. 82–83; *id.*, Defending the Action, at § 10.88, pp. 604–605
- 2 Wilcox, California Employment Law (1989) *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.92
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.54[2] (Matthew Bender)
- Bancroft-Whitney's California Civil Practice: Employment Litigation (2001 supp.) Discrimination in Employment, § 2.82.2, pp. 87–89

2520
Fair Employment and Housing Act
Quid pro quo Sexual Harassment—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] subjected [him/her] to sexual harassment. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [was an employee of [***name of defendant***]/applied to [***name of defendant***] for a job/was a person providing services pursuant to a contract with [***name of defendant***]];**

2. **That [***name of alleged harasser***] made unwanted sexual advances to [***name of plaintiff***] or engaged in other unwanted verbal or physical conduct of a sexual nature;**

3. **[That job benefits were conditioned, by words or conduct, on [***name of plaintiff***]'s acceptance of [***name of alleged harasser***]'s sexual advances or conduct;]**

   [or]

   [That employment decisions affecting [*name of plaintiff***] were made based on [his/her] acceptance or rejection of [***name of alleged harasser***]'s sexual advances or conduct;]**

4. **That at the time of [his/her] conduct, [***name of alleged harasser***] was a supervisor or agent for [***name of defendant***];**

5. **That [***name of plaintiff***] was harmed; and**

6. **That [***name of alleged harasser***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

DIRECTIONS FOR USE

Employers may be liable for the conduct of certain agents (see Gov. Code §§ 12925(d), 12926(d), and 12940(j)(1), and *Reno v. Baird* (1998) 18 Cal.4th 640, 648 [76 Cal.Rptr.2d 499] [California Supreme Court declined to express opinion whether "agent" language in the FEHA merely incorporates respondeat superior principles or has some other meaning]).

SOURCES AND AUTHORITY

- Government Code section 12940(j) provides that it is an unlawful employment practice for "an employer … or any other person, because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation, to harass an employee, an applicant, or a person providing services pursuant to a contract. Harassment of an employee, an applicant, or a person providing services pursuant to a contract by an employee other than an agent or supervisor shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action. An entity shall take all reasonable steps to prevent harassment from occurring. Loss of tangible job benefits shall not be necessary in order to establish harassment."

- Government Code section 12940(j)(4)(A) provides that for purposes of claims of harassment under the FEHA, " 'employer' means any person regularly employing one or more persons or regularly receiving the services of one or more persons providing services pursuant to a contract, or any person acting as an agent of an employer, directly or indirectly, the state, or any political or civil subdivision of the state, and cities." (Gov. Code, § 12940(j)(4)(A).)

- Government Code section 12940(j)(5) provides that for purposes of claims of harassment under the FEHA, "a person providing services pursuant to a contract" means a person who meets all of the following criteria:

  (A) The person has the right to control the performance of the contract for services and discretion as to the manner of performance.
  (B) The person is customarily engaged in an independently established business.
  (C) The person has control over the time and place the work is performed, supplies the tools and instruments used in the work, and performs work that requires a particular skill not ordinarily used in the course of the employer's work.

- The Fair Employment and Housing Commission's regulations provide: "Sexual harassment is unlawful as defined in Section 7287.6(b), and includes verbal, physical, and visual harassment, as well as unwanted sexual advances." (Cal. Code Regs, tit. 1, § 7291.1(f)(1).)

- "Courts have generally recognized two distinct categories of sexual harassment claims: quid pro quo and hostile work environment. Quid pro quo harassment occurs when submission to sexual conduct is made a condition of concrete employment benefits." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 607 [262 Cal.Rptr. 842], internal citation omitted.)

- "A cause of action for quid pro quo harassment involves the behavior most commonly regarded as sexual harassment, including, e.g., sexual propositions,

unwarranted graphic discussion of sexual acts, and commentary on the employee's body and the sexual uses to which it could be put. To state a cause of action on this theory, it is sufficient to allege that a term of employment was expressly or impliedly conditioned upon acceptance of a supervisor's unwelcome sexual advances." (*Mogilefsky v. Superior Court* (1993) 20 Cal.App.4th 1409, 1414 [26 Cal.Rptr.2d 116], internal citations omitted.)

- "Cases based on threats which are carried out are referred to often as quid pro quo cases, as distinct from bothersome attentions or sexual remarks that are sufficiently severe or pervasive to create a hostile work environment. The terms quid pro quo and hostile work environment are helpful, perhaps, in making a rough demarcation between cases in which threats are carried out and those where they are not or are absent altogether, but beyond this are of limited utility … ¶ We do not suggest the terms quid pro quo and hostile work environment are irrelevant to Title VII litigation. To the extent they illustrate the distinction between cases involving a threat which is carried out and offensive conduct in general, the terms are relevant when there is a threshold question whether a plaintiff can prove discrimination in violation of Title VII. When a plaintiff proves that a tangible employment action resulted from a refusal to submit to a supervisor's sexual demands, he or she establishes that the employment decision itself constitutes a change in the terms and conditions of employment that is actionable under Title VII. For any sexual harassment preceding the employment decision to be actionable, however, the conduct must be severe or pervasive." (*Burlington Industries, Inc. v. Ellerth* (1998) 524 U.S. 742, 751, 753–754 [118 S.Ct. 2257, 141 L.Ed.2d 633].)

<u>Secondary Sources</u>

- 1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 2000) Sexual Harassment, §§ 3.14, 3.31–3.35, pp. 123–124, 136–140
- 2 Wilcox, California Employment Law (1989) *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.81[1][a], 41.81[6]
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.36[5][b] (Matthew Bender)
- Bancroft-Whitney's California Civil Practice: Employment Litigation (1993) Discrimination in Employment, § 2.52, pp. 71–72 (rel. 12/93); *id.* (2001 supp.) at § 2.52, pp. 67–69

2521
Fair Employment and Housing Act
Hostile Work Environment Harassment—Essential Factual Elements
Employer or Entity Defendant (Gov. Code, § 12940(j))

[*Name of plaintiff***] claims that that [he/she] was subjected to harassment based on [his/her] [***describe protected status—for example, race, gender, or age***], in [his/her] workplace at [***name of defendant***], causing a hostile or abusive work environment. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [was an employee of [***name of defendant***]/applied to [***name of defendant***] for a job/was a person providing services pursuant to a contract with [***name of defendant***]];**

2. **That [***name of plaintiff***] was subjected to unwanted harassing conduct because [***he/she***] [was/was believed to be/was associated with a person who was/was associated with a person who was believed to be] [***protected status***];**

3. **That the harassing conduct was so severe, widespread, or persistent that a reasonable [***describe member of protected group***] in [***name of plaintiff***]'s circumstances would have considered the work environment to be hostile or abusive;**

4. **That [***name of plaintiff***] considered the work environment to be hostile or abusive;**

5. **[***Select applicable basis of defendant's liability:***]**

   [That a supervisor with actual [or reasonably perceived] authority over [*name of plaintiff***] engaged in the conduct;]**

   [That [*name of defendant***] [or [his/her/its] supervisors or agents] knew or should have known of the conduct and failed to take immediate and appropriate corrective action;]**

6. **That [***name of plaintiff***] was harmed; and**

7. **That the conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

DIRECTIONS FOR USE

This instruction is intended for use when the defendant is an employer or other entity covered by the FEHA. For an individual defendant, such as the alleged harasser or plaintiff's co-worker, see instruction 2522, *Fair Employment and Housing Act—Hostile Work Environment Harassment—Essential Factual Elements—Individual Defendant*.

Element 5 must be modified to select the applicable basis of liability: (a) vicarious liability for a supervisor's harassing conduct, or (b) ratification/respondeat superior.

Under Federal Title VII, an employer's liability may be based on the conduct of an official "within the class of an employer organization's officials who may be treated as the organization's proxy." (*Faragher v. City of Boca Raton* (1998) 524 U.S. 775, 790 [118 S.Ct. 2275; 1312 L.Ed.2d 662].)

Employers may be liable for the conduct of certain agents (see Gov. Code, §§ 12925(d), 12926(d), and 12940(j)(1) and *Reno v. Baird* (1998) 18 Cal.4th 640, 648 [76 Cal.Rptr.2d 499] [California Supreme Court declined to express opinion whether "agent" language in the FEHA merely incorporates respondeat superior principles or has some other meaning]).

SOURCES AND AUTHORITY

- Government Code section 12940(j) provides that it is an unlawful employment practice for "an employer … or any other person, because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation, to harass an employee, an applicant, or a person providing services pursuant to a contract. Harassment of an employee, an applicant, or a person providing services pursuant to a contract by an employee other than an agent or supervisor shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action. An entity shall take all reasonable steps to prevent harassment from occurring. Loss of tangible job benefits shall not be necessary in order to establish harassment."

- Government Code section 12940(j)(4)(A) provides: "For purposes of this subdivision only, 'employer' means any person regularly employing one or more persons or regularly receiving the services of one or more persons providing services pursuant to a contract, or any person acting as an agent of an employer, directly or indirectly, the state, or any political or civil subdivision of the state, and cities."

- Government Code section 12940(j)(5) provides that for purposes of claims of harassment under the FEHA, "a person providing services pursuant to a contract" means a person who meets all of the following criteria:

(A) The person has the right to control the performance of the contract for services and discretion as to the manner of performance.
(B) The person is customarily engaged in an independently established business.
(C) The person has control over the time and place the work is performed, supplies the tools and instruments used in the work, and performs work that requires a particular skill not ordinarily used in the course of the employer's work.

- Government Code section 12940(j)(4)(C) provides, in part: " '[H]arassment' because of sex includes sexual harassment, gender harassment, and harassment based on pregnancy, childbirth, or related medical conditions." (Gov. Code, § 12940(j)(4)(C).)

- "The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)

- "[A]lthough no California courts have directly addressed racial harassment in the workplace, the California courts have applied the federal threshold standard to claims of sexual harassment and held that FEHA is violated when the harassment was 'sufficiently severe or pervasive to alter the conditions of the victim's employment.' " (*Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 464–465 [79 Cal.Rptr.2d 33], internal citations and footnote omitted.)

- "When the workplace is permeated with discriminatory intimidation, ridicule and insult that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,' the law is violated." (*Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 Cal.App.4th 397, 409 [27 Cal.Rptr.2d 457], internal citation omitted.)

- "[N]ot every utterance of a racial slur in the workplace violates the FEHA or Title VII. As the United States Supreme Court has recognized in the context of sexual harassment: '[N]ot all workplace conduct that may be described as "harassment" affects a "term, condition, or privilege" of employment within the meaning of Title VII. For sexual harassment to be actionable, it must be sufficiently severe or pervasive "to alter the conditions of [the victim's] employment and create an abusive working environment." ' … 'Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.' … California courts have adopted the same standard

in evaluating claims under the FEHA." (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 129–130 [87 Cal.Rptr.2d 132], internal citations omitted.)

- "If an employee other than an agent or supervisor commits the harassment, and the employer takes immediate and appropriate corrective action when it becomes or reasonably should become aware of the conduct—for example, when the victim or someone else informs the employer—there simply is no 'unlawful employment practice' that the FEHA governs." (*Carrisales v. Dept. of Corrections* (1999) 21 Cal.4th 1132, 1136 [90 Cal.Rptr.2d 804], called into doubt on other grounds by statute.)

- Under Federal Title VII, an employer's liability may be based on the conduct of an official "within the class of an employer organization's officials who may be treated as the organization's proxy." (*Faragher v. City of Boca Raton* (1998) 524 U.S. 775, 790 [118 S.Ct. 2275; 141 L.Ed.2d 662].)

- Government Code section 12940(i) provides that it is an unlawful employment practice "[f]or any person to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under this part, or to attempt to do so."

- Government Code section 12926(m) provides: " 'Race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation' includes a perception that the person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics."

<u>Secondary Sources</u>

- 2 Witkin, Summary of California Law (9th ed. 1988) Agency and Employment, § 310, pp. 304–305; *id.* (2002 supp.) at § 310, pp. 301–302
- 1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 2000) Discrimination Claims, §§ 2.68, 2.75, pp. 56, 60; *id.*, Sexual Harassment, at §§ 3.1, 3.17, 3.36, pp. 116, 125–126, 140–141
- 2 Wilcox, California Employment Law (1989) *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.80[1][a], 41.81[1][b]; *id.*, Civil Actions Under Equal Employment Opportunity Laws, at § 43.01[10][g][i]
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.36 (Matthew Bender)
- Bancroft-Whitney's California Civil Practice: Employment Litigation (1993) Discrimination in Employment, §§ 2.51, 2.53, pp. 68–70, 72–75 (rel. 12/93); *id.* (2001 supp.) at §§ 2.51, 2.53, pp. 61–66, 69–73

2522
Fair Employment and Housing Act
Hostile Work Environment Harassment—Essential Factual Elements
Individual Defendant (Gov. Code, § 12940(j))

[*Name of plaintiff***] claims that [***name of defendant***] subjected [him/her] to harassment based on [***describe protected status—for example, race, gender, or age***], causing a hostile or abusive work environment. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [was an employee of [***name of employer***]/applied to [***name of employer***] for a job/was a person providing services pursuant to a contract with [***name of employer***]];**

2. **That [***name of plaintiff***] was subjected to unwanted harassing conduct because [***he/she***] [was/was believed to be/was associated with a person who was/was associated with a person who was believed to be] [***protected status***];**

3. **That the harassing conduct was so severe, widespread, or persistent that a reasonable [***describe member of protected group***] in [***name of plaintiff***]'s circumstances would have considered the work environment to be hostile or abusive;**

4. **That [***name of plaintiff***] considered the work environment to be hostile or abusive;**

5. **That [***name of defendant***] participated in the harassing conduct [or assisted or encouraged it];**

6. **That [***name of plaintiff***] was harmed; and**

7. **That the conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

SOURCES AND AUTHORITY

- Government Code section 12940(j) provides that it is an unlawful employment practice for "an employer … or any other person, because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation, to harass an employee, an applicant, or a person providing services pursuant to a contract. Harassment of an employee, an applicant, or a person providing services pursuant to a contract by an

employee other than an agent or supervisor shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action. An entity shall take all reasonable steps to prevent harassment from occurring. Loss of tangible job benefits shall not be necessary in order to establish harassment."

- Government Code section 12940(j)(4)(A) provides, in part: "For purposes of this subdivision only, 'employer' means any person regularly employing one or more persons or regularly receiving the services of one or more persons providing services pursuant to a contract, or any person acting as an agent of an employer, directly or indirectly, the state, or any political or civil subdivision of the state, and cities."

- Government Code section 12940(j)(5) provides that for purposes of claims of harassment under the FEHA, "a person providing services pursuant to a contract" means a person who meets all of the following criteria:

  (A) The person has the right to control the performance of the contract for services and discretion as to the manner of performance.
  (B) The person is customarily engaged in an independently established business.
  (C) The person has control over the time and place the work is performed, supplies the tools and instruments used in the work, and performs work that requires a particular skill not ordinarily used in the course of the employer's work.

- "The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)

- Government Code section 12940(j)(3), effective January 1, 2001, provides: "An employee of an entity … is personally liable for any harassment prohibited by this section that is perpetrated by the employee, regardless of whether the employer or covered entity knows or should have known of the conduct and fails to take immediate and appropriate corrective action."

- "When the workplace is permeated with discriminatory intimidation, ridicule and insult that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,' the law is violated." (*Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 Cal.App.4th 397, 409 [27 Cal.Rptr.2d 457], internal citation omitted.)

- "[W]e conclude a nonharassing supervisor, who fails to take action to prevent sexual harassment, is not personally liable for sexual harassment under the Fair Employment and Housing Act (FEHA)." (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1322 [58 Cal.Rptr.2d 308].)

- Government Code section 12940(i) provides that it is an unlawful employment practice "[f]or any person to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under this part, or to attempt to do so."

- "A supervisor who, without more, fails to take action to prevent sexual harassment of an employee is not personally liable as an aider and abettor of the harasser, an aider and abettor of the employer or an agent of the employer." (*Fiol*, *supra*, 50 Cal.App.4th at p. 1331.)

- "[A]lthough no California cases have directly addressed racial harassment in the workplace, the California courts have applied the federal threshold standard to claims of sexual harassment and held that FEHA is violated when the harassment was 'sufficiently severe or pervasive to alter the conditions of the victim's employment.' " (*Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 464–465 [79 Cal.Rptr.2d 33], internal citations and footnote omitted.)

- Government Code section 12926(m) provides: " 'Race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation' includes a perception that the person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics."

<u>Secondary Sources</u>

- 2 Witkin, Summary of California Law (9th ed. 1988) Agency and Employment, § 310, pp. 304–305; *id.* (2002 supp.) at § 310, pp. 301–302
- 1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 2000) Discrimination Claims, §§ 2.68, 2.75, pp. 56, 60; *id.*, Sexual Harassment, at §§ 3.1, 3.17, 3.36, pp. 116, 125–126, 140–141
- 2 Wilcox, California Employment Law (1989) *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.80[1][a], 41.81[1][b]; *id.*, *Civil Actions Under Equal Employment Opportunity Laws*, at § 43.01[10][g][i]
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.36 (Matthew Bender)
- Bancroft-Whitney's California Civil Practice: Employment Litigation (1993) Discrimination in Employment, §§ 2.51, 2.53, pp. 68–70, 72–75 (rel. 12/93); *id.* (2001 supp.) at §§ 2.51, 2.53, pp. 61–66, 69–73

2523
Fair Employment and Housing Act
"Harassing Conduct" Explained

Harassing conduct may include the following:

a. Verbal harassment, such as obscene language, demeaning comments, slurs, [or] threats [or] [*describe other form of verbal harassment***];**

b. Physical harassment, such as unwanted touching, assault, or physical interference with normal work or movement; [or]

c. Visual harassment, such as offensive posters, objects, cartoons, or drawings; [or]

[d. Unwanted sexual advances.] [or]

[e. [*Describe other form of harassment if appropriate***].]**

SOURCES AND AUTHORITY

- Government Code section 12940(j) provides that it is an unlawful employment practice for "an employer … or any other person, because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation, to harass an employee, an applicant, or a person providing services pursuant to a contract."

- The Fair Employment and Housing Commission's regulations provide:

  "Harassment" includes but is not limited to:
  (A) Verbal harassment, e.g., epithets, derogatory comments or slurs on a basis enumerated in the Act;
  (B) Physical harassment, e.g., assault, impeding or blocking movement, or any physical interference with normal work or movement, when directed at an individual on a basis enumerated in the Act;
  (C) Visual forms of harassment, e.g., derogatory posters, cartoons, or drawings on a basis enumerated in the Act; or
  (D) Sexual favors, e.g., unwanted sexual advances which condition an employment benefit upon an exchange of sexual favors." (Cal. Code Regs, tit. 2, § 7287.6(b)(1).)

Secondary Sources

- 1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 2000) Sexual Harassment, § 3.13, p. 123
- 2 Wilcox, California Employment Law (1989) Substantive Requirements Under Equal Employment Opportunity Laws, § 41.80[1][a][i]
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.36 (Matthew Bender)
- Bancroft-Whitney's California Civil Practice: Employment Litigation (2001 supp.) Discrimination in Employment, § 2.51, pp. 61–62

2524
Fair Employment and Housing Act
"Hostile Work Environment" Explained

Harassing conduct does not create a hostile work environment if it is only occasional, isolated, or trivial. In determining whether the work environment was hostile or abusive, you should consider all the circumstances, including the following:

(a) The nature and severity of the conduct;

(b) How often, and over what period of time, the conduct occurred; and

(c) The circumstances under which the conduct occurred.

SOURCES AND AUTHORITY

- " 'For sexual harassment to be actionable, it must be sufficiently severe or pervasive "to alter the conditions of [the victim's] employment and create an abusive working environment." ' … 'Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.' … California courts have adopted the same standard in evaluating claims under the FEHA." (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 129–130 [87 Cal.Rptr.2d 132], internal citations omitted.)

- "Whether the sexual conduct complained of is sufficiently pervasive to create a hostile or offensive work environment must be determined from the totality of the circumstances. The plaintiff must prove that the defendant's conduct would have interfered with a reasonable employee's work performance and would have seriously affected the psychological well-being of a reasonable employee and that she was actually offended. … The factors that can be considered in evaluating the totality of the circumstances are: (1) the nature of the unwelcome sexual acts or works (generally, physical touching is more offensive than unwelcome verbal abuse); (2) the frequency of the offensive encounters; (3) the total number of days over which all of the offensive conduct occurs; and (4) the context in which the sexually harassing conduct occurred." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 609–610 [262 Cal.Rptr. 842], internal citation omitted.)

- "In determining what constitutes 'sufficiently pervasive' harassment, the courts have held that acts of harassment cannot be occasional, isolated, sporadic, or trivial[;] rather the plaintiff must show a concerted pattern of harassment of a repeated, routine or a generalized nature." (*Fisher, supra*, 214 Cal.App.3d at p. 610.)

- "The United States Supreme Court … has clarified that conduct need not seriously affect an employee's psychological well-being to be actionable as abusive work environment harassment. So long as the environment reasonably would be perceived, and is perceived, as hostile or abusive, there is no need for it also to be psychologically injurious." (*Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 Cal.App.4th 397, 412 [27 Cal.Rptr.2d 457], internal citations omitted.)

- "As the Supreme Court recently reiterated, in order to be actionable, '… a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.' The work environment must be viewed from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.' This determination requires judges and juries to exercise '[c]ommon sense, and an appropriate sensitivity to social context' in order to evaluate whether a reasonable person in the plaintiff's position would find the conduct severely hostile or abusive." (*Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 518–519 [76 Cal.Rptr.2d 547], internal citations omitted.)

- "In the present case, the jury was instructed as follows: 'In order to find in favor of Plaintiff on his claim of race harassment, you must find that Plaintiff has proved by a preponderance of the evidence that the racial conduct complained of was sufficiently severe or pervasive to alter the conditions of employment. In order to find that racial harassment is "sufficiently severe or pervasive," the acts of racial harassment cannot be occasional, isolated, sporadic, or trivial.' … [W]e find no error in the jury instruction given here. … [T]he law requires the plaintiff to meet a threshold standard of severity or pervasiveness. We hold that the statement within the instruction that severe or pervasive conduct requires more than 'occasional, isolated, sporadic, or trivial' acts was an accurate statement of that threshold standard." (*Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 465–467 [79 Cal.Rptr.2d 33].)

<u>Secondary Sources</u>

- 2 Witkin, Summary of California Law (9th ed. 1988) Agency and Employment, § 310, pp. 304–305; *id.* (2002 supp.) at § 310, pp. 301–302
- 1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 2000) Discrimination Claims, §§ 2.68 and 2.75, pp. 56, 60; *id.*, Sexual Harassment, at §§ 3.1, 3.17, 3.36, pp. 116, 125–126, 140–141
- 2 Wilcox, California Employment Law (1989) *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.80[1][a], 41.81[1][b]; *id., Civil Actions Under Equal Employment Opportunity Laws*, at § 43.01[10][g][i]

- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.36 (Matthew Bender)
- Bancroft-Whitney's California Civil Practice: Employment Litigation (1993) Discrimination in Employment, §§ 2.51, 2.53, pp. 68–70, 72–75 (rel. 12/93); *id.* (2001 supp.) at §§ 2.51, 2.53, pp. 61–66, 69–73

2525
Fair Employment and Housing Act
Harassment—"Supervisor" Defined

[*Name of alleged harasser***] was a supervisor for [***name of defendant***] if [he/she] had the discretion and authority:**

[a. To hire, direct, transfer, promote, assign, reward, discipline, [or] discharge [or] [*insert other employment action***] other employees [or to recommend any of these actions];] [or]**

[b. To act on the grievances of other employees or to recommend action on grievances.]

DIRECTIONS FOR USE

This instruction is intended for use only in a quid pro quo sexual harassment case brought under the Fair Employment and Housing Act.

SOURCES AND AUTHORITY

- Government Code section 12940(j) provides that it is an unlawful employment practice for "an employer … or any other person, because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation, to harass an employee, an applicant, or a person providing services pursuant to a contract. Harassment of an employee, an applicant, or a person providing services pursuant to a contract by an employee other than an agent or supervisor shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action."

- Government Code section 12926(r) provides: " 'Supervisor' means any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend that action, if, in connection with the foregoing, the exercise of that authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

- "This section has been interpreted to mean that the employer is strictly liable for the harassing actions of its supervisors and agents, but that the employer is only liable for harassment by a coworker if the employer knew or should have known of the conduct

and failed to take immediate corrective action. Thus, characterizing the employment status of the harasser is very significant." (*Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 1046 [58 Cal.Rptr.2d 122], internal citations omitted.)

- "The case and statutory authority set forth three clear rules. First, … a supervisor who personally engages in sexually harassing conduct is personally liable under the FEHA. Second, … if the supervisor participates in the sexual harassment or substantially assists or encourages continued harassment, the supervisor is personally liable under the FEHA as an aider and abettor of the harasser. Third, under the FEHA, the employer is vicariously and strictly liable for sexual harassment by a supervisor." (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1327 [58 Cal.Rptr.2d 308].)

- "[W]hile an employer's liability under the [FEHA] for an act of sexual harassment committed by a supervisor or agent is broader than the liability created by the common law principle of respondeat superior, respondeat superior principles are nonetheless relevant in determining liability when, as here, the sexual harassment occurred away from the workplace and not during work hours." (*Doe*, *supra*, 50 Cal.App.4th at pp. 1048–1049.)

- "The FEHA does not define 'agent.' Therefore, it is appropriate to consider general principles of agency law. An agent is one who represents a principal in dealings with third persons. An agent is a person authorized by the principal to conduct one or more transactions with one or more third persons and to exercise a degree of discretion in effecting the purpose of the principal. A supervising employee is an agent of the employer." (*Fiol*, *supra*, 50 Cal.App.4th at p. 1328, internal citations omitted.)

- "A supervisor who, without more, fails to take action to prevent sexual harassment of an employee is not personally liable as an aider and abettor of the harasser, an aider and abettor of the employer or an agent of the employer." (*Fiol*, *supra*, 50 Cal.App.4th at p. 1331.)

<u>Secondary Sources</u>

- 1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 2000) Sexual Harassment, § 3.21, pp. 128–129
- 2 Wilcox, California Employment Law (1989) Substantive Requirements Under Equal Employment Opportunity Laws, § 41.81
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.20, 115.36, 115.54 (Matthew Bender)
- Bancroft-Whitney's California Civil Practice: Employment Litigation (1993) Discrimination in Employment, § 2.51, p. 69 (rel. 12/93); *id.* (2001 supp.) at § 2.51, pp. 62–63

2540
Fair Employment and Housing Act
Disability Discrimination—Disparate Treatment
Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] wrongfully discriminated against [him/her] based on [his/her] [physical/mental] disability. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was [an employer/[***other covered entity***]];**

2. **That [***name of plaintiff***] [was an employee of [***name of defendant***]/applied to [***name of defendant***] for a job/[***describe other covered relationship to defendant***]];**

3. **[That [***name of defendant***] [knew/thought] [***name of plaintiff***] had a [physical/ mental] [condition/disease/disorder/[***describe health condition***]] that limited [***insert major life activity***];] [or]**

   [That [*name of defendant***] [knew/thought] [***name of plaintiff***] had a history of having a [physical/mental] [condition/disease/disorder/ [***describe health condition***]] that limited [***insert major life activity***];]**

4. **That [***name of plaintiff***] was able to perform the essential job duties [with reasonable accommodation for [his/her] condition];**

5. **That [***name of defendant***] [discharged/refused to hire/[***other adverse employment action***]] [***name of plaintiff***];**

6. **[That [***name of plaintiff***]'s [history of a] [physical/mental] [condition/disease/ disorder/[***describe health condition***]] was a motivating reason for the [discharge/refusal to hire/[***other adverse employment action***]];] [or]**

   [That [*name of defendant***]'s belief that [***name of plaintiff***] had [a history of] the [physical/mental] [condition/disease/disorder/[***describe health condition***]] was a motivating reason for the [discharge/refusal to hire/***other adverse employment action***];]**

7. **That [***name of plaintiff***] was harmed; and**

8. **That [***name of defendant***]'s [decision/conduct] was a substantial factor in causing [***name of plaintiff***]'s harm.**

DIRECTIONS FOR USE

If element 1 is given, the court may need to instruct the jury on the statutory definition of "employer" under the FEHA. Other covered entities under the FEHA include labor organizations, employment agencies, and apprenticeship training programs. (See Gov. Code, § 12940(a)–(d).)

Under element 3, select the claimed basis of discrimination: an actual disability, a record of a disability, and/or a perceived disability. If the only claimed basis of discrimination is a perceived disability, then delete element 4.

The FEHA also prohibits medical condition discrimination, but defines "medical condition" narrowly (see Gov. Code, § 12926(h)). This instruction may be modified for use for a medical condition discrimination claim under the FEHA.

Regarding element 4, there appears a divergence in authority on whether the plaintiff is required to prove that he or she has the ability to perform the essential duties of the job. Cases involving discrimination based on disability have stated that the issue is an element of the plaintiff's burden of proof: "The plaintiff can establish a prima facie case by proving that: (1) plaintiff suffers from a disability; (2) plaintiff is a qualified individual; and (3) plaintiff was subjected to an adverse employment action because of the disability." (*Brundage v. Hahn* (1997) 57 Cal.App.4th 228, 236, citation omitted) However, in *Bagatti v. Department of Rehabilitation* (2002) 97 Cal.App.4th 344, 360 [118 Cal.Rptr.2d 443], a case involving an alleged failure to provide a reasonable accommodation, the court observed that FEHA, unlike ADA, does not require a plaintiff to prove he or she is a "qualified individual with a disability."

Where the existence of a qualifying disability is disputed, the court must tailor an instruction to the evidence in the case.

SOURCES AND AUTHORITY

- Government Code section 12940(a) provides that it is an unlawful employment practice "[f]or an employer, because of the … physical disability, mental disability, [or] medical condition … of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment."

- Government Code section 12940(a)(1) also provides that the FEHA "does not prohibit an employer from refusing to hire or discharging an employee with a physical or mental disability … where the employee, because of his or her physical or mental disability, is unable to perform his or her essential duties even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger

his or her health or safety or the health or safety of others even with reasonable accommodations."

- For a definition of "mental disability" see Government Code section 12926(i).

- For a definition of "physical disability" see Government Code section 12926(k).

- Government Code section 12926.1(c) provides, in part: "[T]he Legislature has determined that the definitions of 'physical disability' and 'mental disability' under the law of this state require a 'limitation' upon a major life activity, but do not require, as does the Americans with Disabilities Act of 1990, a 'substantial limitation.' This distinction is intended to result in broader coverage under the law of this state than under that federal act. Under the law of this state, whether a condition limits a major life activity shall be determined without respect to any mitigating measures, unless the mitigating measure itself limits a major life activity, regardless of federal law under the Americans with Disabilities Act of 1990. Further, under the law of this state, 'working' is a major life activity, regardless of whether the actual or perceived working limitation implicates a particular employment or a class or broad range of employments."

- "[T]he purpose of the 'regarded-as' prong is to protect individuals rejected from a job because of the 'myths, fears and stereotypes' associated with disabilities. In other words, to find a perceived disability, the perception must stem from a false idea about the existence of or the limiting effect of a disability." (*Diffey v. Riverside County Sheriff's Dept.* (2000) 84 Cal.App.4th 1031, 1037 [101 Cal.Rptr.2d 353], internal citation omitted.)

- "An adverse employment decision cannot be made 'because of' a disability when the disability is not known to the employer. … [A] plaintiff must prove the employer had knowledge of the employee's disability when the adverse employment decision was made." (*Brundage*, *supra*, 57 Cal.App.4th at pp. 236–237.)

<u>Secondary Sources</u>

- 8 Witkin, Summary of California Law (9th ed. 1988) Constitutional Law, § 762, pp. 262–263; *id.* (2002 supp.) at §§ 762, 762A, pp. 159–164
- 1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 2000) Discrimination Claims, § 2.78, pp. 61–63
- 2 Wilcox, California Employment Law (1989) Substantive Requirements Under Equal Employment Opportunity Laws, § 41.32[2][c]
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.14, 115.23, 115.34, 115.77[3][a] (Matthew Bender)
- Bancroft-Whitney's California Civil Practice: Employment Litigation (1993) Discrimination in Employment, §§ 2:45–2:46, pp. 59–61; *id.* (2001 supp.) at § 2:46, pp. 50–52

2541
Fair Employment and Housing Act
Disability Discrimination—Reasonable Accommodation
Essential Factual Elements (Gov. Code, § 12940(m))

[*Name of plaintiff***] claims that [***name of defendant***] failed to reasonably accommodate [his/her] [physical/mental] [condition/disease/disorder/[***describe health condition***]]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was [an employer/[***other covered entity***]];**

2. **That [***name of plaintiff***] [was an employee of [***name of defendant***]/applied to [***name of defendant***] for a job/[***describe other covered relationship to defendant***]];**

3. **That [***name of plaintiff***] had a [physical/mental] [condition/disease/disorder/ [***describe health condition***]] that limited [***insert major life activity***];**

4. **That [***name of defendant***] knew of [***name of plaintiff***]'s [physical/mental] [condition/disease/disorder/[***describe health condition***]] that limited [***insert major life activity***];**

5. **That [***name of defendant***] failed to provide reasonable accommodation for [***name of plaintiff***]'s [physical/mental] [condition/disease/disorder/ [***describe health condition***]];**

6. **That [***name of plaintiff***] was harmed; and**

7. **That [***name of defendant***]'s failure to provide reasonable accommodation was a substantial factor in causing [***name of plaintiff***]'s harm.**

[In determining whether [*name of plaintiff***]'s [condition/disease/disorder/ [***describe health condition***]] limits [***insert major life activity***], you must consider the [condition/ disease/disorder/***describe health condition***] [in its unmedicated state/ without assistive devices/[***describe mitigating measures***].]]**

DIRECTIONS FOR USE

If element 1 is given, the court may need to instruct the jury on the statutory definition of "employer" under the FEHA. Other covered entities under the FEHA include labor organizations, employment agencies, and apprenticeship training programs. (See Gov. Code, § 12940(a)–(d).)

Where the existence of a qualifying disability is disputed, the court must tailor an instruction to the evidence in the case.

There appears a divergence in authority regarding whether the plaintiff is required to prove that he or she has the ability to perform the essential duties of the job. Cases involving discrimination based on disability have stated that the issue is an element of the plaintiff's burden of proof: "The plaintiff can establish a prima facie case by proving that: (1) plaintiff suffers from a disability; (2) plaintiff is a qualified individual; and (3) plaintiff was subjected to an adverse employment action because of the disability." (*Brundage v. Hahn* (1997) 57 Cal.App.4th 228, 236, citation omitted) However, in *Bagatti v. Department of Rehabilitation* (2002) 97 Cal.App.4th 344, 360 [118 Cal.Rptr.2d 443], a case involving an alleged failure to provide a reasonable accommodation, the court observed that FEHA, unlike ADA, does not require a plaintiff to prove he or she is "a qualified individual with a disability."

SOURCES AND AUTHORITY

- Government Code section 12940(m) provides that it is an unlawful employment practice "[f]or an employer or other entity covered by this part to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee. Nothing in this subdivision or in … subdivision (a) shall be construed to require an accommodation that is demonstrated by the employer or other covered entity to produce undue hardship to its operation."

- "Any employer or other covered entity shall make reasonable accommodation to the disability of any individual with a disability if the employer or other covered entity knows of the disability, unless the employer or other covered entity can demonstrate that the accommodation would impose an undue hardship." (Cal. Code Regs., tit. 2, § 7293.9)

- Government Code section 12926(n) provides:

  "Reasonable accommodation" may include either of the following:
  (1) Making existing facilities used by employees readily accessible to, and usable by, individuals with disabilities.
  (2) Job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

- Government Code section 12940(n) provides that it is an unlawful employment practice "[f]or an employer or other entity covered by this part to fail to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable

accommodation by an employee or applicant with a known physical or mental disability or known medical condition."

- For a definition of "mental disability" see Government Code section 12926(i).

- For a definition of "physical disability" see Government Code section 12926(k).

- Government Code section 12926.1(c) provides, in part: "[T]he Legislature has determined that the definitions of 'physical disability' and 'mental disability' under the law of this state require a 'limitation' upon a major life activity, but do not require, as does the Americans with Disabilities Act of 1990, a 'substantial limitation.' This distinction is intended to result in broader coverage under the law of this state than under that federal act. Under the law of this state, whether a condition limits a major life activity shall be determined without respect to any mitigating measures, unless the mitigating measure itself limits a major life activity, regardless of federal law under the Americans with Disabilities Act of 1990. Further, under the law of this state, 'working' is a major life activity, regardless of whether the actual or perceived working limitation implicates a particular employment or a class or broad range of employments."

- "Employers must make reasonable accommodations to the disability of an individual unless the employer can demonstrate that doing so would impose an 'undue hardship.' " (*Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 947 [62 Cal.Rptr.2d 142].)

- "[A]n employer who knows of the disability of an employee has an affirmative duty to make known to the employee other suitable job opportunities with the employer and to determine whether the employee is interested in, and qualified for, those positions, if the employer can do so without undue hardship or if the employer offers similar assistance or benefit to other disabled or nondisabled employees or has a policy of offering such assistance or benefit to any other employees." (*Prilliman, supra,* 53 Cal.App.4th at pp. 950–951.)

- " 'Ordinarily the reasonableness of an accommodation is an issue for the jury.' " (*Prilliman, supra,* 53 Cal.App.4th at p. 954, internal citation omitted.)

- "[T]he duty of an employer to provide reasonable accommodation for an employee with a disability is broader under the FEHA than under the ADA." (*Bagatti v. Department of Rehabilitation* (2002) 97 Cal.App.4th 344, 362 [118 Cal.Rptr.2d 443].)

- "Under the FEHA … an employer is relieved of the duty to reassign a disabled employee whose limitations cannot be reasonably accommodated in his or her current job only if reassignment would impose an 'undue hardship' on its operations or if there is no vacant position for which the employee is qualified." (*Spitzer v. Good Guys, Inc.* (2000) 80 Cal.App.4th 1376, 1389 [96 Cal.Rptr.2d 236].)

Secondary Sources

- 2 Witkin, Summary of California Law (9th ed. 1987) Agency and Employment, § 306, p. 301; *id.* (2002 supp.) at § 306, pp. 293–295
- 8 Witkin, Summary of California Law (9th ed. 1988) Constitutional Law, § 762, pp. 262–263; *id.* (2002 supp.) at §§ 762, 762A, pp. 159–164
- 1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 2000) Discrimination Claims, § 2.79, pp. 64–65
- 2 Wilcox, California Employment Law (1989) *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.32[2][c], 41.51[3][a]–[b]
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.22, 115.35, 115.92 (Matthew Bender)
- Bancroft-Whitney's California Civil Practice: Employment Litigation (1993) Discrimination in Employment, § 2:49, pp. 64–66

2542
Fair Employment and Housing Act
Disability Discrimination—"Reasonable Accommodation" Explained

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A reasonable accommodation is a reasonable change to the workplace that [*choose one or more of the following***]**

[gives a qualified applicant with a disability an equal opportunity in the job application process;]

[allows an employee with a disability to perform the essential duties of the job;] [or]

[allows an employee with a disability to enjoy the same benefits and privileges of employment that are available to employees without disabilities.]

Reasonable accommodations may include the following:

a. Making the workplace readily accessible to and usable by employees with disabilities;

b. Changing job responsibilities or work schedules;

c. Reassigning the employee to a vacant position;

d. Modifying or providing equipment or devices;

e. Modifying tests or training materials;

f. Providing qualified interpreters or readers; or

g. Providing other similar accommodations for an individual with a disability.

If more than one accommodation is reasonable, an employer satisfies its obligation to make a reasonable accommodation if it selects one of those accommodations in good faith.

SOURCES AND AUTHORITY

- Government Code section 12940(m) provides that it is an unlawful employment practice "[f]or an employer or other entity covered by this part to fail to make reasonable accommodation for the known physical or mental disability of an

applicant or employee. Nothing in this subdivision or in … subdivision (a) shall be construed to require an accommodation that is demonstrated by the employer or other covered entity to produce undue hardship to its operation."

- Government Code section 12926(n) provides:

  "Reasonable accommodation" may include either of the following:
  (1) Making existing facilities used by employees readily accessible to, and usable by, individuals with disabilities.
  (2) Job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

- The California Fair Employment and Housing Commission's regulations provide:

  Reasonable accommodation may, but does not necessarily, include, nor is it limited to, such measures as:
  (1) Accessibility. Making existing facilities used by employees readily accessible to and usable by individuals with disabilities;
  (2) Job Restructuring. Job restructuring, reassignment to a vacant position, part-time or modified work schedules, acquisition or modification of equipment or devices, adjustment or modification of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar actions." (Cal. Code Regs., tit. 2, § 7293.9(a).)

- Government Code section 12926.1(c) provides, in part: "[T]he Legislature has determined that the definitions of 'physical disability' and 'mental disability' under the law of this state require a 'limitation' upon a major life activity, but do not require, as does the Americans with Disabilities Act of 1990, a 'substantial limitation.' This distinction is intended to result in broader coverage under the law of this state than under that federal act. Under the law of this state, whether a condition limits a major life activity shall be determined without respect to any mitigating measures, unless the mitigating measure itself limits a major life activity, regardless of federal law under the Americans with Disabilities Act of 1990. Further, under the law of this state, 'working' is a major life activity, regardless of whether the actual or perceived working limitation implicates a particular employment or a class or broad range of employments."

- "[T]he duty of an employer to provide reasonable accommodation for an employee with a disability is broader under the FEHA than under the ADA." (*Bagatti v. Department of Rehabilitation* (2002) 97 Cal.App.4th 344, 362 [118 Cal.Rptr.2d 443].)

- "[A]n employer who knows of the disability of an employee has an affirmative duty to make known to the employee other suitable job opportunities with the employer

and to determine whether the employee is interested in, and qualified for, those positions, if the employer can do so without undue hardship or if the employer offers similar assistance or benefit to other disabled or nondisabled employees or has a policy of offering such assistance or benefit to any other employees." (*Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 950–951 [62 Cal.Rptr.2d 142].)

- "Under the FEHA … an employer is relieved of the duty to reassign a disabled employee whose limitations cannot be reasonably accommodated in his or her current job only if reassignment would impose an 'undue hardship' on its operations or if there is no vacant position for which the employee is qualified." (*Spitzer v. Good Guys, Inc.* (2000) 80 Cal.App.4th 1376, 1389 [96 Cal.Rptr.2d 236].)

Secondary Sources

- 1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 2000) Discrimination Claims, § 2.79, pp. 64–65
- 2 Wilcox, California Employment Law (1989) *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.51[3][a]–[b]
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.35 (Matthew Bender)
- Bancroft-Whitney's California Civil Practice: Employment Litigation (1993) Discrimination in Employment, § 2:49, pp. 64–65

2543
Fair Employment and Housing Act
Disability Discrimination
Affirmative Defense—Inability to Perform Essential Job Duties

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[*Name of defendant***] claims that [his/her/its] conduct was lawful because [***name of plaintiff***] was unable to perform an essential job duty even with reasonable accommodations. To succeed, [***name of defendant***] must prove both of the following:**

1. **That [***describe job duty***] was an essential job duty; and**

2. **That [***name of plaintiff***] could not perform it, even with reasonable accommodations.**

In deciding a job duty is essential, you may consider, among other factors, the following:

a. **Whether the reason the job exists is to perform that duty;**

b. **The number of employees available who can perform that duty; and**

c. **Whether the job duty is highly specialized.**

SOURCES AND AUTHORITY

- Government Code section 12940(a)(1) provides that the FEHA "does not prohibit an employer from refusing to hire or discharging an employee with a physical or mental disability, or subject an employer to any legal liability resulting from the refusal to employ or the discharge of an employee with a physical or mental disability, where the employee, because of his or her physical or mental disability, is unable to perform his or her essential duties even with reasonable accommodations."

- Government Code section 12926(f) provides, in part, that " 'essential functions' means the fundamental job duties of the employment position the individual with a disability holds or desires. 'Essential functions' does not include the marginal functions of the position."

- Government Code section 12926(f) provides, in part:

  (1) A job function may be considered essential for any of several reasons, including, but not limited to, any one or more of the following:
  (A) The function may be essential because the reason the position exists is to perform that function.

(B) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed.
(C) The function may be highly specialized, so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

(2) Evidence of whether a particular function is essential includes, but is not limited to, the following:
(A) The employer's judgment as to which functions are essential.
(B) Written job descriptions prepared before advertising or interviewing applicants for the job.
(C) The amount of time spent on the job performing the function.
(D) The consequences of not requiring the incumbent to perform the function.
(E) The terms of a collective bargaining agreement.
(F) The work experiences of past incumbents in the job.
(G) The current work experience of incumbents in similar jobs.

Secondary Sources

- 8 Witkin, Summary of California Law (9th ed. 1988) Constitutional Law, § 762, p. 263; *id.* (2002 supp.) at § 762A, pp. 161–164
- 1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 2000) Discrimination Claims, § 2.79, p. 64
- 2 Wilcox, California Employment Law (1989) *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.97[1]
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.22, 115.54[b], 115.104 (Matthew Bender)
- Bancroft-Whitney's California Civil Practice: Employment Litigation (1993) Discrimination in Employment, § 2:82, pp. 102–103; *id.* (2001 supp.) at § 2:46, pp. 50–52

2544
Fair Employment and Housing Act
Disability Discrimination
Affirmative Defense—Health or Safety Risk

[*Name of defendant***] claims that [his/her/its] conduct was lawful because, even with reasonable accommodations, [***name of plaintiff***] was unable to perform an essential job duty without endangering [[his/her] health or safety] [or] [the health or safety of others]. To succeed, [***name of defendant***] must prove both of the following:**

1. **That [***describe job duty***] was an essential job duty; and**

2. **That even with reasonable accommodations, [***name of plaintiff***] could not perform [***describe job duty***] without endangering [[his/her] health or safety] [or] [the health or safety of others more than if an individual without a disability performed the job duty].**

[In determining whether [*name of plaintiff***]'s performance of the job duty would endanger [his/her] health or safety, you must decide whether the performance of the job duty presents an immediate and substantial degree of risk to [him/her].]**

In deciding whether a job duty is essential, you may consider, among other factors, the following:

a. **Whether the reason the job exists is to perform that duty;**

b. **The number of employees available who can perform that duty; and**

c. **Whether the job duty is highly specialized.**

SOURCES AND AUTHORITY

- Government Code section 12940(a)(1) provides that the FEHA "does not prohibit an employer from refusing to hire or discharging an employee with a physical or mental disability … where the employee, because of his or her physical or mental disability … cannot perform those [essential] duties in a manner that would not endanger his or her health or safety or the health or safety of others even with reasonable accommodations."

- The California Fair Employment and Housing Commission's regulations provide: "It is a permissible defense for an employer … to demonstrate that after reasonable accommodation the applicant or employee cannot perform the essential functions of the position in question in a manner which would not endanger his or her health or

safety because the job imposes an imminent and substantial degree of risk to the applicant or employee. … It is a permissible defense for an employer … to demonstrate that after reasonable accommodation has been made, the applicant or employee cannot perform the essential functions of the position in question in a manner which would not endanger the health or safety of others to a greater extent than if an individual without a disability performed the job. … However, it is no defense to assert that an individual with a disability has a condition or a disease with a future risk, so long as the condition or disease does not presently interfere with his or her ability to perform the job in a manner that will not immediately endanger the individual with a disability or others, and the individual is able to safely perform the job over a reasonable length of time." (Cal. Code Regs., tit. 2, § 7293.8(c)–(e).)

- "FEHA's 'danger to self' defense has a narrow scope; an employer must offer more than mere conclusions or speculation in order to prevail on the defense. … As one court said, '[t]he defense requires that the employee face an "imminent and substantial degree of risk" in performing the essential functions of the job.' An employer may not terminate an employee for harm that is merely potential. … In addition, in cases in which the employer is able to establish the 'danger to self' defense, it must also show that there are 'no "available reasonable means of accommodation which could, without undue hardship to [the employer], have allowed [the plaintiff] to perform the essential job functions … without danger to himself." ' " (*Wittkopf v. County of Los Angeles* (2001) 90 Cal.App.4th 1205, 1218–1219 [109 Cal.Rptr.2d 543], internal citations omitted.)

- "An employer may refuse to hire persons whose physical handicap prevents them from performing their duties in a manner which does not endanger their health. Unlike the BFOQ defense, this exception must be tailored to the individual characteristics of each applicant … in relation to specific, legitimate job requirements. … [Defendant's] evidence, at best, shows a possibility [plaintiff] might endanger his health sometime in the future. In the light of the strong policy for providing equal employment opportunity, such conjecture will not justify a refusal to employ a handicapped person." (*Sterling Transit Co. v. Fair Employment Practice Com.* (1981) 121 Cal.App.3d 791, 798, 799 [175 Cal.Rptr. 548], internal citations and footnote omitted.)

- "The employer has the burden of proving the defense of the threat to the health and safety of other workers by a preponderance of the evidence." (*Raytheon Co. v. Fair Employment & Housing Com.* (1989) 212 Cal.App.3d 1242, 1252 [261 Cal.Rptr. 197].)

<u>Secondary Sources</u>

- 8 Witkin, Summary of California Law (9th ed. 1988) Constitutional Law, § 762, p. 263; *id.* (2002 supp.) at § 762A, pp. 161–164
- 1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 2000) Discrimination Claims, § 2.111, p. 84

- 2 Wilcox, California Employment Law (1989) Substantive Requirements Under Equal Employment Opportunity Laws, § 41.97[1]
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.54[b], 115.104 (Matthew Bender)
- Bancroft-Whitney's California Civil Practice: Employment Litigation (1993) Discrimination in Employment, § 2:82, pp. 102–103

2545
Fair Employment and Housing Act
Disability Discrimination
Affirmative Defense—Undue Hardship

[*Name of defendant***] claims that [***name of plaintiff***]'s proposed accommodations would create an undue hardship to the operation of [his/her/its] business. To succeed, [***name of defendant***] must prove that the accommodations would be significantly difficult or expensive to make. In deciding whether an accommodation would create an undue hardship, you may consider the following factors:**

a. The nature and cost of the accommodation;

b. [*Name of defendant***]'s ability to pay for the accommodation;**

c. The type of operations conducted at the facility;

d. The impact on the operations of the facility;

e. The number of [*name of defendant***]'s employees and the relationship of the employees' duties to one another;**

f. The number, type, and location of [*name of defendant***]'s facilities; and**

g. The administrative and financial relationship of the facilities to one another.

DIRECTIONS FOR USE

The issue of whether undue hardship is a true affirmative defense or whether the defendant only has the burden of coming forward with the evidence of hardship as a way of negating the element of plaintiff's case concerning the reasonableness of an accommodation appears to be unclear.

SOURCES AND AUTHORITY

- Government Code section 12940(m) provides that it is an unlawful employment practice "[f]or an employer or other entity covered by this part to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee. Nothing in this subdivision or in … subdivision (a) shall be construed to require an accommodation that is demonstrated by the employer or other covered entity to produce undue hardship to its operation."

- Government Code section 12926(s) provides:

  "Undue hardship" means an action requiring significant difficulty or expense, when considered in light of the following factors:
  (1) the nature and cost of the accommodation needed,
  (2) the overall financial resources of the facilities involved in the provision of the reasonable accommodations, the number of persons employed at the facility, and the effect on expenses and resources or the impact otherwise of these accommodations upon the operation of the facility,
  (3) the overall financial resources of the covered entity, the overall size of the business of a covered entity with respect to the number of employees, and the number, type, and location of its facilities,
  (4) the type of operations, including the composition, structure, and functions of the workforce of the entity, and
  (5) the geographic separateness, administrative, or fiscal relationship of the facility or facilities.

Secondary Sources

- 1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 2000) Discrimination Claims, § 2.80, p. 65
- 2 Wilcox, California Employment Law (1989) *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.51[4][b]
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.35, 115.54, 115.100 (Matthew Bender)

2560
Fair Employment and Housing Act
Religious Creed Discrimination—Failure to Accommodate
Essential Factual Elements (Gov. Code, § 12940(l))

[*Name of plaintiff***] claims that [***name of defendant***] wrongfully discriminated against him by failing to reasonably accommodate his religious [belief/ observance]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was [an employer/***other covered entity***];**

2. **That [***name of plaintiff***] [was an employee of [***name of defendant***]/applied to [***name of defendant***] for a job/[***other covered relationship to defendant***]];**

3. **That [***name of plaintiff***] has a sincerely held religious belief that [***describe religious belief, observance, or practice***];**

4. **That [***name of plaintiff***]'s religious [belief/observance] conflicted with a job requirement;**

5. **That [***name of defendant***] knew of the conflict between [***name of plaintiff***]'s religious [belief/observance] and the job requirement;**

6. **That [***name of defendant***] did not reasonably accommodate [***name of plaintiff***]'s religious [belief/observance];**

7. **That [***name of defendant***] [discharged/refused to hire/[***other adverse employment action***]] [***name of plaintiff***] for failing to comply with the conflicting job requirement;**

8. **That [***name of plaintiff***] was harmed; and**

9. **That [***name of defendant***]'s failure to reasonably accommodate [***name of plaintiff***]'s religious [belief/observance] was a substantial factor in causing [his/her] harm.**

If more than one accommodation is reasonable, an employer satisfies its obligation to make a reasonable accommodation if it selects one of those accommodations in good faith.

DIRECTIONS FOR USE

If element 1 is given, the court may need to instruct the jury on the statutory definition of "employer" under the FEHA. Other covered entities under the FEHA include labor organizations, employment agencies, and apprenticeship training programs. (See Gov. Code, § 12940(a)–(d).)

SOURCES AND AUTHORITY

- Government Code section 12940(l) provides that it is an unlawful employment practice "[f]or an employer … to refuse to hire or employ a person, … or to discharge a person from employment, … or to discriminate against a person in compensation or in terms, conditions, or privileges of employment because of a conflict between the person's religious belief or observance and any employment requirement, unless the employer … demonstrates that it has explored any available reasonable alternative means of accommodating the religious belief or observance … but is unable to reasonably accommodate the religious belief or observance without undue hardship on the conduct of the business of the employer ... Religious belief or observance … includes, but is not limited to, observance of a Sabbath or other religious holy day or days, and reasonable time necessary for travel prior and subsequent to a religious observance."

- Government Code section 12926(o) provides: " 'Religious creed,' 'religion,' 'religious observance,' 'religious belief,' and 'creed' include all aspects of religious belief, observance, and practice."

- The Fair Employment and Housing Commission's regulations provide: " 'Religious creed' includes any traditionally recognized religion as well as beliefs, observances, or practices which an individual sincerely holds and which occupy in his or her life a place of importance parallel to that of traditionally recognized religions. Religious creed discrimination may be established by showing: … [t]he employer or other covered entity has failed to reasonably accommodate the applicant's or employee's religious creed despite being informed by the applicant or employee or otherwise having become aware of the need for reasonable accommodation." (Cal. Code Regs., tit. 2, § 7293.1(b).)

- The Fair Employment and Housing Commission's regulations provide: "An employer or other covered entity shall make accommodation to the known religious creed of an applicant or employee unless the employer or other covered entity can demonstrate that the accommodation is unreasonable because it would impose an undue hardship." (Cal. Code Regs., tit. 2, § 7293.3.)

- "In evaluating an argument the employer failed to accommodate an employee's religious beliefs, the employee must establish a prima facie case that he or she had a bona fide religious belief, of which the employer was aware, that conflicts with an employment requirement. … Once the employee establishes a prima facie case, then

the employer must establish it initiated good faith efforts to accommodate or no accommodation was possible without producing undue hardship." (*Soldinger v. Northwest Airlines, Inc.* (1996) 51 Cal.App.4th 345, 370 [58 Cal.Rptr.2d 747], internal citation omitted.)

- "Any reasonable accommodation is sufficient to meet an employer's obligations. However, the employer need not adopt the most reasonable accommodation nor must the employer accept the remedy preferred by the employee. The reasonableness of the employer's efforts to accommodate is determined on a case by case basis. … '[O]nce it is determined that the employer has offered a reasonable accommodation, the employer need not show that each of the employee's proposed accommodations would result in undue hardship.' '[W]here the employer has already reasonably accommodated the employee's religious needs, the … inquiry [ends].' " (*Soldinger, supra,* 51 Cal.App.4th at p. 370, internal citations omitted.)

Secondary Sources

- 8 Witkin, Summary of California Law (9th ed. 1988) Constitutional Law, §§ 739 and 763, pp. 224–225, 264–265; *id.* (2002 supp.) at § 763, pp. 168–169
- 2 Wilcox, California Employment Law (1989) Substantive Requirements Under Equal Employment Opportunity Laws, § 41.52[3]
- 1 Lindemann and Grossman, Employment Discrimination Law (3d ed. 1996) Religion, pp. 219–224, 226–227; *id.* (2000 supp.) at pp. 100–101
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.22, 115.35[d], 115.91 (Matthew Bender)
- Bancroft-Whitney's California Civil Practice: Employment Litigation (1993) Discrimination in Employment, § 2.68, pp. 87–88

2561
Fair Employment and Housing Act
Religious Creed Discrimination—Reasonable Accommodation
Affirmative Defense—Undue Hardship

[*Name of defendant***] claims that its failure, if any, to accommodate [***name of plaintiff***]'s religious [belief/observance] was justified because any accommodation would have caused undue hardship. To succeed, [***name of defendant***] must prove both of the following:**

1. **That [***name of defendant***] explored available ways to accommodate [***name of plaintiff***]'s religious [belief/observance], including excusing [him/her] from duties that conflict with [his/her] religious [belief/ observance] or permitting those duties to be performed at another time or by another person; and**

2. **That [***name of defendant***] was unable to accommodate [***name of plaintiff***]'s religious [belief/observance] without causing undue hardship on the conduct of [***name of defendant***]'s business.**

An accommodation causes an "undue hardship" when it would have more than an insignificant effect on the business.

DIRECTIONS FOR USE

Note that the terms "reasonable accommodation" and "undue hardship" do not have the same meanings under religious discrimination and disability discrimination laws as interpreted by California and federal courts. Because an employer has a competing duty to avoid religious preferences, the duty to accommodate an employee's religious beliefs presents a lesser burden than the duty to accommodate an employee's disability.

SOURCES AND AUTHORITY

- Government Code section 12940(l) provides that it is an unlawful employment practice "[f]or an employer … to refuse to hire or employ a person, … or to discharge a person from employment, … or to discriminate against a person in compensation or in terms, conditions, or privileges of employment because of a conflict between the person's religious belief or observance and any employment requirement, unless the employer … demonstrates that it has explored any available reasonable alternative means of accommodating the religious belief or observance … but is unable to reasonably accommodate the religious belief or observance without undue hardship on the conduct of the business of the employer. Religious belief or observance … includes, but is not limited to, observance of a Sabbath or other religious holy day or

days, and reasonable time necessary for travel prior and subsequent to a religious observance."

- "If the employee proves a prima facie case and the employer fails to initiate an accommodation for the religious practices, the burden is then on the employer to prove it will incur an undue hardship if it accommodates that belief. '[T]he extent of undue hardship on the employer's business is at issue only where the employer claims that it is unable to offer any reasonable accommodation without such hardship.' … '[A]n accommodation causes "undue hardship" whenever that accommodation results in "more than a de minimis cost" to the employer.' " (*Soldinger v. Northwest Airlines, Inc.* (1996) 51 Cal.App.4th 345, 371 [58 Cal.Rptr.2d 747], internal citations omitted.)

- "It would be anomalous to conclude that by 'reasonable accommodation' Congress meant that an employer must deny the shift and job preference of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others, and we conclude that Title VII does not require an employer to go that far. … Alternatively, the Court of Appeals suggested that [the employer] could have replaced [plaintiff] on his Saturday shift with other employees through the payment of premium wages. … To require [the employer] to bear more than a de minimus cost … is an undue hardship. Like abandonment of the seniority system, to require [the employer] to bear additional costs when no such costs are incurred to give other employees the days off that they want would involve unequal treatment of employees on the basis of their religion." (*Trans World Airlines, Inc. v. Hardison* (1977) 432 U.S. 63, 81, 84 [97 S.Ct. 2264, 53 L.Ed.2d 113], footnote omitted.)

Secondary Sources

- 2 Wilcox, California Employment Law (1989) Substantive Requirements Under Equal Employment Opportunity Laws, § 41.52[4]
- 1 Lindemann and Grossman, Employment Discrimination Law (3d ed. 1996) Religion, pp. 227–234; *id.* (2000 supp.) at pp. 100–105
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.35[2][a]–[c]), 115.54, 115.91 (Matthew Bender)
- Bancroft-Whitney's California Civil Practice: Employment Litigation (1993) Discrimination in Employment, § 2.68, pp. 87–88

VF-2500
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 motivating reason for [***name of defendant***]'s [discharge/refusal to hire/[***other adverse employment action***]]?**

___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 [discharge/refusal to hire/[***other adverse employment action***]] 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 2500, *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 2500.

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.

VF-2501
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 motivating reason for [***name of defendant***]'s [discharge/refusal to hire/[***other adverse employment action***]]?**

___Yes **___No**

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Was the job requirement regarding [***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***] have a reasonable basis for believing that substantially all [***members of protected group***] are unable to safely and efficiently perform that 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.

9. **Was [***name of defendant***]'s [discharge/refusal to hire/[***other adverse employment action***]] 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 2500, *Fair Employment and Housing Act—Disparate Treatment—Essential Factual Elements (Gov. Code, § 12940(a)),* and Instruction 2501, *Affirmative Defense—Bona fide Occupational Qualification.*

Relationships other than employer/employee can be substituted in question number 2, as in element 2 in instruction 2500.

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.

VF-2502
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 a disproportionate adverse effect 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**

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 2502, *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 2502.

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.

VF-2503
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 a disproportionate adverse effect 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**

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.

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 2502, *Disparate Impact—Essential Factual Elements (Gov. Code, § 12940(a))*, 2503, *Affirmative Defense—Business Necessity/Job Relatedness*, and 2504, *Disparate Impact—Rebuttal to Business Necessity/Job Relatedness Defense*. Relationships other than employer/employee can be substituted in question number 2, as in element 2 in instruction 2502.

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.

VF-2504
Retaliation (Gov. Code, § 12940(h))

We answer the questions submitted to us as follows:

1. Did [*name of plaintiff***] [***describe protected activity***]?**

___Yes **___No**

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [*name of defendant***] [discharge/demote/[***other adverse employment action***]] [***name of plaintiff***]?**

___Yes **___No**

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was [*name of plaintiff***]'s [***describe protected activity***] a motivating reason for [***name of defendant***]'s decision to [discharge/demote/[***other adverse employment action***]] [***name of plaintiff***]?**

___Yes **___No**

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was [*name of defendant***]'s retaliatory conduct a substantial factor in causing harm to [***name of plaintiff***]?**

___Yes **___No**

If your answer to question 4 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 2505, *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.

VF-2505
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. At the time of [his/her] conduct, was [*name of alleged harasser***] a supervisor or agent for [***name of defendant***]?**

___Yes **___No**

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Was [*name of alleged harasser*]'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 2520, *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 2520.

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.

VF-2506
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 a reasonable [*describe member of protected group***] in [***name of plaintiff***]'s circumstances would have considered the work environment to be hostile or abusive?**

___Yes **___No**

If your answer to question 3 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***] consider the work environment to be hostile or abusive?**

___Yes **___No**

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Did [*name of defendant*] [or [his/her/its] supervisors or agents] know or should [he/she/it/they] have known of the 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. Did [*name of defendant*] [or [his/her/its] supervisors or agents] fail to take immediate and appropriate corrective action?

___Yes ___No

If your answer to question 6 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 the harassing conduct a substantial factor in causing harm to [*name of plaintiff*]?

___Yes ___No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. What are [*name of plaintiff*]'s damages?

[a. Past economic loss, 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 2521, *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 2521, *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 questions 5 and 6 as in element 6 in the instruction.

If specificity is not required, users do not have to itemize all the damages listed in question 8 and do not have to categorize “economic” and “noneconomic” damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

This form may be modified if the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest on specific losses that occurred prior to judgment.

VF-2507
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 harassment so severe, widespread, or persistent that a reasonable [*describe member of protected group***] in [***name of plaintiff***]'s circumstances would have considered the work environment to be hostile or abusive?**

___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***] consider the work environment to be hostile or abusive?**

___Yes **___No**

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Did [*name of defendant***] participate in the harassing conduct [***or assist or encourage it***]?**

___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 harassing 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].

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 2522, *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 2522.

If specificity is not required, users do not have to itemize all the damages listed in question 7 and do not have to categorize “economic” and “noneconomic” damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

This form may be modified if the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest on specific losses that occurred prior to judgment.

VF-2508
FEHA—Disability 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 a [physical/mental] [condition/disease/disorder/[***describe health condition***]] that limited [***insert major life activity***]?**

___Yes **___No**

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was [*name of plaintiff***] able to perform the essential job duties [with reasonable accommodation for [his/her] condition]?**

___Yes **___No**

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Did [***name of defendant***] [discharge/refuse to hire/[***other adverse employment action***]] [***name of plaintiff***]?**

___Yes **___No**

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. **Was [***name of plaintiff***]'s [***describe physical disability, mental disability, or medical condition***] a motivating reason for [***name of defendant***]'s decision to [discharge/refuse to hire/[***other adverse employment action***]] [***name of plaintiff***]?**

___Yes **___No**

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. **Was [***name of defendant***]'s [decision/conduct] a substantial factor in causing harm to [***name of plaintiff***]?**

___Yes **___No**

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. **What are [***name of plaintiff***]'s damages?**

[a. Past economic loss, 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 2540, *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 2540. Depending on the facts of the case, other factual scenarios can be substituted in questions 3 and 6, as in elements 3 and 6 in the instruction.

If specificity is not required, users do not have to itemize all the damages listed in question 8 and do not have to categorize “economic” and “noneconomic” damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, 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.

VF-2509
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 a [physical/mental] [condition/disease/disorder/ [***describe health condition***]] that limited [***insert major life activity***]?**

___Yes **___No**

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Did [*name of defendant***] know of [***name of plaintiff***]'s [physical/mental] [condition/disease/ disorder/[***describe health condition***]] that limited [***insert major life activity***]?**

___Yes **___No**

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Did [***name of defendant***] fail to provide reasonable accommodation for [***name of plaintiff***]'s [physical/mental] [condition/disease/disorder/ [***describe health 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. **Was [***name of defendant***]'s failure to provide reasonable accommodation 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].

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 2541, *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 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.

VF-2510
FEHA—Disability Discrimination—Reasonable Accommodation
(Gov. Code, § 12940(m))
Affirmative Defense—Undue Hardship

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 a [physical/mental] [condition/disease/disorder/ [***describe health condition***]] that limited [***insert major life activity***]?**

   ___Yes **___No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Did [***name of defendant***] know of [***name of plaintiff***]'s [physical/mental] [condition/disease/disorder/[***describe health condition***]] that limited [***insert major life activity***]?**

   ___Yes **___No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Did [***name of defendant***] fail to provide reasonable accommodation for [***name of plaintiff***]'s [physical/mental] [condition/disease/disorder/[***describe health 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. **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 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. **Was [***name of defendant***]'s failure to provide a reasonable accommodation 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	**$_____**

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 2541, *Disability or Medical Condition Discrimination—Disparate Treatment—Essential Factual Elements,* and Instruction 2545, *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 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.

VF-2511
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**

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.

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 2560, *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.

VF-2512
FEHA—Religious Creed Discrimination—Failure to Accommodate
(Gov. Code, § 12940(l))
Affirmative Defense—Undue Hardship

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**

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.

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].

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 2560, *Religious Creed Discrimination—Failure to Accommodate—Essential Factual Elements (Gov. Code, § 12940(l)*), and Instruction 2561, *Religious Creed Discrimination—Reasonable Accommodation—Affirmative Defense—Undue Hardship*

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.

2600
California Family Rights Act
Violation of CFRA Rights—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] [refused to grant [him/her] [family care/medical] leave] [refused to return [him/her] to the same or a comparable job when [his/her] [family care/medical] leave ended] [***other violation of CFRA rights***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was eligible for [family care/medical] leave;**

2. **That [***name of plaintiff***] [requested/took] leave [***insert one of the following:***]**

   [for the birth of [*name of plaintiff***]'s child or bonding with the child;]**

   [for the placement of a child with [*name of plaintiff***] for adoption or foster care;]**

   [to care for [*name of plaintiff***]'s [child/parent/spouse] who has a serious health condition;]**

   [for [*name of plaintiff***]'s own serious health condition that makes [him/her] unable to perform the functions of [his/her] job;]**

3. **That [***name of plaintiff***] provided reasonable notice to [***name of defendant***] of [his/her] need for [family care/medical] leave, including its expected timing and length. [If [***name of defendant***] notified [his/her/its] employees that 30 days' advance notice was required before the leave was to begin, then [***name of plaintiff***] must show that [he/she] gave that notice or, if 30 days' notice was not reasonably possible under the circumstances, that [he/she] gave notice as soon as possible];**

4. **That [***name of defendant***] [refused to grant [***name of plaintiff***]'s request for [family care/medical] leave] [refused to return [***name of plaintiff***] to the same or a comparable job when [his/her] [family care/medical] leave ended] [***other violation of CFRA rights***];**

5. **That [***name of plaintiff***] was harmed; and**

6. **That [***name of defendant***]'s [decision/conduct] was a substantial factor in causing [***name of plaintiff***]'s harm.**

DIRECTIONS FOR USE

This instruction is intended for use when an employee claims violation of the CFRA (Gov. Code, § 12945.1 et seq.). In addition to a qualifying employer's refusal to grant CFRA leave, CFRA violations include failure to provide benefits as required by CFRA and loss of seniority.

Give the bracketed sentence under element 3 only if the facts involve an expected birth, placement for adoption, or planned medical treatment, and there is evidence that the employer required 30 days' advance notice of leave. (See Cal. Code Regs, tit. 2, § 7297.4(a).)

The last bracketed option in element 2 does not include leave taken for disability on account of pregnancy, childbirth, or related medical conditions. If there is a dispute concerning the existence of a "serious health condition," the court must instruct the jury as to the meaning of this term pursuant to Government Code section 12945.2(c)(8).

SOURCES AND AUTHORITY

- Government Code section 12945.2(a) provides, in part, that "it shall be an unlawful employment practice for any employer … to refuse to grant a request by any employee with more than 12 months of service with the employer, and who has at least 1,250 hours of service with the employer during the previous 12-month period, to take up to a total of 12 workweeks in any 12-month period for family care and medical leave. Family care and medical leave … shall not be deemed to have been granted unless the employer provides the employee, upon granting the leave request, a guarantee of employment in the same or a comparable position upon the termination of the leave."

- Government Code section 12945.2(l) provides:

  > It shall be an unlawful employment practice for an employer to refuse to hire, or to discharge, fine, suspend, expel, or discriminate against, any individual because of any of the following:
  > (1) An individual's exercise of the right to family care and medical leave. …
  > (2) An individual's giving information or testimony as to his or her own family care and medical leave, or another person's family care and medical leave, in any inquiry or proceeding related to rights guaranteed under this section.

- Government Code section 12945.2(c)(3) provides:

  > "Family care and medical leave" means any of the following:
  > (A) Leave for reason of the birth of a child of the employee, the placement of a child with an employee in connection with the adoption or foster care of the child by the employee, or the serious health condition of a child of the employee.

(B) Leave to care for a parent or a spouse who has a serious health condition.
(C) Leave because of an employee's own serious health condition that makes the employee unable to perform the functions of the position of that employee, except for leave taken for disability on account of pregnancy, childbirth, or related medical conditions.

- Government Code section 12945.2(c)(8) provides:

  "Serious health condition" means an illness, injury, impairment, or physical or mental condition that involves either of the following:
  (A) Inpatient care in a hospital, hospice, or residential health care facility.
  (B) Continuing treatment or continuing supervision by a health care provider.

- Government Code section 12945.2(h) provides, in part: "If the employee's need for a leave … is foreseeable, the employee shall provide the employer with reasonable advance notice of the need for the leave."

- Government Code section 12945.2(i) provides, in part: "If the employee's need for leave … is foreseeable due to a planned medical treatment or supervision, the employee shall make a reasonable effort to schedule the treatment or supervision to avoid disruption to the operations of the employer, subject to the approval of the health care provider of the individual requiring the treatment or supervision."

- "It is not enough that [plaintiff's] mother had a serious health condition. [Plaintiff's] participation to provide care for her mother had to be 'warranted' during a 'period of treatment or supervision … .' " (*Pang v. Beverly Hospital, Inc.* (2000) 79 Cal.App.4th 986, 995 [94 Cal.Rptr.2d 643], internal citation and footnote omitted.)

<u>Secondary Sources</u>

- 8 Witkin, Summary of California Law (9th ed. 2002 supp.) Constitutional Law, §§ 763A, 763B, 763C, 763D, pp. 170–175
- 1 Wilcox, California Employment Law (1989) Leaves of Absence, §§ 8.25[2], pp. 8-32–8-34.1, 8.30[1]–[2], 8.31[2], 8.32
- 1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 2000) Other Employee Rights Statutes, §§ 4.18–4.20, pp. 174–176
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.32 [6][a]–[b] (Matthew Bender)
- Bancroft-Whitney's California Civil Practice: Employment Litigation (1993) Working Conditions, § 5:39, pp. 34–35; *id.* (2001 supp.) at § 5:39, pp. 167–170

2601
California Family Rights Act
Eligibility

To show that [he/she] was eligible for [family care/medical] leave, [*name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was an employee of [***name of defendant***];**

2. **That [***name of defendant***] employed 50 or more employees within 75 miles of [***name of plaintiff***]'s workplace;**

3. **That at the time [***name of plaintiff***] [requested/began] leave, [he/she] had more than 12 months of service with [***name of defendant***] and had worked at least 1,250 hours for [***name of defendant***] during the previous 12 months; and**

4. **That at the time [***name of plaintiff***] [requested/began] leave [***name of plaintiff***] had taken no more than 12 weeks of family care or medical leave in the 12-month period [***define period***].**

DIRECTIONS FOR USE

Uncontested elements may be deleted from this instruction.

SOURCES AND AUTHORITY

- Government Code section 12945.2(a) provides, in part, that "it shall be an unlawful employment practice for any employer … to refuse to grant a request by any employee with more than 12 months of service with the employer, and who has at least 1,250 hours of service with the employer during the previous 12-month period, to take up to a total of 12 workweeks in any 12-month period for family care and medical leave. Family care and medical leave … shall not be deemed to have been granted unless the employer provides the employee, upon granting the leave request, a guarantee of employment in the same or a comparable position upon the termination of the leave."

- Government Code section 12945.2(c) provides, in part:

  "Employer" means either of the following:
  (A) Any person who directly employs 50 or more persons to perform services for a wage or salary.
  (B) The state, and any political or civil subdivision of the state and cities.

- Government Code section 12945.2(b) provides: "It shall not be an unlawful employment practice for an employer to refuse to grant a request for family care and medical leave by an employee if the employer employs less than 50 employees within 75 miles of the worksite where that employee is employed."

Secondary Sources

- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.32[6][c] (Matthew Bender)

2602
California Family Rights Act
Reasonable Notice of CFRA Leave

For notice of the need for leave to be reasonable, [*name of plaintiff***] must make [***name of defendant***] aware that [he/she] needs [family care/medical] leave, when the leave will begin, and how long it is expected to last. The notice can be verbal or in writing and does not need to mention the law. An employer cannot require disclosure of any medical diagnosis, but should ask for information necessary to decide whether the employee is entitled to leave.**

SOURCES AND AUTHORITY

- Government Code section 12945.2(h) provides: "If the employee's need for a leave … is foreseeable, the employee shall provide the employer with reasonable advance notice of the need for the leave."

- "An employee 'shall provide the employer with reasonable advance notice of the need for the leave.' … 'An employee shall provide at least verbal notice sufficient to make the employer aware that the employee needs CFRA-qualifying leave, and the anticipated timing and duration of the leave. The employee need not expressly assert rights under CFRA … or even mention CFRA … to meet the notice requirement; however, the employee must state the reason the leave is needed, such as, for example, the expected birth of a child or for medical treatment. The employer should inquire further of the employee if it is necessary to have more information about whether CFRA leave is being sought by the employee and obtain the necessary details of the leave to be taken.'" (*Gibbs v. American Airlines, Inc.* (1999) 74 Cal.App.4th 1, 6–7 [87 Cal.Rptr.2d 554], internal citation omitted.)

<u>Secondary Sources</u>

- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.32[6][e] (Matthew Bender)

2603
California Family Rights Act
"Comparable Job" Explained

"Comparable job" means a job that is the same or close to the employee's former job in responsibilities, duties, pay, benefits, working conditions, and schedule. It must be at the same or a nearby worksite.

DIRECTIONS FOR USE

Give this instruction only if comparable job is an issue under the plaintiff's CFRA claim.

SOURCES AND AUTHORITY

- Government Code section 12945.2(c)(4) provides: " 'Employment in the same or a comparable position' means employment in a position that has the same or similar duties and pay that can be performed at the same or similar geographic location as the position held prior to the leave."

- The Fair Employment and Housing Commission's regulations provide: " 'Employment in a comparable position' means employment in a position which is virtually identical to the employee's original position in terms of pay, benefits, and working conditions, including privileges, perquisites and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority. It must be performed at the same or geographically proximate worksite from where the employee was previously employed. It ordinarily means the same shift or the same or an equivalent work schedule. It has the same meaning as the term 'equivalent position' in [the Family Medical Leave Act] and its implementing regulations." (Cal. Code Regs., tit. 2, § 7297.0(g).)

- "[W]hile we will accord great weight and respect to the [Fair Employment and Housing Commission]'s regulations that apply to the necessity for leave, along with any applicable federal FMLA regulations that the Commission incorporated by reference, we still retain ultimate responsibility for construing [CFRA]." (*Pang v. Beverly Hospital, Inc.* (2000) 79 Cal.App.4th 986, 994–995 [94 Cal.Rptr.2d 643].)

<u>Secondary Sources</u>

- 1 Wilcox, California Employment Law (1989) Leaves of Absence, §§ 8.30[1]–[2]
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.32[6][h] (Matthew Bender)

2610
California Family Rights Act
Affirmative Defense—No Certification from Health-Care Provider

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[*Name of defendant*] claims that [he/she/it] denied [*name of plaintiff*]'s request for leave because [he/she] did not provide a health-care provider's certification of [his/her] need for leave. To succeed, [*name of defendant*] must prove both of the following:

1. **That [*name of defendant*] told [*name of plaintiff*] in writing that [he/she/it] required written certification from [*name of plaintiff*]'s health-care provider to [grant/extend] leave; and**

2. **That [*name of plaintiff*] did not provide [*name of defendant*] with the required certification from a health-care [within the time set by [*name of defendant*] or as soon as reasonably possible].**

DIRECTIONS FOR USE

The time set by the defendant described in element 2 must be at least 15 days.

SOURCES AND AUTHORITY

- Government Code section 12945.2(k) provides, in part:

  (1) An employer may require that an employee's request for leave because of the employee's own serious health condition be supported by a certification issued by his or her health care provider. That certification shall be sufficient if it includes all of the following:
  (A) The date on which the serious health condition commenced.
  (B) The probable duration of the condition.
  (C) A statement that, due to the serious health condition, the employee is unable to perform the function of his or her position.
  (2) The employer may require that the employee obtain subsequent recertification regarding the employee's serious health condition on a reasonable basis, in accordance with the procedure provided in paragraph (1), if additional leave is required.

- Government Code section 12945.2(j) provides, in part:

  (1) An employer may require that an employee's request for leave to care for a child, a spouse, or a parent who has a serious health condition be supported by

a certification issued by the health care provider of the individual requiring care. That certification shall be sufficient if it includes all of the following:
(A) The date on which the serious health condition commenced.
(B) The probable duration of the condition.
(C) An estimate of the amount of time that the health care provider believes the employee needs to care for the individual requiring the care.
(D) A statement that the serious health condition warrants the participation of a family member to provide care during a period of the treatment or supervision of the individual requiring care.

(2) Upon expiration of the time estimated by the health care provider in subparagraph (C) of paragraph (1), the employer may require the employee to obtain recertification, in accordance with the procedure provided in paragraph (1), if additional leave is required.

- Government Code section 12945.2(k)(4) provides, in part: "As a condition of an employee's return from leave taken because of the employee's own serious health condition, the employer may have a uniformly applied practice or policy that requires the employee to obtain certification from his or her health care provider that the employee is able to resume work."

- Government Code section 12945.2(c)(6) defines "health care provider" as meaning any of the following:

  (A) An individual holding either a physician's and surgeon's certificate issued pursuant to … the Business and Professions Code, an osteopathic physician's and surgeon's certificate issued pursuant to … the Business and Professions Code, or an individual duly licensed as a physician, surgeon, or osteopathic physician or surgeon in another state or jurisdiction, who directly treats or supervises the treatment of the serious health condition.
  (B) Any other person determined by the United States Secretary of Labor to be capable of providing health care services under the FMLA.

- The Fair Employment and Housing Commission's regulations provide: "A request to take a CFRA leave is reasonable if it complies with any applicable notice requirements … and if it is accompanied, where required, by a certification." (Cal. Code Regs., tit. 2, § 7297.1(b).)

<u>Secondary Sources</u>

- 8 Witkin, Summary of California Law (9th ed. 2002 supp.) Constitutional Law, §§ 763B, 763C, pp. 171–174
- 1 Wilcox, California Employment Law (1989) Leaves of Absence, § 8.26

2611
California Family Rights Act
Affirmative Defense—Fitness for Duty Statement

[*Name of defendant***] claims that [he/she/it] refused to return [***name of plaintiff***] to work because [he/she] did not provide a written statement from [his/her] health-care provider that [he/she] was fit to return to work. To succeed, [***name of defendant***] must prove both of the following:**

1. **That [***name of defendant***] has a uniformly applied practice or policy that requires employees on leave because of their own serious health condition to provide a written statement from their health-care provider that they are able to return to work; and**

2. **That [***name of plaintiff***] did not provide [***name of defendant***] with a written statement from [his/her] health-care provider of [his/her] fitness to return to work.**

SOURCES AND AUTHORITY

- Government Code section 12945.2(j) provides, in part:

  (1) An employer may require that an employee's request for leave to care for a child, a spouse, or a parent who has a serious health condition be supported by a certification issued by the health care provider of the individual requiring care. That certification shall be sufficient if it includes all of the following:
  (A) The date on which the serious health condition commenced.
  (B) The probable duration of the condition.
  (C) An estimate of the amount of time that the health care provider believes the employee needs to care for the individual requiring the care.
  (D) A statement that the serious health condition warrants the participation of a family member to provide care during a period of the treatment or supervision of the individual requiring care.
  (2) Upon expiration of the time estimated by the health care provider in subparagraph (C) of paragraph (1), the employer may require the employee to obtain recertification, in accordance with the procedure provided in paragraph (1), if additional leave is required.

- Government Code section 12945.2(k)(4) provides, in part: "As a condition of an employee's return from leave taken because of the employee's own serious health condition, the employer may have a uniformly applied practice or policy that requires

the employee to obtain certification from his or her health care provider that the employee is able to resume work."

- Government Code section 12945.2(c)(6) defines "health care provider" as meaning any of the following:

  (A) An individual holding either a physician's and surgeon's certificate issued pursuant to … the Business and Professions Code, an osteopathic physician's and surgeon's certificate issued pursuant to … the Business and Professions Code, or an individual duly licensed as a physician, surgeon, or osteopathic physician or surgeon in another state or jurisdiction, who directly treats or supervises the treatment of the serious health condition.
  (B) Any other person determined by the United States Secretary of Labor to be capable of providing health care services under the FMLA.

- The Fair Employment and Housing Commission's regulations provide: "A request to take a CFRA leave is reasonable if it complies with any applicable notice requirements … and if it is accompanied, where required, by a certification." (Cal. Code Regs., tit. 2, § 7297.1(b).)

Secondary Sources

- 8 Witkin, Summary of California Law (9th ed. 2002 supp.) Constitutional Law, §§ 763B, 763C, pp. 171–174
- 1 Wilcox, California Employment Law (1989) Leaves of Absence, § 8.26

2612
California Family Rights Act
Affirmative Defense—Employment Would Have Ceased

[*Name of defendant***] claims that [he/she/it] was not required to allow [***name of plaintiff***] to return to work when [his/her] [family care/medical] leave was over because [his/her] employment would have ended for other reasons. To succeed, [***name of defendant***] must prove both of the following:**

1. **That [***name of defendant***] would have [discharged/laid off] [***name of plaintiff***] if [he/she] had continued to work during the leave period; and**

2. **That [***name of plaintiff***]'s [family care/medical] leave was not a reason for [discharging [him/her]/laying [him/her] off].**

An employee on [family care/medical] leave has no greater right to his or her job or to other employment benefits than if he or she had continued working during the leave.

SOURCES AND AUTHORITY

- The Fair Employment and Housing Commission's regulations provide: "An employee has no greater right to reinstatement or to other benefits and conditions of employ-ment than if the employee had been continuously employed during the CFRA leave period. An employer has the burden of proving, by a preponderance of the evidence, that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny reinstatement. … [¶] … If an employee is laid off during the course of taking CFRA leave and employment is terminated, the employer's responsibility to continue CFRA leave, maintain group health plan benefits and reinstate the employee ceases at the time the employee is laid off, provided the employer has no continuing obligations under a collective bargaining agreement or otherwise." (Cal. Code Regs., tit. 2, § 7297.2(c)(1).)

<u>Secondary Sources</u>

- 1 Wilcox, California Employment Law (1989) Leaves of Absence, § 8.30[4]

2613
California Family Rights Act
Affirmative Defense—Key Employee

[*Name of defendant***] claims that [he/she/it] was not required to return [***name of plaintiff***] to work in the same or a comparable job following [family care/medical] leave because [he/she] was employed in a highly paid, essential position. To succeed on this claim, [***name of defendant***] must prove all of the following:**

1. **That [***name of plaintiff***] was a salaried employee and among the highest paid 10 percent of [***name of defendant***]'s employees [employed within 75 miles of [his/her] workplace];**

2. **That [***name of defendant***]'s refusal to return [***name of plaintiff***] to work in the same or a comparable job was necessary to prevent severe economic injury to [***name of defendant***]'s [business] operations; [and]**

3. **That when [***name of defendant***] decided that [***name of plaintiff***] would not be allowed to return to [his/her] job or a comparable position, [***name of defendant***] notified [***name of plaintiff***] of that decision; [and]**

4. **[That [***name of defendant***] gave [***name of plaintiff***] a reasonable opportunity to return to work after notifying [***name of plaintiff***] of [his/her/its] decision.]**

DIRECTIONS FOR USE

Element 4 is applicable only when the employer notifies the employee of its decision to refuse to reinstate plaintiff after family care or medical leave has commenced.

SOURCES AND AUTHORITY

- Government Code section 12945.2(r) provides, in part:

(1) [A]n employer may refuse to reinstate an employee returning from leave to the same or a comparable position if all of the following apply:
  (A) The employee is a salaried employee who is among the highest paid 10 percent of the employer's employees who are employed within 75 miles of the worksite at which that employee is employed.
  (B) The refusal is necessary to prevent substantial and grievous economic injury to the operations of the employer.

(C) The employer notifies the employee of the intent to refuse reinstatement at the time the employer determines the refusal is necessary under subparagraph (B).

(2) In any case in which the leave has already commenced, the employer shall give the employee a reasonable opportunity to return to work following the notice prescribed by subparagraph (C).

Secondary Sources

- 1 Wilcox, California Employment Law (1989) Leaves of Absence, § 8.30[5]

2620
California Family Rights Act
CFRA Rights Retaliation–Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] retaliated against [him/her] for [[requesting/taking] [family care/medical] leave]/[***other protected activity***]]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was eligible for [family care/medical] leave;**

2. **That [***name of plaintiff***] [[requested/took] [family care/medical] leave/ [***other protected activity***]];**

3. **That [***name of defendant***] [discharged/[***other adverse employment action***]] [***name of plaintiff***];**

4. **That [***name of plaintiff***]'s [request for/taking of] [family care/medical] leave]/[***other protected activity***]] was a motivating reason for [discharging/ [***other adverse employment action***]] [him/her];**

5. **That [***name of plaintiff***] was harmed; and**

6. **That [***name of defendant***]'s retaliatory conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

DIRECTIONS FOR USE

The instruction assumes that the defendant is plaintiff's present or former employer, and therefore it must be modified if the defendant is a prospective employer or other person.

SOURCES AND AUTHORITY

- Government Code section 12945.2(l) provides:

  > It shall be an unlawful employment practice for an employer to refuse to hire, or to discharge, fine, suspend, expel, or discriminate against, any individual because of any of the following:
  > (1) An individual's exercise of the right to family care and medical leave. …
  > (2) An individual's giving information or testimony as to his or her own family care and medical leave, or another person's family care and medical leave, in any inquiry or proceeding related to rights guaranteed under this section.

- Government Code section 12940(h) provides that it is an unlawful employment practice "[f]or any employer, labor organization, employment agency, or person to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under [Government Code sections 12900 through 12996] or because the person has filed a complaint, testified, or assisted in any proceeding under this part."

- "Guided by … cases under the analogous federal statute, we conclude the elements of a cause of action for retaliation in violation of CFRA under the circumstances of this case are as follows: (1) the defendant was an employer covered by CFRA; (2) the plaintiff was an employee eligible to take CFRA leave; (3) the plaintiff exercised her right to take leave for a qualifying CFRA purpose; and (4) the plaintiff suffered an adverse employment action, such as termination, fine, or suspension, because of her exercise of her right to CFRA leave." (*Dudley v. Department of Transportation* (2001) 90 Cal.App.4th 255, 261 [108 Cal.Rptr.2d 739].)

Secondary Sources

- 8 Witkin, Summary of California Law (9th ed. 2002 supp.) Constitutional Law, §§ 763C, 763D, pp. 172–175
- 1 Wilcox, California Employment Law (1989) Leaves of Absence, § 8.32
- 1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 2000) Other Employee Rights Statutes, §§ 4.18–4.20, pp. 174–176
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.37[3][c] (Matthew Bender)

VF-2600
Violation of CFRA Rights

We answer the questions submitted to us as follows:

1. **Was [***name of plaintiff***] eligible for family care or medical leave?**

   ___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***] [request/take] leave for the birth of [his/her] child or bonding with the child??**

   ___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***] provide reasonable notice to [***name of defendant***] of [his/her] need for [family care/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. **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 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 [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 2600, *Violation of CFRA Rights—Essential Factual Elements.*

Other factual situations can be substituted in question 2 as in element 2 of Instruction 2600.

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.

VF-2601
Violation of CFRA Rights
Affirmative Defense—Employment Would Have Ceased

We answer the questions submitted to us as follows:

1. Was [*name of plaintiff***] eligible for family care or medical leave?**

___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***] [request/take] leave for the birth of [his/her] child or bonding with the child?**

___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***] provide reasonable notice to [***name of defendant***] of [his/her] need for [family care/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. 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 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. **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 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 [decision/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].

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, *Violation of CFRA Rights—Essential Factual Elements*, and Instruction 2612, *Affirmative Defense—Employment Would Have Ceased*. If a different affirmative defense is at issue, this form should be tailored accordingly.

Other factual situations can be substituted in question 2 as in element 2 of Instruction 2600.

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.

VF-2602
CFRA Rights Retaliation

We answer the questions submitted to us as follows:

1. Was [*name of plaintiff***] eligible for family care or medical leave?**

___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***] [[request/take] [family care/medical] leave/ [***other protected 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 [*name of defendant***] [discharge/[***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 [[request for/taking] [family care/medical] leave/[***other protected activity***]] a motivating reason for [***name of defendant***]'s decision to [discharge/[***other adverse employment action***]]?**

___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 retaliatory 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 2620, *CFRA Rights Retaliation–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. 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.

2700
Nonpayment of Wages—Essential Factual Elements
(Lab. Code, §§ 201, 202, 218)

[*Name of plaintiff***] claims that [***name of defendant***] owes [him/her] unpaid wages. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] performed work for [***name of defendant***];**

2. **That [[***name of defendant***] discharged [***name of plaintiff***]]/[[***name of plaintiff***] quit [his/her] job];**

3. **That [***name of defendant***] owes [***name of plaintiff***] wages under the terms of the employment; and**

4. **The amount of unpaid wages.**

"Wages" include all amounts for labor performed by an employee, whether the amount is calculated by time, task, piece, commission, or some other method.

DIRECTIONS FOR USE

This instruction is intended for use in a civil action for payment of wages. Depending on the allegations in the case, the definition of "wages" may be modified to include additional compensation such as earned vacation, nondiscretionary bonuses, or severance pay.

The court may modify this instruction or write an appropriate instruction in cases where the defendant employer claims a permissible setoff from the plaintiff employee's unpaid wages. Under California Wage Orders, an employer may deduct from an employee's wages for cash shortage, breakage, or loss of equipment if the employer proves that this was caused by a dishonest or willful act, or by the gross negligence of the employee. (See, *e.g.*, Cal. Code Regs., tit. 8, § 11010, ¶ 8.)

If the defendant disputes the existence of an employment relationship, the court may consider modifying and giving Instruction 3704, *Existence of "Employee" Status Disputed*, in the Vicarious Responsibility series.

SOURCES AND AUTHORITY

- Labor Code section 218 provides, in part: "Nothing in this article shall limit the right of any wage claimant to sue directly or through an assignee for any wages or penalty due. …"

- Labor Code section 201 provides, in part: "If an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately."

- Labor Code section 202 provides, in part: "If an employee not having a written contract for a definite period quits his or her employment, his or her wages shall become due and payable not later than 72 hours thereafter, unless the employee has given 72 hours previous notice of his or her intention to quit, in which case the employee is entitled to his or her wages at the time of quitting."

- Labor Code section 200 defines "wages" as including "all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation. … 'Labor' includes labor, work, or service whether rendered or performed under contract, subcontract, partnership, station plan, or other agreement if the labor to be paid for is performed personally by the person demanding payment."

- Labor Code section 206(a) provides: "In case of a dispute over wages, the employer shall pay, without condition and within the time set by this article, all wages, or parts thereof, conceded by him to be due, leaving to the employee all remedies he might otherwise be entitled to as to any balance claimed."

- Labor Code section 221 provides: "It shall be unlawful for any employer to collect or receive from an employee any part of wages theretofore paid by said employer to said employee."

- "[Labor Code] section 221 has long been held to prohibit deductions from an employee's wages for cash shortages, breakage, loss of equipment, and other business losses that may result from the employee's simple negligence." (*Hudgins v. Neiman Marcus Group, Inc.* (1995) 34 Cal.App.4th 1109, 1118 [41 Cal.Rptr.2d 46].)

- California Wage Orders Provide: "No employer shall make any deduction from the wage or require any reimbursement from an employee for any cash shortage, breakage, or loss of equipment, unless it can be shown that the shortage, breakage, or loss is caused by a dishonest or willful act, or by the gross negligence of the employee." Cal. Code Regs., tit. 8, § 11010, ¶ 8.)

- "[A]n employer is not entitled to a setoff of debts owing it by an employee against any wages due that employee." (*Barnhill v. Robert Saunders & Co.* (1981) 125 Cal.App.3d 1, 6 [177 Cal.Rptr. 803].)

- Labor Code section 206.5 provides, in part: "No employer shall require the execution of any release of any claim or right on account of wages due, or to become due, or made as an advance on wages to be earned, unless payment of such wages has been made."

- Labor Code section 219(a) provides, in part: "No provision of [Labor Code sections 200 through 243] can in any way be contravened or set aside by a private agreement, whether written, oral, or implied."

Secondary Sources

- 2 Witkin, Summary of California Law (9th ed. 1987) Agency and Employment, § 335, pp. 327–329; *id*. (2002 supp.) at § 335, pp. 341–343
- 1 Wilcox, California Employment Law (1989) Administrative and Judicial Remedies Under Wage and Hour Laws, § 5.40
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 250, *Employment Law: Wage and Hour Disputes*, §§ 250.13[1][a], 250.40[3][a], 250.65 (Matthew Bender)
- Bancroft-Whitney's California Civil Practice: Employment Litigation (1993) Wage and Hour, §§ 4:67, 4:76, pp. 51, 55–56

2701
Nonpayment of Minimum Wage
Essential Factual Elements (Lab. Code, § 1194)

[*Name of plaintiff***] claims that [***name of defendant***] owes [him/her] the difference between the wages paid by [***name of defendant***] and the wages [***name of plaintiff***] should have been paid according to the minimum wage rate required by state law. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] performed work for [***name of defendant***];**
2. **That [***name of plaintiff***] was paid less than the minimum wage by [***name of defendant***]; and**
3. **The amount of wages owed.**

The minimum wage for labor performed from [*beginning date***] to [***ending date***] was [***minimum wage rate***] per hour.**

An employee is entitled to be paid the legal minimum wage rate even if he or she agrees to work for a lower wage.

DIRECTIONS FOR USE

The court must determine the prevailing minimum wage rate from applicable state or federal law. (See, *e.g.*, Cal. Code Regs., tit. 8, § 11000.)

The task force has chosen not to write model instructions for the numerous fact-specific affirmative defenses to minimum wage claims. The California Labor Code and the IWC's wage orders provide that certain employees are exempt from minimum wage requirements (for example, outside salespersons; see Lab. Code, § 1171), and that under certain circumstances employers may claim credits for meals and lodging against minimum wage pay (see Cal. Code Regs., tit. 8, § 11000, ¶ 3 and §§ 11010–11150, ¶ 10(B)). The assertion of an exemption from wage and hour laws is an affirmative defense. (See generally *Ramirez v. Yosemite Water Co., Inc.* (1999) 20 Cal.4th 785, 794 [85 Cal.Rptr.2d 844].)

SOURCES AND AUTHORITY

- Labor Code section 1194(a) provides: "Notwithstanding any agreement to work for a lesser wage, any employee receiving less than the legal minimum wage or the legal overtime compensation applicable to the employee is entitled to recover in a civil

action the unpaid balance of the full amount of this minimum wage or overtime compensation, including interest thereon, reasonable attorney's fees, and costs of suit."

- Labor Code section 1194.2 provides, in part:

  (a) In any action under … Section 1194 to recover wages because of the payment of a wage less than the minimum wage, … an employee shall be entitled to recover liquidated damages in an amount equal to the wages unlawfully unpaid and interest thereon. Nothing in this subdivision shall be construed to authorize the recovery of liquidated damages for failure to pay overtime compensation.
  (b) Notwithstanding subdivision (a), if the employer demonstrates to the satisfaction of the court that the act or omission giving rise to the action was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of any provision of the Labor Code relating to minimum wage, or an order of the commission, the court may, in its discretion, refuse to award liquidated damages or award any amount of liquidated damages not exceeding the amount specified in subdivision (a).

- Labor Code section 200 defines "wages" as including "all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation. … [¶] 'Labor' includes labor, work, or service whether rendered or performed under contract, subcontract, partnership, station plan, or other agreement if the labor to be paid for is performed personally by the person demanding payment."

- Labor Code section 206(a) provides: "In case of a dispute over wages, the employer shall pay, without condition and within the time set by this article, all wages, or parts thereof, conceded by him to be due, leaving to the employee all remedies he might otherwise be entitled to as to any balance claimed."

- Labor Code section 1193.6(a) provides, in part: "The department or division may, with or without the consent of the employee or employees affected, commence and prosecute a civil action to recover unpaid minimum wages or unpaid overtime compensation. … The consent of any employee to the bringing of this action shall constitute a waiver on the part of the employee of his or her cause of action under Section 1194 unless the action is dismissed without prejudice by the department or the division."

- Labor Code section 1173 provides, in part: "It is the continuing duty of the Industrial Welfare Commission … to ascertain the wages paid to all employees in this state, [and] to ascertain the hours and conditions of labor and employment in the various occupations, trades, and industries in which employees are employed in this state. … The commission shall conduct a full review of the adequacy of the minimum wage at least once every two years."

Secondary Sources

- 2 Witkin, Summary of California Law (9th ed. 1987) Agency and Employment, §§ 330, 335, pp. 321–322, 327–329; *id*. (2002 supp.) at §§ 330, 335, pp. 325–327, 341–343
- 1 Wilcox, California Employment Law (1989) Minimum Wages, §§ 2.02[1], 2.03[1], 2.04[1], 2.05[1], 2.20[1], 2.21[1]; Administrative and Judicial Remedies Under Wage and Hour Laws, § 5.72
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 250, *Employment Law: Wage and Hour Disputes*, §§ 250.13[1][a], 250.14[d] (Matthew Bender)
- Bancroft-Whitney's California Civil Practice: Employment Litigation (1993) Wage and Hour, §§ 4:67, 4:77, pp. 51, 56

2702
Nonpayment of Overtime Compensation
Essential Factual Elements (Lab. Code, § 1194)

[*Name of plaintiff***] claims that [***name of defendant***] owes [him/her] overtime pay as required by state law. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] performed work for [***name of defendant***];**
2. **The amount of overtime [***name of plaintiff***] worked;**
3. **That [***name of plaintiff***] was [not paid overtime] [was paid less than the legal overtime rate] for that overtime; and**
4. **The amount of overtime pay owed.**

The legal overtime pay rate for workers in [*name of plaintiff***]'s industry and job is [one and one-half times an employee's hourly rate for work performed after 8 hours in a day or in excess of 40 hours in a workweek/[***insert other overtime compensation rate***]].**

An employee is entitled to be paid the legal overtime pay rate even if he or she agrees to work for a lower rate.

DIRECTIONS FOR USE

The court must determine the overtime compensation rate under applicable state or federal law. (See, *e.g.*, Lab. Code, §§ 1173, 1182; Cal. Code Regs., tit. 8, § 11000, ¶ 2 and §§ 11010–11150, ¶ 4(A).)

The assertion of an employee's exemption from overtime laws is an affirmative defense. (*Ramirez v. Yosemite Water Co., Inc.* (1999) 20 Cal.4th 785, 794 [85 Cal.Rptr.2d 844].) For example, outside salespersons are exempt from overtime requirements (see Lab. Code, § 1171). An employee's exemption from overtime laws presents a mixed question of law and fact. (*Id.*) Because of the case-specific nature of exemptions to overtime laws, the subcommittee has chosen not to write model instructions for these affirmative defenses.

SOURCES AND AUTHORITY

- Labor Code section 1194(a) provides: "Notwithstanding any agreement to work for a lesser wage, any employee receiving less than the legal minimum wage or the legal overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount of this minimum wage or overtime compensation, including interest thereon, reasonable attorney's fees, and costs of suit."

- Labor Code section 1194.2 provides, in part:

  (a) In any action under … Section 1194 to recover wages because of the payment of a wage less than the minimum wage, … an employee shall be entitled to recover liquidated damages in an amount equal to the wages unlawfully unpaid and interest thereon. Nothing in this subdivision shall be construed to authorize the recovery of liquidated damages for failure to pay overtime compensation.

  (b) Notwithstanding subdivision (a), if the employer demonstrates to the satisfaction of the court that the act or omission giving rise to the action was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of any provision of the Labor Code relating to minimum wage, or an order of the commission, the court may, in its discretion, refuse to award liquidated damages or award any amount of liquidated damages not exceeding the amount specified in subdivision (a).

- Labor Code section 200 defines "wages" as including "all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation. … 'Labor' includes labor, work, or service whether rendered or performed under contract, subcontract, partnership, station plan, or other agreement if the labor to be paid for is performed personally by the person demanding payment."

- "Absent an *explicit*, *mutual* wage agreement, a fixed salary does not serve to compensate an employee for the number of hours worked under statutory overtime requirements. … Since there was no evidence of a wage agreement between the parties that appellant's … per week compensation represented the payment of minimum wage or included remuneration for hours worked in excess of 40 hours per week, … appellant incurred damages of uncompensated overtime." (*Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721, 725–726 [245 Cal.Rptr. 36].)

- "[T]he assertion of an exemption from the overtime laws is considered to be an affirmative defense, and therefore the employer bears the burden of proving the employee's exemption." (*Ramirez v. Yosemite Water Co., Inc.* (1999) 20 Cal.4th 785, 794–795 [85 Cal.Rptr.2d 844].)

- "The question whether [plaintiff] was an outside salesperson within the meaning of applicable statutes and regulations … is a mixed question of law and fact." (*Ramirez, supra,* 20 Cal.4th at p. 794.)

- Labor Code section 206(a) provides: "In case of a dispute over wages, the employer shall pay, without condition and within the time set by this article, all wages, or parts thereof, conceded by him to be due, leaving to the employee all remedies he might otherwise be entitled to as to any balance claimed."

- Labor Code section 1193.6(a) provides, in part: "The department or division may, with or without the consent of the employee or employees affected, commence and prosecute a civil action to recover unpaid minimum wages or unpaid overtime compensation. … The consent of any employee to the bringing of this action shall constitute a waiver on the part of the employee of his or her cause of action under Section 1194 unless the action is dismissed without prejudice by the department or the division."

Secondary Sources

- 2 Witkin, Summary of California Law (9th ed. 1987) Agency and Employment, §§ 330, 335, pp. 321–322, 327–329; *id*. (2002 supp.) at §§ 330, 335, pp. 325–327, 341–343
- 1 Wilcox, California Employment Law (1989) Overtime Compensation and Regulation of Hours Worked, §§ 3.03[1], 3.04[1], 3.07[1], 3.08[1], 3.09[1]; Administrative and Judicial Remedies Under Wage and Hour Laws, § 5.72
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 250, *Employment Law: Wage and Hour Disputes* (Matthew Bender)
- Bancroft-Whitney's California Civil Practice: Employment Litigation (1993) Wage and Hour, §§ 4:67, 4:77, pp. 51, 56

2703
Nonpayment of Overtime Compensation—Proof of Overtime Hours Worked

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State law requires California employers to keep payroll records showing the hours worked by and wages paid to employees. If [*name of defendant*] has not presented accurate information about the hours worked by [*name of plaintiff*], then your decision may be based on a reasonable estimate of the hours worked by [*name of plaintiff*].

DIRECTIONS FOR USE

This instruction is intended for use when the plaintiff is unable to provide evidence of the precise number of hours worked because of the employer's failure to keep accurate payroll records. (See *Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721, 727–728 [245 Cal.Rptr. 36].)

SOURCES AND AUTHORITY

- Labor Code section 1194(a) provides: "Notwithstanding any agreement to work for a lesser wage, any employee receiving less than … the legal overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount of this … overtime compensation, including interest thereon, reasonable attorney's fees, and costs of suit."

- "Although the employee has the burden of proving that he performed work for which he was not compensated, public policy prohibits making that burden an impossible hurdle for the employee. … 'In such situation … an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate.' " (*Hernandez, supra,* 199 Cal.App.3d at p. 727, internal citation omitted.)

- "It is the trier of fact's duty to draw whatever reasonable inferences it can from the employee's evidence where the employer cannot provide accurate information." (*Hernandez, supra,* 199 Cal.App.3d at p. 728, internal citation omitted.)

- Labor Code section 1174(d) provides: "Every person employing labor in this state shall … [k]eep … payroll records showing the hours worked daily by and the wages

paid to, and the number of piece-rate units earned by and any applicable piece rate paid to, employees employed at the respective plants or establishments. These records shall be kept in accordance with rules established for this purpose by the commission, but in any case shall be kept on file for not less than two years."

- "Absent an *explicit*, *mutual* wage agreement, a fixed salary does not serve to compensate an employee for the number of hours worked under statutory overtime requirements. … Since there was no evidence of a wage agreement between the parties that appellant's . . . per week compensation represented the payment of minimum wage or included remuneration for hours worked in excess of 40 hours per week, … appellant incurred damages of uncompensated overtime." (*Hernandez*, *supra*, 199 Cal.App.3d at pp. 725–726, internal citations omitted.)

Secondary Sources

- 1 Wilcox, California Employment Law (1989) Administrative and Judicial Remedies Under Wage and Hour Laws, § 5.72[1]
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 250, *Employment Law: Wage and Hour Disputes* (Matthew Bender)

2704
Damages—Waiting-Time Penalty for Nonpayment of Wages

If you decide that [*name of plaintiff***] has proved [his/her] claim against [***name of defendant***] for [unpaid wages/[***insert other claim***]], then [***name of plaintiff***] may be entitled to receive an award of a civil penalty based on the number of days [***name of defendant***] failed to pay [his/her] wages when due.**

To recover the civil penalty, [*name of plaintiff***] must prove all of the following:**

1. **The date on which [***name of plaintiff***]'s employment ended;**

2. **The date on which [***name of defendant***] paid [***name of plaintiff***] all wages due; and**

3. **[***Name of plaintiff***]'s daily wage rate at the time [his/her] employment with [***name of defendant***] ended.**

The term "wages" includes all amounts for labor performed by an employee, whether the amount is calculated by time, task, piece, commission, or some other method.

DIRECTIONS FOR USE

This instruction is intended to instruct the jury on factual determinations required to assist the court in calculating waiting time penalties under Labor Code section 203. The court must determine when final wages are due based on the circumstances of the case and applicable law—see Labor Code sections 201 and 202. If there is a factual dispute, for example, whether plaintiff gave advance notice of his or her intention to quit, or whether payment of final wages by mail was authorized by plaintiff, the court may be required to give further instruction to the jury. Final wages generally are due on the day an employee is discharged by the employer, but are not due for 72 hours if an employee quits without notice (see Lab. Code, §§ 201, 201.5, 201.7, 202, 205.5).

The definition of "wages" may be deleted as redundant if it is redundant with other instructions.

SOURCES AND AUTHORITY

- Labor Code section 203 provides: "If an employer willfully fails to pay, without abatement or reduction, in accordance with Sections 201, 201.5, 202, and 205.5, any wages of an employee who is discharged or who quits, the wages of the employee

shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced; but the wages shall not continue for more than 30 days. An employee who secretes or absents himself or herself to avoid payment to him or her, or who refuses to receive the payment when fully tendered to him or her, including any penalty then accrued under this section, is not entitled to any benefit under this section for the time during which he or she so avoids payment. Suit may be filed for these penalties at any time before the expiration of the statute of limitations on an action for the wages from which the penalties arise."

- Labor Code section 218 provides, in part: "Nothing in this article shall limit the right of any wage claimant to sue directly or through an assignee for any wages or penalty due him under this article."

- Labor Code section 201 provides, in part: "If an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately."

- Labor Code section 202 provides: "If an employee not having a written contract for a definite period quits his or her employment, his or her wages shall become due and payable not later than 72 hours thereafter, unless the employee has given 72 hours previous notice of his or her intention to quit, in which case the employee is entitled to his or her wages at the time of quitting. Notwithstanding any other provision of law, an employee who quits without providing a 72-hour notice shall be entitled to receive payment by mail if he or she so requests and designates a mailing address. The date of the mailing shall constitute the date of payment for purposes of the requirement to provide payment within 72 hours of the notice of quitting."

- Labor Code section 200 defines "wages" as including "all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation. … 'Labor' includes labor, work, or service whether rendered or performed under contract, subcontract, partnership, station plan, or other agreement if the labor to be paid for is performed personally by the person demanding payment."

- Labor Code section 227.3 provides, in part: "Unless otherwise provided by a collective-bargaining agreement, whenever a contract of employment or employer policy provides for paid vacations, and an employee is terminated without having taken off his vested vacation time, all vested vacation shall be paid to him as wages at his final rate in accordance with such contract of employment or employer policy respecting eligibility or time served."

- Labor Code section 206(a) provides: "In case of a dispute over wages, the employer shall pay, without condition and within the time set by this article, all wages, or parts thereof, conceded by him to be due, leaving to the employee all remedies he might otherwise be entitled to as to any balance claimed."

- "The purpose of section 203 is to compel the prompt payment of wages; the section is to be given a reasonable but strict interpretation. … [T]o be at fault within the meaning of the statute, the employer's refusal to pay need not be based on a deliberate evil purpose to defraud workmen of wages which the employer knows to be due. As used in section 203, 'willful' merely means that the employer intentionally failed or refused to perform an act which was required to be done." (*Barnhill v. Robert Saunders & Co*. (1981) 125 Cal.App.3d 1, 7 [177 Cal.Rptr. 803].)

- "A proper reading of section 203 mandates a penalty equivalent to the employee's daily wages for each day he or she remained unpaid up to a total of 30 days. … [T]he critical computation required by section 203 is the calculation of a daily wage rate, which can then be multiplied by the number of days of nonpayment, up to 30 days." (*Mamika v. Barca* (1998) 68 Cal.App.4th 487, 493 [80 Cal.Rptr.2d 175].)

- " 'A tender of the wages due at the time of the discharge, if properly made and in the proper amount, terminates the further accumulation of penalty, but it does not preclude the employee from recovering the penalty already accrued. …' " (*Oppenheimer v. Sunkist Growers, Inc.* (1957) 153 Cal.App.2d Supp. 897, 899 [315 P.2d 116], internal citation omitted.)

<u>Secondary Sources</u>

- 2 Witkin, Summary of California Law (9th ed. 1987) Agency and Employment, § 335, pp. 327–329; *id*. (2002 supp.) at § 335, pp. 341–343
- 1 Wilcox, California Employment Law (1989) Administrative and Judicial Remedies Under Wage and Hour Laws, § 5.40
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 250, *Employment Law: Wage and Hour Disputes*, § 250.16[2][d] (Matthew Bender)
- Bancroft-Whitney's California Civil Practice: Employment Litigation (1993) Wage and Hour, §§ 4:67, 4:76, pp. 51, 55–56

2710
Solicitation of Employee by Misrepresentation
Essential Factual Elements (Lab. Code, § 970)

[*Name of plaintiff***] claims that [***name of defendant***] made [a] false representation[s] about work to persuade [him/her] to change [his/her] residence. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] made [a] representation[s] to [***name of plaintiff***] about [***insert one or more of the following***:]**

   [the kind, character, or existence of work;]

   [the length of time work would last;]

   [the compensation for work;]

   [the sanitary or housing conditions relating to work;]

   [the existence or nonexistence of any pending strike, lockout, or other labor dispute affecting work;]

2. **That [***name of defendant***]'s representation(s) [was/were] not true;**

3. **That [***name of defendant***] knew when the representation[s] [was/were] made that [it/they] [was/were] not true;**

4. **That [***name of defendant***] intended that [***name of plaintiff***] rely on the representation[s];**

5. **That [***name of plaintiff***] reasonably relied on [***name of defendant***]'s representation[s] and changed [his/her] residence for the purpose of working for [***name of defendant***];**

6. **That [***name of plaintiff***] was harmed; and**

7. **That [***name of plaintiff***]'s reliance on [***name of defendant***]'s representation(s) was a substantial factor in causing [his/her] harm.**

DIRECTIONS FOR USE

If the statutory action under Labor Code section 970 is applicable, do not give the common-law fraud instruction. For other jury instructions regarding opinions as statements of fact, misrepresentations to third parties, reliance, and reasonable reliance, see Instructions 1904 through 1908 in the Fraud or Deceit series.

SOURCES AND AUTHORITY

- Labor Code section 970 provides:

  No person, or agent or officer thereof, directly or indirectly, shall influence, persuade, or engage any person to change from one place to another in this State or from any place outside to any place within the State, or from any place within the State to any place outside, for the purpose of working in any branch of labor, through or by means of knowingly false representations, whether spoken, written, or advertised in printed form, concerning either:
  (a) The kind, character, or existence of such work;
  (b) The length of time such work will last, or the compensation therefor;
  (c) The sanitary or housing conditions relating to or surrounding the work;
  (d) The existence or nonexistence of any strike, lockout, or other labor dispute affecting it and pending between the proposed employer and the persons then or last engaged in the performance of the labor for which the employee is sought.

- Labor Code section 971 provides: "Any person, or agent or officer thereof, who violates Section 970 is guilty of a misdemeanor punishable by a fine of not less than fifty dollars ($50) nor more than one thousand dollars ($1,000) or imprisonment for not more than six months or both."

- Labor Code section 972 provides, in part: "[A]ny person, or agent or officer thereof who violates any provision of Section 970 is liable to the party aggrieved, in a civil action, for double damages resulting from such misrepresentations. Such civil action may be brought by an aggrieved person or his assigns or successors in interest, without first establishing any criminal liability."

- "[S]ection 970, although applied … to other employment situations, was enacted to protect migrant workers from the abuses heaped upon them by unscrupulous employers and potential employers, especially involving false promises made to induce them to move in the first instance." (*Tyco Industries, Inc. v. Superior Court* (1985) 164 Cal.App.3d 148, 155 [211 Cal.Rptr. 540], internal citation and italics omitted.)

- "To establish … a claim [for violation of section 970], [plaintiff] had to prove that defendants made a knowingly false representation regarding the length of her employment … with the intent to persuade her to move there from another place to

take the position." (*Finch v. Brenda Raceway Corp.* (1994) 22 Cal.App.4th 547, 553 [27 Cal.Rptr.2d 531].)

- "[Section 970] requires the employee to demonstrate that his or her employer made 'knowingly false representations' concerning the nature, duration or conditions of employment. … Moreover, under the statute an employee must establish that the employer induced him or her to relocate or change residences." (*Eisenberg v. Alameda Newspapers, Inc.* (1999) 74 Cal.App.4th 1359, 1392 [88 Cal.Rptr.2d 802].)

- "The words 'to change from one place to another' import temporary as well as permanent relocation of residence, as contrasted with a mere change in the site of employment. The quantitative fact that the change of residence was to be only for two weeks rather than for a longer period would not appear to affect the qualitative misrepresentations, nor does it render the statute inapplicable." (*Collins v. Rocha* (1972) 7 Cal.3d 232, 239–240 [102 Cal.Rptr. 1].)

- "The construction of a statute and whether it is applicable to a factual situation present solely questions of law. Although the trial court erred in determining that the Labor Code sections 970 and 972 were not applicable and hence the issue of double damages was not submitted to the jury, the record reflects that the jury specifically found that [defendant] made false representations to induce [plaintiff] to accept the position in California. Given the express findings by the jury, it is unnecessary to remand this case for a retrial on the limited issue of damages. … We therefore modify the judgment to reflect double damages in accordance with Labor Code section 972." (*Seubert v. McKesson Corp.* (1990) 223 Cal.App.3d 1514, 1522–1523 [273 Cal.Rptr. 296], internal citation omitted.)

<u>Secondary Sources</u>

- 2 Witkin, Summary of California Law (9th ed. 1987) Agency and Employment, § 344, pp. 335–336; *id.* (2002 supp.) at § 344, p. 356
- 4 Wilcox, California Employment Law (1989) Causes of Action Related to Wrongful Termination, § 63.06[1]
- 1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 2000) Other Employee Rights Statutes, § 4.51, pp. 188–189
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 250, *Employment Law: Wage and Hour Disputes*, §§ 249.30, 249.80 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 100, *Wrongful Termination and Discipline* (Matthew Bender)
- Bancroft-Whitney's California Civil Practice: Employment Litigation (1993) Termination of Employment, § 6:26, pp. 42–43; *id.* (2001 supp.) at § 6:26, pp. 249–250

2711
Preventing Subsequent Employment by Misrepresentation
Essential Factual Elements (Lab. Code, § 1050)

[*Name of plaintiff***] claims that [***name of defendant***] made [a] false representation[s] to prevent [him/her] from obtaining employment. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That after [***name of plaintiff***]'s employment with [***name of defendant***] ended, [***name of defendant***] made [a] representation(s) to [***name of prospective employer***] about [***name of plaintiff***];**

2. **That [***name of defendant***]'s representation[s] [was/were] not true;**

3. **That [***name of defendant***] knew the representation[s] [was/were] not true when [he/she/it] made [it/them];**

4. **That [***name of defendant***] made the representation[s] with the intent of preventing [***name of plaintiff***] from obtaining employment;**

5. **That [***name of plaintiff***] was harmed; and**

6. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

DIRECTIONS FOR USE

For jury instructions regarding opinions as statements of fact and the definition of an important fact, see Instructions 1904 and 1905 in the Fraud or Deceit series. For an instruction on the qualified privilege pursuant to Civil Code section 47(c), see Instruction 1723 in the Defamation series.

It is unclear whether elements 3 and 4 are necessary elements to this cause of action.

SOURCES AND AUTHORITY

- Labor Code section 1050 provides: "Any person, or agent or officer thereof, who, after having discharged an employee from the service of such person or after an employee has voluntarily left such service, by any misrepresentation prevents or attempts to prevent the former employee from obtaining employment, is guilty of a misdemeanor."

- Labor Code section 1052 provides: "Any person who knowingly causes, suffers, or permits an agent, superintendent, manager, or employee in his employ to commit a violation of section[] 1050 … or who fails to take all reasonable steps within his power to prevent such violation is guilty of a misdemeanor."

- Labor Code section 1054 provides, in part: "[A]ny person or agent or officer thereof, who violates any provision of sections 1050 to 1052, inclusive, is liable to the party aggrieved, in a civil action, for treble damages. Such civil action may be brought by such aggrieved person or his assigns, or successors in interest, without first establishing any criminal liability under this article."

- Labor Code section 1053 provides: "Nothing in this chapter shall prevent an employer or an agent, employee, superintendent or manager thereof from furnishing, upon special request therefor, a truthful statement concerning the reason for the discharge of an employee or why an employee voluntarily left the service of the employer. If such statement furnishes any mark, sign, or other means conveying information different from that expressed by words therein, such fact, or the fact that such statement or other means of furnishing information was given without a special request therefor is prima facie evidence of a violation of sections 1050 to 1053."

- "Section 1054 provides for a damage remedy for the party aggrieved by a violation of the section 1050 prohibition against an employer blacklisting a former employee. It is patent that the aggrieved party must be the blacklisted employee, not a union, since the latter can neither be fired nor quit." (*Service Employees Internat. Union, Local 193, AFL-CIO v. Hollywood Park, Inc.* (1983) 149 Cal.App.3d 745, 765 [197 Cal.Rptr. 316].)

- "Labor Code section 1050 applies only to misrepresentations made to prospective employers other than the defendant. … [T]he Legislature intended that Labor Code section 1050 would apply only to misstatements to other potential employers, not to misstatements made internally by employees of the party to be charged." (*Kelly v. General Telephone Co.* (1982) 136 Cal.App.3d 278, 288–289 [186 Cal.Rptr. 184].)

- A communication without malice solicited by a prospective employer from a former employer would be privileged in accordance with Civil Code section 47(c). (See *O'Shea v. General Telephone Co.* (1987) 193 Cal.App.3d 1040, 1047 [238 Cal.Rptr. 715].)

- Civil Code section 47(c) provides, in part, that a privileged publication is one made "[i]n a communication, without malice, to a person interested therein. … This … includes a communication concerning the job performance or qualifications of an applicant for employment, based upon credible evidence, made without malice, by a current or former employer of the applicant to, and upon request of, the prospective employer. This subdivision shall not apply to a communication concerning the speech or activities of an applicant for employment if the speech or activities are

constitutionally protected, or otherwise protected by Section 527.3 of the Code of Civil Procedure or any other provision of law."

- "We … recognize that '[t]he primary purpose of punitive damages is to punish the defendant and make an example of him.' … Since this purpose is the same as the treble damages authorized by Labor Code section 1054, we do not sanction a double recovery for the plaintiff. In the new trial on damages, the jury should be instructed on the subject of punitive damages based on malice or oppression. … Any verdict finding compensatory damages must be trebled by the court. Plaintiff may then elect to have judgment entered in an amount which reflects either the statutory trebling, or the compensatory and punitive damages." (*Marshall v. Brown* (1983) 141 Cal.App.3d 408, 419 [190 Cal.Rptr. 392].)

Secondary Sources

- 2 Witkin, Summary of California Law (9th ed. 1987) Agency and Employment, § 313, p. 306
- 4 Wilcox, California Employment Law (1989) Causes of Action Related to Wrongful Termination, § 63.06[2]
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 250, *Employment Law: Wage and Hour Disputes*, §§ 249.22[3][a], 249.31, 249.81 (Matthew Bender)
- Bancroft-Whitney's California Civil Practice: Employment Litigation (1993) Termination of Employment, § 6:27, p. 45; *id.* (2001 supp.) at § 6:27, pp. 252–253

VF-2700
Nonpayment of Wages (Lab. Code, §§ 201, 202, 218)

We answer the questions submitted to us as follows:

1. Did [*name of plaintiff***] perform work for [***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***] 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***] 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].

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 2700, *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.

VF-2701
Nonpayment of Minimum Wage (Lab. Code, § 1194)

We answer the questions submitted to us as follows:

1. Did [*name of plaintiff***] perform work for [***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***] paid less than the minimum wage by [***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 2701, *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.

VF-2702
Nonpayment of Overtime Compensation (Lab. Code, § 1194)

We answer the questions submitted to us as follows:

1. Did [*name of plaintiff***] perform work for [***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***] paid at a rate lower than the legal overtime compensation rate for any overtime hours 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 2702, *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.

VF-2703
Waiting-Time Penalty for Nonpayment of Wages
(Lab. Code, §§ 203, 218)

We answer the questions submitted to us as follows:

1. Did [*name of plaintiff***] perform work for [***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***] 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.

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 2704, *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.

VF-2704
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.

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].

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 2710, *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.

VF-2705
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**

   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 2711, *Preventing Subsequent Employment by Misrepresentation—Essential Factual Elements (Lab. Code, § 1050).* 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.

2800
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 [he/she] was [***name of defendant***]'s employee and therefore can only recover under California's Workers' Compensation Act. To succeed, [***name of defendant***] must prove all of the following:**

1. **That [***name of plaintiff***] was [***name of defendant***]'s employee;**

2. **That [***name of defendant***] had workers' compensation insurance [covering [***name of plaintiff***] at the time of injury]; 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 3700–3726). 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.

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."

- 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.)

- "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 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 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 1053, 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 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
- CALIFORNIA EMPLOYMENT LAW, Ch. 20, *Liability for Work-Related Injuries*, § 20.10 (Matthew Bender)
- 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
- HERLICK, CALIFORNIA WORKERS' COMPENSATION LAW (6th Edition), Ch. 10, *The Injury*, § 10.09 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 577, *Workers' Compensation*, §§ 577.530, 577.310 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 100, *Employer and Employee* (Matthew Bender)

2801
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 all of 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 3710, *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 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 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
- CALIFORNIA EMPLOYMENT LAW, Ch. 20, *Liability for Work-Related Injuries*, §§ 20.12[1][b], 20.41 (Matthew Bender)
- HERLICK, CALIFORNIA WORKERS' COMPENSATION LAW (6th Edition), Ch. 12, *Tort Actions-Subrogation*, § 12.20 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 577, *Workers' Compensation*, §§ 577.17, 577.314[2] (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 100, *Employer and Employee* (Matthew Bender)

2802
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 all of 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 even if [***name of defendant***] had not concealed the 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 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.)

- “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

- 2 Witkin, Summary of California Law (9th ed. 1987) Workers' Compensation, §§ 54–56
- CALIFORNIA EMPLOYMENT LAW, Ch. 20, *Liability for Work-Related Injuries*, § 20.12[1][c] (Matthew Bender)
- 1 Levy, et al., California Torts, Workers' Compensation, § 10.11[1][d]
- HERLICK, CALIFORNIA WORKERS' COMPENSATION LAW (6th Edition), Ch. 12, *Tort Actions-Subrogation*, § 12.20 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 577, *Workers' Compensation*, §§ 577.314[3], 577.525 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 100, *Employer and Employee* (Matthew Bender)

2803
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 all of 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 1200–1243) 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 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

- 2 Witkin, Summary of California Law (9th ed. 1987) Workers' Compensation, § 50
- CALIFORNIA EMPLOYMENT LAW, Ch. 20, *Liability for Work-Related Injuries,* § 20.12[1][d] (Matthew Bender)
- 1 Levy, et al., California Torts, Workers' Compensation, § 10.11[1][e]
- HERLICK, CALIFORNIA WORKERS' COMPENSATION LAW (6th Edition), Ch. 12, *Tort Actions-Subrogation,* § 12.20 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 577, *Workers' Compensation,* § 577.314[4] (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 100, *Employer and Employee* (Matthew Bender)

2804
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 all of 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.

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.

- "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.)

- "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].)

Secondary Sources

- 2 Witkin, Summary of California Law (9th ed. 1987) Workers’ Compensation, § 57
- CALIFORNIA EMPLOYMENT LAW, Ch. 20, *Liability for Work-Related Injuries*, § 20.12[1][e] (Matthew Bender)
- 1 Levy, et al., California Torts, Workers’ Compensation, § 10.11[1][f]
- HERLICK, CALIFORNIA WORKERS’ COMPENSATION LAW (6th Edition), Ch. 12, *Tort Actions-Subrogation*, § 12.20 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 577, *Workers’ Compensation*, § 577.314[5] (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 100, *Employer and Employee* (Matthew Bender)

2810
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 [he/she] 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 all of 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 [covering [***name of plaintiff***] at the time of injury]; 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 3700–3726). 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 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.)

<u>Secondary Sources</u>

- 2 Witkin, Summary of California Law (9th ed. 1987) Workers' Compensation, §§ 60–64
- CALIFORNIA EMPLOYMENT LAW, Ch. 20, *Liability for Work-Related Injuries,* § 20.43 (Matthew Bender)
- 1 Levy, et al., California Torts, Workers' Compensation, § 10.13

- HERLICK, CALIFORNIA WORKERS' COMPENSATION LAW (6th Edition), Ch. 12, *Tort Actions-Subrogation*, § 12.22 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 577, *Workers' Compensation*, § 577.316 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 100, *Employer and Employee* (Matthew Bender)

2811
Co-Employee's Willful and Unprovoked Physical Act of Aggression (Lab. Code, § 3601(a)(1))—Essential Factual Elements

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[*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 all of 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.

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 ... .' 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.)

Secondary Sources

- 2 Witkin, Summary of California Law (9th ed. 1987) Workers' Compensation, §§ 60–64
- CALIFORNIA EMPLOYMENT LAW, Ch. 20, *Liability for Work-Related Injuries*, § 20.43 (Matthew Bender)
- 1 Levy, et al., California Torts, Workers' Compensation, § 10.13
- HERLICK, CALIFORNIA WORKERS' COMPENSATION LAW (6th Edition), Ch. 12, *Tort Actions-Subrogation*, § 12.22 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 577, *Workers' Compensation*, § 577.316 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 100, *Employer and Employee* (Matthew Bender)

2812
Injury Caused by Co-Employee's Intoxication
(Lab. Code, § 3601(a)(2))—Essential Factual Elements

[*Name of plaintiff***] claims that [he/she] was harmed because [***name of defendant***] was intoxicated. To establish this claim, [***name of plaintiff***] must prove all of 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.
(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.)

<u>Secondary Sources</u>

- 2 Witkin, Summary of California Law (9th ed. 1987) Workers' Compensation, §§ 60–64
- CALIFORNIA EMPLOYMENT LAW, Ch. 20, *Liability for Work-Related Injuries*, § 20.43 (Matthew Bender)
- 1 Levy, et al., California Torts, Workers' Compensation, § 10.13
- HERLICK, CALIFORNIA WORKERS' COMPENSATION LAW (6th Edition), Ch. 12, *Tort Actions-Subrogation*, § 12.22 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 100, *Employer and Employee* (Matthew Bender)

VF-2800
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:] **$_____]**
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] **$_____]**
[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, *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 2801.

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.

VF-2801
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.

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 the 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.**

$_____

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, *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.

VF-2802
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.

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 2803, *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.

VF-2803
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**

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 [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. This verdict form is based on Instruction 2804, *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.

VF-2804
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**

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, *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 2811. 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.

VF-2805
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.

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 2812, *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.

2900
Essential Factual Elements

[*Name of plaintiff***] claims that while [he/she/[***name of decedent***]] was employed by [***name of defendant***], [[he/she] was harmed by/[his/her] death was caused by] [***name of defendant***]'s negligence. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff/decedent]***] **was employed by [***name of defendant***];**
2. **That [***name of defendant***] was a common carrier by railroad;**
3. **That [***name of defendant***] was engaged in interstate commerce;**
4. **That [***name of plaintiff/decedent***]'s job duties furthered, or in any way substantially affected, interstate commerce;**
5. **That [***name of plaintiff/decedent***] was acting within the scope of [his/her] employment at the time of the incident;**
6. **That [***name of defendant***] was negligent;**
7. **That [***name of plaintiff***] was harmed; and**
8. **That [***name of defendant***]'s negligence was a cause of [***name of plaintiff/decedent***]'s [harm/death].**

["Interstate commerce" is commercial activity that crosses more than one country or state, such as the movement of goods from one state to another.]

DIRECTIONS FOR USE

In many case, some of the elements itemized above may not be contested or may be decided by the judge as a matter of law in advance of trial. Such elements may be deleted from this instruction.

If the plaintiff is bringing a negligence claim under the Federal Employer Liability Act (FELA) and a claim under the Federal Safety Appliance Act (SAA) or the Boiler Inspection Act (BIA), the court may wish to add an introductory instruction that would alert the jury to the difference between the two claims.

SOURCES AND AUTHORITY

- Title 45 United States Code section 51 provides:

  > Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.
  >
  > Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

- The FELA is "liberally construed" to further Congress's remedial goal of protecting railroad workers. (*Consolidated Rail Corp. v. Gottshall* (1994) 512 U.S. 532, 543 [114 S.Ct. 2396, 129 L.Ed.2d 427].)

- The elements of a FELA case are: "(1) the injury occurred while the plaintiff was working within the scope of his or her employment with the railroad; (2) the employment was in furtherance of the railroad's interstate transportation business; (3) the employer railroad was negligent; and (4) the employer's negligence played some part in causing the injury for which compensation is sought under the Act." (*Monarch v. Southern Pacific Transportation Co.* (1999) 70 Cal.App.4th 1197, 1210, fn. 10 [83 Cal.Rptr.2d 247], internal citations omitted.)

- "That FELA is to be liberally construed … does not mean that it is a workers' compensation statute. We have insisted that FELA 'does not make the employer the insurer of the safety of his employees while they are on duty. The basis of his liability

is his negligence, not the fact that injuries occur.' " (*Consolidated Rail Corp., supra,* 512 U.S. at p. 543, internal citations omitted.)

- "We note that under the Federal Employers' Liability Act of 1908 an injured railroad employee may bring a cause of action without proof of negligence based on failure of the SAA-mandated safety appliances to function. When such strict liability does not apply, i.e., the injury does not result from defective equipment covered by the SAA, the employee must establish common law negligence." (*Carrillo v. ACF Industries, Inc.* (1999) 20 Cal.4th 1158, 1170 [86 Cal.Rptr.2d 832], fn. 4, internal citations omitted.)

- "Under the FELA, liability is established if the employer's negligence played any part in causing the employee's injury." (*McDonald v. Southern Pacific Transportation Co.* (1999) 71 Cal.App.4th 256, 260, fn. 4 [83 Cal.Rptr.2d 734], internal citation omitted.)

- "The test for coverage under the amendment is not whether the employee is engaged in transportation, but rather whether what he does in any way furthers or substantially affects transportation." (*Reed v. Pennsylvania Railroad Co.* (1956) 351 U.S. 502, 505 [76 S.Ct. 958, 100 L.Ed.2d 1366].)

- "Where more than one inference can be drawn from the evidence, the question whether an employee was, at the time of receiving the injury sued for, engaged in interstate commerce, is for the jury." (*Sullivan v. Matt* (1955) 130 Cal.App.2d 134, 139 [278 P.2d 499], internal citations omitted.)

2901
Negligence—Duty of Railroad

A railroad must use reasonable care under the circumstances to provide its employees with a reasonably safe place to work and with reasonably safe and suitable tools, machinery, and appliances. The reasonableness of care depends on the danger associated with the workplace or the equipment. The failure to use reasonable care is negligence. A railroad is not negligent if, using reasonable care, it could not reasonably have foreseen that the particular condition could cause injury.

[*Name of defendant***] is responsible for the negligence of any of its officers, agents, or employees.**

DIRECTIONS FOR USE

For a definition of the term "negligence" see Instruction 401, *Basic Standard of Care*.

SOURCES AND AUTHORITY

- "The plaintiff must make out a prima facie case of negligence on the part of the employer, including the element of reasonable foreseeability. … 'To recover, the plaintiff must prove that the railroad, with the exercise of due care, could have reasonably foreseen that a particular condition could cause injury. The defendant's duty is measured by what a reasonably prudent person should or could have reasonably anticipated as occurring under like circumstances.' " (*Albert v. Southern Pacific Transportation Co.* (1994) 30 Cal.App.4th 529, 534 [35 Cal.Rptr.2d 777], internal citations omitted.)

- "Absent foreseeability, negligence is not established under FELA and without a showing of negligence, recovery is not permitted." (*Albert, supra,* 30 Cal.App.4th at p. 536, internal citation omitted.) But note that foreseeability is not required for claims arising from the Federal Safety Appliance Act (49 USC § 20301, et seq.), or the Boiler Inspection Act (49 USC § 20701).

- "Although a railroad's duty to use reasonable care in furnishing employees a safe place to work is not stated explicitly in the statute, it has become an integral part of the FELA. Under the FELA, that duty becomes 'more imperative' as the risk to an employee increases. The duty is a 'continuing one' and requires a jury to weigh a myriad of factors—including the nature of a task, its hazards and efforts—in determining whether an employer furnished an employee with a reasonably safe place to work. This continuous duty to provide a safe place to work is broader than the general duty to use reasonable care. Other courts in FELA actions have held that

failure to instruct a jury regarding an employer's duty to provide a reasonably safe place to work is reversible error. We agree that when the issue is properly raised and an instruction is requested, the FELA requires jury instructions on the duty to provide a reasonably safe place to work." (*Ragsdell v. Southern Pacific Transportation Co.* (9th Cir. 1982) 688 F.2d 1281, 1283, internal citations omitted.)

- "The test of negligence in supplying the employee a safe place to work is 'whether reasonable men, examining the circumstances and the likelihood of injury, would have taken those steps necessary to remove the danger.' " (*Mortensen v. Southern Pacific Co.* (1966) 245 Cal.App.2d 241, 244 [53 Cal.Rptr. 851], internal citations omitted.)

- The duty to use reasonable care "is a duty which becomes 'more imperative' as the risk increases. 'Reasonable care' becomes, then, a demand of higher supremacy, and yet, in all cases it is a question of the reasonableness of the care, reasonableness depending upon the danger attending the place or the machinery." (*Bailey v. Central Vermont Ry., Inc.* (1943) 319 U.S. 350, 353 [63 S.Ct. 1062, 87 L.Ed. 1444], internal citation omitted.)

- "The employer is not the insurer of the safety of its employees and the test of the employer's liability to an injured employee is whether ordinary care was used by the employer in regard to the risk." (*Baez v. Southern Pacific Co.* (1963) 210 Cal.App.2d 714, 717 [26 Cal.Rptr. 899], internal citation omitted.)

- The U.S. Supreme Court has held that an independent contractor is an "agent" for purposes of establishing an employer's liability under the FELA if the contractor performs "operational activities" of the employer. (*Sinkler v. Missouri Pacific Railroad Co.* (1958) 356 U.S. 326, 331–332 [78 S.Ct. 758, 2 L.Ed.2d 799].)

2902
Negligence—Assignment of Employees

[*Name of defendant***] was negligent if**

[it assigned [*name of plaintiff/decedent***] to a task that it knew or should have known [he/she] was not medically fit to perform.]**

[it failed to assign a sufficient number of employees to safely perform the task that [*name of plaintiff/decedent***] was assigned to at the time of the incident.]**

DIRECTIONS FOR USE

Read only the alternative that applies to the facts of the case.

SOURCES AND AUTHORITY

- "The court correctly instructed the jury as to defendant's liability for assigning an employee to a job for which he is medically unfit. In this regard the jury was told that 'Under the Federal Employers' Liability Act, the word "injury" may include sickness, and it is negligence for a railroad company to assign a sick employee, of whose illness it knew or should have known, to tasks for which he is, by reason of his condition, unfitted, and the employee may recover damages from the railroad if such assignment plays any part in proximately worsening or aggravating such condition.' " (*Waller v. Southern Pacific Co.* (1967) 66 Cal.2d 201, 214 [57 Cal.Rptr. 353].)

- It is not necessary to include as an element that the defendant must have "forced" the plaintiff to perform the injurious task. (*Waller, supra,* 66 Cal.2d at p. 214.)

- "The employer is under the nondelegable obligation of providing sufficient help for the particular task." (*Southern Ry. Co. v. Welch* (6th Cir. 1957) 247 F.2d 340, 341, internal citation omitted.)

- "As a corollary to this duty to maintain safe working conditions, the carrier is required to provide its employee with sufficient help in the performance of the work assigned to him. Where the failure to provide sufficient help proximately causes injury to the employee, the carrier is liable for negligence under the provisions of the FELA." (*Yawn v. Southern Ry. Co.* (5th Cir. 1979) 591 F.2d 312, 315, internal citations omitted.)

2903
Causation—Negligence

[*Name of defendant***]'s negligence, if any, was a cause of [[***name of plaintiff***]'s harm/ [***name of decedent***]'s death] if it played any part, no matter how small, in bringing about the [harm/death], even if other factors also contributed to the [harm/death].**

DIRECTIONS FOR USE

For an instruction on concurrent cause, see Instruction 431, *Multiple Causes.*

SOURCES AND AUTHORITY

- "Under this statute … the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." (*Rogers v. Missouri Pacific Railroad Co.* (1957) 352 U.S. 500, 506 [77 S.Ct. 443, 1 L.Ed.2d 493].)

- "The common law concept of proximate cause … has not been adopted as the causation test in FELA cases. Causation in an FELA case exists even if there is a plurality of causes, including the negligence of the defendant or of a third person. The negligence of the employer need not be the sole cause or even a substantial cause of the ensuing injury." (*Parker v. Atchison, Topeka and Santa Fe Ry. Co.* (1968) 263 Cal.App.2d 675, 678 [70 Cal.Rptr. 8].)

- "Although the burden upon the plaintiff in proving causation in an F.E.L.A. case can be weighed neither in pounds nor ounces, it is a substantially lighter burden that that imposed upon him by [the common-law jury instruction]." (*Parker, supra,* 263 Cal.App.2d at p. 678.)

2904
Contributory Negligence

[*Name of defendant***] claims that [***name of plaintiff/decedent***] was negligent and that [his/her] negligence contributed to [his/her] own [harm/death]. To succeed, [***name of defendant***] must prove both of the following:**

1. **That [***name of plaintiff/decedent***] was negligent; and**

2. **That [***name of plaintiff/decedent***]'s negligence was a cause of [his/her] [harm/death].**

[*Name of plaintiff/decedent***]'s negligence, if any, was a cause of [his/her] own [harm/death] if it played any part, no matter how small, in bringing about [his/her] [harm/death], even if other factors also contributed to [his/her] [harm/death].**

If you decide that [*name of defendant***] was negligent but also decide that [***name of plaintiff/decedent***]'s negligence contributed to the harm, then you must determine the percentage of negligence that you attribute to [***name of plaintiff/decedent***].**

DIRECTIONS FOR USE

This instruction does not apply in cases where the claim is based on a violation of the Federal Safety Appliance Act or the Boiler Inspection Act. For a definition of the term "negligence" see Instruction 401, *Basic Standard of Care*.

SOURCES AND AUTHORITY

- Title 45 United States Code section 53 provides, in part: "[T]he fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

- "The FELA provides that defense of contributory negligence is not available to an employer to defeat an employee's claim for injury, but only to diminish the amount of damages in proportion to the amount of negligence attributable to the employee. The burden of proving contributory negligence is on the defendant." (*Torres v. Southern Pacific Co.* (1968) 260 Cal.App.2d 757, 763 [67 Cal.Rptr. 428], internal citations omitted.)

2905
Compliance With Employer's Requests or Directions

[*Name of plaintiff/decedent***] was not negligent simply because [he/she], at the request or direction of [***name of defendant***], worked at a dangerous job, or in a dangerous place, or under dangerous conditions.**

SOURCES AND AUTHORITY

- "In *Joyce v. Atlantic Richfield Co.*, this court held that when the evidence could support either contributory negligence or assumption of the risk, instructions which only define contributory negligence are not sufficient to prevent the jury from applying assumption of the risk. The court held the jury instructions should also include the following admonition: 'You may not find contributory negligence on the part of the plaintiff, however, simply because he acceded to the request or direction of the responsible representatives of his employer that he work at a dangerous job, or in a dangerous place, or under unsafe conditions.' The same instruction has been held sufficient by other circuits." (*Sauer v. Burlington Northern Railroad Co.* (10th Cir. 1996) 106 F.3d 1490, 1493, internal citation omitted.)

- "[I]f no evidence of impermissible assumption of risk has reached the jury, a correct instruction on contributory negligence will do. However, if, either because of evidence introduced at trial or because of statements made by counsel in opening or closing arguments, there is a risk that the implied consent theory of assumption of the risk seeped its way into the case, the jury should be instructed that it 'may not find contributory negligence on the part of the plaintiff ... simply because he acceded to the request or direction of the responsible representatives of his employer that he work at a dangerous job, or in a dangerous place, or under unsafe conditions.' " (*Fashauer v. New Jersey Transit Rail Operations, Inc.* (3rd Cir. 1995) 57 F.3d 1269, 1280.)

2920
Essential Factual Elements
Federal Safety Appliance Act or Boiler Inspection Act

[*Name of plaintiff***] [also] claims that while [he/she[***name of decedent***]] was employed by [***name of defendant***], [[he/she] was harmed by/[his/her] death was caused by] [***name of defendant***]'s [***describe violation of Federal Safety Appliance Act/Boiler Inspection Act***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff/decedent***] was employed by [***name of defendant***];**

2. **That [***name of defendant***] was a common carrier by railroad;**

3. **That [***name of plaintiff/decedent***] was acting within the scope of [his/her] employment at the time of the incident;**

4. **That [***name of defendant***] was engaged in interstate commerce;**

5. **That [***name of plaintiff/decedent***]'s job duties furthered, or in any way substantially affected, interstate commerce;**

6. **That [***name of defendant***] [***describe violation of Federal Safety Appliance Act/Boiler Inspection Act***];**

7. **That [***name of plaintiff***] was harmed; and**

8. **That [***name of defendant***]'s conduct was a cause of [[***name of plaintiff***]'s harm/[***name of decedent***]'s death].**

[Interstate commerce is commercial activity that crosses more than one country or state, such as the movement of goods from one state to another.]

[*Name of defendant***] is responsible for harm caused by [***describe conduct that violated the FSA/BIA***] even if it was not negligent. If you find that [***name of defendant***] is responsible for [***name of plaintiff/decedent***]'s [harm/death], [***name of plaintiff***]'s recovery, if any, must not be reduced because of [***name of plaintiff/decedent***]'s own conduct.**

DIRECTIONS FOR USE

The statutory violation should be paraphrased in this instruction where indicated. Separate instructions may need to be drafted detailing the statutory requirements of the specific violation as alleged and any applicable defenses. (See 49 USC §§ 20301, *et seq.*, 20501, *et seq.*, and 20701.)

In many case, some of the elements itemized above may not be contested or may be decided by the judge as a matter of law in advance of trial. Such elements may be deleted from this instruction.

If the plaintiff is bringing a negligence claim under the Federal Employer Liability Act (FELA) and a claim under the Federal Safety Appliance Act (SAA) or the Boiler Inspection Act (BIA), the court may wish to add an introductory instruction that would alert the jury to the difference between the two claims.

Do not give a contributory negligence instruction if the case is brought under this theory.

SOURCES AND AUTHORITY

- Title 45 United States Code section 53 provides, in part: "[T]he fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

- Title 45 United States Code section 54 provides: "In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

- Title 45 United States Code section 54a provides: "A regulation, standard, or requirement in force, or prescribed by the Secretary of Transportation under chapter 201 of Title 49, or by a State agency that is participating in investigative and surveillance activities under section 20105 of Title 49, is deemed to be a statute under sections 53 and 54 of this title."

- "We note that under the Federal Employers' Liability Act of 1908 an injured railroad employee may bring a cause of action without proof of negligence based on failure of

the SAA-mandated safety appliances to function. When such strict liability does not apply, i.e., the injury does not result from defective equipment covered by the SAA, the employee must establish common law negligence. The Supreme Court has also recognized that the SAA imposes a duty on railroads extending to nonemployee travelers at railway/highway crossings, who must bring a common law tort action in state court (absent diversity) and must prove negligence." (*Carrillo v. ACF Industries, Inc.* (1999) 20 Cal.4th 1158, 1170, fn. 4 [86 Cal.Rptr.2d 832], internal citations omitted.)

- "[An] FSAA violation is per se negligence in a FELA suit. In other words, the injured employee has to show only that the railroad violated the FSAA, and the railroad is strictly liable for any injury resulting from the violation." (*Phillips v. CSX Transportation Co.* (4th Cir. 1999) 190 F.3d 285, 288.)

- 49 USC section 20302(a) provides:

  General.—Except as provided in subsection (c) of this section and section 20303 of this title, a railroad carrier may use or allow to be used on any of its railroad lines—
  (1) a vehicle only if it is equipped with—
    (A) couplers coupling automatically by impact, and capable of being uncoupled, without the necessity of individuals going between the ends of the vehicles;
    (B) secure sill steps and efficient hand brakes; and
    (C) secure ladders and running boards when required by the Secretary of Transportation, and, if ladders are required, secure handholds or grab irons on its roof at the top of each ladder;
  (2) except as otherwise ordered by the Secretary, a vehicle only if it is equipped with secure grab irons or handholds on its ends and sides for greater security to individuals in coupling and uncoupling vehicles;
  (3) a vehicle only if it complies with the standard height of drawbars required by regulations prescribed by the Secretary;
  (4) a locomotive only if it is equipped with a power-driving wheel brake and appliances for operating the train-brake system; and
  (5) a train only if—
    (A) enough of the vehicles in the train are equipped with power or train brakes so that the engineer on the locomotive hauling the train can control the train's speed without the necessity of brake operators using the common hand brakes for that purpose; and
    (B) at least 50 percent of the vehicles in the train are equipped with power or train brakes and the engineer is using the power or train brakes on those vehicles and on all other vehicles equipped with them that are associated with those vehicles in the train.

- 49 USC section 20502(b) provides:

  Use.—A railroad carrier may allow a signal system to be used on its railroad line only when the system, including its controlling and operating appurtenances—

(1) may be operated safely without unnecessary risk of personal injury; and
(2) has been inspected and can meet any test prescribed under this chapter.

- Title 49 United States Code section 20701 provides:

  A railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances—

  (1) are in proper condition and safe to operate without unnecessary danger of personal injury;
  (2) have been inspected as required under this chapter and regulations prescribed by the Secretary of Transportation under this chapter; and
  (3) can withstand every test prescribed by the Secretary under this chapter.

- " 'The BIA and the SAA are regarded as amendments to the FELA. The BIA supplements the FELA to provide additional public protection and facilitate employee recovery. … [T]he BIA imposes on the carrier an absolute duty to maintain the locomotive, and all its parts and appurtenances, in proper condition, and safe to operate without unnecessary peril to life or limb.' " (*Fontaine v. National Railroad Passenger Corp.* (1997) 54 Cal.App.4th 1519, 1525 [63 Cal.Rptr.2d 644], internal citation omitted.)

- "[N]either contributory negligence nor assumption of the risk is a defense to a BIA violation which has contributed to the cause of an injury." (*Fontaine, supra,* 54 Cal.App.4th at p. 1525.)

- "Where an inefficient brake causes an injury the carrier in interstate commerce under the Safety Appliance Act cannot escape liability, and proof of negligence on the part of the railroad is unnecessary." (*Leet v. Union Pacific Railroad Co.* (1943) 60 Cal.App.2d 814, 817 [142 P.2d 37].)

- "Proof of a BIA violation is enough to establish negligence as a matter of law, and neither contributory negligence nor assumption of risk can be raised as a defense." (*Law v. General Motors Corp.* (9th Cir. 1997) 114 F.3d 908, 912, internal citations omitted.)

- "The purpose in enacting the BIA was to protect train service employees and the traveling public from defective locomotive boilers and equipment. '[I]t has been held consistently that the [BIA] supplements the [FELA] by imposing on interstate railroads "an absolute and continuing duty" to provide safe equipment.' In addition to the civil penalty, a person harmed by violation of the BIA is given recourse to sue under FELA, which applies only to railroad employees injured while engaged in interstate commerce. FELA provides the exclusive remedy for recovery of damages against a railroad by its employees. FELA liability is expressly limited to common

carriers." (*Viad Corp. v. Superior Court* (1997) 55 Cal.App.4th 330, 335 [64 Cal.Rptr.2d 136], internal citations omitted, disapproved on other grounds in *Scheiding v. General Motors Corp.* (2000) 22 Cal.4th 471, 484, fn. 6 [93 Cal.Rptr.2d 342].)

- Title 45 United States Code section 51 provides, in part: "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

- "The test for coverage under the amendment is not whether the employee is engaged in transportation, but rather whether what he does in any way furthers or substantially affects transportation." (*Reed v. Pennsylvania Railroad Co.* (1956) 351 U.S. 502, 505 [76 S.Ct. 958, 100 L.Ed.2d 1366].)

- "Where more than one inference can be drawn from the evidence, the question whether an employee was, at the time of receiving the injury sued for, engaged in interstate commerce, is for the jury." (*Sullivan v. Matt* (1955) 130 Cal.App.2d 134, 139 [278 P.2d 499], internal citations omitted.)

2921
Causation Under FSAA or BIA

If you decide that [*name of defendant***] [***describe violation of the Federal Safety Appliance Act/Boiler Inspection Act***], then this is a cause of harm if it played any part, no matter how small, in bringing about the [harm/death], even if other factors also contributed to the [harm/death].**

SOURCES AND AUTHORITY

- "Actions alleging a violation of the BIA are brought under the FELA. The standard of causation required in a BIA case is the same as the standard of causation required in a FELA negligence case." (*Summers v. Missouri Pacific Railroad System* (10th Cir. 1997) 132 F.3d 599, 606, internal citations omitted.)

- "Proximate cause, as traditionally understood, is not required to establish causation under either the FELA or the BIA. 'Under the FELA [but not the BIA], an employee is entitled to recover damages if the employer's negligence played any part in producing the injury, no matter how slight.' " (*Fontaine v. National Railroad Passenger Corp.* (1997) 54 Cal.App.4th 1519, 1525 [63 Cal.Rptr.2d 644], internal citations omitted.)

- Liability under the BIA is established if defendant's violation of the BIA "played any part, no matter how small, in bringing about or actually causing injury to the plaintiff … without any requirement of a showing of negligence on the part of the defendant." (*Oglesby v. Southern Pacific Transportation Co.* (9th Cir. 1993) 6 F.3d 603, 606–609.)

2922
Statute of Limitations—Special Verdict Form or Interrogatory

[*Name of plaintiff***] must prove that [he/she] did not know, and could not reasonably have known, before [***date three years before action was commenced***],**

1. **That [he/she] had been harmed; and**

2. **That the harm was potentially caused by [his/her] work with [***name of defendant***].**

You will be asked a question about this on a special [verdict form/ interrogatory].

SOURCES AND AUTHORITY

- Title 45 United States Code section 56 provides: "No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued."

- "Compliance with the three-year statute of limitations is a condition precedent for recovery in a FELA action. In cases of latent or progressive injuries … the 'discovery rule' directs that the cause of action does not commence to run until the plaintiff knew or should have known of the injury and its cause." (*Monarch v. Southern Pacific Transportation Co.* (1999) 70 Cal.App.4th 1197, 1203 [83 Cal.Rptr.2d 247], internal citations omitted.)

- "The burden is therefore on the claimant to allege and to prove that his cause of action was commenced within the three-year period." (*Emmons v. Southern Pacific Transportation Co.* (5th Cir. 1983) 701 F.2d 1112, 1118, internal citations omitted.)

- "Under the discovery rule, the test is an objective inquiry into whether the plaintiff knew or should have known, in the exercise of reasonable diligence, the essential facts of injury and cause. Constructive rather than actual knowledge of the fact of causation triggers a duty to investigate the possible causes of injury. Thus, in accordance with the objective test, 'definite knowledge' that the injury is work related is not necessary in order for the cause of action to accrue. Once the plaintiff believes or suspects that the 'potential cause of his injury' is work related, an affirmative duty to investigate is imposed." (*Monarch, supra,* 70 Cal.App.4th at p. 1203.)

2923
Borrowed Servant/Dual Employee

[[*Name of plaintiff***] claims [he/she[***name of decedent***]] was [***name of defendant***]'s employee at the time of the incident even though [he/she] was primarily employed by [***name of primary employer***].]**

[[*Name of plaintiff***] claims [he/she[***name of decedent***]] was employed by both [***name of defendant***] and [***name of primary employer***] at the time of the incident.]**

In deciding whether [*name of plaintiff/decedent***] was [***name of defendant***]'s employee, you must first decide whether [***name of defendant***] had the right to control the work of [***name of plaintiff/decedent***], rather than just the right to specify the result. It does not matter whether [***name of defendant***] exercised the right to control. Sharing information or coordinating efforts between employees of two companies, by itself, is not enough to establish the right to control.**

If you decide that [*name of defendant***] did not have the right of control, then you must consider all the circumstances in deciding whether [***name of plaintiff/decedent***] was [***name of defendant***]'s employee. The following factors, if true, may show that [***name of plaintiff/decedent***] was the employee of [***name of defendant***]:**

(a) [*Name of defendant***] supplied the equipment, tools, and place of work;**

(b) [*Name of plaintiff/decedent***] was paid by the hour rather than by the job;**

(c) The work being done by [*name of plaintiff/decedent***] was part of the regular business of [***name of defendant***];**

(d) [*Name of defendant***] had the right to end its relationship with [***name of plaintiff/decedent***];**

(e) The work being done by [*name of plaintiff/decedent***] was [his/her] only occupation or business;**

(f) The kind of work performed by [*name of plaintiff/decedent***] is usually done under the direction of a supervisor rather than by a specialist working without supervision;**

(g) The kind of work performed by [*name of plaintiff/decedent***] does not require specialized or professional skill;**

(h) The services performed by [*name of plaintiff/decedent***] were to be performed over a long period of time;**

(i) **[***Name of defendant***] and [***name of plaintiff/decedent***] acted as if they had an employer-employee relationship;**

(j) **[***Name of plaintiff/decedent***]'s duties to [***name of defendant***] were only for its benefit;**

(k) **[***Name of plaintiff/decedent***] consented to the employment with [***name of defendant***]?**

DIRECTIONS FOR USE

Read the first bracketed paragraph for cases raising the borrowed-servant theory. Read the second bracketed paragraph for cases involving dual employment.

It may not be necessary to read all of the listed factors. Read only the factors for which evidence exists.

SOURCES AND AUTHORITY

- "Under common-law principles, there are basically three methods by which a plaintiff can establish his 'employment' with a rail carrier for FELA purposes even while he is nominally employed by another. First, the employee could be serving as the borrowed servant of the railroad at the time of his injury. Second, he could be deemed to be acting for two masters simultaneously. Finally, he could be a subservant of a company that was in turn a servant of the railroad." (*Kelley v. Southern Pacific Co.* (1974) 419 U.S. 318, 324 [95 S.Ct. 472, 42 L.Ed.2d 498], internal citations omitted.)

- "[A] finding of agency is not tantamount to a finding of a master-servant relationship." (*Kelley, supra,* 419 U.S. at p. 325.)

- "In this case … the evidence of contacts between Southern Pacific employees and PMT employees may indicate, not direction or control, but rather the passing of information and the accommodation that is obviously required in a large and necessarily coordinated operation. … The informal contacts between the two groups must assume a supervisory character before the PMT employees can be deemed *pro hac vice* employees of the railroad." (*Kelley, supra,* 419 U.S. at p. 330.)

- " 'Employee' status is established by 'proof of a master-servant relationship' under principles of common law." (*Dixon v. CSX Transportation Co.* (4th Cir. 1993) 990 F.2d 1440, citing *Kelley, supra,* 419 U.S. at p. 323.)

- "The special employment relationship and its consequent imposition of liability upon the special employer flows from the borrower's power to supervise the details of the employee's work. Mere instruction by the borrower on the result to be achieved will

not suffice." (*Marsh v. Tilley Steel Co.* (1980) 26 Cal.3d 486, 492 [162 Cal.Rptr. 320].)

- Contract terms are not conclusive evidence of the existence of the right to control. (*Kowalski v. Shell Oil Co.* (1979) 23 Cal.3d 168, 176 [151 Cal.Rptr. 671].)

- "With respect to the dual servant doctrine, the Second Restatement of Agency says: 'A person may be the servant of two masters, not joint employers, at one time as to one act, if the service to one does not involve abandonment of the service to the other.' The borrowed servant doctrine states: 'A servant directed or permitted by his master to perform services for another may become the servant of such other in performing such services. He may become the other's servant as to some acts and not as to others.' " (*Williamson v. Consolidated Rail Corp.* (3rd Cir. 1991) 926 F.2d 1344, 1349, internal citations omitted.)

- Restatement Second of Agency, section 220(1) defines a servant as "a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control." Section 220(2) lists various factors that are helpful in applying this definition:

  (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
  (b) whether or not the one employed is engaged in a distinct occupation or business;
  (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
  (d) the skill required in the particular occupation;
  (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
  (f) the length of time for which the person is employed;
  (g) the method of payment, whether by the time or by the job;
  (h) whether or not the work is a part of the regular business of the employer;
  (i) whether or not the parties believe they are creating the relation of master and servant; and
  (j) whether the principal is or is not in business.

- "While [section 220] is directed primarily at determining whether a particular bilateral arrangement is properly characterized as a master-servant or independent contractor relationship, it can also be instructive in analyzing the three-party relationship between two employers and a worker." (*Kelley, supra*, 419 U.S. at p. 324.)

- "The Supreme Court has held that a person falls within FELA if that worker can be classified as a joint employee of the railroad even though it is not his formal

employer." (*Bradsher v. Missouri Pacific Railroad* (8th Cir. 1982) 679 F.2d 1253, 1257.)

- "[U]nder the FELA a worker can be the 'employee' of a railroad even though carried on the employment rolls of another company and paid by that other company. The test of employment is the established test in workers' compensation cases. It is whether the railroad has control of the employee or the right to control the employee. The law does not require that the railroad have full supervisory control. It requires only that the railroad, through its employees, plays 'a significant supervisory role' as to the work of the injured employee. (*Lindsey v. Louisville & Nashville Railroad Co*. (5th Cir.1985) 775 F.2d 1322, 1324, internal citation omitted.)

2924
Status as Defendant's Employee—Subservant Company

[*Name of plaintiff***] claims [he/she/[***name of decedent***]] was [***name of defendant***]'s employee because [he/she] was employed by [***name of primary employer***], a company that was controlled by [***name of defendant***]. To succeed, [***name of plaintiff***] must prove that [***name of defendant***] controlled or had the right to control the daily operations of [***name of primary employer***]. Sharing information or coordinating efforts between two companies, by itself, is not enough to establish the right to control.**

In deciding whether [*name of defendant***] controlled [***name of primary employer***], you should consider the following:**

(a) Did the two companies share directors or management-level officers?

(b) Did the two companies share strategies, policies, sales, administrative, and operating staffs?

(c) Did the two companies share payroll and personnel records?

(d) Did [*name of defendant***] have a right to participate in the [***name of primary employer***]'s day-to-day operations?**

(e) Did [*name of defendant***] establish [***name of primary employer***]'s work procedures?**

(f) [*Insert other applicable factor.***]**

A "yes" answer to one or more of these questions suggests that the right to control exists. "No" answers suggest that the right to control does not exist. You should consider the relative importance of each factor and not simply count the number of "yes" and "no" answers. Remember that the ultimate test is the right to control.

SOURCES AND AUTHORITY

- "In the *Kelley* case, the Supreme Court recognized that if a second company could be shown to be a conventional common-law servant, the 'control or right to control' test would be met." (*Bradsher v. Missouri Pacific Railroad* (8th Cir. 1982) 679 F.2d 1253, 1257–1258, internal citation omitted.)

- "Under the FELA the test of employee status is whether [defendant railroad] had control or the right to control [plaintiff] in the performance of his job. Where the

evidence of control is in dispute, the case should go to the jury." (*Vanskike v. ACF Industries, Inc.* (8th Cir. 1981) 665 F.2d 188, 198, internal citations omitted.)

- "In this case … the evidence of contacts between Southern Pacific employees and PMT employees may indicate, not direction or control, but rather the passing of information and the accommodation that is obviously required in a large and necessarily coordinated operation. … The informal contacts between the two groups must assume a supervisory character before the PMT employees can be deemed pro hac vice employees of the railroad." (*Kelley v. Southern Pacific Co.* (1974) 419 U.S. 318, 330 [95 S.Ct. 472, 42 L.Ed.2d 498].)

2925
Status of Defendant as Common Carrier

[*Name of plaintiff*] claims that [*name of defendant*] was a common carrier by railroad. To prove this, [*name of plaintiff*] must show that [*name of defendant*] was in the business of transporting [the property of] the general public by rail.

SOURCES AND AUTHORITY

- Title 45 United States Code Annotated section 57 provides: "The term 'common carrier' as used in this chapter shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier."

- "A common carrier has been defined generally as one who holds himself out to the public as engaged in the business of transportation of persons or property from place to place for compensation, offering his services to the public generally. The distinctive characteristic of a common carrier is that he undertakes to carry for all people indifferently, and hence is regarded in some respects as a public servant. The dominant and controlling factor in determining the status of one as a common carrier is his public profession as to the service offered or performed." (*Kelly v. General Electric Co.* (D.C.Pa. 1953) 110 F.Supp 4, 6.)

- "According to these cases various considerations are of prime importance in determining whether a particular entity is a common carrier. First—actual performance of rail service, second—the service being performed is part of the total rail service contracted for by a member of the public, third—the entity is performing as part of a system of interstate rail transportation by virtue of common ownership between itself and a railroad or by a contractual relationship with a railroad, and hence such entity is deemed to be holding itself out to the public, and fourth—remuneration for the services performed is received in some manner, such as a fixed charge from a railroad or by a percent of the profits from a railroad." (*Lone Star Steel Co. v. McGee* (5th Cir. 1957) 380 F.2d 640, 647.)

2926
Scope of Employment

[*Name of plaintiff*] must prove that [he/she [*name of decedent*]] was acting within the scope of [his/her] employment at the time of the incident.

Conduct is within the scope of employment if:

(a) It is reasonably related to the kinds of tasks that the employee was hired to perform; or

(b) It is reasonably foreseeable in light of the employer's business or the employee's job responsibilities.

DIRECTIONS FOR USE

See other instructions that further define the concept of scope of employment in the vicarious liability instructions (Instruction 3720, et seq.)

SOURCES AND AUTHORITY

- "FELA's limitation of a railroad's liability to injuries occurring 'while [the person] is employed by' the railroad means that it must generally be determined whether the employee was injured while she was acting within the scope of her employment. 'Normally, whether an employee is acting within the scope of employment is a question to be resolved by the jury from all the surrounding circumstances,' for 'in negligence actions brought under the FELA, ... the role of the jury is significantly greater ... than in common law negligence actions ... .' Indeed, ' "trial by jury is part of the remedy." ' " (*Goldwater v. Metro-North Commuter Railroad* (2nd Cir. 1996) 101 F.3d 296, 298, internal citations omitted.)

- "The scope of employment under FELA is broadly construed by the federal courts—and has been for more than 80 years. In the seminal FELA case of *Erie Railroad Company v. Winfield,* the Supreme Court held that an employee who leaves the railroad carrier's yard 'at the close of his day's work' is engaged in a 'necessary incident of his day's work,' and thus is 'but discharging a duty of his employment.' " (*Ponce v. Northeast Illinois Regional Commuter Railroad Corp.* (N.D.Ill. 2000) 103 F.Supp.2d 1051, 1056, internal citations omitted.)

- "Railroad employment has been broadly interpreted to extend not only to acts required by the employer, but also to those acts necessarily incidental to the employment. [¶] This circuit and others have nevertheless held that even 'given its

most liberal interpretation, the Act cannot be extended to cover activities not necessarily incident to or an integral part of employment in interstate commerce. It obviously does not cover activities undertaken by an employee for a private purpose and having no causal relationship with his employment.' " (*Feichko v. Denver & Rio Grande Western Railroad Co.* (10th Cir. 2000) 213 F.3d 586, 592, internal citations omitted.)

- Restatement Second of Agency, section 229 provides:

  (1) To be within the scope of the employment, conduct must be of the same general nature as that authorized, or incidental to the conduct authorized.
  (2) In determining whether or not the conduct, although not authorized, is nevertheless so similar to or incidental to the conduct authorized as to be within the scope of employment, the following matters of fact are to be considered:
    (a) whether or not the act is one commonly done by such servants;
    (b) the time, place and purpose of the act;
    (c) the previous relations between the master and the servant;
    (d) the extent to which the business of the master is apportioned between different servants;
    (e) whether or not the act is outside the enterprise of the master or, if within the enterprise, has not been entrusted to any servant;
    (f) whether or not the master has reason to expect that such an act will be done;
    (g) the similarity in quality of the act done to the act authorized;
    (h) whether or not the instrumentality by which the harm is done has been furnished by the master to the servant;
    (i) the extent of departure from the normal method of accomplishing an authorized result; and
    (j) whether or not the act is seriously criminal.

- "The Restatement at § 229 sets forth intelligent factors for a factfinder to consider in determining whether this has happened. We emphasize that no one factor is dispositive; establishing one or more factors is not equivalent to establishing scope of employment." (*Wilson v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co.* (7th Cir. 1988) 841 F.2d 1347, 1355.)

- "[A]s a general rule, courts have held that an employee injured while commuting to and from work is not covered by FELA." (*Ponce, supra,* 103 F.Supp.2d at p. 1057.) However, FELA may apply if the injury occurs on the employer's work site "while the employee is attempting to report to or leave the job within a reasonable time of his or her shift, and is exposed to risks not confronted by the public generally." (*Ibid.*)

2940
Income Tax Effects of Award

[*Name of plaintiff***] will not be required to pay any federal or state income taxes on any amount that you award.**

[When calculating lost earnings, if any, you should use after-tax earnings.]

DIRECTIONS FOR USE

The Eight Circuit Model Jury Instructions state that the bracketed sentence should be given if there is evidence of both gross and net earnings and there is any danger that the jury may be confused as to the proper measure of damages.

SOURCES AND AUTHORITY

- If requested, the jury must be instructed that the verdict will not be subject to income taxes. (*Norfolk & Western Ry. Co. v. Liepelt* (1980) 444 U.S. 490, 498 [100 S.Ct. 755, 62 L.Ed.2d 689].) Further, the Supreme Court in the *Liepelt* case stated that the jury should base its award on the "after-tax" value of lost earnings in determining lost earnings. (*Id.* at p. 493.)

2941
Introduction to Damages for Personal Injury

See Instruction 3900, *Introduction to Tort Damages—Liability Contested,* or Instruction 3901, *Introduction to tort Damages—Liability Established.*

DIRECTIONS FOR USE

Either Instruction 3900, *Introduction to Tort Damages—Liability Contensted,* or Instruction 3901, *Introduction to Tort Damages—Liability Established* may be used, depending on the facts. However, the second full paragraph of those instructions should be deleted as it is based on a California statute (Civ. Code, § 3333). It is not clear that this state standard applies to cases brought under FELA.

See the Damages series (3900 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, 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 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 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.)

2942
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*] does not have to prove the exact amount of these damages. 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 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.

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 3904, *Present Cash Value*, and Instruction 3932, *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 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 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 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.)

VF-2900
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.

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 loss, including [lost earnings/ lost profits/medical expenses:]	**$_____]**
[b. Future loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:]	**$_____]**
[c. Past loss, including [physical pain/mental suffering:]	**$_____]**
[d. Future loss, including [physical pain/mental suffering:]	**$_____]**
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: 100 %

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 2900, *FELA—Essential Factual Elements*, and Instruction 2904, *FELA—Contributory Negligence*.

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.

VF-2901
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.

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 loss, including [lost earnings/ lost profits/medical expenses:]	**$_____]**
[b. Future loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:]	**$_____]**
[c. Past loss, including [physical pain/mental suffering:]	**$_____]**
[d. Future loss, including [physical pain/mental suffering:]	**$_____]**
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 2920, *Essential Factual Elements—Federal Safety Appliance Act or Boiler Inspection Act*.

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.

3000
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 purporting to act in the performance of [his/her] 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 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 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.
- CIVIL RIGHTS ACTIONS, Ch. 7, *Deprivation of Rights Under Color of State Law—General Principles (Civil Rights Act of 1871, 42 U.S.C. § 1983)*, ¶¶ 7.05–7.07, Ch. 17, *Deprivation of Rights Under Color of State Law—General Principles (Civil Rights Act of 1871, 42 U.S.C. § 1983)*, ¶ 17.02 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 113, Civil Rights: The Post-Civil War Civil Rights Statutes, § 113.14 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 35, *Civil Rights* (Matthew Bender)

3001
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] [him/her]. 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 purporting to act in the performance of [his/her] official duties;**
4. **That [***name of plaintiff***] was harmed; and**
5. **That [***name of defendant***]'s 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].**

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.)

- "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.
- CIVIL RIGHTS ACTIONS, Ch. 10, *Deprivation of Rights Under Color of State Law—Law Enforcement and Prosecution*, ¶¶ 10.00–10.03 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 35, *Civil Rights* (Matthew Bender)

3002
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 purporting to act in the performance of [his/her] official duties;**

4. **That [***name of plaintiff***] was harmed; and**

5. **That [***name of defendant***]'s unreasonable search was a substantial factor in causing [***name of plaintiff***]'s harm.**

In deciding whether 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 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 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.
- CIVIL RIGHTS ACTIONS, Ch. 10, *Deprivation of Rights Under Color of State Law—Law Enforcement and Prosecution*, ¶ 10.04 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 35, *Civil Rights* (Matthew Bender)

3003
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 purporting to act in the performance of [his/her] official duties;**

4. **That [***name of plaintiff***] was harmed; and**

5. **That [***name of defendant***]'s search 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.)

- " '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.)

<u>Secondary Sources</u>

- 8 Witkin, Summary of California Law (9th ed. 1988) Constitutional Law, § 706 et seq.

- CIVIL RIGHTS ACTIONS, Ch. 10, *Deprivation of Rights Under Color of State Law—Law Enforcement and Prosecution*, ¶ 10.04 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 35, *Civil Rights* (Matthew Bender)

3004
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 [he/she] 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 whether 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 1400–1409).

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.)

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.

3005
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 whether 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.)

- "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.)

Secondary Sources

- 8 Witkin, Summary of California Law (9th ed. 1988) Constitutional Law, § 706 et seq.

3006
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 whether 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.'" (*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.

3007
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 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 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.

3008
"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 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.

3009
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 … ."

- "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.)

3010
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 [him/her]. 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 purporting to act in the performance of [his/her] official duties;**

4. **That [***name of plaintiff***] was harmed; and**

5. **That [***name of defendant***]'s 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 whether 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.***]**

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 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.)

- "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.)

Secondary Sources

- CIVIL RIGHTS ACTIONS, Ch. 10, *Deprivation of Rights Under Color of State Law—Law Enforcement and Prosecution*, ¶ 10.01 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 114, *Civil Rights: Prisoner's Rights*, § 114.70 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 35, *Civil Rights* (Matthew Bender)

3011
Violation of Prisoner's Federal Civil Rights (42 U.S.C. § 1983)
Eighth Amendment—General Conditions of Confinement Claim

[*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 purporting to act in the performance of [his/her] official duties;**

4. **That [***name of plaintiff***] was harmed; and**

5. **That [***name of defendant***]'s 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.

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.)

- "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.)

Secondary Sources

- CIVIL RIGHTS ACTIONS, Ch. 11, *Deprivation of Rights Under Color of State Law—Prisons*, ¶¶ 11.02–11.03 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 114, *Civil Rights: Prisoner's Rights*, § 114.28 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 35, *Civil Rights* (Matthew Bender)

3012
Violation of Prisoner's Federal Civil Rights (42 U.S.C. § 1983)
Eighth Amendment—Medical Care

[*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 purporting to act in the performance of [his/her] 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 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.)

- "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.' 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.)

Secondary Sources

- CIVIL RIGHTS ACTIONS, Ch. 11, *Deprivation of Rights Under Color of State Law—Prisons*, ¶ 11.09 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 114, *Civil Rights: Prisoner's Rights*, § 114.15 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 35, *Civil Rights* (Matthew Bender)

3020
Unruh Civil Rights Act (Civ. Code, §§ 51, 52)
Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] denied [him/her] full and equal [accommodations/advantages/facilities/privileges/services] because of [his/her] [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 motivating 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 motivating 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 motivating 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.

"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.

- 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, 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 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].)

Secondary Sources

- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 116, *Civil Rights Discrimination in Business Establishments*, §§ 116.10–116.13 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 35, *Civil Rights* (Matthew Bender)

3021
Unruh Civil Rights Act—Boycott Etc. (Civ. Code, § 51.5)
Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] denied [him/her] 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 motivating 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 motivating 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 motivating 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.**

DIRECTIONS FOR USE

Note that this instruction uses the standard of "motivating 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 3020. 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.
  (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].)

<u>Secondary Sources</u>

- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 116, *Civil Rights Discrimination in Business Establishments,* §§ 116.10–116.13 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 35, *Civil Rights* (Matthew Bender)

3022
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 on 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.
  (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].)

Secondary Sources

- CALIFORNIA POINTS AND AUTHORITIES, Ch. 35, *Civil Rights* (Matthew Bender)

3023
Ralph Act (Civ. Code, § 51.7)
Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] subjected [him/her] 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 motivating 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 motivating 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.

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 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].)

Secondary Sources

- CALIFORNIA POINTS AND AUTHORITIES, Ch. 35, *Civil Rights* (Matthew Bender)

3024
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).)

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.

Secondary Sources

- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.36, Ch. 116, *Civil Rights: Discrimination in Business Establishments*, §§ 116.35, 116.90, Ch. 117, *Civil Rights: Housing Discrimination*, § 117.32 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 35, *Civil Rights* (Matthew Bender)

3025
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] [his/her] 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 [***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 [***insert right, e.g., "to 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 [him/her] from exercising [his/her] right to [***insert right***] or retaliate against [***name of plaintiff***] for having exercised [his/her] right [***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 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].)

- "[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.)

Secondary Sources

- 8 Witkin, Summary of California Law (9th ed. 1988) Constitutional Law, § 775

- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 117A, *Civil Rights: Interference with Civil Rights by Threats, Intimidation, Coercion, or Violence*, § 117A.11 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 35, *Civil Rights* (Matthew Bender)

3026
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 [him/her] 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 3900–3963) 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."

Secondary Sources

- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 116, *Civil Rights: Discrimination in Business Establishments*, § 116.15 (Matthew Bender)

- CALIFORNIA POINTS AND AUTHORITIES, Ch. 35, *Civil Rights* (Matthew Bender)

3027
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 3900–3963) for additional instructions on actual damages and punitive damages. Instruction 3942, *Punitive Damages—Individual Defendant—Bifurcated Trial (Second Phase),* instructs the jury on how to calculate the amount of punitive damages.

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.

Secondary Sources

- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 116, *Civil Rights: Discrimination in Business Establishments*, § 116.15 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 35, *Civil Rights* (Matthew Bender)

VF-3000
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 purporting to act in the performance of [his/her] 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***]?**

   ___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:] $_____]
   [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 3000, *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.

VF-3001
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 purporting to act in the performance of [his/her] 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:] **$_____]**
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] **$_____]**
[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 3001, *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.

VF-3002
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 purporting to act in the performance of [his/ her] 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:] **$_____]**
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] **$_____]**
[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 3002, *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.

VF-3003
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 purporting to act in the performance of [his/ her] 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:] **$_____]**
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] **$_____]**
[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 3003, *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.

VF-3004
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 purporting to act in the performance of [his/ her] 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.

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].

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 3003, *Unreasonable Search—Search Without a Warrant (42 U.S.C. § 1983)* and Instruction 3004, *Affirmative Defense—Search Incident to Lawful Arrest.* This form can be modified if another affirmative defense is at issue (see

Instruction 3005, *Affirmative Defense—Consent to Search*, and Instruction 3006, *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.

VF-3005
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:] **$_____]**
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] **$_____]**
[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 3007, *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.

VF-3006
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**

   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 3009, *Public Entity Liability—Failure To Train (42 U.S.C. § 1983)—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.

VF-3007
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 purporting to act in the performance of [his/her] 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.

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 3010, *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.

VF-3008
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 purporting to act in the performance of [his/her] 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**

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 3011, *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.

VF-3009
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 purporting to act in the performance of [his/her] 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:] **$_____]**
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] **$_____]**
[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 3012, *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.

VF-3010
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 motivating 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:] **$_____]**
   [b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] **$_____]**
   [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 3020, *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 3020. 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.

VF-3011
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 motivating 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:] **$_____]**
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] **$_____]**
[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 3021, *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 3021. 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.

VF-3012
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.

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 3022, *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.

VF-3013
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 motivating 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:] **$_____]**
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] **$_____]**
[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 3023, *Ralph Act (Civ. Code, § 51.7)—Essential Factual Elements,* and Instruction 3027, *Unruh Civil Rights Act—Civil Penalty (Civ. Code, §§ 51.7, 51.9).* For instructions on punitive damages, see instructions in the Damages series (Instruction 3900, 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.

VF-3014
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**

   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 3024, *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 3024.

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 3900, et seq).

If there are multiple causes of action, users may wish to combine the individual forms into one form.

VF-3015
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:] **$_____]**
[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] **$_____]**
[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 3025, *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 3025.

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.

3100
Financial Abuse—Essential Factual Elements
(Welf. & Inst. Code, § 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 [him/her/ [***name of decedent***]]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

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 plaintiff/decedent***] was harmed; and**

5. **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 both of the following:**

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-in-fact]]; 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-in-fact]].

DIRECTIONS FOR USE

This instruction is intended for plaintiffs who are not seeking survival damages for pain and suffering or attorney fees and costs. Plaintiffs who are seeking such damages should use Instruction 3101, Financial Abuse—Essential Factual Elements—Enhanced Remedies Sought—Individual or Individual and Employer Defendants (Welf. & Inst. Code, §§ 15657, 15610.30), or Instruction 3102, Financial Abuse—Essential Factual Elements—Enhanced Remedies Sought—Employer Defendants (Welf. & Inst. Code, §§ 15657, 15610.30). The instructions in this set are not intended to cover every circumstance in which a plaintiff can bring a cause of action under the Elder Abuse and Dependent Adult Civil Protection Act.

Add the 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).)

SOURCES AND AUTHORITY

- Welfare and Institutions Code section 15610.07 provides:

  "Abuse of an elder or a dependent adult" means either of the following:
  (a) Physical abuse, neglect, financial abuse, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering.
  (b) The deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering.

- Welfare and Institutions Code section 15610.30 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.

- "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].)

<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

3101
Financial Abuse—Essential Factual Elements—Enhanced Remedies Sought Individual or Individual and Employer Defendants (Welf. & Inst. Code, §§ 15657, 15610.30)

[*Name of plaintiff***] claims that [***name of individual defendant***] violated the Elder Abuse and Dependent Adult Civil Protection Act by taking financial advantage of [him/her/[***name of decedent***]. To establish this claim, [***name of plaintiff***] must prove all of the following by clear and convincing evidence:**

1. **That [***name of individual 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 individual 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 individual defendant***] acted with [recklessness/malice/ oppression/fraud];**

5. **That [***name of plaintiff/decedent***] was harmed; and**

6. **That [***name of individual defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

[One way [*name of plaintiff***] can prove that [***name of individual defendant***] [[took/hid/ appropriated/retained]/assisted in [taking/hiding/ appropriating/retaining]] the property for a wrongful use is by proving both of the following:**

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-in-fact]]; and**

2. **That [***name of individual defendant***] knew or should have known that [***name of plaintiff/decedent***] had this right.**

[*Name of individual defendant***] should have known that [***name of plaintiff/decedent***] had this right if, on the basis of information received by [[***name of individual defendant***]/[***name of individual 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-in-fact]].**

[[*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 individual defendant***] 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 individual defendant***] 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 individual defendant***]'s conduct;] [or]**

4. **[That an officer, a director, or a managing agent of [***name of defendant employer***] knew of [***name of individual defendant***]'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 damages for pain and suffering and/or attorney fees and costs. Plaintiffs who are seeking conventional tort damages should use Instruction 3100, *Financial Abuse—Essential Factual Elements—(Welf. & Inst. Code, § 15610.30).* The instructions in this set are not intended to cover every circumstance in which a plaintiff can bring a cause of action under the Elder Abuse and Dependent Adult Civil Protection Act.

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 final bracketed portion if the individual defendant is an employee and the plaintiff is also seeking damages against this defendant's employer. If the plaintiff is seeking damages only against the employer, use Instruction 3102, *Financial Abuse—Essential Factual Elements—Enhanced Remedies Sought—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 15610.07 provides:

  "Abuse of an elder or a dependent adult" means either of the following:
  (c) Physical abuse, neglect, financial abuse, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering.
  (d) 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 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.
(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.

- "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.)

Secondary Sources

- 2 California Elder Law (Cont.Ed.Bar 1993–2002) §§ 14.5–14.6, 14.25–14.30, 14.38–14.47
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 5, *Abuse of Minors and Elderly*, §§ 5.33[4], 5.38 (Matthew Bender)

3102
Financial Abuse—Essential Factual Elements
Enhanced Remedies Sought—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 [him/her/ [***name of decedent***]] and that [***name of defendant***] is responsible for the harm. To establish this claim, [***name of plaintiff***] must prove all of 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]**

   [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 both of the following:**

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-in-fact]]; 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-in-fact]].**

DIRECTIONS FOR USE

This instruction is intended for plaintiffs who are seeking survival damages for pain and suffering and/or attorney fees and costs. Plaintiffs who are not seeking such damages should use Instruction 3100, *Financial Abuse—Essential Factual Elements—(Welf. & Inst. Code, § 15610.30).* The instructions in this set are not intended to cover every circumstance in which a plaintiff can bring a cause of action under the Elder Abuse and Dependent Adult Civil Protection Act.

Add the last bracketed portion 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 3101, *Financial Abuse—Essential Factual Elements—Enhanced Remedies Sought—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 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 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.
    (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 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
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 5, *Abuse of Minors and Elderly*, § 5.33[4] (Matthew Bender)

3103
Neglect—Essential Factual Elements
(Welf. & Inst. Code, § 15610.57)

[*Name of plaintiff***] claims that [he/she/[***name of decedent***]] was neglected by [***name of defendant***] in violation of the Elder Abuse and Dependent Adult Civil Protection Act. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] had care or custody of [***name of plaintiff/ decedent***];**

2. **That [***name of plaintiff/decedent***] was [65 years of age or older/a dependent adult];**

3. **That [***name of defendant***] failed to use the degree of care that a reasonable person in the same situation would have used by [***insert one or more of the following:***]**

   [failing to assist in personal hygiene or in the provision of food, clothing, or shelter;]

   [failing to provide medical care for physical and mental health needs;]

   [failing to protect [*name of plaintiff/decedent***] from health and safety hazards;]**

   [failing to prevent malnutrition or dehydration;]

   [*insert other grounds for neglect;***]**

4. **That [***name of plaintiff/decedent***] was harmed; and**

5. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff/decedent***]'s harm.**

DIRECTIONS FOR USE

This instruction is intended for plaintiffs who are not seeking survival damages for pain and suffering or attorney fees and costs. Plaintiffs who are seeking such damages should use Instruction 3104, *Neglect—Essential Factual Elements—Enhanced Remedies Sought—Individual or Individual and Employer Defendants (Welf. & Inst. Code, §§ 15657, 15610.57)*, or Instruction 3105, *Neglect—Essential Factual Elements—Enhanced Remedies Sought—Employer Defendants (Welf. & Inst. Code, §§ 15657, 15610.57)*. The instructions in this set are not intended to cover every circumstance in which a plaintiff

can bring a cause of action under the Elder Abuse and Dependent Adult Civil Protection Act.

SOURCES AND AUTHORITY

- Welfare and Institutions Code section 15610.07 provides:

  "Abuse of an elder or a dependent adult" means either of the following:
  (a) Physical abuse, neglect, financial abuse, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering.
  (b) The deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering.

- Welfare and Institutions Code section 15610.57 provides:

  (a) "Neglect" means either of the following:
  (1) The negligent failure of any person having the care or custody of an elder or a dependent adult to exercise that degree of care that a reasonable person in a like position would exercise.
  (2) The negligent failure of 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.

- "[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 15610.27 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.

- "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].)

- "The Act was expressly designed to protect elders and other dependent adults who 'may be subjected to abuse, neglect, or abandonment ... .' Within the Act, two groups of persons who ordinarily assume responsibility for the 'care and custody' of the elderly are identified and defined: health practitioners and care custodians. A 'health practitioner' is defined in section 15610.37 as a 'physician and surgeon, psychiatrist, psychologist, dentist, ...' etc., who 'treats an elder ... for any condition.' 'Care custodians,' on the other hand, are administrators and employees of public and private institutions that provide 'care or services for elders or dependent adults,' including nursing homes, clinics, home health agencies, and similar facilities which house the elderly. The Legislature thus recognized that both classes of professionals—health practitioners as well as care custodians—should be charged with responsibility for the health, safety and welfare of elderly and dependent adults." (*Mack v. Soung* (2000) 80 Cal.App.4th 966, 974 [95 Cal.Rptr.2d 830], internal citations omitted.)

<u>Secondary Sources</u>

- 2 California Elder Law (Cont.Ed.Bar 1993–2002) §§ 12.58–12.62

3104
Neglect—Essential Factual Elements—Enhanced Remedies Sought Individual or Individual and Employer Defendants (Welf. & Inst. Code, §§ 15657, 15610.57)

[*Name of plaintiff***] claims that [he/she/[***name of decedent***]] was neglected by [***name of individual defendant***] in violation of the Elder Abuse and Dependent Adult Civil Protection Act. To establish this claim, [***name of plaintiff***] must prove all of the following by clear and convincing evidence:**

1. **That [***name of individual defendant***] had care or custody of [***name of plaintiff/ decedent***];**

2. **That [***name of plaintiff/decedent***] was [65 years of age or older/a dependent adult];**

3. **That [***name of individual 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 individual defendant***] acted with [recklessness/malice/ oppression/fraud];**

5. **That [***name of plaintiff/decedent***] was harmed; and**

6. **That [***name of individual 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 individual defendant***] 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 individual defendant***] 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 individual defendant***]'s conduct;] [or]**

4. **[That an officer, a director, or a managing agent of [***name of defendant employer***] knew of [***name of individual defendant***]'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 damages for pain and suffering and/or attorney fees and costs. Plaintiffs who are not seeking such damages should use Instruction 3103, *Neglect—Essential Factual Elements (Welf. & Inst. Code, § 15610.57)* The instructions in this set are not intended to cover every circumstance in which a plaintiff can bring a cause of action under the Elder Abuse and Dependent Adult Civil Protection Act.

Add the second bracketed portion if the individual defendant is an employee and the plaintiff is also seeking damages against this defendant's employer. If the plaintiff is seeking damages only against the employer, use Instruction 3105, *Neglect—Essential Factual Elements—Enhanced Remedies Sought—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.

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.

- "[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 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.)

- "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.)

<u>Secondary Sources</u>

- 2 California Elder Law (Cont.Ed.Bar 1993–2002) §§ 12.58–12.62
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 5, *Abuse of Minors and Elderly*, §§ 5.33[3], 5.36 (Matthew Bender)

3105
Neglect—Essential Factual Elements—Enhanced Remedies Sought Employer Defendant (Welf. & Inst. Code, §§ 15657, 15610.57)

[*Name of plaintiff***] claims [he/she/[***name of 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 all of the following by clear and convincing evidence:**

1. **That [***name of defendant***] had care or custody of [***name of plaintiff/decedent***];**

2. **That [***name of plaintiff/decedent***] was [65 years of age or older/a dependent adult];**

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][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]**

   [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 damages for pain and suffering and/or attorney fees and costs. Plaintiffs who are not seeking such damages should use Instruction 3100, *Neglect—Essential Factual Elements (Welf. & Inst. Code, § 15610.57).* If the plaintiff is seeking damages against the employer and the employee, use Instruction 3104, *Neglect—Essential Factual Elements—Enhanced Remedies Sought—Individual or Individual and Employer Defendants (Welf. & Inst. Code, §§ 15657, 15610.57).* The instructions in this set are not intended to cover every circumstance in which a plaintiff can bring a cause of action under the Elder Abuse and Dependent Adult Civil Protection Act.

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 15610.57 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.

- 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 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 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.)

<u>Secondary Sources</u>

- 2 California Elder Law (Cont.Ed.Bar 1993–2002) §§ 12.58–12.62
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 5, *Abuse of Minors and Elderly*, § 5.33[3] (Matthew Bender)

3106
Physical Abuse—Essential Factual Elements
(Welf. & Inst. Code, § 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 all of the following:**

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 plaintiff/decedent***] was harmed; and**

4. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff/decedent***]'s harm.**

DIRECTIONS FOR USE

This instruction is intended for plaintiffs who are not seeking survival damages for pain and suffering or attorney fees and costs. Plaintiffs who are seeking such damages should use Instruction 3107, Physical Abuse—Essential Factual Elements—Enhanced Remedies Sought—Individual or Individual and Employer Defendant (Welf. & Inst. Code, §§ 15657, 15610.63) or Instruction 3108, Physical Abuse—Essential Factual Elements—Enhanced Remedies Sought—Employer Defendant (Welf. & Inst. Code, §§ 15657, 15610.63.) The instructions in this set are not intended to cover every circumstance in which a plaintiff can bring a cause of action under the Elder Abuse and Dependent Adult Civil Protection Act.

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 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 15610.63 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].)

Secondary Sources

- 2 California Elder Law (Cont.Ed.Bar 1993–2002) §§ 12.58–12.62

3107
Physical Abuse—Essential Factual Elements—Enhanced Remedies Sought—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 individual defendant***] in violation of the Elder Abuse and Dependent Adult Civil Protection Act. To establish this claim, [***name of plaintiff***] must prove all of the following by clear and convincing evidence:**

1. **That [***name of individual 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 individual defendant***] acted with [recklessness/malice/oppression/fraud];**

4. **That [***name of plaintiff/decedent***] was harmed; and**

5. **That [***name of individual 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 individual defendant***] 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 individual defendant***] 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 individual defendant***]'s conduct;] [or]**

4. **[That an officer, a director, or a managing agent of [***name of defendant employer***] knew of [***name of individual defendant***]'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 damages for pain and suffering and/or attorney fees and costs. Plaintiffs who are not seeking such damages should use Instruction 3106, *Physical Abuse—Essential Factual Elements (Welf. & Inst. Code, § 15610.63).* The instructions in this set are not intended to cover every circumstance in which a plaintiff can bring a cause of action under the Elder Abuse and Dependent Adult Civil Protection Act.

Add the second bracketed portion if the individual defendant is an employee and the plaintiff is also seeking damages against this defendant's employer. If the plaintiff is only seeking damages against the employer, use Instruction 3108, *Physical Abuse—Essential Factual Elements—Enhanced Remedies Sought—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 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 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 15610.63 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 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
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 5, *Abuse of Minors and Elderly*, § 5.33[2] (Matthew Bender)

3108
Physical Abuse—Essential Factual Elements—Enhanced Remedies Sought—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 all of 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]**

   [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 damages for pain and suffering and/or attorney fees and costs. Plaintiffs who are not seeking such damages should use Instruction 3106, Physical Abuse—Essential Factual Elements (Welf. & Inst. Code, § 15610.63). The instructions in this set are not intended to cover every circumstance in which a plaintiff can bring a cause of action under the Elder Abuse and Dependent Adult Civil Protection Act.

If the plaintiff is seeking damages against the employer and the employee, use instruction 3107, Physical Abuse—Essential Factual Elements—Enhanced Remedies Sought—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 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 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 15610.63 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."

- "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.)

Secondary Sources

- 2 California Elder Law (Cont.Ed.Bar 1993–2002) §§ 12.58–12.62
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 5, *Abuse of Minors and Elderly*, § 5.33[2] (Matthew Bender)

3109
Abduction—Essential Factual Elements
(Welf. & Inst. Code, § 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 all of the following:**

1. **That [***name of defendant***] [removed [***name of plaintiff/decedent***] from California and] restrained [him/her/[***name of 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.**

DIRECTIONS FOR USE

This instruction is intended for plaintiffs who are not seeking survival damages for pain and suffering or attorney fees and costs. Plaintiffs who are seeking such damages should use Instruction 3110, *Abduction—Essential Factual Elements—Enhanced Remedies Sought—Individual or Individual and Employer Defendants (Welf. & Inst. Code, §§ 15657.05, 15610.06)*, or Instruction 3111, *Abduction—Essential Factual Elements—Enhanced Remedies Sought—Employer Defendant (Welf. & Inst. Code, §§ 15657.05, 15610.06).* The instructions in this set are not intended to cover every circumstance under which a plaintiff can bring a cause of action under the Elder Abuse And Dependent Adult Civil Protection Act.

SOURCES AND AUTHORITY

- 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].)

Secondary Sources

- 2 California Elder Law (Cont.Ed.Bar 1993–2002) §§ 12.58–12.62

3110
Abduction—Essential Factual Elements—Enhanced Remedies Sought Individual or Individual and Employer Defendants (Welf. & Inst. Code, §§ 15657.05, 15610.06)

[*Name of plaintiff***] claims that [***name of individual 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 all of the following by clear and convincing evidence:**

1. **That [***name of individual defendant***] [removed [***name of plaintiff/decedent***] from California and] restrained [him/her/[***name of 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];]**

4. **[That [[***name of conservator***]/the court] did not consent to the [removal/ restraint];]**

5. **That [***name of plaintiff/decedent***] was harmed; and**

6. **That [***name of individual 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 individual defendant***] 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 individual defendant***] 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 individual defendant***]'s conduct;] [or]**

4. **[That an officer, a director, or a managing agent of [***name of defendant employer***] knew of [***name of individual defendant***]'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 damages for pain and suffering and/or attorney fees and costs. Plaintiffs who are not seeking such damages should use instruction 3109, *Abduction—Essential Factual Elements—(Welf. & Inst. Code, § 15610.06).* The instructions in this set are not intended to cover every circumstance in which a plaintiff can bring a cause of action under the Elder Abuse and Dependent Adult Civil Protection Act.

Add the second bracketed portion if the individual defendant is an employee and the plaintiff is also seeking damages against this defendant's employer. If the plaintiff is seeking damages only against the employer, use instruction 3111, *Abduction—Essential Factual Elements—Enhanced Remedies Sought—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.

  (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
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 5, *Abuse of Minors and Elderly*, § 5.33[5] (Matthew Bender)

3111
Abduction—Essential Factual Elements—Enhanced Remedies Sought—Employer Defendant
(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 and that [***name of defendant***] is responsible for the harm. To establish this claim, [***name of plaintiff***] must prove all of 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 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]**

   [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 damages for pain and suffering and/or attorney fees and costs. Plaintiffs who are not seeking such damages should use Instruction 3109, Abduction—Essential Factual Elements—(Welf. & Inst. Code, § 15610.06). The instructions in this set are not intended to cover every circumstance in which a plaintiff can bring a cause of action under the Elder Abuse and Dependent Adult Civil Protection Act.

If the plaintiff is seeking damages against the employer and the employee, use Instruction 3110, Abduction—Essential Factual Elements—Enhanced Remedies Sought—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 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
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 5, *Abuse of Minors and Elderly*, § 5.33[5] (Matthew Bender)

3112
"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
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 5, *Abuse of Minors and Elderly*, § 5.31 (Matthew Bender)

3113
"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."

3114
"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.)

3115
"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.)

3116
"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."

Secondary Sources

- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake*, § 215.70 (Matthew Bender)

VF-3100
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**

   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.

This verdict form is based on Instruction 3101, Financial Abuse—Essential Factual Elements—Enhanced Remedies Sought—Individual or Individual and Employer Defendant (Welf. & Inst. Code, §§ 15657, 15610.30). Delete questions 3 and 5 if this form is being used in conjunction with Instruction 3100, Financial Abuse—Essential Factual Elements (Welf. & Inst. Code, § 15610.30).

If the plaintiff alleges that the defendant assisted in the wrongful conduct, modify question 1 as in element 2 of instruction 3101. Question 5 can be altered to correspond to

one of the alternative bracketed options in the second part of instruction 3101, 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.

VF-3101
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**

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.

This verdict form is based on Instruction 3102, *Financial Abuse—Essential Factual Elements—Enhanced Remedies Sought—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 3102. Question 5 can be altered to correspond to one of the alternative bracketed options in element 7 of instruction 3102.

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.

VF-3102
Neglect—Individual or Individual and Employer Defendant
(Welf. & Inst. Code, §§ 15657, 15610.57)

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] have care or custody of [***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] 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**

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].

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, Neglect—Essential Factual Elements—Enhanced Remedies Sought—Individual or Individual and Employer

Defendant—(Welf. & Inst. Code, §§ 15657, 15610.57). Delete questions 4 and 6 if this form is being used in conjunction with Instruction 3103, Neglect—Essential Factual Elements (Welf. & Inst. Code, § 15610.57).

Question 3 can be modified to correspond to the alleged wrongful conduct as in element 3 of instruction 3104. Question 6 can be altered to correspond to one of the alternative bracketed options in the lower bracketed portion of instruction 3104, 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.

VF-3103
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**

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]['] 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	**$_____**

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, *Neglect—Essential Factual Elements—Enhanced Remedies Sought—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 3105. Question 6 can be altered to correspond to one of the alternative bracketed options in element 8 of instruction 3105.

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.

VF-3104
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.

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 3107, *Physical Abuse—Essential Factual Elements—Enhanced Remedies Sought—Individual or Individual and Employer Defendant—(Welf. & Inst. Code, §§ 15657, 15610.63).* Delete questions 3 and 5 if this form is being used in conjunction with Instruction 3106, *Physical Abuse—Essential Factual Elements (Welf. & Inst. Code, § 15610.63).*

Question 5 can be altered to correspond to one of the alternative bracketed options in the lower bracketed portion of instruction 3107, 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.

VF-3105
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]['] 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.

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].

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 3108, *Physical Abuse—Essential Factual Elements—Enhanced Remedies Sought—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 3108.

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.

VF-3106
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**

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.

This verdict form is based on Instruction 3110, *Abduction—Essential Factual Elements—Enhanced Remedies Sought—Individual or Individual and Employer Defendant—(Welf. & Inst. Code, §§ 15657.05, 15610.06).* Delete question 5 if this form is being used in conjunction with Instruction 3109, *Abduction—Essential Factual Elements (Welf. & Inst. Code, § 15610.06).*

Question 3 can be altered to correspond to the alternative bracketed option in element 3 of instruction 3110.

Question 5 can be altered to correspond to one of the alternative bracketed options in the lower bracketed portion of instruction 3110, 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.

VF-3107
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**

   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

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 3111, *Abduction—Essential Factual Elements—Enhanced Remedies Sought—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 3111.

Question 5 can be altered to correspond to one of the alternative bracketed options in element 6 of instruction 3111.

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.

SONG-BEVERLY CONSUMER WARRANTY ACT

3200
Violation of Civil Code Section 1793.2(d)—Consumer Goods
Essential Factual Elements

[*Name of plaintiff***] claims that [he/she] was harmed by [***name of defendant***]'s breach of a warranty that [***describe alleged express warranty***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] bought a[n] [***consumer good***] [from/distributed by/ manufactured by] [***name of defendant***];**

2. **That [***name of defendant***] gave [***name of plaintiff***] a warranty by [***insert at least one of the following:***]**

   [making a written statement that [*describe alleged express warranty***];] [or]**

   [showing [him/her] a sample or model of the [*consumer good***] and representing, by words or conduct, that [his/her] [***consumer good***] would match the quality of the sample or model;]**

3. **That the [***consumer good***] [***insert at least one of the following:***]**

   [did not perform as stated for the time specified;] [or]

   [did not match the quality [of the [sample/model]] [or] [as set forth in the written statement];]

4. **[That [***name of plaintiff***] delivered the [***consumer good***] to [***name of defendant***] or its authorized repair facilities for repair;]**

5. **[That [***name of plaintiff***] notified [***name of defendant***] in writing of the need for repair because [he/she] reasonably could not deliver the [***consumer good***] to [***name of defendant***] or its authorized repair facilities due to the [size and weight/method of attachment/method of installation] [or] [the nature of the defect] of the [***consumer good***]]; [and]**

6. **That [***name of defendant***] or its representative failed to repair the [***consumer good***] to match the [written statement/represented quality] after a reasonable number of opportunities; [and]**

7. **[That [***name of defendant***] did not replace the [***consumer good***] or reimburse [***name of plaintiff***] an amount of money equal to the purchase price of the [***consumer good***], less the value of its use by [***name of plaintiff***] before discovering the defect[s];]**

[A written statement need not include the words "warranty" or "guarantee," but if those words are used, a warranty is created. It is also not necessary for [*name of defendant***] to have specifically intended to create a warranty. A warranty is not created if [***name of defendant***] simply stated the value of the [***consumer good***] or gave an opinion about the [***consumer good***]. General statements concerning customer satisfaction do not create a warranty.]**

DIRECTIONS FOR USE

An instruction on the definition of "consumer good" may be necessary if that issue is disputed. Civil Code section 1791(a) provides: "'Consumer goods' means any new product or part thereof that is used, bought, or leased for use primarily for personal, family, or household purposes, except for clothing and consumables. 'Consumer goods' shall include new and used assistive devices sold at retail."

Select the alternative in element 4 that is appropriate to the facts of the case.

Regarding element 4, where the plaintiff claims that the consumer goods could not be delivered for repair, the judge should decide whether written notice of nonconformity is required. The statute—see Civil Code section 1793.2(c)—is unclear on this point.

Depending on the circumstances of the case, further instruction may be warranted regarding element 6 to clarify how the jury should calculate "the value of its use" during the time before discovery of the defect.

If remedies are sought under the Commercial Code, the plaintiff may be required to prove reasonable notification within a reasonable time. (Cal. U. Com. Code, § 2607(3).) If the court determines such proof is necessary, add the following element to this instruction:

> That [*name of plaintiff*] took reasonable steps to notify [*name of defendant*] within a reasonable time that the [*consumer good*] [did not match the quality [of the [sample/model]]/as set forth in the written statement];

See also instruction 1243, *Notification/Reasonable Time*.

If appropriate to the facts, add: "It is not necessary for [*name of plaintiff*] to prove the cause of a defect in the [*consumer good*]." The Song-Beverly Consumer Warranty Act does not require a consumer to prove the cause of the defect or failure, only that the consumer good "did not conform to the express warranty." (See *Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1102, fn. 8 [109 Cal.Rptr.2d 583].)

In addition to sales of consumer goods, the Consumer Warranty Act applies to leases. (Civ. Code, §§ 1791(g)–(i), 1795.4.) This instruction may be modified for use in cases involving an express warranty in a lease of consumer goods.

Where the warranty period has been extended, it cannot expire any sooner than 60 days after the last repair of a claimed defect. (Civ. Code, § 1793.1(a)(2).)

SOURCES AND AUTHORITY

- "Broadly speaking, the Act regulates warranty terms; imposes service and repair obligations on manufacturers, distributors and retailers who make express warranties; requires disclosure of specified information in express warranties; and broadens a buyer's remedies to include costs, attorney fees and civil penalties. … [T]he purpose of the Act has been to provide broad relief to purchasers of consumer goods with respect to warranties." (*National R.V., Inc. v. Foreman* (1995) 34 Cal.App.4th 1072, 1080 [40 Cal.Rptr.2d 672].)

- Civil Code section 1794(a) provides, in part: "Any buyer of consumer goods who is damaged by a failure to comply with any obligation under this [Act] or under an … express warranty … may bring an action for the recovery of damages and other legal and equitable relief."

- Civil Code section 1791.2 provides:

  (a) "Express warranty" means:
  (1) A written statement arising out of a sale to the consumer of a consumer good pursuant to which the manufacturer, distributor, or retailer undertakes to preserve or maintain the utility or performance of the consumer good or provide compensation if there is a failure in utility or performance; or
  (2) In the event of any sample or model, that the whole of the goods conforms to such sample or model.
  (b) It is not necessary to the creation of an express warranty that formal words such as "warrant" or "guarantee" be used, but if such words are used then an express warranty is created. An affirmation merely of the value of the goods or a statement purporting to be merely an opinion or commendation of the goods does not create a warranty.
  (c) Statements or representations such as expressions of general policy concerning customer satisfaction which are not subject to any limitation do not create an express warranty.

- Civil Code section 1795 provides, in part: "If express warranties are made by persons other than the manufacturer of the goods, the obligation of the person making such warranties shall be the same as that imposed on the manufacturer."

- Civil Code section 1793.2(d) provides, in part:

  (1) Except as provided in paragraph (2), if the manufacturer or its representative in this state does not service or repair the goods to conform to the applicable

express warranties after a reasonable number of attempts, the manufacturer shall either replace the goods or reimburse the buyer in an amount equal to the purchase price paid by the buyer, less that amount directly attributable to use by the buyer prior to discovery of the nonconformity.

(2) If the manufacturer or its representative in this state is unable to service or repair a new motor vehicle … to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either promptly replace the new motor vehicle … or promptly make restitution to the buyer … . However, the buyer shall be free to elect restitution in lieu of replacement, and in no event shall the buyer be required to accept a replacement vehicle.

- "[S]ection 1793.2, subdivision (d)(2), differs from section 1793.2, subdivision (d)(1), in that it gives the new motor vehicle consumer the right to elect restitution in lieu of replacement; provides specific procedures for the motor vehicle manufacturer to follow in the case of replacement and in the case of restitution; and sets forth rules for offsetting the amount attributed to the consumer's use of the motor vehicle. These 'Lemon Law' provisions clearly provide greater consumer protections to those who purchase new motor vehicles than are afforded under the general provisions of the Act to those who purchase other consumer goods under warranty." (*National R.V., Inc., supra,* 34 Cal.App.4th at p. 1079, internal citations and footnotes omitted.)

- Civil Code section 1793.2(c) provides, in part: "The buyer shall deliver nonconforming goods to the manufacturer's service and repair facility within this state, unless, due to reasons of size and weight, or method of attachment, or method of installation, or nature of the nonconformity, delivery cannot reasonably be accomplished. If the buyer cannot return the nonconforming goods for any of these reasons, he or she shall notify the manufacturer or its nearest service and repair facility within the state. Written notice of nonconformity to the manufacturer or its service and repair facility shall constitute return of the goods for purposes of this section."

- The act does not require a consumer to give a manufacturer, in addition to its local representative, at least one opportunity to fix a problem. Regarding previous repair efforts entitling an automobile buyer to reimbursement, "[t]he legislative history of [Civil Code section 1793.2] demonstrates beyond any question that . . . a differentiation between manufacturer and local representative is unwarranted." (*Ibrahim v. Ford Motor Co.* (1989) 214 Cal.App.3d 878, 888 [263 Cal.Rptr. 64].)

- Civil Code section 1795.5 provides, in part: Notwithstanding the provisions … defining consumer goods to mean 'new' goods, the obligation of a distributor or retail seller of used consumer goods in a sale in which an express warranty is given shall be the same as that imposed on manufacturers," with limited exceptions provided by statute.

- Civil Code section 1790.3 provides: "The provisions of [the Song-Beverly Consumer Warranty Act] shall not affect the rights and obligations of parties determined by

reference to the Commercial Code except that, where the provisions of the Commercial Code conflict with the rights guaranteed to buyers of consumer goods under the provisions of [the act], the provisions of [the act] shall prevail."

- Civil Code section 1793.1(a)(2) provides, in part: "The warranty period will be extended for the number of whole days that the product has been out of the buyer's hands for warranty repairs. If a defect exists within the warranty period, the warranty will not expire until the defect has been fixed. The warranty period will also be extended if the warranty repairs have not been performed due to delays caused by circumstances beyond the control of the buyer, or if the warranty repairs did not remedy the defect and the buyer notifies the manufacturer or seller of the failure of the repairs within 60 days after they were completed."

- Civil Code section 1795.6 provides, in part:

  (a) Every warranty period relating to an … express warranty accompanying a sale or consignment for sale of consumer goods selling for fifty dollars ($50) or more shall automatically be tolled for the period from the date upon which the buyer either (1) delivers nonconforming goods to the manufacturer or seller for warranty repairs or service or (2), pursuant to [sections 1793.2(c) or 1793.22], notifies the manufacturer or seller of the nonconformity of the goods up to, and including, the date upon which (1) the repaired or serviced goods are delivered to the buyer, (2) the buyer is notified the goods are repaired or serviced and are available for the buyer's possession or (3) the buyer is notified that repairs or service is completed, if repairs or service is made at the buyer's residence.

  (b) Notwithstanding the date or conditions set for the expiration of the warranty period, such warranty period shall not be deemed expired if … : (1) after the buyer has satisfied the requirements of subdivision (a), the warranty repairs or service has not been performed due to delays caused by circumstances beyond the control of the buyer or (2) the warranty repairs or service performed upon the nonconforming goods did not remedy the nonconformity for which such repairs or service was performed and the buyer notified the manufacturer or seller of this failure within 60 days after the repairs or service was completed. When the warranty repairs or service has been performed so as to remedy the nonconformity, the warranty period shall expire in accordance with its terms, including any extension to the warranty period for warranty repairs or service.

<u>Secondary Sources</u>

- 3 Witkin, Summary of California Law (9th ed. 1987) Sales, §§ 51, 55, 306–308, pp. 47, 51, 240–242; *id.* (2002 supp.) at §§ 51, 55, 306–308, pp. 14–15, 94–103
- 1 Sales & Leases (Cont.Ed.Bar 2001) Warranties, §§ 7.4, 7.8, 7.15, 7.87, pp. 233–234, 239, 245–246, 293–294; *id.*, Prelitigation Remedies, at § 13.68, pp. 619–620; *id.*, Litigation Remedies, at § 14.25, pp. 658–659; *id.*, Division 10: Leasing of Goods, at § 17.31, p. 807

- CALIFORNIA PRODUCTS LIABILITY ACTIONS, Ch. 2, *Liability for Defective Products*, §§ 2.30[3], 2.31, Ch. 8, *Defenses*, § 8.07[3][b] (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 502, *Sales: Warranties*, §§ 502.42, 502.53 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 206, *Sales* (Matthew Bender)
- 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

SONG-BEVERLY CONSUMER WARRANTY ACT

3201
Violation of Civil Code section 1793.2(d)—New Motor Vehicle
Essential Factual Elements

[*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 all of 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;]**

5. **[That [***name of plaintiff***] notified [***name of defendant***] in writing of the need for repair because [he/she] reasonably could not deliver the vehicle to [***name of defendant***] or its authorized repair facilities due to the nature of the defect];**

6. **That [***name of defendant***] or its representative failed to service or repair the vehicle to match the written warranty after a reasonable number of opportunities to do so; and**

7. **That [***name of defendant***] did not promptly replace or buy back the vehicle as requested by [***name of plaintiff***].**

[A written warranty need not include the words "warranty" or "guarantee," but if those words are used, a warranty is created. It is also not necessary for [*name of defendant***] to have specifically intended to create a warranty. A warranty is not created if [***name of defendant***] simply stated the value of the vehicle or gave an opinion about the vehicle. General statements concerning customer satisfaction do not create a warranty.]**

DIRECTIONS FOR USE

If remedies are sought under the Commercial Code, the plaintiff may be required to prove reasonable notification within a reasonable time. (Cal. U. Com. Code, § 2607(3).) If the court determines such proof is necessary, add the following element to this instruction:

> That [*name of plaintiff*] took reasonable steps to notify [*name of defendant*] within a reasonable time that the [*new motor vehicle*] had a defect covered by the warranty;

See also instruction 1243, *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.

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.

Where the warranty period has been extended, it cannot expire any sooner than 60 days after the last repair of a claimed defect. (Civ. Code, § 1793.1(a)(2).)

SOURCES AND AUTHORITY

- "Broadly speaking, the Act regulates warranty terms; imposes service and repair obligations on manufacturers, distributors and retailers who make express warranties; requires disclosure of specified information in express warranties; and broadens a buyer's remedies to include costs, attorney fees and civil penalties. … [T]he purpose of the Act has been to provide broad relief to purchasers of consumer goods with respect to warranties." (*National R.V., Inc. v. Foreman* (1995) 34 Cal.App.4th 1072, 1080 [40 Cal.Rptr.2d 672].)

- "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.

- 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 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.)

- Civil Code section 1793.1(a)(2) provides, in part: "The warranty period will be extended for the number of whole days that the product has been out of the buyer's hands for warranty repairs. If a defect exists within the warranty period, the warranty will not expire until the defect has been fixed. The warranty period will also be extended if the warranty repairs have not been performed due to delays caused by circumstances beyond the control of the buyer, or if the warranty repairs did not remedy the defect and the buyer notifies the manufacturer or seller of the failure of the repairs within 60 days after they were completed."

- Civil Code section 1795.6 provides, in part:

  (a) Every warranty period relating to an … express warranty accompanying a sale or consignment for sale of consumer goods selling for fifty dollars ($50) or more shall automatically be tolled for the period from the date upon which the buyer either (1) delivers nonconforming goods to the manufacturer or seller for warranty repairs or service or (2), pursuant to [sections 1793.2(c) or 1793.22], notifies the manufacturer or seller of the nonconformity of the goods up to, and including, the date upon which (1) the repaired or serviced goods are delivered to the buyer, (2) the buyer is notified the goods are repaired or serviced and are available for the buyer's possession or (3) the buyer is notified that repairs or service is completed, if repairs or service is made at the buyer's residence.

  (b) Notwithstanding the date or conditions set for the expiration of the warranty period, such warranty period shall not be deemed expired if … : (1) after the buyer has satisfied the requirements of subdivision (a), the warranty repairs or service has not been performed due to delays caused by circumstances beyond the control of the buyer or (2) the warranty repairs or service performed upon the nonconforming goods did not remedy the nonconformity for which such repairs or service was performed and the buyer notified the manufacturer or seller of this failure within 60 days after the repairs or service was completed. When the warranty repairs or service has been performed so as to remedy the nonconformity, the warranty period shall expire in accordance with its terms, including any extension to the warranty period for warranty repairs or service.

<u>Secondary Sources</u>

- 3 Witkin, Summary of California Law (9th ed. 1987) Sales, §§ 51, 55, 306–308, pp. 47, 51, 240–242; *id.* (2002 supp.) at §§ 51, 55, 306–308, pp. 14–15, 94–103
- 1 Sales & Leases (Cont.Ed.Bar 2001) Warranties, §§ 7.4, 7.8, 7.15, 7.87, pp. 233–234, 239, 245–246, 293–294; *id.*, Prelitigation Remedies, at § 13.68, pp. 619–620; *id.*,

Litigation Remedies, § at 14.25, pp. 658–659; *id.*, Division 10: Leasing of Goods, at § 17.31, p. 807

- CALIFORNIA PRODUCTS LIABILITY ACTIONS, Ch. 2, *Liability for Defective Products*, § 2.31, (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 502, *Sales: Warranties*, § 502.43[5][b] (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 206, *Sales* (Matthew Bender)
- 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

3202
"Repair Opportunities" Explained

Each time the [*consumer good*] was given to [*name of defendant*] [or its representative] for repair counts as an opportunity to repair, even if [it/they] 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
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 502, *Sales: Warranties*, § 502.43 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 206, *Sales* (Matthew Bender)

3203
Reasonable Number of Repair Opportunities—Rebuttable Presumption
(Civ. Code, § 1793.22(b))

The number of opportunities to make repairs is presumed to be reasonable if [*name of plaintiff***] proves that within [18 months from delivery of the [***new motor vehicle***] to [him/her/it]] [or] [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 opportunities 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.]**

DIRECTIONS FOR USE

Note that the factfinder's inquiry should be focused on overall reasonableness of the opportunities plaintiff gave defendant to make repairs. Therefore, while satisfying the rebuttable presumption (without having it overcome by defendant) is one way for plaintiff to satisfy the reasonable opportunities requirement, he or she may do so in other

ways instead. Likewise, because the statutory presumption is rebuttable, defendant is allowed an opportunity to overcome it.

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."

- "We believe … that the 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 citations and footnote omitted.)

- 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 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

- 2 Sales & Leases (Cont.Ed.Bar 2001) Prelitigation Remedies, § 13.68, pp. 619–621
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 502, *Sales: Warranties*, § 502.43[5][b] (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 206, *Sales* (Matthew Bender)
- 5 Bancroft-Whitney's California Civil Practice: Business Litigation (1993) Consumer Warranties, § 53:27, pp. 33–34

SONG-BEVERLY CONSUMER WARRANTY ACT

3210
Warranty of Merchantability
Essential Factual Elements

[*Name of plaintiff***] claims that [he/she] was harmed because the [***consumer good***] 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 all of the following:**

1. **That [***name of plaintiff***] bought a[n] [***consumer good***] [from/manufactured by] [***name of defendant***];**

2. **That at the time of purchase [***name of defendant***] was in the business of [selling [***consumer goods***] to retail buyers] [manufacturing [***consumer good***s]]; and**

3. **That the [***consumer good***] [***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.]

DIRECTIONS FOR USE

If remedies are sought under the Commercial Code, the plaintiff may be required to prove reasonable notification within a reasonable time. (Cal. U. Com. Code, § 2607(3).) If the court determines such proof is necessary, add the following element to this instruction:

> That [*name of plaintiff*] took reasonable steps to notify [*name of defendant*] within a reasonable time that the [*consumer good*] did not have the quality that a buyer would reasonably expect;

See also instruction 1243, *Notification/Reasonable Time*.

Delete element 2 if the defendant is the manufacturer of the consumer good in question or if it is uncontested that the defendant was a retail seller within the meaning of the act.

If appropriate to the facts, add: "It is not necessary for [*name of plaintiff*] to prove the cause of a defect of the [*consumer good*]." The Song-Beverly Consumer Warranty Act does not require a consumer to prove the cause of the defect or failure, only that the consumer good "did not conform to the express warranty." (See *Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1102, fn. 8 [109 Cal.Rptr.2d 583].)

In addition to sales of consumer goods, the Consumer Warranty Act applies to leases—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.
  (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."

- Commercial Code section 2714(2) provides: "The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount."

- "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.)

- 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.)

Secondary Sources

- 3 Witkin, Summary of California Law (9th ed. 1987) Sales, §§ 67–68, pp. 61–62; *id.* (2002 supp.) at § 68, p. 19
- 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
- CALIFORNIA PRODUCTS LIABILITY ACTIONS, Ch. 2, *Liability for Defective Products*, § 2.31[2][a] (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 502, *Sales: Warranties*, § 502.51 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 206, *Sales* (Matthew Bender)
- 5 Bancroft-Whitney's California Civil Practice: Business Litigation (1993) Consumer Warranties, § 53:5–53:7, 53:31, pp. 11–13, 38–39

3211
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 good***] was not suitable for [his/her] intended use. This is known as an "breach of an implied warranty." To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] bought a[n] [***consumer good***] [from/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 good***] 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 [his/her/its] skill and judgment to select or provide a [***consumer good***] 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 good***] was not suitable for the particular purpose.**

DIRECTIONS FOR USE

If remedies are sought under the Commercial Code, the plaintiff may be required to prove reasonable notification within a reasonable time. (Cal. U. Com. Code, § 2607(3).) If the court determines such proof is necessary, add the following element to this instruction:

> That [*name of plaintiff*] took reasonable steps to notify [*name of defendant*] within a reasonable time that the [*consumer good*] was not suitable for its intended use;

See also instruction 1243, *Notification/Reasonable Time*.

If appropriate to the facts, add: "It is not necessary for [*name of plaintiff*] to prove the cause of a defect of the [*consumer good*]." The Song-Beverly Consumer Warranty Act does not require a consumer to prove the cause of the defect or failure, only that the consumer good "did not conform to the express warranty." (See *Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1102, fn. 8 [109 Cal.Rptr.2d 583].)

In addition to sales of consumer goods, the Consumer Warranty Act applies to leases 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."

- Commercial Code section 2714(2) provides: "The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount."

- "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."

- "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.)

Secondary Sources

- 3 Witkin, Summary of California Law (9th ed. 1987) Sales, §§ 69–70, 72–74, pp. 63–67; *id.* (2002 supp.) at §§ 69–70, 72–74, pp. 19–20
- 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
- CALIFORNIA PRODUCTS LIABILITY ACTIONS, Ch. 2, *Liability for Defective Products*, § 2.31[2][b] (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 502, *Sales: Warranties*, § 502.51 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 206, *Sales* (Matthew Bender)
- 5 Bancroft-Whitney's California Civil Practice: Business Litigation (1993) Consumer Warranties, §§ 53:5–53:7, 53:31, pp. 11–13, 38–39

3212
Duration of Implied Warranty

An implied warranty is in effect for one year after the sale of the [*consumer good*], unless a shorter period is stated in a writing that comes with the [*consumer good*], 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 good*] 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 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

- 3 Witkin, Summary of California Law (9th ed. 1987) Sales, § 309, p. 243
- 1 Sales & Leases (Cont.Ed.Bar 2001) Warranties, § 7.15, pp. 245–246
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 502, *Sales: Warranties*, §§ 502.51–502.52 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 206, *Sales* (Matthew Bender)
- 5 Bancroft-Whitney's California Civil Practice: Business Litigation (1993) Consumer Warranties, § 53:7, pp. 12–13

3220
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 good*]] [failure to match any [written/ implied] warranty] [was/were] caused by unauthorized or unreasonable use of the [*consumer good*] 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

- 3 Witkin, Summary of California Law (9th ed. 1987) Sales, § 306, p. 240
- CALIFORNIA PRODUCTS LIABILITY ACTIONS, Ch. 8, *Defenses*, § 8.07[7] (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 502, *Sales: Warranties*, § 502.51 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 206, *Sales* (Matthew Bender)
- 5 Bancroft-Whitney's California Civil Practice: Business Litigation (1993) Consumer Warranties, § 53:55, p. 66

3221
Affirmative Defense—Disclaimer of Implied Warranties

[*Name of defendant***] claims that it did not breach any implied warranties because the [***consumer good***] was sold on an "as is" or "with all faults" basis. To succeed, [***name of defendant***] must prove both of the following:**

1. **That at the time of sale a clearly visible written notice was attached to the [***consumer good***]; and**

2. **That the written notice, in clear and simple language, told the buyer each of the following:**

   a. **That the [***consumer good***] 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 good***]; and**

   c. **That if the [***consumer good***] 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."

- "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 and all warranties created by this chapter by conspicuously disclosing in the lease that these warranties are disclaimed."

<u>Secondary Sources</u>

- 3 Witkin, Summary of California Law (9th ed. 1987) Sales, § 87, pp. 74–75
- 1 Sales & Leases (Cont.Ed.Bar 2001) Warranties, § 7.57, p. 274
- CALIFORNIA PRODUCTS LIABILITY ACTIONS, Ch. 2, *Liability for Defective Products*, § 2.34[3], Ch. 8, *Defenses*, § 8.07[5][c] (Matthew Bender)

- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 502, *Sales: Warranties*, § 502.51 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 206, *Sales* (Matthew Bender)
- 5 Bancroft-Whitney's California Civil Practice: Business Litigation (1993) Consumer Warranties, §§ 53:8–53:9, pp. 13–14

3230
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 all of 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/[***name of state***]]'s motor vehicle warranty laws; and]**

   [That [*name of defendant***] knew or should have known that the vehicle had been returned to the manufacturer under [California/[***name of state***]]'s motor vehicle warranty laws; and]**

[3. 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]]**

[4. That before the [sale/leasing] to [*name of plaintiff***], the defect experienced by the vehicle's original [buyer/lessee] was not fixed; [or]]**

[5. 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];]**

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 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

- CALIFORNIA POINTS AND AUTHORITIES, Ch. 206, *Sales* (Matthew Bender)
- 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

3240
Reimbursement Damages—Consumer Goods

If you decide that [*name of defendant*] or its representative failed to repair or service the [*consumer good*] to match the [written warranty/represented quality] after a reasonable number of opportunities, then [*name of plaintiff*] is entitled to be reimbursed for the purchase price of the [*consumer good*], 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 good*].

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 3241, *Restitution From Manufacturer—New Motor Vehicle*.

This instruction can be modified if it is being used for claims other than those described in the instruction.

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.
  (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>

- 3 Witkin, Summary of California Law (9th ed. 1987) Sales, § 308, pp. 242–243; *id.* (2002 supp.) at § 308, pp. 99–103
- 1 Sales & Leases (Cont.Ed.Bar 2001) Warranties, § 7.87, pp. 293–294
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 502, *Sales: Warranties*, § 502.43 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 206, *Sales* (Matthew Bender)
- 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

3241
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 opportunities, then [***name of plaintiff***] is entitled to recover the price [he/she] proves [he/she] paid for the car, including:**

1. **The purchase price of the vehicle itself;**
2. **Charges for transportation and manufacturer-installed options;**
3. **Finance charges actually paid by [***name of plaintiff***]; and**
4. **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 3240, *Reimbursement Damages—Consumer Goods*.

This instruction can be modified if it is being used for claims other than those described in the instructions. In lieu of restitution, plaintiff may request replacement with 'a new motor vehicle substantially identical to the vehicle replaced,' pursuant to Civil Code s 1793.2(d)(2)(A). If plaintiff so requests, elements 1–4 should be replaced with appropriate language.

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:
  (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 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].)

Secondary Sources

- 3 Witkin, Summary of California Law (9th ed. 1987) Sales, § 308, pp. 242–243; *id.* (2002 supp.) at § 308, pp. 99–103
- 1 Sales & Leases (Cont.Ed.Bar 2001) Warranties, § 7.87, pp. 293–294
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 502, *Sales: Warranties*, § 502.43 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 206, *Sales* (Matthew Bender)
- 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

3242
Incidental Damages

[*Name of plaintiff***] also claims additional reasonable expenses for [***list claimed incidental damages***].**

To recover these expenses, [*name of plaintiff***] must prove all of the following:**

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 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>

- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 502, *Sales: Warranties*, § 502.160 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 206, *Sales* (Matthew Bender)
- 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

3243
Consequential Damages

[*Name of plaintiff***] also claims additional amounts for [***list claimed consequential damages***].**

To recover these damages, [*name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***]'s [***describe violation of Song-Beverly Consumer Warranty Act***] was a substantial factor in causing damages to [***name of plaintiff***];**

2. **That the damages resulted from [***name of plaintiff***]'s requirements and needs;**

3. **That [***name of defendant***] had reason to know of those requirements and needs at the time of the [sale/lease] to [***name of plaintiff***];**

4. **That [***name of plaintiff***] could not reasonably have prevented the damages; and**

5. **The amount of 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.

- 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>

- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 502, *Sales: Warranties*, § 502.160 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 206, *Sales* (Matthew Bender)
- 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

3244
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 punish a defendant or discourage [him/ her/it] from committing such violations in the future.**

If [*name of plaintiff***] has proved that [***name of defendant***]'s failure was intentional, you may impose a civil penalty against [him/her/it]. 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). The parties will need to draft a separate instruction for cases involving a civil penalty based on the defendant's violation of Civil Code section 1793.2(d)(2).

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.

- "[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>

- 3 Witkin, Summary of California Law (9th ed. 1987) Sales, § 308, pp. 242–243; *id.* (2002 supp.) at § 308, pp. 99–103
- 1 Sales & Leases (Cont.Ed.Bar 2001) Warranties, § 7.87, pp. 293–294
- CALIFORNIA PRODUCTS LIABILITY ACTIONS, Ch. 2, *Liability for Defective Products,* § 2.30 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 502, *Sales: Warranties,* § 502.53[1][b] (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 206, *Sales* (Matthew Bender)
- 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

VF-3200
SONG-BEVERLY CONSUMER WARRANTY ACT
Violation of Civil Code Section 1793.2(d)—Consumer Goods

We answer the questions submitted to us as follows:

1. Did [*name of plaintiff***] buy a[n] [***consumer good***] [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 good***] 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 defendant***] or its authorized repair facility repair the [***consumer good***] to conform to the [written statement/represented quality] after a reasonable number of opportunities?**

___Yes **___No**

If your answer to question 4 is no, then answer question 5. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Did [***name of defendant***] fail to replace the [***consumer good***] or reimburse [***name of plaintiff***] the appropriate amount of money?**

   ___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 amount is [***name of plaintiff***] entitled to receive to reimburse [him/her] for the [***consumer good***]?**

   $_____

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 3200, *Violation of Civil Code Section 1793.2(d)—Consumer Goods.*

If the plaintiff was unable to deliver the good, modify question 4 as in element 4 of instruction 3200. See verdict form 3201 for additional questions in the event the plaintiff is claiming consequential damages.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

VF-3201
SONG-BEVERLY CONSUMER WARRANTY ACT
Consequential Damages

We answer the questions submitted to us as follows:

1. **Was [***name of defendant***]'s conduct a substantial factor in causing damages 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 the damages result from [***name of plaintiff***]'s requirements and needs?**

   ___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 reason to know of those requirements and needs at the time of the [sale/lease] 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. **Could [***name of plaintiff***] reasonably have prevented the damages?**

   ___Yes **___No**

   If your answer to question 4 is no, then answer question 5. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **What is the amount of [***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 3243, *Consequential Damages.*

Normally, this verdict form would be combined with verdict forms containing the underlying cause(s) of action.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

VF-3202
SONG-BEVERLY CONSUMER WARRANTY ACT
Violation of Civil Code Section 1793.2(d)—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 good***] [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 good***] 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. Was the failure to comply with the warranty caused by unauthorized or unreasonable use of the [*consumer good***] following its sale?**

___Yes **___No**

If your answer to question 4 is no, then answer question 5. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Did [*name of defendant*] or its authorized repair facility repair the [*consumer good*] to conform to the [written statement/represented quality] after a reasonable number of opportunities?**

___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 good*] 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. **What amount is [*name of plaintiff*] entitled to receive to reimburse [him/her] for the [*consumer good*]?**

$_____

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 3200, *Violation of Civil Code Section 1793.2(d)—Consumer Goods*, and Instruction 3220, *Affirmative Defense—Unauthorized or Unreasonable Use*.

If the plaintiff was unable to deliver the good, modify question 4 as in element 4 of instruction 3200. See verdict form 3201 for additional questions in the event the plaintiff is claiming consequential damages. If there are multiple causes of action, users may wish to combine the individual forms into one form.

VF-3203
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 defendant***] or its authorized repair facility service or repair the vehicle to conform to the written warranty after a reasonable number of opportunities?**

___Yes **___No**

If your answer to question 4 is no, then answer question 5. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **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 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?** **$_____**

Answer question 7.

7. **Did [***name of defendant***] intentionally fail to repurchase or replace the [***new motor vehicle***]?**

___Yes **___No**

Answer question 8.

8. 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 3201, *Breach of Express Warranty—New Motor Vehicle—Essential Factual Elements (Civ. Code, § 1794)*, and Instruction 3244, *Civil Penalty–Willful Violation (Civ. Code, § 1794(c))*. See verdict form 3201 for additional questions in the event the plaintiff is claiming consequential damages.

If plaintiff was unable to deliver the vehicle, modify question 4 as in element 4 of instruction 3201.

VF-3204
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 good***] [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 goods***] to retail buyers] [manufacturing [***consumer goods***]]?**

___Yes **___No**

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was the [*consumer good***] 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. What amount is [*name of plaintiff***]'s entitled to receive as restitution to [him/her] for the [***consumer good***]?**

$_____

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 3210, *Breach of Implied Warranty of Merchantability—Essential Factual Elements.* See verdict form 3201 for additional questions in the event the plaintiff is claiming consequential damages.

Depending on the facts, question 3 can be modified to cover other grounds for breach of the warranty, as in element 3 of instruction 3210.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.

VF-3205
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 good***] [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 goods***] to retail buyers] [manufacturing [***consumer goods***]]?**

   ___Yes **___No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Was the [***consumer good***] 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 good***] sold on an "as is" or "with all faults" basis ?**

   ___Yes **___No**

   If your answer to question 4 is no, then answer question 5. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. What amount is [*name of plaintiff*]'s entitled to receive as restitution [him/her] for the [*consumer good*]?

$_____

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 3210, *Breach of Implied Warranty of Merchantability—Essential Factual Elements*, and Instruction 3221, *Affirmative Defense—Disclaimer of Implied Warranties.* See verdict form 3201 for additional questions in the event the plaintiff is claiming consequential damages.

Depending on the facts, question 3 can be modified to cover other grounds for breach of the warranty, as in element 3 of instruction 3210.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

VF-3206
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 harm to [***name of plaintiff***]?**

   ___Yes **___No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **What are [***name of plaintiff***]'s damages?** **$_____**

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 3230, *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 3230. Make sure that the "yes" and "no" directions match appropriately.

Omit question 4 if the plaintiff is not seeking consequential damages.

UNFAIR PRACTICES ACT

3300
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 all of 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].)

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].)

- "[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.

Secondary Sources

- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 591–596
- 1 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 1997), § 1.02B
- CALIFORNIA TORTS, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.153 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 565, *Unfair Competition* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 235, *Unfair Competition* (Matthew Bender)

UNFAIR PRACTICES ACT

3301
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 all of 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 3303, *Definition of "Cost"*; instruction 3304, *Presumptions Concerning Costs—Manufacturer*; instruction 3305, *Presumptions Concerning Costs—Distribution*; and instruction 3306, *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 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 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 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 591–596
- 1 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 1997), § 1.02A
- CALIFORNIA TORTS, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.153 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 565, *Unfair Competition* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 235, *Unfair Competition* (Matthew Bender)

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 all of 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 [him/her/it]; [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 intent was 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 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 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 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 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 Witkin, Summary of California Law (9th ed. 1987) Contracts, § 595
- 1 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 1997), § 1.02D
- CALIFORNIA TORTS, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.153 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 565, *Unfair Competition* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 235, *Unfair Competition* (Matthew Bender)

3303
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; [and]**
12. **[***Insert other cost(s)***]**

[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.]

[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 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.)

<u>Secondary Sources</u>

- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 591–596
- 1 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 1997), § 1.02A.4
- CALIFORNIA TORTS, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.153 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 565, *Unfair Competition* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 235, *Unfair Competition* (Matthew Bender)

3304
Presumptions Concerning Costs—Manufacturer

A manufacturer's costs include the cost of raw materials and the cost 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."

- 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 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 591–596
- 1 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 1997), § 1.02A.4
- CALIFORNIA TORTS, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.153 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 565, *Unfair Competition* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 235, *Unfair Competition* (Matthew Bender)

3305
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.

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.)

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- 1 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 1997), § 1.02A.4
- CALIFORNIA TORTS, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.153 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 565, *Unfair Competition* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 235, *Unfair Competition* (Matthew Bender)

3306
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.)

- "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

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- 1 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 1997), § 1.02A.4
- CALIFORNIA TORTS, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.153 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 565, *Unfair Competition* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 235, *Unfair Competition* (Matthew Bender)

3320
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 all of 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 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 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 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 591–596
- 1 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 1997), § 1.02C
- CALIFORNIA TORTS, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.153 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 565, *Unfair Competition* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 235, *Unfair Competition* (Matthew Bender)

3321
Secret Rebates—Definition of "Secret"

[Rebates/Refunds/Commissions/Unearned discounts/Services or privileges] are "secret" if they are concealed from or not disclosed to other buyers.

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 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 591–596
- 1 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 1997), § 1.02C.2
- CALIFORNIA TORTS, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.153 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 565, *Unfair Competition* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 235, *Unfair Competition* (Matthew Bender)

3330
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.)

<u>Secondary Sources</u>

- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 591–596
- 1 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 1997), § 1.02B.5
- CALIFORNIA TORTS, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.153 (Matthew Bender)

- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 565, *Unfair Competition* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 235, *Unfair Competition* (Matthew Bender)

UNFAIR PRACTICES ACT

3331
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 both of 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 sets forth the reason[s] for the sale and indicates the number of items to be sold.**

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.

Secondary Sources

- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 591–596
- 1 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 1997), § 1.03B
- CALIFORNIA TORTS, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.153 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 565, *Unfair Competition* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 235, *Unfair Competition* (Matthew Bender)

3332
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 they apply to different classes of customers. To succeed, [***name of defendant***] must prove all of 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.
  (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 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 591–596
- 1 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 1997), § 1.02B.5
- CALIFORNIA TORTS, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.153 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 565, *Unfair Competition* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 235, *Unfair Competition* (Matthew Bender)

3333
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***] [is/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 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 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 591–596
- 1 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 1997), § 1.03A
- CALIFORNIA TORTS, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.153 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 565, *Unfair Competition* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 235, *Unfair Competition* (Matthew Bender)

3334
Affirmative Defense to Locality Discrimination Claim
Manufacturer Meeting Downstream Competition

[*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 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 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 591–596
- 1 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 1997), § 1.03A
- CALIFORNIA TORTS, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.153 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 565, *Unfair Competition* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 235, *Unfair Competition* (Matthew Bender)

3335
Affirmative Defenses—"Good Faith" Explained

In deciding whether [*name of defendant*] acted in good faith in attempting to meet competition, you must decide whether [his/her/its] 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 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 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 591–596
- 1 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 1997), § 1.03A
- CALIFORNIA TORTS, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.153 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 565, *Unfair Competition* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 235, *Unfair Competition* (Matthew Bender)

VERDICT FORMS

VF-3300
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? $_____**

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 3300, *Locality Discrimination—Essential Factual Elements.*

If there are multiple causes of action, users may wish to combine the individual forms into one form.

VF-3301
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**

   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 3300, *Locality Discrimination—Essential Factual Elements*, and Instruction 3330, *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.

VF-3302
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].

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 3301, *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 3301.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

VF-3303
Unfair Practices Act—Below Cost Sales Claim—Affirmative Defense
Closed-out, Discontinued, Damaged, or Perishable Items

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 part 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***] give 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**

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 3301, *Below Cost Sales—Essential Factual Elements*, and Instruction 3331, *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 3331. 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.

VF-3304
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 intent 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**

   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 3302, *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 3302.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

VF-3305
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 intent to injure competitors or destroy competition?**

   ___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 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 3302, *Loss Leader Sales—Essential Factual Elements*, and Instruction 3333, *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 3302. 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.

VF-3306
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**

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 3320, *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.

VF-3307
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**

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?** **$_____**

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 3320, *Secret Rebates—Essential Factual Elements*, and Instruction 3332, *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.

3400
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 on were high or low, reasonable or unreasonable. To establish this claim, [***name of plaintiff***] must prove all of 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 (3409, *Vertical Restraints—Termination of Reseller*; 3410, *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.

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].)

- "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.4th 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* (1997) 51 Cal.App.4th 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.)

- "[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 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

- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 575–590
- 2 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 2001), §§ 9.03–9.05
- ANTRITRUST LAWS & TRADE REGULATION, Ch. 105, *California*, § 105.02[1] (Matthew Bender)
- CALIFORNIA TORTS, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.168[2] (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 565, *Unfair Competition* (Matthew Bender)

3401
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 or divide [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 all of the following:**

1. **That [***name of defendant***] and [***name of alleged co-participant***] were or are competitors in the same or related markets;**

2. **That [***name of defendant***] and [***name alleged co-participant***] agreed to allocate or divide [customers/territories/products];**

3. **That [***name of plaintiff***] was harmed; and**

4. **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.)

- "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 & Distilleries v. J. Sosnick and Son* (1980) 102 Cal.App.3d 627, 633 [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* (1997) 51 Cal.App.4th 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 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.* (1982) 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

- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 575–590
- 2 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 2001), §§ 9.03, 9.04, 9.07
- ANTRITRUST LAWS & TRADE REGULATION, Ch. 105, *California*, § 105.02[2] (Matthew Bender)
- CALIFORNIA TORTS, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.168[3] (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 565, *Unfair Competition* (Matthew Bender)

3402
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] [[him/her/it]/a reseller]. To establish this claim, [***name of plaintiff***] must prove all of 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 motivating reason for the decision to [end business with/refuse to deal with/restrain] [[***name of plaintiff***]/the reseller] was [his/her/its] 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."

- 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 & Distilleries 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 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

- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 575–590
- 2 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 2001), §§ 9.03, 9.04, 9.08
- ANTRITRUST LAWS & TRADE REGULATION, Ch. 105, *California*, § 105.02 (Matthew Bender)
- CALIFORNIA TORTS, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.168 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 565, *Unfair Competition* (Matthew Bender)

3403
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 [him/her/it] [or to deal with [him/her/it] only on specified terms]. To establish this claim, [***name of plaintiff***] must prove all of 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."

- "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, 195 [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.)

- 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.* (1982) 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>

- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 575–590
- 2 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 2001), §§ 9.03, 9.04, 9.11
- ANTRITRUST LAWS & TRADE REGULATION, Ch. 105, *California*, § 105.02[3] (Matthew Bender)
- CALIFORNIA TORTS, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.168[5] (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 565, *Unfair Competition* (Matthew Bender)

3404
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 all of 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 3411 through 3414.

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, 931 [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 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.* (1982) 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>

- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 575–590
- 2 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 2001), §§ 9.03, 9.04, 9.11
- ANTRITRUST LAWS & TRADE REGULATION, Ch. 105, *California*, § 105.02[3] (Matthew Bender)
- CALIFORNIA TORTS, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.168[5] (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 565, *Unfair Competition* (Matthew Bender)

3405
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 all of 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 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 3411 through 3414.

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* (1997) 51 Cal.App.4th 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.)

- "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.* (1982) 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>

- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 575–590
- 2 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 2001), § 9.03B
- ANTRITRUST LAWS & TRADE REGULATION, Ch. 12, *The Per Se Rule and the Rule of Reason*, § 12.03 (Matthew Bender)
- CALIFORNIA TORTS, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.165[2] (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 565, *Unfair Competition* (Matthew Bender)

3406
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/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, among other factors, the following:**

(a) The nature of the acts;

(b) The relationship between the parties;

(c) Whether the conduct was contrary to the best interests of some of the persons or companies in question;

(d) Whether the conduct lacked a legitimate business purpose; or

(e) Whether the conduct occurred following communications concerning the subject of 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. …"

- "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>

- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 575–590

- 2 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 2001), §§ 9.04, 10.04
- CALIFORNIA TORTS, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.160[2] (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 565, *Unfair Competition* (Matthew Bender)

3407
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.)

- "[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].)

<u>Secondary Sources</u>

- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 575–590
- 2 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 2001), § 9.04B

3408
Vertical Restraints—"Coercion" Explained

Coercion is conduct that interferes with the freedom of a 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 [his/her/its] competition in the market.] A unilateral decision to deal or refuse to deal with a particular reseller does not constitute coercion.**

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***] penalized or threatened to penalize [***name of plaintiff***] for not following [his/her/its] suggestions;**

(b) Whether [*name of defendant***] made or threatened to make an important benefit depend on [***name of plaintiff***] following [his/her/its] suggestions;**

(c) Whether [*name of defendant***] required [***name of plaintiff***] to get approval before doing something other than what [he/she/it] suggested; and**

(d) The relative bargaining power of [*name of defendant***] and [***name of plaintiff***].**

DIRECTIONS FOR USE

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 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.)

- "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." (*Kolling, supra,* 137 Cal.App.3d at p. 721, 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

- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 575–590
- 2 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 2001), § 10.04B
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 565, *Unfair Competition* (Matthew Bender)

3409
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 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.)

<u>Secondary Sources</u>

- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 575–590

- 2 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 2001), § 10.04A
- ANTITRUST LAWS & TRADE REGULATION, Ch. 105, *California*, § 105.02 (Matthew Bender)
- CALIFORNIA TORTS, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.168[3] (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 565, *Unfair Competition* (Matthew Bender)

3410
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>

- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 575–590
- 2 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 2001), § 10.04C
- ANTITRUST LAWS & TRADE REGULATION, Ch. 105, *California*, § 105.02 (Matthew Bender)
- CALIFORNIA TORTS, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.168 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 565, *Unfair Competition* (Matthew Bender)

3411
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 nature of the restraint;

(b) The probable effect of the restraint on the business involved;

(c) The history of the restraint;

(d) The reasonableness of the stated purpose for the restraint;

(e) The availability of less restrictive means to accomplish the stated purpose;

(f) The portion of the market affected by the restraint; [and]

(g) The extent of [*name of defendant*]'s market power; [and]

(h) [*Insert other relevant consideration*].

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.)

- "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
- ANTITRUST LAWS & TRADE REGULATION, Ch. 12, *The Per Se Rule and the Rule of Reason*, § 12.03 (Matthew Bender)
- CALIFORNIA TORTS, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.168 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 565, *Unfair Competition* (Matthew Bender)

3412
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 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: 3413, *Rule of Reason—"Product Market" Explained,* and 3414, *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.)

- "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. 189], 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., supra*, 200 Cal.App.3d at pp. 706–707, footnote omitted.)

Secondary Sources

- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 575–590
- ANTITRUST LAWS & TRADE REGULATION, Ch. 12, *The Per Se Rule and the Rule of Reason*, § 12.03 (Matthew Bender)
- CALIFORNIA TORTS, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.168 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 565, *Unfair Competition* (Matthew Bender)

3413
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 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. 189].)

Secondary Sources

- ANTITRUST LAWS & TRADE REGULATION, Ch. 12, *The Per Se Rule and the Rule of Reason*, § 12.03 (Matthew Bender)
- CALIFORNIA TORTS, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.168 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 565, *Unfair Competition* (Matthew Bender)

3414
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 3413, *Rule of Reason—"Product Market" Explained* may be adapted. Regarding the significance of customer purchasing patterns, the following example may suffice:

> 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 per unit. 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.)

<u>Secondary Sources</u>

- ANTITRUST LAWS & TRADE REGULATION, Ch. 12, *The Per Se Rule and the Rule of Reason*, § 12.03 (Matthew Bender)
- CALIFORNIA TORTS, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.168 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 565, *Unfair Competition* (Matthew Bender)

3420
Tying—Real Estate, Products, or Services—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 all of 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 item***]; 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.**

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 unlawful tying than does 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.
  (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." (*Morrison v. Viacom, Inc.* (1997) 52 Cal.App.4th 1514, 1524 [61 Cal.Rptr.2d 544], internal citations omitted.)

- "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, supra,* 66 Cal.App.4th at pp. 541–542, 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, supra,* 101 Cal.App.3d at p. 549, 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>

- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 575–590
- 2 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 2001), § 10.06
- ANTITRUST LAWS & TRADE REGULATION, Ch. 105, *California*, § 105.04 (Matthew Bender)
- CALIFORNIA TORTS, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.168[4] (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 565, *Unfair Competition* (Matthew Bender)

3421
Tying—Products or Services—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 all of the following:**

1. **That [***tying product***] 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***]] [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.**

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. 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 the 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.)

Secondary Sources

- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 575–590
- 2 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 2001), § 10.06
- ANTITRUST LAWS & TRADE REGULATION, Ch. 105, *California*, § 105.04 (Matthew Bender)
- CALIFORNIA TORTS, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.168[4] (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 565, *Unfair Competition* (Matthew Bender)

3422
Tying—"Separate Products" Explained

In deciding whether [*tying product or service***] and [***tied product or service***] are separate and distinct, you should consider, among other factors, the following:**

(a) Whether competitors offer to sell [*tied product or service***] separately from [***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 [***tied product or service***] separate from [***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 [***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.

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

- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 575–590
- 2 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 2001), § 10.06A
- ANTITRUST LAWS & TRADE REGULATION, Ch. 105, *California*, § 105.04 (Matthew Bender)
- CALIFORNIA TORTS, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.168[4] (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 565, *Unfair Competition* (Matthew Bender)

3423
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 item*] that buyers do not have alternate sources of [*tying item*] 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 item*] 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. If that proof is note summarily established or agreed to, then this instruction also must be read in such cases.

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 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

- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 575–590
- 2 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 2001), § 10.06D
- ANTITRUST LAWS & TRADE REGULATION, Ch. 105, *California*, § 105.04 (Matthew Bender)
- CALIFORNIA TORTS, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.168[4] (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 565, *Unfair Competition* (Matthew Bender)

3430
"Noerr-Pennington" Doctrine

[*Name of defendant***] claims that [his/her/its] agreement with [***name of alleged co-participant***] 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 both of 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 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>

- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, § 578
- 2 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 2001), § 16.11
- ANTITRUST LAWS & TRADE REGULATION, Ch. 105, *California,* § 105.10[1][h] (Matthew Bender)
- CALIFORNIA TORTS, Ch. 40, *Fraud and Deceit and Other Business Torts,* § 40.164[5][a] (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 565, *Unfair Competition* (Matthew Bender)

3431
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 all of 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 engage in the harmful conduct.**

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

- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 575–590
- 2 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 2001), § 16.13
- ANTITRUST LAWS & TRADE REGULATION, Ch. 105, *California*, § 64.05[2][b] (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 565, *Unfair Competition* (Matthew Bender)

3440
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 particular 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 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 the area of the economy that is endangered by a breakdown of competitive conditions." (*Kolling v. Dow Jones & Co., Inc.* (1982) 137 Cal.App.3d 709, 723–724 [187 Cal.Rptr. 797], internal citations and footnote omitted.)

- " '[D]amage issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts. … [I]n the absence of

more precise proof, the factfinder may "conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs." ' " (*Diesel Electric Sales and Service, Inc. v. Marco Marine San Diego, Inc.* (1993) 16 Cal.App.4th 202, 219–220 [20 Cal.Rptr.2d 62], internal citations omitted.)

Secondary Sources

- 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, § 585
- 2 Antitrust and Trade Regulation Law Section, State Bar of California, California Antitrust Law (2d ed. 2001), §§ 10.06E, 12.05, 12.07
- ANTITRUST LAWS & TRADE REGULATION, Ch. 105, *California*, § 105.09 (Matthew Bender)
- CALIFORNIA TORTS, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.172 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 565, *Unfair Competition* (Matthew Bender)

VF-3400
Cartwright Act—Horizontal and Vertical Restraints
(Use for Direct Competitors)—Price Fixing

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].

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 3400, *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.

VF-3401
Cartwright Act—Horizontal Restraints (Use for Direct Competitors)
Allocation of Trade or Commerce

We answer the questions submitted to us as follows:

1. Were or are [*name of defendant***] and [***name of alleged co-participant***] competitors in the same or related markets?**

___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***] and [***name of alleged co-participant***] agree to allocate or divide [customers/territories/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 [*name of defendant***]'s and [***name of alleged co-participant***]'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].

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 3401, *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.

VF-3402
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. **Were or are [***name of defendant***] and [***name of alleged co-participant***] competitors in the same or related markets?**

   ___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***] and [***name of alleged co-participant***] agree to allocate or divide [customers/territories/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. **Did [***name of plaintiff***] and [***name of defendant***] have substantially equal economic strength?**

   ___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 [***name of plaintiff***] at least equally responsible for the harmful conduct as [***name of defendant***]?**

   ___Yes **___No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, skip question 5 and answer question 6.

5. **Was [***name of plaintiff***] compelled by economic pressure to enter into the agreement?**

   ___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].

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 3401, *Horizontal Restraints (Use for Direct Competitors)—Allocation of Trade or Commerce—Essential Factual Elements,* and Instruction 3431, *Affirmative Defense—In Pari Delicto.*

If there are multiple causes of action, users may wish to combine the individual forms into one form.

VF-3403
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 motivating 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**

   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 3402, *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.

VF-3404
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].

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 3403, *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.

VF-3405
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**

   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 3404, *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.

VF-3406
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[s]***]] 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**

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 3405, *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.

VF-3407
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

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.

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].

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 3405, *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 3430, *"Noerr-Pennington" Doctrine.*

If there are multiple causes of action, users may wish to combine the individual forms into one form.

VF-3408
Cartwright Act—Tying—Real Estate, Products, or Services (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**

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 3420, *Tying—Real Estate, Products, or Services—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.

VF-3409
Cartwright Act—Tying—Products or Services (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**

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 3421, *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 3421.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

3500
Introductory Instruction

Public agencies such as the [*name of condemnor*] have the right to take private property for public use if they pay the owner just compensation.

SOURCES AND AUTHORITY

- Article I, section 19 of the California Constitution provides: "Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner. The Legislature may provide for possession by the condemnor following commencement of eminent domain proceedings upon deposit in court and prompt release to the owner of money determined by the court to be the probable amount of just compensation."

- The Fifth Amendment of the U.S. Constitution provides, in part: "[N]or shall private property be taken for public use, without just compensation."

- Code of Civil Procedure section 1240.010 provides: "The power of eminent domain may be exercised to acquire property only for a public use. Where the Legislature provides by statute that a use, purpose, object, or function is one for which the power of eminent domain may be exercised, such action is deemed to be a declaration by the Legislature that such use, purpose, object, or function is a public use."

- "The power of eminent domain arises as an inherent attribute of sovereignty that is necessary for government to exist. Properly exercised, the eminent domain power effects a compromise between the public good for which private land is taken, and the protection and indemnification of private citizens whose property is taken to advance that public good. The Fifth Amendment of the United States Constitution, made applicable to the states by the Fourteenth Amendment, and California Constitution, article I, section 19 require this protection of private citizens' property." (*Burbank-Glendale-Pasadena Airport Authority v. Hensler* (2000) 83 Cal.App.4th 556, 561 [99 Cal.Rptr.2d 729], internal citation omitted.)

- " 'An inverse condemnation action is an eminent domain proceeding initiated by the property owner rather than the condemnor. The principles which affect the parties' rights in an inverse condemnation suit are the same as those in an eminent domain action.' " (*Customer Co. v. City of Sacramento* (1995) 10 Cal.4th 368, 377, fn. 4 [41 Cal.Rptr.2d 658], internal citations omitted.)

- "The principle sought to be achieved by this concept 'is to reimburse the owner for the property interest taken and to place the owner in as good a position pecuniarily as

if the property had not been taken.' " (*Redevelopment Agency of the City of Long Beach v. First Christian Church of Long Beach* (1983) 140 Cal.App.3d 690, 705 [189 Cal.Rptr. 749], internal citation omitted, disapproved on other grounds in *Los Angeles County Metropolitan Transportation Authority v. Continental Development Corp*. (1997) 16 Cal.4th 694, 720–721 [66 Cal.Rptr.2d 630].)

- The only issue for the jury is valuation; all others are tried by the court. (*People v. Ricciardi* (1943) 23 Cal.2d 390, 402 [144 P.2d 799].)

- "While Article I, section 14 [now 19], of the California Constitution guarantees a jury trial in condemnation cases on the issue of the defendant's damages, this is the only issue to be decided by the jury; all other issues of law or fact must be decided by the court. " (*Pacific Gas & Electric Co. v. Peterson* (1969) 270 Cal.App.2d 434, 438 [75 Cal.Rptr. 673], internal citations omitted.)

Secondary Sources

- 8 Witkin, Summary of California Law (9th ed. 1988) Constitutional Law, §§ 1009, 1015
- Condemnation Practice in California (Cont.Ed.Bar 1995) § 4.1
- NICHOLS ON EMINENT DOMAIN, Ch. 1, *The Nature, Origin, Evolution and Characteristics of the Power*, §§ 1.1, 1.11 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Chapter 247, *Eminent Domain* (Matthew Bender)

3501
"Fair Market Value" Explained

Just compensation includes the fair market value of the property as of [*insert date of valuation***]. Fair market value is the highest price for the property that a willing buyer would have paid in cash to a willing seller, assuming that:**

1. **There is no pressure on either one to buy or sell; and**

2. **The buyer and seller know all the uses and purposes for which the property is reasonably capable of being used.**

DIRECTIONS FOR USE

Do not give this instruction in cases where there is no relevant market for the property. Instead, instruct on the appropriate alternative method of valuation.

SOURCES AND AUTHORITY

- Code of Civil Procedure section 1263.320 provides:

  (a) The fair market value of the property taken is the highest price on the date of valuation that would be agreed to by a seller, being willing to sell but under no particular or urgent necessity for so doing, nor obliged to sell, and a buyer, being ready, willing, and able to buy but under no particular necessity for so doing, each dealing with the other with full knowledge of all the uses and purposes for which the property is reasonably adaptable and available.
  (b) The fair market value of property taken for which there is no relevant, comparable market is its value on the date of valuation as determined by any method of valuation that is just and equitable.

- " 'Market value,' in turn, traditionally has been defined as 'the highest price estimated in terms of money which the land would bring if exposed for sale in the open market, with reasonable time allowed in which to find a purchaser, buying with knowledge of all of the uses and purposes to which it was adapted and for which it was capable.' " (*Klopping v. City of Whittier* (1972) 8 Cal.3d 39, 43 [104 Cal.Rptr. 1], internal citation omitted.)

- "Recognized alternatives to the market data approach to valuation are reproduction or replacement costs less depreciation or obsolescence." (*Redevelopment Agency of the City of Long Beach v. First Christian Church of Long Beach* (1983) 140 Cal.App.3d

690, 705 [189 Cal.Rptr. 749], internal citation omitted, disapproved on other grounds in *Los Angeles County Metropolitan Transportation Authority v. Continental Development Corp*. (1997) 16 Cal.4th 694, 720–721 [66 Cal.Rptr.2d 630].)

- Alternative methods of valuation particularly apply to properties such as schools, churches, cemeteries, parks, and utilities for which there is no relevant market; therefore these properties may be valued on any basis that is just and equitable. (*County of San Diego v. Rancho Vista Del Mar, Inc.* (1993) 16 Cal.App.4th 1046, 1060 [20 Cal.Rptr.2d 675].)

- "Fair market value is not limited to the value of the property as used at the time of the taking, but has long taken into account the 'highest and most profitable use to which the property might be put in the reasonable near future, to the extent that the probability of such a prospective use affects the market value.' " (*City of San Diego v. Neuman* (1993) 6 Cal.4th 738, 744 [25 Cal.Rptr.2d 480], internal citations omitted.)

- "In condemnation actions, California courts have long recognized what has been referred to as the 'appraisal trinity.' This term encompasses three methods or approaches used by appraisers to determine the fair market value of real estate: (1) the current cost of reproducing (or replacing) the property less depreciation from all sources; (2) the 'market data' value as indicated by recent sale of comparable properties; and (3) the 'income approach,' or the value of which the property's net earning power will support based upon the capitalization of net income. In 1965, the state Legislature codified these three approaches in Evidence Code section 815–820. A qualified appraiser in an eminent domain proceeding may use one or more of these valuation techniques to ascertain the fair market value of the condemned property." (*Redevelopment Agency of the City of Long Beach, supra,* 140 Cal.App.3d at p. 705, internal citations omitted.)

<u>Secondary Sources</u>

- 8 Witkin, Summary of California Law (9th ed. 1988) Constitutional Law, § 1016
- Condemnation Practice in California (Cont.Ed.Bar 1995) §§ 4.1–4.2
- NICHOLS ON EMINENT DOMAIN, Ch. 12, *Valuation Generally*, §§ 12.01-12.05, Ch. 13, *Fair Market Value ¾ Physical Character*, § 13.01 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Chapter 247, *Eminent Domain* (Matthew Bender)

3502
"Highest and Best Use" Explained

You must determine fair market value based on the property's highest and best use. The highest and best use is the most profitable legally permissible use for which the property is physically, geographically, and economically adaptable.

Do not consider any personal value of the property to [*insert name of property owner***] or [his/her/its] need for the property. Also, do not consider the particular need of [***name of condemnor***] for the property.**

SOURCES AND AUTHORITY

- "The property taken is valued based on the highest and best use for which it is geographically and economically adaptable." (*County of San Diego v. Rancho Vista Del Mar, Inc.* (1993) 16 Cal.App.4th 1046, 1058 [20 Cal.Rptr.2d 675], internal citation omitted.)

- "It is long settled that the condemned property may not be valued based on its special value to the property owner. … Thus, the cases have generally held that a property owner may not value his property based upon its use for a projected special purpose or for a hypothetical business." (*County of San Diego, supra*, 16 Cal.App.4th at pp. 1058–1059.)

- "Just as the property may not be valued based on its special value to the owner, the property may not be valued on the basis of its special value to the government." (*County of San Diego, supra*, 16 Cal.App.4th at p. 1061, internal citation omitted.)

- "Simply stated, purchasers of property that is known to be condemned are prevented from inflating the value of the property by conjecturing what the condemner will actually pay for the property." (*People ex rel. Dept. of Water Resources v. Andresen* (1987) 193 Cal.App.3d 1144, 1156 [238 Cal.Rptr. 826], internal citation omitted.)

- "In condemnation cases it is a firmly established principle that the compensation payable is to be based upon the loss to the owner rather than upon the benefit received by the taker. The California Supreme Court early stated that 'it seems monstrous to say that the benefit arising from the proposed improvement is to be taken into consideration as an element of the value of the land.' This has been construed to mean that '[t]he beneficial purpose to be derived by the condemnor's use of the property is not to be taken into consideration in determining market values, for it is wholly irrelevant.' This rule, however, does not mean that evidence of the highest and best use of the property must be excluded simply because that is the use that the

condemnor intends to make of the property. … [I]n *City of Los Angeles v. Decker*, the court reiterated that it is improper to award compensation based upon the value to the condemnor, but held that it was proper in that case to consider the value of the property for parking purposes (the highest and best use) despite the fact that the city intended to use it for such purposes." (*Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1127–1128 [234 Cal.Rptr. 630], internal citations omitted.)

- "Once the highest and best use of the property is determined, one of several approaches to valuation must be selected. Evidence Code sections 815–820 set forth various methodologies sanctioned for use by valuation experts, including considering sales contracts of comparable properties and capitalizing income from the subject land and its existing improvements." (*San Diego Metropolitan Transit Development Bd. v. Cushman* (1997) 53 Cal.App.4th 918, 926 [62 Cal.Rptr.2d 121], internal citations omitted.)

Secondary Sources

- 8 Witkin, Summary of California Law (9th ed. 1988) Constitutional Law, § 1016
- Condemnation Practice in California (Cont.Ed.Bar 1995) § 4.9–4.21

3503
Change in Zoning or Land Use Restriction

A determination of the property's highest and best use is not necessarily limited by current zoning or land use restrictions. If you decide that as of [*insert date of valuation***] there was a reasonable probability of a change in zoning or other use restrictions in the near future, then you must determine the highest and best use of the property based on that change.**

SOURCES AND AUTHORITY

"Where due to zoning restrictions the condemned property is not presently available for use to which it is otherwise geographically and economically adaptable, the condemnee is entitled to show a reasonable probability of a zoning change in the near future and thus to establish such use as the highest and best use of the property. … 'The general rule is that present market value must be determined only by uses for which land is adaptable and available. However, where land sought to be condemned is not presently available for a particular use by reason of a zoning ordinance or other restriction imposed by law, but the evidence tends to show a "reasonable probability" of a change in the near future, the effect of such probability on the minds of purchasers generally may be taken into consideration in fixing present market value. … .' " (*City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 867–868 [135 Cal.Rptr. 647], internal citations omitted.)

"A determination of the property's highest and best use is not necessarily limited to the current zoning or land use restrictions imposed on the property; the property owner 'is entitled to show a reasonable probability of a zoning [or other change] in the near future and thus to establish such use as the highest and best use of the property.'" (*County of San Diego v. Rancho Vista Del Mar, Inc.* (1993) 16 Cal.App.4th 1046, 1058 [20 Cal.Rptr.2d 675], internal citations omitted.)

Secondary Sources

- 8 Witkin, Summary of California Law (9th ed. 1988) Constitutional Law, § 1017
- Condemnation Practice in California (Cont.Ed.Bar 1995) §§ 4.12–4.17
- NICHOLS ON EMINENT DOMAIN, Ch. 12C, *Absence of Market Value and Effect of Restrictions*, §§ 12C.01-12C.03, Ch. 13, *Fair Market Value ¾ Physical Character*, §§ 13.04, 13.29 (Matthew Bender)

3504
Project Enhanced Value

You must consider any increase or decrease in the property's fair market value caused by public knowledge of [*insert entity's purpose for condemning the property***] until [***insert date of property's probable inclusion***]. You may not consider any change in value caused by [***insert entity's purpose for condemning the property***] after that date. You may, however, consider other factors that changed the property's value after [***insert date of property's probable inclusion***], but before [***insert date of valuation***].**

SOURCES AND AUTHORITY

- Code of Civil Procedure section 1263.330 provides:

  The fair market value of the property taken shall not include any increase or decrease in the value of the property that is attributable to any of the following:
  (a) The project for which the property is taken.
  (b) The eminent domain proceeding in which the property is taken.
  (c) Any preliminary actions of the plaintiff relating to the taking of the property.

- ♦ "A legitimate element of just compensation lies in the increase in value resulting from a reasonable expectation that a particular piece of property will be outside a proposed public improvement, and thus will reap the benefits of that improvement." (*Merced Irrigation Dist. v. Woolstenhulme* (1971) 4 Cal.3d 478, 488 [93 Cal.Rptr. 833].)

- ♦ "The 'market value' of a given piece of property, of course, reflects a great variety of factors independent of the size, nature, or condition of the property itself. The general character of the neighborhood, the quality of the public and private services, and the availability of public facilities all play important roles in establishing market value. Thus, widespread knowledge of a proposed public improvement, planned for an indefinite location within a given region or neighborhood, will frequently cause the market value of land in the region or neighborhood to rise." (*Merced Irrigation Dist., supra,* 4 Cal.3d at p. 488.)

- ♦ "[W]e now hold that increases in value, attributable to a project but reflecting a reasonable expectation that property will not be taken for the improvement, should properly be considered in determining 'just compensation.' " (*Merced Irrigation Dist., supra,* 4 Cal.3d at p. 495.)

- ♦ "[I]n computing 'just compensation' in such a case, a jury should only consider the increase in value attributable to the project up until the time when it became probable

that the land would be needed for the improvement." (*Merced Irrigation Dist., supra*, 4 Cal.3d at p. 498.)

Secondary Sources

- 8 Witkin, Summary of California Law (9th ed. 1988) Constitutional Law, § 1020
- Condemnation Practice in California (Cont.Ed.Bar 1995) §§ 4.3–4.8
- NICHOLS ON EMINENT DOMAIN, Ch. 8A, *Enhancement*, §§ 8A.01-8A.02, Ch. 12B, *Valuation of the Fee Interest*, § 12B.17 (Matthew Bender)

3505
Information Discovered after Date of Valuation

In determining fair market value you must consider any condition that affects the value of the property if the condition existed on [*insert date of valuation***] but was discovered after that date.**

SOURCES AND AUTHORITY

- "[W]hile evidence of a change in the condition of the property after the date of valuation may not be admissible …, information about the condition of the property on the date of valuation which happens to be discovered after that date must be considered. In effect, the parties are presumed to know all relevant information available at the time of trial, even if it could not reasonably have been discovered until after the date of valuation." (*San Diego Water Authority v. Mireiter* (1993) 18 Cal.App.4th 1808, 1814 [23 Cal.Rptr.2d 455].)

- "The California statutory scheme and the overwhelming weight of authority supports the conclusion that relevant factual discoveries up to and including the date of trial must be taken into account, regardless of whether they inflate or deflate the value of the property. Accordingly, the trial court erred in failing to instruct the jury it was required to consider the newly discovered information in determining the compensation due defendants, and reversal is therefore required." (*San Diego County Water Authority, supra,* 18 Cal.App.4th at pp. 1817–1818 [23 Cal.Rptr.2d 455].)

Secondary Sources

- 8 Witkin, Summary of California Law (9th ed. 1988) Constitutional Law, § 1017
- Condemnation Practice in California (Cont.Ed.Bar 1995) § 4.23
- NICHOLS ON EMINENT DOMAIN, Ch. 12A, *Market Value ¾ Time of Valuation*, § 12A.01 [7] (Matthew Bender)

3506
Effect of Improvements

In determining the fair market value of the property you must consider both the value of the land and whether any buildings, machinery, or other equipment attached to the property increase or decrease the value of the property.

DIRECTIONS FOR USE

The court decides as a legal issue whether an improvement is a fixture "pertaining to the realty." (Code Civ. Pro., § 1260.030.)

SOURCES AND AUTHORITY

- Code of Civil Procedure section 1263.210(a) provides: "Except as otherwise provided by statute, all improvements pertaining to the realty shall be taken into account in determining compensation."

- Code of Civil Procedure section 1263.205(a) defines "improvements pertaining to the realty" as including "any machinery or equipment installed for use on property taken by eminent domain, or on the remainder if such property is part of a larger parcel, that cannot be removed without a substantial economic loss or without substantial damage to the property on which it is installed, regardless of the method of installation."

- Code of Civil Procedure section 1263.205(b) provides: "In determining whether particular property can be removed 'without substantial economic loss' within the meaning of this section, the value of the property in place considered as a part of the realty should be compared with its value if it were removed and sold."

- "[T]he market value of land and the improvements thereon is the market value thereof viewed as a whole and not separately." (*South Bay Irrigation Dist., v. California-American Water Co.* (1976) 61 Cal.App.3d 944, 986 [133 Cal.Rptr. 166], internal citation omitted.)

Secondary Sources

- 8 Witkin, Summary of California Law (9th ed. 1988) Constitutional Law, § 1011
- Condemnation Practice in California (Cont.Ed.Bar 1995) § 4.54
- NICHOLS ON EMINENT DOMAIN, Ch. 13, *Fair Market Value ¾ Physical Character*, §§ 13.02, 13.12 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Chapter 247, *Eminent Domain* (Matthew Bender)

3507
Personal Property and Inventory

Just compensation also includes the loss of any inventory or personal property caused by the taking. [*Name of property owner***] may be entitled to the retail value of the inventory or personal property if the property is unique and not readily replaceable. Otherwise, [***name of property owner***] is entitled to wholesale value.**

SOURCES AND AUTHORITY

- "The Fifth Amendment of the United States Constitution, as applied to the states by the Fourteenth Amendment, conditions the power of eminent domain upon the payment of 'just compensation.' That constitutional requirement makes no distinction between real property and personal property. If personal property is taken by the government in the exercise of its eminent domain power, it must compensate the owner." (*Baldwin Park Redevelopment Agency v. Irving* (1984) 156 Cal.App.3d 428, 435 [202 Cal.Rptr. 792].)

- "We further acknowledge that where a condemner takes certain real property and the removal or relocation of either tangible or intangible personal property is impossible due to the condemnatory act, the owner is entitled to be justly compensated for the loss of property, regardless of its nature." (*San Diego Metropolitan Transit Development Bd. v. Handlery Hotel, Inc.* (1999) 73 Cal.App.4th 517, 533 [86 Cal.Rptr.2d 473], internal citations omitted.)

- "The general rule is that the constitution does not require compensation for personal property not affixed to the condemned realty. Movable items of personal property are not 'taken' by the public entity when it condemns real property or a business; instead, under the Relocation Assistance Act, the public entity compensates the owner for the cost of moving the personal property to a new site." (*County of San Diego v. Cabrillo Lanes, Inc.* (1992) 10 Cal.App.4th 576, 583 [12 Cal.Rptr.2d 613].)

- "Business inventory may be compensable under limited circumstances, i.e., where the loss results from the condemnatory act itself (e.g., the inventory cannot be relocated) rather than the personal circumstances of the condemnee (e.g., the owner has decided that he will not relocate." (*Chhour v. Community Redevelopment Agency of Buena Park* (1996) 46 Cal.App.4th 273, 283 [53 Cal.Rptr.2d 585].)

- "The goal of the eminent domain trial [is] 'to determine just compensation,' to wit, to put [condemnee] in 'as good a position' as if its business inventory had 'not been taken.' However, [condemnee] was only 'entitled to be reimbursed for the actual value of what [it] lost—no more and no less.' " (*People ex rel. Dept. of*

Transportation v. Clauser/Wells Partnership (2002) 95 Cal.App.4th 1066, 1072–1073 [116 Cal.Rptr.2d 240], internal citations omitted.)

- "To award [condemnee] retail value instead of wholesale value would result in a windfall to [condemnee]—an award in excess of just compensation sufficient to make [condemnee] whole. Here, the proper standard of fair market value is the wholesale value. This is what a retailer, whose inventory of nonunique, fungible, and readily replaceable goods is damaged as a result of an act of inverse condemnation, should receive." (*McMahan's of Santa Monica v. City of Santa Monica* (1983) 146 Cal.App.3d 683, 700 [194 Cal.Rptr. 582].)

- In *Clauser/Wells Partnership, supra,* the court held that a jury should have been allowed to consider expert witnesses' testimony on valuation of inventory based both on retail and wholesale value: "[A]lthough any 'just and equitable' method could be proper, the jury would remain 'free to accept or reject' [an expert's] valuation." (*Clauser/Wells Partnership, supra,* 95 Cal.App.4th at p. 1083, internal citation omitted.)

Secondary Sources

- 8 Witkin, Summary of California Law (9th ed. 1988) Constitutional Law, § 1032
- Condemnation Practice in California (Cont.Ed.Bar 1995) § 4.55
- NICHOLS ON EMINENT DOMAIN, Ch. 13, *Fair Market Value ¾ Physical Character,* §§ 13.11, 13.18[8] (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Chapter 247, *Eminent Domain* (Matthew Bender)

3508
Bonus Value of Leasehold Interest

[Some/All] of the property taken was leased to [*name of lessee***]. You must determine the amount of compensation that [***name of lessee***] can recover.**

To do this, you must determine the difference between:

1. **The present value of the total rent that [***name of lessee***] agreed to pay during the time remaining on the lease after [***insert date of possession when lessee no longer occupied the premises***]; and**

2. **The present value of the total fair market rent for the leased property from [***date of valuation***] for the time remaining on the lease.**

If the present value of the total agreed rent is less than the present value of the total fair market rent, then [*name of lessee***] is entitled to the difference.**

DIRECTIONS FOR USE

Do not give this instruction if bonus value is allocated under the lease to the owner.

This instruction may not be appropriate in every case involving a lessee.

This instruction would be applicable to the apportionment phase of the case under Code of Civil Procedure section 1260.220(b).

SOURCES AND AUTHORITY

- Code of Civil Procedure section 1265.150 provides: "Nothing in this article affects or impairs any right a lessee may have to compensation for the taking of his lease in whole or in part or for the taking of any other property in which he has an interest."

- Code of Civil Procedure section 1265.160 provides: "Nothing in this article affects or impairs the rights and obligations of the parties to a lease to the extent that the lease provides for such rights and obligations in the event of the acquisition of all or a portion of the property for public use."

- "Under the Eminent Domain Law, a provision of a lease that declares that the lease terminates if all the property subject thereto is acquired for public use does not deprive the lessee of any right he may have to compensation for the taking of his leasehold or other property. The Eminent Domain Law itself declares the generally applicable rules that the lease terminates if all the property subject thereto is acquired

for public use, and that such termination does not affect any right of the lessee to compensation related thereto." (*City of Vista v. W.O. Fielder* (1996) 13 Cal.4th 612, 618 [55 Cal.Rptr.2d 861].)

- "Usually the rental value of the property is measured in terms of existing tenancies. Tenants, like owners in fee, are also entitled to compensation in condemnation." (*People ex rel. Dept. of Water Resources v. Andresen* (1987) 193 Cal.App.3d 1144, 1163 [238 Cal.Rptr. 826].)

- "The bonus value can be more precisely defined as the present value of the difference between economic rent, i.e., the value of market rental, and the contract rent through the remaining lease term. The bonus value usually assumes importance only in long-term commercial leases." (*New Haven Unified School Dist. v. Taco Bell Corp.* (1994) 24 Cal.App.4th 1473, 1478–1479 [30 Cal.Rptr.2d 469], internal citations omitted.)

- "Whether or not the lessor and lessee are joined in a single proceeding, these rules will ordinarily result in an aggregate award to both lessor and lessee equal to market value of the property. Where the lease rental falls below market value, the lessor will have a claim to less than the full market value of the property, since he is restricted to the present value of actual contract rental; but the lessee will have a right to recover the balance of the market value, above that recovered by the lessor, as lease bonus value." (*New Haven, supra*, 24 Cal.App.4th at p. 1479, internal citation omitted.)

- "Although generally a tenant is entitled to all compensation attributable to the tenant's interest in a lease, it is well recognized that the parties to a lease may contractually agree to allocate a condemnation award to the landlord rather than the tenant." (*City of South San Francisco v. Mayer* (1998) 67 Cal.App.4th 1350, 1354 [79 Cal.Rptr.2d 704], internal citations omitted.)

- "A lessee's option to renew a lease should be considered to the extent that the option enhances the value of the leasehold." (*San Francisco Bay Area Rapid Transit Dist. v. McKeegan* (1968) 265 Cal.App.2d 263, 272 [71 Cal.Rptr. 204].)

<u>Secondary Sources</u>

- 8 Witkin, Summary of California Law (9th ed. 1988) Constitutional Law, § 1035
- Condemnation Practice in California (Cont.Ed.Bar 1995) §§ 4.56–4.62
- NICHOLS ON EMINENT DOMAIN, Ch. 12D, *Valuation of Interests Other Than Fee Interests*, § 12D.01[3] (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Chapter 247, *Eminent Domain* (Matthew Bender)

3509
Precondemnation Damages (*Klopping* Damages)

I have determined that [*insert one or both of the following:***]**

[there was an unreasonable delay between [*date of announcement of intent to condemn***], when the [***name of condemnor***] announced its intent to condemn [***name of property owner***]'s property, and [***date of filing***], when this case was filed] [and]**

[*insert description of unreasonable conduct***].**

In determining just compensation you must award damages that [*name of property owner***] has suffered as a result of the [***name of condemnor***]'s [delay/ [***describe unreasonable conduct***]]. Such damages may include [***insert damages appropriate to the facts, e.g., the cost of repairs, the loss of use of the property, loss of rent, loss of profits, or increased operating expenses pending repairs, and diminution of market value***].**

DIRECTIONS FOR USE

This instruction will need to be modified in cases where the entity does not ultimately proceed with the condemnation, or where there has been another type of unreasonable conduct other than "unreasonable delay."

SOURCES AND AUTHORITY

- The Supreme Court in *Klopping v. City of Whittier* (1972) 8 Cal.3d 39, 52, held that "a condemnee must be provided with an opportunity to demonstrate that (1) the public authority acted improperly either by unreasonably delaying eminent domain action following an announcement of intent to condemn or by other unreasonable conduct prior to condemnation; and (2) as a result of such action the property in question suffered a diminution in market value."

- "The measure of damages may be the cost of repairs, the loss of use of the property, loss of rent, loss of profits, or increased operating expenses pending repairs." (*City of Los Angeles v. Tilem* (1983) 142 Cal.App.3d 694, 703 [191 Cal.Rptr. 229], internal citations omitted.)

- "[A]bsent a formal resolution of condemnation, recovery under *Klopping* requires that the public entity's conduct 'directly and specially affect the landowner to his injury.' This requirement mandates that the plaintiff demonstrate conduct on the part of the public entity 'which significantly invaded or appropriated the use or

enjoyment' of the property." (*Barthelemy v. Orange County Flood Control Dist.* (1998) 65 Cal.App.4th 558, 570 [76 Cal.Rptr.2d 575], internal citations omitted.)

- "[S]ince *Klopping* damages compensate a landowner for a public entity's unreasonable precondemnation conduct, their recovery 'is permitted irrespective of whether condemnation proceedings are abandoned or whether they are instituted at all.' " (*Barthelemy, supra,* 65 Cal.App.4th at p. 569, internal citation omitted.)

- "Whether there has been unreasonable delay by the condemnor and whether the condemnor has engaged in unreasonable conduct are both questions of fact. What constitutes a direct and substantial impairment of property rights for purposes of compensation is also a factual question. In deciding factual matters on conflicting testimony and inferences, it is for the trier of fact to determine which evidence and inferences it finds more reasonable." (*Contra Costa County Water Dist. v. Vaquero Farms, Inc.* (1997) 58 Cal.App.4th 883, 897 [68 Cal.Rptr.2d 272], internal citations omitted.)

- "Whether the public entity has acted unreasonably is a question of fact. 'However, the threshold question of liability for unreasonable precondemnation conduct is to be determined by the court, with the issue of the amount of damages to be thereafter submitted to the jury only upon a sufficient showing of liability by the condemnee.' Because inverse condemnation damages for precondemnation conduct must be claimed in a pending eminent domain action, the appropriate procedure is to bifurcate the trial of the action so that the question of the liability of the public entity is first adjudicated by the court without a jury." (*City of Ripon v. Sweetin* (2002) 100 Cal.App.4th 887, 897 [122 Cal.Rptr.2d 802], internal citations omitted.)

<u>Secondary Sources</u>

- 8 Witkin, Summary of California Law (9th ed. 1988) Constitutional Law, § 1021
- Condemnation Practice in California (Cont.Ed.Bar 1995) § 4.7–4.8
- NICHOLS ON EMINENT DOMAIN, Ch. 26D, *Abandonment, Dismissal of Action and Assessment of Damages,* § 26D.01 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Chapter 247, *Eminent Domain* (Matthew Bender)

3510
Value of Easement

The [*name of condemnor*] has taken the right to use a portion of [*name of property owner*]'s land for a specific purpose. That right is called an "easement." After an easement has been taken, the property owner has the right to use the land for any purpose that does not conflict with the easement.

You must determine the fair market value of the easement on [*insert date of valuation*]. The fair market value of the easement is determined by subtracting the fair market value of the land after the easement was taken from the fair market value of the land before the easement was taken.

SOURCES AND AUTHORITY

- "The holder of an easement is entitled to damages when the easement is taken or damaged for public use." (*County Sanitation Dist. No. 8 of Los Angeles County v. Watson Land Co.* (1993) 17 Cal.App.4th 1268, 1279, internal citation omitted.)

- "The value of an easement in gross … is the difference in the before and after value of the strip of land taken, and not what has been gained by the public agency." (*County Sanitation Dist., supra,* 17 Cal.App.4th at p. 1279, internal citations omitted.)

- "Ordinarily, the value of an easement is the diminution in market value of the dominant tenement caused by its loss. When a second easement is sought on land already burdened, the owner of the servient land is entitled to the difference in value of the land before and after the imposition of the second easement; and, if no substantial difference in value is shown, only nominal damages will be awarded." (8 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 1019, p. 582, internal citations omitted.)

- " 'An easement is an incorporeal interest in the land of another that gives its owner the right to use the land of another or to prevent the property owner from using his land.' " (*County Sanitation Dist., supra,* 17 Cal.App.4th at p. 1278, internal citations omitted.)

Secondary Sources

- 8 Witkin, Summary of California Law (9th ed. 1988) Constitutional Law, § 1019
- Condemnation Practice in California (Cont.Ed.Bar 1995) §§ 4.64–4.66
- NICHOLS ON EMINENT DOMAIN, Ch. 12D, *Valuation of Interests Other Than Fee Interests*, § 12D.01[1][a] (Matthew Bender)

- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Chapter 247, *Eminent Domain* (Matthew Bender)

3511
Severance Damages

The [*name of condemnor*] has taken only a part of [*name of property owner*]'s property. [*Name of property owner*] claims that [his/her/its] remaining property has lost value as a result of the taking. This loss in value is called "severance damages" and must be included in determining just compensation.

Severance damages are the damages to [*name of property owner*]'s remaining property caused by the taking, or by the construction and use of the [*name of condemnor*]'s proposed project, or by both.

Severance damages are determined as follows:

1. **Determine the fair market value of the remaining property on [*date of valuation*] by subtracting the fair market value of the part taken from the fair market value of the entire property;**

2. **Determine the fair market value of the remaining property after the [*name of condemnor*]'s proposed project is completed; and**

3. **Subtract the fair market value of the remaining property after the [*name of condemnor*]'s proposed project is completed from the fair market value of the remaining property on [*date of valuation*].**

DIRECTIONS FOR USE

Read Instruction 3512 if benefits are at issue.

SOURCES AND AUTHORITY

- Code of Civil Procedure section 1263.410 provides:

  (a) Where the property acquired is part of a larger parcel, in addition to the compensation awarded pursuant to Article 4 (commencing with Section 1263.310) for the part taken, compensation shall be awarded for the injury, if any, to the remainder.
  (b) Compensation for injury to the remainder is the amount of the damage to the remainder reduced by the amount of the benefit to the remainder. If the amount of the benefit to the remainder equals or exceeds the amount of the damage to the remainder, no compensation shall be awarded under this article. If the amount of the benefit to the

remainder exceeds the amount of damage to the remainder, such excess shall be deducted from the compensation provided in Section 1263.510, if any, but shall not be deducted from the compensation required to be awarded for the property taken or from the other compensation required by this chapter.

- Code of Civil Procedure section 1263.420 provides:

Damage to the remainder is the damage, if any, caused to the remainder by either or both of the following:

(a) The severance of the remainder from the part taken.

(b) The construction and use of the project for which the property is taken in the manner proposed by the plaintiff whether or not the damage is caused by a portion of the project located on the part taken.

- Code of Civil Procedure section 1263.430 provides: "Benefit to the remainder is the benefit, if any, caused by the construction and use of the project for which the property is taken in the manner proposed by the plaintiff whether or not the benefit is caused by a portion of the project located on the part taken."

- "When property acquired by eminent domain is part of a larger parcel, compensation must be awarded for the injury, if any, to the remainder. Such compensation is commonly called severance damages. When the property taken is but part of a single legal parcel, the property owner need only demonstrate injury to the portion that remains to recover severance damages." (*City of San Diego v. Neumann* (1993) 6 Cal.4th 738, 741 [25 Cal.Rptr.2d 480], internal citations omitted.)

- "Severance damages must be based upon real physical disturbance of a property right and a decrease in market value of the property rather than upon remote possibilities which are highly speculative and conjectural." (*County Sanitation Dist. No. 8 of Los Angeles County v. Watson Land Co.* (1993) 17 Cal.App.4th 1268, 1282, internal citation omitted.)

- "The court determines as a matter of law what constitutes the 'larger parcel' for which severance damages may be obtained: 'The Legislature has framed the question of whether property should be viewed as an integrated whole in terms of whether the land remaining after the taking forms part of a "larger parcel".' " (*City of San Diego, supra*, 6 Cal.4th at p. 745, internal citations omitted.)

- "As we said in *Pierpont Inn*, 'Where the property taken constitutes only a part of a larger parcel, the owner is entitled to recover, inter alia, the difference in the fair market value of his property in its "before" condition and the fair market value of the remaining portion thereof after the construction of the improvement on the portion taken. Items such as view, access to beach property, freedom from noise, etc. are unquestionably matters which a willing buyer in the open market would consider in

determining the price he would pay for any given piece of real property.' Severance damages are not limited to special and direct damages, but can be based on any factor, resulting from the project, that causes a decline in the fair market value of the property." (*Los Angeles County Metropolitan Transportation Authority v. Continental Development Corp.* (1999) 16 Cal.4th 694, 712 [66 Cal.Rptr.2d 630], internal citations omitted.)

- "We hold that in determining a landowner's entitlement to severance damages, the factfinder henceforth shall consider competent evidence relevant to any conditions caused by the project that affect the remainder property's fair market value, insofar as such evidence is neither conjectural nor speculative." (*Los Angeles County Metropolitan Transportation Authority, supra,* 16 Cal.4th at p. 718.)

- "In determining severance damage, the jury must assume 'the most serious damage' which will be caused to the remainder by the taking of the easement and construction of the property. The value of the remainder after the condemnation has occurred is referred to as the 'after' value of the property. The diminution in fair market value is determined by comparing the before and after values. This is the amount of the severance damage." (*San Diego Gas & Electric Co.* (1988) 205 Cal.App.3d 1334, 1345 [253 Cal.Rptr. 144], internal citations omitted, disapproved on other grounds in *Los Angeles County Metropolitan Transportation Authority, supra,* 16 Cal.4th at p. 720.)

- "[S]everance damages are not limited to specific direct damages but can be based on any indirect factors that cause a decline in the market value of the property. California decisions have indicated the following are compensable as direct damages under section 1263.410: (1) impairment of view, (2) restriction of access, (3) increased noise, (4) invasion of privacy, (5) unsightliness of the project, (6) lack of maintenance of the easement and (7) nuisances in general such as trespassers and safety risks. Several courts have recognized that the condemnee should be compensated for any characteristic of the project which causes 'an adverse impact on the fair market value of the remainder.' " (*San Diego Gas & Electric Co., supra,* 205 Cal.App.3d at p. 1345.)

- "When 'the property acquired [by eminent domain] is part of a larger parcel,' in addition to compensation for the property actually taken, the property owner must be compensated for the injury, if any, to the land that he retains. Once it is determined that the owner is entitled to severance damages, they, too, normally are measured by comparing the fair market value of the remainder before and after the taking." (*City of San Diego, supra,* 6 Cal.4th at p. 745, internal citations and footnote omitted.)

<u>Secondary Sources</u>

- 8 Witkin, Summary of California Law (9th ed. 1988) Constitutional Law, §§ 1022–1030
- Condemnation Practice in California (Cont.Ed.Bar 1995) §§ 5.1–5.37

- NICHOLS ON EMINENT DOMAIN, Ch. 14, *Damages for Partial Takings*, §§ 14.01-14.03, Ch. 16, *Consequential Damages as a Result of Proposed Use*, §§ 16.01-16.05 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Chapter 247, *Eminent Domain* (Matthew Bender)

3512
Severance Damages—Offset for Benefits

The [*name of condemnor*] claims that the remainder of [*name of property owner*]'s property has received a benefit from the project as proposed.

You must determine the amount of benefit by determining any reasonably certain increase in the fair market value of the remaining property caused by the project.

[You must then subtract that amount from the severance damages. If the project's benefit to the remaining property is equal to or greater than the loss caused by the taking, then you must award zero severance damages. Any benefits to the remaining property should not be subtracted from the value of the property that [*name of condemnor*] has taken.]

DIRECTIONS FOR USE

A special verdict form may be used to have jury set forth separately the determination of severance damages and benefits. Use the bracketed paragraph if the judge will not be calculating the offset to severance damages for the benefit to the remaining property.

SOURCES AND AUTHORITY

- Code of Civil Procedure section 1263.410 provides:

  (a) Where the property acquired is part of a larger parcel, in addition to the compensation awarded pursuant to Article 4 (commencing with Section 1263.310) for the part taken, compensation shall be awarded for the injury, if any, to the remainder.
  (b) Compensation for injury to the remainder is the amount of the damage to the remainder reduced by the amount of the benefit to the remainder. If the amount of the benefit to the remainder equals or exceeds the amount of the damage to the remainder, no compensation shall be awarded under this article. If the amount of the benefit to the remainder exceeds the amount of damage to the remainder, such excess shall be deducted from the compensation provided in Section 1263.510, if any, but shall not be deducted from the compensation required to be awarded for the property taken or from the other compensation required by this chapter.

- Code of Civil Procedure section 1263.430 provides: "Benefit to the remainder is the benefit, if any, caused by the construction and use of the project for which the

property is taken in the manner proposed by the plaintiff whether or not the benefit is caused by a portion of the project located on the part taken."

- CCP section 1260.230 provides:

  As far as practicable, the trier of fact shall assess separately each of the following:
  (a) Compensation for the property taken as required by Article 4 (commencing with Section 1263.310) of Chapter 9.
  (b) Where the property acquired is part of a larger parcel:
    (1) The amount of the damage, if any, to the remainder as required by Article 5 (commencing with Section 1263.410) of Chapter 9.
    (2) The amount of the benefit, if any, to the remainder as required by Article 5 (commencing with Section 1263.410) of Chapter 9.
  (c) Compensation for loss of goodwill, if any, as required by Article 6 (commencing with Section 1263.510) of Chapter 9.

Secondary Sources

- 8 Witkin, Summary of California Law (9th ed. 1988) Constitutional Law, §§ 1022–1030
- Condemnation Practice in California (Cont.Ed.Bar 1995) §§ 5.1–5.37
- NICHOLS ON EMINENT DOMAIN, Ch. 16, *Consequential Damages as a Result of Proposed Use*, §§ 16.01-16.05 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Chapter 247, *Eminent Domain* (Matthew Bender)

3513
Goodwill

In this case, [*name of business owner*] is entitled to compensation for any loss of goodwill as a part of just compensation. "Goodwill" is the benefit that a business gains as a result of its location, reputation for dependability, skill or quality, and any other circumstances that cause a business to keep old customers or gain new customers. You must include the amount of any loss of goodwill as an item in your award for just compensation.

SOURCES AND AUTHORITY

- Code of Civil Procedure section 1263.510 provides:

  (a) The owner of a business conducted on the property taken, or on the remainder if such property is part of a larger parcel, shall be compensated for loss of goodwill if the owner proves all of the following:
    (1) The loss is caused by the taking of the property or the injury to the remainder.
    (2) The loss cannot reasonably be prevented by a relocation of the business or by taking steps and adopting procedures that a reasonably prudent person would take and adopt in preserving the goodwill.
    (3) Compensation for the loss will not be included in payments under Section 7262 of the Government Code.
    (4) Compensation for the loss will not be duplicated in the compensation otherwise awarded to the owner.

  (b) Within the meaning of this article, "goodwill" consists of the benefits that accrue to a business as a result of its location, reputation for dependability, skill or quality, and any other circumstances resulting in probable retention of old or acquisition of new patronage.

- "Historically, business goodwill was not an element of damages under eminent domain law. As recently as 1975, the California Supreme Court reaffirmed the principle that damage to a business conducted on property condemned for public use was not compensable as a property right under the just compensation clause of the California Constitution. But in 1975, the Legislature enacted a comprehensive revision of California's eminent domain law, which, among other things, authorizes compensation for the loss of business goodwill." (*Community Development Com. v. Asaro* (1989) 212 Cal.App.3d 1297, 1301–1302 [261 Cal.Rptr. 231], internal citation and footnote omitted.)

- "As to entitlement of goodwill, the landowner bears the burden of proof." (*Metropolitan Transit Development Bd. v. Handlery Hotel* (1999) 73 Cal.App.4th 517, 537 [86 Cal.Rptr.2d 473], internal citations omitted.)

- "We … hold that where the presence of [the conditions in section 1263.510(a)] is disputed, the determination of that dispute, including the resolution of any disputed factual issues, is for the trial court. Only upon proving to the court's satisfaction that the statutory conditions are satisfied may the landowner present evidence of lost goodwill to the jury." (*Emeryville Redevelopment v. Elementis Pigments, Inc.* (2002) 101 Cal.App.4th 1083, 1119 [125 Cal.Rptr.2d 12]

- "After entitlement to goodwill is shown (which includes a showing that compensation for the loss will not be duplicated) neither party has the burden of proof with regard to valuation." (*Redevelopment Agency of the City of Pomona v. Thrifty Oil Co.* (1992) 4 Cal.App.4th 469, 475 [5 Cal.Rptr.2d 687], internal citations omitted.)

- "Only an owner of a business conducted on the real property taken may claim compensation for loss of goodwill." (*Metropolitan Transit Development Bd., supra,* 73 Cal.App.4th at p. 537, internal citation omitted.)

- "The underlying purpose of this statute is to provide compensation for the kind of losses which typically occur when an ongoing business is forced to move and give up the benefits of its former location. It includes not only compensation for lost patronage itself, but also for expenses reasonably incurred in an effort to prevent a loss of patronage." (*Metropolitan Transit Development Bd., supra,* 73 Cal.App.4th at p. 537, internal citations omitted.)

- "Goodwill must, of course, be measured by a method which excludes the value of tangible assets or the normal return on those assets. However, the courts have wisely maintained that there is no single acceptable method of valuing goodwill. Valuation methods will differ with the nature of the business or practice and with the purpose for which the evaluation is conducted." (*People ex rel. Dept. of Transportation v. Muller* (1984) 36 Cal.3d 263, 271, fn. 7 [203 Cal.Rptr. 772], internal citations omitted.)

- "Although the statutory scheme applies only to eminent domain proceedings, the right to recover lost goodwill has been extended to the indirect condemnee. Thus, 'goodwill is compensable in an inverse condemnation action to the same extent and with the same limitations on recovery found in ... section 1263.510.' " (*Metropolitan Transit Development Bd., supra,* 73 Cal.App.4th at p. 537, internal citations omitted.)

- "Goodwill may be measured by the capitalized value of the net income or profits of a business or some similar method of calculating present value of anticipated profits. Valuation methods differ with the nature of the business and the purpose for which the evaluation is conducted. There is no single method to evaluate goodwill." (*People*

ex rel. Dept. of Transportation v. Leslie (1997) 55 Cal.App.4th 918, 922–923 [64 Cal.Rptr.2d 252], internal citations omitted.)

Secondary Sources

- 8 Witkin, Summary of California Law (9th ed. 1988) Constitutional Law, § 1031
- Condemnation Practice in California (Cont.Ed.Bar 1995) § 4.63
- NICHOLS ON EMINENT DOMAIN, Ch. 13, *Loss of Business Goodwill*, § 13.18[5], Ch. 29, *Loss of Business Goodwill*, §§ 29.01-29.08; (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Chapter 247, *Eminent Domain* (Matthew Bender)

3514
Burden of Proof

Neither the [*name of condemnor*] nor [*name of property owner*] has the burden of proving the amount of just compensation.

SOURCES AND AUTHORITY

- Code of Civil Procedure, section 1260.210 provides:

  (a) The defendant shall present his evidence on the issue of compensation first and shall commence and conclude the argument.
  (b) Except as otherwise provided by statute, neither the plaintiff nor the defendant has the burden of proof on the issue of compensation.

Secondary Sources

- 8 Witkin, Summary of California Law (9th ed. 1988) Constitutional Law, § 1007
- Condemnation Practice in California (Cont.Ed.Bar 1995) § 9.21
- NICHOLS ON EMINENT DOMAIN, Ch. 18, *Evidence in Condemnation Proceedings*, § 18.02 (Matthew Bender)

3515
Valuation Testimony

You must decide the value of property based solely on the testimony of the witnesses who have given their opinion of fair market value. You may consider other evidence only to help you understand and weigh the testimony of those witnesses.

You may find the same fair market value testified to by a witness, or you may find a value anywhere between the highest and lowest values stated by the witnesses.

If the witnesses disagreed with one another, you should weigh each opinion against the others based on the reasons given for each opinion, the facts or other matters that each witness relied on, and the witnesses' qualifications.

SOURCES AND AUTHORITY

- Evidence Code section 813(a) provides:

  > The value of property may be shown only by the opinions of any of the following:
  > (1) Witnesses qualified to express such opinions.
  > (2) The owner or the spouse of the owner of the property or property interest being valued.
  > (3) An officer, regular employee, or partner designated by a corporation, partnership, or unincorporated association that is the owner of the property or property interest being valued, if the designee is knowledgeable as to the value of the property or property interest.

- "The only type of evidence which can be used to establish value in eminent domain cases is the opinion of qualified experts and the property owners." (*Aetna Life and Casualty Co. v. City of Los Angeles* (1985) 170 Cal.App.3d 865, 877 [216 Cal.Rptr. 831], internal citations omitted.)

- "A jury hearing a condemnation action may not disregard the evidence as to value and render a verdict which either exceeds or falls below the limits established by the testimony of the witnesses. The trier of fact in an eminent domain action is not an appraiser, and does not make a determination of market value based on its opinion thereof. Instead it determines the market value of the property, based on the opinions of the valuation witnesses." (*Aetna Life and Casualty Co., supra,* 170 Cal.App.3d at p. 877, internal citations omitted.)

- " 'The trier of fact may accept the evidence of any one expert or choose a figure between them based on all of the evidence.' There is insufficient evidence to support a verdict 'only when "no reasonable interpretation of the record" supports the figure ... .' " (*San Diego Metropolitan Transit Development Bd. v. Cushman* (1997) 53 Cal.App.4th 918, 931 [62 Cal.Rptr.2d 121], internal citations omitted.)

Secondary Sources

- 1 Witkin, California Evidence (4th ed. 2000) Opinion Evidence, § 102
- Condemnation Practice in California (Cont.Ed.Bar 1995) § 9.74
- NICHOLS ON EMINENT DOMAIN, Ch. 23, *Expert and Opinion Evidence*, §§ 23.01-23.11 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Chapter 247, *Eminent Domain* (Matthew Bender)

3516
View

You have viewed the property and its surrounding area. The purpose of this view was to help you understand and weigh the testimony of the witnesses.

SOURCES AND AUTHORITY

- Evidence Code section 813(b) provides: "Nothing in this section prohibits a view of the property being valued or the admission of any other admissible evidence (including but not limited to evidence as to the nature and condition of the property and, in an eminent domain proceeding, the character of the improvement proposed to be constructed by the plaintiff) for the limited purpose of enabling the court, jury, or referee to understand and weigh the testimony … and such evidence, except evidence of the character of the improvement proposed to be constructed by the plaintiff in an eminent domain proceeding, is subject to impeachment and rebuttal."

Secondary Sources

- 2 Witkin, California Evidence (4th ed. 2000) Demonstrative, Experimental, and Scientific Evidence, § 31
- Condemnation Practice in California (Cont.Ed.Bar 1995) § 9.68
- NICHOLS ON EMINENT DOMAIN, Ch. 8, *Trial Procedures and Techniques*, § 8.10[4] (Matthew Bender)

VF-3500
Fair Market Value plus Goodwill

We answer the questions submitted to us as follows:

1. What was the fair market value of the property on [*insert date of valuation***]?**

$_____

Answer question 2.

2. Did [*name of property owner***] conduct a business on the property that was taken [or on the property remaining after the taking]?**

___Yes **___No**

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did [*name of property owner***]'s business lose goodwill as a result of the taking?**

___Yes **___No**

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Could the loss reasonably have been prevented by a relocation of the business or by taking other action that a reasonably careful person would take to preserve goodwill?

___Yes **___No**

If your answer to question 4 is no, then answer question 5. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Will compensation for the loss be duplicated in other compensation that is awarded to [*insert name of property owner***]?**

___Yes **___No**

If your answer to question 5 is no, then answer question 6. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

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 3501, *"Fair Market Value" Explained*, and Instruction 3513, *Goodwill*.

VERDICT FORMS

VF-3501
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 3501, *"Fair Market Value" Explained,* and Instruction 3511, *Severance Damages*.

VF-3502
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?

$_____

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 3501, *"Fair Market Value" Explained*, and Instruction 3507, *Personal Property and Inventory*.

3600
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 [he/she] 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 both of 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 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 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 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.)

<u>Secondary Sources</u>

- CALIFORNIA TORTS, Ch. 9, *Civil Conspiracy, Concerted Action, and Related Theories of Joint Liability*, § 9.03 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 126, *Conspiracy* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 46, *Conspiracy* (Matthew Bender)

3601
Ongoing Conspiracy

If you decide that [*name of defendant*] joined the conspiracy to commit [*insert tort theory*], then [he/she] is responsible for all acts done as part of the conspiracy, whether the acts 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.)

<u>Secondary Sources</u>

- CALIFORNIA TORTS, Ch. 9, *Civil Conspiracy, Concerted Action, and Related Theories of Joint Liability*, § 9.03 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 126, *Conspiracy* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 46, *Conspiracy* (Matthew Bender)

3602
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 both of the following:**

1. **That [he/she] was acting in [his/her] official capacity on behalf of [***name of defendant entity***]; 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 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.)

Secondary Sources

- CALIFORNIA TORTS, Ch. 9, *Civil Conspiracy, Concerted Action, and Related Theories of Joint Liability*, § 9.03[3][b] (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 126, *Conspiracy* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 46, *Conspiracy* (Matthew Bender)

VICARIOUS RESPONSIBILITY

3700
Introduction

A [person/partnership/corporation] is responsible for harm caused by the wrongful conduct of [his/her/its] [employees/agents/[*insert other relationship, e.g., "partners"***]] while acting within the scope of their [employment/ authority].**

SOURCES AND AUTHORITIES

- Under the theory of respondeat superior, a principal/employer is vicariously liable for an agent/employee's torts committed within the scope of agency/employment. (*Perez v. Van Groningen & Sons, Inc.* (1986) 41 Cal.3d 962, 967 [227 Cal.Rptr. 106].)

- If a principal's potential liability is based solely on the acts of his or her agent, then the principal cannot be held liable if the agent is exonerated. (2 Witkin, Summary of Cal. Law (9th ed. 1987) Agency and Employment, § 116, p. 111.)

- Liability may result from a principal's authorization or direction to perform a tortious act, resulting in direct liability of the principal for his or her wrongful conduct. (2 Witkin, *supra*, § 113, p. 107.) Such authorization may be found in ratification of the agent's conduct and in delegation of a nondelegable duty.

<u>Secondary Sources</u>

- 2 Witkin, Summary of California Law (9th ed. 1987) Agency and Employment, §§ 113–117
- 1 Levy, et al., California Torts (1985–2000) Vicarious Liability, §§ 8.03–8.04
- CALIFORNIA EMPLOYMENT LAW, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, § 30.01 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 248, *Employer's Liability for Employee's Torts*, § 248.11, Ch. 427, *Principal and Agent* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 100, *Employer and Employee* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, §§ 3:1–3:4

3701
Tort Liability Asserted Against Principal—Essential Factual Elements

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[*Name of plaintiff***] claims that [he/she] was harmed by [***name of agent***]'s [***insert tort theory, e.g., "negligence"***].**

[*Name of plaintiff***] also claims that [***name of defendant***] is responsible for the harm because [***name of agent***] was acting as [his/her/its] [agent/employee/ [***insert other relationship, e.g. "partner"***]] when the incident occurred.**

If you find that [*name of agent***]'s [***insert tort theory***] harmed [***name of plaintiff***], then you must decide whether [***name of defendant***] is responsible for the harm. [***Name of defendant***] is responsible if [***name of plaintiff***] proves the following:**

1. **That [***name of agent***] was [***name of defendant***]'s [agent/employee/[***insert other relationship***]]; and**

2. **That [***name of agent***] was acting within the scope of [his/her] [agency/employment/[***insert other relationship***]] when [he/she] harmed [***name of plaintiff***].**

DIRECTIONS FOR USE

The term "name of agent," in brackets, is intended in the general sense, to denote the person or entity whose wrongful conduct is alleged to have created the principal's liability.

Under other principles of law, a principal may be directly liable for authorizing or directing an agent's wrongful acts. (See 2 Witkin, Summary of Cal. Law (9th ed. 1987) Agency and Employment, § 113, p. 107.)

One of the two bracketed first sentences would be used, depending on whether the plaintiff is suing both the principal and the agent or the principal alone.

If there is no issue regarding whether a principal-agent exists, see Instruction 3703, *Legal Relationship not Disputed.*

This instruction may not apply where employer liability is statutory, such as under the Fair Employment and Housing Act.

SOURCES AND AUTHORITIES

- Civil Code section 2295 provides: "An agent is one who represents another, called the principal, in dealings with third persons. Such representation is called agency."

- "The rule of respondeat superior is familiar and simply stated: an employer is vicariously liable for the torts of its employees committed within the scope of the employment. Equally well established, if somewhat surprising on first encounter, is the principle that an employee's willful, malicious and even criminal torts may fall within the scope of his or her employment for purposes of respondeat superior, even though the employer has not authorized the employee to commit crimes or intentional torts." (*Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal.4th 291, 296-297 [48 Cal.Rptr.2d 510], internal citations and footnote omitted.)

- "The employer is liable not because the employer has control over the employee or is in some way at fault, but because the employer's enterprise creates inevitable risks as a part of doing business." (*Baily v. Filco, Inc.* (1996) 48 Cal.App.4th 1552, 1559 [56 Cal.Rptr.2d 333], internal citations omitted.)

- "Respondeat superior is based on a 'deeply rooted sentiment' that it would be unjust for an enterprise to disclaim responsibility for injuries occurring in the course of its characteristic activities." (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 208 [285 Cal.Rptr. 99], internal citation omitted.)

- The Supreme Court has articulated three reasons for applying the doctrine of respondeat superior: "(1) to prevent recurrence of the tortious conduct; (2) to give greater assurance of compensation for the victim; and (3) to ensure that the victim's losses will be equitably borne by those who benefit from the enterprise that gave rise to the injury." (*Mary M., supra*, 54 Cal.3d at p. 209.)

- The doctrine of respondeat superior applies equally to public and private employers. (*Mary M., supra*, 54 Cal.3d at p. 209.)

<u>Secondary Sources</u>

- 2 Witkin, Summary of California Law (9th ed. 1987) Agency and Employment, §§ 113–117
- 1 Levy, et al., California Torts (1985–2000) Vicarious Liability, §§ 8.03–8.04
- CALIFORNIA EMPLOYMENT LAW, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, § 30.01 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 248, *Employer's Liability for Employee's Torts*, § 248.14, Ch. 427, *Principal and Agent* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 100, *Employer and Employee* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, §§ 3:1–3:4

3702
Affirmative Defense of Plaintiff's Agent's Contributory Negligence

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[*Name of defendant***] claims that [***name of plaintiff principal***]'s harm was caused, in whole or in part, by the negligence of [***name of plaintiff's agent***]. To succeed on this claim, [***name of defendant***] must prove all of the following:**

1. **That [***name of plaintiff's agent***] was acting as [***name of plaintiff principal***]'s [agent/employee/[***insert other relationship, e.g., "partner"***]];**

2. **That [***name of plaintiff's agent***] was acting within the scope of [his/her] [agency/employment/[***insert other relationship***]] when the incident occurred; and**

3. **That the negligence of [***name of plaintiff's agent***] caused all or part of [***name of plaintiff principal***]'s harm.**

If [*name of defendant***] proves the above, [***name of plaintiff principal***]'s claim is reduced by your determination of the percentage of [***name of plaintiff's agent***]'s responsibility. I will perform the actual reduction.**

DIRECTIONS FOR USE

This instruction could be used by a defendant against a principal/employer to assert the contributory negligence of an agent/employee. For example, in an automobile accident brought by a corporate plaintiff, the defendant could use this instruction to assert that the negligence of the plaintiff's employee/driver contributed to causing the accident.

SOURCES AND AUTHORITIES

- The doctrine of respondeat superior is not limited to the principal's responsibility for injuries to third parties. A defendant also can use the doctrine to support a claim of contributory negligence against a plaintiff principal if the plaintiff's agent was contributorily negligent. (See 6 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 1079, pp. 478–479.)

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 1079, pp. 478–479
- CALIFORNIA EMPLOYMENT LAW, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, § 30.08 (Matthew Bender)

- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 248, *Employer's Liability for Employee's Torts*, § 248.19, Ch. 427, *Principal and Agent* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 100, *Employer and Employee* (Matthew Bender)

3703
Legal Relationship Not Disputed

In this case [*name of agent***] was the [employee/agent/[***insert other relationship, e.g., "partner"***]] of [***name of defendant***].**

If you find that [*name of agent***] was acting within the scope of [his/her] [employment/ agency/[***insert other relationship***]] when the incident occurred, then [***name of defendant***] is responsible for any harm caused by [***name of agent***]'s [***insert applicable tort theory, e.g., "negligence"***].**

DIRECTIONS FOR USE

The term "name of agent," in brackets, is intended in the general sense, to denote the person or entity whose wrongful conduct is alleged to have created the principal's liability.

Under other principles of law, a principal may be directly liable for authorizing or directing an agent's wrongful acts. (See 2 Witkin, Summary of Cal. Law (9th ed. 1987) Agency and Employment, § 113, p. 107.)

This instruction may not apply where employer liability is statutory, such as under the Fair Employment and Housing Act.

SOURCES AND AUTHORITIES

- Ordinarily, the question of agency is one of fact; however, where the evidence is undisputed the issue becomes one of law. (*Mantonya v. Bratlie* (1948) 33 Cal.2d 120, 128–129 [199 P.2d 677].)

- This instruction may be appropriate in cases where vicarious liability is asserted in the context of employment, since agency and employment are often viewed as synonymous. Witkin observes: "There is seldom any reason to distinguish between the service of an agent and that of an employee. … However, the two relationships are not considered identical. It is said that a servant or employee works for his employer, while an agent also acts for and in the place of the principal for the purpose of bringing him into legal relations with third persons." (2 Witkin, Summary of Cal. Law (9th ed. 1987), Agency and Employment, § 5, p. 24.)

- "It is settled that for purposes of liability to third parties for torts, a real estate salesperson is the agent of the broker who employs him or her. The broker is liable as a matter of law for all damages caused to third persons by the tortious acts of the

salesperson committed within the course and scope of employment." (*California Real Estate Loans, Inc. v. Wallace* (1993) 18 Cal.App.4th 1575, 1581 [23 Cal.Rptr.2d 462], internal citations omitted.)

Secondary Sources

- 2 Witkin, Summary of California Law (9th ed. 1987) Agency and Employment, §§ 3–5
- 1 Levy, et al., California Torts (1985–2000) Vicarious Liability, §§ 8.01–8.03
- CALIFORNIA EMPLOYMENT LAW, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees,* § 30.04 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 248, *Employer's Liability for Employee's Torts,* § 248.16, Ch. 427, *Principal and Agent* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 100, *Employer and Employee* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 3:1

3704
Existence of "Employee" Status Disputed

[*Name of plaintiff***] claims that [***name of agent***] was [***name of defendant***]'s employee.**

In deciding whether [*name of agent***] was [***name of defendant***]'s employee, you must first decide whether [***name of defendant***] had the right to control how [***name of agent***] performed the work, rather than just the right to specify the result. It does not matter whether [***name of defendant***] exercised the right to control. If you decide that the right to control existed, then [***name of agent***] was [***name of defendant***]'s employee.**

If you decide that [*name of defendant***] did not have the right of control, then you must consider all the circumstances in deciding whether [***name of agent***] was [***name of defendant***]'s employee. The following factors, if true, may show that [***name of agent***] was the employee of [***name of defendant***]:**

(a) [*Name of defendant***] supplied the equipment, tools, and place of work;**

(b) [*Name of agent***] was paid by the hour rather than by the job;**

(c) The work being done by [*name of agent***] was part of the regular business of [***name of defendant***];**

(d) [*Name of defendant***] had an unlimited right to end the relationship with [***name of agent***];**

(e) The work being done by [*name of agent***] was the only occupation or business of [***name of agent***];**

(f) The kind of work performed by [*name of agent***] is usually done under the direction of a supervisor rather than by a specialist working without supervision;**

(g) The kind of work performed by [*name of agent***] does not require specialized or professional skill;**

(h) The services performed by [*name of agent***] were to be performed over a long period of time; and**

(i) [*Name of defendant***] and [***name of agent***] acted as if they had an employer-employee relationship.**

DIRECTIONS FOR USE

Not all of the secondary factors need to be given. Give only those factors that are supported by admissible evidence.

This instruction is primarily intended for employer-employee relationships. Most of the factors are less appropriate for analyzing other types of agency relationships, such as franchisor/franchisee. For an instruction more appropriate to these kinds of relationships see Instruction 3705, *Existence of "Agency" Relationship Disputed.*

SOURCES AND AUTHORITIES

- Civil Code section 2295 provides: "An agent is one who represents another, called the principal, in dealings with third persons. Such representation is called agency."

- "The existence of an agency is a factual question within the province of the trier of fact whose determination may not be disturbed on appeal if supported by substantial evidence." (*L. Byron Culver & Associates v. Jaoudi Industrial & Trading Corp.* (1991) 1 Cal.App.4th 300, 305 [1 Cal.Rptr.2d 680], internal citation omitted.)

- The burden of proving the existence of an agency rests on the one affirming its existence. (*Burbank v. National Casualty Co.* (1941) 43 Cal.App.2d 773, 781 [111 P.2d 740].)

- One who performs a mere favor for another without being subject to any legal duty of service and without assenting to right of control is not an agent, because the agency relationship rests upon mutual consent. (*Insurance Co. of North America v. Hanks, Conard & Sons, Inc.* (1967) 250 Cal.App.2d 156, 161 [58 Cal.Rptr. 190].)

- An agency must rest upon an agreement. (*D'Acquisto v. Evola* (1949) 90 Cal.App.2d 210 [202 P.2d 596].) "Agency may be implied from the circumstances and conduct of the parties." (*Michelson v. Hamada* (1994) 29 Cal.App.4th 1566, 1579 [36 Cal.Rptr.2d 343], internal citations omitted.)

- "Whether a person performing work for another is an agent or an independent contractor depends primarily upon whether the one for whom the work is done has the legal right to control the activities of the alleged agent. … It is not essential that the right of control be exercised or that there be actual supervision of the work of the agent. The existence of the right of control and supervision establishes the existence of an agency relationship." (*Malloy v. Fong* (1951) 37 Cal.2d 356, 370 [232 P.2d 241], internal citations omitted.)

- When the principal controls only the results of the work and not the means by which it is accomplished, an independent contractor relationship is established. (*White v. Uniroyal, Inc.* (1984) 155 Cal.App.3d 1, 25 [202 Cal.Rptr. 141], overruled on other

grounds in *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548 [34 Cal.Rptr.2d 607].)

- "Agency and independent contractorship are not necessarily mutually exclusive legal categories as independent contractor and servant or employee are. … One who contracts to act on behalf of another and subject to the other's control, except with respect to his physical conduct, is both an agent and an independent contractor. (*City of Los Angeles v. Meyers Brothers Parking System* (1975) 54 Cal.App.3d 135, 138 [126 Cal.Rptr. 545], internal citations omitted; accord *Mottola v. R. L. Kautz & Co.* (1988) 199 Cal.App.3d 98, 108 [244 Cal.Rptr. 737].)

- The factors that may be considered in determining whether an agency exists are drawn from the Restatement Second of Agency, section 220, and are phrased therein as follows:

  (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
  (b) whether or not the one employed is engaged in a distinct occupation or business;
  (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
  (d) the skill required in the particular occupation;
  (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
  (f) the length of time for which the person is employed;
  (g) the method of payment, whether by the time or by the job;
  (h) whether or not the work is a part of the regular business of the employer;
  (i) whether or not the parties believe they are creating the relation of master and servant; and
  (j) whether the principal is or is not in business.

- These factors have been cited with approval by the Supreme Court. (*Malloy, supra,* 37 Cal.2d at pp. 370–371.) As phrased in the Restatement, they do not indicate in whose favor each factor weighs. The draft instruction states the factors in a way to suggest whether or not they point toward an employment relationship.

<u>Secondary Sources</u>

- 2 Witkin, Summary of California Law (9th ed. 1987) Agency and Employment, §§ 14–32
- 1 Levy, et al., California Torts (1985–2000) Vicarious Liability, § 8.03[2]
- CALIFORNIA EMPLOYMENT LAW, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, § 30.04 (Matthew Bender)

- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 248, *Employer's Liability for Employee's Torts*, §§ 248.15, 248.51, Ch. 427, *Principal and Agent* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 100, *Employer and Employee* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, §§ 3:5–3:6

3705
Existence of "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 [***name of agent***]'s conduct.**

If [*name of plaintiff***] proves that [***name of defendant***] gave [***name of agent***] authority to act on [his/her/its] behalf, 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.**

DIRECTIONS FOR USE

This instruction should be used when the factual setting involves relationships such as homeowner–real estate agent, or franchisor–franchisee.

SOURCES AND AUTHORITIES

- Civil Code section 2295 provides: "An agent is one who represents another, called the principal, in dealings with third persons. Such representation is called agency."

- "The existence of an agency is a factual question within the province of the trier of fact whose determination may not be disturbed on appeal if supported by substantial evidence." (*L. Byron Culver & Associates v. Jaoudi Industrial & Trading Corp.* (1991) 1 Cal.App.4th 300, 305 [1 Cal.Rptr.2d 680], internal citation omitted.)

- The burden of proving the existence of an agency rests on the one affirming its existence. (*Burbank v. National Casualty Co.* (1941) 43 Cal.App.2d 773, 781 [111 P.2d 740].)

- One who performs a mere favor for another without being subject to any legal duty of service and without assenting to right of control is not an agent, because the agency relationship rests upon mutual consent. (*Insurance Co. of North America v. Hanks, Conard & Sons, Inc.* (1967) 250 Cal.App.2d 156, 161 [58 Cal.Rptr. 190].)

- An agency must rest upon an agreement. (*D'Acquisto v. Evola* (1949) 90 Cal.App.2d 210 [202 P.2d 596].) "Agency may be implied from the circumstances and conduct of the parties." (*Michelson v. Hamada* (1994) 29 Cal.App.4th 1566, 1579 [36 Cal.Rptr.2d 343], internal citations omitted.)

- "Whether a person performing work for another is an agent or an independent contractor depends primarily upon whether the one for whom the work is done has

the legal right to control the activities of the alleged agent. … It is not essential that the right of control be exercised or that there be actual supervision of the work of the agent. The existence of the right of control and supervision establishes the existence of an agency relationship." (*Malloy v. Fong* (1951) 37 Cal.2d 356, 370 [232 P.2d 241], internal citations omitted.)

- When the principal controls only the results of the work and not the means by which it is accomplished, an independent contractor relationship is established. (*White v. Uniroyal, Inc.* (1984) 155 Cal.App.3d 1, 25 [202 Cal.Rptr. 141], overruled on other grounds in *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548 [34 Cal.Rptr.2d 607].)

- "Agency and independent contractorship are not necessarily mutually exclusive legal categories as independent contractor and servant or employee are. … One who contracts to act on behalf of another and subject to the other's control, except with respect to his physical conduct, is both an agent and an independent contractor. (*City of Los Angeles v. Meyers Brothers Parking System* (1975) 54 Cal.App.3d 135, 138 [126 Cal.Rptr. 545], internal citations omitted; accord *Mottola v. R. L. Kautz & Co.* (1988) 199 Cal.App.3d 98, 108 [244 Cal.Rptr. 737].)

Secondary Sources

- 2 Witkin, Summary of California Law (9th ed. 1987) Agency and Employment, §§ 36–38
- 1 Levy, et al., California Torts, (1985–2000) Vicarious Liability, § 8.04
- CALIFORNIA EMPLOYMENT LAW, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, § 30.04 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 248, *Employer's Liability for Employee's Torts*, § 248.51, Ch. 427, *Principal and Agent* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 100, *Employer and Employee* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, §§ 3:26–3:27

3706
Special Employment
General Employer and/or Special Employer Denies Responsibility

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[*Name of plaintiff***] claims that [***name of worker***] was the employee of [***name of defendant first employer***] when the incident occurred, and that [***name of defendant first employer***] is therefore responsible for [***name of worker***]'s conduct. [***Name of defendant first employer***] claims that [***name of worker***] was the temporary employee of [***name of defendant second employer***] and therefore [***name of defendant second employer***] is solely responsible for [***name of worker***]'s conduct.**

In deciding whether [*name of worker***] was [***name of defendant second employer***]'s temporary employee, you must first decide whether [***name of defendant second employer***] had the right to fully control the activities of [***name of worker***], rather than just the right to specify the result.**

It does not matter whether [*name of defendant second employer***] exercised the right to control. If [***name of defendant first employer***] gave [***name of defendant second employer***] full authority to supervise the details of [***name of worker***]'s work, then [he/she] was the temporary employee of [***name of defendant second employer***], and [he/she/it] is responsible for [***name of worker***]'s conduct.**

If you decide that [*name of defendant second employer***] did not have the right of control, then you must consider all the circumstances in deciding whether [***name of worker***] was [***name of defendant second employer***]'s employee. The following factors, if true, may show that [***name of agent***] was the temporary employee of [***name of defendant second employer***]:**

(a) [*Name of defendant second employer***] supplied the equipment, tools, and place of work;**

(b) [*Name of worker***] was paid by the hour rather than by the job;**

(c) The work being done by [*name of worker***] was part of the regular business of [***name of defendant second employer***];**

(d) [*Name of defendant second employer***] had an unlimited right to end the relationship with [***name of worker***];**

(e) The work being done by [*name of worker***] was the only occupation or business of [***name of worker***];**

(f) The kind of work performed by [*name of worker*] is usually done under the direction of a supervisor rather than by a specialist working without supervision;

(g) The kind of work performed by [*name of worker*] does not require specialized or professional skill;

(h) The services performed by [*name of worker*] were to be performed over a long period of time;

(i) [*Name of defendant second employer*] and [*name of worker*] acted as if they had an employer-employee relationship;

(j) [*Name of worker*]'s duties to [*name of defendant second employer*] were only for the benefit of [*name of defendant second employer*];

(k) [*Name of worker*] consented to the temporary employment with [*name of defendant second employer*]; and

(l) [*Name of worker*] and [*name of defendant second employer*] acted as if they had a temporary employment relationship.

DIRECTIONS FOR USE

Not all of the secondary factors need to be given. Give only those factors that are supported by admissible evidence.

The terms "first and second employer" have been substituted for "special and general employer" to make the concept more straightforward. Also, the term "temporary employee" has been substituted for the term "special employee" for the same reason.

In addition to the alleged special employer's control over the employee, there are a number of other relevant factors to use in deciding whether a special employment relationship existed. They are similar, but not identical, to the factors to be used in an independent contractor analysis.

SOURCES AND AUTHORITIES

- "[W]here the servants of two employers are jointly engaged in a project of mutual interest, each employee ordinarily remains the servant of his own master and does not thereby become the special employee of the other." (*Marsh v. Tilley Steel Co.* (1980) 26 Cal.3d 486, 493 [162 Cal.Rptr. 320].)

- "The law of agency has long recognized that a person generally the servant of one master can become the borrowed servant of another. If the borrowed servant commits

a tort while carrying out the bidding of the borrower, vicarious liability attaches to the borrower and not to the general master." (*Societa per Azioni de Navigazione Italia v. City of Los Angeles* (1982) 31 Cal.3d 446, 455-456 [183 Cal.Rptr. 51], internal citations omitted.)

- "Liability in borrowed servant cases involves the exact public policy considerations found in sole employer cases. Liability should be on the persons or firms which can best insure against the risk, which can best guard against the risk, which can most accurately predict the cost of the risk and allocate the cost directly to the consumers, thus reflecting in its prices the enterprise's true cost of doing business." (*Strait v. Hale Construction Co.* (1972) 26 Cal.App.3d 941, 949 [103 Cal.Rptr. 487].)

- "In determining whether a special employment relationship exists, the primary consideration is whether the special employer has [t]he right to control and direct the activities of the alleged employee or the manner and method in which the work is performed, whether exercised or not. ... However, [w]hether the right to control existed or was exercised is generally a question of fact to be resolved from the reasonable inferences to be drawn from the circumstances shown." (*Kowalski v. Shell Oil Co*. (1979) 23 Cal.3d 168, 175 [151 Cal.Rptr. 671], citations and quotation marks omitted.)

- "[S]pecial employment is most often resolved on the basis of reasonable inferences to be drawn from the circumstances shown. Where the evidence, though not in conflict, permits conflicting inferences, the existence or nonexistence of the special employment relationship barring the injured employee's action at law is generally a question reserved for the trier of fact." (*Marsh, supra,* 26 Cal.3d at p. 493, internal quotation marks omitted.)

- "[I]f neither the evidence nor inferences are in conflict, then the question of whether an employment relationship exists becomes a question of law which may be resolved by summary judgment." (*Riley v. Southwest Marine, Inc.* (1988) 203 Cal.App.3d 1242, 1248–1249 [250 Cal.Rptr. 718], internal citations omitted.)

- "The special employment relationship and its consequent imposition of liability upon the special employer flows from the borrower's power to supervise the details of the employee's work. Mere instruction by the borrower on the result to be achieved will not suffice." (*Marsh, supra,* 26 Cal.3d at p. 492.)

- Contract terms are not conclusive evidence of the existence of the right to control. (*Kowalski, supra,* 23 Cal.3d at p. 176.)

- The "secondary" factors may be more important in the special employment analysis than in the independent contractor analysis: "[S]pecial employment is most often resolved on the basis of reasonable inferences to be drawn from the circumstances shown." (*Marsh, supra,* 26 Cal.3d at p. 492.)

- The existence of a special employment relationship may be supported by evidence that: (1) the alleged special employer paid wages to the employee, (2) the alleged special employer had the power to discharge the employee, (3) the work performed by the employee was unskilled, (4) the work tools were provided by the alleged special employer, (5) the work was part of the alleged special employer's regular business, (6) the employee expressly or impliedly consented to a special employment relationship, (7) the parties believed they were creating a special employment relationship and, (8) the alleged special employment period was lengthy. (*Kowalski, supra*, 23 Cal.3d at pp. 176–178.)

Secondary Sources

- 2 Witkin, Summary of California Law (9th ed. 1987) Agency and Employment, §§ 118–121
- 1 Levy, et al., California Torts (1985–2000) Vicarious Liability, § 8.03[2][e]
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 100, *Employer and Employee* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 3:7

3707
Special Employment
Joint Responsibility

If you decide that [*name of worker***] was the temporary employee of [***name of defendant second employer***], but that [***name of defendant first employer***] partially controlled [***name of worker***]'s activities along with [***name of defendant second employer***], then you must conclude that both [***name of defendant first employer***] and [***name of defendant second employer***] are responsible for the conduct of [***name of worker***].**

SOURCES AND AUTHORITIES

- "Facts demonstrating the existence of a special employment relationship do not necessarily preclude a finding that a particular employee also remained under the partial control of the original employer. Where general and special employers share control of an employee's work, a 'dual employment' arises, and the general employer remains concurrently and simultaneously, jointly and severally liable for the employee's torts." (*Marsh v. Tilley Steel Co.* (1980) 26 Cal.3d 486, 494–495 [162 Cal.Rptr. 320], internal citations omitted.)

- "This is especially true where the loaned employee performs work of interest to both the general and special employers." (*Societa per Azioni de Navigazione Italia v. City of Los Angeles* (1982) 31 Cal.3d 446, 460 [183 Cal.Rptr. 51], internal citation omitted.) If the loaned employee performs work of interest to both the general and special employers, there is a presumption that the employee remained in his or her general employment. (*Ibid.*) The general employer can avoid liability only if it can prove that it gave up "authoritative direction and control" over the employee. (*Ibid.*)

- "Authoritative direction and control" is more than the power to suggest details or the necessary cooperation." (*Societa per Azioni de Navigazione Italia, supra*, 31 Cal.3d at p. 460, internal citations omitted.)

<u>Secondary Sources</u>

- 2 Witkin, Summary of California Law (9th ed. 1987) Agency and Employment, §§ 118–121
- 1 Levy, et al., California Torts (1985–2000) Vicarious Liability, § 8.03[2][e]
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 100, *Employer and Employee* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 3:7

3708
Peculiar-Risk Doctrine

[*Name of plaintiff*] claims that even if [*name of independent contractor*] was not an employee, [*name of defendant*] is responsible for [*name of independent contractor*]'s conduct because the work involved a special risk of harm.

A special risk of harm is a recognizable danger that arises out of the nature of the work or the place where it is done and requires specific safety measures appropriate to the danger. A special risk of harm may also arise out of a planned but unsafe method of doing the work. A special risk of harm does not include a risk that is unusual, abnormal, or not related to the normal or expected risks associated with the work.

To establish this claim, [*name of plaintiff*] must prove each of the following:

1. **That the work was likely to involve a special risk of harm to others;**
2. **That [*name of defendant*] knew or should have known that the work was likely to involve this risk;**
3. **That [*name of independent contractor*] failed to use reasonable care to take specific safety measures appropriate to the danger to avoid this risk; and**
4. **That [*name of independent contractor*]'s failure was a cause of harm to [*name of plaintiff*].**

[In deciding whether [*name of defendant*] should have known the risk, you should consider [his/her/its] knowledge and experience in the field of work to be done.]

SOURCES AND AUTHORITIES

- In determining the applicability of the doctrine of peculiar risk, a critical inquiry "is whether the work for which the contractor was hired involves a risk that is 'peculiar to the work to be done,' arising either from the nature or the location of the work and ' "against which a reasonable person would recognize the necessity of taking special precautions." ' " (*Privette v. Superior Court* (1993) 5 Cal.4th 689, 695 [21 Cal.Rptr.2d 72], internal citations omitted.)

- "Whether the particular work which the independent contractor has been hired to perform is likely to create a peculiar risk of harm to others unless special precautions

are taken is ordinarily a question of fact." (*Castro v. State of California* (1981) 114 Cal.App.3d 503, 511 [170 Cal.Rptr. 734], internal citations omitted.)

- The doctrine ensures that an injured person will have a source of recovery even if the independent contractor is insolvent. (*Toland v. Sunland Housing Group, Inc.* (1988) 18 Cal.4th 253, 258 [74 Cal.Rptr.2d 878].)

- "The analysis of the applicability of the peculiar risk doctrine to a particular fact situation can be broken down into two elements: (1) whether the work is likely to create a peculiar risk of harm unless special precautions are taken; and (2) whether the employer should have recognized that the work was likely to create such a risk." (*Jimenez v. Pacific Western Construction Co.* (1986) 185 Cal.App.3d 102, 110 [229 Cal.Rptr. 575.)

- Restatement Second of Torts section 413 states: "One who employs an independent contractor to do work which the employer should recognize as necessarily creating, during its progress, conditions containing an unreasonable risk of bodily harm to others unless special precautions are taken, is subject to liability for bodily harm caused to them by the absence of such precautions, if the employer (a) fails to provide in the contract that the contractor shall take such precautions (as to which see sec. 416), or (b) fails to exercise reasonable care to provide in some other manner for the taking of such precautions."

- Restatement Second of Torts section 416 of states: "One who employs an independent contractor to do work, which the employer should recognize as necessarily requiring the creation during its progress of a condition involving a peculiar risk of bodily harm to others unless special precautions are taken, is subject to liability for bodily harm caused to them by the failure of the contractor to exercise reasonable care to take such precautions."

- California courts have adopted the doctrine as expressed in these Restatement sections. (*Castro, supra,* 114 Cal.App.3d at p. 509.)

- Restatement Second of Torts section 413 has been referred to as "direct" liability, while section 416 has been referred to as "vicarious." However, the Supreme Court has observed that "this distinction is misleading." (*Toland, supra,* 18 Cal.4th at p. 264.) The court also observed that these two sections overlap and are somewhat redundant because, under either section, the hiring person is subject to liability for injuries to others resulting from the contractor's negligence.

- A peculiar risk may arise out of a contemplated and unsafe method of work adopted by the independent contractor. (*Mackey v. Campbell Construction Co*. (1980) 101 Cal.App.3d 774, 785–786 [162 Cal.Rptr. 64].)

- "The term 'peculiar risk' means neither a risk that is abnormal to the type of work done, nor a risk that is abnormally great; it simply means ' "a special, recognizable

danger arising out of the work itself." ' For that reason, as this court has pointed out, the term 'special risk' is probably a more accurate description than 'peculiar risk,' which is the terminology used in the Restatement. (*Privette, supra,* 5 Cal.4th at p. 695, internal citations omitted.)

- "Even when work performed by an independent contractor poses a special or peculiar risk of harm, the person who hired the contractor will not be liable for injury to others if the injury results from the contractor's 'collateral' or 'casual' negligence." (*Privette, supra,* 5 Cal.4th at p. 696.)

- Whether or not a risk is a "peculiar risk" may be decided as a matter of law. (*Jimenez, supra,* 185 Cal.App.3d at p. 111.) In that case, the jury would decide only whether the independent contractor failed to exercise reasonable care to take the necessary special precautions. (*Id*. at p. 108.)

- The Supreme Court has described "collateral" or "casual" negligence as follows: " 'Casual' or 'collateral' negligence has sometimes been described as negligence in the operative detail of the work, as distinguished from the general plan or method to be followed. Although this distinction can frequently be made, since negligence in the operative details will often not be within the contemplation of the employer when the contract is made, the distinction is not essentially one between operative detail and general method. 'It is rather one of negligence which is unusual or abnormal, or foreign to the normal or contemplated risks of doing the work, as distinguished from negligence which creates only the normal or contemplated risk.' (Rest.2d Torts, § 426, com. a; see Prosser, Law of Torts, 4th ed. (1971) pp. 474–475.)" (*Aceves v. Regal Pale Brewing Co.* (1979) 24 Cal.3d 502, 510 [156 Cal.Rptr. 41], overruled on other grounds in *Privette, supra,* 5 Cal.4th at p. 702, fn. 4.)

- The question of whether the harm resulted from collateral or casual negligence is to be resolved by the trier of fact. (*Caudel v. East Bay Municipal Utility Dist.* (1985) 165 Cal.App.3d 1, 9 [211 Cal.Rptr. 222].)

<u>Secondary Sources</u>

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1013–1016
- 1 Levy, et al., California Torts (1985–2000) Vicarious Liability, § 8.05[3][b]
- CALIFORNIA EMPLOYMENT LAW, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees,* § 30.10[2][b] (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 248, *Employer's Liability for Employee's Torts,* § 248.22, Ch. 427, *Principal and Agent* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 100, *Employer and Employee* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 3:22

3709
Ostensible Agent

[*Name of plaintiff*] claims that [*name of defendant*] is responsible for [*name of agent*]'s conduct because [he/she] was [*name of defendant*]'s apparent [employee/agent]. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] intentionally or carelessly created the impression that [*name of agent*] was [*name of defendant*]'s [employee/agent];**

2. **That [*name of plaintiff*] reasonably believed that [*name of agent*] was [*name of defendant*]'s [employee/agent]; and**

3. **That [*name of plaintiff*] was harmed because [he/she] reasonably relied on [his/her] belief.**

SOURCES AND AUTHORITIES

- Civil Code section 2298 provides: "An agency is either actual or ostensible."

- Civil Code section 2300 provides: "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."

- Civil Code section 2317 provides: "Ostensible authority is such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess."

- Whether ostensible agency exists is a question of fact and may be implied from circumstances. (*Yanchor v. Kagan* (1971) 22 Cal.App.3d 544, 550 [99 Cal.Rptr. 367].)

- " 'It is elementary that there are three requirements necessary before recovery may be had against a principal for the act of an ostensible agent. The person dealing with the agent must do so with belief in the agent's authority and this belief must be a reasonable one; such belief must be generated by some act or neglect of the principal sought to be charged; and the third person in relying on the agent's apparent authority must not be guilty of negligence.' " (*Associated Creditor's Agency v. Davis* (1975) 13 Cal.3d 374, 399 [118 Cal.Rptr. 772], internal citations omitted.)

- "Ostensible authority of an agent cannot be based on the agent's conduct alone; there must be evidence of conduct by the principal which causes a third party reasonably to

believe the agent has authority." (*Lindsay-Field v. Friendly* (1995) 36 Cal.App.4th 1728, 1734 [43 Cal.Rptr.2d 71].)

- "Liability of the principal for the acts of an ostensible agent rests on the doctrine of 'estoppel,' the essential elements of which are representations made by the principal, justifiable reliance by a third party, and a change of position from such reliance resulting in injury." (*Preis v. American Indemnity Co.* (1990) 220 Cal.App.3d 752, 761 [269 Cal.Rptr. 617], internal citation omitted.)

Secondary Sources

- 2 Witkin, Summary of California Law (9th ed. 1987) Agency and Employment, §§ 93–98
- 1 Levy, et al., California Torts (1985–2000) Vicarious Liability, § 8.04[6]
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 427, *Principal and Agent* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 100, *Employer and Employee* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 3:29

3710
Ratification

[*Name of plaintiff*] claims that [*name of defendant*] is responsible for the harm caused by [*name of agent*]'s conduct because [he/she/it] approved that conduct after it occurred. If you find that [*name of agent*] harmed [*name of plaintiff*], you must decide whether [*name of defendant*] approved that conduct. To establish [his/her] claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of agent*] intended to act on behalf of [*name of defendant*];**

2. **That [*name of defendant*] learned of [*name of agent*]'s conduct after it occurred; and**

3. **That [*name of defendant*] approved [*name of agent*]'s conduct.**

Approval can be shown through words, or it can be inferred from a person's conduct. [Approval can be inferred if a person voluntarily keeps the benefits of [his/her/its] [representative/employee]'s unauthorized conduct after [he/she/it] learns of the unauthorized conduct.]

DIRECTIONS FOR USE

The last bracketed sentence should be read only if it is appropriate to the facts of the case.

SOURCES AND AUTHORITIES

- "An agency may be created, and an authority may be conferred, by a ... subsequent ratification." (Civ. Code, § 2307.) "A ratification can be made ... by accepting or retaining the benefit of the act, with notice thereof." (Civ. Code, § 2310.) "Ratification of part of an indivisible transaction is a ratification of the whole." (Civ. Code, § 2311.) "A principal is responsible for ... wrongs committed by his agent [if] ... he has ... ratified them … ." (Civ. Code, § 2339.)

- The concept of ratification is more commonly associated with contract law than tort law. Nevertheless, "[r]atification has, in fact, been a basis for imputed tort liability under the common law for centuries." (Kraus, *Ratification of Torts: An Overview and Critique of the Traditional Doctrine and Its Recent Extension to Claims of Workplace Harassment* (1997) 32 Tort & Ins. L.J. 807.)

- "Ratification is the voluntary election by a person to adopt in some manner as his own an act which was purportedly done on his behalf by another person, the effect of

which, as to some or all persons, is to treat the act as if originally authorized by him. A purported agent's act may be adopted expressly or it may be adopted by implication based on conduct of the purported principal from which an intention to consent to or adopt the act may be fairly inferred, including conduct which is 'inconsistent with any reasonable intention on his part, other than that he intended approving and adopting it.' " (*Rakestraw v. Rodrigues* (1972) 8 Cal.3d 67, 73 [104 Cal.Rptr. 57].)

- "A principal is liable when it ratifies an originally unauthorized tort. The failure to discharge an agent or employee may be evidence of ratification. As noted in *McChristian v. Popkin* (1946) 75 Cal.App.2d 249, 171 P.2d 85, 'If the employer, after knowledge of or opportunity to learn of the agent's misconduct, continues the wrongdoer in service, the employer may become an abettor and may make himself liable in punitive damages.' " (*Murillo v. Rite Stuff Foods, Inc.* (1998) 65 Cal.App.4th 833, 852 [77 Cal.Rptr.2d 12].)

Secondary Sources

- 2 Witkin, Summary of California Law (9th ed. 1987) Agency and Employment, §§ 87–92
- 1 Levy, et al., California Torts (1985–2000) Vicarious Liability, § 8.04[7]
- CALIFORNIA EMPLOYMENT LAW, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, §§ 30.02, 30.07 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 248, *Employer's Liability for Employee's Torts*, § 248.13, Ch. 427, *Principal and Agent* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 100, *Employer and Employee* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 3:4

3711
Partnerships

A partnership and each of its partners are responsible for the wrongful conduct of a partner acting within the scope of his or her authority.

You must decide whether a partnership existed in this case. A partnership is a group of two or more persons who own a business in which all the partners agree to share the profits and losses. A partnership can be formed by a written or oral agreement or by an agreement implied by the parties' conduct.

DIRECTIONS FOR USE

This instruction is not intended for cases involving limited liability partnerships.

SOURCES AND AUTHORITIES

- Corporations Code section 16202 provides, in part: "[T]he association of two or more persons to carry on as coowners a business for profit forms a partnership, whether or not the persons intend to form a partnership."

- Corporations Code section 16305(a) provides: "A partnership is liable for loss or injury caused to a person, or for a penalty incurred, as a result of a wrongful act or omission, or other actionable conduct, of a partner acting in the ordinary course of business of the partnership or with authority of the partnership."

- Under traditional legal concepts the partnership is regarded as an aggregate of individuals in which each partner acts as agent for all other partners in the transaction of partnership business and the agents of the partnership act as agents for all of the partners. (*Marshall v. International Longshoremen's and Warehousemen's Union* (1962) 57 Cal.2d 781, 783 [22 Cal.Rptr. 211].)

- "[T]he partners of a partnership are jointly and severally liable for the conduct and torts injuring a third party committed by one of the partners." (*Black v. Sullivan* (1975) 48 Cal.App.3d 557, 569 [122 Cal.Rptr. 119], internal citations omitted.)

- "In determining whether a relationship such as that of partners has been created, the courts are guided not only by the spoken or written words of the contracting parties, but also by their acts." (*Singleton v. Fuller* (1953) 118 Cal.App.2d 733, 740-741 [259 P.2d 687], internal citation omitted.)

- It is essential, however, to the existence of a partnership that there be a community of interest and an agreement to share jointly in the profits and losses resulting from the enterprise." (*Sandberg v. Jacobson* (1967) 253 Cal.App.2d 663, 668, internal citation omitted.)

Secondary Sources

- 9 Witkin, Summary of California Law (9th ed. 1989) Partnership, § 44
- 1 Levy, et al., California Torts (1985–2000) Vicarious Liability, § 8.06
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 427, *Principal and Agent* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 100, *Employer and Employee* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, §§ 3:36–3:37

3712
Joint Ventures

A joint venture and each of its members are responsible for the wrongful conduct of a member acting within the scope of his or her authority.

You must decide whether a joint venture existed in this case. A joint venture exists when two or more persons combine their property, skill, or knowledge to carry out a single business undertaking and agree to share the control, profits, and losses. A joint venture can be formed by a written or oral agreement or by an agreement implied by the parties' conduct.

DIRECTIONS FOR USE

This instruction can be modified for cases involving unincorporated associations by substituting the term "unincorporated association" for "joint venture."

SOURCES AND AUTHORITIES

- "A joint venture is 'an undertaking by two or more persons jointly to carry out a single business enterprise for profit.' " (*Weiner v. Fleischman* (1991) 54 Cal.3d 476, 482 [286 Cal.Rptr. 40], internal citations omitted.)

- "A joint venture has been defined in various ways, but most frequently perhaps as an association of two or more persons who combine their property, skill or knowledge to carry out a single business enterprise for profit." (*Holtz v. United Plumbing and Heating Co.* (1957) 49 Cal.2d 501, 506 [319 P.2d 617].)

- Joint ventures are similar to partnerships, but the term "joint venture" commonly applies to temporary business arrangements involving a single transaction: "From a legal standpoint, both relationships are virtually the same. Accordingly, the courts freely apply partnership law to joint ventures when appropriate." (*Weiner, supra,* 54 Cal.3d at p. 482.)

- "It has generally been recognized that in order to create a joint venture there must be an agreement between the parties under which they have a community of interest, that is, a joint interest, in a common business undertaking, an understanding as to the sharing of profits and losses, and a right of joint control." (*Holtz, supra,* 49 Cal.2d at pp. 506–507.)

- "The joint enterprise theory, while rarely invoked outside the automobile accident context, is well established and recognized in this state as an exception to the general

rule that imputed liability for the negligence of another will not be recognized." (*Christensen v. Superior Court* (1991) 54 Cal.3d 868, 893 [2 Cal.Rptr.2d 79], internal citation omitted.)

- "The existence or nonexistence of a joint venture is a fact question for resolution by the jury." (*Kaljian v. Menezes* (1995) 36 Cal.App.4th 573, 586 [42 Cal.Rptr.2d 510], internal citations omitted.)

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 1008
- 1 Levy, et al., California Torts (1985–2000) Vicarious Liability, § 8.07
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 427, *Principal and Agent* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 100, *Employer and Employee* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 3:38–3:39

3720
Scope of Employment

[*Name of plaintiff***] must prove that [***name of agent***] was acting within the scope of [his/her] [employment/authorization] when [***name of plaintiff***] was harmed.**

Conduct is within the scope of [employment/authorization] if:

(a) It is reasonably related to the kinds of tasks that the [employee/agent] was employed to perform; or

(b) It is reasonably foreseeable in light of the employer's business or the [agent's/employee's job] responsibilities.

DIRECTIONS FOR USE

For an instruction on the scope of employment in cases involving on-duty peace officers, see Instruction 3721, *Scope of Employment—Peace Officer's Misuse of Authority*. This instruction is closely related to Instruction 3723, *Substantial Deviation*, which focuses on when an act is not within the scope of employment.

SOURCES AND AUTHORITIES

- "The question of scope of employment is ordinarily one of fact for the jury to determine." (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 221 [285 Cal.Rptr. 99].) However, it becomes a question of law when the facts are undisputed and no conflicting inferences are possible. (*Hinman v. Westinghouse Electric Co.* (1970) 2 Cal.3d 956, 963 [88 Cal.Rptr. 188].)

- Plaintiff bears the burden of proof to show that the employee's tortious act was committed within the scope of his employment. (*Ducey v. Argo Sales Co.* (1979) 25 Cal.3d 707, 721 [159 Cal.Rptr. 835].)

- "That the employment brought the tortfeasor and victim together in time and place is not enough. … [T]he incident leading to injury must be an 'outgrowth' of the employment [or] the risk of tortious injury must be 'inherent in the working environment' or 'typical of or broadly incidental to the enterprise [the employer] has undertaken.' " (*Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal.4th 291, 298 [48 Cal.Rptr.2d 510], internal citations omitted.)

- “In California, the scope of employment has been interpreted broadly under the respondeat superior doctrine.” (*Farmers Insurance Group v. County of Santa Clara* (1995) 11 Cal.4th 992, 1004 [47 Cal.Rptr.2d 478].)

- “Tortious conduct that violates an employee’s official duties or disregards the employer's express orders may nonetheless be within the scope of employment. So may acts that do not benefit the employer, or are willful or malicious in nature.” (*Mary M., supra*, 54 Cal.3d at p. 209, internal citations omitted.)

- In *Perez v. Van Groningen & Sons, Inc*. (1986) 41 Cal.3d 962, 968 [227 Cal.Rptr. 106], the Supreme Court adopted the following analysis on scope of employment: “A risk arises out of the employment when in the context of the particular enterprise an employee’s conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer’s business. In other words, where the question is one of vicarious liability, the inquiry should be whether the risk was one ‘that may fairly be regarded as typical of or broadly incidental’ to the enterprise undertaken by the employer. Accordingly, the employer’s liability extends beyond his actual or possible control of the employee to include risks inherent in or created by the enterprise.”

- California does not follow the traditional rule that an employee’s actions are within the scope of employment only if motivated, in whole or part, by a desire to serve the employer’s interests. (*Lisa M., supra,* 12 Cal.4th at p. 297.) However, the employee’s motivation is a relevant factor in the scope of employment analysis. (*Id* at p. 298.)

- In *Farmers, supra,* and later in *Lisa M., supra,* the Supreme Court adopted and employed the following “foreseeability test” from *Rodgers v. Kemper Construction Co.* (1975) 50 Cal.App.3d 608, 618–619 [124 Cal.Rptr. 143]: “One way to determine whether a risk is inherent in, or created by, an enterprise is to ask whether the actual occurrence was a generally foreseeable consequence of the activity. However, ‘foreseeability’ in this context must be distinguished from ‘foreseeability’ as a test for negligence. In the latter sense ‘foreseeable’ means a level of probability which would lead a prudent person to take effective precautions whereas ‘foreseeability’ as a test for respondeat superior merely means that in the context of the particular enterprise an employee’s conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer’s business.”

- In *Lisa M., supra*, the court first analyzed whether the wrongful conduct was “engendered by” or was an “outgrowth” of the perpetrator’s employment. (*Id*. at p. 300.) The court then applied the *Rodgers* foreseeability test: “The employment must be such as predictably to create the risk employees will commit [torts] of the type for which liability is sought.” (*Id*. at p. 302.) The court reached the same result under both analyses [ultrasound technician who sexually assaulted a patient was not acting within the scope of employment].

- Some courts have developed a two-prong test for determining whether an act is within the scope of employment. An act is within the scope of employment if it either (1) is required or incident to his duties, or (2) could be reasonably foreseen by the employer in any event. If the act satisfies either part of this test, then the employer is liable. (*Baily v. Filco, Inc.* (1996) 48 Cal.App.4th 1552, 1559 [56 Cal.Rptr.2d 333].) It has been noted that the foreseeability-based test and the two-prong test are "not so much different tests, but different ways of articulating the same test for scope of employment." (*Id.* at p. 1561.)

Secondary Sources

- 2 Witkin, Summary of California Law (9th ed. 1987) Agency and Employment, § 126
- 1 Levy, et al., California Torts (1985–2000) Vicarious Liability, § 8.03[3]
- CALIFORNIA EMPLOYMENT LAW, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, § 30.05 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 248, *Employer's Liability for Employee's Torts*, § 248.16, Ch. 427, *Principal and Agent* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 100, *Employer and Employee* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 3:8

3721
Scope of Employment—Peace Officer's Misuse of Authority

[*Name of plaintiff***] must prove that [***name of agent***] was acting within the scope of [his/her] [employment/authorization] when [***name of plaintiff***] was harmed.**

The conduct of a peace officer is within the scope of [his/her] employment as a peace officer if all of the following are true:

(a) The conduct occurs while the peace officer is on duty as a peace officer;

(b) The conduct occurs while the peace officer is exercising [his/her] authority as a peace officer; and

(c) The conduct results from the use of [his/her] authority as a peace officer.

SOURCES AND AUTHORITIES

- "[W]e hold that when, as in this case, a police officer on duty misuses his official authority by raping a woman whom he has detained, the public entity that employs him can be held vicariously liable. This does not mean that, as a matter of law, the public employer is vicariously liable whenever an on-duty officer commits a sexual assault. Rather, this is a question of fact for the jury." (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202 [285 Cal.Rptr. 99].)

- "The use of authority is incidental to the duties of a police officer. The County enjoys tremendous benefits from the public's respect for that authority. Therefore, it must suffer the consequences when the authority is abused." (*White v. County of Orange* (1985) 166 Cal.App.3d 566, 572 [212 Cal.Rptr. 493].)

Secondary Sources

- 2 Witkin, Summary of California Law (9th ed. 1987) Agency and Employment, §§ 128, 135
- 1 Levy, et al., California Torts (1985–2000) Vicarious Liability, § 8.03[3][f][ii]
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 100, *Employer and Employee* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 3:8

3722
Scope of Employment—Unauthorized Acts

An employee's unauthorized conduct may be within the scope of [employment/ authorization] if [the conduct was committed in the course of a series of acts authorized by the employer] [or] [the conduct arose from a risk inherent in or created by the enterprise].

[An employee's wrongful or criminal conduct may be within the scope of employment even if it breaks a company rule or does not benefit the employer.]

SOURCES AND AUTHORITIES

- An employer's liability extends beyond his actual or possible control of the employee to include risks inherent in or created by the enterprise. (*Perez v. Van Groningen & Sons, Inc.* (1986) 41 Cal.3d 962, 968 [227 Cal.Rptr. 106].)

- "The fact that an employee is not engaged in the ultimate object of his employment at the time of his wrongful act does not preclude attribution of liability to an employer. … [T]he proper inquiry is not whether the wrongful act itself was authorized but whether it was committed in the course of a series of acts of the agent which were authorized by the principal." (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 219 [285 Cal.Rptr. 99], internal quotation marks and citations omitted.)

- "Tortious conduct that violates an employee's official duties or disregards the employer's express orders may nonetheless be within the scope of employment. So may acts that do not benefit the employer, or are willful or malicious in nature." (*Mary M., supra*, 54 Cal.3d at p. 209, internal citations omitted.)

- It is "well established, if somewhat surprising on first encounter, … that an employee's willful, malicious and even criminal torts may fall within the scope of his or her employment for purposes of respondeat superior, even though the employer has not authorized the employee to commit crimes or intentional torts." (*Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal.4th 291, 296–297 [48 Cal.Rptr.2d 510], internal citations omitted.)

<u>Secondary Sources</u>

- 2 Witkin, Summary of California Law (9th ed. 1987) Agency and Employment, §§ 135–138
- 1 Levy, et al., California Torts (1985–2000) Vicarious Liability, §§ 8.03[3][d], 8.03[3][f]

- CALIFORNIA EMPLOYMENT LAW, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, § 30.05 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 248, *Employer's Liability for Employee's Torts*, § 248.16, Ch. 427, *Principal and Agent* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 100, *Employer and Employee* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, §§ 3:11–3:12

3723
Substantial Deviation

If [an employee/a representative] combines his or her personal business with the employer's business, then the employee's conduct is within the scope of [employment/authorization]. However, if it clearly appears at the time of the conduct that the [employee/representative] was not performing work for his or her employer, either directly or indirectly, but was acting only for his or her own personal reasons, then the conduct was not within the scope of [employment/ authorization].

[An employee's conduct that slightly deviates from an employee's work is to be expected. For example, acts that are necessary for an employee's comfort, health, and convenience while at work are within the scope of employment.]

DIRECTIONS FOR USE

This instruction is closely related to Instruction 3720, *Scope of Employment*. It focuses on when an act is not within the scope of employment.

SOURCES AND AUTHORITIES

- "[C]ases that have considered recovery against an employer for injuries occurring within the scope and during the period of employment have established a general rule of liability 'with a few exceptions' in instances where the employee has 'substantially deviated from his duties for personal purposes.' " (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 218 [285 Cal.Rptr. 99], internal citation omitted.)

- "In some cases, the relationship between an employee's work and wrongful conduct is so attenuated that a jury could not reasonably conclude that the act was within the scope of employment." (*Mary M., supra,* 54 Cal.3d at p. 213, internal citations omitted.)

- "[A]n employer cannot deny responsibility for a tort that occurs when an employee engages in an act necessary to his or her comfort and convenience while at work." (*Baily v. Filco, Inc.* (1996) 48 Cal.App.4th 1552, 1563 [56 Cal.Rptr.2d 333].)

- "The fact that an employee is not engaged in the ultimate object of his employment at the time of his wrongful act does not preclude attribution of liability to an employer." (*Alma W. v. Oakland Unified School Dist.* (1981) 123 Cal.App.3d 133, 139 [176 Cal.Rptr. 287], internal citation omitted.)

- "[D]eviations which do not amount to a turning aside completely from the employer's business, so as to be inconsistent with its pursuit, are often reasonably expected … . In order to release an employer from liability, the deviation must be so material or substantial as to amount to an entire departure." (*DeMirjian v. Ideal Heating Corp.* (1954) 129 Cal.App.2d 758, 766 [278 P.2d 114], internal citation omitted.)

- Where the employee combines personal business with that of the employer or attends to both at substantially the same time, "no nice inquiry will be made" into which business the employee was engaged in at the time of injury unless it is readily apparent that the employee could not have been serving the employer, either directly or indirectly. (*Farmers Insurance Group v. County of Santa Clara* (1995) 11 Cal.4th 992, 1004 [47 Cal.Rptr.2d 478].)

- The fact that the employee is on the same route of return that would be used for both his employer's errand and his own tends to show a combination of missions. (*Trejo v. Maciel* (1966) 239 Cal.App.2d 487, 496 [48 Cal.Rptr. 765].)

- But if the employee deviates substantially from employment duties for personal purposes, or "if the misconduct is not an 'outgrowth' of the employment," the scope-of-employment test is not met. (*Farmers Insurance Group, supra,* 11 Cal.4th at p. 1005.) Thus, " 'if the tort is personal in nature, the employee's mere presence at the worksite and attendance to job duties prior to or subsequent to the tort, will not call into play the principles of respondeat superior.' " (*Ibid.,* internal citations omitted.)

- " '[A]cts necessary to the comfort, convenience, health and welfare of the employee while at work, though strictly personal to himself and not acts of service, do not take him outside the scope of his employment.' " (*Baily, supra,* 48 Cal.App.4th at p. 1560, internal citations omitted.)

- "While the question of whether an employee has departed from his special errand is normally one of fact for the jury, where the evidence clearly shows a complete abandonment, the court may make the determination that the employee is outside the scope of his employment as a matter of law." (*Felix v. Asai* (1987) 192 Cal.App.3d 926, 932–933 [237 Cal.Rptr. 718], internal citations omitted.)

<u>Secondary Sources</u>

- 2 Witkin, Summary of California Law (9th ed. 1987) Agency and Employment, §§ 127–128
- 1 Levy, et al., California Torts (1985–2000) Vicarious Liability, § 8.03[3]
- CALIFORNIA EMPLOYMENT LAW, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees,* § 30.05 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 248, *Employer's Liability for Employee's Torts,* § 248.16, Ch. 427, *Principal and Agent* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 100, *Employer and Employee* (Matthew Bender)

- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 3:8

3724
Going-and-Coming Rule

In general, an employee is not acting within the scope of employment while traveling to and from the workplace. But if the employee, while commuting, is on an errand for the employer, then the employee's conduct is within the scope of his or her employment from the time the employee starts on the errand until he or she returns from the errand or until he or she completely abandons the errand for personal reasons.

SOURCES AND AUTHORITIES

- "An employee is not considered to be acting within the scope of employment when going to or coming from his or her place of work. This rule, known as the going-and-coming rule, has several exceptions. Generally, an exception to the going-and-coming rule will be found when the employer derives some incidental benefit from the employee's trip." (*Anderson v. Pacific Gas & Electric Co.* (1993) 14 Cal.App.4th 254, 258 [17 Cal.Rptr.2d 534], internal citations omitted.)

- "If the employee is not simply on his way from his home to his normal place of work or returning from said place to his home for his own purpose, but is coming from his home or returning to it on a special errand either as part of his regular duties or at a specific order or request of his employer, the employee is considered to be in the scope of his employment from the time that he starts on the errand until he has returned or until he deviates therefrom for personal reasons." (*Boynton v. McKales* (1956) 139 Cal.App.2d 777, 789 [294 P.2d 733], internal citations omitted.)

- The going-and-coming rule "is based on the theory that the employment relationship is suspended from the time the employee leaves his job until he returns and on the theory that during the normal everyday commute, the employee is not rendering services directly or indirectly to his employer." (*Felix v. Asai* (1987) 192 Cal.App.3d 926, 931 [237 Cal.Rptr. 718].)

- One specific exception to the going-and-coming rule is when the employer compensates the employee for travel time to and from work. (See *Hinman v. Westinghouse Electric Co.* (1970) 2 Cal.3d 956, 962 [88 Cal.Rptr. 188].)

- Some examples of the special-errand exception include: (1) where an employee goes on a business errand for his employer, leaving from his workplace and returning to his workplace; (2) where an employee is called to work to perform a special task for the employer at an irregular time; and (3) where the employer asks an employee to

perform a special errand after the employee leaves work but before going home. (*Felix, supra,* 192 Cal.App.3d at pp. 931–932.)

- The employee is still within the scope of employment after the errand is completed. (*Trejo v. Maciel* (1966) 239 Cal.App.2d 487, 495 [48 Cal.Rptr. 765].)

Secondary Sources

- 2 Witkin, Summary of California Law (9th ed. 1987) Agency and Employment, §§ 129–134
- 2 Levy, et al., California Torts (1985–2000) Motor Vehicles, § 20.42[3]
- CALIFORNIA EMPLOYMENT LAW, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, § 30.05 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 248, *Employer's Liability for Employee's Torts*, § 248.16, Ch. 427, *Principal and Agent* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 100, *Employer and Employee* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 3:10

3725
Vehicle-Use Exception

If an employer requires an employee to drive to and from the workplace so that the vehicle is available for the employer's business, then the drive to and from work is within the scope of employment.

SOURCES AND AUTHORITIES

- "If an employer requires an employee to furnish a vehicle as an express or implied condition of employment, the employee will be in the scope of his employment while commuting to and from the place of his employment." (*Felix v. Asai* (1987) 192 Cal.App.3d 926, 932 [237 Cal.Rptr. 718], internal citations omitted.)

- "The cases invoking the required-vehicle exception all involve employees whose jobs entail the regular use of a vehicle to accomplish the job in contrast to employees who use a vehicle to commute to a definite place of business." (*Tryer v. Ojai Valley School Dist.* (1992) 9 Cal.App.4th 1476, 1481 [12 Cal.Rptr.2d 114].)

- While workers' compensation cases have recognized an exception to the going-and-coming rule when the employer defrays travel expenses, this exception does not apply to the respondeat superior doctrine. Payment of a travel allowance, in and of itself is insufficient to impose liability on the employer. (*Caldwell v. A.R.B., Inc.* (1986) 176 Cal.App.3d 1028, 1041 [222 Cal.Rptr. 494].) Respondeat superior does apply where the employer pays wages for travel time. (*Hinman v. Westinghouse Electric Co.* (1970) 2 Cal.3d 956, 962 [88 Cal.Rptr. 188].)

- The fact that an employee is on call does not automatically put their actions in the scope of employment. (*Le Elder v. Rice* (1994) 21 Cal.App.4th 1604, 1610 [26 Cal.Rptr.2d 749]).

<u>Secondary Sources</u>

- 2 Witkin, Summary of California Law (9th ed. 1987) Agency and Employment, § 134
- 2 Levy, et al., California Torts (1985–2000) Motor Vehicles, § 20.42[3][d]
- CALIFORNIA EMPLOYMENT LAW, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees,* § 30.05 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 248, *Employer's Liability for Employee's Torts,* § 248.16, Ch. 427, *Principal and Agent* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 100, *Employer and Employee* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 3:10

3726
Social or Recreational Activities

Social or recreational activities that occur after work hours are within the scope of employment if:

(a) They are carried out with the employer's stated or implied permission; and

(b) They either provide a benefit to the employer or have become customary.

SOURCES AND AUTHORITIES

- This aspect of the scope-of-employment analysis was expressly adopted for use in respondeat superior cases in *Rodgers v. Kemper Construction Co.* (1975) 50 Cal.App.3d 608, 620 [124 Cal.Rptr. 143], and reiterated in *Childers v. Shasta Livestock Auction Yard, Inc.* (1987) 190 Cal.App.3d 792, 804 [235 Cal.Rptr. 641]. It is derived from the workers' compensation case of *McCarty v. Workmen's Compensation Appeals Bd.* (1974) 12 Cal.3d 677, 681–683 [117 Cal.Rptr. 65].)

- "[W]here social or recreational pursuits on the employer's premises after hours are endorsed by the express or implied permission of the employer and are 'conceivably' of some benefit to the employer or, even in the absence of proof of benefit, if such activities have become 'a customary incident of the employment relationship,' an employee engaged in such pursuits after hours is still acting within the scope of his employment." (*Rodgers, supra,* 50 Cal.App.3d 608, 620.)

- *McCarty* has been overruled by statute in the context of workers' compensation (see Lab. Code, § 3600(a)(9)). However, courts have acknowledged that "it has been adopted as a test in establishing liability under respondeat superior." (*West American Insurance Co. v. California Mutual Insurance Co.* (1987) 195 Cal.App.3d 314, 322 [240 Cal.Rptr. 540].)

<u>Secondary Sources</u>

- 2 Witkin, Summary of California Law (9th ed. 1987) Agency and Employment, §§ 130, 135
- 1 Levy, et al., California Torts (1985–2000) Vicarious Liability, § 8.03[3][c]
- CALIFORNIA EMPLOYMENT LAW, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees,* § 30.05 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 248, *Employer's Liability for Employee's Torts,* § 248.16, Ch. 427, *Principal and Agent* (Matthew Bender)

- CALIFORNIA POINTS AND AUTHORITIES, Ch. 100, *Employer and Employee* (Matthew Bender)

VF-3700
Negligence—Vicarious Liability

We answer the questions submitted to us as follows:

1. Was [*name of agent***] negligent?**

___Yes **___No**

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was [*name of agent***]'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. Was [*name of agent***] [***name of defendant***]'s [agent/employee/[***insert other 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. Was [*name of agent***] acting within the scope of [his/her] [agency/employment/ [***insert other relationship***]] when [he/she] harmed [***name of plaintiff***]?**

___Yes **___No**

If your answer to question 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: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

DIRECTIONS FOR USE

The special-verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on Instruction 3701, *Tort Liability Asserted Against Principal-Essential factual Elements.*

If specificity is not required, users do not have to itemize all the damages listed in question 5. The breakdown is optional; depending on the circumstances, users may wish to break down the damages even further.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

This form may be modified if the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest on specific losses that occurred prior to judgment.

3800
Comparative Fault Between and Among 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 both of 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 both of 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

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 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 406, *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* (1996) 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].)

- 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

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, § 89, pp. 162–163; *id.* (2002 supp.) at §§ 89–90A, 95, pp. 80–83
- 5 Levy et al., California Torts (1993) Comparative Negligence, §§ 74.01–74.13
- California Tort Guide (Cont.Ed.Bar 3d ed. 1996) General Principles, §§ 1.52–1.59, pp. 41–46 (rel. 4/00)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 300, *Indemnity and Contribution* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 115, *Indemnity and Contribution* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice: Torts (1992) Indemnity, Contribution, and Setoff, §§ 4:14–4:18, pp. 18–22

3801
Implied Contractual Indemnity

[*Name of indemnitee***] claims that [he/she] [is/was] required to pay [***describe liability, e.g., "a court judgment in favor of [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 both of the following:**

1. **That [***name of indemnitor***] failed to use reasonable care in [performing the work/[***describe work or services***]] under an agreement with [***name of indemnitee***]; 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 both of 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.

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.)

- "[U]nder [Code of Civil Procedure] section 877.6, subsection (c), … an [implied contractual] indemnity claim, like other equitable indemnity claims, may not be pursued against a party who has entered into a good faith settlement." (*Bay Development, Ltd., supra*, 50 Cal.3d at p. 1031.)

<u>Secondary Sources</u>

- 5 Witkin, Summary of California Law (2002 supp.) Torts, § 98B, p. 88
- 5 Levy et al., California Torts (1993) Comparative Negligence, §§ 74.03[6]
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 362, *Mental Suffering and Emotional Distress* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 153, *Mental Suffering and Emotional Distress* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice: Torts (1992) Indemnity, Contribution, and Setoff, § 4:13, p. 17

3900
Introduction to Tort Damages—Liability Contested

If you decide that [*name of plaintiff*] has proved [his/her] claim against [*name of defendant*], you also must decide how much money will reasonably compensate [*name of plaintiff*] for the harm. This compensation is called "damages."

The amount of damages must include an award for each item of harm that was caused by [*name of defendant*]'s wrongful conduct, even if the particular harm could not have been anticipated.

[*Name of plaintiff*] does not have to prove 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*]:]

[*Insert applicable instructions on items of damage.***]**

DIRECTIONS FOR USE

Read last bracketed sentence and insert instructions on items of damages here only if Instruction 3902, *Economic and Noneconomic Damages*, is not being read. If Instruction 3902 is not used, this instruction should be followed by applicable instructions (see Instructions 3903A through 3903N, and 3905A) concerning the items of damage claimed by the plaintiff. These instructions should be inserted into this instruction as sequentially numbered items.

SOURCES AND AUTHORITY

- Civil Code section 3333 provides: "For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not."

- Civil Code section 3281 provides: "Every person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation in money, which is called damages."

- Civil Code section 3283 provides: "Damages may be awarded, in a judicial proceeding, for detriment resulting after the commencement thereof, or certain to result in the future."

- Civil Code section 3359 provides: “Damages must, in all cases, be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered.”

- Under Civil Code section 3333 “[t]ort damages are awarded to compensate a plaintiff for all of the damages suffered as a legal result of the defendant’s wrongful conduct.” (*North American Chemical Co. v. Superior Court* (1997) 59 Cal.App.4th 764, 786 [69 Cal.Rptr.2d 466], italics omitted.)

- “Whatever its measure in a given case, it is fundamental that ‘damages which are speculative, remote, imaginary, contingent, or merely possible cannot serve as a legal basis for recovery.’ However, recovery is allowed if claimed benefits are reasonably certain to have been realized but for the wrongful act of the opposing party.” (*Piscitelli v. Friedenberg* (2001) 87 Cal.App.4th 953, 989 [105 Cal.Rptr.2d 88], internal citations omitted.)

- “In general, one who has been tortiously injured is entitled to be compensated for the harm and the injured party must establish ‘by proof the extent of the harm and the amount of money representing adequate compensation with as much certainty as the nature of the tort and the circumstances permit.’ However, ‘[t]here is no general requirement that the injured person should prove with like definiteness the extent of the harm that he has suffered as a result of the tortfeasor’s conduct. It is desirable that responsibility for harm should not be imposed until it has been proved with reasonable certainty that the harm resulted from the wrongful conduct of the person charged. It is desirable, also, that there be definiteness of proof of the amount of damage as far as is reasonably possible. It is even more desirable, however, that an injured person not be deprived of substantial compensation merely because he cannot prove with complete certainty the extent of harm he has suffered.’ ” (*Clemente v. State of California* (1985) 40 Cal.3d 202, 219 [219 Cal.Rptr. 445], internal citations omitted.)

- “If plaintiff’s inability to prove his damages with certainty is due to defendant’s actions, the law does not generally require such proof.” (*Clemente, supra,* 40 Cal.3d at p. 219, internal citations omitted.)

- “While a defendant is liable for all the damage that his tortuous act proximately causes to the plaintiff, regardless of whether or not it could have been anticipated, nevertheless a proximate causal connection must still exist between the damage sustained by the plaintiff and the defendant’s wrongful act or omission, and the detriment inflicted on the plaintiff must still be the natural and probable result of the defendant’s conduct.” (*Chaparkas v. Webb* (1960) 178 Cal.App.2d 257, 260 [2 Cal.Rptr. 879], internal citations omitted.)

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1319–1326
- 4 Levy et al., California Torts (1985–2000) Damages, § 50.02
- California Tort Damages (Cont.Ed.Bar 1988) Bodily Injury, §§ 1.2–1.6
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 177, *Damages* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 65, *Damages* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 5:1

3901
Introduction to Tort Damages—Liability Established

[*Name of defendant***]'s responsibility for [***name of plaintiff***]'s claimed harm is not an issue for you to decide in this case. You must decide how much money will reasonably compensate [***name of plaintiff***] for the harm. This compensation is called "damages."**

The amount of damages must include an award for each item of harm that was caused by [*name of defendant]***'s wrongful conduct, even if the particular harm could not have been anticipated.**

[*Name of plaintiff***] does not have to prove 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***]:]**

[*Insert applicable instructions on items of damage***.]**

DIRECTIONS FOR USE

Read last bracketed sentence and insert instructions on items of damage here only if Instruction 3902, *Economic and Noneconomic Damages*, is not being read. If Instruction 3902 is not used, this instruction should be followed by applicable instructions (see Instructions 3903A through 3903N, and 3905A) concerning the items of damage claimed by the plaintiff. These instructions should be inserted into this instruction as sequentially numbered items.

SOURCES AND AUTHORITY

- Civil Code section 3333 provides: "For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not."

- Civil Code section 3281 provides: "Every person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation in money, which is called damages."

- Civil Code section 3283 provides: “Damages may be awarded, in a judicial proceeding, for detriment resulting after the commencement thereof, or certain to result in the future.”

- Civil Code section 3359 provides: “Damages must, in all cases, be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered.”

- Under Civil Code section 3333 “[t]ort damages are awarded to compensate a plaintiff for all of the damages suffered as a legal result of the defendant’s wrongful conduct.” (*North American Chemical Co. v. Superior Court* (1997) 59 Cal.App.4th 764, 786 [69 Cal.Rptr.2d 466], italics omitted.)

- “Whatever its measure in a given case, it is fundamental that ‘damages which are speculative, remote, imaginary, contingent, or merely possible cannot serve as a legal basis for recovery.’ However, recovery is allowed if claimed benefits are reasonably certain to have been realized but for the wrongful act of the opposing party.” (*Piscitelli v. Friedenberg* (2001) 87 Cal.App.4th 953, 989 [105 Cal.Rptr.2d 88], internal citations omitted.)

- “In general, one who has been tortiously injured is entitled to be compensated for the harm and the injured party must establish ‘by proof the extent of the harm and the amount of money representing adequate compensation with as much certainty as the nature of the tort and the circumstances permit.’ However, ‘[t]here is no general requirement that the injured person should prove with like definiteness the extent of the harm that he has suffered as a result of the tortfeasor’s conduct. It is desirable that responsibility for harm should not be imposed until it has been proved with reasonable certainty that the harm resulted from the wrongful conduct of the person charged. It is desirable, also, that there be definiteness of proof of the amount of damage as far as is reasonably possible. It is even more desirable, however, that an injured person not be deprived of substantial compensation merely because he cannot prove with complete certainty the extent of harm he has suffered.’ ” (*Clemente v. State of California* (1985) 40 Cal.3d 202, 219 [219 Cal.Rptr. 445], internal citations omitted.)

- “If plaintiff’s inability to prove his damages with certainty is due to defendant’s actions, the law does not generally require such proof.” (*Clemente, supra,* 40 Cal.3d at p. 219, internal citations omitted.)

- “While a defendant is liable for all the damage that his tortuous act proximately causes to the plaintiff, regardless of whether or not it could have been anticipated, nevertheless a proximate causal connection must still exist between the damage sustained by the plaintiff and the defendant’s wrongful act or omission, and the detriment inflicted on the plaintiff must still be the natural and probable result of the

defendant's conduct." (*Chaparkas v. Webb* (1960) 178 Cal.App.2d 257, 260 [2 Cal.Rptr. 879], internal citations omitted.)

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1319–1326
- 4 Levy et al., California Torts (1985–2000) Damages, § 50.02
- California Tort Damages (Cont.Ed.Bar 1988) Bodily Injury, §§ 1.2–1.6
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 177, *Damages* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 65, *Damages* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 5:1

3902
Economic and Noneconomic Damages

The damages claimed by [*name of plaintiff*] for the harm caused by [*name of defendant*] fall into two categories called economic damages and non-economic damages. You will be asked on the verdict form to state the two categories of damages separately.

DIRECTIONS FOR USE

This instruction may not be necessary in every case.

SOURCES AND AUTHORITY

- Civil Code section 1431.2 (Prop. 51) provides:

  (a) In any action for personal injury, property damage, or wrongful death, based upon principles of comparative fault, the liability of each defendant for non-economic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be rendered against that defendant for that amount.

  (b) (1) For purposes of this section, the term "economic damages" means objectively verifiable monetary losses including medical expenses, loss of earnings, burial costs, loss of use of property, costs of repair or replacement, costs of obtaining substitute domestic services, loss of employment and loss of business or employment opportunities.

  (2) For the purposes of this section, the term "non-economic damages" means subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation.

- Civil Code section 3333.2 provides, in part: "In any action for injury against a health care provider based on professional negligence, the injured plaintiff shall be entitled to recover noneconomic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement and other nonpecuniary damage." The statute sets the limit for such damages at $250,000.

- The Supreme Court has noted that section 1431.2 "carefully" defines the "important distinction" between economic and noneconomic damages. (*DaFonte v. Up-Right,*

Inc. (1992) 2 Cal.4th 593, 600 [7 Cal.Rptr.2d 238].) The court stated: "Proposition 51 … retains the joint liability of all tortfeasors, regardless of their respective shares of fault, with respect to all objectively provable expenses and monetary losses. On the other hand, the more intangible and subjective categories of damages were limited by Proposition 51 to a rule of strict proportionate liability. With respect to these noneconomic damages, the plaintiff alone now assumes the risk that a proportionate contribution cannot be obtained from each person responsible for the injury." (*Ibid.*, internal citation omitted.)

- "Proposition 51 … allows an injured plaintiff to recover the full amount of economic damages suffered, regardless of which tortfeaser or tortfeasors are named as defendants. The tortfeasors are left to sort out payment in proportion to fault amongst themselves, and they must bear the risk of nonrecovery from impecunious tortfeasors. As to noneconomic damages, however, the plaintiff must sue all the tortfeasors to enable a full recovery. Failure to name a defendant will preclude recovery of that defendant's proportional share of damages, and the plaintiff will bear the risk of nonrecovery from an impecunious tortfeasor." (*Aetna Health Plans of California, Inc. v. Yucaipa-Calimesa Joint Unified School Dist.* (1999) 72 Cal.App.4th 1175, 1190 [85 Cal.Rptr.2d 672].)

Secondary Sources

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, § 53
- California Tort Damages (Cont.Ed.Bar 1988) Bodily Injury, § 1.5
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 177, *Damages* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 65, *Damages* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 5:4

3903
Items of Economic Damage

The following are the specific items of economic damages claimed by [*name of plaintiff***]:**

[*Insert applicable instructions on items of economic damage.***]**

DIRECTIONS FOR USE

This instruction may not be necessary in every case. For example, if the plaintiff is not claiming any noneconomic damages, there would be no need to define the claimed damages as "economic." If this instruction is used, it should be followed by applicable instructions (see Instructions 3903A through 3903N) concerning the items of economic damage claimed by the plaintiff. These instructions should be inserted into this instruction as sequentially numbered items.

Secondary Sources

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, § 53
- California Tort Damages (Cont.Ed.Bar 1988) Bodily Injury, § 1.5
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 177, *Damages* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 65, *Damages* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 5:4

3903A
Medical Expenses—Past and Future (Economic Damage)

[*Insert number, e.g.,* "1."**] [Past] [and] [future] medical expenses.**

[To recover damages for past medical expenses, [*name of plaintiff***] must prove the reasonable cost of reasonably necessary medical care that [he/she] has received.]**

[To recover damages for future medical expenses, [*name of plaintiff***] must prove the reasonable cost of reasonably necessary medical care that [he/she] is reasonably certain to need in the future.]**

SOURCES AND AUTHORITY

- "[A] person injured by another's tortuous conduct is entitled to recover the reasonable value of medical care and services reasonably required and attributable to the tort." (*Hanif v. Housing Authority of Yolo County* (1988) 200 Cal.App.3d 635, 640 [246 Cal.Rptr. 192], internal citations omitted.)

- "It is established that 'the reasonable value of nursing services required by the defendant's tortious conduct may be recovered from the defendant even though the services were rendered by members of the injured person's family and without an agreement or expectation of payment. Where services in the way of attendance and nursing are rendered by a member of the plaintiff's family, the amount for which the defendant is liable is the amount for which reasonably competent nursing and attendance by others could have been obtained. The fact that the injured party had a legal right to the nursing services (as in the case of a spouse) does not, as a general rule, prevent recovery of their value ... ." (*Hanif, supra,* 200 Cal.App.3d at pp. 644–645, internal citations omitted.)

- "Nor is it necessary that the amount of the award equal the alleged medical expenses for it has long been the rule that the costs alone of medical treatment and hospitalization do not govern the recovery of such expenses. It must be shown additionally that the services were attributable to the accident, that they were necessary, and that the charges for such services were reasonable." (*Dimmick v. Alvarez* (1961) 196 Cal.App.2d 211, 216 [16 Cal.Rptr. 308].)

- "Implicit in the … cases is the notion that a plaintiff is entitled to recover up to, and no more than, the actual amount expended or incurred for past medical services so long as that amount is reasonable." (*Hanif, supra,* 200 Cal.App.3d at p 643.)

- " 'To entitle a plaintiff to recover present damages for apprehended future consequences, there must be evidence to show such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury.' " (*Bellman v. San Francisco High School Dist.* (1938) 11 Cal.2d 576, 588 [81 P.2d 894], internal citation omitted.)

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 1408
- 4 Levy et al., California Torts (1985–2000) Medical Expenses and Economic Loss, §§ 52.01, 52.03
- California Tort Damages (Cont.Ed.Bar 1988) Bodily Injury, §§ 1.19–1.31
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 177, *Damages* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 65, *Damages* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 5:12

3903B
Medical Monitoring—Toxic Exposure (Economic Damage)

[*Insert number, e.g.,* "2."**] The cost of future medical monitoring. To recover damages for this item, [***name of plaintiff***] must prove both of the following:**

1. **That as a result of the toxic exposure, the need for future monitoring is reasonably certain; and**

2. **That the monitoring is reasonable.**

In deciding these issues, you should consider the following:

(a) The significance and extent of [*name of plaintiff***]'s exposure to the chemical(s);**

(b) The toxicity of the chemical(s);

(c) The relative increase in [*name of plaintiff***]'s chance of getting the disease as a result of the exposure, when compared to:**
(i) [his/her] chances of developing the disease had [he/she] not been exposed, and
(ii) the chances that members of the public at large will develop the disease;

(d) The seriousness of the disease that may result from the exposure; [and]

(e) The medical benefit of early detection and diagnosis; [and]

(f) [*Insert other relevant factor(s).***]**

[[*Name of defendant***] is not required to pay for medical monitoring that is required for reasons other than [***name of plaintiff***]'s exposure to toxic chemicals.]**

[[*Name of defendant***] is only required to pay for additional or different monitoring that is required because of the toxic exposure.]**

SOURCES AND AUTHORITY

- "In the context of a toxic exposure action, a claim for medical monitoring seeks to recover the cost of future periodic medical examinations intended to facilitate early detection and treatment of disease caused by a plaintiff's exposure to toxic substances."

(*Potter v. Firestone Tire and Rubber Co.* (1993) 6 Cal.4th 965, 1004–1005 [25 Cal.Rptr.2d 550], internal citation omitted.)

- "[W]e hold that the cost of medical monitoring is a compensable item of damages where the proofs demonstrate, through reliable medical expert testimony, that the need for future monitoring is a reasonably certain consequence of a plaintiff's toxic exposure and that the recommended monitoring is reasonable. In determining the reasonableness and necessity of monitoring, the following factors are relevant: (1) the significance and extent of the plaintiff's exposure to chemicals; (2) the toxicity of the chemicals; (3) the relative increase in the chance of onset of disease in the exposed plaintiff as a result of the exposure, when compared to (a) the plaintiff's chances of developing the disease had he or she not been exposed, and (b) the chances of the members of the public at large of developing the disease; (4) the seriousness of the disease for which the plaintiff is at risk; and (5) the clinical value of early detection and diagnosis. Under this holding, it is for the trier of fact to decide, on the basis of competent medical testimony, whether and to what extent the particular plaintiff's exposure to toxic chemicals in a given situation justifies future periodic medical monitoring." (*Potter, supra*, 6 Cal.4th at p. 1009.)

- "The crucial distinction, in other words, is in the nature of the monitoring, not the nature of the harm. '[E]ven if a defendant negligently exposes a smoker to toxins that significantly increase the smoker's risk of cancer, that defendant is not liable for reasonably certain future medical monitoring costs unless the recommended monitoring calls for tests or examinations that are in addition to or different from the type of monitoring that the smoker should prudently undertake regardless of the subsequent toxic exposure.' This accords with the policy concern being addressed in that part of [*Potter*], which was to avoid 'open[ing] the floodgates of litigation.' If 'the plaintiff already remains responsible for any monitoring that is shown to be medically advisable due solely to his or her smoking or other preexisting condition,' he or she will have no incentive to sue for contribution from a subsequent tortfeasor who has caused no need for additional or different monitoring." (*Gutierrez v. Cassiar Mining Corp.* (1998) 64 Cal.App.4th 148, 156 [75 Cal.Rptr.2d 132], internal citations omitted.)

<u>Secondary Sources</u>

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 1408
- 4 Levy et al., California Torts (1985–2000) Medical Expenses and Economic Loss, § 52.01[3][b]
- California Tort Damages (Cont.Ed.Bar 2001 supp.) Bodily Injury, § 1.20A
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 177, *Damages* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 65, *Damages* (Matthew Bender)

3903C
Past and Future Lost Earnings (Economic Damage)

[*Insert number, e.g.,* "3.**"] [Past] [and] [future] lost earnings.**

[To recover damages for past lost earnings, [*name of plaintiff***] must prove the amount of [***insert one or more of the following:* **income/earnings/salary/wages] that [he/she] has lost to date.]**

[To recover damages for future lost earnings, [*name of plaintiff***] must prove the amount of [***insert one or more of the following:* **income/earnings/salary/ wages] [he/she] will be reasonably certain to lose in the future as a result of the injury.]**

DIRECTIONS FOR USE

This instruction is not intended for use in employment cases.

SOURCES AND AUTHORITY

- "We know of no rule of law that requires that a plaintiff establish the amount of his actual earnings at the time of the injury in order to obtain recovery for loss of wages although, obviously, the amount of such earnings would be helpful to the jury in particular situations." (*Rodriguez v. McDonnell Douglas Corp.* (1978) 87 Cal.App.3d 626, 656 [151 Cal.Rptr. 399].)

- " 'To entitle a plaintiff to recover present damages for apprehended future consequences, there must be evidence to show such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury.' " (*Bellman v. San Francisco High School Dist.* (1938) 11 Cal.2d 576, 588 [81 P.2d 894], internal citation omitted.)

- The Supreme Court has stated: " 'Under the prevailing American rule, a tort victim suing for damages for permanent injuries is permitted to base his recovery "on his prospective earnings for the balance of his life expectancy at the time of his injury undiminished by any shortening of that expectancy as a result of the injury." ' " (*Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137, 153 [211 Cal.Rptr. 368], internal citations omitted.)

- "[T]he majority view is that no deduction is made for the injured party's expected living expenses during the lost years." (*Overly v. Ingalls Shipbuilding, Inc.* (1999) 74 Cal.App.4th 164, 171 [87 Cal.Rptr.2d 626], internal citations omitted.)

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1404–1405
- 4 Levy et al., California Torts (1985–2000) Medical Expenses and Economic Loss, §§ 52.10–52.11
- California Tort Damages (Cont.Ed.Bar 1988) Bodily Injury, §§ 1.39–1.41
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 177, *Damages* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 65, *Damages* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 5:15

3903D
Lost Earning Capacity (Economic Damage)

[*Insert number, e.g.,* "4."**] The loss of [***name of plaintiff***]'s ability to earn money.**

To recover damages for the loss of the ability to earn money, [*name of plaintiff***] must prove the amount of money [he/she] would have been reasonably certain to earn if the injury had not occurred. It does not matter if [he/she] has no work history.**

DIRECTIONS FOR USE

This instruction is not intended for use in employment cases.

If lost profits are asserted as an element of damages, see Instruction 3903N, *Lost Profits (Economic Damage)*.

SOURCES AND AUTHORITY

- "Damages may be awarded for lost earning capacity without any proof of actual loss of earnings." (*Heiner v. Kmart Corp.* (2000) 84 Cal.App.4th 335, 348, fn. 6 [100 Cal.Rptr.2d 854], internal citations omitted.)

- "Loss of earning power is an element of general damages which can be inferred from the nature of the injury, without proof of actual earnings or income either before or after the injury, and damages in this respect are awarded for the loss of ability thereafter to earn money." (*Connelly v. Pre-Mixed Concrete Co.* (1957) 49 Cal.2d 483, 489 [319 P.2d 343].)

- " 'To entitle a plaintiff to recover present damages for apprehended future consequences, there must be evidence to show such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury.' " (*Bellman v. San Francisco High School Dist.* (1938) 11 Cal.2d 576, 588 [81 P.2d 894], internal citation omitted.)

- "[I]t is not necessary for a party to produce expert testimony on future earning ability although some plaintiff's attorneys may choose as a matter of trial tactics to present such evidence." (*Gargir v. B'Nei Akiva* (1998) 66 Cal.App.4th 1269, 1282 [78 Cal.Rptr.2d 557], internal citations omitted.)

- The Supreme Court has stated: " 'Under the prevailing American rule, a tort victim suing for damages for permanent injuries is permitted to base his recovery "on his prospective earnings for the balance of his life expectancy at the time of his injury

undiminished by any shortening of that expectancy as a result of the injury." ' " (*Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137, 153 [211 Cal.Rptr. 368], internal citations omitted.)

- "[T]he majority view is that no deduction is made for the injured party's expected living expenses during the lost years." (*Overly v. Ingalls Shipbuilding, Inc.* (1999) 74 Cal.App.4th 164, 175 [87 Cal.Rptr.2d 626], internal citations omitted.)

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1404–1405
- 4 Levy et al., California Torts (1985–2000) Medical Expenses and Economic Loss, §§ 52.10–52.11
- California Tort Damages (Cont.Ed.Bar 1988) Bodily Injury, § 1.42
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 177, *Damages* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 65, *Damages* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 5:15

3903E
Loss of Ability to Provide Household Services (Economic Damage)

[*Insert number, e.g.,* "5."**] The loss of [***name of plaintiff***]'s ability to provide household services.**

To recover damages for the loss of the ability to provide household services, [*name of plaintiff***] must prove the reasonable value of the services [he/she] would have been reasonably certain to provide to [his/her] household if the injury had not occurred.**

SOURCES AND AUTHORITY

- "Although the parties do not distinguish between the different types of lost years damages that were awarded, we note that lost household services damages are different than the other types of future earnings included in this category. Generally, household services damages represent the detriment suffered when injury prevents a person from contributing some or all of his or her customary services to the family unit. The justification for awarding this type of damage as part of the loss of future earnings award is that the plaintiff should be compensated for the value of the services he would have performed during the lost years which, because of the injury, will now have to be performed by someone else. (*Overly v. Ingalls Shipbuilding, Inc.* (1999) 74 Cal.App.4th 164, 171, fn. 5 [87 Cal.Rptr.2d 626], internal citation omitted.)

- " 'To entitle a plaintiff to recover present damages for apprehended future consequences, there must be evidence to show such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury.' " (*Bellman v. San Francisco High School Dist.* (1938) 11 Cal.2d 576, 588 [81 P.2d 894], internal citation omitted.)

Secondary Sources

- California Tort Damages (Cont.Ed.Bar 1988) Bodily Injury, §§ 1.64–1.66
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 177, *Damages* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 65, *Damages* (Matthew Bender)

3903F
Damage to Real Property (Economic Damage)

[*Insert number, e.g.,* "6."**] The harm to [***name of plaintiff***]'s property.**

To recover damages for harm to property, [*name of plaintiff***] must prove the reduction in the property's value or the reasonable cost of repairing the harm. [If there is evidence of both, [***name of plaintiff***] is entitled to the lesser of the two amounts.]**

To determine the reduction in value, you must determine the fair market value of the property before the harm occurred and then subtract the fair market value of the property immediately after the harm occurred. The difference is the reduction of value.

"Fair market value" is the highest price for the property that a willing buyer would have paid to a willing seller, assuming:

1. **That there is no pressure on either one to buy or sell; and**

2. **That the buyer and seller know all the uses and purposes for which the property is reasonably capable of being used.**

[If [*name of plaintiff***] has a genuine desire to repair the property for personal reasons, and if the costs of repair are reasonable given the damage to the property and the value after repair, then the costs of repair may be awarded even if they exceed the property's loss of value.]**

DIRECTIONS FOR USE

Before the last bracketed sentence is given, the judge should decide whether the claimed personal reasons are legally sufficient to justify the costs of repair.

SOURCES AND AUTHORITY

- "The measure applicable to ordinary cases involving tortious injury to real property is 'diminution in value' or 'cost of repair,' whichever is less." (*Housley v. City of Poway* (1993) 20 Cal.App.4th 801, 810 [24 Cal.Rptr.2d 554], internal citations omitted.)

- "Diminution in market value …, is not an absolute limitation; several other theories are available to fix appropriate compensation for the plaintiff's loss. 'There is no fixed, inflexible rule for determining the measure of damages for injury to, or

destruction of, property; whatever formula is most appropriate to compensate the injured party for the loss sustained in the particular case will be adopted.' " (*Heninger v. Dunn* (1980) 101 Cal.App.3d 858, 862 [162 Cal.Rptr. 104].)

- "Courts will normally not award costs of restoration if they exceed the diminution in the value of the property; the plaintiff may be awarded the lesser of the two amounts." (*Henninger, supra*, 101 Cal.App.3d at p. 862.)

- "Defendant … contends that the trial court awarded excessive damages, on the ground that when the cost of restoration is less than the depreciation in value, the former is the measure of damages. This contention cannot be sustained. Plaintiffs established their damages by showing the depreciation in value. It was then incumbent upon defendants to come forward with proof that the cost of restoration would be less." (*Herzog v. Grosso* (1953) 41 Cal.2d 219, 226 [259 P.2d 429], internal citations omitted.)

- "Where a plaintiff establishes damages by showing depreciation in the value of real property, courts have held defendants to the burden of coming forward with proof that cost of restoration would be less. It follows that when a plaintiff proves damages by showing the cost of repairs it should be incumbent on the defendant to introduce evidence that the repair costs exceed the value of the property." (*Armitage v. Decker* (1990) 218 Cal.App.3d 887, 905 [267 Cal.Rptr. 399], internal citations omitted.)

- "The 'fair market value' of real property is 'the best price obtainable from a purchaser on a cash sale.' It 'is measured by the highest price the property would command if offered for sale in the open market with a reasonable time allowed to the seller to find a purchaser who will buy with a knowledge of all the uses to which it may be put.' " (*CMSH Co. v. Antelope Development, Inc.* (1990) 223 Cal.App.3d 174, 182 [272 Cal.Rptr. 605], internal citations omitted.)

- "Where, as here, the plaintiffs have a personal reason to repair and the costs of repair are not unreasonable in light of the damage to the property and the value after repair, costs of repair which exceed the diminution in value may be awarded." (*Orndorff v. Christiana Community Builders* (1990) 217 Cal.App.3d 683, 687 [266 Cal.Rptr. 193], internal citations omitted.)

- "Contrary to the defendants' argument, the 'personal reason' exception does not require that the [plaintiffs] own a 'unique' home. Rather, all that is required is some personal use by them and a bona fide desire to repair or restore." (*Orndorff, supra*, 217 Cal.App.3d at p. 688.)

<u>Secondary Sources</u>

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1461–1462
- 4 Levy et al., California Torts (1985–2000) Medical Expenses and Economic Loss, § 52.35

- California Real Property Remedies Practice (Cont.Ed.Bar 1982) Damages for Injury to Real Property, § 11.5
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 177, *Damages* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 65, *Damages* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 5:19

3903G
Loss of Use of Real Property (Economic Damage)

[*Insert number, e.g.,* "7."**] The loss of use of [***name of plaintiff***]'s [***insert identification of real property***].**

To recover damages for the loss of use, [*name of plaintiff***] must prove the reasonable cost to rent similar property for the time when [he/she/it] could not use [his/her/its] own property.**

DIRECTIONS FOR USE

This instruction is not intended for cases in which the plaintiff is a landlord seeking to recover compensation for lost rents. A more appropriate instruction for that situation is Instruction 3903N, *Lost Profits (Economic Damage)*.

SOURCES AND AUTHORITY

- "[T]he general measure of damages where injury to property is capable of being repaired is the reasonable cost of repair together with the value of lost use during the period of injury." (*Erlich v. Menezes* (1999) 21 Cal.4th 543, 555 [87 Cal.Rptr.2d 886], internal citation omitted.)

- "There is no question that when cost of restoration is the correct measure of damages for injury to real property, compensation for loss of use … would be appropriate." (*Ferraro v. Southern California Gas Co.* (1980) 102 Cal.App.3d 33, 51 [162 Cal.Rptr. 238].)

- When real property has been damaged so that it cannot be restored, damages for loss of use may not be recovered. (*Ferraro, supra,* 102 Cal.App.3d at pp. 50–51.)

- Restatement Second of Torts section 931 provides:

  > If one is entitled to a judgment for the detention of, or for preventing the use of, land or chattels, the damages include compensation for
  > (a) the value of the use during the period of detention or prevention or the value of the use of or the amount paid for a substitute, and
  > (b) harm to the subject matter or other harm of which the detention is the legal cause.

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 1462
- 4 Levy et al., California Torts (1985–2000) Medical Expenses and Economic Loss, § 52.36
- California Real Property Remedies Practice (Cont.Ed.Bar 1982) Damages for Injury to Real Property, § 11.5
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 177, *Damages* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 65, *Damages* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 5:19

3903H
Damage to Annual Crop (Economic Damage)

[*Insert number, e.g.,* "8."**] The harm to [***name of plaintiff***]'s crop.**

[Damages for the destruction of an entire annual crop are determined as follows:

1. **Determine the expected market value of the crop before the harm occurred; and**

2. **Subtract from this amount the estimated costs of producing and marketing the crop, excluding costs that have already been paid by [***name of plaintiff***].]**

[Damages for the destruction of part of an annual crop are determined as follows:

1. **Determine the expected market value of the crop before the harm occurred;**

2. **Subtract from this amount the estimated costs of producing and marketing the crop. This is the expected net profit.**

3. **Next, subtract the actual cost of producing and marketing the surviving crop from the actual receipts. This is actual net profit.**

4. **Subtract number 3 from number 2. This amount is [***name of plaintiff***]'s damages for this loss.]**

DIRECTIONS FOR USE

Select one of the bracketed options depending on whether the plaintiff is seeking damages for the destruction of all or part of a crop.

SOURCES AND AUTHORITY

- "They rely on the distinction drawn between the wrongful destruction of perennial crops, such as volunteer grass for grazing purposes, and annually planted crops. Thus, in the former case the proper measure of damages is the difference in the rental value of the property with and without the crops, while in the latter case the proper measure of damages is the market value of the estimated product at the time of destruction, less the cost of producing and marketing the same." (*Wolfsen v. Hathaway* (1948) 32 Cal.2d 632, 644 [198 P.2d 1], internal citations omitted, overruled on other grounds in *Flores v. Arroyo* (1961) 56 Cal.2d 492 [15 Cal.Rptr. 87].)

- "We concede that the proper method is to show what the crop would have been and to deduct the probable cost of producing and selling such crop with the difference between market value and costs constituting the amount of damages. We have so held in [cited cases]. The rule is clearly set forth also in other California cases and authorities." (*Spinelli v. Tallcott* (1969) 272 Cal.App.2d 589, 592 [77 Cal.Rptr. 481], internal citations omitted.)

- "The proper measure of damages is the market value of the estimated product at the time of destruction, less the cost of producing and marketing the same." (*Parks v. Atwood Crop Dusters, Inc.* (1953) 118 Cal.App.2d 368, 373 [257 P.2d 653], internal citation omitted.)

- "The correct rule for the measurement of damages for the partial destruction of a growing crop was discussed in *Rystrom v. Sutter Butte Canal Co.*, 72 Cal.App. 518, 522-523 [249 P. 53]. In that case a growing crop of rice had been damaged. The court pointed out that estimated costs of production must first be deducted from expected gross receipts to arrive at the expected net profit. Next, the court said, actual cost of production must be deducted from actual receipts to arrive at actual net profit. Finally, deducting actual net profit from expected net profit fixes the actual damage." (*Solis v. County of Contra Costa* (1967) 251 Cal.App.2d 844, 847–848 [60 Cal.Rptr. 99].)

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 1469, p. 940
- 4 Levy et al., California Torts (1985–2000) Medical Expenses and Economic Loss, § 52.34[1]
- California Real Property Remedies Practice (Cont.Ed.Bar 1982) Damages for Injury to Real Property, § 11.14
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 177, *Damages* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 65, *Damages* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 5:19

3903I
Damage to Perennial Crop (Economic Damage)

[*Insert number, e.g.,* "9."**] The harm to [***name of plaintiff***]'s crop.**

[Damages for destruction of [*describe perennial crop***] are determined as follows. For the time period from the destruction of the crop until the crop can be restored you must:**

1. **Determine the rental value of the land with the crop; and**

2. **Subtract from this amount the rental value of the land without the crop.]**

[Damages for destruction of [*describe perennial crop***], which can be harvested and sold, are determined as follows:**

1. **Determine the expected market value of the crop before the harm occurred; and**

2. **Subtract from this amount the estimated costs of producing and marketing the crop, excluding costs that have already been paid by [***name of plaintiff***].]**

[If the [plants/roots/seeds] responsible for producing the crop are destroyed, the measure of damages may also include the costs of [reseeding/replanting].]

DIRECTIONS FOR USE

If the plaintiff claims damages for multiple crops, damages must be calculated for each crop that would have been produced until the land was restored.

SOURCES AND AUTHORITY

- "They rely on the distinction drawn between the wrongful destruction of perennial crops, such as volunteer grass for grazing purposes, and annually planted crops. Thus, in the former case the proper measure of damages is the difference in the rental value of the property with and without the crops, while in the latter case the proper measure of damages is the market value of the estimated product at the time of destruction, less the cost of producing and marketing the same." (*Wolfsen v. Hathaway* (1948) 32 Cal.2d 632, 644 [198 P.2d 1], overruled on other grounds in *Flores v. Arroyo* (1961) 56 Cal.2d 492, 497 [15 Cal.Rptr. 87].)

- "Where the roots of the grass in a pasture have been destroyed by water or fire so as to prevent the matured stocks from automatically reseeding the field, the measure of damages includes not only the rental value of the pasture, but also the additional cost of reseeding the field." (*Miller & Lux, Inc. v. Pinelli* (1927) 84 Cal.App. 42, 49 [257 P. 573].)

- "Upon the foregoing authorities, and upon good reason, we conclude that the measure of damages for the appropriation or destruction of pasturage, which is used for grazing purposes, where the grass cannot be reasonably severed and marketed separate from the land, is the reasonable rental value thereof in that vicinity for pasture purposes." (*Miller & Lux, Inc., supra,* 84 Cal.App. at p. 51.)

- "The measure of damages for the destruction of or injury to fruit, nut, or other productive trees is generally the difference in the value of the land before and after the destruction or injury. Damages may be additionally measured by the value of the trees on the premises in their growing state. Some courts have also awarded damages for the resulting crop loss. Where annual crops are damaged each year for several years, a grower may recover for loss of the crops during those years, the increased labor in the care of the land, and damages for injury to the trees themselves. [¶] More recently, the measure of damages for the destruction of fruit trees has included the costs of replacing the trees or restoring the property to its condition prior to the injury. In *Baker v. Ramirez,* the court held that the cost of restoring an orange grove was the most appropriate measure of damages, where there was no impediment to replacing the orange trees and it was reasonable to replace the trees because only a small portion of the grove was damaged. The court noted that the difference between the value of the property before and after the injury was only one possible measure of damages." (*Santa Barbara Pistachio Ranch v. Chowchilla Water Dist.* (2001) 88 Cal.App.4th 439, 447 [105 Cal.Rptr.2d 856, 861], internal citations omitted.)

<u>Secondary Sources</u>

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 1469, p. 940
- 4 Levy et al., California Torts (1985–2000) Medical Expenses and Economic Loss, § 52.34[1]
- California Real Property Remedies Practice (Cont.Ed.Bar 1982) Damages for Injury to Real Property, § 11.14
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 177, *Damages* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 65, *Damages* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 5:19

3903J
Damage to Personal Property (Economic Damage)

[*Insert number, e.g.,* "10."**] The harm to [***name of plaintiff***]'s [***item of personal property***].**

To recover damages for harm to personal property, [*name of plaintiff***] must prove the reduction in the [***item of personal property***]'s value or the reasonable cost of repairing it, whichever is less. [If there is evidence of both, [***name of plaintiff***] is entitled to the lesser of the two amounts.]**

To determine the reduction in value, you must determine the fair market value of the [*item of personal property***] before the harm occurred and then subtract the fair market value of the [***item of personal property***] immediately after the harm occurred.**

"Fair market value" is the highest price that a willing buyer would have paid to a willing seller, assuming:

1. **That there is no pressure on either one to buy or sell; and**

2. **That the buyer and seller are fully informed of the condition and quality of the [***item of personal property***].**

[If you find that [*name of plaintiff***]'s [***item of personal property***] cannot be completely repaired, the damages are the difference between its value before the harm and its value after the repairs have been made, plus the reasonable cost of making the repairs. The total amount awarded must not exceed the [***item of personal property***]'s value before the harm occurred.]**

SOURCES AND AUTHORITY

- "The general rule is that the measure of damages for tortious injury to personal property is the difference between the market value of the property immediately before and immediately after the injury, or the reasonable cost of repair if that cost be less than the diminution in value. This rule stems from the basic code section fixing the measure of tort damage as 'the amount which will compensate for all the detriment proximately caused thereby.' [citations]" (*Pacific Gas & Electric Co. v. Mounteer* (1977) 66 Cal.App.3d 809, 812 [136 Cal.Rptr. 280])

- "It has also been held that the price at which a thing can be sold at public sale, or in the open market, is some evidence of its market value. In *San Diego Water Co. v. San Diego*, the rule is announced that the judicial test of market value depends upon the fact that the property in question is marketable at a given price, which in turn depends upon the fact that sales of similar property have been, and are being, made at

ascertainable prices. In *Quint v. Dimond*, it was held competent to prove market value in the nearest market." (*Tatone v. Chin Bing* (1936) 12 Cal.App.2d 543, 545–546 [55 P.2d 933], internal citations omitted.)

- " 'Where personal property is injured but not wholly destroyed, one rule is that the plaintiff may recover the depreciation in value (the measure being the difference between the value immediately before and after the injury), and compensation for the loss of use.' In the alternative, the plaintiff may recover the reasonable cost of repairs as well as compensation for the loss of use while the repairs are being accomplished. If the cost of repairs exceeds the depreciation in value, the plaintiff may only recover the lesser sum. Similarly, if depreciation is greater than the cost of repairs, the plaintiff may only recover the reasonable cost of repairs. If the property is wholly destroyed, the usual measure of damages is the market value of the property." (*Hand Electronics, Inc. v. Snowline Joint Unified School Dist.* (1994) 21 Cal.App.4th 862, 870 [26 Cal.Rptr.2d 446], internal citations omitted.)

- The cost of replacement is not a proper measure of damages for injury to personal property. (*Hand Electronics, supra,* 21 Cal.App.4th at p. 871.)

- "When conduct complained of consists of intermeddling with personal property 'the owner has a cause of action for trespass or case, and may recover only the actual damages suffered by reason of the impairment of the property or the loss of its use.' " (*Itano v. Colonial Yatch Anchorage* (1968) 267 Cal.App.2d 84, 90 [72 Cal.Rptr. 823], internal citations omitted.)

- "The measure of damage for wrongful injury to personal property is that difference between the market value of the property immediately before and immediately after the injury, or the reasonable cost of repair if such cost be less than the depreciation in value." (*Smith v. Hill* (1965) 237 Cal.App.2d 374, 388 [47 Cal.Rptr. 49], internal citations omitted.)

- "[I]t is said . . . that 'if the damaged property cannot be completely repaired, the measure of damages is the difference between its value before the injury and its value after the repairs have been made, plus the reasonable cost of making the repairs. The foregoing rule gives the plaintiff the difference between the value of the machine before the injury and its value after such injury, the amount thereof being made up of the cost of repairs and the depreciation notwithstanding such repairs.' The rule urged by defendant, which limits the recovery to the cost of repairs, is applicable only in those cases in which the injured property 'can be entirely repaired.' This latter rule presupposes that the damaged property can be restored to its former state with no depreciation in its former value." (*Merchant Shippers Association v. Kellogg Express and Draying Co.* (1946) 28 Cal.2d 594, 600 [170 P.2d 923], internal citations omitted.)

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1449–1452, pp. 925–927
- 4 Levy et al., California Torts (1985–2000) Medical Expenses and Economic Loss, § 52.31
- California Tort Damages (Cont.Ed.Bar 1988) Vehicles and Other Personal Property, §§ 13.8–13.11
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 177, *Damages* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 65, *Damages* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 5:16

3903K
Loss or Destruction of Personal Property (Economic Damage)

[*Insert number, e.g.,* "11."**] The [loss/destruction] of [***name of plaintiff***]'s [***item of personal property***].**

To recover damages for the [loss/destruction], [*name of plaintiff***] must prove the fair market value of the [***item of personal property***] just before the harm occurred.**

"Fair market value" is the highest price that a willing buyer would have paid to a willing seller, assuming:

1. **That there is no pressure on either one to buy or sell; and**

2. **That the buyer and seller are fully informed of the condition and quality of the [***item of personal property***].**

SOURCES AND AUTHORITY

- " 'As a general rule the measure of damage for the loss or destruction of personal property is the value of the property at the time of such loss or destruction.' " (*Hand Electronics, Inc. v. Snowline Joint Unified School Dist.* (1994) 21 Cal.App.4th 862, 870 [26 Cal.Rptr.2d 446], internal citation omitted.)

- "It is well established that under [Civil Code] section 3333, the measure of damages for the loss or destruction of personal property is generally determined by the value of the property at the time of such loss or destruction." (*Pelletier v. Eisenberg* (1986) 177 Cal.App.3d 558, 567 [233 Cal.Rptr. 84].)

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 1453, pp. 927–928
- 4 Levy et al., California Torts (1985–2000) Medical Expenses and Economic Loss, § 52.32
- California Tort Damages (Cont.Ed.Bar 1988) Vehicles & Other Personal Property, § 13.6
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 177, *Damages* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 65, *Damages* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 5:17

3903L
Damage to Personal Property Having Special Value (Civ. Code, § 3355)
(Economic Damage)

[*Insert number, e.g.,* "12."**] The unique value of [***name of plaintiff***]'s [***item of personal property***].**

To recover damages for the unique value, [*name of plaintiff***] must prove all of the following:**

1. **That the [***item of personal property***] had some market value;**

2. **That the [***item of personal property***] had unique value to [***name of plaintiff***]; and**

3. **[That [***name of defendant***] had notice of this unique value before the harm;]**

   [or]

   [That [*name of defendant***]'s conduct was intentional and wrongful.]**

No fixed standard exists for deciding the amount of this value. You must use your judgment to decide a reasonable amount based on the evidence and your common sense.

DIRECTIONS FOR USE

The judge should determine whether the peculiar value claimed by the plaintiff is legally sufficient. While the subcommittee been unable to locate cases that state this rule explicitly, cases have upheld the giving of this type of instruction where there is substantial evidence of peculiar value.

SOURCES AND AUTHORITY

- Civil Code section 3355 provides: "Where certain property has a peculiar value to a person recovering damages for deprivation thereof, or injury thereto, that may be deemed to be its value against one who had notice thereof before incurring a liability to damages in respect thereof, or against a willful wrongdoer."

- "[T]his section deals with property which has a market value and also a peculiar value to the owner, and not with property having no market value." (*Zvolanek v. Bodger Seeds, Ltd.* (1935) 5 Cal.App.2d 106, 110 [42 P.2d 92].)

- "[T]he question of whether plaintiff proved 'peculiar value' was a factual question for the determination of the jury and that question was properly submitted to it for decision." (*King v. Karpe* (1959) 170 Cal.App.2d 344, 349 [338 P.2d 979].)

Secondary Sources

- 4 Levy et al., California Torts (1985–2000) Medical Expenses and Economic Loss, § 52.33
- California Tort Damages (Cont.Ed.Bar 1988) Vehicles and Other Personal Property, § 13.7
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 177, *Damages* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 65, *Damages* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 5:17

3903M
Loss of Use of Personal Property (Economic Damage)

[*Insert number, e.g.,* "13."**] The loss of use of [***name of plaintiff***]'s [***item of personal property***].**

To recover damages for loss of use, [*name of plaintiff***] must prove the reasonable cost to rent a similar [***item of personal property***] for the amount of time reasonably necessary to repair or replace the [***item of personal property***].**

SOURCES AND AUTHORITY

- "[A]n owner's recovery for being deprived of the use of a damaged vehicle is generally to be determined with reference to the period of time reasonably required for the making of repairs." (*Valencia v. Shell Oil Co*. (1944) 23 Cal.2d 840, 844 [147 P.2d 558].)

- "There appears to be no logical or practical reason why a distinction should be drawn between cases in which the property is totally destroyed and those in which it has been injured but is repairable, and we have concluded that when the owner of a negligently destroyed commercial vehicle has suffered injury by being deprived of the use of the vehicle during the period required for replacement, he is entitled, upon proper pleading and proof, to recover for loss of use in order to 'compensate for all the detriment proximately caused' by the wrongful destruction." (*Reynolds v. Bank of America National Trust & Savings Assn.* (1959) 53 Cal.2d 49, 50–51 [345 P.2d 926].)

- " 'Loss of use' of property is different from 'loss' of property. To take a simple example, assume that an automobile is stolen from its owner. The value of the 'loss of use' of the car is the rental value of a substitute vehicle; the value of the 'loss' of the car is its replacement cost. The nature of 'loss of use' damages is described in California Jurisprudence Third as: 'The measure of damages for the loss of use of personal property may be determined with reference to the rental value of similar property which the plaintiff can hire for use during the period when he is deprived of the use of his own property.' " (*Collin v. American Empire Insurance Co.* (1994) 21 Cal.App.4th 787, 818 [26 Cal.Rptr.2d 391], internal citations omitted.)

<u>Secondary Sources</u>

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 1454, pp. 928–929
- 4 Levy et al., California Torts (1985–2000) Medical Expenses and Economic Loss, § 52.32

- California Tort Damages (Cont.Ed.Bar 1988) Vehicles and Other Personal Property, § 13.6
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 177, *Damages* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 65, *Damages* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 5:17

3903N
Lost Profits (Economic Damage)

[*Insert number, e.g.,* "13."**] Lost profits.**

To recover damages for lost profits, [*name of plaintiff***] must prove it is reasonably certain [he/she/it] would have earned profits but for [***name of defendant***]'s conduct.**

To decide the amount of damages for lost profits, you must determine the gross amount [*name of plaintiff***] would have received but for [***name of defendant***]'s conduct and then subtract from that amount the expenses [including the value of the [***specify categories of evidence, such as labor/materials/rents/all expenses/interest of the capital employed***]] [***name of plaintiff***] would have had if [***name of defendant***]'s conduct had not occurred.**

The amount of the lost profits need not be calculated with mathematical precision, but there must be a reasonable basis for computing the loss.

DIRECTIONS FOR USE

This instruction is not intended for personal injury cases. Instead, use Instruction 3903C, *Past and Future Lost Earnings (Economic Damage)*. (See *Pretzer v. California Transit Co.* (1930) 211 Cal. 202, 207–208 [294 P. 382].)

Insertion of specified types of costs to be deducted from gross earnings is optional, depending on the facts of the case. Other types of costs may be inserted as appropriate.

SOURCES AND AUTHORITY

- "The measure of damages in this state for the commission of a tort, as provided by statute, is that amount which will compensate the plaintiff for all detriment sustained by him as the proximate result of the defendant's wrong, regardless of whether or not such detriment could have been anticipated by the defendant. It is well established in California, moreover, that such damages may include loss of anticipated profits where an established business has been injured." (*Fibreboard Paper Products Corp. v. East Bay Union of Machinists, Local 1304, United Steelworkers of America, AFL-CIO* (1964) 227 Cal.App.2d 675, 702 [39 Cal.Rptr. 64], internal citations omitted.)

- "[E]vidence of lost profits must be unspeculative and in order to support a lost profits award the evidence must show 'with reasonable certainty both their occurrence and the extent thereof.' " (*Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 907 [215 Cal.Rptr. 679], internal citation omitted.)

- "It is enough to demonstrate a reasonable probability that profits would have been earned except for the defendant's conduct. The plaintiff has the burden to produce the best evidence available in the circumstances to attempt to establish a claim for loss of profits." (*S. C. Anderson, Inc. v. Bank of America* (1994) 24 Cal.App.4th 529, 536 [30 Cal.Rptr.2d 286], internal citations omitted.)

- "Damages for loss of profits may be denied to an 'unestablished' or new business as being too uncertain and speculative if they cannot be calculated with reasonable certainty. 'The ultimate test is whether there has been "operating experience sufficient to permit a reasonable estimate of probable income and expense" … or, … "anticipated profits dependent upon future events are allowed where their nature and occurrence can be shown by evidence of reasonable reliability." ' " (*Maggio, Inc. v. United Farm Workers* (1991) 227 Cal.App.3d 847, 870 [278 Cal.Rptr. 250], internal citations omitted.)

- The rule denying profits to an unestablished business "is, however, 'not a hard and fast one.' The issue is, rather, whether the damages can be calculated with reasonable certainty." (*S. Jon Kreedman & Co. v. Meyers Bros. Parking-Western Corp.* (1976) 58 Cal.App.3d 173, 184–185 [130 Cal.Rptr. 41], internal citations omitted.)

- "Lost profits to an established business may be recovered if their extent and occurrence can be ascertained with reasonable certainty; once their existence has been so established, recovery will not be denied because the amount cannot be shown with mathematical precision. Historical data, such as past business volume, supply an acceptable basis for ascertaining lost future profits. In some instances, lost profits may be recovered where plaintiff introduces evidence of the profits lost by similar businesses operating under similar conditions. In either case, recovery is limited to net profits." (*Berge v. International Harvester Co.* (1983) 142 Cal.App.3d 152, 161–162 [190 Cal.Rptr. 815], internal citations omitted.)

- "If the occurrence and extent of anticipated profits is shown by evidence of reasonable reliability damages are recoverable; uncertainty as to the amount of damages is not fatal; uncertainties are to be resolved against [defendant]." (*Aronowicz v. Nalley's, Inc.* (1972) 30 Cal.App.3d 27, 40, fn. 11 [106 Cal.Rptr. 424], internal citations omitted.)

<u>Secondary Sources</u>

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 1463, pp. 935–936
- 4 Levy et al., California Torts (1985–2000) Medical Expenses and Economic Loss, §§ 52.12, 52.37
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 177, *Damages* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 65, *Damages* (Matthew Bender)

3904
Present Cash Value

If you decide that [*name of plaintiff*]'s harm includes future [economic] damages for [loss of earnings/future medical expenses/lost profits/ [*insert other damages*]], then the amount of those future damages must be reduced to their present cash value. This is necessary because money received now will, through investment, grow to a larger amount in the future.

To find present cash value, you must determine the amount of money that, if reasonably invested today, will provide [*name of plaintiff*] with the amount of [his/her/its] future damages.

[You may consider expert testimony in determining the present cash value of future [economic] damages.]

[You will be provided with a table to help you calculate the present cash value.]

DIRECTIONS FOR USE

Give the second bracketed option if parties have stipulated to a discount rate or if evidence from which the jury can determine an appropriate discount rate has been presented. A table appropriate to this calculation should be provided. (See *Schiernbeck v. Haight* (1992) 7 Cal.App.4th 869, 877 [9 Cal.Rptr.2d 716].)

Expert testimony will usually be required to accurately establish present values for future economic losses. However, tables may be helpful to the jury in many cases.

SOURCES AND AUTHORITY

- "The present value of a gross award of future damages is that sum of money prudently invested at the time of judgment which will return, over the period the future damages are incurred, the gross amount of the award. 'The concept of present value recognizes that money received after a given period is worth less than the same amount received today. This is the case in part because money received today can be used to generate additional value in the interim.' The present value of an award of future damages will vary depending on the gross amount of the award, and the timing and amount of the individual payments." (*Holt v. Regents of the University of California* (1999) 73 Cal.App.4th 871, 878 [86 Cal.Rptr.2d 752], internal citations omitted.)

- "Exact actuarial computation should result in a lump-sum, present-value award which if prudently invested will provide the beneficiaries with an investment return allowing them to regularly withdraw matching support money so that, by reinvesting the surplus earnings during the earlier years of the expected support period, they may maintain the anticipated future support level throughout the period and, upon the last withdrawal, have depleted both principal and interest." (*Canavin v. Pacific Southwest Airlines* (1983) 148 Cal.App.3d 512, 521 [196 Cal.Rptr. 82].)

- The Supreme Court has held that "it is not a violation of the plaintiff's jury trial right for the court to submit only the issue of the gross amount of future economic damages to the jury, with the timing of periodic payments—and hence their present value—to be set by the court in the exercise of its sound discretion." (*Salgado v. County of Los Angeles* (1998) 19 Cal.4th 629, 649 [80 Cal.Rptr.2d 46], internal citation omitted.)

- "Neither party introduced any evidence of compounding or discounting factors, including how to calculate an appropriate rate of return throughout the relevant years. Under such circumstances, the 'jury would have been put to sheer speculation in determining … "the present sum of money which … will pay to the plaintiff … the equivalent of his [future economic] loss … ." ' " (*Schiernbeck v. Haight* (1992) 7 Cal.App.4th 869, 877 [9 Cal.Rptr.2d 716], internal citations omitted.)

<u>Secondary Sources</u>

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 1326, pp. 783–784
- 4 Levy et al., California Torts (1985–2000) Medical Expenses and Economic Loss, §§ 52.21–52.22
- California Tort Damages (Cont.Ed.Bar 1988) Bodily Injury, § 1.96
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 177, *Damages* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 65, *Damages* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 5:22

3905
Items of Noneconomic Damage

The following are the specific items of noneconomic damages claimed by [*name of plaintiff***]:**

[*Insert applicable instructions on items of noneconomic damage.***]**

DIRECTIONS FOR USE

This instruction may not be needed in every case. For example, if the plaintiff is not claiming any economic damages, there is no need to define the claimed damages as "noneconomic." If this instruction is used, it should be followed by applicable instructions concerning the items of noneconomic damage claimed by the plaintiff. These instructions should be inserted into this instruction as sequentially numbered items.

Secondary Sources

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, § 53, pp. 113–114
- California Tort Damages (Cont.Ed.Bar 1988) Bodily Injury, § 1.5
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 177, *Damages* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 65, *Damages* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 5:4

3905A
Physical Pain, Mental Suffering, and Emotional Distress
(Noneconomic Damage)

[*Insert number, e.g.,* "1."**] [Past] [and] [future] [physical pain/mental suffering/loss of enjoyment of life/disfigurement/physical impairment/ inconvenience/grief/anxiety/ humiliation/emotional distress [***insert other damages***]].**

[To recover for future [*insert item of pain and suffering***], [***name of plaintiff***] must prove that [he/she] is reasonably certain to suffer that harm.]**

No fixed standard exists for deciding the amount of these damages. You must use your judgment to decide a reasonable amount based on the evidence and your common sense.

[Your award for noneconomic damages should not be reduced to present cash value.]

DIRECTIONS FOR USE

Insert the bracketed terms that best describe the damages claimed by the plaintiff. The final bracketed sentence should be used if the plaintiff is claiming both economic and noneconomic damages.

SOURCES AND AUTHORITY

- "In general, courts have not attempted to draw distinctions between the elements of 'pain' on the one hand, and 'suffering' on the other; rather, the unitary concept of 'pain and suffering' has served as a convenient label under which a plaintiff may recover not only for physical pain but for fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation, indignity, embarrassment, apprehension, terror or ordeal. Admittedly these terms refer to subjective states, representing a detriment which can be translated into monetary loss only with great difficulty. But the detriment, nevertheless, is a genuine one that requires compensation, and the issue generally must be resolved by the 'impartial conscience and judgment of jurors who may be expected to act reasonably, intelligently and in harmony with the evidence.' " (*Capelouto v. Kaiser Foundation Hospitals* (1972) 7 Cal.3d 889, 892–893 [103 Cal.Rptr. 856], internal citations and footnote omitted.)

- "Compensatory damages may be awarded for bodily harm without proof of pecuniary loss. The fact that there is no market price calculus available to measure the amount of appropriate compensation does not render such a tortious injury noncompensable. 'For harm to body, feelings or reputation, compensatory damages reasonably

proportioned to the intensity and duration of the harm can be awarded without proof of amount other than evidence of the nature of the harm. There is no direct correspondence between money and harm to the body, feelings or reputation. There is no market price for a scar or for loss of hearing since the damages are not measured by the amount for which one would be willing to suffer the harm. The discretion of the judge or jury determines the amount of recovery, the only standard being such an amount as a reasonable person would estimate as fair compensation.' " (*Duarte v. Zachariah* (1994) 22 Cal.App.4th 1652, 1664–1665 [28 Cal.Rptr.2d 88], internal citations omitted.)

- "The general rule of damages in tort is that the injured party may recover for all detriment caused whether it could have been anticipated or not. In accordance with the general rule, it is settled in this state that mental suffering constitutes an aggravation of damages when it naturally ensues from the act complained of, and in this connection mental suffering includes nervousness, grief, anxiety, worry, shock, humiliation and indignity as well as physical pain." (*Crisci v. The Security Insurance Co. of New Haven* (1967) 66 Cal.2d 425, 433 [58 Cal.Rptr. 13], internal citations omitted.)

- " 'To entitle a plaintiff to recover present damages for apprehended future consequences, there must be evidence to show such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury.' " (*Bellman v. San Francisco High School Dist.* (1938) 11 Cal.2d 576, 588 [81 P.2d 894], internal citation omitted.)

- "To avoid confusion regarding the jury's task in future cases, we conclude that when future noneconomic damages are sought, the jury should be instructed expressly that they are to assume that an award of future damages is a present value sum, i.e., they are to determine the amount in current dollars paid at the time of judgment that will compensate a plaintiff for future pain and suffering. In the absence of such instruction, unless the record clearly establishes otherwise, awards of future damages will be considered to be stated in terms of their present or current value." (*Salgado v. County of Los Angeles* (1998) 19 Cal.4th 629, 646–647 [80 Cal.Rptr.2d 46].)

<u>Secondary Sources</u>

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1409–1413, pp. 879–884
- 4 Levy et al., California Torts (1985–2000) Pain and Suffering, §§ 51.01–51.14
- California Tort Damages (Cont.Ed.Bar 1988) Bodily Injury, §§ 1.68–1.74
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 177, *Damages* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 65, *Damages* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 5:10

3920
Loss of Consortium (Noneconomic Damage)

[*Name of plaintiff***] claims that [he/she] has been harmed by the injury to [his/her] [husband/wife]. If you decide that [***name of injured spouse***] has proved [his/her] claim against [***name of defendant***], you also must decide how much money, if any, will reasonably compensate [***name of plaintiff***] for loss of [his/her] [husband/wife]'s companionship and services, including:**

1. **The loss of love, companionship, comfort, care, assistance, protection, affection, society, moral support; and**

2. **The loss of the enjoyment of sexual relations [or the ability to have children].**

[*Name of plaintiff***] may recover for harm [he/she] proves [he/she] has suffered to date and for harm [he/she] is reasonably certain to suffer in the future. No fixed standard exists for deciding the amount of these damages. You must use your judgment to decide a reasonable amount based on the evidence and your common sense.**

Do not include in your award any compensation for the following:

1. **The loss of financial support from [***name of injured spouse***];**

2. **Personal services, such as nursing, that [***name of plaintiff***] has provided or will provide to [***name of injured spouse***]; or**

3. **Any loss of earnings that [***name of plaintiff***] has suffered by giving up employment to take care of [***name of injured spouse***].**

DIRECTIONS FOR USE

Depending on the circumstances of the case, it may be appropriate to add after "to be suffered in the future" either "during the period of [*name of injured spouse*]'s disability" or "as measured by the life expectancy that [*name of injured spouse*] had before [his/her] injury or by the life expectancy of [*name of plaintiff*], whichever is shorter."

Insofar as this instruction addresses the loss of a spouse's assistance in operating the household, it is not intended to include the cost of obtaining household services. (See *Kellogg v. Asbestos Corp. Ltd.* (1996) 41 Cal.App.4th 1397, 1408 [49 Cal.Rptr.2d 256]: "Although the trial court labeled the damages awarded Mrs. Kellogg as being for 'loss of consortium' (a noneconomic damages item under Proposition 51), much of the testimony at trial actually involved the 'costs of obtaining substitute domestic services' on her

behalf (an economic damage item in the statute). (See Civ. Code, § 1431.2, subd. (b)(1), (2).)"

SOURCES AND AUTHORITY

- Civil Code section 1431.2(b)(2) provides, in part: "For purposes of this section, the term 'non-economic damages' means subjective, non-monetary losses including … loss of consortium … ."

- "We … declare that in California each spouse has a cause of action for loss of consortium, as defined herein, caused by a negligent or intentional injury to the other spouse by a third party. (*Rodriguez v. Bethlehem Steel Corp.* (1974) 12 Cal.3d 382, 408 [115 Cal.Rptr. 765].)

- "The concept of consortium includes not only loss of support or services; it also embraces such elements as love, companionship, comfort, affection, society, sexual relations, the moral support each spouse gives the other through the triumph and despair of life, and the deprivation of a spouse's physical assistance in operating and maintaining the family home." (*Ledger v. Tippitt* (1985) 164 Cal.App.3d 625, 633 [210 Cal.Rptr. 814], disapproved of on other grounds in *Elden v. Sheldon* (1988) 46 Cal.3d 267, 277 [250 Cal.Rptr. 254].)

- "Since he has no cause of action in tort his spouse has no cause of action for loss of consortium." (*Blain v. Doctor's Co.* (1990) 222 Cal.App.3d 1048, 1067 [272 Cal.Rptr. 250].)

- "*Rodriguez* never mentions the concept of a complete loss of consortium. To the contrary, the opinion speaks of 'loss or impairment of her rights of consortium.' This dichotomy suggests that a diminution of a wife's rights are compensible, and we so hold." (*Carlson v. Wald* (1984) 151 Cal.App.3d 598, 602 [199 Cal.Rptr. 10], internal citation omitted.)

- "[S]hould [husband] prevail in his own cause of action against these defendants, he will be entitled to recover, among his medical expenses, the full cost of whatever home nursing is necessary. To allow [wife] also to recover the value of her nursing services, however personalized, would therefore constitute double recovery." (*Rodriguez, supra,* 12 Cal.3d at p. 409, internal citations omitted.)

- "For the same reason, [wife] cannot recover for the loss of her earnings and earning capacity assertedly incurred when she quit her job in order to furnish [husband] these same nursing services. To do so would be to allow her to accomplish indirectly that which we have just held she cannot do directly." (*Rodriguez, supra,* 12 Cal.3d at p. 409.)

- "The deprivation of a husband's physical assistance in operating and maintaining the home is a compensable item of loss of consortium." (*Rodriguez, supra,* 12 Cal.3d at p. 409, fn. 31, internal citations omitted.)

- "Whether the degree of harm suffered by the plaintiff's spouse is sufficiently severe to give rise to a cause of action for loss of consortium is a matter of proof. When the injury is emotional rather than physical, the plaintiff may have a more difficult task in proving negligence, causation, and the requisite degree of harm; but these are questions for the jury, as in all litigation for loss of consortium. In *Rodriguez* we acknowledged that the loss is 'principally a form of mental suffering,' but nevertheless declared our faith in the ability of the jury to exercise sound judgment in fixing compensation. We reaffirm that faith today." (*Molien v. Kaiser Foundation Hospitals* (1980) 27 Cal.3d 916, 933 [167 Cal.Rptr. 831], internal citations omitted.)

- "We … conclude that we should not recognize a cause of action by a child for loss of parental consortium." (*Borer v. American Airlines, Inc.* (1977) 19 Cal.3d 441, 451 [138 Cal.Rptr. 302].)

- A parent may not recover loss of consortium damages for injury to his or her child. (*Baxter v. American Airlines, Inc.* (1977) 19 Cal.3d 441 [138 Cal.Rptr. 315].)

- Unmarried cohabitants may not recover damages for loss of consortium. (*Elden, supra,* 46 Cal.3d at p. 277.)

- Under Proposition 51, damages for loss of consortium may be reduced by the negligence of the injured spouse. (*Craddock v. Kmart Corp.* (2001) 89 Cal.App.4th 1300, 1309–1310 [107 Cal.Rptr.2d 881]; *Hernandez v. Badger Construction Equipment Co.* (1994) 28 Cal.App.4th 1791, 1810–1811 [34 Cal.Rptr.2d 732].)

- " 'To entitle a plaintiff to recover present damages for apprehended future consequences, there must be evidence to show such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury.' " (*Bellman v. San Francisco High School Dist.* (1938) 11 Cal.2d 576, 588 [81 P.2d 894], internal citation omitted.)

<u>Secondary Sources</u>

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1416–1422, pp. 886–903
- 4 Levy et al., California Torts (1985–2000) Loss of Consortium, § 56.08
- California Tort Damages (Cont.Ed.Bar 1988) Loss of Consortium, §§ 2.6–2.7
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 177, *Damages* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 65, *Damages* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, §§ 10:10–10:16

3921
Wrongful Death (Death of an Adult)

If you decide that [*name of plaintiff***] has proved [his/her] claim against [***name of defendant***] for the death of [***name of decedent***], you also must decide how much money will reasonably compensate [***name of plaintiff***] for the death of [***name of decedent***]. This compensation is called "damages."**

[*Name of plaintiff***] does not have to prove the exact amount of these damages. However, you must not speculate or guess in awarding damages.**

The damages claimed by [*name of plaintiff***] fall into two categories called economic damages and noneconomic damages. You will be asked to state the two categories of damages separately on the verdict form.**

[*Name of plaintiff***] claims the following economic damages:**

1. **The financial support, if any, that [***name of decedent***] would have contributed to the family during either the life expectancy that [***name of decedent***] had before [his/her] death or the life expectancy of [***name of plaintiff***], whichever is shorter;**

2. **The loss of gifts or benefits that [***name of plaintiff***] would have expected to receive from [***name of decedent***];**

3. **Funeral and burial expenses; and**

4. **The amount paid, and reasonably certain to be paid in the future, to obtain household services that [***name of decedent***] would have provided.**

Your award of any future economic damages must be reduced to present cash value.

[*Name of plaintiff***] also claims the following noneconomic damages:**

1. **The loss of [***name of decedent***]'s love, companionship, comfort, care, assistance, protection, affection, society, moral support; [and]**

[2. The loss of the enjoyment of sexual relations.]

[2. The loss of [*name of decedent***]'s training and guidance.]**

No fixed standard exists for deciding the amount of noneconomic damages. You must use your judgment to decide a reasonable amount based on the evidence and your

common sense. [Your award for noneconomic damages should not be reduced to present cash value.]

Do not include in your award any compensation for the following:

1. **[***Name of plaintiff***]'s grief, sorrow, or mental anguish; or**

2. **[***Name of decedent***]'s pain and suffering.**

In deciding a person's life expectancy, you may consider, among other factors, the average life expectancy of a person of that age, as well as that person's health, habits, activities, lifestyle, and occupation. According to [*insert source of information***], the average life expectancy of a [***insert number***]-year-old [male/female] is [***insert number***] years and the average life expectancy of a [***insert number***]-year-old [male/female] is [***insert number***] years. This published information is evidence of how long a person is likely to live but is not conclusive. Some people live longer and others die sooner.**

[In computing these damages, consider the losses suffered by all plaintiffs and return a verdict of a single amount for all plaintiffs. I will divide the amount [among/between] the plaintiffs.]

DIRECTIONS FOR USE

One of the life expectancy subjects in the second sentence of the second to last paragraph should be the decedent, and the other should be the plaintiff. This definition is intended to apply to the element of damages pertaining to the financial support the decedent would have provided to the plaintiff.

SOURCES AND AUTHORITY

- Code of Civil Procedure section 377.60 provides:

  A cause of action for the death of a person caused by the wrongful act or neglect of another may be asserted by any of the following persons or by the decedent's personal representative on their behalf:
  (a) The decedent's surviving spouse, domestic partner, children, and issue of deceased children, or, if there is no surviving issue of the decedent, the persons, including the surviving spouse or domestic partner, who would be entitled to the property of the decedent by intestate succession.
  (b) Whether or not qualified under subdivision (a), if they were dependent on the decedent, the putative spouse, children of the putative spouse, stepchildren, or parents. As used in this subdivision, 'putative spouse' means the surviving spouse of a void or voidable marriage who is

found by the court to have believed in good faith that the marriage to the decedent was valid.

(c) A minor, whether or not qualified under subdivision (a) or (b), if, at the time of the decedent's death, the minor resided for the previous 180 days in the decedent's household and was dependent on the decedent for one-half or more of the minor's support.

(d) This section applies to any cause of action arising on or after January 1, 1993.

(e) The addition of this section by Chapter 178 of the Statutes of 1992 was not intended to adversely affect the standing of any party having standing under prior law, and the standing of parties governed by that version of this section as added by Chapter 178 of the Statutes of 1992 shall be the same as specified herein as amended by Chapter 563 of the Statutes of 1996.

(f) For the purpose of this section, "domestic partner" has the meaning provided in Section 297 of the Family Code.

- Code of Civil Procedure section 377.61 provides: "In an action under this article, damages may be awarded that, under all the circumstances of the case, may be just, but may not include damages recoverable under Section 377.34. The court shall determine the respective rights in an award of the persons entitled to assert the cause of action."

- "A cause of action for wrongful death is purely statutory in nature, and therefore 'exists only so far and in favor of such person as the legislative power may declare.' " (*Barrett v. Superior Court* (1990) 222 Cal.App.3d 1176, 1184 [272 Cal.Rptr. 304], internal citations omitted.)

- "There are three distinct public policy considerations involved in the legislative creation of a cause of action for wrongful death: '(1) compensation for survivors, (2) deterrence of conduct and (3) limitation, or lack thereof, upon the damages recoverable.' " (*Barrett, supra,* 222 Cal.App.3d at p. 1185, internal citation omitted.)

- "We therefore conclude, on this basis as well, that 'wrongful act' as used in section 377 means any kind of tortious act, including the tortious act of placing defective products into the stream of commerce." (*Barrett, supra,* 222 Cal.App.3d at p. 1191.)

- "In any action for wrongful death resulting from negligence, the complaint must contain allegations as to all the elements of actionable negligence." (*Jacoves v. United Merchandising Corp.* (1992) 9 Cal.App.4th 88, 105 [11 Cal.Rptr.2d 468], internal citation omitted.)

- "Damages for wrongful death are not limited to compensation for losses with 'ascertainable economic value.' Rather, the measure of damages is the value of the benefits the heirs could reasonably expect to receive from the deceased if she had

lived." (*Allen v. Toledo* (1980) 109 Cal.App.3d 415, 423 [167 Cal.Rptr. 270], internal citations omitted.)

- "The death of a father may also cause a special loss to the children." (*Syah v. Johnson* (1966) 247 Cal.App.2d 534, 547 [55 Cal.Rptr. 741], internal citation omitted.)

- "These benefits include the personal services, advice, and training the heirs would have received from the deceased, and the value of her society and companionship. 'The services of children, elderly parents, or nonworking spouses often do not result in measurable net income to the family unit, yet unquestionably the death of such a person represents a substantial "injury" to the family for which just compensation should be paid.' " (*Allen, supra,* 109 Cal.App.3d at p. 423, internal citations omitted.)

- The wrongful death statute "has long allowed the recovery of funeral expenses in California wrongful death actions." (*Vander Lind v. Superior Court* (1983) 146 Cal.App.3d 358, 364 [194 Cal.Rptr. 209].)

- "Thus, the rule remains and we hold damages for wrongful death must be reduced to present value." (*Fox v. Pacific Southwest Airlines* (1982) 133 Cal.App.3d 565, 569 [184 Cal.Rptr. 87].)

- "Where, as here, decedent was a husband and father, a significant element of damages is the loss of financial benefits he was contributing to his family by way of support at the time of his death and that support reasonably expected in the future. The total future lost support must be reduced by appropriate formula to a present lump sum which, when invested to yield the highest rate of return consistent with reasonable security, will pay the equivalent of lost future benefits at the times, in the amounts and for the period such future benefits would have been received." (*Canavin v. Pacific Southwest Airlines* (1983) 148 Cal.App.3d 512, 520–521 [196 Cal.Rptr. 82], internal citations omitted.)

- "The California statutes and decisions … have been interpreted to bar the recovery of punitive damages in a wrongful death action." (*Tarasoff v. Regents of the University of California* (1976) 17 Cal.3d 425, 450 [131 Cal.Rptr. 14], internal citation omitted.) There is an exception to this rule for death by felony homicide for which the defendant has been convicted. (Civ. Code, § 3294(d).)

- "Punitive damages are awardable to the decedent's estate in an action by the estate representative based on the cause of action the decedent would have had if he or she had survived." (*Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 616 [103 Cal.Rptr.2d 492], internal citation omitted.)

- "California cases have uniformly held that damages for mental and emotional distress, including grief and sorrow, are not recoverable in a wrongful death action." (*Krouse v. Graham* (1977) 19 Cal.3d 59, 72 [137 Cal.Rptr. 863], internal citations omitted.)

- "[A] simple instruction excluding considerations of grief and sorrow in wrongful death actions will normally suffice." (*Krouse, supra,* 19 Cal.3d at p. 69.)

- "[T]he competing and conflicting interests of the respective heirs, the difficulty in ascertaining individual shares of lost economic support when dealing with minors, the lack of any reason under most circumstances to apportion the lump-sum award attributable to loss of monetary support where minors are involved, the irrelevance of the heirs' respective interests in that portion of the award pertaining to lost economic support in determining the aggregate award, and the more efficient nature of court proceedings without a jury, cumulatively establish apportionment by the court, rather than the jury, is consistent with the efficient administration of justice." (*Canavin, supra,* 148 Cal.App.3d at pp. 535–536.)

- "[W]here all statutory plaintiffs properly represented by legal counsel waive judicial apportionment, the trial court should instruct the jury to return separate verdicts unless the remaining considerations enumerated above mandate refusal." (*Canavin, supra,* 148 Cal.App.3d at p. 536.)

- "We note that the court instructed the jury that in determining pecuniary loss they should consider inter alia the age, state of health and respective life expectancies of the deceased and each plaintiff but should be concerned only with 'the shorter of the life expectancies, that of one of the plaintiffs or that of the deceased. ...' This was a correct statement of the law." (*Francis v. Sauve* (1963) 222 Cal.App.2d 102, 120–121 [34 Cal.Rptr. 754], internal citation omitted.)

- "It is the shorter expectancy of life that is to be taken into consideration; for example, if, as in the case here, the expectancy of life of the parents is shorter than that of the son, the benefits to be considered are those only which might accrue during the life of the surviving parents." (*Parsons v. Easton* (1921) 184 Cal. 764, 770–771 [195 P. 419], internal citation omitted.)

- "The life expectancy of the deceased is a question of fact for the jury to decide, considering all relevant factors including the deceased's health, lifestyle and occupation. Life expectancy figures from mortality tables are admissible but are not conclusive." (*Allen, supra,* 109 Cal.App.3d at p. 424, internal citations omitted.)

<u>Secondary Sources</u>

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1423–1430, pp. 903–909
- 4 Levy et al., California Torts (1985–2000) Death and Survival Actions, §§ 55.10–55.13
- California Tort Damages (Cont.Ed.Bar 1988) Wrongful Death, §§ 3.1–3.52
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 177, *Damages* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 65, *Damages* (Matthew Bender)

- 2 Bancroft-Whitney's California Civil Practice (1992) Torts, § 23:8

3922
Wrongful Death (Parents' Recovery for Death of a Minor Child)

If you decide that [*name of plaintiff***] has proved [his/her] claim against [***name of defendant***] for the death of [***name of minor***], you also must decide how much money will reasonably compensate [***name of plaintiff***] for the death of [***name of minor***]. This compensation is called "damages."**

[*Name of plaintiff***] does not have to prove the exact amount of these damages. However, you must not speculate or guess in awarding damages.**

The damages claimed by [*name of plaintiff***] fall into two categories called economic damages and noneconomic damages. You will be asked to state the two categories of damages separately on the verdict form.**

[*Name of plaintiff***] claims the following economic damages:**

1. **The value of the financial support, if any, that [***name of minor***] would have contributed to the family during either the life expectancy that [***name of minor***] had before [his/her] death or the life expectancy of [***name of plaintiff***], whichever is shorter;**

2. **The loss of gifts or benefits that [***name of plaintiff***] could have expected to receive from [***name of minor***];**

3. **Funeral and burial expenses; and**

4. **The amount paid, and reasonably certain to be paid in the future, to obtain household services that [***name of minor***] would have provided.**

Your award of any future economic damages must be reduced to present cash value.

[*Name of plaintiff***] also claims the following noneconomic damages: The loss of [***name of minor***]'s love, companionship, comfort, care, assistance, protection, affection, society, and moral support.**

No fixed standard exists for deciding the amount of noneconomic damages. You must use your judgment to decide a reasonable amount based on the evidence and your common sense. [Your award for noneconomic damages should not be reduced to present cash value.]

Do not include in your award any compensation for the following:

1. **[***Name of plaintiff***]'s grief, sorrow, or mental anguish; or**

2. **[***Name of minor***]'s pain and suffering.**

In computing these damages, you should deduct the present cash value of the probable costs of [*name of minor***]'s support and education.**

In deciding a person's life expectancy, consider, among other factors, that person's health, habits, activities, lifestyle, and occupation. Life expectancy tables are evidence of a person's life expectancy but are not conclusive.

[In computing these damages, consider the losses suffered by all plaintiffs and return a verdict of a single amount for all plaintiffs. I will divide the amount [among/between] the plaintiffs.]

SOURCES AND AUTHORITY

- Code of Civil Procedure section 377.60 provides:

> A cause of action for the death of a person caused by the wrongful act or neglect of another may be asserted by any of the following persons or by the decedent's personal representative on their behalf:
>
> (a) The decedent's surviving spouse, domestic partner, children, and issue of deceased children, or, if there is no surviving issue of the decedent, the persons, including the surviving spouse or domestic partner, who would be entitled to the property of the decedent by intestate succession.
>
> (b) Whether or not qualified under subdivision (a), if they were dependent on the decedent, the putative spouse, children of the putative spouse, stepchildren, or parents. As used in this subdivision, 'putative spouse' means the surviving spouse of a void or voidable marriage who is found by the court to have believed in good faith that the marriage to the decedent was valid.
>
> (c) A minor, whether or not qualified under subdivision (a) or (b), if, at the time of the decedent's death, the minor resided for the previous 180 days in the decedent's household and was dependent on the decedent for one-half or more of the minor's support.
>
> (d) This section applies to any cause of action arising on or after January 1, 1993.
>
> (e) The addition of this section by Chapter 178 of the Statutes of 1992 was not intended to adversely affect the standing of any party having standing under prior law, and the standing of parties governed by that version of this section as added by Chapter 178 of the Statutes of 1992 shall be the same as specified herein as amended by Chapter 563 of the Statutes of 1996.

(f) For the purpose of this section, "domestic partner" has the meaning provided in Section 297 of the Family Code.

- Code of Civil Procedure section 377.61 provides: “In an action under this article, damages may be awarded that, under all the circumstances of the case, may be just, but may not include damages recoverable under Section 377.34. The court shall determine the respective rights in an award of the persons entitled to assert the cause of action.”

- “A cause of action for wrongful death is purely statutory in nature, and therefore ‘exists only so far and in favor of such person as the legislative power may declare.’ ” (*Barrett v. Superior Court* (1990) 222 Cal.App.3d 1176, 1184 [272 Cal.Rptr. 304], internal citations omitted.)

- “Where the deceased was a minor child, recovery is based on the present value of reasonably probable future services and contributions, deducting the probable cost of rearing the child.” (6 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 1428, p. 908.)

- “There is authority in such cases for deducting from the loss factors—including the pecuniary loss a parent suffers by being deprived of the comfort, protection and society of a child—the prospective cost to the parent of the child’s support and education.

- Although neither the loss factors nor such offsets are readily measurable in a particular case—nor need they be measured in precise terms of dollars and cents—in the case at bench the jury had before it for consideration a court order subject to mathematical computation which required plaintiff to pay support for his child in the sum of $125 monthly. The jury was entitled and required to take into consideration the prospective cost to plaintiff of the boy’s maintenance and rearing, and they may well have offset their reasonable appraisal of such costs, under the general verdict, against any pecuniary loss which they found that plaintiff suffered.” (*Fields v. Riley* (1969) 1 Cal.App.3d 308, 315 [81 Cal.Rptr. 671], internal citations omitted.)

- “There are three distinct public policy considerations involved in the legislative creation of a cause of action for wrongful death: ‘(1) compensation for survivors, (2) deterrence of conduct and (3) limitation, or lack thereof, upon the damages recoverable.’ ” (*Barrett, supra,* 222 Cal.App.3d at p. 1185, internal citation omitted.)

- “We therefore conclude, on this basis as well, that ‘wrongful act’ as used in section 377 means any kind of tortious act, including the tortious act of placing defective products into the stream of commerce.” (*Barrett, supra,* 222 Cal.App.3d at p. 1191.)

- “In any action for wrongful death resulting from negligence, the complaint must contain allegations as to all the elements of actionable negligence.” (*Jacoves v.*

United Merchandising Corp. (1992) 9 Cal.App.4th 88, 105 [11 Cal.Rptr.2d 468], internal citation omitted.)

- "Damages for wrongful death are not limited to compensation for losses with 'ascertainable economic value.' Rather, the measure of damages is the value of the benefits the heirs could reasonably expect to receive from the deceased if she had lived." (*Allen v. Toledo* (1980) 109 Cal.App.3d 415, 423 [167 Cal.Rptr. 270], internal citations omitted.)

- The wrongful death statute "has long allowed the recovery of funeral expenses in California wrongful death actions." (*Vander Lind v. Superior Court* (1983) 146 Cal.App.3d 358, 364 [194 Cal.Rptr. 209].)

- "Thus, the rule remains and we hold damages for wrongful death must be reduced to present value." (*Fox v. Pacific Southwest Airlines* (1982) 133 Cal.App.3d 565, 569 [184 Cal.Rptr. 87].)

- "The California statutes and decisions … have been interpreted to bar the recovery of punitive damages in a wrongful death action." (*Tarasoff v. Regents of the University of California* (1976) 17 Cal.3d 425, 450 [131 Cal.Rptr. 14], internal citation omitted.) There is an exception to this rule for death by felony homicide for which the defendant has been convicted. (Civ. Code, § 3294(d).)

- "Punitive damages are awardable to the decedent's estate in an action by the estate representative based on the cause of action the decedent would have had if he or she had survived." (*Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 616 [103 Cal.Rptr.2d 492], internal citation omitted.)

- "California cases have uniformly held that damages for mental and emotional distress, including grief and sorrow, are not recoverable in a wrongful death action." (*Krouse v. Graham* (1977) 19 Cal.3d 59, 72 [137 Cal.Rptr. 863], internal citations omitted.)

- "[A] simple instruction excluding considerations of grief and sorrow in wrongful death actions will normally suffice." (*Krouse, supra,* 19 Cal.3d at p. 69.)

- "[T]he competing and conflicting interests of the respective heirs, the difficulty in ascertaining individual shares of lost economic support when dealing with minors, the lack of any reason under most circumstances to apportion the lump-sum award attributable to loss of monetary support where minors are involved, the irrelevance of the heirs' respective interests in that portion of the award pertaining to lost economic support in determining the aggregate award, and the more efficient nature of court proceedings without a jury, cumulatively establish [that] apportionment by the court, rather than the jury, is consistent with the efficient administration of justice." (*Canavin v. Pacific Southwest Airlines* (1984) 148 Cal.App.3d 512, 535–536 [196 Cal.Rptr. 82].)

- "[W]here all statutory plaintiffs properly represented by legal counsel waive judicial apportionment, the trial court should instruct the jury to return separate verdicts unless the remaining considerations enumerated above mandate refusal." (*Canavin, supra,* 148 Cal.App.3d at p. 536.)

- "We note that the court instructed the jury that in determining pecuniary loss they should consider inter alia the age, state of health and respective life expectancies of the deceased and each plaintiff but should be concerned only with 'the shorter of the life expectancies, that of one of the plaintiffs or that of the deceased. ...' This was a correct statement of the law." (*Francis v. Suave* (1963) 222 Cal.App.2d 102, 120–121 [34 Cal.Rptr. 754], internal citation omitted.)

- "It is the shorter expectancy of life that is to be taken into consideration; for example, if, as in the case here, the expectancy of life of the parents is shorter than that of the son, the benefits to be considered are those only which might accrue during the life of the surviving parents." (*Parsons v. Easton* (1921) 184 Cal. 764, 770–771 [195 P. 419], internal citation omitted.)

- "The life expectancy of the deceased is a question of fact for the jury to decide, considering all relevant factors including the deceased's health, lifestyle and occupation. Life expectancy figures from mortality tables are admissible but are not conclusive." (*Allen v. Toledo* (1980) 109 Cal.App.3d 415, 424 [167 Cal.Rptr. 270], internal citations omitted.)

<u>Secondary Sources</u>

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 1428, p. 908
- 4 Levy et al., California Torts (1985–2000) Death and Survival Actions, §§ 55.10–55.13
- California Tort Damages (Cont.Ed.Bar 1988) Wrongful Death, §§ 3.1–3.52
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 177, *Damages* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 65, *Damages* (Matthew Bender)
- 2 Bancroft-Whitney's California Civil Practice (1992) Torts, § 23:8

3923
Public Entities—Collateral Source Payments (Gov. Code, § 985)

You shall award damages in an amount that fully compensates plaintiff for damages in accordance with instructions from the court. You shall not speculate or consider any other possible sources of benefit the plaintiff may have received. After you have returned your verdict the court will make whatever adjustments are necessary in this regard.

DIRECTIONS FOR USE

Per Government Code section 985, this language is mandatory.

SOURCES AND AUTHORITY

- Government Code section 985(b) provides, in part: "Any collateral source payment paid or owed to or on behalf of a plaintiff shall be inadmissible in any action for personal injuries or wrongful death where a public entity is a defendant."

- Government Code section 985(j) provides: "In all actions affected by this section, the court shall instruct the jury with the following language: 'You shall award damages in an amount that fully compensates plaintiff for damages in accordance with instructions from the court. You shall not speculate or consider any other possible sources of benefit the plaintiff may have received. After you have returned your verdict the court will make whatever adjustments are necessary in this regard.' "

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 1392, pp. 862–863
- California Tort Damages (Cont.Ed.Bar 1988) Restrictions on Recovery, § 15.21
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 177, *Damages* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 65, *Damages* (Matthew Bender)
- 2 Bancroft-Whitney's California Civil Practice (1992) Torts, § 31:47

3924
No Punitive Damages

You must not include in your award any damages to punish or make an example of [*name of defendant*]. Such damages would be punitive damages, and they cannot be a part of your verdict. You must award only the damages that fairly compensate [*name of plaintiff*] for [his/her/its] loss.

DIRECTIONS FOR USE

Do not use this instruction if punitive damages are being sought in the phase of the trial in which these instructions are given.

SOURCES AND AUTHORITY

- "Punitive damages are not permitted in wrongful death actions." (*Cortez v. Macias* (1980) 110 Cal.App.3d 640, 657 [167 Cal.Rptr. 905].)

- "The punitive damages theory cannot be predicated on the breach of contract cause of action without an underlying tort." (*Palmer v. Ted Stevens Honda, Inc.* (1987) 193 Cal.App.3d 530, 536 [238 Cal.Rptr. 363], internal citations omitted.)

- "An award of punitive damages is not supported by a verdict based on breach of contract, even where the defendant's conduct in breaching the contract was wilful, fraudulent, or malicious. Even in those cases in which a separate tort action is alleged, if there is 'but one verdict based upon contract' a punitive damage award is improper." (*Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 960 [17 Cal.Rptr.2d 242], internal citations omitted.)

- Government Code section 818 provides: "Notwithstanding any other provision of law, a public entity is not liable for damages awarded under Section 3294 of the Civil Code or other damages imposed primarily for the sake of example and by way of punishing the defendant."

<u>Secondary Sources</u>

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 1343, pp. 805–806
- 4 Levy et al., California Torts (1985–2000) Punitive Damages, §§ 54.05, 54.08
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 177, *Damages* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 65, *Damages* (Matthew Bender)
- California Tort Damages (Cont.Ed.Bar 1988) Punitive Damages, § 14.3

3925
Arguments of Counsel Not Evidence of Damages

The arguments of the attorneys are not evidence of damages. Your award must be based on your reasoned judgment applied to the testimony of the witnesses and the other evidence that has been admitted during trial.

DIRECTIONS FOR USE

If a pleading is admitted into evidence, the following may be added: "The amount of damages that [*name of plaintiff*] has claimed in [his/her] written pleadings is not evidence of [*name of plaintiff*]'s damages."

SOURCES AND AUTHORITY

- "[T]he trial court can and should instruct the jury that the argument of counsel as to the amount of damages claimed by the plaintiff is not evidence and that its duty is only to award such damages as will reasonably compensate the plaintiff for his pain and suffering." (*Beagle v. Vasold* (1966) 65 Cal.2d 166, 180–181 [53 Cal.Rptr. 129], internal citation omitted.)

- Courts have held that "attempts to suggest matters of an evidentiary nature to a jury other than by the legitimate introduction into evidence is misconduct whether by questions on cross-examination, argument or other means." (*Smith v. Covell* (1980) 100 Cal.App.3d 947, 960 [161 Cal.Rptr. 377].)

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 1413
- 4 Levy et al., California Torts (1985–2000) Pain and Suffering, §§ 51.50–51.51
- California Tort Damages (Cont.Ed.Bar 1988) Bodily Injury, § 1.74
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 177, *Damages* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 65, *Damages* (Matthew Bender)

3926
Settlement Deduction

You have heard evidence that [*name of plaintiff*] has settled [his/her/its] claim against [*name of defendant*]. Your award of damages to [*name of plaintiff*] should be made without considering any amount that [he/she/it] may have received under this settlement. After you have returned your verdict, I will make the proper deduction from your award of damages.

SOURCES AND AUTHORITY

- Code of Civil Procedure section 877 provides, in pertinent part: "Where a release, dismissal with or without prejudice, or a covenant not to sue or not to enforce judgment is given in good faith before verdict or judgment to one or more of a number of tortfeasors claimed to be liable for the same tort ... it shall have the following effect: … It shall not discharge any other such party from liability unless its terms so provide, but it shall reduce the claims against the others in the amount stipulated by the release, the dismissal or the covenant, or in the amount of the consideration paid for it whichever is the greater."

- "When the plaintiff stipulates to the fact and amount of settlement before the court, an approved procedure is for the court to reduce the verdict award by the amount paid in settlement before entering judgment on the verdict." (*Syverson v. Heitmann* (1985) 171 Cal.App.3d 106, 111 [214 Cal.Rptr. 581], internal citations omitted.)

- Courts have held that it is "proper to exclude evidence of the pretrial settlement by one joint tortfeasor from the jury's consideration, leaving it to the court to apply Code of Civil Procedure section 877 to reduce the verdict." (*Knox v. County of Los Angeles* (1980) 109 Cal.App.3d 825, 834–835 [167 Cal.Rptr. 463], internal citation omitted.)

- "[W]here there is an admission 'that a settlement has been made with one or more joint tortfeasors in a certain amount there is no factual question to be resolved by the jury respecting the settlement.' " (*Albrecht v. Braughton* (1970) 6 Cal.App.3d 173, 177 [85 Cal.Rptr. 659], internal citation omitted.)

- "Where the purpose of introducing evidence of a settlement is to reduce any recovery that might be awarded pro tanto, this result can be achieved by a simple calculation made by the court after the verdict has been rendered." (*Shepherd v. Walley* (1972) 28 Cal.App.3d 1079, 1082 [105 Cal.Rptr. 387], footnote omitted.)

- "The presentation of evidence concerning the amount or fact of settlement to the jury ... is not only confusing, but also can lead to abuse in argument as it did here." (*Shepherd, supra,* 28 Cal.App.3d at p. 1083.)

- "[E]vidence of the fact and amount of settlement made by [plaintiff] with [settling witness] might be admissible under proper limiting instructions for the purpose of showing bias since he was a witness." (*Shepherd, supra,* 28 Cal.App.3d at p. 1082, fn. 2, internal citation omitted.)

- "Under Civil Code section 1431.2, a defendant is only responsible for its share of noneconomic damages as that share has been determined by the jury. 'Therefore, a nonsettling defendant may not receive any setoff under [Code of Civil Procedure] section 877 for the portion of a settlement by another defendant that is attributable to noneconomic damages.' After application of Civil Code section 1431.2, '... there is no amount that represents a common claim for noneconomic damages against the settling and nonsettling defendants' and thus Code of Civil Procedure section 877 has no applicability to noneconomic damages." (*Ehret v. Congoleum Corp.* (1999) 73 Cal.App.4th 1308, 1319 [87 Cal.Rptr.2d 363], internal citations omitted.)

- "[A]n undifferentiated settlement must be apportioned between economic and noneconomic damages so that the setoff applies only to economic damages." (*Ehret, supra,* 73 Cal.App.4th at p. 1320, internal citation omitted.)

- It has been held that, "[i]n the absence of any other allocation … the percentage of economic damages reflected in the jury verdict [should] be applied to determine the percentage of the settlements to be offset." (*Ehret, supra,* 73 Cal.App.4th at p. 1320, internal citation omitted.)

- "Where there is a complete dismissal of a defendant, and a plaintiff seeks an allocation of the settlement with that defendant for purposes of limiting the setoff against another defendant's liability, the burden is on the plaintiff to establish facts to justify the allocation." (*Ehret, supra,* 73 Cal.App.4th at p. 1322, internal citation omitted.)

<u>Secondary Sources</u>

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, § 76, pp. 148–149
- California Tort Damages (Cont.Ed.Bar 1988) Restrictions on Recovery, § 15.12
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 177, *Damages* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 65, *Damages* (Matthew Bender)

3927
Aggravation of Preexisting Condition or Disability

[*Name of plaintiff*] is not entitled to damages for any physical or emotional condition that [he/she] had before [*name of defendant*]'s conduct occurred. However, if [*name of plaintiff*] had a physical or emotional condition that was made worse by [*name of defendant*]'s wrongful conduct, you must award damages that will reasonably and fairly compensate [him/her] for the effect on that condition.

SOURCES AND AUTHORITY

- "A tortfeasor may be held responsible where the effect of his negligence is to aggravate a preexisting condition or disease." (*Hastie v. Handeland* (1969) 274 Cal.App.2d 599, 604 [79 Cal.Rptr. 268], internal citations omitted.)

- "Plaintiff may recover to the full extent that his condition has worsened as a result of defendant's tortious act." (*Ng v. Hudson* (1977) 75 Cal.App.3d 250, 255 [142 Cal.Rptr. 69], internal citations omitted, overruled on another ground in *Soule v. General Motors* (1994) 8 Cal.4th 548, 574 [34 Cal.Rptr.2d 607].)

- "It is by no means self-evident that an act which precipitates a flare-up of a pre-existing condition should be considered a 'cause which, in natural and continuous sequence, produces the injury.' Thus, general instructions on proximate cause were not sufficient to inform the jury on the more specific issue of aggravation of pre-existing conditions." (*Ng, supra,* 75 Cal.App.3d at p. 256.)

- "[An instruction on preexisting condition] is proper only where the injured is the claimant seeking compensation for his injuries. That is not the case here in a wrongful death action." (*Vecchione v. Carlin* (1980) 111 Cal.App.3d 351, 358 [168 Cal.Rptr. 571].)

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 1414, pp. 885–886
- 4 Levy et al., California Torts (1985–2000) Pain and Suffering, § 51.23[3]
- California Tort Damages (Cont.Ed.Bar 1988) Bodily Injury, § 1.86
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 177, *Damages* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 65, *Damages* (Matthew Bender)
- 2 Bancroft-Whitney's California Civil Practice (1992) Torts, § 5:11

3928
Unusually Susceptible Plaintiff

You must decide the full amount of money that will reasonably and fairly compensate [*name of plaintiff*] for all damages caused by the wrongful conduct of [*name of defendant*], even if [*name of plaintiff*] was more susceptible to injury than a normally healthy person would have been, and even if a normally healthy person would not have suffered similar injury.

SOURCES AND AUTHORITY

- "That a plaintiff without such a [preexisting] condition would probably have suffered less injury or no injury does not exonerate a defendant from liability." (*Ng v. Hudson* (1977) 75 Cal.App.3d 250, 255 [142 Cal.Rptr. 69], internal citations omitted, overruled on another ground in *Soule v. General Motors* (1994) 8 Cal.4th 548, 574 [34 Cal.Rptr.2d 607].)

- "The tortfeasor takes the person he injures as he finds him. If, by reason of some preexisting condition, his victim is more susceptible to injury, the tortfeasor is not thereby exonerated from liability." (*Rideau v. Los Angeles Transit Lines* (1954) 124 Cal.App.2d 466, 471 [268 P.2d 772], internal citations omitted.)

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 1414, pp. 885–886
- 4 Levy et al., California Torts (1985–2000) Pain and Suffering, § 51.23[3]
- California Tort Damages (Cont.Ed.Bar 1988) Bodily Injury, § 1.86
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 177, *Damages* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 65, *Damages* (Matthew Bender)
- 2 Bancroft-Whitney's California Civil Practice (1992) Torts, § 5:11

3929
Subsequent Medical Treatment

If you decide that [*name of defendant*] is legally responsible for [*name of plaintiff*]'s harm, [he/she/it] is also responsible for any additional harm resulting from the acts of others in providing aid that [*name of plaintiff*]'s injury reasonably required, even if those acts were negligently performed.

DIRECTIONS FOR USE

A physician is entitled to have the jury allocate fault among other negligent physicians who subsequently treat the plaintiff and is not barred by Proposition 51 from presenting evidence regarding the negligence of those other physicians. (*Marina Emergency Medical Group v. Superior Court* (2000) 84 Cal.App.4th 435 [100 Cal.Rptr.2d 866].)

SOURCES AND AUTHORITY

- "It has long been the rule that a tortfeasor responsible for the original accident is also liable for injuries or death occurring during the course of medical treatment to treat injuries suffered in that accident. In *Ash v. Mortensen* (1944) 24 Cal.2d 654, 150 P.2d 876, the Supreme Court stated: 'It is settled that where one who has suffered personal injuries by reason of the tortious act of another exercises due care in securing the services of a doctor and his injuries are aggravated by the negligence of such doctor, the law regards the act of the original wrongdoer as a proximate cause of the damages flowing from the subsequent negligent medical treatment and holds him liable therefor.' " (*Anaya v. Superior Court* (2000) 78 Cal.App.4th 971, 974 [93 Cal.Rptr.2d 228].)

- "Obviously, if the original tortfeasor is liable for injuries or death suffered during the course of the treatment of injuries suffered in the accident, the original tortfeasor is liable for injuries or death suffered during transportation of the victim to a medical facility for treatment of the injuries resulting from the accident." (*Anaya, supra,* 78 Cal.App.4th at p. 975.)

- "While it is true the original tortfeasor is liable for additional harm (even death) resulting from the negligent care and treatment of the original injury by physicians and hospitals, such liability is not limited to negligently caused additional harm or that caused by malpractice." (*Hastie v. Handeland* (1969) 274 Cal.App.2d 599, 604–605 [79 Cal.Rptr. 268], internal citations and footnote omitted.)

- This rule applies to the first doctor who treats a patient who subsequently is treated by other doctors. (*Maxwell v. Powers* (1994) 22 Cal.App.4th 1596, 1607–1608 [28 Cal.Rptr.2d 62].)

- Restatement Second of Torts section 457 states: "If the negligent actor is liable for another's bodily injury, he is also subject to liability for any additional bodily harm resulting from normal efforts of third persons in rendering aid which the other's injury reasonably requires, irrespective of whether such acts are done in a proper or a negligent manner."

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 1414, pp. 885–886
- California Tort Damages (Cont.Ed.Bar 1988) Bodily Injury, § 1.85
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 177, *Damages* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 65, *Damages* (Matthew Bender)

3930
Mitigation of Damages (Personal Injury)

If you decide [*name of defendant*] is responsible for the original harm, [*name of plaintiff*] is not entitled to recover damages for harm that [*name of defendant*] proves [*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] at the time, including [his/her] ability to make the efforts or expenditures without undue risk or hardship.

If [*name of plaintiff*] made reasonable efforts to avoid harm, then your award should include reasonable amounts that [he/she] spent for this purpose.

SOURCES AND AUTHORITY

- "It has been the policy of the courts to promote the mitigation of damages. The doctrine applies in tort, wilful as well as negligent. A plaintiff cannot be compensated for damages which he could have avoided by reasonable effort or expenditures." (*Green v. Smith* (1968) 261 Cal.App.2d 392, 396 [67 Cal.Rptr. 796], internal citations omitted.)

- "The frequent statement of the principle in the terms of a 'duty' imposed on the injured party has been criticized on the theory that a breach of the 'duty' does not give rise to a correlative right of action. It is perhaps more accurate to say that the wrongdoer is not required to compensate the injured party for damages which are avoidable by reasonable effort on the latter's part." (*Green, supra,* 261 Cal.App.2d at p. 396, internal citations omitted.)

- "The reasonableness of the efforts of the injured party must be judged in the light of the situation confronting him at the time the loss was threatened and not by the judgment of hindsight. The fact that reasonable measures other than the one taken would have avoided damage is not, in and of itself, proof of the fact that the one taken, though unsuccessful, was unreasonable. 'If a choice of two reasonable courses presents itself, the person whose wrong forced the choice cannot complain that one rather than the other is chosen.' The standard by which the reasonableness of the injured party's efforts is to be measured is not as high as the standard required in other areas of law. It is sufficient if he acts reasonably and with due diligence, in good faith." (*Green, supra,* 261 Cal.App.2d at pp. 396–397, internal citations omitted.)

- "The correct rule is that an injured person must use reasonable diligence in caring for his injuries. What is reasonable diligence depends upon all the facts and

circumstances of each case. There is no hard and fast rule that the injured person must seek medical care of a particular type. Self-care may be reasonable under the circumstances, and the jury should be so instructed where that factor is relevant." (*Christiansen v. Hollings* (1941) 44 Cal.App.2d 332, 346 [112 P.2d 723], internal citations omitted.)

- " 'The rule of mitigation of damages has no application where its effect would be to require the innocent party to sacrifice and surrender important and valuable rights.' " (*Valle de Oro Bank v. Gamboa* (1994) 26 Cal.App.4th 1686, 1691 [32 Cal.Rptr.2d 329], internal citations omitted.)

- "The duty to minimize damages does not require an injured person to do what is unreasonable or impracticable, and, consequently, when expenditures are necessary for minimization of damages, the duty does not run to a person who is financially unable to make such expenditures." (*Valencia v. Shell Oil Co.* (1944) 23 Cal.2d 840, 846 [147 P.2d 558], internal citations omitted.)

- "Contributory negligence was closely allied and easily confused with the rule of mitigation of damages, on which the jury was also instructed. Both doctrines involved the plaintiff's duty to act reasonably. Contributory negligence was concerned with the plaintiff's negligence before being injured, while the mitigation rule was concerned with a lack of due care after the injury. The effect of contributory negligence was to bar all recovery by the plaintiff. In contrast, a plaintiff's failure to mitigate barred recovery of only the portion of damages which could have been avoided by ordinary care after the injury." (*LeMons v. Regents of University of California* (1978) 21 Cal.3d 869, 874–875 [148 Cal.Rptr. 355], internal citations omitted.)

- " 'The rule of [mitigation of damages] comes into play after a legal wrong has occurred, but while some damages may still be averted ... .' " (*Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1066 [232 Cal.Rptr. 528], internal citations omitted.)

- "Generally, '[a] person injured by the wrongful act of another is bound … to exercise reasonable care and diligence to avoid loss or minimize the resulting damages and cannot recover for losses which might have been prevented by reasonable efforts and expenditures on his part.' The burden of proving facts in mitigation of damages rests upon the defendant." (*Hunter v. Croysdill* (1959) 169 Cal.App.2d 307, 318 [337 P.2d 174], internal citations omitted.)

- "One who contributes to damage cannot escape liability because the proportionate contribution may not be accurately measured. It is incumbent upon the party alleging injury to prove the amount of damages. Respondent sustained that burden in this case. If the damages proven could be reduced proportionately, that burden rested upon appellant." (*City of Oakland v. Pacific Gas & Electric Co.* (1941) 47 Cal.App.2d 444, 450 [118 P.2d 328], internal citations omitted.)

- "It is true that plaintiff is in duty bound to minimize his damage in any way that he reasonably can, and if he negligently refuses to do so he cannot recover for that which he might have prevented. It is for appellant to establish that the steps taken by plaintiff to so minimize his loss or damage falls short of the obligation so fixed. In other words, the burden is on defendant to establish matters asserted by him in mitigation or reduction of the amount of plaintiff's damage, and defendant here has not met that burden." (*McNary v. Hanley* (1933) 131 Cal.App. 188, 190 [20 P.2d 966].)

- Restatement of Torts Second section 918 provides:

  (1) Except as stated in Subsection (2), one injured by the tort of another is not entitled to recover damages for any harm that he could have avoided by the use of reasonable effort or expenditure after the commission of the tort.
  (2) One is not prevented from recovering damages for a particular harm resulting from a tort if the tortfeasor intended the harm or was aware of it and was recklessly disregardful of it, unless the injured person with knowledge of the danger of the harm intentionally or heedlessly failed to protect his own interests.

<u>Secondary Sources</u>

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1382–1385, pp. 852–855
- 4 Levy et al., California Torts (1985–2000) Mitigation and Collateral Source Rule, §§ 53.01–53.04
- California Tort Damages (Cont.Ed.Bar 1988) Restrictions on Recovery, §§ 15.22–15.23
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 177, *Damages* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 65, *Damages* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, §§ 6:1–6:6

3931
Mitigation of Damages (Property Damage)

If you decide [*name of defendant*] is responsible for the original harm, [*name of plaintiff*] is not entitled to recover damages for harm to [his/her] property that [*name of defendant*] proves [*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] at the time, including [his/her] ability to make the efforts or expenditures without undue risk or hardship.

If [*name of plaintiff*] made reasonable efforts to avoid harm, then your award should include reasonable amounts that [he/she] spent for this purpose.

SOURCES AND AUTHORITY

- "It has been the policy of the courts to promote the mitigation of damages. The doctrine applies in tort, wilful as well as negligent. A plaintiff cannot be compensated for damages which he could have avoided by reasonable effort or expenditures." (*Green v. Smith* (1968) 261 Cal.App.2d 392, 396 [67 Cal.Rptr. 796], internal citations omitted.)

- "The frequent statement of the principle in the terms of a 'duty' imposed on the injured party has been criticized on the theory that a breach of the 'duty' does not give rise to a correlative right of action. It is perhaps more accurate to say that the wrongdoer is not required to compensate the injured party for damages which are avoidable by reasonable effort on the latter's part." (*Green, supra,* 261 Cal.App.2d at p. 396, internal citations omitted.)

- "The reasonableness of the efforts of the injured party must be judged in the light of the situation confronting him at the time the loss was threatened and not by the judgment of hindsight. The fact that reasonable measures other than the one taken would have avoided damage is not, in and of itself, proof of the fact that the one taken, though unsuccessful, was unreasonable. 'If a choice of two reasonable courses presents itself, the person whose wrong forced the choice cannot complain that one rather than the other is chosen.' The standard by which the reasonableness of the injured party's efforts is to be measured is not as high as the standard required in other areas of law. It is sufficient if he acts reasonably and with due diligence, in good faith." (*Green, supra,* 261 Cal.App.2d at pp. 396–397, internal citations omitted.)

- “A plaintiff who suffers damage as a result of either a breach of contract or a tort has a duty to take reasonable steps to mitigate those damages and will not be able to recover for any losses which could have been thus avoided. Here the jury determined that 25 percent of the ‘property damage to the house’ could have been avoided. That damage was measured by the cost of repair, i.e., $130,000. The court was obligated to give effect to the jury’s finding and reduce this aspect of the award to $97,500.” (*Shaffer v. Debbas* (1993) 17 Cal.App.4th 33, 41 [21 Cal.Rptr.2d 110], internal citations omitted.)

- “A plaintiff has a duty to mitigate damages and cannot recover losses it could have avoided through reasonable efforts. Thrifty-Tel’s only response is that mitigation does not ‘ “require a complex series of doubtful acts and expenditures.” ’ Picking up the telephone to reach out and touch the Bezeneks or sending them a letter was complex, doubtful, or expensive? Based on Myron Bezenek’s unchallenged testimony, we must presume that simple expedient would have averted the second hacking episode. Accordingly, Thrifty-Tel is not entitled to recover damages for the February 1992 event.” (*Thrifty-Tel, Inc. v. Bezenek* (1996) 46 Cal.App.4th 1559, 1568–1569 [54 Cal.Rptr.2d 468], internal citations omitted.)

- “Contributory negligence was closely allied and easily confused with the rule of mitigation of damages, on which the jury was also instructed. Both doctrines involved the plaintiff’s duty to act reasonably. Contributory negligence was concerned with the plaintiff’s negligence before being injured, while the mitigation rule was concerned with a lack of due care after the injury. The effect of contributory negligence was to bar all recovery by the plaintiff. In contrast, a plaintiff's failure to mitigate barred recovery of only the portion of damages which could have been avoided by ordinary care after the injury.” (*LeMons v. Regents of University of California* (1978) 21 Cal.3d 869, 874–875 [148 Cal.Rptr. 355], internal citations omitted.)

- “ ‘The rule of [mitigation of damages] comes into play after a legal wrong has occurred, but while some damages may still be averted ... .’ ” (*Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1066 [232 Cal.Rptr. 528], internal citations omitted.)

- “Generally, ‘[a] person injured by the wrongful act of another is bound … to exercise reasonable care and diligence to avoid loss or minimize the resulting damages and cannot recover for losses which might have been prevented by reasonable efforts and expenditures on his part.’ The burden of proving facts in mitigation of damages rests upon the defendant.” (*Hunter v. Croysdill* (1959) 169 Cal.App.2d 307, 318 [337 P.2d 174], internal citations omitted.)

- “One who contributes to damage cannot escape liability because the proportionate contribution may not be accurately measured. It is incumbent upon the party alleging injury to prove the amount of damages. Respondent sustained that burden in this case. If the damages proven could be reduced proportionately, that burden rested upon appellant.” (*City of Oakland v. Pacific Gas & Elec. Co.* (1941) 47 Cal.App.2d 444, 450 [118 P.2d 328], internal citations omitted.)

- Restatement Second of Torts section 918 provides:

  (1) Except as stated in Subsection (2), one injured by the tort of another is not entitled to recover damages for any harm that he could have avoided by the use of reasonable effort or expenditure after the commission of the tort.
  (2) One is not prevented from recovering damages for a particular harm resulting from a tort if the tortfeasor intended the harm or was aware of it and was recklessly disregardful of it, unless the injured person with knowledge of the danger of the harm intentionally or heedlessly failed to protect his own interests.

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1382–1385, pp. 852–855
- 4 Levy et al., California Torts (1985–2000) Mitigation and Collateral Source Rule, §§ 53.01–53.04
- California Tort Damages (Cont.Ed.Bar 1988) Restrictions on Recovery, §§ 15.22–15.23
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 177, *Damages* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 65, *Damages* (Matthew Bender)
- 1 Bancroft-Whitney's California Civil Practice (1992) Torts, §§ 6:1–6:6

3932
Life Expectancy

If you decide [*name of plaintiff*] has suffered damages that will continue for the rest of [his/her] life, you must determine how long [he/she] will probably live. According to [*insert source of information*], a [*insert number*]-year-old [male/female] is expected to live another [*insert number*] years. This is the average life expectancy. Some people live longer and others die sooner.

This published information is evidence of how long a person is likely to live but is not conclusive. In deciding a person's life expectancy, you should also consider, among other factors, that person's health, habits, activities, lifestyle, and occupation.

DIRECTIONS FOR USE

Use of the life tables in *Vital Statistics of the United States*, published by the National Center for Health Statistics, is recommended.

SOURCES AND AUTHORITY

- "The life expectancy of the deceased is a question of fact for the jury to decide, considering all relevant factors including the deceased's health, lifestyle and occupation. Life expectancy figures from mortality tables are admissible but are not conclusive. Here the jury was correctly told the figure given was not conclusive evidence of Charlene's life expectancy. It was merely 'a factor which you may consider,' along with the evidence of Charlene's health, habits, occupation and activities." (*Allen v. Toledo* (1980) 109 Cal.App.3d 415, 424 [167 Cal.Rptr. 270], internal citations omitted.)

- "Mortality tables are admissible to assist the jury but they are not indispensable. It has been held, for example, that, absent mortality tables, the trier of fact may still approximate the life expectancy of a statutory beneficiary who appeared in court." (*Francis v. Sauve* (1963) 222 Cal.App.3d 102, 121 [34 Cal.Rptr. 754], internal citations omitted.)

- "It is a matter of common knowledge that many persons live beyond the period of life allotted them by the mortality roles." (*Temple v. De Mirjian* (1942) 51 Cal.App.2d 559, 566 [125 P.2d 544], internal citation omitted.)

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 1405, pp. 876–877
- 4 Levy et al., California Torts (1985–2000) Pain and Suffering, § 51.42[2][c], Medical Expenses and Economic Loss, § 52.20
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 177, *Damages* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 65, *Damages* (Matthew Bender)

3940
Punitive Damages—Individual Defendant
Trial Not Bifurcated

If you decide that [*name of defendant*]'s conduct caused [*name of plaintiff*] harm, you must decide whether that conduct justifies an award of punitive damages. The purposes of punitive damages are to punish a wrongdoer and to discourage him or her and others from similar conduct in the future.

You may award punitive damages only if [*name of plaintiff*] proves by clear and convincing evidence that [*name of defendant*] engaged in that conduct with malice, oppression, or fraud.

"Malice" means that [*name of defendant*] acted with intent to cause injury or that [*name of defendant*]'s conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A person acts with knowing disregard when he or she is aware of the probable dangerous consequences of his or her conduct and deliberately fails to avoid those consequences.

"Oppression" means that [*name of defendant*]'s conduct was despicable and subjected [*name of plaintiff*] to cruel and unjust hardship in knowing disregard of [his/her] rights.

"Despicable conduct" is conduct that is so mean, vile, base, or contemptible that it would be looked down on and despised by reasonable people.

"Fraud" means that [*name of defendant*] intentionally misrepresented or concealed a material fact and did so intending to deprive [*name of plaintiff*] of property or of a legal right or otherwise to cause [*name of plaintiff*] injury.

There is no fixed standard for determining the amount of punitive damages, and you are not required to award any punitive damages. In deciding the amount of punitive damages, if any, you should consider all of the following:

(a) How reprehensible was [*name of defendant*]'s conduct?

(b) Is there a reasonable relationship between the amount of punitive damages and [*name of plaintiff*]'s harm?

(c) In view of [*name of defendant*]'s financial condition, what amount is necessary to punish [him/her] and discourage future wrongful conduct?

DIRECTIONS FOR USE

This instruction is intended to apply to individual persons only. When the plaintiff is seeking punitive damages against corporate defendants, use Instruction 3943, *Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee—Trial Not Bifurcated*, or Instruction 3945, *Punitive Damages—Entity Defendant—Trial Not Bifurcated*. When plaintiff is seeking punitive damages against both an individual person and a corporate defendant, use Instruction 3947, *Punitive Damages—Individual and Entity Defendants—Trial Not Bifurcated*.

Courts have stated that "[p]unitive damages previously imposed for the same conduct are relevant in determining the amount of punitive damages required to sufficiently punish and deter. The likelihood of future punitive damage awards may also be considered, although it is entitled to considerably less weight." (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661 [57 Cal.Rptr.2d 525], internal citations omitted.) The court in *Stevens* suggested that the following instruction be given if evidence of other punitive damage awards is introduced into evidence:

> If you determine that a defendant has already been assessed with punitive damages based on the same conduct for which punitive damages are requested in this case, you may consider whether punitive damages awarded in other cases have sufficiently punished and made an example of the defendant. You must not use the amount of punitive damages awarded in other cases to determine the amount of the punitive damage award in this case, except to the extent you determine that a lesser award, or no award at all, is justified in light of the penalties already imposed. (*Stevens, supra*, 49 Cal.App.4th at p. 1663, fn. 7.)

Regarding the relationship between punitive and compensatory damages, case law suggests that a jury may consider harm that could have been caused by the defendant's conduct, even if that harm did not come to pass: "The high court in *TXO* [*TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443 [113 S.Ct. 2711, 125 L.Ed.2d 366]] and *BMW* [*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559 [116 S.Ct. 1589, 134 L.Ed.2d 809]] has refined the disparity analysis to take into account the *potential* loss to the plaintiffs, as where a scheme worthy of punitive damages does not fully succeed. In such cases, the proper ratio would be the ratio of punitive damages to the potential harm to plaintiff." (*Sierra Club Foundation v. Graham* (1999) 72 Cal.App.4th 1135, 1162, fn. 15 [85 Cal.Rptr.2d 726], internal citations omitted.)

In *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 123 S.Ct. 1513, 1520, citing *BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, 575 [116 S.Ct. 1589; 134 L.Ed.2d 809], the U.S. Supreme Court reiterated the guideposts courts must consider in reviewing punitive damages awards: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the

punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases."

SOURCES AND AUTHORITY

- Civil Code section 3294 provides, in part:

  (a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.
  (b) An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.
  (c) As used in this section, the following definitions shall apply:
    (1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.
    (2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.
    (3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

- "An award of punitive damages is not supported by a verdict based on breach of contract, even where the defendant's conduct in breaching the contract was wilful, fraudulent, or malicious. Even in those cases in which a separate tort action is alleged, if there is 'but one verdict based upon contract' a punitive damage award is improper." (*Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 960 [17 Cal.Rptr.2d 242], internal citations omitted.)

- "The purpose of punitive damages is to punish wrongdoers and thereby deter the commission of wrongful acts." (*Neal v. Farmers Insurance Exchange* (1978) 21 Cal.3d 910, 928, fn. 13 [148 Cal.Rptr. 389].)

- "Punitive damages are to be assessed in an amount which, depending upon the defendant's financial worth and other factors, will deter him and others from committing similar misdeeds. Because compensatory damages are designed to make the plaintiff 'whole,' punitive damages are a 'windfall' form of recovery." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 712 [34 Cal.Rptr2d 898], internal citations omitted.)

- "It follows that the wealthier the wrongdoing defendant, the larger the award of exemplary damages need be in order to accomplish the statutory objective." (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 65 [118 Cal.Rptr. 184].)

- " 'A plaintiff, upon establishing his case, is always entitled of right to compensatory damages. But even after establishing a case where punitive damages are permissible, he is never entitled to them. The granting or withholding of the award of punitive damages is wholly within the control of the jury, and may not legally be influenced by any direction of the court that in any case a plaintiff is entitled to them. Upon the clearest proof of malice in fact, it is still the exclusive province of the jury to say whether or not punitive damages shall be awarded. A plaintiff is entitled to such damages only after the jury, in the exercise of its untrammeled discretion, has made the award.' " (*Brewer v. Second Baptist Church of Los Angeles* (1948) 32 Cal.2d 791, 801 [197 P.2d 713], internal citation omitted.)

- "In light of our holding that evidence of a defendant's financial condition is essential to support an award of punitive damages, Evidence Code section 500 mandates that the plaintiff bear the burden of proof on the issue. A plaintiff seeking punitive damages is not seeking a mere declaration by the jury that he is entitled to punitive damages in the abstract. The plaintiff is seeking an award of real money in a specific amount to be set by the jury. Because the award, whatever its amount, cannot be sustained absent evidence of the defendant's financial condition, such evidence is 'essential to the claim for relief.' " (*Adams v. Murakami* (1991) 54 Cal. 3d 105, 119 [284 Cal.Rptr. 318], internal citation omitted.)

- "[W]e are afforded guidance by certain established principles, all of which are grounded in the purpose and function of punitive damages. One factor is the particular nature of the defendant's acts in light of the whole record; clearly, different acts may be of varying degrees of reprehensibility, and the more reprehensible the act, the greater the appropriate punishment, assuming all other factors are equal. Another relevant yardstick is the amount of compensatory damages awarded; in general, even an act of considerable reprehensibility will not be seen to justify a proportionally high amount of punitive damages if the actual harm suffered thereby is small. Also to be considered is the wealth of the particular defendant; obviously, the function of deterrence will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort. By the same token, of course, the function of punitive damages is not served by an award which, in light of the defendant's wealth and the gravity of the particular act, exceeds the level necessary to

properly punish and deter." (*Neal, supra,* 21 Cal.3d at p. 928, internal citations and footnote omitted.)

- "The decision to award punitive damages is exclusively the function of the trier of fact. So too is the amount of any punitive damage award. The relevant considerations are the nature of the defendant's conduct, the defendant's wealth, and the plaintiff's actual damages." (*Gagnon v. Continental Casualty Co.* (1989) 211 Cal.App.3d 1598, 1602 [260 Cal.Rptr. 305], internal citations omitted.)

- "It has been recognized that punitive damages awards generally are not permitted to exceed 10 percent of the defendant's net worth." (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1166 [74 Cal.Rptr.2d 510].)

- "In light of our discussion, we conclude that even where, as here, punitive but not compensatory damages are available to the plaintiff, the defendant is entitled to an instruction that punitive damages must bear a reasonable relation to the injury, harm, or damage actually suffered by the plaintiff and proved at trial. Consequently, the trial court erred in failing to so instruct the jury." (*Gagnon, supra,* 211 Cal.App.3d at p. 1605.)

- "Malice, for purposes of awarding exemplary damages, includes 'despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.' To establish conscious disregard, the plaintiff must show 'that the defendant was aware of the probable dangerous consequences of his conduct, and that he wilfully and deliberately failed to avoid those consequences.' " (*Hoch v. Allied-Signal, Inc.* (1994) 24 Cal.App.4th 48, 61 [29 Cal.Rptr.2d 615], internal citations omitted.)

- "Used in its ordinary sense, the adjective 'despicable' is a powerful term that refers to circumstances that are 'base,' 'vile,' or 'contemptible.' As amended to include this word, the statute plainly indicates that absent an intent to injure the plaintiff, 'malice' requires more than a 'willful and conscious' disregard of the plaintiffs' interests. The additional component of 'despicable conduct' must be found." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 725, internal citations omitted.)

- "We conclude that the rule … that an award of exemplary damages must be accompanied by an award of compensatory damages [or its equivalent] is still sound. That rule cannot be deemed satisfied where the jury has made an express determination not to award compensatory damages." (*Cheung v. Daley* (1995) 35 Cal.App.4th 1673, 1677 [42 Cal.Rptr.2d 164], footnote omitted.)

- "With the focus on the plaintiff's injury rather than the amount of compensatory damages, the ["reasonable relation"] rule can be applied even in cases where only equitable relief is obtained or where nominal damages are awarded or, as here, where compensatory damages are unavailable." (*Gagnon, supra,* 211 Cal.App.3d at p. 1605.)

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1327, 1335–1341, 1369–1381
- 4 Levy et al., California Torts (1985–2000) Punitive Damages, §§ 54.01–54.06, 54.20–54.25
- California Tort Damages (Cont.Ed.Bar 1988) Punitive Damages, §§ 14.1–14.8, 14.15–14.18
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 177, *Damages* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 65, *Damages* (Matthew Bender)

3941
Punitive Damages—Individual Defendant
Bifurcated Trial (First Phase)

If you decide that [*name of defendant*]'s conduct caused [*name of plaintiff*] harm, you must decide whether that conduct justifies an award of punitive damages. At this time, you must decide whether [*name of plaintiff*] has proved by clear and convincing evidence that [*name of defendant*] engaged in that conduct with malice, oppression, or fraud. The amount of punitive damages, if any, will be decided later.

"Malice" means that [*name of defendant*] acted with intent to cause injury or that [*name of defendant*]'s conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A person acts with knowing disregard when he or she is aware of the probable dangerous consequences of his or her conduct and deliberately fails to avoid those consequences.

"Oppression" means that [*name of defendant*]'s conduct was despicable and subjected [*name of plaintiff*] to cruel and unjust hardship in knowing disregard of [his/her] rights.

"Despicable conduct" is conduct that is so mean, vile, base, or contemptible that it would be looked down on and despised by reasonable people.

"Fraud" means that [*name of defendant*] intentionally misrepresented or concealed a material fact and did so intending to deprive [*name of plaintiff*] of property or of a legal right or otherwise to cause [*name of plaintiff*] injury.

SOURCES AND AUTHORITY

- Civil Code section 3294 provides, in part:

> (a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant. …
>
> (c) As used in this section, the following definitions shall apply:
>
> (1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.

(2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.
(3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

- Civil Code section 3295(d) provides: "The court shall, on application of any defendant, preclude the admission of evidence of that defendant's profits or financial condition until after the trier of fact returns a verdict for plaintiff awarding actual damages and finds that a defendant is guilty of malice, oppression, or fraud in accordance with Section 3294. Evidence of profit and financial condition shall be admissible only as to the defendant or defendants found to be liable to the plaintiff and to be guilty of malice, oppression, or fraud. Evidence of profit and financial condition shall be presented to the same trier of fact that found for the plaintiff and found one or more defendants guilty of malice, oppression, or fraud."

- "[Section 3295(d)] affects the order of proof at trial, precluding the admission of evidence of defendants' financial condition until after the jury has returned a verdict for plaintiffs awarding actual damages and found that one or more defendants were guilty of 'oppression, fraud or malice,' in accordance with Civil Code section 3294." (*City of El Monte v. Superior Court* (1994) 29 Cal.App.4th 272, 274–275 [34 Cal.Rptr.2d 490], internal citations omitted.)

- "Evidence of the defendant's financial condition is a prerequisite to an award of punitive damages. In order to protect defendants from the premature disclosure of their financial position when punitive damages are sought, the Legislature enacted Civil Code section 3295." (*City of El Monte, supra,* 29 Cal.App.4th at p. 276, internal citations omitted.)

- "[C]ourts have held it is reversible error to try the punitive damages issue to a new jury after the jury which found liability has been excused." (*Rivera v. Sassoon* (1995) 39 Cal.App.4th 1045, 1048 [46 Cal.Rptr.2d 144], internal citations omitted.)

- "Malice, for purposes of awarding exemplary damages, includes 'despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.' To establish conscious disregard, the plaintiff must show 'that the defendant was aware of the probable dangerous consequences of his conduct, and that he wilfully and deliberately failed to avoid those consequences.' " (*Hoch v. Allied-Signal, Inc.* (1994) 24 Cal.App.4th 48, 61 [29 Cal.Rptr.2d 615], internal citations omitted.)

- "Used in its ordinary sense, the adjective 'despicable' is a powerful term that refers to circumstances that are 'base,' 'vile,' or 'contemptible.' As amended to include this word, the statute plainly indicates that absent an intent to injure the plaintiff, 'malice'

requires more than a 'willful and conscious' disregard of the plaintiffs' interests. The additional component of 'despicable conduct' must be found." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 725 [34 Cal.Rptr2d 898], internal citations omitted.)

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1327, 1335–1341, 1369–1381
- 4 Levy et al., California Torts (1985–2000) Punitive Damages, §§ 54.01–54.06, 54.24[4][d]
- California Tort Damages (Cont.Ed.Bar 1988) Punitive Damages, §§ 14.1–14.8, 14.15–14.18, 14.23
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 177, *Damages* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 65, *Damages* (Matthew Bender)

3942
Punitive Damages—Individual Defendant
Bifurcated Trial (Second Phase)

You must now decide the amount, if any, that you should award [*name of plaintiff***] in punitive damages. The purposes of punitive damages are to punish a wrongdoer and to discourage him or her and others from similar conduct in the future.**

There is no fixed standard for determining the amount of punitive damages and you are not required to award any punitive damages. In deciding the amount of punitive damages, if any, you should consider all of the following:

(a) How reprehensible was [*name of defendant***]'s conduct?**

(b) Is there a reasonable relationship between the amount of punitive damages and [*name of plaintiff***]'s harm?**

(c) In view of [*name of defendant***]'s financial condition, what amount is necessary to punish [him/her] and discourage future wrongful conduct?**

DIRECTIONS FOR USE

Courts have stated that "[p]unitive damages previously imposed for the same conduct are relevant in determining the amount of punitive damages required to sufficiently punish and deter. The likelihood of future punitive damage awards may also be considered, although it is entitled to considerably less weight." (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661 [57 Cal.Rptr.2d 525], internal citations omitted.) The court in *Stevens* suggested that the following instruction be given if evidence of other punitive damage awards is introduced into evidence:

> If you determine that a defendant has already been assessed with punitive damages based on the same conduct for which punitive damages are requested in this case, you may consider whether punitive damages awarded in other cases have sufficiently punished and made an example of the defendant. You must not use the amount of punitive damages awarded in other cases to determine the amount of the punitive damage award in this case, except to the extent you determine that a lesser award, or no award at all, is justified in light of the penalties already imposed. (*Stevens, supra,* 49 Cal.App.4th at p. 1663, fn. 7.)

Regarding the relationship between punitive and compensatory damages, case law suggests that a jury may consider harm that could have been caused by the defendant's

conduct, even if that harm did not come to pass: "The high court in *TXO* [*TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443 [113 S.Ct. 2711, 125 L.Ed.2d 366]] and *BMW* [*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559 [116 S.Ct. 1589, 134 L.Ed.2d 809]] has refined the disparity analysis to take into account the *potential* loss to the plaintiffs, as where a scheme worthy of punitive damages does not fully succeed. In such cases, the proper ratio would be the ratio of punitive damages to the potential harm to plaintiff." (*Sierra Club Foundation v. Graham* (1999) 72 Cal.App.4th 1135, 1162, fn. 15 [85 Cal.Rptr.2d 726], internal citations omitted.)
In *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 123 S.Ct. 1513, 1520, citing *BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, 575 [116 S.Ct. 1589; 134 L.Ed.2d 809], the U.S. Supreme Court reiterated the guideposts courts must consider in reviewing punitive damages awards: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases."

SOURCES AND AUTHORITY

- Civil Code section 3294 provides, in part: "In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant."

- Civil Code section 3295(d) provides: "The court shall, on application of any defendant, preclude the admission of evidence of that defendant's profits or financial condition until after the trier of fact returns a verdict for plaintiff awarding actual damages and finds that a defendant is guilty of malice, oppression, or fraud in accordance with Section 3294. Evidence of profit and financial condition shall be admissible only as to the defendant or defendants found to be liable to the plaintiff and to be guilty of malice, oppression, or fraud. Evidence of profit and financial condition shall be presented to the same trier of fact that found for the plaintiff and found one or more defendants guilty of malice, oppression, or fraud."

- "[Section 3295(d)] affects the order of proof at trial, precluding the admission of evidence of defendants' financial condition until after the jury has returned a verdict for plaintiffs awarding actual damages and found that one or more defendants were guilty of 'oppression, fraud or malice,' in accordance with Civil Code section 3294." (*City of El Monte v. Superior Court* (1994) 29 Cal.App.4th 272, 274–275 [34 Cal.Rptr.2d 490], internal citations omitted.)

- "Evidence of the defendant's financial condition is a prerequisite to an award of punitive damages. In order to protect defendants from the premature disclosure of their financial position when punitive damages are sought, the Legislature enacted

Civil Code section 3295." (*City of El Monte, supra,* 29 Cal.App.4th at p. 276, internal citations omitted.)

- "[C]ourts have held it is reversible error to try the punitive damages issue to a new jury after the jury which found liability has been excused." (*Rivera v. Sassoon* (1995) 39 Cal.App.4th 1045, 1048 [46 Cal.Rptr.2d 144], internal citations omitted.)

- "The purpose of punitive damages is to punish wrongdoers and thereby deter the commission of wrongful acts." (*Neal v. Farmers Insurance Exchange* (1978) 21 Cal.3d 910, 928, fn. 13 [148 Cal.Rptr. 389].)

- "Punitive damages are to be assessed in an amount which, depending upon the defendant's financial worth and other factors, will deter him and others from committing similar misdeeds. Because compensatory damages are designed to make the plaintiff 'whole,' punitive damages are a 'windfall' form of recovery." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 712 [34 Cal.Rptr.2d 898], internal citations omitted.)

- "It follows that the wealthier the wrongdoing defendant, the larger the award of exemplary damages need be in order to accomplish the statutory objective." (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 65 [118 Cal.Rptr. 184].)

- " 'A plaintiff, upon establishing his case, is always entitled of right to compensatory damages. But even after establishing a case where punitive damages are permissible, he is never entitled to them. The granting or withholding of the award of punitive damages is wholly within the control of the jury, and may not legally be influenced by any direction of the court that in any case a plaintiff is entitled to them. Upon the clearest proof of malice in fact, it is still the exclusive province of the jury to say whether or not punitive damages shall be awarded. A plaintiff is entitled to such damages only after the jury, in the exercise of its untrammeled discretion, has made the award.' " (*Brewer v. Second Baptist Church of Los Angeles* (1948) 32 Cal.2d 791, 801 [197 P.2d 713], internal citation omitted.)

- "In light of our holding that evidence of a defendant's financial condition is essential to support an award of punitive damages, Evidence Code section 500 mandates that the plaintiff bear the burden of proof on the issue. A plaintiff seeking punitive damages is not seeking a mere declaration by the jury that he is entitled to punitive damages in the abstract. The plaintiff is seeking an award of real money in a specific amount to be set by the jury. Because the award, whatever its amount, cannot be sustained absent evidence of the defendant's financial condition, such evidence is 'essential to the claim for relief.' " (*Adams v. Murakami* (1991) 54 Cal.3d 105, 119 [284 Cal. Rptr. 318], internal citation omitted.)

- "[W]e are afforded guidance by certain established principles, all of which are grounded in the purpose and function of punitive damages. One factor is the particular nature of the defendant's acts in light of the whole record; clearly, different

acts may be of varying degrees of reprehensibility, and the more reprehensible the act, the greater the appropriate punishment, assuming all other factors are equal. Another relevant yardstick is the amount of compensatory damages awarded; in general, even an act of considerable reprehensibility will not be seen to justify a proportionally high amount of punitive damages if the actual harm suffered thereby is small. Also to be considered is the wealth of the particular defendant; obviously, the function of deterrence will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort. By the same token, of course, the function of punitive damages is not served by an award which, in light of the defendant's wealth and the gravity of the particular act, exceeds the level necessary to properly punish and deter." (*Neal, supra,* 21 Cal.3d at p 928, internal citations and footnote omitted.)

- "The decision to award punitive damages is exclusively the function of the trier of fact. So too is the amount of any punitive damage award. The relevant considerations are the nature of the defendant's conduct, the defendant's wealth, and the plaintiff's actual damages." (*Gagnon v. Continental Casualty Co.* (1989) 211 Cal.App.3d 1598, 1602 [260 Cal.Rptr. 305], internal citations omitted.)

- "It has been recognized that punitive damages awards generally are not permitted to exceed 10 percent of the defendant's net worth." (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1166 [74 Cal.Rptr.2d 510].)

- "In light of our discussion, we conclude that even where, as here, punitive but not compensatory damages are available to the plaintiff, the defendant is entitled to an instruction that punitive damages must bear a reasonable relation to the injury, harm, or damage actually suffered by the plaintiff and proved at trial. Consequently, the trial court erred in failing to so instruct the jury." (*Gagnon, supra,* 211 Cal.App.3d at p. 1605.)

- "We conclude that the rule … that an award of exemplary damages must be accompanied by an award of compensatory damages [or its equivalent] is still sound. That rule cannot be deemed satisfied where the jury has made an express determination not to award compensatory damages." (*Cheung v. Daley* (1995) 35 Cal.App.4th 1673, 1677 [42 Cal.Rptr.2d 164], footnote omitted.)

- "With the focus on the plaintiff's injury rather than the amount of compensatory damages, the ["reasonable relation"] rule can be applied even in cases where only equitable relief is obtained or where nominal damages are awarded or, as here, where compensatory damages are unavailable." (*Gagnon, supra,* 211 Cal.App.3d at p. 1605.)

<u>Secondary Sources</u>

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1327, pp. 784–786, 1369–1381, pp. 836–852

- 4 Levy et al., California Torts (1985–2000) Punitive Damages, §§ 54.20–54.25, 54.24[4][d]
- California Tort Damages (Cont.Ed.Bar 1988) Punitive Damages, §§ 14.1–14.8, 14.23
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 177, *Damages* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 65, *Damages* (Matthew Bender)

3943
Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee Trial Not Bifurcated

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If you decide [*name of employee/agent***]'s conduct caused [***name of plaintiff***] harm, you must decide whether that conduct justifies an award of punitive damages against [***name of defendant***] for [***name of employee/ agent***]'s conduct. The purposes of punitive damages are to punish a wrongdoer and to discourage him or her and others from similar conduct in the future.**

You may award punitive damages against [*name of defendant***] for [***name of employee/agent***]'s conduct only if [***name of plaintiff***] proves by clear and convincing evidence that [***name of employee/agent***] engaged in that conduct with malice, oppression, or fraud.**

"Malice" means that [*name of employee/agent***] acted with intent to cause injury, or that [***name of employee/agent***]'s conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A person acts with knowing disregard when he or she is aware of the probable dangerous consequences of his or her conduct and deliberately fails to avoid those consequences.**

"Oppression" means that [*name of employee/agent***]'s conduct was despicable and subjected [***name of plaintiff***] to cruel and unjust hardship in knowing disregard of [his/her] rights.**

"Despicable conduct" is conduct that is so mean, vile, base, or contemptible that it would be looked down on and despised by reasonable people.

"Fraud" means that [*name of employee/agent***] intentionally misrepresented or concealed a material fact and did so intending to deprive [***name of plaintiff***] of property or of a legal right or otherwise to cause [***name of plaintiff***] injury.**

[*Name of plaintiff***] must also prove [one of] the following:**

1. **[That [***name of employee/agent***] was an officer, director, or managing agent of [***name of defendant***] acting in a [corporate/ employment] capacity; [or]]**

2. **[That an officer, a director, or a managing agent of [***name of defendant***] had advance knowledge of the unfitness of [***name of employee/agent***] and employed [him/her] with a knowing disregard of the rights or safety of others; [or]]**

3. **[That an officer, a director, or a managing agent of [***name of defendant***] authorized [***name of employee/agent***]'s conduct; [or]]**

4. **[That an officer, a director, or a managing agent of [*name of defendant*] knew of [*name of employee/agent*]'s wrongful conduct and adopted or approved the conduct after it occurred.]**

An employee is a "managing agent" if he or she exercises substantial independent authority and judgment in his or her corporate decision making so that his or her decisions ultimately determine corporate policy.

There is no fixed standard for determining the amount of punitive damages, and you are not required to award any punitive damages. In deciding the amount of punitive damages, if any, you should consider all of the following:

(a) How reprehensible was [*name of defendant*]'s conduct?

(b) Is there a reasonable relationship between the amount of punitive damages and [*name of plaintiff*]'s harm?

(c) In view of [*name of defendant*]'s financial condition, what amount is necessary to punish [him/her] and discourage future wrongful conduct?

DIRECTIONS FOR USE

This instruction is intended for use when the plaintiff is seeking to hold only an employer or principal liable for punitive damages based on the conduct of a specific employee or agent. When the plaintiff is seeking punitive damages from both the employer/principal and the employee/agent, use Instruction 3947, *Punitive Damages—Individual and Entity Defendants—Trial Not Bifurcated.* When punitive damages are sought against a corporation or other entity for the conduct of its directors, officers, and managing agents, use Instruction 3945, *Punitive Damages—Entity Defendant—Trial Not Bifurcated.*

If any of the alternative grounds for seeking punitive damages are inapplicable to the facts of the case, they may be omitted.

This instruction combines elements of Civil Code section 3294(a) and 3294(b). The standard of proof under section 3294(a) is clear and convincing evidence; but it is not clear whether the standard of proof for the findings required under section 3294(b) is "clear and convincing" or "preponderance of the evidence."

See Instruction 3940, *Punitive Damages—Individual Defendant—Trial Not Bifurcated* for additional sources and authority.

Courts have stated that "[p]unitive damages previously imposed for the same conduct are relevant in determining the amount of punitive damages required to sufficiently punish and deter. The likelihood of future punitive damage awards may also be considered,

although it is entitled to considerably less weight." (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661 [57 Cal.Rptr.2d 525], internal citations omitted.) The court in *Stevens* suggested that the following instruction be given if evidence of other punitive damage awards is introduced into evidence:

> If you determine that a defendant has already been assessed with punitive damages based on the same conduct for which punitive damages are requested in this case, you may consider whether punitive damages awarded in other cases have sufficiently punished and made an example of the defendant. You must not use the amount of punitive damages awarded in other cases to determine the amount of the punitive damage award in this case, except to the extent you determine that a lesser award, or no award at all, is justified in light of the penalties already imposed. (*Stevens, supra,* 49 Cal.App.4th at p. 1663, fn. 7.)

Regarding the relationship between punitive and compensatory damages, case law suggests that a jury may consider harm that could have been caused by the defendant's conduct, even if that harm did not come to pass: "The high court in *TXO* [*TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443 [113 S.Ct. 2711, 125 L.Ed.2d 366]] and *BMW* [*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559 [116 S.Ct. 1589, 134 L.Ed.2d 809]] has refined the disparity analysis to take into account the *potential* loss to the plaintiffs, as where a scheme worthy of punitive damages does not fully succeed. In such cases, the proper ratio would be the ratio of punitive damages to the potential harm to plaintiff." (*Sierra Club Foundation v. Graham* (1999) 72 Cal.App.4th 1135, 1162, fn. 15 [85 Cal.Rptr.2d 726], internal citations omitted.)
In *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 123 S.Ct. 1513, 1520, citing to *BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, 575 [116 S.Ct. 1589; 134 L.Ed.2d 809], the U.S. Supreme Court reiterated the guideposts courts must consider in reviewing punitive damages awards: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases."

SOURCES AND AUTHORITY

- Civil Code section 3294 provides, in part:

  (a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.
  (b) An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the

employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.

(c) As used in this section, the following definitions shall apply:

(1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.

(2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.

(3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

- "Subdivision (b) is not a model of clarity, but in light of California's history of employer liability for punitive damages and of the Legislature's reasons for enacting subdivision (b), we have no doubt that it does no more than codify and refine existing law. Subdivision (b) thus authorizes the imposition of punitive damages on an employer in three situations: (1) when an employee was guilty of oppression, fraud or malice, and the employer with advance knowledge of the unfitness of the employee employed him or her with a conscious disregard of the rights or safety of others, (2) when an employee was guilty of oppression, fraud or malice, and the employer authorized or ratified the wrongful conduct, or (3) when the employer was itself guilty of the oppression, fraud or malice." (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1151 [74 Cal.Rptr.2d 510].)

- " 'California has traditionally allowed punitive damages to be assessed against an employer (or principal) for the acts of an employee (or agent) only where the circumstances indicate that the employer himself was guilty of fraud, oppression, or malice. Thus, even before section 3294, subdivision (b) was added to the Civil Code in 1980, the courts required evidence that the employer authorized or ratified a malicious act, personally committed such an act, or wrongfully hired or retained an unfit employee.' The 'additional' burden on a plaintiff seeking punitive damages from an employer is to show not only that an employee acted with oppression, fraud or malice, but that the employer engaged in conduct defined in subdivision (b)." (*Weeks, supra,* 63 Cal.App.4th at p. 1154, internal citation omitted.)

- "Civil Code section 3294, subdivision (b) does not authorize an award of punitive damages against an employer for the employee's wrongful conduct. It authorizes an award of punitive damages against an employer for the employer's own wrongful conduct. Liability under subdivision (b) is vicarious only to the extent that the employer is liable for the actions of its officer, director or managing agent in hiring or controlling the offending employee, in ratifying the offense or in acting with oppression, fraud or malice. It is not vicarious in the sense that the employer is liable for the wrongful conduct of the offending employee." (*Weeks, supra,* 63 Cal.App.4th at pp. 1154–1155.)

- "An award of punitive damages is not supported by a verdict based on breach of contract, even where the defendant's conduct in breaching the contract was wilful, fraudulent, or malicious. Even in those cases in which a separate tort action is alleged, if there is 'but one verdict based upon contract' a punitive damage award is improper." (*Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 960 [17 Cal.Rptr.2d 242], internal citations omitted.)

- "[P]unitive damages are not assessed against employers on a pure respondeat superior basis. Some evidence of fault by the employer itself is also required." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 724, fn. 11 [34 Cal.Rptr.2d 898].)

- "Subdivision (b) … governs awards of punitive damages against employers, and permits an award for the conduct described there without an additional finding that the employer engaged in oppression, fraud or malice." (*Weeks, supra,* 63 Cal.App.4th at p. 1137.)

- "Section 3294 is no longer silent on who may be responsible for imputing punitive damages to a corporate employer. For corporate punitive damages liability, section 3294, subdivision (b), requires that the wrongful act giving rise to the exemplary damages be committed by an 'officer, director, or managing agent.' " (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572 [88 Cal.Rptr.2d 19].)

- "[I]n performing, ratifying, or approving the malicious conduct, the agent must be acting as the organization's representative, not in some other capacity." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 723.)

- The concept of "managing agent" "assumes that such individual was acting in a corporate or employment capacity when the conduct giving rise to the punitive damages claim against the employer occurred." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 723.)

- "No purpose would be served by punishing the employer for an employee's conduct that is wholly unrelated to its business or to the employee's duties therein." (*College Hospital, Inc., supra,* 8 Cal.4th at pp. 723–724.)

- " 'The determination whether employees act in a managerial capacity [i.e., are managing agents] does not necessarily hinge on their "level" in the corporate hierarchy. Rather, the critical inquiry is the degree of discretion the employees possess in making decisions that will ultimately determine corporate policy.' " (*Kelly-Zurian v. Wohl Shoe Co.* (1994) 22 Cal.App.4th 397, 421 [27 Cal.Rptr.2d 457], internal citation omitted.)

- "[W]e conclude the Legislature intended the term 'managing agent' to include only those corporate employees who exercise substantial independent authority and judgment in their corporate decisionmaking so that their decisions ultimately determine corporate policy. The scope of a corporate employee's discretion and authority under our test is therefore a question of fact for decision on a case-by-case basis." (*White, supra,* 21 Cal.4th at pp. 566–567.)

- "In order to demonstrate that an employee is a true managing agent under section 3294, subdivision (b), a plaintiff seeking punitive damages would have to show that the employee exercised substantial discretionary authority over significant aspects of a corporation's business." (*White, supra,* 21 Cal.4th at p. 577.)

- " '[C]orporate policy' is the general principles which guide a corporation, or rules intended to be followed consistently over time in corporate operations. A 'managing agent' is one with substantial authority over decisions that set these general principles and rules." (*Cruz v. Homebase* (2000) 83 Cal.App.4th 160, 167–168 [99 Cal.Rptr.2d 435].)

- " '[R]atification' is the '[c]onfirmation and acceptance of a previous act.' A corporation cannot confirm and accept that which it does not actually know about." (*Cruz, supra,* 83 Cal.App.4th at p. 168.)

- "For purposes of determining an employer's liability for punitive damages, ratification generally occurs where, under the particular circumstances, the employer demonstrates an intent to adopt or approve oppressive, fraudulent, or malicious behavior by an employee in the performance of his job duties." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 726.)

- "Corporate ratification in the punitive damages context requires actual knowledge of the conduct and its outrageous nature." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 726.)

<u>Secondary Sources</u>

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1344–1348, pp. 807–810
- 4 Levy et al., California Torts (1985–2000) Punitive Damages, § 54.07
- California Tort Damages (Cont.Ed.Bar 1988) Punitive Damages, §§ 14.13–14.14

- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 177, *Damages* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 65, *Damages* (Matthew Bender)

3944
Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee Bifurcated Trial (First Phase)

If you decide that [*name of employee/agent***]'s conduct caused [***name of plaintiff***] harm, you must decide whether that conduct justifies an award of punitive damages against [***name of defendant***] for [***name of employee/ agent***]'s conduct. At this time, you must decide whether [***name of plaintiff***] has proved by clear and convincing evidence that [***name of employee/agent***] engaged in that conduct with malice, oppression, or fraud. The amount of punitive damages, if any, will be decided later.**

"Malice" means that [*name of employee/agent***] acted with intent to cause injury or that [***name of employee/agent***]'s conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A person acts with knowing disregard when he or she is aware of the probable dangerous consequences of his or her conduct and deliberately fails to avoid those consequences.**

"Oppression" means that [*name of employee/agent***]'s conduct was despicable and subjected [***name of plaintiff***] to cruel and unjust hardship in knowing disregard of [his/her] rights.**

"Despicable conduct" is conduct that is so mean, vile, base, or contemptible that it would be looked down on and despised by reasonable people.

"Fraud" means that [*name of employee/agent***] intentionally misrepresented or concealed a material fact and did so intending to deprive [***name of plaintiff***] of property or of a legal right or otherwise to cause [***name of plaintiff***] injury.**

[*Name of plaintiff***] must also prove [one of] the following:**

1. **[That [***name of employee/agent***] was an officer, a director, or a managing agent of [***name of defendant***] acting in a [corporate/ employment] capacity; [or]]**

2. **[That an officer, a director, or a managing agent of [***name of defendant***] had advance knowledge of the unfitness of [***name of employee/agent***] and employed [him/her] with a knowing disregard of the rights or safety of others; [or]]**

3. **[That an officer, a director, or a managing agent of [***name of defendant***] authorized [***name of employee/agent***]'s conduct; [or]]**

4. **[That an officer, a director, or a managing agent of [***name of defendant***] knew of [***name of employee/agent***]'s wrongful conduct and adopted or approved the conduct after it occurred.]**

An employee is a "managing agent" if he or she exercises substantial independent authority and judgment in his or her corporate decision making so that his or her decisions ultimately determine corporate policy.

DIRECTIONS FOR USE

Instruction 3942, *Punitive Damages—Individual Defendant—Bifurcated Trial (Second Phase)* may be used for the second phase of a bifurcated trial.

This instruction is intended for use when the plaintiff is seeking to hold only an employer or principal liable for punitive damages based on the conduct of a specific employee or agent. When the plaintiff is seeking punitive damages from both the employer/principal and the employee/agent, use Instruction 3948, *Punitive Damages—Individual and Corporate Defendants (Corporate Liability Based on Acts of Named Individual)—Bifurcated Trial (First Phase)*. When punitive damages are sought against a corporation or other entity for the conduct of its directors, officers, and managing agents, use Instruction 3946, *Punitive Damages—Entity Defendant—Bifurcated Trial (First Phase).*

If any of the alternative grounds for seeking punitive damages are inapplicable to the facts of the case, they may be omitted.

This instruction combines elements of Civil Code section 3294(a) and 3294(b). The standard of proof under section 3294(a) is clear and convincing evidence; but it is not clear whether the standard of proof for the findings required under section 3294(b) is "clear and convincing" or "preponderance of the evidence."

SOURCES AND AUTHORITY

- Civil Code section 3294 provides, in part:

  (a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.
  (b) An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or

authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.

(c) As used in this section, the following definitions shall apply:

(1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.

(2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.

(3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

- Civil Code section 3295(d) provides: "The court shall, on application of any defendant, preclude the admission of evidence of that defendant's profits or financial condition until after the trier of fact returns a verdict for plaintiff awarding actual damages and finds that a defendant is guilty of malice, oppression, or fraud in accordance with Section 3294. Evidence of profit and financial condition shall be admissible only as to the defendant or defendants found to be liable to the plaintiff and to be guilty of malice, oppression, or fraud. Evidence of profit and financial condition shall be presented to the same trier of fact that found for the plaintiff and found one or more defendants guilty of malice, oppression, or fraud."

- "[Section 3295(d)] affects the order of proof at trial, precluding the admission of evidence of defendants' financial condition until after the jury has returned a verdict for plaintiffs awarding actual damages and found that one or more defendants were guilty of 'oppression, fraud or malice,' in accordance with Civil Code section 3294." (*City of El Monte v. Superior Court* (1994) 29 Cal.App.4th 272, 274–275 [34 Cal.Rptr.2d 490].)

- "Evidence of the defendant's financial condition is a prerequisite to an award of punitive damages. In order to protect defendants from the premature disclosure of their financial position when punitive damages are sought, the Legislature enacted Civil Code section 3295." (*City of El Monte, supra,* 29 Cal.App.4th at p. 276.)

- "[C]ourts have held it is reversible error to try the punitive damages issue to a new jury after the jury which found liability has been excused." (*Rivera v. Sassoon* (1995) 39 Cal.App.4th 1045, 1048 [46 Cal.Rptr.2d 144].)

- “Malice, for purposes of awarding exemplary damages, includes ‘despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.’ To establish conscious disregard, the plaintiff must show ‘that the defendant was aware of the probable dangerous consequences of his conduct, and that he wilfully and deliberately failed to avoid those consequences.’ ” (*Hoch v. Allied-Signal, Inc.* (1994) 24 Cal.App.4th 48, 61 [29 Cal.Rptr.2d 615], internal citations omitted.)

- “Used in its ordinary sense, the adjective ‘despicable’ is a powerful term that refers to circumstances that are ‘base,’ ‘vile,’ or ‘contemptible.’ As amended to include this word, the statute plainly indicates that absent an intent to injure the plaintiff, ‘malice’ requires more than a ‘willful and conscious’ disregard of the plaintiffs’ interests. The additional component of ‘despicable conduct’ must be found.” (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 725 [34 Cal.Rptr2d 898], internal citations omitted.)

- “Section 3294 is no longer silent on who may be responsible for imputing punitive damages to a corporate employer. For corporate punitive damages liability, section 3294, subdivision (b), requires that the wrongful act giving rise to the exemplary damages be committed by an ‘officer, director, or managing agent.’ ” (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572 [88 Cal.Rptr.2d 19].)

- “[I]n performing, ratifying, or approving the malicious conduct, the agent must be acting as the organization’s representative, not in some other capacity.” (*College Hospital, Inc., supra,* 8 Cal.4th at p. 723.)

- "[T]he concept [of managing agent] assumes that such individual was acting in a corporate or employment capacity when the conduct giving rise to the punitive damages claim against the employer occurred.” (*College Hospital, Inc., supra,* 8 Cal.4th at p. 723.)

- “No purpose would be served by punishing the employer for an employee’s conduct that is wholly unrelated to its business or to the employee’s duties therein.” (*College Hospital, Inc., supra,* 8 Cal.4th at pp. 723–724.)

- “ ‘The determination whether employees act in a managerial capacity [i.e., are managing agents] does not necessarily hinge on their “level” in the corporate hierarchy. Rather, the critical inquiry is the degree of discretion the employees possess in making decisions that will ultimately determine corporate policy.’ ” (*Kelly-Zurian v. Wohl Shoe Co.* (1994) 22 Cal.App.4th 397, 421 [27 Cal.Rptr.2d 457], internal citation omitted.)

- “[W]e conclude the Legislature intended the term ‘managing agent’ to include only those corporate employees who exercise substantial independent authority and judgment in their corporate decisionmaking so that their decisions ultimately determine corporate policy. The scope of a corporate employee’s discretion and

authority under our test is therefore a question of fact for decision on a case-by-case basis." (*White, supra,* 21 Cal.4th at pp. 566–567.)

- "In order to demonstrate that an employee is a true managing agent under section 3294, subdivision (b), a plaintiff seeking punitive damages would have to show that the employee exercised substantial discretionary authority over significant aspects of a corporation's business." (*White, supra,* 21 Cal.4th at p. 577.)

- " '[C]orporate policy' is the general principles which guide a corporation, or rules intended to be followed consistently over time in corporate operations. A 'managing agent' is one with substantial authority over decisions that set these general principles and rules." (*Cruz v. Homebase* (2000) 83 Cal.App.4th 160, 167–168 [99 Cal.Rptr.2d 435].)

- " '[R]atification' is the '[c]onfirmation and acceptance of a previous act' A corporation cannot confirm and accept that which it does not actually know about." (*Cruz, supra,* 83 Cal.App.4th at p. 168.)

- "For purposes of determining an employer's liability for punitive damages, ratification generally occurs where, under the particular circumstances, the employer demonstrates an intent to adopt or approve oppressive, fraudulent, or malicious behavior by an employee in the performance of his job duties." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 726.)

- "Corporate ratification in the punitive damages context requires actual knowledge of the conduct and its outrageous nature." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 726.)

<u>Secondary Sources</u>

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1344–1348, pp. 807–810
- 4 Levy et al., California Torts (1985–2000) Punitive Damages, §§ 54.07, 54.24[4][d]
- California Tort Damages (Cont.Ed.Bar 1988) Punitive Damages, §§ 14.13–14.14, 14.23
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 177, *Damages* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 65, *Damages* (Matthew Bender)

3945
Punitive Damages—Entity Defendant
Trial Not Bifurcated

If you decide that [*name of defendant*]'s conduct caused [*name of plaintiff*] harm, you must decide whether that conduct justifies an award of punitive damages. The purposes of punitive damages are to punish a wrongdoer and to discourage him or her and others from similar conduct in the future.

You may award punitive damages against [*name of defendant*] only if [*name of plaintiff*] proves that [*name of defendant*] engaged in that conduct with malice, oppression, or fraud. To do this, [*name of plaintiff*] must prove [one of] the following by clear and convincing evidence:

1. **[That the conduct constituting malice, oppression, or fraud was committed by one or more officers, directors, or managing agents of [*name of defendant*] acting in a corporate capacity; [or]]**

2. **[That the conduct constituting malice, oppression, or fraud was authorized by one or more officers, directors, or managing agents of [*name of defendant*]; [or]]**

3. **[That one or more officers, directors, or managing agents of [*name of defendant*] knew of the conduct constituting malice, oppression, or fraud and adopted or approved that conduct after it occurred.]**

"Malice" means that [*name of defendant*] acted with intent to cause injury or that [*name of defendant*]'s conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A person acts with knowing disregard when he or she is aware of the probable dangerous consequences of his or her conduct and deliberately fails to avoid those consequences.

"Oppression" means that [*name of defendant*]'s conduct was despicable and subjected [*name of plaintiff*] to cruel and unjust hardship in knowing disregard of [his/her] rights.

"Despicable conduct" is conduct that is so mean, vile, base, or contemptible that it would be looked down on and despised by reasonable people.

"Fraud" means that [*name of defendant*] intentionally misrepresented or concealed a material fact and did so intending to deprive [*name of plaintiff*] of property or of a legal right or otherwise to cause [*name of plaintiff*] injury.

An employee is a "managing agent" if he or she exercises substantial independent authority and judgment in his or her corporate decision making so that his or her decisions ultimately determine corporate policy.

There is no fixed standard for determining the amount of punitive damages, and you are not required to award any punitive damages. In deciding the amount of punitive damages, if any, you should consider all of the following:

(a) How reprehensible was [*name of defendant***]'s conduct?**

(b) Is there a reasonable relationship between the amount of punitive damages and [*name of plaintiff***]'s harm?**

(c) In view of [*name of defendant***]'s financial condition, what amount is necessary to punish it and discourage future wrongful conduct?**

DIRECTIONS FOR USE

This instruction is intended for use when the plaintiff is seeking punitive damages against a corporation or other entity for the conduct of its directors, officers, and managing agents. When the plaintiff seeks to hold an employer or principal liable for the conduct of a specific employee or agent, use Instruction 3943, *Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee—Trial Not Bifurcated.* When the plaintiff is seeking punitive damages from both the employer/principal and the employee/agent, use Instruction 3947, *Punitive Damages—Individual and Entity Defendants—Trial not Bifurcated*.

If any of the alternative grounds for seeking punitive damages are inapplicable to the facts of the case, they may be omitted.

This instruction combines elements of Civil Code section 3294(a) and 3294(b). The standard of proof under section 3294(a) is clear and convincing evidence; but it is not clear whether the standard of proof for the findings required under section 3294(b) is "clear and convincing" or "preponderance of the evidence."

See Instruction 3940, *Punitive Damages—Individual Defendant—Trial Not Bifurcated*, for additional sources and authority.

Courts have stated that "[p]unitive damages previously imposed for the same conduct are relevant in determining the amount of punitive damages required to sufficiently punish and deter. The likelihood of future punitive damage awards may also be considered, although it is entitled to considerably less weight." (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661 [57 Cal.Rptr.2d 525].) The court in *Stevens* suggested that the following instruction be given if evidence of other punitive damage awards is introduced into evidence:

> If you determine that a defendant has already been assessed with punitive damages based on the same conduct for which punitive damages are requested in this case, you may consider whether punitive damages awarded in other cases have sufficiently punished and made an example of the defendant. You must not use the amount of punitive damages awarded in other cases to determine the amount of the punitive damage award in this case, except to the extent you determine that a lesser award, or no award at all, is justified in light of the penalties already imposed. (*Stevens, supra,* 49 Cal.App.4th at p. 1663, fn. 7.)

Regarding the relationship between punitive and compensatory damages, case law suggests that a jury may consider harm that could have been caused by the defendant's conduct, even if that harm did not come to pass: "The high court in *TXO* [*TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443 [113 S.Ct. 2711, 125 L.Ed.2d 366]] and *BMW* [*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559 [116 S.Ct. 1589, 134 L.Ed.2d 809]] has refined the disparity analysis to take into account the *potential* loss to the plaintiffs, as where a scheme worthy of punitive damages does not fully succeed. In such cases, the proper ratio would be the ratio of punitive damages to the potential harm to plaintiff." (*Sierra Club Foundation v. Graham* (1999) 72 Cal.App.4th 1135, 1162, fn. 15 [85 Cal.Rptr.2d 726], internal citations omitted.)

In *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 123 S.Ct. 1513, 1520, citing *BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, 575 [116 S.Ct. 1589; 134 L.Ed.2d 809], the U.S. Supreme Court reiterated the guideposts courts must consider in reviewing punitive damages awards: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases."

SOURCES AND AUTHORITY

- Civil Code section 3294 provides, in part:

> (a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.
> (b) An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or

authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.

(c) As used in this section, the following definitions shall apply:

(1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.

(2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.

(3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

- "Section 3294 is no longer silent on who may be responsible for imputing punitive damages to a corporate employer. For corporate punitive damages liability, section 3294, subdivision (b), requires that the wrongful act giving rise to the exemplary damages be committed by an 'officer, director, or managing agent.' " (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572 [88 Cal.Rptr.2d 19].)

- "An award of punitive damages is not supported by a verdict based on breach of contract, even where the defendant's conduct in breaching the contract was wilful, fraudulent, or malicious. Even in those cases in which a separate tort action is alleged, if there is 'but one verdict based upon contract' a punitive damage award is improper." (*Myers Building Industries v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 960 [17 Cal.Rptr.2d 242], internal citations omitted.)

- "[I]n performing, ratifying, or approving the malicious conduct, the agent must be acting as the organization's representative, not in some other capacity." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 723 [34 Cal.Rptr.2d 898].)

- "[T]he concept [of managing agent] assumes that such individual was acting in a corporate or employment capacity when the conduct giving rise to the punitive damages claim against the employer occurred." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 723.)

- "No purpose would be served by punishing the employer for an employee's conduct that is wholly unrelated to its business or to the employee's duties therein." (*College Hospital, Inc., supra,* 8 Cal.4th at pp. 723–724.)

- " 'The determination whether employees act in a managerial capacity [i.e., are managing agents] does not necessarily hinge on their "level" in the corporate hierarchy. Rather, the critical inquiry is the degree of discretion the employees possess in making decisions that will ultimately determine corporate policy.' " (*Kelly-Zurian v. Wohl Shoe Co.* (1994) 22 Cal.App.4th 397, 421 [27 Cal.Rptr.2d 457], internal citation omitted.)

- "[W]e conclude the Legislature intended the term 'managing agent' to include only those corporate employees who exercise substantial independent authority and judgment in their corporate decisionmaking so that their decisions ultimately determine corporate policy. The scope of a corporate employee's discretion and authority under our test is therefore a question of fact for decision on a case-by-case basis." (*White, supra,* 21 Cal.4th at pp. 566–567.)

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1344–1348, pp. 807–810
- 4 Levy et al., California Torts (1985–2000) Punitive Damages, §§ 54.07
- California Tort Damages (Cont.Ed.Bar 1988) Punitive Damages, §§ 14.13–14.14
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 177, *Damages* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 65, *Damages* (Matthew Bender)

3946
Punitive Damages—Entity Defendant
Bifurcated Trial (First Phase)

If you decide that [*name of defendant*]'s conduct caused [*name of plaintiff*] harm, you must decide whether that conduct justifies an award of punitive damages. The amount, if any, of punitive damages will be an issue decided later.

At this time, you must decide whether [*name of plaintiff*] has proved that [*name of defendant*] engaged in that conduct with malice, oppression, or fraud. To do this, [*name of plaintiff*] must prove [one of] the following by clear and convincing evidence:

1. **[That the conduct constituting malice, oppression, or fraud was committed by one or more officers, directors, or managing agents of [*name of defendant*] acting in a corporate capacity; [or]]**

2. **[That the conduct constituting malice, oppression, or fraud was authorized by one or more officers, directors, or managing agents of [*name of defendant*]; [or]]**

3. **[That one or more officers, directors, or managing agents of [*name of defendant*] knew of the conduct constituting malice, oppression, or fraud and adopted or approved that conduct after it occurred.]**

"Malice" means that [*name of defendant*] acted with intent to cause injury or that [*name of defendant*]'s conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A person acts with knowing disregard when he or she is aware of the probable dangerous consequences of his or her conduct and deliberately fails to avoid those consequences.

"Oppression" means that [*name of defendant*]'s conduct was despicable and subjected [*name of plaintiff*] to cruel and unjust hardship in knowing disregard of [his/her] rights.

"Despicable conduct" is conduct that is so mean, vile, base, or contemptible that it would be looked down on and despised by reasonable people.

"Fraud" means that [*name of defendant*] intentionally misrepresented or concealed a material fact and did so intending to deprive [*name of plaintiff*] of property or of a legal right or otherwise to cause [*name of plaintiff*] injury.

An employee is a "managing agent" if he or she exercises substantial independent authority and judgment in his or her corporate decision making so that his or her decisions ultimately determine corporate policy.

DIRECTIONS FOR USE

Instruction 3942, *Punitive Damages—Individual Defendant—Bifurcated Trial (Second Phase)* may be used for the second phase of a bifurcated trial.

This instruction is intended for use when the plaintiff is seeking punitive damages against a corporation or other entity for the conduct of its directors, officers, and managing agents. When the plaintiff is seeking to hold an employer or principal liable for the conduct of a specific employee or agent, use Instruction 3944, *Punitive Damages Against Employer or Principal For Conduct of a Specific Agent or Employee—Bifurcated Trial (First Phase).* When the plaintiff is seeking punitive damages from both the employer/principal and the employee/agent, use Instruction 3948, *Punitive Damages—Individual and Corporate Defendants (Corporate Liability Based on Acts of Named Individual)—Bifurcated Trial (First Phase)*.

If any of the alternative grounds for seeking punitive damages are inapplicable to the facts of the case, they may be omitted.

This instruction combines elements of Civil Code section 3294(a) and 3294(b). The standard of proof under section 3294(a) is clear and convincing evidence; but it is not clear whether the standard of proof for the findings required under section 3294(b) is "clear and convincing" or "preponderance of the evidence."

SOURCES AND AUTHORITY

- Civil Code section 3294 provides, in part:

  (a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.
  (b) An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization,

ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.

(c) As used in this section, the following definitions shall apply:

(1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.

(2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.

(3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

- Civil Code section 3295(d) provides: "The court shall, on application of any defendant, preclude the admission of evidence of that defendant's profits or financial condition until after the trier of fact returns a verdict for plaintiff awarding actual damages and finds that a defendant is guilty of malice, oppression, or fraud in accordance with Section 3294. Evidence of profit and financial condition shall be admissible only as to the defendant or defendants found to be liable to the plaintiff and to be guilty of malice, oppression, or fraud. Evidence of profit and financial condition shall be presented to the same trier of fact that found for the plaintiff and found one or more defendants guilty of malice, oppression, or fraud."

- "[Section 3295(d)] affects the order of proof at trial, precluding the admission of evidence of defendants' financial condition until after the jury has returned a verdict for plaintiffs awarding actual damages and found that one or more defendants were guilty of 'oppression, fraud or malice,' in accordance with Civil Code section 3294." (*City of El Monte v. Superior Court* (1994) 29 Cal.App.4th 272, 274–275 [34 Cal.Rptr.2d 490], internal citations omitted.)

- "Evidence of the defendant's financial condition is a prerequisite to an award of punitive damages. In order to protect defendants from the premature disclosure of their financial position when punitive damages are sought, the Legislature enacted Civil Code section 3295." (*City of El Monte, supra,* 29 Cal.App.4th at p. 276, internal citations omitted.)

- "[C]ourts have held it is reversible error to try the punitive damages issue to a new jury after the jury which found liability has been excused." (*Rivera v. Sassoon* (1995) 39 Cal.App.4th 1045, 1048 [46 Cal.Rptr.2d 144], internal citations omitted.)

- "Malice, for purposes of awarding exemplary damages, includes 'despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.' To establish conscious disregard, the plaintiff must show

‘that the defendant was aware of the probable dangerous consequences of his conduct, and that he wilfully and deliberately failed to avoid those consequences.’ ” (*Hoch v. Allied-Signal, Inc.* (1994) 24 Cal.App.4th 48, 61 [29 Cal.Rptr.2d 615], internal citations omitted.)

- “Used in its ordinary sense, the adjective ‘despicable’ is a powerful term that refers to circumstances that are ‘base,’ ‘vile,’ or ‘contemptible.’ As amended to include this word, the statute plainly indicates that absent an intent to injure the plaintiff, ‘malice’ requires more than a ‘willful and conscious’ disregard of the plaintiffs’ interests. The additional component of ‘despicable conduct’ must be found.” (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 725 [34 Cal.Rptr2d 898], internal citations omitted.)

- “Section 3294 is no longer silent on who may be responsible for imputing punitive damages to a corporate employer. For corporate punitive damages liability, section 3294, subdivision (b), requires that the wrongful act giving rise to the exemplary damages be committed by an ‘officer, director, or managing agent.’ ” (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572 [88 Cal.Rptr.2d 19].)

- “[I]n performing, ratifying, or approving the malicious conduct, the agent must be acting as the organization’s representative, not in some other capacity.” (*College Hospital, Inc., supra,* 8 Cal.4th at p. 723.)

- "[T]he concept [of managing agent] assumes that such individual was acting in a corporate or employment capacity when the conduct giving rise to the punitive damages claim against the employer occurred.” (*College Hospital, Inc., supra,* 8 Cal.4th at p. 723.)

- “No purpose would be served by punishing the employer for an employee’s conduct that is wholly unrelated to its business or to the employee’s duties therein.” (*College Hospital, Inc., supra,* 8 Cal.4th at pp. 723–724.)

- “ ‘The determination whether employees act in a managerial capacity [i.e., are managing agents] does not necessarily hinge on their “level” in the corporate hierarchy. Rather, the critical inquiry is the degree of discretion the employees possess in making decisions that will ultimately determine corporate policy.’ ” (*Kelly-Zurian v. Wohl Shoe Co.* (1994) 22 Cal.App.4th 397, 421 [27 Cal.Rptr.2d 457], internal citation omitted.)

- “[W]e conclude the Legislature intended the term ‘managing agent’ to include only those corporate employees who exercise substantial independent authority and judgment in their corporate decisionmaking so that their decisions ultimately determine corporate policy. The scope of a corporate employee’s discretion and authority under our test is therefore a question of fact for decision on a case-by-case basis.” (*White, supra,* 21 Cal.4th at pp. 566–567.)

- "In order to demonstrate that an employee is a true managing agent under section 3294, subdivision (b), a plaintiff seeking punitive damages would have to show that the employee exercised substantial discretionary authority over significant aspects of a corporation's business." (*White, supra,* 21 Cal.4th at p. 577.)

- " '[C]orporate policy' is the general principles which guide a corporation, or rules intended to be followed consistently over time in corporate operations. A 'managing agent' is one with substantial authority over decisions that set these general principles and rules." (*Cruz v. Homebase* (2000) 83 Cal.App.4th 160, 167–168 [99 Cal.Rptr.2d 435].)

- " '[R]atification' is the '[c]onfirmation and acceptance of a previous act.' A corporation cannot confirm and accept that which it does not actually know about." (*Cruz, supra,* 83 Cal.App.4th at p. 168.)

- "For purposes of determining an employer's liability for punitive damages, ratification generally occurs where, under the particular circumstances, the employer demonstrates an intent to adopt or approve oppressive, fraudulent, or malicious behavior by an employee in the performance of his job duties." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 726.)

- "Corporate ratification in the punitive damages context requires actual knowledge of the conduct and its outrageous nature." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 726.)

<u>Secondary Sources</u>

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1344–1348, pp. 807–810
- 4 Levy et al., California Torts (1985–2000) Punitive Damages, §§ 54.07, 54.24[4][d]
- California Tort Damages (Cont.Ed.Bar 1988) Punitive Damages, §§ 14.13–14.14, 14.23
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 177, *Damages* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 65, *Damages* (Matthew Bender)

3947
Punitive Damages—Individual and Entity Defendants
Trial Not Bifurcated

If you decide that [*name of individual defendant***]'s or [***name of entity defendant***]'s conduct caused [***name of plaintiff***] harm, you must decide whether that conduct justifies an award of punitive damages. The purposes of punitive damages are to punish a wrongdoer and to discourage him or her and others from similar conduct in the future.**

You may award punitive damages against [*name of individual defendant***] only if [***name of plaintiff***] proves by clear and convincing evidence that [***name of individual defendant***] engaged in that conduct with malice, oppression, or fraud.**

You may award punitive damages against [*name of entity defendant***] only if [***name of plaintiff***] proves that [***name of entity defendant***] acted with malice, oppression, or fraud. To do this, [***name of plaintiff***] must prove [one of] the following by clear and convincing evidence:**

1. **[That the malice, oppression, or fraud was conduct of one or more officers, directors, or managing agents of [***name of entity defendant***] acting in a corporate capacity; [or]]**

2. **[That an officer, a director, or a managing agent of [***name of entity defendant***] had advance knowledge of the unfitness of [***name of individual defendant***] and employed [him/her] with a knowing disregard of the rights or safety of others; [or]]**

3. **[That the conduct constituting malice, oppression, or fraud was authorized by one or more officers, directors, or managing agents of [***name of entity defendant***]; [or]]**

4. **[That one or more officers, directors, or managing agents of [***name of entity defendant***] knew of the conduct constituting malice, oppression, or fraud and adopted or approved that conduct after it occurred.]**

"Malice" means that a defendant acted with intent to cause injury or that a defendant's conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A defendant acts with knowing disregard when the defendant is aware of the probable dangerous consequences of his, her, or its conduct and deliberately fails to avoid those consequences.

"Oppression" means that a defendant's conduct was despicable and subjected [*name of plaintiff***] to cruel and unjust hardship in knowing disregard of [his/her] rights.**

"Despicable conduct" is conduct that is so mean, vile, base, or contemptible that it would be looked down on and despised by reasonable people.

"Fraud" means that a defendant intentionally misrepresented or concealed a material fact and did so intending to deprive [*name of plaintiff***] of property or of a legal right or otherwise to cause [***name of plaintiff***] injury.**

An employee is a "managing agent" if he or she exercises substantial independent authority and judgment in his or her corporate decision making so that his or her decisions ultimately determine corporate policy.

There is no fixed standard for determining the amount of punitive damages, and you are not required to award any punitive damages. In deciding the amount of punitive damages, if any, you should consider all of the following separately for each defendant:

(a) How reprehensible was that defendant's conduct?

(b) Is there a reasonable relationship between the amount of punitive damages and [*name of plaintiff***]'s harm?**

(c) In view of that defendant's financial condition, what amount is necessary to punish [him/her/it] and discourage future wrongful conduct?

DIRECTIONS FOR USE

This instruction is intended to apply to cases where punitive damages are sought against both an individual person and a corporate defendant. When punitive damages are sought only against corporate defendants, use Instructions 3943, *Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee—Trial Not Bifurcated* or Instruction 3945, *Punitive Damages—Entity Defendant—Trial Not Bifurcated*. When punitive damages are sought against an individual defendant, use Instruction 3940, *Punitive Damages—Individual Defendant—Trial Not Bifurcated*.

If any of the alternative grounds for seeking punitive damages are inapplicable to the facts of the case, they may be omitted.

This instruction combines elements of Civil Code section 3294(a) and 3294(b). The standard of proof under section 3294(a) is clear and convincing evidence; but it is not clear whether the standard of proof for the findings required under section 3294(b) is "clear and convincing" or "preponderance of the evidence."

See Instruction 3940, *Punitive Damages—Individual Defendant—Trial Not Bifurcated*, for additional sources and authority.

Courts have stated that "[p]unitive damages previously imposed for the same conduct are relevant in determining the amount of punitive damages required to sufficiently punish and deter. The likelihood of future punitive damage awards may also be considered, although it is entitled to considerably less weight." (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661 [57 Cal.Rptr.2d 525], internal citations omitted.) The court in *Stevens* suggested that the following instruction be given if evidence of other punitive damage awards is introduced into evidence:

> If you determine that a defendant has already been assessed with punitive damages based on the same conduct for which punitive damages are requested in this case, you may consider whether punitive damages awarded in other cases have sufficiently punished and made an example of the defendant. You must not use the amount of punitive damages awarded in other cases to determine the amount of the punitive damage award in this case, except to the extent you determine that a lesser award, or no award at all, is justified in light of the penalties already imposed. (*Stevens, supra,* 49 Cal.App.4th at p. 1663, fn. 7.)

Regarding the relationship between punitive and compensatory damages, case law suggests that a jury may consider harm that could have been caused by the defendant's conduct, even if that harm did not come to pass: "The high court in *TXO* [*TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443 [113 S.Ct. 2711, 125 L.Ed.2d 366]] and *BMW* [*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559 [116 S.Ct. 1589, 134 L.Ed.2d 809]] has refined the disparity analysis to take into account the *potential* loss to the plaintiffs, as where a scheme worthy of punitive damages does not fully succeed. In such cases, the proper ratio would be the ratio of punitive damages to the potential harm to plaintiff." (*Sierra Club Foundation v. Graham* (1999) 72 Cal.App.4th 1135, 1162, fn. 15 [85 Cal.Rptr.2d 726], internal citations omitted.)
In *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 123 S.Ct. 1513, 1520, citing *BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, 575 [116 S.Ct. 1589; 134 L.Ed.2d 809], the U.S. Supreme Court reiterated the guideposts courts must consider in reviewing punitive damages awards: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases."

SOURCES AND AUTHORITY

- Civil Code section 3294 provides, in part:

  (a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may

recover damages for the sake of example and by way of punishing the defendant.

(b) An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.

(c) As used in this section, the following definitions shall apply:

(1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.

(2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.

(3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

- "Subdivision (b) is not a model of clarity, but in light of California's history of employer liability for punitive damages and of the Legislature's reasons for enacting subdivision (b), we have no doubt that it does no more than codify and refine existing law. Subdivision (b) thus authorizes the imposition of punitive damages on an employer in three situations: (1) when an employee was guilty of oppression, fraud or malice, and the employer with advance knowledge of the unfitness of the employee employed him or her with a conscious disregard of the rights or safety of others, (2) when an employee was guilty of oppression, fraud or malice, and the employer authorized or ratified the wrongful conduct, or (3) when the employer was itself guilty of the oppression, fraud or malice." (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1151 [74 Cal.Rptr.2d 510].)

- " 'California has traditionally allowed punitive damages to be assessed against an employer (or principal) for the acts of an employee (or agent) only where the circumstances indicate that the employer himself was guilty of fraud, oppression, or malice. Thus, even before section 3294, subdivision (b) was added to the Civil Code in 1980, the courts required evidence that the employer authorized or ratified a malicious act, personally committed such an act, or wrongfully hired or retained an unfit employee.' The 'additional' burden on a plaintiff seeking punitive damages

from an employer is to show not only that an employee acted with oppression, fraud or malice, but that the employer engaged in conduct defined in subdivision (b)." (*Weeks, supra,* 63 Cal.App.4th at p. 1154, internal citation omitted.)

- "Civil Code section 3294, subdivision (b) does not authorize an award of punitive damages against an employer for the employee's wrongful conduct. It authorizes an award of punitive damages against an employer for the employer's own wrongful conduct. Liability under subdivision (b) is vicarious only to the extent that the employer is liable for the actions of its officer, director or managing agent in hiring or controlling the offending employee, in ratifying the offense or in acting with oppression, fraud or malice. It is not vicarious in the sense that the employer is liable for the wrongful conduct of the offending employee." (*Weeks, supra,* 63 Cal.App.4th at pp. 1154–1155.)

- "An award of punitive damages is not supported by a verdict based on breach of contract, even where the defendant's conduct in breaching the contract was wilful, fraudulent, or malicious. Even in those cases in which a separate tort action is alleged, if there is 'but one verdict based upon contract' a punitive damage award is improper." (*Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 960 [17 Cal.Rptr.2d 242].)

- "[P]unitive damages are not assessed against employers on a pure respondeat superior basis. Some evidence of fault by the employer itself is also required." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 724, fn. 11 [34 Cal.Rptr.2d 898].)

- "Subdivision (b) … governs awards of punitive damages against employers, and permits an award for the conduct described there without an additional finding that the employer engaged in oppression, fraud or malice." (*Weeks, supra,* 63 Cal.App.4th at p. 1137.)

- "Section 3294 is no longer silent on who may be responsible for imputing punitive damages to a corporate employer. For corporate punitive damages liability, section 3294, subdivision (b), requires that the wrongful act giving rise to the exemplary damages be committed by an 'officer, director, or managing agent.' " (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572 [88 Cal.Rptr.2d 19].)

- "[I]n performing, ratifying, or approving the malicious conduct, the agent must be acting as the organization's representative, not in some other capacity." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 723.)

- "[T]he concept [of managing agent] assumes that such individual was acting in a corporate or employment capacity when the conduct giving rise to the punitive damages claim against the employer occurred." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 723.)

- "No purpose would be served by punishing the employer for an employee's conduct that is wholly unrelated to its business or to the employee's duties therein." (*College Hospital, Inc., supra,* 8 Cal.4th at pp. 723–724.)

- " 'The determination whether employees act in a managerial capacity [i.e., are managing agents] does not necessarily hinge on their "level" in the corporate hierarchy. Rather, the critical inquiry is the degree of discretion the employees possess in making decisions that will ultimately determine corporate policy.' " (*Kelly-Zurian v. Wohl Shoe Co.* (1994) 22 Cal.App.4th 397, 421 [27 Cal.Rptr.2d 457], internal citation omitted.)

- "[W]e conclude the Legislature intended the term 'managing agent' to include only those corporate employees who exercise substantial independent authority and judgment in their corporate decisionmaking so that their decisions ultimately determine corporate policy. The scope of a corporate employee's discretion and authority under our test is therefore a question of fact for decision on a case-by-case basis." (*White, supra,* 21 Cal.4th at pp. 566–567.)

- "In order to demonstrate that an employee is a true managing agent under section 3294, subdivision (b), a plaintiff seeking punitive damages would have to show that the employee exercised substantial discretionary authority over significant aspects of a corporation's business." (*White, supra,* 21 Cal.4th at p. 577.)

- " '[C]orporate policy' is the general principles which guide a corporation, or rules intended to be followed consistently over time in corporate operations. A 'managing agent' is one with substantial authority over decisions that set these general principles and rules." (*Cruz v. Homebase* (2000) 83 Cal.App.4th 160, 167–168 [99 Cal.Rptr.2d 435].)

- " '[R]atification' is the '[c]onfirmation and acceptance of a previous act.' A corporation cannot confirm and accept that which it does not actually know about." (*Cruz, supra,* 83 Cal.App.4th at p. 168.)

- "For purposes of determining an employer's liability for punitive damages, ratification generally occurs where, under the particular circumstances, the employer demonstrates an intent to adopt or approve oppressive, fraudulent, or malicious behavior by an employee in the performance of his job duties." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 726.)

- "Corporate ratification in the punitive damages context requires actual knowledge of the conduct and its outrageous nature." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 726.)

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1344–1348, pp. 807–810
- 4 Levy et al., California Torts (1985–2000) Punitive Damages, § 54.07
- California Tort Damages (Cont.Ed.Bar 1988) Punitive Damages, §§ 14.13–14.14
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 177, *Damages* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 65, *Damages* (Matthew Bender)

3948
Punitive Damages—Individual and Corporate Defendants (Corporate Liability Based on Acts of Named Individual) Bifurcated Trial (First Phase)

If you decide that [*name of individual defendant***]'s conduct caused [***name of plaintiff***] harm, you must decide whether that conduct justifies an award of punitive damages against [***name of individual defendant***] and, if so, against [***name of corporate defendant***]. The amount, if any, of punitive damages will be an issue decided later.**

You may award punitive damages against [*name of individual defendant***] only if [***name of plaintiff***] proves by clear and convincing evidence that [***name of individual defendant***] engaged in that conduct with malice, oppression, or fraud.**

"Malice" means that a defendant acted with intent to cause injury or that a defendant's conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A defendant acts with knowing disregard when the defendant is aware of the probable dangerous consequences of his, her, or its conduct and deliberately fails to avoid those consequences.

"Oppression" means that a defendant's conduct was despicable and subjected [*name of plaintiff***] to cruel and unjust hardship in knowing disregard of [his/her] rights.**

"Despicable conduct" is conduct that is so mean, vile, base, or contemptible that it would be looked down on and despised by reasonable people.

"Fraud" means that a defendant intentionally misrepresented or concealed a material fact and did so intending to deprive [*name of plaintiff***] of property or of a legal right or otherwise to cause [***name of plaintiff***] injury.**

You may also award punitive damages against [*name of corporate defendant***] based on [***name of individual***]'s conduct if [***name of plaintiff***] proves [one of] the following:**

1. **[That [***name of individual defendant***] was an officer, director, or managing agent of [***name of corporate defendant***] acting in a corporate capacity at the time of the conduct constituting malice oppression or fraud; [or]]**

2. **[That an officer, a director, or a managing agent of [***name of corporate defendant***] had advance knowledge of the unfitness of [***name of individual defendant***] and employed [him/her] with a knowing disregard of the rights or safety of others; [or]]**

3. **[That [***name of individual defendant***]'s conduct constituting malice, oppression, or fraud was authorized by an officer, a director, or a managing agent of [***name of corporate defendant***]; [or]]**

4. **[That an officer, a director, or a managing agent of [***name of corporate defendant***] knew of [***name of individual defendant***]'s conduct constituting malice, oppression, or fraud and adopted or approved that conduct after it occurred.]**

An employee is a "managing agent" if he or she exercises substantial independent authority and judgment in his or her corporate decision making so that his or her decisions ultimately determine corporate policy.

DIRECTIONS FOR USE

Use Instruction 3949, *Punitive Damages—Individual and Corporate Defendants (Corporate Liability Based on Acts of Named Individual)—Bifurcated Trial (Second Phase),* for the second phase of a bifurcated trial

This instruction is intended to apply to cases where punitive damages are sought against both an individual person and a corporate defendant. When damages are sought only against a corporate defendant, use Instructions 3944, *Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee—Bifurcated Trial (First Phase)*, or Instruction 3946, *Punitive Damages—Entity Defendant—Bifurcated Trial (First Phase)*. When damages are sought against individual defendants, use Instruction 3941, *Punitive Damages—Individual Defendant—Bifurcated Trial (First Phase).*

If any of the alternative grounds for seeking punitive damages are inapplicable to the facts of the case, they may be omitted.

This instruction combines elements of Civil Code section 3294(a) and 3294(b). The standard of proof under section 3294(a) is clear and convincing evidence; but it is not clear whether the standard of proof for the findings required under section 3294(b) is "clear and convincing" or "preponderance of the evidence."

See Instruction 3940, *Punitive Damages—Individual Defendant—Trial Not Bifurcated*, for additional sources and authority.

SOURCES AND AUTHORITY

- Civil Code section 3294 provides, in part:

  (a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in

addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant. …

(c) As used in this section, the following definitions shall apply:

(1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.

(2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.

(3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

- Civil Code section 3295(d) provides: "The court shall, on application of any defendant, preclude the admission of evidence of that defendant's profits or financial condition until after the trier of fact returns a verdict for plaintiff awarding actual damages and finds that a defendant is guilty of malice, oppression, or fraud in accordance with Section 3294. Evidence of profit and financial condition shall be admissible only as to the defendant or defendants found to be liable to the plaintiff and to be guilty of malice, oppression, or fraud. Evidence of profit and financial condition shall be presented to the same trier of fact that found for the plaintiff and found one or more defendants guilty of malice, oppression, or fraud."

- "[Section 3295(d)] affects the order of proof at trial, precluding the admission of evidence of defendants' financial condition until after the jury has returned a verdict for plaintiffs awarding actual damages and found that one or more defendants were guilty of 'oppression, fraud or malice,' in accordance with Civil Code section 3294." (*City of El Monte v. Superior Court* (1994) 29 Cal.App.4th 272, 274–275 [34 Cal.Rptr.2d 490], internal citations omitted.)

- "Evidence of the defendant's financial condition is a prerequisite to an award of punitive damages. In order to protect defendants from the premature disclosure of their financial position when punitive damages are sought, the Legislature enacted Civil Code section 3295." (*City of El Monte, supra,* 29 Cal.App.4th at p. 276, internal citations omitted.)

- "[C]ourts have held it is reversible error to try the punitive damages issue to a new jury after the jury which found liability has been excused." (*Rivera v. Sassoon* (1995) 39 Cal.App.4th 1045, 1048 [46 Cal.Rptr.2d 144], internal citations omitted.)

- "Malice, for purposes of awarding exemplary damages, includes 'despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.' To establish conscious disregard, the plaintiff must show

‘that the defendant was aware of the probable dangerous consequences of his conduct, and that he wilfully and deliberately failed to avoid those consequences.’ ” (*Hoch v. Allied-Signal, Inc.* (1994) 24 Cal.App.4th 48, 61 [29 Cal.Rptr.2d 615], internal citations omitted.)

- “Used in its ordinary sense, the adjective ‘despicable’ is a powerful term that refers to circumstances that are ‘base,’ ‘vile,’ or ‘contemptible.’ As amended to include this word, the statute plainly indicates that absent an intent to injure the plaintiff, ‘malice’ requires more than a ‘willful and conscious’ disregard of the plaintiffs’ interests. The additional component of ‘despicable conduct’ must be found.” (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 725 [34 Cal.Rptr2d 898], internal citations omitted.)

- “Section 3294 is no longer silent on who may be responsible for imputing punitive damages to a corporate employer. For corporate punitive damages liability, section 3294, subdivision (b), requires that the wrongful act giving rise to the exemplary damages be committed by an ‘officer, director, or managing agent.’ ” (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572 [88 Cal.Rptr.2d 19].)

- “[I]n performing, ratifying, or approving the malicious conduct, the agent must be acting as the organization’s representative, not in some other capacity.” (*College Hospital, Inc., supra,* 8 Cal.4th at p. 723.)

- "[T]he concept [of managing agent] assumes that such individual was acting in a corporate or employment capacity when the conduct giving rise to the punitive damages claim against the employer occurred.” (*College Hospital, Inc., supra,* 8 Cal.4th at p. 723.)

- “No purpose would be served by punishing the employer for an employee’s conduct that is wholly unrelated to its business or to the employee’s duties therein.” (*College Hospital, Inc., supra,* 8 Cal.4th at pp. 723–724.)

- “ ‘The determination whether employees act in a managerial capacity [i.e., are managing agents] does not necessarily hinge on their “level” in the corporate hierarchy. Rather, the critical inquiry is the degree of discretion the employees possess in making decisions that will ultimately determine corporate policy.’ ” (*Kelly-Zurian v. Wohl Shoe Co.* (1994) 22 Cal.App.4th 397, 421 [27 Cal.Rptr.2d 457], internal citation omitted.)

- “[W]e conclude the Legislature intended the term ‘managing agent’ to include only those corporate employees who exercise substantial independent authority and judgment in their corporate decisionmaking so that their decisions ultimately determine corporate policy. The scope of a corporate employee’s discretion and authority under our test is therefore a question of fact for decision on a case-by-case basis.” (*White, supra,* 21 Cal.4th at pp. 566–567.)

- "In order to demonstrate that an employee is a true managing agent under section 3294, subdivision (b), a plaintiff seeking punitive damages would have to show that the employee exercised substantial discretionary authority over significant aspects of a corporation's business." (*White, supra,* 21 Cal.4th at p. 577.)

- " '[C]orporate policy' is the general principles which guide a corporation, or rules intended to be followed consistently over time in corporate operations. A 'managing agent' is one with substantial authority over decisions that set these general principles and rules." (*Cruz v. Homebase* (2000) 83 Cal.App.4th 160, 167–168 [99 Cal.Rptr.2d 435].)

- " '[R]atification' is the '[c]onfirmation and acceptance of a previous act.' A corporation cannot confirm and accept that which it does not actually know about." (*Cruz, supra,* 83 Cal.App.4th at p. 168.)

- "For purposes of determining an employer's liability for punitive damages, ratification generally occurs where, under the particular circumstances, the employer demonstrates an intent to adopt or approve oppressive, fraudulent, or malicious behavior by an employee in the performance of his job duties." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 726.)

- "Corporate ratification in the punitive damages context requires actual knowledge of the conduct and its outrageous nature." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 726.)

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1344–1348, pp. 807–810
- 4 Levy et al., California Torts (1985–2000) Punitive Damages, §§ 54.07, 54.24[4][d]
- California Tort Damages (Cont.Ed.Bar 1988) Punitive Damages, §§ 14.13–14.14, 14.23
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 177, *Damages* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 65, *Damages* (Matthew Bender)

3949
Punitive Damages—Individual and Corporate Defendants (Corporate Liability Based on Acts of Named Individual) Bifurcated Trial (Second Phase)

You must now decide the amount, if any, that you should award [*name of plaintiff*] in punitive damages. The purposes of punitive damages are to punish a wrongdoer and to discourage him or her and others from similar conduct in the future.

There is no fixed standard for determining the amount of punitive damages and you are not required to award any punitive damages. In deciding the amount of punitive damages, if any, you should consider all of the following separately for each defendant:

(a) How reprehensible was that defendant's conduct?

(b) Is there a reasonable relationship between the amount of punitive damages and [name of plaintiff]'s harm?

(c) In view of that defendant's financial condition, what amount is necessary to punish [him/her/it] and discourage future wrongful conduct?

DIRECTIONS FOR USE

This instruction combines elements of Civil Code section 3294(a) and 3294(b). The standard of proof under section 3294(a) is clear and convincing evidence; but it is not clear whether the standard of proof for the findings required under section 3294(b) is "clear and convincing" or "preponderance of the evidence."

Courts have stated that "[p]unitive damages previously imposed for the same conduct are relevant in determining the amount of punitive damages required to sufficiently punish and deter. The likelihood of future punitive damage awards may also be considered, although it is entitled to considerably less weight." (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661 [57 Cal.Rptr.2d 525], internal citations omitted.) The court in *Stevens* suggested that the following instruction be given if evidence of other punitive damage awards is introduced into evidence:

> If you determine that a defendant has already been assessed with punitive damages based on the same conduct for which punitive damages are requested in this case, you may consider whether punitive damages awarded in other cases have sufficiently punished and made an example of the defendant. You must not use the amount of punitive damages awarded in other cases to determine the amount of the punitive damage award in

> this case, except to the extent you determine that a lesser award, or no award at all, is justified in light of the penalties already imposed. (*Stevens, supra,* 49 Cal.App.4th at p. 1663, fn. 7.)

Regarding the relationship between punitive and compensatory damages, case law suggests that a jury may consider harm that could have been caused by the defendant's conduct, even if that harm did not come to pass: "The high court in *TXO* [*TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443 [113 S.Ct. 2711, 125 L.Ed.2d 366]] and *BMW* [*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559 [116 S.Ct. 1589, 134 L.Ed.2d 809]] has refined the disparity analysis to take into account the *potential* loss to the plaintiffs, as where a scheme worthy of punitive damages does not fully succeed. In such cases, the proper ratio would be the ratio of punitive damages to the potential harm to plaintiff." (*Sierra Club Foundation v. Graham* (1999) 72 Cal.App.4th 1135, 1162, fn. 15 [85 Cal.Rptr.2d 726], internal citations omitted.)
In *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 123 S.Ct. 1513, 1520, citing *BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, 575 [116 S.Ct. 1589; 134 L.Ed.2d 809], the U.S. Supreme Court reiterated the guideposts courts must consider in reviewing punitive damages awards: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases."

SOURCES AND AUTHORITY

- Civil Code section 3294 provides, in part: "In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant."

- Civil Code section 3295(d) provides: "The court shall, on application of any defendant, preclude the admission of evidence of that defendant's profits or financial condition until after the trier of fact returns a verdict for plaintiff awarding actual damages and finds that a defendant is guilty of malice, oppression, or fraud in accordance with Section 3294. Evidence of profit and financial condition shall be admissible only as to the defendant or defendants found to be liable to the plaintiff and to be guilty of malice, oppression, or fraud. Evidence of profit and financial condition shall be presented to the same trier of fact that found for the plaintiff and found one or more defendants guilty of malice, oppression, or fraud."

- "[Section 3295(d)] affects the order of proof at trial, precluding the admission of evidence of defendants' financial condition until after the jury has returned a verdict for plaintiffs awarding actual damages and found that one or more defendants were guilty of 'oppression, fraud or malice,' in accordance with Civil Code section 3294."

(*City of El Monte v. Superior Court* (1994) 29 Cal.App.4th 272, 274–275 [34 Cal.Rptr.2d 490], internal citations omitted.)

- "Evidence of the defendant's financial condition is a prerequisite to an award of punitive damages. In order to protect defendants from the premature disclosure of their financial position when punitive damages are sought, the Legislature enacted Civil Code section 3295." (*City of El Monte, supra,* 29 Cal.App.4th at p. 276, internal citations omitted.)

- "[C]ourts have held it is reversible error to try the punitive damages issue to a new jury after the jury which found liability has been excused." (*Rivera v. Sassoon* (1995) 39 Cal.App.4th 1045, 1048 [46 Cal.Rptr.2d 144], internal citations omitted.)

- "The purpose of punitive damages is to punish wrongdoers and thereby deter the commission of wrongful acts." (*Neal v. Farmers Insurance Exchange* (1978) 21 Cal.3d 910, 928, fn. 13 [148 Cal.Rptr. 389].)

- "Punitive damages are to be assessed in an amount which, depending upon the defendant's financial worth and other factors, will deter him and others from committing similar misdeeds. Because compensatory damages are designed to make the plaintiff 'whole,' punitive damages are a 'windfall' form of recovery." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 712 [34 Cal.Rptr2d 898], internal citations omitted.)

- "It follows that the wealthier the wrongdoing defendant, the larger the award of exemplary damages need be in order to accomplish the statutory objective." (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 65 [118 Cal.Rptr. 184].)

- " 'A plaintiff, upon establishing his case, is always entitled of right to compensatory damages. But even after establishing a case where punitive damages are permissible, he is never entitled to them. The granting or withholding of the award of punitive damages is wholly within the control of the jury, and may not legally be influenced by any direction of the court that in any case a plaintiff is entitled to them. Upon the clearest proof of malice in fact, it is still the exclusive province of the jury to say whether or not punitive damages shall be awarded. A plaintiff is entitled to such damages only after the jury, in the exercise of its untrammeled discretion, has made the award.' " (*Brewer v. Second Baptist Church of Los Angeles* (1948) 32 Cal.2d 791, 801 [197 P.2d 713].)

- "In light of our holding that evidence of a defendant's financial condition is essential to support an award of punitive damages, Evidence Code section 500 mandates that the plaintiff bear the burden of proof on the issue. A plaintiff seeking punitive damages is not seeking a mere declaration by the jury that he is entitled to punitive damages in the abstract. The plaintiff is seeking an award of real money in a specific amount to be set by the jury. Because the award, whatever its amount, cannot be sustained absent evidence of the defendant's financial condition, such evidence is

‘essential to the claim for relief.’ ” (*Adams v. Murakami* (1991) 54 Cal. 3d 105, 119 [284 Cal.Rptr. 318], internal citation omitted.)

- “[W]e are afforded guidance by certain established principles, all of which are grounded in the purpose and function of punitive damages. One factor is the particular nature of the defendant’s acts in light of the whole record; clearly, different acts may be of varying degrees of reprehensibility, and the more reprehensible the act, the greater the appropriate punishment, assuming all other factors are equal. Another relevant yardstick is the amount of compensatory damages awarded; in general, even an act of considerable reprehensibility will not be seen to justify a proportionally high amount of punitive damages if the actual harm suffered thereby is small. Also to be considered is the wealth of the particular defendant; obviously, the function of deterrence will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort. By the same token, of course, the function of punitive damages is not served by an award which, in light of the defendant’s wealth and the gravity of the particular act, exceeds the level necessary to properly punish and deter.” (*Neal, supra,* 21 Cal.3d at p. 928, internal citations and footnote omitted.)

- “The decision to award punitive damages is exclusively the function of the trier of fact. So too is the amount of any punitive damage award. The relevant considerations are the nature of the defendant’s conduct, the defendant’s wealth, and the plaintiff’s actual damages.” (*Gagnon v. Continental Casualty Co.* (1989) 211 Cal.App.3d 1598, 1602 [260 Cal.Rptr. 305], internal citations omitted.)

- “It has been recognized that punitive damages awards generally are not permitted to exceed 10 percent of the defendant’s net worth.” (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1166 [74 Cal.Rptr.2d 510].)

- “In light of our discussion, we conclude that even where, as here, punitive but not compensatory damages are available to the plaintiff, the defendant is entitled to an instruction that punitive damages must bear a reasonable relation to the injury, harm, or damage actually suffered by the plaintiff and proved at trial. Consequently, the trial court erred in failing to so instruct the jury.” (*Gagnon, supra,* 211 Cal.App.3d at p. 1605.)

- “We conclude that the rule … that an award of exemplary damages must be accompanied by an award of compensatory damages [or its equivalent] is still sound. That rule cannot be deemed satisfied where the jury has made an express determination not to award compensatory damages.” (*Cheung v. Daley* (1995) 35 Cal.App.4th 1673, 1677 [42 Cal.Rptr.2d 164], footnote omitted.)

- “With the focus on the plaintiff’s injury rather than the amount of compensatory damages, the [“reasonable relation”] rule can be applied even in cases where only equitable relief is obtained or where nominal damages are awarded or, as here, where

compensatory damages are unavailable." (*Gagnon, supra,* 211 Cal.App.3d at p. 1605.)

Secondary Sources

- 6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1344–1348, pp. 807–810
- 4 Levy et al., California Torts (1985–2000) Punitive Damages, §§ 54.07, 54.24[4][d]
- California Tort Damages (Cont.Ed.Bar 1988) Punitive Damages, §§ 14.13–14.14, 14.23
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 177, *Damages* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 65, *Damages* (Matthew Bender)

3960
Contributory Negligence—General Verdict

If you decide that [*name of plaintiff*]'s negligence combined with [*name of defendant*]'s [negligence/conduct/product] in causing [*name of plaintiff*]'s harm, then you must decide the percentage of responsibility for the harm that you attribute to each of them.

First, decide the total amount of [*name of plaintiff*]'s damages. Then decide the percentage of responsibility that [*name of plaintiff*] and [*name of defendant*] have for the damages. Then reduce the total damages by the percentage of responsibility that you attribute to [*name of plaintiff*].

After you make these calculations, state the reduced damage award in your verdict.

SOURCES AND AUTHORITY

- "In determining to what degree the injury was due to the fault of the plaintiff, it is logically essential that the plaintiff's negligence be weighed against the combined total of all other causative negligence; moreover, inasmuch as a plaintiff's actual damages do not vary by virtue of the particular defendants who happen to be before the court, we do not think that the damages which a plaintiff may recover against defendants who are joint and severally liable should fluctuate in such a manner." (*American Motorcycle Assn. v. Superior Court* (1978) 20 Cal.3d 578, 590, fn. 2 [146 Cal.Rptr. 182, 578 P.2d 899].)

- "Proposition 51 … retains the joint liability of all tortfeasors, regardless of their respective shares of fault, with respect to all objectively provable expenses and monetary losses. On the other hand, the more intangible and subjective categories of damage were limited by Proposition 51 to a rule of strict proportionate liability. With respect to these noneconomic damages, the plaintiff alone now assumes the risk that a proportionate contribution cannot be obtained from each person responsible for the injury." (*DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 600 [7 Cal.Rptr.2d 238, 828 P.2d 140].)

Secondary Sources

- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 177, *Damages* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 65, *Damages* (Matthew Bender)

3961
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 returning to gainful 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 3930, *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].)

- "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.)

- "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.)

- "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 & Rio Grande Western Railroad 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.)

Secondary Sources

- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 177, *Damages* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 65, *Damages* (Matthew Bender)

3962
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 3930, *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].)

- "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.)

- "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.)

- "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 & Rio Grande Western Railroad 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.)

Secondary Sources

- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 177, *Damages* (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 65, *Damages* (Matthew Bender)

3963
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, 682 [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 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].)

- "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, pp. 578–584
- 1 Levy, California Torts, Workers' Compensation, § 10.10
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 577, *Workers' Compensation,* § 577.319 (Matthew Bender)
- CALIFORNIA POINTS AND AUTHORITIES, Ch. 100, *Employer and Employee* (Matthew Bender)

VF-3900
Punitive Damages—Trial Not Bifurcated

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] engage in the conduct 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.

Normally, this form should be combined with the verdict form(s) on the underlying cause(s) of action.

This form is based on Instruction 3940, *Punitive Damages—Individual Defendant—Trial Not Bifurcated.*

VF-3901
Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee
Trial Not Bifurcated

We answer the questions submitted to us as follows:

1. Did [*name of agent/employee***] engage in the conduct 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].

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.

Normally, this verdict form should be combined with the verdict form(s) on the underlying cause(s) of action.

This form is based on Instruction 3943, *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 3943.

VF-3902
Punitive Damages—Entity Defendant
Trial Not Bifurcated

We answer the questions submitted to us as follows:

1. Was the conduct constituting malice, oppression, or fraud committed by one or more officers, directors, or managing agents of [*name of defendant***] acting in a corporate 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.

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.

Normally, this verdict form should be combined with the verdict form(s) on the underlying cause(s) of action.

This form is based on Instruction 3945, *Punitive Damages—Entity Defendant—Trial Not Bifurcated.* This form is intended to address the first bracketed option in Instruction 3945.

VF-3903
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***] engage in the conduct 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 this 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].

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.

Normally, this verdict form should be combined with the verdict form(s) on the underlying cause(s) of action.

This form is based on Instruction 3945, *Punitive Damages—Entity Defendant—Trial Not Bifurcated.* This form is intended to address the third bracketed option in Instruction 3945.

Users may wish to combine this verdict form with the verdict form(s) on the underlying cause(s) of action.

VF-3904
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***] engage in the conduct 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 this 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. 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 3945, *Punitive Damages—Entity Defendant—Trial Not Bifurcated.* This form is intended to address the second bracketed option in Instruction 3945.

Users may wish to combine this verdict form with the verdict form(s) on the underlying cause(s) of action.

LIFE EXPECTANCY TABLE

National Center for Health Statistics

[To be inserted]

CONCLUDING INSTRUCTIONS

5000
Duties of the Judge and Jury

Members of the jury, you have now heard all the evidence [and the closing arguments of the attorneys]. [The attorneys will have one last chance to talk to you in closing argument. But before they do, it] [It] is my duty to instruct you on the law that applies to this case. You will have a copy of my instructions with you when you go to the jury room to deliberate. [I have provided each of you with your own copy of the instructions.] [I will display each instruction on the screen.]

You, and only you, must decide what the facts are. You must consider all the evidence and then decide what you think really happened. You must decide the facts based on the evidence admitted in this trial. You must not let bias, sympathy, prejudice, or public opinion influence your decision.

I will now tell you the law that you must follow to reach your verdict. You must follow the law exactly as I give it to you, even if you disagree with it. If the attorneys have said anything different about what the law means, you must follow what I say.

In reaching your verdict, do not guess what I think your verdict should be from something I may have said or done.

Pay careful attention to all the instructions that I give you. All the instructions are important because together they state the law that you will use in this case. You must consider all of the instructions together.

After you have decided what the facts are, you may find that some instructions do not apply. In that case, follow the instructions that do apply and use them together with the facts to reach your verdict.

If I repeat any ideas or rules of law during my instructions, that does not mean that these ideas or rules are more important than the others are. In addition, the order of the instructions does not make any difference.

DIRECTIONS FOR USE

As indicated by the brackets in the first paragraph, this instruction can be read either before or after closing arguments.

SOURCES AND AUTHORITY

- Code of Civil Procedure section 608 provides that "[i]n charging the jury the court may state to them all matters of law which it thinks necessary for their information in giving their verdict." It also provides that the court "must inform the jury that they are the exclusive judges of all questions of fact." (See also Code Civ. Proc., § 592.)

- Evidence Code section 312 (a) provides that "[e]xcept as otherwise provided by law, where the trial is by jury [a]ll questions of fact are to be decided by the jury."

- An instruction to disregard any appearance of bias on the part of the judge is proper. (*Gist v. French* (1955) 136 Cal.App.2d 247, 257–259, disapproved on other grounds in *Deshotel v. Atchinson, Topeka & Santa Fe Ry. Co.* (1958) 50 Cal.2d 664, 667 and *West v. City of San Diego* (1960) 54 Cal.2d 469, 478.)

- Jurors must avoid bias: " 'The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to trial by jury guaranteed by the constitution.' [Citations.] " (*Weathers v. Kaiser Foundation Hospitals* (1971) 5 Cal.3d 98, 110.) Evidence of racial prejudice and bias on the part of jurors amounts to misconduct and may constitute grounds for ordering a new trial. (*Ibid.*)

- An instruction to consider all the instructions together can help avoid instructional errors of conflict, omission, and undue emphasis. (*Escamilla v. Marshburn Brothers* (1975) 48 Cal.App.3d 472, 484.)

- Providing an instruction stating that, depending on what the jury finds to be the facts, some of the instructions may not apply can help avoid reversal on the grounds of misleading jury instructions. (See *Rodgers v. Kemper Construction Co.* (1975) 50 Cal.App.3d 608, 629–630.)

- In *Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 57–59, the Supreme Court held that the giving of cautionary instructions stating that no undue emphasis was intended by repetition and that the judge did not intend to imply how any issue should be decided should be considered in weighing the net effect of the instructions on the jury.

<u>Secondary Sources</u>

- 7 Witkin, California Procedure (4th ed. 1997) Trial, § 268
- CALIFORNIA TRIAL GUIDE, Unit 91, *Jury Deliberations and Rendition of Verdict*, § 91.20.
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 326, *Jury Instructions*, § 326.21 (Matthew Bender)

CONCLUDING INSTRUCTIONS

5001
Predeliberation Instructions

When you go to the jury room, the first thing you should do is choose a presiding juror. The presiding juror should see to it that your discussions are orderly and that everyone has a fair chance to be heard.

It is your duty to talk with one another in the jury room and to consider the views of all the jurors. Each of you must decide the case for yourself, but only after you have considered the evidence with the other members of the jury. Feel free to change your mind if you are convinced that your position should be different. You should all try to agree. But do not give up your honest beliefs just because the others think differently.

Please do not state your opinions too strongly at the beginning of your deliberations. Also, do not immediately announce how you plan to vote. Keep an open mind so that you and your fellow jurors can easily share ideas about the case.

You should use your common sense, but do not use or consider any special training or unique personal experience that any of you have in matters involved in this case. Such training or experience is not a part of the evidence received in this case.

Sometimes jurors disagree or have questions about the evidence or about what the witnesses said in their testimony. If that happens, you may ask to have testimony read back to you or ask to see the exhibits. Also, jurors may need further explanation about the laws that apply to the case. If this happens during your discussions, write down your questions and give them to the clerk or bailiff. I will do my best to answer them. When you write me a note, do not tell me how you voted on an issue until I ask for this information in open court.

At least nine jurors must agree on each verdict and on each question that you are asked to answer. However, the same jurors do not have to agree on each verdict or each question. Any nine jurors are sufficient. As soon as you have agreed on a verdict and answered all the questions as instructed, the presiding juror must date and sign the form(s) and notify the clerk or the bailiff.

Your decision must be based on your personal evaluation of the evidence presented in the case. While I know you would not do this, I am required to advise you that you must not base your decision on chance, such as a flip of a coin. If you decide to award damages, you must not simply add up the amounts each juror thinks is right and then make the average your verdict.

You may take breaks, but do not resume your discussions until all of you are back in the jury room.

DIRECTIONS FOR USE

This instruction should be given after the instructions on the substantive law and immediately before the jury retires to deliberate.

SOURCES AND AUTHORITY

- Code of Civil Procedure section 613 provides, in part: "When the case is finally submitted to the jury, they may decide in court or retire for deliberation; if they retire, they must be kept together, in some convenient place, under charge of an officer, until at least three-fourths of them agree upon a verdict or are discharged by the court."

- Code of Civil Procedure section 614 provides: "After the jury have retired for deliberation, if there be a disagreement between them as to any part of the testimony, or if they desire to be informed of any point of law arising in the cause, they may require the officer to conduct them into court. Upon their being brought into court, the information required must be given in the presence of, or after notice to, the parties or counsel."

- Code of Civil Procedure section 618 and article I, section 16, of the California Constitution provide that three-fourths of the jurors must agree to a verdict in a civil case.

- The prohibition on chance or quotient verdict is stated in Code of Civil Procedure section 657, which provides that a verdict may be vacated and a new trial ordered "whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by a resort to the determination of chance." (See also *Chronakis v. Windsor* (1993) 14 Cal.App.4th 1058, 1064–1065.)

- Jurors should be encouraged to deliberate on the case. (*Vomaska v. City of San Diego* (1997) 55 Cal.App.4th 905, 911.)

- The jurors may properly be advised of the duty to hear and consider each other's arguments with open minds, rather than preventing agreement by stubbornly sticking to their first impressions. (*Cook v. Los Angeles Ry. Corp.* (1939) 13 Cal.2d 591, 594.)

<u>Secondary Sources</u>

- 7 Witkin, California Procedure (4th ed. 1997) Trial, §§ 330, 336
- CALIFORNIA TRIAL GUIDE, Unit 91, *Jury Deliberations and Rendition of Verdict*, § 91.01 (Matthew Bender)
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 326, *Jury Instructions*, § 326.32, Ch. 326A, *Jury Verdicts*, § 326A.14 (Matthew Bender)

CONCLUDING INSTRUCTIONS

5002
Insurance

You must not consider whether any of the parties in this case has insurance. The presence or absence of insurance is totally irrelevant. You must decide this case based only on the law and the evidence.

SOURCES AND AUTHORITY

- Evidence Code section 1155 provides: "Evidence that a person was, at the time a harm was suffered by another, insured wholly or partially against loss arising from liability for that harm is inadmissible to prove negligence or other wrongdoing."

- As a rule, evidence that the defendant has insurance is both irrelevant and prejudicial to the defendant. (*Neumann v. Bishop* (1976) 59 Cal.App.3d 451, 469.)

- Generally, evidence that the plaintiff was insured is not admissible under the "collateral source rule." (*Helfend v. Southern California Rapid Transit Dist.* (1970) 2 Cal.3d 1, 16–18; *Acosta v. Southern California Rapid Transit Dist.* (1970) 2 Cal.3d 19, 25–26.)

- Evidence of insurance coverage may be admissible where it is coupled with other relevant evidence, provided that the probative value of the other evidence outweighs the prejudicial effect of the mention of insurance. (*Blake v. E. Thompson Petroleum Repair Co., Inc.* (1985) 170 Cal.App.3d 823, 831.)

- An instruction to disregard whether a party has insurance may, in some cases, cure the effect of counsel's improper reference to insurance. (*Scally v. Pacific Gas & Electric Co.* (1972) 23 Cal.App.3d 806, 814.)

Secondary Sources

- 7 Witkin, California Procedure (4th ed. 1997) Trial, §§ 230–233
- Jefferson, California Evidence Benchbook (3rd ed. 1977) §§ 34.32–34.36
- California Practice Guide: Civil Trials and Evidence, § 5:371

5003
Evidence

Sworn testimony, documents, or anything else may be admitted into evidence. You must decide what the facts are in this case from the evidence you have seen or heard during the trial. You may not consider as evidence anything that you saw or heard when court was not in session, even something done or said by one of the parties, attorneys, or witnesses.

What the attorneys say during the trial is not evidence. In their opening statements and closing arguments, the attorneys talk to you about the law and the evidence. What the lawyers say may help you understand the law and the evidence, but their statements and arguments are not evidence.

The attorneys' questions are not evidence. Only the witnesses' answers are evidence. You should not think that something is true just because an attorney's question suggested that it was true. However, the attorneys for both sides can agree that certain facts are true. This agreement is called a stipulation. No other proof is needed and you must accept those facts as true in this trial.

Each side had the right to object to evidence offered by the other side. If I sustained an objection to a question, you must ignore the question. If the witness did not answer, you must not guess what he or she might have said or why I sustained the objection. If the witness already answered, you must ignore the answer.

[During the trial I granted a motion to strike testimony that you heard. You must totally disregard that testimony. You must treat it as though it did not exist.]

DIRECTIONS FOR USE

Read last bracketed paragraph only if testimony was struck during the trial.

SOURCES AND AUTHORITY

- Evidence Code section 140 defines "evidence" as "testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact."

- Evidence Code section 312 provides:

  Except as otherwise provided by law, where the trial is by jury:
  (a) All questions of fact are to be decided by the jury.
  (b) Subject to the control of the court, the jury is to determine the effect and value of the evidence addressed to it, including the credibility of witnesses and hearsay declarants.

- Evidence Code section 353 provides:

  A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed by reason of the erroneous admission of evidence unless:
  (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion; and
  (b) The court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and that the error or errors complained of resulted in a miscarriage of justice.

- A stipulation in proper form is binding on the parties if it is within the authority of the attorney. Properly stipulated facts may not be contradicted. (*Palmer v. City of Long Beach* (1948) 33 Cal.2d 134, 141–142.)

- Courts have held that "attempts to suggest matters of an evidentiary nature to a jury other than by the legitimate introduction into evidence is misconduct whether by questions on cross-examination, argument or other means." (*Smith v. Covell* (1980) 100 Cal.App.3d 947, 960.)

- Courts have stated that "[t]he right to object on appeal to misconduct or improper argument, even when prejudicial, is generally waived in the absence of a proper objection and request the jury be admonished." (*Atkins v. Bisigier* (1971) 16 Cal.App.3d 414, 427; *Horn v. Atchison, Topeka & Santa Fe Ry. Co*. (1964) 61 Cal.2d 602, 610.)

<u>Secondary Sources</u>

- 7 Witkin, California Evidence (4th ed. 1997) Trial

5004
Witnesses

A witness is a person who has knowledge related to this case. You will have to decide whether you believe each witness and how important each witness's testimony is to the case. You may believe all, part, or none of a witness's testimony.

In deciding whether to believe a witness's testimony, you may consider, among other factors, the following:

(a) How well did the witness see, hear, or otherwise sense the things that he or she described in court?

(b) How well did the witness remember and describe what happened?

(c) How did the witness look, act, and speak while testifying?

(d) Did the witness have any reason to say something that was not true? Did the witness show any bias or prejudice? Did the witness have a personal relationship with any of the parties involved in the case? Does the witness have a personal stake in how this case is decided?

(e) What was the witness's attitude toward this case or about giving testimony?

Sometimes a witness may say something that is not consistent with something else he or she said. Sometimes different witnesses will give different versions of what happened. People often forget things or make mistakes in what they remember. Also, two people may see the same event but remember it differently. You may consider these differences, but do not decide that testimony is untrue just because it differs from other testimony.

However, if you decide that a witness deliberately testified untruthfully about something important, you may choose not to believe anything that witness said. On the other hand, if you think the witness testified untruthfully about some things but told the truth about others, you may accept the part you think is true and ignore the rest.

Do not make any decision simply because there were more witnesses on one side than on the other. If you believe it is true, the testimony of a single witness is enough to prove a fact.

You must not be biased against any witness because of his or her race, sex, religion, occupation, sexual orientation, [or] national origin [or [*insert any other impermissible form of bias***].].**

DIRECTIONS FOR USE

This instruction should be given as an introductory instruction.

SOURCES AND AUTHORITY

- Evidence Code section 312 provides:

  Except as otherwise provided by law, where the trial is by jury:
  (a) All questions of fact are to be decided by the jury.
  (b) Subject to the control of the court, the jury is to determine the effect and value of the evidence addressed to it, including the credibility of witnesses and hearsay declarants.

- Considerations for evaluating the credibility of witnesses are contained in Evidence Code section 780:

  Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following:

  (a) His demeanor while testifying and the manner in which he testifies.
  (b) The character of his testimony.
  (c) The extent of his capacity to perceive, to recollect, or to communicate any matter about which he testifies.
  (d) The extent of his opportunity to perceive any matter about which he testifies.
  (e) His character for honesty or veracity or their opposites.
  (f) The existence or nonexistence of a bias, interest, or other motive.
  (g) A statement previously made by him that is consistent with his testimony at the hearing.
  (h) A statement made by him that is inconsistent with any part of his testimony at the hearing.
  (i) The existence or nonexistence of any fact testified to by him.
  (j) His attitude toward the action in which he testifies or toward the giving of testimony.
  (k) His admission of untruthfulness.

- Evidence Code section 411 provides that "[e]xcept where additional evidence is required by statute, the direct evidence of one witness who is entitled to full credit is sufficient proof of any fact." According to former Code of Civil Procedure section 2061, the jury should be instructed that "they are not bound to decide in conformity

with the declarations of any number of witnesses, which do not produce conviction in their minds, against a less number or against a presumption or other evidence satisfying their minds."

- The willfully false witness instruction was formerly codified at Code of Civil Procedure section 2061. This statute was repealed in 1965 to avoid giving undue emphasis to this rule compared to other common-law rules. Refusal to give an instruction on this point is not error: "It should certainly not be deemed of vital importance to tell the ordinary man of the world that he should distrust the statements of a witness whom he believes to be a liar." (*Wallace v. Pacific Electric Ry. Co.* (1930) 105 Cal.App. 664, 671.)

CONCLUDING INSTRUCTIONS

5005
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 is not to participate in the deliberations in any way other than as necessary to provide the service to [***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 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
- CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 322, *Juries and Jury Selection*, § 322.32 (Matthew Bender)

CONCLUDING INSTRUCTIONS

5006
Deadlocked Jury Admonition

You should reach a verdict if you reasonably can. You have spent time trying to reach a verdict and this case is important to the parties.

Please carefully consider the opinions of all the jurors, including those with whom you disagree. Keep an open mind and feel free to change your opinion if you become convinced that it is wrong.

You should not, however, surrender your beliefs concerning the truth and the weight of the evidence. Each of you must decide the case for yourself and not merely go along with the conclusions of your fellow jurors.

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.)

- "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.)

CONCLUDING INSTRUCTIONS

5007
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

5008
Introduction to Special-Verdict Form

I will give you [a] verdict form[s] with questions you must answer. I have already instructed you on the law that you are to use in answering these questions. You must follow my instructions and the form[s] carefully. You must consider each question separately. Please answer the questions in the order they appear. After you answer a question, the form tells you what to do next. At least nine of you must agree on an answer before you can move on to the next question. However, the same nine or more people do not have to agree on each answer.

When you are finished filling out the form[s], your presiding juror must write the date and sign it at the bottom. Return the form[s] to [me/the bailiff/the clerk] when you have finished.

SOURCES AND AUTHORITY

- Code of Civil Procedure section 624 provides: "The verdict of a jury is either general or special. A general verdict is that by which they pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant; a special verdict is that by which the jury find the facts only, leaving the judgment to the Court. The special verdict must present the conclusions of fact as established by the evidence, and not the evidence to prove them; and those conclusions of fact must be so presented as that nothing shall remain to the Court but to draw from them conclusions of law."

- Code of Civil Procedure section 625 provides: "In all cases the court may direct the jury to find a special verdict in writing, upon all, or any of the issues, and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon. In all cases in which the issue of punitive damages is presented to the jury the court shall direct the jury to find a special verdict in writing separating punitive damages from compensatory damages. The special verdict or finding must be filed with the clerk and entered upon the minutes. Where a special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court must give judgment accordingly."

- "A special verdict presents to the jury each ultimate fact in the case, so that 'nothing shall remain to the Court but to draw from them conclusions of law.' This procedure presents certain problems: ' " The requirement that the jury must resolve every controverted issue is one of the recognized pitfalls of special verdicts. '[T]he possibility of a defective or incomplete special verdict, or possibly no verdict at all, is much greater than with a general verdict that is tested by special findings....' " ' With

a special verdict, we do not imply findings on all issues in favor of the prevailing party, as with a general verdict. The verdict's correctness must be analyzed as a matter of law." (*Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 285 [73 Cal.Rptr.2d 596], internal citations omitted.)

- "Appellate courts differ concerning the use of special verdicts. In one case the court said, 'we should utilize opportunities to force counsel into requesting special verdicts.' In contrast, a more recent decision included the negative view: 'Toward this end we advise that special findings be requested of juries only when there is a compelling need to do so. Absent strong reason to the contrary their use should be discouraged.' Obviously, it is easier to tell after the fact, rather than before, whether the special verdict is helpful in disclosing the jury conclusions leading to the end result." (*All-West Design, Inc. v. Boozer* (1986) 183 Cal.App.3d 1212, 1221 [228 Cal.Rptr. 736], internal citations omitted.)

- "[A] juror who dissented from a special verdict finding negligence should not be disqualified from fully participating in the jury's further deliberations, including the determination of proximate cause. The jury is to determine all questions submitted to it, and when the jury is composed of twelve persons, each should participate as to each verdict submitted to it. To hold that a juror may be disqualified by a special verdict on negligence from participation in the next special verdict would deny the parties of 'the right to a jury of 12 persons deliberating on all issues.' Permitting any nine jurors to arrive at each special verdict best serves the purpose of less-than-unanimous verdicts, overcoming minor disagreements and avoiding costly mistrials. Once nine jurors have found a party negligent, dissenting jurors can accept the finding and participate in determining proximate cause just as they may participate in apportioning liability, and we may not assume that the dissenting jurors will violate their oaths to deliberate honestly and conscientiously on the proximate cause issue." (*Resch v. Volkswagen of America, Inc.* (1984) 36 Cal.3d 676, 682 [205 Cal.Rptr. 827], internal citations omitted.)

<u>Secondary Sources</u>

- 7 Witkin, California Procedure (4th ed. 1997) Trial, §§ 352–355

VF-5000
General-Verdict Form
Single Plaintiff—Single Defendant—Single Cause of Action

Select one of the following two options:

___ We find in favor of [*name of plaintiff***] and against [***name of defendant***] and award damages to [***name of plaintiff***] in the amount of $_____.**

___ We find in favor of [*name of defendant***] and against [***name of plaintiff***].**

Signed: _____
Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

VERDICT FORMS

VF-5001
General-Verdict Form
Single Plaintiff—Single Defendant—Multiple Causes of Action

For each claim, select one of the two options listed.

On [*name of plaintiff***]'s claim for [***insert first cause of action***]**

___ we find in favor of [*name of plaintiff***] and against [***name of defendant***].**

___ we find in favor of [*name of defendant***] and against [***name of plaintiff***].**

On [*name of plaintiff***]'s claim for [***insert second cause of action***]**

___ we find in favor of [*name of plaintiff***] and against [***name of defendant***].**

___ we find in favor of [*name of defendant***] and against [***name of plaintiff***].**

Complete the section below only if you find in favor of [*name of plaintiff***] on at least one of [his/her/its] claims.**

We award [*name of plaintiff***] the following damages: $ _____.**

Signed: _____
Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

DIRECTIONS FOR USE

Use of a special-verdict form is recommended when there are different measures of damages for the different causes of action